Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

November 24, 1969

Dear Bill:

In No. 62 - Goldberg v. Kelly
and No. 14 - Wheeler v. Montgomery,
please count me in your opinions.

WOD

Mr. Justice Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 25, 1969

MEMORANDUM FOR THE CONFERENCE

Re: No. 14 - Wheeler v. Montgomery
No. 62 - Goldberg v. Kelly

I intend to dissent in these cases and will await Justice Black's opinion.

WEB

W. E. B.

November 25, 1969

MEMORANDUM FOR THE CONFERENCE

Re: No. 14 - Max Wheeler, et al. v. John Montgomery, etc., et al. and
No. 15 - Jack D. Goldberg, Commissioner v. John Kelly, et al.

In due course I expect to circulate a dissent in these two cases.

Respectfully,

Hugo L. Black

hlblk

Supreme Court of the United States
Washington, D. C. 20543

November 25, 1969

Re: No. 14 - Wheeler v. Montgomery
and
No. 62 - Goldberg v. Kelly

Dear Bill:

Please join me in both of these.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 2, 1969

Re: No. 62 - Goldberg v. Kelly

Dear Bill:

Please join me.

Sincerely,

B.R.W.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN M. HARLAN

December 11, 1969

Re: No. 62 - Goldberg v. Kelly
No. 14 - Wheeler v. Montgomery

Dear Bill:

As I have already indicated to you in conversation, I am in basic agreement with your opinion in the Goldberg case. However, there are some things in your opinion which carry overtones to which I would not wish to subscribe, and in order to avoid any separate writing on my part (which I would much prefer not to have to do) I thought I would put such matters to you for consideration.

1. I would like to see footnote 7 deleted. It seems to me that there is little to be gained by raising the possibility of a substantive due process right to welfare only then to recognize, as you do, that the issue is not presented in this case. As to the remainder of the footnote, I feel that it really adds nothing to what is already stated in the text, which makes clear, I believe, that this case does not require a hearing with respect to initial applications for welfare.

2. I would like to see the last clause in the last sentence on page 16, including the citation to Wong Yang Sung, deleted, thus making the sentence end with the word "review." Wong Yang Sung was not a constitutional decision, but instead an interpretation of the requirements of the Administrative Procedure Act, which, of course, has no application here. The constitutional principle that "an impartial decision maker is essential" is one with which I entirely agree, but I would not be

willing to hold that the rule of Wong Yang Sung is required under due process standards.

3. Throughout the opinion, reference is made to the necessity of a "trial-type hearing." That term is not, of course, self-defining. While, except as noted, I agree with the procedural safeguards which you hold necessary in cases of this kind, the term "trial-type hearing" might connote something broader. For example, as an abstract proposition I would think that a "trial-type hearing" might be thought to require a transcript which, as your opinion indicates, due process does not require in cases like this. Rather than "trial-type hearing" would it not be better to employ a more neutral term such as "hearing," "adequate hearing," or "evidentiary hearing"?

4. I suggest that it would be well to add a footnote which would make explicit that which is already implicit in your opinion: "Due process does not, of course, require two hearings. If, for example, a State simply wished to continue benefits until after a 'fair hearing' there would be no need for a preliminary hearing." Such a footnote might be placed at the bottom of page 14.

5. I think it should be made clear that due process does not require an evidentiary hearing in a case where there are no factual issues in dispute or where the application of the rule of law is not intertwined with factual issues. In a case where a welfare recipient is simply attacking the validity of a statute or regulation on its face, due process, in my view, does not require an opportunity for cross-examination or an oral argument -- notice, an opportunity to present written submissions, and an impartial decision maker would be sufficient. See Denver Union Stockyard Co. v. Producers Livestock Marketing Assn., 356 U. S. 282, 287-288. I fear that the references on pages 13-14, which indicate that cross-examination and oral hearing are "particularly" important where factual issues (including credibility) are in dispute might be taken to imply that these procedural safeguards should also be required in other circumstances, such as those just indicated.

Forgive me for writing at such length. I have done so because of my feeling that as we embark upon this new constr-

tutional area we should take care to write as narrowly as possible. This, it seems to me, is especially important in light of what I anticipate the dissenters here may say. If you can see your way clear to meeting my suggestions, I am prepared to join your opinion, which I think is a very good one, subject to further suggestions, or possibly some separate writing, after the dissent makes its appearance.

As to the Wheeler case (No. 14), I am not entirely at rest as to its appropriate disposition. However, I will let you know if I have any suggestions.

Sincerely,

Mr. Justice Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 15, 1969

RE: No. 62 - Goldberg v. Kelly, et al.

Dear John:

As I told you this morning the enclosed circulation embodies virtually all the changes suggested in your letter of December 11.

(1) I've deleted all of footnote 7 except the first sentence.

(2) The last clause in the last sentence on page 16 makes the sentence end with the word "review" but I have added Wong Yang Sung as a "Cf" following Murchison just above. I thought it would not be improper to alert the Welfare Department to the problem raised by commingling of function, and, while neither case is directly in point, I thought their "Cf" citation might accomplish that purpose.

(3) I have changed "trial type hearing" to "evidentiary hearing" at the eleven places where "trial type hearing" appeared in my original circulation.

(4) I have added as footnote 14 the wording suggested in your (4).

(5) I've deleted the word "particularly" in line 8 from the top of page 13, but propose a compromise for your proposal (5) that we state that due process does not require an oral argument. This is prompted by what was said in FCC v. WJR, 337 U.S. 265, as follows:

"[D]ue process of law has never been a term of fixed and invariable content. This is as true with reference to oral argument as with respect to other elements of procedural due process. For this Court has held in some situations that such argument is essential to a fair hearing, Londoner v. Denver, 210 U.S. 373, in others that argument submitted in writing is sufficient. Morgan v. United States, 298 U.S. 468, 481. See also Johnson & Wimsatt v. Hazen, 69 App. D.C. 151; Mitchell v. Reichelderfer, 61 App. DC 50. The decisions cited are sufficient to show that the broad generalization made by the Court of Appeals is not the law. [The Court of Appeals had held that the due process clause requires a hearing, except on interlocutory matters, on every issue in an administrative proceeding.] Rather it is in conflict with this Court's rulings, in effect, that the right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations." (276) "It follows also that we should not undertake in this case to generalize more broadly than the particular circumstances require upon when and under what circumstances procedural due process may require oral argument. That is not a matter, under our decisions, for broadside generalization and indiscriminate application. It is rather one for case-to-case determination, through which alone account may be taken of differences in the particular interests affected, circumstances involved, and procedures prescribed by Congress for dealing with them . . . . Any other approach would be, in these respects, highly abstract, indeed largely in a vacuum." (277) The Court went on to hold that in the particular circumstances of this FCC proceeding there was no constitutional right to oral argument.

Potter cited W.J.R. with apparent approval in Cafeteria Workers, 367 U.S. at 896. The test of W.J.R. cannot be made on the record in Goldberg. All these cases raise factual questions. Moreover, the petitioner's brief in Goldberg makes some substantial arguments for oral presentation by lawyers where only questions of law are mooted. The emphasis is that those conducting the hearings are not lawyers.

and there is a risk that Welfare officials may tend to avoid oral hearings by characterizing the issues for decision as only matters of law. I may add that your point that we should proceed cautiously in this area would be better served, it seems to me, if we leave this question open until the issue is presented in concrete settings that none of the present cases provide. Footnote 15 embodies my suggested compromise.

I'd appreciate your reaction. I'll not circulate the enclosure to the conference until I've heard from you.

Sincerely,

Potter

Mr. Justice Harlan