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COMMENTS

The Constitutional Minimum for the Termination of Welfare Benefits: The Need for and Requirements of a Prior Hearing

Recently state welfare officials in New York terminated the benefits of a welfare recipient on the basis of an erroneous tip from her landlady that her husband visited her every night. She requested a posttermination hearing which was provided under New York law. During the four-month delay between the termination of benefits and the hearing, the recipient and her four small children were evicted from their apartment for nonpayment of rent. They were forced to move in with the woman's sister, who had nine children of her own, and who was also on relief. The recipient's children lost weight and became ill because of lack of money to buy food. The welfare recipient joined a class action, Kelly v. Wyman, which challenged the constitutionality of the New York procedure, alleging that termination of welfare benefits without a prior hearing violates the due process clause of the fourteenth amendment. Plaintiffs in at least seventeen other states have similarly challenged welfare programs which provide for the termination of benefits without a prior hearing.

The courts have made various dispositions of this issue ranging from a holding that no prior hearing is required\(^5\) to one that a trial-type prior hearing must be available on request.\(^6\) In *Kelly* a three-judge federal court for the Southern District of New York upheld the plaintiff's argument that due process requires the availability of a prior hearing, including notice, personal appearance, disclosure of evidence, confrontation of witnesses, and a decision by a supervisory official.\(^7\) A lower state court in California went even further and required a trial-type prior hearing.\(^8\) The hearing called for by that court includes, in addition to the procedural safeguards required by *Kelly*, testimony under oath, a record, and a written decision on the record by an impartial referee.\(^9\) By contrast, in *Wheeler v. Montgomery*, a three-judge federal court for the Northern District of California held that the opportunity for an informal conference with a caseworker before termination of benefits, coupled with a trial-type hearing subsequent to termination, satisfied due process.\(^10\) There are other cases, however, which have held that there is no right at all to a prior hearing.\(^11\) The Supreme Court has consented to hear the *Kelly*\(^12\) and *Wheeler*\(^13\) cases during the present term. The general constitutional problem raised by those cases concerns the extent to which due process operates as a limitation on the right of a state to terminate welfare

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7. 294 F. Supp. at 903-06. The opinion was written by Judge Wilfred Feinberg and concurred in by Judges Frederick van Pelt Bryan and Edward C. McLean.
8. McCollough v. Terzian, No. 379,011 (Cal. Super. Ct. May 2, 1968). For other cases in which a prior hearing has been required, see note 4 supra.
9. In stating the requirements necessary in a prior hearing, the court applied the procedural safeguards established by state statute for posttermination hearings. Those procedural safeguards are specified in CAL. WELF. & INSTNS. CODE, §§ 10950-65 (West 1966).
10. 296 F. Supp. 138 (1968). The opinion in that case was a memorandum opinion entered by Judges O.D. Hamlin, Albert C. Wollenberg, and Alfonso J. Zirpoli. For the relevant state regulation, see note 23 infra.
payments to individual recipients. More specifically, the questions are whether a full and adequate hearing must be made available before termination, and if so, what minimum procedural safeguards are required to ensure such a hearing.14

I. THE PRESENT STRUCTURE OF WELFARE PROGRAMS

There are two basic types of welfare programs—categorical assistance and general assistance.15 Categorical assistance programs are supported by federal grants-in-aid and are administered by the states according to regulations established by the Secretary of Health, Education, and Welfare.16 Those programs include old-age assistance,17 aid to families with dependent children,18 aid to the blind,19 and aid to the permanently and totally disabled.20 General assistance, on the other hand, is financed and administered solely by the state and local governments, and is therefore not subject to federal regulation.21

With respect to categorical assistance, the absence of any Supreme Court decision defining the minimum procedural safeguards prior to termination renders the federal regulations the only nationwide guidelines. The states, of course, could afford the recipient the needed protection. But most state statutes provide for a "fair" hearing only after termination,22 and thus permit the agencies to

14. These issues will be significant even if Congress adopts President Nixon's proposal that a negative income tax replace many of the present federal welfare programs, including the Aid to Families with Dependent Children program (AFDC). His proposal calls for a "family assistance system" that would guarantee a basic minimum income to all families in all states but that would also provide an incentive to work by allowing the "working poor" to keep part of their welfare grants. That system would be administered by the federal government. See Speech by President Nixon, N.Y. Times, Aug. 9, 1969, at 1, col. 8. But the proposed system would not eliminate all of the present programs. For example, programs for aiding the aged, the blind, and the disabled would remain unaffected. Thus, the question whether a prior hearing is constitutionally compelled would still be important in the administration of those programs. Moreover, even with respect to the guaranteed minimum income itself, the constitutional issues presented here would arise, for it is questionable whether those payments could be terminated or reduced without an adequate hearing.


21. General assistance includes various home relief programs administered under state welfare laws. Such programs provide for aid to poor people; unlike categorical assistance programs, they are not based on particular categories of individuals.

22. State statutes seldom make a clear delineation between procedures to be applied to categorical assistance programs and those to be applied to general assistance. Further-
cease payments without any sort of adjudicative procedure beforehand. Even in jurisdictions in which the state regulations now call for an "informal conference" prior to termination, the procedure is inadequate, for it fails to provide many of the safeguards necessary to satisfy due process. Until there is a constitutional decision, then, federal regulations must be relied on to give a welfare recipient sufficient protection prior to a termination of his grants.

The present regulation of the Department of Health, Education, and Welfare (HEW) requires an informal conference before benefits are terminated. But in at least one county in California, the regulation has not been implemented, and, while actual administrative practices in other localities are not known, various studies have suggested that actual practice deviates significantly from federal requirements. Moreover, it is doubtful that the informal conference procedures are often buried in inaccessible administrative regulations. Nevertheless, the following state statutes are examples of those which provide for a fair hearing subsequent to the termination of benefits:

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<th>State</th>
<th>Statute</th>
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<tr>
<td>FLA. STAT. ANN.</td>
<td>§ 409.19 (1960)</td>
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<td>ILL. REV. STAT.</td>
<td>ch. 23, § 11-8 (Supp. 1969)</td>
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<td>IND. ANN. STAT.</td>
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<td>IOWA CODE ANN.</td>
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<td>MASS. ANN. LAWS</td>
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<td>MINN. STAT. ANN.</td>
<td>§ 261.123 (Supp. 1969)</td>
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<td>MO. ANN. STAT.</td>
<td>§ 508.060 (1962)</td>
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What constitutes a fair hearing, however, is unclear. The state statutes frequently do not specify the procedural requirements of such a hearing. Thus, a precise definition of a fair hearing is necessary, and either a federal regulation or a constitutional decision by the Court could provide that definition.

23. E.g., CAL. STATE DEPT. OF SOCIAL WELFARE, PUBLIC SERVICES MANUAL, Reg. 44-205.484, provides in pertinent part:

The recipient ... shall be notified, in writing, immediately upon the initial decision being made to withhold a warrant beyond its usual delivery date for any reason other than death, and in no case less than three (3) mail delivery days prior to the usual delivery date of the warrant to the recipient ... Every notification shall include:

- A statement that the recipient ... 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, and the last day of which shall be at least one (1) day prior to the usual delivery date of the warrant, and at a place specifically designated 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 ...; and
  - (c) To discuss the entire matter informally for purposes of clarification and, where possible, resolution.

24. For a discussion of the minimum procedural safeguards which are required by due process, see text accompanying notes 107-37 infra. The "informal conference" clearly does not fulfill all of those conditions.


which the regulation requires is sufficient to comport with due process. 28

A new HEW regulation, however, which is scheduled to become effective July 1, 1970, requires state plans for administering federal welfare programs to provide that "[w]hen a fair hearing is requested because of termination . . . of assistance, . . . 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." 29

Since that regulation requires that recipients of categorical assistance be given a fair hearing before their aid can be terminated, it might appear to moot their constitutional claim for a prior hearing. Both Wheeler and Kelly involved recipients of categorical assistance, and thus the forthcoming regulation will probably have a significant effect on the Supreme Court's decisions in those cases. 30 Both are suits for an injunction to compel the state to furnish a full and adequate hearing before termination of benefits—a result which will arguably be accomplished by the regulation. Thus, the Court, instead of hearing the constitutional issue, might dismiss or remand the cases on the grounds that the forthcoming regulation will provide adequate relief. 31 That course of action, it is submitted, would be a mistake. There are a great many problems with the new regulation, and consequently the constitutional issues, even in the categorical assistance context, remain crucial.

There is the danger, first of all, that states will not implement

28. For a discussion of the requirements of due process, see text accompanying notes 107-65 infra. The informal procedure described in HANDBOOK pt. IV, § 2300(d)(5), lacks many of those safeguards.

29. 34 Fed. Reg. 1144 (1969). The original effective date of the new regulation was October 1, 1969. But in August, the effective date was moved back to July 1, 1970. 34 Fed. Reg. 13,595 (1969). The fair hearing referred to in this regulation is defined and the safeguards it provides are specified in HANDBOOK pt. IV, §§ 6200-500. For a discussion of some of the defects of the procedure prescribed by the new regulation, see notes 40-41 infra and accompanying text.

30. The recipient in Wheeler was receiving Old Age Security Assistance, a type of categorical assistance. In Kelly, although four of the eight plaintiffs received aid under AFDC, another federal program, the other four were recipients of general assistance—home relief under the New York Social Welfare Law. The new federal regulation will have no effect on the home relief recipients. See note 50 infra.

31. The Supreme Court has taken similar action before. In Thorpe v. Housing Authority, 393 U.S. 268 (1969), the question was whether a tenant in a subsidized housing project could be evicted without notice or hearing. While that case was pending before the Supreme Court, the Department of Housing and Urban Development (HUD) promulgated a regulation providing for both notice and a hearing. The Court remanded the case for a determination of whether that regulation had retroactive effect, and, if so, for proceedings consistent with the regulation. See note 66 infra and accompanying text. Wheeler and Kelly are suits for an injunction and thus the question of the retroactivity of the HEW regulation is not pertinent to the Court's decision.
the regulation. Indeed, some states find it desirable to obtain federal funds without conforming to federal procedural regulations;32 those regulations increase state expense and reduce the discretion of local welfare officials to terminate benefits. Should states refuse to implement the new regulation, there may be great difficulty in enforcing it. HEW may be unaware of a failure to conform to its regulation since its inspection of state and local operations is frequently inadequate.33 That deficiency is compounded by the fact that dissatisfied recipients cannot call attention to any failure to conform since they have no right to appeal directly to HEW.34 If the Supreme Court should decide that an adequate prior hearing is constitutionally required, however, states would probably be more willing to follow that direct requirement.

Secondly, if the Court avoids the constitutional issue, it will be difficult for a welfare recipient to secure a court order for a pretermination hearing. Without a constitutional decision, the present inconsistency among lower courts will remain—some will say that there is a constitutional right and will grant relief, and others will deny the right altogether.35 The new federal regulation will not cure that inconsistency, because nation-wide compliance with the regulation cannot be judicially enforced. Federal welfare regulations are administrative directives addressed solely to state agencies, and do not grant substantive rights to individuals.36 Thus, under the new federal regulation, there is no right to a prior hearing, and a recipient who bases his claim solely on that regulation may be unable to obtain relief in either a state or a federal court. Although some states have incorporated the regulation into state law, thereby giving the recipients a right to judicial enforcement of it in state courts, that course of action is by no means universally available.37

Accordingly, in many instances, the sole means of forcing the states to provide a pretermination hearing is for the federal government to withhold funds. But that course of action has had an ex-

32. See note 27 supra and text accompanying note 47 infra.
35. See notes 4-10 supra and accompanying text.
36. Moreover, since state participation in categorical assistance programs is voluntary, recipients have no right to federal welfare money. McCall v. Shapiro, 292 F. Supp. 268, 276 (D. Conn. 1968).
37. Note, Federal Judicial Review of State Welfare Practices, 67 COLUM. L. REV. 84, 95 (1967). The federal regulation defining fair hearing specifically acknowledges that judicial review of welfare decisions is unavailable in some states, and it does not purport to change this rule. HANDBOOK pt. IV, § 6400(i); cf. Testa v. Katt, 330 U.S. 386 (1947) (holding that state courts have a duty to enforce a claim under federal statute which specifically provides for jurisdiction in state courts).
tremely adverse effect on welfare recipients, and has therefore seldom been applied.\textsuperscript{38} Moreover, since 1965, states have had the right to judicial review of decisions to withhold funds.\textsuperscript{39} That right reduces the negotiating leverage which the threatened withholding of federal funds would otherwise have and prolongs the possible duration of non-conformity.

But if the Supreme Court should decide that a pretermination hearing is constitutionally required, a wider range of remedies would be available. Since there would be a constitutional mandate for a prior hearing, recipients would be able to secure enforcement of that mandate in either a state or a federal court, and reliance on the federal regulation would be unnecessary. The recipient's ready access to the courts, in turn, would make a state's continued failure to conform to the constitutional standard easier to remedy.

Even if state adherence to the forthcoming regulation could be effectively enforced, a constitutional decision is necessary. As will be shown later, the fair hearing which the regulation provides does not specifically include all of the minimum procedural safeguards required by the Constitution.\textsuperscript{40} The regulation defining fair hearing does have a saving clause making the hearing "subject to the requirements of due process,"\textsuperscript{41} but that clause will become operative only when there is an explicit constitutional decision as to what safeguards due process requires.

Finally, the new federal regulation is subject to modification or revocation. Since the regulation was promulgated by a lame-duck, Democratic administration,\textsuperscript{42} such action seems likely. Indeed, the present Republican administration has expressed dissatisfaction with the costly procedures of the welfare system and has proposed that a major part of the system be eliminated in favor of a negative income tax.\textsuperscript{43} If Congress should adopt that proposal, the HEW regulation, which applies only to existing welfare programs, would lose much of its effectiveness. Yet the same constitutional issues concerning the necessity for a prior hearing would remain with re-

\textsuperscript{40} The fair hearing procedure, as defined in Handbook pt. IV, §§ 6200-500, contains insufficient notice of the opportunity for a hearing, and it fails to include the right of recipients to confront adverse witnesses. It therefore fails to provide minimum, constitutionally required procedural safeguards. See text accompanying notes 107-37 infra.
\textsuperscript{41} Handbook pt. IV, § 6400(a).
\textsuperscript{43} See Speech by President Nixon, N.Y. Times, Aug. 9, 1969, at 1, col. 8.
spect to the termination of the negative tax payments.\textsuperscript{44} Even if Congress does not adopt the proposal, the HEW regulation creating more expensive procedures may be changed or withdrawn at the discretion of the Secretary of Health, Education, and Welfare. Thus, since the regulation, even before it goes into effect, faces a potential revocation,\textsuperscript{46} the necessity for a consideration of the constitutional issues, even in the categorical assistance context, is obvious.

The constitutional questions are even more significant for general assistance. General assistance programs are administered solely by the state and local governments and are thus not governed by federal regulations. There are, moreover, a substantial number of people affected by those programs. In 1968, for example, 749,000 people received benefits under them.\textsuperscript{48} Procedures are fixed by state administrative directives and local ordinances, and those procedures are often in sharp conflict with federal standards.\textsuperscript{47} In fact, before the current flood of constitutional challenges, only one state had a general provision for a prior hearing,\textsuperscript{48} and even that provision was not generally accepted.\textsuperscript{49} Thus, even if the forthcoming HEW regulation is found to moot the constitutional issues in the categorical assistance context, the same issues are alive and important with respect to general assistance. Because of their importance in these circumstances, the Supreme Court, confronted with the constitutional issues in both \textit{Wheeler} and \textit{Kelly}, should take the opportunity to decide them.\textsuperscript{50}

II. THE DUE PROCESS CLAUSE APPLIES TO THE TERMINATION OF WELFARE BENEFITS

Although the Supreme Court has not expressly held that the requirement of procedural fairness contained in the due process clauses of the fifth and fourteenth amendments is applicable to the

\textsuperscript{44} See note 14 supra.

\textsuperscript{45} In fact, under the Nixon administration, the effective date of the forthcoming regulation has already been changed from October 1, 1969, to July 1, 1970. See note 29 supra.


\textsuperscript{47} See note 27 supra.


\textsuperscript{50} Indeed, in the \textit{Kelly} case, four of the original plaintiffs had general assistance benefits terminated without a prior hearing. Kelly v. Wyman, 294 F. Supp. 893, 896 (S.D.N.Y. 1968), \textit{prob. juris. noted sub nom. Goldberg v. Kelly}, 394 U.S. 971 (1969). Their suits remain unaffected by the new federal regulation, and so the Court's disposition of them must be on constitutional grounds.
termination of welfare benefits, its prior decisions suggest that
such a holding is likely.51 For the due process clause to apply, there
must be both state action and a deprivation of “life, liberty, or
property” or of some other individual interest of sufficient im-
portance to warrant constitutional protection. Since the termina-
tion of welfare benefits clearly involves state action,52 the only sig-
ificant question here is whether it deprives individual recipients of
a protected right.

It can be argued that recipients have no vested property right
to regularly recurring subsistence grants,53 and that therefore pro-
cedural due process is not relevant to the termination of welfare
benefits. Welfare payments, the argument runs, are merely an ex-
ercise of governmental largesse and may be summarily terminated.
According to that argument, since the legislature has the undisputed
power to vote the entire state welfare program out of existence,54
it can set any restrictions it desires on that program without calling
into play the due process clause.

This contention, however, is not persuasive. Indeed, there are
three distinct explanations for the applicability of the due process
clause in the welfare situation. The first is that, while welfare re-
cipients probably do not have a “vested” property right to a con-
tinued stream of benefits,55 they do have a statutory right to those
benefits so long as they are qualified. Arguably, welfare statutes
confer a “property right” to continued benefits, under a somewhat
expanded definition of that term.56 Since the legislatures have pro-
vided welfare benefits on a large scale to a well-defined class of
recipients within a regular institutional framework,57 those benefits
are clearly not granted as special favors to particular individuals.
A welfare recipient would have no right to be free from hardship
if the legislature did not appropriate funds for welfare. But, ac-

51. To say that the due process clause is applicable does not necessarily mean that a
hearing prior to termination is constitutionally required. But it is only after that
clause is found to apply to the termination of welfare benefits that the question of
what due process requires prior to termination can be properly considered.
52. See Thorpe v. Housing Authority, 386 U.S. 670, 678-79 (1967) (Justice Douglas,
concurring).
53. See Flemming v. Nestor, 363 U.S. 603 (1960) (holding that the Government may
deprive a recipient of old-age benefits even though the recipient and his employer have
made contributions over the years to qualify for those benefits).
55. See supra and accompanying text.
56. See Graham, Public Assistance: The Right To Receive; The Obligation To
Repay, 43 N.Y.U. L. Rev. 451 (1968); Morris, Welfare Benefits as Property: Requiring a
Prior Hearing, 20 Ad. L. Rev. 487 (1968); Reich, The New Property, 73 YALE L.J. 733
(1964); Smith, Public Assistance as a Social Obligation, 63 Harv. L. Rev. 266 (1949).
cording to this explanation, once the welfare recipient has the
prima facie characteristics of the class to which the legislature has
given benefits, he has a statutory right to some measure of pro-
cedural protection. Commentators making this argument are quite
sensitive to the brutal impact of terminating the benefits of an
eligible recipient and recommend an expansion of the concept
of property rights only to promote full and adequate procedural
safeguards in that situation.68

The second explanation is that the government must abide by
fundamental principles of fairness even when dispensing a privi-
gle. It has been held that the recipient of governmental aid—
whether unemployment compensation,59 a license to practice law,60
or free education61—is entitled to the protection of the due process
clause, even if the aid is considered a privilege. The same principle
would appear to apply in the case of welfare benefits.62

The third explanation—the one favored by the Supreme Court63
—looks at the importance of the individual interests at stake without
attempting to classify them as “life,” “liberty,” or “property,”
or as rights as opposed to privileges. Under this approach, the due
process clause is applicable whenever the state deals with the indi-
vidual, as long as the individual interests are not frivolous. Since
an erroneous termination of welfare benefits may deprive the re-
cipient of necessary food and medicine, the individual’s interests
are hardly frivolous. Therefore, the due process clause is rightfully
invoked, and a constitutional question is raised as to whether due
process requires a full and adequate hearing prior to termination.

III. DUE PROCESS REQUIRES A FULL AND ADEQUATE HEARING
PRIOR TO THE TERMINATION OF WELFARE BENEFITS

Once the due process clause is found to be applicable, the crucial
question is whether it requires a full and adequate hearing prior

58. See note 58 supra.
61. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), cert. denied,
62. The weakness of this explanation is that a substantial constitutional question
as to whether a hearing is required would be posed in nearly every situation in which
the government deals with the individual. That result is not always desirable. In some
cases the claimed right to a hearing will be clearly frivolous, and the courts should
waste a minimum amount of time disposing of it. For instance, if the President
dismisses the Secretary of State, the government’s interest in being able to dismiss that
employee without giving reasons so clearly outweighs the individual’s interest in not
being arbitrarily removed from his job that the claimed right to a hearing should
be dismissed without a trial of the issues. The same rule should apply whenever the
balance of interests is tipped very heavily in favor of the government. See text accom-
panying note 68 infra.
Procedural due process is a flexible requirement which depends upon "[t]he 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 which was followed, ... and the balance of the hurt complained of and good accomplished ..." In applying that balancing test to the question at issue, the probable damage to individual interests resulting from an erroneous termination of benefits must be balanced against the government's interest in summary procedures. If the recipient's interest outweighs the government's, he cannot constitutionally be deprived of his welfare payments without a prior hearing.

The Supreme Court has not yet had occasion to apply the balancing test in the welfare assistance context. In a similar case, Thorpe v. Housing Authority, in which the question was whether a tenant in a subsidized housing project could be evicted without notice and a hearing, the Court did require a prior hearing. But it based its decision in that case on a federal regulation, and specifically reserved the due process question.

This approach, however, is not without critics. One commentator argues that the process of weighing interests requires the courts to canvas "a host of variables in a quasi-legislative fashion on the strength of a barely adequate record . . . ." Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439, 1447-48 (1968). Nevertheless, that commentator is obviously in agreement with the extension of the right to a hearing—a result which the balancing approach has wrought in this instance. In fact, he argues that it would be desirable to have an absolute right to a hearing which would extend to all situations. Id. at 1454. But there are some instances in which a hearing is clearly undesirable. One example Davis uses is the removal of the Secretary of State by the President. 1 K. Davis, Administrative Law Treatise 454 (1958); see note 62 supra. Thus, since no absolute rule can be applied, the use of the weighing process is inevitable. Davis states:

The true principle is that a party who has a sufficient interest or right at stake in a determination of governmental 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 circumstances when some other interest, such as national security, justifies an overriding of the interest in fair hearing.

64. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Justice Frankfurter, concurring). Compare the standard applied in Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961): "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 affected by governmental action." In Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963), the Supreme Court weighed the interests of the government and the individual in its determination that due process requires the confrontation of adverse character witnesses before an individual can be excluded from the practice of law.

This approach, however, is not without critics. One commentator argues that the process of weighing interests requires the courts to canvas "a host of variables in a quasi-legislative fashion on the strength of a barely adequate record . . . ." Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439, 1447-48 (1968). Nevertheless, that commentator is obviously in agreement with the extension of the right to a hearing—a result which the balancing approach has wrought in this instance. In fact, he argues that it would be desirable to have an absolute right to a hearing which would extend to all situations. Id. at 1454. But there are some instances in which a hearing is clearly undesirable. One example Davis uses is the removal of the Secretary of State by the President. 1 K. Davis, Administrative Law Treatise 454 (1958); see note 62 supra. Thus, since no absolute rule can be applied, the use of the weighing process is inevitable. Davis states:

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1 K. Davis, supra, at 412.


66. When the case came before the Supreme Court, the Court remanded it with instructions that the state court was to determine whether a new HUD directive providing for notice and a hearing had retroactive effect. Thorpe v. Housing Authority, 386 U.S. 670 (1967). The state court held that the directive did not apply, but the Supreme Court at a second hearing held that it did. 393 U.S. 268 (1969). Thus, the due process question was avoided.
There are numerous decisions, however, concerning the constitutional necessity for a hearing before the termination of licenses, the expulsion of students from state colleges, the loss of federal employment, and the deportation of aliens. Those cases can be distinguished from that of the termination of welfare benefits because they involved considerations of detrimental reliance and, in some cases, national defense—considerations not found in the welfare situation. But even though those cases cannot be controlling as to whether a hearing is required prior to the termination of welfare benefits, they can be used to determine what interests have been considered important in the balancing process.

A common feature of the cases was the nature of the facts which the hearing was designed to establish. Each decision involved facts peculiar to the individual—which Professor Kenneth Culp Davis calls "adjudicative facts"—as opposed to facts determining general policy decisions—which he calls "legislative facts." In those cases, the individual was the best source of information, and was in the

67. As early as 1926, the Supreme Court declared in dictum that admission to practice as an accountant could not be denied on the basis of character unfitness without a hearing. Goldsmith v. Board of Tax Appeals, 270 U.S. 117. In 1963, the Court held that before a state may exclude an individual from the practice of law for character unfitness, there must be an opportunity for confrontation of adverse witnesses. Willner v. Committee on Character & Fitness, 373 U.S. 96. The admission-to-practice cases are part of a general class of cases involving state licensing. In 1964, the Fifth Circuit held that a liquor license could be denied without a hearing. Hornsby v. Allen, 326 F.2d 605. These cases all require a hearing and thus lend support to the argument that a hearing is required in welfare cases.


71. In the admission-to-practice cases, the effort it takes to complete law school and to pass the bar examination constitutes detrimental reliance on the objectivity of government licensing. An arbitrary denial of the right to practice law at this point is palpably unfair. In the termination of other types of licenses, there is usually detrimental reliance on the fairness of termination proceedings. That reliance frequently involves business expenses such as advertising and nonsaleable investments. In obtaining welfare benefits, however, there is no detrimental reliance in most states. But there are exceptions. In Illinois, for example, an AFDC recipient must dispose of all assets in excess of one month's welfare benefits before qualifying. BUREAU OF FAMILY SERVICES, U.S. DEPT. OF HEALTH, EDUCATION & WELFARE, CHARACTERISTICS OF STATE PUBLIC ASSISTANCE PLANS UNDER THE SOCIAL SECURITY ACT, GENERAL PROVISIONS 116 (Public Assistance Report No. 50, 1964). Similarly, in Florida, before aid may be paid, court actions for support must be prosecuted against anyone who may be liable for support. FLA. STAT. ANN. § 409.182 (1960).

With regard to the student expulsion cases, the same type of detrimental reliance described above distinguishes a state subsidy to a student's education from a state subsidy to pay for food and housing. The federal employment cases are dominated by national security issues which are not found in welfare cases. Finally, the deportation decisions raise issues such as national defense and the breaking up of family unity—issues not found in welfare cases.

best position to rebut opposing information, about facts such as his own character, his conduct in college, or his connections with the Communist Party. The courts held that, because such adjudicative facts were involved, the state was required to furnish a hearing before it could act.

The termination of welfare benefits also generally involves adjudicative facts. The welfare recipient, typically a woman, is the best source of information about her income, the presence of a man in the house, and other factors determining eligibility. "Legislative facts" in the welfare situation might include a change in the cost-of-living index leading to an across-the-board increase in benefits, or another change in the general rules of eligibility; with respect to those facts the individual recipient would have no right to a hearing. But these situations are not at issue here. Thus, it appears from an examination of the available precedents that when the situation involves adjudicative facts, as it does in termination of welfare benefits, the courts tend to give decisive weight to the individual interests and to require a hearing.

In applying the balancing test directly to the welfare situation, the individual's interest in having an adequate hearing prior to termination must be weighed against the public interest in conserving tax revenues. It is important, at the outset, to characterize the hardship suffered by a recipient who is not afforded a pretermination hearing. The Supreme Court has held that if the hardship is a mere "inconvenience," it weighs lightly in the balance, but if it involves a substantial monetary loss and a change in living standards, then it weighs more heavily. When the hardship has had an adverse effect on health, and when it has approached a deprivation of life, it has usually been controlling.

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76. In only one case of those listed above was a hearing not required. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961). But there the Government had a special interest in the security of a naval base.
77. When a short-order cook is excluded from the employment of only one particular employer, the interest harmed does not weigh heavily. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961).
79. Numerous cases have permitted spoiled or mislabeled food to be seized without a hearing. Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (permitting summary seizure of allegedly mislabeled food); North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1909) (permitting summary destruction of food reasonably thought to be spoiled). Since property cannot normally be seized without a hearing, the public interest in health weighed heavily in reaching those decisions. The possibility that an erroneous termination of benefits may affect the health of the individual recipient may be analyzed in two ways. The individual has an interest in protecting his own health. But also there is a public interest in protecting public health, and that interest requires protecting the health of each individual. Since the threat to health in welfare cases is the result of state action rather than private action, the case for protecting
In the situation at hand, it is clear that the hardship suffered by a welfare recipient whose grants are wrongfully terminated is substantial. In the *Kelly* case, for example, an erroneous termination of welfare benefits, coupled with the four-month delay before the error was corrected, resulted in the overcrowding of thirteen children and two adults into a small apartment where the children lost weight and became ill from lack of food. In the same case, another of the plaintiffs, along with her family, "had to go to the hospital for severe diarrhea, apparently brought on by the only meal they had had that day—spoiled chicken and rice donated by a neighbor." In *Wheeler*, after an erroneous termination of welfare benefits, plaintiff lacked food, medicine, and other necessities. These examples are by no means unusual or unrepresentative. In *Kelly* the Court found that only fifty of seventy-eight cases during a five-month period were affirmed in posttermination hearings; and in *Wheeler* it was stated that California's own eligibility control unit had found that aid to five to eight percent of all recipients was erroneously terminated, while aid to only one percent of recipients was erroneously continued. The four-month delay before reinstatement was also typical. Thus, in a substantial number of cases, welfare recipients had benefits wrongfully withheld for a long period of time. The resulting hardship frequently involved adverse effects upon the health of the recipients or, at least, a substantial reduction in their standard of living.

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85. A consideration which has been important in other cases is the degree of oppro-
If that hardship is to be eliminated, there must be a procedure for correcting erroneous decisions without a delay. The posttermination hearing which is provided by most states has proven inadequate for that purpose. In both Kelly and Wheeler, the welfare procedures required a prompt hearing on a request after termination of benefits. Yet in both cases, the states involved averaged a four-month delay before posttermination hearings were completed. Once benefits are terminated there is no incentive for welfare officials to be prompt. The practical solution seems to be a requirement that a full and adequate hearing be available prior to termination of welfare benefits. Thus, the individual recipients appear to possess a very strong interest in having the right to such a hearing.

brium resulting from administrative action. In the termination of welfare benefits, the recipient is often alleged to be an unfit mother or to have engaged in "immoral" conduct. This type of label must be damaging to the pride and reputation of a poor person who has done nothing wrong. The impact may not be as great as being labeled a "Communist" or a "security risk," but it should be considered. Cf. Greene v. McElroy, 367 U.S. 474 (1959); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 866 (1961).


88. See note 85 supra.

89. The case law on the issue of the timing of hearings involves analogies which are not close enough to be considered controlling in a welfare case. Furthermore, in most of those cases, the primary issue was whether any hearing was required, and the issue of timing was only incidental to an affirmative answer. For instance, the Supreme Court has held that a resident alien cannot be deported without a hearing prior to deportation. However, the Court has not squarely faced the issue of whether a resident alien may be detained pending a deportation hearing when there is no immediate risk to national security. Shaughnessy v. Mezei, 345 U.S. 206 (1953); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Carlson v. Landon, 342 U.S. 524 (1952).

Often the timing of the hearing is not crucial. For instance, in the case of the expulsion of a student from a state college, it does not cause great harm if the student is suspended for a few days pending a hearing. Indeed, that procedure is permitted. Madera v. Board of Educ., 386 F.2d 778 (9th Cir. 1967), cert. denied, 390 U.S. 1028 (1968); Wasson v. Trowbridge, 382 F.2d 807 (9th Cir. 1967); Barker v. Hardway, 283 F. Supp. 228 (S.D. W. Va.), aff'd, 399 F.2d 638 (4th Cir. 1968). But a hearing must be held before a permanent suspension. Woods v. Wright, 384 F.2d 309 (6th Cir. 1964); Knight v. State Bd. of Educ., 200 F. Supp. 174 (N.D. Tenn. 1961). Only when there has been an effect on health and the possibility of a permanent injury has the issue of timing assumed importance. Food reasonably thought to be spoiled may be seized and destroyed before a hearing is held. North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 366 (1908). A doctor's surgical privileges at a state hospital may be suspended when the safety of patients is in jeopardy. Coach v. State, 165 S.W.2d 426 (Fla. Dist. Ct. App. 1944). But when the threat to health is doubtful, and the grounds of the doctor's suspension would result in a permanent loss of reputation, a prior hearing is required. Birnbaum v. Trussell, 371 F.2d 672 (9th Cir. 1966).

90. If welfare recipients could be divided into various classes according to the degree of hardship suffered when benefits are erroneously terminated, different requirements might be proposed for different classes. For instance, if a state were to grant supplemental benefits to provide special education for disadvantaged families, a hearing could, without causing hardship, be postponed until after benefits were terminated. However, welfare benefits are usually granted only to maintain a minimum standard of living and, therefore, the procedural requirements applied to most welfare programs should be uniform.
The governmental interests, on the other hand, are slight. Of course, the requirement of a prior hearing would increase the government's expenses to some extent. Since a request for such a hearing would temporarily suspend the termination of welfare benefits, there would be an increased incentive for recipients to make that request even if they knew they were not qualified. During the period between the request for a hearing and the hearing itself, the government would incur the expense of continuing benefits—an expense that could not be recouped.\(^\text{91}\)

Nevertheless, the Supreme Court has held in numerous cases that when the interest in reducing expenses and in conserving tax revenues is the sole justification for a denial of procedural protection, that interest is not entitled to any weight in the constitutional balancing process.\(^\text{92}\) Moreover, although the continuation of benefits until after a hearing is likely to be much more expensive than is the posttermination mechanism provided in most states,\(^\text{93}\) it does not necessarily have to be so. Under the New York procedure described in the \textit{Kelly} case, the welfare recipient received a notice of proposed termination seven days before benefits were actually terminated.\(^\text{94}\) It is possible that, with more personnel and increased efficiency, a requested hearing could be completed within those seven days. If so, there would be no extra incentive to request hearings and no added expense from continuing benefits. In addition, there are other possible ways to reduce the costs of a pretermination hearing.\(^\text{95}\) The forthcoming federal regulation, which will make prior hearings available on request, indicates that many governmental officials themselves have found that such a requirement is not too burdensome.

The state also has an interest in paying benefits only to those who meet the statutory requirements.\(^\text{96}\) That interest, however,
cuts both ways. On the one hand, the prior hearing rule means that some individuals will continue to receive benefits for a short period of time even though they are no longer qualified. But on the other hand, it will probably reduce the number of erroneous terminations and thus promote the governmental interest. Furthermore, the objection to the prior hearing requirement should not carry much weight. A person who continues to receive benefits until the hearing is either still in actual need of welfare, or is barely self-sufficient. Thus, it is clearly preferable that the error be the continuance of benefits for a short period of time to unqualified individuals who request a hearing than that the mistake be the termination of the benefits of individuals who are actually qualified.

Thus, the governmental interests in preventing an adequate prior hearing are entitled to very little weight. Indeed, on close examination, they are somewhat ambiguous—increased procedural protection yields both costs and benefits to the state. In the interest balancing which determines the requirements of due process, the interest of the individual in having the right to a hearing in order to avoid, as surely as possible, the brutal hardship of an erroneous termination of benefits outweighs the states' interests in conserving tax revenues and in avoiding erroneous payments. Due process, therefore, requires a full and adequate hearing prior to the termination of welfare benefits.

IV. THE MINIMUM PROCEDURAL SAFEGUARDS OF THE FULL AND ADEQUATE PRIOR HEARING REQUIRED BY DUE PROCESS

There are two basic ways to meet the constitutional requirement. One is to initiate a new hearing, fully comporting with the minimum due process safeguards, prior to the termination of

97. In Illinois, for example, an AFDC recipient, before qualifying, must dispose of all assets in excess of one month’s welfare benefits. If benefits are erroneously terminated, the family will become destitute within a short period of time. BUREAU OF FAMILY SERVICES, U.S. DEPT. OF HEALTH, EDUCATION & WELFARE, supra note 71, at 116.


Against the justified desire to protect public funds must be weighed the individual's need in this unique situation not to be wrongfully deprived of assistance, and the startling statistic that post-termination fair hearings apparently override prior decisions to terminate benefits in a substantial number of cases. The obvious remedy is to take greater care to prevent such injustice before it occurs.

99. Those safeguards are defined in the text accompanying notes 107-65 infra.
benefits, or to develop an existing pretermination conference, such as that provided in California,100 into a full and adequate hearing. Such a procedure would make the original posttermination fair hearing unnecessary. The other approach—that adopted by the forthcoming federal regulation—is to utilize the posttermination fair hearing mechanism that exists in most states, that is, to provide for the continuation of benefits until the original fair hearing has been completed.101 Under this approach, the existence of a prior informal conference is irrelevant to the constitutional requirement, although such a conference may be helpful in practical terms.102

Whether a new procedure is instituted or an existing fair hearing mechanism is used, the hearing prior to termination, in order to be adequate and effective and thus to satisfy the requirements of due process,103 must protect the recipient, with as much certainty as is possible, against an arbitrary and erroneous termination of his benefits. To do this, it must contain certain minimum procedural safeguards calculated to insure an accurate determination. Without those safeguards, a hearing is meaningless. As will be shown, the fair hearing, which, under the forthcoming federal regulation, must precede termination, is, on its face, constitutionally insufficient.104 But the constitutional infirmity is easily cured since the regulation defining fair hearing contains a clause stating that, despite the informal nature of the hearing described, “the hearing is to be subject to the requirements of due process.”105 Thus, if there is a decision as to what safeguards due process compels,106 the fair hearing provided in the regulation will become constitutionally sufficient.

The procedural safeguards required by due process in welfare termination proceedings must be adapted to the particular characteristics of welfare recipients, and to the special nature of the determination being made.107 There is the danger of a too literal

100. See note 23 supra.

101. It has been argued that the existence of a posttermination fair hearing reduces the procedural safeguards required in the prior hearing. See Wheeler v. Montgomery, 296 F. Supp. 138, 140 (N.D. Cal. 1968). That argument suggests that some erroneous terminations should be tolerated in the prior hearing because they may be corrected in the posttermination hearing. It must be rejected for the same considerations which led to a requirement of a prior hearing in the first place.

102. See the discussion of Professor Wickham’s proposal in note 169 infra.

103. A hearing which is not effective to adjudicate fairly whether the recipient is qualified could hardly be said to fulfill the constitutional requirement of an adequate prior hearing.

104. The procedural safeguards provided in the fair hearing are described in HANDBOOK pt. IV, §§ 6200-600. The deficiencies in that fair hearing are the failure to provide for oral notice of the opportunity for a hearing, and the failure to provide for confrontation of adverse witnesses. See text accompanying notes 126-28, 133 infra.

105. HANDBOOK pt. IV, § 6400(a).

106. The Supreme Court could make that decision in Wheeler or Kelly. See text accompanying notes 40-41 supra.

107. It is clear that due process requirements vary according to the circumstances
transposition of specific procedural safeguards from other contexts to this one. The controlling legal principle is that the hearing must be meaningful;\textsuperscript{108} it must afford a reasonable opportunity to correct error.\textsuperscript{109} In that determination some safeguards, such as adequate notice and the right to a personal appearance, are clearly necessary.\textsuperscript{110} Others, however, such as a written record or the right to counsel, are less clear.\textsuperscript{111} The discussion in this section will focus on the specific constitutional requirements which are the minimum for a full and adequate prior hearing.

A primary safeguard necessary to satisfy due process is that of adequate notification. The right to a prior hearing can hardly be meaningful unless the individual realizes that he has that right. In order for a hearing to be constitutionally sufficient, then, welfare recipients whose benefits are to be terminated must be notified of the opportunity for a hearing. But effective communication to a recipient that he has a right to such a hearing presents troublesome problems. One study shows that welfare recipients are reluctant to request and attend hearings on their own initiative.\textsuperscript{112} Even when they have received an oral explanation of the right to a hearing, they rarely exercise that right.\textsuperscript{113} There are many causes for this reluctance. The welfare recipient may be illiterate;\textsuperscript{114} he may not understand how to obtain a hearing;\textsuperscript{115} he may regard welfare as

\begin{itemize}
\item A fundamental requirement of due process is the opportunity to be heard, "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965).
\item See text accompanying notes 112-33 infra.
\item See text accompanying notes 140-65 infra.
\item Id. The very low proportion of cases in which hearings have been requested is evidence of the communication problem. Out of 141,286 Texas welfare recipients who were denied assistance or who had their grants lowered or terminated in 1966, only 653 filed appeals. Comment, \textit{Texas Welfare Appeals: The Hidden Right}, 46 TEXAS L. REV. 223 (1967).
\item Only 57\% of welfare mothers in New York City reached high school; only one of six graduated; and one of six did not get beyond the fourth grade. Cox, \textit{Families on Welfare in New York City}, 6 WELFARE IN REVIEW 24 (1968).
\end{itemize}
charity and not realize that it may be asserted as a right; he may believe that requesting a hearing would damage his interests by angering the social worker; or he may be afraid to attend the hearing. Thus, the welfare agency has a duty under the Constitution to make a reasonable effort to see to it that the recipients understand their right to a hearing.

Because of the widespread illiteracy and related problems, a standard written notice is usually insufficient. At a minimum, the right to a hearing should be explained to the recipient at the initial granting of benefits and at periodic re-evaluations. When benefits are to be terminated, the social worker, in addition to sending written notice, should telephone or visit the recipient and should carefully explain to him his procedural and substantive rights. If the recipient indicates in any manner that he wishes an appeal, the social worker should arrange a hearing.

Notice of the proposed termination and of the right to a hearing must be given sufficiently in advance of the scheduling of the hearing to permit adequate opportunity to prepare and attend. When the notification comes only three days before the adjudicative proceeding, as it did in *Wheeler*, the recipient has inadequate time to conduct discovery, to submit all the information necessary to re-establish his eligibility for welfare, and, in general, to prepare to argue for his livelihood. Such a result does not allow for a meaningful hearing, and consequently does not meet constitutional standards. On the other hand, since the recipient does not need a great deal of preparation, the permissible period might be as short as a week, although reasonable extensions should be allowed if the recipient has a legitimate excuse.

The notice must also set forth with particularity the reasons for

119. See notes 112-14 supra and accompanying text.
120. One commentator argues that the social worker should act as an advocate to secure maximum benefits for the recipient, and should even institute an appeal, if necessary. Briar, *Welfare from Below: Recipients' Views of the Public Welfare System*, 54 Calif. L. Rev. 370, 385 (1966).
121. Timeliness is one of the fundamental principles of notice in administrative hearings. See 1 K. Davis, *Administrative Law Treatise* 525-26, 530 (1958). The requirement of timeliness has been applied not only in civil cases, but also in criminal cases. *In re Gault*, 387 U.S. 1, 33 n.53 (1967). The underlying rationale extends also to administrative cases. Gonzales v. United States, 348 U.S. 407, 413-15 (1956).
122. The California regulation provides that the recipient is to be notified of the termination at least three days prior to the withholding of the grant, and that the informal conference may be held at least one day prior to termination. See note 23 supra.
termination. Since the recipient will have no other opportunity before the hearing to discover the case against him, the notice must include the reasons for termination and the nature and sources of the information relied on by the welfare agency. The state-approved "Notice of Action" form used in the Wheeler case employs such cryptic reasons as "Excess property," "Excess income," and "Change in living arrangement"—obviously meaningless terms. A permissible form of notice must be much more specific.

The pretermination fair hearing procedure, established by the forthcoming federal regulation, does not fulfill the constitutional notice requirements. Although it does provide for a timely written notice of the right to a hearing when benefits are to be terminated, it fails to require oral notification. Moreover, it does not provide that the written notice disclose the facts which the recipient must refute in order to prevail. Thus, even for recipients covered by the forthcoming regulation, a constitutional decision is necessary to assure minimum adequate notice of the right to a hearing.

As numerous cases have indicated, a meaningful hearing must also include the right to a personal appearance. Indeed, since the agency should have before it the facts necessary to determine the

123. Courts have held that "particularity" is another fundamental requirement of notice. See, e.g., In re Gault, 387 U.S. 1, 33 (1967).

124. Cf. Gonzales v. United States, 348 U.S. 407 (1955), in which a draftee was held to have a right to see an adverse Justice Department recommendation before he appealed a 1-A classification, so that he could have an opportunity to present facts and arguments to meet its contentions. That decision interpreted a "silent" statute in view of "our underlying concepts of procedural regularity and basic fair play." Gonzales v. United States, 348 U.S. 407, 412 (1955).


126. The new federal regulation requires that notice of the opportunity for a hearing be given in writing. Handbook pt. IV, § 6200(f). The requirement that the hearing be held "at a time, date, and place convenient to the claimant" assures that that notice will be timely. Handbook pt. IV, § 6200(g).

127. In another place, however, the regulation provides "written notice, and oral explanation as necessary, are given at the time of . . . termination of assistance." Handbook pt. IV, § 6300(f). But oral notice should be constitutionally required, not left to the discretion of the welfare agency.


129. Dixon v. Alabama State Bd. of Educ., 324 F.2d 150, 159 (5th Cir.), cert. denied, 358 U.S. 950 (1961); Parker v. Lester, 227 F.2d 708, 716, 717 (9th Cir. 1955); cf. Willner v. Committee on Character & Fitness, 373 U.S. 96, 103, 105 (1963) (admission to the bar cannot be denied without an opportunity to confront adverse character witnesses). It has been said that "argument may be oral or written." Morgan v. United States, 228 U.S. 465, 481 (1916). But written argument should be limited to cases involving highly educated people. Colorado State Bd. of Medical Examiners v. Palmer, 490 F.2d 914 (Colo. 1965) (opportunity to make written submissions is sufficient in the revocation of a doctor's license). When the hearing is provided for an illiterate welfare recipient, a requirement that argument be reduced to writing would be palpably unfair.
continued eligibility of the recipient, and since the recipient is the best source of information about those facts, a personal appearance becomes essential. At that personal appearance the government should disclose, more fully than it did in the notice, reasons for the termination and the nature and sources of adverse information, so that the recipient can respond completely to any false claims. When information is provided by an adverse witness, his identity and a summary of his testimony should be made available. If the recipient states facts which contradict the testimony of the adverse witness, or if he otherwise challenges the veracity of that witness, the welfare officials should arrange a confrontation. Since the recipient will not usually be represented by counsel in such a confrontation, a right to formal cross-examination, including testimony under oath, would be of little benefit. A better method might be to require that the witness whose testimony is challenged be questioned by a welfare official in the presence of the welfare recipient. Here again, the fair hearing referred to in the forthcoming federal regulation is deficient. It provides for disclosure of evidence, but fails to afford an opportunity for confrontation of adverse witnesses.

Another constitutional problem in this area is that of who presides over the hearing. There are several possible solutions to the problem, but the controlling legal principle in setting the minimum standard is impartiality. While that principle does not require an absolute separation of functions, it does require separating the judicial role from the investigative, for when investigating, prosecuting, and judging functions are combined in a single person, bias

130. See text accompanying notes 72-76 supra.

131. Hyser v. Reed, 318 F.2d 225 (D.C. Cir.), cert. denied, 375 U.S. 987 (1963); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 159 (5th Cir.), cert. denied, 368 U.S. 950 (1961). In Kelly, benefits were terminated on the basis of information from the recipient's landlord, who later evicted the recipient for nonpayment of rent. The landlord's reports were subsequently proved to be erroneous. Kelly v. Wyman, 294 F.2d 893, 899 (S.D.N.Y. 1968). The right of confrontation will help to prevent such abuses in the future.

132. Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963). The right of the recipient to confront adverse witnesses and the desire of the welfare agency to confront the recipient's witnesses raise the problem of the lack of compulsory process for obtaining those witnesses. However, the welfare agency is not bound by rules of evidence. If reasonable efforts to obtain attendance are unsuccessful, the same result might be achieved through a telephone call, although the testimony of a person who, for no good reason, refuses to appear might be given no weight in the determination. For the above reasons, then, compulsory process has not been required. Hyser v. Reed, 318 F.2d 225 (D.C. Cir.), cert. denied, 375 U.S. 957 (1963).

133. The regulation provides that a decision be based only on that "evidence and other material" which the claimant has "an opportunity to hear or see." HANDBOOK pt. IV, §§ 6200(6), 6300(6). Therefore, under the regulation, a written statement of an adverse witness could be the basis of a decision even if there were no opportunity for confrontation.

is presumed. Thus, the caseworker who investigated and prosecuted the case would be an improper person to conduct the hearing. Even a higher official, if he had dealt with the case before, could not be allowed to preside. But a supervisory official who did not have prior contact with the case could, consistent with due process, conduct the hearing, as could an independent hearing examiner or an impartial board which included local representatives of poor people.

Since the minimum constitutional safeguards required in a welfare termination hearing consist only of those which are meaningful in the welfare situation, some of the formalities that are required in a trial context are not meaningful and thus not required when welfare grants are to be terminated. One of those formalities is direct judicial review of the initial decision. While such review might be desirable, it has never been constitutionally required in administrative proceedings. Without judicial review, in turn, various other formalities, such as testimony under oath, a record, and a decision based only on competent evidence in the record, become unnecessary. Those formalities would not only increase the expense of the hearing but could add to the insecurity of welfare recipients, for they might make the hearing seem too much like a trial and thus tend to make the recipients afraid to speak for fear that their words would be written down and used against them. Furthermore, when the administrative decision is final, the record is of no benefit to the recipient, and the oath is a matter of indifference. The purposes of having a decision on the record are achieved by disclosing


136. It is psychologically impossible for one who has had the duty to make the case as strong as possible to judge it impartially. Won Yang Sun v. McGrath, 339 U.S. 33, 44 (1950).

137. On this point, the fair hearing mentioned in the new federal regulation conforms to minimum due process requirements, for it provides that the hearing be conducted by an impartial official who has had no prior contact with the case. HANDBOOK pt. IV, §§ 6300(g), (h).

138. See text accompanying notes 107-09 supra.

139. Indeed the current cases attacking the administration of welfare are based on the review of a court record and not on a direct review of the administrative decision.

140. The right of judicial review has always been based on statutes providing for review. "[T]he Supreme Court has never held that denial of limited review is a denial of due process of law." 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE 106 (1958). When the government imposes an obligation on the individual, however, the Court has often strained statutory language to provide some review. For instance, the Court has held that decisions of draft boards made "final" by statute can be reviewed in habeas corpus or in criminal proceedings for violation of the draft law. Estep v. United States, 327 U.S. 114 (1946). But welfare cases involve a termination of benefits rather than an imposition of an obligation. Furthermore, even if judicial review were constitutionally required, de novo review rather than review of the administrative record would be sufficient. See Note, Federal Judicial Review of State Welfare Practices, 67 COLUM. L. REV. 84 (1967).

141. See generally text accompanying note 117 supra.
to the recipient at the hearing all the evidence against him. Finally, the presiding welfare official, unless he has had previous practical experience, is unlikely to know what evidence is competent. Thus, in light of the nature and use of the determination being made, these trial-related formalities are not constitutionally required. Nevertheless, if the state provides for a right to an administrative appeal or to a judicial review of the hearing decision, even though that right is not constitutionally required, then a record, an oath, and a reasoned decision based on competent evidence in the record would become necessary.\footnote{142}

The most difficult procedural question concerns the welfare recipient’s right to counsel at a termination hearing. It is submitted that due process does not compel the state to provide counsel or even to admit the recipient’s own counsel to the hearing. Nevertheless, the arguments in favor of the right to have an attorney present prevent the issue from being clear-cut.

The presence of attorneys in welfare hearings would enable illiterate and inarticulate recipients to understand more clearly the reasons for the termination of benefits and to overcome their doubts and fears about the hearing itself.\footnote{143} Since an attorney has professional skill in fact presentation, he would insist on procedural regularity, and reasoned, consistent interpretations of eligibility criteria.\footnote{144} Finally, the presence of an attorney would nearly eliminate the danger of an erroneous termination of benefits.

On the other hand, the welfare termination hearing is investigative rather than adversary, and it has been generally held that counsel is not constitutionally required in investigative proceedings. Thus, in addition to the historical exclusion of defense counsel from grand jury investigations,\footnote{145} attorneys have been excluded from other investigations leading to criminal charges,\footnote{146} from preliminary investigations in a deportation proceeding,\footnote{147} and from

\footnote{142. It is clear, for example, that a record is required whenever a hearing decision is subject to direct judicial review. Kwock Jan Fat v. White, 253 U.S. 455, 464 (1920).

143. See text accompanying notes 114-18 supra.


145. Fed. R. Crim. P. 6(d) bars defense counsel from the grand jury room during the hearing. The Supreme Court has upheld this rule, emphasizing the investigative function and the historical nature of the grand jury. Jenkins v. McKeithen, 395 U.S. 411, 430 (1969).

146. Counsel may be excluded from an investigation to determine the causes of a fire, even when the investigation may subsequently lead to a prosecution for arson. In re Groban, 352 U.S. 330 (1957). A private detective, not an attorney, is not entitled to his own counsel in an inquiry into unethical legal practices which could lead to criminal prosecution. Anonymous v. Baker, 350 U.S. 287 (1959) (5-4 decision). However, when the sole purpose of an investigation is to expose criminal violations, then a witness is entitled to retained counsel. Jenkins v. McKeithen, 395 U.S. 411, 430 (1969).

147. Nason v. Immigration & Naturalization Serv., 370 F.2d 865 (2d Cir. 1967).}
draft classification proceedings. Indeed, the presence of an attorney would change the character of the hearing from investigative to adversary. Such a change, as has been stated before, would be detrimental both to the recipients and to the government, for it would create a trial-like atmosphere which would increase the recipient's uneasiness and would thus stifle a free exchange of information. Moreover, the attorney would not allow the recipient to volunteer facts detrimental to his case, and would thereby deprive the welfare agency of its primary source of information. It could be argued that this would be a beneficial result, since it would prevent the recipient from harming himself. But there are many instances of investigative hearings in which individuals have been compelled to reveal detrimental information without benefit of counsel. Thus, if the hearing remains investigative, the mere fact that an attorney would prevent the recipient from volunteering harmful information does not mean that his presence is required by due process.

Another important question in the determination of whether there is a right to counsel in a welfare termination hearing concerns the extent to which termination of benefits deprives the recipient of his liberty. In recent decisions involving hearings in which liberty is actually denied, attorneys have usually been admitted or provided. In the welfare situation, however, it appears that the termination of benefits does not involve the deprivation of liberty. In terms of the deprivation of freedom, termination of welfare grants is less drastic than parole revocation and is more nearly equivalent to the expulsion or suspension of students from schools. Yet in those instances the right to be represented by counsel has been denied.

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149. See text accompanying note 141 supra.
150. It has been said in the criminal context that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." Watts v. Indiana, 338 U.S. 49, 59 (1949) (Justice Jackson, concurring), quoted in Miranda v. Arizona, 384 U.S. 436, 516 (1966) (Justice Harlan, dissenting). The lawyer in other contexts is no more likely to allow his client to reveal detrimental information freely.
151. See notes 145-48 supra.
152. The right to retained or appointed counsel has been extended to juvenile proceedings. In re Gault, 387 U.S. 1 (1967). Counsel has also been provided in civil cases in which a deprivation of liberty was involved. For example, an attorney was required in a case in which a juvenile was committed to a training school for the feeble-minded. Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968).
153. The parole revocation cases denying a right to counsel are Hodge v. Markley, 339 F.2d 973 (7th Cir.), cert. denied, 381 U.S. 927 (1965); Hyser v. Reed, 318 F.2d 225 (D.C. Cir.), cert. denied, 375 U.S. 957 (1963); Washington v. Hagan, 287 F.2d 332 (3d Cir. 1960), cert. denied, 381 U.S. 927 (1965). With respect to the student expulsion cases, an attorney was specifically excluded from a hearing which was to decide whether a high school student would be continued in suspension or removed to a school for socially maladjusted children. Madera v. Board of Educ., 586 F.2d 778 (2d Cir. 1977),
Another important reason for not requiring attorneys in welfare hearings, although not considered by the courts, is the expense.\textsuperscript{154} That factor alone is not enough,\textsuperscript{155} but it adds strength to the other arguments against the right to counsel. There are literally millions of welfare recipients who would be eligible for appointed counsel at every proposed termination or reduction of welfare benefits. The courts cannot compel the legislatures to appropriate money for attorneys, and there is a limit to the willingness of the bar to take cases without fee.\textsuperscript{160} In any event, the increase in administrative expense would probably work to the ultimate detriment of poor people.\textsuperscript{167} From the foregoing analysis, then, it appears that due process does not require that counsel be provided in welfare termination hearings.

The forthcoming federal regulation, however, provides that, in categorical assistance programs, "[t]he services of lawyers will be made available to welfare applicants and recipients who desire them in fair hearings."\textsuperscript{158} That provision, although not constitutionally necessary, may have some beneficial effects.\textsuperscript{159} But more probably, it will lead to the troubles described above—the change from an investigative to an adversary proceeding\textsuperscript{160} and a substantial increase in the governmental expense.\textsuperscript{161} Moreover, the provision for assigned counsel could adversely affect the constitutional safeguards required in a termination proceeding.\textsuperscript{162} Thus, that provision appears to be not only unnecessary, but impractical and, possibly, detrimental.

Similar problems arise with respect to the questions whether


154. The expense of providing attorneys has not been considered in the major criminal cases which have guaranteed the right to counsel. Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). In the context of welfare hearings, however, the cost of providing counsel has been considered. Kelly v. Wyman, 294 F. Supp. 893, 900 (S.D.N.Y. 1968).

155. See text accompanying notes 91-95 supra.

156. Under the new federal regulation, attorneys must be provided (see text accompanying note 158 infra) and the federal government pays 75\% of the cost. 34 Fed. Reg. 1144 (1969).

157. See note 91 supra.


159. See text accompanying notes 143-44 supra.

160. See text accompanying notes 149-50 supra.

161. See text accompanying notes 155-57 supra.

162. For instance, welfare officials, faced with the task of enforcing an impractical regulation, cannot easily refuse to provide the counsel required by that regulation; but, in order to reduce the number of hearing requests, they could give inadequate notice of the right to a hearing and still not violate the literal language of the regulation. That procedure might be workable, but it would not solve the problem of erroneous terminations of benefits. To prevent such a result, a decision specifying a constitutional minimum notice requirement becomes even more clearly necessary.
the state is constitutionally required to admit a recipient's own counsel to the hearing and, if not, whether it is compelled to exclude his counsel. A requirement that states must permit recipients' own counsel to participate raises the problem of equal protection.\footnote{163} Recipients aided by counsel get as much as they are entitled to have, while unrepresented recipients often get less.\footnote{164} The discrimination is based on financial ability or access to free counsel, neither of which is a rational criterion for continuing welfare benefits. Moreover, a requirement that states admit recipients' own counsel would result in substantial costs, for the welfare agency might be compelled to augment its investigative and legal staff. Finally, if the recipient retains counsel, there is a prima facie abuse of welfare benefits which are supposed to be paid only to those who cannot afford to live without them. The scarce gratuitous legal assistance presently available is probably better allocated to the defense of indigent criminal defendants. Thus, it appears that the states need not admit recipients' own counsel if they do not want to do so.

But, if that is true, the question arises whether states are constitutionally required to exclude recipients' own counsel. The equal protection rationale argues that all counsel should be prohibited, but that contention is probably not strong enough to defeat a state statute providing for participation of retained counsel but not for appointment of counsel. In fact, some courts have construed parole statutes giving the parolee "an opportunity to appear" as implying the right to appear with counsel.\footnote{165} Thus, in some states, recipients' own counsel might be admitted through an analogous interpretation of welfare statutes. In practical terms, the multiplicity of suits involving the termination of welfare benefits demonstrates the availability of counsel in many communities to challenge welfare proceedings in the courts.

V. PRACTICAL PROBLEMS AND CONCLUSIONS

A full and adequate constitutional hearing prior to the termination of welfare grants is, in practical terms, likely to be expensive and to encumber the expeditious administration of the welfare system. The same problem will probably exist under the forthcoming federal regulation providing for the continuation of benefits until a fair hearing. An in-depth study has shown that "many recipients cheat or continue to accept aid after they no longer need it."\footnote{166} Thus,
if welfare recipients have notice that benefits can be extended by requesting a hearing, the probable result is that nearly all recipients who are notified of a proposed termination will request hearings, regardless of the merits of their claims of eligibility. Accordingly, benefits will have to be continued to them until the hearings can be held—a very costly procedure. And the more hearings are requested, the longer that interim period with its paid benefits will be, so that the welfare agencies' backlog could be close to a year. In addition, both the cost and the backlog will be increased even more under the new federal regulation, since counsel will have to be provided in categorical assistance cases. That counsel will have to be paid by the state, and the time it takes to assign counsel and the preparation and tactics which an attorney is likely to employ will result in a further delay of hearings. Obviously, such procedures are highly impractical.

Of course, as has been demonstrated, this impracticality does not mean that the constitutionally required prior hearing may be eliminated. But it does indicate the necessity for effective practical solutions to these problems. The essence of the dilemma is to devise a system of providing fair procedures without inducing recipients with unmeritorious claims to request hearings. To do so, the delay between the initial decision to terminate benefits and the hearing must be eliminated. The obvious solution, of course, is to provide an administrative staff large enough to make prompt hearings possible. But that procedure is also expensive, and if the state's welfare budget is limited to a fixed amount, the money that now goes to the welfare recipients—even those awaiting a hearing, who are needy whether or not they are eligible—would go to the added staff. Thus, other solutions must be sought.

167. See note 158 supra and accompanying text.

168. See text accompanying notes 77-98 supra. The requirement that counsel be provided, however, may be eliminated without violating the due process clause. See text accompanying notes 143-62 supra.

169. Professor Douglas Q. Wickham has proposed a two-step procedure to deal with these problems. Public Welfare Administration: Quest for a Workable Solution, 58 Geo. L.J. No. 1 (Oct. 1969). Under his proposal, an informal conference, probably including notice and a personal appearance, but not other minimum constitutional safeguards, would be held prior to the fair hearing required by the new federal regulation. Benefits, however, would continue until the fair hearing, if requested, is completed, and that fair hearing would include the full constitutional safeguards. Wickham hopes that since the informal conference would eliminate most of the erroneous decisions, requests for fair hearings would be reduced to a manageable number.

But implicit in his argument are two questionable assumptions. The first is that an informal conference with notice and a personal appearance would eliminate most erroneous decisions. It has been demonstrated, however, that to provide the recipient with a reasonable opportunity to correct error, the hearing must be conducted by an impartial official, and it must include a complete disclosure of evidence and an opportunity to confront adverse witnesses. There is no rational basis for including some minimum safeguards in the informal conference while omitting others. Unless all of the minimum safeguards are provided, a significant number of erroneous decisions must be expected. Therefore, the proposed informal conference would not guarantee a correct
But the problems of practicality are not the concern of the courts and cannot be solved by judicial action. The present task for the courts—particularly for the Supreme Court—is to apply the dictates of due process to protect welfare recipients from the hardships of an erroneous termination of benefits. Due process should be held to require an opportunity for a full and adequate hearing before benefits are terminated. The decision should specify the required minimum procedural safeguards—oral notice of the right to a hearing, a personal appearance, the disclosure of evidence, the opportunity to confront adverse witnesses, and an impartial decision maker.

The importance to welfare recipients of a decision defining the constitutional standard is difficult to overemphasize. A constitutional claim is their key to access to the courts. Indeed, it is the expectation of a constitutional requirement that has led to the recent state and federal regulations ending the pervasive governmental practice of terminating benefits before a hearing. But even the forthcoming federal regulation, providing for the continuation of benefits until a fair hearing, is inadequate. It fails to contain the minimum procedural safeguards, will be difficult to enforce, and might well be withdrawn by the present administration. A constitutional decision, then, is necessary to remedy these deficiencies. Finally, the practices followed by the states in administering general assistance will depend on a constitutional standard.

Wickham's second assumption is that the conference would lessen the number of the costly fair hearings. That assumption may be valid for the situation in which the finding at the conference is that benefits should be continued, since in that case there would be no need for a hearing. But if the decision at the conference is against the recipient, he would invariably request a fair hearing, if not to get a reversal, at least for the purpose of obtaining continued benefits. In many cases, then, the proposal would make two hearings necessary before benefits could be terminated. The individuals penalized by this system would be the scrupulously honest welfare recipients, who would not request fair hearings, and the taxpayers.

170. See text accompanying notes 64-98 supra.
171. See text accompanying notes 112-20 supra.
172. See notes 129-30 supra and accompanying text.
174. See text accompanying notes 132-33 supra.
175. See text accompanying notes 134-37 supra.
176. See text accompanying notes 34-39 supra.
177. For a more complete discussion of the necessity for a constitutional decision, see text accompanying notes 28-50 supra.