1	IN THE SUPREME COURT OF THE UNITED STATES
2	X
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. :
10	X
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.
19	DEANNE E. MAYNARD, ESQ., Assistant to the Solicitor
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.
25	

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- 2 (10:15 a.m.)
- 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.
- 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.
- 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.
- MR. PETRO: No they don't.
- 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.
- 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.

- 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?
- MR. PETRO: Yes, I agree, Your Honor, that we
- 13 could.
- JUSTICE SCALIA: So where is the liberty
- 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.
- JUSTICE SCALIA: Well, I understand, but I feel
- 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.
- 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.
- 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?
- MR. PETRO: That is correct. But when people
- 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.
- JUSTICE O'CONNOR: I'm asking you your opinion.
- 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?
- MR. PETRO: Your Honor, that has not occurred in
- 23 reality. There have been several inmates that have moved
- from admission to level 5.
- 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?
- 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 --
- 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?
- MR. PETRO: Your Honor, the -- the deprivation
- is -- is perhaps marginally greater, but I would suggest
- 24 that it is marginal, and therefore --
- 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.
- 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 --
- that's what you wanted to talk about, but we're on, first,
- 21 the preliminary question.
- MR. PETRO: Yes.
- 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.
- 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?
- MR. PETRO: Yes, it was.
- JUSTICE SCALIA: Didn't we say in Sandin that
- 13 solitary confinement was -- was not enough to -- to
- 14 create --
- JUSTICE GINSBURG: For how long?
- 16 JUSTICE SOUTER: 30 -- for 30 days I believe,
- 17 wasn't it?
- 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 --
- 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.
- MR. PETRO: Thank you, Mr. Chief Justice.
- 16 (Laughter.)
- 17 MR. PETRO: In this instance, the process due,
- 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.
- 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 --
- 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?
- 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 --
- 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.
- 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.
- 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,
- 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 --
- 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
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- 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?
- 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.
- 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?
- 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.
- MR. PETRO: Yes, I did, Your Honor.
- JUSTICE BREYER: Does he get what I just said?
- MR. PETRO: Yes, he does.
- JUSTICE BREYER: He does.
- 19 MR. PETRO: He gets the basic information. He
- 20 doesn't get a list of any evidence.
- JUSTICE KENNEDY: Well, what does he -- can you
- 22 -- can you describe it for us what -- he gets 48 hours
- 23 notice.
- MR. PETRO: Yes.
- 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?
- 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.
- JUSTICE KENNEDY: So he does get the report.
- MR. PETRO: So he gets --
- JUSTICE KENNEDY: 48 hours --
- MR. PETRO: But it's a very bare bones report
- 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.
- MR. PETRO: Okay.
- 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.
- 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?
- MR. PETRO: Yes, Your Honor, he does get that
- 19 notice. He gets that basic form that basically says he's
- 20 being reclassified.
- 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?
- 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 --
- 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?
- 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?
- MR. PETRO: Yes, he does generally. It doesn't
- 12 give any evidence. It simply is --
- JUSTICE SOUTER: No. I'm not --
- MR. PETRO: Okay.
- 15 JUSTICE SOUTER: I'm not worried about evidence.
- MR. PETRO: I understand.
- 17 JUSTICE SOUTER: Just I want to know the charge.
- 18 Will he always get the charge?
- 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
- 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.
- 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?
- 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.
- Ms. Maynard, we'll hear from you.
- 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
- ON BEHALF OF THE UNITED STATES,
- 20 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS
- 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 placer
--

- 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
- judgment that a person is a gang leader? The ultimate
- 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.
- MS. MAYNARD: That's true, Justice Ginsburg. We
- 23 would have three responses to that.
- One is first in Ohio, as in the Federal Bureau
- 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
- and judgment and knowledge of the prison conditions in
- 16 their prison and in the prison system as a whole, to take
- into account things that are rumor, innuendo, and other
- 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
- 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.
- 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.
- JUSTICE SCALIA: Ms. Maynard, this is a class
- 22 action, isn't it?
- 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?
- 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.
- 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?
- 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.
- 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.
- 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.
- 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
- 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.
- 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.
- But it's important to note that what we do when
- 23 we -- what the Bureau of Prisons does when it was free to
- decide its own process is detailed at pages 26 to 28 of
- 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.
- 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.
- 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:
- 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
- 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.
- 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 --
- 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?
- 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 --
- 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 -- during the
- 9 trial, often they didn't get the -- they didn't get any
- 10 notice.
- 11 JUSTICE SOUTER: Okay.
- 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
- or the hearing at which it was determined whether they
- 18 would be or not?
- 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
- 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 --
- MR. LOBEL: Where is theirs?
- 12 JUSTICE BREYER: I'm sorry. You go ahead.
- 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
- 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
- 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?
- MR. LOBEL: Because --
- 11 CHIEF JUSTICE REHNQUIST: I mean, if he can --
- 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.
- 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
- 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.
- 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.

- If it's confidential, they don't have to turn it
- 2 over. The district court --
- 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 --
- 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.
- 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?
- MR. LOBEL: Page -- look at page 22 and -- 23
- and 33 of the new policy. Look at 23.
- JUSTICE O'CONNOR: Where -- where is that?
- 16 MR. LOBEL: JA-23. Look at JA-23 and look at
- 17 JA-33.
- JUSTICE O'CONNOR: All right. I'm on 23. What
- 19 are we --
- 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.
- 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
- 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
- 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.
- JUSTICE BREYER: What that tells him is nothing
- 13 about the facts. That tells him he's been charged.
- 14 Period.
- 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.
- 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 --
- 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?
- 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.
- 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.
- In Ohio's brief, they say we could still do
- 16 that. We only have to give them some reason. For
- 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
- in the middle of the game. And that's what was happening.
- 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.
- JUSTICE O'CONNOR: It's --
- 9 CHIEF JUSTICE REHNQUIST: Well, why does the Due
- 10 Process Clause require reasons?
- 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 --
- JUSTICE O'CONNOR: This form says, state the
- reasons, and leaves blank space to do that.
- MR. LOBEL: But that's --

l JUSTI	ICE O'CONNOR	: So what	's th	e matter?
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- 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.
- 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
- we're working with.
- MR. LOBEL: Yes. Your Honor, it depends --
- 19 JUSTICE KENNEDY: Could you comment on that?
- 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 be respond to that? All be could say is I don't
- 14 know what you're talking about.
- 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.
- 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.
- 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.
- 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.
- 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.
- JUSTICE BREYER: What I'm now saying is I can
- 16 understand exactly why you might feel the way you do. But
- our job is to not necessarily take that feeling. But
- 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
- on the adequacy of the new policies. Now, those are two
- 16 different things. Which is this case?
- 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.
- 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 --
- JUSTICE STEVENS: May I ask this question, Mr.
- 22 Lobel? Putting aside for a second which policy we look at
- and so forth, were there findings that particular inmates
- were improperly sent to this facility?
- 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?
- MR. LOBEL: No. The -- the State never
- 21 implemented the new policy. The court said what you
- 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 --
- 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?
- 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.

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- 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.
- 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 --
- MR. LOBEL: No.
- JUSTICE KENNEDY: -- level 2, that sort of
- 16 thing?
- Why is it that there's a liberty interest in
- 18 being transferred -- I guess being transferred from 4 to
- 19 5?
- 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.
- 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?
- MR. LOBEL: Nothing.
- JUSTICE SCALIA: Nothing about --
- 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
- 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.
- 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.)
- 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.
- 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
- officials says, you're ready to go.
- JUSTICE SCALIA: That's not the whole class,
- 16 though.
- 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.
- MR. LOBEL: Yes, but a -- the vast -- I believe
- 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
- inmates and the safety, of course, of -- of the personnel
- 13 that work at the facility.
- 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,
- obviously, of protecting the -- the safety of the
- 14 personnel. And it is fully consistent with this Court's
- 15 precedents.
- In applying the Mathews test --
- 17 CHIEF JUSTICE REHNQUIST: Thank you, General
- 18 Petro.
- 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.)

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