

## Withdrawal of Public Welfare: The Right to a Prior Hearing

Nearly one in twenty-five Americans must rely on public welfare payments for the necessities of existence.<sup>1</sup> The most important of these programs—those for dependent children,<sup>2</sup> the elderly,<sup>3</sup> the blind<sup>4</sup> and the disabled<sup>5</sup>—were originated with the Social Security Act of 1935. Today, under the administration of the Department of Health, Education and Welfare and the state welfare departments, these categorical programs protect the literal existence of some seven million people who cannot provide for themselves.

But while the country has come to recognize its obligations to the needy, it has yet to accept the correlative duty to treat fairly the individual recipients. Welfare payments are regarded as largesse. The recipient is expected to be grateful; and if assistance is denied or terminated, he has at best limited redress.

The basic test for eligibility under all these programs is need. But the federal statute, under which about 60 per cent of each grant is financed,<sup>6</sup> provides for other criteria, and the individual state may impose additional requirements. Once eligibility has been established, the state may terminate welfare payments if it finds that the recipient's status has changed.<sup>7</sup> Moreover, even where no specific cause for ineligibility has been found, the plans of most states authorize the "sus-

1. In July, 1966, there were over seven million persons receiving public assistance under the categorical assistance programs listed in notes 2-5 *infra*. Bur. of Family Services, HEW, Advance Release of Statistics on Public Assistance, July, 1966, table 1.

2. Aid to Families with Dependent Children, Social Security Act, Title IV, 42 U.S.C. §§ 601-09 (1964).

3. Old Age Assistance, Social Security Act, Title I, 42 U.S.C. §§ 301-06 (1964).

4. Aid to the Blind, Social Security Act, Title X, 42 U.S.C. §§ 1201-06 (1964).

5. Aid to the Permanently and Totally Disabled, Social Security Act, Title XIV, 42 U.S.C. §§ 1351-55 (1964).

6. BUR. OF FAMILY SERVICES, HEW, TREND REPORT: GRAPHIC PRESENTATION OF PUBLIC ASSISTANCE AND RELATED DATA—DEC. 1964 (1965). For a more specific explanation of the formulae used to determine the federal percentages, and the percentages by state, see BUR. OF FAMILY SERVICES, HEW, PUBLIC ASSISTANCE REPORT NO. 50, CHARACTERISTICS OF STATE PUBLIC ASSISTANCE PLANS UNDER THE SOCIAL SECURITY ACT, GENERAL PROVISIONS 116 (1964) [hereinafter cited as PUBLIC ASSISTANCE REPORT NO. 50].

7. For example, the provision of the District of Columbia reads as follows:

After such further investigation as the Commissioners may deem necessary, the amount of public assistance may be changed, or may be entirely withdrawn, if the Commissioners find that any such grant has been made erroneously, or if they find that the recipient's circumstances have altered sufficiently to warrant such action.

D.C. CODE § 3-210 (Supp. V, 1966).

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pension" or "temporary withdrawal" of public assistance where there is mere doubt as to continued eligibility.<sup>8</sup>

8. In Delaware, it is provided by statute that:

Assistance payments may at any time be cancelled or revoked, or suspended for a temporary period pending further determination, if the recipient's eligibility is not clearly established.

DEL. CODE ANN. tit. 31, § 508 (Supp. 1965).

More common than such a statutory provision are regulations issued by the state welfare departments. The Arkansas regulations provide that:

Various situations arise whereby the exact status of a recipient's eligibility is in question. It may be necessary to hold a warrant pending clearance of this involvement.

ARK. DEP'T OF PUBLIC WELFARE, MANUAL § 3301 (1966).

In Connecticut, there are similar provisions:

When the eligibility for continuing assistance is in question, one regular monthly award check or two semi-monthly (AFDC) award checks can be authorized "held" for a period not to exceed one month at the end of which time the case will be either authorized as eligible for assistance and action recommended on the check(s) "held" or discontinued or suspended. Suspension action will be limited to those situations in which the eligibility question is resolved and the case plan is for resumption of payments no later than three months from the date suspension is authorized.

CONN. STATE WELFARE DEP'T, MANUAL: SOCIAL SERVICE POLICIES—PUBLIC ASSISTANCE § 370.3 (A).

In Mississippi:

An assistance payment may be withheld from the recipient after authorization of the payment by the county welfare agent, provided the county or State department has secured information indicating ineligibility or the necessity for securing additional facts about eligibility before the accrual date, or the information indicates that ineligibility existed in the prior month.

The regulations then go on to elaborate the circumstances in which such suspension may occur.

Payment is withheld in the following situations:

...

4. When the county department is trying to re-establish eligibility and is unable to obtain the necessary information.
5. When the county department prior to the first of the current month (the date on which rights accrue) receives information that the client is no longer eligible or finds that additional facts about eligibility are needed . . . .

3 MISS. DEP'T OF PUBLIC WELFARE, POLICIES AND PROCEDURES FOR ADMINISTRATION OF PUBLIC ASSISTANCE 7220-21.

New York states that "suspension shall mean that all public assistance in the present program is stopped for a temporary period," and goes on to provide that "Public Assistance payments may be suspended under the following circumstances: . . . (b) continuing eligibility is questionable and under investigation." N.Y. OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS, tit. 18, ch. II, § 351.22(c)(3).

Illinois allows suspension of assistance for a period of up to six months while the department investigates eligibility. ILL. DEP'T OF PUBLIC WELFARE, MANUAL OF CATEGORICAL ASSISTANCE, ch. 8200. See also C. MAY, A MANUAL ON THE LAWS AND ADMINISTRATIVE REGULATIONS OF THE GENERAL ASSISTANCE AND AID TO DEPENDENT CHILDREN'S PROGRAMS IN THE STATE OF ILLINOIS 88-90 (1967).

It is worth noting that this practice of suspending welfare payments pending investigation might be prohibited by a transmittal from HEW to the states, which is not to take effect until July 1, 1967. There is language in these amendments to the federal requirements which would seem to support such a prohibition. Under the heading "Requirements of State Plans," there is the following:

Effective July 1, 1967, a State plan under titles I, IV, X, XIV, and XVI must:

...

2. Provide that . . . (c) assistance will be given promptly and will continue regularly to all eligible persons until they are found to be ineligible, so long as assistance is being provided under the specific category.
3. Provide that each decision that an applicant for or recipient of assistance or other services is eligible or ineligible will be supported by information in

By federal statute<sup>9</sup> and regulations<sup>10</sup> the state must provide the individual a "fair hearing" at some time after it has denied his application, or terminated or suspended his payments. But for the recipient whose welfare payments have been suddenly cut off,<sup>11</sup> such relief after the fact may be inadequate. If the state has stopped his payments erroneously, he will have been denied for some period the assistance on which his livelihood depends, and for which he was in fact eligible. And he may never recover the funds withdrawn.<sup>12</sup>

The present system may thus work hardship; it also does not comport with the standards generally established for administrative action. The reasons welfare proceedings have not been assimilated to the administrative law deserve examination. When measured against the arguments for such assimilation, a compelling case emerges for the constitutional right of the welfare recipient to a prior hearing before his payments are terminated or suspended.

the case record that shows either that all eligibility requirements of the State plan are met or that one or more such requirements is not met.

The interpretation provided with these requirements states that:

The requirement that the plan provide that decisions on eligibility or ineligibility will be adequately supported and recorded requires that each decision be based on facts—statements about eligibility requirements that have been substantiated by observation, or written records, or other appropriate means.

BUR. OF FAMILY SERVICES, HEW, HANDBOOK TRANSMITTAL No. 77 §§ 2220, 2230(3) March 18, 1966. Unless HEW redrafts these sections prior to their taking effect, they would seem to prohibit the practice of suspending assistance without specific and substantiated cause. They suggest the rule that a recipient is entitled to payments which "continue regularly" until such time as he is proved to be ineligible.

9. While the Social Security Act requires that the state provide opportunity for a fair hearing, nothing is said concerning when this hearing must occur. Sections 302(a) (4), 602(a)(4), 1202(a)(4), 1352(a)(4), and 1382(a) (4) of the Statute (42 U.S.C.) all state that:

A State plan . . . must . . . provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for [aid or assistance under the plan] is denied or is not acted upon with reasonable promptness.

10. The regulations issued by HEW indicate that it is permissible for the state to provide for a fair hearing only after the disputed action has taken effect.

The claimant's freedom to request a hearing, whenever he believes that proper consideration has not been given to all the circumstances surrounding his claim, is a fundamental right and is not to be limited or interfered with in any way. It is essential that the claimant be given a reasonable period in which to appeal an agency action. . . . Agency action or failure to act, which gives rise to a right to a hearing, includes: agency decisions regarding eligibility for assistance, whether on initial determination or subsequent determination; agency decisions regarding amount of assistance (including a change in payments), whether money payments or vendor payments; . . . undue delay in reaching a decision on eligibility or in making a payment; refusal to consider a request for or undue delay in making an adjustment in payment; and *suspension or discontinuance of assistance in whole or in part . . .* (emphasis added).

HEW, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION pt. IV, § 6331 [hereinafter cited as FEDERAL HANDBOOK].

11. Each year, approximately three million persons find their public assistance discontinued. Bur. of Family Services, HEW, Advance Release of Statistics on Public Assistance, July, 1966, tables 17, 18, 20-22. The figures given were for the month of July, 1966, alone but this month was taken to be nearly typical, and an annual rate computed accordingly.

12. See the discussion on retroactivity, notes 42-45 *infra* and pp. 1243-44.

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The questions of whether and when an administrative hearing must be held can be answered only with exceptions and qualifications. The fundamental principle, however, is that a person aggrieved by the action of a governmental agency has a constitutional right to a trial-type hearing on issues of adjudicative fact.<sup>13</sup> When an administrator finds or suspects a welfare recipient is no longer eligible and cuts off assistance, adjudicative and not legislative facts are plainly at issue. Preexisting standards are being applied to a particular situation, and the proceeding affects the recipient's interests as an individual rather than those of a class of people or the population generally.

To claim a constitutional right to a hearing, however, the recipient must show that he is aggrieved—as the rubric is usually phrased, that he has a substantial interest in the agency determination. To do this he will have to pierce the verbiage surrounding the concept of a substantial interest. This done, the remaining and most important question is at what time the hearing must take place.

The prime barrier to a showing of substantial interest for the welfare recipient is the ancient distinction between privilege and right. The traditional argument runs that because welfare payments are a privilege—acts of charity which the government may perform or refrain from at will—the individual has no right to such aid and hence no interest to assert when the state withdraws its assistance. Though some have persuasively argued that the needy have a right to receive welfare aid,<sup>14</sup> the courts have not yet recognized such a right. But even if public assistance is still termed a privilege, the government, having extended the privilege of welfare payments to some, should distinguish fairly among individuals in distributing its largesse. Courts have accepted this analysis to limit the privilege doctrine in other areas. An increasing number of state courts have held that a due process right to a hearing attaches when the individual has been denied a privilege still extended to others.<sup>15</sup> More important, the federal courts have all but abandoned

13. Compare *Londoner v. City and County of Denver*, 210 U. S. 373 (1908), with *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U. S. 441 (1915). However, a trial-type hearing is not required if there is opportunity for *de novo* judicial review before the administrative action takes effect. *Nickey v. Mississippi*, 292 U. S. 393 (1934), *Jordan v. American Eagle Fire Ins. Co.*, 169 F.2d 281 (D. C. Cir. 1948).

Professor Davis has written that:

The conclusion seems rather fully supported that a party who has a sufficient interest or right at stake in a determination of governmental action should have an opportunity for a trial type of hearing on issues of adjudicative facts, but that such a hearing often is not necessarily required on issues of legislative facts.

1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE*, § 7.04, at 426 (1958).

14. E.g., Reich, *The New Property*, 73 *YALE L. J.* 733 (1964).

15. For the developments in the state courts, see 1 & 2 F. COOPER, *STATE ADMINISTRATIVE*

the simplistic conception that the individual can assert no interest in a mere privilege.

The right-privilege dichotomy enjoys continued vitality at the federal level only in a few specific areas. These cases, involving government employee loyalty programs,<sup>16</sup> aliens,<sup>17</sup> and passport issuance,<sup>18</sup> are better explained by the underlying rationale of national security or foreign relations. In less sensitive areas such as licensing,<sup>19</sup> qualification

LAW (1965), chs. V, XIV. At pp. 144-45, Professor Cooper notes the trend toward greater protection in the states, as it is reflected in the licensing cases.

Cases decided during the last decade involving administrative licensing activity demonstrate an ever-increasing acceptance of the principle that notice and opportunity for hearing should be required whenever administrative rulings in licensing cases impinge significantly on individual rights or privileges. There was a time when many courts, accepting a semantic distinction between "property rights" and "mere privileges" held that the grant of a license to engage in specified activities did not create any property rights, and that therefore the license could be revoked without notice and hearing. . . . As the unfairness of the above-described conceptual approach became manifest, courts began to abandon it in favor of an approach which accorded greater weight to ideals of fairness of administrative procedure. . . . Now, it can fairly be said that the courts tend to insist that notice and hearing must normally be accorded in the sphere of licensing, even in the absence of statutory requirement.

16. In the area of government employment, the courts have approved discharges for loyalty reasons even where no opportunity for hearing is presented at any time. *See* *Bailey v. Richardson*, 182 F.2d 46 (D. C. Cir. 1950), *aff'd per curiam* 341 U. S. 918 (1951); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U. S. 886 (1961).

However, even in this area, the Supreme Court has rejected the privilege-right distinction, holding that "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary and discriminatory." *Wieman v. Updegraff*, 344 U. S. 183, 192 (1952). The Court has held that due process requires a fair hearing before public employment may be terminated, *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551 (1956); *Parker v. Lester*, 227 F.2d 708 (9th Cir. 1955); *see* *Cole v. Young*, 351 U. S. 536 (1956). The Court has also hinted that a hearing would be constitutionally required before a security clearance is revoked. *See* *Greene v. McElroy*, 360 U. S. 474 (1959).

Thus, in the area of public employment, due process is applicable, if only to a limited extent.

17. As a rule, aliens entering the country or requesting a suspension of a deportation order are not entitled to the protection of due process. *Jay v. Boyd*, 351 U. S. 345 (1956); *Shaughnessy v. United States ex rel. Mezei*, 345 U. S. 206 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537, 544 (1950). However, the Court has held that a resident alien is entitled to the safeguards of procedural due process, *United States ex rel. Kwong Hai Chew v. Colding*, 344 U. S. 590 (1953), though he is not protected by substantive due process, *Galvan v. Press*, 347 U. S. 522 (1954).

18. While passports were formerly regarded as privileges granted by the government, the Supreme Court has now recognized that there is a right to travel, and consequently that due process applies to this area, *e.g.*, *Zemel v. Rusk*, 381 U. S. 1 (1965), *Kent v. Dulles*, 357 U. S. 116 (1958). However, the requirements of due process have never been delineated in this area, and the Supreme Court has never passed on the question of whether a hearing is required in conjunction with the denial of a passport.

19. The Supreme Court has required that opportunity for a hearing be provided before a state can deny an applicant a license to practice a profession, even though one has no "right" to practice such. *Willner v. Committee on Character & Fitness*, 373 U. S. 96 (1963) (law); *Schwartz v. Board of Bar Examiners*, 353 U. S. 232 (1957) (law). *Cf.* *Goldsmith v. Board of Tax Appeals*, 270 U. S. 117 (1926) (accounting).

The Courts of Appeals have held similarly with respect to liquor licenses, *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964); *Minkoff v. Payne*, 210 F.2d 639 (D. C. Cir. 1953); a license to operate as a bail bond surety, *In re Carter*, 192 F.2d 15 (D. C. Cir.), *cert. denied*, 352 U. S. 862 (1951); and a radio license, *Homer v. Richmond*, 292 F.2d 719 (D. C. Cir. 1961).

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to contract with the government,<sup>20</sup> and attendance at state schools,<sup>21</sup> the federal courts have discarded the privilege label and created a due process requirement for a full trial-type hearing.

Since the welfare recipient obviously presents no question of national security or foreign relations, his constitutional right to a hearing seems clear under the modern analysis. The constitutional foundation for the present statutory right would be a needless buttressing of the existing regime except for the present practice of affording the recipient a hearing only after his payments have been discontinued. This after-the-fact relief does not meet the constitutional standard of a fair hearing.

The time at which a hearing must be held has been less thoroughly explored than the requirement for one, and the constitutional standards are correspondingly less clear. *Londoner v. City and County of Denver*,<sup>22</sup> the earliest Supreme Court case dealing with the issue, involved the power of a city to assess a street-improvement tax against an abutting landowner. The Court there held that the taxpayer had a right to be heard "before the tax became irrevocably fixed. . . ."<sup>23</sup> Similarly, in *United States v. Illinois Cent. R.R.*, the Court held that while the Interstate Commerce Commission could initiate a rate change without formal proceedings, a full and fair hearing was required "before the order became operative."<sup>24</sup> And in *Opp Cotton Mills, Inc. v. Administrator*, the Court stated in upholding a minimum wage order: "The demands of due process do not require a hearing, at the initial stage or at any particular point . . . in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective."<sup>25</sup>

The Supreme Court has departed from its general rule that a hearing required by due process must take place before administrative action is taken only where summary action is required by the peculiarly urgent

20. In *Gonzales v. Freeman*, 334 F.2d 570 (D. C. Cir. 1964), the court noted that the question of right or privilege was irrelevant in holding that one could not be barred from participating in contracts with the Commodity Credit Corporation without opportunity for full hearing and judicial review.

21. In *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961), the court, after recognizing that there was no constitutional right to attend a state college, held that "due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct;" *id.* at 158. Similar applications of due process to the denial of so-called privileges were made in *Woods v. Wright*, 334 F.2d 369 (5th Cir. 1964), and *Knight v. State Bd. of Educ.*, 200 F. Supp. 174 (M. D. Tenn. 1961).

22. 210 U. S. 373 (1908).

23. *Id.* at 385.

24. 291 U. S. 457, 463 (1934).

25. 312 U. S. 126, 152-53 (1941).

nature of the governmental interest.<sup>26</sup> In determining when a due process hearing may be delayed, the courts have resorted to a balancing of the public and private interests.<sup>27</sup>

When applied to the problem of welfare payments, the test shows the clear superiority of the recipient's interest to those of the government. This is true both in the context of prior decisions and on broad policy grounds.

The sole interest of the government in delaying a hearing until after assistance has been discontinued is financial. This interest is of a different order from those which have been held to justify subordination of the private interest.<sup>28</sup> The cases upholding summary administrative action have involved the prevention of some direct harm to the health, safety or well-being of other individuals.<sup>29</sup> Thus, in an early case the

26. Professor Davis has written:

If the contagion is spreading, or the harmful medicinal preparation is being sold to the public, summary administrative action in advance of hearing is appropriate. . . . Drastic administrative action is sometimes essential to take care of problems that cannot be allowed to wait for the completion of formal proceedings.

1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.08, at 438 (1958). There is a great deal of case law supporting this; e.g., *North Amer. Cold Storage Co. v. City of Chicago*, 211 U. S. 306 (1908) (upholding summary seizure and destruction of food reasonably suspected of being dangerous); *Phillips v. Commissioner*, 283 U. S. 589 (1931) (summary process may be used to collect monies due on corporate income tax from shareholder of dissolved corporation, the Court noting that it was "essential that governmental needs be immediately satisfied." *Id.* at 597.); *Yakus v. United States*, 321 U. S. 414 (1944), and *Bowles v. Willingham*, 321 U. S. 503 (1944) (upholding summary price and rent regulations under the Emergency Price Control Act of 1942 on the grounds that speed was essential in preventing wartime inflation, and that these orders involved matters of legislative rather than adjudicative facts); *Fahey v. Mallonee*, 332 U. S. 245 (1947) (upholding summary seizure of savings and loan association by a conservator); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U. S. 594 (1950) (upholding summary seizure of allegedly mislabeled food product by Food and Drug Administration).

As one court summarized it:

In a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing.

*R. A. Holman & Co. v. SEC*, 299 F.2d 127, 131 (D. C. Cir. 1962).

27. E.g., *Gonzalez v. Freeman*, 334 F.2d 570 (D. C. Cir. 1964); *A. A. Holman & Co. v. SEC*, 299 F.2d 127 (D. C. Cir. 1962), *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961).

When the governmental interest is not shown to be compelling, the courts have prohibited the use of summary process. *Cole v. Young*, 351 U. S. 536 (1956); *Standard Airlines v. CAB*, 177 F.2d 18 (D. C. Cir. 1949).

28. In *Phillips v. Commissioner*, 283 U. S. 589 (1931), the Court approved the use of summary process to collect from a shareholder of a dissolved corporation tax deficiencies owed by the corporation. While it is true that the only justification for the use of the summary process was the possibility of direct financial loss to the government resulting from the delay that would be involved in a prior hearing, this case can be distinguished on two grounds. First, the Court noted the uniqueness of the government's interest, in that for centuries the sovereign has had the power to effect summary seizure of the property of a crown debtor. Second, and more importantly, the Court indicated that there was opportunity here for a *de novo* hearing before the Board of Tax Appeals, prior to the payment of the tax, available without the necessity of posting bond. Thus, the process here was not even "summary," since there was opportunity for a hearing before the administrative action became effective.

29. See cases cited note 26 *supra*.

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Supreme Court upheld the summary seizure without hearing of allegedly decayed food products.<sup>30</sup> More recently, the Court has allowed the Food and Drug Administration to seize allegedly mislabeled commodities before a hearing.<sup>31</sup> Similarly, the temporary suspension of a pilot's license for safety reasons by the Civil Aeronautics Board has been impliedly approved.<sup>32</sup> In *Fahey v. Mallonee*,<sup>33</sup> the Court upheld the action of a conservator appointed by the Federal Reserve Board in taking control of a financially embarrassed bank; the summary procedure employed there was justified by "the delicate nature of the institution and the impossibility of preserving credit during an investigation."<sup>34</sup> In 1962 the District of Columbia Circuit recognized the public interest in protecting private individuals from fraud in the securities markets and approved a narrowly drawn summary order issued by the Security and Exchange Commission.<sup>35</sup>

The public interest in postponing welfare hearings, on the other hand, protects only the government purse; no harm to other specific individuals is threatened if payments to a possibly ineligible recipient are continued until a hearing has been held. Moreover, the money dispensed is not necessarily lost forever from the public fisc. Every state has given itself the statutory right to proceed against an individual to recover assistance to which he was not entitled. Hence, if ineligibility is found after a hearing, the state cannot only then discontinue his grant but also can move to recover grants made since the date of ineligibility.

In most cases, of course, the welfare recipient will simply no longer have the money and will be effectively judgment proof. Even in these cases, however, the loss of public funds is anything but catastrophic. For example, in July, 1966, the average payment involved would have been approximately \$43 a month.<sup>36</sup> This is certainly less than the monthly cost of keeping a student in a tax-supported university pending a hearing on his suspension, a burden imposed upon Alabama by a recent Fifth Circuit decision.<sup>37</sup>

The ability of the state to expedite hearings suggests another reason

30. *North Amer. Cold Storage Co. v. City of Chicago*, 211 U. S. 306 (1908).

31. *Ewing v. Mytinger & Casselberry, Inc.*, 339 U. S. 594 (1950).

32. *Cf. Standard Airlines v. CAB*, 177 F.2d 18 (D. C. Cir. 1949).

33. 332 U. S. 245 (1947).

34. *Id.* at 253.

35. *R. A. Holman & Co. v. SEC*, 299 F.2d 127 (D. C. Cir. 1962).

36. This is a weighted average which takes into account the relative numbers of recipients in each of the several categorical assistance programs whose assistance was terminated. *Bur. of Family Services, supra* note 1, at 18-22, Tables 3-7.

37. *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961).

to extend the right of prior hearing to recipients. If welfare payments have been discontinued, the state has no reason to force the administrative machinery into motion.<sup>38</sup> But if payments cannot be cut off until a hearing has been held, the state will strive to hold such hearings as promptly as due process will allow.

Against the argument that the cost of continuing assistance to the individual recipient is relatively slight, some may contend that the large number of recipients involved will make the total cost substantial—so substantial as to justify subordinating the private interest. While the total cost may be significant, it must be measured against the greater total cost to all the recipients cut off from welfare aid. Just as the cost to the public is multiplied by the numbers involved, so is the cost to the recipients whose payments are at issue. The true test is at the individual level; when extrapolated to the totality of cases, both sides of the balancing equation are multiplied proportionately.

The public side of this equation has been examined; against it must be weighed the obvious and compelling interest of the individual in a prior hearing before the state discontinues his welfare payments. The dispositive consideration is that a subsequent hearing cannot rectify a prior mistake. If the needy recipient was in fact eligible, and the state guessed wrong in terminating or suspending his assistance, he will have been denied the aid necessary for his basic sustenance. The requirement in all states that those seeking public assistance dispose of all their assets in excess of a stated amount makes this danger all the more real.<sup>39</sup> In Connecticut, for example, a family receiving Aid for Dependent Children must have no assets, including even the cash value of life insurance, in excess of \$250.<sup>40</sup>

Much more severe is the type of restriction found in Illinois, where an AFDC family may not retain cash or personal property or life insurance with a value greater than one month's assistance grant.<sup>41</sup> Even where a state allows a recipient to retain more cash or personal property, it is unlikely that he will have such possessions; and if he did

38. The federal requirements impose no restrictions upon the states as to the length of the entire hearing process; it is up to the states to determine how much time may elapse between the initial request for a hearing and the final hearing decision. FEDERAL HANDBOOK § 6200(3)(a).

39. These requirements vary from state to state, and within a state, according to the particular program involved. The restrictions tend to be most severe under the Aid to Families with Dependent Children programs. These requirements are summarized, state by state, in PUBLIC ASSISTANCE REPORT No. 50.

40. *Id.* 20.

41. *Id.* 36.

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when he first qualified, he is likely to have exhausted them in supplementing his subsistence level welfare payments.

This factor does more than show the stark need the recipient will face when payments are erroneously denied. In all cases where he has disposed of assets to become eligible for assistance, the individual has a strong reliance claim to a due process hearing before his payments are cut off. The government has induced him to change his position and has therefore incurred a special obligation to treat him fairly.

The practice of denying the recipient full recovery for payments withheld during a period of erroneous suspension or termination makes the present system even more inadequate. The federal regulations require the states, as a condition to receiving matching grants, to limit retroactive payments in suspension cases to the two preceding months.<sup>42</sup> In many states the applicable statutory provisions or regulations will allow the investigation and hearing to drag on longer.<sup>43</sup> And

42. The federal regulations concerning the extent of federal financial participation in retroactive payments made following a suspension are found in § 5423.2(6) of the FEDERAL HANDBOOK.

Payments to an eligible individual that are resumed after assistance has been suspended are subject to Federal financial participation for the current month, i.e. the month of reinstatement. Such payments are not initial payments and are also subject to Federal financial participation for the two preceding months.

The regulations are more generous with respect to payments made after a fair hearing decision, allowing federal financial participation in payments made retroactive up to two months prior to the month in which the request for a hearing was made (and hence going back more than two months from the date of the hearing decision). The FEDERAL HANDBOOK pt. IV, at § 6400 provides:

Federal financial participation is available in:

1. Payments made to carry out hearing decisions, or to carry out a decision to take corrective action after a request for a hearing but prior to the hearing itself, as current payments for all or any part of the period beginning two months prior to the month in which the request for a hearing was made, provided the amounts paid are shown to have been improperly withheld or denied in such months by administrative action.
2. Administrative costs necessary to
  - a. carry out the hearing procedures,
  - b. provide transportation for the claimant, his representative and witnesses to and from the place of the hearing, fees for legal counsel, and
  - c. other costs, expenditures, and fees reasonably related to the hearing.

However, the states need not be so generous, and in fact, most are not; few provide for payments going back more than two months prior to the hearing decision. See note 44 *infra*, and accompanying text.

43. In North Carolina, for example, three months may go by between the initial request for a hearing and a final determination by the state; and even then the decision need not take effect for another two weeks. DIVISION OF PUBLIC ASSISTANCE, N. C. BOARD OF PUBLIC WELFARE, PUBLIC ASSISTANCE MANUAL § 618.

In Georgia, up to 75 days may elapse between the date of request for a hearing and the final decision. GA. DEP'T OF FAMILY AND CHILDREN SERVICES, MANUAL OF PUBLIC ASSISTANCE ADMINISTRATION pt. III, § V.

In Delaware, only 45 days may elapse between the filing of an appeal and a decision upon it, but up to 60 days may have passed between the date of the administrative action and the filing of an appeal. DEL. DEP'T OF PUBLIC WELFARE, MANUAL OF POLICIES AND PROCEDURES, PUBLIC ASSISTANCE ADMINISTRATION § 5300.

even during the federally permitted two-month period, most states will allow such payments only to the extent of currently outstanding debts.<sup>44</sup> At least one state allows no retroactive payments whatever.<sup>45</sup> The rationale for such limitations seems to be that the recipient, having somehow survived, has shown that he did not really need the assistance designed to provide basic necessities. The logic may be impeccable; the philosophy speaks for itself.

Finally, the brutal need of the recipient erroneously denied assistance will make him all the less able to pursue the subsequent hearing now available. Faced with the need to live somehow, he can scarcely devote the time and energy necessary to effectively show his continued eligibility on appeal. Because of this, it is hardly surprising that recipients rarely even request a hearing after the administrator stops payments. In Illinois, for instance, appeals were filed in less than one-third of one percent of the 33,000 public assistance cases closed between July, 1963 and June, 1964 for reasons other than death of the recipient.<sup>46</sup>

Taken together, these considerations compel the conclusion that the

44. The provisions of the Connecticut welfare department are typical in this regard. Payments which carry out the decision of a fair hearing or which are based on a decision by the Department to take corrective action following a request for a hearing but prior to the date of the hearing shall be made for the period during which the request for an appeal was filed and the preceding two months, when applicable, *provided the corrected payment does not exceed the two months preceding the month in which the authorization is dated*. The conditions for retroactive payment as enumerated . . . shall apply in these situations as well (emphasis added).

These conditions are:

- a. The family was in need during the period to be covered by the retroactive payment and is now in debt because of that need.
- b. These debts were incurred for basic items of need, i.e., food, shelter, fuel, utilities, clothing.
- c. These debts must be paid to other than another public or a private agency.

Thus, if the hearing decision authorizing assistance occurs more than two months after the original termination, no assistance payments will be recovered for the period from the termination date to two months prior to the decision. If the period does not exceed two months, retroactive payments will be made only under the very limited conditions stated. CONN. WELFARE DEP'T, MANUAL: SOCIAL SERVICE POLICIES—PUBLIC ASSISTANCE § 370.

45. GA. DEP'T OF FAMILY AND CHILDREN SERVICES, MANUAL OF PUBLIC ASSISTANCE ADMINISTRATION pt. III, § VIII, at 1.

*See also* Matter of Oliver, case no. 47-11940-C, appeal no. 11759 (Ga. State Welfare Dep't 1966), involving a fair hearing before the Georgia welfare department. The claimant had applied for Aid to Families with Dependent Children, for herself and her five children, in October, 1965. When her request was denied, she applied for a hearing before the county department; at this hearing, assistance was again denied. Finally, in April, 1966, her appeal reached the state department, and it was held that she was eligible for the maximum AFDC grant (\$144/mo.). However, the department stated that its action was *de novo* rather than on appeal, and hence that eligibility dated only from April, 1966. There was no retroactivity for the period beginning in October, 1965, when she had first applied for the hearing. The Georgia department also stated, as alternative grounds for its decision, that Georgia made no retroactive payments under any circumstances, citing the Georgia Manual, *supra*.

46. M. Goldberg, unpublished paper dealing with hearings before the Illinois Department of Public Welfare, statistical appendix, attachments 3 & 5 (University of Chicago Law School).

## Welfare Hearing

government interest in guarding the public treasury by postponing hearings should not justify subordination of the private interest in the individual case and, *a fortiori*, in the totality of cases. The recipient should have a constitutional right to a hearing before his welfare payments are discontinued.

In closing, it should be noted that even the right to a prior hearing is worth little if welfare recipients are, for other reasons, unable to exercise it effectively. The laws of public assistance are complex, and the regulations issued by the federal and state welfare agencies are not only labyrinthine but, in some cases, almost impossible to discover.<sup>47</sup> Because of these difficulties of understanding the welfare laws and regulations, welfare recipients will inevitably be unable to pursue their right to a prior hearing unless given assistance.

The *Federal Handbook* recognizes this need explicitly in requiring the state to allow the recipient at his hearing to be represented by legal counsel.<sup>48</sup> Actually, regulations seem to go even further and allow the claimant to invoke the aid of friends or other non-legal counsel.<sup>49</sup> This, of course, is of critical importance, for few recipients will be in a position to retain lawyers for the hearing process. Unfortunately, a number of states have interpreted the federal regulations to mean that only those who have been admitted to practice before the bar may represent or assist the recipient in a hearing.<sup>50</sup> While this in-

47. In most states, only the skeleton of the state plan is to be found in state statutes; the substance and body is contained in regulations issued by the state department of public welfare. These regulations, while theoretically matters of public record, tend to be closely guarded by the state departments, and may be publicly available only to the extent of a single set which may be looked at in the state office.

48. Part IV, § 6200(3) (e) of the FEDERAL HANDBOOK provides that:

The hearing will be conducted at a time, date, and place convenient to the claimant, and the claimant will be given, in writing, adequate preliminary notice, information about the hearing procedure necessary for his effective preparation for the hearing, information that *he has the right to be represented by legal counsel of his own selection*, and, if the State plan provides for fees to legal counsel who represents the claimant in connection with the hearing, information concerning the payment of such fees (emphasis added).

Section 6400 of the FEDERAL HANDBOOK, note 42 *supra*, which allows for federal financial participation in payments made to cover counsel fees and other costs of the hearing, is optional with the states, and they need not compensate for such expenses. Only if the state decides so to compensate will the federal government participate.

49. Part IV, § 6337 of the FEDERAL HANDBOOK states that:

The claimant's right to a hearing includes the privilege of presenting his case in any way he desires. Some will wish to tell their story in their own way, *some will desire to have a relative or friend present the evidence for them*, and still others will want to be represented by legal counsel. Furthermore, the claimant may bring any witnesses he desires to help him establish pertinent facts and to explain his circumstances (emphasis added).

Similarly, pt. IV, § 6200(3) (g) provides that:

The claimant has the opportunity . . . (2) at his option, to present his case himself or with the aid of others, including counsel.

50. Connecticut is an example of such a state. See letter from John F. Harder, Deputy

terpretation seems flatly contrary to the federal requirements, it nevertheless persists.<sup>51</sup> If the right to a hearing is to be more than an abstract legal principle, claimants should be permitted to call upon non-lawyers to assist them at their hearing.<sup>52</sup>

Commissioner of Welfare, Conn. Welfare Dep't, to Carl L. McConnell, May 5, 1967 (on file in Yale Law Library).

51. Upon several occasions, HEW has explicitly stated that the federal regulations require the states to permit claimants at fair hearings to use non-legal counsel. The Bureau of Family Services has stated that:

It is a requirement upon States and is not optional with the State that the "claimant has the opportunity . . . (2) at his option, to present his case himself or with the aid of others, including counsel" (IV-6200, item 3 g). The interpretation of this Federal requirement is contained in IV-6337; hence, the explanation of the meaning of the requirement is also binding upon States in their fair hearing policies. It would be contrary to Federal policy for a State to require that claimants use only individuals who have been admitted to the bar in presenting their case to the fair hearings officer. Claimants at fair hearings throughout the country frequently have persons other than attorneys assisting them at the fair hearing.

Letter from Fred H. Steininger, Director, Bur. of Family Services, HEW, to Christopher N. May, May 9, 1967 (on file in Yale Law Library).

Similarly, in a letter condemning the Connecticut practice, HEW stated that:

Under Federal policy . . . a claimant must have the opportunity, at his option, to present his case himself or with the aid of others, including counsel. Claimants at fair hearings frequently have other than attorneys assist them in presenting the evidence.

Letter from Joseph H. Meyers, Acting Commissioner, Welfare Administration, HEW, to Carl L. McConnell, April 28, 1967 (on file in Yale Law Library).

52. Groups interested in protecting the rights of welfare recipients have begun programs to train lay persons in the pertinent welfare law in order that they be able to accompany recipients to the fair hearing and assist in the presentation of the case. The first hurdle in such an attempt is obtaining sufficiently detailed information concerning the welfare laws and regulations of the particular state. Once this is done, workshops or similar methods may be used to instruct others in the law. The Illinois division of the American Civil Liberties Union is currently involved in such a program in Cook County.