DePaul Law Review

Volume 19
Issue 3 *Spring 1970*

Article 10

Constitutional Law - Due Process - Evidentiary Hearing Required Prior to Termination of Welfare Benefits - Goldberg v. Kelly, 397 U.S. 254 (1970)

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CASE NOTES

CONSTITUTIONAL LAW—DUE PROCESS—EVIDENTIARY HEARING REQUIRED PRIOR TO TERMINATION OF WELFARE BENEFITS

On March 11, 1968, Angela Velez' welfare payments were terminated because her husband allegedly visited her home every night. In mid-March, Mrs. Velez requested a hearing before the New York State Welfare Commission. The hearing was held in June, and the State Welfare Commissioner found untrue the information that caused suspension of her benefits. Accordingly, the State Commissioner directed the local agency to reinstate assistance. However, in the four months between termination of aid and the decision reversing the local agency, Mrs. Velez and her four children were evicted from her apartment for nonpayment of rent. Furthermore, Mrs. Velez stated that she had been unable to adequately feed her children, so they lost weight and became ill. Mrs. Velez joined seven other recipients whose aid had likewise been terminated and filed suit under the Civil Rights Act.[1] Their complaint alleged that the procedures in New York State for termination of welfare without prior notice and hearing violated the due process clause of the fourteenth amendment. A three judge district court held that existing New York welfare procedures were unconstitutional.[2] The United States Supreme Court affirmed, stating that the termination of welfare payments without affording the recipient a prior evidentiary hearing violated the due process clause of the fourteenth amendment. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

This decision is important because the Supreme Court has for the first time extended, as a *right*, the necessity of an evidentiary hearing before the termination of welfare benefits, and lists the procedural due process requirements of such a hearing.[3] The purpose of this casenote is to demonstrate how *Goldberg* effectively ends the right-privilege distinction in the welfare area, to analyze the constitutional due process standard of balancing, and to critically evaluate the specific requirements of *Goldberg* con-

1. 42 U.S.C. § 1983 *et seq.* (1964).

2. Kelly v. Wyman, 294 F. Supp. 893, 899 (S.D.N.Y. 1968), *prob. juris noted sub. nom.* Goldberg v. Kelly, 394 U.S. 971 (1969) (No. 1120, 1968 Term; *renumbered* No. 62, 1969 term). The three judge court was impanelled pursuant to 42 U.S.C. § 2281 (1964).

3. Goldberg v. Kelly, 397 U.S. 254, 266-71 (1970).

cerning prior hearings.

The predominant form of public welfare in the United States is that of categorical assistance to specific categories of needy individuals and families.[4] The Social Security Act recognizes four major categories: Old Age Assistance,[5] Aid to the Blind,[6] Aid to the Permanently and Totally Disabled,[7] and Aid to Families with Dependent Children.[8] Under the Social Security Act the states administer the programs within each category. These programs are supported by grants-in-aid from the federal government. In order to receive federal funds, a state's plan must be approved by the Secretary of Health, Education, and Welfare.[9] The plan must meet certain basic requirements and qualifications under the act,[10] and must conform to the rules and regulations promulgated by the Secretary.[11]

However, the establishment of criteria for individual need and other factors of eligibility are left largely to the states. So also, each state determines the procedures for terminating such aid.[12] For example, the Illinois provision provides that the recipient should be notified within ten days of the decision to terminate aid. The notice must contain a statement defining the recipient's right to appeal.[13] In California, the recipient must be notified immediately of cancellation, revocation, or alteration of payments (including, if necessary, a home call by appropriate personnel), and the right to appeal.[14]

At the time suit was filed in *Goldberg*, there was no New York require-

4. *See* Wedemeyer & Moore, *The American Welfare System*, 54 CALIF. L. REV. 326 (1966).

5. 42 U.S.C. §§ 301-06 (1964).

6. 42 U.S.C. §§ 1201-06 (1964).

7. 42 U.S.C. §§ 1351-55 (1964).

8. 42 U.S.C. §§ 601-09 (1964).

9. 42 U.S.C. § 1302 (1964).

10. 42 U.S.C. §§ 602, 604 (Supp. III, 1965-67).

11. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, pt. IV, §§ 6200-6400 ( ).

12. For example, Arkansas welfare regulation provides for withholding payments in the event the exact status of a recipient's eligibility is in question. ARK. DEP'T OF PUBLIC WELFARE, MANUAL § 3301 (1966). Connecticut allows the monthly assistance payment withheld up to one month while eligibility is resolved. CONN. STATE WELFARE DEP'T, MANUAL § 370.3 (A). In Delaware, assistance payments may at any time be cancelled or revoked, for a temporary period pending further determination of the recipient's eligibility. DEL. CODE ANN. tit. 31, § 508 (Supp. 1965).

13. ILL. REV. STAT. ch. 23, §§ 11-7, 11-16 (1967).

14. CAL. PUBLIC SOCIAL SERVICES MANUAL, § 44-325 (1968).

ment of prior notice or hearing of any kind before termination of financial aid. The State Commissioner of Social Services amended the procedure in February, 1968,[15] after the suit was brought. The new procedure provided for giving the recipient notice of the reasons for a proposed termination at least seven days prior to its effective date.[16] The notice must include information that the recipient, upon request, may have the proposal reviewed by a local welfare official and that the recipient may submit a written statement demonstrating why his grant should not be discontinued, which statement is used for review purposes.[17] The decision by the reviewing official must be made expeditiously, with written notice to the recipient of the disposition of the matter.[18] Although New York does conform with federal guidelines[19] by providing for a post-termina-

15. 18 N.Y. COMP. OF CODES, RULES AND REG'S 351.26 (1968): "Proposed discontinuance or suspension of grant; prior notice to recipient; additional local review and subsequent determination. When a social services official proposes to discontinue or suspend a grant of public assistance he shall proceed in accordance with the provisions of either subdivision (a) or (b) below: . . . [New York City elected subdivision (b)] (b) A social services official may adopt a local procedure concerning discontinuance or suspension of grants of public assistance and submit to the Department such procedure for its approval. Upon approval such local procedure shall become effective. Such local procedure must include the following:

(1) Notice to the recipient of proposed discontinuance or suspension, together with the reasons for the intended action, unless such discontinuance or suspension is in response to the request of the recipient or is due to: the death of the recipient who is an unattached person; the recipient's admission to an institution wherein his assistance may not be continued; the recipient's whereabouts being unknown to the social services official and without leaving a forwarding address; the recipient's moving from the state and establishing his permanent home elsewhere; the recipient's case having been reclassified as to category.

(2) The notice must advise the recipient that, if he so requests, the proposed discontinuance or suspension will be reviewed and he may submit in writing a statement or other evidence to demonstrate why his grant should not be discontinued or suspended.

(3) A review of the proposed discontinuance or suspension shall be made by the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance or suspension.

(4) After review of the relevant materials in the recipient's file including any written material submitted by him the decision shall be made expeditiously as to whether the proposed discontinuance or suspension shall or shall not be made effective as proposed. Appropriate written notice of the decision shall be sent to the recipient and to the Department's area office. Assistance shall not be discontinued or suspended prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance or suspension, whichever occurs later."

16. 18 N.Y. COMP. OF CODES, RULES, AND REG'S 351.26 (6)(1) (1968).

17. *Id.* at (6)(2).

18. *Id.*

19. At the time the complaint was filed in *Goldberg*, the federal statutes re-

tion hearing, there was no provision for the personal appearance of the recipient before the reviewing official, for oral presentation of evidence, or for confrontation and cross-examination of adverse witnesses.

The attack in *Goldberg* was not aimed at state substantive criteria establishing the eligibility of persons receiving public assistance. Rather, it was aimed at state procedural machinery which adjudicates such eligibility. The typical situation in which the problem arises is where a recipient of public assistance benefits has been notified of an adverse termination by the administering agency. The question is whether individuals, dependent on public assistance for their basic necessities, may have their subsistence payments denied by local welfare departments without an opportunity to be heard in a full and fair hearing prior to the termination of their payments.

This fundamental question must be decided by determining whether the due process clause of the fourteenth amendment requires a hearing prior to the termination of welfare payments. Section one of the fourteenth amendment reads, in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."[20] Due process has been defined as "the protection of the individual against arbitrary action,"[21] but the Supreme Court has had more difficulty in applying due process than in defining it.[22]

There are two inquiries courts must make in determining whether the due process clause applies to welfare administration. The initial query is whether welfare is a right to be protected or merely a privilege. Initially,

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quired that the state provide a "fair hearing" to any individual to whom assistance has been denied. There was no requirement, however, that the hearing be held before assistance is cut off. 42 U.S.C. §§ 302 (a)(4), 602 (a)(4), 1202(a)(4), 1352 (a)(4), 1382(a)(4), 1396(a)(3) (1964). However, on January 15, 1969 a new § 205.10 was added to Part 205, Chapter II of Title 45 of the *Code of Federal Regulations*:

"(1) When a fair hearing is requested because of termination or reduction of assistance, involving an issue of fact, or of judgment relating to the individual case, between the agency and the appellant, assistance will be continued during the period of the appeal and through the end of the month in which the final decision on the fair hearing is reached." 34 Fed. Reg. 1144 (1969).

20. U.S. CONST. amend. XIV, § 1.

21. Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 302 (1937).

22. For example, such definitions and descriptions of due process as "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria Workers, Local 473 v. McElroy, 367 U.S. 886, 895 (1961); and, " 'Due process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances," Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 162-63 (1951), can only be considered nebulous.

the Supreme Court adopted the position that "due process of law is not applicable unless one is being deprived of something to which he has a right."[23] In other words, if the matter sought to be protected is a privilege, due process does not apply and the controversy ends. For example, in *Barsky v. Board of Regents*[24] the Supreme Court refused to apply the due process clause where a physician's license had been suspended without a prior hearing. The Court said:

> The practice of medicine in New York is lawfully prohibited by the State except upon the conditions it imposes. Such practice is a privilege granted by the State under its substantially plenary power to fix the terms of admission.[25]

The Court refused to apply due process to the summary action by New York because the Court considered the issuance of a license a privilege, not a right to be protected.[26]

As late as 1960, the Supreme Court held that an act of Congress suspending benefits to deported aliens did not contravene the due process clause of the fifth amendment. The Court in *Flemming v. Nestor*[27] stated that old age, survivor, and disability insurance benefits toward which the petitioner had contributed pursuant to the Social Security Act were not "accrued property rights."[28] The Court said that in dealing

> with a withholding of a noncontractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.[29]

Plaintiff, therefore, was denied a prior hearing because he was attempting to protect a mere privilege and not a right. Neither of these cases has been expressly overruled. *Flemming*'s holding that there is no property right in Social Security payments still stands unmolested.

More recently, however, several federal court of appeal decisions have avoided the somewhat harsh consequences of denying a privilege the

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23. 182 F.2d 46, 58 (D.C. Cir. 1950) *aff'd* [by an equally divided Court] 341 U.S. 918 (1951).

24. 347 U.S. 442 (1954).

25. *Id.* at 451.

26. *Accord*, Hamilton v. Regents of the University of California, 293 U.S. 245 (1934) (Where college students refused to participate in the mandatory ROTC program on the ground that they had a conscientious objection to military training. As a result they were expelled from the State University without a prior hearing. Relief was denied by the Court. Plaintiffs had no right to acquire university education; and since the instruction was dependent on government largess, it was a privilege to which due process did not apply.)

27. 363 U.S. 603 (1960).

28. *Id.* at 610.

29. *Id.* at 611.

protection of due process. The first such case was *Homer v. Richmond*,[30] in which a naval review board denied plaintiffs licenses as radio-telegraph operators after a finding that they were unsuited within the terms of the United States Coast Guard regulations. The plaintiffs maintained that this action violated procedural due process because they were given neither a hearing nor an opportunity to meet the charges of unsuitability. The court admitted that plaintiffs had no right to be issued licenses, but ruled that plaintiffs should have been given a hearing to determine "whether the criteria of the Constitution as well as of the statute are met substantively and under procedures which afford the applicant an opportunity, consistently with due process of law, fairly to test the factual accuracy of the grounds upon which denial is placed."[31] The court refused to consider the privilege-right question in the traditional manner. Less emphasis was placed on answering the question of whether the applicants had a right to be radio-telegraph operators than whether such was merely a privilege not entitling them to the protection of due process of law. The court did not feel the distinction to be controlling.

> 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 McCrea and Homer 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. 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.[32]

Thus, under the rationale of *Homer*, the due process clause of the fifth and fourteenth amendments would be applicable to individuals where they were seeking to protect a privilege.

In *Gonzalez v. Freeman*,[33] The Thomas P. Gonzalez Corporation, which had a record of contractual relations with the Commodity Credit Corporation,[34] received notice by telegram that it was temporarily barred from doing business with Commodity Credit pending investigation into possible misuse of inspection certificates. Gonzalez unsuccessfully sought review of the order. Gonzalez then brought suit alleging that debarment without a prior hearing was a denial of due process. The court agreed and de-

30. 292 F.2d 719 (D.C. Cir. 1961).

31. *Id.* at 724.

32. *Id.* at 722.

33. 334 F.2d 570 (D.C. Cir. 1964).

34. 15 U.S.C. § 714 (1958). The Commodity Credit Corporation is a corporate instrumentality established by Congress under the Secretary of Agriculture for the purpose of stabilizing farm prices and facilitating orderly distribution of farm products.

clared that the "debarment was invalid because it was imposed without observance of procedural requirements and hence in excess of statutory jurisdiction and authority."[35] The court payed lip service to the right-privilege doctrine, saying "that the invasion of some legally protected right is the predicate upon which any exercise of judicial power must rest."[36] But the court rejected the argument of the government that due process application was barred because doing business with Commodity Credit was not a right to be protected:

> Of course there is no such *right*; but that cannot mean that the government can act arbitrarily, either substantively or procedurally, against a person or that such person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for government contracts.[37]

In *Gonzalez* the court extended the doctrine of *Homer* to protect the procedural due process rights of a private corporation, regardless of the fact that only a privilege was involved.

Four years later, in 1968, a physician was denied re-appointment to a hospital medical staff without a prior hearing in *Meredith v. Allen County War Memorial Hospital Commission.*[38] Once again the defense interposed to plaintiff's allegation of denial of due process was that he had no right to practice his profession at a public facility. The court conceded Dr. Meredith had no such right, but said "the constitutional requirements of due process and equal protection, however, place limitations on the manner in which one can be excluded from such practice."[39]

This same approach was used in *Smith v. Reynolds*,[40] a welfare case involving residency requirements. In *Smith*, the court agreed that welfare was merely a privilege, but following the theory of *Homer*, the court said: "There is, of course, no constitutional right to receive public welfare any more than there is a constitutional right to public education or even public police protection."[41] However, the court continued, due process protection is nevertheless available to such recipients and the state may not act arbitrarily once it chooses to provide such "public benefits, privileges, and prerogatives."[42]

Smith joined *Homer, Gonzalez* and *Meredith* in this new approach to

35. *Supra* note 33, at 580.
36. *Supra* note 33, at 574.
37. *Supra* note 33, at 574.
38. 397 F.2d 33 (6th Cir. 1968).
39. *Id.* at 35.
40. 277 F. Supp. 65 (E.D. Pa. 1967).
41. *Id.* at 67.
42. *Id.*

right versus privilege. In these cases the courts recognized that plaintiff did not have a right to the license or occupation or business he was being denied. Relief was nevertheless granted based on an application of procedural due process. Thus a failure by the courts to find the presence of a property right has not deterred application of the due process clause to administrative action.[43] The courts since *Flemming* have tended to recognize that even though no property right is involved, the parties affected do have a right to the protection of due process of law.

The Supreme Court since *Flemming* has viewed right-privilege in conjunction with the application of due process by generally following the trend of lower federal courts in adopting the view that due process is applicable whether a right or merely a privilege is involved. For example, in *Sherbert v. Verner*[44] plaintiff was denied unemployment compensation because she refused to work on Saturday. She claimed her church, the Seventh-Day Adventist denomination, forbade working on the Sabbath. In answer to the defense that unemployment compensation was a privilege, the Supreme Court said:

> Nor may the South Carolina courts construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's "right" but merely a "privilege." It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.[45]

The Court settled the issue by avoiding it, but nevertheless indicated where it would stand in the future. Although *Sherbert* was a first amendment case, it would seem that the relevant constitutional restraints of procedural due process apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation.[46]

Another indication that the Supreme Court was discounting the importance of distinguishing and applying the right-privilege doctrine is found in *Shapiro v. Thompson*,[47] a case which struck down the Pennsylvania one year residency requirement for welfare recipients. In answering the arguments of the State, the Court said: "This constitutional challenge cannot be answered by the argument that public assistance benefits are a 'privilege' and not a 'right'."[48] Thus, as Mr.

43. *E.g.* Wieman v. Updegraff, 344 U.S. 183 (1952); *see generally* DAVIS, ADMINISTRATIVE LAW 127 (1959).

44. 374 U.S. 398 (1963).

45. *Id.* at 404.

46. Justice Brennan used this same analogy in the majority opinion of *Goldberg*.

47. 394 U.S. 618 (1969).

48. *Id.* at 627 n.6. *See generally* Morris, *Welfare Benefits As Property: Requiring a Prior Hearing*, 20 AD. L. REV. 487 (1968).

Justice Douglas has stated, "it is far too late to suggest that . . . there are no constitutional barriers to summary withdrawal of [a] 'privilege'."[49]

The Supreme Court has not, as in *Flemming,* used the distinction as to whether these individuals seek to protect a privilege or a right in determining if due process will apply. It has thus avoided the harsh consequences of finding that only a privilege is sought to be protected. Applying this approach to welfare cases, *Flemming* loses importance; its rationale is undermined. The message of *Sherbert* and *Shapiro* is that even a privilege must be administered fairly. For even if *Flemming* were followed and the receipt of welfare was deemed merely a privilege, the discontinuance thereof would still be subject to the test of whether it is arbitrary, unreasonable, or unfair, and therefore in violation of due process. The recipient may have no constitutional right to receive welfare payments from the government, but the government will not be allowed to deny or revoke such aid by means other than those consonant with due process of law. *How* the administering agency acts is emphasized rather than *what* the agency is dealing with. There is, of course, another approach. It is the one taken in *Goliday v. Robinson,*[50] the most recent prior-hearing welfare case before *Goldberg.* In *Goliday* a three judge district court went further than saying that due process applies regardless of the existence of a privilege. The court never hesitated in summarily disposing of the right-privilege distinction. "If it is necessary to cast the matter of [the receipt of] public aid [governmentally provided] to the needy in one or the other of the long-labored-with molds of privileges or rights we must classify it as a right and we so do."[51] No cases were cited by the court in support of the statement. No court had gone as far as *Goliday* and declared the receipt of welfare to be a right. The court, however, agreed with the concept of Charles Reich,[52] who dis-

49. Jones v. Tennessee State Board of Education, 397 U.S. 31 (1970). (Petitioner was suspended from school indefinitely because of his distribution of leaflets urging a boycott of fall registration. He sought to set aside the suspension on first amendment and due process grounds. After oral argument it appeared that pertinent facts were missing from the record. The Court decided that the clouded record rendered the case an inappropriate vehicle for the Supreme Court's first decision on the extent of first amendment restrictions upon the power of state universities to expel or suspend students for the expression of views alleged to be disruptive of the order of the campus.)

50. Goliday v. Robinson, 305 F. Supp. 1224 (N.D. Ill. 1969) (three judge panel).

51. *Id.* at 1226.

52. Reich, *The New Property,* 73 YALE L.J. 733 (1964). Charles Reich has

regards the importance of distinguishing between right and privilege where social welfare is concerned. Professor Reich evaluates the socio-economic trends which prevail in this country and strongly advocates the recognition that welfare payments are not a privilege:

> The Concept of right is most urgently needed with respect to benefits like unemployment compensation, public assistance, and old age insurance. These benefits are based upon a recognition that misfortune and deprivation are often caused by forces far beyond the control of the individual. . . . In theory they represent part of the individual's rightful share in the common wealth.[53]

Not even the lower federal courts in *Goldberg*[54] or the companion case of *Wheeler v. Montgomery*,[55] declared welfare to be a right. *Goliday* is unique in that respect.

The Supreme Court in deciding *Goldberg* was faced, therefore, with a three-fold choice. It could return to the rationale of *Barsky, Hamilton, and Flemming* and the resulting severe consequences of denying due process protection because only a privilege was involved. It could adopt the theory of cases like *Homer, Sherbert*, and *Shapiro*, which hold that while welfare is a privilege, it must nevertheless be afforded the shield of due process protection. Or, the Court could follow *Goliday* and state that welfare *is* a right which due process protects. Predictably, *Goldberg* avoided a return to *Barsky, Hamilton, and Flemming*.

Justice Brennan cited *Shapiro* and *Sherbert*, but seemed to lean toward the concept of welfare as a *right* when he said: "Such welfare benefits are a matter of statutory entitlement."[56] One does not often relate "entitlement" to a *privilege*. Moreover, the Court accepted Professor Reich's concept of "new property",[57] saying: "It may be

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specifically criticized cases refusing to grant a higher degree of due process protection in social welfare law because of a failure to find a property right present. His approach is to weigh the interests of the individual against the interests of the state in order to determine whether the interests of the individual are similar to property rights warranting due process protection. In this area see also *Withdrawal of Public Welfare: The Right to a Prior Hearing*, 76 YALE L.J. 1234 (1956). This article rejects the "rights" concept on the basis that courts have not accepted it. Instead, the author advocates a hearing prior to revocation of welfare benefits, even though welfare may be a gratuity.

53. Reich, *supra* note 52, at 785 (1964).

54. Kelly v. Wyman, *supra* note 2.

55. Wheeler v. Montgomery, 296 F. Supp. 138 (N.D. Cal. 1968).

56. 397 U.S. at 262.

57. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965): "[S]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the execu-

realistic today to regard welfare entitlements, as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights which do not fall within traditional common-law concepts of property."[58] The Court based this analysis on the fact that discontinuance of benefits pending disposition of the controversy over eligibility may deprive an eligible recipient of the means to live while he waits.[59] The Court added that welfare aid was more like a property right because the goal of welfare has been to implement the "Nation's basic commitment . . . to foster the dignity and well-being of all persons within its borders."[60] The result of Justice Brennan's analysis in *Goldberg* is the effective end of any attempt to deny individuals the safeguards of procedural due process in areas where *Flemming* said they do not have "accrued property rights."[61] It should be pointed out that Justice Black was most unsatisfied with this analysis. He believed that public aid is not a right: "It somewhat strains credulity to say that a government's promise of charity to an individual is property belonging to that individual when the Government denies that the individual is honestly entitled to receive such a payment."[62] But Justice Black stands out as the lone objector.

Notwithstanding Justice Black's "incredulity", the right-privilege distinction, at least as far as it applies to due process, has met its demise. More importantly, any future legal analysis of public aid cannot rest upon the presumption that the individual on the welfare rolls receives his dole as a gratuity. "Public assistance, then, is not mere charity, but a means to 'promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity.' "[63]

An individual, therefore, may fully rely on an independent right to procedural due process to avoid the consequences of the right-privi-

tive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced." *See also* Reich, *supra* note 52.

58. 397 U.S. at 262 n.8.

59. 397 U.S. at 264.

60. 397 U.S. at 264-65.

61. 363 U.S. at 610.

62. 397 U.S. at 275 (dissenting opinion).

63. 397 U.S. at 265.

lege distinction. But it remains to be seen whether due process will always require a prior hearing, and if so, what will be the minimum standards for a proper hearing. This is where the second inquiry becomes important. If welfare is a right, or merely a privilege (nevertheless protected by due process) then the second determination must be made—whether the procedure complained of violates due process?

In determining whether due process requires a prior hearing to minimize arbitrary power and limit arbitrary action by an administrative body, the Supreme Court has employed a balancing of interests standard. The interests examined are those of the individual versus the interests of the government. Professor Davis describes the principle as follows:

> The true principle is that a party who has a sufficient interest or right at stake in determination of government action should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfavorable evidence of adjudicative facts, except in the rare circumstance when some other interest, such as the national security justifies an overriding of the interest in a fair hearing.[64]

In other words, when the balancing of interest test is employed in the procedural due process area, the concerns of the government, state, or administrative agency in maintaining an *ex parte* determination will vary according to the particular interest involved. But in all these cases, the interest of the individual remains the same, namely, his interest in maintaining his status quo by means of due process of law.

The Supreme Court began to mold the rule in the early procedural due process case of *Londoner v. Denver*.[65] *Londoner* involved the fixing of street assessment rates by the municipal authority. The assessed property owners were allowed to object through written statements, but at no time was provision made for an oral hearing. The property owners challenged this procedure as being violative of the due process guarantees of the fourteenth amendment. The Supreme Court agreed, holding that the individuals' essential interests at

64. DAVIS, *supra* note 43, at § 7.02. An excellent statement of the balancing of interest standard is found in *Gonzalez v. Freeman*, *supra* note 33: "The governmental interests on the one hand and the individual interests on the other must be balanced and the procedures established must be considered in the light of various questions which courts have postulated from time to time: How was the individual likely to be hurt? What governmental interest was to be protected? How would the governmental interest be affected, if at all, by extending procedural safeguards to cover the challenged action?"

65. 210 U.S. 373 (1908).

stake were such that final government action must await opportunity for a hearing. The Court did not use the term "balancing of interests." It did, however, balance the concerns of the local government in speedy tax assessment procedures against the minimal safeguard of the taxpayer's right to be heard, in deciding: "Due process of law requires that, at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard."[66]

Though still unnamed, the balancing of interests test was employed in *Opp Cotton Mills, Inc. v. Administrator.*[67] In holding that the Fair Labor Standards Act applied to petitioner, a textile manufacturer, the Court answered the procedural challenge by balancing the interests of the government in minimum wage legislation against that of petitioner. In *Opp*, the Court said that the interests of petitioner in presenting its position on wage fixing were such that due process required the government to afford petitioner a hearing before those wages became irrevocably fixed. The Court stated that the requirements of due process were met "in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective."[68]

In *Kwong Hai Chew v. Colding*,[69] the Court was required to balance the government's interest in security against an alien's right to due process. Petitioner was a Chinese seamen who had served in the United States Merchant Marine during World War II. In 1951, he was ordered temporarily excluded because his proposed entry into the United States was deemed prejudicial to the public interest. The Attorney General directed that the petitioner be denied a hearing before a Board of Special Inquiry and that he be permanently excluded. The Court held that the procedural due process clause of the fifth amendment was applicable to petitioner, reasoning that, "This preservation of petitioner's right to due process does not leave an unprotected spot in the Nation's armor."[70] There is clear implication that if the Supreme Court felt that *ex parte* action was necessary as a security precaution, the balance would have been in favor of the position of the Attorney General. The evidence showed that

66. *Id.* at 385.

67. 312 U.S. 126 (1941).

68. *Id.* at 153. *See also* United States v. Illinois Cental R.R., 291 U.S. 457 (1934).

69. 344 U.S. 590 (1953).

70. *Id.* at 602.

such was not the case. Thus, in weighing the interests of the individual against the interests of the state, the Court held that due process required the government to grant opportunity for a hearing before it could permanently exclude an alien.

In *Greene v. McElroy*,[71] plaintiff was relieved of his security clearance, and therefore his job involving the designing of military equipment, without being afforded an adversary hearing. Although the Court granted the plaintiff relief on the basis of an absence of explicit authorization for *ex parte* action in the legislation, the reasoning of the Court indicated a balancing of the interests of the government in maintaining military secrets against the due process rights of the plaintiff. The Court said:

> Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use.[72]

Unless Congress explicitly ruled otherwise, the Court said a person was entitled to his procedural protection "where governmental action seriously injures an individual."[73] The reasonableness of the action of Congress will depend on the surrounding circumstances.[74]

The United States Court of Appeals for the Fifth Circuit employed a balancing of interests test in *Dixon v. Alabama Board of Education*.[75] Plaintiffs were students at Alabama State College expelled for misconduct and given no explanation nor allowed a hearing. In granting the plaintiffs relief, the court weighed "the nature both of the private interest which has been impaired and the governmental

71. 360 U.S. 474 (1959). *See also* Slochower v. Board of Higher Education of New York City, 350 U.S. 551 (1956) (in which the Court used a balancing test to hold that summary dismissal of a college professor because he invoked fifth amendment privileges in refusing to answer questions about his activities with the Communist party violated due process).

72. *Id.* at 507.

73. *Id.* at 496.

74. *See also* Wieman v. Updegraff, 344 U.S. 183, 192 (1952) (where the Court held unconstitutional a statute which excluded persons from state employment solely on the basis of membership in alleged subversive organizations, regardless of their knowledge concerning the activities and purposes of the organizations to which they had belonged. In the course of its decision the Court said: "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.")

75. 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

power which has been exercised."[76] In examining those private interests, the court said: "It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society."[77] Thus the court concluded that since the students had "an interest of extremely great value,"[78] it outweighed the interest of the Board, and a fair hearing was required. The Supreme Court has recently used this balancing of interest test to require a prior hearing in state garnishment proceedings. In *Sniadach v. Family Finance Corp.*,[79] a 1969 case, petitioner's wages were being garnished. The Wisconsin garnishment statute allowed the garnishee's wages to be frozen in the interim between service on the garnishee and trial on the merits.[80] After balancing the interests of the garnishee against the interests of the creditor, the Court held the statute in violation of the due process clause of the fourteenth amendment. The Court found that "in the present case no situation requiring special protection to a state or creditor interest is presented by the facts."[81] Here the Court applied the balancing rationale to a new area of the law; the interest of an individual debtor to have a hearing prior to the garnishment of his wages.

The balancing test has evolved from *Londoner* to a point where it is consistently employed in determining whether or not due process requires a hearing before any such final administrative or governmental decision is made. It is not surprising to discover that the balncing standard would be an important tool in resolving due process questions in the welfare area.

There are of course cases where the balance of interest has fallen on the side of the government. The cases which have not required a prior hearing before an administrative order became operative generally did so on the basis of governmental emergency where—the public health or national security were at stake.[82] There is little

76. *Id.* at 156.

77. *Id.* at 157.

78. *Id.*

79. 395 U.S. 337 (1969).

80. WIS. STAT. § 267.18 (2)(a).

81. *Supra* note 79, at 339.

82. *E.g.*, Ewing v. Mytinger & Casselberry, 339 U.S. 594, 601 (1950) (where large quantities of alleged misbranded vitamins were seized by the government pursuant to the Federal Food, Drug, and Cosmetic Act without a hearing. Petitioners claimed such *ex parte* action was violative of due process of law. The Court "weighed the potential injury to the public from misbranded articles against the injury to the purveyor of the article from a temporary interference with its distribution." The Court then decided "in favor of the speedy, preventive device

problem in deciding cases where a particularly urgent governmental interest, such as the public health, exists; that interest clearly outweighs the interest of an individual in a prior hearing. In some cases, however, the result of the balancing is not as predictable. It would seem, in the following cases, that in a balancing of the interests between the government and the individual, the government's interest would give way to the right of procedural due process. But the Supreme Court arrived at other conclusions.

In *Fahey v. Mallonee*,[83] petitioner claimed that a regulation of the Home Owner's Loan Act of 1933[84] was unconstitutional because it provided for a hearing only *after* a conservator took possession of property. The Court denied the claim stating that "the delicate nature of the [banking] institution and the impossibility of preserving credit during an investigation has made it an almost invariable custom to apply supervisory authority in this summary manner."[85] Thus the Supreme Court in *Fahey* allowed such summary procedure because the interest in preserving a delicate financial situation outweighed petitioner's interest in a prior hearing.

In *Cafeteria Workers Local 473 v. McElroy*,[86] petitioner was a short-order cook at a snack bar operated by a private concessionaire on the premises of the Naval Gun Factory in Washington, D.C. The government factory was engaged in the development of secret weapons. Access was limited to persons having badges issued by the security office. On the ground that the cook failed to meet security requirements, her badge was taken away, and she lost her job. She was afforded no hearing on the matter. In determining whether petitioner's right of due process of law had been abrogated, the Supreme Court reasoned that "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been af-

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of multiple seizures," and held that due process in this case did not require a prior hearing.) *Accord,* North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) (where the Court upheld the summary seizure and destruction of food reasonably suspected of being dangerous to the consuming public).

83. 332 U.S. 245 (1947).

84. 28 U.S.C. § 1461 *et seq.* (1964).

85. *Supra* note 83, at 253. *See also* Coffin Bros. v. Bennett, 277 U.S. 29 (1927) (where execution on a lien was allowed by summary action of State Superintendent of Banks without a prior hearing).

86. *Supra* note 22.

fected by governmental action."[87] The Court then weighed "the nature both of the private interest which has been impaired and the governmental power which has been exercised."[88] In concluding that the government's interest in security was greater than petitioner's interest in attempting to maintain her employment, the Court held that the due process clause of the fifth amendment was not violated. Thus, the Court concluded in *Greene* that an individual's interest in his job outweighed the government's concern for its security, and two years later in *Cafeteria Worker's* reversed itself saying that the scales tipped in the other direction.

This same balancing of interests test has been utilized in the welfare area. On the issue of whether a public aid recipient has a right to a hearing *before* his benefits are stopped, the governmental interest is the conservation of fiscal and administrative resources. The state of New York argued that these interests justify delaying a hearing until the grants have been discontinued. Such summary determination of ineligibility protects public funds by terminating payments promptly upon discovery of reason to believe that the recipient is no longer eligible. Thus, in the residency requirement case of *Shapiro v. Thompson*,[89] the Supreme Court weighed the interests of the state "in preserving the fiscal integrity of its programs"[90] with the interests of the individual welfare recipient "that all citizens be free to travel throughout the length and breadth of our land."[91] The weight of the individual's interest in *Shapiro* was held to be heavier, and relief was given.

The court's decision in *Goliday* was also based on the "balancing of interests" standard. The interest of the state in not requiring a prior hearing is principally financial. In measuring the cost to the state against the deprivation to individuals erroneously cut off from public aid, the court found that:

> [T]he government's interest in its welfare program in protecting its administrative costs against losses is insufficient to justify a procedure of summary termination, suspension, or reduction of a recipient's benefits prior to notice and a hearing no matter how adequate an appeal procedure may be.[92]

The lower federal court in *Kelly v. Wyman* recognized and used the balancing of interests test, saying: "One test which seems to be evolv-

87. Cafeteria Workers, Local 473 v. McElroy, *supra* note 22, at 895.
88. Cafeteria Workers, Local 473 v. McElroy, *supra* note 22, at 895.
89. *Supra* note 47.
90. *Supra* note 47, at 633.
91. *Supra* note 47, at 633.
92. *Supra* note 50, at 1226.

ing requires the court to balance the private right against the government interest to determine the nature of the hearing."[93] Based on such an examination, it was required that administrative hearings be held before agency action which directly affects personal well-being became final.

Justice Brennan employed a balancing of interests standard in *Goldberg*. The extent to which procedural due process is to be applied, Justice Brennan said, "depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."[94] The majority conceded that some governmental benefits may be administratively discontinued without affording a prior hearing, but "when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process."[95] The majority in *Goldberg* judged the scale to be more heavily weighted in favor of the individual:

> [T]hese governmental interests are not overriding in the welfare context. . . . Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance . . . clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens.[96]

So the Supreme Court, using the balancing of interests standard, declared that a state which terminated public assistance payments to a particular recipient without affording him the opportunity for a hearing prior to termination denies the recipient procedural due process in violation of the fourteenth amendment.[97]

Justice Black, dissenting, pointed out the flaw. He does not approve of the use of a balancing of interests test as a constitutional standard.

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93. Kelly v. Wyman, *supra* note 2, at 891.

94. 397 U.S. at 263.

95. *Id.* at 264.

96. *Id.* at 266.

97. The Court did not decide whether a hearing was required when a State merely wanted to "reduce" benefits. For this reason the district court's judgment in Goliday v. Robinson, 305 F. Supp. 1224 (N.D. Ill. 1969) was vacated on May 25, 1970. In a *per curium* decision the Supreme Court said: "The court below has held that the Due Process Clause of the Fourteenth Amendment requires a State to provide a recipient of public welfare benefits with notice and a hearing prior to 'termination, suspension, or reduction' of benefits. This Court's subsequent decisions in Goldberg v. Kelly, 397 U.S. —, and Wheeler v. Montgomery, 397 U.S. —, decided March 23, 1970, dealt only with termination and suspension, not reduction, of benefits. We think that the bearing of those decisions on the treatment of benefit reductions should be determined in the first instance by the District Court on a record developed by the parties with specific attention to that issue. Accordingly, the judgment is vacated and the case is remanded to the District Court for further proceedings in conformity with this opinion."

Deriving the formula in another dissenting opinion, he said, "All this for me is just another example of the delusiveness of calling 'balancing' a 'test'."[98] Justice Black precisely points out the flaw of such a test, as illustrated by the divergent results in *Greene* and *Cafeteria Workers.*

> Today's balancing act requires a "pre-termination evidentiary hearing," yet there is nothing that indicates what tomorrow's balance will be. Although the majority attempts to bolster its decision with limited quotations from prior cases, it is obvious that today's result depends neither on the language of the Constitution itself or the principles of other decisions, but solely on the collective judgment of the majority as to what would be a fair and humane procedure in this case.[99]

Thus, Black feels the test is harmful because a simple change in the membership of the Court could shift the balance, making the Constitution a victim of an ambulatory, fluctuating judiciary, and not what the Founders intended. Justice Cardozo wrote: "Not lightly to be vacated is the verdict of quiescent years."[100] But the doctrine of stare decisis is a reed in the wind when changing Supreme Courts, employing the balancing test as in *Greene* can arrive at a far different conclusion using the same test only twelve years later in *Cafeteria Workers.* A mere ten years had passed between *Flemming* and *Goldberg.* The balancing test has contributed more to the Court's agility than stability.

Nevertheless, the majority of procedural due process decisions have shown this "balancing of interests" standard to be the clearest way to determine whether the due process clause requires a prior adjudicative hearing before a final determination is made. When the test is applied to revocation of welfare benefits, the result is the requirement of such a hearing. The issue is not settled here, however. The court in *Goliday* recognized the existence of difficulties: "We fully recognize that our decision here poses problems to the state and its counties in their efforts to provide public aid to those who truly are in need of assistance."[101] The extent to which local government will experience financial and administrative problems and difficulties will depend largely on just what type of hearing must be held to satisfy minimum requirements of due process. Can the hearing be informal? Must the hearing be a full-blown adversary type? Just what does due process require?

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98. El Paso v. Simmons, 379 U.S. 497 (1965) (dissenting opinion).

99. 397 U.S. at 276 (Black, J., dissenting).

100. Coler v. Corn Exchange Bank, 250 N.Y. 136, 164 N.E. 882 (1928).

101. *Supra* note 50, at 1228.

Lower federal courts have answered these questions. But they have been uniformly split in their eununciation of the specific procedural safeguards required by due process at such hearings. For example, in *Wheeler v. Montgomery*,[102] a three judge district court held that welfare recipients must be given a hearing before benefits could be terminated. But the court allowed an informal conference with a social worker before termination and a hearing some months afterward to constitute sufficient compliance with the dictates of due process.[103]

The lower federal court in *Goldberg* held that a full-fledged hearing must be conducted prior to termination; that there must be adequate notice; that it must provide for confrontation of adverse evidence and witnesses; that it must provide an opportunity to produce rebuttal, as well as additional evidence; and that a decision on the record must be made by an official unconnected with the investigation that prompted the action.[104]

The court in *Goliday* was somewhere between the lower courts in *Goldberg* and *Wheeler*. There the court refused to set out specific essentials of due process. "We do not propose that in providing a program of public aid the constitutional requirement of due process calls for full-blown adversary proceedings."[105] *Goliday* did, however, indicate that notice and an opportunity to be heard were minimal. That court also mentioned a preference for an informal type hearing.[106]

In *Sims v. Juras*,[107] the United States District Court for the District of Oregon very specifically listed the due process requirements in relation to welfare hearings prior to the agency action affecting a recipient's grant. Accordingly, due process demands: (1) written no-

102. 296 F. Supp. 138 (N.D. Cal. 1968), *prob. juris. noted,* 394 U.S. 970 (1969) (No. 634, 1968 term; *renumbered* No. 14, 1969 term). A California state court disagreed with *Wheeler* in McCullough v. Terzian, No. 379011 (Cal. Super. Ct. May 2, 1968), and held that due process required a more formal hearing. The California Appellate Court overruled the Superior Court in making the requirements conform to *Wheeler*. Finally, in a companion opinion to *Goldberg*, the Supreme Court reversed *Wheeler*, making California welfare administration conform to the procedures set up in *Goldberg*. Wheeler v. Montgomery, 397 U.S. 280 (1970).

103. *Id.*

104. *Supra* note 2.

105. *Supra* note 50, at 1228.

106. *Supra* note 50, at 1228.

107. No. 69-238 (D. Ore. April 30, 1969).

tice seven days prior to the hearing; (2) an informal hearing where the individual has the right to appear in person with counsel, examine documents, produce witnesses, and cross-examine; (3) an opportunity to discover the agency's evidence; (4) written notice of the decision; and (5) an opportunity to appeal to the state agency from the decision of a local welfare examiner.[108]

Thus, opinions on what constitutes a fair welfare hearing have ranged from informal to formal, and from general to very specific. The Court in *Goldberg* has clarified the constitutional minimum for such hearings and particularized the requirements. *Goldberg* takes the view that to protect a recipient against an erroneous termination of his benefits, the pre-termination hearing need not take the form of a quasi-judicial trial; only rudimentary procedures of due process will be required. The first requirement is notice.[109] The majority in *Goldberg* agree that, "these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination."[110] Second, the hearing must be meaningful.[111] It must afford the individual an opportunity to be heard "at a meaningful time and in a meaningful manner."[112] Third, the individual must be granted the right to appear personally.[113] "The fundamental requisite of due process of law is the opportunity to be heard."[114] Fourth, the recipient must be given "an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally."[115] Fifth, "[w]elfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department."[116] Sixth, "the decision maker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing."[117] This does not mean that strict rules of evidence, as at trial,

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108. *Id. See also* Comment, *The Constitutional Minimum for the Termination of Welfare Benefits: The Need for—and Requirements of a Prior Hearing*, 68 MICH. L. REV. 112 (1969).

109. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 178 (1951).

110. 397 U.S. at 267-68.

111. 397 U.S. at 267-68.

112. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

113. 397 U.S. at 268-69.

114. Grannis v. Ordean, 234 U.S. 385, 394 (1914); *See also* Davis, *The Requirement of Opportunity to be Heard in the Administrative Process*, 51 YALE L.J. 1093 (1942).

115. 397 U.S. at 268.

116. 397 U.S. at 270.

117. 397 U.S. at 271.

must be employed. The Court is, however, insuring that the determination must be made only in light of the facts presented at the hearing which are in point. Seventh, "the decision maker should state the reasons for his determination and indicate the evidence he relied on."[118] Eighth, "an impartial decision maker is essential."[119] The Court does not rule out a welfare official as decision-maker merely because he was involved in some prior aspect of the case. If, however, he participated in the decision to terminate, he would not be impartial.

Finally, probably the most difficult procedural question, and certainly the most important insofar as cost, concerns the individual's right to counsel at a termination hearing. There are good arguments in favor of such right. The presence of a lawyer would help uneducated individuals to better understand the proceedings, and it would help eliminate the danger of erroneous termination of benefits. The best argument against right to counsel is the cost involved, and that the presence of an attorney militates against informality, turning the proceeding into one which is adversary in nature. Also, a caseworker may be better equipped to communicate with the welfare recipient. No court has yet held that counsel must be provided at such an administrative hearing,[120] nor does the Court in *Goldberg*. However, the Court does affirm the right of a recipient to be represented by his own counsel, arguing that the presence of "[C]ounsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient."[121]

It is not clear whether a record of the hearing is required.[122] The Court in *Goldberg* said only that a complete record and a comprehensive opinion need *not* be provided at the pre-termination stage.[123] However, since in Illinois, for example, any administrative decision made at this type of hearing is subject to the Administrative Review

118. *Id.*

119. 397 U.S. at 271.

120. On August 20, 1969, 45 C.F.R. § 220.25 was revised to read: "(a) Effective July 1, 1970, legal services must be made available to families who desire the assistance of lawyers at fair hearings and appropriate fee schedules or other methods must be established to assure legal repesentation when desired. 34 Fed. Reg. 1356 (1969).

121. 397 U.S. at 270-71.

122. See Note, *Federal Judicial Review of State Welfare Practices,* 67 COLUM. L. REV. 84 (1967).

123. 397 U.S. at 267.

Act[124] and is subject to appeal to the circuit courts,[125] it would be necessary in Illinois to make some record of the proceedings.[126] The overwhelming practical result of *Goldberg* is that the cost of welfare will go up.[127] Since payments must be continued until a hearing, most welfare recipients will request a hearing whether or not there is merit to their claim. Since the hearing required is somewhat formal, the inevitable procedural delay will result in extended payments to many individuals who no longer qualify for aid. In attempting to recover money paid to those not entitled, the state or county will often find that the recipient has spent the funds and is judgment proof. An increase in the number of hearings will also necessitate an increase in the department's staff—very costly in this period of rising wages.[128]

A possible and ironic result of the Court's decision, which extended the protection of the due process clause of the fourteenth amendment to people on welfare, could be the shifting of money from needy recipient's subsistence payments to costly administrative procedures.[129] Indeed this prophecy is shared by Justice Black:

> The Court apparently feels that this decision will benefit the poor and needy. In my judgment the eventual result will be just the opposite. While today's decision requires only an administrative, evidentiary hearing, the inevitable logic of the approach taken will lead to constitutionally imposed, time-consuming delays of a full adversary process of administrative and judicial review. . . . Thus the end result of today's decision may well be that the Government, once it decides to give welfare benefits, cannot reverse that decision, until the recipient has had the benefits of full administrative and judicial review, including of course, the opportunity to present his case to this Court. Since this process will usually entail a delay of several years, the inevitable result of such a constitutionally imposed burden will be that the Government will not put a claimant on the rolls initially until it has made an exhaustive investigation to determine his eligibility. While this Court will perhaps have insured that no needy person will be taken off the rolls without

124. ILL. REV. STAT. ch. 110, §§ 264-79 (1967).

125. ILL. REV. STAT. ch. 110, § 268 (1967).

126. Kwock Jan Fat v. White, 253 U.S. 454 (1920) (requiring a record whenever a decision of a hearing is subject to direct judicial review).

127. For example, Illinois probably will have to pay out an additional 4.8 million dollars a year to comply with *Goldberg*, according to Harold O. Swank, Illinois State Public Aid Director. Illinois State Auditor, Michael J. Howlett charged that the Court ruling took the state another step toward bankruptcy. He said, "The Court is meddling again in the rules and regulations of state government. If this continues, the only solution will be for the federal government to take over all welfare programs in the nation." Chicago Tribune, March 25, 1970, at 7, col. 8.

128. *But see* Wickham, *Public Welfare Administration: Quest for a Workable Solution*, 58 GEO. L.J. 1 (1969).

129. *See* Graham, *Public Assistance: The Right to Receive; The Obligation to Repay*, 43 N.Y.U. L. REV. 451 (1968).

a full "due process" proceeding, it will also have insured that many will never get on the rolls, or at least that they will remain destitute during the lengthy proceedings followed to determine initial eligibility.[130]

Hopefully, this will not happen.

Finally, Chief Justice Burger dissented on the ground that the majority's decision is an infringement on a legislative function. "I am baffled as to why we should engage in 'legislating' via constitutional fiat."[131] The Chief Justice's point is well taken, for in holding not only that due process requires an evidentiary hearing on the question of a recipient's eligibility *before* any welfare payments may be stopped, but also specifically detailing what the content of such hearing, the Supreme Court has successfully pre-empted legislative action. In a rapidly changing area such as welfare administration, why should the Supreme Court, rather than state legislatures, create rigid procedural requirements for the varied welfare problems of fifty different states? In so doing the Court comes very close to becoming a court of legislative revision; a role the Court was thought to have abandoned in 1937. The result of this is a limiting of state's abilities to experiment with new and creative approaches to the administration of welfare.

John Henely

CONSTITUTIONAL LAW—RIGHT TO CONSULT WITH ACCOUNTANT—AN ADDITION TO FIFTH AMENDMENT LIBERTIES

On January 4, 1965, Special Agent John Trager, accompanied by a Revenue Agent of the Internal Revenue Service, conducted an interview with Walter Tarlowski at the home-office of his accountant, Michael Coppins. Trager, before proceeding with the questioning, gave Tarlowski some of the warnings required by *Miranda v. Arizona*,[1] including the warning of the right to counsel. He then requested and in fact succeeded in having Coppins leave the room while Tarlowski was being interrogated. In his interview Tarlowski made several damaging admissions.

In July, 1967, Special Agent Trager again met with Tarlowski, who had

130. 397 U.S. at 278-79 (dissenting opinion).

131. 397 U.S. at 283 (dissenting opinion).

1. 384 U.S. 436 (1966).