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## APPLYING THE ADMINISTRATIVE PROCEDURE ACT<sup>1</sup> TO FEDERAL PAROLE DECISION MAKING

CAMPBELL MCGINNIS

Seeking to protect the interests of society, the criminal justice system has increasingly aimed at rehabilitating the offender and returning him as a productive member of society.<sup>2</sup> Rehabilitation is important since virtually all prisoners eventually will be released to society.<sup>3</sup> Parole,<sup>4</sup> as a method of obtaining conditional liberty, is a significant tool in the process of rehabilitation, enabling parole authorities to reintegrate the offender when society's interests can best be served.

The United States Board of Parole administers the granting of parole under a federal statute which allows wide discretion in the performance of this function.<sup>5</sup> Since prolonged incarceration may inhibit rehabilitation,<sup>6</sup> the proper functioning of the parole system is essential. Whether an offender emerges from his peno-correctional experience as a greater threat to society than when he was incarcerated may depend largely on how each offender perceives the measure of justice and fairness he has received.<sup>7</sup> Abuses in the parole process, therefore, clearly have an adverse effect on rehabilitating offenders and present strong justification for court intervention in the parole process.

Federal courts have traditionally taken a "hands off" approach to the

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1. 5 U.S.C. §§ 551-706 (1970). Since its enactment in 1946, the Administrative Procedure Act (APA) has been a major impetus to the opening of federal agency action to public scrutiny.

2. Courts recognize that "[r]etribution is no longer the dominative objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." *Williams v. New York*, 337 U.S. 241, 248 (1949). See also *Holt v. Sarver*, 309 F. Supp. 362, 379 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

3. O'Leary, *Issues and Trends in Parole Administration in the United States*, 11 AM. CRIM. L. REV. 97 (1972).

4. Parole has been defined to include two elements:

(1) a decision by an authority constituted according to statute to determine the portion of the sentence which the inmate can complete outside of the institution and (2) a status—the serving of the remainder of the sentence in the community, according to the rules and regulations promulgated by the parole board.

*Hearings on H.R. 13118 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 92d Cong., 2d Sess., ser. 15, pt. VII-A, at 500 (1972) [hereinafter cited as *Hearings*].

5. 18 U.S.C. § 4203 (1970).

6. Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from *Mempa v. Rhay**, 47 TEXAS L. REV. 1, 31 n.128 (1968).

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

parole process and have never overturned a decision to deny parole.<sup>8</sup> Until recently specific provisions of the Administrative Procedure Act, which seem to require judicial review, have not been applied. The Parole Board has not complied with the provisions of the APA and contends that the entire Act is inapplicable<sup>9</sup> because it is not an "agency" as that term is used in the APA. The Parole Board argues that it is not an "agency" because Congress never intended that the function of administering criminal justice be subject to APA, and in support of this proposition points out that the Board is never mentioned in the Act nor in the Congressional debates preceding the passage of the APA.<sup>10</sup>

Though dicta in early cases supports the Parole Board's arguments,<sup>11</sup> the recent opinions of *King v. United States*<sup>12</sup> and *Pickus v. United States Board of Parole*<sup>13</sup> have rejected them and applied two APA provisions. These cases, reinforced by legislative intent and a growing need for procedural modifications of parole system, have opened the door to new applications of the APA. The quality of the Parole Board's criteria for granting parole and individual decisions to grant or deny parole can be materially improved by application of the APA. The purposes of this comment are to determine whether the APA applies to the Board of Parole, to identify major problems in parole decision-making procedure, and to examine the extent of applicability of selected APA provisions to those problems.

#### FEDERAL PAROLE PROCEDURE FOR DETERMINING GRANT OR DENIAL OF PAROLE

Eligibility for parole in the federal system is determined by statutory parameters, the offender's status, and the type of sentence rendered.<sup>14</sup> In most instances adult offenders eligible for parole must file a written application.<sup>15</sup> Juvenile delinquents and youth offenders, however, are expressly prohibited from making application for parole, and must appear instead before a hear-

8. See Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from Mempa v. Rhay*, 47A TEXAS L. REV. 1, 46 (1968).

9. Johnson, *Federal Parole Procedures*, 25 AD. L. REV. 459, 479 (1973).

10. Brief for Appellant at 6-10, *Pickus v. United States Bd. of Parole*, Civil No. 73-1987 (D.C. Cir., filed Sept. 1, 1973).

11. *Hyser v. Reed*, 318 F.2d 225, 236-37 (D.C. Cir. 1963); *Hiatt v. Compagna*, 178 F.2d 42, 47 (5th Cir. 1949).

12. 492 F.2d 1337 (7th Cir. 1974).

13. Civil No. 73-1987 (D.C. Cir., filed Sept. 1, 1973).

14. 18 U.S.C. §§ 4202, 4209, 5010, 5017, 5032, 5034, 5037 (1970).

15. 18 U.S.C. § 4203 (1970) provides:

If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole.

ing examiner at regular intervals.<sup>16</sup> Eligible adult prisoners also have a hearing, more accurately called an interview, conducted in the institution by a Board member or examiner and attended by prison counsel and a stenographer.<sup>17</sup> Prior to the hearing, whether for youth offender, juvenile, or adult, the examiner usually reviews the prisoner's file<sup>18</sup> which is not pre-viewed by or shown to the prisoner, even though selected portions of its contents may be discussed. Upon termination of the interview the examiner dictates a recommendation which is not shown to the prisoner but is included in the file and sent to Washington.<sup>19</sup>

The actual decision to grant or deny parole is made in Washington by two Board members who individually—without consultation—review the prisoner's file, each noting his decision. In the event of disagreement (in approximately 30 percent of the cases) a third member is called,<sup>20</sup> though cases of unusual difficulty or notoriety may be given original en banc consideration by a majority of the Board.<sup>21</sup> The offender receives written notification of the Board's decision, but not of the reasons for that decision.<sup>22</sup> A review may be conducted by the Parole Board if justified by significant new information.<sup>23</sup> Federal courts generally refuse to grant judicial review.<sup>24</sup>

#### THE UNITED STATES BOARD OF PAROLE: AN "AGENCY" WITHIN THE MEANING OF THE APA

A prerequisite to the application of any provision of the APA is that the Parole Board must be definable as an "agency" within the meaning given in that Act. An "agency," as defined in the Act, "means each authority of the Government of the United States, whether or not it is within or subject to review by another agency . . . ."<sup>25</sup> Legislative history, scholarly

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16. 28 C.F.R. § 2.12 (1972).

17. *Hearings*, pt. VII-A at 579.

18. The main features of a prisoner's file are: pre-sentence report, prior arrest record, parole progress report, and a parole release plan. A more detailed study of Parole Board files conducted for the Administrative Conference of the United States is reprinted in *Hearings*, pt. VII-B at 1458-63.

19. *Hearings*, pt. VII-A at 579.

20. U.S. Bd. of Parole 17, quoted in *Hearings*, pt. VII-B at 1289. See also *Hearings*, pt. VII-A at 579.

21. U.S. Bd. of Parole 19-23, quoted in *Hearings*, pt. VII-B at 1293.

22. The decision of the Board may take three forms: 1) it may set a definite date for parole release; 2) it may continue the case for later review; or 3) it may deny parole (continue the case to expiration of sentence). U.S. Bd. of Parole R. 18; *Hearings*, pt. VII-B at 1290.

23. U.S. Bd. of Parole R. 21; *Hearings*, pt. VII-B at 1293.

24. See, e.g., *Juelich v. U.S. Bd. of Parole*, 437 F.2d 1147, 1148 (7th Cir. 1971); *Thompkins v. U.S. Bd. of Parole*, 427 F.2d 222, 223 (5th Cir. 1970); *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir. 1963).

25. 5 U.S.C. § 551(1) (1970). Statutory exceptions to the definition of an agency include:

opinion, and judicial decisions support the proposition that this broad definition encompasses the Parole Board.

### *Legislative History*

Although the voluminous legislative history of the Act never specifically mentions the Parole Board, Congress clearly intended the term "agency" to include *all* authorities. During floor debate Representative Walter<sup>26</sup> explained:

The definition of agency in section 2(a) of the bill is perfectly simple and consists of two elements: First, there are excluded legislative, judicial, and territorial authorities. Secondly, there is included any other authority regardless of its form or organization. In short, whoever has the authority to act with respect to the matters later defined is an agency.<sup>27</sup>

Since Congress has never expressly exempted the Board from the definition of "agency"<sup>28</sup> and has affirmatively expressed its intention that *all* authorities be considered agencies, the absence of specific mention of the Board in Congressional deliberations cannot be considered to exclude it from the "agency" definition.

The omission of any reference to the Parole Board is completely consistent with the functional definition of "agency" enacted in the APA by Congress. That definition contains no exemptions of agencies as such, but exempts certain functions of all agencies.<sup>29</sup> Although the "criminal process

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- (A) the Congress;
  - (B) the courts of the United States;
  - (C) the governments of the territories or possessions of the United States;
  - (D) the government of the District of Columbia;
  - (E) agencies composed of representatives of the parties or of representatives or organizations of the parties to the disputes determined by them;
  - (F) courts martial and military commissions;
  - (G) military authority exercised in the field in time of war or in occupied territory; or
  - (H) functions conferred by sections 1738, 1739, 1743, and 1744 of Title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641 (b)(2) of Title 50, appendix; . . . .

*Id.* § 551(1).

26. Chairman of the Subcommittee of the House Judiciary Committee which reported on the bill later enacted as the APA.

27. 92 CONG. REC. H5649 (1946) (Remarks of Representative Walter), *quoted in* S. Doc. No. 248, 79th Cong., 2d Sess. 354 (1946). Beyond this statement, Congress apparently found the present statutory wording to reflect its understanding, for there are few additional statements bearing on the definition.

28. Various agencies or agency functions have been exempted from specific provisions of the APA. Examples of exemptions from 5 U.S.C. § 552 (1971), the public information section, include the Renegotiation Board, 50 U.S.C.A. § 1221 (1951) and the Selective Service System, 50 U.S.C. § 463(b) (1970).

29. 92 CONG. REC. S2151, S2154-55 (1946) (Remarks of Senator McCarran), *quoted in* S. Doc. No. 248, 79th Cong., 2d Sess. 303, 313 (1946): "The present bill must be distinguished from the Walter-Logan bill in several essential respects . . . since

has always been separate from administrative law,"<sup>30</sup> the functional definition of an "agency" does not exclude the functions of the Parole Board, since it makes no distinction between criminal administration agencies and public regulatory agencies.<sup>31</sup> Instead, the Act defines "agency" as "each authority."<sup>32</sup> The Senate Judiciary Committee Print of June 1945, explaining a previously revised text substantially similar to the APA, defines "authority" as: "[A]ny officer or board whether within another agency or not, which by law has authority to take final and binding action with or without appeal to some superior administrative authority."<sup>33</sup> Congress intended, by defining "agency" functionally in terms of "each authority," to impart the broadest scope of the definition of "agency."<sup>34</sup>

### *Scholarly Opinion*

Recognizing the intention of Congress as expressed in the Act and its legislative history, legal scholars have also given a broad scope to the term. Professor Freedman, a noted authority in administrative law, states:

If the legislative history on this point can be said to reflect a dominant 'temper of legislative opinion,' it is a desire to use the term 'agency' to identify centers of gravity of the exercise of administrative power. Where a center of gravity lies, where substantial 'powers to act' with respect to individuals are vested, there is an administrative agency for purposes of the APA.<sup>35</sup>

Although Professor Davis, another recognized authority, uses a more restrictive definition,<sup>36</sup> he believes the Parole Board is an "agency" within the meaning of the APA.<sup>37</sup> Although these scholars believe that the Parole

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it is drawn entirely on a functional basis it contains no exemptions of agencies as such."

30. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3.00, at 79 (Supp. 1970).

31. The Probation System is exempted from agency status under the APA, though its functions are indistinguishable from those of the Parole Board. See Cohen, *Due Process, Equal Protection and State Parole Revocation Proceedings*, 42 COLO. L. REV. 197, 225 (1971). This result is reached on the basis of 5 U.S.C. § 551(1)(B) (1970) which exempts the courts, who administer the Probation System.

32. 5 U.S.C. § 551(1) (1970).

33. Senate Judiciary Committee Print of June 1945, quoted in S. Doc. No. 248, 79th Cong., 2d Sess. 13 (1946).

34. 37 CONG. REC. S2151 (1946) (Remarks of Senator McCarran), reprinted in S. Doc. No. 248, 79th Cong., 2d Sess. 305 (1946). Exemptions of agencies from specific procedural provisions makes the broadest interpretation of "agency" reasonable.

35. Freedman, *Administrative Procedure and the Control of Foreign Direct Investment*, 119 U. PA. L. REV. 1, 9 (1970); see *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 482 F.2d 710, 714-15 (D.C. Cir. 1973), appeal pending, 42 U.S.L.W. 3502 (Feb. 25, 1974).

36. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.01, at 1 (1958), where he states: "An administrative agency is a governmental authority other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rule-making." *Id.* § 1.01, at 1.

37. K. DAVIS, DISCRETIONARY JUSTICE 129 (1969).

Board is an agency, final responsibility for interpreting the Act rests with courts.<sup>38</sup>

### *Judicial Decisions*

While recognizing a lack of clarity in the definition of an "agency,"<sup>39</sup> federal case law clearly indicates the Parole Board is an "agency." In the leading case of *Soucie v. David*,<sup>40</sup> the Court of Appeals for the District of Columbia Circuit, though not dealing specifically with the Parole Board, has defined "agency" as: "The statutory definition of 'agency' is not entirely clear, but the APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions."<sup>41</sup> Although earlier cases held specific procedures of the Board exempt from the operation of the APA, they did not consider whether the Board is an "agency" nor hold the entire Act inapplicable.<sup>42</sup> The two recent cases that have considered the issue of agency have held that the Parole Board is an "agency." In *King v. United States*<sup>43</sup> the Court of Appeals for the Seventh Circuit applied a specific provision of the APA to the Board, stating that "[t]here is no language in the APA exempting the Parole Board from its application."<sup>44</sup> Similarly, *Pickus v. United States Board of Parole*<sup>45</sup> directly held that the U.S. Board of Parole is an "agency" within the meaning of the APA.<sup>46</sup> Because these cases, the scholarly opinion, and congressional intent indicate the Parole Board is an "agency," problems in parole are exposed to various provisions of the APA.

### PROBLEMS INVOLVING PAROLE PROCEDURES: SEEKING RESOLUTION THROUGH THE APA

Significant problems in the parole process are not subject to resolution by judicial challenge.<sup>47</sup> Parole decision-making procedure, however, is an

38. See generally *Marcello v. Bonds*, 349 U.S. 302, 310 (1955); *Renegotiation Bd. v. Bannerkraft Clothing Co.*, — U.S. —, —, 94 S. Ct. 1028, 1034-38, — L. Ed. 2d —, — (1974).

39. *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 482 F.2d 710, 714 (D.C. Cir. 1973).

40. 448 F.2d 1067 (D.C. Cir. 1971).

41. *Id.* at 1073. This broad interpretation has been approved in *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 482 F.2d 710, 714 (D.C. Cir. 1973); *Blackwell College of Business v. Attorney General*, 454 F.2d 928, 933 (D.C. Cir. 1971).

42. *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963); *Hiatt v. Compagna*, 178 F.2d 42 (5th Cir. 1949), *aff'd*, 340 U.S. 880 (1950).

43. 492 F.2d 1337 (7th Cir. 1974).

44. *Id.* at 1343.

45. Civil No. 73-1987 (D.C. Cir., filed Sept. 1, 1973).

46. *Id.*

47. Some frequently voiced non-judicial problems are: excessive case load, a long time lag between the parole hearing and decision, inadequate financing, and inarticulate offenders.

area which is subject to judicial scrutiny. With increasing frequency federal courts are confronted with challenges to parole decision-making procedure focusing on three critical problem areas: (1) ambiguity of parole criteria; (2) failure to state the reasons for denial of parole; and (3) arbitrariness in parole decision-making.<sup>48</sup> The APA may be applied to alleviate problems in each of these areas.

#### *Ambiguity of Parole Criteria*

The enabling statute of the U.S. Parole Board authorizes release of a prisoner on parole if

[t]here is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society . . . .<sup>49</sup>

These guidelines do not provide specific criteria for determining individual cases, and until recently, the Parole Board had never publicly stated any of the substantive principles upon which its determinations are based.<sup>50</sup>

In the present system, considerable progress has been made by the Board toward specifying the criteria actually used in parole decision-making. In 1971, the Board published an extensive list of general factors considered in parole selection. The list was of little real value since it did no more than enumerate items of information typically found in a prisoner's file.<sup>51</sup> More meaningful guidelines issued by the Parole Board in November 1973 place a weighted value on each of nine separate factors positively correlated with success on parole, and classify crimes into six categories according to the seriousness of the offense.<sup>52</sup> These guidelines provide for a range of months to be served by each prisoner preceding parole, this length of time depending on the seriousness of his crime and the number of favorable factors (such as age, marital status, etc.), with which he is credited. While the

48. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT ON CORRECTIONS Ch. 8 (1967). See also Kimball and Newman, *Judicial Intervention in Correctional Decisions: Threat and Response*, 14 CRIME & DELINQUENCY 1 (1968).

49. 18 U.S.C. § 4203 (1970).

50. K. DAVIS, DISCRETIONARY JUSTICE 127 (1969). As recently as 1969, Professor Davis was thoroughly justified in stating: "The Board has never publicly stated any substantive principals that guide it in determining the probability that a prisoner will commit another crime or whether his release will be compatible with the welfare of society." *Id.* at 127. In addition to being vague and ambiguous, the statute apparently gives the Board the authority to rely solely on its own opinion in construing the guidelines. 18 U.S.C. § 4203 (1970).

51. See generally U.S. Bd. OF PAROLE R. 14-16, quoted in *Hearings* pt. VII-B at 1286-88. Actual criteria used in three state parole systems were enumerated in Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice*, 1966 WASH. L.Q. 243.

52. 38 Fed. Reg. 31942-31945 (1973).



Board states that these guidelines are "merely indicators of how the Board . . . intends to exercise its discretion . . . ,"<sup>53</sup> they actually structure priorities in decision-making. It remains to be seen whether the Parole Board will actually exercise its discretion in the manner outlined by the 1973 guidelines,<sup>54</sup> but a study made in 1973 indicates that specific criteria do have a significant effect on parole decision-making.<sup>55</sup>

The recent progress made in specifying certain parole criteria does not eliminate the need for articulating other factors influencing discretion and integrating those in the system of priorities. So long as the Board can determine whether an offender will have liberty for a substantial portion of his sentence merely on the basis of ambiguous or unwritten criteria, that offender will continue to feel he lacks influence on self-determination. The prisoner's belief that he has some measure of control over his own life appears essential to successful rehabilitation. Ambiguity of parole criteria is part of a larger process contributing to an offender's frustration and adversely influencing his behavior in society.<sup>56</sup>

This ambiguity is a problem which can be improved but not entirely resolved by application of the APA rule-making provisions. Those provisions require that general notice of proposed rule-making be published in the Federal Register,<sup>57</sup> and also that the agency give interested persons an opportunity to participate.<sup>58</sup> Additionally, the agency must "incorporate in the rules adopted a concise general statement of their basis and purpose."<sup>59</sup> The Parole Board, however, has never published a general notice of proposed rule-making in the Federal Register. Although rules formulated in accordance with the APA may still be ambiguous, they will at least have been subjected to enlightened public and professional comment. Articulation of rules is a method of self-education within the correctional system which would reveal both proper and improper grounds for granting or denying parole.<sup>60</sup>

If parole criteria were considered to be either interpretative rules, general statements of policy, or rules of agency procedure, the rule-making provi-

53. *Id.* at 31942-31945.

54. In the first 4 months of a pilot project using the guidelines, "63% of hearing examiner decisions were within the guidelines, 22.5% were below and 14.5% were above the guidelines." *Battle v. Norton*, 365 F. Supp. 925, 929 (D. Conn. 1973).

55. See U.S. DEPT. OF JUSTICE, *PAROLE DECISION MAKING* 40-42 (1973).

56. *Hearings*, pt. VII-A at 294-96.

57. 5 U.S.C. § 553(b) (1970).

58. *Id.* § 553(c).

59. *Id.* § 553(c).

60. Kimball and Newman, *Judicial Intervention in Correctional Decisions: Threat and Response*, 14 *CRIME & DELIQUENCY* 1, 11 (1968). See also *Texaco, Inc. v. FPC*, 412 F.2d 740 (3d Cir. 1969). "Section 553 was enacted to give the public an opportunity to participate in the rule-making process. It also enables the agency . . . to educate itself before establishing rules and procedures which have a substantial impact on those regulated." *Id.* at 744.

sions of the APA would not apply.<sup>61</sup> Whether a particular rule falls within one of these exceptions is to be determined by its purpose and impact.<sup>62</sup> If a rule's purpose is to alter a method of operation and its impact is on the agency's internal systems, then the rule is procedural. The purpose of parole criteria is to determine when an offender will be released. The impact of that determination has its effect both on the inmate's liberty and on the protection of society's interests. Such rules are clearly substantive; they do not affect the agency's internal operation and are thus not excepted from the Act.

Difficult to define, interpretative rules are probably better known by their characteristics than by any single definition.<sup>63</sup> These rules usually deal with the construction of statutes;<sup>64</sup> they are without binding effect upon the persons affected,<sup>65</sup> and they lack legislative mandate with respect to their binding authoritative nature.<sup>66</sup> Although many of the rules promulgated by the Parole Board are interpretative, parole criteria are legislative or substantive in nature. Parole Board rules establishing parole criteria do not construe a statute except to the extent that they identify the welfare of society;<sup>67</sup> they are binding on the offender if they are utilized by the Parole Board, and they do not arise pursuant to a grant of lawmaking power. Clearly, by any of the indicators, parole criteria are not interpretative rules.

The second exception, "general statements of policy," may be defined as "approaches to particular types of problems, which, as they become established, are generally determinative of decisions."<sup>68</sup> Agencies often characterize a statement as policy in order to avoid the collateral consequences of characterization as a policy rule.<sup>69</sup> Courts recognize that "the label that

61. 5 U.S.C. § 553(b)(3)(A) (1970).

62. *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963). "The determinative factor is the context within which the rule was promulgated and, flowing from this context, the essential *purpose* of the rule." *Id.* at 680. "The basic policy of Section 4 at least requires that when a proposed regulation of general applicability has a substantial impact on the regulated industry . . . notice and opportunity for comment should first be provided." *Pharmaceutical Mfrs. Ass'n v. Finch*, 307 F. Supp. 858, 863 (D. Del. 1970). See also *P.B.W. Stock Exchange, Inc. v. SEC*, 485 F.2d 718 (3d Cir. 1973).

63. See generally Bondfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretive Rules and General Statements of Policy under the APA*, 23 AD. L. REV. 101 (1971).

64. *Id.* at 108.

65. Note, *Rulemaking: Some Definitions under the Federal Administrative Procedure Act*, 35 GEO. L.J. 491, 497 (1947).

66. Bondfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretive Rules and General Statements of Policy under the APA*, 23 AD. L. REV. 101, 109 (1971).

67. 18 U.S.C. § 4203 (1970).

68. ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURES IN GOVERNMENT AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 26 (1941).

69. Bondfield, *Some Tentative Thoughts on Public Participation in the Making of*

the particular agency puts upon its given exercise of administrative power is not . . . conclusive; rather it is what the agency does in fact."<sup>70</sup> Although the Board characterizes its parole criteria as a "statement of general policy,"<sup>71</sup> they are, in fact, policy rules because they have prospective influence affecting an individual decision. Though subject to overriding discretion, they have a substantive impact on an offender's liberty.

Furthermore, parole criteria are not rules of agency procedure.<sup>72</sup> They set forth the substantive criteria which will be used by the Board in performing its statutory function. Arguably, even rules which are clearly procedural in nature may be subject to the notice and public comment requirements of the APA<sup>73</sup> if their impact on substantive rights is substantial.<sup>74</sup>

The rules of the U.S. Board of Parole relating to parole criteria are clearly subject to the rule-making provisions of the APA. They are not procedural, interpretative, or statements of general policy, and their impact on both the offender and the public is substantial.

#### *Stating the Reasons for Denial of Parole*

The Parole Board's practice of refusing to state its reasons for the denial of parole<sup>75</sup> has been extensively criticized for at least three reasons. First, stating reasons for the denial of parole might help to rehabilitate the prisoner through education and guidance toward self-improvement.<sup>76</sup> Second, the reasons might help relieve the frustration resulting from a lack of knowledge of how one is being measured for release. Third, a policy of openness and honesty would be promoted, thereby exposing arbitrariness within the decision-making process and allowing for the development of a body of acceptable decision-making formulae.<sup>77</sup>

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*Interpretative Rules and General Statements of Policy under the APA*, 23 AD. L. REV. 101, 109 (1971).

70. *Lewis-Motor v. Secretary of Labor*, 469 F.2d 478, 481-82 (2d Cir. 1972). See also *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 416 (1942); *National Motor Freight Traffic Ass'n v. United States*, 268 F. Supp. 90, 96 (D.D.C. 1967), *aff'd*, 393 U.S. 18 (1968).

71. 38 Fed. Reg. 31942 (1973).

72. Cf. *Fisher v. FCC*, 417 F.2d 551 (D.C. Cir. 1969); *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963).

73. 5 U.S.C. § 553(b) (1970).

74. See, e.g., *National Motor Freight Traffic Ass'n v. United States*, 268 F. Supp. 90, 95 (D.D.C. 1967). A procedure to obtain reparations was not exempted from the APA's notice and public comment provisions. 5 U.S.C. § 553 (1970).

75. O'Leary & Nuffield, *Parole Decision-Making Characteristics: Report of a National Survey*, 8 CRIM. L. BULL. 651, 678 (1973); 28 C.F.R. § 2.16 (1972). But see *Battle v. Norton*, 365 F. Supp. 925, 926 (D. Conn. 1973). The Board is experimenting with giving the reasons for denial of parole on a limited basis. (5 institutions were studied). *Id.* at 926.

76. See *Hearings*, pt. VII-A at 269. See also K. DAVIS, *DISCRETIONARY JUSTICE* 128 (1969).

77. *Hearings*, pt. VII-A at 295-96.

Delineating the reasons for denial of parole is currently inhibited, if not precluded, by the Board's procedural policy of having its members individually review a prisoner's file.<sup>78</sup> Except for infrequent en banc considerations, there is no discussion or agreement by Board members on the basis for either granting or denying parole. This procedural policy prompted Professor Davis to inquire:

How could a Board member have less incentive to avoid prejudice or undue haste than by a system in which his decision can never be reviewed and in which no one, not even his colleagues, can ever know why he voted as he did? Even complete irrationality of a vote can never be discovered. Should any men, even good men, be unnecessarily trusted with such uncontrolled discretionary power?<sup>79</sup>

In a recent landmark decision, *Monks v. New Jersey State Parole Board*,<sup>80</sup> the Supreme Court of New Jersey held that the state board's policy of refusing to reveal the basis for parole denial was invalid and "should be replaced . . . by a carefully prepared rule designed generally towards affording statements of reasons on parole denials . . ."<sup>81</sup> The *Monks* decision was not based on constitutional or statutory grounds, but rather in equity. "[F]airness and rightness clearly dictate the granting of the prisoner's request for a statement of reasons."<sup>82</sup> The equities are no less evident in the Federal Parole System.<sup>83</sup>

Section 555(e) of the APA provides that:

Prompt notice shall be given . . . in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceedings. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.<sup>84</sup>

A literal interpretation of the statute, as clearly intended by Congress,<sup>85</sup> would require the Parole Board to state its reasons for the denial of an ap-

78. K. DAVIS, *DISCRETIONARY JUSTICE* 129 (1969). The Board also refuses to disclose how the Board or any member votes on a particular case. *Hearings*, pt. VII-B at 1308.

79. K. DAVIS, *DISCRETIONARY JUSTICE* 129 (1969).

80. 277 A.2d 193 (N.J. 1971).

81. *Id.* at 199.

82. *Id.* at 199.

83. THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, A TASK FORCE REPORT: CORRECTIONS 86 (1967). The Task Force concluded that reasons for the Board's decision should be given so that meaningful judicial review can be undertaken. *Id.* at 86.

84. 5 U.S.C. § 555(e) (1970).

85. S. Doc. No. 248, 79th Cong., 2d Sess. 206 (1946). Both the Senate and House committees have said:

This subsection affords the parties in an agency proceeding, whether or not formal or upon hearings, the right to prompt action upon their requests, immediate notice of such action, and a statement of the actual grounds therefore. The latter should in any case be sufficient to appraise the party of the basis of the denial. *Id.* at 265; see K. DAVIS, *DISCRETIONARY JUSTICE* 129 n.49 (1969).

plication for parole and the Court of Appeals for the Seventh Circuit so held in *King v. United States*.<sup>86</sup> In that case the court put aside the issue of whether the Fifth Amendment of the United States Constitution forbids denial of parole without a stated reason, and directly held that the APA requires the Parole Board to give a brief statement of the grounds for denial of parole applications.<sup>87</sup> The cause was remanded, however, for determination of whether the palintiff's application was in writing.<sup>88</sup>

In order to be considered for parole, most adult prisoners must make a written application in accordance with the provisions of 18 U.S.C. § 4203 which states: "If it appears to the Board of Parole from a report by the proper institution officers or upon application by a prisoner . . . the Board may in its discretion authorize the release of such prisoner on parole."<sup>89</sup> Youth offenders and juveniles, however, are expressly prohibited by a Board rule from applying for parole.<sup>90</sup> This fact should not prohibit compliance with the written application requirements of the APA. Youths and juveniles are "prisoners,"<sup>91</sup> and thus the Board rule is in violation of the federal statutes requiring application for parole.<sup>92</sup> The Board cannot evade its responsibility to provide a brief statement of reasons as required by the APA by invoking such a rule. In any event, youth offenders and juveniles would be entitled to a statement of reasons upon written request made after the parole hearing.<sup>93</sup>

The precise nature of the "brief statement" required by the APA is uncertain. The only clarification, presented in *King v. United States*,<sup>94</sup> is a recommendation of the Administrative Conference of the United States that "there should . . . be . . . at least a sentence or two of individualized explanation."<sup>95</sup> Many penologists, however, feel that in-depth particularization is necessary to facilitate rehabilitation.<sup>96</sup> Whether due process also re-

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86. 492 F.2d 1337 (7th Cir. 1974).

87. *Id.* at 1345.

88. *Id.* at 1345.

89. 18 U.S.C. § 4203(a) (1970).

90. 28 C.F.R. § 2.12 (1972).

91. *Royce v. Salt Lake City*, 49 P. 290 (Utah 1897). "A prisoner is a person deprived of his liberty by virtue of a judicial or other lawful process." *Id.* at 292. "Treatment" under 18 U.S.C. § 5011 (1970) for Youth Offenders and "Custody" under 18 U.S.C. § 5034 (1970) provide for substantial deprivations of liberty, usually incarceration. *See also State v. Brill*, 83 N.W.2d 721, 723 (Wis. 1957).

92. 38 Fed. Reg. 26653 (1973).

93. 5 U.S.C. § 555(e) (1970).

94. 492 F.2d 1337 (7th Cir. 1974).

95. *Id.* at 1340, quoting *Administrative Conference Recommendation 72-3: Procedures of the United States Board of Parole*, 25 AD. L. REV. 531, 534 (1973). This recommendation was additional to a check-list form that has been used experimentally by the Parole Board.

96. These penologists include Representative Katsenmier, Professors V. O'Leary, Fred Cohen and H. Schwartz, and Mr. Charles Goodell. *See Hearings*, pt. VII-A at 201-202, 219-20, 241, 296, 602.

quires a statement of reasons on denial of parole is not settled; but at least two federal district courts have held that there is such a requirement.<sup>97</sup> One court has described the statement required in these terms:

It . . . must . . . state the ultimate ground of its decision denying parole with sufficient particularity to enable the prisoner to understand how he is expected to regulate his conduct and to enable a reviewing court to determine whether inadmissible factors have influenced the decision, and to determine whether discretion has been abused.<sup>98</sup>

Minimum due process requirements may be more stringent with respect to stating the grounds for denial of parole than is the "brief statement" required by the APA.

#### *Arbitrariness in Parole Decision-Making*

Within very broad guidelines, the Parole Board has discretion to authorize the release of a prisoner on parole.<sup>99</sup> It is this almost unfettered discretion which presents the opportunity for abuse and arbitrariness in the decision to grant or deny parole. Because statutory standards for parole are vague, it is difficult to determine exactly what constitutes arbitrariness in the decision-making process. Consideration of an irrelevant or inappropriate factor presents the only clear cases of abuse which can be substantiated. The parameters for what is "appropriate" come from the Constitution and the enabling statute.<sup>100</sup> In a study by Professor Gaylin from 1967 to 1970, it was found that the Parole Board systematically discriminated among conscientious objectors on the basis of their religious denomination.<sup>101</sup> Specifically, Jehovah's Witnesses were considered "True CO's" and therefore granted parole much earlier than prisoners of other denominations. Such arbitrary policies have been condemned by the Supreme Court as unconstitutional.<sup>102</sup> Other inappropriate factors<sup>103</sup> which may have been considered by the Parole Board have included: overcrowding in particular correctional facilities,<sup>104</sup> promises made by the Board during direct plea bargaining,<sup>105</sup>

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97. *United States ex rel. Johnson v. Chairman, New York State Bd. of Parole*, 363 F. Supp. 416 (E.D.N.Y. 1973); *United States ex rel. Harrison v. Pace*, 357 F. Supp. 354 (E.D. Penn. 1973).

98. *United States ex rel. Johnson v. Chairman, New York State Bd. of Parole*, 363 F. Supp. 416, 419 (E.D.N.Y. 1973).

99. 18 U.S.C. § 4203 (1970).

100. *Id.*

101. Gaylin, *No Exit*, Harpers, Nov., 1971, at 87. This is also discussed in *Hearings*, pt. VII-A at 445-65. See generally *Farries v. United States Bd. of Parole*, 484 F.2d 948 (7th Cir. 1973).

102. Cf. *Sherbert v. Verner*, 374 U.S. 398 (1963).

103. See generally Comment, *Curbing Abuse in the Decision to Grant or Deny Parole*, 8 HARV. CIV. RTS.-CIV. LIB. L. REV. 419, 432-33 (1973).

104. *Hearings*, pt. VII-A at 145-46.

105. *Palermo v. Rockefeller*, 323 F. Supp. 478, 484-85 (S.D.N.Y. 1971).

and political pressure.<sup>106</sup> The presence of arbitrariness in other categories, such as failure to consider a relevant factor, or unreasonable weight given to a relevant factor,<sup>107</sup> is extremely difficult to detect, both because of the wide discretion that permeates the system and because of the secretive practices of the Parole Board.

Arbitrary parole decisions may contribute substantially to an offender's belief that he is being treated unfairly, thereby making him a difficult subject for rehabilitation.<sup>108</sup> Realization of the rehabilitative goal depends greatly upon the extension of rights to prisoners and a system's predictability attainable only by sufficient procedural safeguards.<sup>109</sup> Discretionary authority should be tempered so that it cannot hide arbitrary methods of decision-making.

The most impressive weapon against arbitrariness in decision-making is judicial review. Despite the overwhelming benefits which might accrue to the parole system,<sup>110</sup> the judiciary has taken a "hands-off" approach toward intervention in the correctional process.<sup>111</sup> The unfortunate result, exemplified by *Richardson v. Rivers*,<sup>112</sup> is that courts generally refuse to consider the case even where an abuse of discretion, such as the Parole Board's acting with prejudice, malice and discrimination, is alleged.

The powers of a reviewing court are limited. The nature of judicial review itself is essentially only an overseeing of the criteria and procedures utilized by the administrative agency in decision-making.<sup>113</sup> This sort of review leaves room for considerable agency discretion, since the substantive merits of individual decisions "are almost never reviewed in any substantial way . . . ."<sup>114</sup> Furthermore, courts do not have the power to grant pa-

106. *Hearings*, pt. VII-A at 413-17.

107. L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 180-81, 586 (1965).

108. See Hink, *The Application of Constitutional Standards of Protection to Probation*, 29 U. CHI. L. REV. 483, 485 (1962). See also *The National Council on Crime and Delinquency, Correction in the United States, A Survey for the President's Commission on Law Enforcement and Administration of Justice*, 13 CRIME & DELINQUENCY 1, 223 (1967): "[Due] process need not be in conflict with treatment goals, but indeed may be a crucial prerequisite."

109. See Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L.C. & P.S., 175, 196 (1964). The crucial relationship between the parole applicant's subjective view of the system and the system's potential for successful reformation of the offender has long been recognized. *Fleming v. Tate*, 156 F.2d 848, 850 (D.C. Cir. 1946).

110. Some of the benefits which might be expected because of judicial review are: more articulate rules, more open procedures, and less arbitrariness in decision-making.

111. See *Juelich v. United States Bd. of Parole*, 437 F.2d 1147 (7th Cir. 1971); *Thompkins v. United States Bd. of Parole*, 427 F.2d 222 (5th Cir. 1970); *United States v. Frederick*, 405 F.2d 129 (3d Cir. 1968).

112. 335 F.2d 996 (D.C. Cir. 1964).

113. L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 595 (1965).

114. Kimball & Newman, *Judicial Intervention in Correctional Decisions: Threat and Response*, 14 CRIME & DELINQUENCY 1, 7 (1968).

role,<sup>115</sup> since that authority is vested exclusively in the Parole Board.<sup>116</sup>

Authority for judicial review of Parole Board discretion is derived from two sources: traditional administrative law principles<sup>117</sup> and the judicial review provisions of the APA.<sup>118</sup> Embodied in the APA is a strong presumption in favor of review<sup>119</sup> which can only be overcome by a clear showing of contrary legislative intent.<sup>120</sup> Despite the presumption, several courts have taken a "hands-off" approach,<sup>121</sup> partly because Section 701(A)(2) of the APA provides: "This chapter [concerning judicial review] applies according to the provisions thereof, except to the extent that . . . agency action is committed to agency discretion by law."<sup>122</sup> Since the Board has discretionary authority granted by statute, it might appear that the Board was indeed intended to have been exempt. In an apparent contradiction, however, the same chapter of the APA provides that the reviewing court shall "hold unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law . . ."<sup>123</sup>

Whether abuse of discretion is reviewable under the APA has been a subject of considerable debate.<sup>124</sup> There was a split of authority among the circuit courts,<sup>125</sup> but the Supreme Court has recently approved an analysis favoring review of agency action for abuse of discretion.<sup>126</sup> In *Citizens to Preserve Overton Park, Inc. v. Volpe*,<sup>127</sup> the Court made it clear that

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115. *Thompkins v. United States Bd. of Parole*, 427 F.2d 222, 223 (5th Cir. 1968); *Barradale v. United States Bd. of Paroles & Pardons*, 362 F. Supp. 338, 340 (D.C. Penn. 1973).

116. 18 U.S.C. § 4203 (1970).

117. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967); Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 432 (1958).

118. 5 U.S.C. §§ 701-706 (1970).

119. *Citizens Comm. for Hudson Valley v. Volpe*, 425 F.2d 97, 101 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970); *Sobell v. Reed*, 327 F. Supp. 1294, 1302 (S.D.N.Y. 1971).

120. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967); *Environmental Defense Fund, Inc., v. Hardin*, 428 F.2d 1093, 1098 (D.C. Cir. 1970).

121. Newman, *Court Intervention in the Parole Process*, 36 ALBANY L. REV. 257, 259 (1972); *see, e.g., Hyser v. Reed*, 318 F.2d 225, 236-37 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963); *Washington v. Hagan*, 287 F.2d 332, 334 (3d Cir. 1960).

122. 5 U.S.C. § 701(2)(A) (1970).

123. 5 U.S.C. § 706(2)(A) (1970).

124. *See generally* K. DAVIS, 4 ADMINISTRATIVE LAW TREATISE § 28.08, at 33 (1958); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 359 (1965); Burger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965 (1969); Davis, *Administrative Arbitrariness—A Postscript*, 114 U. PA. L. REV. 823 (1966); Saferstein, *Non-reviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367-71 (1968).

125. *Compare Little v. Morton*, 445 F.2d 1207 (4th Cir. 1971) with *Ferry v. Udall*, 336 F.2d 706 (9th Cir. 1964), *cert. denied*, 381 U.S. 904 (1965).

126. *Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402, 410 (1971).

127. *Id.*



“‘committed to agency discretion’ . . . is a very narrow exception.”<sup>128</sup> Citing legislative history, the Court prescribed a test limiting the “committed to agency discretion” exception to “those rare instances where the ‘statutes are drawn in such broad terms that in a given case there is no law to apply.’”<sup>129</sup> One commentator indicates that “[t]he difficulty in imagining such a case leads one to believe that *Overton Park*’s ‘no law to apply’ test will require judicial review in all cases where Congress has not explicitly prohibited it.”<sup>130</sup> Cases decided since *Overton Park* appear to agree.<sup>131</sup>

The judicial review provisions of the APA should be applied where arbitrariness in parole decision-making is alleged. The “committed to agency discretion” provision does not, and never was intended by the legislature, to preclude judicial review of abuse of discretion. For over 125 years before the APA was enacted, the Supreme Court declared that “there is no room for arbitrary action in our system.”<sup>132</sup> The legislative intent, manifested in Section 706(2)(a)<sup>133</sup> of the APA, was clearly to continue judicial review in cases of arbitrariness.<sup>134</sup>

#### *Applying the “Freedom of Information Act”*

The provisions of Section 552 of the APA,<sup>135</sup> the “Freedom of Information Act,” may also be used to combat arbitrariness in parole decision-making. The Parole Board has no apparent exception from Section 552(a)(4) which provides: “Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.”<sup>136</sup> Directly contrary to this provision, as well as to a specific Department of Justice regulation,<sup>137</sup> the Board’s own rules provide that “[t]here will be no disclosure of how the Board or any member votes . . . .”<sup>138</sup> Such a flagrant violation of statu-

128. *Id.* at 410.

129. *Id.* at 410, quoting, S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945).

130. McCaba, *Recent Developments in Judicial Review of Administrative Actions: A Developmental Note*, 24 AD. L. REV. 67, 95 (1972).

131. See *Cox v. United States*, 473 F.2d 334, 342 (4th Cir. 1973); *National Helium Corp. v. Morton*, 361 F. Supp. 78, 82 (D.C. Kan. 1973).

132. Burger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965, 966 n.10 (1969).

133. 5 U.S.C. § 706(2)(A) (1970).

134. See Burger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965, 966 n.10 (1969) and cases cited therein.

135. 5 U.S.C. § 552 (1970).

136. *Id.* § 552(a)(4). In a similar vein 5 U.S.C. § 552(a)(2)(A) provides that “[e]ach agency . . . shall make available for public inspection and copying final opinions . . . as well as orders, made in the adjudication of cases . . . .”

137. 28 C.F.R. § 16.2 (1972). The Parole Board is specifically required to make the final votes available.

138. U.S. BD. OF PAROLE R. 36 (1971), quoted in *Hearings*, pt. VII-B at 1308.

tory law should not go unchallenged in the courts, particularly since adherence to the rule may benefit the system without unduly burdening the administrative process.

#### CONCLUSION

Applying various provisions of the APA to the U.S. Board of Parole will alleviate at least some of the persistent problems confronting the federal parole system. The APA provisions cannot deal with underlying inadequacies that result from insufficient knowledge of the means by which to effectively guide complex behavior. Within the confines of present penological knowledge, however, are facts which indicate that application of the APA to the actions of the U.S. Board of Parole would be beneficial.<sup>139</sup>

Despite the need for procedural modifications, federal courts have been reluctant to oversee the actions of the Parole Board. This "hands-off" attitude has resulted from a genuine belief on the part of courts that punishment is the best method of protecting society's interests, a belief that parole authorities have greater expertise, an uncertainty as to a prisoner's legal status, and a fear that complaints from prospective parolees would overburden the judicial system. Regardless of the reason for minimal judicial intervention, it is clear that the lack of effective judicial review has not aided the parole system in rehabilitating offenders.

The courts can improve the parole system's rehabilitative efforts, not by limiting access to the judicial system, but rather by directing their attention to the causes of parole problems. "The duty to confront and resolve . . . questions . . . is the very essence of judicial responsibility."<sup>140</sup>

It is becoming increasingly clear that the U.S. Board of Parole is an "agency" within the meaning of the APA, despite its contrary position, and that it is subject to the requirement for stating reasons for its action and the provisions for rule-making and judicial review. The over-all quality of the Board's decisions may be improved if the Board is required to comply with the APA, in that (1) compliance with the rule making provisions will result in more knowledgeable public contribution to the establishment of standards for granting parole; (2) compliance with the requirement of giving reasons for denial of parole will let the prisoner know why his liberty is restricted, what he may expect in the future and what may be expected of him as a condition to release in parole; and (3) judicial review will improve the quality of decision by exposing to public view the occasional decision made without basis or because of some factors which should not properly be considered. In the long run, alleviating current parole problems is less burdensome than facing those problems later in the form of criminal conduct.

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139. See Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L.C. & P.S. 175, 196 (1964).

140. *Brenneman v. Madigan*, 343 F. Supp. 128, 130 (N.D. Cal. 1972).