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*Jeffrey S. Lubbers**

As reported in a recent "News from the Circuits" column,[1] the U.S. Court of Appeals for the Federal Circuit, in two recent decisions, *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009) and *Gambill v. Shinseki*, 576 F.3d 1307 (Fed. Cir. 2009), held that the protections of the Fifth Amendment's Due Process Clause apply to applicants for veterans disability benefits. Shortly after those two decisions, a third decision, *Edwards v. Shinseki*, 582 F3d 1351 (Fed. Cir. 2009), followed the *Cushman* precedent, but in this case the author of the opinion for the court, Judge Randall Rader, also penned a separate opinion in which he offered "additional views" expressing his agreement "with the result" but also asserting his strong disagreement with *Cushman* on the grounds that the Supreme Court has never squarely addressed the issue of whether applicants for government benefits have a property (or liberty) interest sufficient to allow them to invoke due process protections and that, to the extent this issue has come up, a plurality of the Court has seemingly indicated that applicants lack such interests.

I wish to highlight some of the larger implications of these cases for administrative and constitutional law. In the end, I conclude that the *Cushman* decision is not a departure from the way that most appeals courts have dealt with due process in the application context, though whether the Supreme Court would be willing to go along with the mainstream view, if the issue were squarely presented, is an open question.

Let's start with the fundamentals. The Due Process Clauses of the Fifth and Fourteenth Amendments provide that the government may not "deprive any person of life, liberty, or property, without due process of law." The key words for the purpose of this discussion are "deprive" and "property."

In plain English, to be deprived of something, one must presumably possess it first. It would follow, then, that to trigger procedural due process, one must presumably claim that the state is depriving him or her of a possessory interest in property or liberty.

Until 1970, the concept of property in the Supreme Court's jurisprudence was relatively limited to real property, money, and tangible things—items a person might possess in the ordinary sense of the word. If such property were taken away by the state, the person suffering the deprivation generally had a right to a trial-type hearing. The hearing might need to be held before the deprivation, but it could also be afterwards if there were no irreparable harm in doing so—i.e., if there were a make-whole remedy of some sort that could be provided after the fact.

But starting with the landmark cases of *Goldberg v. Kelly* in 1970 and *Board of Regents v. Roth* in 1972, the Supreme Court began to recognize the concept of "entitlements" to continued government benefits such as welfare benefits or a tenured government job as a type of property for the purposes of the Due Process Clause that could not be taken away without a fair hearing. This was true even though such entitlements were not really possessed in the same way as traditional property—they could not, for example, be given away, sold, subdivided, or devolved through inheritance. While it was true that some entitlements, such as the welfare benefits in *Goldberg*, were provided for as a matter of state statutory law, others, such as the government job at issue in *Roth*, were not. Nevertheless, in the latter case, the Court recognized that an employee could have an *implied* entitlement if he or she had regulatory or contractual protection from removal except for good cause.

The concept of entitlements grew to include the right to a continuation of public education, public housing, and other government benefits such as social security, food stamps, Medicaid, and veterans' benefits. In each of these contexts federal courts held that if someone has been granted the right to receive such benefits, they couldn't be revoked (at least on individual, non-programmatic grounds) without due process. After all, at that point there would certainly be a deprivation.

This broad expansion of the concept of property (and a parallel expansion of the concept of liberty by the Supreme Court) led to an examination of what process was due in these various situations. In *Goldberg*, the Court ruled that the beneficiary had to be given a pre-termination, trial-type hearing before welfare benefits were taken away. That was understandable due to what the Court called the "brutal need" of beneficiaries for these subsistence benefits. But, unfortunately, the cost of such hearings led New York City—the defendant in that case—to make policy changes that made it harder for beneficiaries to get on the welfare rolls in the first place because it had become so much harder to remove them later on.

The somewhat unsatisfactory unintended consequences of *Goldberg* and the realization that not every type of deprivation of an entitlement would warrant a *trial-type* hearing led the Supreme Court, a scant six years later, to pull back from *Goldberg* in the case of *Matheus v. Eldridge*, 424 U.S. 319 (1976), in which the Court developed its famous three-prong balancing test for determining what process was due, once a property or liberty deprivation was found.

After *Matheus*, courts have had to balance (1) the importance of the

* Professor of Practice in Administrative Law, Washington College of Law, American University. This article is adapted from remarks made at a Section program, "Due Process Issues in Veterans' Cases after *Cushman v. Shinseki*," co-sponsored by the law firm Finnegan, Henderson, Farabow, Garrett & Dunner LLP (Jan. 12, 2010).

[1] See William S. Jordan, III, *News from the Circuits*, 35 ADMIN. & REG. L. NEWS 16 (Winter 2010) (describing the *Cushman* and *Gambill* decisions).

private interest involved in the case, (2) the risk of error without the sought-after additional procedures, and (3) the government's interest, including an interest in avoiding the cost of the additional procedures. In applying its new formula in the *Mathews* case itself, the Court held that social security beneficiaries did not have a right to the pre-termination trial-type hearing that was granted to the welfare beneficiaries in *Goldberg*. Instead a post-termination hearing sufficed.

Thus, after *Mathews*, the procedural due process decisionmaking sequence was set—first a property or liberty deprivation would have to be shown and, if it were, the *Mathews* balancing test would be used to decide what process was due. This was all fairly clear for persons claiming that the government was taking away entitlements they had already been receiving, but what about *applicants* for these benefits?

Professors Michael Asimow and Ron Levin have explained the so-called "endowment effect": "There is a common sense difference between the rejection of an application and termination of an existing status. We are more outraged when we lose a job for unjust reasons than when we are *not hired* for unjust reasons. Similarly, our life is probably more disrupted when we lose a license than when our license application is rejected."[2]

But does this mean that applicants for an entitlement should have *no due process rights at all* because they haven't been deprived of anything in a narrow traditional sense? That doesn't seem to be an appropriate result.

Perhaps a better way to frame the issue is to ask two discrete questions (and again I owe this formulation to Professor Levin).[3] The first question is the broader one raised by Judge Rader: Assuming that a statute confers an entitlement to a benefit, must the government afford a due process right to a fair hearing *before it can make a final decision* rejecting an applicant's claim for those benefits? A second, narrower question is whether the government can deny benefits to an applicant *temporarily*, while a controversy over his right to payments is pending? This is really a question of the timing of the benefits *vis a vis* the hearing.

It is certainly true that the broader, general question of whether first-time applicants can have a property interest has not been decided by the Supreme Court. It was expressly reserved in *Walters v. Radiation Survivors*, 473 U.S. 305 (1985), a case that challenged the statutory $10 fee limitation in veterans cases. And a few years later, Justice O'Connor dissented from the denial of certiorari in a case that raised the question directly. See *Gregory v. Town of Pittsfield*, 470 U.S. 1018, 1018 (1985) (O'Connor, J., dissenting).

In 1999, however, the Court decided a case which did not reach the broad question but seemed to provide an affirmative answer to the second question. The case is the one cited by Judge Rader—*American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40 (1999).

This case concerned the Pennsylvania workers' compensation law, which provided that employees would receive payment of reasonable and necessary medical expenses for on-the-job injuries. If, however, the employer or insurance company thought that the medical procedure that formed the basis for the claim was not reasonable or necessary, it could refuse to pay until the issue was decided after a "utilization review" hearing. A further de novo appeal of a denial could be taken by the employee to a workers' compensation judge. This, of course, takes time, so employees argued they were entitled to pre-review payments as a matter of due process. The Supreme Court decided that due process was not applicable because the case involved a private insurance company—i.e., no state action—but because it disagreed with the lower court's reasoning, it also discussed the due process issues that might have arisen had it been state action.

The Court could have disposed of that question by simply finding that the *Mathews v. Eldridge* balancing test would have required payment only *after* a hearing, but instead a plurality of the Court went out of its way to say that due process would not apply because the applicants were in a very different position from the beneficiaries in *Goldberg* and *Mathews*, who were trying to protect a *continuation* of their benefits.

Thus, what the Court really did in *American Manufacturers Mutual Insurance* was allow a *temporary* denial of benefits while eligibility was being determined, but it did not really squarely answer the question of whether the government could make a *final* decision rejecting an applicant's claim for those benefits without due process. Indeed, in that case, a hearing was available before the final determination.

Justice Ginsburg concurred in the temporary denial, but she did so while also specifically confronting the question of whether a final denial of benefits could be made without due process—and she said no to that.

I have to say that her view certainly seems right, because the contrary view—that due process does not apply at all to applicants for statutory benefits—would, if taken to its logical extension, mean that it would be constitutional for the government to treat some applications unfairly, shred half of them, throw some in the trash unread, or subject them to a process tainted with corrupt practices.

Another way of viewing this issue, as Professor Michael Herz has pointed out, is that the whole point of the "new property" concept was that the property interest derives "not from possession or expectation but from *legal entitlement*," and as to that, the current holder of the entitlement and the applicant are "identically situated."[4]

Of course for a benefit to qualify as an entitlement, an applicant would have to be able to show that the government is compelled to provide the benefit if the applicant meets the qualifications or eligibility requirements set forth in the statute or regulations—in other words, that the government's decision was not a discretionary one. And of course, some government benefits are discretionary—for example in grant applications or applications for a state scholarship or for a government job subjective judgments figure heavily in the

[2] MICHAEL ASIMOW & RONALD M. LEVIN, TEACHERS MANUAL TO STATE AND FEDERAL ADMINISTRATIVE LAW 25 (3d ed. 2009) (emphasis in original).

[3] E-mail from Ronald Levin, April 2, 2009, to adminlaw@chicagokent.kentlaw.edu (administrative law listserv) as part of a discussion of whether applicants have a right to due process.

[4] E-mail from Michael Herz to same forum as described in note 3, supra (emphasis added).

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