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Paillot v. Wooton: Determining the Complexity of Predeprivation Hearings Required by Procedural Due Process

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INTRODUCTION

Paillot v. Wooton[1] challenged on procedural due process grounds two parish ordinances that allowed the parish president and the sheriff to suspend or revoke liquor permits and liquor licenses without prior notice or a hearing.[2] The case arose after allegations that the plaintiff bar-owner allowed minors inside her bar, sponsored a "Drink Until You

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1. 559 So. 2d 758 (La. 1990).
2. Plaquemines Parish Ordinance § 4-14(d) (1960):

> If any disturbance of the peace, public nuisance or other violation of State Law or of this Chapter is committed on said premises, the President of the Council with the approval of the Commissioner of Finance or the Sheriff, is hereby authorized to suspend or revoke said permit, and such violation shall be cause for the Council to refuse to grant other Parish permits to the same applicant or for the conduct of such business on the same premises. In case of such suspension or revocation, permittee may appeal to the council for a hearing, to remove or recall the suspension or revocation, pending which hearing no liquor or beer shall be sold by permittee under the penalties provided by this chapter. No appeal shall lie to the courts, nor shall the courts have or take jurisdiction of any appeal from such suspension or revocation, unless permittee has exhausted his administrative remedy of appeal to the council in the event of an adverse decision.

Plaquemines Parish Ordinance § 14-26 (1960):

> Suspension or revocation of license
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> If any part of a licensed premises is used for prostitution or the soliciting thereof, or is frequented by prostitutes, or is used for concealing or storing narcotics or stolen property, or if any violation of Louisiana Law or Parish Ordinance is committed on said premises, The Council, through its President, with recommendation from the Director of Administration or the Sheriff, may suspend or revoke the Occupation License to continue to conduct such business and the Parish fiscal officers shall reimburse the license for the balance of the year's license tax from such date of suspension or revocation.
>
> In case of suspension or revocation of said license, the licensee may appeal to the Council for a hearing to recall and set aside said suspensions or revocation, pending which no business operations shall be conducted by said licensee. Penalties for conducting business in violation of this section are provided in Section 14-30. In the event of an adverse decision, no appeal shall lie to the courts, nor shall the courts take jurisdiction of any appeal from such suspension or revocation, unless the licensee has exhausted his administrative remedy of appeal to the Council.

Drop" special, and allowed a drunken couple, one of whom was a minor, to drive from the bar, resulting in a fatal traffic accident. The two officials suspended plaintiff's licenses pending hearing at the next police jury meeting, scheduled for six days later. Plaintiff filed suit seeking an injunction against the suspension on procedural due process grounds.[3] The district court found the ordinances unconstitutional. The Louisiana Supreme Court affirmed, declaring that the two ordinances violated procedural due process standards.

Prior decisions support the result reached in *Paillot*. The supreme court concluded that the ordinances at issue unconstitutionally authorized the government official to suspend the licenses when he believed there to be a "public nuisance"[4] or violation of "even minor state or parish laws."[5]

Yet *Paillot* raises and leaves unresolved an important question for citizens, government officials, and their attorneys: once it is determined that process is due, how can one decide how *much* process is due? The ongoing problem of determining the kind of hearing required is the primary focus of most recent jurisprudence in the area of procedural due process.[6] By analyzing the *Paillot* case, this note suggests a reasonable method of determining what type of hearings are required by due process in various situations.

First, this note analyzes the *Paillot* opinion and the jurisprudence upon which it relied. Next, it lists and explains various components of due process, including those addressed in the opinion.[7] Finally, it suggests an approach for the lawyer or administrator to use in determining how much of a hearing due process requires.

PROCEDURAL DUE PROCESS: THE TREND

The Court's Analysis

The Louisiana constitution requires that "[n]o person shall be deprived of life, liberty, or property, except by due process of law."[8] The United States Constitution contains a like provision.[9] A person threatened

3. U.S. Const. amend. XIV, § 1, cl. 3; La. Const. art. I, § 2.

4. Plaquemines Parish Ordinance § 4-14(d) (1960).

5. Paillot v. Wooton, 559 So. 2d 758, 760 (La. 1990).

6. K. Davis, Administrative Law of the Eighties, § 13:1-1 (Supp. 1989) [hereinafter Davis Supplement].

7. While some cases cited in this note will deal with deprivations of "liberty," most will concern deprivations of "property" interests. This note intentionally avoids procedural due process in the criminal justice realm.

8. La. Const. art. I, § 2.

9. U.S. Const. amend. XIV, § 1, cl. 3: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

with deprivation of such an interest is entitled *to an opportunity to have some kind of process* prior to the governmental action, absent extraordinary circumstances.[10] "What is required is a procedure, not necessarily a hearing."[11] Fairness is the "essential guarantee" of the due process clause.[12] The due process analyses the Louisiana and United States Supreme Courts employ are substantially the same, although the results differ.[13]

Paillot's due process analysis is a three part inquiry:[14] "(1) whether the interest is or is not protected by due process, (2) if it is, whether due process requires some kind of hearing, and (3) if it does, what kind of hearing is required[?]"[15] The Louisiana Supreme Court gave definite answers to the first two questions, but left open the third.

In answer to the first question, the court determined that the suspension of plaintiff's license was a deprivation requiring due process protection. The court cited *Fuentes v. Shevin*,[16] which involved the seizure of property to satisfy a judgment. *Fuentes* took a broad view of the scope of protected interests, stating that the due process clause "has been read broadly to extend protection to 'any significant property interest,' . . . including statutory entitlements."[17] In *Paillot*, the parish officials claimed not to have subjected the plaintiff to a deprivation of a protected interest when they had only suspended plaintiff's licenses. The court, in answer, stated that "[e]ven a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' within the contemplation of the Fourteenth Amendment."[18]

The court answered the second question, whether due process requires some kind of hearing, in the affirmative.[19] Indeed, the court's affirmative answer to question one almost forced an affirmative answer to question

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10. See infra text accompanying notes 24-36.

11. Wilson v. City of New Orleans, 479 So. 2d 891, 895 (La. 1985).

12. J. Nowak, R. Rotunda & J. Young, Constitutional Law, § 13.8, at 487 (1986).

13. See In re Adoption of B.G.S., 556 So. 2d 545, 552 (La. 1990), where the Louisiana Supreme Court stated that "[i]n interpreting our own state constitution. . . we are not bound by this [federal] balancing approach . . . . Nevertheless, we have employed this balancing test in deciding what procedure is due under the state due process clause, . . . and we will continue to do so as long as its application promotes the goals of that safeguard."

14. Davis Supplement, supra note 6, § 13:1-1, at 341.

15. Paillot v. Wooton, 559 So. 2d 758, 760 (La. 1990) (citing Davis Supplement, supra note 6).

16. 407 U.S. 67, 92 S. Ct. 1983 (1972).

17. Id. at 86, 92 S. Ct. at 1997 (quoting Boddie v. Connecticut, 401 U.S. 371, 379, 91 S. Ct. 780, 786 (1971)).

18. *Paillot*, 559 So. 2d at 760.

19. Id.

two.[20] In deciding that the deprivation in *Paillot* did require some kind of prior hearing, the court relied heavily on *Goss v. Lopez*[21] and *Wilson v. City of New Orleans*.[22] In *Goss*, the United States Supreme Court concluded that high school students facing a ten-day suspension are entitled to some notice of the reasons for the action and an opportunity to tell their view of the incident before being suspended. In *Wilson*, the Louisiana Supreme Court concluded that individuals must receive notice and some opportunity to respond before their vehicles may be immobilized by a tire-booting service. The loss, even if only temporary, of one's business is obviously more extreme than the loss in either *Goss* or *Wilson*. The reasoning and results of *Goss* and *Wilson* suggest that the loss in *Paillot* surely merited at least equivalent procedures.[23]

One should not overlook the importance of the requirement that the hearing be held *prior* to the deprivation. In effect, the government did extend due process to the plaintiff in *Paillot*, but only *after* the governmental deprivation. As noted above, the government claimed that because the licenses were only suspended, the council could constitutionally hold the hearing afterwards.[24] As earlier noted, the fatal flaw of this reasoning is that it fails to recognize that even a temporary deprivation is, nevertheless, a deprivation.[25] Both state and federal courts have recognized that post-deprivation hearings will be found constitutional only in extraordinary circumstances.[26] As to what those extraordinary circumstances may be, the *Paillot* court stated "[w]e [do not] address what emergency situations would be adequate to justify such dispensation since the question is not before us."[27] The United States

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20. See Wolff v. McDonnell, 418 U.S. 539, 557-8, 94 S. Ct. 2963, 2975 (1974) (requiring "some kind of hearing" before a person can be deprived of his property and liberty interests).

21. 419 U.S. 565, 95 S. Ct. 729 (1975).

22. 479 So. 2d 891 (La. 1985).

23. Cf. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972), where the Supreme Court held that a college professor employed under a one year contract had no property interest in the employment after the period specified in the contract had expired.

24. Paillot v. Wooton, 559 So. 2d 758, 760 (La. 1990).

25. Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 89 S. Ct. 1820 (1969).

26. See, e.g., Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 740 (1975); Boddie v. Connecticut, 401 U.S. 371, 379, 91 S. Ct. 781, 786 (1971); *Paillot*, 559 So. 2d at 760; In re Adoption of B.G.S., 556 So. 2d 545, 552 (La. 1990).

27. *Paillot*, 559 So. 2d at 762 n.4. This statement seems to illustrate a welcome departure from the broad dicta interpreting La. Const. art. I, § 2 in Bell v. Dept. of Health and Human Resources, 483 So. 2d 945, 951 (La. 1986), which stated "[T]here seems to be an emerging concept that in some instances due process is fulfilled by a 'post-deprivation' hearing . . . . We believe that this view to procedural due process in *certain* situations is sound. . . ." (citations omitted) (emphasis added).

Supreme Court has held subsequent hearings constitutional in cases involving mining regulations,[28] driver's license suspensions upon refusal to undergo a breath test,[29] exclusions from military bases for "security reasons,"[30] misbranded articles in commerce,[31] prevention of bank failures,[32] governmental price-fixing during war time,[33] collections of taxes pending result of appeal,[34] seizure during war time of property allegedly belonging to the enemy,[35] and the seizure of contaminated food.[36] However, more recent federal jurisprudence has indicated that the courts will apply a very narrow interpretation of this "extraordinary circumstances" exception.[37]

The third question, what kind of hearing was required, was raised, discussed, and left unanswered by *Paillot*. For the purpose of this note, this was the most critical question. The primary case cited by the court in its discussion of the type of hearing required was *Mathews v. Eldridge*.[38] *Mathews* stated:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[39]

The court used this balancing approach to determine that the government denied plaintiff's constitutional right to a prior hearing. The *Paillot* court stated: "[T]he benefits of reducing the chance for error and of bolstering the impression that government is operating fairly outweigh the insignificant costs to government of providing a summary of evidence

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28. Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc., 452 U.S. 264, 101 S. Ct. 2352 (1981).

29. Mackey v. Montrym, 443 U.S. 1, 99 S. Ct. 2612 (1979).

30. Cafeteria and Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 81 S. Ct. 1743 (1961).

31. Ewing v. Mytinger & Casselberry, 339 U.S. 594, 70 S. Ct. 870 (1950).

32. Fahey v. Mallonee, 332 U.S. 245, 67 S. Ct. 1552 (1947).

33. Yakus v. United States, 321 U.S. 414, 64 S. Ct. 660 (1944).

34. Phillips v. Comm'r of Internal Revenue, 283 U.S. 589, 51 S. Ct. 608 (1931).

35. Central Union Trust Co. v. Garvan, 254 U.S. 554, 41 S. Ct. 214 (1921).

36. North American Cold Storage Co. v. Chicago, 211 U.S. 306, 29 S. Ct. 101 (1908).

37. See, e.g., Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729 (1975); Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963 (1974).

38. 424 U.S. 319, 96 S. Ct. 893 (1976).

39. Id. at 335, 96 S. Ct. at 903.

and receiving an informal written or oral response."[40] The language above suggests an informal hearing would have satisfied due process, but the decision also cited *Louisiana State Bar Association v. Ehmig*,[41] which concluded that, before an attorney may be disbarred, he must "be heard at a formal hearing."[42] While the plaintiff in *Paillot* was not involved in a "profession," the bar was most likely the basis of her livelihood.[43] The *Goss* and *Wilson* cases, cited earlier by the court, also contained applications of this balancing approach. The hearing required by *Goss* (student suspensions) was very informal, and the notice could come at the time of the hearing.[44] The court limited the procedure in *Wilson* (tire-booting) to allow the owner "to question only whether the criteria for booting his vehicle have been met."[45] In the *Paillot* scenario, how much process was due? The cases cited by the court and the diverse results reached in those cases, combined with the court's decision not to set forth a hearing process, indicate that the question of how much process is due must be answered on an ad hoc basis.[46]

How Much Procedural Protection Must a "Hearing" Allow to Satisfy Procedural Due Process?

Throughout most of the twentieth century, lawyers assumed that the most effective mode of fact-finding was through trial procedure.[47] The extent of procedure required was decided in a categorical fashion—

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40. Paillot v. Wooton, 559 So. 2d 758, 762 (La. 1990). The court adopts an additional factor set forth by Professor Davis—citizens' perceived fairness of governmental actions. See 2 K. Davis, Administrative Law Treatise, § 13:12, at 510-11 (1979). He states that "[e]ven if the accuracy of the written process were found to be equal to the accuracy of the evidentiary hearing, due process could require the hearing on the ground that government *must keep citizens satisfied that governmental processes are fair, not arbitrary*." Id. at 511 (emphasis added).

41. 277 So. 2d 137 (La. 1973).

42. Id. at 140.

43. Plaintiff was accused of being an interposed party on the licenses, and not actually operating the bar. Brief for Applicant, at 3, Paillot v. Wooton, 559 So. 2d 758 (La. 1990) (No. 89-CC-2685).

44. Goss v. Lopez, 419 U.S. 565, 581-2, 95 S. Ct. 729, 740 (1975).

45. Wilson v. City of New Orleans, 479 So. 2d 891, 903 (La. 1985).

46. As a practical matter, governing agencies or bodies would probably better preserve the sanctions (deprivations) they wish to implement by promulgating, in the same provisions, procedures which, at least in theory, protect the individual facing the sanction (deprivation). For example, the type of hearing required by La. State Bar Ass'n v. Ehmig, 277 So. 2d 137, 140 (La. 1973), was promulgated in the Articles of Incorporation of the La. State Bar Ass'n as La. R.S. 37, ch. 4 app., art. XV, §§ 1-6 (1988). Such procedures, if provided, would at least impress a reviewing court that the governing officials considered the appropriate factors in an attempt to satisfy due process.

47. 2 K. Davis, supra note 40, § 12:2, at 410.

a full trial-type hearing or no process at all.[48] This method, however, was usually limited to factual issues.[49] Those cases which did not merit this type of hearing were considered *de minimis*.[50] In this way, if adjudicative facts were to be determined, a full adversary hearing would usually be required. This all-or-nothing approach was criticized by scholars. The increase in governmental interaction with citizens has forced at least some adjudicative facts to be determined in hearings granting less than full adversarial protections.[51] Since 1974, the courts have moved away from the all-or-nothing approach.[52] The very principle of *Goss* indicates that fewer and fewer cases should be considered *de minimus*. Today, the degree of minuteness of the interest at stake should be met with a corresponding degree of informality of proceedings. The problem for agency officials is determining what amount of due process is required in a particular situation. What follows is a formula for determining that amount.

The Problem: What Factors Are to be Balanced When Attempting to Determine What Due Process Is?

As revealed in *Paillot*, the factors to be balanced when deciding how much of a hearing due process requires are:

(1) The private interest affected by government action;
(2) The risk of error in the procedure used, and the probable value of any modified procedure; and
(3) Perceived fairness by the citizen being deprived of a right; balanced against:
(4) The governmental interest in taking the action; and
(5) The overall governmental burden of extending more procedural protections.[53]

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48. Davis supplement, supra note 6, § 13:1-1, at 340. For a good example, see Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011 (1970), where the court held that before A.F.D.C. benefits could be suspended (pending a full hearing later), ten requirements normally present in a trial had to be extended to the individual. Those requirements included oral presentation of argument and evidence, cross-examination, and the right to retain an attorney.

49. 2 K. Davis, supra note 40, § 12:2, at 410.

50. See Goss v. Lopez, 419 U.S. 565, 577, 95 S. Ct. 729, 737 (1975).

51. Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1268 (1975).

52. See Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893 (1976) (termination of social security benefits); Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729 (1975) (high school student suspensions); Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963 (1974) (parole hearings); Wilson v. City of New Orleans, 479 So. 2d 891 (La. 1985) (tire-booting of automobiles); Haughton Elevator Div. v. State Div. of Admin., 367 So. 2d 1161 (La. 1979) (public bid law).

53. *Mathews*, 424 U.S. at 335, 96 S. Ct. at 903; 2 K. Davis, supra note 40, § 13:12, at 511.

Protections Which May Be Offered

The outcome of this balance determines the necessity of extending various procedural safeguards. An illustrative list of those procedures is: (1) an unbiased tribunal, (2) notice of the proposed action and the grounds asserted for it, (3) an opportunity to present reasons why the proposed action should not be taken, (4) the right to call witnesses, (5) the right to know the adverse evidence, (6) the right to have the decision based only on the evidence presented, (7) the right to counsel, (8) a written record, (9) a statement of reasons for the decision, (10) public attendance, and (11) judicial review.[54]

Application of the Method to the Paillot *Case*

Paillot illustrates the dilemma for agency officials in implementing pre-deprivation procedures that satisfy procedural due process. Only after litigation in the trial court and appeal to the supreme court was it brought home to the officials in *Paillot* that reliance on an ordinance providing for a deprivation of a property right, without more, is not enough: the officials, the agency, and the lawmaking body itself must take into account the due process clause whenever a deprivation is to take place. Below is a description of the type of analysis that should have preceded the actions of the officials in *Paillot* and which should precede any deprivation action anticipated by any governmental agency in Louisiana.[55]

Weighing the Private Interest Against the State's

The private interest affected in *Paillot* was of obvious importance—a person's livelihood.[56] In the area of property interests, one's livelihood is considered among the weightiest.[57] The ordinances, as written and applied, created a great risk of error inasmuch as it might be presumed that liquor licensees derive their livelihood from the sale of alcohol. A modified procedure would have been of great value. The ordinances

54. Friendly, supra note 51, at 1279-95.

55. Justice Dennis applied this method of analysis in In re Adoption of B.G.S., 556 So. 2d 545, 554-5, 557 (La. 1990).

56. See La. State Bar Ass'n v. Ehmig, 277 So. 2d 137, 139 (La. 1973). However, plaintiff was accused of being an interposed party on the licenses, and not actually relying on the bar for her livelihood. See Brief for Applicant, at 3, Paillot v. Wooton, 559 So. 2d 758 (La. 1990) (No. 89-CC-2685).

57. See also Haughton Elevator Div. v. State Div. of Admin., 367 So. 2d 1161 (La. 1979) (involving disqualification of public bidder); and Note, Shaping Specific Procedural Requirements for Disqualification under Louisiana's Public Bid Law, 40 La. L. Rev. 871 (1980). Cf. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972).

authorized immediate action if any state or local crime was "committed."[58] The ordinances make no mention of conviction, probable cause, or even reasonable suspicion. The officials' actions in reliance on the ordinances offered no basis for their findings, nor any opportunity to test the credibility of the witnesses. As a result of this arbitrary fact-finding procedure, the deprivee probably would have perceived governmental unfairness.

What "governmental interest," as a counterbalancing force, was at stake in *Paillot*? There were several legitimate governmental interests, i.e.: the parish's interest in ensuring that bar-owners observe the liquor laws, particularly the ones prohibiting service to minors; and the parish's interest in protecting the lives of its citizens from the activities which allegedly resulted in two deaths. The parish council granted a full hearing to the deprivee *after* the deprivation. The fact of this subsequent hearing is certainly evidence that the "burden of providing a more complex procedure" must not have been unreasonable. Why, then, was not a hearing, possibly even of less formality than the subsequent hearing, granted *before* the suspension? Since *Paillot*, it is clear that the agency responsible for such a deprivation must provide procedures in advance of the deprivation.

Unbiased Tribunal

A balancing of the above factors determines which of the various procedural safeguards[59] are necessary to ensure due process. The first of these safeguards considered is the requirement of a neutral and detached decision-maker. "The essential guarantee of the Due Process Clause is fundamentally fair procedure . . . . Therefore, there must be some type of neutral and detached decision maker, be it judge, hearing officer or agency."[60] There is some debate over just how neutral a decision-maker must be in order to comply with due process.[61] The Louisiana Supreme Court seemingly has adopted a more exacting standard than have federal courts in judging neutrality.[62] The dispute over

58. Plaquemines Parish Ordinances §§ 4-14 & 14-26 (1960).

59. See supra text accompanying note 40.

60. In re Adoption of B.G.S., 556 So. 2d 545, 555 (La. 1990).

61. See, e.g., Arnett v. Kennedy, 416 U.S. 134, 155, 94 S. Ct. 1633, 1645 n.21 (1974), where then Justice Rehnquist, speaking for the majority, rejected Justice White's conclusion that the victim of alleged slanderous remarks should not serve as decision-maker in the termination proceeding of the federal employee accused of making the slanderous remarks. See Justice White, concurring in part and dissenting in part, id. at 1666.

62. See, e.g., Wilson v. City of New Orleans, 479 So. 2d 891, 901-2 (La. 1985), where Justice Dennis stated that a situation involving an individual "occup[ying] two inconsistent positions, one partisan and the other judicial, *necessarily* involves a lack of due process." (emphasis added).

the degree of neutrality is avoidable. An approach providing a direct relationship between the degree of neutrality of the decision-maker and the degree of informality of proceedings is more desirable. That is, a predominantly neutral decision-maker would require fewer of the other procedural protections, while a biased or interested decision-maker would require more procedural formality.[63] The parish president who suspended the licenses was a member of the parish council which probably would have served as the hearing body. At a minimum, the council probably would have appeared to the plaintiff as being biased. Thus, more of the various other safeguards would have been required than in a situation involving a more detached fact-finding body.

Notice

Nothing in the *Paillot* decision indicates the deprivee received any prior notice of the suspension. The government must give some notice reasonably calculated to reach the interested party prior to deprivations such as the one in *Paillot*.[64] The notice must be by mail or other means as certain, unless the deprivee's address is not reasonably ascertainable.[65] The Louisiana Supreme Court has declared the judicial sale of a legally separated[66] spouse's community interest in a house without prior notice to be unconstitutional.[67] The *Goss* case, which involved suspension of public school students, however, indicates that due process may be satisfied by notice at the time of the deprivation.[68] A balancing of the interests at stake in *Paillot* indicates that the notice required would more closely resemble that in the former, rather than the latter example.

Right to Present a Case

The right of the individual to present reasons why the action should not be taken "is fundamental."[69] "Persons whose rights may be affected

63. Friendly, supra note 51, at 1279.

64. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652 (1950).

65. Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800, 103 S. Ct. 2706, 2712 (1983).

66. 1990 La. Acts No. 1009 (effective Jan. 1, 1991) abolished the concept of legal separation from the law of marriage in Louisiana.

67. Magee v. Amiss, 502 So. 2d 568 (La. 1987). This decision has been criticized as being in derogation of the Public Records Doctrine. See Mengis, The Public Records Doctrine Revisited, A paper delivered to the Thirty-Seventh Annual Institute on Mineral Law (March 29, 1990). But see Hargrave, Developments in the Law, 1985-1986, Louisiana Constitutional Law, 47 La. L. Rev. 333 (1987).

68. Goss v. Lopez, 419 U.S. 565, 582, 95 S. Ct. 729, 740 (1975).

69. Friendly, supra note 51, at 1281.

by state action are entitled to be heard . . . ."[70] What is not necessarily fundamental is the right to present those reasons orally.[71] Adjudicative facts are more likely to merit oral presentation than legislative facts.[72] The individual is likely to make some valuable contribution to the attainment of the truth if he is intricately involved in the occurrence of the facts at issue (i.e., adjudicative facts). Such is not the case with legislative facts concerning broader statistics or policy questions. In the determination of legislative facts, written reasons will usually present the individual's point of view adequately, while oral presentation would function more as a delay than a fact-finding tool.[73] *Paillot* involved substantive factual findings, and any procedure would have been of little value had the deprivee not been given a chance to orally present her side of the story.[74]

Right to Call Witnesses

The right to call witnesses should generally be granted; however, "the tribunal must be entitled reasonably to limit their number and the scope of examination."[75] Consideration should be given to factors such as what contribution the witnesses will make to the ascertainment of the truth, and at what point testimony becomes repetitive. In effect, a common sense approach to limiting the number or examination of witnesses should be applied. In the context of parole hearings, the United States Supreme Court has suggested but specifically declined to hold that reasons for limiting the right to call witnesses should be given.[76] While an unsubstantiated denial may appear arbitrary, a statement of valid reasons for denial would, in and of itself, contribute to a fairer process. No valid reason appears for denying the individual in *Paillot* the right to, within reason, call and examine witnesses.

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70. In re Adoption of B.G.S., 556 So. 2d 545, 549 (1990).

71. Friendly, supra note 51, at 1281.

72. "Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are the general facts which help the tribunal decide questions of law and policy and discretion." 2 K. Davis, supra note 40, § 12:3, at 413. See also Fed. Code Evid. art. 201, and La. Code Evid. arts. 201 & 202.

73. 2 K. Davis, supra note 40, § 12:3, at 413.

74. Paillot v. Wooton, 559 So. 2d 758, 761 (La. 1990), discussing Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729 (1975).

75. Friendly, supra note 51, at 1282.

76. Wolff v. McDonnell, 418 U.S. 539, 566, 94 S. Ct. 2963, 2979 (1974). See also Ponte v. Real, 471 U.S. 491, 496, 105 S. Ct. 2192, 2195 (1985). The risk of coercion or retaliation is a major consideration in deciding whether to grant a right to an inmate to call witnesses at his parole hearing.

Right to Learn Adverse Evidence

The right to cross-examine witnesses is a method of learning of the adverse evidence. A noted authority has advocated a very limited extension of the right to cross-examine witnesses, stating that "the main effect of cross-examination is delay . . . ."[77] This effect would be even greater and would yield even less benefit in the case of cross-examination of an expert.[78] However, both the state and federal constitutions grant a constitutional right of confrontation to criminal defendants.[79] These provisions, while they do not require this right to be extended outside criminal cases, suggest that American notions of fairness hold the right to confront one's adversaries to be an important one.[80] The facts of the *Paillot* case do not indicate that the government called any witnesses. However, an informal questioning of the parish president concerning the evidence relied upon probably would adequately have revealed the basis of the government's actions. The brief inquiry would have served to reveal to the plaintiff any credibility problems with the government's information. When considered in the context of the *Paillot* case, the right to conduct such an inquiry seemingly would not have caused unbearable delay, and could have been a crucial credibility test.

Decision Based on Evidence Presented

The right to have the decision based on the evidence presented limits the decision-maker's ability to base its decision on outside information. Must the decision-maker base his decision *only* on the evidence presented at the hearing, or may he also consider his own personal knowledge of the matter? Under certain circumstances, even in a criminal trial, a judge may take notice of certain undisputable facts upon his own motion, and is required to take notice of certain laws.[81] However, notice of material facts peculiar to the case, even in an informal hearing, is a very different matter. The very reason the parties are present is to determine facts. The possibility of abuses in taking notice of either

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77. Friendly, supra note 51, at 1285.

78. Id.

79. La. Const. art. I., § 16:

"An accused is entitled to confront and cross-examine the witnesses against him . . . ."

U.S. Const. amend. VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

80. See Wolff v. McDonnell, 418 U.S. 539, 568-9, 94 S. Ct. 2963, 2981 (1974), where the court applied a balancing of competing interests in addressing the issue of granting cross-examination rights to parole hearings.

81. La. Code Evid. arts. 201 & 202; Fed. Code Evid. art. 201.

adjudicative or legislative facts can be lessened by the requirement of written reasons for such notice.[82] Had notice of any material facts been taken at the hearing in the *Paillot* case, written reasons would have been necessary due to the parish president's involvement in the suspension of the licenses.[83] In the *Paillot* situation, it is difficult to imagine relevant facts worthy of consideration in the government's decision which would not merit presentation at a hearing and at least some procedural testing.

Right to Counsel

While an individual's right to legal consultation before any governmental hearing cannot and should not be denied, counsel's participation at the hearing is not always a prerequisite to a fair adjudication of factual issues. A lawyer's duty at trial is to protect his client, which he might often do by avoidance, delay, or confusion in the presentation of facts.[84] To fully inject counsel into an administrative hearing converts what is meant to be an alternative to trial into just that—a trial. Perhaps a limited role for counsel, such as allowing advice to the citizen only outside the presence of the tribunal or agency deciding the case, would be more sensible in some cases. A more exploratory method by the decision-maker, one allowing him or her to actually question the witnesses, would likely compensate for any loss in fact-finding effectiveness resulting from counsel's absence. Ultimately, the disadvantages of allowing counsel should be weighed against any contribution counsel may make to the efficient adjudication of particular claims. While assistance of counsel in *Paillot* was obviously necessary later, the governing body probably would have taken the same action initially even had counsel been present and argued on behalf of plaintiff. The plaintiff apparently understood the action being taken against her, or at least she easily could have had a hearing been allowed. Counsel was therefore not needed for explanation of the case to the plaintiff. Allowing counsel probably would have been only delay of the decision and a fee.

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82. Friendly, supra note 51, at 1287.

83. See supra text accompanying note 63.

84. "Within the limits of professional propriety, causing delay and sowing confusion not only are [a lawyer's] right but may be his duty." Friendly, supra note 51, at 1288. Judge Friendly goes on to criticize the effectiveness of the adversarial process as a fact-finding tool, opting for a more investigatory approach by the decision-maker. Id. at 1289, 1294-95.

But see, contra, 3 K. Davis, Administrative Law Treatise, § 14:12, at 79 (1979), where Professor Davis states, "Probably any person should have a due process right to be represented by retained counsel in any administrative proceeding in absence of special reason for denying it."

Written Record

The primary use of an accurate record of proceedings is for review on appeal.[85] Although a transcript is an effective tool in reviewing the evidence, a proper statement of reasons for the decision describing the evidence relied upon could render a transcript unnecessary. A simple, sensible approach would be to require a statement of reasons and to make a tape recording of the proceeding, to be transcribed only in the event justice requires intervention into the decision-maker's findings.[86] This approach would avoid the cost of a written record, yet preserve its benefit if review becomes necessary.

Statement of Reasons

A statement of reasons for the decision is of the utmost value and little burden. Its primary function is preventing the necessity of other expensive safeguards. For example, with a written statement of reasons to serve as a syllabus of the proceeding, the need for a verbatim transcript is greatly reduced. Furthermore, in many instances an even cursory inspection of the written reasons could indicate to a reviewing court that due process does not require further litigation.

The written statement of reasons can also function as the insemination of a process. The *Paillot* case is an excellent example: a statement of reasons for the government's actions would have at least forced the parish president to articulate the reasons for the action, and possibly would have caused him to verify the facts behind those reasons. This verification could have involved allowing the plaintiff to dispute the facts, which would have amounted to an informal hearing.

Public Attendance

"Whatever other benefits the guarantee to an accused that his trial be conducted *in public* may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution."[87] While specific provisions in the state and federal constitutions protect the right to public trial of criminal matters, the due process clause controls the question of whether there is a right to public attendance at administrative hearings.[88] The need for public attendance at initial hearings probably has an indirect

85. Friendly, supra note 51, at 1291-92.

86. Id.

87. In re Oliver, 333 U.S. 257, 270, 68 S. Ct. 499, 506 (1948) (footnote omitted) (emphasis added).

88. 3 K. Davis, supra note 84, § 14:12, at 59. However, La. Const. art. X does not address procedures for governmental actions in the context of state civil service employees.

relationship with whether a written record of proceedings, written reasons for the decision, or judicial review (discussed below) also is required. For example, an individual would be protected from arbitrary proceedings behind closed doors if there is a proper written record and an opportunity for appeal.[89] While public attendance is generally not constitutionally required in administrative proceedings,[90] in most cases public attendance creates no unreasonable hardships.[91] In particular cases, of course, public attendance could create such a degree of disruption or over-publication of personal matters so as to render its positive effects insignificant. The interest at issue in *Paillot* involved a place of public gathering, so there was probably no danger of over-publication of personal matters. Public attendance would seem to have been in order, absent undue disruption.

Judicial Review

When considering the result of the initial government action involved here, it becomes obvious that some kind of judicial review is necessary. The consistency of analysis here will be of little actual consequence, however, if courts do not exercise some restraint based on reasonable confidence in various fact-finding agencies and officials.[92] Review should be limited to whether due process was had and should not attempt to analyze the resolution of factual issues in hindsight.

In sum, a balancing of the appropriate factors indicates due process was not satisfied prior to the governmental deprivation in the *Paillot* case. Using the above-noted balancing test, a reasonable conclusion is that a prior hearing before an unbiased tribunal, notice of the allegations, opportunity to present reasons why the action should not be taken, the right to know the adverse evidence (cross-examination), the right to have a decision based only on the evidence presented or reasons for taking

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89. Professor Davis has stated that the exact opposite of this point actually exists: "[T]he requirement varies with the degree of formality or lack of formality; the more formal the oral process the greater the requirement of openness." 3 K. Davis, supra note 84, § 14:13, at 58. Professor Davis made this statement in interpreting the jurisprudence on public attendance. For reasons stated in the text, the results of this "sparse" jurisprudence seem to defy reason. Id. Those results, nevertheless, remain: the more formal a hearing, the more likely public attendance will be allowed. This situation may result more from the relatively small burden that public attendance usually entails upon the tribunal than from any need to prevent arbitrariness. If public attendance does not involve any additional burden on the government or any delay in the decision-maker's result, what does the government have to lose by allowing the public to observe the proceedings?

90. Wright, The Constitution on the Campus, 22 Vand. L. Rev. 1027, 1079-80 (1969).

91. For examples of those cases in which public attendance does create too much adverse effect, see, e.g., Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729 (1975) (school suspensions); Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963 (1974) (parole hearings).

92. Friendly, supra note 51, at 1295.

notice of evidence not presented, an informal statement of reasons, and public attendance would have satisfied due process requirements.

CONCLUSION

No single legal approach can solve all problems; close cases must be litigated. This fact rings even more true when dealing with such a nebulous concept as procedural due process.[93] But not all cases are close ones, and the method described in this note provides a consistent and methodical approach which will reduce litigation of those matters involving clearly insufficient due process protections, such as the *Paillot* scenario. Additionally, in many instances the informal proceedings dictated by this method may produce more equitable results than more formal adversarial ones.[94] On the whole, if applied consistently by practitioners and fact-finders, use of the method should result in just adjudication of matters potentially resulting in deprivations while simultaneously reducing the volume of protracted litigation.

M. Shane Craighead

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93. Such a practical approach to due process problems has even been criticized as one which "tends to 'dwarf soft variables' and to ignore complexities and ambiguities." J. Mashaw, The Supreme Court's Due Process Calculus For Administrative Adjudication in *Mathews v. Eldridge*: Three Factors in Search of a Theory of Value, 44 U. Chi. L. Rev. 28, 48 (1976).

94. Davis Supplement, supra note 6, § 13:1-1.