

NOTES

RIGHTS OF THE FEDERAL PAROLEE THREATENED WITH PAROLE REVOCATION

At various times commentators have urged that parolees accused of violating conditions of their paroles be accorded the traditional procedural rights to which persons accused of crime are entitled prior to conviction, especially those rights which are collectively conceived as comprising procedural due process of law. Despite early judicial negation of pleas for procedural guarantees, statutes and cases which reflect, and in some measure adopt, the urgings of the commentators can be found in increasing number. No doubt increased awareness that the administration of criminal justice does not end with conviction has contributed to this trend. Perhaps recognition of the potential rehabilitative function of parole has also been a factor.

Supervision and revocation of conditional freedom—parole—by an administrative agency has been an American practice since 1877.¹ While some state courts have denied the right to an administrative hearing before final parole revocation,² this right has been guaranteed in the federal prison system since 1910. In that year Congress³ established separate parole boards for each federal penitentiary and provided that before revocation, accused parole violators would have an “opportunity to appear” before the respective boards.⁴ This phrase remains intact in the statutory law, although subse-

1. The first American parole statute was passed by the New York legislature in 1877. N. Y. Laws 1877, ch. 173, § 5. See Sharp, *Modern Sentencing in Federal Courts: the Effect on Probation and Parole*, 12 AM. U.L. REV. 167 (1963). Antedating the American administrative practice was the analogous supervision of conditional pardons by the English courts at common law. State *ex rel.* Murray v. Swenson, 196 Md. 222, 76 A.2d 150 (1950).

2. *E.g.*, *Ex parte Dearo*, 96 Cal. App. 2d 141, 214 P.2d 585 (1950); In the Matter of Carpenter, 348 Mich. 408, 83 N.W.2d 326, *cert. denied*, 355 U.S. 850 (1957); State *ex rel.* Bush v. Whittier, 226 Minn. 356, 32 N.W.2d 856 (1948); *Ex parte Owen*, 89 Neb. 596, 131 N.W. 914 (1911); *In re Varner*, 166 Ohio St. 340, 142 N.E.2d 846 (1957); *Ex parte Mose*, 74 Okla. Crim. 134, 124 P.2d 264 (1942); *Ex parte Anderson*, 191 Ore. 409, 229 P.2d 633 (1951); *Ex parte Lewis*, 170 Tex. Crim. 254, 339 S.W.2d 900 (1960), *cert. denied*, 368 U.S. 960 (1961); *McCoy v. Harris*, 108 Utah 407, 160 P.2d 721 (1945). See 4 ATT'Y GEN. SURVEY OF RELEASE PROCEDURES 240-47 (1938).

3. Act of June 25, 1910, 36 Stat. 820.

4. Section 6 of the act provided:

that at the next meeting of the board of parole held at such prison after the issuing [by the board] of the warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before said board of parole, and the said board may then or at any time in its discretion revoke the order and terminate said parole or modify the terms and conditions thereof.

quent amendments, including one that consolidated the several boards into a single Federal Parole Board,⁵ have changed the composition of the body conducting revocation hearings.

The purpose of this note is to inquire into the extent to which the accused federal parole violator is accorded, at the three principal phases of parole revocation—retaking, revocation hearing, and judicial review—rights that parallel the guarantees of procedural due process of law. It also indicates that the federal courts usually consider these rights to be derived solely from the federal parole statute, with no basis in the Constitution.

I. RETAKING: WARRANT AND POST REARREST DETENTION

The warrant for rearrest of a parolee may be issued only by the Federal Parole Board.⁶ The Fourth Circuit has adopted the view that the rearrest

5. The 1930 revision (Act of May 13, 1930, 46 Stat. 272) left the requirement of a hearing unchanged, but consolidated the several bodies into one federal Parole Board, and, in effect, removed the Attorney General from any involvement in such proceedings. A significant change was made in the 1940 revision (Act of June 29, 1940, 54 Stat. 692) which provided that the "opportunity to appear" might be before an individual Board member or an examiner appointed by the Board instead of before the whole body. For purposes of this study, the most relevant current sections of the Federal Criminal Code (Title 18 U.S.C.) are 4205 and 4207.

Section 4205 provides:

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.

Section 4207 provides:

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. The parole statute, section 4205, requires that the warrant state the facts of the parolee's original imprisonment and subsequent release, and recite that a member of the parole board had received sufficient evidence to issue a warrant. The cases of *Nave v. Bell*, 180 F.2d 198 (6th Cir. 1950) and *Hamilton v. Hunter*, 65 F. Supp. 319 (D. Kan. 1946) stand for the proposition that a warrant is "issued" within the meaning of section 4205 when it has been signed by an authorized member of the Parole Board. Thus, if it has been "issued" close to the end of the maximum term of the parolee, but not delivered to the officer who rearrests the parolee until a *reasonable* time after the end of the term, the Board does not lose jurisdiction to determine whether he violated his parole. If a violation is found, even though the determination is made after the time when the original term was supposed to cease, the violator may have to serve the remainder of the term. *Hamilton v. Hunter*, *supra* at 320. The reason for this is that section 4205 states that the unexpired term of such a violator "shall begin to run from the date he is

warrant is not subject to the same standards of evidence sufficiency as an original arrest warrant, that its purpose is "merely to restore . . . [the parolee] to custody and 'to advise him of the purpose of his reincarceration.'" The court reasoned that the parolee had been protected in the pre-conviction accusatorial process by the original arrest requirements of the fourth amendment, that the conviction had suspended his rights under that amendment, and that he could be treated summarily on rearrest.⁸ Although parole warrants are not usually tested by the federal standards for original arrest warrants, there is some judicial control over retaking, as indicated by the statement of one court that "the parole warrant cannot lawfully issue in the absence of any information *and the issuance of a parole warrant in such circumstances is arbitrary and capricious and not warranted by law.*"⁹ However, as long as the Board has some information, the determination of its reliability or sufficiency is usually left to the discretion of the Board.¹⁰

The revocation hearing must be held within a reasonable time after the

returned to the custody of the Attorney General . . . and the time the prisoner was on parole shall not diminish the time he was sentenced to serve." *Accord*, *Doherty v. United States*, 280 F.2d 35 (9th Cir. 1960); *Melton v. Taylor*, 276 F.2d 913 (10th Cir. 1960).

7. *United States ex rel. Nicholson v. Dillard*, 102 F.2d 94, 96 (4th Cir. 1939), citing *Jarman v. United States*, 92 F.2d 309 (4th Cir. 1937). *Accord*, *Hiatt v. Campagna*, 178 F.2d 42, 47 (5th Cir. 1949), *aff'd by an equally divided Court*, 340 U.S. 880 (1950).

8. *United States v. Dillard*, *supra* note 7. See the discussion of the "prior rights theory" of the nature of parole at note 18 *infra*.

9. *United States ex rel. De Lucia v. O'Donovan*, 82 F. Supp. 435 (N.D. Ill. 1948), *aff'd*, 178 F.2d 876 (7th Cir. 1949), *cert. dismissed*, 340 U.S. 886 (1950). (Court's emphasis.)

In *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963), the court adverted to a regulation adopted by the Board which states that a warrant will issue on "satisfactory evidence." This, coupled with the court's construction of section 4205, was taken to mean that there is some standard of sufficiency or reliability of evidence to support a warrant; but this standard is, as is the very power of the Board to issue warrants, derived from Congress and not from the Constitution.

It is equally clear that in issuing a warrant the Board or its member makes only a tentative or preliminary evaluation finding to the effect that reasonable grounds or cause appears to justify a belief that the parole conditions have been violated. This phrase can be analogized to the processes by which a criminal arrest warrant issues although Congress evinced no intent to require precisely the same formalities and safeguards as to those contained in the Constitution for criminal arrests. *Id.* at 241.

10. *E.g.*, (Fifth): *Fox v. Sanford*, 123 F.2d 334 (5th Cir. 1941). (Seventh): *United States ex rel. De Lucia v. O'Donovan*, 82 F. Supp. 435 (N.D. Ill. 1948), *aff'd*, 178 F.2d 876 (7th Cir. 1949), *cert. dismissed*, 340 U.S. 886 (1950). (Ninth): *Rogoway v. Warden*, 122 F.2d 967, 969 (9th Cir.) *cert. denied*, 315 U.S. 808 (1941); *Lopez v. Madigan*, 174 F. Supp. 919 (N.D. Cal. 1959). (Tenth): *Freedman v. Looney*, 210 F.2d 56 (10th Cir. 1954); *Christianson v. Zerbst*, 89 F.2d 40 (10th Cir. 1937). (D.C.): *Hyser v. Reed*, 318 F.2d 225, 240-41 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963). See also cases cited notes 57-58 *infra* and accompanying text.

parolee's rearrest,¹¹ and, because detention during a period of unreasonable delay is illegal, habeas corpus will lie during that period.¹² However, if the parolee fails to object until his hearing is held, and a violation is established, his custody from that time is legal. Therefore habeas corpus is unavailable unless the delay prevented him from receiving a fair hearing.¹³

II. THE REVOCATION HEARING

A. Nature of the Hearing

It has been uniformly held¹⁴ that the hearing to which the parolee is entitled under section 4207 of the Federal Criminal Code may be conducted informally without the full procedural requirements of the Constitution for

11. United States *ex rel.* Buono v. Kenton, 287 F.2d 534 (2d Cir.), *cert. denied*, 368 U.S. 846 (1961); Gibson v. Markley, 205 F. Supp. 742, 744 (S.D. Ind. 1962).

12. Buono v. Kenton, *supra* note 11, at 536.

13. Habeas corpus will lie after the hearing only if the delay made certain evidence unavailable or in some other way caused an unfair hearing. *Ibid.*

14. The federal courts have usually held that any procedural safeguard employed at any revocation hearing—whether for parole or probation—has merely a statutory, not a constitutional basis. Mr. Justice Cardozo's dictum in the leading case of *Escoe v. Zerbst*, 295 U.S. 490 (1939), is usually cited to substantiate this view: "[W]e do not accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose." *Id.* at 492-93. Some cases cited hereafter deal with probation or conditional release, but the courts cite them as authority in cases dealing with parole practices. The court in *Hyser v. Reed*, *infra* note 15, at 236 n.7, declared that the probation and parole revocation situations were analogous because traditional due process procedures applicable prior to conviction were not fully required in either situation.

Only one federal case, *Fleenor v. Hammond*, 116 F.2d 982 (6th Cir. 1941), has explicitly relied on the constitutional argument, and it is questionable authority because it misquoted and misapplied the *Escoe* decision, upon which it had relied:

The comments of Justice Cardozo in *Escoe v. Zerbst* related expressly to rights created by federal statute. This language was appropriated and applied in the *Fleenor* case as if it had been written upon the constitutional issue. For some reason, the court, in the *Fleenor* case, ignored the fact that the United States Supreme Court had expressly rejected the petitioner's contention of a constitutional right to a hearing *Ex parte Anderson*, 191 Ore. 409, 438-39, 229 P.2d 633, 646 (1951).

The Sixth Circuit in *Fleenor* used the language of *Escoe* but disregarded the conclusions reached therein.

Other cases which have considered this issue have indicated that procedural safeguards employed at a parole revocation hearing have a statutory, non-constitutional basis. *E.g.*, (Second): United States *ex rel.* McCreary v. Kenton, 190 F. Supp. 689 (D. Conn. 1960). (Fourth): Jarman v. United States, 92 F.2d 309 (4th Cir. 1937); Rowe v. Nicholson, 78 F.2d 468 (4th Cir. 1935). Woods v. Steiner, 207 F. Supp. 945 (D. Md. 1962); Mac Aboy v. Klecka, 22 F. Supp. 960 (D. Md. 1938). (Fifth): Hiatt v. Campagna, 178 F.2d 42 (5th Cir. 1949), *aff'd by an equally divided Court*, 340 U.S. 880 (1950); Bowers v. Dishong, 103 F.2d 464 (5th Cir. 1939). (Sixth): Poole v. Stevens,

a criminal proceeding. In *Hyser v. Reed*,¹⁵ the District of Columbia Circuit acknowledged that the procedural safeguards claimed by the appellants (venue, notice of charge, confrontation, compulsory process for witnesses and right to counsel) were identical to the requirements of the sixth amendment. However, the sixth amendment was held to be inapplicable to revocation hearings.¹⁶ The court also stated that the claimed safeguards were not

190 F. Supp. 938 (E.D. Mich. 1960). (Seventh): *Gibson v. Markley*, 205 F. Supp. 742, (S.D. Ind. 1962); *United States ex rel. Harris v. Ragen*, 81 F. Supp. 608 (N.D. Ill.), *aff'd*, 177 F.2d 303 (7th Cir. 1949). (Eighth): *Wright v. Settle*, 293 F.2d 317 (8th Cir. 1961); *Bennett v. United States*, 158 F.2d 412 (8th Cir.), *cert. denied*, 331 U.S. 822 (1946); *Anderson v. Williams*, 279 Fed. 822 (8th Cir. 1922), *rev'd on other grounds, sub nom. Anderson v. Corall*, 263 U.S. 193 (1923). (Ninth): *Burns v. United States*, 59 F.2d 721 (9th Cir.), *aff'd*, 287 U.S. 216 (1932); *Lopez v. Madigan*, 174 F. Supp. 919 (N.D. Cal. 1959). (D.C.): *Hyser v. Reed*, 318 F.2d 225 *infra note 15*; *Robbins v. Reed*, 269 F.2d 242 (D.C. Cir. 1959); *Martin v. United States Bd. of Parole*, 199 F. Supp. 542 (D.D.C. 1961); *In re Tate*, 63 F. Supp. 961 (D.D.C.), *aff'd sub nom. Fleming v. Tate*, 156 F.2d 848 (D.C. Cir. 1946). The following quote epitomizes the practical considerations that no doubt influence judicial rejection of a constitutional basis for revocation procedures.

The parolee is still serving a sentence imposed by a court. Many existing statutes refer to such parolees as being in the legal custody of the institution even though by an act of grace of the parole board they may be serving the sentence beyond the confines of the institution. Therefore, no unnecessary obstacles or handicaps should be placed in the way of a prompt return to the institution whenever such return is in the interest of the public or the parolee. The decision to return a violator is administrative rather than judicial and only such checks or limitations should be set up as are necessary to prevent hasty or ill-considered action. . . . The preventative aspect of parole is as vital as the therapeutic one. NATIONAL PROBATION AND PAROLE ASS'N, *PAROLE IN PRINCIPLE AND PRACTICE* 114-15 (1957).

There is, however, one qualification that must be made to any statement that courts reject the constitutional basis.

An important distinction to be remembered when speaking of due process of law as not applying to parole revocation proceedings is that reference is made to procedural due process and not substantive due process. It cannot be doubted that if a parole revocation actually lacked substantive due process it would be inherently defective. Thus, for example, if the parole board's action was based on fraud, bias, corruption, whim or caprice, it should not stand; nor should it be valid if it was based solely on rumor with no evidence to support it, or if the Board's action exceeded statutory authority. These situations would involve a denial of basic substantive due process. . . . Urbaniak, *Due Process Should Not Be a Requirement at a Parole Revocation Hearing*, 27 Fed. Prob. 46, 49 (June, 1963).

15. 318 F.2d 225, 237-38 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963).

16. *Ibid.* One rationale that runs through cases which hold the sixth amendment to be inapplicable is that a revocation hearing is not a "criminal proceeding" since it does not determine guilt or innocence of an offense for which a *new* sentence may be imposed. The term "criminal proceeding" has been restricted by the courts to the concept of original guilt adjudication in an adversary proceeding. See *Counselman v. Hitchcock*, 142 U.S. 547, 563 (1891). The sixth amendment rights afforded the criminal accused have been associated with adversary criminal proceedings to the exclusion of administrative hearings, not only of parole hearings (as in *Hyser v. Reed*, *supra* note 15, at 237), but others as well. Thus, in *In re Groban*, 352 U.S. 330 (1957), the Court held the constitutional right of counsel to be inapplicable to hearings before the Ohio State Fire

binding upon the Parole Board through the due process clause of the fifth amendment.¹⁷ The reasoning of the court synthesized two ideas which regularly appear in federal court denials that a constitutional basis exists for procedural safeguards at revocation hearings. First, the court reasoned that parole authorities have granted a form of conditional liberty to an individual who had forfeited at the time of his conviction the normal constitutional rights of citizens. Therefore, the parolee may be treated *differently*¹⁸ from

Marshal. Although the Marshal's findings might have provided the basis for criminal charges against the appellants, the circumstances had not yet crystallized into a "criminal proceeding." *Accord*, *Hannah v. Larche*, 363 U.S. 420, 440 n.16 (1960); *Anonymous v. Baker*, 360 U.S. 287 (1959); *cf.* *United States v. Thompson*, 319 F.2d 665, 668 (2d Cir. 1963); *Escute v. Delgado*, 282 F.2d 335, 338 (1st Cir.), *cert. denied*, 365 U.S. 883 (1960); *United States v. Levine*, 127 F. Supp. 651, 653 (D. Mass. 1955). Thus, in posing the argument that courts should put factual substance over legal form and designate as a "criminal proceeding" any hearing which may in fact lead to further penal sanctions, the parolee will be pressing against the current of a well established body of law. A further difference between revocation hearings and original criminal proceedings is pointed out in Note, 57 Nw. U.L. Rev. 737, 745 (1963): "[T]he burden of proof at a hearing is much less than at a criminal trial . . . Although the evidence in such a case may be insufficient to support a conviction, it may be enough for a Board determination that the accused is no longer a 'good parole risk.'" See also notes 31, 57 *infra* and accompanying text.

17. 318 F.2d at 239. *But see* *Rubin, Due Process is Required in Parole Revocation Hearings*, 27 Fed. Prob. 42, 44 (June, 1963); *Comment*, 28 So. CAL. L. REV. 158, 167 (1955).

In Note, 57 Nw. U.L. Rev. 737, 753-54, it is pointed out that procedural due process is more than a set of safeguards reserved, as are the specific guarantees of the sixth amendment, for adversary criminal proceedings. It is an index of rules of fair play designed to prevent arbitrary governmental action in any context, administrative or otherwise. The court in *Hyser* rejected the applicability of due process to revocation hearings, however, because the *substantive* rights of the parolee had been impaired by conviction, thus enabling a less strict view of his *procedural* rights. *Id.* at 748-53. See also 17 VAND. L. REV. 577, 584-87 (1964).

Thus, parole revocation is a unique confrontation between the Government and an individual. Because of the impaired status of the parolee, the unique relationship engendered by parole, not only the sixth amendment, but procedural due process as well, is inapplicable to revocation hearings. There is, however, the possibility that other constitutional doctrines may be applicable in spite of the manner in which the courts have characterized the parole relationship. See authority quoted at end of note 14 *supra* for the proposition that the parolee's right to be free from arbitrary and capricious actions has a touchstone in *substantive* due process.

18. 318 F.2d at 237-39. The reasoning of the court has elements of four ways the courts have characterized that "abridged status" of the parolee which makes possible the position that procedural safeguards at revocation hearings have at most only a statutory, not a constitutional basis.

The argument which has been the strongest of the four historically and is also the most frequently asserted today is that parole or pardon is an "act of grace," which the convict has no enforceable right to demand. *Escoe v. Zerbst*, 295 U.S. 490 (1939) (see the discussion of this case note 14 *supra*). This position, with variants, has been taken in decisions in most of the federal circuits. *E.g.*, (Second): *United States ex rel. McCreary v. Kenton*, 190 F. Supp. 689 (D. Conn. 1960). (Fourth): *Woods v. Steiner*, 207 F. Supp.

the free citizen because his freedoms have already "been substantially

945, 951 (D. Md. 1962). (Fifth): *Hiatt v. Campagna*, 178 F.2d 42 (5th Cir. 1949), *aff'd by an equally divided Court*, 340 U.S. 880 (1950). (Seventh): *United States ex rel. Harris v. Ragen*, 81 F. Supp. 608 (N.D. Ill.), *aff'd*, 177 F.2d 303 (7th Cir. 1949). (Eighth): *Bennett v. United States*, 158 F.2d 412 (8th Cir.), *cert. denied*, 331 U.S. 822 (1946). (Ninth): *Lopez v. Madigan*, 174 F. Supp. 919 (N.D. Cal. 1959). (Tenth): *Freedman v. Looney*, 210 F.2d 56 (10th Cir. 1954). (D.C.): *Fleming v. Tate*, 156 F.2d 848 (D.C. Cir. 1946). See also *Ex parte Houghton*, 49 Ore. 232, 89 Pac. 801 (1907); *Urbaniak, Due Process Should Not Be a Requirement at a Parole Revocation Hearing*, 27 Fed. Prob. 46, 49 (June, 1963). This "act of grace" theory has resisted attack more successfully than the other three. *But see Comment*, 28 So. CAL. L. REV. 167 (1955).

According to a second theory, the "contract theory," a "parole, like every other pardon, is subject to rejection or acceptance by the convict. He has an unfettered election . . ." Acceptance of the parole is treated as if the convict, with full competency to bind himself, had expressly contracted and agreed that upon determination of a violation, he would be reconfined. *Fuller v. State*, 122 Ala. 32, 38, 26 So. 146, 147 (1899). *Accord*, *Wiles v. Board of Probation & Parole*, 191 Kan. 705, 383 P.2d 969 (1963). The fact that a revocation hearing is guaranteed in the federal system by section 4207 takes on added significance; the statute is incorporated into the terms of the contract. See *Bowers v. Dishong*, 103 F.2d 464 (5th Cir. 1939). The contract analogy is strengthened by the corollary rule that the conditions of a parole must not be illegal, immoral or impossible to perform. *Ex parte Patterson*, 94 Kan. 439, 146 Pac. 1009 (1915). In some cases, the contract theory has been combined with the previously discussed "act of grace" theory, and the resulting proposition has been that parole is a privilege bestowed by the government, but the granting of a parole to any individual convict is a contract. *In re Saucier*, 122 Vt. 208, 167 A.2d 368 (1961). Cases in two federal circuits have explicitly used the contract theory to support the position that procedural safeguards have only a statutory basis. (Fourth): *Woods v. Steiner*, 207 F. Supp. 945, 951-52 (D. Md. 1962). (Fifth): *Bowers v. Dishong*, 103 F.2d 464 (5th Cir. 1939). The contrary position is that a convicted person cannot, since he has been condemned, make terms with the granting authority. *Burns v. United States*, 59 F.2d 721 (9th Cir.), *aff'd*, 287 U.S. 216 (1932). *Cf. Biddle v. Perovich*, 274 U.S. 480 (1927). The Supreme Court states in *Biddle*,

Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent, determines what shall be done. . . . No one doubts that [for] a reduction of the terms of imprisonment . . . the convict's consent is not required. *Id.* at 486-87.

While the first two views assume as a basic fact that the parolee has somehow changed his status by being conditionally freed, the third view, which might be called the "extension of prison walls theory," takes a directly contrary position: "A prisoner released on parole is not a free man. . . . [T]he granting of the parole does not change his status as a prisoner. . . ." *People v. Denne*, 141 Cal. App. 2d 499, 507-08, 297 P.2d 451, 456-57 (Dist. Ct. App. 1956). One state court has stated that a parole merely "pushes back the prison walls" and allows him the wider freedom of movement while serving his sentence. . . . He is . . . serving his sentence outside of the prison rather than within the walls." *McCoy v. Harris*, 108 Utah 407, 160 P.2d 721 (1945). This theory has been attacked as a "legal fiction" since the parolee's status is "one of liberty, albeit a conditional liberty." *Rubin, Due Process Is Required in Parole Revocation Hearings*, 27 Fed. Prob. 42, 45 (June, 1963), and it has not been widely adopted by the federal courts. However, two Fourth Circuit cases viewed as controlling an older Supreme Court decision employing this theory. *Anderson v. Corall*, 263 U.S. 193 (1923); *Jarman v. United States*, 92 F.2d 309 (4th Cir. 1937); *Rowe v. Nicholson*, 78 F.2d 468 (4th Cir. 1935).

abridged in accord with the requirements of due process.¹⁹ Secondly, this abridgment of status has struck, in the contemplation of the law, an identity, rather than an adversity of interests between the parolee and the Board: the parolee's position is analogous to that of a ward being corrected by a guardian who has the ward's best interest at heart.²⁰ The analogy may be loose, but it sufficed to convince the court that there was lacking that clash of interests which characterizes a "criminal proceeding."

The "prior rights" theory is based on the premise that since the parolee had the full benefit of constitutional guarantees at his original trial, there is a suspension of these guarantees until his term has been served.

[T]he person being dealt with is a *convict* . . . [who] has already been seized in a constitutional way, been confronted by his accusers and the witnesses against him, been tried by a jury . . . and by them convicted of crime. . . . In respect of that crime and his attitude before the law after the conviction of it, he is not a citizen, nor entitled to invoke the organic safeguards which hedge about the citizen's liberty. *Fuller v. State*, 122 Ala. 32, 40, 26 So. 146, 148 (1899).

It has also been stated, in Urbaniak, *Due Process Should Not Be a Requirement at a Parole Revocation Hearing*, 27 Fed. Prob. 46, 50 (June, 1963) that:

A parolee who has breached the conditions of his parole has the status of an escaped prisoner. He was already given full constitutional protection at the trial when he was convicted. After conviction, his constitutional presumption of innocence ceased. The constitutional rights extended to one accused of crime in the first instance should not be extended to one whose punishment, already legally imposed, is now to be enforced.

Although more forthright, and thus more persuasive, this "prior rights" theory previous to Hyser v. Reed, *supra*, had been mentioned only in earlier cases from the fourth and sixth circuits. *Fleener v. Hammond*, 28 F. Supp. 625 (W.D. Ky. 1939), *aff'd*, 116 F.2d 982 (6th Cir. 1941). The appellate court did not use the "prior rights" theory, but based the procedural safeguards in question on the constitutional guarantees. See note 14 *supra*. *United States ex rel. Nicholson v. Dillard*, 102 F.2d 94 (4th Cir. 1939).

Federal courts have thus almost unanimously (see cases cited note 14 *supra*) rejected the alternative theory proposed by some writers that the federal constitution provides procedural safeguards to parolees. These writers apparently believe that the granting of parole has given the convict the right to live in the free community, and that society should be sufficiently concerned to require regular judicial proceedings before this liberty is revoked; thus, failure to provide an alleged violator with an adequate opportunity to explain his conduct is contrary to traditional American ideas of justice. See *Hyser v. Reed*, 318 F.2d 225, 252-53 (D.C. Cir. 1963) (dissent); *Weihofen, Revoking Probation, Parole or Pardon Without a Hearing*, 32 J. CRIM. L., C. & P.S. 531 (1942); Note, 65 HARV. L. REV. 309 (1951); Note, 41 ILL. L. REV. 277 (1946); Comment, 28 So. CAL. L. REV. 158 (1955).

19. 318 F.2d at 239.

20. The Bureau of Prisons and the Parole Board operate from the basic premise that prisoners placed in their custody are to be rehabilitated and restored to useful lives as soon as in the Board's judgment that transition can be safely made. This is plainly what Congress intends. Thus there is a genuine identity of interest if not purpose in the prisoner's desire to be released and the Board's policy to grant release as soon as possible. Here there is not the attitude of adverse, conflicting objectives as between the parolee and the Board inherent between prosecution and defense in a criminal case. Here we do not have pursuer and quarry but a relationship partaking of *parens patriae*. In a real sense the Parole Board in revoking parole occupies the role of parent withdrawing a privilege from an errant child not as punishment but for misuse of the privilege. 318 F.2d at 237.

The majority of tribunals have further facilitated the informality of revocation hearings by holding that the Administrative Procedure Act,²¹ which requires federal agencies to employ due process procedures at their hearings, is not applicable to the Parole Board. The principal reason for this given by the courts is that the act expressly excludes from coverage agencies such as the Parole Board whose action is by law committed to agency discretion.²²

As indicated in the subsections which follow, the District of Columbia Circuit has narrowed the discretion of the Board by holding that the parole statute requires compliance with several procedural safeguards at revocation hearings. This enabled the court in *Robbins v. Reed*²³ to reject the majority position²⁴ and hold that at least that portion of the Administrative Procedure Act²⁵ which provides for judicial review of agency action governs revocation hearings.²⁶ However, this circuit has also held that the portion of the act which requires certain agencies to employ procedural safeguards at their hearings is inapplicable to revocation hearings because the Board is not covered by the language of that portion of the act: "[T]he Board does not adjudicate, nor is it required to hold hearings, in the sense that those words are employed in the Administrative Procedure Act."²⁷ Thus, the safeguards that are required by this circuit are read into the language of section 4207 of the parole statute and are not those listed in the Administrative Procedure Act.

B. *Jury Trial*

The issue of the propriety or necessity of a jury trial on the question of a parole or probation violation sometimes arises in the state courts. The usual position has been that "the prisoner is not entitled to the verdict of the jury as a matter of right. According to the course of common law practice²⁸ the

21. Section 6, 60 Stat. 240 (1946), 5 U.S.C. §§ 1004-06 (1958).

22. *E.g.*, (Fourth): *Bozell v. United States*, 199 F.2d 449 (4th Cir. 1952). (Fifth): *Hiatt v. Campagna*, 178 F.2d 42 (5th Cir. 1949), *aff'd by an equally divided Court*, 340 U.S. 880 (1950). (Seventh): *Gibson v. Markley*, 205 F. Supp. 742, 744 (S.D. Ind. 1962).

23. 269 F.2d 242 (D.C. Cir. 1959).

24. The court in rejecting the majority position stated: "We assume the discretion applies to the action taken [by the Board] as well as to its timing; but when revocation ensues upon a failure to comply with . . . procedural rights there is no discretion to revoke parole." *Id.* at 244.

25. Section 10, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1958).

26. 269 F.2d at 244. *Accord*, *Hurley v. Reed*, 288 F.2d 844 (D.C. Cir. 1961). See notes 59-72 *infra* and accompanying text for a discussion of the unique procedure on appeal engendered by these holdings.

27. *Hysler v. Reed*, 318 F.2d 225, 237 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963).

28. Generally no reference is made in federal cases to the common law practice, as there is, on occasion, in the state courts. The procedural rights of the federal parolee stand or fall generally on the courts' interpretation of section 4207.

only issue that must be tried by a jury is whether the prisoner is the same person who was convicted."²⁹

The question of a parolee's right to jury trial in a revocation hearing has never been explicitly answered by a federal court. The statutory phrase "opportunity to appear" may be suggestive of an intent of Congress to borrow from procedural due process the proposition that an individual's appearance is not effective unless he is afforded the right to be represented by counsel or to present evidence at a hearing. But it seems likely that federal courts would follow the usual state position because the right to a jury has been peculiarly associated with judicial trials and it would take a considerable step to say that Congress intended to extend the right to an administrative parole hearing. Until Congress expressly directs that juries will be employed at revocation hearings, or the courts decide that the hearings are "criminal proceedings" subject to the mandates of the sixth amendment, the parolee may not expect a jury at revocation hearings.

C. Evidence Presentation

The federal courts have allowed the Board to consider forms of information that would be excluded at judicial trials under rules of evidence.³⁰ Because the Board may rely on affidavits, letters, telegrams, prison records and other communications, it possesses the authority to compile an exhaustive brochure reflecting many aspects of conduct and personality that are withheld from the trier of original guilt.³¹

29. State *ex rel.* O'Connor v. Wolfer, 53 Minn. 135, 140, 54 N.W. 1065, 1067 (1893).

30. *E.g.*, (Fifth): Manning v. United States, 161 F.2d 827 (5th Cir.), *cert. denied*, 332 U.S. 792 (1947). (Seventh): Gibson v. Markley, 205 F. Supp. 742 (S.D. Ind. 1962). (Ninth): Lopez v. Madigan, 174 F. Supp. 919 (N.D. Cal. 1959). (Tenth): Christianson v. Zerbst, 89 F.2d 40 (10th Cir. 1937). (D.C.): Fleming v. Tate, 156 F.2d 848, 849 (D.C. Cir. 1946) (dictum).

31. This flexibility affords greater protection to the alleged violator than would be allowed in an adversary proceeding with conventional rules of evidence. It permits the Board to consider all relevant information which may be helpful to the parolee. To hold that compulsory process is constitutionally required would imply that revocation hearings are comparable to criminal prosecutions rather than to administrative processes within the framework of prisoner rehabilitation and penal administration. Hyser v. Reed, 318 F.2d 225, 240 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963). (Footnote omitted.)

One district court has pointed out that the Board performs a different function than the trier in a criminal case. Instead of formally adjudicating guilt by coordinating an isolated set of facts with the elements of a substantive crime, the Board's inquiry must be designed to reveal, in the final analysis, whether the accused violator has indicated that he is no longer a good parole risk. Hock v. Hagan, 190 F. Supp. 749, 751 (M.D. Pa. 1960). "That determination presupposes an informal type of conference far removed from the technical ritual of a trial." *Ibid.* The proposition that the ultimate question is one of parole risk is strengthened by the statement in Hyser v. Reed, *supra* at 238, that if it is found the parolee violated a condition of his parole, "the Board has discretion to continue his parole notwithstanding a violation."

The affirmative discretion to entertain evidence does not necessarily mean that the Board may arbitrarily ignore information offered by the parolee.³² The parolee certainly has a right to appear in person and to hear and personally answer the charges against him. This right may be deduced directly from the phrase "opportunity to appear" in the parole statute.³³ In addition, holdings in the second³⁴ and District of Columbia³⁵ circuits have construed this phrase as granting to the parolee the right to present real or testimonial evidence in his own behalf. However, at this point the phrase appears to be exhausted as a source of rights relating to evidence presentation. The District of Columbia Circuit, which has taken the lead in statutory construction, has held that "Congress has not invested the Parole Board with subpoena power . . . [which] is not an inherent attribute of agency authority. We cannot read it into the statute."³⁶ Thus, the right to witnesses encompasses only the presentation of voluntary witnesses.³⁷ The District of

32. United States *ex rel.* McCreary v. Kenton, 190 F. Supp. 689, 691 (D. Conn. 1960).

33. *Ibid.*

34. United States *ex rel.* Frederick v. Kenton, 308 F.2d 258 (2d Cir. 1962).

35. Reed v. Butterworth, 297 F.2d 776 (D.C. Cir. 1961); Fleming v. Tate, 156 F.2d 848 (D.C. Cir. 1946).

36. Hyser v. Reed, 318 F.2d 225, 239-40 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963). *Accord*, Gibson v. Markley, 205 F. Supp. 742 (S.D. Ind. 1962); Martin v. United States Bd. of Parole, 199 F. Supp. 542 (D.D.C. 1961); Poole v. Stevens, 190 F. Supp. 938 (E.D. Mich. 1960). In United States *ex rel.* McCreary v. Kenton, 190 F. Supp. 689, 691 (D. Conn. 1960), the court stated:

Revoking of parole, like the granting of it . . . is not, under the statute, intended to be determined by means of the full dress adversary proceedings of a trial with right to counsel, right to summon witnesses, right of confrontation, etc. The words "opportunity to appear" do not call for a hearing of this sort. It is not lack of administrative due process that the prisoner is not entitled to have witnesses summoned and heard or that he may not appear with counsel.

37. Sklar, in *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L., C. & P.S. 175, 190 (1964), has interpreted Gibson v. Markley, Poole v. Stevens, and United States v. Kenton, all cited *supra* note 36, as denying the right to present voluntary witnesses as well as the right to compulsory process. However, Poole does not unequivocally refer to *voluntary* witnesses when, in construing the phrase "opportunity to appear," the opinion states "that the right to counsel and witnesses at a parole violation hearing is not encompassed by this language . . ." 190 F. Supp. at 941. The primary issue in the case was the right to counsel and this cryptic reference to witnesses appears to be dictum.

The court in Gibson, in developing its exposition of the informality of revocation hearings, cited Poole for the proposition that "there is no right to have witnesses appear at the hearing." 205 F. Supp. at 743. However, this also appears to be dictum. The precise holding was that since the parolee had not yet taken advantage of an offer of the Board to give him a new hearing at which he would be allowed to have witnesses appear in his behalf, he was not entitled to habeas corpus.

In Kenton, the only discussion of witnesses was a denial of the right to compulsory process, which was qualified by the court's view that if the parolee takes the initiative

Columbia Circuit has also held that the parolee has no right to confront and cross-examine persons who have supplied the Board with information,³⁸ and that the parolee is not entitled to a pre-hearing discovery of the Board's evidence.³⁹

This circuit has taken the lead among the federal circuits in clarifying and extending the rights of the parolee relating to the presentation of evidence. This is also true of its holdings on the right to counsel. However, in taking these progressive positions, that circuit has relied solely upon the intent of Congress. Its unequivocal rejection⁴⁰ of the proposition that revocation is enough like original conviction to be subject to the constitutional requirements for criminal proceedings⁴¹ has firmly fixed the status of the Parole Board as an administrative agency, subject only to the will of Congress and to the requirement that it avoid the capricious abuse of discretion.⁴²

D. Counsel

Perhaps the most controversial question is whether the parolee may be represented by counsel at revocation hearings. A negative answer was uniformly given by federal courts before 1946. In that year the District of Columbia Court of Appeals in *Fleming v. Tate*,⁴³ construed the phrase "opportunity to appear" in the parole provision of the District of Columbia Code (which at that time was worded similarly to the federal parole statute) as impliedly including the right to personally retained counsel. The district court had adverted to the evolving character of the law of parole:

and makes known sources of information to the Board, the Board should investigate those sources. Thus, these three cases do not unequivocally establish the point.

Sklar, *supra* at 191 nn.128-30 does give supplementary information suggesting that the Board in practice is not receptive to voluntary witnesses. This, however, must be read in the light of the offer made by the Board in the *Gibson* case. The inference from that case is that the Board hears, albeit grudgingly, voluntary witnesses; and in the absence of unequivocal authority to the contrary, it may be said that the clearest case authority establishes that the Board must hear voluntary witnesses at least when the parolee has taken the initiative and presented them to the Board.

38. *Hyser v. Reed*, 318 F.2d 225, 238 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963); *accord*, *Gibson v. Markley*, 205 F. Supp. 742 (S.D. Ind. 1962).

39. *Hyser v. Reed*, *supra* note 38, at 239.

40. *Ibid.*

41. See notes 14-18 *supra* for a discussion of the constitutional issues.

42. See authority quoted at the end of note 14 *supra* for a suggestion that the prohibition of arbitrary and capricious action is based on substantive, as distinguished from procedural, due process.

43. 156 F.2d 848 (D.C. Cir. 1946). Following this case, Congress amended the District of Columbia Code to expressly provide that a parolee may be "represented by counsel." See text accompanying notes 45-53 *infra* for a discussion of the significance of that amendment.

The progress in the direction of a fair and humane administration of criminal justice has been in large part marked by an extension of the right of counsel. . . . [I]t seems ironical and anomalous that a parole board representing in itself one of the most recent and progressive advances in the administration of criminal law should be the last to cling to the outmoded denial of the right of representation by counsel . . . [which is] no less important in an administrative hearing on revocation of parole than it is in a judicial proceeding.⁴⁴

The division between the District of Columbia and the other circuits with regard to the right to counsel has been sharply defined since 1947, when Congress revised the District of Columbia Code.⁴⁵ Added to that code was a provision that a parolee may be represented by personally retained counsel at his revocation hearing. However, when Congress re-enacted the Federal Criminal Code in 1948, no similar provision was written into the appropriate section.⁴⁶ As might be expected, the federal courts have reacted differently to the fact of that omission. Some of the courts⁴⁷ have regarded this as conclusive evidence of legislative intent:

[I]n failing to make statutory provisions giving a right of counsel under the Federal statute one year after providing for such a right in the District statute would seem to be a clear indication of its deliberate intention to provide different procedures for parole violators subject to the Federal statute.⁴⁸

In 1946, the District of Columbia Circuit in *Fleming v. Tate*,⁴⁹ was construing only the District of Columbia Code as providing the right to be represented by retained counsel. In 1957 this circuit read into the 1947 revision of this code the further requirement that the parolee be advised of this right.⁵⁰ Two years later, in the first important case to arise under the

44. *In re Tate*, 63 F. Supp. 961, 963 (D.D.C. 1946), *aff'd sub nom. Fleming v. Tate*, *supra* note 43. *Accord*, *Barnes v. Reed*, 301 F.2d 516, 518 (D.C. Cir. 1962); *Reed v. Butterworth*, 297 F.2d 776, 778 (D.C. Cir. 1961).

45. An Act to Reorganize the System of Parole of Prisoners Convicted in the District of Columbia, 61 Stat. 379 (1947). *Fleming v. Tate*, *supra* note 43, was incorporated into this section.

46. For a discussion of section 4207 see note 3 *supra*.

47. *E.g.*, (Second): *United States ex rel. McCreary v. Kenton*, 190 F. Supp. 689 (D. Conn. 1960). (Third): *Washington v. Hagan*, 183 F. Supp. 414 (M.D. Pa. 1960), *cert. denied*, 366 U.S. 970 (1961). (Sixth): *Poole v. Stevens*, 190 F. Supp. 938 (E.D. Mich. 1960). (Ninth): *Lopez v. Madigan*, 174 F. Supp. 919 (N.D. Cal. 1959).

48. *Hock v. Hagan*, 190 F. Supp. 749, 751 (M.D. Pa. 1960).

49. 156 F.2d 848 (D.C. Cir. 1946).

50. *Moore v. Reid*, 246 F.2d 654 (D.C. Cir. 1957). *Accord*, *Glenn v. Reed*, 289 F.2d 462 (D.C. Cir. 1961); *Hurley v. Reed*, 288 F.2d 844 (D.C. Cir. 1961); *Robbins v. Reed*, 269 F.2d 242 (D.C. Cir. 1959).

judicial review procedures of the Administrative Procedure Act,⁵¹ the District of Columbia Circuit took a further step and construed the Federal Criminal Code by analogy to its construction of the District Code, as granting the right to have retained counsel at the hearing, and also as requiring notification of this right to the parolee.⁵² However, when faced with a claim that counsel should be appointed for indigent parolees, the court balked, reiterating that the advances made with respect to retained counsel had been constructions of the intent of Congress, with no basis in the sixth amendment.⁵³

No other federal circuit has been persuaded to advance as far as the District of Columbia Circuit. In fact, since 1946, courts in several circuits have reaffirmed their denial of the right to retained counsel at revocation hearings.⁵⁴ The position of the Supreme Court remains unclear because it has denied certiorari when presented with the issue.⁵⁵

III. JUDICIAL REVIEW

With regard to the scope of appeal, the majority position is that judicial review of the Board's revocation of a parole is limited to the question of whether the Board acted arbitrarily or capriciously,⁵⁶ and cannot be extended to an inquiry into the reliability or sufficiency of the information upon

51. Section 10, 60 Stat. 240 (1946), 5 U.S.C. § 1009 (1958). See text accompanying notes 59-72 for a discussion of this procedure as utilized in the District of Columbia.

52. *Robbins v. Reed*, 269 F.2d 242 (D.C. Cir. 1959). The District of Columbia Court of Appeals subsequently followed this lead and read into the federal statute the further right to present witnesses at the hearing. *Reed v. Butterworth*, 297 F.2d 776 (D.C. Cir. 1961). See text accompanying note 35 *supra*.

53. *Hyser v. Reed*, 318 F.2d 225, 237-38 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963). Rule 44, FED. R. CRIM. P. provides for appointment of counsel for a defendant when he appears *in court*, which language is not comprehensive of administrative proceedings. See *Martin v. United States Bd. of Parole*, 199 F. Supp. 542, 543 (D.D.C. 1961). The court in *Martin* also pointed out that as a practical matter it is virtually impossible to obtain attorneys for appointment because most of the federal penitentiaries are removed from large cities.

54. *E.g.*, (Second): *United States ex rel. McCreary v. Kenton*, 190 F. Supp. 689 (D. Conn. 1960). (Third): *Hock v. Hagan*, 190 F. Supp. 749 (M.D. Pa. 1960). (Sixth): *Poole v. Stevens*, 190 F. Supp. 938 (E.D. Mich. 1960). (Seventh): *Gibson v. Markley*, 205 F. Supp. 742 (S.D. Ind. 1962); *United States ex rel. Harris v. Ragen*, 81 F. Supp. 608 (N.D. Ill.), *aff'd*, 177 F.2d 303 (1949). (Ninth): *Lopez v. Madigan*, 174 F. Supp. 919 (N.D. Cal. 1959). See *Bennett v. United States*, 158 F.2d 412 (8th Cir. 1946), *cert. denied*, 331 U.S. 822 (1947).

55. *Washington v. Hagan*, 183 F. Supp. 414 (M.D. Pa.), *aff'd*, 287 F.2d 332 (3d Cir. 1960), *cert. denied*, 366 U.S. 970 (1961); *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963). See notes 14-15 *supra* and accompanying text for discussion of why the sixth amendment is inapplicable.

56. See also text accompanying note 9 *supra*.

which the revocation decision was based.⁵⁷ It has also been held that there arises a presumption of the regularity of the Board's administrative proceedings,⁵⁸ so that to secure a reversal the parolee must prove that arbitrary conduct did in fact occur.

The traditional procedure for appeal from a determination by the Parole Board has been the petition for a writ of habeas corpus from the district court nearest the prison in which the parolee has been reincarcerated.⁵⁹ However, in recent years another means of obtaining review of the Board's action has developed. The District of Columbia Circuit⁶⁰ has applied the section of the Administrative Procedure Act,⁶¹ which provides judicial review

57. (Third): *Bass v. Hiatt*, 50 F. Supp. 420 (M.D. Pa. 1943). (Fifth): *Fox v. Sanford*, 123 F.2d 334 (5th Cir. 1941). (Sixth): *Clark v. Stevens*, 291 F.2d 388 (6th Cir. 1961). (Seventh): *Gibson v. Markley*, 205 F. Supp. 742 (S.D. Ind. 1962). (Ninth): *Lopez v. Madigan*, 174 F. Supp. 919 (N.D. Cal. 1959). See *In re Tate*, 63 F. Supp. 961 (D.D.C.), *aff'd sub nom. Fleming v. Tate*, 156 F.2d 848 (D.C. Cir. 1946). But see *Clark v. Surprenant*, 94 F.2d 969, 972 (9th Cir. 1938) (discussed note 79 *infra*). Of course, if the Board possesses no reliable information, issuance of the warrant and any further revocation proceedings will be deemed arbitrary and capricious. *United States ex rel. De Lucia v. O'Donovan*, 82 F. Supp. 435 (N.D. Ill. 1948), *aff'd*, 178 F.2d 876 (7th Cir. 1949), *cert. dismissed*, 340 U.S. 886 (1950); *Christianson v. Zerbst*, 89 F.2d 40 (10th Cir. 1937) (dictum). See notes 8-11 *supra* and accompanying text.

There is no right to a court trial on the issue of revocation of parole. *Wright v. Settle*, 293 F.2d 317 (8th Cir. 1961). As stated in *Washington v. Hagan*, *supra*, 287 F.2d at 334: "[The] matter of whether a prisoner is a good risk for release on parole or has shown himself not to be a good risk, is a disciplinary matter which by its very nature should be left in the hands of those charged with the responsibility for deciding the question." *Gibson v. Markley*, *supra* at 743.

The variance in functions performed by the Board and the courts is further pointed out in note 31 *supra*. The inference that may be drawn is that courts feel a judicial determination should not be substituted for the "administrative expertise" of the Board. See also text accompanying note 78 *infra*. The courts appear to have restricted their function to a supervisory one to prevent the abuse of discretion. It is possible, however, that the judicial abhorrence of arbitrary and capricious action has a touchstone in substantive, as distinguished from procedural, due process. See authority quoted at the end of note 14 *supra*.

58. (Third): *Walton v. Hiatt*, 50 F. Supp. 690 (M.D. Pa. 1943). (Fifth): *Harrell v. Aderhold*, 73 F.2d 189 (5th Cir. 1934). (Seventh): *United States ex rel. Harris v. Ragen*, 177 F.2d 303 (7th Cir. 1949). (Tenth): *Christianson v. Zerbst*, 89 F.2d 40 (10th Cir. 1937).

59. (Third): *Bass v. Hiatt*, 50 F. Supp. 420 (M.D. Pa. 1943). (Seventh): *Gibson v. Markley*, 205 F. Supp. 742 (S.D. Ind. 1962); *United States ex rel. Harris v. Ragen*, 81 F. Supp. 608 (N.D. Ill. 1949); *United States ex rel. De Lucia v. O'Donovan*, 82 F. Supp. 435 (N.D. Ill. 1948), *aff'd*, 178 F.2d 876 (7th Cir. 1949), *cert. dismissed*, 340 U.S. 886 (1950). (Ninth): *Lopez v. Madigan*, 174 F. Supp. 919 (N.D. Cal. 1959). (Tenth): *Freedman v. Looney*, 210 F.2d 56 (10th Cir. 1954); *Christianson v. Zerbst*, 89 F.2d 40 (10th Cir. 1937). (D.C.): *Hurley v. Reed*, 288 F.2d 844 (D.C. Cir. 1961); *Robbins v. Reed*, 269 F.2d 242 (D.C. Cir. 1959); *In re Tate*, 63 F. Supp. 961 (D.D.C.), *aff'd sub nom. Fleming v. Tate*, 156 F.2d 848 (D.C. Cir. 1946).

60. Notes 23-26 *supra* and accompanying text.

61. 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1958).

of agency decisions, to parole revocation hearings. Thus, a person whose parole has been revoked may appeal to "any court of competent jurisdiction"⁶² and may specify a declaratory judgment⁶³ as the type of relief desired.

In *Robbins v. Reed*,⁶⁴ and in *Hurley v. Reed*,⁶⁵ the District of Columbia Circuit identified the courts in that circuit as being of "competent jurisdiction" for an appeal; the Board is based in the District, satisfying the venue requirement. In *Hurley*, the court said that although an action might have been brought in the district court nearest the federal prison in which the hearing had been held, the District was perhaps a preferable forum because of geographical proximity to the central records of the Board.

In *Robbins*, the court indicated that one of the influences that led it to assume jurisdiction over these appeals was a prior holding of the Fifth Circuit⁶⁶ which had declared that a petition for mandamus, mandatory injunction, or declaratory judgment to the District of Columbia courts under the review section of the Administrative Procedure Act was the only proper remedy and that habeas corpus petitions would no longer be entertained in the Fifth Circuit.⁶⁷

The most recent case⁶⁸ under these relatively new appeal procedures involved eight petitioners whose cases were consolidated for hearing before the District of Columbia Court of Appeals. Three of these parolees had been reincarcerated and given hearings in other circuits whose courts had not previously passed on the specific question of whether appeal from Parole Board decisions should be by petition for writ of habeas corpus or for declaratory judgment, or, if the latter, in what jurisdiction. Still another petitioner in this case was appealing from the Second Circuit, which had entertained a habeas corpus petition the year before.⁶⁹ All these parolees were heard and treated as parties to the case in which their revocations were reviewed.

Thus, it appears that whether or not the court of appeals for a given

62. 5 U.S.C. § 1009 (1958).

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action . . . in any court of competent jurisdiction. . . .

63. 28 U.S.C. § 2201 (1958).

64. 269 F.2d 242 (D.C. Cir. 1959).

65. 288 F.2d 844 (D.C. Cir. 1961).

66. *Howell v. Hiatt*, 199 F.2d 584 (5th Cir. 1952).

67. Older cases in the Fourth Circuit have also suggested that mandamus, rather than habeas corpus, is the proper remedy. *United States ex rel. Nicholson v. Dillard*, 102 F.2d 94 (4th Cir. 1939); *United States ex rel. Rowe v. Nicholson*, 78 F.2d 468 (4th Cir.), *cert. denied*, 296 U.S. 573 (1935).

68. *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963).

69. *United States ex rel. Frederick v. Kenton*, 308 F.2d 258 (2d Cir. 1962).

circuit has ruled specifically that it will disallow appeals from adverse decisions on petitions for habeas corpus, the District of Columbia courts will take jurisdiction of suits for mandamus or declaratory judgment against the Parole Board. This will not necessarily eliminate the alternative habeas corpus remedy in the circuits of reincarceration if it is not there specifically forbidden.⁷⁰ But this circuit may have paved the way for its future monopolization of parole cases: "Since . . . the construction of the federal . . . statute . . . is notably more liberal in the Court of Appeals for the District of Columbia than in other federal Circuits, reimprisoned parolees have sought relief from the courts of the District."⁷¹ With few exceptions,⁷² all recent cases have arisen in the District of Columbia circuit.

CONCLUSION

The Parole Board, possessing information that a violation has occurred, may issue a rearrest warrant. There is indication in the cases that some objective standards of information sufficiency exist to guide the Board in making the rearrest decision; *i.e.*, the Board must possess "reliable" or "satisfactory" information upon which to base the decision. Presumably, in finding that a violation has in fact occurred, the Board must meet a higher standard of information sufficiency to support revocation than is necessary to support the initial rearrest decision. However, this is only presumed, since the courts do not address themselves specifically to sufficiency standards which guide the revocation decision. This is true because the courts have apparently overlooked a distinction between the two revocation functions of the Board.

Since the Board is empowered to revoke only if it has some information that a violation of parole has occurred, its first function is to inquire into the facts to determine whether there has been a violation. Secondly, if a violation is found, the Board must then deduce from the available information whether the parolee has shown himself to be such a bad parole risk that his parole should be revoked.⁷³

There is some justification for saying that as it is making this latter evaluation, the Board is not accommodating a direct clash of interests between

70. *Hurley v. Reed*, 288 F.2d 844 (D.C. Cir. 1961) specifically indicated that these alternatives were still available to the petitioner.

71. Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L., C. & P.S. 175, 189 (1964).

72. *United States ex rel. Frederick v. Kenton*, 308 F.2d 258 (2d Cir. 1962) is an exception. It is quite possible that the petitioner was willing to appeal in that circuit rather than spend extra time and expense in petitioning the District of Columbia circuit simply because he was confident that, in all probability, the second circuit court would also rule in his favor on this particular issue (presentation of relevant evidence).

73. See note 31 *supra*.

accuser and accused as does the trier of original guilt; that the Board's final decision must be made primarily within the context of the rehabilitative process, rather than in the conventional criminal trial atmosphere of a clash between the safety of the sovereign and the interest of the accused to remain at liberty.⁷⁴ Thus, as it is making this final decision, the Board is said to fall without the purview of constitutional provisions that prescribe mandatory safeguards for adversary criminal proceedings.⁷⁵ This has freed the courts to speculate on the *practical* desirability of requiring certain of these safeguards at revocation hearings. As a result, the courts may entertain arguments that the allowance of these safeguards would cause the Board to be flooded with petitions for rehearing, aggravating its overcrowded docket,⁷⁶ or that if the power to revoke is circumscribed by procedural requirements, the Board might be less willing to grant paroles in the first instance.⁷⁷ The District of Columbia Circuit, taking the lead among the federal circuits, has selectively imposed traditional safeguards upon the Board by reliance upon the intent of Congress. But that circuit has also proclaimed that it will not go so far in this direction as to impair the Board's evaluative expertise.

The basis for Board action in revoking parole must have a rational and legitimate relationship to whether the parolee is good parole risk. What constitutes such cause is left by Congress to the discretion of the Board and judicial review of its exercise is very limited. The functions of the Parole Board involve the application of blended concepts of criminology, penology, and psychology, and if the doctrine of "administrative expertise" should carry weight anywhere it should do so in this area. It is worth repeating that the Board which revokes parole is the same Board which grants parole; its whole orientation is to *release* prisoners and to keep them at liberty.⁷⁸

These arguments can be made to sound plausible enough with regard to the evaluative function of the Board. However, to extend them to the Board's fact-finding function, as the courts have done, is harder to justify. Admittedly, there is an overlap between the two functions; Board members probably are forming parole risk evaluations as they are hearing evidence which, in and of itself, may or may not establish a *prima facie* case of parole violation. But since there is no Board discretion to revoke when there has

74. Notes 14, 16, 17-20, 31, 57 *supra* and accompanying text.

75. See *People v. Dudley*, 173 Mich. 389, 138 N.W. 1044 (1912). See also *Ex parte Levi*, 39 Cal. 2d 41, 244 P.2d 403 (1952). Federal and state parole officers did not indicate at a 1956 national conference that they favored a constitutionalized procedure. NATIONAL PROBATION AND PAROLE ASS'N, PAROLE IN PRINCIPLE AND PRACTICE 114-16 (1957). *But see* MODEL PENAL CODE § 305.23, comment (Tent. Draft No. 5, 1956).

76. See *Hock v. Hagan*, 190 F. Supp. 749, 752 (M.D. Pa. 1960).

77. See 9 W. RES. L. REV. 234, 237 (1958).

78. *Hyser v. Reed*, 318 F.2d 225, 242 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963).

been no specific violation, the inquiry into the truth or falsity of the information before the Board must be somewhat separate and distinct. This fact-finding function is more strictly analogous to the adjudication of original guilt. For example, in either instance if the accused knows of witnesses who are unwilling to testify but could establish his alibi, the need for compulsory process is identical. Yet the courts have failed to draw the distinction between these two functions of the Parole Board. They have held that once some information of a violation is presented, the determination of its reliability or sufficiency is left to Board discretion, and that the constitutional guarantees of confrontation, counsel and compulsory process are unavailable to the parolee who seeks to challenge the information. To reach this conclusion, the courts have, unfortunately, utilized the same arguments applied to the evaluative function of the Board.

As a practical matter, this lack of standards may present no problem in the usual case. The conditions of parole curtail activities that are considered quite normal among some quarters of the population. No doubt many revocations are occasioned by recurrent indulgence in these activities—if the parolee goes back to one of his old ways, he is probably likely to resurrect the whole lot of his former habits. In such a situation, the parolee would probably choose to challenge the Board's decision by saying that in spite of a pattern of small infractions he remained a good parole risk, rather than blatantly denying the truth of the facts asserted against him. If this is the situation in most revocation cases, it is not surprising that courts, whose attention has thus been called to the evaluative function, would use language describing the discretion of the Board with respect to that function, which comprehends, perhaps inadvertently, the fact-finding function. But this failure to distinguish the two functions has left unprotected the parolee accused of one serious violation. This situation centers about the fact-finding function because there may be room for doubt that a technical violation has occurred. So far as the opinions indicate, the courts rarely face this situation in which parole has been revoked because of disputed facts indicating one serious violation. However, when they do face it, the courts are forced into strained efforts to distinguish the cases pertaining to the evaluative function.⁷⁹ Their ability to distinguish on the basis of Board functions has been

79. In *Clark v. Surprenant*, 94 F.2d 969 (9th Cir. 1938), the court was faced with a situation in which parole had been revoked because the parolee had left the Northern District of Ohio. But apparently he did so with the advice of his parole advisor.

Here we have an altogether different situation. The testimony is convincing that the appellee did not intentionally or at all violate his parole and the full term of his sentence had therefore expired as completely satisfied. . . . [T]he court not only had the right but the duty to determine whether appellee had violated the conditions of his release. *Id.* at 972.

The court reached this result by emphasizing that this was not the usual conditional

precluded by the numerous holdings which use arguments applicable to the evaluative function, but reach the result that as long as it has some information, the Board, in its fact-finding capacity, has uncontrolled discretion to determine its sufficiency or reliability.

A possible solution lies in the use of a bifurcated revocation hearing: the Board would at the initial stage make a factual determination whether there has been a violation of the conditions of parole. If the facts are disputed, the accused violator would be afforded those safeguards prescribed by the Constitution for such factual determinations in criminal proceedings. The Board, of course, has discretion to evaluate and assess the evidence presented; if no violation is established, the parolee would be re-paroled and returned to the community. However, if the Board rules that a violation did in fact occur, a second, less formal stage of the revocation hearing would be initiated. The crux of the inquiry at this phase of the procedures has shifted from truth or falsity of the evidence of a violation to the evaluation of the parolee as a parole risk—just what is his rehabilitation potential? Due to the subjective nature of such inquiry, the arguments presently advanced by courts which deny the traditional safeguards at revocation hearings would be more persuasive when focused upon this stage of the proposed hearing.

release situation, but was a case of a prisoner released by reason of statutory allowance for good conduct. In this latter situation, said the court, a different rule applies with respect to revocation hearings held, as was the hearing in this case, after the date at which the original sentence was to expire. *Id.* at 973. The court thus passed an opportunity to distinguish the Board's functions and rested the holding instead on a more technical and less potentially important distinction.