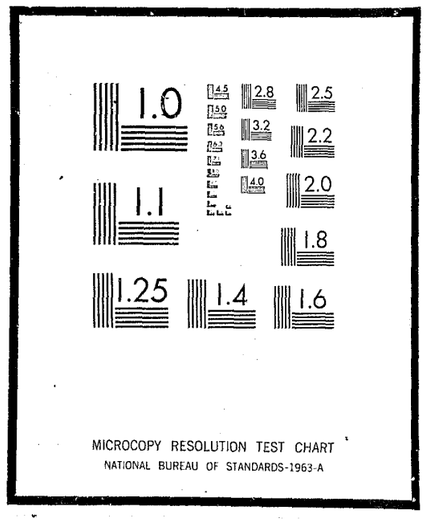

ADMINISTRATIVE REVIEW OF PAROLE SELECTION AND REVOCATION DECISIONS

by

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Introduction

In recent years, parole board decision-making practices have become the subject of considerable criticism.[1] One primary criticism is that there is generally no effective review available of the broad and unstructured administrative discretion of the parole board members. Courts traditionally have been reluctant to review the quasi-judicial decisions of paroling authorities. However, the increasing number of successful court challenges to the decisions and practices of correctional agencies offers some evidence that this reluctance is diminishing.[2]

From the perspective of the paroling agency, judicial review is often seen as a threat, an inconvenience, and an infringement upon the independence believed to have been granted by the legislature.[3] Nevertheless, unless an acceptable alternative is provided, more frequent judicial review of paroling decisions would appear likely.

One alternative to judicial review that has been proposed is the establishment of internal administrative review procedures.[4] This position is reflected in the recent report of the National Advisory Commission on Criminal Justice Standards and Goals:

> . . . there . . . is . . . a rapidly developing demand for mechanisms by which correctional, and specifically parole, decisions can be appealed. The upsurge of cases being considered by the courts documents this need. The courts can and will test at least certain aspects of parole decisions. Yet if parole authorities are to develop correctional policy consistent with correctional needs and meeting judicial standards, they need to establish self-regulation systems, including internal appeal procedures.[5]

Support for the advocates of administrative review is provided by Dawson, who maintains that there would be considerable difficulty in providing judicial review of paroling decisions, even if courts or legislatures desired to provide it. Thus, he argues:

> (i)t is important (1) to re-examine our thinking about legal control of discretion and (2) to explore means of control other than the traditional legislative and judicial ones.[6]

The advantages of an internal administrative review process for the correctional agency are well summarized by Kimball and Newman:

> . . . procedures for internal review of correctional decisions adverse to the interest of an inmate should be provided and publicized. Courts have no corner on due process; the correctional agency, itself,can provide for procedural regularity and opportunity for review as well. This removes from correctional discretion the aura of one-man decision making and places it in a context of well-established procedures emotionally neutral toward any particular case. When the ready availability of procedures for administrative review is known to the court, it may well invoke the requirement that all administrative recourse be exhausted before the court will consider the complaint ... On the merits,

> allegations of unfair use of correctional power will be much less credible where it can be shown that there are regular and fair procedures for making and reviewing correctional decisions.[7]

Moreover, an effective administrative review process may become especially necessary if federal parole board decisions are specifically exempted from judicial review, as provided by a bill introduced by Senator McClellan in January, 1973:

> No court of the United States shall have jurisdiction to review or set aside any action of the Parole Commission regarding, but not limited to, the release or deferment of release of an offender whose maximum term has not expired, the imposition or modification of conditions of parole, or the reimprisonment of an offender for noncompliance with conditions of parole during the term of parole.[8]

It is noted that the drafters of the Model Penal Code[9] also attempt to strengthen administrative review procedures and discourage judicial review.

A Pilot Project

In an attempt to improve paroling procedures, and to answer some of the criticisms directed at it, the United States Board of Parole initiated a pilot regionalization project in October, 1972.[10] Involving five federal institutions in the Northeastern United States,[11] this project contained a number of innovative features,

including hearings conducted by two-man panels of hearing examiners, speedier decisions, limited representation at parole grant hearings, the use of explicit decision-making guidelines to structure discretion, written reasons for parole denial, and a two-step administrative appeal process.

Under the provisions of the pilot project, an inmate was entitled to appeal an adverse decision after a waiting period of thirty days. The grounds for this appeal could be either:

> . . . there is significant information which was in existence at the time of the hearing but was not considered (through no fault of the inmate), or
> . . . the reasons given do not support the order.

These grounds for appeal were specified on the form distributed to inmates for appellate purposes, and were intended to serve as a guide for focusing the appeal. In practice, these grounds were interpreted rather broadly, both by inmates and parole decision-makers.

The first appeal, hereafter referred to as Appeal Level I, was to a parole board member designated as a Regional Director. Upon receipt of a Level I Appeal, the Regional Director could, after consideration, affirm the decision (no change), schedule a re-interview (new hearing) at the institution, modify the decision

(by not more than six months) or schedule a regional level hearing (conducted at the regional headquarters - for the pilot project, Washington, D.C.). After a regional level hearing (to which the inmate was permitted to send a representative), the Regional Director could affirm, amend, or reverse the hearing panel decision.

Similarly, at an institutional re-interview, the hearing panel could affirm, amend, or reverse the original decision. However, if an inmate appealed this decision after another thirty day waiting period, the Regional Director could affirm or modify the decision, or schedule a regional level hearing, but could not schedule another re-interview.

The second appellate step, hereafter referred to as Appeal Level II, was to a National Appellate Board composed of three other parole board members. An inmate was entitled to appeal an adverse decision by the Regional Director after a waiting period of ninety days. This appeal was reviewed by one member of the National Appellate Board, who could either affirm the decision or schedule a review on the record before the full National Appellate Board. No representation was permitted at this stage. At this review, the National Appellate Board, by majority vote, could either affirm, amend, or reverse the Regional Director's decision or remand the case to the regional

or institutional level for rehearing. The ground for this appeal was limited to:

. . . the reasons given do not support the order.

The Appellate Process in Practice

During the first ten months of the pilot project (October, 1972 - July, 1973), 366 Level I Appeals were filed.[12] During this ten month period, 1365 decisions not to parole were made; however, the number of appeals does not relate directly to the number denied parole because of the thirty day waiting period. Also, there were several cases in which an inmate appealed an extended parole grant (e.g. parole in ninety days). Considering only parole denials during the first nine months (1118), it appears that approximately 31 percent of decisions not to parole resulted in Level I Appeals. However, as there was no cutoff date for filing a Level I Appeal, this percentage may underrepresent the number of appeals that will eventually result.

Some examples of actual Level I Appeal decisions are given below:

Decision Affirmed

Case A. Inmate _____ appealed on the ground that there was significant information available at the time of the hearing that was not considered; specifically, that her husband was sick and needed her at home to care for him. In reviewing the hearing summary, it was found that this information had been considered at the time of the original hearing. The original decision was affirmed.

Case B. Inmate _____ appealed on the ground that the reasons given did not support the order. The reason given him was: your release at this time (20 months) would depreciate the seriousness of your offense (armed bank robbery) and thus would be incompatible with the welfare of society. The inmate argued that while he realized the seriousness of his offense, he was now rehabilitated and capable of being returned to society, and that a prolonged stay in the institution would impede his chances for a successful life in the community. The original decision was affirmed.

Re-Interview Ordered

Case C. Inmate _____ appealed on the ground that significant information in existence at the time of the hearing was not considered (a letter from the sentencing judge recommending parole). A re-interview was ordered, which resulted in a decision to parole.

Case D. Inmate _____ appealed on the ground that significant information in existence at the time of the hearing was not considered (that the institution had failed to give him credit for time spent in a correctional center). A re-interview was ordered, which resulted in a decision to parole.

Regional Level Hearing Ordered

Case E. Inmate _____ appealed on the ground that the reasons given did not support the order (you need additional training, and your release at this time would depreciate the seriousness of your offense and is thus incompatible with the welfare of society). The inmate argued that he already had a profession in a health-related field, and that no vocational program offered at the institution would aid him in his profession. He also emphasized that he had no prior record and had been given a Youth Corrections Act sentence. A regional level hearing was conducted, resulting in the inmate's next institutional review hearing date being advanced by nine months.

Case F. Inmate _____ appealed on the ground that the reasons given (you require further institutional treatment in order to make progress in handling your emotional problems, as well as to learn a vocational skill) did not support the order. The inmate argued that he had met all of his institutional goals, had participated in the mental health program, and had been accepted for college enrollment in the upcoming term. A regional level hearing was held and resulted in a parole grant.

Order Modified

Case G. Inmate _____ appealed on the ground that the reasons given did not support the order. He had been given a continuance of six months for the reason: you could benefit from additional treatment, specifically in the area of drug therapy. The inmate argued that he had never been a drug addict and had joined the Narcotic Rehabilitation Program voluntarily in order to benefit from the discipline, suggestions, and group therapy. The order was modified and parole granted.

Level I Appeal Decisions

The distribution of decisions resulting from the first 366 Level I Appeals filed is shown by Figure 1. In 64 per cent (64%) of the cases, it may be seen that the hearing panel decision was affirmed. Twelve per cent (12%) were modified immediately, with approximately equal percentages granted re-interview (11%) or a regional level hearing (13%). From the inmate's standpoint, a regional level hearing appears preferable to a re-interview. Thirty-five (35) out of forty-four (44) regional level hearings resulted in an amended decision favorable to the inmate (with three pending), while only ten (10) out of thirty-seven (37) re-interviews resulted in an amended decision. Altogether, approximately 25 per cent (25%) of the Level I Appeals filed during this period resulted in a decision amendment favorable to the inmate. Decision amendments resulting from re-interviews ranged from 1 - 8 months, averaging five (5) months. Amendments resulting from regional level hearings ranged from 1 - 23 months averaging six (6) months. Immediate modifications ranged from 1 - 6 months, averaging three (3) months.

Figure 1

LEVEL I APPEAL DECISIONS (10/72-7/73)

	Appeal Decision		
Level I Appeals Filed (N=366*)	Affirmed (No change)	222 (63.9%)	
	Modified	41 (11.8%)	
	Re-Interview Granted	37 (10.7%)	Results of Re-Interview: Affirmed 27 (7.8%); Modified 10 (2.9%)
	Regional Level Review Granted	47 (13.5%)	Results of Regional Level Review: Affirmed 9 (2.6%); Modified 35 (10.1%); Pending 3 (0.9%)

* Of the 366 Level I Appeals filed, 19 were not considered because of ineligibility (e.g. revocation or "en banc" hearings).

Level II Appeals

During the ten month period covered by this study, only fifteen (15) Level II Appeals were received. Considering the ninety day waiting period in effect, only inmates who had received an adverse Level I decision no later than April, 1973, would have been eligible to file within this period. Since approximately 128 cases were eligible, this represents a Level II Appeal rate of about twelve percent (12%). Of the fifteen Level II Appeals filed, fourteen were affirmed by the member designated to review the case and one was scheduled for a review on the record before the full National Appellate Board, which then affirmed the decision.

Results of the Pilot Project

A plan for full scale reorganization and regionalization, based upon the experience gathered in this pilot project, was approved by Attorney General Richardson on August 21, 1973, and a supplemental appropriation bill to provide the necessary funding is presently before the Congress.[13] As part of this plan, the following modified appellate review provisions have been adopted and published by the Board.[14] These provisions became effective in the Board's first region (Northeast Region) on October 1, 1973, and will become effective in the other regions as they are established.

§2.20 Appeal of hearing panel decision.

(a) A prisoner may file with the responsible Regional Director a written request for appeal of a hearing panel decision to grant, deny, or revoke parole or to revoke mandatory release. This request for appeal must be filed within thirty days from the entry of such decision. The appeal shall be considered by the Regional Director who may affirm the decision, order a new institutional hearing, order a regional appellate hearing, reverse the decision, or modify a continuance or the effective date of parole. Reversal of an examiner panel decision or the modification of such a decision by more than ninety days, whether based upon the record or following a regional appellate hearing, shall require the concurrence of two out of three Regional Directors. Appeal decisions requiring a second or additional vote shall be referred to other Regional Directors on a rotating basis.

(b) Attorneys, relatives, or other interested parties who wish to appear for (or against) a prisoner at a regional appellate hearing must submit a written request to the responsible Regional Director.

(c) If no request for appeal is made within thirty days of entry of the original decision, this decision shall stand as the final decision of the Board.

§2.21 Appeal to National Appellate Board.

(a) A prisoner may file a written appeal of the Regional Director's decision with the National Appellate Board. The appeal must be submitted within thirty days after the entry of the Regional Director's written decision. The National Appellate Board may, upon the concurrence of two members, affirm, modify, or reverse the decision, or order a rehearing at the institutional or regional level.

(b) Decisions of the National Appellate Board shall be final.[15]

Under the above procedures, an inmate may appeal a parole grant or revocation hearing decision (revocation hearing decisions had been excluded from pilot project appeal procedures)[16] within thirty days of the date of the written board order. The requirement that an inmate file an appeal within thirty days rather than after waiting thirty days was set in an attempt to speed up the appellate process, reducing the time before a decision was deemed final. While the pilot project procedure required a regional level hearing before any change of more than six months in the original decision could be made, the above procedures allow such change without a hearing, but require the concurrence of two Regional Directors before any modification of more than ninety days. This change had several purposes: to carry throughout the process the concept of team decision-making, to reduce chances for disparity or arbitrariness, and to speed up the appellate process by requiring a regional level hearing only when additional material which could be provided at the hearing was deemed necessary.

Appeal Level II procedures were modified similarly. The ninety day waiting period was removed and replaced

by a "within thirty days" requirement. Instead of one National Appellate Board Member screening cases for consideration, the concurrence of two National Appellate Board members is required for any decision. However, it is to be noted that if the work load increases to the extent that this latter provision becomes impractical, a return to a one member screening system will likely win Board approval.

The new provisions also provide appeal procedures for "en banc" cases (special interest cases) which had been excluded from pilot project appeal provisions.[17] En banc decisions, which are now being designated as "original jurisdiction decisions", may be appealed directly to the National Appellate Board within thirty days of the written order. The National Appellate Board may either affirm the decision or schedule the case for a review before the entire Board according to the following provisions.

§2.23 Appeal of original jurisdiction decisions.

> (a) Cases decided under the procedure specified in §2.22 may be appealed within thirty days of the entry of the decision to the National Appellate Board. The National Appellate Board, upon the concurrence of two members may affirm the decision or schedule the case for hearing before the entire Board at its next quarterly meeting. A quorum of six members shall be required and all decisions shall be by a majority vote. The Chairman shall vote on the decision only in the absence of a member. This appellate decision shall be final.

(b) Attorneys, relatives, or other interested parties who wish to speak for or against parole at this appeal hearing must submit a written request to the Chairman of the Board.

(c) If no request for appeal is made within thirty days of the entry of the Regional Directors' decision, this decision shall stand as the final decision of the Board.[18]

Discussion

It is rather difficult to determine what the statistical tabulations noted in the sections above actually signify. The proportion of Level I Appeals filed to those eligible (31%) appears rather low. As the pilot project appeal procedures were new, it may be that many inmates were not sufficiently aware of their right to appeal, or as there was no cutoff date for filing an appeal, some may have taken a "wait and see" attitude or felt that their chances would be better as they came closer to their next regularly scheduled review date.

Moreover, the rate of actual relief granted (about 25%) appears quite high. It might be expected that as the decision-makers gain familiarity with the new procedures and perhaps more importantly with the experience of having certain decisions reversed, they will become less prone to make the types of mistakes that result in a meritorious appeal. Also, as time passes a body of precedents as to the appropriate remedies for various situations may be established. Appendix A illustrates a set of procedural guidelines developed from the pilot project.

Concerning Level II Appeals, the number received or processed is not sufficient to make any inferences, other than that the number filed to date represents only a small percentage (about 12%) of those eligible to file. However, as noted previously, there was no cutoff date for filing an appeal; consequently, this number may underrepresent the number of Level II Appeals which may eventually be filed.

Some Unanswered Questions

Are the grounds provided for appeal appropriate? Do these procedures provide adequate decision review? Will these appeal procedures, combined with other project innovations (explicit decision guidelines, written reasons for parole denial, limited representation at hearings) provide adequate due process? At this point, these questions remain unanswered. The ultimate test of these procedures will undoubtedly come in the courts. Whether they will be found to provide an acceptable substitute to judicial review and, thus, discourage courts from substituting their own standards is yet to be seen.

Moreover, questions may arise as to whether these procedures (if found to meet due process standards as well as to be reasonably efficient in terms of time and expense) might be expanded to other criminal justice decisions. For example, similar procedures might be considered for

review of judicial sentencing decisions: an area subject to similar criticism, similar problems, and, thus far, a similar reluctance to act.

Appendix A

Preliminary Criteria for Granting Appellate Relief (Regional Level)

The following shall be criteria for granting appellate relief.

Decisions	Conditions
Remand for Institutional Rehearing:	a) significant procedural errors, or b) significant information in existence at the time of hearing but not considered (through no fault of the prisoner)
Regional Appellate Hearing Scheduled:	a) when points raised in regional appeal require further clarification, particularly when such clarification might best be obtained from a representative or advocate
Granting Relief by Modification or Reversal: (Note: Decisions for reversal or decisions to modify by more than 90 days require the concurrence of two regional members.)	a) reasons given for order are not persuasive (given the circumstances presented), or b) the decision is outside the guidelines without adequate explanation/justification, or c) significant errors in time computation, or d) to attain equity among codefendants (in the absence of persuasive reasons for different decisions)

Note: Nothing above shall preclude the Regional Director, upon his own motion, from administratively reopening a case at any time and scheduling an institutional hearing upon receipt of new and significant information (for reopening original jurisdiction cases, the concurrence of two members is required) under CFR Part II, Section 2.27 (as amended).

FOOTNOTES

1. See, for example, Davis, K.C., Discretionary Justice, Baton Rouge: Louisiana State University Press, 1969; Gaylin, W., "No Exit", Harpers, November 1971; and American Friends Service Committee, Struggle for Justice, Report on Crime and Punishment in America, New York, Hill and Wang, 1971.

2. See Kimball, E.L. and Newman, D.J., "Judicial Intervention in Correctional Decisions: Threat and Response", Crime and Delinquency, 14(1), January, 1968.

3. See Kimball, E.C. and Newman, D.J., supra note 2.

4. See Dawson, R.O., "The Decision to Grant or Deny Parole: A Study in Law and Practice", Washington University Law Quarterly, 1966 (3), June, 1966; National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on Corrections: Summary Report on Corrections, Texas: Office of the Governor, Criminal Justice Council, 1972; Kimball, E.L. and Newman, D.J., supra note 2.

5. National Advisory Commission on Criminal Justice Standards and Goals, supra note 4 at 67.

6. Dawson, supra note 4 at 296.

7. Kimball and Newman, supra note 2 at 11.

8. S. 1, 93D Congress, First Session, introduced on January 4, 1973, Subchapter F. Section 3-12F7.

9. See American Law Institute, Model Penal Code, Proposed Official Draft, 1962, Article 305, Section 19 - Finality of Determinations with Respect to Reduction of Terms for Good Behavior and Parole which provides: "No court shall have jurisdiction to review or set aside, except for the denial of a hearing when a right to be heard is conferred by law: (1) the action of an authorized official of the Department of Correction or of the Board of Parole withholding, forfeiting or refusing to restore a reduction of a prison or parole term for good behavior; or (2) the orders or decisions of the Board of Parole regarding, but not limited to, the release or deferment of release on parole of a prisoner whose maximum prison term has not expired, the imposition

or modification of conditions of parole, the revocation of parole, the termination or restoration of parole supervision or the discharge from parole or from re-prisonment before the end of the parole term."

10. See Bureau of Prisons Operations Memorandum (B.P.O.M.) 40100.14.

11. The institutions involved were Lewisburg/Allenwood, Pa., Danbury, Ct., Alderson, W.Va., Petersburg, Va., and Morgantow, W.Va.

12. Of the 366 Level I Appeals filed, 19 were not considered because of ineligibility (e.g. revocation or "en banc" hearings).

13. Since this writing, this measure was passed by the House on November 30, 1973, and by the Senate on December 12, 1973.

14. See Federal Register, Part II, vol. 38, number 184, September 24, 1973. As a follow-up, a national paroling policy in the form of guidelines was published by the Board in the Federal Register, Part III, vol. 38, number 222, November 19, 1973.

15. Federal Register, September 24, 1973, supra note 14 at 26654.

16. The reasons for these exclusions appear to have been primarily for administrative convenience in case processing. As the Board became more confident in its ability to administer, the decision was made to extend the appeal procedures to all types of cases.

17. The rationale for the exclusion of en banc cases from the pilot project was similar to that cited in note 18.

18. Federal Register, supra note 15.

END