For Opinion See 90 S.Ct. 1011

U.S., 1969.

Supreme Court of the United States.
Jack R. GOLDBERG, Commissioner of Social Services of the City of New York, Appellant,
v.
John KELLY, Ruby Sheafe, Teresa Negron, et al., Appellees.
No. 62.
October Term, 1969.
August 30, 1969.

On Appeal from the United States District Court for the Southern District of New York

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***xix** Opinion Below

The opinion of the District Court is reported at 294 F. Supp. 893 (S. D. N. Y. 1968). It is set out in the joint appendix at pp. 365a-392a.

Jurisdiction

The decision of the three-judge district court granting appellees' motion for a preliminary injunction and denying appellant's motion for a summary judgment was entered on November 26, 1968. The order appealed from was issued on December 13, 1968. Appellant's notice of appeal ***xx** was filed on January 6, 1969. A jurisdictional statement was filed on March 6, 1969, and probable jurisdiction was noted on April 21, 1969. The jurisdiction of this Court is conferred by 28 U. S. C. 1253 which provides for direct appeals from decisions of three-judge district courts.

Constitutional Provision and Regulation Involved

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part that
No State . . . shall . . . deprive any person of life, liberty or property without due process of law.

Title 18 N. Y. C. R. R., Section 351.26 provides as follows:
351.26 Proposed discontinuance or suspension of grant; prior notice to recipient; additional local review and subsequent determination. When a social services official proposes to discontinue or suspend a grant of public assistance he shall proceed in accordance with the provisions of either subdivision (a) or (b) below:
(a) He shall notify the recipient in writing of his intention to discontinue or suspend the grant at least seven days prior to the proposed effective date of the discontinuance or suspension, together with the reasons for his intended action, unless such discontinuance or suspension is in response to the request of the recipient or is due to; the death of the recipient who is an unattached person; the recipient's admission to an institution wherein his assistance may not ***xxi** be continued; the recipient's whereabouts being unknown to the social services official because the recipient moved from his last known address without notifying the social services official and without leaving a forwarding address; the recipient's moving from the state and establishing his permanent home elsewhere; the recipient's case having been reclassified as to category. Such notification shall further advise the recipient that if he makes a request therefor he will be afforded an opportunity to appear at the time and place indicated in the notice before the person identified therein who will review his case with him and will afford him opportunity to present such written and oral relevant evidence and reasons as the recipient may have to demonstrate why his grant should not be discontinued or suspended, and that the recipient may appear and present such evidence and reasons on his behalf with or without the assistance of an attorney or other representative. Only the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance or suspension shall be designated to make such a review. When recipient requests such a review the designated person shall, at the time and place indicated in the notice to the recipient, review with the recipient and his representative, if any, the evidence and reasons supporting the proposed action and shall thereupon afford the recipient opportunity to present relevant evidence and to state reasons why the proposed discontinuance or suspension should not be made. When such a review has been made by a designated employee, such employee shall promptly make an appropriate written recommendation to the social ***xxii** services official, together with his reasons therefor, including reference to applicable provisions of law, Board rules, Department regulations, and approved local policy. After such a review the social services official shall expeditiously determine whether the proposed discontinuance or suspension shall or shall not be made effective as proposed, after considering all the evidence before him and the recommendation, if any, of the employee designated by him to review the proposed action with the recipient. The social services official shall then promptly send an appropriate written notice of his decision to the recipient and his representative, if any, and to the Department's area office. Assistance shall not be discontinued or suspended prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance or suspension, whichever occurs later.
(b) A social services official may adopt a local procedure concerning discontinuance or suspension of grants of public assistance and submit to the Department such procedure for its approval. Upon approval such local procedure shall become effective. Such local procedure must include the following:
(1) Notice to the recipient of proposed discontinuance or suspension of the grant at least seven days prior to the proposed effective date of the discontinuance or suspension, together with the reasons for the intended action, unless such discontinuance or suspension is in response to the request of the recipient or is due to: the death of the recipient who is an unattached person; the recipient's admission to an institution***xxiii** wherein

his assistance may not be continued; the recipient's whereabouts being unknown to the social services official because the recipient moved from his last known address without notifying the social services official and without leaving a forwarding address; the recipient's moving from the state and establishing his permanent home elsewhere; the recipient's case having been reclassified as to category.
(2) The notice must advise the recipient that, if he so requests, the proposed discontinuance or suspension will be reviewed and he may submit in writing a statement or other evidence to demonstrate why his grant should not be discontinued or suspended.
(3) A review of the proposed discontinuance or suspension shall be made by the social services official or an employee of his social services department who occupies a position superior to that of the supervisor who approved the proposed discontinuance or suspension.
(4) After review of the relevant materials in the recipient's file including any written material submitted by him the decision shall be made expeditiously as to whether the proposed discontinuance or suspension shall or shall not be made effective as proposed. Appropriate writen notice of the decision shall be sent to the recipient and to the Department's area office. Assistance shall not be discontinued or suspended prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance or suspension, whichever occurs later.

Questions Presented

Appellees were found after investigation to be without sufficient income, resources or sources of support to meet minimal daily needs and to be otherwise eligible for public assistance, a statutory entitlement. Thereupon they received a bi-weekly subsistence grant for shelter, food, clothing, and other necessities. Later, a caseworker-investigator undertook to make an administrative finding that Appellees were no longer eligible and forthwith to terminate the subsistence grant.

1. In these circumstances, does due process of law allow abrupt *ex parte* termination of assistance without an opportunity to learn of and contest the reason for termination?

2. Does an opportunity to write a letter in opposition to the caseworker-investigator's confidential report being reviewed constitute a Constitutional opportunity to be heard?

Statement of the Case

This class action, commenced in January, 1968, pursuant to the Civil Rights Act, 42 U. S. C. §1983 and 28 U. S. C. §1343, challenges New York State regulations and administrative policies authorizing the abrupt *ex parte* termination of public assistance grants upon which plaintiffs and all others similarly situated depend for the basic essentials of life. The plaintiffs, recipients of aid under the federally-established Aid to Families with Dependent Children Program, 42 U. S. C. §601 *et seq.*, or under the State Home ***2** Relief Program, New York Social Services Law §157 *et seq.*, were all terminated or threatened with termination without an opportunity for an adjudicatory hearing prior to the contested revocation of entitlement and termination of aid.

The twenty named plaintiffs had received public assistance grants for periods ranging from several months to several years.[FN1] All had been found entitled to receive this aid after an extensive investigation and verification revealing that they were without sufficient income and resources to meet minimal current needs and that they otherwise satisfied the conditions for receipt of a subsistence grant, including the relinquishment of all resources unrelated to daily needs. App. A.

> FN1. The individual situations are set out more fully in Appendix A to this Brief (hereinafter App. A). References to the joint appendix in this Court are designated "--a", and references to appellant's Brief in this Court are designated "Br.--".

During the time that Appellees were receiving aid, a caseworker periodically investigated continuing eligibility through personal interviews with Appellees in their homes (70a, 185a), interviews with collateral sources, such as neighbors, relatives (18a), landlords and employers (79a), 18 NYCRR $82.1, and investigation of unsolicited information furnished by other persons (186a). The caseworker regularly consulted with supervisors on matters of eligibility (257a, 277a) and entered written reports of the investigations and consultations in the confidential "case record" main-

tained for each recipient (200a).[FN2]

FN2. In the New York City Department of Social Services, determination of eligibility is made by a case unit comprised of caseworkers, unit supervisors, and a case supervisor.

***3** In lieu of the recurring bi-weekly check upon which each family was dependent for rent, food, and other essentials, the Appellees received a notice of termination,[FN3] setting forth the department's official category for case closings [e.g., refused to permit collateral visits (70a, 76a), refused to cooperate or comply (19a)] and, at times, a cryptic reference to the applicability of the official category to the individual situation (19a, 70a). Subsequent exploration showed that the revocations had been based upon sundry reports (186a, 228a), statements of collateral sources (79a), rumors, misinterpretation of department policies and, most frequently, misunderstandings or disagreements between caseworker and recipient (185a, 195a). It also showed that the caseworker's actual reason for termination often bore no relation to the summary message contained in the notice (38a, 70a, 186a, 298a).

FN3. In some instances, there was neither payment nor notice of termination (14a, 171a, 190a). Certain other plaintiff-intervenors received a Notice of Intent to Terminate pursuant to New York City's newly-adopted prior review procedure (220a, 222a).

Unlike most indigent recipients of assistance, all the plaintiffs had the assistance of attorneys or lay advocates to challenge their terminations. Some of the plaintiffs sought to contest the finding of ineligibility in the "fair hearing" before the State Agency required for AFDC by 42 U. S. C. §602(a)(4),[FN4] and recently extended by regulation***4** to Home Relief (179a, 186a, 792a). These hearings were held and determined many months after the actual termination of assistance (174-175a, 216a, 298a, 363a, 392a).[FN5] Other plaintiffs sought immediately to reapply, but the contested finding of ineligibility barred any new application until reversed in the subsequent hearing process (72a, 176a, 187a). Others sought to utilize the review procedure formulated during the course of this lawsuit, but encountered the difficulties entailed in that procedure (189a, 196a, 198a, 200a). Despite pertinacious informal efforts to elicit the necessary information, the Appellees were frequently unable to ascertain one unchanging basis for revocation (169a, 188a, 200a). After months of delay and severe deprivation, the revocation of aid was found erroneous in regard to most of the named plaintiffs (298a, 363a, App. A).

FN4. This hearing is held before a state referee; a verbatim transcript is made; and a written decision based on the transcript is rendered by hearing officials in Albany. This hearing systematically entails, then and now, at least several months from request to determination, during which time aid is not continued.

During the course of the lawsuit, New York altered its regulations to provide for retroactive payments after reversal of an erroneous termination in a subsequent statutory hearing. Since the recurring grant is supplemented by grants for special needs and the provision of social services, available only to currently eligible recipients, the amount awarded retroactively is not equal to the amount to which the recipient would have been entitled had aid been continued.

FN5. Under the instructions of the district court, hearings were provided to some of the individual plaintiffs on an expedited basis; even with expedition, the state hearing process did not officially reverse the erroneous terminations or restore aid to the plaintiffs until three to six months after cut-off.

Upon abrupt withdrawal of aid, however, the immediate and overwhelming problem the Appellees confronted was not legal wrangling with the welfare department. It was to survive willy nilly from day to day without subsistence income; to obtain sleeping quarters and daily food for themselves and their children by dint of will and catch as catch can. Thus, plaintiffs sought to obtain emergency food from the Department or from friends, their attorneys, and ***5** other private sources (15a, 21a); to forestall evictions or to find free shelter (187a); to combat illness or obtain free medical assistance (72a). These efforts were often not successful, although injury to some of the named plaintiffs was minimized by applications for temporary

relief in this lawsuit.[FN6]

> FN6. Plaintiffs Esther Lett and Ruby Sheafe were provided an emergency grant or restored to aid *pendente lite* in response to the several requests of the District Court in in-chambers conferences. The hearings of others were expedited pursuant to similar requests.

Immediately after the assertion of the due process claim in this action, the defendant State Administrator agreed to provide by regulation a hearing prior to termination.[FN7] In recognition of the persistent systematic delay in the state-administered hearing system, the State Defendant required that the local departments institute another hearing mechanism to provide an expedited informal hearing before a local review officer. 18 NYCRR §351.26, added eff. March 1, 1968. Under this procedure (hereinafter referred to as Option a), the former Notice of Termination, with the conclusory statement of the reason, became a Notice of Proposed Termination after seven days from mailing, within which time an aggrieved recipient could request a review and appearance, with counsel, before a local official superior to the person approving the tentative decision to terminate. Rights of apprisal, confrontation, cross examination and a decision on the hearing record were not spelled out in the regulation. Aid was to be continued ***6** during the one to two week period contemplated for such review, and, the state hearing process, after termination of aid, remained available to persons still aggrieved.

> FN7. The statutory hearing before the State Administrator, long required in the federal AFDC program, was extended by regulation to recipients of Home Relief two weeks before the filing of this action in January 1968. Numerous other federal and state administrative vicissitudes in response to the due process claim herein are set forth in the opinion of the court below (366a-371a).

The City Department, however, refused to accede to Option a, and, after lengthy negotiations with the State, prevailed upon it to accept an alternative procedure formulated by the City's Office of Corporation Counsel (125a, 147a). This alternative, 18 NYCRR §351.26(b), which became a state-wide option to the original regulation (hereinafter referred to as "Option b,") provides for the same seven-day notice as above, allows the recipient to request her own case supervisor to review the confidential case record, and permits the recipient to submit "in writing a statement or other evidence to demonstrate why aid should not be discontinued." Some of the intervening plaintiffs were terminated under this procedure and it remained in force in New York City from May 1968 through December 1968, when it was enjoined by the three-judge district court, Circuit Judge Feinberg and District Judges Bryan and McLean.

Notwithstanding the somewhat intricate administrative responses tendered to the district court, the issue remained as it was at the outset: whether due process of law required *one* Constitutionally-adequate opportunity to be heard *before* a contested revocation of eligibility and sudden withdrawal of aid. The court unanimously found that under all the circumstances, the Constitution requires "an adequate hearing before termination, and the fact that there is a later Constitutionally-fair proceeding does not alter that result" (377a). The circumstances included "the brutal need of families and individuals . . . in this unique situation not to be wrongfully deprived of assistance," ***7** (374a, 376a), "the shattering effect of wrongful termination upon a recipient," (385a) and "the obvious fact . . . that there is no way truly to make whole a recipient" whose aid is erroneously withdrawn (376a). The additional costs of continued aid during the several week period for review-- the only countervailing governmental interest asserted--was well within "the power of the State and City to minimize . . . by various methods" (375a). Focusing on the adequacy of the pre-termination procedures, the Court found Option b invalid because it denied the rudiments of a right to be heard: the right to learn of the charge and the evidence on which it is based, an opportunity to rebut this evidence by putting questions to its source and by producing evidence in one's own behalf; and the right to a determination by a relatively disinterested official on the evidence introduced before him, absent a demonstrable agency interest in secrecy (380a-386a). Option a was construed to provide these essentials, and as such was deemed to be valid (386a-390a). Pursuant to the preliminary injunction, Option a of the Regulation is now in force throughout the State.

Initially, it is well to express what is not involved in this case. Appellees raise no issue of the procedural protections which must be afforded to individuals

making initial application for public assistance; nor do they raise questions of the procedures required where the administrative determination is to adjust rather than to terminate benefits. Those problems are distinguishable. Further, Appellees agree with the finding of Judge Feinberg that due process does not require "that every person directly affected by administrative action must be afforded all of the procedural rights guaranteed in a full-fledged trial" (380a). ***8** Finally, Appellees also agree that one appropriate and timely hearing on a contested decision to terminate, whether conducted by the State or City, satisfies constitutional standards of due process. The duplication entailed in both a local and state hearing results not from the requirements of due process as applied below, but rather from the voluntary preference of the state in both this case and in *Wheeler v. Montgomery,* for expedited local review.[FN8]

> FN8. The New York State agency chose to require its local departments to afford a hearing before termination, rather than requiring that aid be continued pending the "fair hearing" mandated by federal statute in AFDC. Either alternative would satisfy Appellees' due process claim. The decision to require two hearings was New York State's. Accordingly, the court below did not order dual hearings in either Home Relief or AFDC. It merely required that there be *a* hearing before termination in accordance with *minimal* requirements of due process. Since duplication is the State's preference, the City agency's objections should be directed to the State, not to the due process clause. Duplication is not a consideration in this case or in *Wheeler v. Montgomery.*

Summary of Argument

I.

When the state acts to cause grievous injury through the revocation of statutory rights, entitlements or even governmental privileges, the Due Process Clause of the Fourteenth Amendment requires that minimal procedural safeguards be afforded. Recipients of subsistence grants for the bare necessities of life have a constitutional right to procedures permitting a proper determination of the legal and factual predicates on which governmental action affecting their critical interest is premised.

Public assistance benefits are no longer distributed as an act of charity at the whim of an administrator. Rather, under the applicable state and federal legislation, these grants are statutory entitlements, afforded as a matter of legal right to all persons sufficiently disadvantaged to fall within the category singled out for aid and who lack the resources and income deemed necessary for survival. An individual is found eligible for this statutory entitlement only upon extensive investigation and documentation showing that he has exhausted all assets, is without another source of support and has relinquished all resources unrelated to daily needs to the welfare department. The nature of the statutory entitlement and specific provisions require that an administrative decision to terminate assistance be based on an administrative finding that the individual no longer meets one of the prescribed conditions of eligibility. Administrative action terminating the assistance grant is plainly adjudicatory, entailing both particularistic findings about an individual and the binding application of rules and regulations to such findings. When the caseworker-investigator misunderstands the facts or misapplies the law and aid is erroneously withdrawn, the resulting harms are wholesale and immediate: families are evicted from their homes, children go hungry.

In these circumstances the minimal elements of Due Process include the individual's right to know the case against him, to be heard and to present evidence in his behalf, to confront and question adverse witnesses and to challenge the applicability of a rule or policy to his case.

II.

Final, *ex parte,* government action inflicting immediate harm on the individual is not made constitutional by later affording the individual an opportunity to learn and contest the charges against him. This is particularly so where the injury is immediate and irreparable, the likelihood of administrative error great, the subsequent review is afforded long after the harms are inflicted, and there is no public necessity for summary, *ex parte* action.

III.

The documentary review prior to termination tendered

by the Appellant is not constitutionally adequate. It does not assure that the individual will be informed of the case against him and does not afford the individual an opportunity to contest the charges against him. The document upon which review is primarily based is the record containing the caseworker's *ex parte* version of conversations with the recipient and other collateral sources. This record may be supplemented only by whatever written documents and written evidence the indigent recipient, without knowing the charges or evidence against him, may prepare and submit within a few days. A pre-termination discussion between the caseworker who has made and announced a tentative decision to terminate benefits and the recipient does not ameliorate the constitutional inadequacy of this documentary review. The investigator's home visits, threats and interrogations are not new to welfare; they do not constitute either notice of the charges or an opportunity to be heard but rather simply underscore the critical need for meaningful prior review.

IV.

The proposed regulation of Department of Health, Education and Welfare providing for the restoration of aid pending the determination of a statutory fair hearing in cases raising "an issue of fact or of judgment" is not an acceptable alternative to constitutional resolution of the issue here presented. It affords no relief for the recipients of statutory aid under New York's Home Relief Program. The procedural protection which it offers recipients of federal categorical aid is itself Constitutionally inadequate.

V.

Appellees are not asking for any special or novel Constitutional rule because of their impoverished circumstances. They seek only the time honored procedures afforded by reflex to our more advantaged citizens in dealing with the Government, procedures which themselves embody the Government's respect for the elementary rights of individuals. The plea for administrative flexibility is irrelevant to the issues herein. This Court is asked to affirm the *minimal* safeguards formulated and applied by the court below in response to the evils and abuses in the prevailing system of welfare administration, duly documented in the record of this case, and in the absence of alternatives which effectively control these evils. These minimal safeguards do not impose rigidities or prevent administrative flexibility to deal with problems, if and when they arise. Affording welfare recipients procedural due process of law in no way creates a Constitutional straitjacket.

***12** I.

Due process requires a hearing on the revocation of public assistance benefits.

A. *Appellant's Asserted Distinction Between the Procedure Required for the Protection of "Private Rights" and Other Unspecified Legal Interests Is Inadequate for Determination of the Requirements of Procedural Due Process of Law.*

Appellant concedes that:
"The need for aid is acute and in many cases chronic. The individual cases rightfully should elicit compassion, understanding and financial aid. A civilized society should do no less and probably should do much more than has been done to date" (Br. 11-12).

But, he argues, recipients of statutory assistance are not entitled to the procedural safeguards constitutionally guaranteed to "private rights." The implicit premise is that, since the state's decision to afford statutory aid is not constitutionally compelled, the dispensing power should not be confined to the norms of due process of law.

Although the viewpoint is reflected in the early history of government subsidies and relief programs, particularly as a limitation on substantive constitutional claims (see *Hamilton v. Regents of the University of California,* 293 U. S. 245 (1934); *McAuliffe v. Mayor of New Bedford,* 155 Mass. 216, 220 (1893)), it may no longer be seriously contended that the capricious or invidious revocation of government benefits may be justified by simple characterization of their receipt as a "privilege" rather than ***13** a "right." Substantively, this Court has consistently held that government benefits or entitlements, such as unemployment compensation, *Sherbert v. Verner,* 374 U. S. 398, (1963), or a tax exemption, *Speiser v. Randall,* 357 U. S. 513, 519-520 (1958), or the rather more discretionary privileges, such as government employment, *Slochower v. Board of Higher Education,* 350 U. S. 551 (1956), cannot be conditioned on the relinquishment of constitutional protections, including those inhering in the constitutional guarantees of due process and equal

protection as well as in the Bill of Rights. *Wieman v. Updegraff,* 344 U. S. 183, 192 (1952); *Douglas v. California,* 372 U. S. 353 (1963). Cf. *Traux v. Raich,* 239 U. S. 33 (1915); *Zemel v. Rusk,* 381 U. S. 1 (1965). A state may not impose arbitrary distinctions in the availability of statutory benefits, *Levy v. Louisiana,* 391 U. S. 618 (1967). These substantive constitutional protections assuredly apply to the public assistance programs. *Shapiro v. Thompson,* 394 U. S. 618 (1969); *King v. Smith,* 392 U. S. 309 (1968); *Westberry v. Fisher,* 297 F. Supp. 1109, 1115-1116 (D. C. Me., 1969) (where additional authorities are collected); cf., *Flemming v. Nestor,* 363 U. S. 603 (1960).[FN9] The absence of constitutional compulsion behind the granting of statutory rights, privileges and opportunities provided no resolution to the constitutional issues presented in these cases.

FN9. *See generally,* Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law," 81 *Harv. L. Rev.* 1439 (1968).

The notion that whatever the government undertakes to afford it can precipitously and arbitrarily revoke has played no significant role in this Court's resolution of questions ***14** of the requirements of procedural due process. It was expressly rejected in *Cafeteria and Restaurant Workers Union v. McElroy,* 367 U. S. 886 (1961), where the Court, though upholding the denial of confrontation in the circumstances of that case, stated:
"This question cannot be answered by easy assertion that, because she had no constitutional right to be there in the first place, she was not deprived of liberty or property by the Superintendent's action. 'One may not have a constitutional right to go to Baghdad, but the government may not prohibit one from going there unless by means consonant with due process of law.' " 367 U. S. 886, 894.

Even where the government power has been deemed plenary, as in the expulsion of resident aliens, *Galvan v. Press,* 347 U. S. 522 (1954), this Court has consistently held, from as early as 1903, that a resident alien is constitutionally entitled to a due process hearing prior to expulsion. *The Japanese Immigrant Case,* 189 U. S. 86 (1903); *Wong Yang Sung v. McGrath,* 339 U. S. 33 (1950). The agency's obligation to turn procedural corners rests not on the individual's vested right to remain but because deportation may deprive one "of all that makes life worth living." *Ng Fung Ho v. White,* 259 U. S. 276, 284 (1922). Similarly, this Court has long held that administrative power to require a showing of good character or fitness in licensing real estate brokers or accountants must mean authority "exercised after fair investigation, with such a notice, hearing and opportunity to answer . . . as would constitute due process." *Goldsmith v. Bd. of Tax Appeals,* 270 U. S. 117, 123 (1925); *Bratton v. Chandler,* 260 U. S. 110 (1922).

***15** More recently this Court held that admission to practice law could not constitutionally be denied on the basis of the opinion of a ch aracter committee without an adversary hearing affording both confrontation and cross-examination. *Willner v. Comm. on Character & Fitness,* 373 U. S. 96 (1963). The right to practice was not discussed, except to say that it "was not a matter of grace and favor." 373 U. S. at 102. *Cf., Schware v. Board of Bar Examiners,* 353 U. S. 232, 238-239 (1957). This Court has required an adjudicatory hearing in areas where both the existence of entitlement and the standards of eligibility for the entitlement are less clear than they are in public assistance, as in the loss of public employment, *Slochower v. Board of Higher Education, supra,* or the loss of employment with a government contractor. *Greene v. McElroy,* 360 U. S. 474 (1959).

Rarely has this Court dealt with a total denial of the opportunity to be heard. *Cf., Knauff v. Shaughnessy,* 338 U. S. 537 (1950). But the rare and special instances in which denial of a specified element of due process has been upheld by this Court serve to underscore the position of such procedural rights in our constitutional hierarchy of values. This Court, often divided, has sanctioned such where the Attorney General states that disclosure would endanger the national security, *Bailey v. Richardson,* 182 F. 2d 46 (D. C. Cir. 1950), *aff'd per curiam* 341 U. S. 918 (1951); where Congress has exercised a plenary power over foreign relations or control of the boarders, *Ludecke v. Watkins,* 335 U. S. 160 (1948); *Knauff v. Shaughnessy,* 338 U. S. 537 (1950); where the government is engaged in a military, proprietary or managerial function, ***16***Cafeteria Restaurant Workers Union v. McElroy,* 367 U. S. 886 (1961); where broad discretion to suspend a sanction is committed to the Attorney General or other high official, *Jay v. Boyd,* 351 U. S. 345 (1956). These decisions but confirm the general rule that "[t]he right to be heard before being

condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U. S. 123 at 168 (1951) (Frankfurter, J., concurring).

The federal courts have similarly held that procedural due process must be afforded in the administration of benefit programs, including those with a greater amount of selectivity and administrative discretion than public assistance--government contracting, university education and public housing. The D. C. Circuit Court in *Gonzalez v. Freeman,* 334 F. 2d 570 (D. C. Cir. 1964), noting that the terms right or privilege "tend to confuse the issue," held that one cannot be barred from continuing to contract with the Commodity Credit Corporation "without an opportunity for a full hearing." There may be no right to contract, but
"that cannot mean that the government can act arbitrarily, either substantively or procedurally, against the person, or that such person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for government contracts,"

particularly where
"[the] interruption of an existing relationship between the government and a contractor places the latter in a different posture . . . and can carry with it grave economic consequences." 334 F. 2d at 574.

***17** The Fifth Circuit, in *Dixon v. Alabama State Board of Education,* 294 F. 2d 150, *cert. denied,* 368 U. S. 930 (1961), required an adversary hearing on a disciplinary expulsion from a state university, since one's interest in education is, however characterized, of great value and "the possibility of arbitrary action is not excluded by the existence of reasonable regulations. There may be arbitrary application of the rules to the facts in a particular case." *Id.* at 157.[FN10] Federal courts have also held that a public housing authority must afford some opportunity to be heard prior to the initiation of summary eviction proceedings in landlord-tenant court.[FN11] *Holt v. Richmond Redevelopment and Housing Auth.,* 266 F. Supp. 397 (E. D. Va. 1966); *cf. Thorpe v. Housing Authority of Durham,* 393 U. S. 268 (1969).

FN10. Similarly, in *Wasson v. Trowbridge,* 382 F. 2d 807 (1967), the Second Circuit held that a cadet could not constitutionally be expelled from the United States Marine Academy for "excessive demerits" without full notice of the charges and the case against him in an adjudicatory proceeding. Compare *Madera v. Bd. of Educ. of New York City,* 386 F. 2d 778 (2d Cir., 1967).

FN11. The public housing situation is distinguishable, however, from the instant case, in that the *ex parte* decision to evict requires some form of judicial proceeding to implement. *See Thorpe v. Housing Authority of Durham, supra.*

The cardinal factor in all of these cases is the impact and character of the administrative determination against the individual.[FN12] The individuals therein had no unalterable***18** or vested "right" to the benefits, but they did have a constitutional right to a proper determination of the legal and factual predicates on which the administrative action affecting a substantial interest was premised.

FN12. The courts of appeal have also held that due process requires an adjudicatory hearing with respect to the denial or suspension of a liquor license, *Hornsby v. Allen,* 326 F. 2d 605 (5th Cir. 1964); *Minkoff v. Payne,* 210 F. 2d 689 (D. C. Cir. 1953); of a license to operate as a bail bond surety, *In re Carter,* 192 F. 2d 15 (D. C. Cir. 1951) *cert. denied,* 352 U. S. 862 (1951); of a radio license, *Homer v. Richmond,* 292 F. 2d 719 (D. C. Cir. 1961); of a permit to serve as a merchant marine, *Parker v. Lester,* 227 F. 2d 708 (9th Cir. 1955).

In the court below, the Appellants conceded that constitutional requirements apply to the administration of public assistance and did not suggest that a distinction between private "rights" and other unspecified legal interests justified a uniquely diluted version of due process for recipients of public assistance. In light of these cases, the City Administrator's attempt to resurrect this distinction in this Court to justify "flexibility of procedure" does not advance the inquiry of "what minimal procedural safeguards are required here" (380a).

We turn now to that inquiry. The Constitutional standards for "the protection of the individual against arbitrary action," *Ohio Bell Telephone Co. v. Public Utilities Comm.*, 301 U. S. 292, 302 (1937), are not arcane. "Consideration of what procedures due process may require . . . must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action." *Cafeteria Workers v. McElroy, supra,* at 895. "The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations to be taken into account." *Hannah v. Larche,* 363 U. S. 410, 442 (1960). We set forth these elements--the impact and character of the administrative decision, the nature of the individual and governmental interests, and the nature of the decision making process--to establish the threshold right to procedural due process and the foundation for the timing and content of the hearing.

***19** B. *Home Relief and AFDC Are Statutory Entitlements Afforded as of Right to All Eligible Individuals.*

The federal and state statutes governing AFDC and Home Relief now establish a statutory right to benefits commensurate with the critical individual needs and expectations which these programs are intended to meet. The substance of this statutory entitlement is well revealed in the evolution of AFDC and Home Relief from the pre-Depression pattern of relief. Prior to 1935, relief was administered as an act of charity, private and public, through thousands of poor relief agencies. Benefits were a discretionary "dole" dispensed in whatever amount and on whatever conditions a social worker saw fit to formulate. There was no attempt to define who was "eligible" or to give aid to more than a fraction of those similarly in need.[FN13] Aid was confined to the "worthy" poor and recipients were subjected to civil disabilities and severe behavioral restraints to keep them worthy.[FN14] Withdrawal of aid was as whimsical as its dispensation. Not surprisingly, a rule of law had no function in this system of relief; courts abstained on the ground that welfare was a gratuity or a privilege to be administered with complete discretion. *City of Albany v. McNamara,* 117 N. Y. 168, 174, 22 NE 931 (1889); *Wilkie v. O'Connor,* 261 App. Div. 373 (NY 1941).

FN13. *See* Bell, Aid to Dependent Children, 11-19 (1965). *See also* Abbott, E., Public Assistance 35 (1966).

FN14. Abbott, G., From Relief to Social Security, 227 (1966).

The Social Security Act of 1935, though reflecting a limited view of federal powers, *cf., Shapiro v. Thompson,* 394 U. S. 618 (1969); *Schecter Poultry Co. v. U. S.*, 295 U. S. 495 (1935), sharply departed from this pattern by establishing a uniform statutory "right" to public assistance***20** benefits and requiring fair methods of administration respecting this right. Hence, the Act required that the state agency provide an opportunity for a "fair hearing" to all aggrieved applicants and recipients, 42 U. S. C. §602(a)(4); provide safeguards on the use or disclosure of information concerning recipients, 42 U. S. C. §602(a)(9); provide aid in the form of cash payments without restrictions on use, 42 U. S. C. §§603, 606; and provide a uniform program throughout the state under the administration or supervision of a single state agency. 42 U. S. C. §602(a)(1) and (3).

The concept of entitlement gave rise over the years to an expanding network of federal and state legislative controls on the conditions of eligibility for aid. As this Court recounted in *King v. Smith,* 392 U. S. 309 (1968), this evolution confirmed the rejection of the pre-Depression standard of "worthiness" as the touchstone of aid. "Federal public welfare policy now rests on a basis considerably more sophisticated and enlightened than the 'worthy person' concept of earlier times." 392 U. S. at 324-25. All persons sufficiently disadvantaged to fall within the category singled out for aid and who lack the resources and income deemed necessary for survival, are, as a matter of statutory right, entitled to assistance. Waiting lists or other mechanisms of selecting among eligible persons are legislatively prohibited. 42 U. S. C. §602(a)(10).[FN15] These programs accordingly are without the selectivity and unarticulated administrative preferences inherent in benefit programs with a limited number of units or places, such ***21** as public housing, 42 U. S. C. 1401 *et seq.*,[FN16] Head Start, 42 U. S. C. §2809(a)(c)(1), or employment training, 42 U. S. C. §2571 *et seq.*[FN17] As Congress succinctly put it for AFDC:

FN15. *See,* In the Matter of: The Petition of the State of Georgia for Reconsideration of

Its Proposed Implementation of Section 208(b) of P. L. 90-248 Before the Administrator, Social and Rehabilitation Service, Department of Health, Education and Welfare (April 2, 1968).

FN16. Nonetheless, admissions standards and procedures must comply with due process and equal protection requirements. *Holmes v. New York City Housing Authority,* 398 F. 2d 2 62 (2d Cir. 1968); *Thomas v. Housing Authority of Little Rock,* 282 F. Supp. 575 (E. D. Ark. 1967).

FN17. *See generally,* Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues," 74 *Yale L. J.* 1245 (1965).

"*aid . . . shall be furnished with* reasonable promptness *to all eligible* individuals." 42 U. S. C. §602(a)(10). (Emphasis added.)[FN18]

FN18. This provision, added in 1950, was "to make it clear" that all eligible persons must be given assistance. 1950 U. S. C. Cong. Serv. pp. 3470-71. See, *King v. Smith, supra; Williams v. Dandridge,* 297 F. Supp. 450 (D. Md. 1968).

New York statutes establishing Home Relief and AFDC impose the identical command.[FN19] These provisions create both a duty on the part of welfare administrators to grant assistance to all eligible individuals, and a correlative right in those individuals to receive such assistance.[FN20]

FN19. "Each public welfare district *shall* be responsible for providing aid to dependent children under this title *to persons eligible therefor* who reside in its territory." N. Y. Soc. Serv. L. §344(3) (McKinney 1966). "Any person unable to provide for himself . . . who is not receiving needed assistance or care . . . *shall* be eligible for home relief." *Id.* §158. (Emphasis added.)

FN20. The regulations issued by the Department of Health, Education and Welfare (H. E. W.) pursuant to 42 U. S. C. §602(a)(10) speak in terms of entitlement throughout. They recognize the individual's right to know about the public assistance programs, to apply for them, and to receive payments if found to be eligible, to be informed about "their rights and obligations under the program," and require that "assistance will be provided promptly and will continue regularly to all eligible persons until they are found to be ineligible." Handbook of Public Assistance Administration Part IV, §2200(b)(1-4). They mandate the states to formulate procedures for determining eligibility which
"respect the rights of individuals under the United States Constitution, the Social Security Act, . . . and all other relevant provisions of Federal and State laws; and will not result in practices that violate the individual's privacy or personal dignity, or harass him, or violate his constitutional rights," Handbook of Public Assistance Administration, Part IV, Sec. 2200(a).

The most recent H. E. W. regulation on eligibility, 45 C. F. R. §205.20 (Jan. 24, 1969), requires:
"payment of assistance to all individuals who are eligible and denial to (those) who are not eligible; procedures which are simple, efficient . . .; and full respect for the rights and dignity of applicants for, and recipients of, assistance."

Other sections of this recent regulation repeatedly describe the assistance grant as an "entitlement". 45 C. F. R. §205.20(a)(6) and (c)(1)(i).

Even before §602(a)(10) was added, HEW had stated that:
"State laws specify the eligibility requirements in effect in the public assistance programs. This specification removes from the discretion of the administration the right to exclude persons falling within the scope of the program, because all persons meeting the eligibility qualifications are equal before the law and have a r ight to receive assistance under a uniform application of the law. The right of eligible persons to receive assistance is also inherent in the requirements of the

> Social Security Act for the development and operation of State plans. Methods of administration necessary for proper and efficient operation of State plans are interpreted to include standards and procedures which protect this right for each individual by making the opportunity to apply for assistance freely available and by granting assistance promptly to each eligible individual."
>
> Handbook of Public Assistance Administration, Part IV, §2321 (Sept. 3, 1947).

22** To be sure, the pre-Depression pattern has had its due and there are within the legislative guidelines of need and dependency numerous administratively defined economic and non-economic grounds for disqualification. Administrative standards, whilst sometimes vague and often evaluative, do not purport, however, to represent unfettered discretion23** or simple assessment of worthiness. Since they now affect the scope of a statutory entitlement, they are subject to legal challenge and review. When contained in a state AFDC plan, the eligibility standards are administratively approved only if consonant with the specific requirements of the federal Act and only if "rational . . . in the light of the purposes of the public assistance programs.[FN21]

> FN21. A. Willcox, Memorandum Concerning Authority of the Secretary, Under Title IV of the Social Security Act, to Disapprove Michigan House Bill 145 on the Ground of its Limitations on Eligibility, March 25, 1963. H. E. W.'s authority for such review stems from its obligation to provide proper methods of administration. Proper administration of this entitlement itself imports a statutory equal protection clause into the federal act. *See generally,* "Welfare's Condition X," 76 *Yale L. J.* 1222 (1967), *cf. Steele v. Louisville & Nashville R.R.,* 323 U. S. 192 (1944).

They are also subject to judicial scrutiny, affirming that eligible individuals have a statutory right to receive benefits and that administrative caprice may not nullify this right. As this Court stated in *King v. Smith,* 392 U. S. at 317:

One of the statutory requirements is that "aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals . . ." (citations omitted.) . . . sec. 406(a) of the Act defines a "dependent child" as one who has been deprived of "parental" support . . . *In combination, these two provisions of the Act clearly require participating States to furnish aid to families who have a parent absent from the home, if such families are in other respects eligible.* See also, Handbook, Part IV, sec. 2200(b)(4).[FN22] (Emphasis added.)

> FN22. The Court thus endorsed the ruling of the court below in *Smith v. King,* 277 F. Supp. 31 (M. D. Ala. 1967), that:
> . . . Aid to Dependent Children financial assistance is a statutory entitlement under both the laws of Alabama and the federal Social Security Act, *and where the child meets the statutory eligibility requirements he has a right to receive financial benefits under the program . . . (C)lassifications may only be created which are rationally related to the purpose of the federal and Alabama Aid to Dependent Children statutes.* (Emphasis added.)

***24** See also, *Shapiro v. Thompson, supra; Williams v. Dandridge,* 297 F. Supp. 450 (D. Md. 1969); *Rothstein v. Wyman,* ----- F. Supp. ----- 69 Civ. 2763 (S. D. N. Y., August 4, 1969); *Dews v. Henry,* 297 F. Supp. 587 (D. Ariz. 1969); *Solmon v. Shapiro,* ----- F. Supp. ----- (Civ. No. 12,790, D. Conn. April, 1969); *Doe v. Shapiro,* ----- F. Supp. ----- Civ. No. 13,093 (D. Conn. August, 1969).[FN23] This statutory entitlement has been recognized by the New York courts as well:

> FN23. *See also, Board of Social Welfare v. Los Angeles County,* 27 Cal. 2d 81, 86, 162 P. 2d 630, 633 (1945) ("The obligation to pay became a debt due from the county to the applicant as of the date the latter was first entitled to receive the aid.") and *Conant v. State,* 197 Wash. 21 (1938).

"It is the statutory duty of the commissioner to provide adequately for those unable to maintain themselves. Indigent people are entitled to such payments as a matter of law." (Under New York's Social Services Law.)
Hunt v. Bonilla, ----- M. 2d -----, ----- N. Y. S. 2d ----- (N. Y. L. J., April 8, 1968, p. 18, col. 3, N. Y. Sup. Ct.)[FN24]

FN24. As a three-judge court recently stated in *Doc v. Shapiro:*
"Under the Social Security Act, a child is eligible for and entitled to AFDC assistance if he is both 'needy' and 'dependent.' A child is 'needy' if he 'does not have the income and resources sufficient to assure economic security' when measured against standards of need established by the individual states. HEW, Handbook of Public Assistance, Part IV, §3120. A child is 'dependent' if a parent is continually absent from the home. 42 U. S. C. §606(a). These are the only two eligibility requirements which Congress has imposed." Civ. No. 13,093, *supra* at 6.

***25** The cumulative impact of the statutes, regulations and judicial decisions makes it clear that this is not a case in which the legislature has delegated unreviewable discretion to an administrative agency or official. Cf. *Norwegian Nitrogen Products v. United States,* 288 U. S. 294 (1933). No legislative judgment is being assailed. The philosophy that needy citizens are "non-persons" allowed to receive state charity at the whim of an administrator is not a part of AFDC or Home Relief.[FN25]

FN25. The concept of entitlements under these programs has been the subject of much scholarly discussion. See Reich, "The New Property," 73 *Yale L. J.* 733 (1964), and "Individual Rights and Social Welfare: The Emerging Legal Issues," 74 *Yale L. J.* 1245 (1965); Graham, "Public Assistance: The Right to Receive; the Obligation to Repay," 43 *N. Y. U. L. Rev.* 451 (1968); Note, "Social Welfare--An Emerging Doctrine of Statutory Entitlement," 44 *Notre Dame Lawyer* 603 (1969); see also, Notes, "Welfare's Condition X," 76 *Yale L. J.* 1222 (1967), and "Withdrawal of Public Welfare: The Right to a Prior Hearing," 76 *Yale L. J.* 1234 (1967). But its root meaning in AFDC and Home Relief is "objective eligibility safeguards against revocation or loss of benefits." Reich, "Emerging Legal Issues," *supra,* at 1256.

C. *The Entitlement to Home Relief and AFDC Is Afforded Only to Destitute Persons and Families Without Resources, Income and Alternative Sources of Support Who Are Starkly Reliant on the Bi-Weekly Subsistence Grant.*

The statutory entitlements at stake here under these residual assistance programs are the last resource for individuals and families who have been found to be unable to support themselves or to qualify for other forms of public aid, and who have no other private source of support.***26** As a prerequisite of receiving aid, an individual must show that he is unable to work because of age, infirmity, disability or the need to care for young children. Individuals who are capable of working must show that they have diligently sought employment and work is not available. 42 U. S. C. §602(a)(19); N. Y. Social Services Law §131(4) (McKinney 1966).[FN26] The pervasive criteria of economic need and dependency assure unqualified reliance on the bi-weekly grants for the basics of life--food, shelter, and clothing. The aid afforded is penurious and permits neither common amenities nor savings of any kind.[FN27] To qualify and remain qualified for aid, the family must report and relinquish to the agency all assets and property unrelated***27** to current basic needs.[FN28] The severity of such resource restrictions and the meagerness of the bi-weekly grant do not allow one to budget for any contingency, including administrative error, which, as will be shown, is considerable. As the court below found, "There is one overpowering fact which controls here. By hypothesis, a welfare recipient is destitute, without funds or assets" (372a).

FN26. Some individuals receiving aid are working, but receive wages so low that the family income falls below subsistence levels.

FN27. The gross inadequacy of the public assistance grant, even in a r elatively progressive state such as New York, is well documented. The Commissioner of the Nassau County Department has stated that, even prior to the recent reductions of grants in New York the "standards of assistance provide for life on a l evel of subsistance, nothing more, and often less." *Rosado v. Wyman,* ----- F. Supp. -----, 69 Civ. 355 (E. D. N. Y. 1969), rev. other grounds, ----- F. 2d ----- (Nos. 711, 726, 729, 2d Cir. 1969). The amounts provided are substantially lower than the standards which have been determined to be minimally necessary for a low-income urban family by the U. S. Bureau

of Labor Statistics, the U. S. Department of Agriculture, the Community Counsel of Greater New York and several other reputable public and private agencies. New York currently provides 66 cents per person per day for food. No allowance whatsoever is made for necessities such as home furniture, school clothing, winter coats and boots, or for "luxuries" such as newspapers, telephone calls, babysitters, suspenders, cosmetics, cigarettes, birthday presents or parties, or any form of entertainment. Since costs for the non-food components of the budget--rent and utilities-- are fixed, any purchase of an item not provided for must be made from the 66 cents a day allotted for food. N. Y. Soc. Serv. L. §131-a, added by L. 1969, Ch. 184.

FN28. The exceptions show the rigor of the rule. New York allows recipients to retain $500 for a burial fund, but requires that this fund be given to the Department to be held in trust. 18 NYCRR §§352.8(a)(1) and (b)(4). A family may continue to live in their home or cooperative apartment only if the mortgage payments are less than it would minimally cost for other shelter and if they give the state a lien on the property which permits the Department to make recovery for all assistance paid if the family ever becomes solvent. 18 NYCRR 352.8(a) and (d). Life insurance policy may be retained only if the face value is less than $500. 18 NYCRR §352.8(c)(2).

D. *The Erroneous Revocation of Entitlement and Withdrawal of Aid Works Immediate and Irremediable Harms Jeopardizing Critical Aspects of Individual and Family Life and Liberty.*

In light of the stark reliance on the bi-weekly grant, "the individual's overpowering need in this unique situation not to be wrongfully deprived of assistance" (376a) is both obvious and inescapable. When aid is erroneously withheld, the entire quality of life--sometimes even life itself--is placed in immediate jeopardy. The Appellees herein are no worse than typical, less in some cases because of this suit. But they illustrate the immediacy of the impact of withdrawal. After termination, Angela Velez and her four young children were evicted for non-payment of rent and all forced to live in one small room of a relative's ***28** already crowded apartment (187a). The children had little to eat during the four months it took for the Department to correct its error. Esther Lett and her four children at once began to live on the handouts of impoverished neighbors (78a); within two weeks all five required hospital treatment because of the inadequacy of their diet (72a). Soon after, Esther Lett fainted in a welfare center while seeking an emergency food payment of $15 to feed herself and her four children for three days. Pearl Frye and her 8 children "had gone hungry," living on peanut butter and jelly sandwiches and rice supplied by friends who were also dependent on public assistance (37a). Juan DeJesus found himself homeless, living in temporary shelter provided by a friend (17a). Other plaintiffs lived on the money extended by their counsel (42a, 97a), or friends (17a, 97a). The record, however, cannot document the impact of erroneous termination on the children in these families, the unmeasurable toll on their capacity to learn and to mature into healthy and productive citizens.

These harms are inescapable in most every case of *erroneous* termination and they occur immediately upon such termination, often as intense in the early days as afterwards. They comprise a syndrome beginning with eviction and deprivation of food and other necessities, including health services,[FN29] and ending with private handouts for ***29** the fortunate and illness, family disintegration, institutionalization and hospitalization for the less fortunate. Rarely, if ever, does administrative action, adjudicatory in nature, in revoking a statutory right, result in such irremediable and wholesale harms upon individuals, certainly without first affording notice and an opportunity to contest the basis of the decision causing such grievous injury. Cf., *Ng Fung Ho v. White, supra.*

FN29. Eligibility for public assistance is the basic condition for the receipt of health care and services under the Medicaid program in most states. 42 U. S. C. §1396, *et seq.* Even where Medicaid benefits are afforded to the medically indigent, a broader category than public assistance, revocation of eligibility for public assistance terminates one's eligibility for Medicaid benefits and a new application for such benefits must be filed. The unreviewed basis for termination renders a new application uncertain.

E. *The Complexity of the Factual and Evaluative Issues Involved, the Characteristics of the Decision Makers, and the Consequently High Probability of Administrative Error Render an Adequate Hearing Peculiarly and Extraordinarily Necessary.*

The statutory right to assistance requires that termination of aid to persons found eligible must rest upon an administrative re-determination that the individual is no longer eligible. To deprive one of the statutory entitlement, there must be an administrative investigation and decision, supported by findings, that the individual now offends one of the prescribed conditions of eligibility. The applicable regulations make this clear. After making a finding of eligibility, the agency may not cease or reduce payments while investigating a family's current situation or evaluating information it may have received which appears to raise a question of continuing eligibility. H. E. W. Handbook, PT. IV, §2200(b)(4).[FN30] Similarly, the New York ***30** State regulations authorize termination after the agency "verifies ineligibility" 18 NYCRR §351.22.[FN31] Hence, a foundation for revocation of aid has long been required. It is the process of *ex parte* formulation of this foundation under the applicable standards by agency casework personnel which demonstrates the Constitutional necessity for and function of an opportunity to be heard.

FN30. The United States informed the court below that "until the agency has made a definite determination of ineligibility . . . payments must continue as before." Brief Amicus Curiae of the United States, *Kelly v. Wyman,* at 4. A decision that a recipient is no longer eligible must be "based on facts--statements about eligibility requirements that have been substantiated by observation or written records, or other appropriate means." The decision and its support must be recorded in the case record maintained for each recipient. H. E. W. Handbook §§2220, 2230(3), March 18, 1966.

FN31. The regulation also requires that information suspecting possible ineligibility be investigated within 30 days, 18 NYCRR §351.22(b), and provides that "the findings of the investigation . . . together with the recommendation [be] reviewed by the supervisor." 18 NYCRR §351.24.

The New York City regulation states that: "Upon completion of the investigation or reinvestigation . . . it is the Investigator's responsibility to recommend . . . that assistance be continued or withdrawn. This recommendation should be based on complete, factual, verified information clearly stated so that there is no doubt as to eligibility . . ." Policies Governing the Administration of Assistance, New York City §174.

Initial eligibility is established only after exhaustive investigation and findings on an extraordinary range of factors deemed relevant under this system to need and dependency.[FN32] In every case there is individual verification of every relevant aspect of an applicant's life, 18 NYCRR §§351.1 and 351.2, since under the premise of distrust characteristic of welfare administration, inquiry must be penetrating and comprehensive. 18 NYCRR §351.7. Although recipients are required to report any material change in ***31** status or income under pain of criminal sanction, 52 N. Y. Soc. Serv. L. §145 (McKinney 1966), caseworker re-investigations are mandatory in AFDC and Home Relief every three months, 18 NYCRR §82.1(b)(2)(i)(2), and more frequently where there is any doubt of continuing eligibility. 18 NYCRR §351.22(b). Considerable casework time is spent in investigating each beneficiary while concurrently providing counseling or social services.

FN32. These conditions are found in the State statute, rules of the State Board, regulations of the State Commissioner, and bulletins and procedurals of the local agency, 52 N. Y. Soc. Services Law §1 *et seq.* (McKinney 1966), 18 NYCRR, Handbook for Case Units in Public Assistance. They are not easily summarized, but they include the continuous absence of a parent, continuing disability or unemployment, support payments or gifts of any kind, lack of resources or assets, maintaining attendance at school, and so on. See, 52 NY Soc. Serv. L. §§158, 302, 349 (McKinney 1966) and 18 NYCRR §§351.2; 351.6-351.10.

The number and character of the events generating caseworker suspicion and investigation are seen in the factors or reasons for case closings. Most all of these

are not susceptible to objective ascertainment; they are very open to dispute. The New York City Handbook lists in seven pages the "reasons for terminations" in the summary form in which they are communicated to clients in the official notice of termination. (See App. C.) They include such economic factors as:
"employment or increased earnings of any 'person in the home,' including dependent children or boarders; return of parent; receipt of increased support from the father or 'other person outside the home'; receipt or increase of any benefit, pension, life insurance, inheritance; refusal to accept referral for employment or to accept employment; and other material change in income or resources of person in the home."

The non-economic grounds deemed "refusal to comply with Department policy" or "to reveal information which may affect eligibility" are less specific but far more embracing, requiring termination where the recipient
***32** "refused to comply with Department's resource policy; refused to permit collateral visits; refused to explain management; misuse[d] funds; and refused to keep medical placement or *other* appointments."[FN33]

> FN33. The State regulations call for termination, *inter alia,* where a parent is no longer incapacitated, an absent parent returns, a parent remarries or returns to full employment, a minor between 18 and 21 leaves school, unexcused absence from the State of any member of the family unit, and, to be comprehensive, where "need does not continue." 18 NYCRR §369.3(c)(1) & (2).

The congeries of circumstances thought to warrant termination under these standards are well nigh infinite. The instant cases are illustrative.

Randolph Young was terminated for "mismanagement of funds" after he was robbed of $20. (15a); and Mary Holmes was terminated for "mismanagement" when she used rent security money to purchase a bed for her daughter who had been sleeping with her (230a, 234a). Pearl McKinney was terminated because of "failure to get us information concerning [son's] employment," (34a) even though her son did not receive aid and was not legally responsible for her support (33-36a). Pearl Frye was terminated for failure to keep an appointment with the caseworker (17a). Juan DeJesus was terminated because he failed to "produce" a past employer who no longer lived in New York and because he allegedly drank or took drugs (17a). Altagracia Guzman was terminated because she refused to bring a support action against her husband, which she deemed groundless and harassing, since he was making regular contributions to her support (23a). Ina Sidor was terminated because a newly appointed caseworker suspected that she owned a car and some stock, even though those ***33** very reasons had been rejected in an appeal from a previous termination (216a, 183a).

The information raising caseworker suspicion or surmise in providing the basis for decision under these standards is generated by a variety of sources. There is simple but serious bureaucratic error, as in Esther Lett's termination because the City Board of Education informed the caseworker that she was currently in their employ when in fact such employment had ceased six months before (79a). There is information from sundry collateral sources, sometimes hostile ones. Angela Velez' landlady, observing Mr. Velez visiting his children, reported his return to the home (186a). Felix Gomez' estranged wife reported that he had bought a two hundred dollar gold watch for his girl-friend (190a). There are other citizen complaints or anonymous letters reporting "facts" about the recipient to the caseworker, supervisors and, indeed, high officials in the Department (257a). There is also unreported and unsubstantiated suspicion. Theresa Negron was terminated because of a suspicion that her husband had returned (169-170a), though the entry in the case record stated that the client had left town (171a, 200a). Too often the adverse information stems from caseworker hostility, annoyance, or altercation with the recipient. Hence, John Kelly was terminated for being missing after a dispute over where he should live; he remained missing after he and a private social worker made repeated attempts to see the caseworker (14a, 105a). Minerva Rodriquez was also deemed "missing" because she was not at home on two occasions when the caseworker made an unscheduled visit to the home (214a).

***34** It is obvious that termination of aid rests upon evaluation of third party information, the exercise of judgment about the character and honesty of recipients, and the application of standards which are both vague and evaluative to a matrix of complex and disputable facts. The alleged facts underlying terminations are obviously controvertible, and indeed they were con-

troverted in the instant cases. So too is the existence of the so-called "department policies" said to be applied. The caseworkers in the instant cases, however, having formed an opinion, either did not learn of the recipient's explanation or did not accept it. The materials for judgment were scant, reflecting either the caseworker's lack of inclination or lack of time to develop the necessary information. It also no doubt reflects the inability of recipients, persons of limited education and articulation, instantly to establish their case to an accusing caseworker in their homes. Even where there was further caseworker inquiry, such was an investigator's search for evidence to substantiate a suspicion and to build a case.

The dynamics of welfare administration and the singular absence of safeguards in the personnel serve to exacerbate the obvious dangers of error and arbitrariness under these standards. Caseworkers, the principal or initial decision-makers in the termination of assistance, are persons without any professional training or education to render either social work judgment or legal assessments. High turnover is chronic throughout the country;[FN34] in New York City, from one quarter to one half the caseworkers leave every ***35** year.[FN35] In sum, "the shortage of qualified personnel for social welfare programs is critical . . . . [N]ew programs, and existing programs, are in jeopardy unless prompt and effective action is taken to assure a sufficient supply of manpower with skills and knowledge."[FN36]

FN34. "Many states have experienced serious difficulty in obtaining competent casework staff and in keeping staff turnover to a minimum." Federal and State Action to Correct Problems of Ineligibility and Incorrect Payment Found in the Nationwide AFDC Review, HEW, Welfare Administration, Bureau of Family Services, Feb. 24, 1964, p. 2.

FN35. Glaser, "Beyond Income Maintenance, A Note on Welfare in N. Y. C.," 15 The Public Interest 108 (Summer 1969) reports turnover rates of 24% and 40%.

FN36. HEW, Report of the Advisory Council on Public Welfare (1966) 75; see also, *Report on States with Increased Rate of Payment Errors from 1963 t o 1964,* Memorandum from Fred Steininger, Director, HEW Bureau of Family Services, to Ellen Winston, Commissioner of Welfare, HEW, May 3, 1965, at 2.

The law which these untrained workers are empowered to administer is both intricate and not readily available.[FN37] Simplification for caseworkers, however, is achieved through vagueness and equivocation on the critical questions of eligibility.[FN38] Local policies thus become

FN37. The law governing public assistance eligibility is found in a plethora of sources. In addition to state and federal statutes, there are six volumes of federal regulations, state regulations and bulletins of the State Commissioner, rules of the State Board, volumes of fair hearing decisions, supposedly binding on caseworkers and published to enable them to avoid the errors of their colleagues, and the local agency materials. The City materials include a lengthy statement of policies and a handbook for case units, each of which are supplemented by informationals, procedurals, and executive orders, which are issued with great frequency.

See, Brier: "Welfare from Below: Recipients' Views of the Public Welfare System," 54 *Calif. L. Rev.* 370, 378 (1966); Keith-Lucas, Decisions About People in Need 165 (1957).

The state and local regulations are often considered confidential and clients and their counsel are denied access. Bell and Norvell, "Texas Welfare Appeals: The Hidden Right," 46 *Tex. L. Rev.* 223, 226, n. 31, 241 (1964).

FN38. Despite federal requirement that states provide specific standards to determine who is to be compelled to work, 42 U. S. C. §602 (a)(19) New York City advises its workers that:
"The mother or other female relative may be considered available for employment or training where this is desirable and suitable arrangements can be made for the care of the child or minor. Factors to be considered in developing employment plans are the needs,

> attitude, and potential of the mother or female relative, the age and needs of the child, as well as the arrangements for his care." Policies Governing Public Assistance §38.
>
> Another example is the requirement that, if aid is to be given, the home be suitable. "Care provided in the home must be such that his physical, mental and moral wellbeing is protected and his religious faith preserved. The standards generally, provided by the community for self-maintaining families are to be used in evaluating the adequacy of the care received by the child or minor . . ." Policies Governing Public Assistance §37.

***36** "frameworks into which an administrator can put his own ideas or in which other criteria may freely interplay." Keith-Lucas, Decisions About People in Need 243 (1957).

The complexity and vagueness of the standards as well as the ingrained premise that need for assistance implies individual pathology make recipients "vulnerable not only to the punitive, moralistic official but also to the overzealous, well-intentioned but mistaken official, the social therapist who is certain that he knows what the 'client needs.' "[FN39] Handler & Rosenheim, "Privacy in Welfare: Public Assistance & Juvenile Justice," 31 *Law & Contemp. Probs.* 377, 393 (1966).

> FN39. Another student has concluded that the typical caseworker is guided by "a more or less vague or even personal, set of values coupled with a belief in one's right or authority to lead clients to these." Keith-Lucas, *supra,* at 151.

The combination of incompatible functions--investigator and social counselor-- renders irresistible the temptation to shape and mold the lives of the poor. The power to ***37** terminate for "non-cooperation" or "failure to comply with Department policy" is the bulwark of this temptation. Further, caseworkers are frequently and inevitably influenced by "the deference welfare pays to politics."[FN40] Welfare recipients are one of the politically weakest, least organized, and least respected groups in our society,[FN41] particularly as the public image changes from "respectable, aged, white literate citizen in his 'golden years' " to "an uneducated, unmarried Negro mother and her offspring."[FN42]

> FN40. Bell and Norvell, "Texas Welfare Appeals: The Hidden Right," 46 *Tex. L. Rev.* 223, 234, n. 71 (1967).
>
> FN41. "Probably no beneficiaries of a public subsidy have less real influence on the terms and conditions of that subsidy than do the recipients of public assistance." Steiner, Social Insecurity: The Politics of Welfare, 153 (1966).
>
> FN42. Steiner, *supra,* at 3.

Purging the welfare rolls of ineligibles, and the hue and cry of welfare fraud and milching the public fisc is a part of our political rhetoric. The system and its administrators, political appointees, are not impervious to these pressures. Nor are caseworkers and the public.[FN43] There is consequently the "attempt to influence behavior, at least as far as the grant and eligibility are concerned . . . to satisfy public opinion."[FN44]

> FN43. In response to increasing welfare rolls, the New York City Department has been thoroughly investigated this year by the City Council, the Department of Health, Education and Welfare, and the General Accounting Office. No incidence of fraud has been reported to date. See N. Y. Times at 28 (Feb. 15, 1969) on City Council Investigation; at 1 (Jun. 1, 1969), on General Accounting Office investigation.
>
> FN44. Keith-Lucas, *supra,* p. 228. See, generally, Ten Brock and Wilson, "Public Assistance and Social Insurance--A Normative Evaluation," 1 *UCLA Law Rev.* 237, 271 (1954) and 31 *Law & Contemporary Problems* (Winter 1966).

***38** The influence of all these factors on eligibility redetermination need not be left theoretical. H. E. W.'s quality control review of individual case records, with no access to information outside the written case record, reveals that decisions to terminate or deny assistance were erroneous in 6.3% of the AFDC cases

across the nation. In New York this rate substantially exceeded the national average at 7.9% for AFDC and 7.0% in the adult categories.[FN45] Predictably the rate of reversal after hearing is considerably higher. The New York State agency reversed approximately 37% of the terminations that went to hearing during the year ending March 31, 1968, and reversed some 23% of those terminated from June to October, 1968.[FN46]

FN45. The rate of error in the AFDC programs was 16.3% in Pennsylvania, 11.2% in Ohio, and 10.3% in Florida. In the adult categories the leading states are Maryland at 16.3% and Delaware at 10.4%. H. E. W., "Aid to Families with Dependent Children and Adult Categories: Estimated Percent of Negative Case Actions in Which Local Agency Action Was Incorrect, July 1, 1966--March 31, 1967." See also, Greenleigh Associates, *Addenda to Facts, Fallacies and Future: A Study of the Aid to Dependent Children Program of Cook County, Illinois* (N. Y. 1960), p. 122, which reports that 23% of all terminations were invalid or questionable. See also, The Bureau of Social Service Research, *The Ineligibles: A Study of Fifty Families Terminated or Ineligible for Public Assistance* (Washington, D. C. 1963).

FN46. 316a-317a, 356a, 358a and 360a. These figures contain an underestimating bias since many applicants withdrew or defaulted after the local agency reinstated aid.

The pattern in other states is the same. Clients won 50% of their fair hearings in Texas from 1958 to 1966.[FN47] The rate climbed to 57% in 1967 and 66% in 1968.[FN48] Michigan***39** reports that in the first half of 1969, 69% of its termination cases were reversed.[FN49] Reversals in Louisiana range from some 25 to 29% of AFDC appeals and from 77 to 92% of general assistance appeals.[FN50] There was also a reversal rate in West Virginia in excess of 25%.[FN51] This rate of administrative error is truly startling.

FN47. Bell & Norvell, "Texas Welfare Appeals: The Hidden Right," 46 *Tex. L. Rev.* 223, 224 n. 13.

FN48. Texas State Department of Public Welfare Annual Reports, Fiscal years ending August, 1967, August 1968.

FN49. Michigan State Department of Social Services, Time Intervals Between Date Hearing Request Received in State Office and Date of Final Action, January 1 to June 30, 1969 (mimeo).

FN50. Interrogatories V, Nos. 24 and 25, *Lampton v. Bonin* (Civil Action No. 68-2092 E. District Louisiana, 1969).

FN51. West Virginia Dept. of Welfare, *Annual Report* July 1, 1964 to June 30, 1965, p. 19.

F. *The Interest of the State: The Nature of the Governmental Power Exercised Does Not Justify the Abrogation of Traditional Requirements of Due Process.*

Public assistance is not an area in which a special domain of plenary executive or congressional authority, uncluttered by process, may be claimed. Cf., *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U. S. 886 (1961). The government in the establishment and administration of these programs is not engaged in its managerial or proprietary functions as employer or contractor or in the special sensitive functions of administering military or foreign affairs. Rather, the government is fulfilling its constitutional responsibility in the twentieth century, "to insure domestic tranquility" and "to promote the general welfare" by providing that our most impoverished citizens will have the bare minimums essential for existence, without which our expressed constitutional liberties become meaningless. Aside from the history repudiated by the establishment of these statutory programs, no special reasons for immunity from constitutional guarantees***40** exist with regard to the administration to social welfare programs. The paramount purpose of these programs is to protect the economic security of disadvantaged citizens, *King v. Smith*, 392 U. S. 309 (1968), *Shapiro v. Thompson*, 394 U. S. 618 (1969), to maintain life in accordance with community standards of health and decency, and, additionally in AFDC, to
"help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self support and personal independence." 42 USC §601.

There is plainly nothing in these legislative goals or the government function to be impaired by the right to be heard. Indeed both the state and federal legislative judgments requiring fair hearings confirm the applicability of due process standards to these programs. The only state interest asserted is the avoidance of expenditures entailed in affording an adjudicatory hearing before termination of aid. Since this interest pertains solely to the timing of the hearing, it will be discussed under that point.

It should be obvious by now that termination of public assistance benefits entails all of the factors which underlie and call into being the Constitutional requirement of due process of law. Administrative action in terminating an individual's grant is plainly adjudicatory, involving the resolution of facts surrounding the conduct and fitness and qualification of particular parties, herein individuals and families, not large groups, Compare, *Londoner v. Denver,* 210 U. S. 373 (1908) with *Bi-Metallic Co. v. Colorado,* 239 U. S. 441 (1915), and the application of rules, regulations and legal consequences to those parties. In these ***41** circumstances, "it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Hannah v. Larche,* 363 U. S. 420, 442 (1960). The controverted issues in termination are peculiarly of the kind subject to the adversary process; they do not relate to technical questions susceptible of demonstrable proof on which evidence is not likely to be overlooked. *Cf., Willner v. Committee on Character and Fitness,* 373 U. S. 96, 108 (1963). Rather, they entail administrative assessments about the honesty and reliability of individual recipients, a determination on which this Court has particularly stressed the right to be heard. *Goldsmith v. Board of Tax Appeals,* 270 U. S. 117 (1925); *Willner v. Committee, supra.* See also, *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U. S. 123 (1951). The individual interest at stake is in a statutory right on which the very quality of life and liberty depends, itself a weighty factor in the due process decisions of this Court. Compare, *Greene v. McElroy,* 360 U. S. 474 (1959) with *Cafeteria and Restaurant Workers Union v. McElroy,* 367 U. S. 886 (1961); *Kwong Hai Chew v. Colding,* 344 U. S. 590 (1953); *Cole v. Young,* 351 U. S. 536 (1956). Surely this is not an interest subject "to the arbitrary will of another man who happens to partake of public power."[FN52] The very unreliability and capricious character of welfare administration renders procedural regularity at least as imperative in welfare cases as in other administrative programs.[FN53] The need ***42** for "the protection of the individual against arbitrary action . . ." *Ohio Bell Tele. Co. v. Public Utilities Comm.,* 301 U. S. 292, 302 (1937) and against "the play and action of purely personal and arbitrary power," *Yick Wo v. Hopkins,* 118 U. S. 356, 370 (1886), is certainly as great.

FN52. Jones, "The Rule of Law and the Welfare State," 58 *Colum. L. Rev.* 143, 155 (1958).

FN53. See generally, Note, "Withdrawal of Public Welfare: The Right to a Prior Hearing," 76 *Yale L. J.* 1234 (1967); Note, "Due Process and the Right to a Prior Hearing in Welfare Cases," 37 *Fordham L. Rev.* 604 (1969); Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues," 74 *Yale L. J.* 1245 (1965).

Absent procedural safeguards, there is the real and self-evident danger of an erroneous or groundless administrative decision, which, unsupported by evidence, is arbitrary and hence unconstitutional in an elemental sense. See, *I. C. C. v. Louisville & Nashville R.R.,* 227 U. S. 88 (1913); and *Rios v. Hackey,* 294 F. Supp. 885 (N. D. Texas 1967). But a valid basis is determined by process, not caseworker whim or surmise. There are also the obvious dangers to other Constitutionally protected freedoms, particularly acute, as recipients begin to organize, petition, and assert their rights to privacy in their homes, *James v. Goldberg,* 69 Civil 2448 (S. D. N. Y. June 1969); *Bradley v. Ginsberg,* 67-3047 (S. D. N. Y. 1967), and their privilege against self-incrimination, *cf., Doe v. Shapiro,* ----- F. Supp. ----- (Civ. No. 13, 093, D. Conn., August 1949), and their rights guaranteed by the federal Social Security Act.[FN54]

FN54. *King v. Smith,* 394 U. S. 309 (1968); *Williams v. Dandridge,* 297 F. Supp. 450 (D. Md. 1968); *Dews v. Henry,* No. ----- Civ. -----, 6417 Phx. 2548 Tuc. (D. C. Ariz. ----- March 1969); *Solmon v. Shapiro,* Civ. No. 12,790 (D. Conn. April 1969); *Jefferson v. Hackney,* Civ. Action 3-3012-B, 3-3126-B (N. D. Texas 1969); *Doe v. Shapiro, supra.*

***43** II.

Due process requires the rudiments of an opportunity to be heard on a contested decision to terminate assistance.

"When the Constitution requires a hearing, it requires a fair one," *Wong Yang Sung v. McGrath,* 339 U. S. 33, 50 (1950), "granted . . . in a meaningful manner," *Armstrong v. Manzo,* 380 U. S. 545, 552 (1965) and, "aimed at establishing the validity, or at least the probable validity, of the underlying claim." *Snaidach v. Family Finance Corp.,* 395 U. S. 337, 343 (concurring opinion). The hearing must be "*appropriate to the case,* and just to the parties to be affected . . . it must give them an opportunity to be heard." *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123, 162 (1950) (Emphasis added).

The minimal elements of the right to be heard in a contested administrative proceeding need little elaboration. The party is entitled to know the case against him, to present evidence in his behalf, to confront and question adverse witnesses, and to challenge the applicability of any rule or policy to his case. *Willner v. Committee on Character and Fitness,* 373 U. S. 96, 105-106 (1963); *Greene v. McElroy,* 360 U. S. 474, 496-498 (1959); *Simmons v. U. S.,* 348 U. S. 397 (1955). He is also entitled to a decision based on the evidence presented. *Office of Communication of United Church of Christ v. FCC,* 359 F. 2d 994 (D. C. Cir. 1966).[FN55] These minimal safeguards are particularly ***44** necessary where adjudicatory action "seriously injures an individual." *Greene v. McElroy, supra,* at 496; See *Southern Ry. Co. v. Virginia,* 290 U. S. 190 (1933). These principles have remained relatively immutable in our jurisprudence. *Hannah v. Larche, supra.* They are not disparate "formalities" of a judicial trial; they are the inseparable essentials of an adjudicatory hearing, however brief or informal.[FN56]

FN55. *See also In re Gault,* 387 U. S. 1, 31-34 (1967); *Kent v. U. S.,* 383 U. S. 541 (1966); *Reilly v. Pincus,* 338 U. S. 269 (1949); *Homsby v. Allen,* 326 F. 2d 605 (5th Cir. 1964); and *Hyser v. Reed,* 318 F. 2d 225 (D. C. Cir. 1963).

FN56. The plight of the poor caught in the administrative process has recently attracted substantial scholarly consideration of the application of traditional procedural due process principles in the welfare field. The uniform conclusion is that a hearing containing at least the elements set out above is constitutionally required. Note, "Withdrawal of Public Welfare: The Right to a Prior Hearing," 76 *Yale L. J.* 1235 (1967); Morris, "Welfare Benefits as Property: Requiring a Prior Hearing," 20 *Admin. L. Rev.* 487 (1968); Note, "Due Process and the Right to a Prior Hearing in Welfare Cases," 37 *Fordham L. Rev.* 604 (1969); Burrus and Fessler, "Constitutional Due Process Hearing Requirements in the Administration of Public Assistance: The District of Columbia Experience," 16 *American University Law Review* 199 (1967); Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues," 74 *Yale L. J.* 1245 (1965).

We do not rely solely on rudimentary principles. "The circumstances . . . determine the necessary limits and incidents in the concept of a fair hearing," *Willner v. Committee on Character and Fitness, supra,* at 107. As we have seen, the factors involved in the vast preponderance of welfare terminations include a caseworker's resolution of adjudicatory facts and the application of legal rules or policies to such facts; terminations also often rest upon the workers' normative and evaluative judgments. Decisions are based upon sundry third-party information, the observations or suspicions of the investigator, an assessment of client compliance or cooperation with "department policies". Personal animosities between caseworker and client may influence the decision. Termination is sometimes directed from higher echelons of the department (259a). Frequently***45** multiple justifications for the termination are asserted. For all these reasons, a contested decision to terminate aid is a classic situation requiring a structured and adversary presentation to a review officer who has not previously passed on the matters in controversy.

The adversary presentation, though not protracted, is the first reliable revelation of the Department's case and hence the only means of assuring that the recipient "be adequately informed of the nature of the evidence against him and be accorded an adequate opportunity to rebut this evidence." *Willner v. Committee on Character and Fitness, supra* at 107. The hearing also represents the recipient's first effective chance to show

that the case against him is unfounded.

The opportunity for rebuttal in an adversary proceeding is particularly important where, as here, the evidence is not documentary but consists of "the testimony of individuals whose memory might be faulty or who, in fact, might be perjurors or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy." *Greene v. McElroy,* 360 U. S. 474, 496-497 (1959). "There is no possible way to contest the truthfulness of anonymous accusations." *Jay v. Boyd,* 351 U. S. 345 (1956) (Black, J., dissenting). The right to present one's own case through testimony or witnesses is obviously critical where the decision turns on facts pertaining to the clients' actions and circumstances and is in practice frequently influenced by an assessment of the clients' veracity and character.[FN57] ***46** "[A] hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal." *Londoner v. Denver, supra* at 386.

FN57. See, *Rios v. Hackney,* 294 F. Supp. 885 (N. D. Tex. 1967), describing a typical welfare termination based solely on third party statements and holding that a hearing affirmance based solely on such hearsay denies due process of law.

Option b, conceived during this lawsuit, contains none of these rudimentary safeguards. The client learns of "the case" through a notice stating the official category under which his grant will be imminently terminated (e.g., failure to comply with policies, failure to cooperate, excessive resources, misuse of funds). Despite an asserted "intent not to be mysterious," Br. 16, Option b does not suggest or require that caseworkers provide a written report of their investigation and findings, the sources of their evidence, or the regulations or policies deemed applicable.

Option b is also hopelessly *ex parte,* as seen in the document upon which review is primarily based, the client's case record. This record is comprised of the caseworker's own version of conversations with the recipient and others; the caseworker findings are prepared to substantiate the decision and to avoid reversal on review.[FN58] This dossier is never made available to recipients, before, during or after review.[FN59]

FN58. After reviewing case records reflecting hundreds of thousands of decisions, a professor of social work concluded: "How far these records represent actuality is a debatable question." Keith-Lucas, *Decisions About People in Need,* 214 (1957).

FN59. See *Turner v. Barbaro,* ---- M. 2d -----, ----- N. Y. S. 2d ----- (Sup. Ct., Nassau County, 1968).

The client may submit in writing a "statement or other evidence" to sustain his position in a case not yet revealed to him and this must be submitted almost instantly.[FN60] ***47** Marshalling the evidence and submitting persuasive argument under this procedure to reveal error, misinformation and misjudgment would try the wit of astute counsel.[FN61] It is obvious that for persons, many of whom are functionally illiterate, legally unversed, and without access to counsel, no less instant access, this opportunity to be heard is "cruelly ironic." How does one cast doubt on the credibility of third persons of whom the client is not aware or assail the shortcomings in a record that is not revealed, even in summary form? How does one establish one's own veracity or introduce the testimony of witnesses in a written statement prepared on a one or two days' notice?[FN62] ***48** The answer is plain.

FN60. Under Option b the client has seven days after the notice of proposed termination is *mailed* to submit documents in opposition.

FN61. There is no preference in welfare administration for dealing with recipients in written correspondence. Indeed the emphasis is on personal contact through home visits and interviews with collateral sources. Neither recipients nor caseworkers are accustomed to dealing with each other in written correspondence.

FN62. Option b as implemented in New York City is also defective because the functionary responsible for conducting the review, the Case Supervisor, is in many cases actually involved in the initial decision to terminate and in the others is in the position of evaluating the actions of his own daily colleagues and assistance. In other cases termi-

nation is initiated from above and the Case Supervisor is in a position of reviewing the decision of a superior. This is why case supervisors in New York resisted implementation of New York City's written review procedure (272a-288a). A supervisor with thirty years of experience in the City department testified:
"Case supervisors were consulted and participated in decisions to terminate when the issue was whether there was a man in the house, whether there were hidden resources, whether the family might not actually be living at the address, and so forth. Often this sort of termination resulted from confidential information from a hostile landlord or other source and had not been verified. Another common ground for termination in which Case Supervisors participated was 'refusal to comply with departmental policies.' This often meant that the mother would not give what the Department deems satisfactory information about the whereabouts of the father, even though she may in fact not have known the father's whereabouts" (260a).

A current case supervisor testified:
"When a case is considered for termination, I am often consulted initially, on either an informal or formal basis for guidance . . . . Hence, the review I am asked to undertake is of a decision in which I participated. The only additional information at my disposal in undertaking this review is a letter or document from the recipient. These materials in my view do not provide a meaningful or effective basis for review of a decision to close" (277a-278a).

According to the official state job description, the case supervisor's duties include responsibility for the proper application of policy to individual situations and supervision of the case work staff in administering public assistance. 18 N.Y.C.R.R. §98.7. Indeed, in New York City the Handbook for Case Units and Public Assistance prescribes case supervisor approval for almost every important decision made (300a).

Option b is an internal review mechanism to be used by the agency to correct glaring error on the face of the Department's own case records.[FN63] As such, it is not ineffective, according to Appellant's asserted reversal rate.[FN64] But it is not, however, an opportunity to be heard.

FN63. The internal nature of the review is exemplified by the assumption that the caseworker will be consulted during the review, but that the recipient is limited to a written statement *instanter* without knowledge of the content of the case record.

FN64. 9 out of 65 cases or 13.8% were reversed (Br. 15).

It is argued here and in *Wheeler v. Montgomery,* that procedural deficiencies before termination are cured by the pre-termination personal conference, usually in the recipient's home, at which the caseworker announces his intention to terminate. This conference is simply another required home visit by the caseworker, but with a somewhat greater focus than usual. It has long been a mandatory part of the ***49** investigation of continuing eligibility.[FN65] Appellant now claims that this

FN65. H. E. W . Handbook, Part IV, §2300(e)(3). 18 N.Y.C.R.R. §351.23.

"personal conference is a part of the procedure under attack and can be used by the client as an opportunity to get whatever information is needed to understand the reasons for the proposed termination." Br. 16.

The Department of Health, Education and Welfare characterizes it as an important and mandatory local adjustment process requiring that the local agency
"gives advance notice of questions it has about an individual's eligibility so that a recipient has an opportunity to discuss the situation before receiving formal written notice of reduction in payment or termination of assistance." Handbook, IV, §2300(b)(5).

The caseworker's routine and well established investigation of the client is thus transmogrified into the client's prior opportunity to contest termination.

However characterized, the caseworker here acts as an eligibility investigator who has tentatively decided to

terminate the client. The conference is essentially one between adversaries, albeit very unequal ones, pitting the suspicious caseworker against an often intimidated or hostile client. The exchange is frequently more heated than informative. Except where deemed missing, all recipients in this case had a pre-termination "conference," albeit to little avail. For example:
***50** "The caseworker told Mrs. Velez that she could not get the requested items, saying: 'You people think welfare has got to give you for everything.' At this Mrs. Velez lost her temper and told the caseworker, 'You come here to see my needs and you are not doing it. If you are not here to see my needs, what are you doing here? Get out.' The caseworker's reply was: 'You cannot talk to me that way. I can close your case' " (185a).

The scope of the inquiry is entirely in the hands of the investigator; the facts and issues are as he defines them. At this moment, the caseworker neatly combines in his one person the function of legislator, investigator, prosecutor and judge. He indeed represents "the play and action of purely personal and arbitrary power." *Yick Wo v. Hopkins,* 118 U. S. 356, 370 (1886). A caseworker's investigative home visits, threats and interrogations are not new to welfare. They do not constitute an opportunity to be heard but rather underscore the critical need for such opportunity.

***51** III.

Due process requires that individuals previously found eligible for statutory subsistance grants be given an opportunity to be heard before those grants are terminated.

Appellant Goldberg and Appellee Montgomery in *Wheeler v. Montgomery* place heavy reliance on the availability on a trial-type hearing substantially after termination of assistance to justify their pre-termination review procedures. The one, they argue, must be "viewed" in light of the other. But the issue of what process is constitutionally compelled cannot be addressed or resolved by indiscriminately viewing a combination of a constitutionally inadequate hearing before termination with a constitutionally untimely one afterwards. Since a written review or conference does not afford any of the safeguards of due process of law, the principal issue in these cases remains as it was at the outset: whether the Constitution requires an opportunity to be heard before the termination of aid. If so, the availability of the hearing afterwards does not cure the deficiencies of the pre-termination procedures.

The issue of *when* a hearing must be afforded is usually synonymous in this Court with the question *whether* due process requires an opportunity to be heard. *Snaidach v. Family Finance Corp.,* 395 U. S. 337 (1969). Where it does, there is rarely pause for doubt or discussion on the timing of the hearing. Notice and a hearing necessarily precede administrative action predicated on the very matters sought to be adjudicated and effecting the very harms the contestant seeks to avoid. The function of the right to be ***52** heard is to contest the basis for proposed administrative action, not to obtain a *post facto* review of the correctness of the decision to inflict immediate harm. Cf. *Pennsylvania v. West Virginia,* 262 U. S. 553, 593 (1923). The general rule is well settled:
"The demands of due process do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held *before the* final order becomes effective." *Opp Cotton Mills v. Administrator,* 312 U. S. 126, 152-153 (1941). (Emphasis added.)
"Those who are brought into contest with the government in a quasi-judicial proceeding . . . are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals *before it* issues its final command." *Morgan v. United States,* 304 U. S. 1, 25 (1938). (Emphasis added.)

See also, *Londoner v. Denver,* 210 U. S. 373 (1910); *Nickey v. Mississippi,* 292 U. S. 393 (1934); *U. S. v. Illinois Central Railway Co.,* 291 U. S. 457, 463 (1934). ("It is enough that opportunity was given for a full and fair hearing before the order became operative."); *Wilson v. Standefer,* 184 U. S. 399 (1902).

Just last term, the issue before this Court in *Snaidach v. Family Finance Company, supra,* was not the availability of a hearing *vel non* but its availability before the debtor was subject to the injury resulting from the interim freeze of half his weekly salary. This Court's answer was plain: "It needs no extended argument to conclude that absent notice and prior hearing . . . prejudgment garnishment***53** violates the fundamental principles of due process." 395 U. S. 337 at 342.

As the Court pointed out in *Snaidach,* summary or *ex parte* process has passed muster only in "extraordi-

nary situations" of overriding public necessity. 395 U. S. 337 at 339. The salient factors in these situations attest to the due process values inherent in the timeliness of the opportunity to be heard. Summary termination of welfare benefits can find no justification in the public nuisance cases; persons thought to be ineligible are not akin to dangerous drugs or foods threatening the public health or safety, *Ewing v. Mytinger & Casselberry, Inc.*, 339 U. S. 594 (1950). Nor is termination analogous to the issuance of a provisional restraining order necessary to preserve the issues for review in protracted rate making or other intricate proceedings. *FPC v. Tennessee Gas Transmission Co.*, 371 U. S. 145 (1962); *Halsey, Stuart & Co. v. Public Service Comm.*, 212 Wis. 184, 248 N. W. 458 (1933). Public assistance programs bear little resemblance to wartime controls contained in the Emergency Price Control Act of 1942, *Yakus v. U. S.*, 321 U. S. 414 (1944) and *Bowles v. Willingham*, 321 U. S. 503 (1944), or to the management of a loan association believed to be pursuing a course injurious to creditors and the public. *Fahey v. Mallonee*, 332 U. S. 245 (1947). The issue in dispute is assuredly not a question of which party should be the stakeholder of a fund *pendente lite* upon a finding that collection of a federal tax is endangered, itself a p ower sparingly used. 26 U. S. C. §6658. *Phillips v. Commissioner*, 283 U. S. 589 (1931). Further, in all of these cases there were no obvious serious harms which could not be fully remedied in the subsequent review and this Court stressed both the adequacy***54** and effectiveness of the subsequent hearing. "When justified by compelling public interest, the legislature may authorize summary action subject to later judicial review . . ." *Yakus v. U. S., supra,* at 442; "Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been sustained." *Phillips v. Commissioner, supra,* at 595. *Cf. Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290 (1923).

The appellant's asserted justification for summary termination of aid is that:
"The cost of the program is enormous. . . . The program adopted by the legislature and supported by hundreds of millions of dollars should [not] be administered without some regard for fiscal control. Some people apply for assistance who are not eligible. Some who are eligible later become ineligible and must be removed from the rolls." Br. 11-12.

This novel justification for summary process calls for close inspection.

First, appellant's reliance on his obligation to terminate ineligible persons is question-begging; the very point of process is to determine who is or who is not eligible. It also ill befits an agency which reverses half of the terminations in which review is sought to rely on the necessity for summary uncontestable revocation of aid.[FN66]

> FN66. New York City Department of Social Services, Review Section Reports for Quarter Ending March 31, 1969, and Months Ending April 30, 1969, and May 31, 1969.

***55** Protection of the public purse is a worthy enough goal, but what precisely is being protected here? The enormous "New York City budget . . . for public assistance," surely does not delineate the interest protected (Br. 11). The premises are unstated but discernible. There is first the interest in those amounts paid to recipients who request a hearing and are ultimately found ineligible. That interest must be viewed against the statutory power to recover the monies paid[FN67] and more fundamentally, "the power of the state and city to minimize that additional cost by various methods, e.g., by expediting hearings, by increasing the number of hearing officials . . ." (375a). The indigent family suffering erroneous termination has no power to expedite the processes that may ultimately provide relief.

> FN67. The State Agency has statutory powers to recover any monies paid during a period of ineligibility. N. Y. Soc. Serv. L. §104 (McKinney 1966), see *Snell v. Wyman*, 281 F. Supp. 853 (S. D. N. Y., 1968), aff'd 393 U. S. 323 (1969). Note also that the costs of AFDC are reimbursed by the federal government at a 50% rate. 42 U. S. C. §§1118, 1905.

Since the commencement of this action the state agency has taken steps to provide a constitutionally adequate prior hearing in the most economical fashion possible. In describing the decision to adopt the local review procedure sustained below rather than provide that aid be continued pending the statutory "fair hearing," the State Commissioner states:
"A predetermination local review procedure which

meets the test of due process as required under the provisions of Section 351.26(a) . . . is a more effective and expeditious method of preventing error than the fair hearing procedure since such local review can be completed within a period of no more than two weeks, ***56** whereas the fair hearing method takes substantially more time" (App. B herein).

The actual experience in the New York City Department, the largest in the country, confirms the prediction. The hearing process takes one to two weeks and the expenditure incurred is perhaps one more check for the limited number of those seeking review who are found ineligible.[FN68] This cost is a very miniscule part of the budget set forth in Appellant's Brief. Whether viewed in terms of each individual case (and after all we deal with the due process rights of individuals) or collectively, the amounts involved do not exceed the normal burdens of observing procedural safeguards.[FN69]

FN68. See App. B.

FN69. The added administration cost of six review officers, a supervisor, and supporting staff, is clearly *de minimus.*

There is also the fear expressed below that the continuation of aid would lead to a greater number of requests for hearings. Hence undue delay in circumstances of immediacy is viewed as a device to limit or eviscerate entirely the due process right to be heard. This is impermissible. "Constitutional rights would be of little value if they could be . . . indirectly denied," *Smith v. Alright,* 321 U. S. 649, 664 (1944) ". . . or manipulated out of existence." *Harmon v. Forssenius,* 380 U. S. 528, 540 (1965). See also *Western Union Tel. Co. v. Kansas,* 216 U. S. 1 (1910). Nor can delay be justified as a device to sift out frivolous or unsubstantial claims. For it discourages most if not all claims, deals with the merits of few, and its incidence turns on the hardihood or fortune of individuals in obtaining private aid, not the substantiality of their claims. This Court has ***57** invalidated a variety of devices intended to eliminate or discourage proceedings without a determination on the merits. See *Williams v. Oklahoma City,* ----- U. S. -----, 89 S. Ct. 1818 (1969); *Anders v. California,* 386 U. S. 738 (1967); *Lane v. Brown,* 372 U. S. 477 (1963); *Draper v. Washington,* 372 U. S. 487 (1963).

The wholly unsubstantiated fear of frivolous requests for review is based on the stubborn prejudice or myth that the poor cannot be trusted with rights, procedural or substantive, just as the fear of fraud and predatory invasion were the reasons for widespread durational residency laws. *Shapiro v. Thompson,* 394 U. S. 618 (1969). The fear is quite belied by actual experience. The fact is not that the poor abuse their legal rights, but that they do not use them. During a four and a half month period in New York City, in which approximately 60,000 cases were closed, just over 1,000 persons requested review. The entire review system for the city of New York, servicing approximately 375 thousand cases and nearly 1 million individuals, is comprised of 6 review officers and 1 supervisor handling the total caseload of 250 cases a month.[FN70] The system acknowledges that over 7% of the terminations are erroneous on the face of the record.[FN71] The city's own 50% reversal rate hardly indicates frivolity or abuse. Prior hearings are now also provided in many states and there is not a scintilla of evidence of abuse or predatory raids.[FN72]

FN70. New York City Department of Social Services Monthly Statistical Report, March 1969, pp. 6, 7, 10.

In a survey conducted in 1969 by Professor Douglas Quickham of the University of South Carolina, the 29 states responding reported 772,437 terminations for reasons other than death or removal from the state and only 4,032 hearing requests in connection with those terminations.

FN71. See note 45 *supra.*

FN72. The following states, generally under pressure of litigation, have now changed their regulations to provide for a prior hearing: Mississippi, Manual Sec. F, pp. 6101-6103 (20 days' notice, prior fair hearing); Washington, D. C., Handbook of Public Assistance Policies and Procedures (HPA-II) BR 1.1, III, Sec. 17 (15 days, notice, prior fair hearing); Massachusetts, Manual Sec. App. 12-13 (prior local review); Washington, Manual Sec. 10-41 FF. (prior local review), and, of course, New York, 18 N.Y.C.R.R. §351.26 (prior local review). Statewide injunctions are now in effect in California,

McCullough v. Terzian, No. 379011 (Super. Ct., Alameda County, May 12, 1968) and in Texas, *Machado v. Hackney,* ----- F. Supp. ----- (Civ. Act No. 68-108-SA, W. D. Tex. May 12, 1969). A statewide order is now being drafted in *Bailey v. Engleman,* Civ. Act. No. 654-69 (D. N. J.). Prior hearings have been ordered in the Bureau of Indian Affairs general assistance program, *Homer v. Hickel,* No. Civ. 69-83-Tucson (D. Ariz. May 14, 1969). We are advised that recipients won 85% of the first 46 hearings held under that order. Letter from Roger Wolf, Director, Papago Legal Services, July 30, 1969. See other eases cited in Appellant's Brief, *Wheeler v. Montgomery,* p. 23, n. 29.

***58** It is not likely that any infusion of legal process will overcome the erosion of spirit and the destruction of self image and personality resulting from welfare's pervasive distrust of the poor.[FN73]

FN73. New York City Welfare Commissioner James R. Dumpson concluded while in office that:
"We hold fast to the meanest possible application of a means test that strips those in need, and who muster enough strength to apply for public assistance, of the last vestiges of dignity and self-respect by requiring that they in fact, be paupers . . . We prattle about strengthening family life, yet we continue in public assistance practices and regulations to humiliate parents in the process of attempting to help them." James R. Dumpson, "Our Welfare System--Radical Surgery Needed," 23 Public Welfare 226, 230 (1965).

Mitchell Ginsburg, ex-Commissioner of the New York City Department of Social Services, now Human Resources Administrator, summed up his experience before the Kerner Commission in stating: "The welfare system is designed to save money instead of people, and tragically ends up doing neither." Report of the National Advisory Commission on Civil Disorders, at 457 (Bantam Books, New York, 1967).

This is confirmed by a recent study of New York AFDC recipients, financed by HEW and developed under the guidance of the New York City Department of Social Services. It revealed that the process of eligibility determination made over two-fifths of the respondents feel untrusted by the Department, a third feel ashamed, and a quarter feel insulted. Yahr and Pomeroy, "Studies in Public Welfare: Effects of Eligibility Investigation on Welfare Clients" (City University of New York, 1968). See generally Briar, "Welfare from Below: Recipients' Views of the Public Welfare System," 54 *Calif L. Rev.* 370 (1966); Handler, "Controlling Official Behavior in Welfare Administration," 54 *Calif. L. Rev.* 479 (1966).

***59** But generalized distruct of the poor by our presumably neutral legal institutions is singularly inappropriate. Rates of dishonesty in obtaining public assistance compare quite favorably with those in the collection of taxes and other government programs.[FN74] The rate of error on the part of the government does not. The myth of the dishonest poor does not create an "extraordinary situation" justifying summary process.

FN74. A recent study of fraud in New York City found that 1.8% of applicants granted aid, and recipients on the rolls, were ineligible. Of course, some of these cases represent error rather than active fraud. *Evaluation of the Welfare Declaration* (Center for Social Research, City University of New York, 1969) p. 3.

There are, of course, criminal sanctions for misrepresentation in the receipt of public assistance, N. Y. Soc. Serv. L. §145, and these are not unused.

In determining what process is due, this Court cannot ignore the potent impediment to any challenge and review imposed by the dilatoriness of the subsequent statutory hearing. The constitutionally required opportunity to be heard must be more than theoretical, *Brinkerhoff-Farrish Trust & Savings Co. v. Hill,* 281 U. S. 673, 682 (1929). *Mullane v. Central Hanover Trust Co.,* 339 U. S. 306 (1944); and *Covey v. Summer,* 351 U. S. 141 (1955). "[The opportunity to be heard] must be at a meaningful time." *Armstrong v. Manzo,* 380 U. S. 545, 552 (1966). This opportunity***60** can-

not be meaningful or adequate where its extreme untimeliness forestalls its use. Untimeliness is well-documented in the record below; in almost every appeal there is month upon month of delay during which time the family is denied the statutory assistance grant. Despite several years of federal and state regulations requiring somewhat less time, the states own statistics show that in almost no case is the decision rendered within three months.[FN75] This systemic delay is not attributable to the complexity or the protractedness of the hearing itself. Each hearing typically takes less than one hour. It is no doubt attributable to its subsidization by the very withdrawal of aid being contested. Indeed the Appellant implicitly recognizes this subsidization in his express concern that a a greater number of hearings and consequent expenditures would result from continuation of aid until the hearing. The illusory nature of this tardy proceeding is also eloquently***61** revealed in its practical non-usage in cases of termination.[FN76]

FN75. The state's statistics lump together all decisions rendered more than three months after request for a hearing. The available records show an interval of up to 260 days between request and hearing in termination cases, with decisions rendered some 65 to 195 additional days after the hearing (264a, 268a and see Fair Hearing Report for April, 1968 (318a)).

Despite the fact that they commenced this action and the court requested expedition, plaintiff Velez waited four months for a fair hearing decision (364a, 186a); plaintiff Fuller waited at least seven months (328a); plaintiff Sidor eleven months (182a, 324a, & Appendix A); and plaintiff Sheafe four months (76a, 298a). The State itself recognizes this systemic delay in its explanation for the local review procedure (Appendix B).

The record in many other states is no better, although hard data is difficult to obtain. The average elapsed time between a determination to terminate and a fair hearing decision is 196 days in Pennsylvania, *Caldwell v. Laupheimer,* Civ. Action No. 69-392 (E. D. Pa. 1969) Interrogatories dated May 13, 1969; and 101 days in Texas, Motion of State of Texas to Stay Enforcement, *Machado v. Hackney,* Civil Action No. 68-108-S. A. (W. D. Tex., May 12, 1969).

FN76. Until 1966, the total number of State hearings in New York on all issues, including initial denial of aid, denial of special grants and terminations, averaged approximately several hundred per year with a statewide caseload of over one-half million recipients. With the advent of welfare rights organizations and fair hearing campaigns for special grants, this figure increased sharply in 1967-1968 with a total of 4,233 hearings requested for 1967. Almost all of these hearings, however, related to denials of special grants. The requested hearings after termination of aid remained negligible, amounting to approximately 50 a month in New York City and 50 a month for the rest of New York State. Recipient caseload during this period increased to approximately one million recipients. (308a-319a, 356a-362a).

But even were the State or federally imposed time limits of 30-60 days not merely exhortatory, the subsequent hearing would remain nominal and inadequate. As we have seen the consequences of withdrawal are immediate and intense from the very day the expected check fails to arrive. Neither rent nor daily need for food and other necessities can be postponed. These immediate needs do not leave most people either inspired or able later to pursue an adversary contest with the welfare department. It hardly instills a belief in the efficacy of legal process. And for those who do pursue the subsequent hearing, the interim harms, being irremediable, remain unremedied.

***62** IV.

The H. E. W. tentative regulation requiring continuation of aid in some circumstances during the state hearing process is not an alternative basis for affirmance in this case.

Since courts should not decide constitutional issues if a case may be resolved on other legal grounds, *Greene v. McElroy,* 360 U. S. 474 (1959); *Thorpe v. Durham Housing Authority,* 393 U. S. 268 (1969), the effect of the proposed Regulation of the Department of Health, Education & Welfare (H. E. W.) requires some consideration. 45 C.F.R. §205.10.[FN77] This proposed

regulation, applicable in the categorical assistance programs, including AFDC, would require that in some circumstances the states continue or restore aid when a statutory "fair hearing" has been requested. Although the regulation is a belated and partial recognition that a "fair hearing" must be timely, it does not, for several reasons, resolve the issues in this case.

> FN77. "(1) When a fair hearing is requested because of termination or reduction of assistance, involving an issue of fact, or of judgment relating to the individual case, between the agency and the appellant, assistance will be continued during the period of the appeal and through the end of the month in which the final decision on the fair hearing is reached. (If assistance has been terminated prior to timely request for fair hearing, assistance will be reinstated.) Where delays are occasioned during the period of appeal, assistance will be continued if the delay is at the instance of the agency or because of illness of the claimant or for other essential reasons. To the extent that there are other delays at the request of the claimant the agency may but is not required to continue assistance."

***63** A. *The H. E. W. Regulation Does Not Afford Adequate or Effective Protections to Recipients in the Federal Programs.*

First the regulation offers an illusory and uncertain promise of protection to persons in the federal programs. When viewed against three decades of impediments to realization of the statutory hearing and a persistent pattern of undue delay in deciding questions of the greatest immediacy, which continues despite federally-imposed time limits, the validity of this attempt to implement the statutory command for a "fair hearing" can hardly be doubted. The "manifest purpose" of the statutory command that a "fair hearing" be afforded aggrieved recipients, 42 U. S. C. §602(a)(4), is to satisfy the requirements of due process. See *Shields v. Utah-Idaho Central Ry. Co.,* 305 U. S. 177, 182 (1938). The regulation simply seeks to make the statutory command a realizable right consonant with due process.

Predictably, however, it is being vigorously resisted by H. E. W.'s regulated clientele, the sovereign states. The basis for this resistance may be seen in the very decided state preference for expedited review by the local agency of contested terminations because of the systemic delays in the more formal and cumbersome state hearing process. This is particularly true in states where the statutory hearing mechanism is actually utilized to some degree, *vide* New York and California in the instant cases.[FN78] See App. B. ***64** At the time of this writing, the regulation is not in force and H. E. W. has expressed an intent to postpone its effective date, although the states have had somewhat over ***65** ten months to prepare to comply. It is not administrative adjustment which underlies the postponement being considered. In light of H. E. W.'s conceded inability to obtain compliance with the most basic statutory commands in the federal act,[FN79] compliance with this recent regulatory gloss, however narrowly construed, is not promising. H. E. W.'s unwieldy and unused power to cutoff federal funding is singularly inapt to obtain compliance with procedural regulations. So too is case by case litigation by individual recipients. H. E. W.'s traditional process of negotiation and discussions with the state agency to obtain compliance would doubtlessly be more protracted than usual, and usual means several years. See, *King v. Smith,* 392 U. S. at n. 11 and 23.

> FN78. The only sanction available to H. E. W. for the enforcement of the requirements of the federal law is the termination of federal funds. 42 U. S. C. §604. Because of the drastic nature of this remedy, the invocation of which causes severe injury to those very individuals which the Act is designed to protect, H. E. W. has been understandably reluctant to use it. Only once since 1935 have federal funds been terminated in response to state non-compliance with federal commands; in 1938 federal funds to Ohio under the Old Age Assistance program were withheld for one month because of gross and persistent mismanagement, including the use of caseworkers to campaign among recipients for the reelection of the incumbent governor. Altmeyer, *The Formative Years of Social Security* 75-83 (1968).
>
> Less understandably, H. E. W. also refuses to conduct conformity hearings even where there is a substantial showing that the state is not conforming to federal requirements. H. E.

W. has been supplied documentation of gross non compliance with fair hearing requirements in many states. "*Alternatives to King v. Smith in Enforcing State Compliance with the Social Security Act,*" Clearinghouse Review, 70-71 (July 1969). New York has acknowledged to H. E. W. a systematic failure to render fair hearing decisions within the federal time limits; Missouri admits non-conformity in the processing of applications. *Ibid.* New York recipients petitioned H. E. W. for a hearing on the state's long-standing failure to comply with federal requirements. *In Re Barbara Stanton, et al.,* filed Feb. 7, 1969. Secretary of H. E. W. Robert H. Finch refused to call a conformity hearing stating: "In the absence of a specific request by the State agency, such hearings are held only on the initiative of this Department as a last resort after questions have been raised . . . [and] deficiencies in that State's public assistance program are so serious, and attempts to obtain correction are so unpromising that Federal payments must be withdrawn." Letter to Richard Flaster, May 6, 1969.

The states are not unaware of the fact that the extreme nature of the remedy of federal cut-off effectively precludes its use, and that, as a co nsequence, H. E. W. is reluctant to make firm or final findings of non-conformity. The passive and conciliatory manner in which H. E. W. endeavors to obtain state compliance was succinctly put in State Commissioner King's statement in *King v. Smith, supra,* that "the Federal Government has never had enough guts themselves to define what a substitute parent policy should be." Appellant Reply Brief, *King v. Smith,* at 15.

The immunization of the states from effective enforcement of the federal requirements has had particularly telling effects in the area of state non-compliance with procedural requirements, since the states may promulgate regulations in apparent conformity and then simply fail to follow their own procedures. Clearinghouse Review, *supra* at 70.

FN79. As the New Jersey Director of Public Welfare said, in reference to the H. E. W. hearing regulation, New Jersey "has been opposing and is continuing to oppose the proposed Federal mandates on these issues. In taking this position we are associating ourselves with what we believe is the position of the overwhelming majority of the Council of State Administrators of Public Welfare . . . Accordingly, we are making no plans at the present time for its implementation." Circular Letter No. 609, March 3, 1969, Irving J. Engleman, Director, Division of Public Welfare. N. Y. Welfare Commissioner George K. Wyman has also "filed objection to the proposed Regulations" for a variety of reasons. Administrative Letter No.: 69 PWD-14, Feb. 14, 1969. Steven Simonds, Commissioner of Assistance Payments Administration of H. E. W., informed representatives of organized welfare recipients that the pressures on the Secretary of H. E. W. to withdraw the interim regulation on prior hearing were greater than on any other H. E. W. policy, with the possible exception of the regulations requiring the use of the declaration method for determining eligibility, 33 Fed. Reg. 17189 (Nov. 20, 1968), which has now been withdrawn.

Second, the H. E. W. regulation does not afford the *minimal* protections of due process of law. For the regulation requires restoration of aid, after termination and ***66** request for review,[FN80] only in cases "involving an issue of fact or of judgment" about an individual. H. E. W. was not unaware of the difficulties and possibilities of nullification inhering in this limitation. But the limitation represents H. E. W.'s concession to the intense opposition of the states.

FN80. The regulation requires continuation of aid only after a request for a fair hearing has been filed; such a request may not be filed in New York or other states until after final agency action which, in this context, means after aid has been terminated. The state agency will not review a proposed decision to terminate. N. Y. Soc. Serv. L. §353(2); 18 NYCRR §§351.22 & 356.4. Hence, aid will be terminated and in some cases subsequently restored.

Whatever its political wisdom, the limitation is not consonant with due process of law. To be sure, due process does not require adjudicatory review of government action in all circumstances. Where ineligibility under clear legal standards is apparent on the face of documents furnished by a party or other undisputable objective material, such as a death certificate, an adjudicatory hearing is not required. See, *F. P. C. v. Texaco,* 377 U. S. 33 (1964). Indeed, the New York regulation sustained below makes provision for these situations by specifying the circumstances in which aid need not be continued.

By hypothesis, however, we deal here with the minimal procedural safeguards for a *contested* decision to terminate. The investigator has made particularistic factual findings, applied what he deems to be agency policy and reached a decision to terminate. The focal point of the caseworker's concern may not be defined or communicated to the recipient at this preliminary investigative stage. The basis for termination is certainly not agreed upon between client and investigator. There is at this point ***67** simply a controversy or dispute between government investigator and client. The administrative setting and brevity of the hearing itself precludes a prehearing conference or exchange of pleadings between caseworker and client for definition of the issues. The H. E. W. regulation does not require, suggest or contemplate any administrative mechanism to allow clarification and specification of the matters in controversy before a relatively neutral official for application of the limitation.

Rather the regulation contemplates that the question whether determination involves "an issue of fact or of judgment" will be made in the local adjustment process, either by the caseworker with a sufficient conviction to order aid terminated or by an administrator on the basis of the case record prepared by the caseworker. We need not invoke nice notions of impartiality or separations of functions, *cf., Morgan v. United States,* 298 U. S. 468 (1936), *Wong Yang Sung v. McGrath,* 339 U. S. 33 (1950), to recognize that the caseworker whose order to terminate is being appealed is not fairly placed to decide or provide the basis for deciding whether an appeal involves substantial issues of fact or judgment to warrant continuation of aid.

Involving questions of fact or a judgment about an individual is not a self-defining or self-executing standard. It involves the shadowy distinction between questions of fact, mixed questions of fact and law, and "pure" questions of law, and adds to them questions of judgment. No doubt we as lawyers might agree in the application of the standard to the twenty Appellees herein. All of their terminations entailed an issue of fact or judgment about an individual. But the legal sophistication and difficulty of ***68** application is apparent[FN81] and the materials for our application of the standard to Appellees are affidavits prepared by attorneys and decisions of hearing officers after full elaboration and review. But this critical decision to continue aid is to be made *before* any hearing or federal lawsuit. It is obvious that the administration of this standard will vary among caseworkers and among departments throughout the country. It should also be obvious that the play and action of personal power has not been substantially diminished.

> FN81. For example, Alta Gracia Guzman was threatened with termination for refusal to commence a support action against her husband (25a), who was already contributing regular support payments from his limited income (23a). But Department policy does not require that clients participate in groundless lawsuits. Mrs. Guzman thought the suit harassing and the caseworker thought otherwise (24a). In retrospect, it is apparent that there is a substantial question of judgment in the application of policy invoked, but this question would hardly be reflected in the caseworker's view or reports (23a-25a).
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> Mrs. Guzman's specific transgression was to refuse to sign a document permitting the Department to receive directly the proceeds of a support suit (24a-25a). This document was intended for her benefit; if she had signed, the Department would collect on any support order and her AFDC check would continue in the full amount. By not signing, her AFDC check would be reduced by the anticipated amount of support and she would bear the loss if support was not paid. It is dubious whether any policy supports termination in these circumstances.

It may be argued in support of this limitation that due process probably does not require prior review where

the facts are not in dispute and the decision to terminate is purely legal. But even this much is not established. Although an evidentiary hearing is not required in these circumstances, *cf., Morgan v. United States, supra,* it is hardly clear that due process allows *ex parte* administrative action causing grievous injury without some form of ***69** review of a challenge to the particular application or existence of a regulation or policy alleged to apply to an individual's situation. *Cf., Londoner v. Denver,* 210 U. S. 373 (1908) (where the Court envisioned legal argument on such a case before final action). See also *Yakus v. United States,* 321 U. S. 414 (1944); compare *United States v. McCrillis,* 200 F. 2d 884 (1st Cir. 1952). The erroneous application of a valid policy or the application of a non-existent one is quite plainly arbitrary administrative action. The risk of error is at least as great, indeed perhaps greater in the welfare context, and the consequences of error are quite the same.

But this nice question need not be resolved, for the situation envisioned in the regulation does not exist at the time of the initial decision to terminate, or afterwards. As we have seen, almost all contested decisions to terminate do entail facts or judgments about an individual. Most of the policies relied on are not crisp rules of law, but evaluative standards themselves entailing judgment. Due process safeguards, and administrative rules too, are formulated for the vast preponderance of cases, not the aberrational situation. The H. E. W. regulation is not.

B. *The H. E. W. Regulation Does Not Afford Any Protection to the Appellees Receiving Benefits Under New York's Home Relief Program.*

An H. E. W. regulation has no legal application to a state financed and governed general relief program, such as New York's Home Relief Program under which six of the Appellees herein were terminated. The State Commissioner has by regulation required prior local review for terminations in the Home Relief Program, under the two options set forth in 18 NYCRR 351.26. Review is now provided in New York City and elsewhere under Option a, ***70** which affords a hearing, since the use of Option b was enjoined below. New York City pursues this appeal, however, to dissolve the preliminary injunction so that it may reimpose the procedures in Option b. The Home Relief recipients' claim against the use of Option b perforce rests solely on the due process clause. This is, therefore, not an academic controversy, nor one affected by the H. E. W. regulation.

It will not do to say that the New York State Commissioner might choose to follow the H. E. W. regulation in the Home Relief Program. The appellant City Administrator, while desiring this result, has no authority to order State review. The State Administrator, who does not appeal from the order below, has required local agency review in Home Relief, and has expressed a decided opposition to the procedures established by the H. E. W. regulation, based on the substantially greater expense resulting from the long delays inherent in the state hearing process. App. B. Further, there is a long tradition of differences in the administration of Home Relief and the federal programs. Many of the basic federal requirements and safeguards have not been applied in Home Relief. Indeed, the statutory hearing before the state agency, available since 1935 in AFDC, was extended to recipients of Home Relief in January 1968, at the initiation of this lawsuit. Local agencies, bearing a larger share of the financing, have played a considerably greater role in the administration of Home Relief. Both this tradition and the additional costs of utilizing the formal state machinery persuasively argue against voluntary adoption of the H. E. W. procedure in preference to §351.26(a) in the Home Relief program.

***71** V.

The plea for administrative flexibility is both untimely and irrelevant to constitutional resolution of the due process rights of welfare recipients.

The unfortunate history of public assistance administration since the Social Security Act of 1935 is no longer an invisible part of our legal system. After three decades of federal and state inaction and failure to administer welfare benefits in a manner commensurate with the vital interests of individuals and families statutorily entitled to receive them, the plea today for flexibility, experimentation, and its upshot, immunity from the basic prerequisites of due process, is singularly inappropriate.

There are some who believe our traditional legal institutions and precepts of fairness cannot respond to the needs of the poor and disadvantaged. There may be some truth in this. Due process of law is not a panacea to the problems inherent in our ossified and

bureaucratic system of public assistance administration. Errors will continue apace and process will not rectify all of them. But until legislative or administrative ingenuity creates something better, the time-honored procedures afforded by reflex to our more advantaged citizens in dealing with the government can no longer be denied to the poor. Appellees are not asking for any special or novel constitutional rule because of their circumstances. They seek only traditional constitutional safegards, safeguards which themselves embody the government's respect for the elementary rights of individuals.

The plea for administrative flexibility is also irrelevant. This Court is not asked to prescribe an administrative code ***72** of procedure for welfare termination proceedings; nor is it asked to specify the atypical instances where a h earing might not be required. The Court is asked to affirm the minimal safeguards formulated and applied by the court below. That court did not deal with the details of implementation or procedural minutiae below the threshold of constitutional concern. It applied minimal safeguards in response to the evils and abuses in the prevailing system of welfare administration, as documented in the record of this case, and in the absence of alternatives which effectively control these evils. These minimal safeguards do not impose rigidities or prevent administrative flexibility to deal with problems, if and when they arise. And even this much is not permanent. Where a procedure is Constitutionally required, it may cease to be so if and when suitable and adequate alternatives are developed or other measures have eliminated the evils at which the rule is aimed. Constitutional holdings in procedural matters are not immutable. Compare, *Wolfe v. Colorado,* 338 U. S. 25 (1949) with *Mapp v. Ohio,* 367 U. S. 643 (1961). See *Miranda v. Arizona,* 384 U. S. 436, 467, 490 (1966); *U. S. v. Wade,* 388 U. S. 218 (1967); *Gilbert v. California,* 388 U. S. 263, 273 (1967). Nor do they preclude alternative adequate protection by Congress, the state, or H. E. W. See, *Miranda v. Arizona, supra.* Affording welfare recipients procedural due process of law "in no way creates a Constitutional straitjacket." *Miranda v. Arizona, supra,* at 467.

***73** CONCLUSION

The judgment below should be affirmed.

Appendix not available.

Jack R. GOLDBERG, Commissioner of Social Services of the City of New York, Appellant, v. John KELLY, Ruby Sheafe, Teresa Negron, et al., Appellees.
1969 WL 136924 (U.S.) (Appellate Brief)

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