St. John's Law Review

Volume 50, Winter 1975, Number 2 Article 3

Hearing Not Required Prior to Reduction of Social Security Survivors' Benefits (Frost v. Weinberger)

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ADMINISTRATIVE LAW

HEARING NOT REQUIRED PRIOR TO REDUCTION OF SOCIAL SECURITY SURVIVORS' BENEFITS

Frost v. Weinberger

Whenever the government acts to deprive an individual of life, liberty, or property, due process requires that the proposed deprivation be neither arbitrary nor capricious.[1] Due process is flexible enough, however, to fit the needs of a wide variety of cases.[2] To achieve this flexibility, the procedural requirements of each situation will be determined by a balancing process in which the court will weigh the interests of the individual against those of the government.[3] At a minimum, the individual is generally entitled to notice and a hearing prior to governmental deprivation of any protected interest,[4] with the court applying the balancing test to determine the specific nature of the hearing. Nevertheless, in a small number of cases, characterized as "rare and extraordinary,"[5] the Supreme Court has held that a prior hearing may be constitu-

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[1] Wickard v. Filburn, 317 U.S. 111, 129 (1942) (due process attack rejected since federal statute not arbitrary and capricious); Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330, 354 (1935) (due process attack sustained since statute defined pension eligibility arbitrarily); Nebbia v. New York, 291 U.S. 502, 537-39 (1934) (due process attack rejected since statute fixing milk prices not arbitrary and capricious).

[2] In Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961), the Supreme Court noted that "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." *Id.* at 895. *Accord,* Goss v. Lopez, 419 U.S. 565, 577-78 (1975) (very informal procedure prior to 10-day suspension of high school student held adequate).

[3] Bell v. Burson, 402 U.S. 535, 539-40 (1971) (licensee's interest in avoiding suspension of driver's license balanced against government's interest in protecting claimants from the possibility of unrecoverable judgments); Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970) (welfare recipient's interest in a hearing prior to termination of payments balanced against government's interest in preserving fiscal and administrative resources); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) (complaining organization's interest in not being designated "Communist" balanced against the government's interest in national security). *See generally* Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing,* 88 HARV. L. REV. 1510 (1975).

[4] Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972). In Boddie v. Connecticut, 401 U.S. 371 (1971), the Court remarked:

> [The] root requirement [of due process is] that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.

Id. at 379 (emphasis in original) (footnotes omitted).

[5] Board of Regents v. Roth, 408 U.S. 564, 570 n.7 (1972).

tionally denied.[6] In these instances, curtailment of the individual's due process protection has been justified by the presence of "a countervailing state interest of overriding significance."[7] It is against this background that the Second Circuit, in *Frost v. Weinberger*,[8] held that due process does not require a hearing prior to reduction of Social Security survivors' benefits.[9]

The plaintiffs in *Frost*[10] were the spouse and dependent children of Charles Frost, Jr., who had died fully insured under the Social Security Act.[11] Since his death, plaintiffs had filed for and received benefit payments[12] amounting to the statutory aggregate maximum.[13] In addition, another woman claiming to be the mother of Frost's illegitimate children[14] filed for benefits on their behalf. Although this claim was initially denied pursuant to a provision barring payments to illegitimates where benefits to other claimants equaled or exceeded the statutory maximum,[15] the Social Security Administration (SSA) began making payments to Frost's

[6] *See, e.g.*, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 549 (1950) (seizure of mislabeled vitamins); Fahey v. Mallonee, 332 U.S. 245 (1947) (appointment of conservator for bank); Yakus v. United States, 321 U.S. 414 (1944) (mandatory price regulations in wartime); North Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (seizure of allegedly contaminated food).

[7] Boddie v. Connecticut, 401 U.S. 371, 377 (1971).

[8] 515 F.2d 57 (2d Cir. 1975), *rev'g* 375 F. Supp. 1312 (E.D.N.Y. 1974). The unanimous opinion was authored by Judge Friendly. The other members of the panel were Judges Waterman and Gurfein.

[9] 42 U.S.C. §§ 401 *et seq.* (1970), *as amended*, (Supp. IV, 1974).

[10] The suit was brought as a class action pursuant to FED. R. CIV. P. 23, with the named plaintiffs representing all other persons entitled to survivors' benefits whose benefits have been or may be reduced without the benefit of a prior hearing. 375 F. Supp. at 1316.

[11] *See* 42 U.S.C. § 414(a) (1970), *as amended*, (Supp. IV, 1974).

[12] *See* 42 U.S.C. § 402(d)(1)-(2), (g)(1) (1970), *as amended*, (Supp. IV, 1974), which entitles the children and wife of an insured wage earner to receive survivors' benefits.

[13] Although all beneficiaries are entitled to a specified monthly stipend based upon the decedent's average earnings, the total payments to the survivors of a single decedent may not exceed a statutory maximum which is also a function of the decedent's average earnings. When total benefits would otherwise exceed this maximum, each beneficiary's entitlement is decreased to reduce the aggregate to the prescribed level. 42 U.S.C. § 403 (1970), *as amended*, (Supp. IV, 1974).

The constitutionality of the statutory maximum figure was not at issue in *Frost*. The validity of a statutory maximum in an analogous situation has, however, been upheld by the Supreme Court. In Dandridge v. Williams, 397 U.S. 471 (1970), the Court reviewed a Maryland statute which placed a ceiling on the total amount of benefits each family may receive under the Aid to Families with Dependent Children program, 42 U.S.C. §§ 601 *et seq.* (1970), *as amended*, (Supp. IV, 1974), and held that such a limitation does not violate the equal protection clause. 397 U.S. at 483-87.

[14] Several years before his death, Frost had left his wife and cohabited with one Lola Coolidge. In support of her claim that Frost had fathered her two illegitimate children, Coolidge produced birth certificates naming Frost as the father. 515 F.2d at 60 n.6.

[15] 42 U.S.C. § 403(a) (1970) provides that where the inclusion of benefits to illegitimate children pursuant to *id.* § 416(h)(3) would raise the total benefits to a level above the statutory maximum, *see* note 13 *supra*, illegitimates' benefits should be reduced before any reduction of other beneficiaries' payments is made. Under this scheme, illegitimates could receive no more than the difference between the benefits being paid to the decedent's legitimate family and the statutory maximum.

illegitimate offspring after the provision was subsequently held unconstitutional.[16] Since Mrs. Frost and her children had been receiving the statutory maximum, their benefits were necessarily reduced to provide funds for the newly entitled claimants.

SSA procedure for adjusting payments provided the plaintiffs with several opportunities to contest the reduction in benefits.[17] While plaintiffs were permitted to submit evidence prior to the actual reduction,[18] no opportunity for a hearing was provided until after the adjustment had become effective.[19] Mrs. Frost, claiming

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[16] In Griffin v. Richardson, 346 F. Supp. 1226 (D. Md.) (three-judge court), *aff'd mem.*, 409 U.S. 1069 (1972), a class action, plaintiffs asserted that the arbitrary denial of benefits to illegitimate children in favor of legitimate offspring was discriminatory. 346 F. Supp. at 1229. The court held the provision "to be unconstitutional because it violates the due process guarantee set forth in the Fifth Amendment of the United States Constitution." *Id.* at 1237.

Prior to a 1965 amendment, the only children entitled to survivors' benefits were legitimate or adopted children, children who could inherit from the insured under the law of the state in which the insured was domiciled, and children who would otherwise be entitled except for the fact that the decedent's marriage ceremony was invalid due to specified legal impediments. 42 U.S.C. §§ 402(d)(3), 416(h)(2)(A)-(B) (1970). A new subdivision, added in 1965, Social Security Amendments of 1965, Pub. L. No. 89-97, § 339(a), 79 Stat. 409 (codified at 42 U.S.C. § 416(h)(3)(C)(i) (1970)), provides that illegitimate children are entitled to benefits if the deceased

> (I) had acknowledged in writing that the applicant is his son or daughter,
> (II) had been decreed by a court to be the father of the applicant, or
> (III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter . . . .

Such acknowledgment, decree, or order must be made before the death of the insured. 42 U.S.C. § 416(h)(3)(C)(i) (1970). Alternatively, *id.* § 416(h)(3)(C)(ii), also added in 1965, Social Security Amendments of 1965, Pub. L. No. 89-97, § 339(a), 79 Stat. 409, entitles a child to benefits if satisfactory evidence establishes that the decedent was the child's father and that, at the time of the decedent's death, he was living with or contributing to the child's support. Lucas v. HEW, 390 F. Supp. 1310 (D.R.I. 1975), *prob. juris. noted*, 44 U.S.L.W. 3200 (U.S. Oct. 6, 1975) (No. 75-88).

[17] The SSA adjustment procedure provided for: (1) notification and explanation of the action to be taken; (2) a 45-day waiting period before any reduction; and (3) an opportunity for the beneficiary, within 30 days of the time he receives notification, to both inform the SSA district office of his intention to contest the adjustment and present any proof which would substantiate his position. If the district office made no change in its determination, the reasons for its decision, along with any proof submitted by the beneficiary, would then be forwarded to the reviewing office. If the reviewing office reached a conclusion that the beneficiary's proof cast no doubt upon the original determination, the benefits would be adjusted downward accordingly, and the beneficiary informed of his right to further appeal.

The beneficiary could then petition for reconsideration of the adjustment. Such a petition would be handled by the reconsideration branch, which would review the record and summarize the facts and the law of the decision. If the reconsideration branch upheld the adjustment, the beneficiary would then be entitled to an evidentiary hearing before an administrative law judge. From an adverse ruling, appeal could be taken to the appeals council, and, as a last resort, judicial review would be available. SSA, SOCIAL SECURITY CLAIMS MANUAL (1972-1973), *discussed in* Frost v. Weinberger, 515 F.2d 57, 59-60 (2d Cir. 1975).

[18] *See* note 17 *supra*. Mrs. Frost asserted two grounds for her objection to the SSA's original determination: First, she claimed that Mr. Frost had become impotent in early 1966 and could not, therefore, have fathered the illegitimate children; and second, she claimed that the illegitimates were not entitled to benefits because Frost had not consented in writing to being named the father on their birth certificates. 515 F.2d at 60 n.6. The circumstances under which illegitimates are entitled to benefits are set forth in note 16 *supra*.

[19] *See* note 17 *supra*.

that her benefits had been reduced without due process, commenced an action in federal district court to have the SSA procedures declared unconstitutional. Although the district court held for plaintiffs,[20] the Second Circuit reversed.[21]

In upholding the constitutionality of the SSA procedure, the Second Circuit was compelled to distinguish *Frost* from *Goldberg v. Kelly*,[22] where the Supreme Court held that due process requires that a welfare recipient be afforded a hearing prior to termination of benefits. In *Goldberg*, after a preliminary finding that welfare benefits constituted a protected property interest,[23] the Court balanced the opposing interests to determine what procedures were required by due process and concluded that the Government's interest in terminating the benefits of unqualified welfare recipients was outweighed by the disaster which could befall an eligible recipient whose benefits were erroneously terminated.[24] The *Goldberg* Court thus rejected the Government's contention that the situation before it fell within the narrow class of exceptional cases in which overwhelming governmental interests will permit suspension of the traditional prior hearing rule. Although it recognized the Government's valid interest in avoiding fiscal and administrative waste, the Court concentrated upon the position of the welfare recipient, stating 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."[25]

Faced with *Goldberg*, ostensibly a controlling precedent, the Second Circuit began by noting a number of factual distinctions to justify the contrary result it reached in *Frost*.[26] Looking first to the

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[20] 375 F. Supp. at 1326-27. In finding the SSA procedure unconstitutional, the district court relied heavily upon Goldberg v. Kelly, 397 U.S. 254 (1970), *discussed in* text accompanying notes 22-25 *infra*.

[21] 515 F.2d at 68. The Second Circuit's decision was made contingent upon SSA compliance with two requirements: First, all Social Security recipients faced with possible reduction of benefits must be allowed full access to all files relevant to the SSA's preliminary determination; and second, the SSA must schedule all postreduction hearings, when requested, "with all feasible speed." *Id.*

[22] 397 U.S. 254 (1970), *discussed in* Cook & McKenna, *Due Process in the Administration of the Social Security Program*, 33 FED. B.J. 168 (1974); Meyerhoff & Mishkin, *Application of* Goldberg v. Kelly *Hearing Requirements to Termination of Social Security Benefits*, 26 STAN. L. REV. 549 (1974); *and* Note, *Procedural Due Process and the Termination of Social Security Disability Benefits*, 46 S. CAL. L. REV. 1263 (1973).

[23] 397 U.S. at 261-62.

[24] *Id.* at 265-71.

[25] *Id.* at 264 (emphasis in original).

[26] Before reaching the merits, Judge Friendly disposed of several procedural questions. The court was initially confronted with whether it even had federal question jurisdiction under 28 U.S.C. § 1331 (1970). Since no individual claim exceeded the requisite $10,000 amount in controversy, Judge Friendly thought it unclear under Snyder v. Harris, 394 U.S. 332 (1969), whether the claims of the class could be aggregated to satisfy this jurisdictional predicate. 515 F.2d at 61-62. Rather than resolve this question, the court based its finding of

private interests, deemed crucial in *Goldberg*, the *Frost* court examined the nature of the Social Security benefits there involved.[27] Admittedly, SSA survivors' benefits are not awarded on the basis of need, nor were they the last available source of income to the Frosts. In fact, the Second Circuit suggested that the family would still have recourse to welfare assistance.[28] Unlike the plaintiffs in *Goldberg*, therefore, there was no danger that Mrs. Frost and her children, potential victims of an erroneous prehearing determina-

jurisdiction upon 28 U.S.C. § 1361 (1970), which grants to federal courts original jurisdiction to entertain actions in which the plaintiff is seeking to compel a federal agency to perform a duty owed to him. 515 F.2d at 62. Section 1361 was similarly used as a basis for jurisdiction in Martinez v. Richardson, 472 F.2d 1121, 1125-26 (10th Cir. 1973); Mattern v. Weinberger, 377 F. Supp. 906, 914 (E.D. Pa. 1974), *vacated and remanded on other grounds*, 519 F.2d 150 (3d Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3280 (U.S. Oct. 31, 1975) (No. 75-649); and Elliott v. Weinberger, 371 F. Supp. 960, 967-68 (D. Hawaii 1974), *aff'd*, 44 U.S.L.W. 2175 (9th Cir. Oct. 1, 1975).

The Second Circuit next affirmed the district court's finding that as a class action the controversy was not mooted by the postreduction hearing eventually provided Mrs. Frost. The SSA argued that since Mrs. Frost had already been granted a postreduction hearing and the administrative law judge had agreed with the SSA's previous decision, a controversy no longer existed. 515 F.2d at 62. The Second Circuit rejected this argument on two grounds. After observing that Mrs. Frost was still entitled to an administrative appeal pursuant to the SOCIAL SECURITY CLAIMS MANUAL, *see* note 17 *supra*, the court concluded that should Mrs. Frost be entitled to a prereduction hearing, notwithstanding the administrative law judge's adverse determination, she would still be eligible for a refund of the benefits withheld pending the outcome of her administrative appeal. 515 F.2d at 62.

Not content to base its finding on such a narrow ground, the court approached the issue of mootness as it applied to the class rather than the individual plaintiffs. *Id.* at 62-64. The peculiar procedural posture of the case, however, gave the court some difficulty. The district court did not rule on Frost's motion for class action status until after the postreduction hearing. 375 F. Supp. at 1318-19. Relying on language in Sosna v. Iowa, 419 U.S. 393, 402 (1975), where the Supreme Court reiterated the general rule that the named plaintiffs must have a live controversy at the time the class action certification is granted, *id.* at 402-03, the SSA contended that because class status did not attach until after the adverse ruling following the hearing the case before the court was already moot. 515 F.2d at 63-64.

In *Sosna*, however, it was noted that in certain cases "the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a [class action] certification motion." 419 U.S. at 402 n.11. Since the particular issue at hand might otherwise "evade review," the Supreme Court indicated that courts have discretion to permit class action certification to relate back to the time of the filing of the complaint. *Id.* In *Frost*, as Judge Friendly pointed out, where the merits of the case would never be reached unless either the class action certification related back to the filing of the complaint or the postreduction hearing was postponed until after the district court made the class action determination, the factual situation fit within the discretionary area left open by *Sosna*. 515 F.2d at 64.

[27] The threshold question was whether recipients of Social Security survivors' benefits had a property interest in their payments which would entitle them to due process. The Supreme Court had held in Flemming v. Nestor, 363 U.S. 603 (1960), that Social Security old age benefits did not constitute "an accrued property right." *Id.* at 608. After the *Goldberg* decision, however, which held that welfare payments were "statutory entitlements" or "important rights" with respect to which due process cannot be suspended offhandedly, 397 U.S. at 262, for the purposes of due process subsequent federal decisions have accorded Social Security benefits the same property status accorded welfare payments. *See, e.g.*, Anderson v. Richardson, 454 F.2d 596 (6th Cir. 1972); Elliott v. Weinberger, 371 F. Supp. 960, 969-72 (D. Hawaii 1974), *aff'd*, 44 U.S.L.W. 2175 (9th Cir. Oct. 1, 1975). *See also* Note, *Procedural Due Process and the Termination of Social Security Disability Benefits*, 46 S. CAL. L. REV. 1263 (1973).

[28] 515 F.2d at 66-67.

tion, would be left utterly destitute. Moreover, the court noted that while the plaintiffs in *Goldberg* faced *termination* of assistance, the *Frost* plaintiffs suffered only a *reduction* of benefits. Although this reduction was sizeable,[29] the distinction tended to dilute the urgency of the plaintiffs' claim.[30]

Turning to the Government's interest, the Second Circuit noted that the SSA had a substantial and valid interest in protecting its financial resources from unreasonable depletion.[31] Judge Friendly, speaking for the court, observed that if the SSA were required to pay benefits to both the plaintiffs and the illegitimate children until an evidentiary hearing was held, it is certain that some erroneous payments would be made.[32] In *Goldberg*, on the

[29] Survivors' benefits to the Frosts were reduced by 40%, from $477.90 to $287.10 per month. *Id.* at 67.

[30] The district court reasoned that, realistically, Social Security beneficiaries have as great a need for their payments as welfare recipients. The court cited an SSA study which reported "that two-thirds of all beneficiaries receiving survivors' benefits depend upon their monthly payments as 'the major source of income.'" 375 F. Supp. at 1322, *quoting* E. PALMORE, G. STANLEY & R. CORMIER, WIDOWS WITH CHILDREN UNDER SOCIAL SECURITY 15 (1966). In line with this report, in Meyerhoff & Mishkin, *Application of* Goldberg v. Kelly *Hearing Requirements to Termination of Social Security Benefits*, 26 STAN. L. REV. 549, 564 (1974), the authors noted that "[r]eports on the economic situation of beneficiaries of survivors' insurance . . . reveal a high degree of poverty among those individuals."

According to the district court, the 40% reduction in benefits placed Mrs. Frost's income marginally above the poverty threshold established by the SSA. 375 F. Supp. at 1322, *citing* SOC. SEC. BULL., ANN. STATISTICAL SUPP. table 7, at 31 (1971). While the Second Circuit was aware that the reduction could produce harsh consequences, the availability of other governmental assistance was deemed sufficient to overcome the possibility that an erroneous adjustment would be made because no prior hearing was conducted. 515 F.2d at 67.

Notably, in Eldridge v. Weinberger, 361 F. Supp. 520 (W.D. Va. 1973), *aff'd per curiam*, 493 F.2d 1230 (4th Cir. 1974), *cert. granted*, 419 U.S. 1104 (1975), the district court held that Social Security disability beneficiaries are entitled to a hearing prior to termination of payments. 361 F. Supp. at 528. With regard to the question of need, the court relied upon Fuentes v. Shevin, 407 U.S. 67 (1972), to support its position that "the Supreme Court specifically rejected a narrow reading of *Goldberg* that would limit the due process requirement of a prior hearing to cases involving necessities." 361 F. Supp. at 524.

[31] In a persuasive article, coauthored by the Director of the Bureau of Hearings and Appeals, HEW-SSA, and the Director of the Bureau of Retirement and Survivors' Insurance, HEW-SSA, the SSA adjustment procedures, outlined in note 17 *supra*, were defended. Cook & McKenna, *Due Process in the Administration of the Social Security Program*, 33 FED. B.J. 168 (1974). The argument presented there was two pronged. The authors' primary rationale for continuing present procedure was simply that "it is accomplishing the desired results." *Id.* at 178. The authors asserted that the current program combines "preinformation . . . to keep the average person informed" with "delay in adjustment of benefits in overpayment and adverse claims situations permit[ting] the individual to present any rebuttal or mitigating evidence" prior to reduction or termination. *Id.*

The second argument involved the prohibitive expense of providing predetermination hearings in every case. Based upon 1970 costs, the authors projected that the expense of implementing full *Goldberg* hearings could approach $1 billion. *Id.* The authors warned:

> [W]e must guard against procedures and policies that go beyond what is needed to insure the integrity of the program . . . .
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> . . . We take very seriously the fact that every dollar spent on administration comes from the contributions people have made for their security.

Id. at 184, *quoting* SSA, THE OBJECTIVES OF THE SOCIAL SECURITY ADMINISTRATION (1965).

[32] 515 F.2d at 67.

other hand, the possibility existed that interim payments made to a questionable recipient would, in fact, be valid. Therefore, in *Frost*, the Government was faced with certain fiscal waste, while in *Goldberg* only the possibility of waste was present. The court also emphasized the SSA's contention that the expense of a prereduction hearing would constitute an unreasonable administrative burden. The *Frost* court noted that the hearing mandated by *Goldberg* did not require a full trial-type proceeding[33] and that the evidence necessary to make the required factual determination there was readily available to both the Government and the welfare recipient. While the Second Circuit could have required that a *Goldberg* hearing be conducted, the issues to be resolved in *Frost* would be far more complex than those involved in determining welfare eligibility. The factual question in *Frost* was whether Mr. Frost was the father of the illegitimate children. Such a hearing would not only require the presence of witnesses who may live in remote areas, but would also generally promise to be more complex, time consuming, and expensive.[34]

Although it may be conceded that in *Frost* the private interests were less compelling and the governmental interests stronger than in *Goldberg*, it is submitted that the court would not have been justified in upholding the SSA procedure for these reasons alone. The mere fact that governmental interests outweigh private interests is insufficient grounds to dispense with a prior hearing. As the Supreme Court stated in *Boddie v. Connecticut*,[35]

> The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, *except for extraordinary situations* where some valid governmental interest is at stake . . . . In short, "within the limits of practicability," . . . a State must afford to all individuals a meaningful opportunity to be heard . . . .[36]

[33] The hearing mandated by *Goldberg* is not required to "take the form of a judicial or quasi-judicial trial." 397 U.S. at 266. Nevertheless, the Court ordered that the hearing permit the welfare recipient to appear personally, to present witnesses, and to confront adverse witnesses orally. *Id.* at 267-68. According to the Court, the recipient should also be allowed to have counsel present, although counsel need not be provided. *Id.* at 270. Finally, although no formal opinion is necessary, the Court stated that the official who renders the decision must state his reasons. *Id.* at 271. It is noteworthy that Professor Davis has suggested that the requirements set forth belie the Court's claim that it has mandated something less than a trial-type hearing. K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.07, at 169-70 (3d ed. 1972).

[34] 515 F.2d at 67.

[35] 401 U.S. 371 (1971).

[36] *Id.* at 378-79 (citation omitted) (emphasis in part added) (footnotes omitted). Simi-

Perhaps recognizing that more than a mere balancing of interests was involved, the Second Circuit analogized to the Supreme Court's opinion in *Arnett v. Kennedy*[37] to justify the absence of a prereduction hearing. In *Arnett,* a federal employee claimed that dismissal without a prior hearing violated his due process rights. The procedures afforded the employee were similar to those in *Frost* in that the plaintiff was permitted to submit evidence prior to the governmental action, but was denied a full hearing until after his dismissal.[38] A divided Court upheld the dismissal procedure. Significantly, the Second Circuit focused on Justice Powell's concurring opinion in *Arnett*[39] to justify its holding in *Frost.*

In validating the *Arnett* procedure Justice Powell also began by drawing factual distinctions with *Goldberg.* Since a discharged federal employee is not financially destitute and his federal employment is not his last available source of income, an erroneous prehearing determination would not have the disastrous effects of an erroneous prehearing termination of welfare benefits. Justice Powell also observed that a discharged federal employee would still be eligible to receive welfare payments.[40] The Powell opinion further noted that the *Arnett* predismissal procedures, including notice and a right to respond orally and in writing, "minimize the risk of error in the initial [determination]."[41] Since the SSA procedure in *Frost* essentially parallels the termination procedure in *Arnett,* welfare is still available to the aggrieved beneficiary, and the reduction of survivors' benefits does not necessarily deprive the beneficiary of all his income; Powell's determination that the procedure in *Arnett* was fundamentally fair adds support to the Second Circuit's adjudication.

Finally, and most importantly, Justice Powell distinguished the Government's interests in *Arnett* from those "rather ordinary" governmental interests deemed by the Court in *Goldberg* to be in-

larly, in Bell v. Burson, 402 U.S. 535 (1971), the Court stated that prior notice and hearing are required in all but "emergency situations." *Id.* at 542. This position was again restated in Board of Regents v. Roth, 408 U.S. 564, 570 n.7 (1972).

[37] 416 U.S. 134 (1974), *discussed in The Supreme Court, 1973 Term,* 88 HARV. L. REV. 41, 83 (1974).

[38] The procedure upheld in *Arnett* provided that the employee be given the reasons for his contemplated dismissal at least 30 days prior to the discharge. Permitted to rebut the charges both orally and in writing, the employee could appear personally to discuss the matter with the official who would make the final decision. Following exhaustion of these procedures, and after the employee had been dismissed, he would then be entitled to a full hearing after which reinstatement with full backpay would be forthcoming if he were successful. 5 U.S.C. § 7501(b) (1970), *discussed in* Arnett v. Kennedy, 416 U.S. 134, 140-41, 170 (1974).

[39] 416 U.S. at 164-71 (Powell, J., concurring).

[40] *Id.* at 169.

[41] *Id.* at 170.

sufficient to deprive a person of a prior hearing. In *Arnett*, in addition to the Government's concern for maintaining fiscal and administrative resources, there was "substantial interest in maintaining the efficiency and discipline of its own employees."[42] In concluding that due process did not mandate a prior hearing it would appear that Justice Powell found that this governmental interest, when coupled with a finding that the established procedures provided a reasonable degree of fairness, was of "overriding significance" when balanced against private interests which cannot be characterized as desperate. While *Frost* did not involve the efficiency of governmental employees, it did contain an additional factor which the Second Circuit seems to have considered to be of equivalent magnitude: the interest of the illegitimate children to receive benefits without undue delay. In fact, the Second Circuit actually found that the interests of the illegitimate children "counterbalanced" those of the plaintiffs.[43] In this light, the court's holding seems justified since, when the substantial interests of the Government are considered together with the important interests of the illegitimate children, interests of "overriding significance" outweighing the needs of the plaintiffs become apparent. The Second Circuit's holding in *Frost*, therefore, may be justified as an extension of the "extraordinary situations"[44] exception to the general rule that governmental deprivation of a protected property interest requires prior notice and hearing.

The problem with the *Frost* reasoning, however, arises from the court's substantial reliance on Justice Powell's concurring opinion in *Arnett*. Justice Powell expressed a view with which only Justices Blackmun and White agreed.[45] His conclusion, therefore, that the Government's interest in maintaining the efficiency of its employees was an opposing interest of "overriding significance" was shared by only two other members of the Court. The Second Circuit failed to give adequate recognition to the fact that the dismissal procedures in *Arnett* were in fact upheld only because Justice Rehnquist, in a plurality opinion in which Chief Justice Burger and Justice Stewart joined, also, but for reasons unrelated to the Government's interest in efficiency, found that the employee

[42] *Id.* at 168 n.4.

[43] 515 F.2d at 67.

[44] *See* note 6 and accompanying text *supra*.

[45] Justice Blackmun joined in Justice Powell's concurring opinion. 416 U.S. at 164-71 (Powell, J., concurring). Justice White, who authored a separate opinion, *id.* at 171-203 (White, J., concurring in part and dissenting in part), agreed that a prior hearing was not required. Justice White found the procedure to be unconstitutional, however, because the same official who initiated the plaintiff's dismissal also made the preliminary finding that the termination was valid. *Id.* at 196-203.

was not entitled to a predismissal hearing.[46] In addition, the *Frost* court failed to consider that Justice Marshall, joined by Justices Brennan and Douglas, emphatically rejected Justice Powell's view, labeled the Government's interest in efficiency "entirely unconvincing,"[47] and deemed it one not amounting to the kind of opposing interest of "overriding significance" required to dispense with a prior hearing.

The Second Circuit's reliance upon the Powell opinion becomes even more tenuous when viewed in the light of *Goss v. Lopez*,[48] wherein the Court recently restated its position on due process protection. Justice White, writing for the majority, emphasized that the minimum requirement of due process continues to be prior notice and hearing.[49] In fact, when considering the constitutionality of SSA procedures which permitted recoupment of excessive disability benefits without a prior hearing, the Third Circuit in *Mattern v. Weinberger*[50] specifically declined to follow the *Frost* rationale. In finding the recoupment procedures constitutionally deficient, the *Mattern* court devoted a portion of its opinion to criticizing reliance on a view espoused by only three members of the Court.[51]

It is suggested that the better view of the *Frost* holding lies in the Second Circuit's recognition that the presence of the new claimants made the SSA's role there clearly distinguishable from the Government's position in both *Goldberg* and *Arnett*. In *Frost*, the

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[46] In *Arnett*, six Justices agreed that a predismissal hearing was not required, but for differing reasons. The three Justices joining in the plurality opinion rested their decision upon a finding that the plaintiff did not have a property interest which was protected by due process requirements. *Id.* at 136-64. Justices Powell, Blackmun, and White concluded that although due process did attach, it did not require a pretermination hearing. *See* note 45 *supra*.

[47] 416 U.S. at 224 (Marshall, J., dissenting).

[48] 419 U.S. 565 (1975). In *Goss* the Court held that a public high school student is entitled to notice and a limited hearing prior to a 10-day suspension from school.

[49] *Id.* at 579.

[50] 519 F.2d 150 (3d Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3280 (U.S. Oct. 31, 1975) (No. 75-649).

[51] *Id.* at 163-64. The Third Circuit also chided the *Frost* opinion for failing to mention North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Goss v. Lopez, 419 U.S. 565 (1975); Fuentes v. Shevin, 407 U.S. 67 (1972); and Bell v. Burson, 402 U.S. 535 (1971), wherein the Supreme Court seems to indicate that a prior hearing is required whenever the impact of the deprivation is more than de minimis. In support of its position that the *Frost* court erred in relying upon the "severity of impact" and "overriding significance" tests espoused by Justice Powell, the Third Circuit, 519 F.2d at 164, pointed to Williams v. Weinberger, 494 F.2d 1191 (5th Cir. 1974), *petition for cert. filed*, 44 U.S.L.W. 3009 (U.S. Aug. 29, 1974) (No. 74-205), and Eldridge v. Weinberger, 493 F.2d 1230 (4th Cir. 1974), *cert. granted*, 419 U.S. 1104 (1975). In these two recent cases, both the Fourth and Fifth Circuits concluded that due process requires that a hearing be held prior to termination of Social Security disability payments.

SSA's only function was to determine the relative rights of two competing claimants to the same fund. Since the SSA had no financial stake in the outcome, the court apparently reasoned that the probability of a fair prehearing determination was greater than in *Goldberg* or *Arnett* where the outcome would affect total government disbursements.[52] As the Third Circuit, discussing the *Frost* opinion, noted in *Mattern*:

> [T]he controversy was not so much one between the Government and beneficiaries as between two groups of beneficiaries, with the Social Security Administration having "no financial stake" and being "totally disinterested as between the two sets of claimants."[53]

In light of both the Supreme Court's continued emphasis on the importance of prior notice and hearing, and the extreme factual variation between *Frost* and cases where the Court has allowed suspension of these fundamental protections,[54] it is arguable that the Second Circuit's decision to dispense with the root due process requirement of a prior hearing demands greater justification than that provided by an opinion apparently shared by less than a majority of the Supreme Court. Nevertheless, although prior notice and hearing are generally its basic elements, it would be erroneous to equate due process with an absolute requirement that all deprivations of protected rights be preceded by a hearing. The purpose of due process is to insure "fundamentally fair procedures"[55] when government acts to the detriment of the individual. The more justifiable view of *Frost* is that the Second Circuit, finding that the SSA procedures provided the plaintiffs with reasonable protection and that the opposing interests were of sufficient importance, decided that the challenged procedures secured fundamental fairness and that no more was necessary to comply with both the spirit and the flexible requirements of due process.

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[52] *See* 515 F.2d at 68.
[53] 519 F.2d at 163.
[54] *See* note 6 *supra*.
[55] Goss v. Lopez, 419 U.S. 565, 574 (1975).

Editor's Note. While this note was being printed, the Supreme Court reversed the decision of the Fourth Circuit in *Eldridge v. Weinberger, discussed in* notes 30 & 51, and held that no hearing is required prior to termination of Social Security disability benefits. 44 U.S.L.W. 4224 (U.S. Feb. 24, 1976). This decision, concerning a procedural due process question closely analogous to that in *Frost*, lends substantial support to the position taken by the Second Circuit.