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In the

Supreme Court of the United States

ELLIOT L. RICHARDSON,
Secretary of Health, Education,
and Welfare,

Appellant,

vs. No. 70-161

RADIE WRIGHT, et al.,

Appellees.

AND

RADIE WRIGHT, et al.,

Appellants,

vs. No. 70-5211

ELLIOT L. RICHARDSON,
Secretary of Health, Education,
and Welfare,

Appellee.

Washington, D. C.
January 13, 1972

Pages 1 thru 42

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RADIE WRIGHT, et al., Appellants, v. ELLIOT L. RICHARDSON, Secretary of Health, Education, and Welfare, Appellee.	No. 70-5211

Washington, D. C.,

Thursday, January 13, 1972.

The above-entitled matters came on for argument at 2:06 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

L. PATRICK GRAY, III, ESQ., Assistant Attorney General, Department of Justice, Washington, D. C. 20530, for the Secretary of HEW

ROBERT N. SAYLER, ESQ., Covington & Burling, 888 Sixteenth Street, N. W., Washington, D. C. 20006, for Wright, et al.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 70-161, Richardson against Wright, and 5211, Wright against Richardson.

Mr. Gray, I think you may proceed now.

ORAL ARGUMENT OF L. PATRICK GRAY, III, ESQ.,

ON BEHALF OF THE SECRETARY OF HEW

MR. GRAY: Good afternoon, Mr. Chief Justice. May it please the Court:

These two cases are here before the Court on cross appeals which have been consolidated for purposes of argument.

These cases arise from a final judgment of a statutory three-judge court in the United States District Court for the District of Columbia.

The court below held that Section 225 of the Social Security Act was unconstitutional, in that under that Act the recipient of social security disability insurance was not afforded the opportunity for an oral hearing prior to suspension.

The court below relied on the decision of this Court in a recent case, Goldberg v. Kelly, which has since become rather well-known in this particular field of the law.

Section 225 of the Social Security Act permits the Secretary of the Department of Health, Education, and Welfare, on information obtained by him or submitted to him, to suspend the benefits, the payments to the social security disability

insurance recipient pending further investigation.

This particular section of the Social Security Act has no provision whatsoever for hearing. It should be noted also, Your Honors, that this particular section of the Social Security Act has been commented on in the floor debates of the Congress and in the reports of the various committees of the Congress, and its purpose has been explicitly stated to permit the Secretary to protect the social security trust funds to administer the social security disability insurance program in a practical, efficient, and helpful manner, so as to assist the maximum number of beneficiaries within the resources available.

This case first arose when the appellee/cross-appellant, one Radie Wright, applied in the Washington, D. C. District Office for social security benefits. Mr. Wright had worked since the age of 14 and had been recently hospitalized; in October of 1965, to be exact; and his application for social security disability insurance benefits was filed June 1, 1966.

Q Excuse me, Mr. Gray.

MR. GRAY: Yes?

Q Might I ask, do I understand that the Secretary has now adopted procedures and required States to adopt procedures which rather provide most of the requirements of Goldberg?

MR. GRAY: No, sir; Mr. Justice Brennan, that's not quite the case here.

Q All right.

MR. GRAY: He has adopted procedures suggested by the United States District Court for the District of Columbia to a certain extent. And I would --

Q I see. But not going as far as --

MR. GRAY: No, sir.

Q -- were they applicable under Goldberg?

MR. GRAY: Not going as far as the holding of the District Court, nor as far as the cross-appellant would like the Secretary to go.

Q No, but how do they compare with the requirements in Goldberg on termination of welfare benefits?

MR. GRAY: They would not go as far either, Your Honor.

Q Where would they -- in what respect would they go, then?

MR. GRAY: They would go -- let me tell you, perhaps, Your Honor, right at this point in time what they would do.

The District Court below, as a part of its holding, stated that the recipient should receive time and notice and an opportunity to respond. And the Secretary has gone that far in his new regulations going out through the social security disability insurance system to state agencies, that they shall not recommend suspension until they contact that recipient,

give him timely notice, offer him the opportunity to present his case, which I might --

Q Meanwhile continuing the payment of benefits?

MR. GRAY: Yes. There would be no suspension recommendation issued then, sir.

Q Yes.

MR. GRAY: I might point out, Mr. Justice Brennan, as you well know, Your Honor, that at this point in time a recipient or an applicant can come right in to that District Office now, at the very first step of intake, with counsel in tow, and can have that counsel assist him at every step of the proceeding, right along, right up to the point of --

Q I didn't mean to interrupt you. Would you complete?

MR. GRAY: Yes, sir.

Q Mr. Gray, just let me follow through with this point, if I may: Somewhere along the line will you tell us what you think the District Court ordered here that is not covered by the new regulations? This ties in to Mr. Justice Brennan's question.

MR. GRAY: I can tell you that right now, Mr. Justice Blackmun.

Q All right.

MR. GRAY: The District Court below felt that, as an additional step, there might be an occasion on which an informal

hearing could be held before an impartial official or hearing examiner, and they also went one step further and said that when the evidence is found to contradict that evidence held by the Social Security Administration, there might very well be a formal hearing; and the next step they took was to say that we're not going to prejudge this matter, we're going to permit the Social Security Administration to develop presuspension procedures, at which time we will then take a look and see if those procedures meet all the requirements that we are laying out here.

And the government's position before you today, Your Honors, is that we go along with the first part of the Court's order below, and we believe that --

Q And that's notice --

MR. GRAY: Yes, timely notice.

Q -- and an opportunity to protest.

MR. GRAY: That's right.

Q And in what form?

MR. GRAY: In the form of written submission.

Q But no hearing?

MR. GRAY: No hearing, Mr. Justice Brennan.

Q And written submissions, of course, are considered by whom?

MR. GRAY: They're considered right up the line. They would become a part of that claimant's file folder.

Q Right.

MR. GRAY: And they would become a part right there at the State agency and would carry right on up the line, all the way in to the Federal District Court for review and --

Q And therefore I gather, unlike what's required before termination of welfare benefits, an opportunity for a hearing before, if not an impartial, at least, more or less an independent member of the operation. Here, I guess, he gets notice and a chance to protest in writing and that's the end of it, is it?

MR.GRAY: Well, he gets -- in our regulations too he also gets a second chance at that same State agency level. If he doesn't come in right away and the State agency still is of that mind, they notify him again.

Q Yes.

MR. GRAY: And he's given ten days more.

Q To do what?

MR. GRAY: To do the same thing, file --

Q That is, to file a written protest.

MR. GRAY: -- written submissions. But the extent of his relief there, Your Honor, is that --

Q But, in any event, his case is decided on the basis of what he submits in writing, without a hearing?

MR. GRAY: That is correct.

Q Yes.

MR. GRAY: That is correct. On the basis of what he submits in writing, Your Honor, and in addition what the State agency has compiled in the way of evidence from the hospitals, the physicians, the laboratories, --

Q Yes, but he doesn't get --

MR. GRAY: -- the vocational rehabilitation people that have seen him.

Q -- he gets no opportunity at a hearing to challenge any of the other materials that have been collected by the agency?

MR. GRAY: Let me say that he gets no opportunity. But, I think, Your Honor, -- he gets no opportunity in the legal sense, as we lawyers understand it.

Q Yes.

MR. GRAY: But let me say, Your Honor, that the Social Security Administration, as you well know and this Court knows, leans over backwards to be of help and assistance to individuals. And I have not the slightest doubt in my mind, and I think if Secretary Richardson were standing before this Court he would say the same thing, if that recipient came into that State agency down in Virginia, which involved one of these cases, the cross-appellant Atkins, with his attorney in tow, that that State agency would permit that recipient and his attorney to make all the points they wanted to make right there, and they would build that record, and that record would move

right on up the line just as they desired to build it.

But if you're speaking, Your Honor, in terms of the hearing, as we understand it, under the due process clause, with all of the protections that Your Honor specified in the opinion of the Court which you delivered in Goldberg, no, we do not acced at all.

Q Now, may I just bother you with one more question?

MR. GRAY: Yes, sir.

Q And then I'll let you be.

In neither of these cases, where the provisions of these new regulations provided, even though there were no regulations, that is, neither of these got the kind of notice and the opportunity to file written protests?

MR. GRAY: Not the kind that we mention, Your Honor, in our supplemental brief.

Q Yes.

MR. GRAY: But other things were done, which, of course, are in my statement of facts that were being made, sir.

Yes?

Q Let me be sure that I have that clear. They would get more now than they did get at the time they were processed?

MR. GRAY: That is correct, Mr. Chief Justice.

Q Under the Secretary's regulations, --

MR. GRAY: That is correct, sir.

Q -- independent of the District Court?

MR. GRAY: But the Secretary -- I think it must be stated, Mr. Chief Justice, that the new regulation of the Secretary, appearing in our Supplemental Brief, was developed and published as a result of the -- a portion of the opinion of the three-judge court below, sir.

Q Mr. Gray, you said that when they submit their written statement it goes right up through the line?

MR. GRAY: Yes, sir, it becomes a part of --

Q Is that the same line it went up before?

MR. GRAY: It becomes a part of the claimant's folder, and it goes --

Q Well, I mean there's no difference in what happened before, except you've got this one statement from the claimant?

MR. GRAY: That is correct, Mr. Justice Marshall. It goes from --

Q And the claimant doesn't know what happens at any one of those steps?

MR. GRAY: I don't think that that statement can be made, Mr. Justice Marshall, because in these types of cases, unlike other cases, the claimant neither goes to work, his work activity, he holds in his hands the control, his work activity generates the activity --

Q If he's able?

MR. GRAY: Or if he's --

Q If he's able?

MR. GRAY: Yes, sir. Or in the improvement in his physical condition. So we don't have a claimant here who is blinded, Your Honor. We have a claimant here who really knows.

Q But does he know what this person said about him?

MR. GRAY: I don't think he would know what this person said about him, no.

Q Or any other person?

MR. GRAY: No, sir. He would know what his own physician said about him, certainly.

Q But he never finds out what's in that document that "goes up the line"?

MR. GRAY: I would say that you're correct, Mr. Justice Marshall, in that he does not look at it; but what I said before in response to a question of Mr. Justice Brennan, and I think that if Secretary Richardson were here he'd say it, that if that claimant walked into that State agency with his attorney, he'd get it.

Q I agree with you fully, but neither you nor Secretary Richardson are in all these offices.

MR. GRAY: I know, but that's the basis on which it operates.

Q These are ordinary peoplein these.

MR. GRAY: That's right, they're human beings, they're very interested in the fairness and integrity of the system.

Q I assume that, too. And I also assume that a fair judge and a fair jury will do well; but we still have the hearing.

MR. GRAY: Oh, I know. In some cases you do for certain reasons, which do not exist in these cases, Your Honor.

Q Well, why can't you give a hearing in these?

MR. GRAY: We feel that there is no compelling individual, private reason to hold a hearing here that is so great that it necessarily must override, in our system of jurisprudence, a governmental function representing the interests of so many people that are at stake in the administration of this program.

Q Mr. Gray, are you finding comfort in the Joppa? case of last term and the other one -- was it Perales?

MR. GRAY: Perales. I find comfort in both cases. In Perales because of the opinion and the extent to which that opinion went; and in the Court's holding there. In Joppa the Court, as you know, Mr. Justice Blackmun, did not reach the constitutional question raised in that unemployment compensation case on the West Coast. I feel, of course, that that lower court was in error and I think there's a case now in New York, Torres and Danger v. New York State Labor Department, where a

contrary result was reached in the Joppa case.

Q Well, actually, the Secretary's position isn't very different than it was in Perales. Your same arguments are being made: the volume of claims, and practical necessity, and the like. Are they not?

MR. GRAY: I think that that certainly is true. And we might go even a little further than we went in Perales in trying to explain in a little greater detail the procedures that are involved here. Because we feel that these procedures are the matrix on which the government's case rests.

These are the things that this Court must look at first to see whether the constitutional rights of these individuals, who are to benefit from this system enacted by the Congress, are being infringed upon. And we rather vigorously contend in our brief that they are not, that the governmental function must prevail. We don't argue that the public necessarily is so sacred, we say more than the conservation is involved here; it's rather the allocation of these resources.

Shall these resources be allocated to assist others who are in need to the maximum extent, or shall they be tied up in a vast bureaucracy for which there is no real constitutional need in these types of cases.

This case, these facts are not a Goldberg context at all; I don't see that context here.

May I proceed, Mr. Chief Justice, with Mr. Wright?

Mr. Wright went in and made this application, and at the time he made the application he completed Item 21 of the application, and he also received the standard information which every applicant receives, that if he goes back to work he should report that; if his physical condition improves he should report that; if he applies for workmen's compensation he should report that.

His application was completed. The District Office referred it to the State agency, which is the Department of Vocational Rehabilitation here in the District of Columbia. All the papers, including his records from Freedmen's Hospital and from the Veterans Administration, all were examined, and a decision was made that Mr. Wright was indeed disabled within the meaning of the terms of the Act.

His illness, in point of fact, was rather severe at the time, following his hospitalization for hemorrhaging, and it stemmed all around cirrhosis of the liver, hypertension, chronic gastritis; and, in fact, the Social Security Administration, their BDI, Bureau of Disability Insurance, deemed his physical condition to be so severe that he was not routinely programmed ahead for a review, as they do regularly in order, once again, to keep track of all these applicants.

Time passed. This was in 1966, and he began receiving

payments from May 1. Time passed, and Mr. Wright apparently began to feel better. Because in 1970, earnings began to show up in the Bureau of Disability Insurance for Mr. Wright.

Now, how did they show up?

The employers, in reporting these earnings, report them to, of course, the Internal Revenue Service, which in turn reports them over to the Social Security Administration for posting to the social security account, and those folks know who is receiving social security disability insurance, and there is a transfer, a cross-indexing.

So that a recipient of social security disability insurance, working and receiving earnings, will have wage postings on his account; and this occurs within the Social Security Administration.

When BDI learned of earnings for Mr. Wright, earnings for the June quarter of 1968 to the December quarter of 1968, and for the first quarter of 1969, they immediately caused a field investigation to be instituted, and that referral was made to the Social Security District Office in the District of Columbia.

An interviewer went to call upon Mr. Wright. The interview was less than satisfactory, Mr. Wright was a little difficult to communicate with, but he did indicate that he had worked. The young lady who interviewed him stated to him that indeed it looked as though his social security disability

insurance benefits might be in jeopardy because of his having worked. That, of course, is one of the provisions of the Social Security Act, one of the definitions of disability: if an individual is able to engage in substantial gainful activity, he cannot be disabled under the Act.

Well, the investigation proceeded, and, as it turned out, Mr. Wright had indeed apparently felt better, because he worked -- he not only worked in the June '68 quarter, the December '68 quarter, but he worked in every quarter of the calendar year 1969, and he earned approximately $626 and some cents in 1968, and $4,041 and some cents in 1969.

Now, when all this verification went through, and the District --

Q How long a time lag is there, administratively, if all goes routinely --

MR. GRAY: Mr. Justice --

Q -- between the --

MR. GRAY: Mr. Justice Stewart, the time lag here was a little long because normally it's nine months.

Q Before it gets to BDI?

MR. GRAY: Before it gets to BDI, and before BDI triggers off the field investigation.

Q Nine months from what? Nine months from the reporting time --

MR. GRAY: From the reporting time of the employer,

yes, six.

Q -- by the employer to the Commission?

MR. GRAY: The employer has to report earnings to the Internal Revenue Service, and --

Q To the Commission, the CIR.

MR. GRAY: -- it was a little --

Q There's a nine months lag.

MR. GRAY: It was a little longer in this case, because BDI instituted their field investigation in February, February 2nd, 1970.

But, in any event, when that was compiled, BDI sent the report back to the District of Columbia Department of Vocational Rehabilitation for a further look at this case, even though, here it was obvious that the man had worked, was in violation; no longer disabled, no longer entitled under the law. But the case folder went back and an additional looksee was taken, and the District Office concluded that Mr. Wright had indeed engaged in substantial gainful activity and was no longer therefore entitled to social security disability benefits.

He was so notified, and the letter of notification indicated that his trial work period had completed. Here's another distinguishing feature from the welfare recipient, the social security disability recipient may work for a period of nine months, none of which need be consecutive; but the law,

the Congress has seen fit, and the Secretary in his implementing regulations has seen fit to permit this recipient to go back and try to rehabilitate himself, try to get back into the mainstream of society, so to speak.

Mr. Wright had indeed utilized more than his nine-month trial work period, and he was determined to have ceased to be disabled as of August of 1969, and his benefits, he was advised that his benefits were going to be suspended. And they were indeed suspended for a short period of time.

Q Is this by computer?

MR. GRAY: Sir?

Q Was this information from a computer?

MR. GRAY: I must presume it is, because, based on my own knowledge, Mr. Justice Marshall, from having been in HEW, that knowing that SSA is heavily computerized, that's the only way they could handle the workload that they handle. And I must assume that that is correct.

Q Then you said a young lady went and talked to him.

MR. GRAY: That's at the District Office level, Mr. Justice Marshall.

Q What else, what other reliable information do you have, other than the computer --

MR. GRAY: Oh, we don't rely on the computer at all, it would be folly to do that, Mr. Justice Marshall. Verifica-

tion is made of these wages paid by direct contact with the reporting employer; no reliance is placed on that computer for that kind of verification.

Q The computer just triggers the further inquiry, is that it?

MR. GRAY: That's right. That's the microswitch, Mr. Chief Justice, that begins this whole procedure, starts it all going.

Q There's no dispute about the fact of the earnings, is there, in the case?

MR. GRAY: No, sir.

In any event, Mr. Wright brought suit, and he was without benefits for a short period of time. He brought suit on May 13, 1970; on May 14, 1970, Judge Gasch issued a temporary restraining order restraining the Secretary from suspending Mr. Wright's benefits. And that action was taken, and Mr. Wright has been paid the benefits since then.

And then Mr. John D. Atkins, plaintiff-intervenor, enters this case. He doesn't come into the case until about August, but he comes in as a plaintiff-intervenor on the basis that he had been hospitalized by reason of mental illness, and he was hospitalized over in the Veterans Administration Hospital at Perry Point, Maryland. And he was hospitalized in December of 1966, and began receiving benefits some six months thereafter and remained in that hospital over there until

January 7 of 1969.

The Social Security Administration, for some reason or another, did not find out that Mr. Atkins was no longer in Perry Point until about September of 1969, when his check was returned from Perry Point V.A. Hospital to the Social Security Administration, to BDI.

Apparently Perry Point had been forwarding his checks to Mr. Atkins, because Mr. Atkins had left the V. A. Hospital at Perry Point, Maryland, and had gone over to Virginia to another hospital, mental hospital, Western Hospital at Salem, Virginia; stayed there a short period of time, then went down to the Veterans Administration Hospital at Roanoke.

But when Social Security received the notice -- received the check back, that immediately triggered off, in accordance with its procedures, a continuing disability investigation. And they had to find out what Mr. Atkins was up to.

So the claim folder went first to Towson, Maryland, and then it went down to Virginia; but, suffice it to say, the case finally became one before the State agency there in Virginia. The State agency went through the same routine: they contacted Mr. Atkins, talked with his clinical psychologist, looked very, very carefully at the medical evidence then available to them; and made a decision that Mr. Atkins' condition had physically improved sufficiently so that he was

no longer disabled.

Mr. Atkins -- this occurred on February 3rd, 1970. On February 4, 1970, Mr. Atkins wrote the Social Security Administration and protested, submitted his own evidence, his wife called BDI three or four times. His Congressman got in touch with Social Security Administration. And, to compress the facts, in view of the fact that time is rapidly running out on me, Your Honor, he was reinstated. His case was sent back rather quickly.

Another hard look was taken at additional evidence, and he was reinstated.

And I think, if I may, Mr. Chief Justice, I'd like to reserve the balance of my time for any rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Gray.

Mr. Sayler.

ORAL ARGUMENT OF ROBERT N. SAYLER, ESQ.,

ON BEHALF OF WRIGHT, ET AL.

MR. SAYLER: Mr. Chief Justice, and may it please the Court:

I am here representing several named individuals in the class of disability recipients.

The government's presentation has made clear we're dealing here with a complicated statutory scheme. That should not obscure the fact that the legal issues in this case are uncomplicated. They've been considerably narrowed in this

Court.

When this case began nearly two years ago, the government was arguing that the provision in the statute authorizing summary suspension of disability payments was constitutional. Judges Gash, Robb, and Matthews disagreed; and the government has abandoned that contention in this Court. It concedes that that statutory section is unconstitutional, and it concedes that there is a right to an opportunity to a hearing before disability benefits are terminated.

Now, these are the propositions that we have been attempting to establish in this case, and we had assumed that once they were recognized that would obviate the necessity for action by this Court. But that has not proved to be the case. Because, in this Court, the government contends that the right to a hearing it would provide means a paper hearing, called a hearing on paper.

By this, the government says, it would provide notice; if it found conflicting evidence, it would provide a brief summary of evidence adverse to the recipient; it would provide an opportunity to file a piece of paper.

It would not, under any circumstances, regardless of whether or not conflicting evidence of continuing disability existed, it would not provide opportunity for an oral proceeding of any kind; it would not assure a decision by an impartial decision-maker.

The government's basic position is that these latter procedural protections are unnecessary, because the decisions in this area, uniquely objective and reliable, as Mr. Gray just said, the government bends over backwards to assure the recipients may stay on the rolls.

There is one overwhelming statistic which demonstrates the difficulty the government has in sustaining that position. At the present time, hearings are required as a matter of statutory right after termination, many months down the road. In those cases, paper determinations that disability has ceased are reversed in 55 percent of the cases.

More times than not, when the recipient gets to the hearing, has an opportunity to tell his story, to present affirmative evidence, cross-examination prevails --

Q Is that post-termination proceeding somewhat like the post-termination proceeding in welfare cases?

MR. SAYLER: Yes, that's right, Your Honor.

Q Do they then get back payments, retroactively?

MR. SAYLER: That is right, Your Honor.

The statute requires that. The problem, of course, is that during the many months --

Q You say it's way down the road; how long?

MR. SAYLER: The statistics are in the record, somewhere between four and six months; different statistics have been supplied from one time to another, and they are all

set out in the briefs.

A considerable period is consumed while the recipient is cut off from payment. Once he gets to that hearing, more times than not --

Q Well, I gather, --

MR. SAYLER: -- he prevails.

Q Well, I don't know what it may have been at the time this case was brought; but I gather, under the new procedures, until the so-called paper hearing procedure has been completed, the recipient will continue to get his disability benefits?

MR. SAYLER: That is my understanding, on the basis of --

Q Then they'd be terminated, and then the post-termination proceedings would take how long? Six months or more?

MR. SAYLER: Some have been three or four months beyond the paper hearing.

Q And after that interval, after the initial termination or suspension, whatever label is put upon it, he gets no disability benefits unless they're reinstated at the post-termination hearing?

MR. SAYLER: That's right.

Q And then if he does get them reinstated, they are retroactive, are they, to the date of suspension or whatever

it was?

MR. SAYLER: That's right. Just as was the case in the welfare area. Precisely the same.

We think that that 55 percent statistic is more eloquent than pages of testimony, to demonstrate the importance of the protections we seek, and the inadequacy of the procedures that are now followed or that would be followed under the protections the government has now undertaken to provide.

Q And I gather your position is that nothing short of the Goldberg procedures would satisfy the constitutional question; is that it?

MR. SAYLER: Your Honor, we take from Goldberg the language that the Court in that case was undertaking to prescribe the minimum, what it called the rudimentary due process, and we are --

Q Yes, but do you think anything more than that is required in this situation?

MR.SAYLER: Your Honor, we are seeking only those rudimentary protections provided in the Goldberg decision.

Q Mr. Sayler, I noticed in the government's brief they relied rather heavily on Cafeteria Workers vs. McElroy, and you, in your reply to them, treated that case in a footnote as if it were virtually limited to its facts; at least that's one impression one could get from your treatment of it. Do you disagree with the general statements of

the Court in McElroy that due process is a flexible concept and you have to analyze precisely what it is that you're effecting before you decide what procedures will be accorded?

MR. SAYLER: Not at all, Mr. Justice Rehnquist. Our basic proposition is that Cafeteria establishes basic propositions, which have been set forth in a number of other cases, that the Court is obliged to indulge in a balancing of the interests of government on the one side and the persons affected by governmental interest on the other side.

We think this is the case where the balance must be struck very much on the side of the recipients. In view of the pressing need of disability payments, we have indicated the statistics in our brief on this point.

The facts are that disability recipients are over half dependent on disability benefits for their income. Most of them are over 80 percent dependent. As a category, the disability recipients have a very low level of educational attainment, which very much hampers their prospects to gain substantial income once they are terminated from the disability rolls.

Their work experience, even those who are able to work, is not very bright. Labor experience is characterized by an extremely high unemployment; characterized by mostly part-time work.

Our point is that the prospect of a man who is cut

off from the disability program, a man who must qualify in the first instance under the most rigid definition of disability, that is not a man who is in any sense a potential olympic champion. This is a man who needs those moneys, and that's why Congress has provided them to him. He needs them in the same sense that the welfare recipient needed those moneys in the Goldberg situation.

Q I suppose the balancing factor would fit under what you just referred to in the Cafeteria Workers case, would be the amounts that are paid out in disability payments to people for periods after they had become ineligible. Does the record show anything about the dollar amounts, either estimates or accurate figures on that?

MR. SAYLER: Yes. The average recipient receives, according to government figures, something along the lines of $200 a month.

Now, the government has undertaken an estimate of what it would cost to give hearings, an opportunity for a hearing, satisfying the Goldberg standards. And it has determined that it would cost something in the neighborhood of $16 million.

Now, the problem with that estimate, Your Honor, is that it assumes that every person who is terminated, in an effort to gain unwarranted payments, would demand a hearing. And the experience under Goldberg, in the welfare context, does

not bear that out at all. Less than 10 percent in the District of Columbia of persons who are cut off from welfare are now demanding a hearing.

The government also assumes that the government would prevail in every one of these hearings. Every one of them. And that there would therefore be proper payments in every case. The fact, again, is that it's losing more of these cases than it's winning.

We've recomputed those figures on the basis of the government statistics, and the cost would be considerably less than $1 million, even assuming twice as many recipients sought a hearing as now seek a post-termination hearing. Even assuming that the government had no power to collect any over-payments it might make, and it has substantial statutory power to collect overpayments in the disability context, unlike the welfare context where the government has no power to collect overpayments; and even assuming that this hearing would require a full two months over and above the paper hearing that the government has now --

Q You estimate a million dollars for the whole United States, for the personnel necessary, the expense necessary to do this?

MR. SAYLER: We have computed this on the basis, Your Honor, that the government has computed it, on the basis of payments that would be made to recipients in the interim, as

distinguished from undertaking any computation.

Q But I was thinking of the geographical area. Is that for the District of Columbia or the whole United States?

MR. SAYLER: No, that figure I have just given you is for the entire country. There are some 37,000 cessations a year in this area, and something in the neighborhood of 4,000 recipients have been seeking hearings.

I've computed that on the basis of the entire country.

What I have not undertaken is --

Q Your assumption is that you could have the machinery for 4,000 cases, that could be handled for a million dollars?

MR. SAYLER: It would be considerably less than a million dollars, and what I want to make clear is that we have not undertaken to compute the cost to the government of operating this machiney. We're trying to figure out how much money would be expended in making the payments, which might be determined after the hearing --

Q You're talking about administrative expenses?

MR. SAYLER: That's right.

Q So I was --

MR. SAYLER: The government did not undertake that showing, either.

Q Oh, I see. I was thinking of the figure that's in a footnote, I think in the Goldberg case, or the parallel New York case, that in Los Angeles County alone there are 12,000 employees who service the welfare recipients, and therefore your million-dollar figure wouldn't go very far to paying --

MR. SAYLER: That's right.

Q -- those employees, would it?

MR. SAYLER: I'm sorry, Mr. Chief Justice. The point that that illustrates is that the welfare program, where prior hearings were held required, dwarfs the size of the disability program, both in numbers of recipients and in numbers of cessations.

Q While I have you interrupted, Mr. Sayler, I suppose you'd agree that in some respects this program is analogous to a private insurance contract for disability insurance, the standards, I suspect, are very much the same, total and permanent disability; and in general there is an analogy there. Would you agree?

MR. SAYLER: To some extent, Your Honor. There is no halfway disability in this program. It's all -- you're either all in or you're all out. There's no partial disability.

Q I understand, there's no partial disability.

MR. SAYLER: And the insurance programs generally have attempted to use a more objective standard to determine

disability. They use schedules. If a person qualifies under Schedule X, he is or is not disabled.

The government in this program has undertaken a quite more elaborate scheme. This program is to be based on the individual facts of each individual case, as the regulations made clear.

Q What happens to a policyholder on either life insurance or accident insurance that receives a total and permanent disability from, let us say, the Aetna or one of the other large companies, and they discover that he is working full time and making 5, 6, 8 thousand dollars a year; what do they do to his payments, ordinarily?

MR. SAYLER: In the event they determine what?

Q That he's earning a lot of money, that he's no longer totally and permanently disabled. They terminate him, don't they?

MR. SAYLER: Well, I take it that would be a factor that the insurance company would take into account, and would undertake an inquiry.

Q Well, they'd write him a letter and tell him his payments are being stopped, wouldn't they?

MR. SAYLER: One would hope that an insurance company would do more than that, and would undertake an inquiry to determine the facts.

Q Well, I'm assuming that they found these circum-

stances of his earnings by an inquiry, and perhaps sent investigators out to watch him leave in the morning, and in a very large case, you've probably known of them, they'd take moving pictures of him, the man playing golf, or whatever it may be. I'm sure you don't have any welfare recipients doing that that you -- this is the technique that an insurance company employs, and then they send him a letter and stop the payments, don't they?

MR. SAYLER: Your Honor, I'm trying to make two points in response to that.

One is that the insurance disability programs usually use a considerably more objective standard of disability than federal programs.

The other is that one would assume that an insurance company would apply its standards fairly, and if its standards required, as the federal regulations do in the disability area, that a thorough inquiry into all the facts be made, that a determination not be based on any easy litmus test; a determination not be based solely on earnings, which the regulations say; not be based solely on a doctor's report, which the regulations say. But an insurance company --

Q Well, that sounds to me, Mr. Sayler, like really a question of law you have here, rather than a factual question requiring a hearing.

MR. SAYLER: I'm not sure I understand the question.

The question of whether the disability is --

Q Well, the government automatically terminates -- well, it automatically terminates when it verifies earnings of a certain amount?

MR. SAYLER: In some of the cases, Your Honor. More of the cases are so-called medical cessations, where they have a doctor's report.

Q Well, in Mr. Wright's case it was an earnings case?

MR. SAYLER: An earnings case, yes.

Q And you're saying that the government may not terminate just upon verification of earnings?

MR. SAYLER: That's right, Your Honor.

Q And is that a question of law or is it a factual matter for a hearing?

MR. SAYLER: No, the regulations make that a question of fact. They say that the mere fact that a recipient has earned money is not the end of the inquiry, but the beginning of it. He has an opportunity to show how he performed, whether he was able to continue; and in Mr. Wright's case, he was not. He undertook to work and he could not continue. He had to stop.

The regulations say that's the kind of inquiry that should be undertaken, and that's the kind of inquiry that is undertaken at the end of the road, in the post-termination hearings now required as a matter of statutory law.

Q Well, I take it that there was a personal interview with Mr. Wright, and he verified the, his earnings that he had had?

MR. SAYLER: That's right.

Q And -- but, nevertheless, claimed that he was still disabled?

MR. SAYLER: That's right.

And he undertook a hearing. He asked for a hearing at that point.

Q Yes. But he had an opportunity to say anything he wanted to at that time?

MR. SAYLER: Well, --

Q Either personally in the interview, or in writing afterwards?

MR. SAYLER: That's right. He could have --

Q He could have revealed any of the circumstances which would indicate that despite his earnings he was still disabled?

MR. SAYLER: Yes. But he would not have protections provided in Goldberg: a chance to meet the decision-maker face to face; to demonstrate his disability, to show it; to tell his story.

Q Well, he had an interview.

MR. SAYLER: And to be cross-examined.

Q He had an interview.

MR. SAYLER: Had an interview with a claims representative. And the government says in its brief that he is not qualified to make judgments of medical disability.

Q Well, he could have told him anything he wanted to, though?

MR.SAYLER: That is right. I'm not disputing that, Mr. Justice White. What I am saying is that the questions that arise in this context are inherently complicated and subjective. That's what the legislative history says, that's what the regulations say. The 55 percent reversal rate, which arises only on the basis of terminations on the basis of either medical evidence or employer's report is eloquent testimony that these are tough fact questions.

Indeed, in some respects they're the identical fact questions that arise in the welfare context, because this Court has required prior hearings under welfare disability programs for these very precise same issues, as are raised in these cases.

We say that Goldberg rules this case. The same kind of top complex fact issue, the same kind of pressing interest and receiving benefits; no basis in the Social Security Act which governs both disability and welfare to distinguish Goldberg in this case.

In fact the government has recognized the closs connection between the two. It argued in its brief in the

Goldberg case to this Court that it would be inconsistent to provide hearings in the welfare context and not in the disability context. It went on to say the disability case was the a fortiori case, because the disability recipient, as a mandatory condition of his entitlement, must have contributed substantial funds for a protracted period, the precise fund from which he proposes to draw his benefits.

It's not true in the welfare context.

As this Court said in Flemming v. Nestor, in that sense social security benefits are earned, a functioning member of the economy ought to be able to draw upon that economy when the protected-against event takes place.

We think it would be intolerable to distinguish the disability case and the welfare case. That would create the anomalous result that the man who has contributed his money over the years, and worked, would have fewer procedural prtections than the welfare recipient who is not required to contribute to a fund.

Q How would you analogize that to a man who has bought and paid for an insurance policy, private policy --

MR. SAYLER: Well, I think there's --

Q -- do you think the Aetna Insurance Company, for example, must give notice before they terminate payments, and a hearing, as a matter of due process? Now, I'm not talking about what they do, what their practices are, what their

contract provides. What would be the constitutional obligation in a private insurance for disability?

MR. SAYLER: Well, I think --

Q Would it be the same as this?

MR. SAYLER: Well, I would say the answer comes out the same way. If one buys a permanent disability protection policy, which I happen to have now, I paid my money for five years; if I become disabled tomorrow, I am entitled, as a matter of contract, to all of it. That's benefits. I've paid my money, I've earned it.

They cannot turn around and say, "Oh, no, we don't think we should be paying this money."

Q But you don't have a right to insist to the insurance company that they grant you a hearing. If you don't like what the insurance company does, you go to court, I think.

MR. SAYLER: Go to court and try to enforce my contract. And of course we all recognize the fact that we are talking about the Federal Government administering a major federal program to the general welfare of the people. And that's an important distinction when --

Q Well, we're talking about the Fifth Amendment, which doesn't apply to a private insurance company; it applies to the Government of the United States. That the government shall not deprive anyone --

MR. SAYLER: That's right.

Q -- isn't that right?

MR. SAYLER: That's the point I was trying to make is that it's an awfully important distinction. But the analogy between insurance and a disability recipient's right to claim benefits when the protected-against event transpires is a very close one.

One other reason we think it would be intolerable to distinguish Goldberg in this case is that the upshot would be that the States which administer the welfare programs would be held to a higher procedural due process requirement under the Federal Constitution than would the Federal Government which administers the social security program.

I want to say one final word about the relief we seek in this Court. I think the Court can either do two things: It could remand to the lower court to enjoin further terminations without affording the preliminary hearings satisfying Goldberg v. Kelly standards.

The character of the government's argument has suggested an alternative approach. The government now does concede the unconstitutionality of the exception in the Act, which permits summary termination. Now, admitting the unconstitutionality of that provision leaves extant and standing only the general requirement in the Act that an oral hearing must precede final agency action. That's set forth in Sections 405 and 421; Section 1303 of the Act is the severability

provision, which says if one provision is declared unconstitutional, the rest of the Act remains standing.

What this would mean would be that the general requirement would obtain, oral hearings which are now statutorily required, as a matter of statutory construction, would have to be held before disability benefits could be terminated.

This in effect gives the matter back to Congress. And it says the summary suspension that you have undertaken will not satisfy the recent teachings of this Court. We declare that section unconstitutional.

Congress at that point either leaves the existing oral hearings as they are, can order them speeded up; Congress, on the other hand, may decide that it does want to have some sort of a preliminary determination before the full-scale hearing, and it may decide that it wants to institute a Goldberg v. Kelly type oral hearing, which meets just the rudimentary requirements of due process.

This, we think, should more appropriately be determined by the Congress rather than the government in a brief, which has undertaken, in the 13th hour in this case, to rewrite a summary suspension provision into the Act of Congress.

The essence of our case is that, as the Court said in Perales, the social security system must be fair. We don't

think the procedures which fall short of the Goldberg v. Kelly standards can be said to be fair.

We would urge this Court to make it clear that those standards obtain in this area, as well as in other areas.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Sayler.

Mr. Gray, you have three minutes left.

REBUTTAL ARGUMENT OF L. PATRICK GRAY, III, ESQ.,

ON BEHALF OF SECRETARY OF HEW

MR. GRAY: Thank you, Mr. Chief Justice.

May it please the Court:

I would like just to make a brief comment regarding Mr. Sayler's statement concerning reversal rates.

Appendix B in the government's brief contains statistics for the fiscal year 1971, and much can be done with figures, as we all know. And I think the only fair way to handle this particular matter of the reversal rate and the play on numbers is to take the actual number of claims that are processed and then trace those through and find the reversals.

And that brings you to a 6.6 percent rate of reversal. That speaks something for this system. At least a sufficient number of individuals somewhere throughout this total number of claims who do not feel that the system has dealt with them unfairly.

And I would merely submit to the Court that this kind of a consideration be given to dealing with statistics.

I would like also to point out once again and reaffirm the fact that the government has not conceded anything. This is not summary decapitation that we are engaged in here, and we have never considered it to be, and we have not conceded any point of constitutionality, and we stand by firmly the points made in our brief to this Honorable Court.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Gray.

Thank you, Mr. Sayler.

The case is submitted.

[Whereupon, at 2:58 o'clock, p.m., the case was submitted.]

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