Administrative Law for Non-Admin Attorneys

January 21, 2022

East Valley Bar Association

Presented by:

Flynn P. Carey

MITCHELL | STEIN | CAREY | CHAPMAN, PC

Board Certified Specialist in Administrative Law, State Bar of Arizona

Speaker Bio

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ATTORNEYS AT LAW

Flynn Carey

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Education

University of Arizona
James E. Rogers College of Law, J.D., 2007

- Cum Laude
- Research Editor, Arizona Law Review
- Honorable Rufus C. Coulter Scholarship
- Criminal Law Society, President

University of Arizona
B.S., Management Information Systems, 2000

- Cum Laude

Flynn Carey's practice focuses on Criminal Defense, Administrative Law, and School Discipline and Title IX litigation. Flynn is recognized by the State Bar of Arizona as a Certified Specialist in Administrative Law.

Criminal Defense

Flynn has litigated all manner of criminal cases, from assault and domestic violence charges to drug charges, to sexual misconduct and homicide cases. Flynn manages the firm's DUI and Vehicular Crimes practice, and has litigated issues related to impaired drivers before the trial courts and the Arizona Court of Appeals. Flynn has represented all types of licensed drivers, including those with specialized licensing and certifications, in a variety of vehicular matters including DUI, aggressive/reckless driving, aggravated assault with a vehicle, and leaving the scene of an accident cases. He also appears regularly before the Arizona Department of Transportation, defending clients in administrative actions against their driving privileges.

Administrative Law/License Defense

Flynn represents professionals before their licensing agencies in situations in which professionals are accused of violating the practice restrictions and standards of their licensing entity and in conjunction with parallel criminal allegations. Flynn appears on behalf of clients before a significant number of the licensing and professional boards in Arizona.

Some of the Boards and Agencies before which Flynn appears include:

- Arizona Board of Behavioral Health Examiners
- Arizona Board of Psychologist Examiners
- Arizona State Board of Nursing
- Arizona Medical Board

- Arizona Board of Osteopathic Examiners
- Arizona Department of Education / Professional Practice Advisory Committee (PPAC)
- Arizona Board of Pharmacy
- Arizona State Veterinary Medical Examining Board
- Arizona Board of Podiatry Examiners
- Arizona State Board of Massage Therapy
- Arizona State Board of Physical Therapy
- Arizona Board of Respiratory Care Therapists
- Arizona Naturopathic Physicians Medical Board
- Arizona Department of Real Estate
- Department of Public Safety (security guard/security agency licensing and discipline, fingerprint clearance cards/good cause exceptions)

School Discipline and Education Law

Flynn has extensive experience in Title IX and student discipline matters with students in elementary schools through post-graduate public and private educational institutions.
His school discipline work includes:

- Title IX investigations and hearings
- Suspension/Expulsion Hearings
- Honor Code/Ethical Code Violation Proceedings
- In-State Tuition and Residency Challenges
- Grade Challenges
- Teacher/Professor Misconduct Defense

Civil Litigation and Family Law Support

Flynn has extensive civil litigation experience in the trial courts at all levels of practice, and has litigated complex civil cases including racketeering claims, fraud, and unlawful shareholder oppression. With his technology training and background, Flynn is retained by other attorneys to manage electronic discovery, expert depositions, and other science and technology related areas of litigation.

Flynn is also retained frequently by family law attorneys to consult on issues involving the intersection of domestic relations law and criminal law. Flynn has experience addressing criminal allegations by one spouse against another, situations in which the Department of Child Safety/CPS is investigating a parent's actions, and instances where threats have been made against a parent during family law proceedings. Flynn is also frequently retained to litigate orders of protection in relation to family law cases.

Additional Background

Flynn holds a degree in Management Information Systems, and managed information technology for the City of Tucson prior to a career in law. Flynn's knowledge of science and technology has allowed him to successfully litigate complex legal issues involving computer forensics, police technology, DNA analysis, mobile technology, surveillance, and toxicology.

Flynn graduated cum laude from the James E. Rogers College of Law at the University of Arizona, where he was the President of the Criminal Law Society and served as the Research Editor of the Arizona Law Review. During law school, he externed for the Arizona Office of the Attorney General, assisting in the prosecution of violent crime and white collar cases.

Representative cases

Felony and Misdemeanor Charges

- Defended multiple clients in relation to allegations of soliciting minors for exploitation.
- Defended clients against allegations of possession of narcotics and marijuana for sale.
- Defended clients in relation to allegations of sexual abuse, sexual assault, and sexual misconduct.
- Defended client in relation to resisting arrest and disorderly conduct.
- Defended client in relation to allegations of domestic violence, aggravated assault, and criminal damage.
- Defended clients in relation to allegations of brandishing/discharging firearms unlawfully.
- Defended client in relation to "straw purchases" of firearms.
- Act as consultant for family law/domestic relations attorneys in cases in which allegations of criminal misconduct are made against spouse.
- Represent juveniles in delinquency proceedings involving allegations of DUI, theft, assault, and burglary.

Vehicular Crimes and DUI Defense.

- Defended clients against homicide allegations in relation to vehicle fatalities, in cases in which impairment, speed, and distracted driving was alleged.
- Defended clients against allegations of driving under the influence of alcohol and drugs.
- Defended client accused of aggravated assault with a dangerous instrument, arising from an accident in which allegations were made that client was intoxicated while driving.
- Represented clients in relation to allegations of leaving the scene of fatal accidents.
- Represented auto dealers in relation criminal licensing violations.
- Represented commercial truck drivers concerning weigh station violations, improper placarding, failure to properly maintain hours-of-service logs, and failure to maintain a medical card.
- Represent clients before the Motor Vehicle Division in all manner of proceedings, including admin per se hearings, refusal hearings, Interlock violation proceedings, and point violation hearings.

Student Discipline and Title IX Litigation

- Successfully defended students accused of sexual assaulting other students alleged to have been incapacitated by alcohol or drugs
- Successfully defended student accused of forcible sexual assault on campus
- Successfully defended student against allegations of improper touching
- Defended student against allegations of academic dishonesty
- Defended student against claims of cultivating marijuana on campus
- Defended student against charges of surreptitious recording and voyeurism
- Defended student against claims of fighting
- Defended student against charges of sending illegal photographs to other students
- Defended students against sexual harassment and hate speech
- Represent student in grade appeals and in-state tuition and residency disputes

White Collar Criminal Defense and Government Investigations

- Assisted corporations and non-profits with allegations of breach of fiduciary duty, financial misconduct, failures to report, and other allegations of misappropriation and self-dealing.

- Assisted national corporate client in responding to federal investigation concerning to allegations of utilizing improperly licensed personnel.
- Assisted individuals pre-charging in responding to inquiries by law enforcement of allegations of sexual misconduct.
- Assisted corporate clients in uncovering fraud, waste, and misuse of company resources.
- Advise corporate clients concerning liability for criminal and fraudulent acts of employees, vendors, contractors, and others.
- Represent real estate agent in relation to allegations of financing fraud.
- Represent individuals before the Arizona Corporation Commission, as targets of investigations and as advocates for those victimized by Ponzi schemes.
- Represent individuals in relation to misuse of computers, hacking, improper access to stored communications, and other state and federal violations.

Civil & Administrative Proceedings & Complex Civil Fraud Litigation

- Defended client against allegations by Department of Child Safety/CPS of child abuse and neglect.
- Defended client against allegations by Department of Child Safety/CPS of sexual misconduct.
- Represent individuals before the Arizona Board of Fingerprinting to obtain "Good Cause Exceptions" to allow for licensing.
- Represent individuals before Arizona Board of Education.

Healthcare Discipline and Peer Review

- Regularly defend nurses, physicians, behavioral health professionals, and other licensed professionals in relation to a variety of criminal offenses while simultaneously representing clients before their Boards during proceedings.
- Regularly represent healthcare professionals in relation to allegations of unprofessional conduct.
- Represent nurse before the Board in relation to charges of domestic violence.
- Represent nurse before the Board in relation to improper/incomplete charting and related allegations.
- Represent nurse before the Board in relation to allegation of contamination of surgical

site.

- Represent nurse practitioner before Board in relation to over-prescribing and failure meet standard of care.
- Represent nurse practitioners before Board in relation to allegations of unfitness to practice.
- Represent psychologist before Board in relation to allegations of exceeding scope and violating standards of care.
- Represent licensed social worker before Board in relation to allegations of boundary violations with patient and failure to obtain informed consent.
- Represent various professional before their Boards in relation to documentation errors.

Professional recognition

- Certified Specialist in Administrative Law, State Bar of Arizona
- Southwest SuperLawyers
  - Listed in Southwest SuperLawyers – Criminal Defense (2015-2021)
  - Top 50 Attorneys in Arizona (2016)
  - Southwest SuperLawyers Rising Star – Criminal Defense (2014)
- Listed in Best Lawyers in America – Criminal Defense (2015-2021 eds.)
- AV Preeminent Rating, Martindale Hubbell (2013-2021)
- AzBusiness Magazine, March 2017
  - Selected as one of the Top 100 Attorneys in Arizona link (https://issuu.com/azbigmedia/docs/azb_ma2017_issuu/40)
- Client's Choice Award, AVVO.com (2013-2015, 2018, 2019)
- 10.0 AVVO Rating (2013-2021)
- Chambers and Partners Rated (2014-2017)
- Arizona Attorney Creative Arts Competition, Honorable Mention (2008)
- American Legal Institute-American Bar Association Scholarship & Leadership Award (2007)
- Rosenberg Distinguished Editor Award (2007)
- T.C. Clark Litigation with Civility Award (2007)
- City of Tucson Public Service Excellence Award (2004)

- Public Manager Certification (2004)
- Outstanding Leader in Library Youth Development (2002)
- Letter of Recognition, City of Tucson City Managers Office (2002)

Professional leadership and membership

- Maricopa County Bar Association, Board of Directors (2014-Present)
  - Immediate Past President (2021)
  - President (2020)
  - President-Elect (2019)
  - Treasurer (2018)
  - Secretary (2017)
- Maricopa County Bar Association, Young Lawyers Division, Board Member (2010-2016)
  - Sponsorship Chair, Barristers Ball Committee (2010-2011)
  - Committee Chair, Barristers Ball Committee (2011-2012)
  - Silent Auction Chair, Barristers Ball Committee (2012-2013)
- The American Association of Nurse Attorneys, Affiliate (2016-Present)
- Arizona Attorneys for Criminal Justice, Member
- National Association of Criminal Defense Lawyers, Member
- Association of Family and Conciliation Courts (2016-Present)
- City of Surprise Judicial Selection Advisory Committee (2018-Present)
- Town of Guadalupe Judicial Advisory Board (2017)
- Thurgood Marshall Inn of Court (2008-Present)
  - Secretary, 2009-2011, 2016
  - Vice President, 2011-2012
  - President, 2012-2013
- Phoenix Children's Hospital Foundation, Emerging Leaders (2014-2016)
- Barrows Neurological Foundation – Futures Committee (2014-2016)
- Barrows Neurological Foundation – Barrows Beyond (2016-Present)
- State Bar of Arizona, Criminal Jury Instructions Committee (2010-2013)

- State Bar of Arizona, Bar Leadership Institute 2008, Graduate
- Banner Health Foundation, Major Gifts Committee, Past Member
- Pima County Sheriff's Auxiliary (2002 – 2005)
- Board of Directors, Homicide Survivors, Inc. (1999 – 2002)

Related employment

- Gallagher & Kennedy, PA, Criminal Law and Regulatory Enforcement Group (2007-2013)
- City of Tucson, Library Systems Analyst/Systems Programmer, Technical Assistant II, (1996-2004)

Speaking events

- "Closing Arguments: Do's and Don'ts," MCBA Bench/Bar Conference, October 4, 2019.
- State Bar Professionalism Course, August 18, 2018.
- "White Collar Crime, Scams, and Fraud: What Every Paralegal Should Know," MCBA Paralegal Conference, September 8, 2017.
- State Bar Professionalism Course, August 22, 2017.
- "I Fought the Law: The Intersection of Licensing Actions and Criminal Law," The American Association of Nurse Attorneys Annual Conference, Boston, MA, August 4, 2017.
- "Order of Protection Update," Maricopa County Bar Association, March 29, 2017.
- State Bar Professionalism Course, February 14, 2017.
- "911 In Family Court: A Field Guide on Criminal, Mental Health, and Domestic Abuse Issues for Judges, Litigators, and Mental Health Professionals," Arizona Chapter of the Association of Family and Conciliation Courts, January 28, 2017.
- "Sudden Impact: The Intersection of Family Law and Criminal Law Matters," Maricopa County Bar Association, December 14, 2016.
- "Criminal Law for Civil Litigators", Burch & Cracchiolo, November 19, 2015.
- "Current Issues in Title IX Litigation," UC Davis School of Law, October 26, 2015.
- "Courtroom and Mobile Technology," NALS Annual Conference, October 8, 2015.
- "Things Civil Litigators Should Know About Criminal Law", Jennings Strouss, April 17, 2015.

- "White Collar Crime for Paralegals and Support Professionals," NALS, April 9, 2015.
- "Starting Your Own Law Firm – Streamlining Workflow," Maricopa County Bar Association, September 17, 2014.
- "Issues in Defending the Domestic Violence Case," Arizona Public Defender Association Annual Conference, June 26, 2014.
- "Mitigating the Sentence and Collateral Consequences with Plea Agreements," Arizona Public Defender Association Annual Conference, June 26, 2014.
- "Pertinent Legal Matters Around the Treatment of Sex Addiction and Sex Offender Behaviors," Psychological Counseling Services Monthly Meeting, May 28, 2014.
- "Mitigating the Sentence and Collateral Consequences with Plea Agreements," National Association of Criminal Defense Lawyers, Midwinter Conference, New Orleans, March 7, 2014.
- "Focusing on Mitigation from the First Handshake Through Sentencing," Arizona Public Defender Association Annual Conference, June 27, 2013.
- "Staying Out of the Dog House: New Issues Re Animals in Family Law & Criminal Matters," Arizona State Bar Convention, June 19, 2013.
- "Current DUI Issues," Arizona Association of Defense Counsel, 2013.
- "Sexual Addiction, Sexual Offending or Both?", Symposium Panel, International Institute for Trauma & Addiction Professionals, 2012.

Publications

- "The Business World Quickly Adapts to Change," Maricopa Lawyer, Maricopa County Bar Association, June 2020.
- "The MCBA is Here for You," Maricopa Lawyer, Maricopa County Bar Association, May 2020.
- "MCBA Here to Help in This Time of COVID-19," Maricopa Lawyer, Maricopa County Bar Association, April 2020.
- "A Night Out for You, Justice for Others," Maricopa Lawyer, Maricopa County Bar Association, March 2020.
- "In Support of Doing Nothing," Maricopa Lawyer, Maricopa County Bar Association, February 2020.
- "Flynn Carey, Mitchell Stein Carey Chapman, Takes Reins as MCBA President," Maricopa Lawyer, Maricopa County Bar Association, January 2020.
- "Law Enforcement, Victim Advocates Worry About At-Home Rape Kits", KJZZ Radio, October 28, 2019, (Guest Legal Analysis) Link (https://kjzz.org/content/1272871/law-enforcement-victim-advocates-worry-about-home-rape-kits)

- “Could Kody Brown and the Sister Wives Actually Go to Jail Now That They’re in Flagstaff?”, Good Housekeeping, April 14, 2019, (Guest Legal Analysis) Link (https://bit.ly/2IszC0w)
- Legal Nurse Consulting, 4th Edition (Contributor), 2019
- Civil Litigation Guide (Chapter Author and Contributor), 2015
  - Expert Disclosures
  - Medical Examinations and Evaluations
  - Requests for Entry Upon Land
- Arizona Tort Law Handbook, (Chapter Author and Contributor), State Bar of Arizona, 2013
  - Malicious Prosecution and Abuse of Process
  - Assault
  - Trespass
- *In re Hamm: From Behind Bars to the Arizona Bar?*, 48 ARIZ. L. REV. 397 (2006)
- *Extending the Home Court Advantage: A Call to Update the Arizona Civil Rights Restoration Scheme*, 48 ARIZ. L. REV. 1129 (2006)
- *Collateral Sanctions: A Comprehensive Study of the Ongoing Effects of Criminal Convictions in Arizona*, G. Jack Chin, F. Carey, et al. (2006)

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Map and directions (/media/Map-and-Directions.pdf)

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How a Bill Becomes a Law

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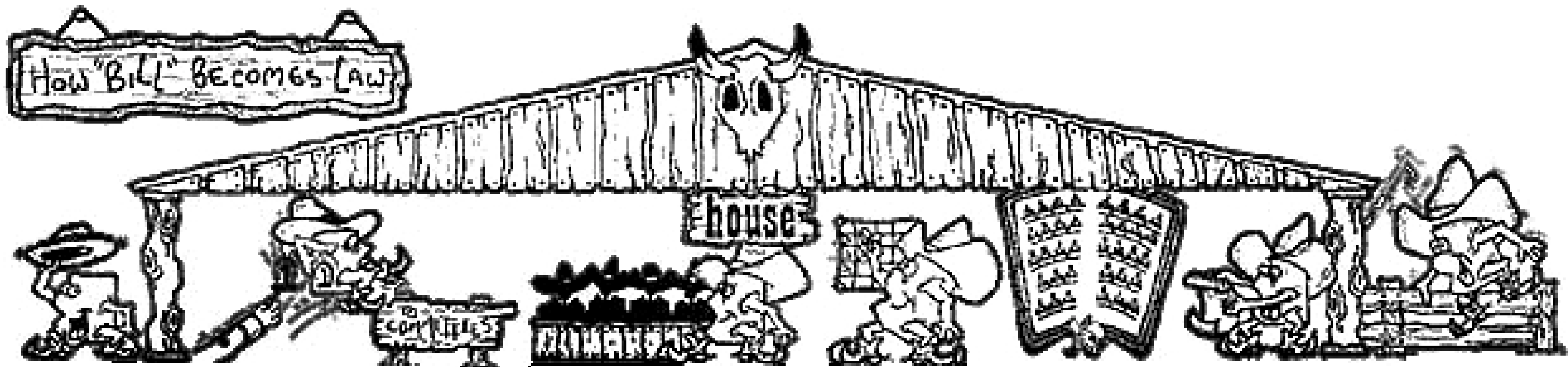
ARIZONA BILL



Arizona Bill is introduced in the House by a Member, a group of Members, a Standing Committee or a Majority of a Committee, after being written in proper form by the Legislative Council.

Bill is branded (assigned a number), First Read and referred by the Speaker to appropriate Standing Committees and to the Chief Clerk for printing and distribution.

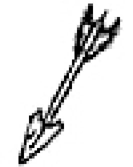
Committees consider Bill (may include hearings, expert testimony, statements from citizenry). Reports recommendations to Whole House. Committee on Rules determines if Bill is constitutional and in proper form.

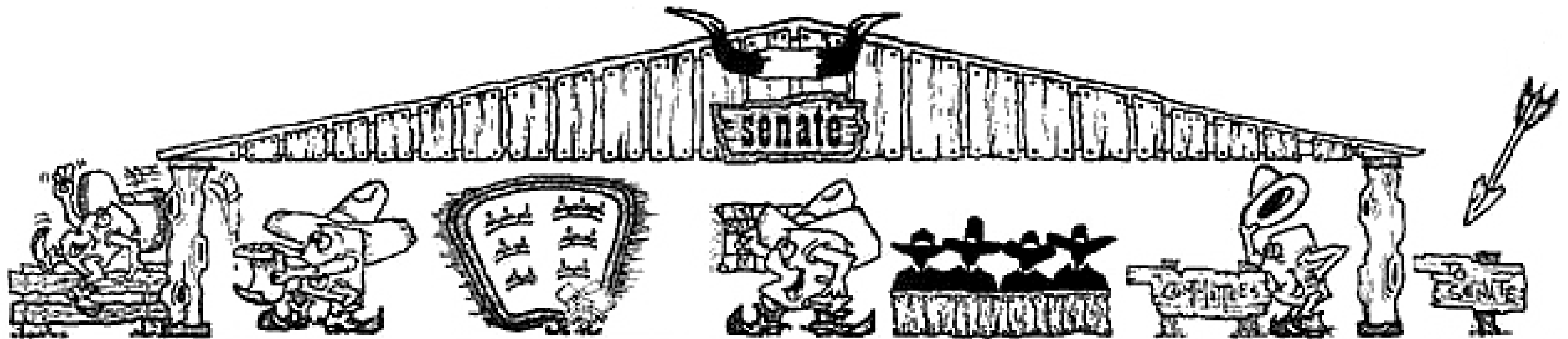
Committee on Rules places Bill on Active Calendar and Speaker sets order in which measures will be considered.

Committee of the Whole. Informal session of entire House membership acting as one committee. Debate, amendment, recommendations on Bills on Calendar.

Third Reading-Roll Call. Every Member present must vote (unless excused and no Member may vote for another Member.

If passed by House, Bill goes on to the Senate.





House Bill is First Read in the Senate and laid over one day.

Second Reading--President refers Bill to appropriate Standing committees.

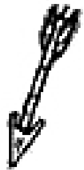
Committees consider Bill (May include hearings, expert testimony, statements from citizenry). Reports recommendations to entire Senate.

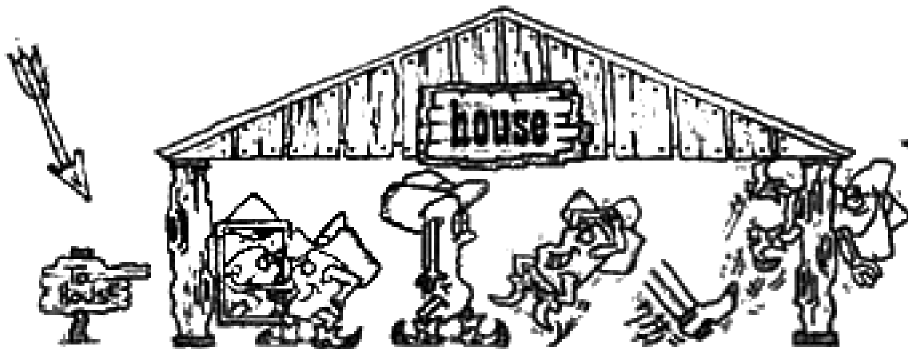
Committee on Rules' agenda becomes the calendar for Committee of the Whole and after 5 days President designates which measures are to be placed on Active Calendar of the Committee of the Whole.

Committee of the Whole. Entire membership of Senate acts as one committee. Debate, amendments and recommendations on Bills on Calendar.

Third Reading -- Names called alphabetically and unless excused, each Senator present must vote on each measure.

If passed by Senate (either in identical form or amended by adding or deleting material), Bill is sent back to House...





If Bill is identical to measure originally passed by House, goes to Governor...

If Bill comes back to House in different form (amended either by addition or deletion of material)

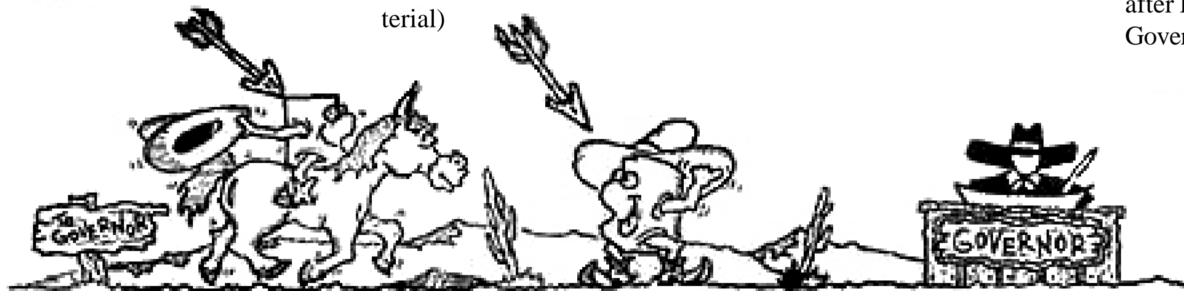
Bill may be accepted in new form and sent to Governor...

Bill may be rejected and sent to a Conference Committee

Bill is sent to Conference Committee made up of Representatives appointed by the Speaker and Senators appointed by the President -- each with own idea of how Bill should pass...

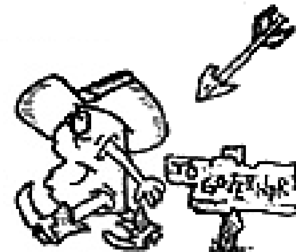
Conference committee "mends" Bill by accepting original version, by adding new material, by deleting language or in some way compromising disagreements.

A Conference Committee Report is sent back to each House for adoption and after Final Passage, Bill is sent on to Governor...



After Bill is received by Governor having been passed by both House and Senate, the Governor may sign Bill or allow Bill to become law without his signature if he takes no action during next five days (or ten days after adjournment). Then Bill becomes law - a part of the Arizona Revised Statutes.

Arizona Revised Statutes



The Governor may veto Bill, but must return Bill to House stating his reasons. The House and Senate may override the Governor's veto by a two thirds vote (or three-fourths, if an emergency measure).

LEGISLATIVE GLOSSARY

adjournment — termination or closing of a session of the Legislature or committee until another set time for meeting

adjournment sine die — final adjournment of legislative body — adjournment "without day" being set for reconvening

adopt — to accept or approve

agenda — list of action or bills to be considered by standing committees issued prior to scheduled meeting

amendment — changes in pending legislation by adding, deleting or modifying material

apportionment — establishment of legislative districts after every 10th year federal census — based on population with boundaries established by Legislature

appropriation — money allocated by the Legislature to various departments or agencies for their operation

Arizona Revised Statutes — ARS — the set of books which contains the Constitution and laws enacted by the Legislature to govern the state — updated after every session

attache — employee of the Legislature

bicameral — a legislature composed of two houses — in Arizona, a House of Representatives and a Senate. Only the State of Nebraska has a unicameral, or one house, legislature

bill — a proposal for the enactment of a new law, the amendment or repeal of an existing one, or appropriation of public money. The only vehicle for enactment of a law by the Legislature. It may originate in House or Senate but must be passed on roll call vote by both bodies and be approved by the Governor to become law. If the Governor vetoes the measure, the Senate and House may override his decision as provided by the Constitution of Arizona.

bills passed by Legislature and signed by Governor become law as follows:

- with emergency clause — date Governor signs
- with effective date — date given in measure providing it is at least 90 days after adjournment of Legislature
- without emergency clause or effective date — automatically 90 days after adjournment of Legislature

calendar — listing of bills reported out of committees and ready for floor action.

caucus — an informal meeting of a group of members — usually of same political party — to discuss policy or legislation

chair — presiding officer of Legislature — may be member, Speaker, President or committee chairman

chamber — the area reserved for members and staff for conducting legislative sessions — also called "floor"

chief clerk — chief administrative officer of the House of Representatives elected by House membership

committees:

- committee of the whole — informal session of entire membership of House or Senate acting as one committee — presided over by chairman appointed by Speaker or President
- conference committee — a joint committee made up of Representatives appointed by Speaker and Senators appointed by President to try to resolve differences in legislative measures. A majority of conferees of each house required to approve compromise before submitting to entire membership of each house for final approval
- select committee — created by Speaker or President to handle specific matters and usually dissolved when purpose accomplished
- standing committee — members appointed by Speaker and President at beginning of Legislature — has continuing responsibility in a general field of legislative activity — name reflects area of jurisdiction, i.e., Education, Health
- statutory committee — created by passage of legislation for specific purpose and with composition of membership defined
- subcommittee — small committee appointed by standing committee chairman to research and study bill or problem and to report findings to entire committee

concurrence — action of one house agreeing to or approving proposal or action by the other body

constituent — a citizen residing within the district of a legislator

convene — to assemble — the meeting of the Legislature daily or at beginning of session as provided by Constitution or law.

debate — discussion of a matter according to parliamentary rules

decorum — proper conduct of legislator as set forth in House and Senate Rules

digest, legislative — weekly publication of House listing bills introduced in Legislature by number, short title, sponsors and committees to which assigned

emergency clause — statement added to legislation which declares necessity of immediate enactment — requires 2/3's vote by each house and becomes law immediately upon Governor's signature

engrossed bill — version of bill which includes all amendments attached to original measure

enrolled bill — final official version containing all necessary signatures

gallery — balcony of House or Senate chamber from which visitors may view proceedings of Legislature

hopper — desk which assigns numbers to legislative measures and processes for introduction

initiative — a method of initiating legislation by the people

interim — period between legislative sessions

introduction of legislation — bills, memorials, resolutions may be introduced during first 29 days of first and second regular session; first 10 days of special session. House and Senate rules spell out provisions for prefiling

journal — official chronological record of each house — contains roll call votes, attendance records, committee assignments, daily record of events, but not a verbatim transcript

laid over — a postponement of consideration of legislative measure for a day — usually in connection with introduction and committee assignments in Senate

Legislature — in Arizona, the House of Representatives and the Senate made up of 30 Senators and 60 Representatives elected for two-year terms from 30 legislative districts

lobbyist — person who seeks directly or indirectly to encourage the passage, defeat or modification of any legislation

majority — group of legislators usually of same political party who have greatest number of elected members and who control top leadership positions — also the number of members, 31 in House and 16 in Senate, necessary to pass legislation

minority — group of legislators usually of same political party which numbers fewest members

President — presiding officer of Senate elected by Senate members

pro tempore — designated officer of House or Senate to act in absence of Speaker or President

qualifications of members of Legislature — must be citizen of United States, an Arizona resident 3 years, county resident one year and 25 years of age

quorum — a majority of the membership necessary to conduct business

recall — constitutional process by which elected officials may be removed from office

recess — intermission in daily session or committee meeting

referendum — constitutional process by which Legislature or qualified voters may refer certain legislative measures to a vote of the electorate

rules — the set of regulations and parliamentary procedures adopted separately by House and Senate

secretary of Senate — chief administrative officer of the Senate elected by Senate membership

Speaker — presiding officer of House of Representatives elected by House members

veto — the action of the Governor in disapproving a legislative measure

Rulemaking Process

From the Publisher

ABOUT THIS PUBLICATION

The authenticated pdf of the *Administrative Register* (A.A.R.) posted on the Arizona Secretary of State's website is the official published version for rulemaking activity in the state of Arizona.

Rulemaking is defined in Arizona Revised Statutes known as the Arizona Administrative Procedure Act (APA), A.R.S. Title 41, Chapter 6, Articles 1 through 10.

The *Register* is cited by volume and page number. Volumes are published by calendar year with issues published weekly. Page numbering continues in each weekly issue.

In addition, the *Register* contains notices of rules terminated by the agency and rules that have expired.

ABOUT RULES

Rules can be: made (all new text); amended (rules on file, changing text); repealed (removing text); or renumbered (moving rules to a different Section number). Rulemaking activity published in the *Register* includes: proposed, final, emergency, expedited, and exempt rules as defined in the APA, and other state statutes.

New rules in this publication (whether proposed or made) are denoted with underlining; repealed text is stricken.

WHERE IS A "CLEAN" COPY OF THE FINAL OR EXEMPT RULE PUBLISHED IN THE *REGISTER*?

The *Arizona Administrative Code* (A.A.C) contains the codified text of rules. The A.A.C. contains rules promulgated and filed by state agencies that have been approved by the Attorney General or the Governor's Regulatory Review Council. The *Code* also contains rules exempt from the rulemaking process.

The authenticated pdf of *Code* chapters posted on the Arizona Secretary of State's website are the official published version of rules in the A.A.C. The *Code* is posted online for free.

LEGAL CITATIONS AND FILING NUMBERS

On the cover: Each agency is assigned a Chapter in the *Arizona Administrative Code* under a specific Title. Titles represent broad subject areas. The Title number is listed first; with the acronym A.A.C., which stands for the *Arizona Administrative Code*; following the Chapter number and Agency name, then program name. For example, the Secretary of State has rules on rulemaking in Title 1, Chapter 1 of the *Arizona Administrative Code*. The citation for this chapter is 1 A.A.C. 1, Secretary of State, Rules and Rulemaking

Every document filed in the office is assigned a file number. This number, enclosed in brackets, is located at the top right of the published documents in the *Register*. The original filed document is available for 10 cents a page.

Arizona Administrative REGISTER

Vol. 27 Issue 53

PUBLISHER
SECRETARY OF STATE
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DIRECTOR
Scott Cancelosi

RULES MANAGING EDITOR
Rhonda Paschal

ADMINISTRATIVE REGISTER
This publication is available online for free at www.azsos.gov.

ADMINISTRATIVE CODE
A price list for the *Arizona Administrative Code* is available online at www.azsos.gov.

PUBLICATION DEADLINES
Publication dates are published in the back of the *Register.* These dates include file submittal dates with a three-week turnaround from filing to published document.

CONTACT US
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Phoenix, AZ 85007
(602) 364-3223

The Office of the Secretary of State is an equal opportunity employer.

Participate in the Process

Look for the Agency Notice

Review (inspect) notices published in the *Arizona Administrative Register*. Many agencies maintain stakeholder lists and would be glad to inform you when they proposed changes to rules. Check an agency's website and its newsletters for news about notices and meetings.

Feel like a change should be made to a rule and an agency has not proposed changes? You can petition an agency to make, amend, or repeal a rule. The agency must respond to the petition. (See A.R.S. § 41-1033)

Attend a public hearing/meeting

Attend a public meeting that is being conducted by the agency on a Notice of Proposed Rulemaking. Public meetings may be listed in the Preamble of a Notice of Proposed Rulemaking or they may be published separately in the *Register*. Be prepared to speak, attend the meeting, and make an oral comment.

An agency may not have a public meeting scheduled on the Notice of Proposed Rulemaking. If not, you may request that the agency schedule a proceeding. This request must be put in writing within 30 days after the published Notice of Proposed Rulemaking.

Write the agency

Put your comments in writing to the agency. In order for the agency to consider your comments, the agency must receive them by the close of record. The comment must be received within the 30-day comment timeframe following the *Register* publication of the Notice of Proposed Rulemaking.

You can also submit to the Governor's Regulatory Review Council written comments that are relevant to the Council's power to review a given rule (A.R.S. § 41-1052). The Council reviews the rule at the end of the rulemaking process and before the rules are filed with the Secretary of State.

Arizona Regular Rulemaking Process

START HERE

APA, statute or ballot proposition is passed. It gives an agency authority to make rules.

It may give an agency an exemption to the process or portions thereof.

→ Agency opens a docket.

Agency files a Notice of Rulemaking Docket Opening; it is published in the *Register*. Often an agency will file the docket with the proposed rulemaking.

→ Agency decides not to act and closes docket.

The agency may let the docket lapse by not filing a Notice of Proposed rulemaking within one year.

↓ Agency drafts proposed rule and Economic Impact Statement (EIS); informal public review/comment.

↓ Agency files Notice of Proposed Rulemaking.

Notice is published in the *Register*.

Notice of meetings may be published in *Register* or included in Preamble of Proposed Rulemaking.

Agency opens comment period.

→ Agency decides not to proceed and does not file final rule with G.R.R.C. within one year after proposed rule is published. A.R.S. § 41-1021(A)(4).

Agency decides not to proceed and files Notice of Termination of Rulemaking for publication in *Register*. A.R.S. § 41-1021(A)(2).

↓ Oral proceeding and close of record. Comment period must last at least 30 days after publication of notice. Oral proceeding (hearing) is held no sooner than 30 days after publication of notice of hearing

Substantial change?

← Agency files Notice of Supplemental Proposed Rulemaking. Notice published in *Register*. (→ returns to Oral proceeding and close of record)

→ Agency decides not to proceed; files Notice of Termination of Rulemaking. May open a new Docket.

If no change then

↓ Rule must be submitted for review or terminated within 120 days after the close of the record.

↓ A final rulemaking package is submitted to G.R.R.C. or A.G. for review. Contains final preamble, rules, and Economic Impact Statement.

↓ G.R.R.C. has 90 days to review and approve or return the rule package, in whole or in part; A.G. has 60 days.

↓ After approval by G.R.R.C. or A.G., the rule becomes effective 60 days after filing with the Secretary of State (unless otherwise indicated).

Final rule is published in the *Register* and the quarterly *Code* Supplement.

Definitions

***Arizona Administrative Code* (A.A.C.):** Official rules codified and published by the Secretary of State's Office. Available online at www.azsos.gov.

***Arizona Administrative Register* (A.A.R.):** The official publication that includes filed documents pertaining to Arizona rulemaking. Available online at www.azsos.gov.

Administrative Procedure Act (APA): A.R.S. Title 41, Chapter 6, Articles 1 through 10. Available online at www.azleg.gov.

Arizona Revised Statutes (A.R.S.): The statutes are made by the Arizona State Legislature during a legislative session. They are complied by Legislative Council, with the official publication codified by Thomson West. Citations to statutes include Titles which represent broad subject areas. The Title number is followed by the Section number. For example, A.R.S. § 41-1001 is the definitions Section of Title 41 of the Arizona Administrative Procedures Act. The "§" symbol simply means "section." Available online at www.azleg.gov.

Chapter: A division in the codification of the *Code* designating a state agency or, for a large agency, a major program.

Close of Record: The close of the public record for a proposed rulemaking is the date an agency chooses as the last date it will accept public comments, either written or oral.

Code of Federal Regulations (CFR): The *Code of Federal Regulations* is a codification of the general and permanent rules published in the *Federal Register* by the executive departments and agencies of the federal government.

Docket: A public file for each rulemaking containing materials related to the proceedings of that rulemaking. The docket file is established and maintained by an agency from the time it begins to consider making a rule until the rulemaking is finished. The agency provides public notice of the docket by filing a Notice of Rulemaking Docket Opening with the Office for publication in the *Register*.

Economic, Small Business, and Consumer Impact Statement (EIS): The EIS identifies the impact of the rule on private and public employment, on small businesses, and on consumers. It includes an analysis of the probable costs and benefits of the rule. An agency includes a brief summary of the EIS in its preamble. The EIS is not published in the *Register* but is available from the agency promulgating the rule. The EIS is also filed with the rulemaking package.

Governor's Regulatory Review (G.R.R.C.): Reviews and approves rules to ensure that they are necessary and to avoid unnecessary duplication and adverse impact on the public. G.R.R.C. also assesses whether the rules are clear, concise, understandable, legal, consistent with legislative intent, and whether the benefits of a rule outweigh the cost.

Incorporated by Reference: An agency may incorporate by reference standards or other publications. These standards are available from the state agency with references on where to order the standard or review it online.

Federal Register (FR): The *Federal Register* is a legal newspaper published every business day by the National Archives and Records Administration (NARA). It contains federal agency regulations; proposed rules and notices; and executive orders, proclamations, and other presidential documents.

Session Laws or "Laws": When an agency references a law that has not yet been codified into the Arizona Revised Statutes, use the word "Laws" is followed by the year the law was passed by the Legislature, followed by the Chapter number using the abbreviation "Ch.", and the specific Section number using the Section symbol (§). For example, Laws 1995, Ch. 6, § 2. Session laws are available at www.azleg.gov.

United States Code (U.S.C.): The Code is a consolidation and codification by subject matter of the general and permanent laws of the United States. The Code does not include regulations issued by executive branch agencies, decisions of the federal courts, treaties, or laws enacted by state or local governments.

Acronyms

A.A.C. – *Arizona Administrative Code*

A.A.R. – *Arizona Administrative Register*

APA – Administrative Procedure Act

A.R.S. – Arizona Revised Statutes

CFR – *Code of Federal Regulations*

EIS – Economic, Small Business, and Consumer Impact Statement

FR – *Federal Register*

G.R.R.C. – Governor's Regulatory Review Council

U.S.C. – *United States Code*

About Preambles

The Preamble is the part of a rulemaking package that contains information about the rulemaking and provides agency justification and regulatory intent.

It includes reference to the specific statutes authorizing the agency to make the rule, an explanation of the rule, reasons for proposing the rule, and the preliminary Economic Impact Statement.

The information in the Preamble differs between rulemaking notices used and the stage of the rulemaking.

Excerpts from Arizona Lobbying Handbook

Available at:

https://azsos.gov/elections/lobbyists

Arizona Lobbying Handbook

www.azsos.gov

1700 W Washington St, Phoenix, AZ 85007

1-877-THE-VOTE (843-8683)

CHAPTER 1
INTRODUCTION TO LOBBYING IN ARIZONA

The Secretary of State's Office registers lobbyists, principals, and public bodies in the state of Arizona. This handbook is a reference to assist the lobbyists, principals, and public bodies in complying with statutory registration and reporting obligations.

A. What is lobbying?

Lobbying in Arizona means:

- Attempting to influence the passage or defeat of any legislation by directly communicating with any legislator;
- Attempting to influence any formal rulemaking proceeding by directly communicating with any state officer or employee; or
- Attempting to influence the procurement of materials, services or construction by a state agency when the person is otherwise required to register as a lobbyist for compensation or is employed by, supervised by at any level, or contracted with a person who is otherwise required to register as a lobbyist for compensation.[1]

Lobbying does NOT include:

- Interagency communications between state agency employees;
- Communications between a public official or employee of a public body, designated public lobbyist or authorized public lobbyist and any state officer, except for a member of the legislature or an employee of the legislature;
- Oral questions or comments that are made by a person to a state officer or employee regarding a proposed rule while at a meeting or workshop that is open to the public and that is sponsored by a state agency, board, commission, council, or office; or
- Communications between a public body and a person regarding procurement unless the person is otherwise required to register or is employed by, supervised by at any level, or contracted with a person who is otherwise required to register as a lobbyist for compensation pursuant to the existing lobbying statute. [2]

Arizona lobbyist regulation involves disclosure and begins with the registration of either a Principal or Public Body with the Secretary of State's Office.

[1] A.R.S. § 41-1231(11)(a)-(b).
[2] A.R.S. § 41-1231(11)(c).

B. Lobbying terminology

1. Lobbyist

Under A.R.S. § 41-1231(12), "lobbyist" means any person who is employed by, retained by, or representing a person other than themselves, with or without compensation, for the purpose of lobbying and who is listed as a lobbyist by the Principal in its registration pursuant to A.R.S. § 41-1232.

A lobbyist who is not an individual (*e.g.*, a lobbying firm) may register as a lobbyist but is required to list on their registration all employees who will be engaging in lobbying. Those employees are subject to the same requirements as any lobbyist.

While the statutory definition of lobbyist only includes lobbyists that might be associated with a Principal,[3] this handbook will use the word "lobbyist" to include five types of lobbyists:

- **Designated Lobbyist** (DL): The person who is designated by a principal as the single point of contact for the principal and who is listed as the DL by the principal in its registration.[4]
- **Authorized Lobbyist** (AL): Any person, other than a designated lobbyist or lobbyist for compensation, who is employed by, retained by, or representing a principal, with or without compensation, for the purpose of lobbying and who is listed as an AL by the principal in its registration.[5]
- **Lobbyist for Compensation** (LFC): A lobbyist who is compensated for the primary purpose of lobbying on behalf of a principal and who is listed by the principal in its registration.[6]
- **Designated Public Lobbyist** (DPL): The person who is designated by a public body as the single point of contact for the public body and who is listed as the DPL by the public body in its registration.[7]
- **Authorized Public Lobbyist** (APL): A person, other than a DPL, who is employed by, retained by, or representing a public body, with or without compensation, for the purpose of lobbying and who is listed as an APL by the public body in its registration.[8]

[3] Although A.R.S. § 41-1231(12) excludes DPLs and APLs from the definition of lobbyist, APLs are defined under A.R.S. § 41-1231(2) and DPLs under A.R.S. § 41-1231(4). For the purposes of this handbook, the term lobbyist will include all five types (DL, AL, LFC, DPL, and APL) unless otherwise specified.
[4] A.R.S. § 41-1231(3).
[5] A.R.S. § 41-1231(1).
[6] A.R.S. § 41-1231(13).
[7] A.R.S. § 41-1231(4).
[8] A.R.S. § 41-1231(2).

2. Principal

"Principal" means any person, other than a public body, that employs, retains, engages, or uses a lobbyist, with or without compensation.[9] A principal includes any subsidiary of a corporation.

Principals are represented by lobbyists and must report expenditures that benefit any state officer or employee, including legislators and legislative employees.[10] Each Principal must have one DL.[11] Before any Principal causes any lobbying to occur on its behalf, it must register with the Secretary of State. A Principal must also include in its registration any LFCs, ALs, or employees of any lobbyist who lobby on the principal's behalf (if the LFC, AL, or DL is an entity, such as a lobbying firm, and not an individual).[12]

Each Principal may have any number of lobbyists associated with its registration. Please see Chapter 3, Section B for a flowchart of lobbyist roles and responsibilities.[13]

3. Public Body

A "Public Body" may be any of the following:

- the Arizona board of regents;
- a university under the jurisdiction of the Arizona board of regents;
- the judicial department;
- any state agency, board, commission, or council;
- any county;
- any county elected officer who elects to appoint a designated public lobbyist; or
- any city, town, district or other political subdivision of this state that receives and uses tax revenues and that employs, retains, engages, or uses, with or without compensation, a DPL or APL.[14]

Each Public Body must have one DPL.[15] Before any Public Body causes any lobbying to occur on its behalf, it must register with the Secretary of State. A Public Body must also include in its registration an APL or employee of a DPL or APL (if the DPL or APL is an entity, such as a lobbying firm).[16] Each Public Body may have any number of lobbyists associated with its registration. See Chapter 2, Section (B)(4) for a flowchart of lobbyist roles and responsibilities.

[9] A.R.S. § 41-1231(16).
[10] A.R.S. § 41-1232.03(A).
[11] A.R.S. § 41-1232(A)(2).
[12] A.R.S. § 41-1232(A)(3)-(4).
[13] A.R.S. §§ 41-1232, 41-1232.02.
[14] A.R.S. § 41-1231(18).
[15] A.R.S. § 41-1232.01(A)(2).
[16] A.R.S. § 41-1232.01(A)(3)-(4).

NOTE: A Public Body must register a paid lobbyist as a DPL or APL, not as an LFC, pursuant to A.R.S. § 41-1232.01(A).

C. Role of the Filing Officer

The Secretary of State's Office serves as the filing officer for lobbyist registrations and reports. Principals, Public Bodies, and lobbyists must follow reporting requirements as prescribed by Arizona law. The Secretary of State maintains a website with useful information and an online portal to assist with registration and reporting requirements.

The Secretary of State is required to refer matters to the Attorney General for investigation and enforcement when the Secretary has reasonable cause to believe a person is violating any provision of the lobbying statutes.[17]

The Secretary of State also serves as the filing officer for third party complaints against a regulated lobbyist. The lobbying complaint process mirrors the campaign finance complaint process outlined in Chapter 16 of the Elections Procedures Manual.

[17] A.R.S. § 41-1239(A)(2).

CHAPTER 4
PROHIBITIONS

A. What gifts are prohibited under Arizona's lobbying laws?

The following gifts are prohibited:

- Expenditures or gifts by a Principal to a state officer or employee (including legislators and legislative employees);
- Expenditures or gifts by a Public Body to a member or employee of the legislature;
- Gifts or expenditures for the above recipients made through another for the purpose of disguising the identity of the giver are prohibited; and
- Gifts with a total value of more than $10 in any calendar year, or gifts that are designed to influence the recipient's official conduct are prohibited.[45]

There is an exception to the gift prohibition for an employee of a Public Body. A person representing a Public Body may give a gift to an employee of a Public Body if: (1) the employee is not a public official or a member of the household of a public official; or, (2) if the gift is accepted on behalf of the Public Body and remains the property of the Public Body.[46]

B. What acts are prohibited under Arizona's lobbying laws?

Certain acts are prohibited under the lobbying laws, including the following:

- Retaining or employing a lobbyist to promote or oppose legislation (including seeking the approval or veto of any legislation by the Governor) on a contingent fee basis, or, for a lobbyist, accepting payment for lobbying on a contingent fee basis;[47]
- Lobbying the legislature for compensation within one year after the person ceases to be a member of the legislature;[48]
- Lobbying the public body that employed the person in a capacity having a significant procurement role in the procurement of materials or construction within one year after the person ceases to be employed by the public body;[49]
- Attempting to influence the vote of any legislator through communication with that legislator's employer;[50]

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[45] A.R.S. §§ 41-1232.02(I)-(J), 41-1232.03(I)-(J).
[46] A.R.S. § 41-1232.03(I)-(K).
[47] A.R.S. § 41-1233(1).
[48] A.R.S. § 41-1233(2).
[49] A.R.S. § 41-1233(4).
[50] A.R.S. § 41-1233(3).

- For a state agency, office, department, board, or commission and any person acting on behalf of a state agency, office, department, board, or commission: entering into a contract or other agreement with a person or entity for lobbying services or spending monies for any person or entity to lobby on behalf of that agency, office, department, board, or commission unless that person is a state employee or other specified exception applies;[51]
- Making or promising a campaign contribution to (or soliciting or promising to solicit campaign contributions for) a legislator or the Governor when the legislature is in regular session;[52] and
- Knowingly making any false, forged, counterfeit, or fictitious communication to a legislator, legislative employee, or any state officer that is materially related to any matter within the jurisdiction of the legislature (Class 2 misdemeanor).[53]

C. What is the ban on entertainment?

"Entertainment" means the amount of any expenditure paid or incurred for admission to any sporting or cultural event or for participation in any sporting or cultural activity.[54]

No Principal, Public Body, or lobbyist of any type (including a lobbyist specializing in procurement) may make entertainment expenditures for a state officer or employee. Likewise, state officers and employees are prohibited from accepting entertainment expenditures from Principals, Public Bodies, or lobbyists.[55]

Arizona law also prohibits lobbyists from making entertainment expenditures for an elected or appointed member of the Corporation Commission, a county Board of Supervisors, a city or town governing body, or a school district governing body.[56]

The only exceptions to the entertainment ban are:

- Entertainment in connection with a "special event," which includes parties, dinners, athletic events, entertainment and other functions to which all members of the legislature, either house of the legislature or any committee of the legislature is invited.[57]

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[51] A.R.S. § 41-1234(A)-(B). This prohibition does not apply to any state agency, office, department, board, or commission that is either headed by one or more elected officials or exempt from title 41, chapter 23 for the purposes of contracts of professional lobbyists. This prohibition does not apply to any state agency, office, department, board, or commission that is either headed by one or more elected officials or exempt from title 41, chapter 23 for the purposes of contracts of professional lobbyists.

[52] The prohibition may extend past the end of regular session with regard to the Governor if regular session legislation is pending approval or veto. A.R.S. § 41-1234.01(A).

[53] A.R.S. § 41-1235.

[54] A.R.S. § 41-1231(5).

[55] A.R.S. § 41-1232.08(A).

[56] A.R.S. § 41-1232.08(B).

[57] A.R.S. §§ 41-1232.02(F), 41-1232.03(F). Special events must be reported.

- Entertainment incidental to a "speaking engagement," which means an event, committee, meeting, conference, or seminar if the state officer or employee participates in the event as a speaker or panel participant by presenting information relating to the state officer's or employee's legislative or official duties or by performing a ceremonial function appropriate to the state officer's or employee's position.[58]

D. What is the penalty for violating the lobbyist laws?

Knowingly violating any of the lobbyist laws is a Class 1 misdemeanor, punishable by up to 6 months in jail, and up to a $2,500 fine, unless another penalty is specifically prescribed.[59] The Attorney General or county attorney of the county in which the alleged offense was committed may investigate and prosecute any alleged lobbying violation.[60]

The Secretary of State is required to refer matters to the Attorney General for investigation and enforcement when the Secretary has reasonable cause to believe a person is violating any provision of the lobbying statutes.[61]

[58] A.R.S. § 41-1231(21). Speaking engagement includes state, regional, or national organizational meetings or meetings of their committees regarding legislative or governmental activities. Entertainment incidental to a speaking engagement does not include an honorarium or any other similar fee paid to a speaker.
[59] A.R.S. §§ 41-1237(A), 13-707(A)(1), 13-802(A).
[60] A.R.S. § 41-1237.
[61] A.R.S. § 41-1239(A)(2).

Arizona Ombudsman FAQs

https://www.azoca.gov/open-meeting-and-public-records-law/overview/

Arizona Public Records Laws

Frequent Referrals

Office of Government Information Services – The Federal FOIA Ombudsman
Arizona State Library – How and where to find various Arizona records
Arizona State Library – Retention Schedules

Frequently Asked Questions

Does the Ombudsman – Citizens' Aide receive complaints regarding matters related to public records?

Yes, we receive complaints regarding matters related to public access laws including public records. The Arizona public access laws do not apply to federal agencies.

Does the Ombudsman- Citizens' Aide receive complaints regarding local government agencies?

Yes, but only for matters relating to Arizona's public record and open meeting law.

Will the Ombudsman's Office tell me where to find the records or get the records for me?

No. The Ombudsman's Office does not locate or request records for you. For some information on where to obtain various types of records go to the Arizona State Library website. To obtain records, you must contact the public

Resources
‹ FAQs
Department of Child Safety
Department of Economic Security
Elderly and Aging
Elected Officials
Financial
Healthcare Concerns
Housing
Inmate
Legal
Non-State

body that you believe maintains the record and make a request.

How can I obtain a copy of a birth or death certificate?

Please review the Arizona Department of Health Office of Vital Records website.

What are public records?

In most cases, anything created or received by a government agency or employee that relates to public business. This includes records created or received in the course of business (even if on personal computers). This includes all books, papers, maps, photographs or documentary materials, regardless of physical form or characteristics, including prints or copies of such items produced or reproduced on film or electronic media made or received by any governmental agency in pursuance of law or in connection with the transaction of public business. A.R.S. §§ 39-121.01(B) and 41-1350.

What public records are available to the public?

All public records are available for inspection unless

- they are confidential by law (statute, rule, or privilege),
- privacy interests outweigh the public's right to know, or
- disclosure is not in the best interest of the state.

Who must retain records?

Any person elected or appointed to hold any elective or appointive office of any public body. Also included are the chief administrative officer, head, director, superintendent or chairman of any public body. A.R.S. § 39-121.01(A)(1).

Public bodies include the state; any county, city, town, school district, political subdivision or tax-supported district in the state; any branch, department, board, bureau, commission, council or committee of the before mentioned; and any public organization or agency supported in whole or in part or expending monies provided by the state or any political subdivision of the

Agencies

Open Meetings Law

Public Records

Voting

Resource Web Links

State Agency Phone Numbers

SEE ALSO:

- Resources
- How to Make a Complaint
- Complaint Form
- Contact Information

Arizona Ombudsman Citizens' Aide
7878 N. 16th Street,
Suite 235
Phoenix, AZ 85020

(602) 277-7292

(800) 872-2879

(Arizona outside Phoenix metro area)

Fax: (602) 277-7312

state. A.R.S. § 39-121.01(A)(2).

HOW TO FILE A COMPLAINT

COMPLAINT FORM

MORE CONTACT INFO

Do I have to tell the public body why I want the record?

You are not required to state the purpose for the record request or the reason you want the record. You are required to disclose whether the public records will be used for a commercial or non-commercial purpose. Requestors are required to provide the purpose of a commercial request.

What is a commercial purpose?

A commercial purpose includes:

1. Obtaining records which will be used for sale or resale
2. Obtaining names and addresses for purpose of solicitation, or
3. The sale of names and addresses for the purpose of solicitation or any other purpose in which the purchaser can reasonable anticipate monetary gain. A.R.S. § 39-121.03.

This does not include the use of public records as evidence or research for evidence in an action. It also does not include obtaining records for news gathering.

Is there a fee to inspect records?

No, inspection is free. A person is entitled to inspect a record without receiving a copy. You may also make notes from the record and take them with you.

Can the public body charge me for copies?

Yes. A.R.S. § 39-121.01.

The cost will depend on whether the records will be used for a commercial or non-commercial purposes.

A person requesting copies for a non-commercial purpose may be charged a copying fee, which includes a reasonable amount of the cost of time, equipment, and personnel used in producing copies. A.R.S. § 39-121.01(D)(1).

The public body may not charge for the cost of searching

the records. *Hanania v. City of Tucson,*128 Ariz. 135, 624 P.2d 332 (Ct. App. 1980); Ariz. Att'y Gen. Op. I13-012.

The public body also cannot charge for inspection of the record, labor, redaction, overhead costs, or any fee to examine or review a record to determine whether the record is disclosable.

If a record will be used for commercial purposes the public body may impose a higher fee based on the following:

1. Portion of the cost to the public body for obtaining the record,
2. A reasonable fee for the cost of time, materials, equipment, and personnel in reproducing the record, and
3. The value of the reproduction on the commercial market as best determined by the public body. A.R.S. § 39-121.03(A).

Free copies must be provided for:

1. A claim for a pension, allotment, allowance, compensation, insurance or other benefits which are to be presented to the United States or a bureau or department thereof and
2. Police reports for victim or family member as well as a copy of the minute entry or portion of the record of any proceeding in the case that arises out of the offense committed against the victim and that is reasonably necessary for the purpose of pursing a claimed victim's right. A.R.S. §§ 39-122(A) and -127.

If requesting a public record for news gathering purposes is not a commercial purpose, what about requesting mailing lists to sell newspapers?

Requesting a mailing list to sell newspapers is a commercial purposes and the public body may impose additional fees.

How long does the public body have to provide the records requested?

The law requires prompt disclosure. A.R.S. § 39-121.01(D)(1). What constitutes prompt depends on what is reasonable under the circumstances.

Criteria that will be taken into account includes: the agency's resources, the nature of the request, the content of the records (particularly whether information must be redacted), and the location of the records (for instance, whether the records are stored off site). That said, mere inconvenience does not justify delay. The Arizona Court of Appeals recently applied the Webster's Dictionary definition, which defines prompt as "quick to act or to do what is required" or "done, spoken, etc., at once or without delay."

Also, keep in mind that some public bodies are required by statute to provide records within a specifically stated period of time.

Can the public agency withhold a record because some of the information is precluded from disclosure?

No. The public body is required to separate or redact the parts of the record that are precluded from disclosure and provide the rest.

Does the public body have to tell me why they are withholding a record?

Yes. The public body must provide a legal basis for not disclosing a record. In addition, upon request state agencies, with a few exceptions, are required to provide an index of each record withheld and a reason for withholding that record. A.R.S. § 39-121.01(D)(2).

How long must a public body keep public records?

It depends on the record. Every public body is required to have and follow a retention and disposition schedule. A.R.S. § 41-1346(A). Records are organized into record series and their retention period is determined by Arizona State Library, Archives, and Public Records.

Are e-mails sent or received by public officials, public bodies, and government employees public record?

It depends. While the presumption is that everything created or received on office time with office equipment constitutes a public record, the nature and purpose of the document determine its status as a public record. The

Supreme Court has recently concluded that purely personal e-mail, that has no relationship to official duties, is not automatically a public record just because it was on a government computer and e-mail system. That said, e-mails sent or received by a public official or public employee regarding public business constitute public records regardless of the e-mail account. This includes e-mails sent from or received by personal and other non-government e-mail systems or accounts.

How long must public bodies and public officers retain e-mail?

E-mail is destroyed once its retention period expires. E-mail, however, is not in and of itself a "record series". It is a medium by which records are transmitted and therefore, its retention depends on the classification of the e-mail. Therefore, it must first be determined what type of record it is depending on its subject, content, and attachments. Common e-mail record series include: administrative correspondence, general correspondence, and transitory information (i.e. junk mail).

E-mails are also often stored on the server backup tapes for a period of time after the back up is run. Records that exist on back up tapes must be restored and retrieved in response to a public records request.

Like any other public record, if an e-mail is kept after its retention period has expired, it must still be furnished in response to a public records request. It may not be destroyed once a request is made.

I requested copies of public records and cannot afford the copying fee. Must the public body waive the copying fee if it causes financial hardship?

No. The law permits public bodies to impose a copying fee and does not require a waiver for financial hardship. That said, public bodies are not required to impose a charge for copies.

Do the Anti-Identification Statutes (A.R.S. §§ 18-201, -521, and -522) affect the type of personal identifying information that may be redacted from public records?

No. The legislation adds nothing new to the existing

public records law and provides no guidance as to redaction of personal identifying information contained in public records. While government agencies are required to develop procedures to protect entity and personal identifying information from hacking of electronic data and unauthorized access or change to the data, they should continue to apply existing public records principles when this information is contained in a public record. In other words, if entity and personal identifying information is contained in a public record it is presumptively subject to disclosure. Redaction or withholding of information should only occur when the information is deemed confidential by statute or where privacy interests or best interests of the state prevail and trump the public's right to know.

Does Arizona's public records law require government entities to comply with on-going public record requests?

In the recent opinion, *West Valley Valley View, Inc. v. Maricopa County Sheriff's Office,* 216 Ariz. 225, 165 P.3d 203 (Ariz. App. 1 2007), the Arizona Court of Appeals concluded that nothing in A.R.S. § 39-121.01(D) precludes an ongoing request for disclosure of a narrowly defined, clearly identifiable category of to-be-created documents that the public agency concedes are public records.

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Due Process Cases

KeyCite Yellow Flag - Negative Treatment
Not Followed as Dicta Rockville Cars, LLC v. City of Rockville, Maryland, 4th Cir.(Md.), May 24, 2018

105 S.Ct. 1487
Supreme Court of the United States

CLEVELAND BOARD OF EDUCATION, Petitioner,
v.
James LOUDERMILL et al.
PARMA BOARD OF EDUCATION, Petitioner,
v.
Richard DONNELLY et al.
James LOUDERMILL, Petitioner,
v.
CLEVELAND BOARD OF EDUCATION et al.

Nos. 83–1362, 83–1363 and 83–6392.
|
Argued Dec. 3, 1984.
|
Decided March 19, 1985.

Synopsis
Terminated school district employees brought action against boards of education challenging propriety of their discharges. The District Court for the Northern District of Ohio, John M. Manos, J., dismissed the actions for failure to state claims on which relief could be granted, and the Court of Appeals affirmed in part and vacated and remanded in part. 721 F.2d 550. On certiorari, the Supreme Court, Justice White, held that process due to the terminated employees was pretermination opportunity to respond, coupled with posttermination administrative procedures as provided by Ohio statute and, because the employees alleged that they had no chance to respond, their complaints against boards of education sufficiently stated a claim.

Judgment of Court of Appeals affirmed; case remanded.

Justice Marshall filed opinion concurring in part and concurring in judgment.

Justice Brennan filed opinion concurring in part and dissenting in part.

Justice Rehnquist filed dissenting opinion.

Order on remand, 763 F.2d 202.

West Headnotes (8)

[1] **Constitutional Law** Public Employment Relationships

Public employees having property right in continued employment cannot be deprived of that property right by the state without due process. U.S.C.A. Const.Amends. 5, 14.

1226 Cases that cite this headnote

[2] **Constitutional Law** Source of right or interest

Property interests protected by due process are not created by the Constitution but, rather, are created, and their dimensions defined, by existing rules or understandings that stem from an independent source such as state law. U.S.C.A. Const.Amends. 5, 14.

993 Cases that cite this headnote

[3] **Constitutional Law** Procedural due process in general

Constitutional Law Rights, Interests, Benefits, or Privileges Involved in General

As relating to due process clause provision that substantive rights of life, liberty and property cannot be deprived except pursuant to constitutionally adequate procedures, categories of substance and procedure are distinct; once it is determined that the due process clause applies, question remains what process is due. U.S.C.A. Const.Amends. 5, 14.

975 Cases that cite this headnote

[4] **Constitutional Law** Duration and timing of deprivation; pre- or post-deprivation remedies

An essential principle of due process is that a deprivation of life, liberty or property be preceded by notice and opportunity for hearing appropriate to the nature of the case. U.S.C.A. Const.Amends. 5, 14.

1627 Cases that cite this headnote

[5] **Constitutional Law** Notice, hearing, proceedings, and review in general

Due process clause requires some kind of a hearing prior to discharge of employee who has a constitutionally protected property interest in his employment. U.S.C.A. Const.Amends. 5, 14.

2730 Cases that cite this headnote

[6] **Constitutional Law** Notice and Hearing

Right to a hearing under the due process clause does not depend on a demonstration of certain success. U.S.C.A. Const.Amends. 5, 14.

309 Cases that cite this headnote

[7] **Constitutional Law** Notice and hearing; proceedings and review

Education Pleadings

Process due to terminated school district employees was pretermination opportunity to respond, coupled with posttermination administrative procedures as provided by Ohio statute and, because the employees alleged that they had no chance to respond, their complaints against boards of education sufficiently stated a claim. Ohio R.C. § 124.34; U.S.C.A. Const.Amends. 5, 14.

2397 Cases that cite this headnote

[8] **Education** Pleadings

Public Employment Pleading

Former school district employee's complaint reciting course of proceedings regarding his termination but which did not indicate that his wait for conclusion of the proceedings was unreasonably prolonged other than the fact that it took nine months failed to state a claim of a constitutional deprivation. U.S.C.A. Const.Amends. 5, 14.

78 Cases that cite this headnote

****1488 *532** *Syllabus*[*]

In No. 83–1362, petitioner Board of Education hired respondent Loudermill as a security guard. On his job application Loudermill stated that he had never been convicted of a felony. Subsequently, upon discovering that he had in fact been convicted of grand larceny, the Board dismissed him for dishonesty in filling out the job application. He was not afforded an opportunity to respond to the dishonesty charge or to challenge the dismissal. Under Ohio law, Loudermill was a "classified civil servant," and by statute, as such an employee, could be terminated only for cause and was entitled to administrative review of the dismissal. He filed an appeal with the Civil Service Commission, which, after hearings before a referee and the Commission, upheld the dismissal some nine months after the appeal had been filed. Although the Commission's decision was subject to review in the state courts, Loudermill instead filed suit in Federal District Court, alleging that the Ohio statute providing for administrative review was unconstitutional on its face because it provided no opportunity for a discharged employee to respond to charges against him prior to removal, thus depriving him of liberty and property without due process. It was also alleged that the statute was unconstitutional as applied because discharged employees were not given sufficiently prompt postremoval hearings. The District Court dismissed the suit for failure to state a claim on which relief could be granted, holding that because the very statute that created the property right in continued employment also specified the procedures for discharge, and because those procedures were followed, Loudermill was, by definition, afforded all the process due; that the post-termination hearings also adequately protected Loudermill's property interest; and that in light of the Commission's crowded docket the delay in processing his appeal was constitutionally acceptable. In No. 83–1363, petitioner Board of Education fired respondent Donnelly from his job as a bus mechanic because he had ***533** failed an eye

examination. He appealed to the Civil Service Commission, which ordered him reinstated, but without backpay. He then filed a complaint in Federal District Court essentially identical to Loudermill's, and the court dismissed for failure to state a claim. On a ****1489** consolidated appeal, the Court of Appeals reversed in part and remanded, holding that both respondents had been deprived of due process and that the compelling private interest in retaining employment, combined with the value of presenting evidence prior to dismissal, outweighed the added administrative burden of a pretermination hearing. But with regard to the alleged deprivation of liberty and Loudermill's 9-month wait for an administrative decision, the court affirmed the District Court, finding no constitutional violation.

Held: All the process that is due is provided by a pretermination opportunity to respond, coupled with posttermination administrative procedures as provided by the Ohio statute; since respondents alleged that they had no chance to respond, the District Court erred in dismissing their complaints for failure to state a claim. Pp. 1491–1496.

(a) The Ohio statute plainly supports the conclusion that respondents possess property rights in continued employment. The Due Process Clause provides that the substantive rights of life, liberty, and property cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. "Property" cannot be defined by the procedures provided for its deprivation. Pp. 1491–1493.

(b) The principle that under the Due Process Clause an individual must be given an opportunity for a hearing *before* he is deprived of any significant property interest, requires "some kind of hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment. The need for some form of pretermination hearing is evident from a balancing of the competing interests at stake: the private interest in retaining employment, the governmental interests in expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination. Pp. 1493–1495.

(c) The pretermination hearing need not definitively resolve the propriety of the discharge, but should be an initial check against mistaken decisions—essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. The essential requirements of due process are notice and an opportunity to respond. Pp. 1495–1496.

(d) The delay in Loudermill's administrative proceedings did not constitute a separate constitutional violation. The Due Process Clause ***534** requires provision of a hearing "at a meaningful time," and here the delay stemmed in part from the thoroughness of the procedures. P. 1496.

721 F.2d 550 (6 Cir.1983), affirmed and remanded.

Attorneys and Law Firms

James G. Wyman argued the cause for petitioners in Nos. 83-1362 and 83-1363 and respondents in No. 83-6392. With him on the brief for petitioner in No. 83-1362 was *Thomas C. Simiele. John F. Lewis* and *John T. Meredith* filed a brief for petitioner in No. 83-1363. *John D. Maddox* and *Stuart A. Freidman* filed a brief for respondents Cleveland Civil Service Commission et al. in No. 83-6392.

Robert M. Fertel, by appointment of the Court, 468 U.S. 1203, argued the cause and filed briefs for respondents in Nos. 83-1362 and 83-1363 and petitioner in No. 83-6392.†

† Briefs of *amici curiae* urging reversal in Nos. 83-1362 and 83-1363 were filed for the State of Ohio et al. by *Anthony J. Celebrezze, Jr.,* Attorney General of Ohio, *Gene W. Holliker* and *Christine Manuelian,* Assistant Attorneys General, *Charles A. Graddick,* Attorney General of Alabama, *Robert K. Corbin,* Attorney General of Arizona, *Tany S. Hong,* Attorney General of Hawaii, *Lindley E. Pearson,* Attorney General of Indiana, *Robert T. Stephen,* Attorney General of Kansas, *Frank J. Kelley,* Attorney General of Michigan, *Hubert H. Humphrey III,* Attorney General of Minnesota, *William A. Allain,* Attorney General of Mississippi, *Michael T. Greely,* Attorney General of Montana, *Brian McKay,* Attorney General of Nevada, *Gregory H. Smith,* Attorney General of New Hampshire, *Irwin I. Kimmelman,* Attorney General of New Jersey, *Robert WeFald,* Attorney General of North Dakota, *Michael Turpen,* Attorney General of Oklahoma, *David Frohnmayer,* Attorney General of Oregon, *LeRoy S. Zimmerman,* Attorney General of Pennsylvania, *Mark V. Meierhenry,* Attorney General of South Dakota, *Bronson C. La Follette,* Attorney General of Wisconsin, and *Archie G. McClintock,* Attorney General of Wyoming; and for the National School Boards Association by *Gwendolyn H. Gregory* and *August W. Steinhilber.*

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Briefs of *amici curiae* urging affirmance in Nos. 83-1362 and 83-1363 were filed for the American Civil Liberties Union of Cleveland Foundation by *Gordon J. Beggs, Edward R. Stege, Jr.,* and *Charles S. Sims;* for the American Federation of State, County, and Municipal Employees, AFL-CIO, by *Richard Kirschner;* and for the National Educational Association by *Robert H. Chanin* and *Michael H. Gottesman.*

Opinion

***535** Justice WHITE delivered the opinion of the Court.

In these cases we consider what pretermination process must be accorded a public employee who can be discharged only for cause.

I

In 1979 the Cleveland Board of Education, petitioner in No. 83–1362, hired respondent James Loudermill as a security guard. On his job application, Loudermill stated that he had never been convicted of a felony. Eleven months later, as part of a routine examination of his employment records, the Board discovered that in fact Loudermill had been convicted of grand larceny in 1968. By letter dated November 3, 1980, the Board's Business Manager informed Loudermill that he had been dismissed because of his dishonesty in filling out the employment application. Loudermill was not afforded an opportunity to respond to the charge of dishonesty or to ****1490** challenge his dismissal. On November 13, the Board adopted a resolution officially approving the discharge.

Under Ohio law, Loudermill was a "classified civil servant." Ohio Rev.Code Ann. § 124.11 (1984). Such employees can be terminated only for cause, and may obtain administrative review if discharged. § 124.34. Pursuant to this provision, Loudermill filed an appeal with the Cleveland Civil Service Commission on November 12. The Commission appointed a referee, who held a hearing on January 29, 1981. Loudermill argued that he had thought that his 1968 larceny conviction was for a misdemeanor rather than a felony. The referee recommended reinstatement. On July 20, 1981, the ***536** full Commission heard argument and orally announced that it would uphold the dismissal. Proposed findings of fact and conclusions of law followed on August 10, and Loudermill's attorneys were advised of the result by mail on August 21.

Although the Commission's decision was subject to judicial review in the state courts, Loudermill instead brought the present suit in the Federal District Court for the Northern District of Ohio. The complaint alleged that § 124.34 was unconstitutional on its face because it did not provide the employee an opportunity to respond to the charges against him prior to removal. As a result, discharged employees were deprived of liberty and property without due process. The complaint also alleged that the provision was unconstitutional as applied because discharged employees were not given sufficiently prompt postremoval hearings.

Before a responsive pleading was filed, the District Court dismissed for failure to state a claim on which relief could be granted. See Fed.Rule Civ.Proc. 12(b)(6). It held that because the very statute that created the property right in continued employment also specified the procedures for discharge, and because those procedures were followed, Loudermill was, by definition, afforded all the process due. The post-termination hearing also adequately protected Loudermill's liberty interests. Finally, the District Court concluded that, in light of the Commission's crowded docket, the delay in processing Loudermill's administrative appeal was constitutionally acceptable. App. to Pet. for Cert. in No. 83–1362, pp. A36–A42.

The other case before us arises on similar facts and followed a similar course. Respondent Richard Donnelly was a bus mechanic for the Parma Board of Education. In August 1977, Donnelly was fired because he had failed an eye examination. He was offered a chance to retake the examination but did not do so. Like Loudermill, Donnelly appealed to the Civil Service Commission. After a year of wrangling about the timeliness of his appeal, the Commission heard ***537** the case. It ordered Donnelly reinstated, though without backpay.[1] In a complaint essentially identical to Loudermill's, Donnelly challenged the constitutionality of the dismissal procedures. The District Court dismissed for failure to state a claim, relying on its opinion in *Loudermill.*

The District Court denied a joint motion to alter or amend its judgment,[2] and the ****1491** cases were consolidated for appeal. A divided panel of the Court of Appeals for the Sixth Circuit reversed in part and remanded. 721 F.2d 550 (1983). After rejecting arguments that the actions were barred by failure to exhaust administrative remedies and by res judicata—arguments that are not renewed here—the Court of Appeals found that both respondents had been deprived of due process. It disagreed with the District Court's original

rationale. Instead, it concluded that the compelling private interest in retaining employment, combined with the value of presenting evidence prior to dismissal, outweighed the added administrative burden of a pretermination hearing. *Id.,* at 561–562. With regard to the alleged deprivation of liberty, and Loudermill's 9-month wait for an administrative decision, the court affirmed the District Court, finding no constitutional violation. *Id.,* at 563–564.

***538** The dissenting Judge argued that respondents' property interests were conditioned by the procedural limitations accompanying the grant thereof. He considered constitutional requirements satisfied because there was a reliable pretermination finding of "cause," coupled with a due process hearing at a meaningful time and in a meaningful manner. *Id.,* at 566.

Both employers petitioned for certiorari. Nos. 83–1362 and 83–1363. In a cross-petition, Loudermill sought review of the rulings adverse to him. No. 83–6392. We granted all three petitions, 467 U.S. 1204, 104 S.Ct. 2384, 81 L.Ed.2d 343 (1984), and now affirm in all respects.

II

[1] Respondents' federal constitutional claim depends on their having had a property right in continued employment.[3] *Board of Regents v. Roth,* 408 U.S. 564, 576–578, 92 S.Ct. 2701, 2708–2709, 33 L.Ed.2d 548 (1972); *Reagan v. United States,* 182 U.S. 419, 425, 21 S.Ct. 842, 845, 45 L.Ed. 1162 (1901). If they did, the State could not deprive them of this property without due process. See *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 11–12, 98 S.Ct. 1554, 1561–1562, 56 L.Ed.2d 30 (1978); *Goss v. Lopez,* 419 U.S. 565, 573–574, 95 S.Ct. 729, 735–736, 42 L.Ed.2d 725 (1975).

[2] Property interests are not created by the Constitution, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law...." *Board of Regents v. Roth, supra,* 408 U.S., at 577, 92 S.Ct., at 2709. See also *Paul v. Davis,* 424 U.S. 693, 709, 96 S.Ct. 1155, 1164, 47 L.Ed.2d 405 (1976). The Ohio statute plainly creates such an interest. Respondents were "classified civil service employees," Ohio Rev.Code Ann. § 124.11 (1984), entitled to retain their positions "during good behavior and efficient service," who could not be dismissed "except ... for ... misfeasance, ***539** malfeasance, or nonfeasance in office," § 124.34.[4] The statute plainly supports the conclusion, reached by both lower courts, that respondents possessed property rights in continued employment. Indeed, this question does not seem to have been disputed below.[5]

****1492** The Parma Board argues, however, that the property right is defined by, and conditioned on, the legislature's choice of procedures for its deprivation. Brief for Petitioner in No. 83–1363, pp. 26–27. The Board stresses that in addition to specifying the grounds for termination, the statute sets out procedures by which termination may take place.[6] The ***540** procedures were adhered to in these cases. According to petitioner, "[t]o require additional procedures would in effect expand the scope of the property interest itself." *Id.,* at 27. See also Brief for State of Ohio et al. as *Amici Curiae* 5–10.

This argument, which was accepted by the District Court, has its genesis in the plurality opinion in *Arnett v. Kennedy,* 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974). *Arnett* involved a challenge by a former federal employee to the procedures by which he was dismissed. The plurality reasoned that where the legislation conferring the substantive right also sets out the procedural mechanism for enforcing that right, the two cannot be separated:

> "The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause.
>
> "[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet." *Id.,* at 152–154, 94 S.Ct., at 1643–1644.

This view garnered three votes in *Arnett,* but was specifically rejected by the other six Justices. See *id.,* at 166–167, 94 S.Ct., at 1650–1651 (POWELL, J., joined by BLACKMUN, J.,); *id.,* at 177–178, 185, 94 S.Ct., at 1655–1656 (WHITE, J.,); *id.,* at 211, 94 S.Ct., at 1672 (MARSHALL, J., joined by Douglas and BRENNAN, JJ.). Since then, this theory has at times seemed to gather some additional support. See *Bishop v. Wood,* 426 U.S. 341, 355–361, 96 S.Ct. 2074, 2082–2085, 48 L.Ed.2d 684 (1976) (WHITE, J., dissenting); *Goss v. Lopez,* 419 U.S., at 586–587, 95 S.Ct., at 742–743 (POWELL, J., joined ***541** by BURGER, C.J., and BLACKMUN and REHNQUIST, JJ., dissenting). More recently, however, the

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Court has clearly rejected it. In *Vitek v. Jones,* 445 U.S. 480, 491, 100 S.Ct. 1254, 1263, 63 L.Ed.2d 552 (1980), we pointed out that "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." This conclusion was reiterated in *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 432, 102 S.Ct. 1148, 1155, 71 L.Ed.2d 265 (1982), where we reversed the lower court's holding that because the entitlement arose from a state statute, the legislature had ****1493** the prerogative to define the procedures to be followed to protect that entitlement.

[3] In light of these holdings, it is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Arnett v. Kennedy, supra,* 416 U.S., at 167, 94 S.Ct., at 1650 (POWELL, J., concurring in part and concurring in result in part); see *id.,* at 185, 94 S.Ct., at 1659 (WHITE, J., concurring in part and dissenting in part).

In short, once it is determined that the Due Process Clause applies, "the question remains what process is due." *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). The answer to that question is not to be found in the Ohio statute.

***542** III

[4] **[5]** An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950). We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest."[7] *Boddie v. Connecticut,* 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971) (emphasis in original); see *Bell v. Burson,* 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90 (1971). This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment. *Board of Regents v. Roth,* 408 U.S., at 569–570, 92 S.Ct., at 2705; *Perry v. Sindermann,* 408 U.S. 593, 599, 92 S.Ct. 2694, 2698, 33 L.Ed.2d 570 (1972). As we pointed out last Term, this rule has been settled for some time now. *Davis v. Scherer,* 468 U.S. 183, 192, n. 10, 104 S.Ct. 3012, 3018, n. 10, 82 L.Ed.2d 139 (1984); *id.,* at 200–203, 104 S.Ct., at 3022–3024 (BRENNAN, J., concurring in part and dissenting in part). Even decisions finding no constitutional violation in termination procedures have relied on the existence of some pretermination opportunity to respond. For example, in *Arnett* six Justices found constitutional minima satisfied where the employee had access to the material upon which the charge was based and could respond orally and in writing and present rebuttal affidavits. See also *Barry v. Barchi,* 443 U.S. 55, 65, 99 S.Ct. 2642, 2649, 61 L.Ed.2d 365 (1979) (no due process violation where horse trainer whose license was suspended "was given more than one opportunity to present his side of the story").

The need for some form of pretermination hearing, recognized in these cases, is evident from a balancing of the competing interests at stake. These are the private interests in ***543** retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination. ****1494** See *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. See *Fusari v. Steinberg,* 419 U.S. 379, 389, 95 S.Ct. 533, 539, 42 L.Ed.2d 521 (1975); *Bell v. Burson, supra,* 402 U.S., at 539, 91 S.Ct., at 1589; *Goldberg v. Kelly,* 397 U.S. 254, 264, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970); *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 340, 89 S.Ct. 1820, 1822, 23 L.Ed.2d 349 (1969). While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous

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job. See *Lefkowitz v. Turley,* 414 U.S. 70, 83–84, 94 S.Ct. 316, 325–326, 38 L.Ed.2d 274 (1973).

Second, some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. Cf. *Califano v. Yamasaki,* 442 U.S. 682, 686, 99 S.Ct. 2545, 2550, 61 L.Ed.2d 176 (1979). Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect. See *Goss v. Lopez,* 419 U.S., at 583–584, 95 S.Ct., at 740–741; *Gagnon v. Scarpelli,* 411 U.S. 778, 784–786, 93 S.Ct. 1756, 1760–1761, 36 L.Ed.2d 656 (1973).[8]

[6] ***544** The cases before us illustrate these considerations. Both respondents had plausible arguments to make that might have prevented their discharge. The fact that the Commission saw fit to reinstate Donnelly suggests that an error might have been avoided had he been provided an opportunity to make his case to the Board. As for Loudermill, given the Commission's ruling we cannot say that the discharge was mistaken. Nonetheless, in light of the referee's recommendation, neither can we say that a fully informed decisionmaker might not have exercised its discretion and decided not to dismiss him, notwithstanding its authority to do so. In any event, the termination involved arguable issues,[9] and the right to a hearing does not depend on a demonstration of certain success. *Carey v. Piphus,* 435 U.S. 247, 266, 98 S.Ct. 1042, 1053, 55 L.Ed.2d 252 (1978).

The governmental interest in immediate termination does not outweigh these interests. As we shall explain, affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled, the employer would continue to receive the benefit of the employee's labors. It is preferable to keep ****1495** a qualified employee on than to train a new one. A governmental employer also has an interest in keeping citizens usefully employed rather than taking the possibly erroneous and counterproductive step of forcing its employees onto the welfare rolls. Finally, in those situations where the employer perceives a significant hazard in ***545** keeping the employee on the job,[10] it can avoid the problem by suspending with pay.

IV

[7] The foregoing considerations indicate that the pretermination "hearing," though necessary, need not be elaborate. We have pointed out that "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie v. Connecticut,* 401 U.S., at 378, 91 S.Ct., at 786. See *Cafeteria Workers v. McElroy,* 367 U.S. 886, 894–895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). In general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action. *Mathews v. Eldridge,* 424 U.S., at 343, 96 S.Ct., at 907. Under state law, respondents were later entitled to a full administrative hearing and judicial review. The only question is what steps were required before the termination took effect.

In only one case, *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), has the Court required a full adversarial evidentiary hearing prior to adverse governmental action. However, as the *Goldberg* Court itself pointed out, see *id.,* at 264, 90 S.Ct., at 1018, that case presented significantly different considerations than are present in the context of public employment. Here, the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether ***546** there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. See *Bell v. Burson,* 402 U.S., at 540, 91 S.Ct., at 1590.

The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. See Friendly, "Some Kind of Hearing," 123 U.Pa.L.Rev. 1267, 1281 (1975). The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. See *Arnett v. Kennedy,* 416 U.S., at 170–171, 94 S.Ct., at 1652–1653 (opinion of POWELL, J.); *id.,* at 195–196, 94 S.Ct., at 1664–1665 (opinion of WHITE, J.); see also *Goss v. Lopez,* 419 U.S., at 581, 95 S.Ct., at 740. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

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V

[8] Our holding rests in part on the provisions in Ohio law for a full post-termination hearing. In his cross-petition Loudermill asserts, as a separate constitutional violation, that his administrative proceedings took too long.[11] The Court of ***547** ****1496** Appeals held otherwise, and we agree.[12] The Due Process Clause requires provision of a hearing "at a meaningful time." *E.g., Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). At some point, a delay in the post-termination hearing would become a constitutional violation. See *Barry v. Barchi,* 443 U.S., at 66, 99 S.Ct., at 2650. In the present case, however, the complaint merely recites the course of proceedings and concludes that the denial of a "speedy resolution" violated due process. App. 10. This reveals nothing about the delay except that it stemmed in part from the thoroughness of the procedures. A 9-month adjudication is not, of course, unconstitutionally lengthy *per se.* Yet Loudermill offers no indication that his wait was unreasonably prolonged other than the fact that it took nine months. The chronology of the proceedings set out in the complaint, coupled with the assertion that nine months is too long to wait, does not state a claim of a constitutional deprivation.[13]

VI

We conclude that all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination ***548** administrative procedures as provided by the Ohio statute. Because respondents allege in their complaints that they had no chance to respond, the District Court erred in dismissing for failure to state a claim. The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Justice MARSHALL, concurring in part and concurring in the judgment.

I agree wholeheartedly with the Court's express rejection of the theory of due process, urged upon us by the petitioner Boards of Education, that a public employee who may be discharged only for cause may be discharged by whatever procedures the legislature chooses. I therefore join Part II of the opinion for the Court. I also agree that, before discharge, the respondent employees were entitled to the opportunity to respond to the charges against them (which is all they requested), and that the failure to accord them that opportunity was a violation of their constitutional rights. Because the Court holds that the respondents were due all the process they requested, I concur in the judgment of the Court.

I write separately, however, to reaffirm my belief that public employees who may be discharged only for cause are entitled, under the Due Process Clause of the Fourteenth Amendment, to more than respondents ****1497** sought in this case. I continue to believe that *before the decision is made to terminate an employee's wages,* the employee is entitled to an opportunity to test the strength of the evidence "by confronting and cross-examining adverse witnesses and by presenting witnesses on his own behalf, whenever there are substantial disputes in testimonial evidence," *Arnett v. Kennedy,* 416 U.S. 134, 214, 94 S.Ct. 1633, 1674, 40 L.Ed.2d 15 (1974) (MARSHALL, J., dissenting). Because the Court suggests that even in this situation due process requires no more than notice and an opportunity to be heard before wages are cut off, I am not able to join the Court's opinion in its entirety.

***549** To my mind, the disruption caused by a loss of wages may be so devastating to an employee that, whenever there are substantial disputes about the evidence, additional pre-deprivation procedures are necessary to minimize the risk of an erroneous termination. That is, I place significantly greater weight than does the Court on the public employee's substantial interest in the accuracy of the pretermination proceeding. After wage termination, the employee often must wait months before his case is finally resolved, during which time he is without wages from his public employment. By limiting the procedures due prior to termination of wages, the Court accepts an impermissibly high risk that a wrongfully discharged employee will be subjected to this often lengthy wait for vindication, and to the attendant and often traumatic disruptions to his personal and economic life.

Considerable amounts of time may pass between the termination of wages and the decision in a post-termination evidentiary hearing—indeed, in this case nine months passed before Loudermill received a decision from his postdeprivation hearing. During this period the employee is left in limbo, deprived of his livelihood and of wages on which

he may well depend for basic sustenance. In that time, his ability to secure another job might be hindered, either because of the nature of the charges against him, or because of the prospect that he will return to his prior public employment if permitted. Similarly, his access to unemployment benefits might seriously be constrained, because many States deny unemployment compensation to workers discharged for cause.[*] Absent an interim source of wages, the employee might be unable to meet his basic, fixed costs, such as food, rent or mortgage payments. He would be forced to spend his savings, if he had any, and to convert his possessions to ***550** cash before becoming eligible for public assistance. Even in that instance

> "[t]he substitution of a meager welfare grant for a regular paycheck may bring with it painful and irremediable personal as well as financial dislocations. A child's education may be interrupted, a family's home lost, a person's relationship with his friends and even his family may be irrevocably affected. The costs of being forced, even temporarily, onto the welfare rolls because of a wrongful discharge from tenured Government employment cannot be so easily discounted," *id.,* at 221, 94 S.Ct., at 1677.

Moreover, it is in no respect certain that a prompt postdeprivation hearing will make the employee economically whole again, and the wrongfully discharged employee will almost inevitably suffer irreparable injury. Even if reinstatement is forthcoming, the same might not be true of back-pay—as it was not to respondent Donnelly in this case—and the delay in receipt of wages would thereby be transformed into a permanent deprivation. Of perhaps equal concern, the personal trauma experienced during the long months in which the employee awaits decision, during which he suffers doubt, humiliation, and the loss of an opportunity to perform work, will never be recompensed, and indeed probably could not be with dollars alone.

****1498** That these disruptions might fall upon a justifiably discharged employee is unfortunate; that they might fall upon a wrongfully discharged employee is simply unacceptable. Yet in requiring only that the employee have an opportunity to respond before his wages are cut off, without affording him any meaningful chance to present a defense, the Court is willing to accept an impermissibly high risk of error with respect to a deprivation that is substantial.

Were there any guarantee that the post-deprivation hearing and ruling would occur promptly, such as within a few days of the termination of wages, then this minimal pre-deprivation ***551** process might suffice. But there is no such guarantee. On a practical level, if the employer had to pay the employee until the end of the proceeding, the employer obviously would have an incentive to resolve the issue expeditiously. The employer loses this incentive if the only suffering as a result of the delay is borne by the wage earner, who eagerly awaits the decision on his livelihood. Nor has this Court grounded any guarantee of this kind in the Constitution. Indeed, this Court has in the past approved, at least implicitly, an average 10 or 11-month delay in the receipt of a decision on Social Security benefits, *Mathews v. Eldridge,* 424 U.S. 319, 341–342, 96 S.Ct. 893, 905–906, 47 L.Ed.2d 18 (1976), and, in the case of respondent Loudermill, the Court gives a stamp of approval to a process that took nine months. The hardship inevitably increases as the days go by, but nevertheless the Court countenances such delay. The adequacy of the predeprivation and postdeprivation procedures are inevitably intertwined, and only a constitutional guarantee that the latter will be immediate and complete might alleviate my concern about the possibility of a wrongful termination of wages.

The opinion for the Court does not confront this reality. I cannot and will not close my eyes today—as I could not 10 years ago—to the economic situation of great numbers of public employees, and to the potentially traumatic effect of a wrongful discharge on a working person. Given that so very much is at stake, I am unable to accept the Court's narrow view of the process due to a public employee before his wages are terminated, and before he begins the long wait for a public agency to issue a final decision in his case.

Justice BRENNAN, concurring in part and dissenting in part.
Today the Court puts to rest any remaining debate over whether public employers must provide meaningful notice and hearing procedures before discharging an employee for ***552** cause. As the Court convincingly demonstrates, the employee's right to fair notice and an opportunity to "present his side of the story" before discharge is not a matter of legislative grace, but of "constitutional guarantee." *Ante,* at 1493, 1495. This principle, reaffirmed by the Court today, has been clearly discernible in our "repeated pronouncements" for many years. See *Davis v. Scherer,* 468 U.S. 183, 203, 104 S.Ct. 3012, 3023, 82 L.Ed.2d 139 (1984) (BRENNAN, J., concurring in part and dissenting in part).

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Accordingly, I concur in Parts I–IV of the Court's opinion. I write separately to comment on two issues the Court does not resolve today, and to explain my dissent from the result in Part V of the Court's opinion.

I

First, the Court today does not prescribe the precise form of required pretermination procedures in cases where an employee disputes the *facts* proffered to support his discharge. The cases at hand involve, as the Court recognizes, employees who did not dispute the facts but had "plausible arguments to make that might have prevented their discharge." *Ante,* at 1494. In such cases, notice and an "opportunity to present reasons," *ante,* at 1495, are sufficient to protect the important interests at stake.

****1499** As the Court also correctly notes, other cases "will often involve factual disputes," *ante,* at 1494, such as allegedly erroneous records or false accusations. As Justice MARSHALL has previously noted and stresses again today, *ante* at 1497, where there exist not just plausible arguments to be made, but also "substantial disputes in testimonial evidence," due process may well require more than a simple opportunity to argue or deny. *Arnett v. Kennedy,* 416 U.S. 134, 214, 94 S.Ct. 1633, 1674, 40 L.Ed.2d 15 (1974) (MARSHALL, J., dissenting). The Court acknowledges that what the Constitution requires prior to discharge, in general terms, is pretermination procedures sufficient to provide "an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe ***553** that the charges against the employee are *true* and support the proposed action." *Ante,* at 1495 (emphasis added). When factual disputes are involved, therefore, an employee may deserve a fair opportunity before discharge to produce contrary records or testimony, or even to confront an accuser in front of the decisionmaker. Such an opportunity might not necessitate "elaborate" procedures, see *ante,* at 1495, but the fact remains that in some cases only such an opportunity to challenge the source or produce contrary evidence will suffice to support a finding that there are "reasonable grounds" to believe accusations are "true."

Factual disputes are not involved in these cases, however, and the "very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). I do not understand Part IV to foreclose the views expressed above or by Justice MARSHALL, *ante,* p. 1497, with respect to discharges based on disputed evidence or testimony. I therefore join Parts I–IV of the Court's opinion.

II

The second issue not resolved today is that of administrative delay. In holding that Loudermill's administrative proceedings did not take too long, the Court plainly does *not* state a flat rule that 9-month delays in deciding discharge appeals will pass constitutional scrutiny as a matter of course. To the contrary, the Court notes that a full post-termination hearing and decision must be provided at "a meaningful time" and that "[a]t some point, a delay in the post-termination hearing would become a constitutional violation." *Ante,* at 1496. For example, in *Barry v. Barchi,* 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979), we disapproved as "constitutionally infirm" the shorter administrative delays that resulted under a statute that required "prompt" postsuspension hearings for suspended racehorse trainers with decision to follow within 30 days of the hearing. *Id.,* at 61, 66, 99 S.Ct., at 2647, 2650. As Justice MARSHALL demonstrates, when an employee's wages are terminated pending ***554** administrative decision, "hardship inevitably increases as the days go by." *Ante,* at 1498; see also *Arnett v. Kennedy, supra,* 416 U.S., at 194, 94 S.Ct., at 1664 (WHITE, J., concurring in part and dissenting in part) ("The impact on the employee of being without a job pending a full hearing is likely to be considerable because '[m]ore than 75 percent of actions contested within employing agencies require longer to decide than the 60 days required by ... regulations' ") (citation omitted). In such cases the Constitution itself draws a line, as the Court declares, "at some point" beyond which the State may not continue a deprivation absent decision.[1] The holding in Part V is merely that, in this particular case, Loudermill failed to allege facts sufficient ****1500** to state a cause of action, and not that nine months can never exceed constitutional limits.

III

Recognizing the limited scope of the holding in Part V, I must still dissent from its result, because the record in this case is insufficiently developed to permit an informed judgment on the issue of overlong delay. Loudermill's complaint was dismissed without answer from the respondent Cleveland

Civil Service Commission. Allegations at this early stage are to be liberally construed, and "[i]t is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *McLain v. Real Estate Bd. of New Orleans, Inc.,* 444 U.S. 232, 246, 100 S.Ct. 502, 511, 62 L.Ed.2d 441 (1980) (citation omitted). Loudermill alleged that it took the Commission over two and one-half months simply to hold ***555** a hearing in his case, over two months *more* to issue a non-binding interim decision, and more than three and one-half months after *that* to deliver a final decision. Complaint ¶¶ 20, 21, App. 10.[2] The Commission provided no explanation for these significant gaps in the administrative process; we do not know if they were due to an overabundance of appeals, Loudermill's own foot-dragging, bad faith on the part of the Commission, or any other of a variety of reasons that might affect our analysis. We do know, however, that under Ohio law the Commission is obligated to hear appeals like Loudermill's "within thirty days." Ohio Rev.Code Ann. § 124.34 (1984).[3] Although this ****1501** statutory limit has been ***556** viewed only as "directory" by Ohio courts, those courts have also made it clear that when the limit is exceeded, "[t]he burden of proof [is] placed on the [Commission] to illustrate to the court that the failure to comply with the 30-day requirement ... was reasonable." *In re Bronkar,* 53 Ohio Misc. 13, 17, 372 N.E.2d 1345, 1347 (Com.Pl.1977). I cannot conclude on this record that Loudermill could prove "no set of facts" that might have entitled him to relief after nine months of waiting.

***557** The Court previously has recognized that constitutional restraints on the timing, no less than the form, of a hearing and decision "will depend on appropriate accommodation of the competing interests involved." *Goss v. Lopez,* 419 U.S. 565, 579, 95 S.Ct. 729, 738–739, 42 L.Ed.2d 725 (1975). The relevant interests have generally been recognized as threefold: "the importance of the private interest and the length or finality of the deprivation, the likelihood of governmental error, and the magnitude of the governmental interests involved." *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 434, 102 S.Ct. 1148, 1157, 71 L.Ed.2d 265 (1982) (citations omitted); accord, *Mathews v. Eldridge,* 424 U.S. 319, 334–335, 96 S.Ct. 893, 902–903, 47 L.Ed.2d 18 (1976); cf. *United States v. $8,850,* 461 U.S. 555, 564, 103 S.Ct. 2005, 2012, 76 L.Ed.2d 143 (1983) (four-factor test for evaluating constitutionality of delay between time of property seizure and initiation of forfeiture action). "Little can be said on when a delay becomes presumptively improper, for the determination necessarily depends on the facts of the particular case." *Id.,* at 565, 103 S.Ct., at 2012.

Thus the constitutional analysis of delay requires some development of the relevant factual context when a plaintiff alleges, as Loudermill has, that the administrative process has taken longer than some minimal amount of time. Indeed, all of our precedents that have considered administrative delays under the Due Process Clause, either explicitly or *sub silentio,* have been decided only after more complete proceedings in the District Courts. See, *e.g., $8,850, supra; Barry v. Barchi,* 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979); *Arnett v. Kennedy,* 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); *Mathews v. Eldridge, supra.*[4] Yet in Part V, the Court summarily holds Loudermill's allegations ***558** insufficient, without adverting to any considered balancing of interests. Disposal of Loudermill's complaint without examining the competing interests involved marks an unexplained departure from the careful multifaceted analysis of the facts we consistently have employed in the past.

I previously have stated my view that

> "[t]o be meaningful, an opportunity for a full hearing and determination must be afforded at least at a time when the potentially irreparable and substantial harm caused by a suspension can still be avoided—*i.e.,* either before or immediately after suspension." *Barry v. Barchi, supra,* 443 U.S., at 74, 99 S.Ct., at 2654 (BRENNAN, J., concurring in part).

****1502** Loudermill's allegations of months-long administrative delay, taken together with the facially divergent results regarding length of administrative delay found in *Barchi* as compared to *Arnett,* see n. 4, *supra,* are sufficient in my mind to require further factual development. In no other way can the third *Mathews* factor—"the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement [in this case, a speedier hearing and decision] would entail," 424 U.S., at 335, 96 S.Ct., at 903—sensibly be evaluated in this case.[5] I therefore would remand the delay issue to the District Court for further evidentiary proceedings consistent with the *Mathews* approach. I respectfully dissent from the Court's contrary decision in Part V.

***559** Justice REHNQUIST, dissenting.

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In *Arnett v. Kennedy,* 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974), six Members of this Court agreed that a public employee could be dismissed for misconduct without a full hearing prior to termination. A plurality of Justices agreed that the employee was entitled to exactly what Congress gave him, and no more. The Chief Justice, Justice Stewart, and I said:

> "Here appellee did have a statutory expectancy that he not be removed other than for 'such cause as will promote the efficiency of [the] service.' But the very section of the statute which granted him that right, a right which had previously existed only by virtue of administrative regulation, expressly provided also for the procedure by which 'cause' was to be determined, and expressly omitted the procedural guarantees which appellee insists are mandated by the Constitution. Only by bifurcating the very sentence of the Act of Congress which conferred upon appellee the right not to be removed save for cause could it be said that he had an expectancy of that substantive right without the procedural limitations which Congress attached to it. In the area of federal regulation of government employees, where in the absence of statutory limitation the governmental employer has had virtually uncontrolled latitude in decisions as to hiring and firing, *Cafeteria Workers v. McElroy,* 367 U.S. 886, 896–897, 81 S.Ct. 1743, 1749–1750, 6 L.Ed.2d 1230 (1961), we do not believe that a statutory enactment such as the Lloyd-La Follette Act may be parsed as discretely as appellee urges. Congress was obviously intent on according a measure of statutory job security to governmental employees which they had not previously enjoyed, but was likewise intent on excluding more elaborate procedural requirements which it felt would make the operation of the new scheme unnecessarily burdensome in practice. Where the focus of legislation was thus strongly on the procedural mechanism for enforcing the substantive ***560** right which was simultaneously conferred, we decline to conclude that the substantive right may be viewed wholly apart from the procedure provided for its enforcement. The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause." *Id.,* at 151–152, 94 S.Ct., at 1643.

In these cases, the relevant Ohio statute provides in its first paragraph that

> "[t]he tenure of every officer or employee in the classified service of the state ****1503** and the counties, civil service townships, cities, city health districts, general health districts, and city school districts thereof, holding a position under this chapter of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except ... for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office." Ohio Rev.Code Ann. § 124.34 (1984).

The very next paragraph of this section of the Ohio Revised Code provides that in the event of suspension of more than three days or removal the appointing authority shall furnish the employee with the stated reasons for his removal. The next paragraph provides that within 10 days following the receipt of such a statement, the employee may appeal in writing to the State Personnel Board of Review or the Commission, such appeal shall be heard within 30 days from the time of its filing, and the Board may affirm, disaffirm, or modify the judgment of the appointing authority.

***561** Thus in one legislative breath Ohio has conferred upon civil service employees such as respondents in these cases a limited form of tenure during good behavior, and prescribed the procedures by which that tenure may be terminated. Here, as in *Arnett,* "[t]he employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which [the Ohio Legislature] has designated for the determination of cause." 416 U.S., at 152, 94 S.Ct., at 1643 (opinion of REHNQUIST, J.). We stated in *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972):

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

We ought to recognize the totality of the State's definition of the property right in question, and not merely seize upon one of several paragraphs in a unitary statute to proclaim that in that paragraph the State has inexorably conferred upon a civil service employee something which it is powerless under the United States Constitution to qualify in the next paragraph of the statute. This practice ignores our duty under *Roth* to rely on state law as the source of property interests

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for purposes of applying the Due Process Clause of the Fourteenth Amendment. While it does not impose a federal definition of property, the Court departs from the full breadth of the holding in *Roth* by its selective choice from among the sentences the Ohio Legislature chooses to use in establishing and qualifying a right.

Having concluded by this somewhat tortured reasoning that Ohio has created a property right in the respondents in these cases, the Court naturally proceeds to inquire what process is "due" before the respondents may be divested of ***562** that right. This customary "balancing" inquiry conducted by the Court in these cases reaches a result that is quite unobjectionable, but it seems to me that it is devoid of any principles which will either instruct or endure. The balance is simply an ad hoc weighing which depends to a great extent upon how the Court subjectively views the underlying interests at stake. The results in previous cases and in these cases have been quite unpredictable. To paraphrase Justice Black, today's balancing act requires a "pretermination opportunity to respond" ****1504** but there is nothing that indicates what tomorrow's will be. *Goldberg v. Kelly,* 397 U.S. 254, 276, 90 S.Ct. 1011, 1024, 25 L.Ed.2d 287 (1970) (Black, J., dissenting). The results from today's balance certainly do not jibe with the result in *Goldberg* or *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).[*] The lack of ***563** any principled standards in this area means that these procedural due process cases will recur time and again. Every different set of facts will present a new issue on what process was due and when. One way to avoid this subjective and varying interpretation of the Due Process Clause in cases such as these is to hold that one who avails himself of government entitlements accepts the grant of tenure along with its inherent limitations.

Because I believe that the Fourteenth Amendment of the United States Constitution does not support the conclusion that Ohio's effort to confer a limited form of tenure upon respondents resulted in the creation of a "property right" in their employment, I dissent.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The statute authorizes the Commission to "affirm, disaffirm, or modify the judgment of the appointing authority." Ohio Rev.Code Ann. § 124.34 (1984). Petitioner Parma Board of Education interprets this as authority to reinstate with or without backpay and views the Commission's decision as a compromise. Brief for Petitioner in No. 83–1363, p. 6, n. 3; Tr. of Oral. Arg. 14. The Court of Appeals, however, stated that the Commission lacked the power to award backpay. 721 F.2d 550, 554, n. 3 (1983). As the decision of the Commission is not in the record, we are unable to determine the reasoning behind it.

2 In denying the motion, the District Court no longer relied on the principle that the state legislature could define the necessary procedures in the course of creating the property right. Instead, it reached the same result under a balancing test based on Justice POWELL's concurring opinion in *Arnett v. Kennedy,* 416 U.S. 134, 168–169, 94 S.Ct. 1633, 1651–1652, 40 L.Ed.2d 15 (1974), and the Court's opinion in *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). App. to Pet. for Cert. in No. 83–1362, pp. A54–A57.

3 Of course, the Due Process Clause also protects interests of life and liberty. The Court of Appeals' finding of a constitutional violation was based solely on the deprivation of a property interest. We address below Loudermill's contention that he has been unconstitutionally deprived of liberty. See n. 13, *infra.*

4 The relevant portion of § 124.34 provides that no classified civil servant may be removed except "for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office."

5 The Cleveland Board of Education now asserts that Loudermill had no property right under state law because he obtained his employment by lying on the application. It argues that had Loudermill answered truthfully he would not have been hired. He therefore lacked a "legitimate claim of entitlement" to the position. Brief for Petitioner in No. 83–1362, pp. 14–15.

For several reasons, we must reject this submission. First, it was not raised below. Second, it makes factual assumptions —that Loudermill lied, and that he would not have been hired had he not done so—that are inconsistent with the allegations of the complaint and inappropriate at this stage of the litigation, which has not proceeded past the initial pleadings stage. Finally, the argument relies on a retrospective fiction inconsistent with the undisputed fact that Loudermill was hired and did hold the security guard job. The Board cannot escape its constitutional obligations by rephrasing the basis for termination as a reason why Loudermill should not have been hired in the first place.

6 After providing for dismissal only for cause, see n. 4, *supra,* § 124.34 states that the dismissed employee is to be provided with a copy of the order of removal giving the reasons therefor. Within 10 days of the filing of the order with the Director of Administrative Services, the employee may file a written appeal with the State Personnel Board of Review or the Commission. "In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority." Either side may obtain review of the Commission's decision in the State Court of Common Pleas.

7 There are, of course, some situations in which a postdeprivation hearing will satisfy due process requirements. See *Ewing v. Mytinger & Casselberry, Inc.,* 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (1950); *North American Cold Storage Co. v. Chicago,* 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195 (1908).

8 This is not to say that where state conduct is entirely discretionary the Due Process Clause is brought into play. See *Meachum v. Fano,* 427 U.S. 215, 228, 96 S.Ct. 2532, 2540, 49 L.Ed.2d 451 (1976). Nor is it to say that a person can insist on a hearing in order to argue that the decisionmaker should be lenient and depart from legal requirements. See *Dixon v. Love,* 431 U.S. 105, 114, 97 S.Ct. 1723, 1728, 52 L.Ed.2d 172 (1977). The point is that where there is an entitlement, a prior hearing facilitates the consideration of whether a permissible course of action is also an appropriate one. This is one way in which providing "effective notice and informal hearing permitting the [employee] to give his version of the events will provide a meaningful hedge against erroneous action. At least the [employer] will be alerted to the existence of disputes about facts and arguments about cause and effect.... [H]is discretion will be more informed and we think the risk of error substantially reduced." *Goss v. Lopez,* 419 U.S., at 583–584, 95 S.Ct., at 740–741.

9 Loudermill's dismissal turned not on the objective fact that he was an ex-felon or the inaccuracy of his statement to the contrary, but on the subjective question whether he had lied on his application form. His explanation for the false statement is plausible in light of the fact that he received only a suspended 6-month sentence and a fine on the grand larceny conviction. Tr. of Oral Arg. 35.

10 In the cases before us, no such danger seems to have existed. The examination Donnelly failed was related to driving school buses, not repairing them. *Id.,* at 39–40. As the Court of Appeals stated, "[n]o emergency was even conceivable with respect to Donnelly." 721 F.2d, at 562. As for Loudermill, petitioner states that "to find that we have a person who is an ex-felon as our security guard is very distressful to us." Tr. of Oral Arg. 19. But the termination was based on the presumed misrepresentation on the employment form, not on the felony conviction. In fact, Ohio law provides that an employee "shall not be disciplined for acts," including criminal convictions, occurring more than two years previously. See Ohio Admin.Code § 124–3–04 (1979). Petitioner concedes that Loudermill's job performance was fully satisfactory.

11 Loudermill's hearing before the referee occurred two and one-half months after he filed his appeal. The Commission issued its written decision six and one-half months after that. Administrative proceedings in Donnelly's case, once it was determined that they could proceed at all, were swifter. A writ of mandamus requiring the Commission to hold a hearing was issued on May 9, 1978; the hearing took place on May 30; the order of reinstatement was issued on July 6.

Section 124.34 provides that a hearing is to be held within 30 days of the appeal, though the Ohio courts have ruled that the time limit is not mandatory. *E.g., In re Bronkar,* 53 Ohio Misc. 13, 17, 372 N.E.2d 1345, 1347 (Com.Pl.1977). The statute does not provide a time limit for the actual decision.

12 It might be argued that once we find a due process violation in the denial of a pretermination hearing we need not and should not consider whether the post-termination procedures were adequate. See *Barry v. Barchi,* 443 U.S. 55, 72–74, 99 S.Ct. 2642, 2653–2654, 61 L.Ed.2d 365 (1979) (BRENNAN, J., concurring in part). We conclude that it is appropriate to consider this issue, however, for three reasons. First, the allegation of a distinct due process violation in the administrative delay is not an alternative theory supporting the same relief, but a separate claim altogether. Second, it was decided by the court below and is raised in the cross-petition. Finally, the existence of post-termination procedures is relevant to the necessary scope of pretermination procedures.

13 The cross-petition also argues that Loudermill was unconstitutionally deprived of liberty because of the accusation of dishonesty that hung over his head during the administrative proceedings. As the Court of Appeals found, 721 F.2d, at

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563, n. 18, the failure to allege that the reasons for the dismissal were published dooms this claim. See *Bishop v. Wood,* 426 U.S. 341, 348, 96 S.Ct. 2074, 2079, 48 L.Ed.2d 684 (1976).

* See U.S. Dept. of Labor, Comparison of State Unemployment Insurance Laws §§ 425, 435 (1984); see also *id.,* at 4–33 to 4–36 (table of state rules governing disqualification from benefits for discharge for misconduct).

1 Post-termination administrative procedures designed to determine fully and accurately the correctness of discharge actions are to be encouraged. Multiple layers of administrative procedure, however, may not be created merely to smother a discharged employee with "thoroughness," effectively destroying his constitutionally protected interests by over-extension. Cf. *ante,* at 1496 ("thoroughness" of procedures partially explains delay in this case).

2 The interim decision, issued by a hearing examiner, was in Loudermill's favor and recommended his reinstatement. But Loudermill was not reinstated nor were his wages even temporarily restored; in fact, there apparently exists no provision for such interim relief or restoration of backpay under Ohio's statutory scheme. See *ante,* at 1490, n. 1; cf. *Arnett v. Kennedy,* 416 U.S. 134, 196, 94 S.Ct. 1633, 1665, 40 L.Ed.2d 15 (1974) (WHITE, J., concurring in part and dissenting in part) (under federal civil service law, discharged employee's wages are only "provisionally cut off" pending appeal); *id.,* at 146 (opinion of REHNQUIST, J.) (under federal system, backpay is automatically refunded "if the [discharged] employee is reinstated on appeal"). See also N.Y.Civ.Serv.Law § 75(3) (McKinney 1983) (suspension without pay pending determination of removal charges may not exceed 30 days). Moreover, the final decision of the Commission to reverse the hearing examiner apparently was arrived at without any additional evidentiary development; only further argument was had before the Commission. 721 F.2d 550, 553 (CA6 1983). These undisputed facts lead me at least to question the administrative value of, and justification for, the 9-month period it took to decide Loudermill's case.

3 A number of other States similarly have specified time limits for hearings and decisions on discharge appeals taken by tenured public employees, indicating legislative consensus that a month or two normally is sufficient time to resolve such actions. No state statutes permit administrative delays of the length alleged by Loudermill. See, *e.g.,* Ariz.Rev.Stat.Ann. § 41–785(A), (C) (Supp.1984–1985) (hearing within 30 days, decision within 30 days of hearing); Colo.Rev.Stat. § 24–50–125(4) (Supp.1984) (hearing within 45 days, decision within 45 days of hearing); Conn.Gen.Stat.Ann. § 5–202(b) (Supp.1984) (decision within 60 days of hearing); Ill.Rev.Stat., ch. 24½, ¶ 38b14 (1983) (hearing within 45 days); Ind.Code § 4–15–2–35 (1982) (decision within 30 days of hearing); Iowa Code § 19A.14 (1983) (hearing within 30 days); Kan.Stat.Ann. § 75–2949(f) (Supp.1983) (hearing within 45 days); Ky.Rev.Stat. § 18A.095(3) (1984) (hearing within 60 days of filing, decision within 90 days of filing); Maine Rev.Stat.Ann., Tit. 5, § 753(5) (1979) (decision within 30 days of hearing); Md.Ann.Code, Art. 64A, §§ 33(b)(2), (e) (Supp.1984) (salary suspension hearing within 5 days and decision within 5 more days; discharge hearing within 90 days and decision within 45 days of hearing); Mass.Gen.Laws Ann., ch. 31, § 43 (Supp.1984–1985) (hearing within 10 days, findings "forthwith," decision within 30 days of findings); Minn.Stat. § 44.08 (1970) (hearing within 10 days, decision within 3 days of hearing); Nev.Rev.Stat. § 284.390(2) (1983) (hearing within 20 days); N.J.Stat.Ann. §§ 11:15–4, 11:15–6 (West 1976) (hearing within 30 days, decision within 15 days of hearing); Okla.Stat., Tit. 74, §§ 841.13, 841.13A (Supp.1984) (hearing within 35 days, decision within 15 days of hearing); R.I.Gen.Laws §§ 36–4–40, 36–4–40.2, 36–4–41 (1984) (initial hearing within 14 days, interim decision within 20 days of hearing, appeal decision within 30 more days, final decision of Governor within 15 more days); S.C.Code §§ 8–17–330, 8–17–340 (Supp.1984) (interim decision within 45 days of filing, final decision within 20 days of hearing); Utah Code Ann. § 67–19–25 (Supp.1983) (interim decision within 5–20 days, final hearing within 30 days of filing final appeal, final decision within 40 days of hearing); Wash.Rev.Code § 41.64.100 (1983) (final decision within 90 days of filing); Wis.Stat. § 230.44(4)(f) (Supp.1984–1985) (decision within 90 days of hearing); see also Ala.Code § 36–26–27(b) (Supp.1984) (hearings on citizen removal petitions within 20 days of service); D.C.Code § 1–617.3(a)(1)(D) (1981) ("Career and Educational Services" employees "entitled" to decision within 45 days); Ga.Code Ann. § 45–20–9(e)(1) (1982) (hearing officer's decision required within 30 days of hearing); Miss.Code Ann. § 21–31–23 (Supp.1984) (hearing required within 20 days of termination for "extraordinary circumstances").

4 After giving careful consideration to well-developed factual contexts, the Court has reached results that might be viewed as inconsistent in the abstract. Compare *Barchi,* 443 U.S., at 66, 99 S.Ct., at 2650 (disapproving statute requiring decision within 30 days of hearing), with *Arnett,* 416 U.S., at 194, 94 S.Ct., at 1664 (WHITE, J., concurring in part and dissenting in part) (approving statutory scheme under which over 50 percent of discharge appeals "take more than three months"). Rather than inconsistency, however, these differing results demonstrate the impossibility of drawing firm lines and the importance of factual development in such cases.

5 In light of the complete absence of record evidence, it is perhaps unsurprising that the Court of Appeals below was forced to speculate that "[t]he delays in the instant cases in all likelihood were inadvertent." 721 F.2d at 564, n. 19. Similarly, the Cleveland Board of Education and Civil Service Commission assert only that "[n]o authority is necessary to support

the proposition" that administrative resolution of a case like Loudermill's in less than nine months is "almost impossible." Brief for Respondents in No. 83–6392, p. 8, n. 4. To the contrary, however, I believe our precedents clearly require demonstration of some "authority" in these circumstances.

* Today the balancing test requires a pretermination opportunity to respond. In *Goldberg* we required a full-fledged trial-type hearing, and in *Mathews* we declined to require any pretermination process other than those required by the statute. At times this balancing process may look as if it were undertaken with a thumb on the scale, depending upon the result the Court desired. For example, in *Mathews* we minimized the importance of the benefit to the recipient, stating that after termination he could always go on welfare to survive. 424 U.S., at 340–343, 96 S.Ct., at 905–907; see also *id.,* at 350, 96 S.Ct., at 910 (BRENNAN, J., dissenting). Today, however, the Court exalts the recipient's interest in retaining employment; not a word is said about going on welfare. Conversely, in *Mathews* we stressed the interests of the State, while today, in a footnote, the Court goes so far as to denigrate the State's interest in firing a school security guard who had lied about a prior felony conviction. *Ante,* at 1495, n. 10.

Today the Court purports to describe the State's interest, *ante,* at 1495, but does so in a way that is contrary to what petitioner Boards of Education have asserted in their briefs. The description of the State's interests looks more like a make-weight to support the Court's result. The decision whom to train and employ is strictly a decision for the State. The Court attempts to ameliorate its ruling by stating that a State may always suspend an employee with pay, in lieu of a predischarge hearing, if it determines that he poses a threat. *Ante,* at 1495. This does less than justice to the State's interest in its financial integrity and its interest in promptly terminating an employee who has violated the conditions of his tenure, and ignores Ohio's current practice of paying back wages to wrongfully-discharged employees.

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Sessions v. Morales-Santana, U.S., June 12, 2017

92 S.Ct. 2294
Supreme Court of the United States

Richard GRAYNED, Appellant,
v.
CITY OF ROCKFORD.

No. 70—5106.
|
Argued Jan. 19, 1972.
|
Decided June 26, 1972.

Synopsis
Defendant was convicted before the Circuit Court of Winnebago County, for his part in a demonstration in front of a senior high school in Rockford, Illinois, and he appealed. The Illinois Supreme Court, 46 Ill.2d 492, 263 N.E.2d 866, affirmed, and defendant appealed. The Supreme Court, Mr. Justice Marshall, held that city antinoise ordinance prohibiting a person while on grounds adjacent to a building in which a school is in session from willfully making a noise or diversion that disturbs or tends to disturb the peace or good order of the school session is not unconstitutionally vague or overbroad. In addition, the court held that ordinance prohibiting picketing within 100 feet of a school, except peaceful picketing of any school involved in a labor dispute, was invalid as violative of equal protection.

Affirmed in part and reversed in part.

Mr. Justice Douglas filed an opinion dissenting in part and joining in Part I of the Court's opinion; Mr. Justice Blackmun filed a statement joining in the judgment in Part I of the Court's opinion and concurring in result as to Part II of the opinion.

West Headnotes (25)

[1] **Constitutional Law** Freedom of speech and press

City ordinance prohibiting picketing within 150 feet of a primary or secondary school, except peaceful picketing of any school involved in a labor dispute, violated equal protection. U.S.C.A.Const. Amend. 14.

37 Cases that cite this headnote

[2] **Constitutional Law** Vagueness

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. U.S.C.A.Const. Amend. 14.

955 Cases that cite this headnote

[3] **Constitutional Law** Statutes
Constitutional Law Vagueness in General
Constitutional Law Delegation of Powers

Vague laws offend several important values: first, vague laws may trap the innocent by not providing fair warning; second, vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with attendant dangers of arbitrary and discriminatory application; and third, where a vague statute abuts on sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. U.S.C.A.Const. Amends. 1, 14.

1179 Cases that cite this headnote

[4] **Constitutional Law** Vagueness as to Covered Conduct or Standards of Enforcement; Offenses and Penalties

A law must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. U.S.C.A.Const. Amend. 14.

1252 Cases that cite this headnote

[5] **Constitutional Law** Vagueness as to Covered Conduct or Standards of Enforcement; Offenses and Penalties

If arbitrary and discriminatory enforcement is to be prevented, laws must provide

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explicit standards for those who apply them. U.S.C.A.Const. Amend. 14.

491 Cases that cite this headnote

[6] **Constitutional Law** Noise regulation
Education Control and Use in General
Municipal Corporations Public peace and order

City anti-noise ordinance prohibiting a person while on grounds adjacent to a building in which a school is in session from willfully making a noise or diversion that disturbs or tends to disturb the peace or good will of the school session is not unconstitutionally vague since, with fair warning, it prohibits only actual or imminent, and willful, interference with normal school activity, and is not a broad invitation to discriminatory enforcement. U.S.C.A.Const. Amend. 14.

399 Cases that cite this headnote

[7] **Constitutional Law** Overbreadth

A clear and precise enactment may nevertheless be overbroad if in its reach it prohibits constitutionally protected conduct. U.S.C.A.Const. Amend. 14.

363 Cases that cite this headnote

[8] **Municipal Corporations** Proceedings concerning construction and validity of ordinances

Defendant, charged with violating city antinoise ordinance, had standing to raise an overbroad challenge, notwithstanding that defendant did not urge that, as applied to him, the ordinance punished constitutionally protected activity. U.S.C.A.Const. Amend. 14.

34 Cases that cite this headnote

[9] **Constitutional Law** Noise and Sound Amplification
Education Control and Use in General
Municipal Corporations Public peace and order

City antinoise ordinance prohibiting a person while on ground adjacent to a building in which a school is in session from willfully making a noise or diversion that disrupts or tends to disturb the peace or good order of the school session is not constitutionally overbroad as unduly interfering with First Amendment rights, including right to picket on a public sidewalk near a school, since expressive activity is prohibited only if it materially disrupts classwork. U.S.C.A.Const. Amends. 1, 14.

266 Cases that cite this headnote

[10] **Constitutional Law** Government Property and Events

The right to use a public place for expressive activity may be restricted only for weighty reasons. U.S.C.A.Const. Amend. 1.

25 Cases that cite this headnote

[11] **Constitutional Law** Conduct, protection of

Government has no power to restrict expressive activity because of its message. U.S.C.A.Const. Amends. 1, 14.

7 Cases that cite this headnote

[12] **Constitutional Law** Reasonableness

Reasonable time, place and manner regulations of expressive activity may be necessary to further significant governmental interests, and are permitted. U.S.C.A.Const. Amends. 1, 14.

170 Cases that cite this headnote

[13] **Municipal Corporations** Processions and unusual noises and performances in streets

A demonstration or parade on a large street during rush hour might put an intolerable burden on the essential flow of the traffic, and for that reason could be prohibited. U.S.C.A.Const. Amends. 1, 14.

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9 Cases that cite this headnote

[14] **Constitutional Law** Noise and Sound Amplification

If overamplified loudspeakers assault the citizenry, government may turn them down without violating right of free expression. U.S.C.A.Const. Amends. 1, 14.

16 Cases that cite this headnote

[15] **Constitutional Law** Government property and facilities

Subject to reasonable regulation, peaceful demonstrations in public places are protected by the First Amendment. U.S.C.A.Const. Amend. 1.

39 Cases that cite this headnote

[16] **Constitutional Law** Protests and Demonstrations in General

Where demonstrations turn violent, they lose their protected quality as expression under the First Amendment. U.S.C.A.Const. Amend. 1.

18 Cases that cite this headnote

[17] **Constitutional Law** Time, Place, or Manner Restrictions

The nature of a place, the pattern of its normal activities, dictates the kinds of regulations of time, place, and manner of expressive activities that are reasonable. U.S.C.A.Const. Amends. 1, 14.

66 Cases that cite this headnote

[18] **Constitutional Law** Time, Place, or Manner Restrictions

Crucial question in determining whether regulation of expressive activity is reasonable is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. U.S.C.A.Const. Amends. 1, 14.

147 Cases that cite this headnote

[19] **Constitutional Law** Conduct, protection of

Constitutional Law Strict or exacting scrutiny; compelling interest test

In assessing the reasonableness of regulation of expressive activity, the court must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the state's legitimate interest. U.S.C.A.Const. Amends. 1, 14.

59 Cases that cite this headnote

[20] **Constitutional Law** Government property or facilities

Access to the streets, sidewalks, parks, and other similar public places for the purpose of exercising First Amendment rights cannot constitutionally be denied broadly. U.S.C.A.Const. Amends. 1, 14.

18 Cases that cite this headnote

[21] **Constitutional Law** Freedom of Speech, Expression, and Press

Free expression must not, in the guise of regulation, be abridged or denied. U.S.C.A.Const. Amends. 1, 14.

2 Cases that cite this headnote

[22] **Constitutional Law** Access to Facilities and Other Public Places; Public Forum Issues

Education Control and Use in General

School property may not be declared off limits for expressive activity by students. U.S.C.A.Const. Amends. 1, 14.

29 Cases that cite this headnote

[23] **Constitutional Law** Access to Facilities and Other Public Places; Public Forum Issues

The public sidewalk adjacent to school grounds may not be declared off limits for expressive

activity by members of the public; however, expressive activity may be prohibited if it materially disrupts classwork or involves substantial disorder or invasion of the rights of others. U.S.C.A.Const. Amends. 1, 14.

19 Cases that cite this headnote

[24] **Constitutional Law** Time, Place, or Manner Restrictions

One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place. U.S.C.A.Const. Amends. 1, 14.

6 Cases that cite this headnote

[25] **Education** Speech and assembly; demonstrations

Noisy demonstrations and other expressive conduct which disrupt or are incompatible with normal school activities may be prohibited. U.S.C.A.Const. Amends. 1, 14.

27 Cases that cite this headnote

****2296** Syllabus[*]

***104** 1. Antipicketing ordinance, virtually identical with one invalidated as violative of equal protection in Police Department of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212, is likewise invalid. P. 2298.

2. Antinoise ordinance prohibiting a person while on grounds adjacent to a building in which a school is in session from willfully making a noise or disversion that disturbs or tends to disturb ****2297** the peace or good order of the school session is not unconstitutionally vague or overbroad. The ordinance is not vague since, with fair warning, it prohibits only actual or imminent, and willful, interference with normal school activity, and is not a broad invitation to discriminatory enforcement. Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471; Coates v. Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214, distinguished. The ordinance is not overbroad as unduly interfering with First Amendment rights since expressive activity is prohibited only if it 'materially disrupts classwork.' Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 513, 89 S.Ct. 733, 740, 21 L.Ed.2d 731. Pp. 2298—2306.

46 Ill.2d 486, 263 N.E.2d 866, affirmed in part and reversed in part.

Attorneys and Law Firms

Sophia H. Hall, Chicago, for appellant Richard Grayned.

William E. Collins, Rockford, Ill., for appellee City of Rockford.

Opinion

***105** Mr. Justice MARSHALL delivered the opinion of the Court.

Appellant Richard Grayned was convicted for his part in a demonstration in front of West Senior High School in Rockford, Illinois. Negro students at the school had first presented their grievances to school administrators. When the principal took no action on crucial complaints, a more public demonstration of protest was planned. On April 25, 1969, approximately 200 people—students, their family members, and friends—gathered next to the school grounds. Appellant, whose brother and twin sisters were attending the school, was part of this group. The demonstrators marched around on a sidewalk about 100 feet from the school building, which was set back from the street. Many carried signs which summarized the grievances: 'Black cheerleaders to cheer too'; 'Black history with black teachers'; 'Equal rights, Negro counselors.' Others, without placards, made the 'power to the people' sign with their upraised and clenched fists.

In other respects, the evidence at appellant's trial was sharply contradictory. Government witnesses reported that the demonstrators repeatedly cheered, chanted, baited policemen, and made other noise that was audible in the school; that hundreds of students were distracted from their school activities and lined the classroom windows to watch the demonstration; that some demonstrators successfully yelled to their friends to leave the school building and join the demonstration; that uncontrolled latenesses after period changes in the school were far greater than usual, with late students admitting that they had been watching the demonstration; and that, in general, orderly school procedure was disrupted. Defense witnesses claimed that the demonstrators were at all times quiet and orderly; that they

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did not seek to violate the law, but only to 'make ***106** a point'; that the only noise was made by policemen using loudspeakers; that almost no students were noticeable at the schoolhouse windows; and that orderly school procedure was not disrupted.

After warning the demonstrators, the police arrested 40 of them, including appellant.[1] For participating in the ****2298** demonstration, Grayned was tried and convicted of violating two Rockford ordinances, hereinafter referred to as the 'antipicketing' ordinance and the 'antinoise' ordinance. A $25 fine was imposed for each violation. Since Grayned challenged the constitutionality of each ordinance, he appealed directly to the Supreme Court of Illinois. Ill.Sup.Ct. Rule 302, Ill.Rev.Stat.1971, c. 110A, s 302. He claimed that the ordinances were invalid on their face, but did not urge that, as applied to him, the ordinances had punished constitutionally protected activity. The Supreme Court of Illinois held that both ordinances were constitutional on their face. 46 Ill.2d 492, 263 N.E.2d 866 (1970). We noted probable jurisdiction, 404 U.S. 820, 92 S.Ct. 119, 30 L.Ed.2d 48 (1971). We conclude that the antipicketing ordinance is unconstitutional, but affirm the court below with respect to the antinoise ordinance.

***107** I

[1] At the time of appellant's arrest and conviction, Rockford's antipicketing ordinance provided that
'A person commits disorderly conduct when he knowingly:

'(i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute . . ..' Code of Ordinances, c. 28, s 18.1(i).

This ordinance is identical to the Chicago disorderly conduct ordinance we have today considered in Police Department of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212. For the reasons given in Mosley, we agree with dissenting Justice Schaefer below, and hold that s 18.1(i) violates the Equal Protection Clause of the Fourteenth Amendment. Appellant's conviction under this invalid ordinance must be reversed.[2]

II

The antinoise ordinance reads, in pertinent part, as follows: '(N)o person, while on public or private grounds adjacent to any building in which a school or any ***108** class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof. . . .' Code of Ordinances, c. 28, s 19.2(a).

Appellant claims that, on its face, this ordinance is both vague and overbroad, and therefore unconstitutional. We conclude, however, that the ordinance suffers from neither of these related infirmities.

A. Vagueness

[2] **[3]** **[4]** **[5]** It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity ****2299** to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.[3] Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.[4] A vague law impermissibly delegates ***109** basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.[5] Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,'[6] it 'operates to inhibit the exercise of (those) freedoms.'[7] Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.'[8]

[6] Although the question is close, we conclude that the antinoise ordinance is not impermissibly vague. The court below rejected appellant's arguments 'that proscribed conduct was not sufficiently specified and that police were given too broad a discretion in determining whether conduct was proscribed.' 46 Ill.2d, at 494, 263 N.E.2d, at 867. Although it referred to other, similar statutes it had recently construed

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and upheld, the court ***110** below ****2300** did not elaborate on the meaning of the antinoise ordinance.[9] In this situation, as Mr. Justice Frankfurter put it, we must 'extrapolate its allowable meaning.'[10] Here, we are 'relegated, . . . to the words of the ordinance itself,'[11] to the interpretations the court below has given to analogous statutes,[12] and, perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it.[13] 'Extrapolation,' of course, is a delicate task, for it is not within our power to construe and narrow state laws.[14]

With that warning, we find no unconstitutional vagueness in the antinoise ordinance. Condemned to the use of words, we can never expect mathematical certainty from our language.[15] The words of the Rockford ordinance are marked by 'flexibility and reasonable breadth, rather than meticulous specificity,' Esteban v. Central Missouri State College, 415 F.2d 1077, 1088 (CA8 1969) (Blackmun, J.), cert. denied, 398 U.S. 965, 90 S.Ct. 2169, 26 L.Ed.2d 548 (1970), but we think it is clear what the ordinance as a whole prohibits. Designed, according to its preamble, 'for the protection of Schools,' the ordinance forbids deliberately ***111** noisy or diversionary[16] activity that disrupts or is about to disrupt normal school activities. It forbids this willful activity at fixed times—when school is in session—and at a sufficiently fixed place—'adjacent' to the school.[17] Were we left with just the words of the ordinance, we might be troubled by the imprecision of the phrase 'tends to disturb.'[18] However, in Chicago v. Meyer, 44 Ill.2d 1, 4, 253 N.E.2d 400, 402 (1969), and Chicago v. Gregory, 39 Ill.2d 47, 233 N.E.2d 422 (1968), reversed on other grounds, 394 U.S. 111, 89 S.Ct. 946, 22 L.Ed.2d 134 (1969), the Supreme Court of Illinois construed a Chicago ordinance prohibiting, inter alia, a 'diversion tending to disturb the peace,' and held that it permitted conviction only where there was ****2301** 'imminent threat of violence.' (Emphasis supplied.) See Gregory v. Chicago, 394 U.S. 111, 116—117, 121—122, 89 S.Ct. 946, 947, 951—952 (1969) (Black, J., concurring).[19] Since Meyer was specifically cited in the opinion below, and it in turn drew heavily on Gregory, we think it proper to conclude that the Supreme Court of Illinois would interpret the Rockford ordinance to prohibit only actual ***112** or imminent interference with the 'peace or good order' of the school.[20]

Although the prohibited quantum of disturbance is not specified in the ordinance, it is apparent from the statute's announced purpose that the measure is whether normal school activity has been or is about to be disrupted. We do not have here a vague, general 'breach of the peace' ordinance, but a statute written specifically for the school context, where the prohibited disturbances are easily measured by their impact on the normal activities of the school. Given this 'particular context,' the ordinance gives 'fair notice to those to whom (it) is directed.'[21] Although the Rockford ordinance may not be as precise as the statute we upheld in Cameron v. Johnson, 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968)—which prohibited picketing 'in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from' any courthouse—we think that, as in Cameron, the ordinance here clearly 'delineates its reach in words of common understanding.' Id., at 616, 88 S.Ct., at 1338.

***113** Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965), and Coates v. Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971), on which appellant particularly relies, presented completely different situations. In Cox, a general breach of the peace ordinance had been construed by state courts to mean 'to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet.' The Court correctly concluded that, as construed, the ordinance permitted persons to be punished for merely expressing unpopular views.[22] In Coates, the ordinance punished the sidewalk assembly of three or more persons who 'conduct themselves in a manner annoying to ****2302** persons passing by . . ..' We held, in part, that the ordinance was impermissibly vague because enforcement depended on the completely subjective standard of 'annoyance.'

In contrast, Rockford's antinoise ordinance does not permit punishment for the expression of an unpopular point of view, and it contains no broad invitation to subjective or discriminatory enforcement. Rockford does not claim the broad power to punish all 'noises' and 'diversions.'[23] The vagueness of these terms, by themselves, is dispelled by the ordinance's requirements that (1) the 'noise or diversion' be actually incompatible with normal school activity; (2) there be a demonstrated causality between the disruption that occurs and the 'noise or diversion'; and (3) the acts be ***114** 'willfully' done.[24] 'Undesirables' or their 'annoying' conduct may not be punished. The ordinance does not permit people to 'stand on a public sidewalk . . . only at the whim of any police officer.'[25] Rather, there must be demonstrated

interference with school activities. As always, enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible. The Rockford City Council has made the basic policy choices, and has given fair warning as to what is prohibited. '(T)he ordinance defines boundaries sufficiently distinct' for citizens, policemen, juries, and appellate judges.[26] It is not impermissibly vague.

B. Overbreadth

[7] **[8]** **[9]** A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct.[27] Although appellant does not claim that, as applied to him, the antinoise ordinance has punished protected expressive activity, he claims that the ordinance is overbroad on its face. Because overbroad laws, like vague ones, deter privileged activity, our cases firmly establish appellant's standing to raise an overbreadth challenge.[28] The crucial question, then, is ***115** whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments. Specifically, appellant contends that the Rockford ordinance unduly interferes with First and Fourteenth Amendment rights to picket on a public sidewalk near a school. We disagree.

[10] 'In considering the right of a municipality to control the use of public streets for the expression of religious (or political) views, we start with the words of Mr. Justice Roberts that 'Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing ****2303** public questions.' Hague v. C.I.Q., 1939, 307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed. 1423.' Kunz v. New York, 340 U.S. 290, 293, 71 S.Ct. 312, 314, 95 L.Ed. 280 (1951). See Shuttles-worth v. Birmingham, 394 U.S. 147, 152, 89 S.Ct. 935, 939, 22 L.Ed.2d 162 (1969). The right to use a public place for expressive activity may be restricted only for weighty reasons.

[11] **[12]** **[13]** **[14]** **[15]** **[16]** Clearly, government has no power to restrict such activity because of its message.[29] Our cases make equally clear, however, that reasonable 'time, place and manner' regulations may be necessary to further significant governmental interests, and are permitted.[30] For example, two parades cannot march on the same street simultaneously, and government may allow only one. Cox v. New Hampshire, 312 U.S. 569, 576, 61 S.Ct. 762, 765, 85 L.Ed. 1049 (1941). A demonstration or parade on a large street during rush hour ***116** might put an intolerable burden on the essential flow of traffic, and for that reason could be prohibited. Cox v. Louisiana, 379 U.S., at 554, 85 S.Ct., at 464. If overamplified loudspeakers assault the citizenry, government may turn them down. Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949); Saia v. New York, 334 U.S. 558, 562, 68 S.Ct. 1148, 1150, 92 L.Ed. 1574 (1948). Subject to such reasonable regulation, however, peaceful demonstrations in public places are protected by the First Amendment.[31] Of course, where demonstrations turn violent, they lose their protected quality as expression under the First Amendment.[32]

[17] **[18]** **[19]** **[20]** **[21]** The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.'[33] Although a silent vigil may not unduly interfere with a public library, Brown v. Louisiana, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966), making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved;[34] the regulation must be narrowly ***117** tailored ****2304** to further the State's legitimate interest.[35] Access to the 'streets, sidewalks, parks, and other similar public places . . . for the purpose of exercising (First Amendment rights) cannot constitutionally be denied broadly . . .'[36] Free expression 'must not, in the guise of regulation, be abridged or denied.'[37]

In light of these general principles, we do not think that Rockford's ordinance is an unconstitutional regulation of activity around a school. Our touchstone is Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), in which we considered the question of how to accommodate First Amendment rights with the 'special characteristics of the school environment.' Id., at 506, 89 S.Ct. at 736. Tinker held that the Des Moines School District could not punish students for wearing black armbands to school in protest of the Vietnam war. Recognizing that "wide exposure to . . .

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robust exchange of ideas" is an 'important part of the educational process' and should be nurtured, id., at 512, 89 S.Ct., at 739, we concluded that free expression could not be barred from the school campus. We made clear that 'undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression,' id., at 508, 89 S.Ct., at 737,[38] and that particular expressive activity could not be prohibited because of a 'mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,' Id., at 509, 89 S.Ct., at 738. But we nowhere suggested that students, teachers, or anyone else has an absolute constitutional right to use ***118** all parts of a school building or its immediate environs for his unlimited expressive purposes. Expressive activity could certainly be restricted, but only if the forbidden conduct 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others.' Id., at 513, 89 S.Ct., at 740. The wearing of armbands was protected in Tinker because the students 'neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder.' Id., at 514, 89 S.Ct., at 740. Compare Burnside v. Byars, 363 F.2d 744 (CA5 1966), and Butts v. Dallas Ind. School District, 436 F.2d 728 (CA5 1971), with Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (CA5 1966).

[22] **[23]** Just as Tinker made clear that school property may not be declared off limits for expressive activity by students, we think it clear that the public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public. But in each case, expressive activity may be prohibited if it 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others.' Tinker v. Des Moines School District, 393 U.S., at 513, 89 S.Ct., at 740.[39]

[24] We would be ignoring reality if we did not recognize that the public schools in a community are important institutions, and are often the focus of ****2305** significant grievances.[40] Without interfering with normal school activities, ***119** daytime picketing and handbilling on public grounds near a school can effectively publicize those grievances to pedestrians, school visitors, and deliverymen, as well as to teachers, administrators, and students. Some picketing to that end will be quiet and peaceful, and will in no way disturb the normal functioning of the school. For example, it would be highly unusual if the classic expressive gesture of the solitary picket disrupts anything related to the school, at least on a public sidewalk open to pedestrians.[41] On the other hand, schools could hardly tolerate boisterous demonstrators who drown out classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse.[42]

Rockford's antinoise ordinance goes no further than Tinker says a municipality may go to prevent interference with its schools. It is narrowly tailored to further Rockford's compelling interest in having an undisrupted school session conducive to the students' learning, and does not unnecessarily interfere with First Amendment rights. Far from having an impermissibly broad prophylactic ordinance,[43] Rockford punishes only conduct which disrupts or is about to disrupt normal school activities. That decision is made, as it should be, on an individualized basis, given the particular fact situation. Peaceful picketing which does not interfere with the ordinary functioning of the school is permitted. ***120** And the ordinance gives no license to punish anyone because of what he is saying.[44]

[25] We recognize that the ordinance prohibits some picketing that is neither violent nor physically obstructive. Noisy demonstrations that disrupt or are incompatible with normal school activities are obviously within the ordinance's reach. Such expressive conduct may be constitutionally protected at other places or other times, cf. Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963); Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965), but next to a school, while classes are in session, it may be prohibited.[45] The antinoise ordinance imposes no such restriction on expressive activity before or after the school session, while the student/faculty 'audience' enters and leaves the school.

****2306** In Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965), this Court indicated that, because of the special nature of the place,[46] persons could be constitutionally prohibited from picketing 'in or near' a courthouse 'with the intent of interfering with, obstructing, or impeding administration of justice.' Likewise, in Cameron v. Johnson, 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968), we upheld a statute prohibiting ***121** picketing 'in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouses.'[47] As in those two cases, Rockford's modest restriction on some peaceful picketing represents a

considered and specific legislative judgment that some kinds of expressive activity should be restricted at a particular time and place, here in order to protect the schools.[48] Such a reasonable regulation is not inconsistent with the First and Fourteenth Amendments.[49] The antinoise ordinance is not invalid on its face.[50]

The judgment is affirmed in part and reversed in part.

Affirmed in part and reversed in part.

Mr. Justice BLACKMUN joins in the judgment and in Part I of the opinion of the Court. He concurs in the result as to Part II of the opinion.

Mr. Justice DOUGLAS, dissenting in part.

While I join Part I of the Court's opinion, I would also reverse the appellant's conviction under the antinoise ordinance.

***122** The municipal ordinance on which this case turns is c. 28, s 19.2(a) which provides in relevant part:

'That no person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof.'

Appellant was one of 200 people picketing a school and carrying signs promoting a black cause—'Black cheerleaders to cheer too,' 'Black history with black teachers,' 'We want out rights', and the like. Appellant, however, did not himself carry a picket sign. There was no evidence that he yelled or made any noise whatsoever. Indeed, the evidence reveals that appellant simply marched quietly and on one occasion raised his arm in the 'power to the people' salute.

The pickets were mostly students; but they included former students, parents of students, and concerned citizens. They had made proposals to the school board on their demands and were turned down. Hence the picketing. The picketing ****2307** was mostly by black students who were counseled and advised by a faculty member of the school. The school contained 1,800 students. Those counseling the students advised they must be quiet, walk hand in hand, no whispering, no talking.

Twenty-five policemen were stationed nearby. There was noise but most of it was produced by the police who used loudspeakers to explain the local ordinance and to announce that arrests might be made. The picketing did not stop, and some 40 demonstrators, including appellant, were arrested.

The picketing lasted 20 to 30 minutes and some students went to the windows of the classrooms to observe it. It is not clear how many there were. The picketing ***123** was, however, orderly or, as one officer testified, 'very orderly.' There was no violence. And appellant made no noise whatever.

What Mr. Justice Roberts said in Hague v. CIO, 307 U.S. 496, 515—516, 59 S.Ct. 954, 964, 83 L.Ed. 1423, has never been questioned:

'Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.'

We held in Cox v. Louisiana, 379 U.S. 536, 544—545, 85 S.Ct. 453, 458—459, 13 L.Ed.2d 471, that a State could not infringe the right of free speech and free assembly by convicting demonstrators under a 'disturbing the peace' ordinance where all that the students in that case did was to protest segregation and discrimination against blacks by peaceably assembling and marching to the courthouse where they sang, prayed, and listened to a speech, but where there was no violence, no rioting, no boisterous conduct.

The school where the present picketing occurred was the center of a racial conflict. Most of the pickets were indeed students in the school. The dispute doubtless disturbed the school; and the blaring of the loudspeakers of the police was certainly a 'noise or diversion' in the ***124** meaning of the ordinance. But there was no evidence that appellant was noisy or boisterous or rowdy. He walked quietly and in an orderly manner. As I read this record, the disruptive force loosed at this school was an issue dealing with race—an issue that is preeminently one for solution by First Amendment means.[*] That is all that was done here; and the entire picketing,

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including appellant's part in it, was done in the best First Amendment tradition.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Police officers testified that 'there was no way of picking out any one in particular' while making arrests. Report of Proceedings in Circuit Court, 17th Judicial Circuit, Winnebago County 66. However, apparently only males were arrested. Id., at 65, 135, 147. Since appellant's sole claim in this appeal is that he was convicted under facially unconstitutional ordinances, there is no occasion for us to evaluate either the propriety of these selective arrests or the sufficiency of evidence that appellant himself actually engaged in conduct within the terms of the ordinances. Mr. Justice DOUGLAS, in concluding that appellant's particular behavior was protected by the First Amendment, reaches a question not presented by the parties here or in the court below. See Tr. of Oral Arg. 16—17; Jurisdictional Statement 3; City of Rockford v. Grayned, 46 Ill.2d 492, 494, 263 N.E.2d 866, 867 (1970).

2 In November 1971, the antipicketing ordinance was amended to delete the labor picketing proviso. As Rockford notes, 'This amendment and deletion has, of course, no effect on Appellant's personal situation.' Brief 2. Necessarily, we must consider the facial constitutionality of the ordinance in effect when appellant was arrested and convicted.

3 E.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972); Cramp v. Board of Public Instruction, 368 U.S. 278, 287, 82 S.Ct. 275, 280, 7 L.Ed.2d 285 (1961); United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 811, 98 L.Ed. 989 (1954); Jordan v. De George, 341 U.S. 223, 230—232, 71 S.Ct. 703, 707—708, 95 L.Ed. 886 (1951); Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939); Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926); United States v. L. Cohen Grocery Co., 255 U.S. 81, 89, 41 S.Ct. 298, 300, 65 L.Ed. 516 (1921); International Harvester Co. v. Kentucky, 234 U.S. 216, 223—224, 34 S.Ct. 853, 855—856, 58 L.Ed. 1284 (1914).

4 E.g., Papachristou v. City of Jacksonville, supra; Coates v. Cincinnati, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214 (1971); Gregory v. Chicago, 394 U.S. 111, 120, 89 S.Ct. 946, 951, 22 L.Ed.2d 134 (1969) (Black, J., concurring); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 684—685, 88 S.Ct. 1298, 1303—1304, 20 L.Ed.2d 225 (1968); Ashton v. Kentucky, 384 U.S. 195, 200, 86 S.Ct. 1407, 1410, 16 L.Ed.2d 469 (1966); Giaccio v. Pennsylvania, 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966); Shuttlesworth v. Birmingham, 382 U.S. 87, 90—91, 86 S.Ct. 211, 213—214, 15 L.Ed.2d 176 (1965); Kunz v. New York, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (s951); Saia v. New York, 334 U.S. 558, 559—560, 68 S.Ct. 1148, 1149, 92 L.Ed. 1574 (1948); Thornhill v. Alabama, 310 U.S. 88, 97—98, 60 S.Ct. 736, 741—742, 84 L.Ed. 1093 (1940); Herndon v. Lowry, 301 U.S. 242, 261—264, 57 S.Ct. 732, 740—742, 81 L.Ed. 1066 (1937).

5 Where First Amendment interests are affected, a precise statute 'evincing a legislative judgment that certain specific conduct be . . . proscribed,' Edwards v. South Carolina, 372 U.S. 229, 236, 83 S.Ct. 680, 684, 9 L.Ed.2d 697 (1963), assures us that the legislature has focused on the First Amendment interests and determined that other governmental policies compel regulation. See Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup.Ct.Rev. 1, 32; Garner v. Louisiana, 368 U.S. 157, 200, 202, 82 S.Ct. 248, 271—272, 7 L.Ed.2d 207 (1961) (Harlan, J., concurring in judgment).

6 Baggett v. Bullitt, 377 U.S. 360, 372, 84 S.Ct. 1316, 1323, 12 L.Ed.2d 377 (1964).

7 Cramp v. Board of Public Instruction, 368 U.S., at 287, 82 S.Ct., at 281.

8 Baggett v. Bullitt, supra, 377 U.S., at 372, 84 S.Ct., at 1323, quoting Speiser v. Randall, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 12 L.Ed.2d 1460. See Interstate Circuit v. Dallas, supra, 390 U.S., at 684, 88 S.Ct., at 1303; Ashton v. Kentucky, supra, 384 U.S., at 195, 200—201, 86 S.Ct., at 1407, 1410; Dombrowski v. Pfister, 380 U.S. 479, 486, 85 S.Ct. 1116, 1120, 14 L.Ed.2d 22 (1965); Smith v. California, 361 U.S. 147, 150—152, 80 S.Ct. 215, 217—218, 4 L.Ed.2d 205 (1959); Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1948); Stromberg v. California, 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931).

9 The trial magistrate simply charged the jury in the words of the ordinance. The complaint and verdict form used slightly different language. See n. 24, infra.

10 Garner v. Louisiana, 368 U.S., at 174, 82 S.Ct., at 257 (concurring in judgment).

11 Coates v. Cincinnati, 402 U.S., at 614, 91 S.Ct., at 1688.

12 E.g., Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972).

13 E.g., Lake Carriers Association v. MacMullan, 406 U.S. 498, 506—508, 92 S.Ct. 1749, 1755—1756, 32 L.Ed.2d 257 (1972); Cole v. Richardson, 405 U.S. 676, 92 S.Ct. 1332, 31 L.Ed.2d 593 (1972); Ehlert v. United States, 402 U.S. 99, 105, 107, 91 S.Ct. 1319, 1323, 1324, 28 L.Ed.2d 625 (1971); cf. Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961).

14 United States v. 37 Photographs, 402 U.S. 363, 369, 91 S.Ct. 1400, 1404, 28 L.Ed.2d 822 (1971).

15 It will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of (disputed) terms will be in nice question.' American Communications Assn. v. Douds, 339 U.S. 382, 412, 70 S.Ct. 674, 691, 94 L.Ed. 925 (1950).

16 'Diversion' is defined by Webster's Third New International Dictionary as 'the act or an instance of diverting from one course or use to another . . .: the act or an instance of diverting (as the mind or attention) from some activity or concern . . .: a turning aside . . .: something that turns the mind from serious concerns or ordinary matters and relaxes or amuses.'

17 Cf. Cox v. Louisiana, 379 U.S. 559, 568—569, 85 S.Ct. 476, 482—483, 13 L.Ed.2d 487 (1965) ('near' the courthouse not impermissibly vague).

18 See Gregory v. Chicago, 394 U.S., at 119—120, 89 S.Ct., at 950—951, 22 L.Ed.2d 134 (Black, J., concurring); Gooding v. Wilson, 405 U.S., at 525—527, 92 S.Ct., at 1107—1108; Craig v. Harney, 331 U.S. 367, 372, 67 S.Ct. 1249, 1253, 91 L.Ed. 1546 (1947); cf. Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942) (statute punishing 'fighting words,' that have a 'direct tendency to cause acts of violence,' upheld); Street v. New York, 394 U.S. 576, 592, 89 S.Ct. 1354, 1365 (1969).

19 Cf. Chicago v. Terminiello, 400 Ill. 23, 79 N.E.2d 39 (1948), reversed on other grounds, 337 U.S. 1, 6, 69 S.Ct. 894, 896, 93 L.Ed. 1131 (1949).

20 Some intermediate appellate courts in Illinois appear to have interpreted the phrase 'tending to' out of the Chicago ordinance entirely, at least in some contexts. Chicago v. Hansen, 337 Ill.App. 663, 86 N.E.2d 415 (1949); Chicago v. Holmes, 339 Ill.App. 146, 88 N.E.2d 744 (1949); Chicago v. Nesbitt, 19 Ill.App.2d 220, 153 N.E. 259 (1958); but cf. Chicago v. Williams, 45 Ill.App.2d 327, 195 N.E.2d 425 (1963).

In its brief, the city of Rockford indicates that its sole concern is with actual disruption. '(A) court and jury (are) charged with the duty of determining whether or not . . . a school has been disrupted and that the defendant's conduct, (no matter what it was), caused or contributed to cause the disruption.' Brief for Appellee 16 (emphasis supplied). This was the theory on which the city tried appellant's case to the jury, Report, supra, n. 1, at 12—13, although the jury was instructed in the words of the ordinance. As already noted, supra, n. 1, no challenge is made here to the Rockford ordinance as applied in this case.

21 American Communications Assn. v. Douds, 339 U.S., at 412, 70 S.Ct., at 691.

22 Cf. Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963); Cantwell v. Connecticut, 310 U.S. 296, 308, 60 S.Ct. 900, 905, 84 L.Ed. 1213 (1940). Similarly, in numerous other cases, we have condemned broadly worded licensing ordinances which grant such standardless discretion to public officials that they are free to censor ideas and enforce their own personal preferences. Shuttlesworth v. Birmingham, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969); Staub v. City of Baxley, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958); Saia v. New York, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948); Schneider v. State, 308 U.S. 147, 163—164, 60 S.Ct. 146, 151—152, 84 L.Ed. 155 (1939); Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938); Hague v. CIO, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939).

23 Cf. Cox v. Louisiana, 379 U.S. 536, 546—550, 85 S.Ct. 453, 459—462, 13 L.Ed.2d 471 (1965); Edwards v. South Carolina, 372 U.S., at 234—237, 83 S.Ct., at 682—684.

24 Tracking the complaint, the jury verdict found Grayned guilty of "(w) ilfully causing diversion of good order of public school in session, in that while on school grounds and while school was in session, did wilfully make and assist in the making of a diversion which tended to disturb the peace and good order of the school session and class thereof."

25 Shuttlesworth v. Birmingham, 382 U.S., at 90, 86 S.Ct., at 213.

26 Chicago v. Fort, 46 Ill.2d 12, 16, 262 N.E.2d 473, 476 (1970), a case cited in the opinion below.

27 See Zwickler v. Koota, 389 U.S. 241, 249—250, 88 S.Ct. 391, 396—397, 19 L.Ed.2d 444 (1967), and cases cited.

28 E.g., Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972); Coates v. Cincinnati, 402 U.S., at 616, 91 S.Ct., at 1689; Dombrowski v. Pfister, 380 U.S., at 486, 85 S.Ct., at 1120, and cases cited; Kunz v. New York, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951).

29 Police Department of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972).

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30 Cox v. New Hampshire, 312 U.S. 569, 575—576, 61 S.Ct. 762, 765, 766, 85 L.Ed. 1049 (1941); Kunz v. New York, 340 U.S., at 293—294, 71 S.Ct., at 314—315; Poulos v. New Hampshire, 345 U.S. 395, 398, 73 S.Ct. 760, 762, 97 L.Ed. 1105 (1953); Cox v. Louisiana, 379 U.S., at 554—555, 85 S.Ct., at 464—465; Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965); Adderley v. Florida, 385 U.S. 39, 46—48, 87 S.Ct. 242, 246—247, 17 L.Ed.2d 149 (1966); Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308, 320—321, 88 S.Ct. 1601, 1609—1610, 20 L.Ed.2d 603 (1968); Shuttlesworth v. Birmingham, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969).

31 Police Department of Chicago v. Mosley, 408 U.S., at 95—96, 92 S.Ct., at 2289—2290, and cases cited.

32 See generally T. Emerson, The System of Freedom of Expression 328—345 (1970).

33 Wright, The Constitution on the Campus, 22 Vand.L.Rev. 1027, 1042 (1969). Cf. Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965); Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966); Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968); Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

34 E.g., Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939); Talley v. California, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960); Saia v. New York, 334 U.S., at 562, 68 S.Ct., at 1150; Cox v. New Hampshire, 312 U.S., at 574, 61 S.Ct., at 765; Hague v. CIO, 307 U.S., at 516, 59 S.Ct., at 964. See generally Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup.Ct.Rev. 1.

35 De Jonge v. Oregon, 299 U.S. 353, 364—365, 57 S.Ct. 255, 259—260, 81 L.Ed. 278 (1937); Lovell v. Griffin, 303 U.S., at 451, 58 S.Ct., at 668; Schneider v. State, 308 U.S., at 164, 60 S.Ct., at 152; Cantwell v. Connecticut, 310 U.S., at 307, 60 S.Ct., at 905; Cox v. Louisiana, 379 U.S., at 562—564, 85 S.Ct., at 479—480; Davis v. Francois, 395 F.2d 730 (CA5 1968). Cf. Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960); NAACP v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405 (1963).

36 Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S., at 315, 88 S.Ct., at 1607.

37 Hague v. CIO, 307 U.S., at 516, 59 S.Ct., at 964.

38 Cf. Hague v. CIO, supra, 307 U.S., at 516, 59 S.Ct., at 964.

39 In Tinker we recognized that the principle of that case was not limited to expressive activity within the school building itself. Id., 393 U.S. at 512 n. 6, 513—514, 89 S.Ct., at 739, 740—741. See Esteban v. Central Missouri State College, 415 F.2d 1077 (CA8 1969) (Blackmun, J.), cert. denied, 398 U.S. 965, 90 S.Ct. 2169, 26 L.Ed.2d 548 (1970); Jones v. Board of Regents, 436 F.2d 618 (CA9 1970); Hammond v. South Carolina State College, 272 F.Supp. 947 (S.C.1967) cited in Tinker.

40 Cf. Thornhill v. Alabama, 310 U.s., at 102, 60 S.Ct., at 744. It goes without saying that 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' Schneider v. State, 308 U.S., at 163, 60 S.Ct., at 151.

41 Cf. Jones v. Board of Regents, supra.

42 Cf. Barker v. Hardway, 283 F.Supp. 228 (SD W.Va.), aff'd 399 F.2d 638 (CA4 1968), cert. denied, 394 U.S. 905, 89 S.Ct. 1009, 22 L.Ed.2d 217 (1969) (Fortas, J., concurring).

43 See Jones v. Board of Regents, supra; Hammond v. South Carolina State College, supra.

44 Compare Scoville v. Board of Education, 425 F.2d 10 (CA7), cert. denied, 400 U.S. 826, 91 S.Ct. 51, 27 L.Ed.2d 55 (1970); Dickey v. Alabama State Board of Education, 273 F.Supp. 613 (MD Ala.1967) (cited in Tinker).

45 Different considerations, of course, apply in different circumstances. For example, restrictions appropriate to a single-building high school during class hours would be inappropriate in many open areas on a college campus, just as an assembly that is permitted outside a dormitory would be inappropriate in the middle of a mathematics class.

46 Noting the need 'to assure that the administration of justice at all stages is free from outside control and influence,' we emphasized that '(a) State may protect against the possibility of a conclusion by the public . . . (that a) judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process.' 379 U.S., at 562, 565, 85 S.Ct., at 480.

47 Quoting Schneider v. State, 308 U.S., at 161, 60 S.Ct., at 150, we noted that "such activity bears no necessary relationship to the freedom to . . . distribute information or opinion." Id., at 617, 88 S.Ct., at 1339.

48 Cf. Garner v. Louisiana, 368 U.S., at 202—203, 82 S.Ct., at 271—272 (Harlan, J., concurring in judgment).

49 Cf. Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966). In Adderley, the Court held that demonstrators could be barred from jailhouse grounds not ordinarily open to the public, at least where the demonstration obstructed the jail driveway and interfered with the functioning of the jail. In Tinker we noted that 'a school is not like a hospital or a jail enclosure.' 393 U.S., at 512 n. 6, 89 S.Ct., at 739.

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50 It is possible, of course, that there will be unconstitutional applications; but that is not a matter which presently concerns us. See Shuttlesworth v. Birmingham, 382 U.S., at 91, 86 S.Ct., at 213, and n. 1, supra.

* The majority asserts that 'appellant's sole claim . . . is that he was convicted under facially unconstitutional ordinances' and that there is, therefore, no occasion to consider whether his activities were protected by the First Amendment. Ante, at 2297 n. 1. Appellant argues, however, that the ordinance is overly broad in that it punishes constitutionally protected activity. A statute may withstand an overbreadth attack 'only if, as authoritatively construed . . ., it is not susceptible of application to speech . . . that is protected by the First and Fourteenth Amendments.' Gooding v. Wilson, 405 U.S. 518, 520, 92 S.Ct. 1103, 1105, 31 L.Ed.2d 408 (1972). If the ordinance applies to appellant's activities and if appellant's activities are constitutionally protected, then the ordinance is overly broad and, thus, unconstitutional. There is no merit, therefore, to the Court's suggestion that the question whether 'appellant's particular behavior was protected by the First Amendment,' ante, at 2297 n. 1, is not presented.

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Not Followed on State Law Grounds M.E.K. v. R.L.K., Fla.App. 5 Dist., February 24, 2006

96 S.Ct. 893
Supreme Court of the United States

F. David MATHEWS, Secretary of Health, Education, and Welfare, Petitioner, v. George H. ELDRIDGE.

No. 74-204.
|
Argued Oct. 6, 1975.
|
Decided Feb. 24, 1976.

Synopsis
A person whose social security disability benefits had been terminated brought an action challenging the constitutional validity of the administrative procedures established by the Secretary of Health, Education and Welfare for assessing whether there exists a continuing disability. The United States District Court for the Western District of Virginia, 361 F.Supp. 520, determined that the administrative procedures in question were unconstitutional, and the Court of Appeals, 493 F.2d 1230, affirmed. On grant of certiorari, the Supreme Court, Mr. Justice Powell, held that an evidentiary hearing is not required prior to termination of disability benefits, and that the present administrative procedures for such termination fully comport with due process.

Reversed.

Mr. Justice Brennan dissented and filed opinion in which Mr. Justice Marshall concurred.

West Headnotes (11)

[1] **Social Security** Exhaustion of other remedies

Despite disability benefit claimant's failure to exhaust administrative remedies under Social Security Act after termination of disability benefits, district court had jurisdiction to entertain his claim that evidentiary hearing was required prior to termination of such benefits where claimant's answers to questionnaire and letter to state agencies specifically presented claim that his benefits should not be terminated because he was still disabled and where claimant's interest in having particular issue promptly resolved was so great that deference to decision of Secretary of Health, Education and Welfare whether to waive exhaustion requirements was inappropriate. Social Security Act, § 205(a, g, h) as amended 42 U.S.C.A. § 405(a, g, h); Fed.Rules Civ.Proc. rules 8(c), 12(h)(1), 28 U.S.C.A.; Social Security Administration Regulations, §§ 404.910, 404.916, 404.940, 42 U.S.C.A. App.; 28 U.S.C.A. §§ 1257, 1291.

1479 Cases that cite this headnote

[2] **Social Security** Exhaustion of other remedies

Secretary of Health, Education and Welfare may waive requirement that administrative remedies be exhausted before court review of agency determination is sought if Secretary satisfies himself, at any stage of administrative process, that no further review is warranted either because internal needs of agency are fulfilled or because relief that is sought is beyond his power to confer. Social Security Act, § 205(g) as amended 42 U.S.C.A. § 405(g).

701 Cases that cite this headnote

[3] **Constitutional Law** Social Security

Interest by individual in continued receipt of social security benefits is statutorily-created property interest protected by due process clause of Fifth Amendment. Social Security Act, § 201 et seq. as amended 42 U.S.C.A. § 401 et seq.; U.S.C.A.Const. Amend. 5.

1128 Cases that cite this headnote

[4] **Constitutional Law** Notice and Hearing

Fundamental requirement of due process is opportunity to be heard at meaningful time and

in meaningful manner. U.S.C.A.Const. Amends. 5, 14.

4013 Cases that cite this headnote

[5] **Constitutional Law** Factors considered; flexibility and balancing

Due process is not technical conception with fixed content unrelated to time, place and circumstances; rather, it is flexible and calls for such procedural protections as particular situation demands. U.S.C.A.Const. Amends. 5, 14.

1745 Cases that cite this headnote

[6] **Constitutional Law** Factors considered; flexibility and balancing

Identification of specific dictates of due process generally requires consideration of three distinct factors: private interest that will be affected by official action; risk of erroneous deprivation of such interest through procedures used, and probable value, if any, of additional or substitute procedural safeguards; and government's interest, including function involved and fiscal and administrative burdens that additional or substitute procedural requirements would entail. U.S.C.A.Const. Amends. 5, 14.

7538 Cases that cite this headnote

[7] **Constitutional Law** Disability benefits

Evidentiary hearing is not required prior to termination of social security disability benefits; present administrative procedures for such terminations fully comport with due process. U.S.C.A.Const. Amends. 5, 14; Social Security Act, §§ 201(b), 202(b–d), 204, 204(b), 205(a, g, h), 215, 216(i)(2)(D), 221, 221(b, c), 223, 223(a)(1, 2), (d)(1), (d)(1)(A), (d)(2)(A), (d)(3), 224, 1614(a)(3), 1631(c) as amended 42 U.S.C.A. §§ 401 et seq., 401(b), 402(b–d), 404, 404(b) 405(a, g, h), 415, 416(i)(2)(D), 421, 421(b, c), 423, 423(a)(1, 2), (d)(1), (d)(1)(A), (d)(2)(A), (d)(3), 424a, 1382c(a)(3), 1383(c); Social Security Administration Regulations, §§ 404.408, 404.501–404.515, 404.503, 404.504, 404.907, 404.909, 404.910, 404.916, 404.917, 404.927, 404.934, 404.940, 404.945, 404.951, 42 U.S.C.A. App.; 28 U.S.C.A. §§ 1257, 1291, 1361.

336 Cases that cite this headnote

[8] **Constitutional Law** Administrative Agencies and Proceedings in General

Degree of potential deprivation that may be created by particular decision is factor to be considered in assessing validity of administrative decision-making process from due process standpoint. U.S.C.A.Const. Amends. 5, 14.

67 Cases that cite this headnote

[9] **Constitutional Law** Factors considered; flexibility and balancing

Procedural due process rules are shaped by risk of error inherent in truth-finding process as applied to generality of cases, not rare exceptions. U.S.C.A.Const. Amends. 5, 14.

439 Cases that cite this headnote

[10] **Constitutional Law** Administrative Agencies and Proceedings in General

Financial cost alone is not controlling weight in determining whether due process requires particular procedural safeguard prior to some administrative decision; but government's interest, and hence that of public, in conserving scarce fiscal and administrative resources, is factor which must be weighed. U.S.C.A.Const. Amends. 5, 14.

1072 Cases that cite this headnote

[11] **Constitutional Law** Notice and Hearing

Essence of due process is requirement that person in jeopardy of serious loss be given notice of case against him and opportunity to meet it; all that is necessary is that procedure be tailored, in light of decision to be made, to capacities and circumstances of those who are to be heard, to insure that they are given meaningful

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opportunity to present their case. U.S.C.A.Const. Amends. 5, 14.

3187 Cases that cite this headnote

****895** ***319** *Syllabus*[*]

In order to establish initial and continued entitlement to disability benefits under the Social Security Act (Act), a worker must demonstrate that, inter alia, he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . ." The worker bears the continuing burden of showing, by means of "medically acceptable . . . techniques" that his impairment is of such severity that he cannot perform his previous work or any other kind of gainful work. A state agency makes the continuing assessment of the worker's eligibility for benefits, obtaining information from the worker and his sources of medical treatment. The agency may arrange for an independent medical examination to resolve conflicting information. If the agency's tentative assessment of the beneficiary's condition differs from his own, the beneficiary is informed that his benefits may be terminated, is provided a summary of the evidence, and afforded an opportunity to review the agency's evidence. The state agency then makes a final determination, which is reviewed by the Social Security Administration (SSA). If the SSA accepts the agency determination it gives written notification to the beneficiary of the reasons for the decision and of his right to de novo state agency reconsideration. Upon acceptance by the SSA, benefits are terminated effective two months after the month in which recovery is found to have occurred. If, after reconsideration by the state agency and SSA review, the decision remains adverse to the recipient, he is notified of his right to an evidentiary hearing before an SSA administrative law judge. If an adverse decision results, the recipient may request discretionary review by the SSA Appeals Council, and finally may obtain judicial review. If it is determined after benefits are terminated that the claimant's disability extended beyond the date of cessation initially established, he is entitled to retroactive payments. Retroactive adjustments are also made for overpayments. A few years after respondent was first awarded disability benefits he received and completed a questionnaire ***320** from the monitoring state agency. After considering the information contained therein and obtaining reports from his doctor and an independent medical consultant, the agency wrote respondent that it had tentatively determined that his disability had ceased in May 1972 and advised him that he might request a reasonable time to furnish additional information. In a reply letter respondent disputed one characterization of his medical condition and indicated that the agency had enough evidence to establish his disability. The agency then made its final determination reaffirming its tentative decision. This determination was accepted by the SSA, which notified respondent in July that his benefits would end after that month and that he had a right to state agency reconsideration within six months. Instead of requesting such reconsideration respondent brought this action challenging the constitutionality of the procedures for terminating disability benefits and seeking reinstatement of benefits pending a hearing. The District Court, relying in part on Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287, held that the termination procedures violated procedural due process and concluded that prior to termination of benefits respondent was entitled to an evidentiary hearing of the type provided welfare beneficiaries under Title IV of the Act. The Court of Appeals affirmed. Petitioner contends, inter alia, that the District Court is barred from considering respondent's action by Weinberger v. Salfi, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522, which held that district courts are precluded from exercising jurisdiction over an action seeking a review of a decision of the Secretary of Health, Education, and Welfare regarding benefits under the Act except ****896** as provided in 42 U.S.C. s 405(g), which grants jurisdiction only to review a "final" decision of the Secretary made after a hearing to which he was a party. Held :

1. The District Court had jurisdiction over respondent's constitutional claim, since the denial of his request for benefits was a final decision with respect to that claim for purposes of s 405(g) jurisdiction. Pp. 898-902.

(a) The s 405(g) finality requirement consists of the waivable requirement that the administrative remedies prescribed by the Secretary be exhausted and the nonwaivable requirement that a claim for benefits shall have been presented to the Secretary. Respondent's answers to the questionnaire and his letter to the state agency specifically presented the claim that his benefits should not be terminated because he was still disabled, and thus satisfied the nonwaivable requirement. Pp. 899-901.

***321** (b) Although respondent concededly did not exhaust the Secretary's internal-review procedures and ordinarily only the Secretary has the power to waive exhaustion, this is a case where the claimant's interest in having a

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particular issue promptly resolved is so great that deference to the Secretary's judgment is inappropriate. The facts that respondent's constitutional challenge was collateral to his substantive claim of entitlement and that (contrary to the situation in Salfi) he colorably claimed that an erroneous termination would damage him in a way not compensable through retroactive payments warrant the conclusion that the denial of his claim to continued benefits was a sufficiently "final decision" with respect to his constitutional claim to satisfy the statutory exhaustion requirement. Pp. 900-902.

2. An evidentiary hearing is not required prior to the termination of Social Security disability payments and the administrative procedures prescribed under the Act fully comport with due process. Pp. 901-910.

(a) "(D)ue process is flexible and calls for such procedural protections as the particular situation demands," Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484. Resolution of the issue here involving the constitutional sufficiency of administrative procedures prior to the initial termination of benefits and pending review, requires consideration of three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail. Pp. 901-903.

(b) The private interest that will be adversely affected by an erroneous termination of benefits is likely to be less in the case of a disabled worker than in the case of a welfare recipient, like the claimants in Goldberg, supra. Eligibility for disability payments is not based on financial need, and although hardship may be imposed upon the erroneously terminated disability recipient, his need is likely less than the welfare recipient. In view of other forms of government assistance available to the terminated disability recipient, there is less reason than in Goldberg to depart from the ordinary principle that something less than an evidentiary hearing is sufficient prior to adverse administrative action. Pp. 905-907.

(c) The medical assessment of the worker's condition implicates ***322** a more sharply focused and easily documented decision than the typical determination of welfare entitlement. The decision whether to discontinue disability benefits will normally turn upon "routine, standard, and unbiased medical reports by physician specialists," Richardson v. Perales, 402 U.S. 389, 404, 91 S.Ct. 1420, 1428-1429, 28 L.Ed.2d 842. In a disability situation the potential value of an evidentiary hearing is thus substantially less than in the welfare context. Pp. 907-908.

(d) Written submissions provide the disability recipient with an effective means of communicating his case to the decision-maker. The detailed questionnaire identifies ****897** with particularity the information relevant to the entitlement decision. Information critical to the decision is derived directly from medical sources. Finally, prior to termination of benefits, the disability recipient or his representative is afforded full access to the information relied on by the state agency, is provided the reasons underlying its tentative assessment, and is given an opportunity to submit additional arguments and evidence. Pp. 907, 908.

(e) Requiring an evidentiary hearing upon demand in all cases prior to the termination of disability benefits would entail fiscal and administrative burdens out of proportion to any countervailing benefits. The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances, and here where the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action but also assure a right to an evidentiary hearing as well as subsequent judicial review before the denial of his claim becomes final, there is no deprivation of procedural due process. Pp. 909-910.

493 F.2d 1230, reversed.

Attorneys and Law Firms

***323** Donald E. Earls, Norton, Va., for respondent.

Opinion

Mr. Justice POWELL delivered the opinion of the Court.

The issue in this case is whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing.

I

Cash benefits are provided to workers during periods in which they are completely disabled under the disability insurance benefits program created by the 1956 amendments to Title II of the Social Security Act. 70 Stat. 815, 42 U.S.C. s 423.[1] Respondent Eldridge was first awarded benefits in June 1968. In March 1972, he received a questionnaire from the state agency charged with monitoring his medical condition. Eldridge completed ***324** the questionnaire, indicating that his condition had not improved and identifying the medical sources, including physicians, from whom he had received treatment recently. The state agency then obtained reports from his physician and a psychiatric consultant. After considering these reports and other information in his file the agency informed Eldridge by letter that it had made a tentative determination that his disability had ceased in May 1972. The letter included a statement of reasons for the proposed termination of benefits, and advised Eldridge that he might request reasonable time in which to obtain and submit additional information pertaining to his condition.

In his written response, Eldridge disputed one characterization of his medical condition and indicated that the agency already had enough evidence to establish his disability.[2] The state agency then made its final determination that he had ceased to be disabled in May 1972. This determination was accepted by the Social Security Administration ****898** (SSA), which notified Eldridge in July that his benefits would terminate after that month. The notification also advised him of his right to seek reconsideration by the state agency of this initial determination within six months.

Instead of requesting reconsideration Eldridge commenced this action challenging the constitutional validity ***325** of the administrative procedures established by the Secretary of Health, Education, and Welfare for assessing whether there exists a continuing disability. He sought an immediate reinstatement of benefits pending a hearing on the issue of his disability.[3] 361 F.Supp. 520 (W.D.Va.1973). The Secretary moved to dismiss on the grounds that Eldridge's benefits had been terminated in accordance with valid administrative regulations and procedures and that he had failed to exhaust available remedies. In support of his contention that due process requires a pretermination hearing, Eldridge relied exclusively upon this Court's decision in Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), which established a right to an "evidentiary hearing" prior to termination of welfare benefits.[4] The Secretary contended that Goldberg was not controlling since eligibility for disability benefits, unlike eligibility for welfare benefits, is not based on financial need and since issues of credibility and veracity do not play a significant role in the disability entitlement decision, which turns primarily on medical evidence.

The District Court concluded that the administrative procedures pursuant to which the Secretary had terminated Eldridge's benefits abridged his right to procedural ***326** due process. The court viewed the interest of the disability recipient in uninterrupted benefits as indistinguishable from that of the welfare recipient in Goldberg. It further noted that decisions subsequent to Goldberg demonstrated that the due process requirement of pretermination hearings is not limited to situations involving the deprivation of vital necessities. See Fuentes v. Shevin, 407 U.S. 67, 88-89, 92 S.Ct. 1983, 1998-1999, 32 L.Ed.2d 556 (1972); Bell v. Burson, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90 (1971). Reasoning that disability determinations may involve subjective judgments based on conflicting medical and nonmedical evidence, the District Court held that prior to termination of benefits Eldridge had to be afforded an evidentiary hearing of the type required for welfare beneficiaries under Title IV of the Social Security Act. 361 F.Supp., at 528.[5] Relying entirely upon the District Court's opinion, the Court of Appeals for the Fourth Circuit affirmed the injunction barring termination of Eldridge's benefits prior to an evidentiary hearing. 493 F.2d 1230 (1974).[6] We reverse.

****899** II

[1] At the outset we are confronted by a question as to whether the District Court had jurisdiction over this suit. The Secretary contends that our decision last Term in Weinberger v. Salfi, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), bars the District Court from considering Eldridge's action. Salfi was an action challenging the Social Security Act's ***327** duration-of-relationship eligibility requirements for surviving wives and stepchildren of deceased wage earners. We there held that 42 U.S.C. s 405(h)[7] precludes federal-question jurisdiction in an action challenging denial of claimed benefits. The only avenue for judicial review is 42 U.S.C. s 405(g), which requires exhaustion of the administrative remedies provided under the Act as a jurisdictional prerequisite.

Section 405(g) in part provides:

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"Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow."[8]

***328** On its face s 405(g) thus bars judicial review of any denial of a claim of disability benefits until after a "final decision" by the Secretary after a "hearing." It is uncontested that Eldridge could have obtained full administrative review of the termination of his benefits, yet failed even to seek reconsideration of the initial determination. Since the Secretary has not "waived" the finality requirement as he had in Salfi, supra, at 767, 95 S.Ct., at 2467-2468, he concludes that Eldridge cannot properly invoke s 405(g) as a basis for jurisdiction. We disagree.

Salfi identified several conditions which must be satisfied in order to obtain judicial review under s 405(g). Of these, the requirement that there be a final decision by the Secretary after a hearing was regarded as "central to the requisite grant of subject-matter jurisdiction . . .." 422 U.S., at 764, 95 S.Ct., at 2466.[9] Implicit in Salfi however, is the principle that this condition consists of two elements, only one of which is purely "jurisdictional" in the sense that it cannot be "waived" by the Secretary in a particular case. The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary. Absent such a claim there can be no "decision" of any type. And some decision by the Secretary is clearly required by the statute.

***329** ****900** That this second requirement is an essential and distinct precondition for s 405(g) jurisdiction is evident from the different conclusions that we reached in Salfi with respect to the named appellees and the unnamed members of the class. As to the latter the complaint was found to be jurisdictionally deficient since it "contain(ed) no allegations that they have even filed an application with the Secretary . . . ." 422 U.S., at 764, 95 S.Ct., at 2466. With respect to the named appellees, however, we concluded that the complaint was sufficient since it alleged that they had "fully presented their claims for benefits 'to their district Social Security Office and, upon denial, to the Regional Office for reconsideration.' " Id., at 764-765, 95 S.Ct., at 2466. Eldridge has fulfilled this crucial prerequisite. Through his answers to the state agency questionnaire, and his letter in response to the tentative determination that his disability had ceased, he specifically presented the claim that his benefits should not be terminated because he was still disabled. This claim was denied by the state agency and its decision was accepted by the SSA.

The fact that Eldridge failed to raise with the Secretary his constitutional claim to a pretermination hearing is not controlling.[10] As construed in Salfi, s 405(g) requires only that there be a "final decision" by the Secretary with respect to the claim of entitlement to benefits. Indeed, the named appellees in Salfi did not present their constitutional claim to the Secretary. Weinberger v. Salfi, O.T.1974, No. 74-214, App. 11, 17-21. The situation here is not identical to Salfi, for, while the ***330** Secretary had no power to amend the statute alleged to be unconstitutional in that case, he does have authority to determine the timing and content of the procedures challenged here. 42 V.S.C. s 405(a). We do not, however, regard this difference as significant. It is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context. The Secretary would not be required even to consider such a challenge.

[2] As the nonwaivable jurisdictional element was satisfied, we next consider the waivable element. The question is whether the denial of Eldridge's claim to continued benefits was a sufficiently "final" decision with respect to his constitutional claim to satisfy the statutory exhaustion requirement. Eldridge concedes that he did not exhaust the full set of internal-review procedures provided by the Secretary. See 20 CFR ss 404.910, 404.916, 404.940 (1975). As Salfi recognized, the Secretary may waive the exhaustion requirement if he satisfies himself, at any stage of the administrative process, that no further review is warranted either because the internal needs of the agency are fulfilled or because the relief that is sought is beyond his power to confer. Salfi suggested that under s 405(g) the power to determine when finality has occurred ordinarily rests with the Secretary since ultimate responsibility for the integrity of the administrative program is his. But cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate. This is such a case.

Eldridge's constitutional challenge is entirely collateral to his substantive claim of entitlement. Moreover, there ***331** is a crucial distinction between the nature of the constitutional

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claim asserted here and that raised in Salfi. A claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a postdeprivation hearing. ****901** See Regional Rail Reorganization Act Cases, 419 U.S. 102, 156, 95 S.Ct. 335, 365, 42 L.Ed.2d 320 (1974). In light of the Court's prior decisions, see, e. g., Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), Eldridge has raised at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments.[11] Thus, unlike the situation in Salfi, denying Eldridge's substantive ***332** claim "for other reasons" or upholding it "under other provisions" at the post-termination stage, 422 U.S., at 762, 95 S.Ct., at 2465, would not answer his constitutional challenge.

We conclude that the denial of Eldridge's request for benefits constitutes a final decision for purposes of s 405(g) jurisdiction over his constitutional claim. We now proceed to the merits of that claim.[12]

III

A

[3] Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. The Secretary does not contend that procedural due process is inapplicable to terminations of Social Security disability benefits. He recognizes, as has been implicit in our prior decisions, e. g., Richardson v. Belcher, 404 U.S. 78, 80-81, 92 S.Ct. 254, 256-257, 30 L.Ed.2d 231 (1971); Richardson v. Perales, 402 U.S. 389, 401-402, 91 S.Ct. 1420, 1427-1428, 28 L.Ed.2d 842 (1971); Flemming v. Nestor, 363 U.S. 603, 611, 80 S.Ct. 1367, 1372-1373, 4 L.Ed.2d 1435 (1960), that the interest of an individual in continued receipt of these benefits is a statutorily created "property" interest protected by the Fifth Amendment. Cf. Arnett v. Kennedy, 416 U.S. 134, 166, 94 S.Ct. 1633, 1650, 40 L.Ed.2d 15 (Powell, J., concurring in part) (1974); Board of Regents v. Roth, 408 U.S. 564, 576-578, 92 S.Ct. 2701, 2708-2710, 33 L.Ed.2d 548 (1972); Bell v. Burson, 402 U.S., at 539, 91 S.Ct., at 1589; Goldberg v. Kelly, 397 U.S., at 261-262, 90 S.Ct., at 1016-1017. Rather, the Secretary contends that the existing administrative procedures, detailed below, provide all the process ***333** that is constitutionally due before a recipient can be deprived of that interest.

****902** **[4]** This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. Wolff v. McDonnell, 418 U.S. 539, 557-558, 94 S.Ct. 2963, 2975-2976, 41 L.Ed.2d 935 (1974). See, e. g. Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 596-597, 51 S.Ct. 608, 611-612, 75 L.Ed. 1289 (1931). See also Dent v. West Virginia, 129 U.S. 114, 124-125, 9 S.Ct. 231, 234, 32 L.Ed. 623 (1889). The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). See Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). Eldridge agrees that the review procedures available to a claimant before the initial determination of ineligibility becomes final would be adequate if disability benefits were not terminated until after the evidentiary hearing stage of the administrative process. The dispute centers upon what process is due prior to the initial termination of benefits, pending review.

In recent years this Court increasingly has had occasion to consider the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter. In only one case, Goldberg v. Kelly, 397 U.S., at 266-271, 90 S.Ct., at 1019-1022, 25 L.Ed.2d 287, has the Court held that a hearing closely approximating a judicial trial is necessary. In other cases requiring some type of pretermination hearing as a matter of constitutional right the Court has spoken sparingly about the requisite procedures. ***334** SniaDachv. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), involving garnishment of wages, was entirely silent on the matter. In Fuentes v. Shevin, 407 U.S., at 96-97, 92 S.Ct., at 2002-2003, 32 L.Ed.2d 556, the Court said only that in a replevin suit between two private parties the initial determination required something more than an ex parte proceeding before a court clerk. Similarly, Bell v. Burson, supra, at 540, 91 S.Ct., at 1590, 29 L.Ed.2d 90, held, in the context of the revocation of a state-granted driver's license,

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that due process required only that the prerevocation hearing involve a probable-cause determination as to the fault of the licensee, noting that the hearing "need not take the form of a full adjudication of the question of liability." See also North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 607, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975). More recently, in Arnett v. Kennedy, supra, we sustained the validity of procedures by which a federal employee could be dismissed for cause. They included notice of the action sought, a copy of the charge, reasonable time for filing a written response, and an opportunity for an oral appearance. Following dismissal, an evidentiary hearing was provided. 416 U.S., at 142-146, 94 S.Ct., at 1638-1640.

[5] **[6]** These decisions underscore the truism that " '(d)ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). "(D)ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. Arnett v. Kennedy, supra, 416 U.S., at 167-168, 94 S.Ct., at 1650-1651 (Powell, J., concurring in part); Goldberg v. Kelly, supra, 397 U.S., at 263-266, 90 S.Ct., at 1018-1020; ****903** Cafeteria Workers v. McElroy, supra, 367 U.S., at 895, 81 S.Ct., at 1748-1749. More precisely, our prior decisions ***335** indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e. g., Goldberg v. Kelly, supra, 397 U.S., at 263-271, 90 S.Ct., at 1018-1022.

We turn first to a description of the procedures for the termination of Social Security disability benefits and thereafter consider the factors bearing upon the constitutional adequacy of these procedures.

B

The disability insurance program is administered jointly by state and federal agencies. State agencies make the initial determination whether a disability exists, when it began, and when it ceased. 42 U.S.C. s 421(a).[13] The standards applied and the procedures followed are prescribed by the Secretary, see s 421(b), who has delegated his responsibilities and powers under the Act to the SSA. See 40 Fed.Reg. 4473 (1975).

***336** In order to establish initial and continued entitlement to disability benefits a worker must demonstrate that he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . . ." 42 U.S.C. s 423(d)(1)(A).

To satisfy this test the worker bears a continuing burden of showing, by means of "medically acceptable clinical and laboratory diagnostic techniques," s 423(d)(3), that he has a physical or mental impairment of such severity that
"he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." s 423(d)(2)(A).[14]

The principal reasons for benefits terminations are that the worker is no longer disabled or has returned to work. As Eldridge's benefits were terminated because he was determined to be no longer disabled, we consider only the sufficiency of the procedures involved in such cases.[15]

***337** ****904** The continuing-eligibility investigation is made by a state agency acting through a "team" consisting of a physician and a nonmedical person trained in disability evaluation. The agency periodically communicates with the disabled worker, usually by mail in which case he is sent a detailed questionnaire or by telephone, and requests information concerning his present condition, including current medical restrictions and sources of treatment, and any additional information that he considers relevant to his continued entitlement to benefits. CM s 6705.1; Disability

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Insurance State Manual (DISM) s 353.3 (TL No. 137, Mar. 5, 1975).[16]

Information regarding the recipient's current condition is also obtained from his sources of medical treatment. DISM s 353.4. If there is a conflict between the information provided by the beneficiary and that obtained from medical sources such as his physician, or between two sources of treatment, the agency may arrange for an examination by an independent consulting physician.[17] Ibid. Whenever the agency's tentative assessment of the beneficiary's condition differs from his ***338** own assessment, the beneficiary is informed that benefits may be terminated, provided a summary of the evidence upon which the proposed determination to terminate is based, and afforded an opportunity to review the medical reports and other evidence in his case file.[18] He also may respond in writing and submit additional evidence. Id., s 353.6.

The state agency then makes its final determination, which is reviewed by an examiner in the SSA Bureau of Disability Insurance. 42 U.S.C. s 421(c); CM ss 6701(b), (c).[19] If, as is usually the case, the SSA accepts the agency determination it notifies the recipient in writing, informing him of the reasons for the decision, and of his right to seek de novo reconsideration by the state agency. 20 CFR ss 404.907, 404.909 (1975).[20] Upon acceptance by the SSA, benefits are terminated effective two months after the month in which medical recovery is found to have occurred. 42 U.S.C. (Supp. III) s 423(a) (1970 ed., Supp. III).

***339** If the recipient seeks reconsideration by the state agency and the determination is adverse, the SSA reviews the reconsideration determination and notifies the recipient of the decision. He then has a right to an evidentiary hearing before an SSA administrative law judge. 20 CFR ss 404.917, 404.927 (1975). The hearing is nonadversary, ****905** and the SSA is not represented by counsel. As at all prior and subsequent stages of the administrative process, however, the claimant may be represented by counsel or other spokesmen. s 404.934. If this hearing results in an adverse decision, the claimant is entitled to request discretionary review by the SSA Appeals Council, s 404.945, and finally may obtain judicial review. 42 U.S.C. s 405(g); 20 CFR s 404.951 (1975).[21]

Should it be determined at any point after termination of benefits, that the claimant's disability extended beyond the date of cessation initially established, the worker is entitled to retroactive payments. 42 U.S.C. s 404. Cf. s 423(b); 20 CFR ss 404.501, 404.503, 404.504 (1975). If, on the other hand, a beneficiary receives any payments to which he is later determined not to be entitled, the statute authorizes the Secretary to attempt to recoup these funds in specified circumstances. 42 U.S.C. s 404.[22]

C

[7] Despite the elaborate character of the administrative procedures provided by the Secretary, the courts ***340** below held them to be constitutionally inadequate, concluding that due process requires an evidentiary hearing prior to termination. In light of the private and governmental interests at stake here and the nature of the existing procedures, we think this was error.

Since a recipient whose benefits are terminated is awarded full retroactive relief if he ultimately prevails, his sole interest is in the uninterrupted receipt of this source of income pending final administrative decision on his claim. His potential injury is thus similar in nature to that of the welfare recipient in Goldberg, see 397 U.S., at 263-264, 90 S.Ct., at 1018-1019, the nonprobationary federal employee in Arnett, see 416 U.S., at 146, 94 S.Ct., at 1640, 1641, and the wage earner in Sniadach. See 395 U.S., at 341-342, 89 S.Ct., at 1822-1823.[23]

Only in Goldberg has the Court held that due process requires an evidentiary hearing prior to a temporary deprivation. It was emphasized there that welfare assistance is given to persons on the very margin of subsistence:

"The crucial factor in this context a factor not present in the case of . . . virtually anyone else whose governmental entitlements are ended is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." 397 U.S., at 264, 90 S.Ct., at 1018 (emphasis in original).

Eligibility for disability benefits, in contrast, is not based upon financial need.[24] Indeed, it is wholly unrelated to ***341** the worker's income or support from many other sources, such as earnings of other family members, workmen's compensation awards,[25] tort claims awards, savings, private ****906** insurance, public or private pensions, veterans' benefits, food stamps, public assistance, or the "many other important programs, both public and private, which contain provisions for disability payments affecting a substantial portion of the work force . . . ." Richardson v. Belcher, 404

U.S., at 85-87, 92 S.Ct., at 259 (Douglas, J., dissenting). See Staff of the House Committee on Ways and Means, Report on the Disability Insurance Program, 93d Cong., 2d Sess., 9-10, 419-429 (1974) (hereinafter Staff Report).

[8] As Goldberg illustrates, the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process. Cf. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). The potential deprivation here is generally likely to be less than in Goldberg, although the degree of difference can be overstated. As the District Court emphasized, to remain eligible for benefits a recipient must be "unable to engage in substantial gainful activity." 42 U.S.C. s 423; 361 F.Supp., at 523. Thus, in contrast to the discharged federal employee in Arnett, there is little possibility that the terminated recipient will be able to find even temporary employment to ameliorate the interim loss.

As we recognized last Term in Fusari v. Steinberg, 419 U.S. 379, 389, 95 S.Ct. 533, 540, 42 L.Ed.2d 521 (1975), "the possible length of wrongful deprivation of . . . benefits (also) is an important factor in assessing the impact of official action on the private interests." The Secretary concedes that the delay between ***342** a request for a hearing before an administrative law judge and a decision on the claim is currently between 10 and 11 months. Since a terminated recipient must first obtain a reconsideration decision as a prerequisite to invoking his right to an evidentiary hearing, the delay between the actual cutoff of benefits and final decision after a hearing exceeds one year.

In view of the torpidity of this administrative review process, cf. id., at 383-384, 386, 95 S.Ct., at 536-537, 538, and the typically modest resources of the family unit of the physically disabled worker,[26] the hardship imposed upon the erroneously terminated disability recipient may be significant. Still, the disabled worker's need is likely to be less than that of a welfare recipient. In addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability benefits places a worker or his family below the subsistence level.[27] See ***343** Arnett v. Kennedy, supra, 416 U.S., at 169, ****907** 94 S.Ct., at 1651-1652 (Powell, J., concurring in part); id., at 201-202, 94 S.Ct., at 1667-1668 (White, J., concurring in part and dissenting in part). In view of these potential sources of temporary income, there is less reason here than in Goldberg to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action.

D

An additional factor to be considered here is the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards. Central to the evaluation of any administrative process is the nature of the relevant inquiry. See Mitchell v. W. T. Grant Co., 416 U.S. 600, 617, 94 S.Ct. 1895, 1905, 40 L.Ed.2d 406 (1974); Friendly, Some Kind of Hearing, 123 U.Pa.L.Rev. 1267, 1281 (1975). In order to remain eligible for benefits the disabled worker must demonstrate by means of "medically acceptable clinical and laboratory diagnostic techniques," 42 U.S.C. s 423(d)(3), that he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . ." s 423(d)(1)(A) (emphasis supplied). In short, a medical assessment of the worker's physical or mental condition is required. This is a more sharply focused and easily documented decision than the typical determination of welfare entitlement. In the latter case, a wide variety of information may be deemed relevant, and issues of witness credibility and ***344** veracity often are critical to the decisionmaking process. Goldberg noted that in such circumstances "written submissions are a wholly unsatisfactory basis for decision." 397 U.S., at 269, 90 S.Ct., at 1021.

[9] By contrast, the decision whether to discontinue disability benefits will turn, in most cases, upon "routine, standard, and unbiased medical reports by physician specialists," Richardson v. Perales, 402 U.S., at 404, 91 S.Ct., at 1428, concerning a subject whom they have personally examined.[28] In Richardson the Court recognized the "reliability and probative worth of written medical reports," emphasizing that while there may be "professional disagreement with the medical conclusions" the "specter of questionable credibility and veracity is not present." Id., at 405, 407, 91 S.Ct., at 1428, 1430. To be sure, credibility and veracity may be a factor in the ultimate disability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decisionmaker, ***345** is substantially less in this context than in Goldberg.

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The decision in Goldberg also was based on the Court's conclusion that written submissions were an inadequate substitute for oral presentation because they did not provide an effective means for the recipient to communicate his case to the decisionmaker. Written submissions were viewed as an unrealistic option, for most recipients lacked the "educational attainment necessary to ****908** write effectively" and could not afford professional assistance. In addition, such submissions would not provide the "flexibility of oral presentations" or "permit the recipient to mold his argument to the issues the decision maker appears to regard as important." 397 U.S., at 269, 90 S.Ct., at 1021. In the context of the disability-benefits-entitlement assessment the administrative procedures under review here fully answer these objections.

The detailed questionnaire which the state agency periodically sends the recipient identifies with particularity the information relevant to the entitlement decision, and the recipient is invited to obtain assistance from the local SSA office in completing the questionnaire. More important, the information critical to the entitlement decision usually is derived from medical sources, such as the treating physician. Such sources are likely to be able to communicate more effectively through written documents than are welfare recipients or the lay witnesses supporting their cause. The conclusions of physicians often are supported by X-rays and the results of clinical or laboratory tests, information typically more amenable to written than to oral presentation. Cf. W. Gellhorn & C. Byse, Administrative Law Cases and Comments 860-863 (6th ed. 1974).

A further safeguard against mistake is the policy of allowing the disability recipient's representative full access ***346** to all information relied upon by the state agency. In addition, prior to the cutoff of benefits the agency informs the recipient of its tentative assessment, the reasons therefor, and provides a summary of the evidence that it considers most relevant. Opportunity is then afforded the recipient to submit additional evidence or arguments, enabling him to challenge directly the accuracy of information in his file as well as the correctness of the agency's tentative conclusions. These procedures, again as contrasted with those before the Court in Goldberg, enable the recipient to "mold" his argument to respond to the precise issues which the decisionmaker regards as crucial.

Despite these carefully structured procedures, amici point to the significant reversal rate for appealed cases as clear evidence that the current process is inadequate. Depending upon the base selected and the line of analysis followed, the relevant reversal rates urged by the contending parties vary from a high of 58.6% For appealed reconsideration decisions to an overall reversal rate of only 3.3%.[29] Bare statistics rarely provide a satisfactory measure of the fairness of a decisionmaking process. Their adequacy is especially suspect here since ***347** the administrative review system is operated on an open-file basis. A recipient may always submit new evidence, and such submissions may result in additional medical examinations. Such fresh examinations were held in approximately 30% To 40% Of the appealed cases, in fiscal 1973, either at the reconsideration or evidentiary hearing stage of the administrative process. Staff Report 238. In this context, the value of reversal rate statistics as one means of evaluating the adequacy of the pretermination process is diminished. Thus, although we view such information as relevant, it is certainly not controlling in this case.

****909** E

In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits. The most visible burden would be the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision. No one can predict the extent of the increase, but the fact that full benefits would continue until after such hearings would assure the exhaustion in most cases of this attractive option. Nor would the theoretical right of the Secretary to recover undeserved benefits result, as a practical matter, in any substantial offset to the added outlay of public funds. The parties submit widely varying estimates of the probable additional financial cost. We only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial.

[10] ***348** Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the

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cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited. See Friendly, supra, 123 U.Pa.L.Rev., at 1276, 1303.

[11] But more is implicated in cases of this type than ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies "preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts." FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143, 60 S.Ct. 437, 441, 84 L.Ed. 656 (1940). The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it." ***349** Joint Anti-Fascist Comm. v. McGrath, 341 U.S., at 171-172, 71 S.Ct., at 649. (Frankfurter, J., concurring). All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard," Goldberg v. Kelly, 397 U.S., at 268-269, 90 S.Ct., at 1021 (footnote omitted), to insure that they are given a meaningful opportunity to present their case. In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals. See Arnett v. Kennedy, 416 U.S., at 202, 94 S.Ct., at 1667-1668 (White, J., concurring in part and dissenting in part). This is especially so where, as here, the prescribed procedures not only provide the claimant with an effective process for ****910** asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final. Cf. Boddie v. Connecticut, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971).

We conclude that an evidentiary hearing is not required prior to the termination of disability benefits and that the present administrative procedures fully comport with due process.

The judgment of the Court of Appeals is

Reversed.

Mr. Justice STEVENS took no part in the consideration or decision of this case.

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL concurs, dissenting.

For the reasons stated in my dissenting opinion in Richardson v. Wright, 405 U.S. 208, 212, 92 S.Ct. 788, 791, 31 L.Ed.2d 151 (1972), I agree with the District Court and the Court of Appeals that, prior to termination of benefits, Eldridge must be afforded ***350** an evidentiary hearing of the type required for welfare beneficiaries under Title IV of the Social Security Act, 42 U.S.C. s 601 et seq. See Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). I would add that the Court's consideration that a discontinuance of disability benefits may cause the recipient to suffer only a limited deprivation is no argument. It is speculative. Moreover, the very legislative determination to provide disability benefits, without any prerequisite determination of need in fact, presumes a need by the recipient which is not this Court's function to denigrate. Indeed, in the present case, it is indicated that because disability benefits were terminated there was a foreclosure upon the Eldridge home and the family's furniture was repossessed, forcing Eldridge, his wife, and their children to sleep in one bed. Tr. of Oral Arg. 39, 47-48. Finally, it is also no argument that a worker, who has been placed in the untenable position of having been denied disability benefits, may still seek other forms of public assistance.

George P. McLAUGHLIN, petitioner, v. Douglas VINZANT, Superintendent, Massachusetts Correctional Institution. No. 75-5671.

Former decision, 423 U.S. 1037, 423 U.S. 1037, 96 S.Ct. 573.

Facts and opinion, 1 Cir., 522 F.2d 448.

Jan. 26, 1976. Petition for rehearing denied.

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Mr. Justice STEVENS took no part in the consideration or decision of this petition.

All Citations

424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The program is financed by revenues derived from employee and employer payroll taxes. 26 U.S.C. ss 3101(a), 3111(a); 42 U.S.C. s 401(b). It provides monthly benefits to disabled persons who have worked sufficiently long to have an insured status, and who have had substantial work experience in a specified interval directly preceding the onset of disability. 42 U.S.C. ss 423(c)(1)(A) and (B). Benefits also are provided to the worker's dependents under specified circumstances. ss 402(b)-(d). When the recipient reaches age 65 his disability benefits are automatically converted to retirement benefits. ss 416(i)(2)(D), 423(a)(1). In fiscal 1974 approximately 3,700,000 persons received assistance under the program. Social Security Administration, The Year in Review 21 (1974).

2 Eldridge originally was disabled due to chronic anxiety and back strain. He subsequently was found to have diabetes. The tentative determination letter indicated that aid would be terminated because available medical evidence indicated that his diabetes was under control, that there existed no limitations on his back movements which would impose severe functional restrictions, and that he no longer suffered emotional problems that would preclude him from all work for which he was qualified. App. 12-13. In his reply letter he claimed to have arthritis of the spine rather than a strained back.

3 The District Court ordered reinstatement of Eldridge's benefits pending its final disposition on the merits.

4 In Goldberg the Court held that the pretermination hearing must include the following elements: (1) "timely and adequate notice detailing the reasons for a proposed termination"; (2) "an effective opportunity (for the recipient) to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally"; (3) retained counsel, if desired; (4) an "impartial" decisionmaker; (5) a decision resting "solely on the legal rules and evidence adduced at the hearing"; (6) a statement of reasons for the decision and the evidence relied on. 397 U.S., at 266-271, 90 S.Ct., at 1019-1022. In this opinion the term "evidentiary hearing" refers to a hearing generally of the type required in Goldberg.

5 The HEW regulations direct that each state plan under the federal categorical assistance programs must provide for pretermination hearings containing specified procedural safeguards, which include all of the Goldberg requirements. See 45 CFR s 205.10(a) (1975); n. 4, supra.

6 The Court of Appeals for the Fifth Circuit, simply noting that the issue had been correctly decided by the District Court in this case, reached the same conclusion in Williams v. Weinberger, 494 F.2d 1191 (1974), cert. pending, No. 74-205.

7 Title 42 U.S.C. s 405(h) provides in full:
"(h) Finality of Secretary's decision.
"The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter."

8 Section 405(g) further provides:
Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. . . . The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive . . . ."

9 The other two conditions are (1) that the civil action be commenced within 60 days after the mailing of notice of such decision, or within such additional time as the Secretary may permit, and (2) that the action be filed in an appropriate district court. These two requirements specify a statute of limitations and appropriate venue, and are waivable by the parties. Salfi, 422 U.S., at 763-764, 95 S.Ct., at 2465-2466. As in Salfi no question as to whether Eldridge satisfied these requirements was timely raised below, see Fed.Rules Civ.Proc. 8(c), 12(h)(1), and they need not be considered here.

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10 If Eldridge had exhausted the full set of available administrative review procedures, failure to have raised his constitutional claim would not bar him from asserting it later in a district court. Cf. Flemming v. Nestor, 363 U.S. 603, 607, 80 S.Ct. 1367, 1370-1371, 4 L.Ed.2d 1435 (1960).

11 Decisions in different contexts have emphasized that the nature of the claim being asserted and the consequences of deferment of judicial review are important factors in determining whether a statutory requirement of finality has been satisfied. The role these factors may play is illustrated by the intensely "practical" approach which the Court has adopted, Cohen v. Beneficial Ind. Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-1226, 93 L.Ed. 1528 (1949), when applying the finality requirements of 28 U.S.C. s 1291, which grants jurisdiction to courts of appeals to review all "final decisions" of the district courts, and 28 U.S.C. s 1257, which empowers this Court to review only "final judgments" of state courts. See, e. g., Harris v. Washington, 404 U.S. 55, 92 S.Ct. 183, 30 L.Ed.2d 212 (1971); Construction Laborers v. Curry, 371 U.S. 542, 549-550, 83 S.Ct. 531, 536, 537, 9 L.Ed.2d 514 (1963); Mercantile Nat. Bank v. Langdeau, 371 U.S. 555, 557-558, 83 S.Ct. 520, 521-522 (1963); Cohen v. Beneficial Ind. Loan Corp., supra, 337 U.S., at 545-546, 69 S.Ct., at 1225-1226. To be sure, certain of the policy considerations implicated in ss 1257 and 1291 cases are different from those that are relevant here. Compare Construction Laborers, supra, 371 U.S., at 550, 83 S.Ct., at 536-537; Mercantile Nat. Bank, supra, 371 U.S., at 558, 83 S.Ct., at 522, with McKart v. United States, 395 U.S. 185, 193-195, 89 S.Ct. 1657, 1662-1663, 23 L.Ed.2d 194 (1969); L. Jaffe, Judicial Control of Administrative Action 424-426 (1965). But the core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered remains applicable.

12 Given our conclusion that jurisdiction in the District Court was proper under s 405(g), we find it unnecessary to consider Eldridge's contention that notwithstanding s 405(h) there was jurisdiction over his claim under the mandamus statute, 28 U.S.C. s 1361, or the Administrative Procedure Act, 5 U.S.C. s 701 et seq.

13 In all but six States the state vocational rehabilitation agency charged with administering the state plan under the Vocational Rehabilitation Act of 1920, 41 Stat. 735, as amended, 29 U.S.C. s 701 et seq. (1970 ed., Supp. III), acts as the "state agency" for purposes of the disability insurance program. Staff of the House Comm. on Ways and Means, Report on the Disability Insurance Program, 93d Cong., 2d Sess., 148 (1974). This assignment of responsibility was intended to encourage rehabilitation contacts for disabled workers and to utilize the well-established relationships of the local rehabilitation agencies with the medical profession. H.R.Rep.No.1698, 83d Cong., 2d Sess., 23-24 (1954).

14 Work which "exists in the national economy" is in turn defined as "work which exists in significant numbers either in the region where such individual lives or in several regions of the country." s 423(d)(2)(A).

15 Because the continuing-disability investigation concerning whether a claimant has returned to work is usually done directly by the SSA Bureau of Disability Insurance, without any state agency involvement, the administrative procedures prior to the post-termination evidentiary hearing differ from those involved in cases of possible medical recovery. They are similar, however, in the important respect that the process relies principally on written communications and there is no provision for an evidentiary hearing prior to the cutoff of benefits. Due to the nature of the relevant inquiry in certain types of cases, such as those involving self-employment and agricultural employment, the SSA office nearest the beneficiary conducts an oral interview of the beneficiary as part of the pretermination process. SSA Claims Manual (CM) s 6705.2(c).

16 Information is also requested concerning the recipient's belief as to whether he can return to work, the nature and extent of his employment during the past year, and any vocational services he is receiving.

17 All medical-source evidence used to establish the absence of continuing disability must be in writing, with the source properly identified. DISM s 353.4C.

18 The disability recipient is not permitted personally to examine the medical reports contained in his file. This restriction is not significant since he is entitled to have any representative of his choice, including a lay friend or family member, examine all medical evidence. CM s 7314. See also 20 CFR s 401.3(a)(2) (1975). The Secretary informs us that this curious limitation is currently under review.

19 The SSA may not itself revise the state agency's determination in a manner more favorable to the beneficiary. If, however, it believes that the worker is still disabled, or that the disability lasted longer than determined by the state agency, it may return the file to the agency for further consideration in light of the SSA's views. The agency is free to reaffirm its original assessment.

20 The reconsideration assessment is initially made by the state agency, but usually not by the same persons who considered the case originally. R. Dixon, Social Security Disability and Mass Justice 32 (1973). Both the recipient and the agency may adduce new evidence.

21 Unlike all prior levels of review, which are de novo, the district court is required to treat findings of fact as conclusive if supported by substantial evidence. 42 U.S.C. s 405(g).

22 The Secretary may reduce other payments to which the beneficiary is entitled, or seek the payment of a refund, unless the beneficiary is "without fault" and such adjustment or recovery would defeat the purposes of the Act or be "against equity and good conscience." 42 U.S.C. s 404(b). See generally 20 CFR ss 404.501-404.515 (1975).

23 This, of course, assumes that an employee whose wages are garnisheed erroneously is subsequently able to recover his back wages.

24 The level of benefits is determined by the worker's average monthly earnings during the period prior to disability, his age, and other factors not directly related to financial need, specified in 42 U.S.C. s 415 (1970 ed., Supp. III). See s 423(a)(2).

25 Workmen's compensation benefits are deducted in part in accordance with a statutory formula. 42 U.S.C. s 424a (1970 ed., Supp. III); 20 CFR s 404.408 (1975); see Richardson v. Belcher, 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971).

26 Amici cite statistics compiled by the Secretary which indicate that in 1965 the mean income of the family unit of a disabled worker was $3,803, while the median income for the unit was $2,836. The mean liquid assets i. e., cash, stocks, bonds of these family units was $4,862; the median was $940. These statistics do not take into account the family unit's nonliquid assets i. e., automobile, real estate, and the like. Brief for AFL-CIO et al. as Amici Curiae App. 4a. See n.29, infra.

27 Amici emphasize that because an identical definition of disability is employed in both the Title II Social Security Program and in the companion welfare system for the disabled, Supplemental Security Income (SSI), compare 42 U.S.C. s 423(d)(1) with s 1382c(a)(3) (1970 ed., Supp. III), the terminated disability-benefits recipient will be ineligible for the SSI Program. There exist, however, state and local welfare programs which may supplement the worker's income. In addition, the worker's household unit can qualify for food stamps if it meets the financial need requirements. See 7 U.S.C. ss 2013(c), 2014(b); 7 CFR s 271 (1975). Finally, in 1974, 480,000 of the approximately 2,000,000 disabled workers receiving Social Security benefits also received SSI benefits. Since financial need is a criterion for eligibility under the SSI program, those disabled workers who are most in need will in the majority of cases be receiving SSI benefits when disability insurance aid is terminated. And, under the SSI program, a pretermination evidentiary hearing is provided, if requested. 42 U.S.C. s 1383(c) (1970 ed., Supp. III); 20 CFR s 416.1336(c) (1975); 40 Fed.Reg. 1512 (1975); see Staff Report 346.

28 The decision is not purely a question of the accuracy of a medical diagnosis since the ultimate issue which the state agency must resolve is whether in light of the particular worker's "age, education, and work experience" he cannot "engage in any . . . substantial gainful work which exists in the national economy . . . ." 42 U.S.C. s 423(d)(2)(A). Yet information concerning each of these worker characteristics is amenable to effective written presentation. The value of an evidentiary hearing, or even a limited oral presentation, to an accurate presentation of those factors to the decisionmaker does not appear substantial. Similarly, resolution of the inquiry as to the types of employment opportunities that exist in the national economy for a physically impaired worker with a particular set of skills would not necessarily be advanced by an evidentiary hearing. Cf. K. Davis, Administrative Law Treatise s 7.06, at 429 (1958). The statistical information relevant to this judgment is more amenable to written than to oral presentation.

29 By focusing solely on the reversal rate for appealed reconsideration determinations amici overstate the relevant reversal rate. As we indicated last Term in Fusari v. Steinberg, 419 U.S. 379, 383 n. 6, 95 S.Ct. 533, 536-537, 42 L.Ed.2d 521 (1975), in order fully to assess the reliability and fairness of a system of procedure, one must also consider the overall rate of error for all denials of benefits. Here that overall rate is 12.2%. Moreover, about 75% Of these reversals occur at the reconsideration stage of the administrative process. Since the median period between a request for reconsideration review and decision is only two months, Brief for AFL-CIO et al. as Amici Curiae App. 4a, the deprivation is significantly less than that concomitant to the lengthier delay before an evidentiary hearing. Netting out these reconsideration reversals, the overall reversal rate falls to 3.3%. See Supplemental and Reply Brief for Petitioner 14.

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