

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 REGINALD A. WILKINSON, :  
4 DIRECTOR, OHIO DEPARTMENT :  
5 OF REHABILITATION AND :  
6 CORRECTION, ET AL., :

7 Petitioners :

8 v. : No. 04-495

9 CHARLES E. AUSTIN, ET AL. :

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11 Washington, D.C.

12 Wednesday, March 30, 2005

13 The above-entitled matter came on for oral  
14 argument before the Supreme Court of the United States at  
15 10:15 a.m.

16 APPEARANCES:

17 JAMES M. PETRO, ESQ., Attorney General, Columbus, Ohio; on  
18 behalf of the Petitioners.

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20 General, Department of Justice, Washington, D.C.; on  
21 behalf of the United States, as amicus curiae,  
22 supporting the Petitioners.

23 JULES LOBEL, ESQ., Pittsburgh, Pennsylvania; on behalf of  
24 the Respondents.

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3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in No. 04-495, Reginald Wilkinson v. Charles E.  
5 Austin.

6 General Petro.

7 ORAL ARGUMENT OF JAMES M. PETRO

8 ON BEHALF OF THE PETITIONERS

9 MR. PETRO: Mr. Chief Justice, and may it please  
10 the Court:

11 The purpose of any hearing process is to get a  
12 better answer. If the question is what happened in the  
13 past, an adversarial fact-finding can help provide the  
14 answers. If, however, the question seeks to look forward  
15 and predict future behavior, then a slightly more limited  
16 procedure will serve to expedite and arrive at the best  
17 possible answer to this predictive question.

18 JUSTICE SCALIA: General Petro, before you get  
19 into the details of why -- why you think the process here  
20 was all that was due, I'm -- I'm more concerned about the  
21 preliminary question of whether there was a liberty  
22 interest here. I -- I know you haven't challenged the  
23 existence of it, but I'm not sure that lets me off the  
24 hook.

25 We -- we had a case some years ago in which both

1 sides apparently wanted the statute in existence and they  
2 conceded in the -- in the court of appeals that the  
3 statute existed and wanted us to say what this  
4 presumptively existing statute said. And we held, since  
5 there was serious doubt about whether the statute had been  
6 properly enacted, we had to reach that question first  
7 because we were not going to speculate on what a, you  
8 know, hypothetical statute said.

9           And I think you're asking us to do sort of the  
10 same thing here. You're -- if -- you know, without even  
11 conceding or -- the Government doesn't concede anyway.  
12 The United States doesn't.

13           MR. PETRO: No they don't.

14           JUSTICE SCAIA: You're asking us to hold that  
15 if this is covered by the Due Process Clause, what you've  
16 given here is enough. But I don't -- I don't like to  
17 speculate on -- on hypothetical questions like that.

18           And it -- it really seems to me that to say that  
19 there's a liberty interest here flies in the face of our  
20 more reasoned opinions in this area, especially Sandin  
21 which -- which has some language that's -- that's almost  
22 -- almost right on point. We note also that this -- where  
23 is it? Conner's confinement did not exceed similar but  
24 totally discretionary confinement in either duration or  
25 degree of restriction.

1 I -- I don't understand how this person has a  
2 liberty interest in not -- in not being put in a maximum  
3 security facility. Presumably you could put all your  
4 prisoners in maximum security. I mean, you don't pull  
5 their fingernails or anything, do you?

6 MR. PETRO: No -- no, we don't, Your Honor.

7 JUSTICE SCALIA: So there's -- there's no Eighth  
8 Amendment problem.

9 MR. PETRO: No.

10 JUSTICE SCALIA: So if you wanted to, you could  
11 put all of your prisoners in maximum security. Right?

12 MR. PETRO: Yes, I agree, Your Honor, that we  
13 could.

14 JUSTICE SCALIA: So where is the liberty  
15 interest here? I don't understand.

16 MR. PETRO: We -- we made a decision in  
17 petitioning the Court that the liberty interest issue was  
18 something that we would not raise. We raised it on appeal  
19 through the district court and through the circuit court.  
20 We chose not to raise it here to focus on the due process  
21 issue.

22 JUSTICE SCALIA: Well, I understand, but I feel  
23 like something of a fool being asked, you know, Justice  
24 Scalia, if -- if there were a liberty interest here, would  
25 these procedures be enough to secure it. That's not the

1 kind of work I usually do. I -- you know, I usually ask  
2 -- answer real questions.

3 MR. PETRO: The -- the circuit court made a  
4 factual determination that there was a significant and  
5 atypical deprivation. We would respectfully disagree with  
6 that determination, but because it was a factual  
7 determination, we chose to confine our appeal to the issue  
8 of law.

9 JUSTICE O'CONNOR: Well, but there is a -- there  
10 is a question of law involved as to whether there's a  
11 liberty interest.

12 MR. PETRO: Yes.

13 JUSTICE O'CONNOR: In the Sandin case in 1995,  
14 this Court said that prisoners have a State-created  
15 liberty interest only where the deprivation or restraint  
16 imposes atypical and significant hardship on the inmate in  
17 relation to the ordinary incidents of prison life.

18 Now, I guess to be categorized in category 5 in  
19 your State, it does involve putting someone in solitary  
20 confinement, reducing their time for exercise, and  
21 reducing their options for parole. Is that correct?

22 MR. PETRO: That is correct. But when people  
23 are moved to level 5, Your Honor, typically they're being  
24 moved from level 4, at least more than 90 percent of the  
25 time, and level 4 has a similar area of restriction. In

1 reality, I would argue -- and I would concur with Justice  
2 Scalia -- that this is not a significant or atypical  
3 deprivation --

4 JUSTICE O'CONNOR: Well, do you take the -- why  
5 don't you simplify it by telling us whether you take the  
6 position today that there is or is not a liberty interest  
7 here?

8 MR. PETRO: Your Honor, we chose not to --

9 JUSTICE O'CONNOR: I know you did.

10 MR. PETRO: -- petition on that.

11 JUSTICE O'CONNOR: I'm asking you your opinion.

12 MR. PETRO: Your Honor, I would be most pleased  
13 to argue that there is no liberty interest in this  
14 instance under Sandin. The Court made it very clear that  
15 where there is a mandatory State-created interest, that  
16 interest would have to involve a significant and atypical  
17 deprivation. In this instance, we do not believe that  
18 moving an inmate to level 5 classification is a  
19 significant or atypical deprivation.

20 JUSTICE STEVENS: What if he were moved from  
21 level 1 to level 5?

22 MR. PETRO: Your Honor, that has not occurred in  
23 reality. There have been several inmates that have moved  
24 from admission to level 5.

25 JUSTICE STEVENS: But why isn't the comparison

1 the entire prison population rather than just 5 versus 4?

2 MR. PETRO: Your Honor, it's just typically what  
3 occurs, and so there are some circumstances where a level  
4 3 inmate may be moved to 5, but in any event, that inmate  
5 would have been moved to 4. The classification jump is,  
6 in a practical standpoint --

7 JUSTICE STEVENS: Well, is it -- is it your view  
8 that we should consider it the normal practice in the Ohio  
9 system to keep people in solitary for 23 hours a day?

10 MR. PETRO: Your Honor, that's not the normal  
11 practice. In fact, it involves --

12 JUSTICE STEVENS: Well, then isn't that the  
13 standard of reference that we should use?

14 MR. PETRO: Your Honor, it involves a small  
15 number of inmates, and those inmates have been determined  
16 through a very predictive determination that -- that in  
17 fact they do pose a threat --

18 JUSTICE STEVENS: So we're -- we're dealing with  
19 a small number of inmates out of a very large population,  
20 but isn't the frame of reference for telling whether it's  
21 a liberty interest a comparison to the large population?

22 MR. PETRO: Your Honor, the -- the deprivation  
23 is -- is perhaps marginally greater, but I would suggest  
24 that it is marginal, and therefore --

25 JUSTICE SOUTER: Well, you say it's marginally



1 greater than 4. It's not marginally greater than 1 or 2  
2 certainly.

3 MR. PETRO: Your Honor, I would submit that it  
4 is -- it is more -- it is much greater than 4. But  
5 whether it represents something that is unexpected by the  
6 inmate, in reality the inmate has an expectation of having  
7 his liberty essentially extremely limited in this  
8 instance --

9 JUSTICE SOUTER: Well, but the -- the point of  
10 the case is that the inmate does not expect to be put in  
11 solitary confinement for 23 or 23 and a half hours a day  
12 for a period of 1, 2, or more years without some process  
13 to do it because that is so extraordinarily onerous and so  
14 different from the general run of incarceration practice.

15 MR. PETRO: And -- and, Your Honor, we initiated  
16 a process. It is our New Policy 111-07, which the  
17 district court and then the circuit court ultimately ruled  
18 on, where we made --

19 JUSTICE GINSBURG: That -- but that's what --  
20 that's what you wanted to talk about, but we're on, first,  
21 the preliminary question.

22 MR. PETRO: Yes.

23 JUSTICE GINSBURG: And is -- I think you started  
24 to say that you regarded atypical and significant as a  
25 fact-finding which was made against you --

1 MR. PETRO: Yes.

2 JUSTICE GINSBURG: -- based on the extreme  
3 conditions of this kind of confinement where you don't see  
4 another human.

5 MR. PETRO: Yet, Your Honor, we would -- I would  
6 continue to -- to argue that it is not -- if it is  
7 significant and atypical, it is marginally significant and  
8 atypical.

9 JUSTICE SCALIA: Wasn't solitary confinement  
10 involved in Sandin?

11 MR. PETRO: Yes, it was.

12 JUSTICE SCALIA: Didn't we say in Sandin that  
13 solitary confinement was -- was not enough to -- to  
14 create --

15 JUSTICE GINSBURG: For how long?

16 JUSTICE SOUTER: 30 -- for 30 days I believe,  
17 wasn't it?

18 MR. PETRO: Yes, it was, Your Honor.

19 JUSTICE SOUTER: Not 1 year, 2 years, 3 years.

20 MR. PETRO: No. And in this case the -- but --  
21 but level 5 as a classification is a limited confinement.  
22 It is reserved for those very dangerous inmates not  
23 dissimilar to Sandin.

24 JUSTICE SOUTER: But -- but typically it has  
25 been represented maybe -- maybe wrongly -- typically it

1 has been represented that they tend to be in there for a  
2 year or 2-year periods.

3 MR. PETRO: Your Honor, they are reviewed from a  
4 classification standpoint on an annual basis. They are  
5 reviewed from a privilege standpoint -- and there's  
6 different levels within 5 -- on a quarterly basis and  
7 so --

8 JUSTICE SOUTER: But in -- but in fact, they  
9 tend to be in there for the extended periods of time.  
10 Isn't that --

11 MR. PETRO: That -- that's correct, Your Honor.

12 CHIEF JUSTICE REHNQUIST: Mr. -- General Petro,  
13 I for one would like to hear what you have to say about  
14 the question presented in your petition for certiorari.

15 MR. PETRO: Thank you, Mr. Chief Justice.

16 (Laughter.)

17 MR. PETRO: In this instance, the process due,  
18 as provided by Ohio, was outlined in New Policy 111-07.  
19 That policy was adopted and ultimately then reviewed by  
20 the district court. The district court held it to be  
21 unconstitutional and added a number of other procedures.

22 The process that was contained in New Policy  
23 111-07 was a predictive policy, and it understood --

24 JUSTICE SOUTER: May -- may I just ask you a  
25 question about that? I realize that there is a predictive

1 element. I don't think anyone disputes that. One of the  
2 points of contention here, as I understand it, is that  
3 even the new policy did not give a -- an -- an inmate a  
4 statement of the charge or reason for the -- for the  
5 reclassification to 5. Is -- is that correct?

6 MR. PETRO: Your Honor, it gave notice, 48 hours  
7 in advance, under the new policy --

8 JUSTICE SOUTER: Notice of what?

9 MR. PETRO: Notice of the fact that there would  
10 be a reclassification.

11 JUSTICE SOUTER: But did it give notice of the  
12 reason for the reclassification? You did such and such.  
13 You are such and such kind of person, a gang member. Does  
14 it tell him anything?

15 MR. PETRO: It doesn't spell out -- in New  
16 Policy 111-07, it doesn't spell out all the evidence, but  
17 it gives a basic --

18 JUSTICE SOUTER: No, not the evidence, just the  
19 reason.

20 MR. PETRO: It gives a basic statement that  
21 you're being considered for reclassification.

22 JUSTICE SOUTER: I -- I know that, but does it  
23 say you're being reconsidered for -- considered for  
24 reclassification because you hit somebody over the head or  
25 because you've shown that you're a member of a gang or

1 some other reason?

2 MR. PETRO: It -- it as a general rule does not  
3 have to do that, Your Honor.

4 JUSTICE BREYER: What about -- I mean, the  
5 person, if he reads the regulation, would see that it says  
6 that to classify him, the State has to show that through  
7 repetitive and seriously disruptive behavior, he has  
8 demonstrated a chronic inability to adjust as evidenced by  
9 repeated class 2 rule violations.

10 MR. PETRO: Yes.

11 JUSTICE BREYER: So I guess he would like to  
12 know give me at least a vague idea of what behavior you're  
13 talking about and which class 2 rule violations you're  
14 talking about. Now, does the notice tell him those two  
15 things?

16 MR. PETRO: The notice is very general in its  
17 nature. At the time that the hearing actually commences,  
18 there's an opportunity to sit down and actually discuss  
19 with the inmate, and the inmate can respond in writing or  
20 in presence at the -- at the hearing --

21 JUSTICE SOUTER: Well, you say he has the  
22 opportunity. Do you actually tell him you are about to be  
23 reclassified or our proposal is to reclassify you because  
24 you violated this particular regulation by this particular  
25 conduct?

1 MR. PETRO: There is -- what initiates the  
2 reclassification is a report form that would identify to  
3 the inmate --

4 JUSTICE SOUTER: I'm asking you what you tell  
5 the inmate, not what initiates your process. Now, please  
6 answer my question.

7 MR. PETRO: The inmate, Your Honor, has access  
8 to the report form that says specifically what's  
9 initiated.

10 JUSTICE SOUTER: At which point does he get --  
11 at which point does he get access?

12 MR. PETRO: At the point of notice.

13 JUSTICE BREYER: So -- so this -- I mean, that's  
14 what I don't understand what this case is about because I  
15 -- I'm amazed that -- I think it is too detailed what  
16 they're requiring of you, by far.

17 But the elements are I have to know. I'm an  
18 inmate. I want to know what is this about. Suppose I  
19 think they're wrong. I need to know how to tell them  
20 they're wrong. And the other thing I think I'd need to  
21 know is after the committee or the warden decides against  
22 me, what are his reasons. I'm not asking for a book. All  
23 I want to know are the basic reasons.

24 Now, those things I can't work out from the  
25 briefs, quite honestly, whether the new policy gives him

1 those new things, those two things, or doesn't.

2 MR. PETRO: The new policy gives him the basic  
3 information that we are asserting that --

4 JUSTICE BREYER: Now, already you say that, but  
5 I would think the basic information includes some idea of  
6 what my disruptive behavior was and some idea of what the  
7 class 2 violations that I was convicted of were. And now,  
8 I've heard you both say that he does get it and that he  
9 doesn't get it. I'm sure that's my fault, but I want to  
10 know, does he get this information before the hearing, or  
11 does he not?

12 MR. PETRO: Your Honor, he gets the basic reason  
13 for the classification and that's --

14 JUSTICE BREYER: Now -- you heard what I said.

15 MR. PETRO: Yes, I did, Your Honor.

16 JUSTICE BREYER: Does he get what I just said?

17 MR. PETRO: Yes, he does.

18 JUSTICE BREYER: He does.

19 MR. PETRO: He gets the basic information. He  
20 doesn't get a list of any evidence.

21 JUSTICE KENNEDY: Well, what does he -- can you  
22 -- can you describe it for us what -- he gets 48 hours  
23 notice.

24 MR. PETRO: Yes.

25 JUSTICE KENNEDY: Notice that's there's going to

1 be a hearing. What else does he get? Does he get a  
2 summary of the written report? Does he get a -- a  
3 statement of -- of the reasons? What --

4 MR. PETRO: At the close of the hearing, he --  
5 there is --

6 JUSTICE KENNEDY: No. Before the hearing  
7 starts, he gets 48 hours notice, but is he -- is he just  
8 told there's going to be a hearing in 48 hours and that's  
9 it?

10 MR. PETRO: There's going to be a hearing and  
11 it's for reclassification, and here is -- here is the --  
12 the actual report that actually identifies what has  
13 triggered this activity for reclassification.

14 JUSTICE KENNEDY: So he does get the report.

15 MR. PETRO: So he gets --

16 JUSTICE KENNEDY: 48 hours --

17 MR. PETRO: But it's a very bare bones report  
18 and it doesn't identify the specific evidence involved  
19 which --

20 JUSTICE BREYER: Now, I don't care that he  
21 doesn't have evidence.

22 MR. PETRO: Okay.

23 JUSTICE BREYER: I want to know that he thinks  
24 he's being sent to this prison because his roommate, Rat  
25 Fink, has made up a bunch of stories about him. All



1 right? So he needs to know whether -- what it is that --  
2 that this board is considering before he can come in and  
3 explain what it isn't true. He doesn't have to have all  
4 the evidence. He has to know what the point is, what the  
5 charge is, what the claim is. And you're saying he gets  
6 it because he has the report.

7 Is there an example in the record of a report?

8 MR. PETRO: There's an example of the report  
9 form that is filled out by the prison officials at the  
10 time that a reclassification is going to occur, and the  
11 inmate does have access to that report form at the time of  
12 notice.

13 JUSTICE STEVENS: May I ask this --

14 JUSTICE GINSBURG: Perhaps we can be concrete.  
15 If he -- suppose the charge is he is a gang leader. Will  
16 he get notice that says you are being considered for  
17 reclassification because you are a gang leader?

18 MR. PETRO: Yes, Your Honor, he does get that  
19 notice. He gets that basic form that basically says he's  
20 being reclassified.

21 JUSTICE GINSBURG: Not that he's been  
22 reclassified, but is the reason -- the reason that you are  
23 being reclassified is that you are a gang leader. Those  
24 -- those words, you are a gang leader. Will he get those?

25 MR. PETRO: He gets the -- the accusation. He

1 knows the accusation is made from the report form that is  
2 prepared by the prison officials. So he knows --

3 JUSTICE STEVENS: May I --

4 MR. PETRO: -- that one of those criteria has  
5 been asserted --

6 JUSTICE STEVENS: May I ask you this question?

7 MR. PETRO: Yes, Your Honor.

8 JUSTICE STEVENS: I'm just -- is the procedure  
9 you're describing the procedure that was reviewed by the  
10 district court?

11 MR. PETRO: The procedure. Yes, it is. New  
12 Policy 111-07 is what the district court reviewed and then  
13 what was further reviewed by the circuit court.

14 JUSTICE STEVENS: So the evidence in the record  
15 before the district court describes exactly what you're  
16 describing.

17 MR. PETRO: The evidence that's in the record  
18 was the procedure in place prior to the enactment of New  
19 Policy 111-07, and the court choose -- chose to review for  
20 procedural purposes Policy 111-07 and then make its  
21 decision based on New Policy 111-07. So the evidence  
22 that's in the record, the testimony at the -- during the  
23 trial, really is not relevant to this policy. It's  
24 relevant to the former policy.

25 If -- if --

1 JUSTICE SOUTER: General Petro, I -- I don't --  
2 I'm going to ask you a very tendentious question, but it's  
3 something I don't want to make a mistake on. Going back  
4 to your answer to Justice Ginsburg's question, when he is  
5 given what you described as the bare bones report at the  
6 beginning of the proceedings, when he gets the 48-hour  
7 notice, will in her example the bare bones report say you  
8 are being reconsidered for reclassification because you  
9 are believed to be a gang leader? Does he get the gang  
10 leader information?

11 MR. PETRO: Yes, he does generally. It doesn't  
12 give any evidence. It simply is --

13 JUSTICE SOUTER: No. I'm not --

14 MR. PETRO: Okay.

15 JUSTICE SOUTER: I'm not worried about evidence.

16 MR. PETRO: I understand.

17 JUSTICE SOUTER: Just I want to know the charge.  
18 Will he always get the charge?

19 MR. PETRO: He will get the -- there is a form  
20 that is completed, a long form that is completed by the  
21 prison officials that basically stipulates the predicate  
22 act or the predicate acts that really result in the  
23 reclassification action.

24 JUSTICE SOUTER: So that in the gang leader  
25 example, he will be told that it's because he is accused

1 of being a gang leader that this is occurring.

2 MR. PETRO: Yes, because that is part of the  
3 form.

4 With the Court's permission --

5 JUSTICE STEVENS: And the form -- and the form  
6 is in the record, I take it.

7 MR. PETRO: Yes, it is.

8 With the --

9 JUSTICE STEVENS: Where?

10 MR. PETRO: With the Court's permission, I'd  
11 like to reserve the balance of my time.

12 CHIEF JUSTICE REHNQUIST: Thank you, General  
13 Petro.

14 Ms. Maynard, we'll hear from you.

15 JUSTICE STEVENS: Ms. Maynard, before you start,  
16 maybe you could answer the question I tried to ask at the  
17 end of his argument. Where in the record is the report?

18 ORAL ARGUMENT OF DEANNE E. MAYNARD

19 ON BEHALF OF THE UNITED STATES,

20 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

21 MS. MAYNARD: JA-58 is the form, and if you look  
22 at that, you'll see that it has a line that says, you are  
23 being considered for a transfer for the following reasons,  
24 colon, and there's a blank to be filled in.

25 Mr. Chief Justice, and may it please the Court:

1           The procedures that Ohio provides for placement  
2 into its supermax prison facility are more than ample to  
3 satisfy due process.

4           As the Federal Government has argued in its  
5 brief, the Bureau of Prisons believes there is no liberty  
6 interest implicated here. But even if one assumes that  
7 there is, the type of decision at issue is inherently a  
8 predictive one that turns on the holistic judgment of  
9 prison officials.

10           JUSTICE GINSBURG: Why is it a predictive  
11 judgment that a person is a gang leader? The ultimate  
12 decision, given the facts and circumstances, we predict  
13 that this person is among the worst of the worst, but the  
14 findings that have to be made along the way are not  
15 necessarily predictive. I mean, it -- it would be nice if  
16 the -- if the issues came simply divided what happened in  
17 the past, what might happen in the future, but the  
18 judgment that's made to classify someone as 5 inevitably  
19 involves some, well, what happened in the past on the  
20 basis of which we can project what might happen in the  
21 future.

22           MS. MAYNARD: That's true, Justice Ginsburg. We  
23 would have three responses to that.

24           One is first in Ohio, as in the Federal Bureau  
25 of Prisons, in the large majority of instances, most of

1 the facts upon which a predictive assessment would turn  
2 have already been subject to some more formal type --  
3 trial-type procedure. For example, in the Bureau of  
4 Prisons, the vast majority of prisoners who are placed in  
5 one of our two more restrictive facilities have committed  
6 some violent act in prison for which they have been found  
7 to be guilty pursuant to formal Wolff-type, trial-type  
8 procedures.

9           Secondly, with respect to facts that might be  
10 taken into consideration for which there hasn't yet been  
11 such a formal trial-type proceeding, this Court has made  
12 clear that when you're talking about the types of  
13 predictive risk assessments that are at issue here, it is  
14 appropriate for prison officials, using their expertise  
15 and judgment and knowledge of the prison conditions in  
16 their prison and in the prison system as a whole, to take  
17 into account things that are rumor, innuendo, and other  
18 imponderables that may not have been proven in any fact-  
19 type proceeding.

20           JUSTICE GINSBURG: But that would be -- that  
21 would be a what happened question, not what might happen.  
22 What happened, the determination might be made on the  
23 basis of rumor or innuendo. My only point is that  
24 questions don't come labeled so simply, predictive versus  
25 what happened in the past.

1 MS. MAYNARD: That's true. I agree with that.  
2 But again, I believe that most of the -- the facts upon  
3 which these decisions are based and -- and Ohio asserts in  
4 its brief that that's the case in their case too, that  
5 people who are placed in level 5 have either been subject  
6 of a rule board's infraction hearing or have committed a  
7 crime for which they've been convicted while in prison.

8 JUSTICE GINSBURG: And suppose neither of those  
9 are -- are so.

10 MS. MAYNARD: Well, I -- as I say, I think in  
11 the vast majority of cases, in both the Federal system and  
12 Ohio, that is the case. But even so, the consideration at  
13 issue takes into a broader spectrum of consideration than  
14 just the individual inmate. Having the type of formal  
15 fact-finding retrospective proceeding that the court below  
16 required here is going to focus the decision-maker in the  
17 wrong direction and on a more narrow set of facts than  
18 ideally we want the prison administrators to focus upon.  
19 We want them to be looking at, just like in Hewitt, the  
20 relationship of this inmate to other inmates, of inmates  
21 within the prison generally, of inmates to this inmate,  
22 and the safety of others. So there's more of them at  
23 stake. There are other private interests at stake besides  
24 those of the individual who may be moved in the prison  
25 administration's --

1 JUSTICE KENNEDY: Well, those two, it seems to  
2 me, are all questions of -- of fact. I mean, ultimately  
3 your position may be correct, but I -- I just can't place  
4 a lot of store in this predictive versus nonpredictive  
5 judgment, and it's contrary to your own argument. You  
6 say, well, in almost all the cases, it's because he's been  
7 convicted of a crime in prison and so forth. Well, that  
8 -- that undercuts, it seems to me, the -- the basic  
9 argument that you're trying to make that established this  
10 line between predictive and nonpredictive judgment.

11 I -- I suppose you would say even in cases where  
12 it is a matter of past effect, these procedures are -- are  
13 adequate. Or would you?

14 MS. MAYNARD: Yes. We believe that the  
15 procedures that Ohio provides are -- are more than  
16 adequate because it gives the prisoner notice of the  
17 charges and an opportunity to contest the placement  
18 decision. In fact, we believe that the -- the process  
19 that Ohio provides is more than is necessary to satisfy  
20 due process.

21 JUSTICE SCALIA: Ms. Maynard, this is a class  
22 action, isn't it?

23 MS. MAYNARD: Yes, it is, Justice Scalia.

24 JUSTICE SCALIA: What if -- what if for some of  
25 the prisoners, maybe a majority of the prisoners, this --



1 this reality of having a prior factual hearing exists, but  
2 for some of it, it doesn't? What -- what disposition  
3 would this Court then make of the case?

4 MS. MAYNARD: There's -- still, the appropriate  
5 analysis, when you're talking about -- basically what we  
6 have at bottom --

7 JUSTICE SCALIA: But I mean, suppose I think  
8 that a -- a trial-type proceeding is necessary, and in  
9 fact, it's been given for most of the people in this class  
10 action, but not for the rest. What happens to the case?

11 MS. MAYNARD: It seems to me that you hold that  
12 -- that the procedures here are adequate because -- under  
13 the Due Process Clause because in the broad range of  
14 cases, you're going to have sufficient notice and an  
15 opportunity to contest.

16 Again, I think it's really important to  
17 understand the nature of the decision issued here. It's  
18 really a gestalt judgment of prison officials exercising  
19 their expertise in an area that this Court has repeatedly  
20 said prison officials get a wide range of deference.

21 Again, I would like to make a point about the  
22 Federal Bureau of Prisons because the respondents have  
23 pointed to our control unit procedures which are more  
24 trial-like. And I just want to let the Court know that  
25 those procedures were imposed upon the Federal Government

1 and the Bureau of Prisons pursuant to a court order in  
2 1978 before this Court issued its decision in cases such  
3 as Hewitt where the Court made clear this distinction  
4 about prison placement and issues involving the judgment  
5 and predictive decisions of prison administrators. When  
6 the Bureau of Prisons has been --

7 JUSTICE GINSBURG: Did you ask for -- did the  
8 Government move for modification of a decree? I -- I  
9 assume that it was not a decision of this Court. You said  
10 this -- what you do in the supermax at the Federal level  
11 has been imposed by a court. Which court?

12 MS. MAYNARD: Let me clarify one thing. What --  
13 it would be -- this relates only to the control unit,  
14 which is now at -- at -- in -- in part of the ADX Florence  
15 facility. It does not apply to the general populations of  
16 the ADX Florence facility and the Marion facility.

17 JUSTICE GINSBURG: Well, you talked about  
18 something being imposed.

19 MS. MAYNARD: Right.

20 JUSTICE GINSBURG: And so I want to know what  
21 was imposed, first, by whom, by which court, and what --  
22 what the order was.

23 MS. MAYNARD: The injunction was entered by the  
24 Eastern District of Illinois and was affirmed by the  
25 Seventh Circuit in a case called Bono v. Saxby. And the

1 Federal court -- the -- the Bureau of Prisons adopted the  
2 regulations pointed to by the respondents in the C.F.R. as  
3 it -- in -- in -- to comply with that injunction. We have  
4 not yet sought to have that injunction set aside, but  
5 those procedures apply to a very small number of Federal  
6 prisoners.

7 JUSTICE GINSBURG: But even so, I mean, you were  
8 saying this was forced on -- on the -- effectively on the  
9 Government. Well, it seems to me if that were the case,  
10 you would, after this Court rendered the decisions it did  
11 in Hewitt and Sandin, say, Seventh Circuit, please  
12 reconsider. It sounds to me as though you haven't done  
13 that so you probably think it's okay.

14 MS. MAYNARD: We don't think it's  
15 constitutionally required, Justice Ginsburg. It hasn't --  
16 we haven't moved to set it aside because it hasn't caused  
17 an administrative burden. There are currently only 49  
18 inmates in the control unit at Florence. In the last  
19 decade, we have only placed 118 inmates there, and so we  
20 were able to cope with these burdensome procedures with  
21 respect to those numbers.

22 But it's important to note that what we do when  
23 we -- what the Bureau of Prisons does when it was free to  
24 decide its own process is detailed at pages 26 to 28 of  
25 our brief, and that applies to a large number of

1 prisoners, 550 who are in the general populations of -- in  
2 very similar conditions to those in the Ohio State  
3 penitentiary. And there we have adopted a much less  
4 formal process even than the one that Ohio does, and we  
5 believe that is also constitutionally sufficient.

6 JUSTICE SOUTER: Well, is -- is the population  
7 with respect to which you have adopted the far more  
8 lenient process a -- the population of the control unit,  
9 which I understand is comparable to the unit we're talking  
10 about in Ohio, or is it with respect to the general  
11 maximum security population which is housed in conditions  
12 less onerous than the control unit?

13 MS. MAYNARD: It is -- applies to the general  
14 conditions in ADX -- the general populations in ADX  
15 Florence and USP Marion.

16 JUSTICE SOUTER: Okay, and --

17 MS. MAYNARD: But those conditions, Your Honor,  
18 are similar to the Ohio State penitentiary. The  
19 difference between -- may I finish, Justice -- Mr. Chief  
20 Justice?

21 CHIEF JUSTICE REHNQUIST: Yes.

22 MS. MAYNARD: The -- the difference in the  
23 general population, the prisoners are out 10 to 12 hours a  
24 week for recreation, and in the control unit, they are out  
25 7 hours a week.

1 CHIEF JUSTICE REHNQUIST: Thank you, Ms.

2 Maynard.

3 Mr. Lobel, we'll hear from you.

4 Would you tell us what happened in Mr. Austin's  
5 case? I mean, did he get a notice and that sort of thing?

6 ORAL ARGUMENT OF JULES LOBEL

7 ON BEHALF OF THE RESPONDENTS

8 MR. LOBEL: Yes. Yes, Your Honor. May -- Mr.  
9 Chief Justice, and may it please the Court:

10 In many of the cases -- and I -- I will try to  
11 -- in Mr. Austin's case and many of the other cases,  
12 people didn't get a notice. I'd like to try to explain  
13 what they get and what they don't get.

14 First, they do not get a final decision which  
15 gives them reasons.

16 CHIEF JUSTICE REHNQUIST: Well, could you answer  
17 my question first? What kind of notice, if any, did Mr.  
18 Austin get?

19 MR. LOBEL: I think Mr. Austin got no notice.

20 JUSTICE KENNEDY: Perhaps you can take us  
21 through this chronologically. You -- you began at the  
22 end.

23 MR. LOBEL: Okay. The notice they get at the  
24 beginning is an -- a notice which sometimes includes the  
25 reasons, sometimes it doesn't include the reasons. What

1 the requirement in this policy is and what was found at  
2 trial was that often they would get very vague reasons  
3 like you're a gang member or a gang leader. Now --

4 JUSTICE BREYER: Then can you just explain that?  
5 Because the policy says that he shall get notice and  
6 attached to the notice will be a committee report. Then  
7 they have a copy of the form that the report is supposed  
8 to fill out on page 58 to about page 78 and it's about the  
9 most detailed thing I've ever seen. So --

10 MR. LOBEL: Yes, that they don't get. That they  
11 do not get.

12 JUSTICE BREYER: Even though -- you mean even  
13 though it says that the policy says you should be noticed  
14 and you're -- it says, attached to the notice will be a  
15 copy of the -- I'm sorry. I'm looking -- am I looking at  
16 the wrong place?

17 MR. LOBEL: I think you're reading in the wrong  
18 place. But it -- there -- they do attach something, but  
19 it's not that long form. That long form is what was never  
20 given to the prisoners which would tell them what it is  
21 that they were said to have done.

22 For example, if --

23 JUSTICE SOUTER: May I -- may I -- I just want  
24 to make sure. There is then a direct disagreement of fact  
25 between you and the Attorney General. I understood him to

1 say they got the form that starts at JA-58, and I  
2 understand you to be saying they don't.

3 MR. LOBEL: They do not. The form that starts  
4 at JA-58 they get, but the form that starts at JA-58 is  
5 only one page. It's JA-58. They get that form. That  
6 form says you'll tell them the reasons.

7 JUSTICE SOUTER: Yes.

8 MR. LOBEL: So at this -- at -- at -- during the  
9 trial, often they didn't get the -- they didn't get any  
10 notice.

11 JUSTICE SOUTER: Okay.

12 MR. LOBEL: But now they should get a notice.  
13 It should tell them some reason.

14 The problem at trial was that --

15 CHIEF JUSTICE REHNQUIST: You mean a trial  
16 before all the -- before they were about to be committed  
17 or the hearing at which it was determined whether they  
18 would be or not?

19 MR. LOBEL: At the hearing and -- they got a  
20 notice. The notice said you're a gang leader. How is a  
21 man supposed to respond to a vague notice that I'm a gang  
22 leader when he doesn't know what it is that they are  
23 saying is their -- is the reason that he's a gang leader?  
24 All he could say -- this isn't like a trial. It's not a  
25 trial-type procedure. What happens in reality --

1 JUSTICE O'CONNOR: Well, do you think it should  
2 be?

3 MR. LOBEL: No.

4 JUSTICE O'CONNOR: I mean, this is a prison  
5 classification, for goodness sakes.

6 MR. LOBEL: No. We're not --

7 JUSTICE O'CONNOR: He's been found guilty and  
8 sentenced to prison.

9 MR. LOBEL: Right, and we're not --

10 JUSTICE O'CONNOR: The question is what  
11 procedures are required. And we've given a lot of  
12 discretion in prison administration.

13 MR. LOBEL: And -- and we are not asking for  
14 trial-type procedures. All we're asking for is very  
15 minimal due process, which is that the person comes before  
16 a committee of three correction officials, and they say,  
17 what do you have to say for yourself? They don't present  
18 any evidence. They don't present witnesses. They say,  
19 you're a gang leader. What do you have to say for  
20 yourself?

21 JUSTICE BREYER: Here is the exact words I -- I  
22 think. It's -- tell me. This certainly seems to be  
23 right. The inmate shall be served with notice at least 48  
24 hours prior to the commencement of a hearing. The notice  
25 shall include all of the reasons for the proposed



1 placement --

2 MR. LOBEL: No.

3 JUSTICE BREYER: -- and a summary of the  
4 evidence relied on. Now, I'm just reading that. What is  
5 it I'm reading?

6 MR. LOBEL: That's -- that's the district  
7 court's order. That's not what they -- that's the revised  
8 policy under the district court's order.

9 JUSTICE BREYER: All right. Where is -- where  
10 is --

11 MR. LOBEL: Where is theirs?

12 JUSTICE BREYER: I'm sorry. You go ahead.

13 MR. LOBEL: Their policy is, I believe, on page  
14 JA-23. That tells you what they -- they say. He is to be  
15 served with a notice of hearing form 48 hours prior to the  
16 hearing.

17 That will -- that -- there were problems with  
18 this. One is very vague notice. You're a gang leader.  
19 They have evidence for why he's a gang leader. In Mr.  
20 Roe's case, who's one of the plaintiffs, the evidence  
21 which -- which was never told to the prisoner -- the  
22 committee didn't even know the evidence. The evidence was  
23 that he was hit over the head with a spatula while he was  
24 waiting on line at the maximum security lunch line, and he  
25 went to the hospital, and he never fought back. And from

1 this, somebody determined that he was a gang leader  
2 because the people who were being targeted at that time  
3 were gang leaders.

4 Now, if you take a man and say, come before a  
5 committee, we're not going to tell you what this is about,  
6 just that you're a gang leader, what do you have say for  
7 yourself --

8 CHIEF JUSTICE REHNQUIST: Well, what's -- what's  
9 wrong with that?

10 MR. LOBEL: Because --

11 CHIEF JUSTICE REHNQUIST: I mean, if he can --  
12 if he's not a gang leader, he can tell them why he isn't.

13 MR. LOBEL: He'll say I'm not a gang leader.  
14 But if they know and the reason is because he was involved  
15 in this fight, which -- in which he didn't fight back, he  
16 should be able to then say, well, this guy -- you're  
17 wrong. This guy beat me up because I insulted him, or  
18 he's been an enemy of mine. He has something to respond.  
19 Otherwise, he can just say I'm not a gang leader.

20 CHIEF JUSTICE REHNQUIST: You -- you want a  
21 trial-type proceeding.

22 MR. LOBEL: This is a far cry from a trial. A  
23 trial -- the State would have to put on witnesses. They'd  
24 have to prove something. All you're doing here is saying  
25 to the man, we're going to give you an opportunity to

1 respond. And the question is, do you have to give them  
2 notice detailed enough? And that's all the district court  
3 required was some summary so that it's detailed enough so  
4 that he can respond. And really, all they have to do is  
5 take that form that they print up, Justice Breyer, which  
6 you were looking at, that long form, and copy it and  
7 append it to the notice.

8 JUSTICE GINSBURG: Well, there is -- isn't there  
9 the problem -- at least Ohio suggested that there is --  
10 that if this person is indeed a gang leader and the form  
11 says so-and-so and so-and-so effectively ratted on you,  
12 those persons who came forward might not live to see  
13 another day?

14 MR. LOBEL: And the district court ordered what  
15 Ohio does in all its disciplinary proceedings, what the  
16 Federal Government does in its disciplinary proceedings,  
17 which is if it's confidential information, you don't have  
18 to turn it over because they understand that, Justice  
19 Ginsburg. The district court understood that.

20 But in Mr. Roe's case, it wasn't confidential  
21 that he was hit over the head. Or in Mr. Thompson's case,  
22 it wasn't confidential that they said to him, you were  
23 present at some fight and they didn't tell who he was  
24 fighting and they never were -- they never gave him any of  
25 the -- the details so -- to be able to respond.

1           If it's confidential, they don't have to turn it  
2 over. The district court --

3           JUSTICE O'CONNOR: But was -- was this under the  
4 old policy that you're talking about what occurred?

5           MR. LOBEL: Yes, Your Honor. It was under --

6           JUSTICE O'CONNOR: Yes. And I thought that we  
7 had to address this facial challenge insofar as it affects  
8 the new policy. And if the State complied with the new  
9 policy, what is your complaint with that?

10          MR. LOBEL: The -- the new policy, which really  
11 was in all honesty, Your Honor, a tweaked policy or a  
12 modified policy -- they took the old policy and they made  
13 some changes to it. The question before the Court is  
14 whether that new policy fixed the problems. We saw the  
15 problems --

16          JUSTICE GINSBURG: Which was never -- never in  
17 effect, right? The new policy --

18          MR. LOBEL: Never went into effect.

19          JUSTICE GINSBURG: So all -- the evidence  
20 relates to the old policy which I think Ohio recognizes  
21 was not adequate. And then there's -- Ohio has this new  
22 policy, and you, just on the basis of the written  
23 statement of the policy, made the judgment that it's not  
24 good enough.

25          MR. LOBEL: It doesn't on -- just on the face of

1 it, it doesn't fix the problem that the district court  
2 found. Vague notice. The other thing they would do is  
3 they would give the person notice of one reason --

4 JUSTICE O'CONNOR: Well, let -- you keep talking  
5 about what happened in the past, and I'm -- I find some  
6 difficulty with that because we're being asked to review a  
7 new policy. And I would like you to look at the new  
8 policy, show us where to find it in the record, and tell  
9 us specifically what's wrong with it.

10 MR. LOBEL: I'll give you a very specific --

11 JUSTICE O'CONNOR: Could -- could you refer to  
12 something?

13 MR. LOBEL: Page -- look at page 22 and -- 23  
14 and 33 of the new policy. Look at 23.

15 JUSTICE O'CONNOR: Where -- where is that?

16 MR. LOBEL: JA-23. Look at JA-23 and look at  
17 JA-33.

18 JUSTICE O'CONNOR: All right. I'm on 23. What  
19 are we --

20 MR. LOBEL: On 23, you look at the final  
21 decision-maker -- the Bureau of Classification -- the  
22 bottom line of the next-to-the-last paragraph -- will  
23 review the recommendation and any objections filed and  
24 make a final decision.

25 Now, here's what was happening, and I --

1 CHIEF JUSTICE REHNQUIST: Is this happening  
2 under the new policy?

3 MR. LOBEL: That's the new policy.

4 CHIEF JUSTICE REHNQUIST: But now, you just were  
5 going to say here's what was happening. Do you mean under  
6 the new policy?

7 MR. LOBEL: No. The question is whether this  
8 page 23 fixes what was happening in the past. This is  
9 their new policy.

10 CHIEF JUSTICE REHNQUIST: Well, why -- why is  
11 that the question? If the new policy meets constitutional  
12 standards, why does it have to fix something else?

13 MR. LOBEL: Your Honor, it doesn't meet  
14 constitutional standards because it only says the chief  
15 has to make a final decision. The chief doesn't have to  
16 give any reasons for it, and I don't know of any case in  
17 this Court in predictive decisions, in punitive decisions  
18 where a -- a decision-maker can send somebody to solitary  
19 confinement long-term. And Justice Souter, it's for at  
20 least 2 years. Over 200 people there were for more than 3  
21 years, which was really the -- the -- only limited by how  
22 long the building was open -- and say, I'm putting you in  
23 there and I'm not telling you why. And this policy lets  
24 them do it, and that's what they were doing.

25 And there's nothing in this policy to change

1 that. And what was happening --

2 JUSTICE BREYER: So I think I've got your point.  
3 Tell me if I -- I mean, I've now looked at -- this is very  
4 confusing to me. I'm sure it's my fault. But I take it,  
5 if you look at page 22, that's the new policy.

6 MR. LOBEL: Exactly.

7 JUSTICE BREYER: And what the new policy says  
8 is, committee, you must give the prisoner some  
9 information. Then it refers to form 2598. Form 2598 is  
10 the form on page 58.

11 MR. LOBEL: Exactly.

12 JUSTICE BREYER: What that tells him is nothing  
13 about the facts. That tells him he's been charged.  
14 Period.

15 MR. LOBEL: He's been charged for being a gang  
16 leader.

17 JUSTICE BREYER: Now, the new policy goes on to  
18 say, the classification committee shall document  
19 information presented by staff and the inmate which is  
20 form 2627 and 2628. And I don't know where 2698 fits in,  
21 but 2698 are all those pages with the information.

22 MR. LOBEL: And they don't have to give that to  
23 anybody.

24 JUSTICE BREYER: And it just doesn't say  
25 anything about them at all.

1 MR. LOBEL: And all the district court was  
2 saying --

3 JUSTICE BREYER: So your point is in the past,  
4 they didn't give them the information.

5 MR. LOBEL: They didn't give them the  
6 information.

7 JUSTICE BREYER: Then they promulgated a new  
8 policy and the new policy says nothing about it.

9 MR. LOBEL: Exactly. And that is why it's  
10 facially invalid. But if you look at what was happening,  
11 you could --

12 JUSTICE O'CONNOR: But form 58 -- I'm -- I'm  
13 looking at page 58 -- says that the prisoner will be given  
14 this form that says you were referred to the  
15 classification committee for the following reasons. And  
16 that leaves space to be filled out. What's the matter  
17 with that?

18 MR. LOBEL: And -- two problems with that. It  
19 could either say you're a gang leader, and second, it  
20 could say which --

21 JUSTICE O'CONNOR: This is a facial attack.  
22 What in the world is the matter with that, saying you were  
23 referred for the following reasons and leaving space to  
24 have it filled out? Is that defective under the Due  
25 Process Clause?



1           MR. LOBEL: Because you -- at trial we showed  
2 what the practice was.

3           JUSTICE O'CONNOR: You showed what happened in  
4 the past.

5           MR. LOBEL: And the question is, does this fix  
6 it? And what happened in the past was they gave, for  
7 example, a prisoner, and it said, here are the reasons.  
8 The reason is you stabbed somebody. The committee said,  
9 you stabbed somebody. It wasn't very bad. We recommend  
10 that you not be put in the place. In over 50 percent of  
11 the cases of those committee recommendations on retention,  
12 the chief rendered a decision, without giving a final --  
13 any real reasons, and used evidence and reasons which were  
14 never given to the inmate.

15           In Ohio's brief, they say we could still do  
16 that. We only have to give them some reason. For  
17 example, we have to say you're a gang member. If it turns  
18 out that you're -- turns out you're not a gang member, the  
19 chief can say later on, well, you were dealing drugs.  
20 That's -- that's not adequate. Facially it's not adequate  
21 to give the person some reason and then switch the reason  
22 in the middle of the game. And that's what was happening.

23           JUSTICE O'CONNOR: Well, I can understand that  
24 you could come on behalf of a prisoner on an as-applied  
25 challenge, but to look at this form and tell us it is

1 facially invalid is difficult for me to understand. If --  
2 if there are specific incidents where something was  
3 defective, then challenge it, but what's the matter with  
4 the form?

5 MR. LOBEL: Well -- well, the first thing that's  
6 matter with the form is it doesn't require reasons for the  
7 decision.

8 JUSTICE O'CONNOR: It's --

9 CHIEF JUSTICE REHNQUIST: Well, why does the Due  
10 Process Clause require reasons?

11 MR. LOBEL: Even in Salerno, the -- the -- this  
12 Court held that in a preventive case, the bail -- the bail  
13 reform statute still requires, as a basic modicum of due  
14 process, that you give the person the reason --

15 CHIEF JUSTICE REHNQUIST: That -- that was a  
16 statute.

17 MR. LOBEL: That was a statute, and the Court  
18 relied on that for why the statute was constitutional.

19 Even in Greenholtz, the parole case, the -- this  
20 Court said over and over again that in the -- in the  
21 parole decision, which is much more predictive than here,  
22 the parole board gave its reasons for why it --

23 JUSTICE O'CONNOR: This form says, state the  
24 reasons, and leaves blank space to do that.

25 MR. LOBEL: But that's --

1 JUSTICE O'CONNOR: So what's the matter?

2 MR. LOBEL: That's in the notice. It's not in  
3 -- it's not in the decision.

4 JUSTICE BREYER: Well, what it says about --

5 JUSTICE KENNEDY: It -- it seems to me that the  
6 -- the facial attack objection would -- would not be --  
7 carry much weight if what happened was this. There was a  
8 trial. The policies were found deficient, and the court  
9 said, you devise some new forms. At that point, it seems  
10 to me that the facial attack would -- objection would --  
11 would not be relevant. And -- and your point would be  
12 right. You say, you know, they -- they haven't -- this  
13 doesn't -- is not going to cure the -- the deficiency.

14 But what happened here was that, as I understand  
15 it, midway in the litigation there was a new policy, and  
16 it -- it seems -- so we have sort of a moving target that  
17 we're working with.

18 MR. LOBEL: Yes. Your Honor, it depends --

19 JUSTICE KENNEDY: Could you comment on that?

20 MR. LOBEL: It depends on what you mean by  
21 midway. On the eve of trial, as we approached the trial  
22 court for trial, they promulgated the new policy which was  
23 not supposed to be implemented until several months after  
24 trial. And it seems in that situation perfectly  
25 reasonable for a district court to say, here are the

1 problems that I've uncovered. I'm going to look at the  
2 new policy and see if this new policy fixes it.

3 The -- the problems were not moot, Justice  
4 O'Connor. These were ongoing problems. There were 200  
5 prisoners who were there under a deficient policy. The  
6 question then was, were they entitled to something better?  
7 And did this new policy give them something better?

8 And the -- the district court found, I think  
9 quite correctly, that it gave them a little better. It  
10 was tweaked. It was modified. But on some of the basic  
11 questions of whether or not you can bait and switch the  
12 reasons, whether you could tell somebody you're in here  
13 for drugs and then the classification chief could -- could  
14 put him in for something else, or whether you had to give  
15 them some reason that he can respond to -- in a situation  
16 where you're not having a trial, Mr. Chief Justice, where  
17 -- where the State does not have to come forward with any  
18 evidence. The only evidence the person is getting of what  
19 is his problem is this notice.

20 And the question is, when that is the only  
21 evidence -- it's not like a trial like in the Federal  
22 courts where you have to present witnesses, you have to  
23 meet a standard of proof. It's not even in the -- like a  
24 disciplinary trial where you have to meet a certain  
25 standard of proof and present witnesses. The committee

1 sits there. The guy comes in and they say to him, tell us  
2 why you're not a gang leader. And he says, well, tell me  
3 why you think I am a gang leader. And they should be  
4 forced to tell him that.

5 CHIEF JUSTICE REHNQUIST: Well, what's wrong  
6 with giving him the opportunity to say why he's not a gang  
7 leader?

8 MR. LOBEL: How is Mr. Roe going to say I'm not  
9 a gang leader because I wasn't hit over the head with a  
10 spatula because I'm a gang leader, I was hit over the head  
11 with a spatula because the guy doesn't like me, unless he  
12 knows that that's why they think he is a gang leader? How  
13 could he respond to that? All he could say is I don't  
14 know what you're talking about.

15 JUSTICE BREYER: But why can't you do that in an  
16 as-applied challenge? I mean, it may be that there was  
17 all this -- suppose we wrote an opinion hypothetically.  
18 Suppose -- and it said, look, I've read through this new  
19 policy. I assume it will be administered in accordance  
20 with the elements of due process, the basic elements being  
21 some kind of notice basically what -- what the factual  
22 part is, some kind of opportunity to present proofs in  
23 evidence that's a reasonable one, and some kind of  
24 decision by a neutral decision-maker.

25 Certainly the language of the new policy permits

1 such an interpretation. It doesn't -- and -- and suppose  
2 we were to say, well, we assume it will have the basic  
3 elements, and it's so complex, so detailed that -- that if  
4 they don't, then the individual who suffers could bring a  
5 claim and say it was administered unfairly in my case.

6 MR. LOBEL: Your Honor, I think as a facial  
7 matter, when you're putting somebody in long-term solitary  
8 confinement for years and years in a small cell with no  
9 possibility of parole, you're -- I think you should give  
10 them notice of the reasons in sufficient --

11 JUSTICE BREYER: No, I'm not disagreeing with  
12 you.

13 MR. LOBEL: -- in sufficient detail.

14 JUSTICE BREYER: But you see -- yes. I'm -- I'm  
15 not disagreeing with you. I'm saying I read their new  
16 policy, now having gotten to it the third time through all  
17 this detail, and it seems to me that they do give a  
18 notice, and Justice O'Connor just pointed out where  
19 there's a place for reasons. And as I read what happens  
20 after the committee decides, it says, it shall make a  
21 decision -- a recommendation accordingly -- according to  
22 this very long, detailed form.

23 MR. LOBEL: Right.

24 JUSTICE BREYER: And it doesn't say they won't  
25 tell the prisoner. It doesn't say whether they'll tell

1 the prisoner.

2 MR. LOBEL: Right.

3 JUSTICE BREYER: So why can't I assume they will  
4 tell him so he'll know what's going on? And then if they  
5 don't, you'd have an as-applied challenge.

6 MR. LOBEL: Even if, as an abstract matter, you  
7 could assume it, when you've had a 1-week trial with  
8 witness after witness, and the witnesses say they're not  
9 doing this --

10 JUSTICE BREYER: That was before the new policy.

11 MR. LOBEL: But the new policy is introduced at  
12 trial. And the -- the question is -- really what you're  
13 saying, Justice Breyer, is the mere introduction of the  
14 new policy renders the whole case -- case moot.

15 JUSTICE BREYER: What I'm now saying is I can  
16 understand exactly why you might feel the way you do. But  
17 our job is to not necessarily take that feeling. But  
18 shouldn't we presume that the State will administer words  
19 that comport with the basic elements, not every detail as  
20 you want, but they will administer this new policy in  
21 accord with those basic elements of fairness? Isn't that  
22 giving a -- sort of like a deference to the State, which  
23 maybe we should?

24 MR. LOBEL: Maybe you should in an ordinary  
25 case. Where there's been a trial and it's a clear pattern

1 and practice that they're not, then I think that Friends  
2 of the Earth v. Laidlaw says that you have to show that  
3 the new policy is going to cure the problems.

4 JUSTICE KENNEDY: Are you -- are you saying that  
5 what we have before us is this, a trial which showed that  
6 the pre-new policy procedures were deficient and the trial  
7 judge and you and a court of appeals interpreted the new  
8 policies as remedies for past wrongs that were  
9 established? And the question is the adequacy of that  
10 remedy. That's one way to look at the case.

11 MR. LOBEL: That's certainly one way.

12 JUSTICE KENNEDY: Another way to look at the  
13 case is to say that Ohio admitted that there were some  
14 improprieties, showed its new policy, and the case turned  
15 on the adequacy of the new policies. Now, those are two  
16 different things. Which is this case?

17 MR. LOBEL: But to look at it the second way,  
18 you have to show that the problems proved at trial were  
19 moot. If the problems are ongoing, then the plaintiffs  
20 are entitled to a remedy. You can't say that there are  
21 problems that are ongoing, which there were -- they were  
22 all --

23 CHIEF JUSTICE REHNQUIST: But how can you know  
24 whether the problems are ongoing if the new rules haven't  
25 been implemented?



1           MR. LOBEL: Well, they are ongoing at trial.  
2   When the trial judge renders his decision, they're  
3   ongoing. The question then is looking at this abstractly,  
4   it's not a question of in the abstract is it okay, but in  
5   the abstract will it cure the problems.

6           CHIEF JUSTICE REHNQUIST: Why -- why isn't it a  
7   question of as facially in the abstract is it okay?

8           MR. LOBEL: Yes. Well, as I said, facially in  
9   the abstract, I think it's not okay because I think they  
10  should have final decision with reasons and notice with  
11  sufficient detail for reasons.

12           But even if you don't agree with me on that, I  
13  think that this case, when you have an -- when you have a  
14  trial and there's a pattern and practice of -- of  
15  problems, I don't think that it's proper to simply assume  
16  that a piece of paper which says we'll give reasons is  
17  adequate when the reasons that they're giving and that the  
18  trial shows they're giving are inadequate. They're vague.  
19  They're -- they're shifting the ball on people. And I --  
20  and I think --

21           JUSTICE STEVENS: May I ask this question, Mr.  
22  Lobel? Putting aside for a second which policy we look at  
23  and so forth, were there findings that particular inmates  
24  were improperly sent to this facility?

25           MR. LOBEL: There -- there were findings that --

1 that there were -- particular inmates who were improperly  
2 -- were sent with no evidence against them.

3 JUSTICE STEVENS: All right, and was there any  
4 -- any order saying that inmate should get out and go to a  
5 different facility?

6 MR. LOBEL: No. The district court simply  
7 ordered that since there was a widespread showing of  
8 arbitrary and capricious placement and -- and that there  
9 was a showing that they built the prison for 500 -- with  
10 500 cells and they didn't need 500 cells and they were  
11 putting people in there who didn't need -- who didn't meet  
12 the criteria that they set forward -- there was a  
13 widespread showing of that. The district court said you  
14 should give them new hearings following a procedure which  
15 would be sufficient to meet the constitutional Due Process  
16 Clause.

17 JUSTICE STEVENS: And so the State then came  
18 back and said we're putting in this new policy, we will  
19 give them new hearings under the new policy?

20 MR. LOBEL: No. The -- the State never  
21 implemented the new policy. The court said what you  
22 should do is give them hearings, which give them notice  
23 sufficient to explain what's going on, render a final  
24 decision which explains what's going on, give them a  
25 chance to produce witnesses if they have a -- if they have

1 witnesses, and they gave them hearings --

2 JUSTICE STEVENS: So that even though -- if I  
3 understand it correctly, even though there had findings  
4 that some inmates have been improperly -- had had  
5 inadequate procedure as a predicate to going into the new  
6 facility, they can just stay there until the litigation is  
7 over.

8 MR. LOBEL: That's right because the district  
9 court didn't move any particular prisoner. But what  
10 happened was when you --

11 CHIEF JUSTICE REHNQUIST: Where do -- where do  
12 we find those findings? Where in the record do we find  
13 the findings about individual people?

14 MR. LOBEL: They're -- they're all through the  
15 district court's opinion. If you want to look at Mr. Roe,  
16 it's at 73 to 76. Mr. Thompson is at 77 to 79. All of  
17 these were cases where the district court found people are  
18 being put in here on no evidence or essentially no  
19 evidence.

20 JUSTICE KENNEDY: And as -- and as to those  
21 prisoners, was there a requirement that the -- that the  
22 court's procedures be made applicable and so there would  
23 have to be a retroactive hearing as to those prisoners?

24 MR. LOBEL: For all the prisoners. Several --  
25 several months later, there were new hearings. And what

1 happened then was that the amount of prisoners at this  
2 prison went from 330 to where it is right now, which is  
3 48, the same in the Federal control -- as in the Federal  
4 control unit.

5 JUSTICE BREYER: Can you just give me 1 minute  
6 on the other issue?

7 MR. LOBEL: We're talking about 48 prisoners.

8 JUSTICE KENNEDY: Can you tell us on -- on the  
9 liberty interest where we started with the --

10 MR. LOBEL: Yes.

11 JUSTICE KENNEDY: -- with the Attorney General,  
12 is there a liberty interest in not being transferred from  
13 prison 1 -- level 1 to level 2 --

14 MR. LOBEL: No.

15 JUSTICE KENNEDY: -- level 2, that sort of  
16 thing?

17 Why is it that there's a liberty interest in  
18 being transferred -- I guess being transferred from 4 to  
19 5?

20 MR. LOBEL: We argued here that this was an  
21 atypical, significant hardship compared not to level 1, 2,  
22 3, or 4, but compared to the segregation units, any other  
23 prison in Ohio, even the segregation units, and for three  
24 reasons, all of which in combination the court of -- the  
25 district court held required a finding of liberty

1 interest.

2 One, it's long-term, indefinite. There were  
3 over 200 people here who were there for almost as long as  
4 the building was open, and there was no reason to believe  
5 that they were ever going to get out. It was indefinite.  
6 That's very different than Sandin's 30-day disciplinary  
7 confinement.

8 JUSTICE SCALIA: I thought there -- there was at  
9 least annual review. Isn't -- wasn't there an annual --

10 MR. LOBEL: There was an annual review, but the  
11 committee that they set up to review it, made up not of  
12 law professors, but made up of correctional officials,  
13 said --

14 JUSTICE SCALIA: And a good thing too.

15 (Laughter.)

16 MR. LOBEL: And a good thing, I agree. I would  
17 -- I would hate to be doing this.

18 But made up of wardens and deputy wardens, said  
19 Mr. Roe, there's no reason you should be here, you should  
20 get out. And then based on reasons and evidence, which  
21 Mr. Roe never knew, which the committee never knew -- the  
22 committee thought Mr. Roe was in there for one reason, and  
23 it turned out on trial he was in there for another reason.  
24 The classification chief says to him -- says, you're going  
25 to stay here another year.

1           Mr. Roe goes back, has a perfect record, does  
2 every program he can do. He comes back to the committee.  
3 The committee says, Mr. Roe, you should get out of here  
4 again. And the classification chief again says, I'm  
5 sorry, for no reason I'm just going to keep you here. And  
6 at that point you say, well, Mr. Roe, you may be here for  
7 the rest of your life, and there's no -- this is not  
8 definite like in the control unit where --

9           JUSTICE SCALIA: What does the new policy say  
10 about this?

11          MR. LOBEL: Nothing.

12          JUSTICE SCALIA: Nothing about --

13          MR. LOBEL: Nothing.

14          JUSTICE SCALIA: -- about the annual review.

15          MR. LOBEL: It says you get an annual review.

16 They got an annual review. The new policy doesn't say.

17           And what the district court ordered was  
18 draconian, that the classification chief, after he does  
19 this, without hearing from the inmate, without giving him  
20 reasons, has to write a final decision, which gives him  
21 some of the reasons that Mr. Roe is being kept there, and  
22 that they have to tell him, like they told the prisoners  
23 in -- in Greenholtz, what you have to do to get out. What  
24 -- and that doesn't seem to me unreasonable. And all you  
25 have to do is give a one-paragraph reason. Now, that's

1 the first reason, but that's not the only reason.

2 The State officials testified that this was  
3 qualitatively different than any other prisoner, that the  
4 level of restriction, the no outdoor recreation for many  
5 years, that people have not been outside for years, the  
6 small cell with solid steel doors so that they could not  
7 hardly talk to anybody or see anybody, that these were  
8 conditions --

9 JUSTICE KENNEDY: Did they have reading  
10 materials? I --

11 MR. LOBEL: They had reading materials, yes,  
12 Your Honor, and they had televisions so they could watch  
13 their favorite programs.

14 But they had nobody to talk to. And we -- the  
15 experiment that was done with long-term solitary  
16 confinement, which this Court itself in the 1890's found  
17 caused people to go crazy -- if you have to give people  
18 the process that was required here to send the prisoner to  
19 a mental institution, you should have to give them at  
20 least that process to send them into a situation which is  
21 going to send them to the mental institution.

22 (Laughter.)

23 MR. LOBEL: And that's what's involved here.  
24 It's a qualitatively different type of experience. And  
25 the Seventh Circuit in U.S. v. Johnson said you cannot

1 sentence somebody to -- into solitary confinement for the  
2 term of their sentence because it's a qualitatively  
3 different type of experience. It's not the 30 days in  
4 Sandin. It's not the 7 weeks in Ewing. This is  
5 qualitatively different.

6           And to top it off, the third reason is because  
7 these people were automatically deemed ineligible for  
8 parole. And Justice Scalia, in Sandin, the Court said in  
9 this case it's not -- the -- the prisoner isn't being  
10 denied parole. Well, here we have evidence that there are  
11 prisoners who were -- the parole board said we will  
12 release you on parole. All you have to do is get out of  
13 the supermax. The committee says -- a correctional  
14 officials says, you're ready to go.

15           JUSTICE SCALIA: That's not the whole class,  
16 though.

17           MR. LOBEL: Not --

18           JUSTICE SCALIA: You have a class action. It's  
19 just a few of them. In fact, there's -- there's no more  
20 parole in Ohio, as I understand it.

21           MR. LOBEL: Yes, but a -- the vast -- I believe  
22 it's over 90 percent of the people who were in this prison  
23 were sentenced under the old rules, under the old parole  
24 rules. And in addition, every prisoner who got sent to  
25 this prison was delayed parole for the 2, 3, 4, 5, 6, 10



1 years that they were going to spend at this prison. So  
2 every prisoner it affected.

3 Thank you very much.

4 CHIEF JUSTICE REHNQUIST: General Petro, you  
5 have 3 minutes remaining.

6 REBUTTAL ARGUMENT OF JAMES M. PETRO

7 ON BEHALF OF THE PETITIONERS

8 MR. PETRO: Thank you, Your Honor.

9 It has been pointed out that -- that inmates  
10 stay in the prison for many years, but in reality, over  
11 600 inmates since the opening of -- of Ohio State  
12 penitentiary in 1998 -- over 600 inmates have gone into  
13 level 5 and over 550 inmates have left level 5. And so  
14 the classification process is an ongoing process.

15 It is now established under an order of the  
16 district court, but we submit, Your Honors, that the new  
17 policy that was presented in 2002 at the time this case  
18 was pending trial, was a policy that provided a process  
19 which was the best type of process for a predictive  
20 decision. This Court has often deferred to the decision-  
21 making of -- of prison officials in seeking to protect the  
22 safety and security of the prison.

23 And in this instance, the policy that was put in  
24 place and the hearing process, without actually having  
25 essentially a fact-finding process, which is what the

1 court has imposed on this process, was the kind of process  
2 that allows for prison officials to review a whole variety  
3 of additional information even beyond what might be  
4 evidentiary.

5           When we think about the conditions in the prison  
6 where the inmate is currently housed, if they're at the  
7 Lucasville penitentiary in level 4 -- and the conditions  
8 there are particularly volatile -- the prison officials  
9 need to have the flexibility to make a decision on  
10 placement in level 5 not only to protect this inmate but  
11 to protect the institution itself and the safety of the  
12 inmates and the safety, of course, of -- of the personnel  
13 that work at the facility.

14           In the Mathews test, which was applied both by  
15 the district court and by the court of appeals, there is  
16 clearly an acknowledgement that the interest of the  
17 government is very strong. But in the second step of the  
18 Mathews test, there's a recognition that additional  
19 procedures really add no value to the decision-making  
20 process.

21           Here the -- the government needs to have the  
22 capacity and the -- the ability to make the best possible  
23 decision looking at a whole variety of factors, and to  
24 have a procedure put in place by the court that requires a  
25 full display of all the evidence that will be presented at

1 the time of hearing, as incorporated in the notice to the  
2 inmate that a hearing will be held, and then an  
3 acknowledgement that there's -- only this evidence is the  
4 evidence that -- that is being relied upon really presents  
5 essentially a fact-finding hearing where the hearing  
6 process that is set forth in New Policy 111-07 is more  
7 than just fact-finding. It's kind of an analysis. It  
8 gets an opportunity -- provides an opportunity to really  
9 assess the attitude of the inmate, the -- the risks that  
10 are involved in -- in placement in a -- in a different  
11 level in a different penitentiary. It is directed at  
12 protecting the safety and the security of the inmates and,  
13 obviously, of protecting the -- the safety of the  
14 personnel. And it is fully consistent with this Court's  
15 precedents.

16 In applying the Mathews test --

17 CHIEF JUSTICE REHNQUIST: Thank you, General  
18 Petro.

19 MR. PETRO: Thank you.

20 CHIEF JUSTICE REHNQUIST: The case is submitted.

21 (Whereupon, at 11:16 a.m., the case in the  
22 above-entitled matter was submitted.)  
23  
24  
25