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Constitutional Law -- Due Process and Compliance with Processing Requirements for Welfare Applications

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stantiated viewpoints currently surrounding the issue," the standard follows the reasoning of the Fourth Circuit Court of Appeals in *Larus & Brother v. FCC*.⁵⁴ In that decision the court expressly refused to hold the fairness doctrine applicable to certain anti-smoking messages for the reason that the detrimental effects of cigarette smoking are now clearly established beyond controversy. Such an application of the fairness doctrine avoids the required presentation of viewpoints totally lacking in present credibility although once perhaps strongly advocated. The test's second requirement, that the issue affect "a relatively large number of people," is designed to justify application of the fairness doctrine with its accompanying demands upon both licensees and the public.

In short, this analysis is designed to bring only those media commercials raising truly significant public issues within the ambit of the fairness doctrine. With this goal in mind, the proposed test is believed to satisfy both the demands of the public interest and the practical requirement that commercial advertising be sustained as a means of providing revenue for the broadcast industry. Simultaneously, the test recognizes the importance of bringing increased certainty to a crucially significant area of the law.

LACY H. REAVES

Constitutional Law—Due Process and Compliance with Processing Requirements for Welfare Applications

Judicial impetus to welfare reform has appeared recently as a potent force in the effort to resolve the complex problems surrounding welfare administration. The source of these problems is the conflict between the need to reconcile idealistically conceived welfare programs with the grass-roots practicalities of welfare administration.¹ In 1970 the

⁵⁴447 F.2d 876 (4th Cir. 1971).

¹The inability of the courts to establish workable guidelines in the area of welfare administration may be attributed to the fact that the protections of procedural due process have only recently been extended to welfare proceedings. The delay in instituting these safeguards into the framework of the welfare system can be traced to the attitude that welfare is synonymous with charity and to the ever present controversy over the "right-privilege" dichotomy.

Recent Developments, *Constitutional Law—Public Assistance—Due Process Clause Requires an Evidentiary Hearing to Precede the Termination of Benefits to Welfare Recipients*, 16 VILL. L. REV. 587, 589-90 (1971).

Supreme Court assumed a vital position in the resolution of this problem by holding in *Goldberg v. Kelly*² that procedural due process requires that an evidentiary hearing be held before public-assistance payments to welfare recipients may be discontinued. In the recent case of *Like v. Carter*³ the Eighth Circuit Court of Appeals extended the due process analysis of *Kelly* to situations in which state welfare officials administering federal public-assistance funds⁴ failed to act upon public-assistance applications within the statutorily required time period of thirty days.⁵

The court in *Like* held that such a delay was a denial of the applicants' due process rights and paid little heed to the large volume of welfare applications and the insufficient number of competent workers in the Missouri Welfare Department.⁶ Rather, the Eighth Circuit noted that the delay in applications was not a result of any fault of the applicants and that the Missouri Welfare Department could have greatly minimized the delays.⁷ The court indicated that the state excep-

²397 U.S. 254 (1970).

³448 F.2d 798 (8th Cir. 1971). Jurisdiction in *Like* was based upon 28 U.S.C. §§ 1343(3)-(4) (1970). This issue in itself is an intriguing one but one with which the Eighth Circuit had little difficulty. The court relied on *Johnson v. Harder*, 438 F.2d 7 (1971), for the proposition "that where colorable constitutional (equal protection and due process) claims have been raised, jurisdiction will lie." 448 F.2d at 801. Similarly, the court rejected defendants' assertions that jurisdiction was lacking "by reason of plaintiffs' failure to exhaust available state administrative remedies." *Id.* Nor were the defendants persuasive in their contention that jurisdiction was barred under the eleventh amendment. *Id.* at 802.

⁴The State of Missouri cooperates in the following federal programs under the United States Social Security Act, 42 U.S.C. §§ 301-1396 (1970); Old Age Assistance (OAA), 42 U.S.C. §§ 301-306 (1970); Aid to Families with Dependent Children (AFDC), 42 U.S.C. §§ 601-610 (1970); Aid to the Blind (AB), 42 U.S.C. §§ 1201-1206 (1970); Aid to the Permanently and Totally Disabled (APTD), 42 U.S.C. §§ 1351-1355 (1970); and Aid to the Aged, Blind or Disabled (AABD), 42 U.S.C. §§ 1381-1385 (1970). 448 F.2d at 800.

⁵The applicable federal provision is found in HEW, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, pt. IV, § 2200(b)(3) (1970), which provides:

A state plan for OAA, AFDC, AB, APTD must provide that:

. . . .

(b)(3) prompt action will be taken on each application, within reasonable state-established time standards (which, effective July 1, 1968, will not exceed 30 days in AFDC, OAA, and AB

The pertinent Missouri provision is found in Missouri Division of Welfare Regulation No. 4.1 (1968):

For the OAA, ADC, and AB assistance applications (unless there are unusual or extreme circumstances), prompt disposition means that there shall not be more than 30 days between date of application and (a) the date of approval if eligible; or (b) date of rejection, if ineligible.

⁶448 F.2d at 803.

⁷*Id.* at 804.

tion that excused compliance with the thirty-day requirement in the case of unusual or extreme circumstances was inconsistent with the federal statute and therefore contravened the supremacy clause.⁸ In awarding the decision to the plaintiff-applicants, the court was satisfied

that the plaintiffs as a minimum are entitled to a declaratory judgment determining that the applications . . . must be acted upon and the first payment made to eligible applicants within thirty days . . . and that eligible applicants whose claims have not been passed upon within thirty days are entitled to have retroactive benefits. . . .⁹

The focal points of this analysis will be the impact of this decision upon state welfare administration and the applicability of the *Kelly* balancing test of due process.

The due process implications of state-caused delay in the processing of welfare applications were not unforeseen by the judiciary. Justice Black, writing in dissent in *Kelly*, contended that

the inevitable result of such a constitutionally imposed burden [the right to a pretermination hearing] will be that the government will not put a claimant on the rolls initially until it has made an exhaustive investigation to determine his eligibility. While this Court will perhaps have insured that no needy person will be taken off the rolls without a full "due process" proceeding, it will also have insured that many will never get on the rolls, or at least that they will remain destitute during the lengthy proceedings followed to determine initial eligibility.¹⁰

The court in *Like v. Carter*, therefore, was readily able to anticipate the due process problem and to apply appropriately the *Kelly* solution. Yet, in its haste to find a denial of due process, the Eighth Circuit glossed over the requisite balancing of governmental interests against the rights of the individual welfare recipient and made only conclusory application of the *Kelly* test of due process.¹¹ That *Kelly* and *Like* both involved

⁸*Id.* at 803. An obvious prerequisite to invocation of the supremacy clause is that there be, in fact, a federal law that will override the state law in question. That the supremacy clause applied in *Like* was established by the judicial acknowledgement that the HEW HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION (1970) has the force and effect of law and therefore that the regulations and *exceptions* promulgated therein must prevail over contrary state provisions. *Id.* at 803-04.

⁹*Id.* at 805.

¹⁰397 U.S. at 279 (1970) (Black, J., dissenting); see also *id.* at 284-85 (Burger, C.J., dissenting).

¹¹For the application of this test in *Kelly*, see 397 U.S. at 261-66. Upon implementation of the balancing test,

the Court prefers to look closely at the particular benefit at stake, weighing factors such as the nature of government function involved, the extent of the possible injury, the

rights under a state-administered public-assistance program did not obviate the need for the Eighth Circuit to implement the *Kelly* balancing test. It was essential to ascertain what in fact were the interests of both government and welfare applicant and whether the applicant's interest in receiving payments outweighed the government's interest in delay. Such a balancing test is required in every instance of alleged denial of due process as one must recognize from the fact that every violation of a state welfare regulation does not automatically constitute an abridgement of due process.¹² Nor is the scope of *Kelly* so broad that one may equate without scrutiny the rights of welfare recipients who have realized financial assistance with those of welfare applicants who have yet to benefit from a public-assistance program. Therefore, the court in *Like* should have considered the following factors: the nature of the governmental function, the rationale for a particular procedure or regulation, the extent of potential injury, and the available methods of adhering to current procedures.¹³

The fundamental nature of the governmental function of financially assisting the nation's impoverished was best described by Justice Brennan in *Kelly*:

From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."¹⁴

The tenor of the Constitution, if not its letter, thus appears to mandate

reason for the particular procedure, and the available alternatives before determining the applicability of the due process clause.

The Supreme Court, 1969 Term, 84 HARV. L. REV. 32, 103 (1970).

¹²The dissent of Chief Justice Burger in *Kelly* illustrates this point by questioning whether a welfare recipient must be accorded a hearing when his public assistance is merely reduced and not completely terminated. 397 U.S. at 284-85.

¹³See note 11 *supra*.

¹⁴397 U.S. at 264-65, quoting U.S. CONST. Preamble.

the role that the government must play in public assistance.¹⁵ However, the absence of a specific constitutional obligation on the federal or state governments to provide funds for welfare does not remove the right to survive from that category of rights that are denominated "fundamental."¹⁶

The thirty-day maximum limitation on the application processing period is not an irrational guideline for the administration of welfare funds. Rather, it is a necessary corollary to the governmental recognition of the individual's right to survive and of the prominent position that government must assume in the protection of that right.¹⁷ However, the thirty-day requirement in itself was not the central issue in *Like*,¹⁸ since the state regulation conformed to the federal standard except for a clause in the state provision that read "unless there are unusual or extreme circumstances."¹⁹ On the basis of a broad interpretation of this clause, the defendants in *Like* contended "that the large volume of applications and the inability of the state welfare department to employ a sufficient number of competent case workers excuses compliance with the thirty-day requirement."²⁰ The rationality of such an interpretation is highly doubtful. To excuse delay where the applicant was not at fault or where there was no uncontrollable administrative or emergency delay (the recognized exceptions under the federal act²¹) would nullify the provisions of both the state and federal statute requiring reasonable

¹⁵The Court relied in *Kelly* upon the language of the preamble to the Constitution for positive proof of some "fundamental" quality to the administration of public assistance. 397 U.S. at 265. The courts have clearly established that there is no constitutional obligation on the states or the federal government to furnish welfare funds. *Westberry v. Fisher*, 297 F. Supp. 1109, 1115 (D. Me. 1969); *Smith v. King*, 277 F. Supp. 31, 40 (M.D. Ala. 1967), *aff'd on nonconstitutional grounds*, 392 U.S. 309 (1968).

¹⁶*E.g.*, *Brown v. Board of Education*, 347 U.S. 483, 494 (1954), established the essential and fundamental nature of the right to primary and secondary education without any allusion to constitutionally imposed obligations.

¹⁷448 F.2d at 803, 804.

¹⁸*Id.* at 803.

¹⁹Missouri Division of Welfare Regulation No. 4.1 (1968).

²⁰448 F.2d at 803.

²¹HEW, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, pt. IV, § 2300(b)(6) (1970) provides:

Agency policies on standards of promptness for acting on applications are not used as a basis for denying applications; they are exceeded in practice only in unusual situations (e.g., where the agency cannot reach a decision because of failure or delay on the part of the applicant or an examining physician to provide needed information) and in a small percentage of cases, and in such instances, the case record clearly shows that the delay results either from circumstances within the claimant's control or from some administrative or other emergency that could not reasonably be controlled by the agency.

promptness in application processing.²²

The potential for injury caused by processing delay is strikingly apparent. The withholding of aid beyond the thirty-day period for determining the applicant's eligibility "may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate."²³ Furthermore, the failure to alleviate promptly an applicant's need for subsistence commodities may engender indignation, frustration, and resentment.²⁴ These natural reactions to a government irresponsible to the needs of the impoverished may deepen social alienation of large groups of deprived citizens—an evil that is certainly more fatal to the social fabric than the travail of a particular welfare petitioner whose application has been unreasonably delayed in processing.

Finally, the reasonable methods of meeting the state and federal mandate of thirty days must be considered. If there are none, then perhaps the original requirement was ill-conceived and the proper remedy is not to find a denial of due process but rather to revamp the guidelines to welfare administration. The court in *Like*, however, did conclude that several alternatives to prolonged delay in processing did exist. Specifically noted was the possibility that "more aggressive and effective action could be taken in the investigative procedure."²⁵ Further cited was the excessive "twelve-day processing period after certification elapses before the issuance of a check."²⁶ Also ill-received was the State Welfare Department's assertion that a prolonged processing period was required to screen out applications that were allowed on the basis of the false representations of the applicant. The court indicated that the proper remedies were the invocation of termination proceedings and the implementation of criminal penalties rather than the wholesale delay in processing of applications that were substantially non-fraudulent.²⁷

The conclusion to be reached under the foregoing application of the factors involved in the balancing test of *Kelly* is that due process was indeed denied the welfare applicants in *Like*. The governmental function involved was that of dispensing aid necessary for the subsistence of the impoverished. The governmental duty of *promptly* administering such

²²448 F.2d at 804.

²³*Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

²⁴*Id.* at 265.

²⁵448 F.2d at 804.

²⁶*Id.*

²⁷*Id.*

relief and the individual right to secure welfare benefits are organically attached to that body of principles that control our society. The state interpretation of acceptable exemptions from the explicit thirty-day processing requirement was clearly illogical in view of the general policy of prompt administration of welfare to those who require it. Furthermore, the potential damage that results from protracted periods of processing is acute at both the individual and societal level. And finally, the State Welfare Department did not pursue the available alternatives to relieve the hardships incurred by excessive delays. The result of weighing these factors is that the scales of due process come down heavily on the side of the individual's interests and compel proper state action to remedy the aggravated conditions present in *Like*.

The significance of *Like v. Carter* for welfare administration is demonstrated in the Eighth Circuit's recognition of the demise of the "right-privilege" dichotomy and the vitality of the "new property" concept.²⁸ *Like* clearly represents the trend away from the "benevolent-gratuity argument as a basis for insulating agency action from due process requirements."²⁹ This traditional view precludes protection of the due process clause when a privilege rather than a right is involved.³⁰ This concept has been substantially eroded by two distinct theories. One theory suggests that despite the characterization of welfare as a privilege, it must nonetheless be accorded due process protection.³¹ The other theory, which has become the prevalent one, regards welfare as a right.³² This latter theory rests on the premise that "[s]uch benefits are a matter of statutory entitlement. . . ."³³ Judicial recognition of this premise is effectively an acceptance of Professor Reich's concept of "new property,"³⁴ which the *Kelly* Court acknowledged by noting that "[i]t may be realistic today to regard welfare entitlements as more like

²⁸See Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

²⁹Recent Developments, 16 VILL. L. REV., *supra* note 1, at 592.

³⁰The traditional view was espoused in *Flemming v. Nestor*, 363 U.S. 603 (1960), in which the Supreme Court held that insurance benefits under the Social Security Act were not "accrued property rights." *Id.* at 610. See also *Barsky v. Board of Regents*, 347 U.S. 442 (1954); *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245 (1934).

³¹*E.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Homer v. Richmond*, 292 F.2d 719 (D.C. Cir. 1961).

³²*E.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Goliday v. Robinson*, 305 F. Supp. 1224 (N.D. Ill. 1969).

³³*Goldberg v. Kelly*, 397 U.S. 254, 262 (1970).

³⁴Reich, *The New Property*, 73 YALE L.J. 733 (1964).

'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property."³⁵ That the classical "right-privilege" dichotomy is extinct and that the "entitlement" theory of Reich's "new property" enjoys complete judicial acquiescence is conclusively established by the Eighth Circuit's total unconcern in *Like* over the applicability of due process protection to the traditional notion of "accrued property rights."³⁶

The remedies fashioned by the Eighth Circuit in *Like* will have significance not only for the aggrieved applicants but also for the entire concept of state administration of welfare funds. *Kelly* and *Like* establish that the state is no longer a distinct, separate governmental entity that exercises its reasonable discretion in the administration of federal public assistance. The two cases demonstrate that the imposition of federal guidelines, through the power of the supremacy clause, upon the state administration of welfare funding has resulted in the atrophy of state discretionary powers in the area of public assistance. The state has become a mere appendage of the federal government in the management of welfare funds. Yet the alternative to state acquiescence in a welfare program funded by the federal government is greatly diminished revenue sources for public-assistance funding, which would be potentially more devastating to a state than the mere curtailment of its discretion. On the other hand, the question remains unresolved as to whether a state government, having once accepted federal funds, has made an irrevocable election to accept federal assistance in the future even if faced with burdensome capital outlays to revamp the entire welfare program in order to conform to federal provisions.

The judicial response to the foregoing question is problematical although not altogether unpredictable. The courts appear to be concerned with the practical effects that a controverted state action—such as the rejection of federal welfare funds—might have on the well-being of the individual.³⁷ Indeed such an emphasis is but a manifestation of the due process balancing test of *Kelly*, weighing governmental interests against those of the individual. The specific interests to be balanced are the state's concern in maintaining a reasonable degree of discretion over welfare administration and the individual's ability to survive on a sub-

³⁵397 U.S. at 262 n.8.

³⁶*Flemming v. Nestor*, 363 U.S. 603, 610 (1960).

³⁷*E.g.*, *Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971).

stantially diminished allocation of total welfare funds. It is difficult to envision that a federal court, having recognized the fundamental duty of the government to "provide for the general welfare," would permit the state concern over preservation of its dignity, identity, and discretion to prevail over the individual's natural need to subsist where the state has no source of necessary revenue other than federal funds. But perhaps such a difficulty is not shared by all. Chief Justice Burger, dissenting in *Kelly*, indicated his doubts over the broad applicability of the due process concept as developed in that case:

Does the Court's holding embrace welfare reductions or denial of increases as opposed to terminations, or decisions concerning initial applications or requests for special assistance? The Court supplies no distinguishable considerations and leaves these crucial questions unanswered.³⁸

The Court in *Kelly* did supply identifiable standards for resolving this issue in the four factors that comprise the majority's due process balancing test. One of the crucial questions alluded to by Chief Justice Burger has now been answered by *Like*. The Court in *Like* applied the *Kelly* balancing test, though not in a conspicuous fashion, and determined that the petitioning applicants were denied due process by state noncompliance with the thirty-day requirement. In the wake of *Like* it is neither illogical nor unforeseeable to predict that the courts' next step may entail an application of the *Kelly* due process balancing test to the situation in which the state has reduced welfare payments by voluntary non-participation in federal programs. The outcome of such a case would depend on too many variables—degree of reduction, potential economic impact, and availability of alternatives—to hazard a general prediction as to whether the individual's interests will prevail as they did in *Kelly* and *Like*. Although the eventual position that the courts will assume when faced with this situation is not altogether apparent, the path that they will tread to reach that conclusion is clear. For the standard of due process adopted in *Kelly*, and extended in *Like*, is not a panacea for all the ills that beset welfare administration but a guideline to the priorities and interests that must be recognized if welfare is ever to function in a manner responsive to the needs of those individuals whose very existence depends on it.

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³⁸397 U.S. at 284-85.