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REVOKING PROBATION, PAROLE OR PARDON WITHOUT A HEARING

Henry Weihofen¹

In about half the states, whenever the pardon or parole authorities are satisfied that a prisoner released on parole or conditional pardon has violated the terms of his release, he is summarily returned to prison without being given any hearing or chance to disprove the alleged violation.² In at least five states, the same summary procedure is used also in revoking probation.³ In a Missouri case, for example, a prisoner had been given a "sick parole," to allow him to obtain treatment for tuberculosis. Later, the Governor revoked this parole because the parole board "had concluded" that the parolee did not have tuberculosis. He was thereupon sent back to prison without being afforded an opportunity to present medical testimony to show, if he could, that he actually was tubercular.⁴

Such summary revocation of conditional release (the term we shall use in this article to cover parole, conditional pardon and probation) has been criticized from the standpoint of sound penal administration, but until lately, its constitutionality has hardly been doubted.

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² This is the practice in Alabama, Colorado, Florida, Georgia, Iowa, Louisiana, Maryland, Missouri, Montana, Nebraska, New Mexico, North Carolina, Oklahoma, Oregon, Tennessee,

Recently, however, a federal case has held that such revocation without a hearing violates due process of law.

The case arose in Kentucky. The Governor had granted a conditional pardon which provided that if the prisoner failed to fulfill its conditions he might "by executive order . . . be re-arrested and re-confined. . . ." The pardon was revoked without notice or hearing. The convict thereupon instituted habeas corpus proceedings for release, claiming that such summary revocation violated due process. The Kentucky Court of Appeals construed the pardon to reserve power to revoke without a hearing, and held that the prisoner by accepting it had assented to its terms.⁵ The convict then filed a similar petition in the federal district court, which held that if it were free to construe the pardon for itself, it would find that the pardon did not reserve a right to revoke without notice and hearing, but that it considered itself bound by the contrary construction adopted by the state court, and that the writ should for that reason be refused.⁶ Upon appeal, the Circuit

South Dakota, West Virginia, Wisconsin and Wyoming. Attorney General's Survey of Release Procedures, Vol. IV, "Parole," p. 245 (1939).

³ California, Iowa, Kansas, Minnesota and Missouri. *Id.*, Vol. II, "Probation," p. 329.

⁴ *Lime v. Blagg*, 345 Mo. 1, 131 S. W. (2d) 583 (1939).

⁵ *Comm. ex. rel. Meredith v. Hall*, 277 Ky. 612, 126 S. W. (2d) 1056 (1939).

⁶ *Fleenor v. Hammond*, 28 F. Supp. 625 (Ky. 1939).

Court of Appeals for the Sixth Circuit agreed that the state court's interpretation of the pardon was conclusive, but held that, so interpreted, it was unconstitutional; reservation of power to revoke without giving the convict a chance to deny the charges of violation deprives him of due process of law.⁷

Prior cases had in general agreed in making the following distinction: where the statute under which the releasing authority acted specifically authorized

summary revocation, or where the release itself contained as one of its conditions a provision that it might be summarily revoked, summary revocation is legal,⁸ but where neither the statute nor the instrument itself reserved such a right to revoke without a hearing, a judicial trial is necessary.⁹ Some courts, like the Kentucky Court of Appeals, have been amazingly able to find reservations of power to revoke without a hearing.¹⁰ *Fleenor v. Hammond* is the first case to hold that even when provided for by the terms of the pardon,

⁷ *Fleenor v. Hammond*, 116 F. (2d) 982 (C. C. A. 6th 1941).

⁸ Conditional pardon cases so holding: *Henderson v. State*, 55 Fla. 36, 46 So. 151 (1908); *Muckle v. Clarke*, 191 Ga. 202, 12 S. E. (2d) 339 (1940); *Arthur v. Craig*, 48 Iowa 264, 30 Am. Rep. 395 (1878); *State ex rel. Davis v. Hunter*, 124 Iowa 569, 100 N. W. 510, 104 Am. St. Rep. 361 (1904); *Lime v. Blagg*, 345 Mo. 1, 131 S. W. (2d) 583 (1939); *Ex parte Webb*, 322 Mo. 859, 30 S. W. (2d) 612 (1929); *State v. Yates*, 183 N. C. 753, 111 S. E. 337 (1922); *Ex parte Smith*, 65 Okla. Cr. 393, 87 P. (2d) 1106 (1939); *Ex parte Houghton*, 49 Ore. 232, 89 Pac. 801, 9 L. R. A. (n. s.) 737, 13 Ann. Cas. 1101 (1907); *State ex rel. Bedford v. McCorkle*, 163 Tenn. 101, 40 S. W. (2d) 1015 (1931); *Ex parte Davenport*, 110 Tex. Cr. 326, 7 S. W. (2d) 589 (1927); *In re Convicts*, 73 Vt. 414, 51 Atl. 10, 56 L. R. A. 658 (1901); *Spencer v. Kees*, 47 Wash. 276, 91 Pac. 963 (1907); *State ex rel. Rowe v. Connors*, 166 Tenn. 393, 61 S. W. (2d) 471 (1933). See also *Koslowsky v. Judge*, 238 Mass. 532, 131 N. E. 188 (1921).

Parole cases: *Fuller v. State*, 122 Ala. 32, 26 So. 146 (1898); *Woodward v. Murdock*, 124 Ind. 439, 24 N. E. 1047 (1890); *State v. Crepeau*, 150 Minn. 80, 184 N. W. 567 (1921); *Ex parte Vigil*, 24 N. M. 640, 175 Pac. 713 (1918); *Ex parte Foster*, 61 P. (2d) 37 (Okla., 1936); *Ex parte Woodward*, 58 Okla. Cr. 333, 53 P. (2d) 288 (1935); *Ex parte Butler*, 40 Okla. Cr. 434, 269 Pac. 786 (1928); *Ex parte Collins*, 32 Okla. Cr. 6, 239 Pac. 693 (1925); *Ex parte Horine*, 11 Okla. Cr. 517, 148 Pac. 825 (1915).

Probation cases: *People v. O'Donnell*, 37 Cal. App. 192, 174 Pac. 102 (1918); *People v. Sanders*, 64 Cal. App. 1, 220 Pac. 24 (1923); *People v. Blankenship*, 16 Cal. App. (2d) 606, 61 P. (2d) 352 (1936); *In re Young*, 121 Cal. App. 711, 10 P. (2d) 154 (1932); *Pagano v. Bechly*, 211 Iowa 1294, 323 N. W. 798 (1930); *Bowers v. Wilson*, 143 Kan. 732, 56 P. (2d) 1212 (1936); *In re Patterson*, 94 Kan. 439, 146 Pac. 1009 (1915); *State v. Chandler*, 158 Minn. 447, 197 N. W. 847 (1924);

State ex rel. Jenks v. Municipal Court, 197 Minn. 141, 266 N. W. 433 (1936).

⁹ *State v. Horne*, 52 Fla. 125, 42 So. 388, 7 L. R. A. (n. s.) 719 (1906); rehearing denied, 52 Fla. 143, 42 So. 714 (1907); *Alvarez v. State*, 50 Fla. 24, 39 So. 481, 111 Am. St. Rep. 102, 7 Ann. Cas. 88 (1905); *Smith v. Veach*, 165 Ga. 190, 140 S. E. 356 (1927); *Plunkett v. Miller*, 161 Ga. 466, 131 S. E. 170 (1925); *State ex rel. O'Connor v. Wolfer*, 53 Minn. 135, 54 N. W. 1065, 19 L. R. A. 783, 39 Am. St. Rep. 582, 9 Am. Cr. Rep. 487 (1893); *Ex parte Strauss*, 320 Mo. 349, 7 S. W. (2d) 1000 (1928). And see *People v. Potter*, 1 Park. Cr. 47 (N. Y., 1846); *People v. Burns*, 77 Hun 92, 28 N. Y. Supp. 300 (1894); *State v. Barnes*, 32 S. C. 14, 10 S. E. 611, 6 L. R. A. 743, 17 Am. Dec. 557 (1847).

¹⁰ *In Muckle v. Clarke*, 191 Ga. 202, 12 S. E. (2d) 339 (1940), the pardon merely provided that it should be "revocable at the pleasure of the Governor upon violation of any of the laws," etc. The court held that this language "would admit of no reasonable interpretation other than that the Governor reserved the power to revoke the pardon *without notice or hearing* on violation of its terms." (Italics added.) *In Lime v. Blagg*, 345 Mo. 1, 131 S. W. (2d) 583 (1939), a prisoner was given a "sick parole," to receive treatment for tuberculosis, which provided that he might be recommitted upon his restoration to health. The governor later revoked the parole because the parole board "had concluded" that the prisoner did not have tuberculosis. No hearing was had. The court apparently assumed that the provision for revocation upon restoration to health was to be interpreted to give the governor the power to revoke on this ground without a hearing.

These cases seem wrong; they violate the generally accepted rule that "ambiguities are to be resolved in favor of the recipient of the act of grace, and limitations are to be strictly construed." *In re Charles and Howard*, 115 Kan. 323, 222 Pac. 606 (1924); accord: *Osborn v. United States*, 91 U. S. 474 (1875).

revocation without notice and hearing is unconstitutional.¹¹

It is submitted that the case is right, and that the distinction made in other cases, mentioned above, is wrong on both counts: It should not be deemed constitutional to deprive a parolee or person released on probation or conditional pardon of his freedom without a hearing, even though such summary revocation is specifically provided for. On the other hand, due process does not require a *judicial* hearing; an informal hearing before the governor or board should be sufficient.

It may be argued that a person at liberty on conditional release should be subject to re-commitment without further trial because he has already had his hearing in his criminal trial. Having been convicted and sentenced, he could legally have been required to serve his full sentence without further process. If the state, instead, releases him on certain conditions before expiration of the full sentence, that is a matter of grace, and if the possibility of summary revocation is one of these conditions, the prisoner has no right to complain. He is not being deprived of any right, but

merely of a gratuity which the state need not have conferred to begin with.¹²

This argument is well answered by the Circuit Court of Appeals in *Fleenor v. Hammond*:

"We may grant at once that the giving of a pardon is an act of grace; that to it the Governor may attach conditions; that if any condition is broken the Governor may revoke and that his judgment as to the breach is final and conclusive upon the courts. It does not follow, however, from the reservation of a right to revoke, that it may be exercised arbitrarily or upon whim, caprice, or rumor. Upon the granting of a pardon, albeit conditionally, the convict was entitled to his liberty and possessed of a right which could be forfeited only by reason of a breach of the conditions of the grant. In the present case it carried with it ultimate restoration of full civil rights. To hold that such forfeiture may be imposed without giving the grantee an opportunity to be heard, does violence to what are said to be 'immutable principles of justice, which inhere in the very idea of free government, which no member of the Union can disregard'."¹³

The court could have gone further. It was not necessary to "grant at once" that pardon is an act of grace. If pardon was once the exercise of mere grace or favor by a personal monarch, that day

¹¹ The Michigan court in 1886 had held a statute unconstitutional insofar as it authorized the warden or other prison official to arrest and remand to prison without a warrant or empowered a trial in the circuit court without a preliminary examination before a magistrate. *People v. Moore*, 62 Mich. 496, 29 N. W. 80 (1886). This actually goes further than *Fleenor v. Hammond*, supra, because the Michigan statute gave the prisoner a hearing; but the fact that it did not give him as full protection as other criminals accused of crime was held fatal. "If a condition is imposed," the court said, "that he shall not do anything or things, this does not hamper or abridge his rights or liberties until the condition is broken; and in order to remand and confine him in prison again, the fact of the violation of such condition must be established by the due administration of the law, as in

other cases of the violation of the penal statutes." *Id.* at 501, 29 N. W. at 82. The court felt certain that no "courts or executives will ever be invested in our State with the power of remanding pardoned convicts back to prison for the alleged violation of the conditions of their pardon, without an arrest by due process of law, and a fair trial, with the same opportunities for defense that are afforded every other citizen when accused of crime." *Id.* at 505, 29 N. W. at 84.

¹² This reasoning was followed by the Kentucky Court of Appeals in *Comm. ex rel. Meredith v. Hall*, 277 Ky. 612, 126 S. W. (2d) 1056 (1939). See also *Arthur v. Craig*, 48 Iowa 264, 268 (1878); *Ex parte Horine*, 11 Okla. Cr. 517, 523, 148 Pac. 825, 827 (1915).

¹³ 116 F. (2d) 982, 986 (C. C. A. 6th, 1941).

is past. Restricted to its proper sphere, pardon might correctly be referred to as an act of grace, but conditional pardon is today extensively used as a regular release procedure, to serve the purpose of parole. As such, it is part and parcel of our system of criminal administration, and in that administration, the state is required to act in accordance with due process.

The courts themselves recognize that it is not true that the power of imposing conditions is wholly unrestricted. In pardon cases, the rule is usually stated that the governor or other pardoning authority may grant pardons on any conditions "not illegal, immoral, or incapable of performance." A condition that a pardon may be revoked on order of the probation officer has been held void.¹⁴ It would seem that a condition permitting revocation without notice and hearing should be declared an illegal condition.

It may be suggested that the doctrine of unconstitutional conditions should apply here. It is established doctrine "that a regulation that would violate a given provision of the federal constitution if directly imposed will violate that same provision if sought to be imposed as a condition to the grant of a privilege which the state is free to grant or withhold."¹⁵

Where the statute or the parole or pardon itself provides as one of the conditions of release that the prisoner's liberty may be summarily revoked without a hearing, a further argument is almost always added: that the defendant voluntarily accepted the release on the conditions laid down, and so cannot now be heard to complain. This argument is based upon the oft-repeated but nevertheless wholly absurd proposition that a prisoner has a right to accept or reject such a conditional release. Does any sensible man—on the bench or off—really believe that a convicted criminal has a right to reject probation, pardon, or parole, and insist on keeping his cell or being hanged, even though the proper authorities have ordered him discharged?

It seems amazing, but scores of judicial opinions have solemnly stated that he does.¹⁶ It is true that these statements are almost all mere *obiter dicta*.¹⁷ All can be traced back to a grandfatherdictum of that master of dictum, Chief Justice John Marshall. In 1833, he stated that "a pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance," and a pardon "may then be rejected by the person to whom it is tendered."¹⁸

¹⁴ *In re McKinney*, 33 Del. 434, 138 Atl. 649 (1927). A condition that the convict be put to work for three years in such manner as the directors of public buildings might direct has also been held void. *Comm. v. Fowler*, 4 Call. 35 (Va. 1785). And in *State ex rel. Davis v. Hunter*, 124 Iowa 569, 100 N. W. 510 (1904), a conditional release providing that on violation, the prisoner was to be returned to prison and was to forfeit his statutory good time allowance, was held bad, the court saying that while the governor could attach any conditions not illegal, immoral or impossible, he could not require forfeiture of this statutory privilege.

¹⁵ Rottschaefer, *Handbook of American Constitutional Law* (1939) p. 557.

¹⁶ See cases collected in 52 A. L. R. 835.

¹⁷ See *ex parte Powell*, 73 Ala. 517 (1883); *Grubb v. Bullock*, 44 Ga. 379 (1871); *Lee v. Murphy*, 22 Grat. (Va.) 798, 12 Am. Rep. 563 (1872). In other cases where the statement occurs, the decision actually turned on points of pleading, as in *Michael v. State*, 40 Ala. 361 (1867), or on statutes, as in *Carpenter v. Lord*, 88 Ore. 127, 171 Pac. 577 (1918).

¹⁸ *United States v. Wilson*, 7 Pet. (U. S.) 150 (1833).

This statement was wholly unnecessary to the decision of the case, and apparently rested on a misconception of early English decisions. In England, the king's pardon, being a private act of grace, was not the subject of judicial notice.¹⁹ Under old English rules of pleading, it was said that a plea of not guilty waived the pardon, and it could not thereafter be availed of.²⁰ Only in this sense could a pardon be "rejected" in England, but Marshall skipped lightly from this rule of pleading to a substantive rule that acceptance was necessary. This was not the law of England. On the contrary, it had been held that where a pardon was properly brought to the attention of the court, whether by pleading or by judicial notice as in the case of a legislative pardon, the convict could not waive it.²¹ This is also the prevailing view of most European countries.²²

Nevertheless, Marshall's dictum has been solemnly repeated by federal and state courts in scores of cases, and has even been extended to parole as well as pardon, because "parole is merely a kind of conditional pardon,"—an error piled on an error.²³ Even in probation cases, the courts not infrequently talk about the prisoner's having accepted

such release,²⁴ though it is difficult to see how the notion can be rationalized here: certainly probation is not "a kind of conditional pardon."

It is true that the dictum has remained almost entirely pure dictum. Direct decisions on the point are rare, perhaps because prisoners have rarely preferred to be hanged or imprisoned rather than to accept conditional release. But in 1939 a California prisoner *did* insist on his alleged right not to be paroled (for the very good reason that the parole was to be to the custody of the Texas authorities who wanted him for an escape on a 30 year sentence); and the California court actually held that he had a right to retain his California cell!²⁵

This decision opens new vistas of prison privileges in California. Perhaps we can say that it gives prisoners a vested right to their maximum punishment. Can a prisoner refuse to work on the prison farm, by refusing to "accept" that sort of limited freedom? Can he "reject" the liberty of using the exercise yard?

If it seems unfair to condemn the California court for actually applying a proposition to which so many other

¹⁹ 4 Bl. Comm. 402.

²⁰ I have reviewed the English law on this point in Attorney General's Survey of Release Procedures, Vol. III, "Pardons," p. 189.

²¹ 2 Hawkins, 1 P. C., ch. 37, §58.

²² Feuerbach, *Peinlichen Rechts* (1847 ed.) p. 123; Garraud, *Traite theorique et pratique de droit penal francais* (1914) p. 643.

²³ Parole is not merely a form of conditional pardon. See Weihofen, "Consolidation of Pardon and Parole: A Wrong Approach," 30 Jour. Crim. Law and Crimin. 534 (1940).

²⁴ See Pagano v. Bechly, 211 Iowa 1294, 232 N. W. 798 (1930); *In re Patterson*, 94 Kan. 439, 146 Pac. 1009 (1915); *State v. Collins*, 225 Mo. 633, 125 S. W. 465 (1910). See also *Ex parte Young*, 121 Cal. App. 711, 10 P. (2d) 154 (1932), where

defendant had "waived any informality of procedure by failing to object thereto, when he was taken before the court for the purpose of revoking his probation," though the court also said that he was not entitled to a trial or formal hearing on revocation; and *People v. Sanders*, 64 Cal. App. 1, 220 Pac. 24 (1923), where, although defendant complained that he had had no notice of revocation, he had in fact had a hearing at which he appeared and was represented by counsel. In the only other case sustaining revocation of probation without notice and hearing, the court merely cited the statute providing for summary revocation, without troubling to discuss its constitutionality. *State v. Chandler*, 158 Minn. 447, 197 N. W. 847 (1924).

²⁵ *Ex parte Peterson*, 14 Cal. (2d) 82, 92 P. (2d) 890 (1939).

courts had given lip service, it may be pointed out that the fallacious dictum which the California court swallows so blindly had years before been exposed and disowned by the very court which gave it birth. In 1927 the United States Supreme Court was confronted with a case where a federal prisoner condemned to death had been given a commutation by the President to life imprisonment. Sixteen years later, he sued out a writ of habeas corpus alleging (1) that the President had no power to grant a commutation changing the nature and character of the punishment, and (2) that at all events such a commutation was ineffective without his consent. The United States Supreme Court rejected both contentions. Mr. Justice Holmes, writing the opinion of the unanimous court, said:

"A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed. See *Ex parte Grossman*, 267 U. S. 87, 120, 121. 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. So far as a pardon legitimately cuts down a penalty, it affects the judgment imposing it. No one doubts that a reduction of the term of an imprisonment or the amount of a fine would limit the sentence effectively on the one side and on the other would leave the reduced term or fine valid and

to be enforced, and that the convict's consent is not required:

"When we come to the commutation of death to imprisonment for life it is hard to see how consent has any more to do with it than it has in the cases first put. Supposing that Perovich did not accept the change, he could not have got himself hanged against the Executive order. Supposing that he did accept, he could not affect the judgment to be carried out. The considerations that led to the modification had nothing to do with his will. . . . The opposite answer would permit the President to decide that justice requires the diminution of a term or a fine without consulting the convict, but would deprive him of the power in the most important cases and require him to permit an execution which he had decided ought not to take place unless the change is agreed to by one who on no sound principle ought to have any voice in what the law should do for the welfare of the whole."²⁶

There is little to add to this statement.

One can only wish that courts would read it before indulging in ill-considered statements to the effect that pardon is an act of grace, and that a prisoner has the right to accept or reject.

It was argued by the California court in the Peterson case and has been argued by other courts, that a prisoner must be conceded the right to reject a conditional pardon because the conditions may be more onerous than the punishment fixed by the sentence.²⁷ But the guaranty against *ex post facto* laws should be sufficient protection against such an unlikely eventuality.²⁸

Thus, the whole argument based on the premise that "the prisoner accepted

²⁶ *Biddle v. Perovich*, 274 U. S. 480, 71 L. ed. 1161, 47 Sup. Ct. 664 (1927). Accord: *Ex parte Denton*, 101 P. (2d) 276 (Okla. Cr., 1940).

²⁷ *Ex parte Peterson*, supra, n. 24; *United States v. Wilson*, 7 Pet. 150, 8 L. ed. 640 (1833); *In re Prout*, 12 Idaho 494, 86 Pac. 275, 5 L. R. A. (n. s.) 1064 (1906); *In re Williams*, 149 N. C. 436, 63 S. E. 108 (1908).

²⁸ It is realized that strictly, the *ex post facto* provisions refer only to passing laws, and an executive or administrative release may be held not to constitute the passing of a law, just as it has been held that a judicial decision cannot be an *ex post facto* law. *Ross v. Oregon*, 227 U. S. 150, 57 L. ed. 458, 33 Sup. Ct. 220 (1913). But the principle of *nulla poena sine lege* is so funda-

the pardon with the condition attached, and so cannot now complain," collapses. He did not accept because he had no privilege to reject. A conditional pardon is not a contract between equals. It is a sovereign act of the state acting through its chief executive, operating upon a subject. In a contract between two parties dealing on an equal standing, they may provide for any sort of conditions they see fit, so long as they are not illegal, immoral or impossible. But when the sovereign state acts upon one of its subjects, it is required to deal with him in accordance with due process of law. Under a conditional pardon, the prisoner is released not by agreement, but by order of the state alone; the conditions upon which he is released and under which he may be returned are not agreed upon by mutual negotiation, but are laid down by the state. It is true that the prisoner is usually required to sign an "agreement" to obey the conditions, but this is not a contract, but merely a means of bringing the conditions home to him. He could be released without such signature, and he could not keep his cell by refusing to sign. His assent is significant only in determining whether the state, in its absolute discretion, would be wise in re-

mental to our system of law that a conditional release more onerous than the original sentence might well be held to violate substantive due process.

²⁹ *State v. O'Neal*, 147 Wash. 169, 265 Pac. 175 (1928). This was a probation case, but the statement should be equally applicable to any other kind of conditional release. The Idaho probation statute makes no provision for a hearing, but the Idaho court has held that "common justice would require that he be given a hearing, which was not done in this case." In re Peterson, 19 Idaho 433, 113 Pac. 729 (1911). *Sem-ble*: *People v. Hodges*, 231 Mich. 656, 204 N. W. 801 (1925); *People ex rel. Stumpf v. Craig*, 79 Misc. 98, 140 N. Y. Supp. 652 (1913). In the latter case, the court said: "To send a person to prison

leasing him or not. If he indicates that he would not obey the conditions, it would probably be unwise to release him, but it is absurd to say that the state would be powerless to do so if it wished.

The majority of state courts already agree, as we have seen, that where the statute or the release does not specifically reserve the power of summary revocation, such revocation without giving the person an opportunity to be heard "is to disregard a principle as old as the law itself."²⁹ The only argument that can be raised for a different rule where such power is reserved is the argument that the prisoner "accepted" the release with such a condition attached. But if the notion that a prisoner has any power to accept or reject release is exploded, there is no reason for the distinction. Depriving a person so released of his liberty upon a charge which he is not allowed to disprove is a violation of due process in every case.

Will the Supreme Court uphold the Circuit Court of Appeals in this view? The Supreme Court has in a general way quoted with approval Daniel Webster's classic definition of due process as "a law which hears before it condemns,"³⁰ and has said that the due process clause requires "that state ac-

because he has violated some condition which he insists he has not, and without specifying what it is, and without giving him an opportunity to be apprised of the condition and its violation which is claimed to have occurred, and to be heard in his own behalf, violates elementary principles of criminal jurisprudence. . . ."

Revocation of a conditional pardon where there had been no violation of the conditions, merely because later discovered evidence had led the governor to delive that clemency was ill advised, has been held a violation of due process. *Ex parte Rice*, 72 Tex. Cr. 587, 162 S. W. 891 (1913).

³⁰ *Powell v. Alabama*, 287 U. S. 45, 77 L. ed. 158, 84 L. ed. 527, 53 Sup. Ct. 55, 64 (1932).

tion, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."³¹ However, in a case where probation had been revoked by a federal district judge without a hearing, the Supreme Court held that the federal probation act made a hearing mandatory, in order that "he shall have a chance to say his say before the word of his pursuers is received to his undoing." But the court specifically said that this decision rested on the statute, and "we 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 to its duration as Congress may impose."³²

This is an ominously clear indication that the court would not agree with the viewpoint of the Circuit Court of Appeals—for obviously the same rationale, based on the concept of probation as an "act of grace" is equally applicable to parole and conditional pardon. Of course, the statement is dictum, and if the court *wishes to*, it can dismiss it as such. Perhaps it would do so, if the error of the dictum is pointed out.

Four flagrant but persistent errors underlie all the cases which uphold the legality of revocation of conditional releases without notice or hearing:

³¹ *Brown v. Mississippi*, 297 U. S. 278, 80 L. ed. 682, 56 Sup. Ct. 461, 465 (1936).

³² *Escoe v. Zerbst*, 295 U. S. 490, 492, 493 (1934).

³³ *Supra*, n. 25.

³⁴ *Supra*, n. 22.

³⁵ *Supra*, n. 23.

³⁶ Similarly, the South Carolina court has held that where pardon is granted on condition that

1. The notion that pardon, parole or probation are "acts of grace." A reading of Judge Holmes' opinion in *Biddle v. Perovich*³³ should be sufficient to silence this misconception—but it hasn't, even in the United States Supreme Court.

2. That a pardon is a deed, to the validity of which acceptance is necessary. (Has no one ever read *Biddle v. Perovich*?)

3. That parole is "a kind of conditional pardon" and so requires acceptance too.³⁴

4. That probation involves acceptance also. The courts do not usually argue that probation is "a kind of conditional pardon," but the cases holding that revocation without notice or hearing is valid are invariably based on a loose assumption that the probationer "accepted" probation.³⁵

Knock out these false props, and it is impossible to construct an argument sustaining the constitutionality of arbitrary revocation of conditional releases.

It may be asked whether there is any crying need for burdening the governor or parole boards with the time-consuming formality of a hearing in every case of revocation. We may admit at once that in many—perhaps most—cases, no such need exists. Where the revocation is on the ground of commission of a new crime, and the prisoner has already been convicted of that new crime, the record of that conviction is pretty conclusive.³⁶ In states where such new crime is practically the only ground on

the prisoner leave the state, no trial is necessary, because the fact that the prisoner has been rearrested in the state is sufficient proof that the condition has been breached. *State v. Smith*, 1 Bailey 283 (S. C. 1829). Cf. *State ex rel. O'Connor v. Wolfer*, 53 Minn. 135, 54 N. W. 1065, 19 L. R. A. 783, 39 Am. St. Rep. 582, 9 Am. Cr. Rep. 487 (1893).

which a parole or conditional pardon is ever revoked (*e.g.*, Colorado and West Virginia), there would be little need for hearings. Nevertheless, where there is room for question as to whether the prisoner has in fact violated the terms of the parole or not, the right to a hearing should not be denied. Perhaps it would be sufficient to give the right to such a hearing if the prisoner thinks he has been unjustly returned to prison, without going through the formality of a hearing in every case. In any case, the hearing certainly need not be a formal judicial trial,³⁷ but may be an informal inquiry "so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe further."³⁸

The arguments for granting hearings in dubious cases, at least, have been well stated in the report of the Attorney General's Survey of Release Procedures:

"A question naturally arises as to the advisability of holding these hearings which consume the time of men already over-burdened with work. The answer to this objection is threefold: In the first place, the possibility exists that the parole agent was over-hasty in his action in returning the parolee as a violator. Parole agents are human, and it is possible that friction between the agent and parolee may have influenced

the agent's judgment. In fairness to the violator, this is a possibility which should be investigated by some higher authority. The hearing is of special importance in those States in which the sponsorship system of supervision exists, since there have been numerous instances in which sponsor-employers 'sweated' the parolees in their custody unmercifully under threat of declaring them parole violators on trumped up charges.

"Another reason for holding a hearing is that often the true psychology of the parolee precedent to the commission of the violation is revealed. The trend of the parolee's thought in trying to rationalize his behavior may afford clues to his mental and emotional make-up which will be useful in effecting his future adjustment in society.

"Third, the hearing is an opportunity for the violator to discuss his behavior and to have it analyzed by men who, by virtue of the position they occupy, necessarily have an interest in his future behavior. If, through his own statements, a parole violator can be made to see how irrationally he has acted, and how twisted his thinking has been; if, as often is the case, he can be led to see himself as ridiculous or foolish by his own statements, a long step toward his ultimate rehabilitation may have been taken."³⁹

In short, a chance to be heard before revocation of a conditional release, is from the standpoint of penal administration, good practice, and from the standpoint of the prisoner, a constitutional right.

³⁷ A number of cases, previously mentioned (*ante*, note 8), have said that in the absence of a provision for revocation by the releasing authority, the revocation must be by a judicial order. But this can be dismissed as mere dictum in almost every case. Only the extreme case of *People v. Moore*, *supra*, note 10, actually so holds. In all the other cases mentioned above, the governor had attempted to revoke the con-

ditional release *without notice and hearing*. It is submitted that these cases reach a correct result in holding that such revocation without notice and hearing was invalid, although they go further than necessary when they add that a *judicial* hearing is required.

³⁸ *Escoe v. Zerbst*, *supra* n. 31, at 493.

³⁹ Attorney General's Survey of Release Procedures, Vol. IV, "Parole," p. 246-7.