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Constitutional Law: Due Process Requires Prior Hearing Before Termination of Welfare Benefits

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CONSTITUTIONAL LAW: DUE PROCESS REQUIRES PRIOR HEARING BEFORE TERMINATION OF WELFARE BENEFITS

Goldberg v. Kelly, 397 U. S. 254 (1970)

Welfare recipients in New York City instituted a class action alleging that termination procedures employed by the New York City Department of Social Service denied due process of law. Local regulations granted each recipient a *post-termination* hearing with procedural safeguards such as provision for adequate notice, the right to appear personally, to offer evidence, to confront and cross-examine witnesses, and to obtain a record of the proceedings.[1] Plaintiffs contended that a hearing was required before benefits could be terminated since informal *pre-termination* procedures were insufficient. The federal district court agreed that due process required a prior hearing at which the recipient was entitled to appear with counsel, present evidence, and cross-examine witnesses.[2] On appeal,[3] the United States Supreme Court affirmed and HELD, the New York procedures were constitutionally inadequate, and due process requirements could be met only by a full-scale pre-termination hearing at which the recipient could effectively defend his right to continuation of welfare benefits. Chief Justice Burger and Justices Black and Stewart dissented.

Application of due process requirements to pre-termination welfare hearings is a comparatively recent development. The traditional view regarded welfare payments as a gratuity and therefore subject to any restrictions the states desired to impose.[4] The recipient, as a beneficiary of governmental largess, had no right to challenge requirements established by welfare agencies.[5] Only ten years ago the Supreme Court refused to accept the argument that Social Security benefits were accrued property rights, although the Court did hold that such benefits could not be arbitrarily terminated.[6]

Nonetheless, prior to the instant decision there were indications that the mood of some courts was changing. A lower state court in California required a trial-type hearing before welfare benefits could be terminated, but the

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1. 397 U.S. 254, 260 (1970), *citing* 18 N.Y.C.R.R. §§84.2-.23 (1968). Local procedures provided for notice to the recipient at least seven days prior to the effective termination date and gave the recipient the opportunity to submit a written statement demonstrating why aid should not be terminated. *Id.* §351.26.

2. Kelly v. Wyman, 294 F. Supp. 893 (S.D.N.Y. 1968).

3. The trial court was a three-judge federal court whose decision was directly appealable to the United States Supreme Court under 28 U.S.C. §1253 (1964).

4. Lynch v. United States, 292 U.S. 571, 577 (1934); Thompson v. Gleason, 317 F.2d 901, 906 (D.C. Cir. 1962) (veteran's disability benefits). *See generally* Reich, *The New Property*, 73 YALE L.J. 733, 740 (1964). Most states provided for post-termination hearings for recipients. *E.g.*, FLA. STAT. §409.19 (1967); ILL. REV. STAT. ch. 23, §11-8, *as amended*, (Supp. 1970); IND. ANN. STAT. §52-1211 (1964); IOWA CODE ANN. §239.7 (1969); MINN. STAT. ANN. §261.123 (1957); MO. ANN. STAT. §208.080, *as amended*, (Supp. 1969).

5. *See* Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965).

6. Flemming v. Nestor, 363 U.S. 603, 611 (1960).

decision was reversed on appeal.[7] The Arizona Court of Appeals held that a prior hearing was required since there was no compelling state interest necessitating termination before the recipient could be heard.[8] Although disagreeing on procedural requisites, federal courts in both Illinois and Texas required pre-termination hearings.[9] In other states, however, judicial attitudes remain unchanged. A three-judge federal court in California denied recipients a formal pre-termination hearing, holding that an informal conference with an agency caseworker was sufficient.[10] A federal district court in Connecticut denied a motion to convene a three-judge court to challenge the absence of a prior-hearing requirement and dismissed the case, finding the recipients' interests were adequately protected by existing regulations.[11] Other cases suggested judicial uncertainty concerning whether pre-termination hearings should be required and, if so, what form they should take.[12] The various judicial approaches reflected this uncertainty: one court attempted to balance the interests of the state against those of the recipient;[13] another decided the question by determining that the hearing involved rights rather than privileges.[14]

Possibly in response to such decisions the Department of Health, Education and Welfare (HEW) issued regulations originally to be effective October 1, 1969, which provided for both continuation of welfare benefits during appeal and for counsel to represent recipients desiring to appeal.[15] The effective date was later postponed.[16] Although Chief Justice Burger argued that HEW regulations would settle the issue, making a decision unnecessary,[17]

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7. McCullough v. Terzian, No. 379,011 (Cal. Super. Ct., Alameda County, May 2, 1968), *rev'd*, 275 Cal. App. 2d 745, 80 Cal. Rptr. 283 (1969), *vacated*, 2 Cal. 3d 647, 470 P.2d 4 (1970).

8. Camerena v. Department of Pub. Welfare, 9 Ariz. App. 120, 449 P.2d 957 (Ct. App. 1969), *vacated*, ___ Ariz. ___, 470 P.2d 111 (1970).

9. Goliday v. Robinson, 305 F. Supp. 1224 (N.D. Ill. 1969); Machado v. Hackney, 299 F. Supp. 644 (W.D. Tex. 1969).

10. Wheeler v. Montgomery, 296 F. Supp. 138 (N.D. Cal. 1968), *rev'd*, 397 U.S. 280 (1970) (companion case to the instant case).

11. McCall v. Shapiro, 292 F. Supp. 268 (D. Conn. 1968), *aff'd*, 416 F.2d 246 (2d Cir. 1969).

12. *See* cases cited in Comment, *The Constitutional Minimum for the Termination of Welfare Benefits: The Need for and Requirements of a Prior Hearing*, 68 MICH. L. REV. 112 n.4 (1969).

13. Camerena v. Department of Pub. Welfare, 9 Ariz. App. 120, 449 P.2d 957 (Ct. App. 1969), *vacated*, ___ Ariz. ___, 470 P.2d 111 (1970).

14. Goliday v. Robinson, 305 F. Supp. 1224, 1226 (N.D. Ill. 1969).

15. 34 Fed. Reg. 1144 (1969).

16. The Supreme Court noted probable jurisdiction in the present case on April 21, 1969, (394 U.S. 971 (1969)), and three months later the effective date of the new regulations was postponed until July 1, 1970. 34 Fed. Reg. 13,595 (1969), 45 C.F.R. §§205.10, 220.25. Both §§205.10(a) and 220.25 were revoked after the instant decision, and new regulations were issued. 35 Fed. Reg. 8448, 10,591 (1970). Apparently HEW was willing to wait for the instant decision to determine whether the new regulations would be necessary. *See* Christensen, *Of Prior Hearings and Welfare as "New Property,"* 3 CLEARINGHOUSE REV. 321, 336 (1970).

17. Wheeler v. Montgomery, 397 U.S. 280, 283 (1970) dissenting opinion (companion case to the instant case) (dissenting opinion applying to both cases).

the Court dealt with the constitutional issues raised, ostensibly because some of the plaintiffs were challenging purely state programs to which the HEW regulations would not apply.[18] By adopting this approach the majority avoided any uncertainty concerning the decision's application to jointly funded welfare programs.

The instant decision settled several problems that had plagued state and federal courts. The Court used the balancing of interests test that had developed in earlier cases involving administrative hearings and procedural due process.[19] Weighing the recipient's interest in uninterrupted assistance and the state's interest that benefits not be improperly terminated against the added burden on the state's fiscal and administrative resources, the majority concluded that the balance favored the recipient.[20] The effect of terminating welfare benefits might well deprive an eligible recipient of his only means of support, and "[h]is need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy."[21] Moreover, much of the additional financial drain on state resources could be reduced by developing efficient procedures and by skillful use of personnel and facilities.[22]

In applying the traditional administrative law distinction between right and privilege,[23] the Court concluded that welfare benefits, as a matter of statutory entitlement, constituted important property rights to which due process safeguards were applicable.[24] Having established the necessity of a pre-termination hearing, the Court enumerated the specific safeguards required at such hearing. The recipient must have adequate and timely notice indicating the reasons for the proposed termination so that he might appear and refute any misapplication of rules or facts.[25] By combining a personal conference with a letter announcing prospective termination, this notice requirement would be met. The right to appear personally at the hearing must be guaranteed. The Court stated that written submissions in lieu of a personal appearance offered uneducated recipients an unrealistic alternative, and presentation of the recipient's version of the facts by a caseworker might not be sufficiently objective because of the caseworker's involvement in the pre-termination investigation.[26] The recipient must also

18. 397 U.S. 254, 257 n.3 (1970).

19. *E.g.*, Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

20. 397 U.S. 254, 264-66 (1970).

21. *Id.* at 264. *See* Comment, *Due Process and the Right to a Prior Hearing in Welfare Cases*, 37 FORD. L. REV. 604, 610-11 (1969).

22. 397 U.S. at 266.

23. Historically, where courts have termed governmental largess a "privilege," far less protection has been extended than in instances where a "right" to largess has been delineated. Reich, *supra* note 5, at 740. The continued validity of the distinction between right and privilege, however, is doubtful. *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

24. 397 U.S. 254, 262 n.8 (1970).

25. *Id.* at 267-68.

26. *Id.* at 269.

be afforded the opportunity to confront and cross-examine witnesses where questions of fact are involved.[27] The Court did not, however, require an attorney to be provided, holding only that the recipient should be allowed to retain one if he so desired.[28] Finally, the decision of the hearing officer, who must be impartial, should be based solely on the evidence presented at the hearing, and a written statement of findings indicating the factual basis for the determination should be filed.[29]

The initial effect of the instant decision has been to require federal and state welfare agencies to revise existing regulations to conform to the new standards. As a result, HEW has withdrawn its proposed regulations and substituted new ones,[30] which provide for continuation of benefits during the pre-termination process where a determination of the facts must be made. States utilizing HEW funds are also required to provide information on available legal services to claimants, although an attorney need not be provided. The new HEW regulations attempt to apply traditional fair hearing requirements[31] to pre-termination hearings. In theory, at least, state welfare regulations must conform to federal regulations where the state is administering federal funds. In practice, however, a state can use such funds without fully complying with federal requirements,[32] since HEW inspections of state and local practices are often inadequate.[33] The present decision gives the federal regulations a constitutional foundation, which state agencies may less easily disregard.[34]

Prior to the instant decision the Florida welfare recipient, while enjoying considerable latitude in presenting his version of the facts at termination proceedings, was not allowed to confront the agency witnesses. Instead, he was permitted, either during or prior to the hearing, to examine all information that would be considered by the hearing officer.[35] In the absence of

27. *Id.*

28. *Id.* at 270.

29. *Id.* at 267-71.

30. 35 Fed. Reg. 8448 (1970).

31. U.S. DEP'T. OF HEALTH, EDUCATION AND WELFARE, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION pt. IV, 6400 (a). Considerable leeway is afforded the recipient: "The claimant's right to a hearing includes the privilege of presenting his case in any way he desires. Some will wish to tell their story in their own way, some will desire to have a relative or friend present the evidence for them, and still others will want to be represented by legal counsel . . . ."

32. Scott, *The Regulation and Administration of the Welfare Hearing Process—The Need for Administrative Responsibility*, 11 WM. & MARY L. REV. 291 (1961). At the time of this study for example, Florida complied fully with only 26% of the federal hearing requirements and with only 8% of the "essential" requirements. *Id.* at 359.

33. *See* Wedemeyer & Moore, *The American Welfare System*, 54 CALIF. L. REV. 326, 340 (1966); Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84, 91 (1967).

34. The problem of communicating to the recipient his right to a hearing remains, however. Studies have demonstrated that the recipient is largely unaware of available appeals procedure. Briar, *Welfare from Below: Recipients' Views of the Public Welfare System*, 54 CALIF. L. REV. 370, 379 (1966). *See also* Comment, *Texas Welfare Appeals: The Hidden Right*, 46 TEXAS L. REV. 223 (1967).

35. FLORIDA MANUAL OF PUBLIC WELFARE ch. 100, at 14 (Transmittal No. 78, April 1969). *See also* FLA. ADMIN. CODE ch. 10c-5 (1970).

specifically required safeguards, the procedures employed by the welfare agency at the post-termination hearing were informal in nature. As one official stated: "The hearing belongs to the client and he should not be intimidated by it."[36] Measured against the standards set forth in the instant decision, however, the continued viability of such procedures is questionable.

In response to the Supreme Court standards, as well as to the injunction of a federal district court applying those standards,[37] Florida authorities formulated new welfare regulations incorporating the new requirements.[38] The revision provides for a hearing to be held at a time and place convenient to the recipient and allows retention of counsel as well as presentation of witnesses. In addition, a provision requiring the hearing officer to extend to the recipient the right to confront and cross-examine agency witnesses is included.[39] The old regulations were silent on this point.

The summary treatment in the instant case of the right to cross-examination at the pre-termination hearing may indicate that the Supreme Court regards the issue as settled in the welfare recipient's favor. Although the accused traditionally has been afforded this right at hearings involving questions of fact,[40] extension of the right to cross-examine witnesses at welfare hearings may have undesirable collateral effects. For example, it may defeat the desired informality in the proceedings.[41] Even assuming that the basic informality of the hearing is preserved, cross-examination is of dubious benefit to the recipient who chooses not to be represented by legal counsel or who is unable to obtain legal aid.[42] Nonetheless, the Supreme Court ,unlike the lower court,[43] refused to qualify the right to confront and cross-examine witnesses.[44]

The majority apparently recognized the danger of over-formalizing the hearing process and agreed with the district court that neither a judicial nor quasi-judicial hearing was required prior to termination. The Court

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36. Telephone interview with Mrs. Grace H. Stewart, Division of Family Services, Department of Health and Rehabilitative Services in Gainesville, Florida, July 2, 1970.

37. Sparrow v. Evans, Civil No. 70-12 (M.D. Fla., filed July 23, 1970). "[I]nsofar as any Florida Statute, or administrative order promulgated thereunder, permits the State of Florida to terminate or suspend welfare payments without first offering the recipient a prior hearing, said statute or order is repugnant to the 14th Amendment of the United States Constitution."

38. FLORIDA MANUAL OF PUBLIC WELFARE ch. 100, at 11 (Transmittal No. 120, July 1970).

39. *Id.* at 14.

40. *E.g.*, Willner v. Committee on Character & Fitness, 373 U.S. 96, 103-04 (1963); Greene v. McElroy, 360 U.S. 474, 496-97 (1959); ICC v. Louisville & N.R.R., 227 U.S. 88 (1913); Southern Stevedoring Co. v. Voris, 190 F.2d 275, 277 (5th Cir. 1951). *See also* Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 199 (1956).

41. Comment, *supra* note 12, at 133.

42. *See* Burrus & Fessler, *Constitutional Due Process Hearing Requirements in the Administration of Public Assistance: The District of Columbia Experience*, 16 AM. U.L. REV. 199, 223-24 (1967); Davis, *supra* note 40, at 213-14.

43. Kelly v. Wyman, 294 F. Supp. 893, 905 (1968): "The right to confront those providing harmful information and have them interrogated may be substantially achieved in an informal way, and we use the term 'cross-examination' here in that less formal sense."

44. 397 U.S. 254, 269-70 (1970).

insisted only on rudimentary elements of due process at the initial hearing, but implicitly indicated that if only the minimal safeguards are afforded the recipient at the preliminary hearing, a post-termination hearing may also be required.[45] To avoid such a dual hearing the agency must provide for a "fair" hearing before discontinuing benefits.

Another problem left unanswered by the instant decision is the applicability of the hearing requirement at other stages in the welfare process.[46] In a companion case, the Court indicated that suspension as well as termination of benefits required the pre-termination hearing.[47] An extension of the rationale to include reduction of benefits is probable since a balancing of interests will again favor the recipient.[48] Indeed, the new Florida regulations have anticipated such an interpretation by requiring a prior hearing where a grant is modified.[49] Other possible extensions may include proposed increases and initial determination of eligibility. A federal district court recently held the requirements of the instant case applicable to those seeking admittance to public housing:[50] "[T]hose seeking to be declared eligible for public benefits may not be declared ineligible without the opportunity to have an evidentiary hearing."[51]

Justice Black, dissenting in the instant case,[52] suggested that its logical application would be to require continuance of benefits through the entire process of administrative and judicial review. Since discontinuing aid after the pre-termination hearing would still deprive the eligible recipient of his only means of existence, the balance of interests would again favor the recipient. Justic Black also indicated that the Court will eventually reconsider its decision not to require that counsel be furnished the recipient: "[O]therwise the right to counsel is a meaningless one since these people are too poor

45. *Id.* at 266-67.

46. A complaint has been filed, challenging termination in the Work Incentive Program without a hearing: Mackey v. Sheffield, No. 399315 (Cal. Super. Ct., Alameda County, filed April 9, 1970), *noted in* 4 CLEARINGHOUSE REV. 106 (1970) (hearing requirement applied to unemployment compensation).

47. Wheeler v. Montgomery, 397 U.S. 280 (1970). *See also* Java v. California Dep't of Human Resources Dev., No. C-69 350ACW (N.D. Cal. April 11, 1970), *noted in* 4 CLEARINGHOUSE REV. 106 (1970) (suspension of unemployment compensation requires a prior hearing).

48. Merriweather v. Burson, No. 13630 (N.D. Ga., April 22, 1970), *noted in* 4 CLEARINGHOUSE REV. 107 (1970) (reduction of benefits requires hearing); Christensen, *Of Prior Hearings and Welfare as "New Property,"* 3 CLEARINGHOUSE REV. 321, 337 (1970). *But see* Wheeler v. Montgomery, 397 U.S. 280, 284-85 (1970) (Burger, C.J., dissenting): "[D]oes the Court's holding embrace welfare reductions or denial of increases as opposed to terminations, or decisions concerning initial applications or requests for special assistance? The Court supplies no distinguishable considerations and leaves these crucial questions unanswered."

49. FLORIDA MANUAL OF PUBLIC WELFARE, *supra* note 38, at 12.

50. Davis v. Toledo Metropolitan Housing Authority, 311 F Supp. 795 (N. D. Ohio 1970). *See also* Barnett v. Lindsay, No. C. 328-9 (D. Utah, April 2, 1970), *noted in* 4 CLEARINGHOUSE REV. 108 (1970) (welfare applicant entitled to fair hearing).

51. Davis v. Toledo Metropolitan Housing Authority, 311 F. Supp. 795, 797 (N.D. Ohio 1970). *But see* Christensen, *supra* note 48, at 340.

52. 397 U.S. 254, 278-79 (1970) (Black, J., dissenting).