

The Burger Court Opinion Writing Database

Greenholtz v. Inmates of Nebraska Penal and Correctional Complex

442 U.S. 1 (1979)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: **27 379**

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-201

John B. Greenholtz, Etc., et al.,
Petitioners.
v.
Inmates of the Nebraska Penal
and Correctional Complex
et al.

On Writ of Certiorari to the
United States Court of
Appeals for the Eighth
Circuit.

[April —, 1979]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Due Process Clause of the Fourteenth Amendment applies to discretionary parole release determinations made by the Nebraska Board of Parole, and, if so, whether the procedures it currently provides meet constitutional requirements.

I

Inmates of the Nebraska Penal and Correctional Complex brought a class action under 42 U. S. C. § 1983 claiming that they had been unconstitutionally denied parole by the Board of Parole. The suit was filed against the individual members of the Nebraska Board of Parole. One of the claims of the inmates was that the statutes and the Board's procedures denied them procedural due process.

The statutes provide for both mandatory and discretionary parole. Parole is automatic when an inmate has served his maximum term, less good-time credits. Neb. Rev. Stat. § 83-1,107 (1)(b). An inmate becomes eligible for discretionary parole when the minimum term, less good-time credits has

1, 2, 6, 9-12

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Black
Mr. Justice Powell
Mr. Justice Renquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: **MAR 28 1979**

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-201

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Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

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Recirculated: APR 6 1979

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

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3, 7, 11

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: MAY 17 1979

4th DRAFT

SUPREME COURT OF THE UNITED STATES

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John B. Greenholtz, Etc., et al.,
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v.
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On Writ of Certiorari to the
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[May —, 1979]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 28, 1979

CASES HELD FOR NO. 78-201 - GREENHOLTZ V. INMATES OF THE
NEBRASKA PENAL & CORRECTIONAL COMPLEX.

MEMORANDUM TO THE CONFERENCE:

Nine cases have been held for this case. I will vote Grant, Vacate and Remand in the following eight cases:

1. No. 78-950 - Missouri Board of Probation & Parole v. Williams: This case involves a class action challenge to the constitutionality of Missouri's parole procedures. The CA8 relied upon its previous opinion in Greenholtz to support finding a protectible liberty interest created by the Missouri statute. In so holding the CA8 reversed the d.ct's decision that this statute created no protectible interest. The CA8 also used its opinion in Greenholtz as a model for determining the minimum process due to the inmates. Obviously, the case requires reconsideration in light of our reversal of the CA8' judgment in Greenholtz.

2. No. 78-1282 - Williams v. Phillips: In Oklahoma the power to grant parole rests with the governor. A parole recommendation is made initially by a committee at the individual prison and it is reviewed by the state parole board. The board can recommend that the governor grant parole or it can remove the prisoner's name from its docket.

Petr's name was removed from the docket without any explanation by the Oklahoma Parole Board. In a mandamus proceeding the Oklahoma S.Ct held that the prisoner had "an expectation of parole" once he was initially recommended for parole and that due process at a minimum required a statement of reasons for the board's action.

Although it could be that the state court found that its specific statute was intended to create a protected liberty interest, the opinion is not clear. In part, the opinion relies upon a perceived trend among state and federal courts toward providing due process protection to inmates eligible for parole. Although it is likely and would be appropriate for the

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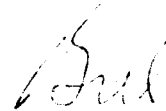
CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

January 23, 1979

Dear Lewis:

You, Thurgood and I are in dissent in No.
78-201 Greenholtz v. Inmates. I've asked Thurgood to undertake the writing of that dissent.

Sincerely,



Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 16, 1979

RE: No. 78-201 Greenholtz v. Inmates of Nebraska
Penal, etc.

Dear Thurgood:

Please join me in your dissent in the above.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill".

Mr. Justice Marshall

cc: The Conference

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 28, 1979

Re: 78-201 - Greenholtz v. Nebraska Penal Inmates

Dear Chief:

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.
/

Mr. Chief Justice

Copies to the Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 30, 1979

Re: 78-201 - Greenholtz v. Inmates of the
Nebraska Penal and Correctional
Complex

Dear Chief,

Please join me.

Sincerely yours,



The Chief Justice

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cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 27, 1979

Re: No. 78-201 - Greenholtz v. Inmates

Dear Chief:

In due time I hope to file a dissent.

Sincerely,


T.M.

The Chief Justice

cc: The Conference

15 MAY 1979

78-201

Greenholtz v. Inmates of the Nebraska Penal and Correctional
Complex

MR. JUSTICE MARSHALL, dissenting in part.

My disagreement with the Court's opinion extends to both its analysis of respondents' liberty interest and its delineation of the procedures constitutionally required in parole release proceedings. Although it ultimately holds that the Nebraska statutes create a constitutionally protected "expectation of parole," the Court nonetheless rejects the argument that criminal offenders have such an interest whenever a state establishes the possibility of parole. This gratuitous commentary reflects a misapplication of our prior decisions and an unduly narrow view of the liberty protected by the Fourteenth Amendment. Since the Court chooses to address the issue, I must register my opinion that all prisoners potentially eligible for parole have a liberty interest, of

CHANGES THROUGHOUT

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: _____

Recirculated: 24 MAY 19

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

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Appeals for the Eighth
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[May —, 1979]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS join, dissenting in part.

My disagreement with the Court's opinion extends to both its analysis of respondent's liberty interest and its delineation of the procedures constitutionally required in parole release proceedings. Although it ultimately holds that the Nebraska statutes create a constitutionally protected "expectation of parole," the Court nonetheless rejects the argument that criminal offenders have such an interest whenever a State establishes the possibility of parole. This gratuitous commentary reflects a misapplication of our prior decisions and an unduly narrow view of the liberty protected by the Fourteenth Amendment. Since the Court chooses to address the issue, I must register my opinion that *all* prisoners potentially eligible for parole have a liberty interest of which they may not be deprived without due process, regardless of the particular statutory language that implements the parole system.

The Court further determines that the Nebraska Board of Parole already provides all the process that is constitutionally due. In my view, the Court departs from the analysis adopted in *Morrissey v. Brewer*, 408 U. S. 471 (1972), and *Mathews v. Eldridge*, 424 U. S. 319, 335 (1976), and disregards considerations that militate for greater procedural protection.

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CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

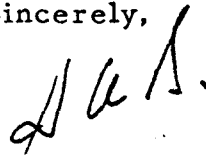
April 2, 1979

Re: No. 78-201 - Greenholtz v. Inmates of Nebraska
Penal Complex

Dear Chief:

I am glad to join your recirculation of March 28.

Sincerely,

A handwritten signature in dark ink, appearing to be 'H. A. Blackmun', written in a cursive style.

The Chief Justice

cc: The Conference

April 4, 1979

78-201 Greenholtz v. Inmates

Dear Chief:

Your may recall that at Conference, I reiterated the view that I had voiced in Scott v. Kentucky that where a state provides for parole it creates a legitimate expectation of eligibility for it. Thus, I stated that I thought Nebraska had created a liberty interest that entitled an inmate to some limited "process" duly protective of that interest.

Although I think your opinion is quite well written, and I agree with a great deal of what you have said, I do not think I will be able to join Part IV-A of your opinion, and I may have some other problems. I am inclined to think, however, that the due process afforded by Nebraska is adequate, and that therefore I can join you in the judgment.

I may try writing something out quite briefly when I return to the Court.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 17, 1979

78-201 Greenholtz v. Inmates

Dear Chief:

Now that Thurgood's dissent has been circulated, I find myself - as my Conference notes also indicate - somewhere between you and Thurgood.

I am, therefore, working on an opinion that will concur in part and dissent in part. I should have this for circulation early next week.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell
#1 MAY 1979

Circulated: _____

Recirculated: _____

1st DRAFT

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[May —, 1979]

MR. JUSTICE POWELL, concurring in part and dissenting in part.

I agree with the Court that the respondents have a right under the Fourteenth Amendment to due process in the consideration of their release on parole. I do not believe, however, that the applicability of the Due Process Clause to parole release determinations depends upon the particular wording of the statute governing the deliberations of the parole board, or that the limited notice of the final hearing currently given by the State is consistent with the requirements of due process.

I

A substantial liberty from legal restraint is at stake when the State makes decisions regarding parole or probation. Although still subject to limitations not imposed on citizens never convicted of a crime, the parolee enjoys a liberty incomparably greater than whatever minimal freedom of action he may have retained within prison walls, a fact that the Court recognized in *Morrissey v. Brewer*, 408 U. S. 471 (1972).

"The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. . . . Subject to the conditions of his

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 29, 1979

Re: No. 78-201 Greenholtz v. Inmates

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

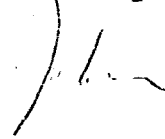
May 17, 1979

Re: 78-201 - Greenholtz v. Inmates of the
Nebraska Penal and Correctional Complex

Dear Thurgood:

Please join me.

Respectfully,



Mr. Justice Marshall

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Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

Personal

May 17, 1979

Re: 78-201 - Greenholtz v. Inmates of the
Nebraska Penal and Correctional Complex

Dear Thurgood:

You have written an outstanding dissent which I am happy to join without any reservation. I wonder, however, if you might see your way clear to citing my Seventh Circuit opinion in United States ex rel. Miller v. Twomey, 479 F.2d 701, 712-713, in one of the footnotes in Part I-A of your opinion. It would fit in note 5 as one of the decisions applying your analysis, with which I agree, of Wolff, except for the fact that it came out before Wolff was decided. In any event, this is just a suggestion.

Respectfully,



Mr. Justice Marshall