#39.70 3/2/72

First Supplement to Memorandum 72-18

Subject: Study 39.70 - Prejudgment Attachment (Determination of Probable Validity: Provision for Oral Testimony)

Memorandum 72-18, in discussing the nature of the hearing on probable validity, takes the view that it is desirable to allow oral testimony at the hearing where such testimony is needed in order to decide the issue. This supplement to that memorandum pursues the inquiry one step further by examining the extent to which due process of law may require the opportunity to present oral testimony and argument at the hearing.

Although due process requires that a person not be deprived of property without a prior notice and opportunity for a "hearing," the Supreme Court has refused to lay down a general rule that would require an opportunity for the presentation of oral testimony and oral argument at such a hearing. The leading case in this area is Federal Communications Comm'n v. WJR, 337 U.S. 265 (1949), the relevant excerpt from which is appended as Exhibit I, which holds that the nature of the hearing required in any particular situation varies with the practical requirements of fairness in that type of situation.

Is the proposed attachment procedure of a type that would require an opportunity to present oral testimony and argument? As the memorandum points out, a decision on the probable validity of the plaintiff's claim may depend heavily on the credibility of witnesses. Perhaps the closest type of situation, as the memorandum points out, is the preliminary injunction situation. In the preliminary injunction situation, federal courts have held that, generally, the defendant should be afforded the opportunity to present oral testimony and to make oral arguments. See, e.g., Sims v. Greene, 161 F.2d 87 (3d Cir. 1947). However, this rule appears to vary from circuit to circuit.

Moreover, cases have held that the judge has discretion to decide the case on the basis of the pleadings and affidavits only, in appropriate special circumstances. See, e.g., Redac Project 6426, Inc. v. Allstate Ins. Co., 402 F.2d 789 (2d Cir. 1968). The California Supreme Court has likewise held that, under California's injunction procedure, a party must have the opportunity "to present evidence and make a reasonable argument in support," in addition to presenting affidavits to the court. See Spector v. Superior Court, 55 Cal.2d 839, 361 P.2d 909, 13 Cal. Rptr. 189 (1961).

The staff draft of the hearing procedure, Section 540.100, provides that the judicial officer makes the decision on the probable validity of the plaintiff's claim on the basis of affidavits alone, unless he is unable to do so, in which case he may call for oral evidence. In light of the cases relating to hearings for preliminary injunctions, such a provision appears to be of borderline constitutionality. It is possible that it does satisfy the demands of due process for an opportunity for a hearing on the probable validity of the plaintiff's claim. However, the statute would appear to stand a better chance of survival if it were phrased to allow an oral presentation unless the hearing officer determines that such a presentation is plainly not needed.

Respectfully submitted,

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First Supplement to
Memorandum 72-18

EXHIBIT I

I.

Taken at its literal and explicit import, the Court's broad constitutional ruling cannot be sustained. So taken, it would require oral argument upon every question of law, apart from the excluded interlocutory matters, arising in administrative proceedings of every sort. This would be regardless of whether the legal question were substantial or insubstantial; of the substantive nature of the asserted right or interest involved; of whether Congress had provided a procedure, relating to the particular interest, requiring oral argument or allowing it to be dispensed with; and regardless of the fact that full opportunity for judicial review may be available.

We do not stop to consider the effects of such a ruling, if accepted, upon the work of the vast and varied administrative as well as judicial tribunals of the federal system and the equally numerous and diversified interests affected by their functioning; or indeed upon the many and different types of administrative and judicial procedures which Congress has provided for dealing adjudicatively with such interests. It is enough to say that due process of law, as conceived by the Fifth Amendment, has never been cast in so rigid and all-inclusive confinement.

On the contrary, due process of law has never been a term of fixed and invariable content.[9] This is as true with reference to oral argument as with respect to other elements of procedural due process. For this Court has held in some situations that such argument is essential to a fair hearing. *Londoner* v. *Denver*, 210 U. S. 373, in

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[9] "The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights." *Labor Board* v. *Mackay Co.*, 304 U. S. 333, 351. "The requirements imposed by that guaranty [Fifth Amendment due process] are not technical, nor is any particular form of procedure necessary." *Inland Empire Council* v. *Millis*, 325 U. S. 697, 710. See also *Bowles* v. *Willingham*, 321 U. S. 503, 519–521; *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 152–153; *Buttfield* v. *Stranahan*, 192 U. S. 470, 496–497; *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 342, 343; *United States* v. *Ju Toy*, 198 U. S 253, 263; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 235; *Phillips* v. *Commissioner*, 283 U. S. 589, 596–597.

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others that argument submitted in writing is sufficient. *Morgan* v. *United States*, 298 U. S. 468, 481. See also *Johnson & Wimsatt* v. *Hazen*, 69 App. D. C. 151; *Mitchell* v. *Reichelderfer*, 61 App. D. C. 50.

The decisions cited are sufficient to show that the broad generalization made by the Court of Appeals is not the law. Rather it is in conflict with this Court's rulings, in effect, that the right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations. Certainly the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or indeed even substantial ones, are raised. Equally certainly it has left wide discretion to Congress in creating the procedures to be followed in both administrative and judicial proceedings, as well as in their conjunction.

Without in any sense discounting the value of oral argument wherever it may be appropriate or, by virtue of the particular circumstances, constitutionally required, we cannot accept the broad formula upon which the Court of Appeals rested its ruling. To do so would do violence not only to our own former decisions but also, we think, to the constitutional power of Congress to devise differing administrative and legal procedures appropriate for the disposition of issues affecting interests widely varying in kind.[10]

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[10] For example, what may be appropriate or constitutionally required by way of procedure, including opportunity for oral argument, in protection of an alien's claims of right to enter the country, cf. *Johnson* v. *Shaughnessy*, 336 U. S. 806, may be very different from what is required to determine an alleged citizen's right of entry or reentry, cf. *Ng Fung Ho* v. *White*, 259 U. S. 276, 282; *Carmichael* v. *Delaney*, 170 F. 2d 239, 243-244; a claimed right of naturalization, *Tutun* v. *United States*, 270 U. S. 568, 576-578; a claim of just compensation for land condemned, cf. *Roberts* v. *New York City*, 295 U. S. 264, 277-278; or the right to defend against an indictment for crime.

It follows also that we should not undertake in this case to generalize more broadly than the particular circumstances require upon when and under what circumstances procedural due process may require oral argument. That is not a matter, under our decisions, for broadside generalization and indiscriminate application. It is rather one for case-to-case determination, through which alone account may be taken of differences in the particular interests affected, circumstances involved, and procedures prescribed by Congress for dealing with them. Only thus may the judgment of Congress, expressed pursuant to its power under the Constitution to devise both judicial and administrative procedures, be taken into account. Any other approach would be, in these respects, highly abstract, indeed largely in a vacuum.