

10/17/69

# Supreme Court of the United States

OCTOBER TERM, 1969

Office Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

In the Matter of:

Docket No. 62

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JACK R. GOLDBERG, Commissioner of  
Social Services of the City of  
New York,

Appellant;

vs.

JOHN KELLY, RUBY SHEAFE,  
TERESA NEGRON, et al.,

Appellees.

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Place Washington, D. C.

Date October 13, 1969

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C O N T E N T S

	<u>ORAL ARGUMENT OF:</u>	<u>P A G E</u>
1		
2	John J. Loflin, Jr., Esq., on behalf of Appellant	2
3	Lee A. Albert, Esq., on behalf of Appellees	20
4	Lee A. Ablert, Esq. on behalf of Appellees	31
5		
6	<u>REBUTTAL ARGUMENT OF:</u>	
7	John J. Loflin, Jr, Esq., on behalf of Appellant	47
8		
9		
10		
11	****	
12		
13		
14		
15		
16		
17		
18		
19		
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21		
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IN THE SUPREME COURT OF THE UNITED STATES

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JACK R. GOLDBERG, Commissioner of   :  
Social Services of the City of       :  
New York,                               :  
:  
                                  Appellant;       :  
:  
                                  vs.                 :  
:  
JOHN KELLY, RUBY SHEAFE,           :  
TERESA NEGRON, et al.,             :  
:  
                                  Appellees.       :  
:  
-----X

No. 62

Washington, D. C.  
October 13, 1969

The above-entitled matter came on for argument at  
11:20 a.m.

BEFORE:

- WARREN E. BURGER, Chief Justice
- HUGO L. BLACK, Associate Justice
- WILLIAM O. DOUGLAS, Associate Justice
- JOHN M. HARLAN, Associate Justice
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice

APPEARANCES:

- JOHN J. LOFLIN, JR., Esq.  
Assistant Corporation Counsel  
New York, N. Y.  
Counsel for Appellant
  
- LEE A. ALBERT, Esq.  
Center on Social Welfare Policy and Law  
401 West 117th Street  
New York, N. Y.  
Counsel for Appellees





1 would meet the standard of due process of law.

2 In addition, they wanted a declaratory judgment. As  
3 we got to the three-judge hearing stage, the declaratory judg-  
4 ment section of that relief focused on a new New York State  
5 regulation which was, in fact, promulgated after the first of  
6 these cases was filed.

7 I would like to dwell for a moment on the sequence of  
8 events, because it did have some influence, I believe, on the  
9 decision below.

10 At the time the first of these cases was filed in New  
11 York, there was no pre-termination conference hearing procedure.  
12 It was entirely possible, and frequently happened, that a bene-  
13 ficiary would simply receive a notice saying "Your benefits have  
14 been cut off. Refer to your handbook or your pamphlet as to  
15 any rights you might have to have a fair hearing."

16 This led to unfortunate circumstances, unfortunate  
17 damage, to a number of recipients, and led directly to the filing  
18 of a lawsuit.

19 Shortly after the suit was filed, New York State fol-  
20 lowed California in adopting a pre-termination regulation. This  
21 is the regulation which is here before this Court, No. 351.26.

22 As you may know, in the State of New York, well over  
23 half of the total welfare recipients reside in the City of New  
24 York. The State, however, promulgated this new regulation with-  
25 out consultation with the city. It reached the city officials

1 in late February and was to become effective, by its terms, on  
2 March 1. The State, however, did not provide Hearing Officers  
3 or training or any real guidelines, much less any financing so  
4 that this machinery could be set up on what was at the time  
5 two or three days' notice.

6 The city reacted to this by asking for conferences  
7 with State officials to see if the impact of this new procedure  
8 on the city administration could be lessened. In fact, after  
9 a series of conferences at which the difficulties of enforcing  
10 the new State regulation in a city with approximately 1 million  
11 people on welfare was pointed out, the State rescinded its ori-  
12 ginal regulation and then, at the same time, put out the regu-  
13 lation which is now before this Court.

14 It consists of two parts -- 351.26(a) and 351.26(b).  
15 A welfare district, of which New York City is one --

16 Q Excuse me, counsel. Where did you pinpoint, in  
17 the briefs or record where we can find this.

18 A In the record it is set forth at 127(a), and that  
19 is the regulation as finally adopted.

20 Q Is that contained in your brief on pages 2 to 5?

21 A Yes, sir; 351.26(a) and (b). They are quoted in  
22 several places, but that is one of them.

23 Q It is set out in full, however, in your brief  
24 pages 2 to 5?

25 A Yes, sir.

1 Q With the date April 26, 1968?

2 A Correct.

3 Q That is the one.

4 A Yes, sir.

5 Now, both of these subparagraphs, that is, (a) and (b),  
6 were challenged by the plaintiffs below. The court examined both  
7 of them, and held, in fact, that subparagraph (b), which had  
8 been adopted in New York City, was unconstitutional as not afford-  
9 ing proper due process of law, and in particular, the deficits  
10 that they pointed out were the lack of confrontation and cross-  
11 examination.

12 The three-judge court in the Southern District saw no  
13 room for that in the procedure before it under subparagraph (b)  
14 and held that those were essential elements which must be pre-  
15 sent. Since there was some ambiguity as to subparagraph (a),  
16 they construed subparagraph (a) to require confrontation and  
17 cross-examination of adverse witnesses and said, in effect, "If  
18 you don't operate it in that fashion, that section, too, would  
19 be unconstitutional and a denial of due process of law."

20 The State did not appeal in this case. The city, with  
21 an interest in subparagraph (b), is here before the Court.

22 It is vital to our case for the Court to understand  
23 that we do not rest alone on subparagraph (b) of 351.26. It is  
24 the pattern of regulation in the State of New York for a city  
25 welfare district, particularly one of the size of the city of

1 New York, to adopt its own implementing regulations, subject to  
2 State approval. That was done in this case.

3 Our local regulation is known as Procedure 68-18.  
4 That is set forth in the record following pages 147 and 148.

5 I stress the importance of our local procedure because  
6 I think the Court needs to have the full process before you and  
7 understand particularly how the client first becomes involved in  
8 these procedural steps.

9 Under our local procedure, the case worker is obliged  
10 to notify the client when information comes to him indicating  
11 there is a question as to his continued eligibility to receive  
12 benefits. The case worker has the duty of calling the client in  
13 and discussing these matters with him in a face-to-face confer-  
14 ence.

15 The client is in a position, then, to discover what  
16 it is that has led the city to believe that this person is no  
17 longer eligible. The client is in a position to tell the city  
18 why it is making a mistake, if it is, and to correct error, if  
19 error there be.

20 In the event the case worker determines after a con-  
21 ference with the client that there is probable reason to con-  
22 clude that the client is, in fact, no longer eligible, the case  
23 file and the case worker's recommendation goes to the unit super-  
24 visor, where the entire matter is subject to review. It is only  
25 if the unit supervisor concurs in the judgment of the case worker



1 that the formal notice contemplated by 351.26(b) is issued.

2 That notice tells the recipient --

3 Q Is that what you consider due process notice,  
4 this one you are talking about now?

5 A Your Honor, I believe that the due process, as I  
6 see it, begins at the point where the client is called in for a  
7 conference with the case worker.

8 Q So your idea of due process is that the case  
9 worker calls the person in, just two of them in the room, and  
10 he gives them notice, and that is the type of notice that is  
11 due process notice?

12 A That is where the process begins, Your Honor.

13 Q Is that a due process notice or not?

14 A For the purposes of this case, under these facts,  
15 I believe that it is, yes.

16 Q Well, how does that fit with the Constitution,  
17 your idea of what due process is? Do you want to call this due  
18 process or not?

19 A I have accepted the fact that a welfare recipient  
20 faced with termination is entitled to due process appropriate to  
21 the circumstances. This, to me, does not necessarily mean the  
22 type of due process that would be appropriate under circumstances  
23 of criminal law or civil case law or any number of other factual  
24 patterns.

25 Q Well, what is it similar to, or do you say that

1 it is something that is peculiar to welfare?

2 A There are many facets which are peculiar to wel-  
3 fare.

4 Q Do you have any other cases that you could cite  
5 to other than welfare cases?

6 A As was adverted to earlier this morning, it bears  
7 some resemblance to the cases where public employees have been  
8 called up on charges and suspended, but later given an oppor-  
9 tunity to be heard. There is a situation where monetary bene-  
10 fits of one sort or another are --

11 Q Well, do you see any difference between a Govern-  
12 ment employee making \$20,000 a year and a welfare worker as to  
13 being able to live during this due process period?

14 A Well, obviously the impact on the individual is  
15 much worse if we make an error in the case of someone who is  
16 destitute than if we make an error in the case of someone who  
17 is well off.

18 Q Wouldn't you then be inclined to give them some  
19 due process?

20 A I definitely would be inclined, and my position  
21 is that this --

22 Q Your idea of due process is that the case worker  
23 that has investigated it and has made up his or her mind that  
24 this recipient doesn't deserve it any more, calls him in and  
25 gives him notice and hearing and determination. That is your

1 idea of due process.

2 A I don't accept the hypothesis, sir, that the  
3 case worker has a closed mind at the time he invites the client  
4 to come in.

5 Q Well, who investigated it?

6 A It may be the case worker. Information may come  
7 from other sources. Information comes to the Welfare Department  
8 from many sources. It may come from a bank, from a landlady,  
9 from a friend.

10 Q Well, would the case worker ask him to come in  
11 if the case worker hadn't thought that there was a bare possi-  
12 bility that perhaps the recipient might be wrong?

13 A That is the reason he is called in. The case  
14 worker has some information which he wants verified. He gets  
15 hold of information which is of sufficient weight that he says,  
16 "I need a personal conference with this person to hear their  
17 side of the story and maybe he can explain this away."

18 Q A personal conference is nothing close to a due  
19 process hearing, is it?

20 A Your Honor, I contend that it is part of a pro-  
21 cedure which, when taken in its entirety, constitutes such basic  
22 fairness that it is due process of law.

23 Q That is your idea of fairness.

24 A Taken altogether, it is my idea of fairness, but  
25 not truncating it and chopping it off in one little chapter and

1 saying, "Well, "this is all the due process the person is going  
2 to get." That is not my position, and that is not the end of  
3 the process.

4 Q When is the money cut off -- when the supervisor  
5 says it is all right?

6 A No, sir.

7 Q Well, when?

8 A We have had the meeting with the case worker.  
9 We have had the review by the Unit Supervisor. We have had the  
10 notice go out to the client which gives him seven days to come  
11 in with any written information, with the aid of counsel, he  
12 would like to present. That is then reviewed by still a third  
13 level of officials who have no personal involvement in the deci-  
14 sion at the case worker level.

15 This supervisory person gets the record and anything  
16 submitted by the client, reviews the entire matter, and only  
17 after he is satisfied that the person is ineligible are the  
18 benefits cut off.

19 Q That is your idea of due process.

20 A I think that meets due process; yes, sir.

21 Q Mr. Loflin, I suppose up in Mariposa County,  
22 where they have a few recipients and few staff members, it would  
23 be possible that the man who made the decision to grant the  
24 benefit in the first place might be the same man who listened  
25 to the recipient in this process you are describing.



1           A     New York regulation prevents those decisions  
2 being --

3           Q     I am transporting Mariposa into New York, and  
4 I suppose that is not right.

5           A     I have to admit --

6           Q     A small community in New York that would not have  
7 a large staff of workers or a large number of recipients, if  
8 you have such a community, is it possible, then, that the man  
9 who granted the relief might be the man who was considering its  
10 termination?

11          A     I believe that would not comply with the State  
12 regulation in New York.

13          Q     Under the new regulation.

14          A     Under the new regulation; that is right. Whether  
15 it could happen, I can't tell you. It is not administratively  
16 set up that way in the City of New York where, of course, we  
17 do have the highest volume in the country.

18                 So we have gone through these three layers of admin-  
19 istrative review before any action adverse to the welfare recipi-  
20 ent is taken. If the decision ultimately, after the Review  
21 Officer has gone over the entire matter and reached a conclusion,  
22 if he decides the benefits are to be terminated, a notice to  
23 that effect is sent to the client, and the notice also includes  
24 a clear statement to the effect that the decision may be reviewed  
25 in a fair hearing.

1           When I suggested to Mr. Justice Marshall that the en-  
2 tire process has to be looked at in order to see whether or not  
3 due process has been observed, I think it starts with the initial  
4 conference with the case worker, and does not conclude until  
5 after the fair hearing.

6           Q     And after the fair hearing is an opportunity for  
7 judicial review, is there not?

8           A     Yes, sir. Under Article 78 of the New York Civil  
9 Practice Law and Rules, any decision of a Hearing Officer that  
10 results in a denial of benefits, the person whose benefits are  
11 denied is considered an aggrieved person and he may sue the  
12 State Hearing Officer and have the entire package, the record of  
13 the case, reviewed by a State Supreme Court Justice.

14           So we do have this gap that can occur and Mr. Justice  
15 Marshall is entirely right, and there is no denying that a per-  
16 son who is, in fact, destitute can be hurt between the period  
17 when the Review Officer cuts off the benefits and the time when  
18 if, in fact, we are wrong, the State Hearing Officer restores  
19 those benefits.

20           Q     Is there any way of knowing how long that time  
21 is, on the average, or in a typical situation?

22           A     There is evidence in the case that it varies  
23 tremendously. New York had fallen behind beginning in about  
24 1967. I might point out in the first half of 1967 fair hearings  
25 were running at the rate of 200 or 300 per month. In the last

1 half of 1967, they jumped to as high as 1100 per month. This  
2 problem has been alleviated somewhat. The total number of  
3 hearing officers has been increased by 50 percent. We had only  
4 eight for the State at the beginning of this period. We now  
5 have 12, and additional staff has been provided.

6 So as Mrs. Palmer advised the Court, California has  
7 responded to the increased case load. So has New York. I can't  
8 tell you that we have completely caught up on our backlog. We  
9 haven't. But we are making deep inroads into it and we hope  
10 to bring the State of New York into compliance with the time-  
11 table that the Federal Government has proposed.

12 Q And that is 60 days?

13 A Yes, sir.

14 I would point out to you that in this case, in addi-  
15 tion to the constitutional issues which drew the focus of atten-  
16 tion in the court below, there is a statutory regulatory scheme  
17 which provides a framework within which the case could also be  
18 examined.

19 Q Which are you resting on?

20 A I will rest on either, Your Honor. I claim that  
21 we have granted due process, if it is to be measured by consti-  
22 tutional standards. I also claim here, and I believe that the  
23 record will show, we are in compliance with the HEW regulations  
24 on the subject. Here, too, this was a development during the  
25 course of this case. The regulation to which I refer became

1 effective July 1, 1968, well after these cases had started,  
2 but the regulation is set forth in part on page 12 of the  
3 Solicitor General's brief.

4 It is very brief, if I may refer to it. It is cited  
5 to the HEW handbook, Section 2300(d)(5), and it states that  
6 advance notice of questions it has about an individual's eligi-  
7 bility so that a recipient has an opportunity to discuss the  
8 situation before receiving formal written notice of reduction  
9 in payment of termination of assistance is required.

10 Q I gather, Mr. Loflin, that like California, the  
11 city also concedes that constitutionally there is some obliga-  
12 tion of some form of due process before termination may be made.

13 A Yes. We have not denied that. I just point  
14 this regulatory framework out to afford another basis for the  
15 Court's examination, if you wish. The court below turned away  
16 from that entirely and went to the constitutional issue.

17 But we do not here claim that a welfare beneficiary,  
18 whose benefits are about to be terminated, is not entitled to  
19 some pre-termination procedure.

20 Q Constitutionally.

21 A Constitutionally entitled to some pre-termination  
22 procedure.

23 Q Do you think that New York's procedure satisfies  
24 the Federal law?

25 A I do, sir.



1 Q Do you think the New York statute goes as far in  
2 according due process before a termination as the Solicitor  
3 General's brief would indicate?

4 A I believe it goes as far as the Solicitor Gen-  
5 eral's brief says is required. I would point out to you that  
6 annexed to the reply brief filed by my opponent is another brief  
7 filed in the court below in which the Federal Government took  
8 the position explicitly that both subparagraph (a) and (b) of  
9 the regulation complied with the Federal regulation.

10 Q What is there in New York which requires the per-  
11 sonal conference?

12 A That comes up under our Procedure 68-18, the local  
13 procedure adopted to implement the State regulation.

14 Q Under paragraph (b).

15 A Under paragraph (b), and that procedure had to  
16 obtain State approval.

17 Q Is that in the record, that particular provision?

18 A Yes, sir. The Procedure 68-18 appears in the  
19 record following pages 147 and 148(a). It is annexed to an  
20 affidavit of the appellant, the Commissioner of Social Welfare,  
21 Jack Goldberg.

22 I consider those procedures adopted through the local  
23 regulation as complimentary to the State regulation. We could  
24 not have implemented the State regulation without adopting local  
25 procedures and I believe that we are properly entitled to be

1 judged by what we actually did, not by theoretically what we  
2 might have done.

3 These procedures, of course, were before the court  
4 below. They were not adopted after the decision at that time.

5 The regulation by the State came out in the spring of  
6 1968, the revised regulation. It took, I would say, roughly  
7 close to a month before the regulation became effective in New  
8 York City. During part of that month, Review Officers had to be  
9 selected and guidelines had to be developed. In addition, the  
10 procedure that City of New York intended to follow had to be  
11 submitted to the State for its approval.

12 Q Can you state in capsule what that city pro-  
13 cedure contemplates?

14 A Yes, sir. It is the city's procedure which im-  
15 poses, first of all, the duty on the case worker to call the  
16 client in for a conference and explain to him the reasons why  
17 his benefits may be terminated. I stress the fact "may be  
18 terminated." Nothing has happened at this point. The client  
19 is called in and told that we have certain information which  
20 leads us to believe that you may no longer be eligible.

21 The client, of course, has an opportunity to rebut,  
22 to explain, to say anything he would like in response to this  
23 information.

24 Following that conference, which is summarized in some  
25 detail by the case worker, all of the information concerning this

1 matter is referred to the Unit Supervisor. This is the man  
2 next up the line above the case worker. The Unit Supervisor  
3 reviews the whole matter, and it is only if he concurs that the  
4 notice contemplated by this paragraph (b) goes out. Still no  
5 benefits have been terminated.

6 The client receives a notice saying that "Your bene-  
7 fits may be terminated within seven days unless you request a  
8 review. The reasons for the proposed termination are as fol-  
9 lows:," and then the reasons are explained, and it further goes  
10 on to say "If you wish to have a review, you may submit anything  
11 you would like for a review by a Review Officer and you may  
12 have the assistance of counsel in submitting anything that you  
13 would like."

14 Now, this submission does not constitute a hearing  
15 in the classic sense, nor confrontation with witnesses, but it  
16 is the continuation of the process that began with the face-to-  
17 face meeting between the case worker and the client, and it does  
18 bring into play another and a higher official who has no stake  
19 in the decision reached by those subordinate officials below,  
20 and it is only after his review that any impact in any monetary  
21 sense is felt by the client.

22 Q I notice in this Notice of Decision it says "If  
23 you are dissatisfied with this decision, you may request a fair  
24 hearing" -- in capitals -- "in writing or orally."

25 Does that word "fair" hearing occur in the State law?

1           A     There are State law provisions for fair hearing,  
2 but the reason for that --

3           Q     Does it use that term, and does it define what  
4 it means?

5           A     Yes, sir; it does.

6           Q     Where is that? I would like to see just what  
7 statutory thing we are talking about.

8           A     Well, the fair hearing requirement originates in  
9 Federal law. Any State plan submitted to the --

10          Q     You mean there is no definition of it in the  
11 State law?

12          A     Yes, sir; there is. I can't cite it to you off-  
13 hand, but --

14          Q     What is it in the State law?

15          A     All right, that is easier for me.

16                   A State fair hearing is a hearing in the tra-  
17 ditional sense. By that I mean --

18          Q     I am not talking about your judgment, now, as to  
19 what it is. What does the statute make a fair hearing?

20          A     There is a State Hearing Officer, first of all,  
21 not a city official. These original decisions that I am talking  
22 about to terminate are at the city level. The Hearing Officer  
23 on a State fair hearing is a State official. Evidence is intro-  
24 duced, although it is administrative rules of evidence that apply,  
25 and by that I mean it is possible that some hearsay may be



1 introduced, as is true in most administrative proceedings.

2 The client whose benefits may be terminated or re-  
3 stored has a right to examine, before the hearing, any evidence  
4 that the State or the city intends to use against him. In other  
5 words, if there are written documents involved, they must be  
6 displayed to the recipient or his counsel in advance of the  
7 hearing.

8 Witnesses are examined and a verbatim transcript is  
9 made of the proceedings and a written --

10 Q Does the statute require that?

11 A The regulations require that, sir.

12 Q It defines that as a part of a fair hearing?

13 A That is correct, sir. And finally a written  
14 decision comes down.

15 Q Mr. Loflin, isn't there a New York statute that  
16 says that you shall have a fair hearing in certain cases?

17 A Yes.

18 Q Isn't there a statute that says just that?

19 A Yes, sir.

20 Q That is what I think Mr. Justice Black -- do you  
21 have the citation of that statute?

22 A I will give it to you subsequently. I don't have  
23 it now.

24 Q What I want to know is what New York has said is  
25 a fair hearing, because I am not familiar with that term in the

1 Constitution, and I want to see it in the statute.

2 A I have reserved one or two minutes for rebuttal,  
3 and when I rebut, I will give you the precise citation to the  
4 statute and to the regulations that give you the details. They  
5 are substantially as I have outlined them to Your Honor, and I  
6 will reserve that opportunity, if I may, for that time.

7 MR. CHIEF JUSTICE BURGER: Mr. Albert?

8 ARGUMENT OF LEE A. ALBERT, ESQ.

9 ON BEHALF OF APPELLEES

10 MR. ALBERT: Mr. Chief Justice, and may it please  
11 the Court:

12 In discussing the procedures that have been added,  
13 or the administrative changes since this case was before the  
14 District Court between January and June 1968, it is well, I  
15 think, to look at briefly the situation, the procedures used  
16 for the termination of the 20 appellees -- not each one indivi-  
17 dually, of course -- in this very case. Each of them --

18 Q Are those the ones we are going to be passing  
19 upon?

20 A Those are the situations, I think, Mr. Justice  
21 White, that present the typical issues of a contested termination,  
22 that is to say, the typical kind of --

23 Q How about my question? Are those the ones we  
24 have to decide on in this case?

25 A Those are certainly the people who, but for the

1 lawsuit and the injunction below, are faced with the same kinds  
2 of termination problems that they already experienced. Many of  
3 them were restored to aid solely by virtue --

4 Q You mean the change in the New York situation  
5 doesn't change anything?

6 A Mr. Justice White, some of the intervenors in this  
7 suit were actually terminated under the New York change, that  
8 is, the option (b) procedure the city wishes to reinstate by  
9 virtue of this appeal.

10 Q Some of them.

11 A That is correct, Mr. Justice White. Others --

12 Q So which ones are we going to be arguing about,  
13 all of them or just some of them?

14 A I think, Mr. Justice White, all of them present  
15 the kinds of questions, and because they continue to receive  
16 welfare benefits and, therefore, are confronted with the same  
17 kinds of issues of termination, or are likely to be confronted  
18 with such issues, very similar to a kind of union employer con-  
19 tinuing relationship. One strike being settled doesn't neces-  
20 sarily solve all the legal problems for the future.

21 I think that we are really confronted with all those  
22 cases of the people who still continue to receive benefits, who  
23 still are involved in this case worker relationship.

24 The terminations of the appellees, I think, can be  
25 grouped briefly into several categories. It is important to

1 note that all of them had a conference or interview with their  
2 case worker before termination. Indeed, that interview, which  
3 has long been required for the periodic recertification of  
4 eligibility in New York and most other States, all other States,  
5 was actually the cause of termination in many of these cases.

6 For example, John Kelly and Leroy Pavey were termi-  
7 nated because, during that interview, they had a dispute with  
8 the case worker about where they should live. As a result of  
9 their disagreement with the case worker over where they should  
10 live, they were terminated.

11 Two weeks before Angela Velez, who is discussed in  
12 the opinion of Judge Feinberg below, was terminated she had an  
13 argument with her case worker over an extraneous matter, over  
14 a special grant, and she actually asked the case worker to leave  
15 the home. Two weeks later she received a Notice of Termination  
16 informing her, I should say, she was terminated for concealment  
17 of assets, nothing further.

18 During a hearing subsequently, it was found out that  
19 referred to a landlady's report to the case worker that her  
20 husband had returned home.

21 Q Was this action taken under the procedures that  
22 are now before us?

23 A Mr. Justice Stewart, all the procedures except  
24 for -- well, some of them have taken place under all the pro-  
25 cedures, Mr. Justice Stewart.



1 Q I am talking about this one.

2 A These particular ones, there was no option (b).

3 Q Exactly, and I thought that was my brother White's  
4 question, and what is before us now is option (b) as part and  
5 parcel of the whole procedural process that has been described  
6 by counsel for the city, isn't that correct?

7 A But, Mr. Justice Stewart, the process has been  
8 described by the city. The city does not rely on option (b) as  
9 a particularly important element, I don't think, in the process.  
10 They rely on the whole process. I am merely trying to establish,  
11 Mr. Justice Stewart, that there was certainly the case worker  
12 interview, the Unit Supervisor approval, the consultation with  
13 the Unit Supervisor, as Mr. Loflin has mentioned, long before  
14 option (b) was added.

15 Option (b) provides one further step that several of  
16 the appellees did invoke in this case. For example, one of the  
17 appellees, Antonio Soto, was terminated. He received a notice  
18 informing him "Failure to attend rehabilitation COC," and I  
19 should say, Your Honors, that that notice meant as much to him  
20 at that point as it may mean to you now. He did not know what  
21 rehabilitation COC was. It turns out, upon investigation, that  
22 the case worker believed that he was taking drugs. They had a  
23 dispute over that and she wanted him to attend some particular  
24 rehabilitation center.

25 Q Wouldn't you think that there was a reasonable

1 administrative basis for some ambiguity in that notice, so as  
2 not to --

3 A The basis, I think, for the ambiguity is the  
4 fact that we are dealing with form notices issued by case  
5 workers with very, very heavy case loads, and this is, to be  
6 sure, an assembly-line type operation in that regard.

7 Q Yes, but you notice that his benefits are being  
8 at least questioned and he has a ready way to find out what they  
9 have in mind by these symbols.

10 A Well, in fact, in his particular case, he unlike  
11 most welfare recipients did have an attorney to assist him, Mr.  
12 Chief Justice, and his attorney phoned up the case unit to find  
13 out some information. That is reflected in the record, and his  
14 attorney, Mr. Greenberg, has written an affidavit that is in this  
15 record.

16 The information wasn't very helpful. He unlike most  
17 recipients received a copy of the review decision under this  
18 option (b) which Judge Feinberg refers to in his opinion below,  
19 and the review decision by the case supervisor, this neutral  
20 official, states that Mr. Soto was terminated because he was a  
21 parasite, because he was playing a game. I am quoting from that  
22 decision, which is also printed in the record, Mr. Chief Justice.

23 As to the facts involved, Mr. Soto has never yet  
24 learned just what this dispute was about, nor has his attorney,  
25 Mr. Greenberg. Upon intervention in this lawsuit, the city

1 dropped the term "parasite" and "playing a game" and restored  
2 him to the rolls.

3 Q Was his restoration retroactive?

4 A His restoration probably was retroactive, Mr.  
5 Chief Justice, but I am not clear on that. Certainly from July  
6 1, 1968, upon subsequent vindications in the subsequent fair  
7 hearing, the payments themselves are retroactive.

8 Q Then his complaints have been redressed in that  
9 respect.

10 A His benefits were not terminated for any length  
11 of time because he did intervene in this lawsuit soon afterward.  
12 I think in terms of your question, if one looked at the cases,  
13 there were few intervenors here. The harms in this case were  
14 minimized for most of the appellees by virtue of this lawsuit.  
15 There were a few, however, who came into this lawsuit who came  
16 to attorneys late in the process of termination, while they were  
17 awaiting the fair hearing, as in the case of Esther Lett and  
18 Angela Velez.

19 In their particular cases, as this record makes clear,  
20 they suffered eviction, living in one room with four children,  
21 in a sister's overcrowded apartment, living on handouts, attend-  
22 ing Harlem Hospital for treatment of dysentery. Mrs. Lett fainted  
23 in a welfare center while waiting for an emergency grant for  
24 food.

25 The retroactive payments, based on the amount of money

1 that she would have received had there been deliberation before  
2 termination, had there been an examination of this decision that  
3 she contested from the outset, surely cannot in any way be  
4 commensurate or in any way repair or ameliorate those kinds of  
5 indignities, those kinds of harms, and of course, no one is en-  
6 titled to damages for those kinds of injuries.

7 Q Is this still a relevant problem for us?

8 A It most certainly is.

9 Q Under the new regulations, under the change?

10 A It most certainly is, Mr. Chief Justice.

11 Q For this particular person? I thought you said  
12 he was reinstated and got retroactive benefits?

13 A He was vindicated after this procedure was passed  
14 in the fair hearing -- or she, I should say. Most of these  
15 appellees are still receiving welfare benefits and still face  
16 the procedures that are to be used in regard to a termination  
17 of those benefits. Indeed some of the termination issues in  
18 regard to some of the appellees here was never even resolved;  
19 the city just, because of this lawsuit, finding these people  
20 different because of this lawsuit, dropped the matter of termi-  
21 nation.

22 We think that were they not in this lawsuit, they are  
23 faced with that ever present danger, and, of course, they do  
24 represent the class of individuals very similarly situated.

25 Our legal argument is based essentially on three



1 propositions. The first is that the due process guarantees of  
2 the Fourteenth Amendment against Government arbitrariness and  
3 capriciousness apply to the --

4 Q Does the due process clause use those words?

5 A No, the due process -- the guarantee that no  
6 person shall be deprived of life, liberty or property without  
7 due process of law, that guarantee --

8 Q That is proceedings, isn't it?

9 A I am sorry, Mr. Justice?

10 Q That is the proceedings required by law.

11 A Without due process of law, without the pro-  
12 ceedings --

13 Q The proceedings required by law or the proceed-  
14 ings a majority of this Court might think were arbitrary or  
15 unreasonable.

16 A No, Mr. Justice Black, we are not relying on  
17 notions of reasonableness or arbitrariness. We are relying on  
18 the well established obligation in the decisions of this Court --

19 Q Are you relying on obligations imposed by the  
20 language of the Constitution outside of due process with this  
21 latitude in area and definition?

22 A We think that the procedural aspect of due process  
23 does not permit the latitude or leave the Justices at bay in  
24 the sense that substantive due process may be said to. We are  
25 talking about various procedures which this Court time and time

1 again has deemed --

2 Q You mean notice?

3 A I mean notice and the other --

4 Q The Constitution uses the word "notice", doesn't  
5 it?

6 A I think due process, it is well accepted, Mr.  
7 Justice Black, that due process refers to an adversary proceed-  
8 ing preceded by notice.

9 Q The well established thing you are talking about  
10 has certainly had considerable questioning from year to year and  
11 decade to decade during this century.

12 A There may be some question as to what context,  
13 what it requires in certain context, but I think the point here  
14 is that it is conceded, Mr. Justice Black, that the due process  
15 guarantees against Government arbitrariness and capriciousness  
16 apply to public assistance programs. That is not really an issue  
17 here. None of the parties --

18 Q You mean it is not an issue between the parties.

19 A Nor is it an issue -- certainly it is not an issue  
20 in the Government's view, also in its memorandum.

21 Q I don't think the views of the parties bind this  
22 Court, do you?

23 A Certainly not, Mr. Justice White, and that is  
24 one of the reasons why we reestablished that proposition de  
25 novo --

1 Q Don't you think the question that was asked you  
2 had some bearing on that?

3 A I am sorry, Mr. Justice White.

4 Q Don't you think, in responding to Mr. Justice  
5 Black's question, you have to really --

6 A Say why it does? No question. I do and I would  
7 like to briefly address myself to why that concession is well  
8 founded.

9 Q Are you arguing that it is arbitrary and capri-  
10 cious of the Government to cut off a gift or gratuity?

11 A I think one has to make some certain distinctions,  
12 Mr. Justice Black. If you are talking about emergency handout  
13 programs in a period of disaster, or if we are talking about the  
14 19th Century pattern of relief, the 19th Century distribution  
15 of relief, private or public, for which there is very little  
16 distinction, I think it is quite different from the kinds of  
17 programs we are dealing with here.

18 Concededly these programs establish statutory entitle-  
19 ment for all eligible individuals. Concededly that entitlement  
20 cannot be denied or revoked, I should say, without an admin-  
21 istrative finding that the person is no longer eligible. Con-  
22 cedly that finding must be supported by evidence. Concededly  
23 were a case worker to merely terminate a person because he did  
24 not like the color of his hair, for example, that would be arbi-  
25 trary administrative action under these programs, and unconsti-  
tutional. That would be a denial of due process.

1 Q That is quite a difference between what you are  
2 saying there and this law, isn't it?

3 A Mr. Justice Black, I think it is very important  
4 that we recognize we are not dealing with the kind of program  
5 that you mentioned following the Civil War.

6 Q I would gather from your argument that it would  
7 be hard to repeal a gratuity once you have given it on the  
8 ground that it would be arbitrary and capricious.

9 A Not at all.

10 MR. CHIEF JUSTICE BURGER: Mr. Albert, if you will  
11 bear the pending question in mind, we will recess at this time.

12 (Whereupon, at 12 Noon the argument in the above-  
13 entitled matter was recessed, to reconvene at 12:30 p.m. the  
14 same day.)

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1 (The argument in the above-entitled matter resumed  
2 at 12:35 p.m.)

3 FURTHER ARGUMENT OF LEE A. ALBERT, ESQ.

4 ON BEHALF OF APPELLEES

5 MR. CHIEF JUSTICE BURGER: Mr. Albert, you may resume.

6 MR. ALBERT: Mr. Chief Justice, and may it please the  
7 Court: We left off before the lunchtime recess on the threshold  
8 and fundamental question of whether the due process procedural  
9 guarantees apply to public assistance benefits at all.

10 If one looks to the nature of the factors that this  
11 Court has traditionally deemed relevant, the nature of the indi-  
12 vidual interest, the nature of the Government interest, the  
13 burden on the program or proceedings, one finds that all of  
14 those factors compel one answer.

15 The nature of the individual interest that has been  
16 examined is in his statutory entitlement of enormous value to  
17 the beholders, a statutory entitlement on which the very  
18 quality of life depends. This record makes very clear the con-  
19 sequences of erroneous withdrawal of that entitlement.

20 Q What is the closest case in this Court with that  
21 proposition?

22 A I think that the factor of gravity of harm, Mr.  
23 Justice White, is reflected in, for example, the deportation of  
24 alien cases in which the agency is held to highest degree of  
25 legal safeguards before an alien may be deported, although he

1 has no vested right to remain here, but because, as this Court  
2 once said, deportation may deprive one of all that makes life  
3 worth living.

4 Q What about Flemming and Nestor?

5 A Flemming and Nestor is support for our proposi-  
6 tion. It certainly said that the statutory entitlement under  
7 OASDI is within the due process guarantees against arbitrariness  
8 and capriciousness. It only went on to say an issue not involved  
9 here, whether it is vested in all circumstances, or are there  
10 circumstances where it is not vested.

11 We are not arguing with the substantive grounds that  
12 they are relevant to the procedures. We are not arguing with  
13 the substantive grounds of revocation whatsoever; nor are we  
14 arguing with Congress' power or the States' power to add to  
15 those grounds, or, indeed, to use an extreme example, to do away  
16 with these programs. The programs exist.

17 I am sorry, Mr. Justice Stewart.

18 Q It just occurred to me that the deportation pro-  
19 cess is final and irrevocable so far as the administrative pro-  
20 cess goes; whereas, this is not. This is subject to a so-called  
21 fair hearing review in which, as I understand, you concede all  
22 of the due process qualities that you are asserting are neces-  
23 sary are, in fact, accorded.

24 A I think it is very important in looking to that  
25 to recognize that the subsequent fair hearing, in the light of

1 these circumstances, is largely an illusory and certainly an  
2 ineffective remedy.

3 I think this is one of those situations not dissimilar  
4 to Sniadach in this respect: that the delay in relief, putting  
5 the decision into operation before an opportunity to contest it,  
6 all but precludes the opportunity to contest. If one looks to  
7 the fair hearing figures over a course of years on termination,  
8 they are not reflected in the 6,000 hearings that were talked  
9 about by California. They are not reflected in the many more  
10 hearings talked about by New York. They are reflected in  
11 figures amounting, in many States, to zero out of thousands and  
12 thousands of terminations.

13 In New York to, the subsequent fair hearing, approxi-  
14 mately 50 a month from the City of New York out of 10,000 termi-  
15 nations, and about a lesser number from Upstate.

16 Q Of course, that could lead to quite a different  
17 inference, also, couldn't it? It could lead to an inference  
18 that people are terminated with the exception of only about 50  
19 a month only when it is very clear that they should be termi-  
20 nated, and that there are only as few as 50 a month where there  
21 is any real doubt.

22 A It certainly could, Mr. Justice Stewart, except  
23 for the fact that we have figures in this record, and no one  
24 really argues about them, that the weight of administrative  
25 error in denying or terminating aid is enormous. The rate

1 reflected on the face of case records is only the case worker's  
2 version of why she terminated, which is meant to obviously re-  
3 flect a proper version to sustain the decision, so to speak. The  
4 national rate there is between six and seven percent on the face  
5 of case records of erroneous terminations.

6 The figures upon the reversals in those hearings, and  
7 in particular in the prior hearings, range from at least 25 per-  
8 cent to up to 51 percent in New York City today. It can't be  
9 said that the contested decisions to terminate -- we agree that  
10 people come on welfare in periods of temporary crisis and they  
11 go off welfare. Usually most terminations are by agreement with  
12 the case worker. Those we have no concern with.

13 Our concern is with those in which the recipient dis-  
14 agrees with the case worker and wishes to contest that case  
15 worker's decision. In that narrow group of cases, we find that  
16 the times in which the recipient, as opposed to the case worker,  
17 is correct is enormous. The rate of error is just startling.  
18 It is singular, I think, in a Government benefit program.

19 Nonetheless, these decisions are not vindicated in  
20 subsequent fair hearings for a variety of reasons, not the least  
21 of which is that the overwhelming impact, the interim depreda-  
22 tions, and equally important, the fact that the time of the  
23 hearing is wholly in the hands of the Government is not without  
24 significance here.

25 No one really argues that the HEW 60-day rule now in



1 force for several years is anything but theoretical. The periods  
2 reflected in this case, and still reflected in New York, range  
3 from anything from four months to eight months. We are not  
4 using years as examples. But four months to eight months, or  
5 even 60 days, Mr. Justice Stewart, to go without the very sub-  
6 sistence, money for food, clothing and shelter, does not leave  
7 one in any position to engage in a legal wrangle with the Wel-  
8 fare Department.

9 We don't know what happens to those people. The  
10 mystery, though, is by no means reassuring.

11 Q What about the voluntary legal aid program in  
12 New York?

13 A Mr. Justice Marshall, there is nothing one can  
14 do about the systematic, sustained delay in the fair hearing  
15 process. Indeed, the attempts to obtain civil relief in the New  
16 York courts --

17 Q The only question I have is with your point that  
18 they didn't have money enough to process their appeal. That is  
19 all I was asking.

20 A I am sorry, Mr. Justice Marshall. I didn't mean  
21 to imply they didn't have money to process their appeal. There  
22 isn't a cost in processing the appeal. They didn't have the  
23 wherewithal, they didn't have the weight. They were concerned  
24 with the daily problems of living and survival, evication, and  
25 the like, which accounts for this kind of low rate.

1           It certainly isn't, in the timing of the hearing, a  
2 fact of significance in the timing. It is not the practicalities  
3 of the situation, that is, the kind of hearing involved, the  
4 number of interviews or witnesses, that account for delay. As  
5 we well know, welfare termination hearings, unlike most admin-  
6 istrative hearings that this Court deals with, involve one or  
7 two issues, at most one outside source of information, or two,  
8 that take at most one-half hour to one hour.

9           Q     What are those one or two issues?

10          A     Those one or two issues fall into several cate-  
11 gories. One is that the landlady said that her husband has  
12 returned home. The Board of Education says she is working for  
13 her now, just to use the instant cases, which aren't the typical  
14 Or the case worker says, "You haven't cooperated properly. You  
15 haven't permitted me to see this. You haven't cooperated in  
16 bringing your missing husband to heel."

17           These are all evaluative judgments under very vague  
18 standards which arise from this very personal relationship,  
19 and very singular to welfare, I should say, between a case  
20 worker and a recipient, that relationship being imbued with  
21 notions of wardship treatment, rehabilitation, as well as the  
22 policing function of eligibility. Those are the typical issues  
23 in contested terminations.

24          Q     What must be the financial condition of a person  
25 in New York to be eligible for this list, and how much does he  
get?

1           A     He gets an average grant, Mr. Justice Black, of  
2 approximately \$60 to \$65 a month, somewhat less for children,  
3 and that is to take care of all -- plus rent, I am sorry. Plus  
4 rent. That is to take care of all his non-rent needs. Rent is  
5 paid within certain limits as it is actually incurred, and  
6 nothing more.

7           There is no question that the level of aid is penurious  
8 to extreme. The resource policy requiring you to yield resources  
9 when you are found eligible, and to continue to yield resources  
10 to the Welfare Department afterwards insures that you cannot  
11 budget for any contingency, including administrative error.

12           It is not for the practicalities that protract the  
13 hearing process that revealed in the fact that in those States  
14 in which prior hearings are now afforded, the pattern of timing  
15 is from one to two weeks, and that is really what we are talking  
16 about when we look to the so-called extra cost or the burdens  
17 on the system, which is certainly is a relevant factor. We do  
18 not argue that the Constitution requires the impractical or the  
19 impossible. There is neither of that here.

20           Q     Did you say, Mr. Albert, that there are some  
21 States that provide trial-type hearings before termination?

22           A     I certainly did, Mr. Justice.

23           Q     How many are there?

24           A     There are approximately four or five, pursuant  
25 to court orders, who agreed in stipulations during the course

1 of the hearing.

2 Q Any large States?

3 A New York State is the best example of that. In  
4 New York State, New York City in particular, has the largest  
5 Welfare Department in the country, including any State Welfare  
6 Department, I should add, and the largest number of recipients,  
7 presumably relatively more sophisticated recipients, relatively  
8 greater access to legal assistance, so it provides a good test  
9 case for the notion of what kind of burdens this will incur.

10 The burdens it incurs afford evidence in the fact  
11 that New York State, which shares half these costs, is not here  
12 today. The burdens it incurs is better revealed in the fact  
13 that out of 60,000 terminations in the course of five months  
14 in New York City, there were 1,000 prior hearings requested, in  
15 out of which 51 percent of the recipients prevailed.

16 Even under the Government's test in its memorandum  
17 of whether more eligible than ineligible people requested hear-  
18 ings, we would prevail in this case.

19 In comparing also those additional costs for the one  
20 or two weeks, and after all, the only additional costs, we be-  
21 lieve, that can be considered here are those that are the one-  
22 or two-week payments to people who are ultimately found ineli-  
23 gible, in comparing that, one must also look to the kind of  
24 cumbersome procedure that New York City seems to offer. We say  
25 it is totally an ineffective one, the written review-type thing



1 and all these supervisors talking to each other, but that cer-  
2 tainly must cost and take time, too.

3 The entire operation in New York City, with 10,000  
4 closings a month, entails six Review Officers. Now, I will  
5 grant you, compared to the State fair hearing process, which  
6 only has 10 altogether for the entire State, that is quite a few,  
7 but in terms of actual monetary burdens on the system, six Re-  
8 view Officers, we submit in a Welfare Department with the budget  
9 of the City of New York such as it has, is de minimis. It is  
10 just not a factor that can really be accounted for.

11 We also would ask this Court to recognize in looking  
12 at the burdens or non-burdens that there can be no question that  
13 the effect of the present procedure of postponing, and seriously  
14 postponing the fair hearing, is to deter and discourage its use.

15 To the extent that prior hearings will be used more  
16 as a result of removing this deterrent, we don't think those are  
17 appropriate costs for the simple reason that we think any policy  
18 of deliberately forestalling a constitutional opportunity to be  
19 heard, in order to discourage its use, regardless of the merits  
20 of the claims, we think would be impermissible. The right to  
21 be heard must be more than a theoretical or nominal one.

22 Q I think the content of the hearing you urge goes  
23 beyond what the Federal Government thinks is warranted.

24 A The Federal Government isn't talking about a  
25 hearing, Mr. Justice White, when it talks about advance notice

1 of questions. It talks about a case worker, which has been  
2 done for a long time. It is really nothing new. It involves  
3 the recipient in the redetermination process.

4 Q I take it, though, that you would also go beyond  
5 what the District Court said was required, wouldn't you?

6 A Absolutely not, Mr. Justice White. We are talk-  
7 ing about the absolute rudiments of an adversary proceeding  
8 where the recipient requests it. By that we mean only that the  
9 case worker presents the case to a relatively uninvolved offi-  
10 cial, the recipient hears the case -- after all, that is the  
11 first opportunity the recipient has to learn of the case, at  
12 this hearing; those cryptic notices will not reveal the case --  
13 has an opportunity to hear the evidence and question the case  
14 worker, of course, since those are facts about the recipient.  
15 Functionally, those are facts very intimately about that par-  
16 ticular person, and obviously the assumption of our system is  
17 that that person is in the best position to refute them.

18 Q What if there is a conflict on the evidence?

19 A Where the determination -- which is not in all  
20 cases, Mr. Justice White -- rests entirely on third-party infor-  
21 mation, the landlady said blank --

22 Q Or in part; yes.

23 A Or in part, all right. Or in part, and not sub-  
24 stantiated by other documentary evidence, let's say, two third  
25 parties, yes, in that case where the credibility of those

1 witnesses is called into question, we say those witnesses have  
2 to be there so that the recipient can question them. There is  
3 no way to rebut anonymous accusations.

4 Q I didn't think the District Court would go that  
5 far in all cases.

6 A In cases, it said, where the evidence depends on  
7 the veracity or credibility of third parties.

8 Q Or is critical to the case.

9 A And critical to the case; yes. Mr. Justice White,  
10 we are not asking you to spell out a code of welfare procedures.

11 Q Well, what about the situation where there are  
12 no factual -- it is just a question of law or a question of  
13 opinion, or something like that.

14 A This issue really is not involved in this case.  
15 There is not one of the appellees who raised a question of law.  
16 We are not arguing that; let's be clear. We are not, to use  
17 the Government's example, arguing that where there is across-  
18 the-board reduction by the Legislature or the regulations, and  
19 the validity of that reduction is being challenged as a legal  
20 matter. In those situations, you are entitled to prior hearings

21 We agree that questions of statutory validity or con-  
22 stitutional validity are much more appropriate for the judicial  
23 process than for administrative hearings. Administrative agen-  
24 cies don't have the power to resolve those questions. We are  
25 not talking about them.

1           The application of regulations, as in the case of Mrs.  
2 Guzman, for example, we are including, of course. That is where  
3 the case worker states that she thinks there is a policy of this  
4 kind of cooperation, the recipient states that there is no such  
5 policy. Certainly the policy is based upon whether there are  
6 justifiable reasons not to participate in this lawsuit. The  
7 Department recognizes that.

8           In that kind of a situation, that is an application  
9 of a regulation, an evaluative regulation at that. We submit  
10 that that requires a hearing.

11           Q     I take it that if you got the kind of hearing  
12 prior to termination that you want, that would be the end of  
13 the matter as far as that stage of the process is concerned.

14           A     Certainly as far as the due process clause of the  
15 Constitution is concerned. We are not asking for two hearings.  
16 We are not asking for appeals. We do not care if the Hearing  
17 Examiner's salary is paid by the city or the State. We think  
18 there are different viewpoints on that, as indicated in the State  
19 Commissioner's viewpoint, and perhaps in HEW's viewpoint. Those  
20 are considerations that really have little to do with the due  
21 process clause.

22           We are only asking for one constitutional right -- the  
23 adequate opportunity to be heard at a meaningful time, at a time  
24 when recipients can use that, at a time when the remedy can be  
25 effective, that is to say, when it can provide relief against the



1 kinds of harm that are reflected in this record.

2 We think that one thing that has been left out that  
3 should be stressed here is that a good part of the reason for  
4 due process procedural guarantees is because Government arbi-  
5 trariness, regardless of the context, is still Government arbi-  
6 trariness, and, therefore, unconstitutional. We think that the  
7 dangers of arbitrariness in this system are about as great as in  
8 any administrative program one can think of.

9 Q Do you say if you prevail, a fortiori the same  
10 would apply to civil employees?

11 A Absolutely not.

12 Q Why not?

13 A Well, for factors, one, observed in Cafeteria  
14 Workers versus McElroy, the Government engaged in a managerial  
15 function as employer; to the discretionary kinds of decisions,  
16 which is slightly different; and three, the question of a sus-  
17 pension of an employee may well fall into one of those extra-  
18 ordinary situations laid out by this Court where, for example,  
19 the employee represents some immediate threat to the service or  
20 to the Department. That is not the case here.

21 Q I just ask you about the ordinary case, where  
22 the ordinary employee, no unusual circumstances, except someone  
23 just wants to fire him. Would you say there is some due process  
24 requirement before stopping the salary or the wage?

25 A There might be at least the requirement, as

1 indeed is the practice in the Federal Civil Service --

2 Q If you prevail, it would be more likely.

3 A I agree with you, Mr. Justice White, but I think  
4 it important to recognize that we are not litigating a variety  
5 of Government benefit programs or Government employment which  
6 involve factors that are very different than the ones here.  
7 There are many benefit programs that provide for benefits to  
8 continue after eligibility has ceased -- Social Security, OASDI  
9 and Disability. The one area where there might be dispute is  
10 one of those programs; Civil Service is another.

11 Q I would like to ask one question.

12 I thought I saw among the papers that have been filed  
13 a reference to a Federal regulation that would require, in  
14 relation to AFDC, for example, relief a continuance of benefit  
15 payments even though they were terminated at a pre-hearing stage  
16 until the final hearing post-termination stage had been reached.  
17 Is that right?

18 A That is correct, Mr. Justice Harlan. It was pro-  
19 mulgated a year ago by HEW.

20 Q What bearing does that have on your position?

21 A I think it verifies that the fair hearing require-  
22 ment of the Federal Act, which after all does import notions of  
23 due process into it, cannot be truly effective unless the hear-  
24 ing is prior, and that is what HEW said when it promulgated the  
25 regulation.

1           It has been postponed, Mr. Justice Harlan, until next  
2 July over opposition, over a variety of oppositions, some like  
3 New York, which prefers the local agency hearings, some States  
4 that just don't like Federal incursions, additional procedural  
5 impositions under HEW's power.

6           We think the relevance is that it represents the judg-  
7 ment of the administrative agency charged knowing something  
8 about these matters, but that is required and that is still  
9 current Federal policy although its effective date is post-  
10 poned. It is still part of the Federal regulations, as is the  
11 Federal matching formulas to encourage States to continue.

12           Q     Is it supposed to be a requirement, Mr. Albert?

13           A     It is supposed to be a requirement, Mr. Justice  
14 Brennan.

15           Q     That is, when it goes into effect.

16           A     If and when it goes into effect, it will be a  
17 requirement.

18           Q     If it were in effect now, what effect would it  
19 have on these cases?

20           A     It would have the effect in the AFDC reciprocity  
21 of providing them with the relief they want, as interpreted by  
22 the Government.

23           Q     In other words, the State is going to be obliged  
24 by the Federal regulations not to terminate until when?

25           A     Until the actual subsequent statutory hearing

1 before the State agency.

2 Q After a fair hearing has been held.

3 A That is correct.

4 Q What is the situation now?

5 A The situation now is that the regulation is not  
6 effective.

7 Q What is the situation as far as Federal matching  
8 money is concerned? There is a choice. The State can do it  
9 either way.

10 A The State can do it either way but it is simply  
11 stated quite so neutrally in that the matching formula provides  
12 for a continuation of payments or Federal funds for continuation

13 Q If the States make them.

14 A Up to that fair hearing, regardless of when that  
15 fair hearing is held, regardless of the HEW time limits. Also,  
16 the matching formulas provide 90 days for the local agency to  
17 investigate, decide and implement the decision of ineligibility.  
18 Within those 90 days, the local hearing, the two-week hearing  
19 we talk of here --

20 Q Mr. Albert, you said that HEW regulation's effect-  
21 ive date has been postponed. I take it HEW could rescind it  
22 tomorrow, couldn't it?

23 A It most certainly could.

24 Q Was that promulgated by the last Administration?

25 A It was, Mr. Justice Brennan, although it was



1 promulgated actually in final form in January 1969, during the  
2 transition, I think it is fair to say, with the concurrence of  
3 both Administrations, but the postponement is of this Admin-  
4 istration.

5 Q That regulation would not affect the branch of  
6 your case that concerns general relief, would it?

7 A That is correct, Mr. Justice Harlan, it would not  
8 resolve the issue in the home relief program.

9 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Albert.

10 How much time does Mr. Loflin have?

11 THE CLERK: Five minutes.

12 REBUTTAL ARGUMENT OF JOHN J. LOFLIN, JR., ESQ.

13 ON BEHALF OF APPELLANT

14 MR. LOFLIN: If the Court please, I ask particularly  
15 the leave of Mr. Justice Black to check the citation. You had  
16 asked me, sir, where we could find the regulations that would  
17 describe the rights afforded those who appear in a State fair  
18 hearing.

19 It is in our record following page 160, and I par-  
20 ticularly referred you to Section 84 of the State regulations,  
21 and more particularly beginning on page 2 where it describes the  
22 entire procedure from the time a request is made.

23 Q What page is that?

24 A It follows page 160 of the record. Immediately  
25 following that page is a resolution of the State Board of Welfare

1 which goes for two pages and then begins Regulation No. 84.2,  
2 and that entire regulation deals with the procedure under the  
3 State fair hearings.

4           You will find, among other things, there is a notice  
5 of the hearing, which gives all the details you would need to  
6 know to go to the proper place. It tells you who you are going  
7 to appear before. It advises you of the right of each party to  
8 be represented, to testify, to produce witnesses, to present  
9 documentary evidence, and to examine opposing witnesses and  
10 evidence.

11           84.9 gives you the right to examine the other side's  
12 evidence in advance of the hearing. It points out that the  
13 hearing is to be conducted by an impartial hearing officer. It  
14 goes on to detail the burden of the hearing officer to render  
15 a written opinion, what the content shall be, that the decision  
16 must be sent to the client, and that he be advised, upon receipt  
17 of the decision, of his right to judicial review under New York  
18 law.

19           Q     Is there anything in there that prescribes  
20 exactly when the hearing shall take place?

21           A     Under Federal regulations, sir, they are supposed  
22 to take place and be completed within 60 days. This is the 60-  
23 day period that has been referred to previously in the discussion  
24 this morning.

25           Q     That is the termination?

1 A Yes, sir.

2 Q Does the State law with respect to home relief  
3 and the other general assistance programs alone provide any  
4 time limitation for the fair hearing?

5 A I don't know of any. The pattern would not be  
6 much different under the home relief cases than under any of  
7 the others.

8 I would refer, if I may, to the section of my main  
9 brief on pages 14 and 15. Our procedures have been sharply  
10 criticized here and it has been pointed out by my adversary  
11 that under paragraph (a), which is his preferred procedure, a  
12 number of reversals of case worker decisions have occurred.

13 We had a brief period, just a few months, roughly from  
14 June to November of 1968, during which the City of New York  
15 operated under the provisions of subparagraph (b) and its local  
16 Procedure 68-18. During that period, approximately 44 percent  
17 of the decisions to terminate were reversed as a result of our  
18 own procedures.

19 I submit to the Court that our procedures were working  
20 and during that same period of time, as is true now, some of  
21 our cases then went on to the fair hearing stage. During those  
22 same months, the reversals on termination cases, after fair  
23 hearings, did not exceed three cases per month, and in one month,  
24 September 1968, there were no reversals.

25 I think this is a demonstration that goes beyond the

1 face of the regulation itself, but the procedure is designed to  
2 be fair; it is designed to weed out error, and it works.

3 This Court has on other occasions, and in other con-  
4 tests, molded constitutional requirements appropriate to the  
5 facts. Due process has been described as a flexible, not a  
6 fixed, concept.

7 It might also be noted that under the Fourth Amendment  
8 in the Camera and See cases, where there was a question of the  
9 burden of proof on a locality before a warrant should be issued,  
10 it was found by this Court that the burden of proof need not be  
11 quite as high as in a traditional warrant for search and seizure.

12 There is room for innovation at the local level in  
13 State and local governments, and I feel that our innovation  
14 meets the standards that this Court has indicated are required  
15 for due process.

16 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Loflin.

17 Are there any other questions?

18 The case is submitted.

19 (Whereupon, at 1:00 p.m. the argument in the above-  
20 entitled matter was concluded.)

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