

NLWJC - Kagan

Counsel - Box 025 - Folder 006

Wisconsin Waiver - Welfare [4]

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	Phone No. (Partial) (1 page)	n.d.	P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8289

FOLDER TITLE:

Wisconsin Waiver- Welfare [4]

2009-1006-F

bm12

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Withdrawal/Redaction Marker

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✓ 1. Anna Durand

2 yr requirement.

↳ cont call. Carey Kane.

This alt?

P6/(b)(6)

[001]

✓ 2. David Shaul

P6/(b)(6)

P6/(b)(6)

if accept w/ provision.
- DP → ∴ No answer // ^{called} if "ent" → unconst.
- Residency - problematic

P6/(b)(6)

Jones
Amy
lap reviews
talk today.

July 8, 1996

DRAFT

MEMORANDUM FOR THE CHIEF OF STAFF

FROM: Bruce Reed
Ken Apfel

SUBJECT: Major Issues -- Wisconsin Waiver

Here is a brief summary of issues the White House needs to resolve in the next few days so that the President can announce the Wisconsin waiver at the NGA meeting July 16.

I. Overview

On May 29, Gov. Thompson delivered a 400-page request for specific waivers of 69 AFDC, 18 Medicaid, and 5 Food Stamp provisions. HHS sees no problem with at least 54 of the 69 welfare provisions and 7 of the 18 Medicaid provisions. USDA has more limited waiver authority (it cannot allow changes that would make any families worse off), but ___ of ___ have been worked out.

The earliest the waiver can be approved without legal challenge is July 11, which marks the end of 30-day period for public comment. Dole stopped in Wisconsin last week to attack the Administration for not getting the waiver done yet. Last month, the House overwhelmingly passed a bill to deem the entire Wisconsin waiver approved, but the Senate is less likely to move that legislation -- unless we stir it up again by turning down too much.

II. Major Policy Issues

There are two schools of thought on how to approach the major remaining policy and legal issues in the Wisconsin plan. One approach, advocated by HHS, is to treat Wisconsin as another waiver request, and try to hold the line on a handful of issues -- time limits, residency requirements, etc. -- that HHS has denied states in the past. The other approach would be to treat Wisconsin as the political equivalent of another welfare reform bill, and judge its elements based on what we are willing to accept or reject in national legislation from Congress. The first approach would deny Wisconsin some provisions even though states could do them under the Breaux-Chafee welfare bill we support. The second approach would take the same position on Wisconsin that we have staked out in the national debate: yes to a work-based welfare block grant, no to a Medicaid block grant.

1. Medicaid: On Medicaid, the state will get very little of what it asked for. Although the health plan was designed to expand coverage up to 165% of poverty by placing welfare recipients in managed care, we will have to reject the basic framework, which is a block grant that ends the Medicaid guarantee. HCFA is also firmly opposed to allowing premiums of \$20 a month and forcing recipients to accept insurance from their employer if it is available. However, we can grant a pending Medicaid 1915(b) waiver that will place welfare recipients in managed care and use the savings to expand coverage, and pledge to keep working with the state to approve as much of the W-2 waiver as we can while preserving the guarantee. As always, budget neutrality will be a problem. The Medicaid provisions are the primary reason we need to keep Congress from passing legislation to deem the waiver approved, because such a bill would be their current reconciliation package in miniature -- generally acceptable welfare reform linked to unacceptable Medicaid.

2. Time Limits: The Wisconsin plan includes a 5-year lifetime limit, like our bill and all the major congressional plans. The issue for the waiver is whether to impose terms on who should get extensions to the time limit. Wisconsin wants to leave that decision to the discretion of the caseworker. In other states, HHS has always forced states to accept mandatory extensions for anyone who reaches the time limit and can't find a job. The one exception is the two-county waiver we granted Wisconsin in 1993, which essentially left that decision to the state.

We have two realistic options: 1) allow the state to implement the exact terms statewide that we granted in 1993; or 2) let the state develop its own terms. Under the first option, Thompson could only complain a little, since he has bragged in the past that his two-county waiver was the toughest in the country. Under the second option, the state could do what it will be able to do anyway if welfare reform becomes law. As a practical matter, Wisconsin will probably implement the same rules whichever option we choose. (Mary Jo Bane favors a third option, to "clarify" the 1993 terms along the lines of what HHS has demanded from other states -- but others at HHS consider this a non-starter, since it would enrage Thompson without enabling us to say he had agreed to the same terms once before.)

3. Entitlement: The toughest issue in the entire waiver is how best to make sure that recipients get jobs and child care, without handing Thompson the chance to claim we vetoed his waiver by demanding an individual entitlement, which has not been our bottom line in the congressional debate. The intent of the Wisconsin plan is to provide enough work and child care to go around, and to use some savings from caseload reduction toward that purpose, but like Breaux-Chafee and other congressional reform bills, there is no explicit guarantee.

The legislature enacted a specific non-entitlement provision, for two reasons: 1) the major national welfare reform bills end the entitlement; and 2) the state wanted to avoid the due-process constraints of *Goldberg v. Kelly*, a 1970 Supreme Court case which requires states to grant a recipient notice and an evidentiary hearing (including the opportunity to submit evidence, cross-examine opposing witnesses, and retain a lawyer) before terminating any benefits. Wisconsin is willing to provide ~~reasonable notice and opportunity for a~~

to which the recipient has a statutory entitlement.

Indeed, the state specifically denies that any individual is entitled to such benefits.

certain post-termination opportunities for review,

full evidentiary

review/ but argues that requiring a hearing before terminating benefits would make it easier for recipients to get around work requirements, and would keep the system still looking like a welfare program instead of the real world of work.

and the consequent due process safeguards,

There is no having it both ways on this question: any outright guarantee will maintain the individual entitlement even if we call it an assurance or something else. HHS would like to do just that, and impose due process procedures that go further than the state proposed. That would have the advantage of protecting recipients if the state runs out of money. On the other hand, it might prompt Thompson to reject the terms of the waiver, claim that we had vetoed welfare reform a third time in order to preserve the current system, and lobby Congress to pass a full Wisconsin waiver.

probably would

Another approach would be to require the state to "make best efforts to ensure that those eligible receive services and benefits." Holding Wisconsin to a "best efforts" standard would make it easier for courts and the Administration to review the waiver if Wisconsin fails to provide jobs, but it could not be interpreted as an individual entitlement. Recipients would get the notice and review proposed by the state, but they could not go to court every time they were sanctioned.

; therefore, the full panoply of due process protections would not apply.

and demand a full evidentiary hearing prior to any sanction.

White House Counsel suggests that instead of HHS outlining its own detailed due process procedures for the state, we could grant the state the right to go forward with its procedural provisions "insofar as and to the extent that they comport with applicable constitutional requirements." Since these issues are bound to be litigated no matter what we say, it probably makes sense to leave them to the courts to decide.

III. Legal Issues

Assuming we allow the state to proceed with something short of an individual entitlement (which clearly demands the full range of due process protections),

On two of labor's main concerns (worker displacement and the minimum wage), we lack the legal authority to grant exactly what the state wanted. The provision that requires workfare participants to be placed in new (not existing) job vacancies is in a section of the Social Security Act that cannot be waived under current law. But every major welfare bill would remove that provision, so Wisconsin will be free to do what it wants once welfare reform becomes law. On the minimum wage, we can essentially grant the state's request to pay participants the minimum wage for 30 hours a week of work but not additional hours of education and training. But the state will have to reduce hours or raise benefits once an increase in the minimum wage goes into effect.

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Two constitutional issues will require a White House decision. First, the state asked for a 60-day residency requirement before applying for assistance. HHS has refused to grant even 30-day requirements in the past, based on a 1970 Supreme Court decision, *Shapiro v. Thompson* (no relation), that a one-year residency requirement violated the constitutional right to travel. HHS is now willing to go along with a 30-day requirement for Wisconsin (and Minnesota, which has had a waiver pending for several months), on the grounds that 30 days represents a reasonable administrative period but 60 days does not. White House

Issue: do you not want to say that still a third approach is to have the same-sounding language (without adding a best-efforts requirement)

certain post-termination opportunities for review,

full evidentiary

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Barue: do you not want to say that still a third approach is to have the... language (without adding a best-efforts requirement)

^{although this argument is substantial} believes that [^]the constitutional issue is not crystal clear, noting that the current Court may wish to confine Shapiro to its facts and that Wisconsin (like many other states) has

Counsel argues that many states have residency requirements of 60 days or longer for other benefits -- Wisconsin requires university students to live in the state for a full year before they can qualify for resident tuition, and that we could grant the state a residency requirement for "the period up to 60 days for which the state can demonstrate a compelling administrative interest." That would allow us to grant the state's request, but put the burden on Wisconsin to defend its provision in court under the strictest possible standard. An approach still more favorable to the state, reflecting the constitutional uncertainty,

requiring, for example, that

constitutional

[The second constitutional issue involves the denial of benefits to U.S.-born citizen children of illegal immigrants. HHS argues that because the children are born here, they have the same right to get welfare even though their parents are not eligible and cannot be required to work. White House Counsel argues that if welfare is turned into a jobs program and eligibility is based on work, the children of illegal immigrants might well have no constitutional claim, any more than the children of parents who refuse to work. This is not a big issue in Wisconsin, where there are very few child-only cases, but it is an enormous concern in California, where most of the caseload growth in the past decade has been child-only cases involving children of illegal immigrants.]

these citizen

benefits as any others,

and also suggested by Counsel

The counsel's office suggests that consistent with Shapiro,

in this area, would ~~also~~ generally, to require the state to demonstrate an interest ~~substantive~~ for the residency period satisfying constitutional ~~requirements~~ ^{standards,} without stating precisely what those standards are.

again think the constitutional issue is more difficult, than this analysis suggests. It

~~Appellate and Supreme~~

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§ 211 amending 49.84(5)

no subst change? applic must provide
proof of immig status.

§ 86 or creating 49.145

only qualifying aliens entitled for W-2
[emp positions + job access loans]

11-2 - to be elig for W-2, need to be citizen or
qualifying alien

waiver requests 27/28 page VIII-11

Anna Durand -

Assuming due date soon

July 11 - comment period expires.

July 13 - NGA conf

Comments passing in - prob on last day from advoc
grps. Have to deal w/ in decision
~~of~~ memo.

Cit child - no longer a problem

Proposing to treat as child-only cases.
w/ve.
Assuming above.

T+C refers specifically to this situation.]

↳ NOT sent to state.

shared w/ them next wk.

Memorializes discussions we've had.

Usula - said - durational / res req.

ST needs to take whole period for everyone.

U's rec. - even de min. diff b/w immig +

long-term

bill comment
finalize by Mon.

meeting.

ADA questions -

Think we're OK - at least at OCC level.

Fairly conf. That this is not a problem.

labor - OK re min wage issue generally,

some concerns re actual private sector jobs.

should it be a problem.

July 16 -

Worker displacement - don't have auth. to waive this
Not a problem.

Residency req -

willing to say so OK.

w/ some hardship exceptions

Solve probs w/ MINN as well.

Were still going to see

Either line - not here issue.

Child - only cases - Citizen children.

Still not sure what state

court with room?

If not drop lead court
issue, then let's fight
over that

Evaluation - / cost neutrality

5 major policy issues -

- bears vary by family size?

Problem.

willing to live w/

- replacing w/ of welfare process

willing to care

Real issues of coverage -

1. Medicaid - NOT give what ~~is~~ ^{They} want
separate the wavers

2.

2. Time limits - extensions -

live w/

Do what you're doing now - statewide
OK then - he may squawk

3. Entitlement / due process

Take to Pres.

Preference - True (not job)

want it to
be certifying

no longer ent to cash benefits

but st has oblig to make wk available

They want to see -

st has to assure health care, child care, jobs.

BR/

end of waiver

st must provide jobs

but not have entitlement

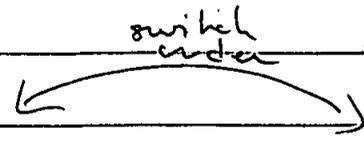
pass them to individual

Think about way to: req w/ to provide jobs

a political
issue out of this.

w/out giving everyone the ability to have hearing etc.
+ w/out giving Thompson the courts abil to make

Variation - distinguish btw entitlement
to job + entitlement to other benefits?



(1) (2) (3) (4)

No entitlement	State req'd ^{to provide} job but no inducement to - or -	State best efforts; no resource pleading; no inducement.	Entitlement
No due process	?	?	Due Process

"to extent?"

"to extent DPC"

That "
?"

Permits, gives
status of benefits/
services given"

diff.

Does fed gov't need?

2 is hard to defend -

If st is req'd, there is an
ent in the relevant source →
ergo DPC protection

↓
just a 2 of expectations

Look into citizen stuff

Agency -

No entitlement -
vouching scheme -
& in mind

Citizen children

Do not want laws to undoc persons
2 cit kids.

Child-only cars.

But wise wants to say - no law headed
by undoc man is elig.

Children don't get any laws at all.

[Where? like]

↳ CITS

EP ^{CIT} Kids being
problem treated diff'ly than other ^{CIT} kids
for something not at all
in their control.

Bruce

Walker

Randy

Janet

Anna

Kathy

Me

Mary Jo

get little bit closer

copy of welfare
memo

Anna Howard

690-6318

THE WHITE HOUSE
WASHINGTON

392 (1) 633 ← Oyama v. Calif.

S.Ct.
1940s
S.S.

struck down law
preventing alien
from transferring
prop to Amer cit child.

Just Japanes aliens

numerous lower ct
applied princ more
broadly

↓

What

Pieces can't be waived
out to continued Medicaid
benefits after you've taken job.

1-800-800

7759

WALTER

6-21-96

Anna: If there are things we have to say 'no' to,
what can we say 'yes' to?
What to present that's defensible?

Res Reg

60-day let you can
apply? or let you can
be paid?

MINN - newcomers

set ben level of
old state -

30-day waiting per.

2) can apply on day!

exempt for hardship.

processing time -

up to 45 days.

(not setting anything
else by this)

current

30 day - no pay

45 w.p.

↑

practice?

Does it

actually do

this?

Puuu-dicka -

30 days more.

↑

HHS hesitant to do 15-30 day

ext. of processing period.

No fix -

at least no fix yet.

Hearings

Any streamlined procedure?

Mass - If GVK applies,

DP req'd is that set forth in G/D/ben.

RM - hearing if denied ben because didn't hit criteria
" " " " " for discretionary reasons.

No process - This isn't a benefits prog

A jobs program

Emp. act will - treating like 7. Who
work - who have no unemployment

881 beneficiaries -

- Civil Rights Division -

no answer yet.

Citizen children -

All or nothing.

Split the difference? No way.

Plan - not sure how prog who

payment to p. who are able

no child-only benefit

not geared to # of kids.

(under income
act wh)

kids get but if
adults can't work

other reasons

Conchs is difficult here

Policy may be that this is terrible

Discussion waiver - OCC/HHS conv 6/12

1. Disability? - diff in payment

↓
SSI recipient?

Civ Rts Div want
to talk

2. diff issues

1. $\$77$ per each child so fam w/ disabled mem

may receive less than family w/ same # of kids.

same info (2. & SSI income will be counted for some p. to

wh program → determine income of family - serves to reduce

(less problematic) w/ benefit - to same as any other family of
that size

2. Children of undocumented aliens.

Sec 211 49.84(5)

applicants must provide proof of immig status

Sec 86 49.145

only qual alien elig, for w2.

Nothing indicates kids would be considered separately

By silence - kids gets screwed.

Distinguishing between ^{2 pp} ~~ch~~ ^{of ch} ~~ch~~ on basis of ~~ch~~ parents' status, which they have no control over.

[Citizenship clause of 14A]

Benefits go to kids or parents - if parents, maybe

classif is OK - just distinguishing btw parents.

3. Due Process -

Factual background re applicatic?
↓

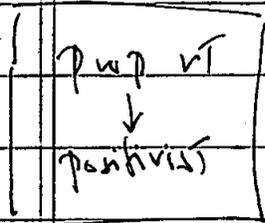
Real practice - what happens??

Wisc. - articulates how plans to ration?

None here - when it runs out of it.

Are there 2 underpinnings to holding?

- bottom of safety net.



v.

- [Tough question]

4. RT to travel -

Minimal time period? De minimis -

Wisc sup ct - 60-day period OK

168 Wis 2nd 892

485 NW 2nd 21

Duane 405 US 330

Minnesota -

30 day



Proposed - except - for unique hardship

5. Min wage?

FLSA applies only to trial jobs

↑
↳ These - ~~employees~~ will pay min wage.

All others - start gives excepti-

Immunization Cites: ✍

42 U.S.C. §§ 602(a)(10) and 606(a)
45 C.F.R. 233.10(a)(1)(ii)(A) and (B)

Court Cases interpreting the statutory cites:

Townsend v. Swank, 404 U.S. 282 (1971)

Carlson v. Remillard, 406 U.S. 598 (1971)

New York State Dept. of Soc. Services v. Dublino, 413 U.S.
405 (1973)

ACF determined immunizations were an impermissible condition of eligibility and has granted waivers in a number of states to allow immunizations

Citizen Children of Immigrants

I was not able to find a discussion in the W-2 proposal on this. I did find a statement on III-1 that to be eligible for W-2 you must be a citizen or qualifying alien. Also found waiver requests 27 and 28 (dealing with aliens) on page VIII-11.

I did a computer search of the W-2 statute and found:

1. Nothing under immigrant or immigrants.
2. One reference to immigration in § 211 which amends § 49.84(5) to say that an applicant must provide satisfactory proof of immigration status (the reference to W-2 was added; this part does not appear to be otherwise changed)
3. One reference to alien - § 86 which creates § 49.145 states that only qualifying aliens, as defined in state rules, are eligible for W-2 employment positions and job access loans

WIN
602a 17
630

condition - employable indivs should
get training etc.

Try to suggest changes that don't make them change legislative

Rules
Time limit - 60 mos.
"assurance" / entitlement
Medicaid - lost
immigrant children - (citizen - alien parents) DRAFT
illegal

Wisconsin Works (W2) - Waiver application

Of the 69 AFDC, child care, and child support enforcement waiver provisions requested in the W2 application, 54 appear to pose no legal or policy problems for the Administration, 7 pose some legal or policy difficulties which can probably be resolved, 4 merit discussion but may not result in actual policy issues, and 6 pose significant legal/policy problems. In addition there are Medicaid and Food Stamps waiver provisions in W2 which appear to raise significant policy/legal issues (based on AC's preliminary analysis, without input yet from HCFA or FCS).

Significant problems

(no entitlement - but resources available)

entitlement
↓
Don't know how to respond

1) The State would not guarantee W2 employment or child care to all eligible families. The State's plan should assure work and necessary services that would enable a needy family to support itself when it plays by the rules and has no other option to earn adequate income.

2) The State would replace the AFDC fair hearing process with one that would allow individuals to appeal to the State decisions of financial eligibility only, would not continue benefits while an appeal decision is pending, and would not restore incorrectly lost benefits. The combination of weakening due process, providing great discretion to the local service providers who would operate W2, and not providing the assurance of needed financial support, poses great risks that individuals will be subjected to arbitrary negative decisions. In addition, constitutional issues are raised. To ensure equitable treatment, there should be objective standards for the provision of benefits and services, and the ability to appeal negative decisions to a responsible state agency.

combination of weakening DP; lack of assurance (see above); due to unclear NGOs - no proposal for how to deal.

Yes/No one

3) The State would impose a 60-day State residency requirement for eligibility. This has potential constitutional problems.

consistently rejected such things

4) The State would limit participation to 24 months in any employment position and limit lifetime W2 participation to 60 months, with very limited extensions on a discretionary case-by-case basis. The Administration has approved AFDC time limits only when they protect children and do not punish families in which the adults are playing by the rules but simply unable to find work.

5) The State would weaken protections for regular employees against being displaced by W2 participants in certain cases. These provisions are in a section of the Social Security Act that is not subject to section 1115 waiver authority.

can't waive.

6) The State's evaluation would be limited to a process analysis. Given the radical nature of the change W2 represents, the state

evaluation should at least include an assessment of outcomes achieved and produce early and regular reports on these outcomes.

Difficulties that can probably be solved with further discussion

1) The State would provide children whose parents are SSI recipients a payment of \$77 instead of the regular AFDC payment for family of one, \$248. This poses an equal treatment concern. If the State could be allowed to count some portion of parents' SSI benefits, they might be willing to amend their State plan to establish child-only payment standards that would be applied to all child-only cases.

can probably solve -
4 on next page depends on this.

2) The State would count all income for eligibility purposes from a wide variety of statutes that exempt particular types of income for AFDC purposes. While these statutes are not subject to 1115 waiver authority, we are willing to explore other ways to resolve this obstacle.

3) The State would merge AFDC and Medicaid funds and reallocate them for other services. While transfer of funds between programs is illegal and federal matching rates for AFDC and Medicaid cannot be waived under 1115, the cost-neutrality structure allows for savings in one program to offset costs in another.

4) The State would assign individuals with severe barriers to regular employment to the Transitional Placement component, which would pay a lower benefit than the Community Services Jobs based on the required hours of work. Under the Americans with Disabilities Act, individuals must be given access to employment opportunities that would allow them to earn the same benefits as others in W2. Also of concern is that the State would not exempt from work activities parents who are needed in the home to care for disabled children.

issue that can be worked - They prob. will want to fix

5) The State would provide financial support under authority of title IV-E of the Social Security Act rather than under title IV-A to an AFDC-eligible child who lives with a non-needy non-legally responsible relative. While we cannot approve this provision because it would require waiving provisions of the Act not subject to 1115 waiver authority, we may allow the State to transfer administrative responsibility for these cases to their foster care agency.

↑

6) The State requests a waiver of AFDC Quality Control (QC) requirements, which we cannot approve because it would require waiving provisions the Act not subject to 1115 waiver authority. We can, however, allow the State to develop a broader quality assurance system and to reinvest QC disallowances in the program.

can't waive.

7) The State would limit Emergency Assistance (EA) for certain homeless persons to once in a 36-month period unless the

homelessness was caused by domestic abuse. While we cannot waive EA provisions under 1115, it is not clear that the State requires a waiver to do this.

Items and questions for further discussion

1) The State would require co-payments for child care based on family income and the category of care used. In the past we have denied this sort of request based on the legal requirement that AFDC be a cash payment. The policy issues with this proposal are that the co-payments would not be nominal, and because the co-payments would be based on a percentage of the cost of care, families would be more likely to choose lower quality care.

2) The State would increase required CWEP participation up to 40 hours per week. It is unclear how this activity would be implemented along with the Community Services Program and Transitional Placements, which would have work requirements of 30 and 28 hours a week respectively. More important, this could result in work assignments for less than the minimum wage.

related
to
min
wage
issue

3) The State would sanction the entire family for non-participation in a W2 employment position beginning with the first instance of noncompliance. It is not clear how this interacts with pay for performance. We have generally approved more progressive approaches to denial of children's benefits when an adult does not comply with program requirements.

④ As a consequence of the way state proposes to deal with child only cases, it appears to deny benefits to citizen children of undocumented aliens. If this is indeed the case, it could raise a severe constitutional issue.

]

POTENTIAL MEDICAID ISSUES

- 1) Eliminates the entitlement to Medicaid.
- 2) Requires all recipients to pay premiums.
- 3) Denies children Medicaid benefits if their parents fail to cooperate with child support enforcement.

1 wk-10 days
of time discussion

4 or 5 issues to go to Pres
- / some alternatives

~~at least
minimum no
de minimis~~

~~Inter mit
sicher -
kenn - unkennt~~

Ranking

- 1) ~~full or review (agency level)~~
- 2) ~~partial veto-instruction~~
- 3) non-entitlement

THE WHITE HOUSE

WASHINGTON

June 10, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN

SUBJECT: WISCONSIN WAIVER APPLICATION

The Wisconsin waiver application appears to present two serious constitutional issues. (HHS attorneys also believe the application presents two statutory problems -- one under the Disabilities Act and one under the Fair Labor Standards Act -- but OLC has not yet started to look into these issues.) In this memo, I briefly summarize the constitutional issues, first noting the arguments (already being pressed by HHS attorneys and, more tentatively, OLC deputies) that certain provisions in the waiver application violate the Constitution and then offering the best available responses to those arguments. Finally I suggest, in light of the President's desire to approve the waiver, one way to fudge these issues; this approach would allow Wisconsin to pursue its desired course without deeming that course constitutional, effectively punting the legal questions to the courts.

1. Right to travel issue. Under the Wisconsin program, an individual must reside in the State for at least 60 days prior to applying for a "Wisconsin works" employment position. There is a strong argument that this provision is unconstitutional under Shapiro v. Thompson. It is, however, possible to distinguish Shapiro. Moreover, this distinction, though not very convincing on its face, gains a measure of credibility from the widespread hostility to Shapiro, which may make the Court grab hold of any means available to confine that case to its facts.

In Shapiro, the Supreme Court held unconstitutional a statute requiring a person to reside within a State for a year prior to receiving welfare assistance. The Court reasoned that because this provision burdened a person's constitutional "right to travel" (i.e., to move to another state), the State had to show that the provision was necessary to achieve a compelling interest. The Court then found that the State had failed to make the requisite showing.

Under a straightforward application of Shapiro, the Wisconsin residency requirement is unconstitutional. On this view (currently held by both HHS attorneys and OLC deputies), the requirement, just like the one at issue in Shapiro, impermissibly burdens a welfare recipient's ability to move to the State.

There is, however, one obvious difference between the Wisconsin provision and the Shapiro provision: the difference

between a year and sixty days. This difference could change the constitutional analysis on either of two theories. First, it might be argued that because Wisconsin's provision imposes less of a burden on a person's right to travel, that provision should be held to a less strict standard of review than the one at issue in Shapiro. Wisconsin then could claim that its interests in the residency requirement in fact meet this lesser standard. This argument, however, seems quite weak. Standards of constitutional review do not usually vary in accordance with how much an action burdens a right, at least assuming the burden is not de minimis. And no sensible person could say that a state's determination to deprive a welfare recipient of benefits for two months would have only a de minimis effect on her ability to move to that state.

More promisingly, it might be claimed that Wisconsin's 60-day waiting period in fact meets the strict scrutiny standard, whereas the one-year period at issue in Shapiro could not. The Court in Shapiro clearly viewed the length of the waiting period as evidence that the State adopted the requirement to keep poor people out of the State -- an intent the Court held illegitimate; the Court saw no other, constitutionally legitimate let alone compelling, interest that would necessitate such a long waiting period. By contrast, it might be easier to portray a 60-day waiting period as a necessary administrative device, intended to promote rational budgeting, ensure orderly eligibility decisions, prevent fraud, and so forth. This argument would be strengthened to the extent Wisconsin subjects other state-provided services to the same residency requirement. (For example, it would be quite useful if Wisconsin insisted on a 60-day residency period before granting in-state tuition or voting privileges.)

Even in these circumstances, however, the argument seems fairly tenuous. Shapiro also contains language suggesting that states simply do not need residency requirements -- of any length -- to achieve their administrative interests. In this vein, it may be especially hard to explain why a State, acting only to advance these proper purposes, needs to completely deny benefits for a set period, rather than to delay benefits for this time (thus allowing an orderly decision on eligibility) and then grant the benefits retroactively. Thus, if the Court sticks with the basic message of Shapiro, Wisconsin will be hard put to show that it could not achieve its legitimate purposes through means less drastic than the 60-day period.

What gives the proposed distinction some viability is that Shapiro might well be on the Supreme Court's chopping block; many view the decision as one of the worst excesses of the Warren Court, and certain Justices have indicated that they want to overrule it. At the least, the current Court might welcome an opportunity to interpret Shapiro narrowly, as essentially applying only to its own facts. OLC does not like to take such considerations into account; it generally thinks that as long as the law remains the law, it should be treated as the law. But it would be obtuse not to recognize that any pronouncement that the

Wisconsin provision violates the Constitution would stand on an uncertain foundation.

2. Procedural due process issue. The Wisconsin program offers fairly paltry procedural protections to persons dependent on it for assistance. This aspect of the program raises real concerns under the Due Process Clause: indeed, OLC told me last week that in light of the Supreme Court's decision in Goldberg v. Kelly, Wisconsin's proposed procedural framework clearly violates constitutional standards. I do not think this conclusion follows so easily; indeed, I think there is a reasonably strong argument that the Wisconsin program is not subject to the requirements of due process. I have communicated this argument to OLC, which is currently considering whether it agrees.

Under the Wisconsin program, a "Wisconsin works agency" -- a local (sometimes governmental, sometimes non-governmental) group under contract with Wisconsin's Department of Industry, Labor, and Job Development to administer the Wisconsin works program in a geographic area -- may refuse, modify, or terminate benefits without a prior hearing. If the person affected files a petition within 45 days, the agency must provide "reasonable notice and opportunity for a review" and as soon as possible thereafter render a decision. The Department, upon a petition of either the person affected or the works agency, generally has discretion to review this decision. (But where the decision at issue denies an application for benefits based solely on a determination of financial ineligibility, Departmental review is mandatory.) Even if the Department reverses the agency's decision, the affected person receives no retroactive benefits.

In Goldberg v. Kelly, the Supreme Court held that the Due Process Clause required a State providing assistance under the AFDC program to grant a recipient notice and an evidentiary hearing (including the opportunity to submit evidence orally or in writing, to cross-examine opposing witnesses, and to retain a lawyer) prior to terminating any benefits. The Court reached this conclusion upon finding that a welfare recipient's interest in avoiding "grievous loss" (and society's interest in fostering "dignity and well-being" through the welfare system) outweighed the government's interest in conserving fiscal and administrative resources.

At first blush (HHS and OLC seem to think at last blush too), Goldberg commands the invalidation of Wisconsin's hearing provisions. In Wisconsin, a works agency can terminate benefits prior to giving the recipient notice or a hearing. This is exactly what Goldberg prohibits. Indeed, Wisconsin does not guarantee even a post-termination evidentiary hearing. Only the works agency -- which may be a private actor under contract with the government -- need review the termination; the Department's review is discretionary. And there is nothing to indicate that the review -- whether by the agency or by the Department -- will include an evidentiary hearing of the kind Goldberg contemplates,

with the ability to offer evidence and confront adverse witnesses.

But Goldberg is based on one essential premise; if that premise evaporates, so too do the due process requirements the decision articulates. That premise, in the words of the Court, is that "[welfare] benefits are a matter of statutory entitlement for persons qualified to receive them." It is only when a person has an entitlement of some kind to a substantive benefit (only when, that is, the benefit counts as "property" within the meaning of the Due Process Clause) that denial of the benefit demands procedural safeguards. This is why, to use a concrete example, the government must provide due process (notice and a hearing) before dismissing an employee who has a "for cause" provision in his employment contract, but need not provide such process to an employee who lacks such a contract clause. It is only the former who has a contractual "entitlement" to employment, and it is only this entitlement -- this property interest -- that invokes the requirements of the due process clause.

It thus becomes extremely important that the Wisconsin legislation at issue specifically disavows any creation of an entitlement on the part of welfare recipients. In the words of the statute (in a subsection labeled "Nonentitlement"), "Notwithstanding fulfillment of the eligibility requirements for any component of Wisconsin works, an individual is not entitled to services or benefits under Wisconsin works." It is at least arguable that this provision of the Wisconsin law makes Goldberg completely inapplicable. Goldberg, or so the argument goes, sets forth due process standards for cases in which a statute grants an entitlement to welfare assistance; where a statute explicitly denies such an entitlement, effectively leaving the provision of assistance to the discretion of the State, due process standards never come into play. Stated another way, the difference between Goldberg and this case is identical to the difference between the cases noted above involving "for cause" and "at-will employment" contractual clauses.

A court, of course, might reject this analysis and apply Goldberg notwithstanding the Wisconsin law's "Nonentitlement" provision. Such a court might reason that the government cannot insulate itself from due process requirements simply by labeling a given benefit as a "nonentitlement." If, for example, a law details certain qualifications for receiving a benefit -- and, further, if those qualified to receive the benefit in fact always do so -- then there is a good case for disregarding the State's terminology and treating the benefit as a property. Perhaps, then, in evaluating the Wisconsin program, a court should look behind the formal description of the benefit and ask whether (and how) the State exercises discretion and, relatedly, whether the State's actions generate legitimate expectations on the part of recipients. And perhaps (though perhaps not) when viewed in this non-formalist light, the Wisconsin program would look similar to

the program in Goldberg, leading to adoption of the identical due process requirements.

The key point, however, is that there is a pretty decent constitutional argument that Goldberg does not apply here -- more specifically, that the due process clause imposes no procedural requirements on the Wisconsin program, because the substantive benefits provided in that program do not count as property interests.

3. Recommended Approach

One possible approach is simply to approve Wisconsin's residency requirement and procedural provisions as written, thus implicitly finding that they satisfy constitutional standards. I have argued that there is a very credible argument that the procedural provisions do so and a not wholly embarrassing argument that the residency requirement does so too. Perhaps the existence of such arguments allows simple approval of these provisions.

Another approach is to fudge the issue, allowing Wisconsin to do what it wishes, but withholding judgment on the legality of such action and pushing these questions to the courts. For example, the Secretary could approve the eligibility requirements (including the sixty-day waiting period for non-residents) and the procedural provisions "insofar as and to the extent that they comport with applicable constitutional requirements." Or the Secretary could be more specific, approving the sixty-day waiting period "insofar as that requirement is necessary to achieve a compelling state interest" (thus signalling continued approval of the Shapiro framework) or approving the procedural provisions "to the extent such provisions apply to non-property interests" (thus signalling continued approval of the Goldberg analysis). The variations here are almost endless. All would license the State to act without sanctioning the constitutionality of such action, leaving it for the courts to determine whether the action is indeed lawful.

The above suggestions of course assume that we want to allow use of Wisconsin's proposed residency requirement and procedural provisions. If for some reason we do not, we need only accept the constitutional arguments now being pressed by HHS and OLC.

Col. Bahan
John Angell
B. Reed
Carol [unclear]

THE WHITE HOUSE

WASHINGTON

June 10, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN *EK*

SUBJECT: WISCONSIN WAIVER APPLICATION

The Wisconsin waiver application appears to present two serious constitutional issues -- more serious than Walter knew when I last talked with him. (HHS attorneys also believe the application presents two statutory problems -- one under the Disabilities Act and one under the Fair Labor Standards Act -- but OLC has not yet started to look into these issues.) In this memo, I briefly summarize the constitutional issues, first noting the arguments (already being pressed by HHS attorneys and, more tentatively, OLC deputies) that certain provisions in the waiver application violate the Constitution and then offering the best available responses to those arguments. Finally I suggest, in light of the President's desire to approve the waiver, one way to fudge these issues; this approach would allow Wisconsin to pursue its desired course without deeming that course constitutional, effectively punting the legal questions to the courts.

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The above suggestions of course assume that we want to allow use of Wisconsin's proposed residency requirement and procedural provisions. If for some reason we do not, we need only accept the constitutional arguments now being pressed by HHS and OLC.

Leah wants decision memo for DC this week.

How to involve HHS - not clear.

Mtg w/ Leah + HHS? Perhaps in some fashion.
What exactly Reg want - w.r.t. fair hearings.

etc.

HHS - moving slowly in terms of saying what
their bottom line position is.

Welfare meeting - Lecu 7/7/96

Thurs - mkt, progress; draft t/c in next couple of days
having conv. w/ state today

Draft t/c on same sent to state already -
uncontroversial.

July 11 - end of summer period - hundreds.

Preparing without materials

Big 2's still open - see sheet

BR - want to do next wk.

Tuesday the best day? Yes

They call Gov on the day.

* | Can he be briefed by
| HHH on this?

Randy Moss 6-5-96

Serious const problems - Goldkup

Rt to travel - 60 days or a year.

unless there is a diff justif

(paperwork thru - but expect to pay a year retroactively.)

No automatic Post-termination hearing

if denied for lack of financial qualif

(make too much \$) → post-hearing but no backpay.

broad swath of p denied lens -

e.g. failed to cooperate w/ establishing reg

everyone else.

No hearing at all.

Goldkup - never overruled -

welfare partic denied lens w/out hearing

(t: you have to have pre(?) - hearing.

[Same people?]

but strong

less strong depending on rationale

Tentative views

Mt of Richlin, Lew, Apfel, Reed etc on Wise waiver -

Talking pts - throw back in their face

not after cheap publicity

don't engage on substance

operation documents

outliney waivers - forms + cards

Base - big issues

Harris/
Walker

1. No guarantee - health plan, emp position, child care

2. Hearing vts ^{Section 402} - any - r of review? / narrowing of hearing vts.

They want to waive law hearing issues

⇒ Old law v Kelly issues / const

3. 60-day residency req before apply ^{imp} for benefits
const issues.

⇒ ?? 4. Waive 403 - but this init waivable - only 402/1702 can
be waived.

5. Medicaid problems - no entitlement; substantial copays.
Assumes a block grant

6. Child care - guarantee / copay issue.

Lower exemption up to 12-wks - full-time wk.

ADA issues - also

Low - can't do Medicaid / food stamps

Do fast on welfare

Base - 6 weeks at minimum -

30-day pub comment period.

Can announce beforehand, though?

Harriet Rabb

Jeff Powell

↳ he would pay w/ issue,

set of papers sent over to him. (to be
then - full Wisc applic. ^{see here})

HR will, ←

Let him know JP

I'm interested in w/plan, schedule etc.

Howard Kushin

Wisc waiver.

Anna Durand 6-5-96

1. Wisconsin waiver -

Hoping to talk w/ JP today.

1. Goldbus v Kelly.

WZ doesn't provide for hearing prior to termination of benefits (can determine by if that person is no longer eligible - e.g. for refusal to look for work; too much income; beyond time limits)

pre-hearing - no

post-hearing - yes

if a determination, receive no backpay.

paid -
now - hearing prior to decision. (by leg)
(no interim period)

2. FLRA applies?

Req of 40 hr wk per wk to get AFDC benefit.

Div benefit by 40 -

less than min wage.

FLRA 2.

DOC - Michael Givley (M Krister)

New vertic: tries to deal by req'ing only 28 hrs.

Plus in add'n req'd hrs of training

Adds up to 40. (if don't go to training - dock 4.25 per hour)

Could wk cut - so don't set min wage for those 28 hrs.

3. Residency req issue

60-days.



absolutely &

NOT what you got
in former state.

Short enuf? only intention to determine bona fides of residency. What's time limit for other res-based services?

4. Disability - currently - SSI b/c of disabil to parent.

full AFDC ben still goes to family. That size of

new program - instead of giving AFDC benefit as normal - sum. pts ~~77~~ per mo for each child.
probably will get less in total

SSI + 77 < AFDC

↳ no person as disability.

Viol of ADA?

Viol of state statutes too?

on OLC - talk w/ them later
today - get initial read.
how serious? which ones to
focus on.

Mid-next wk: sthng more definite

Periodic rev. of eligibility

terminate/modify

no pre-determination notice (op to respond)

↓

petition afterwards - within 45 days

need to review - financial elig (c)

Any other elig reqs -

discretionary review

Unclear - contours of hearing
(SAL type)

Howard Robsten

HHS

401-9220

GOLDBERG, COMMISSIONER OF SOCIAL
SERVICES OF THE CITY OF NEW
YORK *v.* KELLY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 62. Argued October 13, 1969—Decided March 23, 1970

Appellees are New York City residents receiving financial aid under the federally assisted Aid to Families with Dependent Children program or under New York State's general Home Relief program who allege that officials administering these programs terminated, or were about to terminate, such aid without prior notice and hearing, thereby denying them due process of law. The District Court held that only a pre-termination evidentiary hearing would satisfy the constitutional command, and rejected the argument of the welfare officials that the combination of the existing post-termination "fair hearing" and informal pre-termination review was sufficient. *Held:*

1. Welfare benefits are a matter of statutory entitlement for persons qualified to receive them and procedural due process is applicable to their termination. Pp. 261-263.

2. The interest of the eligible recipient in the uninterrupted receipt of public assistance, which provides him with essential food, clothing, housing, and medical care, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. Pp. 264-266.

3. A pre-termination evidentiary hearing is necessary to provide the welfare recipient with procedural due process. Pp. 264, 266-271.

(a) Such hearing need not take the form of a judicial or quasi-judicial trial, but the recipient must be provided with timely and adequate notice detailing the reasons for termination, and an effective opportunity to defend by confronting adverse witnesses and by presenting his own arguments and evidence orally before the decision maker. Pp. 266-270.

(b) Counsel need not be furnished at the pre-termination hearing, but the recipient must be allowed to retain an attorney if he so desires. P. 270.

(c) The decisionmaker need not file a full opinion or make formal findings of fact or conclusions of law but should state the reasons for his determination and indicate the evidence he relied on. P. 271.

(d) The decisionmaker must be impartial, and although prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as decision maker, he should not have participated in making the determination under review. P. 271.

294 F. Supp. 893, affirmed.

John J. Lofin, Jr., argued the cause for appellant. With him on the briefs were *J. Lee Rankin* and *Stanley Buchsbaum*.

Lee A. Albert argued the cause for appellees. With him on the brief were *Robert Borsody*, *Martin Garbus*, and *David Diamond*.

Briefs of *amici curiae* were filed by *Solicitor General Griswold*, *Assistant Attorney General Ruckelshaus*, and *Robert V. Zener* for the United States, and by *Victor G. Rosenblum* and *Daniel Wm. Fessler* for the National Institute for Education in Law and Poverty.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question for decision is whether a State that terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment.

This action was brought in the District Court for the Southern District of New York by residents of New

York City receiving financial aid under the federally assisted program of Aid to Families with Dependent Children (AFDC) or under New York State's general Home Relief program.¹ Their complaint alleged that the New York State and New York City officials administering these programs terminated, or were about to terminate, such aid without prior notice and hearing, thereby denying them due process of law.² At the time

¹ AFDC was established by the Social Security Act of 1935, 49 Stat. 627, as amended, 42 U. S. C. §§ 601-610 (1964 ed. and Supp. IV). It is a categorical assistance program supported by federal grants-in-aid but administered by the States according to regulations of the Secretary of Health, Education, and Welfare. See N. Y. Social Welfare Law §§ 343-362 (1966). We considered other aspects of AFDC in *King v. Smith*, 392 U. S. 309 (1968), and in *Shapiro v. Thompson*, 394 U. S. 618 (1969).

Home Relief is a general assistance program financed and administered solely by New York state and local governments. N. Y. Social Welfare Law §§ 157-165 (1966), since July 1, 1967, Social Services Law §§ 157-166. It assists any person unable to support himself or to secure support from other sources. *Id.*, § 158.

² Two suits were brought and consolidated in the District Court. The named plaintiffs were 20 in number, including intervenors. Fourteen had been or were about to be cut off from AFDC, and six from Home Relief. During the course of this litigation most, though not all, of the plaintiffs either received a "fair hearing" (see *infra*, at 259-260) or were restored to the rolls without a hearing. However, even in many of the cases where payments have been resumed, the underlying questions of eligibility that resulted in the bringing of this suit have not been resolved. For example, Mrs. Altigracia Guzman alleged that she was in danger of losing AFDC payments for failure to cooperate with the City Department of Social Services in suing her estranged husband. She contended that the departmental policy requiring such cooperation was inapplicable to the facts of her case. The record shows that payments to Mrs. Guzman have not been terminated, but there is no indication that the basic dispute over her duty to cooperate has been resolved, or that the alleged danger of termination has been removed. Home Relief payments to Juan DeJesus were terminated because he refused to accept counseling and rehabilitation for drug addiction. Mr. DeJesus maintains that he

the suits were filed there was no requirement of prior notice or hearing of any kind before termination of financial aid. However, the State and city adopted procedures for notice and hearing after the suits were brought, and the plaintiffs, appellees here, then challenged the constitutional adequacy of those procedures.

The State Commissioner of Social Services amended the State Department of Social Services' Official Regulations to require that local social services officials proposing to discontinue or suspend a recipient's financial aid do so according to a procedure that conforms to either subdivision (a) or subdivision (b) of § 351.26 of the regulations as amended.³ The City of New York

does not use drugs. His payments were restored the day after his complaint was filed. But there is nothing in the record to indicate that the underlying factual dispute in his case has been settled.

³The adoption in February 1968 and the amendment in April of Regulation § 351.26 coincided with or followed several revisions by the Department of Health, Education, and Welfare of its regulations implementing 42 U. S. C. § 602 (a) (4), which is the provision of the Social Security Act that requires a State to afford a "fair hearing" to any recipient of aid under a federally assisted program before termination of his aid becomes final. This requirement is satisfied by a post-termination "fair hearing" under regulations presently in effect. See HEW Handbook of Public Assistance Administration (hereafter HEW Handbook), pt. IV, §§ 6200-6400. A new HEW regulation, 34 Fed. Reg. 1144 (1969), now scheduled to take effect in July 1970, 34 Fed. Reg. 13595 (1969), would require continuation of AFDC payments until the final decision after a "fair hearing" and would give recipients a right to appointed counsel at "fair hearings." 45 CFR § 205.10, 34 Fed. Reg. 1144 (1969); 45 CFR § 220.25, 34 Fed. Reg. 1356 (1969). For the safeguards specified at such "fair hearings" see HEW Handbook, pt. IV, §§ 6200-6400. Another recent regulation now in effect requires a local agency administering AFDC to give "advance notice of questions it has about an individual's eligibility so that a recipient has an opportunity to discuss his situation before receiving formal written notice of reduction in payment or termination of assistance." *Id.*, pt. IV, § 2300 (d) (5). This case presents no issue of the validity or con-

elected to promulgate a local procedure according to subdivision (b). That subdivision, so far as here pertinent, provides that the local procedure must include the giving of notice to the recipient of the reasons for a proposed discontinuance or suspension at least seven days prior to its effective date, with notice also that upon request the recipient may have the proposal reviewed by a local welfare official holding a position superior to that of the supervisor who approved the proposed discontinuance or suspension, and, further, that the recipient may submit, for purposes of the review, a written statement to demonstrate why his grant should not be discontinued or suspended. The decision by the reviewing official whether to discontinue or suspend aid must be made expeditiously, with written notice of the decision to the recipient. The section further expressly provides that "[a]ssistance shall not be discontinued or suspended prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance or suspension, whichever occurs later."

Pursuant to subdivision (b), the New York City Department of Social Services promulgated Procedure No. 68-18. A caseworker who has doubts about the recipient's continued eligibility must first discuss them with the recipient. If the caseworker concludes that the recipient is no longer eligible, he recommends termination

struction of the federal regulations. It is only subdivision (b) of § 351.26 of the New York State regulations and implementing procedure 68-18 of New York City that pose the constitutional question before us. Cf. *Shapiro v. Thompson*, 394 U. S. 618, 641 (1969). Even assuming that the constitutional question might be avoided in the context of AFDC by construction of the Social Security Act or of the present federal regulations thereunder, or by waiting for the new regulations to become effective, the question must be faced and decided in the context of New York's Home Relief program, to which the procedures also apply.

of aid to a unit supervisor. If the latter concurs, he sends the recipient a letter stating the reasons for proposing to terminate aid and notifying him that within seven days he may request that a higher official review the record, and may support the request with a written statement prepared personally or with the aid of an attorney or other person. If the reviewing official affirms the determination of ineligibility, aid is stopped immediately and the recipient is informed by letter of the reasons for the action. Appellees' challenge to this procedure emphasizes the absence of any provisions for the personal appearance of the recipient before the reviewing official, for oral presentation of evidence, and for confrontation and cross-examination of adverse witnesses.⁴ However, the letter does inform the recipient that he may request a post-termination "fair hearing."⁵ This is a proceeding before an inde-

⁴ These omissions contrast with the provisions of subdivision (a) of § 351.26, the validity of which is not at issue in this Court. That subdivision also requires written notification to the recipient at least seven days prior to the proposed effective date of the reasons for the proposed discontinuance or suspension. However, the notification must further advise the recipient that if he makes a request therefor he will be afforded an opportunity to appear at a time and place indicated before the official identified in the notice, who will review his case with him and allow him to present such written and oral evidence as the recipient may have to demonstrate why aid should not be discontinued or suspended. The District Court assumed that subdivision (a) would be construed to afford rights of confrontation and cross-examination and a decision based solely on the record. 294 F. Supp. 893, 906-907 (1968).

⁵ N. Y. Social Welfare Law § 353 (2) (1966) provides for a post-termination "fair hearing" pursuant to 42 U. S. C. § 602 (a) (4). See n. 3, *supra*. Although the District Court noted that HEW had raised some objections to the New York "fair hearing" procedures, 294 F. Supp., at 898 n. 9, these objections are not at issue in this Court. Shortly before this suit was filed, New York State adopted a similar provision for a "fair hearing" in ter-

pendent state hearing officer at which the recipient may appear personally, offer oral evidence, confront and cross-examine the witnesses against him, and have a record made of the hearing. If the recipient prevails at the "fair hearing" he is paid all funds erroneously withheld.⁶ HEW Handbook, pt. IV, §§ 6200-6500; 18 NYCRR §§ 84.2-84.23. A recipient whose aid is not restored by a "fair hearing" decision may have judicial review. N. Y. Civil Practice Law and Rules, Art. 78 (1963). The recipient is so notified, 18 NYCRR § 84.16.

I

The constitutional issue to be decided, therefore, is the narrow one whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing before the termination of benefits. The District Court held

terminations of Home Relief. 18 NYCRR §§ 84.2-84.23. In both AFDC and Home Relief the "fair hearing" must be held within 10 working days of the request, § 84.6, with decision within 12 working days thereafter, § 84.15. It was conceded in oral argument that these time limits are not in fact observed.

⁶ Current HEW regulations require the States to make full retroactive payments (with federal matching funds) whenever a "fair hearing" results in a reversal of a termination of assistance. HEW Handbook, pt. IV, §§ 6200 (k), 6300 (g), 6500 (a); see 18 NYCRR § 358.8. Under New York State regulations retroactive payments can also be made, with certain limitations, to correct an erroneous termination discovered before a "fair hearing" has been held. 18 NYCRR § 351.27. HEW regulations also authorize, but do not require, the States to continue AFDC payments without loss of federal matching funds pending completion of a "fair hearing." HEW Handbook, pt. IV, § 6500 (b). The new HEW regulations presently scheduled to become effective July 1, 1970, will supersede all of these provisions. See n. 3, *supra*.

⁷ Appellant does not question the recipient's due process right to evidentiary review after termination. For a general discussion of the provision of an evidentiary hearing prior to termination, see Comment, The Constitutional Minimum for the Termination of Welfare Benefits: The Need for and Requirements of a Prior Hearing, 68 Mich. L. Rev. 112 (1969).

S. 2
that only a pre-termination evidentiary hearing would satisfy the constitutional command, and rejected the argument of the state and city officials that the combination of the post-termination "fair hearing" with the informal pre-termination review disposed of all due process claims. The court said: "While post-termination review is relevant, there is one overpowering fact which controls here. By hypothesis, a welfare recipient is destitute, without funds or assets. . . . Suffice it to say that to cut off a welfare recipient in the face of . . . 'brutal need' without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it." *Kelly v. Wyman*, 294 F. Supp. 893, 899, 900 (1968). The court rejected the argument that the need to protect the public's tax revenues supplied the requisite "overwhelming consideration." "Against the justified desire to protect public funds must be weighed the individual's overpowering need in this unique situation not to be wrongfully deprived of assistance. . . . While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process. Under all the circumstances, we hold that due process requires an adequate hearing before termination of welfare benefits, and the fact that there is a later constitutionally fair proceeding does not alter the result." *Id.*, at 901. Although state officials were party defendants in the action, only the Commissioner of Social Services of the City of New York appealed. We noted probable jurisdiction, 394 U. S. 971 (1969), to decide important issues that have been the subject of disagreement in principle between the three-judge court in the present case and that convened in *Wheeler v. Montgomery*, No. 14, *post*, p. 280, also decided today. We affirm.

Appellant does not contend that procedural due process is not applicable to the termination of welfare bene-

fits. Such benefits are a matter of statutory entitlement for persons qualified to receive them.⁸ Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are "a 'privilege' and not a 'right.'" *Shapiro v. Thompson*, 394 U. S. 618, 627 n. 6 (1969). Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, *Sherbert v. Verner*, 374 U. S. 398 (1963); or to denial of a tax exemption, *Speiser v. Randall*, 357 U. S. 513 (1958); or to discharge from public employment, *Slochower v. Board of Higher Education*, 350 U. S. 551 (1956).⁹ The extent to which procedural due process

⁸ It may be realistic today to regard welfare entitlements as more like "property" than a "gratuity." Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that

"[s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced." Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L. J. 1245, 1255 (1965). See also Reich, *The New Property*, 73 Yale L. J. 733 (1964).

⁹ See also *Goldsmith v. United States Board of Tax Appeals*, 270 U. S. 117 (1926) (right of a certified public accountant to practice before the Board of Tax Appeals); *Hornsby v. Allen*, 326 F. 2d 605

must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U. S. 886, 895 (1961), "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." See also *Hannah v. Larche*, 363 U. S. 420, 440, 442 (1960).

It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing.¹⁰

(*C. A. 5th Cir. 1964*) (right to obtain a retail liquor store license); *Dixon v. Alabama State Board of Education*, 294 F. 2d 150 (*C. A. 5th Cir.*), cert. denied, 368 U. S. 930 (1961) (right to attend a public college).

¹⁰ One Court of Appeals has stated: "In a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing." *R. A. Holman & Co. v. SEC*, 112 U. S. App. D. C. 43, 47, 299 F. 2d 127, 131, cert. denied, 370 U. S. 911 (1962) (suspension of exemption from stock registration requirement). See also, for example, *Ewing v. Mytinger & Casselberry, Inc.*, 339 U. S. 594 (1950) (seizure of mislabeled vitamin product); *North American Cold Storage Co. v. Chicago*, 211 U. S. 306 (1908) (seizure of food not fit for human use); *Yakus v. United States*, 321 U. S. 414 (1944) (adoption of wartime price regulations); *Gonzalez v. Freeman*, 118 U. S. App. D. C. 180, 334 F. 2d 570 (1964) (disqualification of a contractor to do business with the Government). In *Cafeteria & Restaurant Workers Union v. McElroy*, *supra*, at 896, summary dismissal of a public employee was upheld

But we agree with the District Court that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. Cf. *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969). For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care.¹¹ Cf. *Nash v. Florida Industrial Commission*, 389 U. S. 235, 239 (1967). Thus the crucial factor in this context—a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or 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. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.¹²

Moreover, important governmental interests are promoted by affording recipients a pre-termination evidentiary hearing. From its founding the Nation's basic

because "[i]n [its] proprietary military capacity, the Federal Government . . . has traditionally exercised unfettered control," and because the case involved the Government's "dispatch of its own internal affairs." Cf. *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940).

¹¹ Administrative determination that a person is ineligible for welfare may also render him ineligible for participation in state-financed medical programs. See N. Y. Social Welfare Law § 366 (1966).

¹² His impaired adversary position is particularly telling in light of the welfare bureaucracy's difficulties in reaching correct decisions on eligibility. See Comment, *Due Process and the Right to a Prior Hearing in Welfare Cases*, 37 Ford. L. Rev. 604, 610-611 (1969).

commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty.¹³ This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.

Appellant does not challenge the force of these considerations but argues that they are outweighed by countervailing governmental interests in conserving fiscal and administrative resources. These interests, the argument goes, justify the delay of any evidentiary hearing until after discontinuance of the grants. Summary adjudication protects the public fisc by stopping payments promptly upon discovery of reason to believe that a recipient is no longer eligible. Since most terminations are accepted without challenge, summary adjudication also conserves both the fisc and administrative time and energy by reducing the number of evidentiary hearings actually held.

¹³ See, e. g., Reich, *supra*, n. 8, 74 Yale L. J., at 1255.

e. g.
w/ how
date

We agree with the District Court, however, that these governmental interests are not overriding in the welfare context. The requirement of a prior hearing doubtless involves some greater expense, and the benefits paid to ineligible recipients pending decision at the hearing probably cannot be recouped, since these recipients are likely to be judgment-proof. But the State is not without weapons to minimize these increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities. Indeed, the very provision for a post-termination evidentiary hearing in New York's Home Relief program is itself cogent evidence that the State recognizes the primacy of the public interest in correct eligibility determinations and therefore in the provision of procedural safeguards. Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. As the District Court correctly concluded, "[t]he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal." 294 F. Supp., at 904-905.

II

We also agree with the District Court, however, that the pre-termination hearing need not take the form of a judicial or quasi-judicial trial. We bear in mind that the statutory "fair hearing" will provide the recipient

with a full administrative review.¹⁴ Accordingly, the pre-termination hearing has one function only: to produce an initial determination of the validity of the welfare department's grounds for discontinuance of payments in order to protect a recipient against an erroneous termination of his benefits. Cf. *Sniadach v. Family Finance Corp.*, 395 U. S. 337, 343 (1969) (HARLAN, J., concurring). Thus, a complete record and a comprehensive opinion, which would serve primarily to facilitate judicial review and to guide future decisions, need not be provided at the pre-termination stage. We recognize, too, that both welfare authorities and recipients have an interest in relatively speedy resolution of questions of eligibility, that they are used to dealing with one another informally, and that some welfare departments have very burdensome caseloads. These considerations justify the limitation of the pre-termination hearing to minimum procedural safeguards, adapted to the particular characteristics of welfare recipients, and to the limited nature of the controversies to be resolved. We wish to add that we, no less than the dissenters, recognize the importance of not imposing upon the States or the Federal Government in this developing field of law any procedural requirements beyond those demanded by rudimentary due process.

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U. S. 385, 394 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U. S. 545, 552 (1965). In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a

¹⁴Due process does not, of course, require two hearings. If, for example, a State simply wishes to continue benefits until after a "fair" hearing there will be no need for a preliminary hearing.

proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.¹⁵

We are not prepared to say that the seven-day notice currently provided by New York City is constitutionally insufficient *per se*, although there may be cases where fairness would require that a longer time be given. Nor do we see any constitutional deficiency in the content or form of the notice. New York employs both a letter and a personal conference with a caseworker to inform a recipient of the precise questions raised about his continued eligibility. Evidently the recipient is told the legal and factual bases for the Department's doubts. This combination is probably the most effective method of communicating with recipients.

The city's procedures presently do not permit recipients to appear personally with or without counsel before the official who finally determines continued eligibility. Thus a recipient is not permitted to present evidence to that official orally, or to confront or cross-examine adverse witnesses. These omissions are fatal to the constitutional adequacy of the procedures.

The opportunity to be heard must be tailored to the

¹⁵This case presents no question requiring our determination whether due process requires only an opportunity for written submission, or an opportunity both for written submission and oral argument, where there are no factual issues in dispute or where the application of the rule of law is not intertwined with factual issues. See *FCC v. WJR*, 337 U. S. 265, 275-277 (1949).

not to
appear
before
decision
maker

capacities and circumstances of those who are to be heard.¹⁶ It is not enough that a welfare recipient may present his position to the decision maker in writing or secondhand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. The secondhand presentation to the decisionmaker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him. Therefore a recipient must be allowed to state his position orally. Informal procedures will suffice; in this context due process does not require a particular order of proof or mode of offering evidence. Cf. HEW Handbook, pt. IV, § 6400 (a).

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *E. g.*, *ICC v. Louisville & N. R. Co.*, 227 U. S. 88, 93-94 (1913); *Willner v. Committee on Character & Fitness*, 373 U. S. 96, 103-104 (1963). What we said in

¹⁶"[T]he prosecution of an appeal demands a degree of security, awareness, tenacity, and ability which few dependent people have." Wedemeyer & Moore, *The American Welfare System*, 54 *Calif. L. Rev.* 326, 342 (1966).

Greene v. McElroy, 360 U. S. 474, 496-497 (1959), is particularly pertinent here:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny."

Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department.

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U. S. 45, 68-69 (1932). We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the

interests of the recipient. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing. Evidently HEW has reached the same conclusion. See 45 CFR § 205.10, 34 Fed. Reg. 1144 (1969); 45 CFR § 220.25, 34 Fed. Reg. 13595 (1969).

Finally, the decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. *Ohio Bell Tel. Co. v. PUC*, 301 U. S. 292 (1937); *United States v. Abilene & S. R. Co.*, 265 U. S. 274, 288-289 (1924). To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on, cf. *Wichita R. & Light Co. v. PUC*, 260 U. S. 48, 57-59 (1922), though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law. And, of course, an impartial decision maker is essential. Cf. *In re Murchison*, 349 U. S. 133 (1955); *Wong Yang Sung v. McGrath*, 339 U. S. 33, 45-46 (1950). We agree with the District Court that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review.

Affirmed.

[For dissenting opinion of MR. CHIEF JUSTICE BURGER, see *post*, p. 282.]

[For dissenting opinion of MR. JUSTICE STEWART, see *post*, p. 285.]

MR. JUSTICE BLACK, dissenting.

In the last half century the United States, along with many, perhaps most, other nations of the world, has moved far toward becoming a welfare state, that is, a nation that for one reason or another taxes its most

affluent people to help support, feed, clothe, and shelter its less fortunate citizens. The result is that today more than nine million men, women, and children in the United States receive some kind of state or federally financed public assistance in the form of allowances or gratuities, generally paid them periodically, usually by the week, month, or quarter.¹ Since these gratuities are paid on the basis of need, the list of recipients is not static, and some people go off the lists and others are added from time to time. These ever-changing lists put a constant administrative burden on government and it certainly could not have reasonably anticipated that this burden would include the additional procedural expense imposed by the Court today.

The dilemma of the ever-increasing poor in the midst of constantly growing affluence presses upon us and must inevitably be met within the framework of our democratic constitutional government, if our system is to survive as such. It was largely to escape just such pressing economic problems and attendant government repression that people from Europe, Asia, and other areas settled this country and formed our Nation. Many of those settlers had personally suffered from persecutions of various kinds and wanted to get away from governments that had unrestrained powers to make life miserable for their citizens. It was for this reason, or so I believe, that on reaching these new lands the early settlers undertook to curb their governments by confining their powers

¹ This figure includes all recipients of Old-age Assistance, Aid to Families with Dependent Children, Aid to the Blind, Aid to the Permanently and Totally Disabled, and general assistance. In this case appellants are AFDC and general assistance recipients. In New York State alone there are 951,000 AFDC recipients and 108,000 on general assistance. In the Nation as a whole the comparable figures are 6,080,000 and 391,000. U. S. Bureau of the Census, Statistical Abstract of the United States: 1969 (90th ed.), Table 435, p. 297.

within written boundaries, which eventually became written constitutions.² They wrote their basic charters as nearly as men's collective wisdom could do so as to proclaim to their people and their officials an emphatic command that: "Thus far and no farther shall you go; and where we neither delegate powers to you, nor prohibit your exercise of them, we the people are left free."³

Representatives of the people of the Thirteen Original Colonies spent long, hot months in the summer of 1787 in Philadelphia, Pennsylvania, creating a government of limited powers. They divided it into three departments—Legislative, Judicial, and Executive. The Judicial Department was to have no part whatever in making any laws. In fact proposals looking to vesting some power in the Judiciary to take part in the legislative process and veto laws were offered, considered, and rejected by the Constitutional Convention.⁴ In my

² The goal of a written constitution with fixed limits on governmental power had long been desired. Prior to our colonial constitutions, the closest man had come to realizing this goal was the political movement of the Levellers in England in the 1640's. J. Frank, *The Levellers* (1955). In 1647 the Levellers proposed the adoption of An Agreement of the People which set forth written limitations on the English Government. This proposal contained many of the ideas which later were incorporated in the constitutions of this Nation. *Id.*, at 135-147.

³ This command is expressed in the Tenth Amendment:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

⁴ It was proposed that members of the judicial branch would sit on a Council of Revision which would consider legislation and have the power to veto it. This proposal was rejected. J. Elliot, 1 Elliot's Debates 160, 164, 214 (Journal of the Federal Convention); 395, 398 (Yates' Minutes); vol. 5, pp. 151, 164-166, 344-349 (Madison's Notes) (Lippincott ed. 1876). It was also suggested that The Chief Justice would serve as a member of the President's executive council, but this proposal was similarly rejected. *Id.*, vol. 5, pp. 442, 445, 446, 462.

judgment there is not one word, phrase, or sentence from the beginning to the end of the Constitution from which it can be inferred that judges were granted any such legislative power. True, *Marbury v. Madison*, 1 Cranch 137 (1803), held, and properly, I think, that courts must be the final interpreters of the Constitution, and I recognize that the holding can provide an opportunity to slide imperceptibly into constitutional amendment and law making. But when federal judges use this judicial power for legislative purposes, I think they wander out of their field of vested powers and transgress into the area constitutionally assigned to the Congress and the people. That is precisely what I believe the Court is doing in this case. Hence my dissent.

The more than a million names on the relief rolls in New York,⁵ and the more than nine million names on the rolls of all the 50 States were not put there at random. The names are there because state welfare officials believed that those people were eligible for assistance. Probably in the officials' haste to make out the lists many names were put there erroneously in order to alleviate immediate suffering, and undoubtedly some people are drawing relief who are not entitled under the law to do so. Doubtless some draw relief checks from time to time who know they are not eligible, either because they are not actually in need or for some other reason. Many of those who thus draw undeserved gratuities are without sufficient property to enable the government to collect back from them any money they wrongfully receive. But the Court today holds that it would violate the Due Process Clause of the Fourteenth Amendment to stop paying those people weekly or monthly allowances unless the government first affords them a full "evidentiary hearing" even

⁵ See n. 1, *supra*.

though welfare officials are persuaded that the recipients are not rightfully entitled to receive a penny under the law. In other words, although some recipients might be on the lists for payment wholly because of deliberate fraud on their part, the Court holds that the government is helpless and must continue, until after an evidentiary hearing, to pay money that it does not owe, never has owed, and never could owe. I do not believe there is any provision in our Constitution that should thus paralyze the government's efforts to protect itself against making payments to people who are not entitled to them.

Particularly do I not think that the Fourteenth Amendment should be given such an unnecessarily broad construction. That Amendment came into being primarily to protect Negroes from discrimination, and while some of its language can and does protect others, all know that the chief purpose behind it was to protect ex-slaves. Cf. *Adamson v. California*, 332 U. S. 46, 71-72, and n. 5 (1947) (dissenting opinion). The Court, however, relies upon the Fourteenth Amendment and in effect says that failure of the government to pay a promised charitable instalment to an individual deprives that individual of *his own property*, in violation of the Due Process Clause of the Fourteenth Amendment. It somewhat strains credulity to say that the government's promise of charity to an individual is property belonging to that individual when the government denies that the individual is honestly entitled to receive such a payment.

I would have little, if any, objection to the majority's decision in this case if it were written as the report of the House Committee on Education and Labor, but as an opinion ostensibly resting on the language of the Constitution I find it woefully deficient. Once the verbiage is pared away it is obvious that this Court today adopts the views of the District Court "that to cut off a welfare recipient in the face of . . . 'brutal need' without a prior

hearing of some sort is unconscionable," and therefore, says the Court, unconstitutional. The majority reaches this result by a process of weighing "the recipient's interest in avoiding" the termination of welfare benefits against "the governmental interest in summary adjudication." *Ante*, at 263. Today's balancing act requires a "pre-termination evidentiary hearing," yet there is nothing that indicates what tomorrow's balance will be. Although the majority attempts to bolster its decision with limited quotations from prior cases, it is obvious that today's result does not depend on the language of the Constitution itself or the principles of other decisions, but solely on the collective judgment of the majority as to what would be a fair and humane procedure in this case.

This decision is thus only another variant of the view often expressed by some members of this Court that the Due Process Clause forbids any conduct that a majority of the Court believes "unfair," "indecent," or "shocking to their consciences." See, e. g., *Rochin v. California*, 342 U. S. 165, 172 (1952). Neither these words nor any like them appear anywhere in the Due Process Clause. If they did, they would leave the majority of Justices free to hold any conduct unconstitutional that they should conclude on their own to be unfair or shocking to them.⁶ Had the drafters of the Due Process Clause meant to leave judges such ambulatory power to declare

⁶ I am aware that some feel that the process employed in reaching today's decision is not dependent on the individual views of the Justices involved, but is a mere objective search for the "collective conscience of mankind," but in my view that description is only a euphemism for an individual's judgment. Judges are as human as anyone and as likely as others to see the world through their own eyes and find the "collective conscience" remarkably similar to their own. Cf. *Griswold v. Connecticut*, 381 U. S. 479, 518-519 (1965) (BLACK, J., dissenting); *Snidach v. Family Finance Corp.*, 395 U. S. 337, 350-351 (1969) (BLACK, J., dissenting).

laws unconstitutional, the chief value of a written constitution, as the Founders saw it, would have been lost. In fact, if that view of due process is correct, the Due Process Clause could easily swallow up all other parts of the Constitution. And truly the Constitution would always be "what the judges say it is" at a given moment, not what the Founders wrote into the document.⁷ A written constitution, designed to guarantee protection against governmental abuses, including those of judges, must have written standards that mean something definite and have an explicit content. I regret very much to be compelled to say that the Court today makes a drastic and dangerous departure from a Constitution written to control and limit the government and the judges and moves toward a constitution designed to be no more and no less than what the judges of a particular social and economic philosophy declare on the one hand to be fair or on the other hand to be shocking and unconscionable.

The procedure required today as a matter of constitutional law finds no precedent in our legal system. Reduced to its simplest terms, the problem in this case is similar to that frequently encountered when two parties have an ongoing legal relationship that requires one party to make periodic payments to the other. Often the situation arises where the party "owing" the money stops paying it and justifies his conduct by arguing that the recipient is not legally entitled to payment. The recipient can, of course, disagree and go to court to compel payment. But I know of no situation in our legal system in which the person alleged to owe money to

⁷ To realize how uncertain a standard of "fundamental fairness" would be, one has only to reflect for a moment on the possible disagreement if the "fairness" of the procedure in this case were propounded to the head of the National Welfare Rights Organization, the president of the national Chamber of Commerce, and the chairman of the John Birch Society.

another is required by law to continue making payments to a judgment-proof claimant without the benefit of any security or bond to insure that these payments can be recovered if he wins his legal argument. Yet today's decision in no way obligates the welfare recipient to pay back any benefits wrongfully received during the pre-termination evidentiary hearings or post any bond, and in all "fairness" it could not do so. These recipients are by definition too poor to post a bond or to repay the benefits that, as the majority assumes, must be spent as received to insure survival.

The Court apparently feels that this decision will benefit the poor and needy. In my judgment the eventual result will be just the opposite. While today's decision requires only an administrative, evidentiary hearing, the inevitable logic of the approach taken will lead to constitutionally imposed, time-consuming delays of a full adversary process of administrative and judicial review. In the next case the welfare recipients are bound to argue that cutting off benefits before judicial review of the agency's decision is also a denial of due process. Since, by hypothesis, termination of aid at that point may still "deprive an eligible recipient of the very means by which to live while he waits," *ante*, at 264, I would be surprised if the weighing process did not compel the conclusion that termination without full judicial review would be unconscionable. After all, at each step, as the majority seems to feel, the issue is only one of weighing the government's pocketbook against the actual survival of the recipient, and surely that balance must always tip in favor of the individual. Similarly today's decision requires only the opportunity to have the benefit of counsel at the administrative hearing, but it is difficult to believe that the same reasoning process would not require the appointment of counsel, for otherwise the right to counsel is a meaningless one since these

people are too poor to hire their own advocates. Cf. *Gideon v. Wainwright*, 372 U. S. 335, 344 (1963). Thus the end result of today's decision may well be that the government, once it decides to give welfare benefits, cannot reverse that decision until the recipient has had the benefits of full administrative and judicial review, including, of course, the opportunity to present his case to this Court. Since this process will usually entail a delay of several years, the inevitable result of such a constitutionally imposed burden will be that the government will not put a claimant on the rolls initially until it has made an exhaustive investigation to determine his eligibility. While this Court will perhaps have insured that no needy person will be taken off the rolls without a full "due process" proceeding, it will also have insured that many will never get on the rolls, or at least that they will remain destitute during the lengthy proceedings followed to determine initial eligibility.

For the foregoing reasons I dissent from the Court's holding. The operation of a welfare state is a new experiment for our Nation. For this reason, among others, I feel that new experiments in carrying out a welfare program should not be frozen into our constitutional structure. They should be left, as are other legislative determinations, to the Congress and the legislatures that the people elect to make our laws.

SHAPIRO, COMMISSIONER OF WELFARE OF
CONNECTICUT *v.* THOMPSON.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT.

No. 9. Argued May 1, 1968.—Reargued October 23–24, 1968.—
Decided April 21, 1969.*

These appeals are from decisions of three-judge District Courts holding unconstitutional Connecticut, Pennsylvania, or District of Columbia statutory provisions which deny welfare assistance to persons who are residents and meet all other eligibility requirements except that they have not resided within the jurisdiction for at least a year immediately preceding their applications for assistance. Appellees' main contention on reargument is that the prohibition of benefits to residents of less than one year creates a classification which constitutes an invidious discrimination denying them equal protection of the laws. Appellants argue that the waiting period is needed to preserve the fiscal integrity of their public assistance programs, as persons who require welfare assistance during their first year of residence are likely to become continuing burdens on welfare programs. Appellants also seek to justify the classification as a permissible attempt to discourage indigents from entering a State solely to obtain larger benefits, and to distinguish between new and old residents on the basis of the tax contributions they have made to the community. Certain appellants rely in addition on the following administrative and related governmental objectives: facilitating the planning of welfare budgets, providing an objective test of residency, minimizing the opportunity for recipients fraudulently to receive payments from more than one jurisdiction, and encouraging early entry of new residents into the labor force. Connecticut and Pennsylvania also argue that Congress approved the imposition of the one-year requirement in § 402 (b) of the Social Security Act. *Held:*

*Together with No. 33, *Washington et al. v. Legrant et al.*, on appeal from the United States District Court for the District of Columbia, argued May 1, 1968, and No. 34, *Reynolds et al. v. Smith et al.*, on appeal from the United States District Court for the Eastern District of Pennsylvania, argued May 1–2, 1968, both reargued on October 23–24, 1968.

1. The statutory prohibition of benefits to residents of less than a year creates a classification which denies equal protection of the laws because the interests allegedly served by the classification either may not constitutionally be promoted by government or are not compelling governmental interests. P. 627.

2. Since the Constitution guarantees the right of interstate movement, the purpose of deterring the migration of indigents into a State is impermissible and cannot serve to justify the classification created by the one-year waiting period. Pp. 629–631.

3. A State may no more try to fence out those indigents who seek higher welfare payments than it may try to fence out indigents generally. Pp. 631–632.

4. The classification may not be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes because the Equal Protection Clause prohibits the States from apportioning benefits or services on the basis of the past tax contributions of its citizens. Pp. 632–633.

5. In moving from jurisdiction to jurisdiction appellees were exercising a constitutional right, and any classification which penalizes the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional. P. 634.

6. Appellants do not use and have no need to use the one-year requirement for the administrative and governmental purposes suggested, and under the standard of a *compelling* state interest, that requirement clearly violates the Equal Protection Clause. Pp. 634–635.

7. Section 402 (b) of the Social Security Act does not render the waiting-period requirements constitutional. Pp. 635–641.

(a) That section on its face does not approve, much less prescribe, a one-year requirement, and the legislative history reveals that Congress' purpose was to curb hardships resulting from excessive residence requirements and not to approve or prescribe any waiting period. Pp. 639–640.

(b) Assuming, *arguendo*, that Congress did approve the use of a one-year waiting period, it is the responsive state legislation and not § 402 (b) which infringes constitutional rights. P. 641.

(c) If the constitutionality of § 402 (b) were at issue, that provision, insofar as it permits the one-year waiting period, would be unconstitutional, as Congress may not authorize the States to violate the Equal Protection Clause. P. 641.

8. The waiting-period requirement in the District of Columbia Code, adopted by Congress as an exercise of federal power, is an unconstitutional discrimination which violates the Due Process Clause of the Fifth Amendment. Pp. 641-642.

No. 9, 270 F. Supp. 331; No. 33, 279 F. Supp. 22; and No. 34, 277 F. Supp. 65, affirmed.

Francis J. MacGregor, Assistant Attorney General of Connecticut, argued the cause for appellant in No. 9 on the original argument and on the reargument. With him on the brief on the original argument was *Robert K. Killian*, Attorney General. *Richard W. Barton* argued the cause for appellants in No. 33 on the original argument and on the reargument. With him on the brief on the original argument were *Charles T. Duncan* and *Hubert B. Pair*. *William C. Sennett*, Attorney General of Pennsylvania, argued the cause for appellants in No. 34 on the original argument and on the reargument. With him on the brief on the reargument was *Edgar R. Casper*, Deputy Attorney General, and on the original argument were *Mr. Casper* and *Edward Friedman*.

Archibald Cox argued the cause for appellees in all three cases on the reargument. With him on the brief were *Peter S. Smith* and *Howard Lesnick*. *Brian L. Hollander* argued the cause *pro hac vice* for appellee in No. 9 on the original argument. With him on the brief were *Norman Dorsen* and *William D. Graham*. *Mr. Smith* argued the cause for appellees in No. 33 on the original argument. With him on the brief were *Joel J. Rabin*, *Jonathan Weiss*, and *Joseph F. Dugan*. *Thomas K. Gilhool* argued the cause *pro hac vice* for appellees in No. 34 on the original argument. With him on the brief were *Harvey N. Schmidt*, *Paul Bender*, and *Mr. Lesnick*.

Lorna Lawhead Williams, Special Assistant Attorney General, argued the cause for the State of Iowa as *amicus curiae* in support of appellants in all three cases on the original argument and on the reargument. With

her on the briefs on the original argument was *Richard C. Turner*, Attorney General.

Briefs of *amici curiae* in support of appellant in No. 9 were filed by *David P. Buckson*, Attorney General, and *Ruth M. Ferrell*, Deputy Attorney General, for the State of Delaware; by *William B. Saxbe*, Attorney General, *Winifred A. Dunton*, Assistant Attorney General, and *Charles S. Lopeman* for the State of Ohio; by *Crawford C. Martin*, Attorney General, *Nola White*, First Assistant Attorney General, *A. J. Carubbi, Jr.*, Executive Assistant Attorney General, and *J. C. Davis*, *John Reeves*, and *Pat Bailey*, Assistant Attorneys General, for the State of Texas; and by *Thomas C. Lynch*, Attorney General, and *Elizabeth Palmer*, Deputy Attorney General, for the State of California.

Briefs of *amici curiae* in support of appellee in No. 9 were filed by *Arthur L. Schiff* for Bexar County Legal Aid Association; by *Eugene M. Swann* for the Legal Aid Society of Alameda County; and by *A. L. Wirin*, *Fred Okrand*, *Laurence R. Sperber*, and *Melvin L. Wulf* for the American Civil Liberties Union et al. Brief of *amicus curiae* in support of appellees in No. 33 was filed by *John F. Nagle* for the National Federation of the Blind. Briefs of *amici curiae* in support of appellees in all three cases were filed by *J. Lee Rankin* and *Stanley Buchsbaum* for the City of New York; by *Joseph B. Robison*, *Carlos Israel*, and *Carl Rachtin* for the American Jewish Congress et al.; and by *Charles L. Hellman* and *Leah Marks* for the Center on Social Welfare Policy and Law et al.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

These three appeals were restored to the calendar for reargument. 392 U. S. 920 (1968). Each is an appeal from a decision of a three-judge District Court holding

unconstitutional a State or District of Columbia statutory provision which denies welfare assistance to residents of the State or District who have not resided within their jurisdictions for at least one year immediately preceding their applications for such assistance.¹ We affirm the judgments of the District Courts in the three cases.

I.

In No. 9, the Connecticut Welfare Department invoked § 17-2d of the Connecticut General Statutes² to

¹ Accord: *Robertson v. Ott*, 284 F. Supp. 735 (D. C. Mass. 1968); *Johnson v. Robinson*, Civil No. 67-1883 (D. C. N. D. Ill., Feb. 20, 1968); *Ramos v. Health and Social Services Bd.*, 276 F. Supp. 474 (D. C. E. D. Wis. 1967); *Green v. Dept. of Pub. Welfare*, 270 F. Supp. 173 (D. C. Del. 1967). Contra: *Waggoner v. Rosen*, 286 F. Supp. 275 (D. C. M. D. Pa. 1968); see also *People ex rel. Heydenreich v. Lyons*, 374 Ill. 557, 30 N. E. 2d 46 (1940).

All but one of the appellees herein applied for assistance under the Aid to Families with Dependent Children (AFDC) program which was established by the Social Security Act of 1935. 49 Stat. 627, as amended, 42 U. S. C. §§ 601-609. The program provides partial federal funding of state assistance plans which meet certain specifications. One appellee applied for Aid to the Permanently and Totally Disabled which is also jointly funded by the States and the Federal Government. 42 U. S. C. §§ 1351-1355.

² Conn. Gen. Stat. Rev. § 17-2d (1965 Supp.), now § 17-2c, provides:

"When any person comes into this state without visible means of support for the immediate future and applies for aid to dependent children under chapter 301 or general assistance under part I of chapter 308 within one year from his arrival, such person shall be eligible only for temporary aid or care until arrangements are made for his return, provided ineligibility for aid to dependent children shall not continue beyond the maximum federal residence requirement."

An exception is made for those persons who come to Connecticut with a bona fide job offer or are self-supporting upon arrival in the State and for three months thereafter. 1 Conn. Welfare Manual, c. II, §§ 219.1-219.2 (1966).

deny the application of appellee Vivian Marie Thompson for assistance under the program for Aid to Families with Dependent Children (AFDC). She was a 19-year-old unwed mother of one child and pregnant with her second child when she changed her residence in June 1966 from Dorchester, Massachusetts, to Hartford, Connecticut, to live with her mother, a Hartford resident. She moved to her own apartment in Hartford in August 1966, when her mother was no longer able to support her and her infant son. Because of her pregnancy, she was unable to work or enter a work training program. Her application for AFDC assistance, filed in August, was denied in November solely on the ground that, as required by § 17-2d, she had not lived in the State for a year before her application was filed. She brought this action in the District Court for the District of Connecticut where a three-judge court, one judge dissenting, declared § 17-2d unconstitutional. 270 F. Supp. 331 (1967). The majority held that the waiting-period requirement is unconstitutional because it "has a chilling effect on the right to travel." *Id.*, at 336. The majority also held that the provision was a violation of the Equal Protection Clause of the Fourteenth Amendment because the denial of relief to those resident in the State for less than a year is not based on any permissible purpose but is solely designed, as "Connecticut states quite frankly," "to protect its fisc by discouraging entry of those who come needing relief." *Id.*, at 338-337. We noted probable jurisdiction. 389 U. S. 1032 (1968).

In No. 33, there are four appellees. Three of them—appellees Harrell, Brown, and Legrant—applied for and were denied AFDC aid. The fourth, appellee Barley, applied for and was denied benefits under the program for Aid to the Permanently and Totally Disabled. The denial in each case was on the ground that the applicant had not resided in the District of Columbia for one year

immediately preceding the filing of her application, as required by § 3-203 of the District of Columbia Code.³

Appellee Minnie Harrell, now deceased, had moved with her three children from New York to Washington in September 1966. She suffered from cancer and moved to be near members of her family who lived in Washington.

Appellee Barley, a former resident of the District of Columbia, returned to the District in March 1941 and was committed a month later to St. Elizabeths Hospital as mentally ill. She has remained in that hospital ever since. She was deemed eligible for release in 1965, and a plan was made to transfer her from the hospital to a foster home. The plan depended, however, upon Mrs. Barley's obtaining welfare assistance for her support. Her application for assistance under the program for Aid to the Permanently and Totally Disabled was denied because her time spent in the hospital did not count in determining compliance with the one-year requirement.

Appellee Brown lived with her mother and two of her three children in Fort Smith, Arkansas. Her third child was living with appellee Brown's father in the District of Columbia. When her mother moved from Fort Smith to Oklahoma, appellee Brown, in February 1966, returned to the District of Columbia where she had lived as a child. Her application for AFDC assistance was approved insofar as it sought assistance for the child who

³ D. C. Code Ann. § 3-203 (1967) provides:

"Public assistance shall be awarded to or on behalf of any needy individual who either (a) has resided in the District for one year immediately preceding the date of filing his application for such assistance; or (b) who was born within one year immediately preceding the application for such aid, if the parent or other relative with whom the child is living has resided in the District for one year immediately preceding the birth; or (c) is otherwise within one of the categories of public assistance established by this chapter." See D. C. Handbook of Pub. Assistance Policies and Procedures, HPA-2, EL 9.1, I, III (1966) (hereinafter cited as D. C. Handbook).

had lived in the District with her father but was denied to the extent it sought assistance for the two other children:

Appellee Legrant moved with her two children from South Carolina to the District of Columbia in March 1967 after the death of her mother. She planned to live with a sister and brother in Washington. She was pregnant and in ill health when she applied for and was denied AFDC assistance in July 1967.

The several cases were consolidated for trial, and a three-judge District Court was convened.⁴ The court, one judge dissenting, held § 3-203 unconstitutional. 279 F. Supp. 22 (1967). The majority rested its decision on the ground that the one-year requirement was unconstitutional as a denial of the right to equal protection secured by the Due Process Clause of the Fifth Amendment. We noted probable jurisdiction. 390 U. S. 940 (1968).

In No. 34, there are two appellees, Smith and Foster, who were denied AFDC aid on the sole ground that they had not been residents of Pennsylvania for a year prior to their applications as required by § 432 (6) of the

⁴ In *Ex parte Cogdell*, 342 U. S. 163 (1951), this Court remanded to the Court of Appeals for the District of Columbia Circuit to determine whether 28 U. S. C. § 2282, requiring a three-judge court when the constitutionality of an Act of Congress is challenged, applied to Acts of Congress pertaining solely to the District of Columbia. The case was mooted below, and the question has never been expressly resolved. However, in *Berman v. Parker*, 348 U. S. 26 (1954), this Court heard an appeal from a three-judge court in a case involving the constitutionality of a District of Columbia statute. Moreover, three-judge district courts in the District of Columbia have continued to hear cases involving such statutes. See, e. g., *Hobson v. Hansen*, 265 F. Supp. 902 (1967). Section 2282 requires a three-judge court to hear a challenge to the constitutionality of "any Act of Congress." (Emphasis supplied.) We see no reason to make an exception for Acts of Congress pertaining to the District of Columbia.

Pennsylvania Welfare Code.⁵ Appellee Smith and her five minor children moved in December 1966 from Delaware to Philadelphia, Pennsylvania, where her father lived. Her father supported her and her children for several months until he lost his job. Appellee then applied for AFDC assistance and had received two checks when the aid was terminated. Appellee Foster, after living in Pennsylvania from 1953 to 1965, had moved with her four children to South Carolina to care for her grandfather and invalid grandmother and had returned to Pennsylvania in 1967. A three-judge District Court for the Eastern District of Pennsylvania, one judge dissenting, declared § 432 (6) unconstitutional. 277 F. Supp. 65 (1967). The majority held that the classification established by the waiting-period requirement is "without rational basis and without legitimate purpose or function" and therefore a violation of the Equal Protection Clause. *Id.*, at 67. The majority noted further that if the purpose of the statute was "to erect a barrier against the movement of indigent persons into the State or to

⁵ Pa. Stat., Tit. 62, § 432 (6) (1968). See also Pa. Pub. Assistance Manual §§ 3150-3151 (1962). Section 432 (6) provides:

"Assistance may be granted only to or in behalf of a person residing in Pennsylvania who (i) has resided therein for at least one year immediately preceding the date of application; (ii) last resided in a state which, by law, regulation or reciprocal agreement with Pennsylvania, grants public assistance to or in behalf of a person who has resided in such state for less than one year; (iii) is a married woman residing with a husband who meets the requirement prescribed in subclause (i) or (ii) of this clause; or (iv) is a child less than one year of age whose parent, or relative with whom he is residing, meets the requirement prescribed in subclause (i), (ii) or (iii) of this clause or resided in Pennsylvania for at least one year immediately preceding the child's birth. Needy persons who do not meet any of the requirements stated in this clause and who are transients or without residence in any state, may be granted assistance in accordance with rules, regulations, and standards established by the department."

effect their prompt departure after they have gotten there," it would be "patently improper and its implementation plainly impermissible." *Id.*, at 67-68. We noted probable jurisdiction. 390 U. S. 940 (1968).

II.

There is no dispute that the effect of the waiting-period requirement in each case is to create two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction. On the basis of this sole difference the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life. In each case, the District Court found that appellees met the test for residence in their jurisdictions, as well as all other eligibility requirements except the requirement of residence for a full year prior to their applications. On reargument, appellees' central contention is that the statutory prohibition of benefits to residents of less than a year creates a classification which constitutes an invidious discrimination denying them equal protection of the laws.⁶ We agree. The interests which appellants assert are promoted by the classification either may not constitutionally be promoted by government or are not compelling governmental interests.

III.

Primarily, appellants justify the waiting-period requirement as a protective device to preserve the fiscal integrity of state public assistance programs. It is asserted that people who require welfare assistance during their first

⁶ This constitutional challenge cannot be answered by the argument that public assistance benefits are a "privilege" and not a "right." See *Sherbert v. Verner*, 374 U. S. 398, 404 (1963).

year of residence in a State are likely to become continuing burdens on state welfare programs. Therefore, the argument runs, if such people can be deterred from entering the jurisdiction by denying them welfare benefits during the first year, state programs to assist long-time residents will not be impaired by a substantial influx of indigent newcomers.⁷

There is weighty evidence that exclusion from the jurisdiction of the poor who need or may need relief was the specific objective of these provisions. In the Congress, sponsors of federal legislation to eliminate all residence requirements have been consistently opposed by representatives of state and local welfare agencies who have stressed the fears of the States that elimination of the requirements would result in a heavy influx of individuals into States providing the most generous benefits. See, e. g., Hearings on H. R. 10032 before the House Committee on Ways and Means, 87th Cong., 2d Sess., 309-310, 644 (1962); Hearings on H. R. 6000 before the Senate Committee on Finance, 81st Cong.,

⁷ The waiting-period requirement has its antecedents in laws prevalent in England and the American Colonies centuries ago which permitted the ejection of individuals and families if local authorities thought they might become public charges. For example, the preamble of the English Law of Settlement and Removal of 1662 expressly recited the concern, also said to justify the three statutes before us, that large numbers of the poor were moving to parishes where more liberal relief policies were in effect. See generally Coll, Perspectives in Public Welfare: The English Heritage, 4 Welfare in Review, No. 3, p. 1 (1966). The 1662 law and the earlier Elizabethan Poor Law of 1601 were the models adopted by the American Colonies. Newcomers to a city, town, or county who might become public charges were "warned out" or "passed on" to the next locality. Initially, the funds for welfare payments were raised by local taxes, and the controversy as to responsibility for particular indigents was between localities in the same State. As States—first alone and then with federal grants—assumed the major responsibility, the contest of nonresponsibility became interstate.

2d Sess., 324-327 (1950). The sponsor of the Connecticut requirement said in its support: "I doubt that Connecticut can and should continue to allow unlimited migration into the state on the basis of offering instant money and permanent income to all who can make their way to the state regardless of their ability to contribute to the economy." H. B. 82, Connecticut General Assembly House Proceedings, February Special Session, 1965, Vol. II, pt. 7, p. 3504. In Pennsylvania, shortly after the enactment of the one-year requirement, the Attorney General issued an opinion construing the one-year requirement strictly because "[a]ny other conclusion would tend to attract the dependents of other states to our Commonwealth." 1937-1938 Official Opinions of the Attorney General, No. 240, p. 110. In the District of Columbia case, the constitutionality of § 3-203 was frankly defended in the District Court and in this Court on the ground that it is designed to protect the jurisdiction from an influx of persons seeking more generous public assistance than might be available elsewhere.

We do not doubt that the one-year waiting-period device is well suited to discourage the influx of poor families in need of assistance. An indigent who desires to migrate, resettle, find a new job, and start a new life will doubtless hesitate if he knows that he must risk making the move without the possibility of falling back on state welfare assistance during his first year of residence, when his need may be most acute. But the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible.

This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. That

proposition was early stated by Chief Justice Taney in the *Passenger Cases*, 7 How. 283, 492 (1849):

"For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision.⁸ It suffices that, as MR. JUSTICE STEWART said for the Court in *United States v. Guest*, 383 U. S. 745, 757-758 (1966):

"The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.

". . . [T]he right finds no explicit mention in the Constitution. The reason, it has been suggested, is

⁸ In *Corfield v. Coryell*, 6 F. Cas. 546, 552 (No. 3230) (C. C. E. D. Pa. 1825), *Paul v. Virginia*, 8 Wall. 168, 180 (1869), and *Ward v. Maryland*, 12 Wall. 418, 430 (1871), the right to travel interstate was grounded upon the Privileges and Immunities Clause of Art. IV, § 2. See also *Slaughter-House Cases*, 16 Wall. 36, 79 (1873); *Twining v. New Jersey*, 211 U. S. 78, 97 (1908). In *Edwards v. California*, 314 U. S. 160, 181, 183-185 (1941) (DOUGLAS and JACKSON, JJ., concurring), and *Twining v. New Jersey*, *supra*, reliance was placed on the Privileges and Immunities Clause of the Fourteenth Amendment. See also *Crandall v. Nevada*, 6 Wall. 35 (1868). In *Edwards v. California*, *supra*, and the *Passenger Cases*, 7 How. 283 (1849), a Commerce Clause approach was employed.

See also *Kent v. Dulles*, 357 U. S. 116, 125 (1958); *Aptheker v. Secretary of State*, 378 U. S. 500, 505-506 (1964); *Zemel v. Rusk*, 381 U. S. 1, 14 (1965), where the freedom of Americans to travel outside the country was grounded upon the Due Process Clause of the Fifth Amendment.

that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution."

Thus, the purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible. If a law has "no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional." *United States v. Jackson*, 390 U. S. 570, 581 (1968).

Alternatively, appellants argue that even if it is impermissible for a State to attempt to deter the entry of all indigents, the challenged classification may be justified as a permissible state attempt to discourage those indigents who would enter the State solely to obtain larger benefits. We observe first that none of the statutes before us is tailored to serve that objective. Rather, the class of barred newcomers is all-inclusive, lumping the great majority who come to the State for other purposes with those who come for the sole purpose of collecting higher benefits. In actual operation, therefore, the three statutes enact what in effect are nonrebuttable presumptions that every applicant for assistance in his first year of residence came to the jurisdiction solely to obtain higher benefits. Nothing whatever in any of these records supplies any basis in fact for such a presumption.

More fundamentally, a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally. Implicit in any such distinction is the notion that indigents who enter a State with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not

take this consideration into account. But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among others factors, the level of a State's public assistance. Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities.

Appellants argue further that the challenged classification may be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes. We have difficulty seeing how long-term residents who qualify for welfare are making a greater present contribution to the State in taxes than indigent residents who have recently arrived. If the argument is based on contributions made in the past by the long-term residents, there is some question, as a factual matter, whether this argument is applicable in Pennsylvania where the record suggests that some 40% of those denied public assistance because of the waiting period had lengthy prior residence in the State.⁹ But we need not rest on the particular facts of these cases. Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its

⁹ Furthermore, the contribution rationale can hardly explain why the District of Columbia and Pennsylvania bar payments to children who have not lived in the jurisdiction for a year regardless of whether the parents have lived in the jurisdiction for that period. See D. C. Code § 3-203; D. C. Handbook, EL 9.1, I (C) (1966); Pa. Stat., Tit. 62, § 432 (6) (1968). Clearly, the children who were barred would not have made a contribution during that year.

citizens. The Equal Protection Clause prohibits such an apportionment of state services.¹⁰

We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification.¹¹

In sum, neither deterrence of indigents from migrating to the State nor limitation of welfare benefits to those regarded as contributing to the State is a constitutionally permissible state objective.

IV.

Appellants next advance as justification certain administrative and related governmental objectives allegedly served by the waiting-period requirement.¹² They argue

¹⁰ We are not dealing here with state insurance programs which may legitimately tie the amount of benefits to the individual's contributions.

¹¹ In *Rinaldi v. Yeager*, 384 U. S. 305 (1966), New Jersey attempted to reduce expenditures by requiring prisoners who took an unsuccessful appeal to reimburse the State out of their institutional earnings for the cost of furnishing a trial transcript. This Court held the New Jersey statute unconstitutional because it did not require similar repayments from unsuccessful appellants given a suspended sentence, placed on probation, or sentenced only to a fine. There was no rational basis for the distinction between unsuccessful appellants who were in prison and those who were not.

¹² Appellant in No. 9, the Connecticut Welfare Commissioner, disclaims any reliance on this contention. In No. 34, the District

that the requirement (1) facilitates the planning of the welfare budget; (2) provides an objective test of residency; (3) minimizes the opportunity for recipients fraudulently to receive payments from more than one jurisdiction; and (4) encourages early entry of new residents into the labor force.

At the outset, we reject appellants' argument that a mere showing of a rational relationship between the waiting period and these four admittedly permissible state objectives will suffice to justify the classification. See *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78 (1911); *Flemming v. Nestor*, 363 U. S. 603, 611 (1960); *McGowan v. Maryland*, 366 U. S. 420, 428 (1961). The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional. Cf. *Skinner v. Oklahoma*, 316 U. S. 535, 541 (1942); *Korematsu v. United States*, 323 U. S. 214, 216 (1944); *Bates v. Little Rock*, 361 U. S. 516, 524 (1960); *Sherbert v. Verner*, 374 U. S. 398, 406 (1963).

The argument that the waiting-period requirement facilitates budget predictability is wholly unfounded. The records in all three cases are utterly devoid of evidence that either State or the District of Columbia in fact uses the one-year requirement as a means to predict the number of people who will require assistance in the budget year. None of the appellants takes a census of new residents or collects any other data that would reveal the number of newcomers in the State less than a year.

Court found as a fact that the Pennsylvania requirement served none of the claimed functions. 277 F. Supp. 65, 68 (1967).

Nor are new residents required to give advance notice of their need for welfare assistance.¹³ Thus, the welfare authorities cannot know how many new residents come into the jurisdiction in any year, much less how many of them will require public assistance. In these circumstances, there is simply no basis for the claim that the one-year waiting requirement serves the purpose of making the welfare budget more predictable. In Connecticut and Pennsylvania the irrelevance of the one-year requirement to budgetary planning is further underscored by the fact that temporary, partial assistance is given to some new residents¹⁴ and full assistance is given to other new residents under reciprocal agreements.¹⁵ Finally, the claim that a one-year waiting requirement is used for planning purposes is plainly belied by the fact that the requirement is not also imposed on applicants who are long-term residents, the group that receives the bulk of welfare payments. In short, the States rely on methods other than the one-year requirement to make budget estimates. In No. 34, the Director of the Pennsylvania Bureau of Assistance Policies and Standards testified that, based on experience in Pennsylvania and elsewhere, "her office had already estimated how much the elimination of the one-year requirement would cost and that the estimates of costs of other changes in regulations "have proven exceptionally accurate."

¹³ Of course, such advance notice would inevitably be unreliable since some who registered would not need welfare a year later while others who did not register would need welfare.

¹⁴ See Conn. Gen. Stat. Rev. § 17-2d, now § 17-2c, and Pa. Pub. Assistance Manual § 3154 (1968).

¹⁵ Both Connecticut and Pennsylvania have entered into open-ended interstate compacts in which they have agreed to eliminate the durational requirement for anyone who comes from another State which has also entered into the compact. Conn. Gen. Stat. Rev. § 17-21a (1968); Pa. Pub. Assistance Manual § 3150, App. I (1966).

The argument that the waiting period serves as an administratively efficient rule of thumb for determining residency similarly will not withstand scrutiny. The residence requirement and the one-year waiting-period requirement are distinct and independent prerequisites for assistance under these three statutes, and the facts relevant to the determination of each are directly examined by the welfare authorities.¹⁶ Before granting an application, the welfare authorities investigate the applicant's employment, housing, and family situation and in the course of the inquiry necessarily learn the facts upon which to determine whether the applicant is a resident.¹⁷

¹⁶ In Pennsylvania, the one-year waiting-period requirement, but not the residency requirement, is waived under reciprocal agreements. Pa. Stat., Tit. 62, § 432 (6) (1968); Pa. Pub. Assistance Manual § 3151.21 (1962).

¹⁷ 1 Conn. Welfare Manual, c. II, § 220 (1966), provides that "[r]esidence within the state shall mean that the applicant is living in an established place of abode and the plan is to remain." A person who meets this requirement does not have to wait a year for assistance if he entered the State with a bona fide job offer or with sufficient funds to support himself without welfare for three months. *Id.*, at § 219.2.

HEW Handbook of Pub. Assistance Administration, pt. IV, § 3650 (1946), clearly distinguishes between residence and duration of residence. It defines residence, as is conventional, in terms of intent to remain in the jurisdiction, and it instructs interviewers that residence and length of residence "are two distinct aspects . . ."

¹⁸ See, e. g., D. C. Handbook, chapters on Eligibility Payments, Requirements, Resources, and Reinvestigation for an indication of how thorough these investigations are. See also 1 Conn. Welfare Manual, c. I (1967); Pa. Pub. Assistance Manual §§ 3170-3330 (1962).

The Department of Health, Education, and Welfare has proposed the elimination of individual investigations, except for spot checks, and the substitution of a declaration system, under which the "agency accepts the statements of the applicant for or recipient of assistance, about facts that are within his knowledge and competence . . . as a basis for decisions regarding his eligibility and extent of entitlement." HEW, Determination of Eligibility for Public

Similarly, there is no need for a State to use the one-year waiting period as a safeguard against fraudulent receipt of benefits;¹⁸ for less drastic means are available, and are employed, to minimize that hazard. Of course, a State has a valid interest in preventing fraud by any applicant, whether a newcomer or a long-time resident. It is not denied, however, that the investigations now conducted entail inquiries into facts relevant to that subject. In addition, cooperation among state welfare departments is common. The District of Columbia, for example, provides interim assistance to its former residents who have moved to a State which has a waiting period. As a matter of course, District officials send a letter to the welfare authorities in the recipient's new community "to request the information needed to continue assistance."¹⁹ A like procedure would be an effective safeguard against the hazard of double payments. Since double payments can be prevented by a letter or a telephone call, it is unreasonable to accomplish this objective by the blunderbuss method of denying assistance to all indigent newcomers for an entire year.

Pennsylvania suggests that the one-year waiting period is justified as a means of encouraging new residents to join the labor force promptly. But this logic would also require a similar waiting period for long-term residents of the State. A state purpose to encourage employment

Assistance Programs, 33 Fed. Reg. 17189 (1968). See also Hoshino, Simplification of the Means Test and its Consequences, 41 Soc. Serv. Rev. 237, 241-249 (1967); Burns, What's Wrong With Public Welfare?, 36 Soc. Serv. Rev. 111, 114-115 (1962). Presumably the statement of an applicant that he intends to remain in the jurisdiction would be accepted under a declaration system.

¹⁸ The unconcern of Connecticut and Pennsylvania with the one-year requirement as a means of preventing fraud is made apparent by the waiver of the requirement in reciprocal agreements with other States. See n. 15, *supra*.

¹⁹ D. C. Handbook, RV 2.1, I, II (B) (1967). See also Pa. Pub. Assistance Manual § 3153 (1962).

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provides no rational basis for imposing a one-year waiting-period restriction on new residents only.

We conclude therefore that appellants in these cases do not use and have no need to use the one-year requirement for the governmental purposes suggested. Thus, even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional.²⁰ But, of course, the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest. Under this standard, the waiting-period requirement clearly violates the Equal Protection Clause.²¹

V.

Connecticut and Pennsylvania argue, however, that the constitutional challenge to the waiting-period requirements must fail because Congress expressly approved the imposition of the requirement by the States as part of the jointly funded AFDC program.

Section 402 (b) of the Social Security Act of 1935, as amended, 42 U. S. C. § 602 (b), provides that:

"The Secretary shall approve any [state assistance] plan which fulfills the conditions specified in sub-

²⁰ Under the traditional standard, equal protection is denied only if the classification is "without any reasonable basis," *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78 (1911); see also *Flemming v. Nestor*, 363 U. S. 603 (1960).

²¹ We imply no view of the validity of waiting-period or residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.

section (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth."

On its face, the statute does not approve, much less prescribe, a one-year requirement. It merely directs the Secretary of Health, Education, and Welfare not to disapprove plans submitted by the States because they include such a requirement.²² The suggestion that Congress enacted that directive to encourage state participation in the AFDC program is completely refuted by the legislative history of the section. That history discloses that Congress enacted the directive to curb hardships resulting from lengthy residence requirements. Rather than constituting an approval or a prescription of the requirement in state plans, the directive was the means chosen by Congress to deny federal funding to any State which persisted in stipulating excessive residence requirements as a condition of the payment of benefits.

One year before the Social Security Act was passed, 20 of the 45 States which had aid to dependent children programs required residence in the State for two or more years. Nine other States required two or more years of

²² As of 1964, 11 jurisdictions imposed no residence requirement whatever for AFDC assistance. They were Alaska, Georgia, Hawaii, Kentucky, New Jersey, New York, Rhode Island, Vermont, Guam, Puerto Rico, and the Virgin Islands. See HEW, *Characteristics of State Public Assistance Plans under the Social Security Act* (Pub. Assistance Rep. No. 50, 1964 ed.).

residence in a particular town or county. And 33 jurisdictions required at least one year of residence in a particular town or county.²³ Congress determined to combat this restrictionist policy. Both the House and Senate Committee Reports expressly stated that the objective of § 402 (b) was to compel "[l]iberality of residence requirement."²⁴ Not a single instance can be found in the debates or committee reports supporting the contention that § 402 (b) was enacted to encourage participation by the States in the AFDC program. To the contrary, those few who addressed themselves to waiting-period requirements emphasized that participation would depend on a State's repeal or drastic revision of existing requirements. A congressional demand on 41 States to repeal or drastically revise offending statutes is hardly a way to enlist their cooperation.²⁵

²³ Social Security Board, *Social Security in America* 235-236 (1937).

²⁴ H. R. Rep. No. 615, 74th Cong., 1st Sess., 24; S. Rep. No. 628, 74th Cong., 1st Sess., 35. Furthermore, the House Report cited President Roosevelt's statement in his Social Security Message that "People want decent homes to live in; they want to locate them where they can engage in productive work . . ." H. R. Rep., *supra*, at 2. Clearly this was a call for greater freedom of movement.

In addition to the statement in the above Committee report, see the remarks of Rep. Doughton (floor manager of the Social Security bill in the House) and Rep. Vinson. 79 Cong. Rec. 5474, 5602-5603 (1935). These remarks were made in relation to the waiting-period requirements for old-age assistance, but they apply equally to the AFDC program.

²⁵ Section 402 (b) required the repeal of 30 state statutes which imposed too long a waiting period in the State or particular town or county and 11 state statutes (as well as the Hawaii statute) which required residence in a particular town or county. See Social Security Board, *Social Security in America* 235-236 (1937).

It is apparent that Congress was not intimating any view of the constitutionality of a one-year limitation. The constitutionality of any scheme of federal social security legislation was a matter of

But even if we were to assume, *arguendo*, that Congress did approve the imposition of a one-year waiting period, it is the responsive *state* legislation which infringes constitutional rights. By itself § 402 (b) has absolutely no restrictive effect. It is therefore not that statute but only the state requirements which pose the constitutional question.

Finally, even if it could be argued that the constitutionality of § 402 (b) is somehow at issue here, it follows from what we have said that the provision, insofar as it permits the one-year waiting-period requirement, would be unconstitutional. Congress may not authorize the States to violate the Equal Protection Clause. Perhaps Congress could induce wider state participation in school construction if it authorized the use of joint funds for the building of segregated schools. But could it seriously be contended that Congress would be constitutionally justified in such authorization by the need to secure state cooperation? Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause. *Katzenbach v. Morgan*, 384 U. S. 641, 651, n. 10 (1966).

VI.

The waiting-period requirement in the District of Columbia Code involved in No. 33 is also unconstitutional even though it was adopted by Congress as an exercise of federal power. In terms of federal power, the discrimination created by the one-year requirement violates the Due

doubt at that time in light of the decision in *Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935). Throughout the House debates congressmen discussed the constitutionality of the fundamental taxing provisions of the Social Security Act, see, *e. g.*, 79 Cong. Rec. 5783 (1935) (remarks of Rep. Cooper), but not once did they discuss the constitutionality of § 402 (b).

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Process Clause of the Fifth Amendment. "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider v. Rusk*, 377 U. S. 163, 168 (1964); *Bolling v. Sharpe*, 347 U. S. 497 (1954). For the reasons we have stated in invalidating the Pennsylvania and Connecticut provisions, the District of Columbia provision is also invalid—the Due Process Clause of the Fifth Amendment prohibits Congress from denying public assistance to poor persons otherwise eligible solely on the ground that they have not been residents of the District of Columbia for one year at the time their applications are filed.

Accordingly, the judgments in Nos. 9, 33, and 34 are
Affirmed.

MR. JUSTICE STEWART, CONCURRING.

In joining the opinion of the Court, I add a word in response to the dissent of my Brother HARLAN, who, I think, has quite misapprehended what the Court's opinion says.

The Court today does *not* "pick out particular human activities, characterize them as 'fundamental,' and give them added protection . . ." To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands.

"The constitutional right to travel from one State to another . . . has been firmly established and repeatedly recognized." *United States v. Guest*, 383 U. S. 745, 757. This constitutional right, which, of course, includes the right of "entering and abiding in any State in the Union," *Truax v. Raich*, 239 U. S. 33, 39, is *not* a mere conditional liberty subject to regulation and control under conven-

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tional due process or equal protection standards.¹ "[T]he right to travel freely from State to State finds constitutional protection that is quite independent of the Fourteenth Amendment." *United States v. Guest, supra*, at 760, n. 17.² As we made clear in *Guest*, it is a right broadly assertable against private interference as well as governmental action.³ Like the right of association, *NAACP v. Alabama*, 357 U. S. 449, it is a virtually unconditional personal right,⁴ guaranteed by the Constitution to us all.

It follows, as the Court says, that "the purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible." And it further follows, as the Court says, that any *other* purposes offered in support of a

¹ By contrast, the "right" of international travel has been considered to be no more than an aspect of the "liberty" protected by the Due Process Clause of the Fifth Amendment. *Kent v. Dulles*, 357 U. S. 116, 125; *Aptheker v. Secretary of State*, 378 U. S. 500, 505-506. As such, this "right," the Court has held, can be regulated within the bounds of due process. *Zemel v. Rusk*, 381 U. S. 1.

² The constitutional right of interstate travel was fully recognized long before adoption of the Fourteenth Amendment. See the statement of Chief Justice Taney in the *Passenger Cases*, 7 How. 283, 492:

"For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

³ MR. JUSTICE HARLAN was alone in dissenting from this square holding in *Guest*. *Supra*, at 762.

⁴ The extent of emergency governmental power temporarily to prevent or control interstate travel, e. g., to a disaster area, need not be considered in these cases.

law that so clearly impinges upon the constitutional right of interstate travel must be shown to reflect a *compelling* governmental interest. This is necessarily true whether the impinging law be a classification statute to be tested against the Equal Protection Clause, or a state or federal regulatory law, to be tested against the Due Process Clause of the Fourteenth or Fifth Amendment. As MR. JUSTICE HARLAN wrote for the Court more than a decade ago, "[T]o justify the deterrent effect . . . on the free exercise . . . of their constitutionally protected right . . . a . . . subordinating interest of the State must be compelling." *NAACP v. Alabama, supra*, at 463.

The Court today, therefore, is not "contriving new constitutional principles." It is deciding these cases under the aegis of established constitutional law.⁹

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE BLACK joins, dissenting.

In my opinion the issue before us can be simply stated: May Congress, acting under one of its enumerated powers, impose minimal nationwide residence requirements or authorize the States to do so? Since I believe that Congress does have this power and has constitutionally exercised it in these cases, I must dissent.

I.

The Court insists that § 402 (b) of the Social Security Act "does not approve, much less prescribe, a one-year requirement." *Ante*, at 639. From its reading of the legislative history it concludes that Congress did not intend to authorize the States to impose residence re-

⁹ It is to be remembered that the Court today *affirms* the judgments of three different federal district courts, and that at least four other federal courts have reached the same result. See *ante*, at 622, n. 1.

quirements. An examination of the relevant legislative materials compels, in my view, the opposite conclusion, *i. e.*, Congress intended to authorize state residence requirements of up to one year.

The Great Depression of the 1930's exposed the inadequacies of state and local welfare programs and dramatized the need for federal participation in welfare assistance. See J. Brown, *Public Relief 1929-1939* (1940). Congress determined that the Social Security Act, containing a system of unemployment and old-age insurance as well as the categorical assistance programs now at issue, was to be a major step designed to ameliorate the problems of economic insecurity. The primary purpose of the categorical assistance programs was to encourage the States to provide new and greatly enhanced welfare programs. See, *e. g.*, S. Rep. No. 628, 74th Cong., 1st Sess., 5-6, 18-19 (1935); H. R. Rep. No. 615, 74th Cong., 1st Sess., 4 (1935). Federal aid would mean an immediate increase in the amount of benefits paid under state programs. But federal aid was to be conditioned upon certain requirements so that the States would remain the basic administrative units of the welfare system and would be unable to shift the welfare burden to local governmental units with inadequate financial resources. See Advisory Commission on Intergovernmental Relations, *Statutory and Administrative Controls Associated with Federal Grants for Public Assistance 9-26* (1964). Significantly, the categories of assistance programs created by the Social Security Act corresponded to those already in existence in a number of States. See J. Brown, *Public Relief 1929-1939*, at 26-32. Federal entry into the welfare area can therefore be best described as a major experiment in "cooperative federalism," *King v. Smith*, 392 U. S. 309, 317 (1968), combining state and federal participation to solve the problems of the depression.

Each of the categorical assistance programs contained in the Social Security Act allowed participating States to impose residence requirements as a condition of eligibility for benefits. Congress also imposed a one-year requirement for the categorical assistance programs operative in the District of Columbia. See H. R. Rep. No. 891, 74th Cong., 1st Sess. (1935) (old-age pensions); H. R. Rep. No. 201, 74th Cong., 1st Sess. (1935) (aid to the blind). The congressional decision to allow the States to impose residence requirements and to enact such a requirement for the District was the subject of considerable discussion. Both those favoring lengthy residence requirements¹ and those opposing all requirements² pleaded their case during the congressional hearings on the Social Security Act. Faced with the competing claims of States which feared that abolition of residence requirements would result in an influx of persons seeking higher welfare payments and of organizations which stressed the unfairness of such requirements to transient workers forced by the economic dislocation of the depression to seek work far from their homes, Congress chose a middle course. It required those States seeking federal grants for categorical assistance to reduce their existing residence requirements to what Congress viewed as an acceptable maximum. However, Congress accommodated state fears by allowing the States to retain minimal residence requirements.

Congress quickly saw evidence that the system of welfare assistance contained in the Social Security Act including residence requirements was operating to encourage States to expand and improve their categorical

¹ See, e. g., Hearings on H. R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess., 831-832, 861-871 (1935).

² See, e. g., Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 522-540, 643, 656 (1935).

assistance programs. For example, the Senate was told in 1939:

"The rapid expansion of the program for aid to dependent children in the country as a whole since 1935 stands in marked contrast to the relatively stable picture of mothers' aid in the preceding 4-year period from 1932 through 1935. The extension of the program during the last 3 years is due to Federal contributions which encouraged the matching of State and local funds." S. Rep. No. 734, 76th Cong., 1st Sess., 29 (1939).

The trend observed in 1939 continued as the States responded to the federal stimulus for improvement in the scope and amount of categorical assistance programs. See Wedemeyer & Moore, *The American Welfare System*, 54 Calif. L. Rev. 326, 347-356 (1966). Residence requirements have remained a part of this combined state-federal welfare program for 34 years. Congress has adhered to its original decision that residence requirements were necessary in the face of repeated attacks against these requirements.³ The decision to retain residence requirements, combined with Congress' continuing desire to encourage wider state participation in categorical assistance programs, indicates to me that Congress has authorized the imposition by the States of residence requirements.

II.

Congress has imposed a residence requirement in the District of Columbia and authorized the States to impose similar requirements. The issue before us must therefore be framed in terms of whether Congress may

³ See e. g., Hearings on H. R. 10032 before the House Committee on Ways and Means, 87th Cong., 2d Sess., 355, 385-405, 437 (1962); Hearings on H. R. 6000 before the Senate Committee on Finance, 81st Cong., 2d Sess., 142-143 (1950).

create minimal residence requirements, not whether the States, acting alone, may do so. See *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408 (1946); *In re Rahrer*, 140 U. S. 545 (1891). Appellees insist that a congressionally mandated residence requirement would violate their right to travel. The import of their contention is that Congress, even under its "plenary" power to control interstate commerce, is constitutionally prohibited from imposing residence requirements. I reach a contrary conclusion for I am convinced that the extent of the burden on interstate travel when compared with the justification for its imposition requires the Court to uphold this exertion of federal power.

Congress, pursuant to its commerce power, has enacted a variety of restrictions upon interstate travel. It has taxed air and rail fares and the gasoline needed to power cars and trucks which move interstate. 26 U. S. C. § 4261 (air fares); 26 U. S. C. § 3469 (1952 ed.), repealed in part by Pub. L. 87-508, § 5 (b), 76 Stat. 115 (rail fares); 26 U. S. C. § 4081 (gasoline). Many of the federal safety regulations of common carriers which cross state lines burden the right to travel. 45 U. S. C. §§ 1-43 (railroad safety appliances); 49 U. S. C. § 1421 (air safety regulations). And Congress has prohibited by criminal statute interstate travel for certain purposes. *E. g.*, 18 U. S. C. § 1952. Although these restrictions operate as a limitation upon free interstate movement of persons, their constitutionality appears well settled. See *Texas & Pacific R. Co. v. Rigsby*, 241 U. S. 33, 41 (1916); *Southern R. Co. v. United States*, 222 U. S. 20 (1911); *United States v. Zizzo*, 338 F. 2d 577 (C. A. 7th Cir., 1964), cert. denied, 381 U. S. 915 (1965). As the Court observed in *Zemel v. Rusk*, 381 U. S. 1, 14 (1965), "the fact that a liberty cannot be inhibited without due

⁴ See *e. g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U. S. 241, 256-260 (1964).

process of law does not mean that it can under no circumstances be inhibited."

The Court's right-to-travel cases lend little support to the view that congressional action is invalid merely because it burdens the right to travel. Most of our cases fall into two categories: those in which state-imposed restrictions were involved, see, *e. g.*, *Edwards v. California*, 314 U. S. 160 (1941); *Crandall v. Nevada*, 6 Wall. 35 (1868), and those concerning congressional decisions to remove impediments to interstate movement, see, *e. g.*, *United States v. Guest*, 383 U. S. 745 (1966). Since the focus of our inquiry must be whether Congress would exceed permissible bounds by imposing residence requirements, neither group of cases offers controlling principles.

In only three cases have we been confronted with an assertion that Congress has impermissibly burdened the right to travel. *Kent v. Dulles*, 357 U. S. 116 (1958), did invalidate a burden on the right to travel; however, the restriction was voided on the nonconstitutional basis that Congress did not intend to give the Secretary of State power to create the restriction at issue. *Zemel v. Rusk*, *supra*, on the other hand, sustained a flat prohibition of travel to certain designated areas and rejected an attack that Congress could not constitutionally impose this restriction. *Aptheker v. Secretary of State*, 378 U. S. 500 (1964), is the only case in which this Court invalidated on a constitutional basis a congressionally imposed restriction. *Aptheker* also involved a flat prohibition but in combination with a claim that the congressional restriction compelled a potential traveler to choose between his right to travel and his First Amendment right of freedom of association. It was this Hobson's choice, we later explained, which forms the rationale of *Aptheker*. See *Zemel v. Rusk*, *supra*, at 16. *Aptheker* thus contains two characteristics distinguishing it from the appeals now before the Court: a combined

infringement of two constitutionally protected rights and a flat prohibition upon travel. Residence requirements do not create a flat prohibition, for potential welfare recipients may move from State to State and establish residence wherever they please. Nor is any claim made by appellees that residence requirements compel them to choose between the right to travel and another constitutional right.

Zemel v. Rusk, the most recent of the three cases, provides a framework for analysis. The core inquiry is "the extent of the governmental restriction imposed" and the "extent of the necessity for the restriction." *Id.*, at 14. As already noted, travel itself is not prohibited. Any burden inheres solely in the fact that a potential welfare recipient might take into consideration the loss of welfare benefits for a limited period of time if he changes his residence. Not only is this burden of uncertain degree,⁵ but appellees themselves assert there is evidence that few welfare recipients have in fact been deterred by residence requirements. See Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs*, 54 Calif. L. Rev. 567, 615-618 (1966); Note, *Residence Requirements in State Public Welfare Statutes*, 51 Iowa L. Rev. 1080, 1083-1085 (1966).

The insubstantiality of the restriction imposed by residence requirements must then be evaluated in light of the possible congressional reasons for such requirements. See, e. g., *McGowan v. Maryland*, 366 U. S. 420, 425-427 (1961). One fact which does emerge with clarity from the legislative history is Congress' belief that a program of cooperative federalism combining federal aid with

⁵ The burden is uncertain because indigents who are disqualified from categorical assistance by residence requirements are not left wholly without assistance. All of the appellees in these cases found alternative sources of assistance after their disqualification.

enhanced state participation would result in an increase in the scope of welfare programs and level of benefits. Given the apprehensions of many States that an increase in benefits without minimal residence requirements would result in an inability to provide an adequate welfare system, Congress deliberately adopted the intermediate course of a cooperative program. Such a program, Congress believed, would encourage the States to assume greater welfare responsibilities and would give the States the necessary financial support for such an undertaking. Our cases require only that Congress have a rational basis for finding that a chosen regulatory scheme is necessary to the furtherance of interstate commerce. See, e. g., *Katzenbach v. McClung*, 379 U. S. 294 (1964); *Wickard v. Filburn*, 317 U. S. 111 (1942). Certainly, a congressional finding that residence requirements allowed each State to concentrate its resources upon new and increased programs of rehabilitation ultimately resulting in an enhanced flow of commerce as the economic condition of welfare recipients progressively improved is rational and would justify imposition of residence requirements under the Commerce Clause. And Congress could have also determined that residence requirements fostered personal mobility. An individual no longer dependent upon welfare would be presented with an unfettered range of choices so that a decision to migrate could be made without regard to considerations of possible economic dislocation.

Appellees suggest, however, that Congress was not motivated by rational considerations. Residence requirements are imposed, they insist, for the illegitimate purpose of keeping poor people from migrating. Not only does the legislative history point to an opposite conclusion, but it also must be noted that "[i]nto the motives which induced members of Congress to [act] . . . this Court may not enquire." *Arizona v. California*, 283 U. S. 423, 455 (1931). We do not at-

tribute an impermissible purpose to Congress if the result would be to strike down an otherwise valid statute. *United States v. O'Brien*, 391 U. S. 367, 383 (1968); *McCray v. United States*, 195 U. S. 27, 56 (1904). Since the congressional decision is rational and the restriction on travel insubstantial, I conclude that residence requirements can be imposed by Congress as an exercise of its power to control interstate commerce consistent with the constitutionally guaranteed right to travel.

Without an attempt to determine whether any of Congress' enumerated powers would sustain residence requirements, the Court holds that congressionally imposed requirements violate the Due Process Clause of the Fifth Amendment. It thus suggests that, even if residence requirements would be a permissible exercise of the commerce power, they are "so unjustifiable as to be violative of due process." *Ante*, at 642. While the reasons for this conclusion are not fully explained, the Court apparently believes that, in the words of *Bolling v. Sharpe*, 347 U. S. 497, 500 (1954), residence requirements constitute "an arbitrary deprivation" of liberty.

If this is the import of the Court's opinion, then it seems to have departed from our precedents. We have long held that there is no requirement of uniformity when Congress acts pursuant to its commerce power. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 401 (1940); *Curran v. Wallace*, 306 U. S. 1, 13-14 (1939).⁶ I do not suggest that Congress is completely free when legislating under one of its enumerated powers to enact wholly arbitrary classifications, for *Bolling v. Sharpe*, *supra*, and *Schneider v. Rusk*, 377 U. S. 163 (1964),

⁶ Some of the cases go so far as to intimate that at least in the area of taxation Congress is not inhibited by any problems of classification. See *Helvering v. Lerner Stores Corp.*, 314 U. S. 463, 468 (1941); *Steward Machine Co. v. Davis*, 301 U. S. 548, 584 (1937); *LaBelle Iron Works v. United States*, 256 U. S. 377, 392 (1921).

counsel otherwise. Neither of these cases, however, is authority for invalidation of congressionally imposed residence requirements. The classification in *Bolling* required racial segregation in the public schools of the District of Columbia and was thus based upon criteria which we subject to the most rigid scrutiny. *Loving v. Virginia*, 388 U. S. 1, 11 (1967). *Schneider* involved an attempt to distinguish between native-born and naturalized citizens solely for administrative convenience. By authorizing residence requirements Congress acted not to facilitate an administrative function but to further its conviction that an impediment to the commercial life of this Nation would be removed by a program of cooperative federalism combining federal contributions with enhanced state benefits. Congress, not the courts, is charged with determining the proper prescription for a national illness. I cannot say that Congress is powerless to decide that residence requirements would promote this permissible goal and therefore must conclude that such requirements cannot be termed arbitrary.

The Court, after interpreting the legislative history in such a manner that the constitutionality of § 402 (b) is not at issue, gratuitously adds that § 402 (b) is unconstitutional. This method of approaching constitutional questions is sharply in contrast with the Court's approach in *Street v. New York*, *ante*, at 585-590. While in *Street* the Court strains to avoid the crucial constitutional question, here it summarily treats the constitutionality of a major provision of the Social Security Act when, given the Court's interpretation of the legislative materials, that provision is not at issue. Assuming that the constitutionality of § 402 (b) is properly treated by the Court, the cryptic footnote in *Katzenbach v. Morgan*, 384 U. S. 641, 651-652, n. 10 (1966), does not support its conclusion. Footnote 10 indicates that Congress is without power to undercut the equal-protection guarantee of racial equality in the guise of implementing

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the Fourteenth Amendment. I do not mean to suggest otherwise. However, I do not understand this footnote to operate as a limitation upon Congress' power to further the flow of interstate commerce by reasonable residence requirements. Although the Court dismisses § 402 (b) with the remark that Congress cannot authorize the States to violate equal protection, I believe that the dispositive issue is whether under its commerce power Congress can impose residence requirements.

Nor can I understand the Court's implication, *ante*, at 638, n. 21, that other state residence requirements such as those employed in determining eligibility to vote do not present constitutional questions. Despite the fact that in *Drueding v. Devlin*, 380 U. S. 125 (1965), we affirmed an appeal from a three-judge District Court after the District Court had rejected a constitutional challenge to Maryland's one-year residence requirement for presidential elections, the rationale employed by the Court in these appeals would seem to require the opposite conclusion. If a State would violate equal protection by denying welfare benefits to those who have recently moved interstate, then it would appear to follow that equal protection would also be denied by depriving those who have recently moved interstate of the fundamental right to vote. There is nothing in the opinion of the Court to explain this dichotomy. In any event, since the constitutionality of a state residence requirement as applied to a presidential election is raised in a case now pending, *Hall v. Beals*, No. 950, 1968 Term, I would await that case for a resolution of the validity of state voting residence requirements.

III.

The era is long past when this Court under the rubric of due process has reviewed the wisdom of a congressional decision that interstate commerce will be fostered by the enactment of certain regulations. Com-

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pare *Adkins v. Children's Hospital*, 261 U. S. 525 (1923), with *United States v. Darby*, 312 U. S. 100 (1941). Speaking for the Court in *Helvering v. Davis*, 301 U. S. 619, 644 (1937), Mr. Justice Cardozo said of another section of the Social Security Act:

"Whether wisdom or unwisdom resides in the scheme of benefits set forth . . . is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom."

I am convinced that Congress does have power to enact residence requirements of reasonable duration or to authorize the States to do so and that it has exercised this power.

The Court's decision reveals only the top of the iceberg. Lurking beneath are the multitude of situations in which States have imposed residence requirements including eligibility to vote, to engage in certain professions or occupations or to attend a state-supported university. Although the Court takes pains to avoid acknowledging the ramifications of its decision, its implications cannot be ignored. I dissent.

MR. JUSTICE HARLAN, dissenting.

The Court today holds unconstitutional Connecticut, Pennsylvania, and District of Columbia statutes which restrict certain kinds of welfare benefits to persons who have lived within the jurisdiction for at least one year immediately preceding their applications. The Court has accomplished this result by an expansion of the comparatively new constitutional doctrine that some state statutes will be deemed to deny equal protection of the laws unless justified by a "compelling" governmental interest, and by holding that the Fifth Amendment's Due Process Clause imposes a similar limitation on federal enactments. Having decided that the "compelling interest" principle

is applicable, the Court then finds that the governmental interests here asserted are either wholly impermissible or are not "compelling." For reasons which follow, I disagree both with the Court's result and with its reasoning.

I.

These three cases present two separate but related questions for decision. The first, arising from the District of Columbia appeal, is whether Congress may condition the right to receive Aid to Families with Dependent Children (AFDC) and Aid to the Permanently and Totally Disabled in the District of Columbia upon the recipient's having resided in the District for the preceding year.¹ The second, presented in the Pennsylvania and Connecticut appeals, is whether a State may, with the approval of Congress, impose the same conditions with

¹ Of the District of Columbia appellees, all sought AFDC assistance except appellee Barley, who asked for Aid to the Permanently and Totally Disabled. In 42 U. S. C. § 602 (b), Congress has authorized "States" (including the District of Columbia, see 42 U. S. C. § 1301 (a)(1)) to require up to one year's immediately prior residence as a condition of eligibility for AFDC assistance. See n. 15, *infra*. In 42 U. S. C. §§ 1352 (b)(1) and 1382 (b)(2), Congress has permitted "States" to condition disability payments upon the applicant's having resided in the State for up to five of the preceding nine years. However, D. C. Code § 3-203 prescribes a one-year residence requirement for both types of assistance, so the question of the constitutionality of a longer required residence period is not before us.

Appellee Barley also challenged in the District Court the constitutionality of a District of Columbia regulation which provided that time spent in a District of Columbia institution as a public charge did not count as residence for purposes of welfare eligibility. The District Court held that the regulation must fall for the same reasons as the residence statute itself. Since I believe that the District Court erred in striking down the statute, and since the issue of the regulation's constitutionality has been argued in this Court only in passing, I would remand appellee Barley's cause for further consideration of that question.

respect to eligibility for AFDC assistance.² In each instance, the welfare residence requirements are alleged to be unconstitutional on two grounds: *first*, because they impose an undue burden upon the constitutional right of welfare applicants to travel interstate; *second*, because they deny to persons who have recently moved interstate and would otherwise be eligible for welfare assistance the equal protection of the laws assured by the Fourteenth Amendment (in the state cases) or the analogous protection afforded by the Fifth Amendment (in the District of Columbia case). Since the Court basically relies upon the equal protection ground, I shall discuss it first.

² I do not believe that the Pennsylvania appeal presents the additional question of the validity of a residence condition for a purely state-financed and state-authorized public assistance program. The Pennsylvania welfare eligibility provision, Pa. Stat. Ann., Tit. 62, § 432 (1968), states:

"Except as hereinafter otherwise provided . . . needy persons of the classes defined in clauses (1) and (2) of this section shall be eligible for assistance:

"(1) Persons for whose assistance Federal financial participation is available to the Commonwealth as . . . aid to families with dependent children, . . . and which assistance is not precluded by other provisions of law.

"(2) Other persons who are citizens of the United States . . .

"(6) Assistance may be granted only to or in behalf of a person residing in Pennsylvania who (i) has resided therein for at least one year immediately preceding the date of application . . ."

As I understand it, this statute initially divides Pennsylvania welfare applicants into two classes: (1) persons for whom federal financial assistance is available and not precluded by other provisions of federal law (if state law, including the residence requirement, were intended, the "Except as hereinafter otherwise provided" proviso at the beginning of the entire section would be surplusage); (2) other persons who are citizens. The residence requirement applies to both classes. However, since all of the Pennsylvania appellees clearly fall into the first or federally assisted class, there is no need to consider whether residence conditions may constitutionally be imposed with respect to the second or purely state-assisted class.

II.

In upholding the equal protection argument,³ the Court has applied an equal protection doctrine of relatively recent vintage: the rule that statutory classifications which either are based upon certain "suspect" criteria or affect "fundamental rights" will be held to deny equal protection unless justified by a "compelling" governmental interest. See *ante*, at 627, 634, 638.

The "compelling interest" doctrine, which today is articulated more explicitly than ever before, constitutes an increasingly significant exception to the long-established rule that a statute does not deny equal protection if it is rationally related to a legitimate governmental objective.⁴ The "compelling interest" doctrine has two branches. The branch which requires that classifications based upon "suspect" criteria be supported by a compelling interest apparently had its genesis in cases involving racial classifications, which have, at least since *Korematsu v. United States*, 323 U. S. 214, 216 (1944), been regarded as inherently "suspect."⁵ The criterion of "wealth" apparently was added to the list of "suspects" as an alternative justification for the rationale in *Harper*

³ In characterizing this argument as one based on an alleged denial of equal protection of the laws, I do not mean to disregard the fact that this contention is applicable in the District of Columbia only through the terms of the Due Process Clause of the Fifth Amendment. Nor do I mean to suggest that these two constitutional phrases are "always interchangeable," see *Bolling v. Sharpe*, 347 U. S. 497, 499 (1954). In the circumstances of this case, I do not believe myself obliged to explore whether there may be any differences in the scope of the protection afforded by the two provisions.

⁴ See, e. g., *Rapid Transit Corp. v. City of New York*, 303 U. S. 573, 578 (1938). See also *infra*, at 662.

⁵ See *Loving v. Virginia*, 388 U. S. 1, 11 (1967); cf. *Bolling v. Sharpe*, 347 U. S. 497, 499 (1954). See also *Hirabayashi v. United States*, 320 U. S. 81, 100 (1943); *Yick Wo v. Hopkins*, 118 U. S. U. S. 356 (1886).

v. Virginia Bd. of Elections, 383 U. S. 663, 668 (1966), in which Virginia's poll tax was struck down. The criterion of political allegiance may have been added in *Williams v. Rhodes*, 393 U. S. 23 (1968).⁶ Today the list apparently has been further enlarged to include classifications based upon recent interstate movement, and perhaps those based upon the exercise of any constitutional right, for the Court states, *ante*, at 634:

"The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving . . . appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional."

I think that this branch of the "compelling interest" doctrine is sound when applied to racial classifications, for historically the Equal Protection Clause was largely a product of the desire to eradicate legal distinctions founded upon race. However, I believe that the more recent extensions have been unwise. For the reasons stated in my dissenting opinion in *Harper v. Virginia Bd. of Elections*, *supra*, at 680, 683-686, I do not consider wealth a "suspect" statutory criterion. And when, as in *Williams v. Rhodes*, *supra*, and the present case, a classification is based upon the exercise of rights guaranteed against state infringement by the Federal Constitution, then there is no need for any resort to the Equal Protection Clause; in such instances, this Court may properly and straightforwardly invalidate any undue burden upon those rights under the Fourteenth Amendment's Due Process Clause. See, e. g., my separate opinion in *Williams v. Rhodes*, *supra*, at 41.

⁶ See n. 9, *infra*.

⁷ See n. 9, *infra*.

The second branch of the "compelling interest" principle is even more troublesome. For it has been held that a statutory classification is subject to the "compelling interest" test if the result of the classification may be to affect a "fundamental right," regardless of the basis of the classification. This rule was foreshadowed in *Skinner v. Oklahoma*, 316 U. S. 535, 541 (1942), in which an Oklahoma statute providing for compulsory sterilization of "habitual criminals" was held subject to "strict scrutiny" mainly because it affected "one of the basic civil rights." After a long hiatus, the principle re-emerged in *Reynolds v. Sims*, 377 U. S. 533, 561-562 (1964), in which state apportionment statutes were subjected to an unusually stringent test because "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.*, at 562. The rule appeared again in *Carrington v. Rash*, 380 U. S. 89, 96 (1965), in which, as I now see that case,⁸ the Court applied an abnormally severe equal protection standard to a Texas statute denying certain servicemen the right to vote, without indicating that the statutory distinction between servicemen and civilians was generally "suspect." This branch of the doctrine was also an alternate ground in *Harper v. Virginia Bd. of Elections*, *supra*, see 383 U. S., at 670, and apparently was a basis of the holding in *Williams v. Rhodes*, *supra*.⁹ It

⁸ I recognize that in my dissenting opinion in *Harper v. Virginia Bd. of Elections*, *supra*, at 683, I characterized the test applied in *Carrington* as "the traditional equal protection standard." I am now satisfied that this was too generous a reading of the Court's opinion.

⁹ Analysis is complicated when the statutory classification is grounded upon the exercise of a "fundamental" right. For then the statute may come within the first branch of the "compelling interest" doctrine because exercise of the right is deemed a "suspect" criterion and also within the second because the statute is considered to affect the right by deterring its exercise. *Williams v. Rhodes*, *supra*, is such a case insofar as the statutes involved both inhibited exercise of the

has reappeared today in the Court's cryptic suggestion, *ante*, at 627, that the "compelling interest" test is applicable merely because the result of the classification may be to deny the appellees "food, shelter, and other necessities of life," as well as in the Court's statement, *ante*, at 638, that "[s]ince the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest."¹⁰

I think this branch of the "compelling interest" doctrine particularly unfortunate and unnecessary. It is unfortunate because it creates an exception which threatens to swallow the standard equal protection rule. Virtually every state statute affects important rights. This Court has repeatedly held, for example, that the traditional equal protection standard is applicable to statutory classifications affecting such fundamental matters as the right to pursue a particular occupation,¹¹ the right to receive greater or smaller wages¹² or to work more or less hours,¹³ and the right to inherit property.¹⁴ Rights such as these are in principle indistinguishable from those involved here, and to extend the "compelling interest" rule to all cases in which such rights are affected would go far toward making this Court a "super-legislature." This branch of the doctrine is also unnecessary. When the right affected is one assured by

right of political association and drew distinctions based upon the way the right was exercised. The present case is another instance, insofar as welfare residence statutes both deter interstate movement and distinguish among welfare applicants on the basis of such movement. Consequently, I have not attempted to specify the branch of the doctrine upon which these decisions rest.

¹⁰ See n. 9, *supra*.

¹¹ See, e. g., *Williamson v. Lee Optical Co.*, 348 U. S. 483 (1955); *Kotch v. Board of River Pilot Comm'rs*, 330 U. S. 552 (1947).

¹² See, e. g., *Bunting v. Oregon*, 243 U. S. 426 (1917).

¹³ See, e. g., *Miller v. Wilson*, 236 U. S. 373 (1915).

¹⁴ See, e. g., *Ferry v. Spokane, P. & S. R. Co.*, 258 U. S. 314 (1922).

the Federal Constitution, any infringement can be dealt with under the Due Process Clause. But when a statute affects only matters not mentioned in the Federal Constitution and is not arbitrary or irrational, I must reiterate that I know of nothing which entitles this Court to pick out particular human activities, characterize them as "fundamental," and give them added protection under an unusually stringent equal protection test.

I shall consider in the next section whether welfare residence requirements deny due process by unduly burdening the right of interstate travel. If the issue is regarded purely as one of equal protection, then, for the reasons just set forth, this nonracial classification should be judged by ordinary equal protection standards. The applicable criteria are familiar and well established. A legislative measure will be found to deny equal protection only if "it is without any reasonable basis and therefore is purely arbitrary." *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78 (1911). It is not enough that the measure results incidentally "in some inequality," or that it is not drawn "with mathematical nicety," *ibid.*; the statutory classification must instead cause "different treatments . . . so disparate, relative to the difference in classification, as to be wholly arbitrary." *Walters v. City of St. Louis*, 347 U. S. 231, 237 (1954). Similarly, this Court has stated that where, as here, the issue concerns the authority of Congress to withhold "a noncontractual benefit under a social welfare program . . . , the Due Process Clause [of the Fifth Amendment] can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming v. Nestor*, 363 U. S. 603, 611 (1960).

For reasons hereafter set forth, see *infra*, at 672-677, a legislature might rationally find that the imposition of a welfare residence requirement would aid in the accomplishment of at least four valid governmental ob-

jectives. It might also find that residence requirements have advantages not shared by other methods of achieving the same goals. In light of this undeniable relation of residence requirements to valid legislative aims, it cannot be said that the requirements are "arbitrary" or "lacking in rational justification." Hence, I can find no objection to these residence requirements under the Equal Protection Clause of the Fourteenth Amendment or under the analogous standard embodied in the Due Process Clause of the Fifth Amendment.

III.

The next issue, which I think requires fuller analysis than that deemed necessary by the Court under its equal protection rationale, is whether a one-year welfare residence requirement amounts to an undue burden upon the right of interstate travel. Four considerations are relevant: *First*, what is the constitutional source and nature of the right to travel which is relied upon? *Second*, what is the extent of the interference with that right? *Third*, what governmental interests are served by welfare residence requirements? *Fourth*, how should the balance of the competing considerations be struck?

The initial problem is to identify the source of the right to travel asserted by the appellees. Congress enacted the welfare residence requirement in the District of Columbia, so the right to travel which is invoked in that case must be enforceable against congressional action. The residence requirements challenged in the Pennsylvania and Connecticut appeals were authorized by Congress in 42 U. S. C. § 602 (b), so the right to travel relied upon in those cases must be enforceable against the States even though they have acted with congressional approval.

In my view, it is playing ducks and drakes with the statute to argue, as the Court does, *ante*, at 639-641, that Congress did not mean to approve these state residence

requirements. In 42 U. S. C. § 602 (b), quoted more fully, *ante*, at 638-639, Congress directed that:

"[t]he Secretary shall approve any [state assistance] plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for [AFDC aid] a residence requirement [equal to or greater than one year]."

I think that by any fair reading this section must be regarded as conferring congressional approval upon any plan containing a residence requirement of up to one year.

If any reinforcement is needed for taking this statutory language at face value, the overall scheme of the AFDC program and the context in which it was enacted suggest strong reasons why Congress would have wished to approve limited state residence requirements. Congress determined to enlist state assistance in financing the AFDC program, and to administer the program primarily through the States. A previous Congress had already enacted a one-year residence requirement with respect to aid for dependent children in the District of Columbia.¹⁵ In these circumstances, I think it only sensible to conclude that in allowing the States to impose limited residence conditions despite their possible impact on persons who wished to move interstate,¹⁶ Congress was motivated by a desire to encourage state participation in

¹⁵ See 44 Stat. 758, § 1.

¹⁶ The arguments for and against welfare residence requirements, including their impact on indigent migrants, were fully aired in congressional committee hearings. See, *e. g.*, Hearings on H. R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess., 831-832, 861-871 (1935); Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 522-540, 643, 656 (1935).

the AFDC program," as well as by a feeling that the States should at least be permitted to impose residence requirements as strict as that already authorized for the District of Columbia. Congress therefore had a genuine federal purpose in allowing the States to use residence tests. And I fully agree with THE CHIEF JUSTICE that this purpose would render § 602 (b) a permissible exercise of Congress' power under the Commerce Clause, unless Congress were prohibited from acting by another provision of the Constitution.

Nor do I find it credible that Congress intended to refrain from expressing approval of state residence requirements because of doubts about their constitutionality or their compatibility with the Act's beneficent purposes. With respect to constitutionality, a similar residence requirement was already in effect for the District of Columbia, and the burdens upon travel which might be caused by such requirements must, even in 1935, have been regarded as within the competence of Congress under its commerce power. If Congress had thought residence requirements entirely incompatible with the aims of the Act, it could simply have provided that state assistance plans containing such requirements should not be approved at all, rather than having limited approval to plans containing residence requirements of less than one year. Moreover, when Congress in 1944 revised the AFDC program in the District of Columbia to conform with the standards of the Act, it chose to condition eligibility upon one year's residence,¹⁷ thus strongly indicating that

¹⁷ I am not at all persuaded by the Court's argument that Congress' sole purpose was to compel "[l]iberality of residence requirement." See *ante*, at 640. If that was the only objective, it could have been more effectively accomplished by specifying that to qualify for approval under the Act a state assistance plan must contain no residence requirement.

¹⁸ See Act to provide aid to dependent children in the District of Columbia § 3, 58 Stat. 277 (1944). In 1962, this Act was repealed

it doubted neither the constitutionality of such a provision nor its consistency with the Act's purposes.¹⁹

Opinions of this Court and of individual Justices have suggested four provisions of the Constitution as possible sources of a right to travel enforceable against the federal or state governments: the Commerce Clause;²⁰ the Privileges and Immunities Clause of Art. IV, § 2;²¹ the Privileges and Immunities Clause of the Fourteenth Amendment;²² and the Due Process Clause of the Fifth Amendment.²³ The Commerce Clause can be of no assistance to these appellees, since that clause grants plenary power to Congress,²⁴ and Congress either enacted or approved all of the residence requirements here challenged. The Privileges and Immunities Clause of Art. IV, § 2,²⁵ is irrelevant, for it appears settled that this clause neither limits federal power nor prevents a State from distinguishing among its own citizens, but simply "prevents a State from discriminating against citizens of other States in favor of its own." *Hague v. CIO*, 307 U. S. 496, 511 (1939) (opinion of Roberts, J.); see *Slaughter-House Cases*, 16 Wall. 36, 77 (1873). Since Congress enacted the District of Columbia residence statute, and since the Pennsylvania and Connecticut appellees were residents

and replaced by D. C. Code § 3-203, the provision now being challenged. See 76 Stat. 914.

¹⁹ Cf. *ante*, at 639-641 and nn. 24-25.

²⁰ See, e. g., *Edwards v. California*, 314 U. S. 160 (1941); the *Passenger Cases*, 7 How. 283 (1849).

²¹ See, e. g., *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3230) (1825) (Mr. Justice Washington).

²² See, e. g., *Edwards v. California*, 314 U. S. 160, 177, 181 (1941) (Douglas and Jackson, JJ., concurring); *Twining v. New Jersey*, 211 U. S. 78, 97 (1908) (dictum).

²³ See, e. g., *Kent v. Dulles*, 357 U. S. 116, 125-127 (1958); *Aptheker v. Secretary of State*, 378 U. S. 500, 505-506 (1964).

²⁴ See, e. g., *Prudential Ins. Co. v. Benjamin*, 328 U. S. 408, 423 (1946). See also *Maryland v. Wirtz*, 392 U. S. 183, 193-199 (1968).

²⁵ "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

and therefore citizens of those States when they sought welfare, the clause can have no application in any of these cases.

The Privileges and Immunities Clause of the Fourteenth Amendment provides that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."²⁶ It is evident that this clause cannot be applicable in the District of Columbia appeal, since it is limited in terms to instances of state action. In the Pennsylvania and Connecticut cases, the respective States did impose and enforce the residence requirements. However, Congress approved these requirements in 42 U. S. C. § 602 (b). The fact of congressional approval, together with this Court's past statements about the nature of the Fourteenth Amendment Privileges and Immunities Clause, leads me to believe that the clause affords no additional help to these appellees, and that the decisive issue is whether Congress itself may impose such requirements. The view of the Privileges and Immunities Clause which has most often been adopted by the Court and by individual Justices is that it extends only to those "privileges and immunities" which "arise or grow out of the relationship of United States citizens to the national government." *Hague v. CIO*, 307 U. S. 496, 520 (1939) (opinion of Stone, J.).²⁷ On the authority of *Crandall v. Nevada*, 6 Wall. 35 (1868), those privileges and immunities have repeatedly been said to include the right to travel from State to State,²⁸ presumably for the reason assigned in *Crandall*: that state restrictions on travel

²⁶ See *Slaughter-House Cases*, 16 Wall. 36, 79 (1873); *In re Kawmler*, 136 U. S. 436, 448 (1890); *McPherson v. Blacker*, 146 U. S. 1, 38 (1892); *Giozza v. Tiernan*, 148 U. S. 657, 661 (1893); *Duncan v. Missouri*, 152 U. S. 377, 382 (1894); *Twining v. New Jersey*, 211 U. S. 78, 97-98 (1908).

²⁷ See, e. g., *Slaughter-House Cases*, *supra*, at 79; *Twining v. New Jersey*, *supra*, at 97.

might interfere with intercourse between the Federal Government and its citizens.²⁸ This kind of objection to state welfare residence requirements would seem necessarily to vanish in the face of congressional authorization, for except in those instances when its authority is limited by a constitutional provision binding upon it (as the Fourteenth Amendment is not), Congress has full power to define the relationship between citizens and the Federal Government.

Some Justices, notably the dissenters in the *Slaughter-House Cases*, 16 Wall. 36, 83, 111, 124 (1873) (Field, Bradley, and Swaine, JJ., dissenting), and the concurring Justices in *Edwards v. California*, 314 U. S. 160, 177, 181 (1941) (DOUGLAS and Jackson, JJ., concurring), have gone further and intimated that the Fourteenth Amendment right to travel interstate is a concomitant of federal citizenship which stems from sources even more basic than the need to protect citizens in their relations with the Federal Government. The *Slaughter-House* dissenters suggested that the privileges and immunities of national citizenship, including freedom to travel, were those natural rights "which of right belong to the citizens of all free governments," 16 Wall., at 98 (Field, J.). However, since such rights are "the rights of citizens of any free government," *id.*, at 114 (Bradley, J.), it would appear that they must be immune from national as well as state abridgment. To the extent that they may be validly limited by Congress, there would seem to be no reason why they may not be similarly abridged by States acting with congressional approval.

The concurring Justices in *Edwards* laid emphasis not upon natural rights but upon a generalized concern for the functioning of the federal system, stressing that to

²⁸ The *Crandall* Court stressed the "right" of a citizen to come to the national capital, to have access to federal officials, and to travel to seaports. See 6 Wall., at 44. Of course, *Crandall* was decided before the enactment of the Fourteenth Amendment.

allow a State to curtail "the rights of national citizenship would be to contravene every conception of national unity," 314 U. S., at 181 (DOUGLAS, J.), and that "[i]f national citizenship means less than [the right to move interstate] it means nothing." *Id.*, at 183 (Jackson, J.). However, even under this rationale the clause would appear to oppose no obstacle to congressional delineation of the rights of national citizenship, insofar as Congress may do so without infringing other provisions of the Constitution. Mr. Justice Jackson explicitly recognized in *Edwards* that: "The right of the citizen to migrate from state to state . . . [is] subject to all constitutional limitations imposed by the federal government," *id.*, at 184. And nothing in the nature of federalism would seem to prevent Congress from authorizing the States to do what Congress might validly do itself. Indeed, this Court has held, for example, that Congress may empower the States to undertake regulations of commerce which would otherwise be prohibited by the negative implications of the Commerce Clause. See *Prudential Ins. Co. v. Benjamin*, 328 U. S. 408 (1946). Hence, as has already been suggested, the decisive question is whether Congress may legitimately enact welfare residence requirements, and the Fourteenth Amendment Privileges and Immunities Clause adds no extra force to the appellants' attack on the requirements.

The last possible source of a right to travel is one which does operate against the Federal Government: the Due Process Clause of the Fifth Amendment.²⁹ It is now set-

²⁹ Professor Chafee has suggested that the Due Process Clause of the Fourteenth Amendment may similarly protect the right to travel against state interference. See Z. Chafee, *Three Human Rights in the Constitution of 1787*, p. 192 (1956). However, that clause surely provides no greater protection against the States than does the Fifth Amendment clause against the Federal Government; so the decisive question still is whether Congress may enact a residence requirement.

ted that freedom to travel is an element of the "liberty" secured by that clause. In *Kent v. Dulles*, 357 U. S. 116, 125-126 (1958), the Court said:

"The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. . . . Freedom of movement across frontiers . . . , and inside frontiers as well, was a part of our heritage. . . ."

The Court echoed these remarks in *Aptheker v. Secretary of State*, 378 U. S. 500, 505-506 (1964), and added:

"Since this case involves a personal liberty protected by the Bill of Rights, we believe that the proper approach to legislation curtailing that liberty must be that adopted by this Court in *NAACP v. Button*, 371 U. S. 415, and *Thornhill v. Alabama*, 310 U. S. 88. . . . [S]ince freedom of travel is a constitutional liberty closely related to rights of free speech and association, we believe that appellants . . . should not be required to assume the burden of demonstrating that Congress could not have written a statute constitutionally prohibiting their travel." *Id.*, at 516-517.

However, in *Zemel v. Rusk*, 381 U. S. 1 (1965), the First Amendment cast of the *Aptheker* opinion was explained as having stemmed from the fact that *Aptheker* was forbidden to travel because of "expression or association on his part," *id.*, at 16. The Court noted that *Zemel* was "not being forced to choose between membership in an organization and freedom to travel," *ibid.*, and held that the mere circumstance that *Zemel's* proposed journey to Cuba might be used to collect information of political and social significance was not enough to bring the case within the First Amendment category.

Finally, in *United States v. Guest*, 383 U. S. 745 (1966), the Court again had occasion to consider the right of

interstate travel. Without specifying the source of that right, the Court said:

"The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized. . . . [The] right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution." *Id.*, at 757-758. (Footnotes omitted.)

I therefore conclude that the right to travel interstate is a "fundamental" right which, for present purposes, should be regarded as having its source in the Due Process Clause of the Fifth Amendment.

The next questions are: (1) To what extent does a one-year residence condition upon welfare eligibility interfere with this right to travel?; and (2) What are the governmental interests supporting such a condition? The consequence of the residence requirements is that persons who contemplate interstate changes of residence, and who believe that they otherwise would qualify for welfare payments, must take into account the fact that such assistance will not be available for a year after arrival. The number or proportion of persons who are actually deterred from changing residence by the existence of these provisions is unknown. If one accepts evidence put forward by the appellees,³⁰ to the effect

³⁰ See Brief for Appellees in No. 33, pp. 49-51 and n. 70; Brief for Appellees in No. 34, p. 24, n. 11; Supplemental Brief for Appellees on Reargument 27-30.

that there would be only a minuscule increase in the number of welfare applicants were existing residence requirements to be done away with, it follows that the requirements do not deter an appreciable number of persons from moving interstate.

Against this indirect impact on the right to travel must be set the interests of the States, and of Congress with respect to the District of Columbia, in imposing residence conditions. There appear to be four such interests. First, it is evident that a primary concern of Congress and the Pennsylvania and Connecticut Legislatures was to deny welfare benefits to persons who moved into the jurisdiction primarily in order to collect those benefits.³¹ This seems to me an entirely legitimate objective. A legislature is certainly not obliged to furnish welfare assistance to every inhabitant of the jurisdiction, and it is entirely rational to deny benefits to those who enter primarily in order to receive them, since this will make more funds available for those whom the legislature deems more worthy of subsidy.³²

³¹ For Congress, see, *e. g.*, Problems of Hungry Children in the District of Columbia, Hearings before the Subcommittee on Public Health, Education, Welfare, and Safety of the Senate Committee on the District of Columbia, 85th Cong., 1st Sess. For Connecticut, see Connecticut General Assembly, 1965 Feb. Spec. Sess., House of Representatives Proceedings, Vol. II, pt. 7, at 3505. For Pennsylvania, see Appendix in No. 34, pp. 96a-98a.

³² There is support for the view that enforcement of residence requirements can significantly reduce welfare costs by denying benefits to those who come solely to collect them. For example, in the course of a long article generally critical of residence requirements, and after a detailed discussion of the available information, Professor Harvith has stated:

"A fair conclusion seems to be that, in at least some states, it is not unreasonable for the legislature to conclude that a useful saving in welfare costs may be obtained by residence tests discouraging those who would enter the state solely because of its welfare programs. In New York, for example, a one per cent saving in

A second possible purpose of residence requirements is the prevention of fraud. A residence requirement provides an objective and workable means of determining that an applicant intends to remain indefinitely within the jurisdiction. It therefore may aid in eliminating fraudulent collection of benefits by nonresidents and persons already receiving assistance in other States. There can be no doubt that prevention of fraud is a valid legislative goal. Third, the requirement of a fixed period of residence may help in predicting the budgetary amount which will be needed for public assistance in the future. While none of the appellant jurisdictions appears to keep data sufficient to permit the making of detailed budgetary predictions in consequence of the requirement,³³ it is probable that in the event of a very large increase or decrease in the number of indigent newcomers the waiting period would give the legislature time to make needed adjustments in the welfare laws. Obviously, this is a proper objective. Fourth, the residence requirements conceivably may have been predicated upon a legislative desire to restrict welfare payments financed in part by state tax funds to persons who have

welfare costs would amount to several million dollars." Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs*, 54 Calif. L. Rev. 567, 618 (1966). (Footnotes omitted.) See also *Helvering v. Davis*, 301 U. S. 619, 644 (1937).

For essentially the same reasons, I would uphold the Connecticut welfare regulations which except from the residence requirement persons who come to Connecticut with a bona fide job offer or with resources sufficient to support them for three months. See 1 Conn. Welfare Manual, c. II, §§ 219.1-219.2 (1966). Such persons are very unlikely to have entered the State primarily in order to receive welfare benefits.

³³ For precise prediction to be possible, it would appear that a residence requirement must be combined with a procedure for ascertaining the number of indigent persons who enter the jurisdiction and the proportion of those persons who will remain indigent during the residence period.

recently made some contribution to the State's economy, through having been employed, having paid taxes, or having spent money in the State. This too would appear to be a legitimate purpose.¹⁴

The next question is the decisive one: whether the governmental interests served by residence requirements outweigh the burden imposed upon the right to travel. In my view, a number of considerations militate in favor of constitutionality. First, as just shown, four separate, legitimate governmental interests are furthered by residence requirements. Second, the impact of the requirements upon the freedom of individuals to travel interstate is indirect and, according to evidence put forward by the appellees themselves, insubstantial. Third, these are not cases in which a State or States, acting alone, have attempted to interfere with the right of citizens to travel, but one in which the States have acted within the terms of a limited authorization by the National Government, and in which Congress itself has laid down a like rule for the District of Columbia. Fourth, the legislatures which enacted these statutes have been fully exposed to the arguments of the appellees as to why these residence requirements are unwise, and have rejected them. This is not, therefore, an instance in which legislatures have acted without mature deliberation.

Fifth, and of longer-range importance, the field of welfare assistance is one in which there is a widely recognized need for fresh solutions and consequently for experimentation. Invalidation of welfare residence

¹⁴ I do not mean to imply that each of the above purposes necessarily was sought by each of the legislatures that adopted durational residence requirements. In Connecticut, for example, the welfare budget is apparently open-ended, suggesting that this State is not seriously concerned with the need for more accurate budgetary estimates.

requirements might have the unfortunate consequence of discouraging the Federal and State Governments from establishing unusually generous welfare programs in particular areas on an experimental basis, because of fears that the program would cause an influx of persons seeking higher welfare payments. Sixth and finally, a strong presumption of constitutionality attaches to statutes of the types now before us. Congressional enactments come to this Court with an extremely heavy presumption of validity. See, e. g., *Brown v. Maryland*, 12 Wheat. 419, 436 (1827); *Insurance Co. v. Glidden Co.*, 284 U. S. 151, 158 (1931); *United States v. Butler*, 297 U. S. 1, 67 (1936); *United States v. National Dairy Corp.*, 372 U. S. 29, 32 (1963). A similar presumption of constitutionality attaches to state statutes, particularly when, as here, a State has acted upon a specific authorization from Congress. See, e. g., *Powell v. Pennsylvania*, 127 U. S. 678, 684-685 (1888); *United States v. Des Moines N. & R. Co.*, 142 U. S. 510, 544-545 (1892).

I do not consider that the factors which have been urged to outweigh these considerations are sufficient to render unconstitutional these state and federal enactments. It is said, first, that this Court, in the opinions discussed, *supra*, at 669-671, has acknowledged that the right to travel interstate is a "fundamental" freedom. Second, it is contended that the governmental objectives mentioned above either are ephemeral or could be accomplished by means which do not impinge as heavily on the right to travel, and hence that the requirements are unconstitutional because they "sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama*, 377 U. S. 288, 307 (1964). The appellees claim that welfare payments could be denied those who come primarily to collect welfare by means of less restrictive provisions, such as New York's

Welfare Abuses Law;³⁵ that fraud could be prevented by investigation of individual applicants or by a much shorter residence period; that budgetary predictability is a remote and speculative goal; and that assurance of investment in the community could be obtained by a shorter residence period or by taking into account prior intervals of residence in the jurisdiction.

Taking all of these competing considerations into account, I believe that the balance definitely favors constitutionality. In reaching that conclusion, I do not minimize the importance of the right to travel interstate. However, the impact of residence conditions upon that right is indirect and apparently quite insubstantial. On the other hand, the governmental purposes served by the requirements are legitimate and real, and the residence requirements are clearly suited to their accomplishment. To abolish residence requirements might well discourage highly worthwhile experimentation in the welfare field. The statutes come to us clothed with the authority of Congress and attended by a correspondingly heavy presumption of constitutionality. Moreover, although the appellees assert that the same objectives could have been achieved by less restrictive means, this is an area in which the judiciary should be especially slow to fetter the judgment of Congress and of some 46 state legislatures³⁶ in the choice of methods. Residence requirements have

³⁵ That law, N. Y. Soc. Welfare Law § 139-a, requires public welfare officials to conduct a detailed investigation in order to ascertain whether a welfare "applicant came into the state for the purpose of receiving public assistance or care and accordingly is undeserving of and ineligible for assistance"

³⁶ The figure may be variously calculated. There was testimony before the District Court in the Pennsylvania case that 46 States had some form of residence requirement for welfare assistance. Appendix in No. 34, pp. 92a-93a. It was stipulated in the Connecticut case that in 1965, 40 States had residence requirements for aid to dependent children. Appendix to Appellant's Brief in No. 9, p. 45a. See also *ante*, at 639-640 and n. 22.

advantages, such as administrative simplicity and relative certainty, which are not shared by the alternative solutions proposed by the appellees. In these circumstances, I cannot find that the burden imposed by residence requirements upon ability to travel outweighs the governmental interests in their continued employment. Nor do I believe that the period of residence required in these cases—one year—is so excessively long as to justify a finding of unconstitutionality on that score.

I conclude with the following observations. Today's decision, it seems to me, reflects to an unusual degree the current notion that this Court possesses a peculiar wisdom all its own whose capacity to lead this Nation out of its present troubles is contained only by the limits of judicial ingenuity in contriving new constitutional principles to meet each problem as it arises. For anyone who, like myself, believes that it is an essential function of this Court to maintain the constitutional divisions between state and federal authority and among the three branches of the Federal Government, today's decision is a step in the wrong direction. This resurgence of the expansive view of "equal protection" carries the seeds of more judicial interference with the state and federal legislative process, much more indeed than does the judicial application of "due process" according to traditional concepts (see my dissenting opinion in *Duncan v. Louisiana*, 391 U. S. 145, 171 (1968)), about which some members of this Court have expressed fears as to its potentialities for setting us judges "at large."³⁷ I consider it particularly unfortunate that this judicial roadblock to the powers of Congress in this field should occur at the very threshold of the current discussions regarding the "federalizing" of these aspects of welfare relief.

³⁷ Cf. *Harper v. Virginia Bd. of Elections*, 383 U. S. 663, 670, 675-680 (BLACK, J., dissenting).

OFFICE OF MANAGEMENT AND BUDGET

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COMMENTS:

Per your request, he's the Justice letter on HR 4.

TO: *Elena Kagan*



Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 9, 1995

Honorable Newt Gingrich
Speaker
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

This presents the views of the Department of Justice on H.R. 4, the "Personal Responsibility Act of 1995," as passed by the House of Representatives, and the "Work Opportunity Act of 1995," as passed by the Senate. Both bills raise many serious welfare policy concerns. We defer to the Department of Health and Human Services in this area and address below a number of constitutional and other legal issues.

CONSTITUTIONAL CONCERNS

1. Denial of Assistance for Children Born to Unmarried
Minor Mothers

Section 101 of the House bill, amending section 405(a)(4) of the Social Security Act, would exclude from eligibility for cash benefits mothers under age 18 and their children born out-of-wedlock. No cash benefits may be provided until the mothers reach age 18. Section 101 of the Senate bill, in what would now be section 406(b) of the Social Security Act, contains a provision that differs from the House version in two respects: denial of assistance is at the option of the states, rather than mandatory; and the authorized exclusion appears to extend to all benefits, rather than only to cash benefits.

We have serious constitutional concerns regarding the discrimination on the basis of out-of-wedlock birth required or authorized by these provisions. On their face, these provisions distinguish among equally needy children based on the conduct of those children's parents. The Supreme Court has held already that for purposes of distributing welfare benefits, "as indispensable to the health and well-being of illegitimate children as to those who are legitimate," such distinctions violate the Equal Protection Clause. See New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619, 621 (1973) (per curiam). Specifically, the Court in Cahill rejected the means chosen by the state to advance its interest in "preserv[ing] and strengthen[ing] family life":

[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrong-doing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual--as well as an unjust--way of deterring the parent.

Cahill, 411 U.S. at 620 (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972); see also Trimble v. Gordon, 430 U.S. 762, 769 (1977) ("we have expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships"). We think that this reasoning would likely compel invalidation of the provision in question.

2. Treatment of "Interstate Immigrants"

Both the House and Senate bills purport to authorize the states to discriminate among beneficiaries based on length of in-state residence.¹ Specifically, the bills would allow each state to provide families that have lived in the state for less than one year with the level of benefits, if any, the families would have received in their prior states of residence.

The Supreme Court has held that a state impermissibly penalizes the right to interstate travel when it denies newcomers the "same right to vital government benefits and privileges . . . as are enjoyed by other residents." Memorial Hosp. v. Maricopa County, 415 U.S. 250, 261 (1974) (one-year residency requirement for free nonemergency medical care invalid as penalty on right to interstate travel); see also Shapiro v. Thompson, 394 U.S. 618 (1969) (one-year residency requirement for welfare benefits; same result). This is so even if the state acts, as it would here, pursuant to attempted congressional authorization. See Shapiro, 394 U.S. at 641. In a related line of cases, the Supreme Court has used a different rationale to come to the same conclusion, holding that distinctions based on length of residence violate the Equal Protection Clause under rational basis review. See, e.g., Zobel v. Williams, 457 U.S. 55 (1982) (state lacks rational and permissible interest in granting incrementally higher oil revenue dividend payments to residents of longer duration).

Recent lower court cases have relied on both these theories to invalidate laws that, like those contemplated by the bill, limit new state residents to the level of welfare benefits they received

¹ The relevant provision appears in section 101 of both the House and Senate bills. The House provision would amend section 403(c)(2) of the Social Security Act; the Senate provision, section 403(b)(2).

in their prior home states. See Mitchell v. Steffen, 504 N.W.2d 198 (Minn. 1993), cert. denied, 114 S. Ct. 902 (1994); Green v. Anderson, 811 F. Supp. 516 (E.D. Cal. 1993), aff'd, 26 F.3d 95 (9th Cir. 1994). The Supreme Court granted certiorari in Green, but recently directed vacation of the prior judgments in the case on procedural grounds without reaching the merits. Anderson v. Green, 63 U.S.L.W. 4162 (U.S. Feb. 22, 1995) (per curiam). Unless and until the Supreme Court revisits this issue, courts applying this case law are very likely to hold unconstitutional state laws passed pursuant to these provisions of the bills.

3. Limited Eligibility of Certain Naturalized Citizens

Under section 502 of the Senate bill, for a period of time after an individual enters the United States pursuant to a sponsorship agreement, the income of the individual's sponsor would be attributed, or "deemed," to the individual in determining his or her eligibility for nearly all federal need-based programs of assistance. The deeming period would extend for a minimum of five years after entry, or for future immigrants, until the entrant has worked in the United States for 40 qualifying quarters. If the entrant never worked for 40 qualifying quarters, deeming would continue indefinitely. States would be authorized to adopt the same deeming rules for state assistance programs.

As applied to naturalized citizens,² the provisions in question would operate effectively to deny welfare benefits to certain United States citizens because they were born outside the country and achieved their citizenship status through naturalization. This appears to be an unprecedented result. Current federal deeming provisions under various benefits programs operate only as against aliens,³ and we are not aware of any comparable restrictions on citizen eligibility for federal assistance. As a matter of policy, we think it would be a mistake to begin now to relegate naturalized citizens -- who have demonstrated their commitment to our country by undergoing the naturalization process -- to a kind of second-class status. We defer to the views of the Department of Health and Human Services to provide you with further information on the overall impact on Federal programs of the provision relating to non-citizens.

As a legal matter, section 502 is highly vulnerable to challenge on the grounds that it distinguishes between naturalized

² Our comment here is limited to the application of deeming requirements to United States citizens. As applied to aliens, the deeming requirements' constitutionality would be judged under the standard set out.

³ See, e.g., 42 U.S.C. § 615 (AFDC); 7 U.S.C. 2014(i) (Food Stamps).

and native-born citizens in violation of the equal protection component of the Fifth Amendment. See Schneider v. Rusk, 377 U.S. 163 (1964) (restriction on length of foreign residence applied to naturalized but not native born citizens violates Fifth Amendment). It is true, of course, that when Congress exercises its plenary authority to regulate immigration and naturalization, the classifications it draws are subject to very deferential review under the Fifth Amendment. See Mathews v. Diaz, 426 U.S. 67 (1976). We do not think, however, that this standard would govern review of section 502. By terms,⁴ section 502 applies subsequent as well as prior to naturalization. Congress' immigration and naturalization authority, on the other hand, expires with respect to an individual immigrant and at the point of his or her naturalization. See Afroyim v. Rusk, 387 U.S. 253 (1967) (Congress lacks power to deprive naturalized citizen of citizenship status). That is, while Congress has broad discretion to impose conditions precedent on entry and naturalization, that authority does not extend to the imposition of restrictions that operate post-naturalization:

While the rights of citizenship of the native born derive from § 1 of the Fourteenth Amendment and the rights of the naturalized citizen derive from satisfying, free of fraud, the requirements set by Congress, the latter, apart from the exception noted [constitutional eligibility for President], "becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual."

Schneider, 377 U.S. at 166 (quoting Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 827 (1824)). Accordingly, section 502 cannot be characterized as an exercise of immigration and naturalization power entitled to deferential review by the courts.

An alternative argument could be made that, because the provision refers generally to citizens with sponsors, it might be defended on the ground that it does not involve discrimination based on naturalized status as such. We doubt, however, that such an argument would succeed. First, the context surrounding the provision's adoption tends to undermine the contention that section 502 is neutral with respect to naturalized status. The Senate did not begin with a clean statutory slate, but rather with an existing

⁴ Section 502 governs determinations of "the eligibility of an individual (whether a citizen or national of the United States or an alien) for assistance"

system of deeming provisions limited expressly to aliens. That it chose to expand those provisions to include citizens; as well -- and to do so with a provision included in title of its bill devoted otherwise exclusively to treatment of aliens -- suggests strongly that the citizens it had in mind were those who once were aliens. Second, we note that state courts have rejected as unduly "abstract" a similar position offered in defense of state deeming provisions, finding that the provisions constitute impermissible discrimination based on alienage despite the fact that they reach only sponsored aliens. El Souri v. Dep't of Social Services, 414 N.W.2d 679, 683 n.9 (Mich. 1987)⁵; see also Town of Greenwich v. Barannikova, 643 A.2d 251, 263-64 (Conn. 1994) (discussing and distinguishing Geduldig). A reviewing court might well find the reasoning of these decisions persuasive, and characterize the deeming provision in question here as one that classifies naturalized citizens with aliens for purposes of benefits ineligibility.

So understood, section 502, as applied to citizens, would contravene the basic equal protection tenet that "the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive." Schneider, 377 U.S. at 165. The commands of the Fifth Amendment, in this respect, are congruent with the limits on Congress' affirmative immigration and naturalization power: neither constitutional provision permits Congress to treat naturalized citizens as it does aliens, see Afroyim, and separately from native born citizens. Perhaps even more troubling, the Senate's effort to bring naturalized citizens within the scope of provisions previously reserved for aliens might be viewed as discrimination based on national origin: as noted above, the new and expanded deeming provision appears intended to reach a class of former aliens, or, put differently, a class of citizens born outside the United States. A classification based on national origin, of course, is subject to strict scrutiny under equal protection review, see Korematsu v. United States, 323 U.S. 214 (1944), and it is unlikely that the deeming provision could be justified under this standard. See Barannikova, 643 A.2d at 265 (invalidating state deeming provision under strict scrutiny); El Souri, 414 N.W.2d at 683 (same).

COMMENTS RELATED TO CHILD SUPPORT ENFORCEMENT

As the agency charged with giving effect to the provisions of

⁵ "[T]he great divide in the [equal protection] decisions lies in the difference between emphasizing the actualities or the abstractions of legislation. * * * To recognize marked differences that exist in fact is living law; to disregard practical differences and concentrate on some abstract identities is lifeless logic." (quoting Morey v. Doud, 354 U.S. 457, 472 (1957) (Frankfurter, J., dissenting)).

the Child Support Recovery Act of 1992, which make it a federal crime to cross state lines to avoid a child support obligation, the Department of Justice has a direct interest in legislation designed to enhance the tools available to states to enforce child support orders. We are supportive of provisions in both the Senate and House bills that incorporate the major proposals for tougher child support enforcement that the Administration demanded.

Both the House and Senate bills provide for the streamlining of state procedures for establishing paternity and child support orders, and for the modification of existing support orders. Additionally, the bills contain provisions permitting local agencies to access more databases, enhancing their ability to locate absent parents and track their employment. Finally, both bills would centralize casetracking, recordkeeping, and employment information. We support these provisions.

We also support the provisions of the bills that provide for the voiding of fraudulent asset transfers by non-custodial parents, improve the provisions of current law mandating "full faith and credit" for child support orders issued in other states, and provide guidance to state courts on priority and recognition of child support orders where more than one order has been issued. These bills also require that states enact statutes providing for the suspension of drivers, professional, occupational and recreational licenses. We support these provisions, as well.

OTHER CONCERNS

1. Limited Eligibility of Legal Aliens

Though they differ in their particulars, both the House and Senate bills would restrict severely the eligibility of legal as well as illegal aliens for federal means-tested benefits programs. Both bills also would authorize the states to impose additional restrictions on the participation of legal aliens in certain benefits programs.

We think such a broad-based exclusionary policy is difficult to justify. In our view, it is neither fair nor sensible to deny subsistence benefits to nearly all legal aliens, many of whom have participated productively in the United States economy for years before requiring assistance, and to their children. Moreover, it should be noted that it is unclear whether states may deny welfare benefits to legal aliens, even when they act pursuant to congressional legislation giving them that option. See Graham v. Richardson, 403 U.S. 365, 382-83 (1971).

In addition, any final legislation should include an exemption, which is included in the House bill, for legal permanent residents who are unable to naturalize because of their physical or mental disabilities. An exception should also be made for legal

permanent residents who are over 75 years of age and who have lived in the United States for over five years. Finally, the Administration has serious reservations about the bill's application of these provisions to Medicaid.

2. Limitations on Federal Authority

In two places, the House bill would limit federal authority by providing that

The Secretary may not regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part.⁶

The Senate bill contains a similar limitation.⁷

The reach of these provisions is unclear. Our assumption is that they are intended to prevent the Secretary from promulgating substantive regulations that govern the disposition of the particular block grant funds at issue in each affected title. Our concern, however, is that the provisions might be read to extend also to the Secretary's enforcement of other global statutes and regulations (e.g., the Administrative Procedure Act, audit-related legislation, and the like) applicable to all federal funding programs.

For instance, the provisions could be construed to prohibit the Secretary from applying to the states' management of their block grants the provisions of Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d et seq., Title IX of the Education Amendments Act of 1974, as amended, 20 U.S.C. § 1681 et seq.; and section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794. Broadly read, the provisions also would prevent the Secretary from instituting program fraud civil remedies actions against states under the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812, which provides administrative remedies for false claims and statements in connection with the receipt of federal funds. Even the Secretary's referral of a matter to the Department of Justice for prosecution or civil action might be barred by the provisions.

To avoid what we think is an unintended consequence, the provisions might be drafted more narrowly to provide that "the Secretary is not authorized by this Act to regulate" Such a provision would make clear that the Secretary may not attack

⁶ Section 101 (amended Social Security Act section 402(f)). The language of the second provision, in section 423(f) of the bill, is substantially similar.

⁷ Section 101 (new section 416).

additional conditions to use of the block grants in question, without inadvertently stripping the Secretary of authority to enforce preexisting or subsequent statutory mandates.

3. Grace Period for State Constitutional Amendment

Section 791(c) of the House bill would establish a "grace period" for states "unable to [] comply" with the requirements of Title VII "without amending the State constitution." It is our view that state constitutional provisions generally could not prevent compliance with Title VII, in that state provisions inconsistent with Title VII would be void under the Supremacy Clause in states receiving federal funds. See, e.g., Townsend v. Swank, 404 U.S. 282 (1971) (state law violates Supremacy Clause by imposing AFDC restrictions inconsistent with federal standards). We therefore recommend drafting section 791(c) to achieve what appears to be its purpose without suggesting that state law can take precedence over federal standards:

If a State constitution is inconsistent with any provision of this title, then the State shall not be found out of compliance with any requirement enacted by this title until the earlier of--

- (1) 1 year after the effective date of a State constitutional amendment achieving consistency with this title; or
- (2) 5 years after the date of the enactment of this title.

We recommend substituting the same language for the similar provision in section 991(c) of the Senate bill.

4. Bar of Benefits to Immigrant Children

In our view, the exclusion contained in this bill of all alien children from most federally funded benefits is problematic and inhumane. The list of programs for excluded benefits includes basic medical services (including mental health), welfare services, foster care, child care, housing assistance, nutrition services, and the like. Otherwise qualifying alien children should be protected from exclusion of such benefit programs. There is no justifiable connection between the exclusion of these children and any governmental interest in reducing government spending. These children are in this country through no fault of their own.

The harm inflicted on these children will be substantial and harmful to all society. They will not be eligible to receive any medical care, until it is an emergency situation. Nor will these children be eligible for basic social services which would rescue an abused or neglected child from a household and place the child in foster care. Those affected by these provisions are innocent children who did not choose to come to this country, and the harm

imposed by denial of such essential health care and social services can surely inflict a lifetime of hardship.

5. Cuban and Haitian Entrants' Access to Benefits

We urge the House and Senate to clarify that Cuban and Haitian entrants, including parolees, are eligible for means-tested benefits under the same terms and conditions as provided to refugees and asylees under H.R. 4. In particular, the House and Senate should clarify that Cuban and Haitian entrants are eligible for the same waivers from benefit restrictions as refugees and asylees. We also urge the House and Senate to retain current law which authorizes Cuban and Haitian entrants' access to refugee assistance benefits.

Under the terms of the September 9, 1994 agreement between the United States and Cuba which has succeeded in encouraging safe, orderly and legal migration, the United States has made a commitment to facilitate the legal migration of at least 20,000 Cubans each year. The May 2, 1995 agreement provides for parole consideration for Cuban migrants at Guantanamo.

Cuban and Haitian entrants, like refugees, do not necessarily have close family ties or employment offers in the United States, and therefore, may lack the support systems available to other immigrants. While good faith efforts are being made to screen out potential Cuban and Haitian entrants who are likely to become public charges and to encourage the early self-sufficiency of those entrants upon arrival in the United States, some may still need the safety net of benefits for the first five years after entry. Requiring fully enforceable affidavits of support for all Cuban lottery beneficiaries in Havana would be contrary to the purpose for which the lottery program was designed, i.e. to provide migration opportunities to persons who may not have family ties to the United States. The elimination of benefits for Cuban and Haitian entrants might result in our inability to fulfill our migration commitment which could trigger an uncontrolled outflow of illegal migration from Cuba.

The five year waiver from the bar on benefits and the continuation of refugee benefits--cash and medical assistance for the critical first 8 months--would lessen the impact on state and local communities across the nation by helping to ensure self-sufficiency and reducing the potential for long term dependency on public assistance.

Finally, clarification is also needed to continue specific benefits for certain groups of foreign nationals who under the current legislative language would be restricted from coverage in direct contravention of treaties to which the United States is signatory. We defer to the Department of State with respect to further details on how the legislation should be clarified.

6. State and Federal Reports on Undocumented Immigrants to the INS

The bill also proposes that the information gathered by state AFDC agencies be given to the INS on illegal aliens. Presently, the AFDC statute restricts the use or disclosure of information concerning applicants, unless it is for a purpose directly connected with benefits eligibility verification under the Systematic Alien Verification for Entitlement (SAVE). Information gained through the SAVE process cannot be used for any purpose other than general verification of eligibility for benefits. See e.g. 7 U.S.C. §2025(e); 42 U.S.C. §§1320-7(c); 1436a(3); 1437 et seq.. Also, access to that information is generally very restricted. See e.g. 7 U.S.C. §2025(e); 42 U.S.C. 1320b-7(d)(3)(B). Further, a change in such a policy to require reporting to the INS by all agencies providing benefits would raise grave privacy concerns.

Any new reporting requirements of benefits agencies to the INS of undocumented aliens would radically alter many service providing environments. Similar to concerns expressed about California's Proposition 187, this change could potentially place state social workers, teachers, doctors, health care providers and other providers in the position of reporting relatives of those they serve. Also, such providers of services would have to undergo some training on this reporting procedure and further increase the administrative burdens of these agencies.

Finally, verification for enforcement purposes would be very difficult to implement. Neither service agencies nor present systems have the capacity to satisfy the requirements of this provision.

7. Use of Social Security Card as Citizenship Identification

While the Administration supports the notion of making the Social Security card more fraud-resistant, section 105A of the Senate bill would take the first step towards using Social Security cards as a national citizenship identification device. The Social Security Administration has previously pointed out and testified that the Social Security card was never intended to be used as an identification card or for verification of benefits or citizenship.

There are a number of real and practical problems that would be encountered if this proposal were enacted (e.g., relating to compiling the data that would be needed to implement the program, as well as the substantial costs that would likely be incurred). Moreover, such a program would have the potential for discriminatory impact, as it seems likely that ethnic minorities,

whether citizens or not, would be called upon to produce their identification cards more often than non-minorities.

8. Food Stamp Forfeiture Provisions

Both the House and Senate versions of H.R. 4 contain provisions providing for criminal forfeitures in connection with convictions obtained in food stamp fraud cases. See § 576 of the House bill; § 361 of the Senate bill. Unfortunately, neither bill expands civilly forfeitable property under 7 U.S.C. § 2024(g).

The absence of the availability of civil forfeiture for some types of property involved in food stamp violations is problematic. For example, only the defendant's property may be forfeited in a criminal forfeiture case. Property used by the defendant but held by a third party cannot be forfeited criminally. In addition, the absence of civil forfeiture will make it impossible to use forfeitures in cases in which the offender has become a fugitive. That is because criminal forfeiture operates only upon the conviction of the defendant. Moreover, there are times when the criminal prosecution of an offender is not necessary to vindicate the government's interest, as long as the proceeds of and/or the property used in the violation can be forfeited civilly.

Having said that, the Senate criminal forfeiture provision is certainly preferable to the House provision. The House bill has the following flaws not present in the Senate counterpart:

First, the House forfeiture provision lacks basic procedures necessary for implementing criminal forfeitures. By contrast, the Senate provision incorporates the criminal forfeiture procedures from 21 U.S.C. § 853 (criminal forfeitures for drug violations).

Second, the House provision incorporates the "innocent owner" defense presently applicable to civil forfeitures (e.g., 21 U.S.C. § 881(a)(6) and (7)) in a criminal forfeiture statute. This poses the same problems that the Department's proposed uniform innocent owner provision is designed to correct. See, e.g., United States v. One 1973 Rolls Royce, 43 F.3d 794 (3d Cir. 1994) (holding that present innocent owner defense in section 881 precludes forfeiture from any person who acquired the property after the offense giving rise to the forfeiture action). On the other hand, the Senate provision's inclusion of 21 U.S.C. § 853(n)(6) in its incorporation of other criminal forfeiture provisions from 21 U.S.C. § 853 applies standards appropriate for non-defendant third party claimants in criminal forfeitures.

Third, the House provision contains unusual features that place amounts realized from food stamp forfeitures at the disposal of the Secretary of Agriculture. Such provisions conflict directly with 28 U.S.C. § 524(c) (Department of Justice Assets Forfeiture Fund), which places such amounts at the discretionary disposal of

the Attorney General for various forfeiture and law enforcement-related purposes. See 28 U.S.C. §§ 524(c)(1), (4)(A) and (12)(A). The Senate version does not contain language of this nature.

9. Withholding of Portion of Assistance for Families Including Children Whose Paternity Is Not Established

Current law requires that a mother applying for welfare benefits cooperate in establishing the paternity of her child. Section 101 of the House bill, while maintaining the cooperation requirement, also would require states to impose financial penalties on families receiving assistance if paternity has not in fact been established.

Presumably, the state interest in imposing the new penalty contemplated by the bill is to provide an incentive for families to aid in establishing paternity. The penalty will apply, however, even when a mother has done all within her control to establish paternity, and the failure to make a final determination is attributable solely to the action (or nonaction) of the father or of the state itself. This penalty is likely to operate unfairly in many cases and seems to be redundant in light of preexisting cooperation requirements.

* * * * *

Thank you for the opportunity to present our views on this legislation. If we may be of additional assistance in connection with this or any other matter, please do not hesitate to call upon us. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,



Andrew Fois
Assistant Attorney General