Washington Law Review

Volume 46 | Number 3

5-1-1971

Due Process—Administrative Law—Public Assistance: Applicant's Right to a Fair Hearing—Davis v. Toledo Metropolitan Housing Authority, 311 F. Supp. 795 (N.D. Ohio 1970)

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DUE PROCESS—ADMINISTRATIVE LAW—PUBLIC ASSISTANCE: APPLICANT'S RIGHT TO A FAIR HEARING—*Davis v. Toledo Metropolitan Housing Authority*, 311 F. Supp. 795 (N.D. Ohio 1970).

Plaintiff applied for admission to a low income housing program administered by the Toledo Metropolitan Housing Authority. The Authority's regulation concerning admission to the program provided several standards for determining an applicant's character eligibility. The regulations required that applicants of unqualified character be declared ineligible on the general grounds of "non-desirability." Plaintiff was denied a place on the waiting list for housing program vacancies on those grounds. Her request for the specific facts supporting the Housing Authority's decision was denied, and her appeal for a "fair hearing" to contest the decision was refused. Plaintiff brought suit to enjoin the Housing Authority from refusing to grant a hearing. *Held*: To satisfy the due process guarantee of the fourteenth amendment to the Constitution of the United States, applicants for public housing must be afforded a "fair hearing" to contest a decision to deny benefits. *Davis v. Toledo Metropolitan Housing Authority*, 311 F. Supp. 795 (N.D. Ohio 1970).

In *Goldberg v. Kelly*,[1] the United States Supreme Court considered, solely on the basis of the fourteenth amendment guarantee of due process,[2] the extent of the right to a "fair hearing" in cases involving termination of public assistance. New York City's practice of denying a hearing until welfare benefits had actually been terminated was challenged. The benefits were disbursed under the Aid to Families with Dependent Children (AFDC) program[3] which requires participating states to provide opportunities for hearings.[4] Since the federal statute did not specify when the hearing was to be held and the state statute provided only for a post-termination hearing,[5] the *Kelly* Court

1. 397 U.S. 254 (1970).
2. Other cases have dealt with the right to a "fair hearing" in public assistance cases, but have been decided on grounds other than due process. *See, e.g.*, Thorpe v. Housing Authority, 393 U.S. 268 (1969), granting a hearing on the basis of a Department of Housing and Urban Development circular requiring a hearing prior to ejectment from a low income housing program.
3. 42 U.S.C. §§ 601-09 (1964). The program is one of joint federal and state government contribution, with distribution entrusted to the states.
4. 42 U.S.C. § 602(a)(4) (1964).
5. N.Y. SOC. WELFARE LAW § 353(2) (McKinney 1966).

had to deal with the question of whether a hearing prior to termination was constitutionally required. The question arose because of the traditional classification of the receipt of public assistance as a privilege, not a right. Historically, the "right-privilege" distinction had been applied in many situations[6] to uphold government action challenged as violating substantive constitutional rights, such as due process. The basis of the distinction is that constitutional protection extends to private rights, those achieved in the private sector, but not to status achieved through governmental grace.[7] Due process did not apply in welfare cases because status as a recipient of public assistance benefits was a consequence of governmental largess, not of private right. The *Kelly* Court rejected the "right-privilege" distinction because "termination [of benefits] involves state action that adjudicates important rights."[8] Thus, at least in cases involving recipients of public welfare, it appears that the "right-privilege" argument will not defeat the constitutional challenge of government action.[9]

6. For a survey of judicial application of the "right-privilege" distinction, see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

7. As noted in Van Alstyne, *supra* note 6, the distinction is clearly expressed in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892) (the first amendment will not protect a policeman discharged for violating a regulation prohibiting political activities, because being a policeman is a privilege, not a right). *See also* Starkey v. Board of Educ., 14 Utah 2d 227, 381 P.2d 718 (1963) (married high school students may be denied the privilege of participating in extracurricular activities); Hornstein v. Illinois Liquor Control Comm'n, 412 Ill. 365, 106 N.E.2d 354 (1952) (the privilege of retaining a retail liquor license may be denied without due process); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951) (there is no prohibition in the Constitution against the denial of the privilege of government employment for the employee's political activities, beliefs or affiliations); and Wilkie v. O'Conner, 261 App. Div. 373, 25 N.Y.S.2d 617 (1941) (the denial of welfare benefits on the grounds that the recipient insisted on sleeping under an old barn does not offend the right to live where one pleases).

8. 397 U.S. at 262.

9. As noted in Van Alstyne, *supra* note 6, courts have rejected the "right-privilege" distinction in various other situations on several grounds, including the following:

a) The Doctrine of Unconstitutional Conditions: conditioning the receipt of largess on relinquishment of private rights guaranteed by the Constitution is as forbidden to government as direct government violation of those rights. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (unemployment compensation cannot be discontinued for the recipient's refusal of Saturday employment for religious reasons); Dixon v. Alabama State Board of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied.*, 368 U.S. 930 (1961) (the State cannot condition the granting of a privilege on the renunciation of the right to procedural due process); and Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926) (holding unconstitutional a state act conditioning the use of state highways by private carriers on their dedicating their property to the business of public transportation, thus subjecting themselves to all the duties and burdens imposed by the act on common carriers).

b) Conditioning the granting of privileges so as to indirectly violate the rights of

In determining the extent to which due process required a hearing prior to termination,[10] the *Kelly* Court applied two tests. First, the determination is influenced by the extent to which the recipient may be "condemned to suffer grievous loss."[11] Second, the Court applied the "interest balancing" test, as it had previously done in reviewing the propriety of summary action by government agencies.[12] This test involves a weighing of the individual's interest in obtaining an opportunity to be heard prior to government action against the government's interest in taking the summary action.

The Court in *Kelly* had no trouble finding that denial of a hearing prior to termination of benefits would expose a recipient to possible grievous loss. Termination of aid during the period prior to the hearing might deprive the recipient "of the very means by which to live while he waits."[13] Applying the "interest balancing" test, the Court found that the recipient's interest in continuing to receive cash payments on which his existence depended outweighed New York City's interest in preserving public funds by avoiding payments to ineligible

private citizens. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479 (1960) (holding unconstitutional an Arkansas statute requiring teachers to report membership in any organization on the grounds that, even though the statute did not prohibit membership in any organization, it would discourage controversial political association in violation of the freedom of association guaranteed by the first amendment).

c) Procedural due process as an independent right. *See, e.g.*, Thorpe v. Housing Authority, 393 U.S. 268 (1969) (granting a hearing on the basis of a Department of Housing and Urban Development circular requiring a hearing prior to ejectment from a low income housing program) and Homer v. Richmond, 292 F.2d 719 (D.C. Cir. 1961) (the denial of the privilege of a license as a radiotelegraph operation without opportunity for a hearing violates due process of law).

d) Equal protection under the law. The distribution of privileges must be made fairly and the bases of classification and treatment must be reasonable. *See, e.g.*, Wieman v. Updegraff, 344 U.S. 183 (1952) (although government employment is a privilege, regulations restricting the class of persons eligible to continue employment to those willing to conform to an unreasonable rule of conduct are arbitrary and discriminatory in violation of equal protection).

10. Several cases have suggested the "flexibility" of due process, depending on the particular circumstances under review. *See, e.g.*, Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) (upholding summary action by the Department of Defense on the basis that the government's interest in national security outweighs the interest of a short-order cook in working in a restaurant on the premises of a Navy gun factory); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (upholding summary action in seizing mislabeled vitamin products); and North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (upholding summary government action in seizing food not fit for human consumption).

11. 397 U.S. at 263, citing Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951).

12. 397 U.S. at 266. Several cases have supplied justification for applying the "interest balancing" test in similar situations. *See, e.g.*, Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) and Hannah v. Larche, 363 U.S. 420 (1960).

13. 397 U.S. at 264.

recipients prior to a "fair hearing."[14] Therefore, a hearing was required prior to termination of public assistance benefits.

In the principal case, *Davis*, the court, relying on *Kelly*, substantially enlarged the scope of the right to a "fair hearing" in public assistance cases by extending the right to an *applicant* for admission to a low income housing program. Two significant questions are raised by this analysis. The first, whether the interests of the applicant are protected by the due process guarantee, appears to be more important in *Davis* than the same question asked with respect to the recipient in *Kelly*. While the statutory hearing requirement was clearly noted in *Kelly*, no reference to such a requirement was made in *Davis*. If the "right-privilege" distinction were to be applied to an applicant for public assistance benefits,[15] the right to a hearing would become quite difficult to support absent any statutory requirement. As noted above, however, the *Kelly* Court rejected the distinction with respect to recipients of public welfare.[16] The same circumstances exist in the case of the applicant. A basis for rejecting the "right-privilege" distinction in all public assistance cases can be found in the Court's treatment of the problem in *Kelly*. The *Kelly* Court held that "[t]he constitutional challenge [summary action violates due process] cannot be answered by an argument that public assistance benefits are a 'privilege' and not a 'right'."[17] Furthermore, to resolve constitutional conflicts by categorizing the status of the challenger as "recipient" or "applicant" seems every bit as artificial as to do so by reference to the privilege-right dichotomy. Instead of distinguishing between rights and privileges, or applicants and recipients, a fairer result is reached by balancing the individual's interest against the government's.[18]

14. *Id.* at 265-66.

15. The distinction between applicants and recipients has been made in another area of the law concerned with the "right-privilege" distinction, parole revocation. An argument in favor of extending due process protection to parolees is that even though parole is a privilege and not a right, the privilege, *once granted*, vests and can only be taken away with due process. Thus the interests of the applicant for parole would not be protected because, to him, the privilege of parole has not vested. For a review of the judicial dilemma over the rights of parolees, see Comment, *Right Versus Results: Quo Vadis Due Process for Parolees*, 1 PACIFIC L.J. 321 (1970). For a view that the demise of the "right-privilege" distinction in constitutional analysis may necessitate a showing of probable cause to re-arrest a parolee for an alleged parole violation, see 46 WASH. L. REV. 175 (1970).

16. *See* note 8 and accompanying text, *supra*.

17. 397 U.S. at 262 (1970), citing Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969).

18. Another argument supporting the rejection of the "right-privilege" distinction is

The second question raised by the *Davis* decision is whether the court accurately applied the *tests* articulated in *Kelly* in extending due process benefits to an applicant for public assistance. First, does the denial of a "fair hearing" expose the applicant to possible "grievous loss"?[19] Since determination of eligibility did not automatically assure an applicant of immediate placement, the denial of a place on the waiting list without a hearing would not deprive the applicant of a place to live. As the *Davis* court correctly noted, the question of present and irreparable harm in the case under review was not as clear as it was in the case of termination of cash payments prior to a "fair hearing" concerning eligibility for benefits.[20] In the latter case, a tangible benefit on which the recipient depended was being taken away, while in the case under review, a merely potential benefit was being denied. The court noted, however, that the applicant could not begin to wait for a vacancy until he was declared eligible and that time lost could never be regained.[21] Apparently, lost time was considered sufficiently "grievous" to satisfy the first *Kelly* test.[22]

Second, were the interests of the applicant in obtaining a "fair hearing" sufficient to outweigh those of the Housing Authority in pursuing summary action? Both the government's interest and that of the individual in *Davis* may be distinguished from the interests in *Kelly*. First, the Housing Authority's interest was solely in avoiding the costs of administrative hearings, while New York City's interest was in avoiding those costs plus the costs of paying ineligible recipients until termination of benefits was finalized at a "fair hearing." Second, the interest of the applicant in obtaining a place on the waiting list was

that the "substantial influence which expanded governmental activity gives the government over the private lives of its citizenry makes the restraints of substantive due process necessary" in all cases. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1462 (1968).

For a similar argument and a more lengthy investigation of the problems and patterns of government largess, *see* Reich, *The New Property*, 73 YALE L.J. 733 (1964); *see also* Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Comment, *The Constitutional Minimum for the Termination of Welfare Benefits: The Need for and Requirements of a Prior Hearing*, 68 MICH. L. REV. 112 (1969); Comment, *Due Process and the Right to a Prior Hearing in Welfare Cases*, 37 FORD. L. REV. 604 (1969). See note 24, *infra*, for several cases involving the legal interests of "applicants."

19. *See* note 11 and accompanying text, *supra*.
20. 311 F. Supp. at 797.
21. *Id.*
22. *See* text accompanying note 11, *supra*.

not as great as the recipient's interest in continuing to receive cash payments on which his existence depended.[23] Relying on the argument that lost time can never be recovered, the *Davis* court held that the interests of the applicant were sufficient to outweigh those of the Housing Authority and, therefore, that a "fair hearing" was required.[24]

As discussed above, the extension in *Davis* of the right to a "fair hearing" to an applicant for a place on the waiting list for low income housing constitutes a substantial broadening of the scope of that right. *Davis* followed *Kelly* in using the "grievous loss" and "interest balancing" tests, however, and the problem remaining is simply to determine what factual circumstances will satisfy the requirements of those tests.[25]

A more serious, unanswered question is whether the tests, as used, are adequate to determine the right to a hearing in such cases, or whether courts should consider other factors in making the determination. The threshold "grievous loss" test seems adequate. It simply determines whether the individual involved has a sufficient interest to justify a formal hearing to adjudicate his claims, a fact issue to be worked out from case to case.

The "interest balancing" test, however, is harder to utilize. It requires both identification of the interests to be balanced and judgment as to the relative importance of the competing interests. Failure to identify all the relevant interests can destroy the validity of the balancing process.

The *Davis* and *Kelly* courts correctly recognized as relevant the interests of the welfare recipient or applicant in receiving the benefits,

23. *See* text accompanying note 20, *supra*.

24. Although most due process problems have concerned persons actually receiving government largess, some cases have extended protection to the interests of applicants. *See, e.g.*, Goldsmith v. United States Bd. of Tax Appeals, 270 U.S. 117 (1926) (holding that a certified public accountant was entitled to notice and a hearing to contest a denial of his application to practice before the Board based on his alleged unfitness) and Hornsby v. Allen, 326 F.2d 605 (5th Cir., 1964) (holding that due process protection must be afforded the interests of an applicant for a retail liquor license because licensing is a judicial act involving the determination of factual issues and the application of legal criteria).

25. The United States Supreme Court has had one opportunity to consider the limits of the right to a "fair hearing" since its decision in Goldberg v. Kelly, 397 U.S. 254 (1970). The problem in Daniel v. Goliday, 398 U.S. 73 (1970), concerned the right to a "fair hearing" prior to *reduction* of benefits. The judgment of the District Court in Goliday v. Robinson, 305 F. Supp. 1224 (N.D. Ill. 1969), holding that a hearing was required, was vacated for failure to pay specific attention to the issue of reduction. Thus, no new light was shed upon the problems discussed here.

and those of the government in protecting government funds. However, both *Davis* and *Kelly* seem to have ignored the practical public interest in maximizing the funds actually disbursed in welfare grants to individual recipients. More funds would be available if the number of administrative hearings were reduced.

The need to limit the right to a "fair hearing" could become especially important during times of financial troubles for state and local governments. The limit should be reached when the governmental (public) interest in extending welfare benefits as far as possible, and in paying grants sufficient to meet the neds of those eligible to receive, outweighs the interests of the individual in obtaining a "fair hearing." Neither the *Davis* court, nor the United States Supreme Court in *Kelly*, expressly considered that public interest. The question, then, is whether practical limitations on public assistance funds are proper considerations for courts in determining Constitutional due process problems.

PRACTICAL LIMITATIONS ON PUBLIC ASSISTANCE FUNDS: ANOTHER INTEREST TO BE WEIGHED AND BALANCED

The conclusion that practical limitations on public assistance funds are proper considerations for courts is supported by the United States Supreme Court's recent decision in *Dandridge v. Williams*.[26] In *Dandridge*, the Court upheld Maryland's maximum public assistance grant limitation which was challenged as an unconstitutional denial of equal protection.[27] The court decided:[28]

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.

26. 397 U.S. 471 (1970).

27. Not considered here is the challenge on the ground that Maryland's maximum grant limitation violated the provisions of Aid to Families with Dependent Children Program, 42 U.S.C. §§ 601-09 (1964). The Court held that there was no violation. Dandridge v. Williams, 397 U.S. 471, 483 (1970).

Generally, states participating in the AFDC program calculate standards of need on which the amount of grant payments is based. *See, e.g.*, 8 WASH. ADM. CODE §§ 388-25-085 to 130 (1969). Public assistance grants are disbursed in the amount that the individual's monthly "needs" exceed his monthly non-exempt resources (income), except as modified by the maximum grant. 8 WASH. ADM. CODE § 388-33-025 (1969). Thus if the individual's needs exceed his non-exempt resources by $500, and the maximum grant limitation is $350, only $350 is paid.

28. 397 U.S. at 485.

Inequality in classifying does not offend the Constitution if the classification has some "reasonable basis,"[29] because the "problems of government are practical ones and may justify, if they do not require, rough accommodation."[30] The *Dandridge* Court found a reasonable basis for Maryland's maximum grant limitation in[31]

> the State's legitimate interest in encouraging employment and in avoiding discrimination between welfare families and families of the working poor.

Employment was encouraged by the provision in the maximum grant limit allowing retention of money earned without reduction in the amount of the grant. Maryland suggested two additional interests to support the reasonableness of the maximum grant; providing incentives for family planning and *allocating limited public funds in such a way as to meet the needs of the largest possible number of families.* The Court decided that it did not have to explore all the reasons advanced to justify the maximum grant because sufficient state interests had been found.[32]

The Court's recognition of legitimate practical state interests supporting classification in public welfare plans suggests that similar interests may be considered in determining the extent of the right to a "fair hearing," even when agency action is challenged on a purely constitutional basis. The most pressing problem facing state departments of public assistance is that of allocating scarce funds among overwhelming needs. The problem is magnified during economic depressions, when the number of persons eligible to receive public assistance benefits rapidly increases and the amount of available tax revenue decreases. Costs of administrative hearings for applicants and recipients, and costs of continuing payments to ineligible recipients prior to final termination at a "fair hearing," increase the load on already overburdened state public assistance budgets.[33] As the number

29. *Id.*
30. *Id.* at 485, citing Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70 (1913).
31. 397 U.S. at 486.
32. *Id.*
33. The burdensome effect of the costs of fair hearings is illustrated by the following data. The approximate average cost of a fair hearing in Washington is:

Fair Hearing Unit's Cost	$86.00
Local Unit's Cost	48.00
Assistant Attorney General's Cost	45.00
Total Cost	$179.00

of applicants and recipients increases, the need for quick government action becomes paramount.[34] Faced with the "fair hearing" requirement, state public assistance departments are forced to allocate funds for that purpose. This allocation results in a decrease in funds available to meet the needs of those eligible to receive benefits. The obvious state response to the problem of limited resources is to cut assistance programs and to impose maximum grant limitations. Those eligible to receive benefits will suffer to the extent that their requirements will not be satisfied. They will, as noted in *Goldberg v. Kelly*,[35] be exposed to possible "grievous loss"; that is, the loss of grant funds and public assistance services on which their lives depend.

Logically, the public interest in maximizing the effect of limited public assistance resources is a legitimate state interest to be weighed in the "interest balancing" equation. Although this interest might be included as part of the governmental interest in *protecting* funds, there is no indication in either *Davis* or *Kelly* that the courts did so. If they had, it appears that greater weight would have been given to the interest in protecting funds, since the focus would then have shifted from an abstract view of government *qua* government with an interest in simply conserving funds, to a practical view of government as representative of the public, with an interest in the best possible use of the funds.

Furthermore, even such an inclusion of the public interest in maximization of effect within the governmental interest in protection is probably inadequate. The two viewpoints are logically distinguishable. The first requires the court to look at the interest from the standpoint of those who will receive benefits, and focuses upon the practical issue

In November of 1970 the average grant paid to cases and persons in the Aid to Families with Dependent Children-Regular Program was:

Per Case	$201.69
Per Person	59.38

The average cost of one fair hearing, if the funds were available for distribution to recipients, would be sufficient to meet 90% of the average monthly grant payment to one recipient. On a per-person basis, the amount would be sufficient to meet the payments to three individual recipients for a whole month. Letter from State of Washington Department of Social and Health Services To Barry E. Wolf, Jan. 5, 1971, on file in offices of *Washington Law Review*.

34. The current rate of applications for public assistance is approximately 300 per week at the King County Central Office, State of Washington Department of Public Assistance. Interview with Mrs. Mary Helms, King County Central Office, State of Washington Department of Public Assistance, December 18, 1970.

35. 397 U.S. 254 (1970).

of available funds, while the second requires spending as little as possible for any purpose. The best analytical approach would be to separate the two interests, focus on each independently, and weigh the combined result against the interest of the individual recipient or applicant. Such an approach might have changed the result in *Davis*. While no one factor should control the "interest balancing" test, all relevant factors should be included. The result will be a truer application of the test and a stronger rule as to the right to a "fair hearing" in public assistance cases.