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Due Process and the Right to a Prior Hearing in Welfare Cases

DUE PROCESS AND THE RIGHT TO A PRIOR HEARING IN WELFARE CASES

I. INTRODUCTION

The need to protect individual rights against abuses of power by quasi-judicial administrative agencies has long been a matter of concern to the American judiciary.[1] Nevertheless, the sheer proliferation of these agencies, combined with their vast control over so many forms of individual conduct and activity,[2] have led both courts and legal scholars to re-examine some basic assumptions in regard to the powers and procedures of these bodies. Concern for procedural safeguards has intensified largely because administrative agencies are charged with regulating economic status in our society. Professor Charles Reich has pointed out that "today more and more of our wealth takes the form of rights or status rather than of tangible goods."[3] Thus an individual's right to obtain licenses, franchises, subsidies, public assistance or any of the other forms of government largess has been left principally to administrators.

Of all the forms of government largess, perhaps none is more important to the individual than public assistance. To an individual, the receipt of welfare benefits may be virtually a matter of physical survival. Clearly then, those who regulate the distribution of welfare should be the most scrupulous in following the "rudimentary requirements of fair play."[4]

A welfare recipient may obtain his assistance either from the combined federal-state program set forth in the Social Security Act,[5] or from a solely local program of general assistance.[6] States must meet certain prerequisites established by the Federal Act if they wish to participate in the federally sponsored program.[7] One of these requirements is that the state must provide a "fair hearing" to any person whose claim for assistance is denied,[8] although

1. See, e.g., Morgan v. United States, 304 U.S. 1 (1938); Goldsmith v. United States B.T.A., 270 U.S. 117 (1926); Londoner v. Denver, 210 U.S. 373 (1908).

2. See generally Reich, The New Property, 73 Yale L.J. 733 (1964).

3. Id. at 738.

4. Morgan v. United States, 304 U.S. 1, 15 (1938).

5. 42 U.S.C. §§ 301-1394 (1964), as amended, (Supp. III, 1965-67). The welfare provisions of the Social Security Act provide relief to only certain categories of persons. The categories include: Old Age Assistance (OAA), 42 U.S.C. §§ 301-06 (1964), as amended, (Supp. III, 1965-67); Aid to Families with Dependent Children (AFDC), 42 U.S.C. §§ 601-09 (1964), as amended, 42 U.S.C. §§ 601-10 (Supp. III, 1965-67); Aid to the Blind (AB), 42 U.S.C. §§ 1201-06 (1964), as amended, (Supp. III, 1965-67); Aid to the Permanently and Totally Disabled (APTD), 42 U.S.C. §§ 1351-55 (1964), as amended, (Supp. III, 1965-67).

6. See, e.g., N.Y. Social Services Law §§ 157-65 (Home Relief).

7. See, e.g., 42 U.S.C. § 602 (Supp. III, 1965-67) ("State plans for aid and services to needy families with children; contents; approval by Secretary."); 42 U.S.C. § 604 (Supp. III, 1965-67) ("Stopping payments on deviation from required provisions of plan or failure to comply therewith.").

8. The fair hearing provision found in the AFDC program is virtually identical with those in the other categories and provides: "A State plan for aid and services to needy

the review need not be held prior to a termination of benefits.[9] As a result, pre-termination hearings have been as virtually unknown to the combined programs as they are to the state and local programs of general assistance.[10] An examination of constitutional due process standards is needed to determine if a prior hearing is required, and, if required, what procedural components are necessary at such a hearing to satisfy minimum constitutional standards.

II. Due Process and Administrative Procedure

The ability to assert procedural protections has generally turned on the question of what function an administrative agency was performing.[11] If an agency engages in rule-making or the determination of legislative facts,[12] no full due process protections would normally extend to those who may be directly or indirectly affected by the outcome.[13] If, on the other hand, the agency adjudicates concerning particular conduct, due process procedures would generally be required.[14] In such cases, the individual is usually entitled to a hearing *before* final action is taken by the agency,[15] except in emergency situations.[16]

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families with children must . . . (4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness." 42 U.S.C. § 602(a)(4) (1964). See 42 U.S.C. § 302(a)(4) (1964); 42 U.S.C. § 1202(a)(4) (1964); 42 U.S.C. § 1352(a)(4) (1964); 42 U.S.C. § 1382(a)(4) (1964). See also U.S. Dep't of HEW, Handbook of Public Assistance Administration pt. IV, §§ 6100, 6300(c) [hereinafter cited as Federal Handbook].

9. The Department of Health, Education and Welfare is apparently making some adjustments in this area under the pressure of increasing litigation. As of October 1, 1969, a new regulation will provide for continuance of benefits through the fair hearing. See 45 C.F.R. § 205.10 (1969). Of course, HEW changes cannot reach state programs of general assistance. Moreover, opposition to the future enforcement of this regulation is now appearing among the states. See, e.g., N.Y.S. Dep't of Soc. Services, Administrative Letter No. 69 PWD-14 (Feb. 14, 1969).

10. "Under the various state public assistance plans . . . the universal practice is that the local agency terminates aid by ex parte action and notifies the recipient of the immediately effective termination and of his right to a subsequent hearing if he wishes to contest the termination." Thorkelson & Sparer, Do the Present Regulations Governing the Time for Holding Fair Hearings in Public Assistance Violate Constitutional Due Process and the Social Security Act?, 6 Welfare L. Bull. 8 (1966).

11. See 1 K. Davis, Administrative Law Treatise § 7.02 (1958).

12. "Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion." Id. at 413.

13. "[W]hen these [administrative] agencies are conducting nonadjudicative, fact-finding investigations, rights such as apprisal, confrontation, and cross-examination generally do not obtain." Hannah v. Larche, 363 U.S. 420, 445-46 (1960).

14. 1 K. Davis, supra note 11, § 7.02, at 413.

15. "Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." Morgan v. United States, 304 U.S. 1, 18-19 (1938). See also Willner v. Committee on Character & Fitness, 373 U.S. 96, 105 (1963); Opp Cotton Mills, Inc. v. Ad-

It seems beyond dispute that an agency determination of whether an individual is eligible to continue receiving public assistance constitutes an adjudicative proceeding. Moreover, no impending peril can be easily imagined which might justify agency action before granting the welfare recipient a hearing. Yet, the right to a prior hearing, firmly established in commercial adjudicative proceedings before agencies, is still struggling for recognition.[17] An explanation lies in the fact that welfare has traditionally been viewed by the courts as a "privilege" rather than a "right."[18] While the right-privilege distinction has generally been subjected to severe criticism,[19] it remains a powerful force in the law, particularly with respect to substantive rights.[20] In the area of procedure, however,

ministrator, 312 U.S. 126, 152-53 (1941); United States v. Illinois Cent. R.R., 291 U.S. 457, 463-64 (1934); Londoner v. Denver, 210 U.S. 373, 385 (1908).

16. "If the contagion is spreading, or the harmful medicinal preparation is being sold to the public, summary administrative action in advance of hearing is appropriate. . . . Drastic administrative action is sometimes essential to take care of problems that cannot be allowed to wait for the completion of formal proceedings." 1 K. Davis, supra note 11, § 7.08, at 438. See, e.g., Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950); Fahey v. Mallonee, 332 U.S. 245 (1947).

17. See Kelly v. Wyman, 294 F. Supp. 893 (S.D.N.Y. 1968) (three-judge court), prob. juris. noted sub nom. Goldberg v. Kelly, 37 U.S.L.W. 3399 (U.S. April 21, 1969) (No. 1120); Wheeler v. Montgomery, No. 48303 (N.D. Cal. April 17, 1968) (three-judge court), prob. juris. noted, 37 U.S.L.W. 3399 (U.S. April 21, 1968) (No. 634).

18. "The typical thinking is that one has no 'right' to a government gratuity, that one who has no 'right' at stake should not be entitled to a hearing . . . that due process protects only 'life, liberty, or property' and not privileges, and that therefore courts are not called upon to require fair hearings when nothing more than privileges are at stake." 1 K. Davis, supra note 11, § 7.11, at 454. See Smith v. Board of Comm'rs, 259 F. Supp. 423, 424 (D.D.C. 1966), aff'd, 380 F.2d 632 (D.C. Cir. 1967), wherein the court stated: "Payments of relief funds are grants and gratuities. . . . Being absolutely discretionary, there is no judicial review of the manner in which that discretion is exercised." See also Jay v. Boyd, 351 U.S. 345 (1956) (suspension of deportation is not a right); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950) (admission of aliens is a privilege); Walker v. City of Clinton, 244 Iowa 1099, 59 N.W.2d 785 (1953) (license to sell beer is a privilege, not a right); Clarke v. Board of Collegiate Authority, 327 Mass. 279, 98 N.E.2d 273 (1951) (veteran's benefits are mere gratuities); Graham, Public Assistance: The Right to Receive; The Obligation to Repay, 43 N.Y.U.L. Rev. 451, 461-75 (1968).

19. See Graham, supra note 18; Morris, Welfare Benefits as Property: Requiring a Prior Hearing, 20 Ad. L. Rev. 487 (1968); Reich, supra note 2; Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968); Note, Withdrawal of Public Welfare: The Right to a Prior Hearing, 76 Yale L.J. 1234 (1967).

20. See, e.g., Flemming v. Nestor, 363 U.S. 603, 608 (1960) wherein the Court held that Social Security benefits do not constitute an " 'accrued property right.' " "The characteristics of the public interest state are varied, but there is an underlying philosophy that unites them. This is the doctrine that the wealth that flows from government is held by its recipients conditionally, subject to confiscation in the interest of the paramount state. This philosophy is epitomized in the most important of all judicial decisions concerning government largess, the case of Flemming v. Nestor." Reich, supra note 2, at 768 (citation omitted). But see Van Alstyne, supra note 19.

the right-privilege dichotomy is apparently giving way to the more equitable doctrine of "balancing."

III. The "Right-Privilege" and "Balancing" Doctrines

Generally, the current judicial view is that a determination of both the *right* to an administrative hearing and the *type* of hearing to be held depends not on the right-privilege distinction, but rather should be made by balancing the individual and public interests involved in any particular case. Thus, the court in *Dixon v. Alabama Board of Education*[21] rejected the argument that because there is no "right" to attend a state college, minimum due process requirements need not be met by way of a fair hearing. The *Dixon* plaintiffs, students at Alabama State College, were expelled for alleged misconduct. They were given neither an explanation for their expulsion nor allowed a hearing to question the action.[22] The determination of the plaintiffs' rights in this case said the court, was to be achieved by considering " 'the nature both of the private interest which has been impaired and the governmental power which has been exercised.' "[23] In weighing the private interests, the court observed: "It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society."[24] Since the plaintiffs had "an interest of extremely great value"[25] at stake, the majority concluded that a fair hearing was required.[26] Most courts have adopted not only the approach but also the conclusion of the *Dixon* Court,[27] largely for reasons expressed by Justice Frankfurter: "The high social

21. 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961).

22. Id. at 154-55.

23. Id. at 156.

24. Id. at 157.

25. Id.

26. Id. at 158; see Madera v. Board of Educ., 386 F.2d 778, 784 (2d Cir. 1967), cert. denied, 390 U.S. 1028 (1968), wherein the court stated that "any action that would effectively deny an education must meet with the minimal standards of due process." See also Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); Woods v. Wright, 334 F.2d 369 (5th Cir. 1964).

27. "Failure to find a property right present . . . has not stopped the Court in applying the due process clause when it wants to. In other cases, it has tended to recognize that even though no property right is involved, the parties affected do have a right to prior notice and hearing." Morris, supra note 19, at 496 (citation omitted). In Hornsby v. Allen, 326 F.2d 605, 609 (5th Cir. 1964), the court stated: "Merely calling a liquor license a privilege does not free the municipal authorities from the due process requirements in licensing and allow them to exercise an uncontrolled discretion." Such requirements were discussed in balancing terms by Mr. Justice Frankfurter, concurring in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951): " '[F]air play' . . . cannot . . . be tested by mere generalities or sentiments abstractly appealing. The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment." See Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964).

and moral values inherent in the procedural safeguard of a fair hearing are attested by the narrowness and rarity of the instances when we have sustained executive action even though it did not observe the customary standards of procedural fairness."[28]

Perhaps the most significant indicia of the changes which have taken place in procedural due process requirements is to be found in employment cases involving national security. Internal security has typically been thought of as the one area in which the public interest most clearly outweighed any private rights[29] and the requirements for fair procedures could most easily be disregarded.[30] Yet the Supreme Court in *Greene v. McElroy*[31] firmly established the principle that normal procedural rights are not to be disregarded in employment cases where questions of national security arise, absent *explicit* congressional or presidential direction to the contrary.[32]

In *Cafeteria Workers, Local 473 v. McElroy*,[33] a civilian employee working at a government installation was summarily discharged for security reasons. The Supreme Court stated that any decision as to whether the denial of a fair hearing violated due process "cannot be answered by easy assertion that, because [petitioner] had no constitutional right to be there in the first place, she was not deprived of liberty or property by the Superintendent's action. 'One may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law.' "[34]

There seems little doubt that the Court engaged in the same balancing in the national security cases as it has done in other due process situations. Thus, in *Greene*, the Court stated that unless Congress explicitly ruled otherwise, a person was entitled to his procedural protections "*where governmental action seriously injures an individual*, and the reasonableness of the action depends on fact findings . . . ."[35]

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28. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 167 (1951) (concurring opinion).

29. See Dennis v. United States, 341 U.S. 494 (1951).

30. See Greene v. McElroy, 360 U.S. 474, 515-16 (1959) (Clark, J., dissenting); 1 K. Davis, supra note 11, § 7.02, at 412; 76 Yale L.J., supra note 19, at 1238.

31. 360 U.S. 474 (1959).

32. Id. at 507-08.

33. 367 U.S. 886 (1961).

34. Id. at 894 (citation omitted). The Court in this case found that there was the statutory and executive authority demanded by Greene to deny the employee a fair hearing. Id. at 889-94. In Homer v. Richmond, 292 F.2d 719 (D.C. Cir. 1961), plaintiffs were refused licenses as radiotelegraph operators in the Merchant Marine by the Commandant of the Coast Guard for security reasons. No fair hearing was held. In response to the Commandant's assertion that plaintiffs had no "right" to the licenses, the court replied: "In our view lack of a constitutional right to a license or to the positions sought does not solve the problem. The question should be stated as whether [plaintiffs] have been deprived of an employment opportunity in private industry by governmental action which does not meet the requirements of the Due Process Clause of the Fifth Amendment." Id. at 722.

35. 360 U.S. at 496 (emphasis added). "The Supreme Court found severe economic

It appears, therefore, that in most[36] situations today, courts will decide the procedural due process question on the basis of the circumstances and competing needs involved in a case. If this be so, what of the welfare termination cases? It is suggested that a balancing of the interests of the recipient against those of the government will reveal an especial and peculiar necessity for both a prior hearing and one which contains the full panoply of procedural safeguards.

IV. Balancing and the Prior Hearing in Welfare Cases

As indicated above, normal administrative procedure in adjudicative cases involves the holding of a hearing prior to a final decision by the agency.[37] The exception is found in those emergency situations where immediate action is required.

The state's interest in denying a hearing prior to termination of benefits in welfare cases can hardly be characterized as an emergency. What is basically involved is the expenditure of tax revenues for the continuance of welfare payments between the time of a decision to terminate and a hearing to adjudicate the proposed termination. That the protection of revenues is a legitimate and important concern is undeniable. When compared to the governmental interests involved in the internal security cases however, the state's claim seems to diminish in significance. Moreover, "[i]t is clearly within the power of the state and city to minimize [the] additional cost by various methods, e.g., by expediting hearings, by increasing the number of hearing officials, by utilizing statutory rights to recover monies paid since the date of ineligibility."[38]

Weighed against the state's concern in conserving its funds is the desperate situation faced by a person or family erroneously terminated from public assistance. The individual who is wrongfully deprived of welfare will, of necessity, be destitute.[39] To such an individual or family, bland assurances of restitution

injury in Greene v. McElroy . . . which was probably dispositive . . . ." Gonzalez v. Freeman, 334 F.2d 570, 580 (D.C. Cir. 1964) (citation omitted). "The Supreme Court rulings make it plain . . . that it does not matter whether the individual's interest is deemed a 'right' or a 'privilege'; where loyalty or security is involved and the impact of an unfavorable decision is substantial, there must be specific and clear authorization to withhold a full-scale hearing." Garrott v. United States, 340 F.2d 615, 619 (Ct. Cl. 1965). See also Bland v. Connally, 293 F.2d 852 (D.C. Cir. 1961); Davis v. Stahr, 293 F.2d 860 (D.C. Cir. 1961); Parker v. Lester, 227 F.2d 708 (9th Cir. 1955).

36. There remain some obvious exceptions. "For instance, if the President discharges a cabinet officer for singing the wrong tune on foreign policy, the officer clearly lacks a 'right' to continue in his position, and therefore he is not entitled to a hearing even if he denies the facts the President sets forth in discharging him." Davis, The Requirement of a Trial-Type Hearing, 70 Harv. L. Rev. 193, 224 (1956).

37. See notes 15-16 supra and accompanying text.

38. Kelly v. Wyman, 294 F. Supp. 893, 900 (S.D.N.Y. 1968), prob. juris. noted sub nom. Goldberg v. Kelley, 37 U.S.L.W. 3399 (U.S. April 21, 1969) (No. 1120).

39. "The requirement [exists] in all states that those seeking public assistance dispose of all their assets in excess of a stated amount . . . ." 76 Yale L.J., supra note 19, at 1242. "These requirements [as to disposition of assets] vary from state to state, and within a state, according to the particular program involved. The restrictions tend to be most severe under

via a subsequent hearing held months after termination[40] must provide scant comfort indeed. The fact is, there is simply no personal need which is greater than the need for public assistance. Thus it is arguable that in the absence of fair procedure, the denial of welfare assistance may often constitute an unfair deprivation of life itself.

The extreme vulnerability of the recipient is compounded by the poor administrative practices which pervade most local welfare departments. The evidence is substantial that these departments are burdened by heavy caseloads[41] and suffer from a lack of qualified staff personnel.[42] Moreover, the agencies must contend with a highly intricate and complex system of federal and state rules and statutes which nonetheless too often provide inadequate guidelines for caseworkers.[43] In addition, many of these agencies are highly inefficient, snowed under by paperwork, and diverted by petty tasks which waste the time and energy of the already overburdened professional staff.[44] Finally, intense public

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the Aid to Families with Dependent Children programs." Id. at n.39; see Bonem & Reno, By Bread Alone, and Little Bread: Life on AFDC, 13 Social Work 5 (Oct. 1968).

40. Federal regulations require that a fair hearing be held within 60 days of a request. Federal Handbook pt. IV, § 6400(g). That this goal is rarely met is revealed in the statistics issued by the New York State Department of Social Services. For example, in July, 1968, out of 88 decisions rendered in fair hearings, 68 of these were handed down more than 90 days after the request and only 7 decisions were reached within 60 days. N.Y.S. Dep't of Soc. Services, Fair Hearing Report (July, 1968). In August, 1968, out of 102 decisions, 77 were rendered after 90 days and 7 within 60 days. Id. (August, 1968). In October, 1968, of the 197 cases decided, 162 were decided after 90 days and only 13 within the 60-day federal limit. Id. (October, 1968). For a study of similar experiences in other states, see 76 Yale L.J., supra note 19, at 1243 n.43.

41. U.S. Dep't of HEW, Report of the Advisory Council on Public Welfare 92 (1966) [hereinafter cited as Advisory Report].

42. "[T]he shortage of qualified personnel for social welfare programs is critical . . . . [N]ew programs, and existing programs, are in jeopardy unless prompt and effective action is taken to assure a sufficient supply of manpower with skills and knowledge . . . ." Advisory Report at 75. "Currently, salaries for many public welfare jobs are too low to attract or to retain the most qualified people." Id. at 92. "The welfare system must also acknowledge excessive caseload [sic] handled by an inadequate, overworked and insufficiently trained staff . . . ." Brief for The Columbia Center on Social Welfare Policy and Law as Amicus Curiae for Certiorari at 10, Wheeler v. Montgomery, No. 48303 (N.D. Cal. April 17, 1968), prob. juris. noted, 37 U.S.L.W. 3393 (U.S. April 21, 1968) (No. 634) [hereinafter cited as Wheeler Brief]. See also Comment, Eligibility Determinations in Public Assistance: Selected Problems and Proposals for Reform in Pennsylvania, 115 U. Pa. L. Rev. 1307, 1326-27 (1967).

43. "Much of the complexity and inefficiency of public welfare administration is rooted in complexities, inequities, and inadequacies written into Federal and State public welfare laws." Advisory Report at 92. "When eligibility criteria are set forth in the legislation (federal and state), the criteria often conflict, or are vague, and the agencies have choice over which criteria to choose in any given situation. Or, the statutes are silent as to critical substantive areas, giving the agencies an even freer hand." Handler, Controlling Official Behavior in Welfare Administration, 54 Calif. L. Rev. 479, 481 (1966). See also Wheeler Brief at 9.

44. "Repeatedly, both internal and external criticisms of the public welfare programs

and political pressures to "cut costs" have had the pernicious effect of forcing welfare departments to be both oversensitive to keeping persons off relief rolls and in not allowing the agencies to improve their internal administrative practices.[45] One can easily conclude that "[t]he structure and operation of the welfare system maximizes the danger of erroneous and arbitrary administrative action."[46] That this is so is attested to by the incredibly high number of decisions by welfare officials which are reversed at subsequent fair hearings.[47] Presumably, the possibility of error, with all its evil effects for the recipient, would be substantially reduced, if not eliminated, by allowing for a hearing prior to termination.

V. Fair Procedures and the Prior Hearing in Welfare Cases

While the constitutional requirement of procedural due process would clearly seem to favor the welfare recipient's right to a prior hearing, this does not settle the matter. The question remains as to *what type* of hearing shall be conducted. While the courts often say that due process "normally" requires such procedural protections as adequate notice, the right to confrontation and cross-examination and the right to present evidence and witnesses,[48] it is clear that the balancing which is inherent in the concept of due process will be used

focus on costly complexities and inefficiencies in program administration that adversely effect the welfare of needy people." Advisory Report at 92. "In addition to the difficulties resulting from inadequate organization and staffing, public welfare administration is plagued by overly detailed administrative systems, procedures and practices. The result is an excess of paperwork, unnecessary risks of error in program operations, and a diversion of scarce professional and technical skills to housekeeping and clerical functions." Id. at 92-93. See also H. Wilensky & C. Lebeaux, Industrial Society and Social Welfare 243-47 (First Free Press ed. 1965).

45. "An ever present influence on the administration of public assistance is the periodic pressure from legislators, the press, and other groups to rid the program of supposed ineligibles. Unfortunately the pressures for the rights of individuals are less vigorously and consistently expressed." Advisory Report at 73. "A recurrent fallacy inherent in many discussions and considerations of public welfare expenditures is that administrative costs should be evaluated on the 'debit' side of the ledger. The inevitable conclusion, then, is that such costs necessarily—too often arbitrarily—must be kept minimum and even static. Thus Congress and State legislatures often show greater reluctance to approve and fund needed increases in administrative costs than in other program area." Id. at 92. See also Report of the Nat'l Advisory Comm'n on Civil Disorders 457-65 (Bantam ed. 1968).

46. Wheeler Brief at 9.

47. Thus the court in Kelly v. Wyman noted that for the period April through August, 1968, only 64% of the decisions to discontinue benefits in New York State were affirmed at later hearings. 294 F. Supp. at 901 n.17 (S.D.N.Y. 1968). In Texas, the reversal rate apparently averages around 55%. Bell & Norvell, Texas Welfare Appeals: The Hidden Right, 46 Texas L. Rev. 223, 224 (1967). "Another general index of the validity of terminations is provided by the Office of Economic Opportunity: '80% of 200 decisions cutting clients off public assistance were reversed' by attorneys in O.E.O. legal services offices." 115 U. Pa. L. Rev., supra note 42, at 1312 n. 31.

48. See, e.g., Morgan v. United States, 304 U.S. 1, 18-19 (1938); Goldsmith v. United States B.T.A., 270 117, 123 (1926); Parker v. Lester, 227 F.2d 708, 716 (9th Cir. 1955).

to determine what procedures are applicable at any particular hearing.[49] Thus the courts will examine the history, surrounding circumstances and the needs of both the individual and government to determine the type of hearing required.

The entire question of what procedural components are necessary to satisfy due process in welfare hearings has been brought into sharp focus by the recent decisions in *Wheeler v. Montgomery*[50] and *Kelly v. Wyman*.[51] While both of these cases upheld the right to a prior hearing for welfare recipients, they differed sharply as to which elements should comprise such a hearing.

In *Wheeler*, plaintiff (a recipient of Old Age Assistance) brought a class action demanding a prior hearing for those persons, who, like herself, had their welfare benefits terminated. In response to the suit, California amended its public assistance regulations to provide that before a welfare department may cease providing assistance to an individual, it must inform the affected person and give reasons for the proposed action. In fact, however, the form of apprisal which is given is so brief as to be almost totally uninformative.[52] Within three days of "notification," the recipient is permitted an "informal conference" with his caseworker in order to discuss the termination and, where possible, resolve the underlying problems.[53] The regulations thus provide for a review of the

49. "[T]he flexibility which is inherent in the concept of due process of law precludes the dogmatic application of specific rules developed in one context to entirely distinct forms of government action. 'For, though "due process of law" generally implies and includes . . . regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings . . . yet, this is not universally true.' . . . Thus to determine in any given case what procedures due process requires, the court must carefully determine and balance the nature of the private interest affected and of the government interest involved, taking account of history and the precise circumstances surrounding the case at hand." Wasson v. Trowbridge, 382 F.2d 807, 811 (2d Cir. 1967). See also Willner v. Committee on Character & Fitness, 373 U.S. 96, 107-08 (1963) (Goldberg, J., concurring); Hannah v. Larche, 363 U.S. 420, 442 (1960); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring); Gonzalez v. Freeman, 334 F.2d 570, 579-80 (D.C. Cir. 1964); Van Alstyne, supra note 19, at 1452.

50. No. 48303 (N.D. Cal. April 17, 1968) (three-judge court), prob. juris. noted, 37 U.S.L.W. 3399 (U.S. April 21, 1968) (No. 634).

51. 294 F. Supp. 893 (S.D.N.Y. 1968) (three-judge court), prob. juris. noted sub nom. Goldberg v. Kelly, 37 U.S.L.W. 3399 (U.S. April 21, 1969) (No. 1120).

52. The notification provision in the new regulations provide for: "A statement setting forth the proposed action and the grounds therefor, together with what information, if any, is needed or action required to reestablish eligibility or to determine a correct grant." Cal. State Dep't of Social Welfare Manual, Reg. 44-325.431 (1968) [hereinafter cited as California Manual]. However, Reg. 44-325.43 expressly allows for the use of a Form ABCD 239, which provides the type of shorthand notice described in the text.

53. Regulation 44-325.434 of the California Manual states that "the recipient, parent, or other person may have the opportunity to meet with his caseworker, an eligibility worker, or another responsible person in the county department, at a specified time, or during a given time period which shall not exceed three (3) working days . . . in order to enable the recipient, parent, or other person: (a) To learn the nature and extent of the information on which the withholding action is based; (b) To provide any explanation or information, including, but not limited to that described in the notification pursuant to Section .431 above;

question of ineligibility by the very person who initially made that determination. The rules also contemplate neither full disclosure of the sources of the evidence presented against the recipient, nor opportunity for cross-examination and confrontation.[54] Nevertheless, the *Wheeler* court ruled that the hearing established by the new regulations does "comport with the due process clause . . . of the United States Constitution."[55]

Kelly was a consolidated action brought by eight welfare recipients who, like Mrs. Wheeler, wanted the right to a hearing prior to termination of assistance. Several of the *Kelly* plaintiffs were receiving aid under the Aid to Families with Dependent Children (AFDC) program while the remainder were on "Home Relief", New York's locally funded general assistance program. Like California, New York reacted to the suit by amending its regulations to allow a prior hearing.[56] The amendment created two options from which local welfare departments could choose. In brief, both options provide for seven days notification of the proposed discontinuance, including reasons for the intended action.[57] Option (a), adopted throughout the state except in New York City, then grants the recipient a right to a personal appearance before a "social services official . . . who occupies a position superior to that of the supervisor who approved the proposed discontinuance or suspension . . . ."[58] As construed by the *Kelly* court, the option also provides for the right of confrontation and cross-examination.[59] Unlike option (a), option (b), adopted in New York City, makes no provision for a personal appearance. Rather, it permits the recipient to "submit in writing a statement or other evidence to demonstrate why his grant should not be discontinued or suspended."[60] Since this option precludes any right of confrontation, the plaintiffs urged that the new procedures failed to meet the procedural demands of the due process clause.

The *Wheeler* court, with only a bare outline of the facts and virtually no discussion of the serious constitutional problems raised, simply affirmed the

(c) To discuss the entire matter informally for purposes of clarification and, where possible, resolution."

54. "The 'meeting' afforded in the regulation contemplates neither the receipt of the actual evidence of ineligibility nor the opportunity to question the sources of such evidence . . . . It is . . . the case or eligibility worker, who informs the recipient of the reasons for his decision and the evidence he deems appropriate to reveal. Thus, the recipient must, after one or two days notice, attempt to disprove such evidence first learned at the meeting, without the opportunity to confront the source or to put questions to him. On this basis the recipient is expected to convince the caseworker or eligibility worker that his initial decision was incorrect." Wheeler Brief at 13-14.

55. No. 48303, at 4.

56. 18 N.Y.C.R.R. 351.26 (1968).

57. However, the notice used in New York generally suffers the same inadequacies as that used in California. Thus, the New York notice may inform the recipient that his aid is being terminated for "'failure to comply with Department resource policy'" or "'failure to attend rehabilitation C.O.C.'" Kelly v. Wyman, 294 F. Supp. at 904 nn.32 & 33.

58. 18 N.Y.C.R.R. 351.26(a) (1968).

59. 294 F. Supp. at 904-06.

60. 18 N.Y.C.R.R. 351.26(b)(2) (1968).

constitutionality of the new California prior hearing system. The *Kelly* decision, on the other hand, carefully balanced the competing individual and state interests on each of the procedural questions involved. The court unanimously concluded that welfare recipients are entitled to a prior hearing containing substantial due process protections.

Both *Kelly* and *Wheeler* (by implication) dealt with the three basic procedural elements normally associated with due process: apprisal, personal appearance, and confrontation and cross-examination.[61] Each of these procedural ingredients merits consideration.

Apprisal. As discussed above, both New York and California employ an extremely sketchy, uninformative type of notification. While this form of prehearing apprisal can hardly aid the recipient in preparing an answer or defense, the situation is aggravated where, as in California, the caseworker is free to withhold evidence at the hearing. The same is true under New York's option (b), where there is not even a meeting to supplement what *Kelly* called the "often incomprehensibly vague"[62] form of notice. It seems self-evident that there is little point to a hearing, however informal, unless the person charged is "adequately informed of the nature of the evidence against him . . . ."[63] The requirement of fair apprisal has been consistently demanded by the courts (including the court in *Kelly*) and is apparently considered an indispensable element of procedural due process.[64]

Personal Appearance. Several factors, peculiar to the circumstances of the welfare system, motivated the court in *Kelly* to require that a personal appearance be offered to a person threatened with termination of public assistance. "In fact, many welfare recipients lack sufficient education or sophistication either to understand the reason for their proposed termination or to prepare an adequate written defense."[65] Aside from this, preparation of a written answer often proved to be impossible *for anyone*, in view of the "vague or cryptic charges"[66] found in the notice of proposed termination. Finally, the court observed that, in a number of the cases involved in this consolidated action, the misunderstandings which had led to termination could have been easily resolved by a simple discussion.[67] In adjudicative proceedings generally, most courts assume that administrative agencies allow personal appearances.[68] In fact, this has been the

61. See Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18. How.) 272, 280 (1855).

62. 294 F. Supp. at 904.

63. Willner v. Committee on Character & Fitness, 373 U.S. 96, 107 (1963) (Goldberg, J., concurring).

64. See cases cited note 74 infra.

65. 294 F. Supp. at 903-04.

66. Id. at 903.

67. Id. at 904.

68. "[A] hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal." Londoner v. Denver, 210 U.S. 373, 386 (1908). See also Morgan v. United States, 304 U.S. 1, 17-19 (1938); Goldsmith v. United States B.T.A., 270 U.S. 117, 123

practice of most agencies.[69] The *Kelly* decision noted this practice in concluding, "the right to a personal appearance [is] ordinarily implicit in the constitutional concept of a fair hearing . . . ."[70]

Confrontation and Cross-Examination. The rights to confront sources of evidence and to cross-examine opposing witnesses at administrative hearings are perhaps the most controversial procedural due process problems with which courts have had to struggle. For the government, such rights involve the time and expense of producing witnesses as well as delays in the conduct of the proceeding itself. These considerations are opposed by a strong legal tradition favoring these rights in both civil and criminal cases.[71] It is apparent that the dangers from unknown and unchallenged informers is as great in the area of welfare as in any other field. Thus the decision in *Kelly* declared: "There have been cited to us too many case histories in which welfare recipients have allegedly been cut off on the basis of untrue rumors and reports . . . ."[72]

While few courts would agree with the unbending language of Justice Douglas, dissenting in *Hannah v. Larche*, that "[c]onfrontation and cross-examination are so basic to our concept of due process . . . that no proceeding by an administrative agency is a fair one that denies these rights,"[73] it seems accurate to say that when, by administrative action, a person is denied something of substantial value, and the denial is based partly on testimony or other evidence supplied by another, the accused should be afforded the rights of confrontation and cross-examination in regard to that evidence.[74] That such evidence is often

(1926); Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967); Parker v. Lester, 227 F.2d 708, 716 (9th Cir. 1955).

69. "In adjudications, both courts and agencies permit argument as a matter of course on all crucial issues and deny opportunity for oral argument only when the issues seem unimportant or when some special reason arises for dispensing with oral argument." Davis, supra note 36, at 218.

70. 294 F. Supp. at 903.

71. "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots . . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny." Greene v. McElroy, 360 U.S. 474, 496-97 (1959) (footnotes and citations omitted). See also Davis, supra note 36, at 212-14.

72. 294 F. Supp. at 905.

73. 363 U.S. 420, 504 (1960).

74. See Willner v. Committee on Character & Fitness, 373 U.S. 96, 107-08 (1963) (Goldberg, J., concurring); Hannah v. Larche, 363 U.S. 420, 441-42 (1960); Greene v. McElroy, 360 U.S. 474, 496-97 (1959); Morgan v. United States, 304 U.S. 1, 17-19 (1938); Hornsby v. Allen, 326 F.2d 605, 608 (5th Cir. 1964); Gonzales v. Freeman, 334 F.2d 570,

employed in the context of welfare administration was clearly determined in *Kelly*. Its decision, therefore, to require these fundamental protections at prior hearings is strongly supported by precedent.[75]

VI. Conclusion

The *Wheeler* and *Kelly* opinions provide interesting contrasts in an increasingly important area of law. Many of the problems raised by these cases are applicable to the administration of other government-sponsored programs. Indeed, vigorous legal efforts are now underway to obtain a greater degree of justice in many of these areas of government.[76] The standards of fairness which indigent Americans will observe as they come into increasing contact with administrative agencies will undoubtedly shape their attitudes towards the government and the law itself.

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578 (D.C. Cir. 1964); Rios v. Hackney, 294 F. Supp. 885 (N.D. Tex. 1967); Garrott v. United States, 340 F.2d 615, 618-19 (Ct. Cl. 1965); Hecht v. Monaghan, 307 N.Y. 461, 470, 121 N.E.2d 421, 425 (1954).

75. See notes 71 and 74 supra.

76. See, e.g., Rolle v. New York City Housing Auth., Poverty L. Rep. ¶ 9124 (S.D.N.Y. Oct. 31, 1968) (Housing Authority's eviction procedures); Southern Christian Leadership Conf. v. Freeman, Poverty L. Rep. ¶ 9021 (D.D.C. June 27, 1968) (Commodity-Distribution Program).