University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 118

JULY 1970

No. 8

IMPLEMENTATION OF THE COST-OF-LIVING ADJUSTMENT FOR AFDC RECIPIENTS: A CASE STUDY IN WELFARE ADMINISTRATION

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I. INTRODUCTION

A. Perspective

Preoccupied with questions of the scope, availability, and timing of judicial review of administrative agency decisions, legal scholars have failed to conduct a systematic study of agency policymaking.¹ Yet the increasingly important role of administrative agencies in government necessitates an informed judgment about the capability of the administrative process to cope with an ever-wider variety of regulatory problems. This judgment is impossible without case studies of the contributions of the agencies to the implementation of governmental policies. More information is needed about the pressures shaping agency policymaking and about the influence of agency policy on both coordinate policymakers and the regulated parties.

This Article examines the implementation of section 402(a)(23) of the 1967 amendments to the Social Security Act, which provided a cost-of-living adjustment for recipients of Aid to Families with De-

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The author wishes to thank Truman A. Morrison, III, of the University of Wisconsin Law School, class of 1970, for his assistance in researching this Article.

¹ For a more detailed statement of the author's views, see Rabin, Book Review, 22 STAN. L. REV. 421 (1970). See also M. SHAPIRO, THE SUPREME COURT AND ADMINISTRATIVE AGENCIES 104-09 (1968).

pendent Children (AFDC).² This originally obscure provision produced a controversy raising broad questions about the responsiveness of Congress, the federal courts, and the federal executive agencies to grievances articulated before them. In particular, this Article focuses on the role played by the Department of Health, Education, and Welfare (HEW), the agency charged with implementing the AFDC program.

B. *The AFDC Program*

One of four categorical aid programs under the Social Security Act, AFDC provides funds to states

[f]or the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance . . . as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life³

The amount of funds provided by the federal government is determined by a formula reimbursing the state for five-sixths of the first eighteen dollars plus roughly fifty percent of the next fourteen dollars in benefits per recipient—the latter percentage varying according to the ratio of state per capita income to national per capita income.⁴

Although optional, a state's participation in the program obligates it to satisfy certain requirements or risk termination of federal funding.⁵ The state must define the standard of need applicable to AFDC

² 42 U.S.C. § 602(a) (23) (Supp. IV, 1969). The provision is set out in the text accompanying note 8 *infra*. Note that § 402 in the 1967 amendments became § 602 in the codification. References in text are to § 402.

³ 42 U.S.C. § 601 (1964). The other three categorical programs are Old Age Assistance (OAA), Aid to the Blind (AB), and Aid for the Permanently and Totally Disabled (APTD).

⁴ The formula is set out in 42 U.S.C. § 603(a) (1964), *as amended*, (Supp. IV, 1969). For the federal share of the second-tier benefits, see 42 U.S.C. § 623(b) (Supp. IV, 1969).

⁵ 42 U.S.C. § 604(a) (1964), *as amended*, (Supp. IV, 1969) provides:

In the case of any State plan for aid and services to needy families with children which has been approved by the Secretary, if the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of such plan, finds—

. . . .

(2) that in the administration of the plan there is a failure to comply substantially with any provision required by section 602(a) . . . to be included in the plan;

the Secretary shall notify such State agency that further payments will not be made to the State . . . until the Secretary is satisfied that . . . there is no longer any such failure to comply.

The requirements are set out in 42 U.S.C. § 602(a) (1964), *as amended*, (Supp. IV, 1969). Section 602(a) (23) is the most recent provision. Earlier provisions relate to such matters as fair hearings for individuals denied AFDC benefits, uniformity in the administration of state plans, and effective provision of services.

recipients by constructing a budget of items necessary for basic subsistence and then totaling their cost.⁶ Yet because the federal government allows the state to determine the pricing of the budgetary items and does not require it to set the level of AFDC benefits in accord with the standard of need, the participating state effectively controls the amount of aid paid to recipients.

The states have adopted several basic methods for computing benefit levels. The simplest method is payment of 100 percent of need. Other states apply a variation of this method and set benefit levels at a specified percentage of the standard of need, a practice commonly referred to as the percentage reduction or ratable reduction system.

A second commonly used method of computing benefits employs a family maximum. The benefits to the family unit increase as the number of family members increases, until a certain level of payments is reached; thereafter the payment is the same regardless of the size of the family. The amount of benefits per individual thus declines as families become larger.

Finally, some states use a system of flat grants. One typical variation of this system ignores the relationship of need to age variations among the members of different families and pays a flat sum to every family of a given size.

Once a state finishes calculating its allocation for the AFDC program, application of the "matching fund" formula determines the federal contribution. As might be expected, tremendous variation in benefit levels exists among the states. The average monthly benefits in July 1969 ranged from a low of \$10.55 per recipient in Mississippi to a high of \$64.65 per recipient in New Jersey.⁷

C. Section 402(a)(23)

On January 2, 1968, Congress enacted section 402(a)(23).

[B]y July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.⁸

⁶ Section 602(a) does not expressly require a state to designate a standard of need, but several of its requirements presume that it will do so. *See, e.g.*, 42 U.S.C. §§ 602(a)(7), (8), (23) (Supp. IV, 1969). Regulations do require that a state plan [s]pecify a State-wide standard, expressed in money amounts, to be used in determining (a) the need of applicants and recipients and (b) the amount of the assistance payment.

45 C.F.R. § 233.20(a)(2)(i) (1970).

⁷ Brief for the United States as Amicus Curiae, appendix B, at 26-27, *Rosado v. Wyman*, 397 U.S. 397 (1970).

⁸ 42 U.S.C. § 602(a)(23) (Supp. IV, 1969).

The effective date of the statute meant that the states had eighteen months in which to comply with the provision, and HEW had eighteen months in which to seek their compliance.

Welfare recipients hotly contested the meaning of section 402(a) (23) at the conference table with HEW and in the courts. The dispute centered on the provision's ambiguity: Could the states adjust only their standard of need to reflect increases in the cost of living, or must they increase the amount of benefits paid as well? Beyond this relatively straightforward question of statutory interpretation lay a wide array of problems created by the diversity of state responses to the provision. The performance of HEW and the courts in dealing with these issues raises serious questions about the availability of an effective forum for the articulation of the grievances of welfare recipients. These questions require a detailed exploration of the judicial and administrative implementation of section 402(a) (23), commencing with an examination of the legislative history of the provision.

II. THE LEGISLATIVE HISTORY

Among the amendments to the House bill⁹ introduced before the Senate Finance Committee was one sponsored by HEW that would require state AFDC programs to

provide (i) effective July 1, 1969, for meeting . . . all the need, as determined in accordance with the standards applicable under the plan for determining need, of eligible individuals . . . and (ii) effective July 1, 1968, for an annual review of such standards and (to the extent prescribed by the Secretary) for updating such standards to take into account changes in living costs.¹⁰

The earlier version of the bill approved by the House contained no provision for changes in either standards of need or amounts of benefits paid. Presumably HEW sought to remedy the failure of most states to pay 100 percent of state-defined standards of need and to increase the amounts of benefits commensurate with increases in the cost of living.¹¹ The suggested amendment satisfied both objec-

⁹ H.R. 12080, 90th Cong., 1st Sess. (1967).

¹⁰ *Hearings on H.R. 12080 Before the Senate Comm. on Finance*, 90th Cong., 1st Sess., pt. 1, at 634-35 (1967).

¹¹ HEW's position at the Senate hearings was that

[p]resent law requires States to establish public assistance need standards but does not require that payments meet the need in full. Our amendments would:

(1) require States to meet full need as reflected in their own standards; . . .

(3) require the standards to be at least as high as they were in January 1967;

(4) require standards to be updated on July 1, 1968, and reviewed annually and modified with significant changes in the cost of living.

Id. 716.

tives,¹² but was inconsistent with the tradition of absolute state discretion in setting benefit levels; indeed, it limited state discretion to the initial pricing of budgetary items for the standard of need.

The amendment did not find its way into the Senate bill. Rather, the Senate Report on the 1967 Social Security Amendments described section 402(a)(23) as requiring

that by July 1, 1969, and at least annually thereafter, the amount used by the State to determine the needs of individuals will be adjusted to reflect fully changes in living costs since such amounts were established, and that any maximums that the State imposes on the amount of aid paid to families will be proportionately adjusted.¹³

The language in the Senate Report closely resembles that in section 402(a)(23) as enacted, except that an annual adjustment of the standard of need and maximums on benefits is contemplated. The elimination from the HEW-sponsored amendment of the requirement to pay all need may evidence the Senate's unwillingness to require the states to raise benefits to a federally prescribed level. But the question whether section 402(a)(23) requires *any* increase in benefits remains unanswered. Certainly the retention of an annual adjustment for "any maximums . . . on the amount of aid paid" is consistent with an intent to require increased benefits irrespective of the particular method employed by a state to compute the standard of need or the amount of benefits.

Section 402(a)(23) underwent one final change at the House-Senate conference. The legislators agreed to require the states to make only one increase in their standards of need and maximums on benefits prior to July 1, 1969, and dropped the provision requiring annual revisions.¹⁴ They left the language of the Senate version otherwise untouched.

Much subsequent litigation involving section 402(a)(23) focused on determining what Congress meant by the requirement that "any maximums that the State imposes on the amount of aid paid to families [be] proportionately adjusted." As is discussed below, the contesting parties relied primarily upon inference rather than upon direct evidence of legislative intent, for scarcely any direct reference was made to the

¹² Note, however, that the cost-of-living adjustment was not made mandatory. Standards were to be updated only "to the extent prescribed by the Secretary." Text accompanying note 10 *supra*. The final Senate version of the bill required annual cost-of-living adjustments. Text accompanying note 13 *infra*.

¹³ S. REP. NO. 744, 90th Cong., 1st Sess. (1967), in 1967 U.S. CODE CONG. & AD. NEWS 3133 (1967).

¹⁴ *Id.* 3180.

language of section 402(a)(23) during the entire course of the legislative hearings and debate—other than mere reiteration of the provision's language. Consequently, the most forceful argument for interpreting section 402(a)(23) to require increases in the amounts of benefits took the "common sense" position that Congress would not provide a purely paper increase—an increase solely in standards of need—and leave optional an increase in the amounts of benefits. Yet the most forceful argument for a more restrictive interpretation—an equally "common sense" stance—was that Congress would not abandon, at least not without debate, its traditional policy of allowing the states to set benefit levels, especially when the change would require a sizable increase in state budgetary allotments for an unpopular program. Either of these interpretations is tenable if recourse is limited to inferences drawn from the provision's language.¹⁵

Unnoticed or at least unmentioned by any of the litigants was one direct exchange in the Senate over the meaning of section 402(a)(23). Debate on the bill—still including the proviso for annual adjustment but otherwise trimmed down to the final language of section 402(a)(23)—was near completion. Senator McGovern offered an amendment to provide that

the standards used for determining the need of applicants and recipients for and the extent of aid under the plan, and any maximum on the amount of aid and other income will be no less than \$4 per month per individual . . . above such amount of aid and other income available under the standards and maximums applicable under the plan on December 31, 1966.¹⁶

To make clear his intent to increase benefits, the Senator apparently felt compelled to refer specifically to increases in "the extent of aid under the plan." This language was included in addition to a reference to increases in "any maximum on the amount of aid"—a phrase similar to the provision in the final version of section 402(a)(23) that recipients in litigating read to require increased benefits.

More important than its language is the context in which the McGovern amendment was put forth. Other amendments provided an eleven percent increase in the amounts of benefits under the three other categorical Social Security programs.¹⁷ The McGovern amendment

¹⁵ Text accompanying notes 24-30 *infra*.

¹⁶ 113 CONG. REC. 33559 (1967). The announced purpose of the amendment was to guarantee an increase in the amounts of benefits payable under AFDC. *Id.* (remarks of Senator Mansfield introducing the McGovern amendment).

¹⁷ See *id.* 33560 (statement of Senator McGovern). The amounts of benefits payable under the other Social Security programs were to be adjusted by requiring each State to adjust its standards for determining need, *the extent of its aid or assistance*, and the maximum amount of the aid or assistance payable under

meant to provide the same percentage adjustment for cost-of-living changes—in dollar amounts—for AFDC recipients. The amendment's rejection indicates that the Senate did not intend to increase the benefits payable under the AFDC program. In the brief debate, Senator Robert Kennedy referred specifically to the inadequacy of section 402 (a) (23) without the McGovern amendment:

As to dependent children on welfare, the bill provides *only that their welfare standards are to be repriced yearly in accordance with the cost of living*. This amendment, moderate as it is, would have required that the discrimination [between AFDC and the other categorical programs] be erased only to the extent of increasing payments for dependent children by \$4 a month.¹⁸

Senator Kennedy thus argued that the amendment was necessary because he interpreted section 402(a) (23) to require only an increase in the standards of need. Supporting this interpretation is Senator Long's complaint that the McGovern amendment required the states to increase benefits without giving them the necessary funds.¹⁹ Obviously, the same problem envisioned by Senator Long would also arise if section 402(a) (23) alone were read to require increased benefits. But none of the Senators in the debate so read the provision. Brief as it was, the debate on the McGovern amendment is the strongest evidence of Congress' intent in enacting section 402(a) (23).

III. HEW'S INTERPRETATION

HEW issued its interpretation of section 402(a) (23) on January 28, 1969, six months before the July 1 deadline, but one year after the earliest possible date for state compliance. The Department's regulation provided that:

By July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of

its plans . . . so that the total aid or assistance and other income per recipient will be no less than \$7.50 per month above [existing benefit levels].

Id. 36360 (Conference Report) (emphasis added).

Section 402(a) (23) does not include the critical phrase requiring adjustment of "the extent of [State] aid or assistance." Obviously had Congress intended § 402(a) (23) to increase benefits payable to AFDC recipients, it could have included the language used to provide specific dollar increases for recipients in the other three categorical programs.

The \$7.50 increase in benefits under titles I, X, & XIV ultimately failed to pass. Instead Congress enacted a \$2.50 increase in the \$5.00 income disregard provision. *See id.*

¹⁸ *Id.* 33560 (emphasis added).

¹⁹ *Id.*

aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions Nevertheless, if a State maintains a system of dollar maximums, these maximums must be proportionately adjusted in relation to the updated standards.²⁰

The critical language is that allowing the states to make ratable reductions if unable to pay their adjusted standards of need. A state paying 100 percent of need, but unwilling to pay additional dollar benefits, could neutralize a mandatory cost-of-living increase of ten percent in its need standard by henceforth paying only ninety percent of need. Or it could even reduce the total amount of dollar benefits by paying only fifty percent of need.²¹ Similarly, a state employing a family maximum method of computing payments could avoid the required cost-of-living increase in benefits by adopting a percentage reduction system set at the level necessary to yield no more in dollar benefits than had the previous family maximum system.

An even broader interpretation of the regulation is possible. After instituting a "flat grant" system imposing neither maximums nor a percentage reduction, New York contended that only a method of computing benefits that imposed "maximums" had to be proportionately adjusted to the increased standard of need.²²

HEW's regulation took a firm stand on the question whether section 402(a)(23) required increased benefits—it not only answered in the negative but also suggested how states unfortunate enough to be employing maximums could avoid any increase. But HEW's constituency is presumably the welfare recipients; certainly the various obligations imposed on states participating in the AFDC program—obligations to be enforced by HEW—are intended to protect and benefit the recipients.²³ Why did HEW choose to read section 402(a)(23) contrary to the interest of the recipients? Is the provision sufficiently ambiguous so that it could have as easily been read to the benefit of the recipients as to their detriment?

²⁰ 45 C.F.R. § 233.20(a)(2)(ii) (1970).

²¹ Some states found their welfare rolls enlarged after the Supreme Court in *King v. Smith*, 392 U.S. 309 (1968), struck down the man-in-the-house rule. This was the cause of Louisiana's welfare cuts which led to *Lampton v. Bonin*, 299 F. Supp. 336 (E.D. La. 1969), *vacated & remanded*, 397 U.S. 663 (1970) (discussed at text accompanying notes 50-56 *infra*).

²² Text accompanying notes 57-60 *infra*; see Brief for the United States as Amicus Curiae at 5-9, *Rosado v. Wyman*, 397 U.S. 397 (1970).

²³ Section 402(a)(23) contains the last in a series of 23 requirements imposed on the states as conditions for the continuation of federal funding. The obligations, primarily intended to guarantee fair treatment of all persons eligible to receive welfare benefits, are set out in 42 U.S.C. § 602(a) (1964), *as amended*, (Supp. IV, 1969).

HEW spelled out its position in its amicus brief in *Jefferson v. Hackney*.²⁴ After suggesting that the term "maximums" is traditionally used as a term of art to refer to a method of computing benefits which imposes dollar maximums,²⁵ HEW argued that the language of section 402(a)(23) requiring a "proportionate adjustment" in maximums makes no sense applied to a percentage reduction system, because dollar benefits in a state paying a percentage of need will be automatically increased by any upward adjustment in the standard of need.²⁶

Although plausible, this argument implies that Congress meant to require increases in the amounts of benefits only in states employing family maximum systems. The only explanation for this discrimination is that Congress thereby intended to discourage states from employing a system of family maximums. Yet Congress would be unlikely to attempt to reach this result by such an indirect route and without a word of explanation.

HEW also contended that Congress did not intend to impose upon the states the heavy financial burden necessarily resulting from a required increase in the amount of benefits. As the legislative history shows, Congress was unwilling to enact an increase of four dollars per month per recipient on the ground that it would cost the states too much.²⁷ Of course, the Senate's unwillingness to accept a specific dollar increase in the amount of benefits does not necessarily mean that it was similarly opposed to a less visible, automatic increase tied to the rising cost of living. But in an inflationary economy a money-conscious Senate would be unlikely to approve silently even an automatic cost-of-living increase when it would require millions of dollars of increased state funding for a politically unpopular program.

Although compelling, this argument reduces section 402(a)(23) to insignificance, for it implies that Congress enacted the provision merely to secure a paper increase in standards of need.²⁸

²⁴ 304 F. Supp. 1332 (N.D. Tex. 1969), *vacated & remanded*, 397 U.S. 821 (1970) (discussed at text accompanying note 63 *infra*).

²⁵ Brief for HEW as Amicus Curiae at 6-8, *Jefferson v. Hackney*, 304 F. Supp. 1332 (N.D. Tex. 1969).

²⁶ *Id.* 8.

²⁷ *Id.* 8-11.

²⁸ The increase makes additional persons eligible for payments because families with incomes sufficient under the old standard of need would be unable to meet the budget set up under the new standard. But nothing in the legislative history suggests that § 402(a)(23) was meant to place more families on the AFDC rolls. Further, in states allocating a fixed sum for the AFDC program, increases in the number of families of recipients must result in decreases in the benefits for families already receiving AFDC. A paper increase in need standards would thus help additional families only at the expense of those already receiving benefits, unless additional funds were supplied.

Finally, HEW contended that if the statute required increased benefits it would be inconsistent with the tradition of reserving to the states absolute discretion to set benefit levels.²⁹ Yet any encroachment on traditional state prerogatives is minimal, suspending state discretion only to require one cost-of-living adjustment in state-prescribed benefit levels.

Ignoring Senator Kennedy's direct reference to section 402(a) (23)—since HEW evidently failed to pick up this telling piece of evidence—equally valid arguments support either interpretation of the statute. Congress did not make clear its purpose in adopting section 402(a) (23), and HEW's restrictive interpretation of the provision reveals more about HEW than about the meaning of the statute. HEW's reading of the legislative history suggests that it viewed the states, rather than the welfare recipients, as its constituency. This conclusion is supported by concrete evidence drawn from the negotiations over section 402(a) (23) between HEW and AFDC recipients represented by the National Welfare Rights Organization (NWRO).³⁰

IV. HEW-NWRO NEGOTIATIONS

Early in the Nixon administration, HEW and NWRO agreed that a variety of enforcement problems resulted from the failure of the states to adhere to requirements of the AFDC program,³¹ and HEW assented to meet frequently with NWRO to discuss means of achieving stricter compliance with the federal rules and regulations. The agency purported to view these meetings as a way of giving AFDC recipients a measure of access to the welfare administrators. By June 1969,

²⁹ Brief for HEW as Amicus Curiae at 11, *Jefferson v. Hackney*, 304 F. Supp. 1332 (N.D. Tex. 1969).

³⁰ The National Welfare Rights Organization is the central office for the local welfare rights organizations of AFDC recipients. The local groups are basically concerned with organizing to protect the rights and represent the interests of AFDC recipients. The national organization assists the local groups in organizing, provides technical legal expertise, and supplies information about developments in the welfare area. In addition, it acts as a spokesman for the local WRO's before Congress and at HEW. In this role of spokesman, NWRO became deeply involved in the implementation of § 402(a) (23).

During the summer of 1969, the author and two University of Wisconsin law students worked for NWRO on a variety of welfare law issues. The following discussion of the HEW-NWRO negotiations is based upon personal observation. Of course, the author's conclusions do not necessarily reflect the viewpoint of NWRO or any other participant in the negotiations.

³¹ On February 25, the Executive Committee of NWRO met with Secretary of HEW Robert Finch to discuss problems of welfare abuse by state and local officials.

At that time the Secretary indicated that he was concerned about the problem of local and state officials disobeying federal law relating to federally financed programs and that he recognized limitations in HEW's ability to remedy this problem. He agreed that there were ways in which poor people could augment the federal effort to enforce the law.

Letter from George Wiley, Exec. Dir. of NWRO, to John Veneman, Undersec'y of HEW, Mar. 18, 1969.

meetings were taking place approximately every two weeks and continued on that basis throughout the summer.³²

From the outset, NWRO expressed concern that the states would not implement section 402(a) (23), even on HEW's limited terms.³³ NWRO believed that compliance on any terms was far better than no compliance at all: first, because some states might raise benefit levels if required to act;³⁴ second, because states employing maximums would be compelled to increase the amounts of benefits unless they changed systems; and third, because states cutting benefits would open themselves to legal and political attack. Thus, rather than questioning HEW's interpretation of section 402(a) (23), NWRO attempted to persuade the agency to prod the states into action. The issue of interpretation was left to the courts.

July 1, 1969, was the deadline for effectuating the cost-of-living increase. At the meetings early in the spring and in June 1969, NWRO repeatedly urged HEW to pressure the states to comply by July 1. HEW responded that the states were aware of the deadline and it assumed that they would act appropriately. But HEW did not reveal its plans if this assumption proved inaccurate.³⁵

The philosophy of "treading softly" exercised a pervasive influence over HEW's approach to the state compliance problem. HEW repeatedly told NWRO that to impose sanctions for state inaction was against both HEW's and NWRO's interests, for the only available sanction was the termination of federal funding, which meant the termination of payments to AFDC recipients.³⁶ Heavy-handed efforts to secure compliance might even cause a state to drop its AFDC program.³⁷ HEW thus concluded that cooperation and negotiation with the states was the only feasible alternative.

³² The General Counsel of NWRO and the Commissioner of the Assistance Payments Administration of HEW's Social and Rehabilitative Service regularly attended the meetings. There was a special meeting with Undersecretary Veneman to discuss § 402(a) (23). The meetings generally lasted three to four hours and dealt with the enforcement problems raised by NWRO. Section 402(a) (23) almost always dominated the agenda.

³³ NWRO did not accept HEW's regulation as the definitive interpretation of § 402(a) (23), but HEW regarded the issue as closed, at least until the courts interpreted the provision.

³⁴ Any upward adjustment of standards of need automatically increased the amounts of benefits in states paying a percentage of need. Text accompanying note 26 *supra*. Such states had to act affirmatively to maintain or reduce benefit levels.

³⁵ At the beginning of June, HEW furnished NWRO with several reports describing the action certain states had taken in response to § 402(a) (23). Only a few states had submitted sufficient data for evaluation. Until the end of July, HEW consistently asserted that adequate data from the remaining states would shortly be forthcoming.

³⁶ 42 U.S.C. § 604(a) (1964), *as amended*, (Supp. IV, 1969).

³⁷ As indicated earlier, state participation in the AFDC program is optional. Text accompanying note 5 *supra*.

NWRO responded that the conformity hearing leading to the termination of federal funding, although the only procedure specified by statute, was not the exclusive means of enforcement. HEW could employ lesser sanctions. For example, NWRO suggested that, upon a complaint tendered by a sufficient number of aggrieved recipients, HEW hold a public hearing that could result in a finding of non-compliance against a delinquent state. In effect a federal citation that the state was disobeying the law,³⁸ the finding would publicize the state's nonconformity and help the recipients to organize themselves to oppose it. A state might then comply without the further necessity of a formal conformity hearing. But this and other suggestions never received serious consideration.³⁹

HEW's timidity yielded predictable results. At a meeting with NWRO shortly after the July 1 deadline, HEW was unable to disclose whether the majority of states had complied with section 402(a)(23).⁴⁰ Three weeks later, on July 25, HEW issued a document entitled *State Plans Which Do Not Meet Federal Requirements on Updating AFDC Assistance Standards*, listing thirty-nine states which had failed to comply on HEW's terms.⁴¹

Soon thereafter NWRO inquired about the states not listed by HEW as failing to comply as of July 25.⁴² Specifically, NWRO desired to know what criteria HEW employed in deciding whether standards of need had been properly adjusted to compensate for the

³⁸ Wiley Letter, *supra* note 31.

³⁹ The public hearing proposal was advanced at various times during the summer meetings. NWRO also proposed that specific unresolved grievances be recorded for informal three-party meetings, to be attended by representatives of HEW, NWRO, and the state involved. Neither of these proposals resulted in concrete action.

⁴⁰ A law student working for NWRO began contacting welfare attorneys in each state in June 1969 both for information and litigation purposes. As a result, at the July 9 meeting NWRO was able to list six specific instances of state violation of § 402(a)(23) on HEW's terms. HEW responded that it could not verify the charges, as its regional offices had not yet forwarded cost data from the states in question.

⁴¹ In a supplementary document, dated July 31, 1969, HEW broke down the non-compliance problems as follows:

Plans not yet submitted but updating completed	14 states
Updating still in process or not started	8 states
Plans submitted but presents compliance questions	10 states
Plans submitted but regional review incomplete	9 states

Total	41 states
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U.S. DEP'T OF HEALTH, EDUC. & WELFARE, STATUS OF COMPLIANCE WITH SELECTED PLAN REQUIREMENTS (1969). Thus 41 states had failed to satisfy HEW's terms as of July 31. Moreover, no less than 31 states had either failed to submit plan materials or submitted materials so late that evaluation was incomplete a month after the effective date.

⁴² NWRO's information indicated that 6 states not listed among the 39 in the July 25 document clearly appeared to be noncomplying on HEW's terms. In addition, the list of noncomplying states included some with plans which the HEW regional office preliminarily indicated would probably be "approvable," but the plans appeared to NWRO to be clearly in violation of HEW's terms.

rise in the cost of living. HEW assured NWRO that a memorandum elaborating the section 402(a)(23) requirements would soon be available. But not until October 17, 1969, three and one-half months after the effective date of section 402(a)(23), was that memorandum sent to the states. It detailed the six cost study methods deemed most appropriate by HEW,⁴³ but permitted any "different method which is identifiable, equitable and objective." This last proviso, together with the Department's general attitude toward sanctions, leaves grave doubt that HEW intended any check on absolute state discretion even at that late date.

An earlier draft of this memorandum warned laggard states that full compliance with section 402(a)(23) required any post-July 1 adjustments raising benefit levels to be retroactive to July 1.⁴⁴ When two cases raising this very point were brought to HEW's attention, however, the official excuse for inaction was that the statute allowed only prospective termination of federal funding.⁴⁵ HEW never adequately explained why the prospective termination of funding must necessarily be limited to prospective acts of nonconformity.⁴⁶ A policy forgiving past violations certainly encourages states to delay complying with federal requirements. Significantly, the October 17 memorandum omitted the earlier draft's directive requiring retroactive payments.

The major problem remained HEW's reluctance to take action against the thirty-nine states that had failed to submit acceptable plans.⁴⁷ Four states were selected which both HEW and NWRO

⁴³ U.S. DEPT OF HEALTH, EDUC. & WELFARE, UPDATING STATE'S STANDARD OF ASSISTANCE IN AFDC—INTERPRETATION OF SOCIAL SECURITY ACT, SECTION 402(a)(23) AND 45 C.F.R. 233.20(a)(2)(ii) . . . (Oct. 17, 1969).

⁴⁴ This earlier version of the memorandum sent to the states is dated August 13, more than 6 weeks after the operative date of § 402(a)(23). U.S. DEPT OF HEALTH, EDUC. & WELFARE, UPDATING STATE'S STANDARD OF ASSISTANCE IN AFDC—INTERPRETATION OF SOCIAL SECURITY ACT, SECTION 402(a)(23) AND 45 C.F.R. 233.20(a)(2)(ii) . . . (Aug. 13, 1969). The earlier draft read as follows:

States which did not make the adjustments by July 1, 1969, have asked what action is necessary to carry out section 402(a)(23) fully. To accomplish this, such States would have to correct underpayments retroactively to July 1, 1969. Other States have pointed out that they cannot make the necessary adjustments until the next redetermination of eligibility and have asked whether this is permissible. This is acceptable only if underpayments are corrected retroactively to July 1, 1969, at the time of redetermination.

⁴⁵ 42 U.S.C. § 604(a) (1964), *as amended*, (Supp. IV, 1969).

⁴⁶ Section 604(a) provides for the termination of funding "until the Secretary is satisfied that such prohibited requirement is no longer so imposed, and that there is no longer any such failure to comply." HEW appeared to argue that once a state met the terms of § 402(a)(23) a "prohibited requirement is no longer so imposed." But this argument ignores the conjunctive clause specifying "that there [be] no longer any such failure to comply." Surely ignoring a statutorily prescribed increase in benefits is a "failure to comply," even if the state later takes nonretroactive action.

⁴⁷ HEW's July 31 tally showed that 41 states had failed to comply with § 402(a)(23) as of that date—two more than the July 25 compilation showed. Twenty-two states had failed even to submit the required data. Note 41 *supra*.

agreed were nonconforming.⁴⁸ When pressed to take action, HEW informed NWRO that it was considering conformity hearings against violators of various provisions, including section 402(a)(23). Subsequently, HEW announced the institution of hearings against two states to review a variety of issues, but one conspicuous omission was section 402(a)(23). Thus compliance with section 402(a)(23), even on HEW's limited terms, was left to the states' initiative.

The negotiations in the administrative forum were far more subtle than might have been expected. Access was no problem; indeed, HEW appeared anxious to provide access at a fairly high official level on a regular basis. The HEW-NWRO meetings were largely free of rancor, recriminations, and polemics; the issues were discussed openly and in depth, although often to an impasse. But HEW's self-perception of powerlessness was an insurmountable limitation to the potential efficacy of the negotiations. As indicated above, this self-perception manifested itself in a consistently negative stance on every issue raised by NWRO.⁴⁹ In effect, HEW's position was that of the states. From the recipients' viewpoint, the negotiations were virtually meaningless because HEW had nothing to offer; essentially, the administrators were engaged not in implementing the law but in effectuating a delaying action. AFDC recipients would have to seek effective legal recourse elsewhere.

V. SECTION 402(a)(23) IN THE COURTS

Recipients sought judicial relief well before the July 1 deadline for state compliance. Indeed, the pursuit of increases in the amounts of benefits under section 402(a)(23) proceeded simultaneously in the administrative and judicial forums, with the adversaries attempting to use any advances in the latter to their advantage in the former.

On April 15, 1969, a three-judge federal district court handed down the first decision on section 402(a)(23) in *Lampton v. Bonin (Lampton I)*.⁵⁰ Louisiana had decided to reduce all its ADC (AFDC)

⁴⁸ NWRO selected 4 of the most flagrant violators and arranged a special ad hoc meeting with a subcommittee from HEW to discuss their nonconformity problems. Both sides agreed that the 4 states had violated § 402(a)(23).

⁴⁹ HEW's negative attitude towards enforcement was not restricted to § 402(a)(23). In January 1969, HEW proposed a regulation requiring a state to maintain assistance to recipients during the fair hearing process for determining continued eligibility. The regulation was to take effect on October 1, 1969, but pressure from the states forced HEW to withdraw the regulation before the deadline.

To reduce unlawful delay, HEW established a 30-day limit for the processing of AFDC applications. U.S. Dep't of Health, Educ. & Welfare, Welfare Adm'n, Bureau of Family Services, Handbook of Public Assistance Administration, pt. IV, § 2200(b)(3) (1968). Yet the agency made no attempt to secure compliance with this limit from a state whose major city had a backlog of applications extending months beyond the limit.

⁵⁰ 299 F. Supp. 336 (E.D. La. 1969), *vacated & remanded*, 397 U.S. 663 (1970).

grant levels by ten percent, allegedly because of the increased costs of its ADC program after *King v. Smith*⁵¹ increased the number of recipients by invalidating the man-in-the-house rule. ADC recipients immediately sought to enjoin Louisiana's action, arguing that section 402(a)(23) precluded a state from reducing grant levels prior to July 1, 1969.⁵² In a supplemental action, the plaintiffs also sought a declaratory judgment that section 402(a)(23) required a state to increase benefits by July 1 commensurate with the increase in the cost of living. The court held that the latter claim was premature because the Louisiana legislature had not yet enacted an appropriations law for the fiscal year beginning July 1⁵³ and the court could not say that the state would not comply with the clause, whatever its meaning.

In deciding whether section 402(a)(23) precluded reduction of grant levels prior to July 1, the court adopted the position taken by HEW in its amicus brief and held that whatever Congress may have required by July 1, nothing in the legislative history suggested that Congress meant to preclude reduction prior to that date.⁵⁴ The court concluded with a statement echoed in every subsequent decision adverse to the recipients:

[W]e have considerable respect for [HEW's] interpretation of the Social Security Act, since [it] is charged with the responsibility of administering [the Act's] provisions. "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."⁵⁵

By adopting HEW's position the court assumed what it explicitly denied having decided—that section 402(a)(23) did not require an increase in the amounts of benefits after July 1. For if section 402(a)(23) did require such an increase, congressional silence would certainly suggest that no decrease could be made prior to July 1.⁵⁶ Otherwise a state could reduce benefit levels so drastically that the percentage increase after July 1 would not accurately reflect the higher cost of living.

In any event, the case denied AFDC recipients judicial assistance in securing state compliance with section 402(a)(23) prior to July 1.

⁵¹ 392 U.S. 309 (1968). The rule barred welfare payments to families in which the parent either lived with or had continuous sexual relations with a member of the opposite sex to whom he or she was not married.

⁵² 299 F. Supp. at 345.

⁵³ *Id.* at 346.

⁵⁴ *Id.* at 344-45.

⁵⁵ *Id.* at 345 (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)).

⁵⁶ *Id.* at 348 (Cassibry, J., dissenting).

Together with HEW's reluctance to apply any administrative pressure towards compliance, this denial virtually assured that most states could ignore the July 1 deadline with impunity.

On May 15, however, a district court judge in New York ruled in *Rosado v. Wyman*⁵⁷ that section 402(a)(23) barred a state from decreasing benefit levels after July 1.⁵⁸ New York had planned to change from a system that paid 100 percent of the standard of need and grants for special needs to a flat grant system, in which benefits were determined by computing the average amount payable to a family of a given size. A single welfare recipient received \$70.00 per month under the new system; each of the first four children added \$46.00 more, and each subsequent child, \$43.00.⁵⁹ The fixed sum for each family size was determined by finding the level of benefits paid to a family with its eldest child at the mean age for that family size and adjusted to equal the amount determined necessary for subsistence by the federal government.⁶⁰ Grants for special needs were abolished. This system reduced grants for those families with eldest children older than the mean age and for some families losing special grants. Each plaintiff alleged that her grant would be reduced under the new system and argued that the statute was invalid under section 402(a)(23), claiming, as did the plaintiffs in *Lampton I*,⁶¹ that the provision required increases in the amounts of benefits to compensate for changes in the cost of living.

After a comprehensive review of the legislative history, Judge Weinstein agreed with Judge Cassibry's dissent in *Lampton I*:⁶² the statute was a nullity unless interpreted to prescribe increases in the amounts of benefits.

No other court ruled on the statute prior to the July 1 deadline, but on that date a three-judge federal district court in *Jefferson v.*

⁵⁷ 304 F. Supp. 1356 (E.D.N.Y.), *rev'd*, 414 F.2d 170 (2d Cir. 1969), *rev'd*, 397 U.S. 397 (1970).

⁵⁸ Three days earlier, a 3-judge court had found that recipients' concurrent challenge to the constitutionality of N.Y. Soc. SERVICES LAW § 131-a (McKinney Supp. 1969), which imposed lower payment schedules for recipients living outside New York City, no longer posed a justiciable issue in view of the enactment of a new provision, § 131(a)(4), on May 9, 1969, potentially eliminating the inequality. *Rosado v. Wyman*, 304 F. Supp. 1354, 1356 (E.D.N.Y.), *aff'd*, 414 F.2d 170 (2d Cir. 1969), *rev'd*, 397 U.S. 397 (1970).

⁵⁹ N.Y. Soc. SERVICES LAW § 131-a (McKinney Supp. 1969). The schedule of payments given applied to the social services district of New York City. Payments for the other districts were lower: \$60.00 for the single recipient, \$41.00 for each of the first four children, and \$33.00 for each subsequent child.

⁶⁰ 304 F. Supp. at 1367-69.

⁶¹ Text accompanying notes 52-53 *supra*.

⁶² The two judge majority in *Lampton I* held only that § 402(a)(23) did not preclude reduction of benefits prior to July 1. See text accompanying notes 54-55 *supra*.

*Hackney*⁶³ enjoined Texas from replacing the state's schedule of maximums with a percentage reduction system lowering grant levels by fifty percent. The court's brief order stated that the change was inconsistent with section 402(a) (23).

At the first NWRO-HEW meeting after the Texas order, NWRO pointed out that five federal judges—Cassibry in Louisiana, Weinstein in New York, and the three-judge panel in Texas—had all rejected HEW's position that the states could lower grant levels.⁶⁴ NWRO suggested that HEW withdraw its regulation or at least make known its questionable status to the states that had not yet submitted plans. HEW ignored the suggestion, indicating that recipients desiring relief in other states would find it only in the courts.⁶⁵

HEW's failure to cooperate forced recipient groups in virtually every state to find the financial resources and skilled attorneys necessary to bring section 402(a) (23) suits. A phalanx of welfare rights attorneys and organizations spearheaded the effort.⁶⁶ The difficulties involved cannot be overstated, however. A section 402(a) (23) suit posed complex jurisdictional questions⁶⁷ and often required bewildering computations for assessing the appropriateness of state adjustments in grant levels.⁶⁸ Lacking adequate manpower and expertise in welfare law, most legal services offices could not undertake such litigation without substantial outside assistance. And a number of summary dismissals in inadequately prepared cases might have jeopardized the overall posture of section 402(a) (23) litigation on its way to the Supreme Court. These obstacles reinforced the inability of recipients to marshal effective representation in litigation to compel state compliance.

Meanwhile, recipients suffered reverses in the states where litigation was actively pursued. On July 16, the three-judge district court

⁶³ 304 F. Supp. 1332 (N.D. Tex. 1969) (3-judge court), *vacated & remanded*, 397 U.S. 821 (1970).

⁶⁴ Each opinion specifically rejected the interpretation placed on § 402(a) (23) by HEW in 45 C.F.R. § 233.20(a) (2) (ii) (1970).

⁶⁵ HEW maintained that discussion of the regulation's validity was futile, because it would not withdraw the regulation unless a court so ordered. Note 33 *supra*.

⁶⁶ The Center for Social Welfare Policy and Law at Columbia University played a key role in developing the § 402(a) (23) litigation and worked with NWRO to disseminate information to welfare attorneys, most of whom were from the OEO Legal Services offices. Professor Edward V. Sparer of the University of Pennsylvania Law School also played a leading role in both developing and disseminating legal strategy.

⁶⁷ For an excellent discussion of the jurisdictional problems, see Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84 (1967).

⁶⁸ First, many states determining benefit levels by administrative action are reluctant to disclose information. Second, even with the necessary information, changes in formula were sometimes extremely difficult to correlate with past practices for § 402(a) (23) purposes. Finally, in addition to statistical vagueness, difficult problems of evaluation arose in assessing, for example, the appropriateness of a 4% increase in shelter allowance, a 6% increase in clothing allowance, and a 3% increase in food allowance, all based on 1967 figures.

in Louisiana reconsidered section 402(a)(23) on the merits and held in *Lampton v. Bonin* (*Lampton II*)⁶⁹ that the ratable reduction enacted by the state, decreasing the amounts of benefits to recipients, did not violate the provision. Judge Wisdom's majority opinion recounted the legislative history, emphasized the inference to be drawn from congressional silence, and concluded:

The construction HEW places on the statute tips the scales in favor of the defendants. HEW is the agency charged with administering the programs under the statute. And, presumably, HEW sponsored or opposed the changes in the Act that became the 1967 Amendments.⁷⁰

This last statement is ironic, because the provision HEW sponsored would have required the states not only to increase benefits but also to pay 100 percent of need and to adjust standards of need annually for cost-of-living changes.⁷¹ HEW's proposed amendment was much more generous towards the recipients than its construction of section 402(a)(23), a construction that "tips the scales" in favor of Louisiana's position.

On the same day in *Rosado v. Wyman*,⁷² the Court of Appeals for the Second Circuit vacated Judge Weinstein's permanent injunction against implementation of New York's revised schedule of AFDC benefits. Both judges in the majority concurred in finding that Judge Weinstein's order was an "abuse of discretion."⁷³ Chief Judge Lombard summarized the majority's position:

[T]he federal claim seems more apt for initial resolution by the Department of Health, Education and Welfare, than by the courts. The two issues upon a resolution of which this claim turns—the practical effect of § 131-a [the contested New York provision] and the proper construction of [402(a)(23)] of the Social Security Act—both are exceedingly complex. The briefs and arguments of the parties, and the varying judicial views they have elicited, have demonstrated the wisdom of allowing HEW, with its expertise in the operation of the AFDC program and its experience in reviewing the very technical provisions of state welfare laws, an initial opportunity to consider whether or not § 131-a is in compliance with [402(a)(23)]. . . . I believe that the district court should have declined to exercise its jurisdiction, thus permitting HEW to determine the statutory claim asserted by

⁶⁹ 304 F. Supp. 1384 (E.D. La. 1969).

⁷⁰ *Id.* at 1389 (emphasis added).

⁷¹ Text accompanying note 10 *supra*.

⁷² 414 F.2d 170 (2d Cir. 1969), *rev'd*, 397 U.S. 397 (1970).

⁷³ *Id.* at 176 (Hays, J.) & 180 (Lombard, C. J.).

plaintiffs, for the Department already had initiated review proceedings concerning § 131-a.⁷⁴

The district court abused its discretion because it took the case before HEW exercised its primary jurisdiction; HEW must decide initially whether a state's plan is satisfactory under section 402(a)(23). But recipients had already sought relief from HEW, only to become convinced that effective relief to compel state compliance could be had only in the courts.⁷⁵

Rosado ran aground on a more fundamental issue of judicial-administrative relations than that discussed in *Jefferson v. Hackney* or either *Lampton* case. The latter cases dealt with the deference to be accorded an administrative regulation interpreting a statutory provision. But in *Rosado* the recipients also contended that by adopting a system of flat grants New York reduced its standard of need and, consequently, failed to comply even under HEW's interpretation of section 402(a)(23). Of course, HEW had not yet examined the details of the New York plan. Thus the court had to determine the timeliness of judicial intervention before considering the validity of the HEW regulation and the meaning of section 402(a)(23).

Through *Rosado* the section 402(a)(23) controversy finally reached the Supreme Court. The majority per Justice Harlan accepted the interpretation embodied in the HEW regulation.⁷⁶ In holding that the provision compelled New York to adjust only its standard of need, the Court found that

two broad purposes may be ascribed to § 402(a)(23): First, to require States to face up realistically to the magnitude of the public assistance requirement and lay bare the extent to which their programs fall short of fulfilling actual need; second, to prod the States to apportion their payments on a more equitable basis.⁷⁷

Both of these purposes are dubious. "To face up realistically" to the public assistance burden presumes that AFDC eligibility should necessarily extend to all those families with incomes insufficient to pay for their needs under the adjusted standard of need. But section 402(a)(23) did not clearly require the states to provide such an extension of eligibility. Indeed, HEW approved the Texas plan contested in *Jefferson v. Hackney*, although it pegged eligibility at the benefit level

⁷⁴ *Id.* at 181.

⁷⁵ Text accompanying notes 31-49 *supra*; see *Rosado v. Wyman*, 397 U.S. 397, 406 n.8 (1970).

⁷⁶ *Rosado v. Wyman*, 397 U.S. 397 (1970).

⁷⁷ *Id.* at 412-13.

after reducing the standard of need by fifty percent. Further, in speaking of forcing the states to "lay bare the extent to which their programs fall short of fulfilling actual need," the Court prophesizes a most improbable public reaction to inadequate benefit levels. Finally, if the purpose of section 402(a)(23) was to discourage states from maintaining maximums, Congress certainly adopted a roundabout means for achieving its objective.

Justice Black, joined by Chief Justice Burger in dissent, did not dispute the majority's interpretation of section 402(a)(23), but agreed with the court of appeals that the statutory scheme required the federal courts to abstain entirely until HEW completed its proceedings.

Ensuring that the federal courts have the benefit of HEW's expertise in the welfare area is an important but by no means the only consideration supporting the limitation of judicial intervention at this stage. . . . [I]t will be impossible for HEW to fulfill its function under the Social Security Act if its proceedings can be disrupted and its authority undercut by courts which rush to make precisely the same determination that the agency is directed by the Act to make. . . . [A]ll judicial examinations of alleged conflicts between state and federal AFDC programs prior to a final HEW decision approving or disapproving the state plan are fundamentally inconsistent with the enforcement scheme created by Congress and hence such suits should be completely precluded.⁷⁸

The dissent in effect fashioned the lower court's holding—that HEW should initially resolve the dispute over section 402(a)(23)—into a rule requiring judicial abstention in all cases in which HEW is charged with administrative responsibility, at least under the AFDC program.

Refusing to accept this position, the majority considered section 402(a)(23) on its merits. Under their reading of the provision, a state may reduce AFDC benefit levels by adopting a system without maximums, but must adjust its standard of need commensurate with any increase in the cost of living. The majority accepted Judge Weinstein's independent determination that New York had lowered its standard of need, principally by the elimination of special need items from recipients' budgets, and remanded the case to the district court with instructions that an order was to be entered restraining the state from receiving federal AFDC funds if it failed to adjust its standard of need within a reasonable period of time.

Both defeat and victory for AFDC recipients, *Rosado v. Wyman*⁷⁹ permits a state to enact a percentage reduction, as in Louisiana and

⁷⁸ *Id.* at 434-35 (Black, J., & Burger, C. J., dissenting).

⁷⁹ 397 U.S. 397 (1970).

Texas, yet affords recipients a judicial safeguard against administrative recalcitrance.

VI. SECTION 402(a)(23) AND THE LEGAL SYSTEM: AN APPRAISAL

Responding to the arguments of the dissenters, the majority in *Rosado* stated that

neither the principle of "exhaustion of administrative remedies" nor the doctrine of "primary jurisdiction" has any application to the situation before us. Petitioners do not seek review of an administrative order, nor could they have obtained an administrative ruling since HEW has no procedure whereby welfare recipients may trigger and participate in the Department's review of state welfare programs.⁸⁰

But both the majority and the dissent evidenced little understanding of the political context in which HEW makes its decisions. An effective judicial remedy requires a more sceptical attitude towards administrative expertise and independence. Although affirming the competence of the courts in cases like *Rosado*, the majority did not abandon past notions of judicial deference to the administrative agencies.

That these formal doctrines of administrative law do not preclude federal jurisdiction does not mean, however, that a federal court must deprive itself of the benefit of the expertise of the federal agency that is primarily concerned with these problems. Whenever possible the district courts should obtain the views of HEW in those cases where it has not set forth its views, either in a regulation or published opinion, or in cases where there is real doubt as to how the Department's standards apply to the particular state regulation or program.⁸¹

Ordinarily HEW will decide whether the AFDC program is properly implemented, rather than allow the decision to pass to the courts by default, as in *Rosado*. The willingness of the majority in *Rosado* to decide what HEW left undecided does not guarantee that, when HEW does take a position, judicial deference will be exercised in proportion to demonstrated administrative competence. Judicial timidity may yet triumph when the banner of administrative expertise is waved. In view of this possibility, a reassessment of the resolution of the controversy over the implementation of section 402(a)(23) is critical.

The court of appeals in *Rosado* left the recipients with no forum in which they could effectively articulate their interests, unless they

⁸⁰ *Id.* at 406.

⁸¹ *Id.* at 406-07.

directly attacked the validity of the HEW regulation. And, as *Lampton II* demonstrated, judicial deference to administrative expertise seriously disadvantaged recipients even when a direct attack was launched. If administrative expertise were meaningful, this deference and its consequences might not be troublesome. But judicial reliance on administrative expertise appears to have been misplaced. First, agency expertise did not necessarily extend to the interpretation of legislative history; indeed, in the present case, HEW apparently overlooked the most persuasive evidence supporting its position. Construing legislative intent is a familiar judicial function, and deference to HEW's interpretation was ill-advised.⁸²

Second, even accepting HEW's interpretation of section 402(a)(23), reliance on HEW's expertise in analyzing and evaluating state responses to the provision presupposed that the agency had secured the relevant data and formulated criteria for its evaluation. HEW's perception of its powerlessness vis-à-vis the states here becomes critical. HEW did not take the initiative in compelling compliance with section 402(a)(23) on *any* terms. HEW offered the states no guidelines until three and one-half months after compliance was statutorily required, although it had eighteen months in which to act before the provision became operative. Further, the guidelines ultimately issued were so broad as to be virtually meaningless. A summer of face-to-face negotiations similarly yielded no clear statement from HEW on what criteria it would employ in assessing state compliance—let alone what measures the Department would take to secure the necessary data about state plans. The agency's expertise in such circumstances is meaningless.

The problem can be viewed from another perspective. In recent years, courts have exhibited an increasing concern for the effective representation of diverse interests within the administrative decision-making process.⁸³ The leading cases involve the major independent federal regulatory agencies. In *Scenic Hudson Preservation Conference v. FPC*,⁸⁴ the court sustained a challenge by a conservation

⁸² The Supreme Court in *Rosado* did not view narrowly HEW's competence to construe the provision:

While, in view of Congress' failure to track the Administration proposals and its substitution without comment of the present compromise section, HEW's construction commands less than the usual deference that may be accorded an administrative interpretation based on its expertise, it is entitled to weight as the attempt of an experienced agency to harmonize an obscure enactment with the basic structure of a program it administers.

Id. at 415.

⁸³ See generally Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540 (1970); Robinson, *The Making of Administrative Policy: Another Look At Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970).

⁸⁴ 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

group to the FPC's determination that Consolidated Edison should be granted a license to build an electric power storage facility on Storm King Mountain on the banks of the Hudson River. The court held that the FPC must demonstrate that it had considered the non-economic as well as the economic consequences of its decision in determining the public interest.

In *Office of Communication of United Church of Christ v. FCC*,⁸⁵ the FCC granted a one-year probationary license to a television station carrying racially discriminatory programming, but refused to allow the United Church of Christ to intervene as a representative of the listening public. The Court of Appeals for the District of Columbia held that the petition to intervene should have been granted, and remanded the case to the FCC for a rehearing. Upon rehearing, the FCC granted a three-year license (without probation) to the station. In a second appeal,⁸⁶ the court found that the FCC had virtually ignored the earlier opinion's requirement to respect the intervenor's attempt to represent the public interest, and revoked the license rather than remanding to the Commission.

At the heart of the present discussion is whether the legal system is capable of adopting a more expansive view of the public interest and opening its doors to claims of groups—welfare recipients, conservationists, consumers—traditionally unrepresented or under-represented in the political decisionmaking process. Decisions such as *Scenic Hudson Preservation Conference* and *United Church of Christ* need not be read as transforming courts into superagencies. Although courts cannot realistically substitute their judgment for that of administrators possessing both expertise and firsthand familiarity with issues of fact and policy, they can steadfastly refuse to be swayed by exaggerated notions of agency competence. HEW's political vulnerability neutralized any special competence it may have had to interpret section 402(a)(23). Beyond the question of statutory interpretation, if HEW is unwilling or unable to compel even the most basic compliance with the law, the judiciary must fill the breach rather than defer to a nonexistent, or at least nonfunctioning, expertise.

Reinforcing the judicial concern that conflicting interests be effectively represented in the decisionmaking process is the well-documented tendency of regulators to adopt the perspective of the regulated.⁸⁷ There is no reason to think that this "captive" phenomenon is limited to the independent regulatory agencies. This Article has demonstrated

⁸⁵ 359 F.2d 994 (D.C. Cir. 1966).

⁸⁶ *Office of Communication of United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969).

⁸⁷ See, e.g., L. KOHLMEIER, *THE REGULATORS* 69-82 (1969).

that an executive department can adopt a perspective on compliance identical to that of the party legally bound to comply with its directives. In the context of HEW's interpretation and enforcement of section 402(a)(23), judicial respect for administrative independence of judgment—like judicial respect for administrative expertise—was largely an unexamined reliance on an empty shibboleth. Hopefully courts will show the same healthy scepticism toward positive acts of administrative implementation that the *Rosado* Court showed towards HEW's pattern of "implementation" by default.

Politically powerless groups will continue to seek redress in the courts.⁸⁸ Courts cannot escape political involvement by the mechanical application of judicial doctrines relating to judicial control of administrative action.⁸⁹ Political involvement is inevitable, and courts should exercise their power to secure effective implementation of the law.

⁸⁸ NWRO recently challenged HEW's continued funding of AFDC plans in states failing to comply with § 402(a)(23). It argued that 42 U.S.C. § 601 (1964) empowered HEW to make payments only to states with approved plans satisfying the conditions specified in § 402(a). Thus, states ignoring § 402(a)(23) failed to fulfill the necessary requirements. See NWRO Brief in Opposition to Defendant's Motion to Dismiss, *NWRO v. Finch*, No. 2954-69 (Jan. 14, 1970).

⁸⁹ An independent judicial construction of § 402(a)(23) would be less politically motivated than a construction based on administrative "expertise" reflecting political pressure rather than technical competence. Moreover, judicial deference to agency inaction sanctions state lawlessness and hence is as "political" as judicial activism. Although a court cannot compel a state to appropriate more funds to the AFDC program, it can enjoin a state from receiving federal funds until it makes the necessary appropriations. See *Jefferson v. Hackney*, 304 F. Supp. 1332 (N.D. Tex. 1969) (3-judge court), *vacated on other grounds & remanded*, 397 U.S. 821 (1970).