December 1980

Essay--Prejudgment Attachments and the Concept of the Neutral Magistrate: A Tale of Two Cases

James Audley McLaughlin

West Virginia University College of Law, james.mclaughlin@mail.wvu.edu

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Civil Procedure Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol83/iss2/5

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
ESSAY—PREJUDGMENT ATTACHMENTS AND THE CONCEPT OF THE NEUTRAL MAGISTRATE: A TALE OF TWO CASES

JAMES AUDLEY MCLAUGHLIN*

They went too far; they did not go far enough. That is the story of two cases from West Virginia's highest court. Taken together they create substantial doubt as to the present status of prejudgment remedies in West Virginia, especially the remedies of attachment and garnishment. The first case, Persinger v. Edwin Associates, Inc.,\(^1\) held the West Virginia attachment-garnishment procedures\(^2\) to be constitutional, despite the lack of preseizure notice and hearing and despite "the lack of a judge [or other judicial officer] personally issuing the writ."\(^3\) The second case, State ex rel. Yanero v. Fox,\(^4\) held the state's detinue statute\(^5\) to be unconstitutional\(^6\) and declared "whenever the government for itself or for litigants, takes property from the possession of a person, a pre-seizure hearing [is necessary]."\(^7\) "Article III, [section] 10, of the West Virginia Constitution demands it. This is so, whatever the ex parte affidavits by the would be possessor, or how clothed with authority the magistrate who would order the seizure."\(^8\) At least the discussion in these cases suggests that Yanero overruled Persinger, yet the court in Yanero, with ample opportunity to expressly disapprove of Persinger, discusses Persinger as if it is perfectly viable.\(^9\)

This essay will argue that the best answer to the prejudgment remedy dilemma lies somewhere between Yanero and

---

* Professor, West Virginia University College of Law; B.A., 1962, Ohio State University; J.D., 1965, Ohio State University.

\(^1\) 230 S.E.2d 460 (W. Va. 1976).
\(^3\) 230 S.E.2d at 464.
\(^4\) 256 S.E.2d 751 (W. Va. 1979).
\(^5\) W. VA. CODE § 55-6-1 to -7 (1981 Replacement Vol.).
\(^6\) 256 S.E.2d at 751 (syllabus pt. 2 by the court).
\(^7\) Id. (syllabus pt. 2 by the court).
\(^8\) Id. at 757.
\(^9\) Id.
Persinger. Yanero goes farther in restricting ex parte prejudgment procedure than is required by the federal procedural due process cases which it purports, up to a point, to follow.¹⁰

In Yanero the court, after discussing Sniadach v. Family Finance Corp. and its progeny,¹¹ rejected the federal test, which it viewed as a "balancing test," and declared such "rational balancing tests [to be] vehicles for judicial sophistry."¹² It opted instead for an absolute rule under the West Virginia Constitution which it determined to require notice and hearing prior to seizure. However, the absolute notice and hearing rule fails to recognize important remedial interests which can be protected without ad hoc balancing¹³ and with as much simplicity as an absolute notice and hearing rule. Therefore Yanero goes farther in prescribing procedure for prejudgment seizure than is wise. Moreover, although the modern doctrine of civil procedural due process is based on the balancing of competing interests,¹⁴ the specific branch relating to prejudgment civil seizures, which flows from Sniadach, does not call for balancing on an individual case basis. This line of cases results in a test of constitutionality which requires as much judicial discretion as the reading of litmus paper.

On the other hand in Persinger the West Virginia Court did not go far enough in restricting ex parte prejudgment seizures. Although the rationale for the fairness of the West Virginia procedure contained in Justice Flower's opinion in Persinger is quite plausible,¹⁵ such rationale misconceives the federal doctrine it

¹⁰ Id. at 753-56.
¹² 256 S.E.2d at 757.
¹³ "Ad hoc balancing" is a process to test the constitutionality of governmental action by balancing its pros and cons in each case rather than determining whether or not it satisfies certain criteria, i.e., satisfies a rule.

The phrase, "ad hoc balancing," is mentioned in T. Emerson, Toward a Theory of the First Amendment 53-56 (1966).

¹⁵ 230 S.E.2d at 464; Justice Flowers states: "The statement of material facts in the affidavit must be certain and definite so as to inform those who may defend of the facts they must repel." (emphasis added).

This may be a plausible reason and consistent with prior West Virginia cases, but it is not what the United States Supreme Court had in mind as the discussion below will show. Nor does a "clerk, an officer of the court", id. at 464, qualify as "a
purports to apply.

This "going too far" and "not far enough" in restricting ex parte prejudgment process is a result of ignoring a key concept implicit in such federal cases as Mitchell v. W. T. Grant and North Georgia Finishing, Inc. v. Di-Chem Inc. The key concept is that of the neutral, experienced fact-finder interposed between the citizen, whose person or property is seized, and the interested party initiating the seizure. This concept was first developed in fourth amendment cases, which explore the public law side of prejudgment seizures of the ex parte variety.

This essay will briefly explore the theoretical basis of this "neutral magistrate concept" and attempt to demonstrate that this idea is indeed at the heart of Di-Chem and the line of cases which flow from it. In order to form a basis for judging the tenet of this essay, one must first review some relevant history and background.

I. CIVIL PROCEDURAL DUE PROCESS

"Civil procedural due process" as a judicially articulated and applied federal constitutional doctrine is a recent development. Prior to 1969 the only instances of state procedure held to be violative of due process in the civil context involved lack of adequate notice of a trial that would permanently deprive a defendant of traditional "property." Since the requirement of notice and a trial prior to permanent deprivation existed throughout the United States, no federal superintending of state civil procedure was necessary. Occasionally correcting the quality of notice was

judicial officer" or other discretion exercising official within the meaning of Mitchell and Di-Chem. In those cases the clerk was contrasted with a judicial officer. Moreover, the clerk's "determination that the statutory mandates have been met," 230 S.E.2d at 464, merely requires a clerical checking to see that all the blanks, so to speak, are filled in. It is not the kind of "independent judgment of probable cause" that Mitchell and Di-Chem call for. But see text accompanying note 47, infra.

18 See text accompanying notes 34 - 42, infra.
the sum of pre-1969 civil procedural due process decisions. Until that time the only deprivations subject to judicial scrutiny were permanent deprivations of interests that have traditionally been regarded as "property," e.g., interests in money, securities, chattels, real estate. Temporary deprivations of traditional property and deprivation of what may be termed "new property" in government benefits, such as welfare payments or social security, were not protected by notice and a hearing. The unspoken rationale of the courts was that temporary deprivations were too trifling to be of constitutional concern, and, regardless, mistaken deprivations could be corrected in the final reckoning after trial; government benefits were a "privilege," not "property," and therefore not subject to due process protection.

Beginning with *Sniadach v. Family Finance Corp.*, decided in 1969, this changed. That case involved a temporary deprivation of traditional property—subsistence wages. The temporariness of such a deprivation is hardly trifling when in the interim one cannot feed, clothe or house oneself. This new concern about temporary deprivations soon lost its mooring in wage garnishment, and temporary deprivations of all types came under judicial scrutiny.

At first these cases seemed to suggest that once the deprivation became more than trifling only notice and an evidentiary hearing would satisfy due process. *Mitchell* laid that notion to rest and *Di Chem* did not resurrect it. Procedural due process is not synonymous with notice and a hearing. This is likewise true in the parallel development of civil procedural due process involving governmental largess—the "new property" labeled "entitlements"—although here also initial cases suggested otherwise.

---

25 416 U.S. 600.
26 419 U.S. 601.
The first case of this genre was Goldberg v. Kelley,\textsuperscript{27} and the interest of the individual was again subsistence; and "due process" was still synonymous with "notice and hearing." But subsequent cases demonstrate that deprivation of any government benefit (including employment and licenses) to which one is "entitled"\textsuperscript{28} is subject to due process scrutiny. Moreover, it has been clear since Justice Powell prevailed in Mathews v. Eldridge,\textsuperscript{29} that notice and a hearing in many cases is not essential to satisfy due process. In this "new property" area of civil procedural due process, ad hoc balancing is utilized for testing the constitutional validity of governmental procedures "depriving" one of "benefits". The procedure one is due depends upon, as Mr. Justice Powell states:

\begin{quote}
[c]onsideration 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.\textsuperscript{30}
\end{quote}

This "test"\textsuperscript{31} is highly subjective, and in spite of Justice Pow-

\begin{footnotes}\textsuperscript{27} 397 U.S. 254 (1970).
\textsuperscript{28} See Board of Regents v. Roth, 408 U.S. 564 (1972).
\textsuperscript{29} 424 U.S. 319 (1976).
\textsuperscript{30} Id. at 335.
\textsuperscript{31} If one puts this "ad hoc balancing test" in balancing language, pretending for the sake of clarity that each factor can be quantified, the Powell "rule" looks like this: on one side of the scale goes the value of the individual interest lost (say, eight for subsistence welfare benefits on a scale of ten, five for social security on the same scale, four for a drivers license, three for a liquor license) times the reduction in the risk of errors disfavoring the individual that will be caused by using the procedure claimed to be claimant's due over the challenged procedure presently used (say five per cent mistaken applications under present procedure (one in twenty people deserving (by law) of welfare do not get it) whereas using proposed procedure there will only be three percent (one in thirty-three) mistaken applications for a net improvement or decrease in risk of mistaken denials of two percent, one in fifty, or for every 100 hundred applications two people formally wrongfully denied benefits will now get them although even under the proposed system three people in every hundred still will be mistakenly denied benefits); on the other side of the balance is the increase in all "costs" of the proposed system over the present—the costs being the fiscal cost of the proposed procedure (e.g., cost of hearing officers & hearing rooms) and the cost of delay in decision-making\end{footnotes}
ell's heroic application of it in *Mathews*, does seem, as Justice Harshbarger insists in *Yanero*, a perfect vehicle for "judicial sophistry." I frankly believe that Powell's clear articulation of the intuition of procedural fairness, showing the patently subjective nature of the intuition, was meant to pave the way for its eventual demise as an active component of constitutional jurisprudence. It is every bit as subjective as substantive due process and will in the future be used more and more sparingly to second guess legislative determination of the best procedure for applying its laws to individual cases. Subjective judgments can only fairly be made in a democracy by some informed majority process, i.e., the legislature. After this legislative judgment is made, only patent misbalancing should be judicially checked.

Whatever its value or its implications for the future, the fact is that the *Mathews v. Eldridge* test does not apply to prejudgment garnishment and attachment. Here a fairly objective test may be deployed to guarantee minimal constitutional fairness. This test has a long and respected history in the area of criminal law enforcement. The fourth amendment has enshrined it. The draconian exclusionary rule enforces it. It applies only where the intrusion on individual interests is both (1) occasioned by exigent circumstances and (2) very brief. The exigency dictates that the procedure be *ex parte* and the brevity of intrusion allows it to be *ex parte* so long as, wherever possible, the principle of the neutral magistrate is observed.

II. THE CONCEPT OF THE NEUTRAL MAGISTRATE

A. The Fourth Amendment Basis

The concept of the neutral magistrate has been established in the context of fourth amendment cases for many years. In *Johnson v. United States* the basis for the neutral magistrate principle was the requirement that the process of drawing inferences

and the cost of increased mistakes disfavoring the state (e.g., more fraudulent claims will be paid under the proposed system, more criminals go free) or, in private litigation, mistakes disfavoring the other litigant.

22 This is the late Justice Black's warning in *Sniadach v. Family Finance Corp.*, 395 U.S. at 345 (Black, J., dissenting).
24 333 U.S. 10 (1948).
from evidence was to be carried out by a neutral and detached magistrate rather than by a police officer whose judgment might be clouded due to his engagement in the "competitive enterprise of ferreting out crime." The Court in Giordenello v. United States stated that the function of the neutral magistrate was not to accept mere conclusions in a complaint, but rather to judge for himself whether the underlying facts of the complaint show probable cause.

The court further emphasized the importance of an independent judgment of the underlying facts in Aguilar v. Texas. Finally the court in United States v. Ventresca cautioned against requiring affidavits for search warrants to conform to technical requirements; the proper interpretation and test of such matters

---

38 Justice Jackson set out the basis for the neutral magistrate principle in the following oft-quoted declaration:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id. at 13-14.


39 The Court further explained:

The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the "probable cause" required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.

Id. at 486.

38 378 U.S. 108 (1964). The Court again emphasized:

[T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, . . . was "credible" or his information "reliable." Otherwise, "the inferences from the facts which lead to the complaint" will be drawn not "by a neutral and detached magistrate," as the Constitution requires, but instead, by a police officer "engaged in the often competitive enterprise of ferreting out crime," . . .

Id. at 114-15.

was to be made in a "common sense and realistic fashion."\textsuperscript{40} However this did not mean that magistrates were to accept affidavits which were purely conclusory but rather that the magistrate be informed of some of the underlying circumstances in the affidavit to avoid becoming a mere "rubber stamp for the police."\textsuperscript{41}

The requirements of this neutral magistrate principle include: (1) presentation of the primary facts—the "underlying circumstances"—under oath to (2) a state official who is (a) neutral and (b) experienced at making fact-to-law judgments or, put another way, whose usual role in the government is to make such judgments, and (3) an independent assessment as to whether grounds exist for the process sought—a process which will result in a brief invasion of someone's liberty or property. A fourth requirement, generally thought to be part of this \textit{ex parte} process, is that the "grounds" be tested by a "probable cause" standard. In sum, a neutral magistrate must make his own inference from the primary facts that probable cause exists for issuing the process.

Over three decades ago in \textit{McDonald v. United States},\textsuperscript{42} Mr. Justice Douglas bluntly, but eloquently, summed up the purpose:

\begin{quote}
We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizens and the police. This was done not to shield criminals nor to make the home a safe haven for illegal
\end{quote}

\textsuperscript{40} The Court cautioned:

[A]ffidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area.

\textit{Id.} at 108.

\textsuperscript{41} This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the "underlying circumstances" upon which that belief is based. \ldots Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police.

\textit{Id.} at 109.

\textsuperscript{42} 335 U.S. 451 (1948).
activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. 43

It is not far to leap from zealous cop to zealous creditor "ferring out" not criminals but deadbeats. The two conditions for the application of the neutral magistrate principle also pertain to debt collection. There is a need for immediate action before assets are dissipated or put beyond the reach of the collection process and a seizure of very brief duration before a hearing can be had. It only remains to demonstrate that this principle is implicit in Sniadach's progeny: Di-Chem and Mitchell.

B. The Basis in Civil Procedural Due Process

In North Georgia Finishing, Inc. v. Di-Chem, Inc., 44 Justice White, writing for the Court, found the Georgia garnishment statute to be constitutionally deficient in allowing for the seizure of a bank account by a "writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer." 45 Justice White distinguished the Court's decision in Mitchell v. W. T. Grant Co. on the basis that in Mitchell the Louisiana statute under attack was not constitutionally deficient due to the presence of a judge, the filing of something more than a conclusory affidavit, and the availability of an immediate hearing after seizure. 46 Those three requirements

43 Id. at 455-56 (emphasis added).
45 Id. at 606.
46 Nor is the statute saved by the more recent decision in Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974). That case upheld the Louisiana sequestration statute which permitted the seller-creditor holding a vendor's lien to secure a writ of sequestration and, having filed a bond, to cause the sheriff to take possession of the property at issue. The writ, however, was issuable only by a judge upon the filing of an affidavit going beyond mere conclusory allegations and clearly setting out the facts entitling the creditor to sequestration. The Louisiana law also expressly entitled the debtor to an immediate hearing after seizure and to
present under the Louisiana statute were not found under the Georgia statute and therefore the Georgia statute could not withstand attack.

Justice Powell's concurrence in Di-Chem has led to some confusion as to whether the important distinction between Di-Chem and Mitchell is the concept of a neutral magistrate or the concept of requiring a factual affidavit.⁴⁷ The language present in this concurrence apparently lead Justice Flowers in Persinger away from the concept of neutral magistrate to one of treating dissolution of the writ absent proof by the creditor of the grounds on which the writ was issued.

419 U.S. at 606-07 (emphasis added).


⁴⁷ Justice Powell concurring in the result stated: "[A]s shown by the affidavit filed in this case, see ante, at 604 n.2, an unrevealing assertion of apprehension of loss suffices to invoke the issuance of garnishment. This is insufficient to enable a neutral officer to make even the most superficial preliminary assessment of the creditor's asserted need." Id. at 612 (Powell, J., concurring) (emphasis added). This statement supports the notion that the neutral magistrate is supposed to make an independent judgment of probable cause. Moreover, Powell asserts that:

[P]rocedural due process would be satisfied where state law requires that the garnishment be preceded by the garnishor's provision of adequate security and by his establishment before a neutral officer of a factual basis of the need to resort to the remedy as a means of preventing removal of dissipation of assets required to satisfy the claim. Due process further requires that the State afford an opportunity for a prompt postgarnishment judicial hearing . . .

Id. at 611 (Powell, J., concurring) (emphasis added) (footnote omitted).

However, Powell belies the inference from the above that the neutral magistrate concept is salient in his thinking with the following:

I am not in accord with the Court's suggestion that the Due Process Clause might require that a judicial officer issue the writ of garnishment. The basic protection required for the debtor is the assurance of a prompt postgarnishment hearing before a judge. Such a hearing affords an opportunity to rectify any error in the initial decision to issue the garnishment. When combined with the availability of the garnishor's bond to compensate for any harm caused, the possibility of prompt correction of possible error suffices to satisfy the requirements of procedural due process in this context. It thus should be sufficient for a clerk or other officer of the court to issue the original writ upon the filing of a proper affidavit.

Id. at 611, n.3 (Powell, J., concurring) (emphasis in original).
the requirement of a factual affidavit as a kind of "bill of particulars" preliminary to a hearing.48

A careful reading of Justice White's opinion in Mitchell v. W. T. Grant 49 should have dispelled the notion that Justice Powell's concurrence embodied the Court's philosophy. In fact, concurring in Mitchell, Powell stated:

In my view, the constitutional guarantee of procedural due process is fully satisfied in cases of this kind where state law requires, as a precondition to invoking the State's aid to sequester property of a defaulting debtor, that the creditor furnish adequate security and make a specific factual showing before a neutral officer or magistrate of probable cause to believe that he is entitled to the relief requested. An opportunity for an adversary hearing must then be accorded promptly after sequestration to determine the merits of the controversy, with the burden of proof on the creditor.50

It is extremely important to note that Justice White, writing for the majority in Mitchell, 51 in no uncertain terms made clear

48 230 S.E.2d at 464.
50 416 U.S. at 625 (Powell, J., concurring) (emphasis added).
51 Justice White emphasized the factual affidavit and its function of allowing a judicial officer to make an independent judgment:

The writ, however, will not issue on the conclusory allegation of ownership or possessory rights. Article 3501 provides that the writ of sequestration shall issue "only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts" shown by a verified petition or affidavit. In the parish where this case arose, the clear showing required must be made to a judge, and the writ will issue only upon his authorization and only after the creditor seeking the writ has filed a sufficient bond to protect the vendee against all damages in the event the sequestration is shown to have been improvident.

Id. at 605-06 (emphasis added) (footnotes omitted).

Later in his opinion he added:

The Florida law under examination in Fuentes authorized repossession of the sold goods without judicial order, approval, or participation. A writ of replevin was employed, but it was issued by the court clerk. As the Florida law was perceived by this Court, "[t]here is no requirement that the applicant make a convincing showing before the seizure," 407 U.S., at 73-74; the law required only "the bare assertion of the party seeking the writ that he is entitled to one" as a condition to the clerk's issuance of the writ. Id., at 74 . . . The Court distinguished the Penn-
the basis for the validity of the Louisiana statute.

[M]oreover, in the parish where this case arose, the requisite showing must be made to a judge, and judicial authorization obtained. Mitchell was not at the unsupervised mercy of the creditor and court functionaries. The Louisiana law provides for judicial control of the process from beginning to end. This control is "one of the measures adopted by the state to minimize the risk that the ex parte procedure will lead to a wrongful taking."58

The court in Mitchell did not condemn all ex parte hearings leading to seizure of property. However from the language above it is clear that ex parte hearings require judicial supervision. In effect the neutral magistrate stands between the zealous creditor and the debtor just as in fourth amendment cases the neutral magistrate stands between the zealous policeman and the citizen.

In two recent 5-4 decisions the Mitchell majority (Stevens, J., has replaced Douglas in the minority) has extended its approval to ex parte procedures to administrative deprivations of licenses as long as an impartial official is involved. In one a driver's license has been suspended for 90 days, sans hearing, for refusal to take a breathalyzer test for alcohol. In Mackey v. Montrym,58 Chief Justice Burger stated:

And when prompt post-deprivation review is available for correction of administrative error, we have generally required no more than that the predeprivation procedures used be designed to provide a reasonably reliable basis for concluding

svylvania and Florida procedures from that of the common law where, the Court said, "a state official made at least a summary determination of the relative rights of the disputing parties before stepping into the dispute and taking goods from one of them." Id., at 80.

416 U.S. at 615-16 (emphasis added).

For final emphasis he added in a footnote:

The approval of a writ of sequestration is not, as petitioner contends, a mere ministerial act. "Since a writ of sequestration issues without a hearing, specific facts as to the grounds relied upon for issuance must be contained in the verified petition in order that the issuing judge can properly evaluate the grounds." Wright v. Hughes, 254 So.2d 293, 296-297 (La. Ct. App. 1971) (on rehearing).

416 U.S. at 616, n. 12 (emphasis added).

58 416 U.S. at 616-17.

that the facts justifying the official action are as a responsible governmental official warrants them to be. 54

He continued: "[a]s was the case in Dixon v. Love, 55 the predicates for a driver’s suspension under the Massachusetts scheme are objective facts either within the personal knowledge of an impartial governmental official or readily ascertainable by him. 56

However, the "impartial governmental official" in this case was a police officer—a factor which seems to run counter to the teaching of the fourth amendment cases discussed above—protection of citizens from the biased inferences of the zealous policeman. 57 But the Chief Justice apparently viewed these police officers as different from those "ferreting" out crime: "The officer whose [corroborated] report of refusal [to take the breathalyzer test] triggers a driver’s suspension is a trained observer and investigator. He is, by reason of his training and experience, well suited to the role the statute accords him in the presuspension process." 58

In Barry v. Barchi 59 a similar result was reached in the suspension of a horse trainer’s license without a hearing, because urinalysis revealed the licensee’s horse to be drugged. Justice White said: "[I]t seems . . . that the state is entitled to impose an interim suspension, pending a prompt judicial or administrative hearing . . . whenever it has satisfactorily established probable cause to believe that a horse has been drugged and that a trainer has been at least negligent in connection with the drugging." 60 In the Barchi Case the "board steward" was apparently the neutral official, and probable cause was supplied by a state testing official’s test results and a statutory "rebuttable presumption or inference, that Barchi [the trainer] was at least negligent." 61 In both these cases, probable cause could be established with relative objectivity 62 and they were predicated on the right to an im-

54 Id. at 13 (emphasis added).
56 443 U.S. at 13 (emphasis added).
57 Id. at 24 (Stewart, J., dissenting).
58 Id. at 14.
60 Id. at 64 (emphasis added).
61 Id. at 65.
62 In Mackey v. Montrym, 443 U.S. at 13-14, the Chief Justice makes note of
mediate post-suspension hearing. The dissenting justices in these cases continue to hold out for “procedural due process” being the equivalent of “notice and a hearing.”

What then is the current status of federal law concerning prejudgment attachments? The two 1979 cases sketched above indicate that a variant of the neutral magistrate principle applies in the administrative law area and that notice and a hearing are not required before temporary deprivation of “property” as long as probable cause for the grounds for deprivation are established before a neutral official and a hearing follows promptly. Apparently, the more objective the grounds, the less neutral the probable-cause-finding official need be. The majority purported to use the balancing test of Mathews v. Eldridge in these cases; this resulted in a great deal of deference to legislative judgment regarding proper procedure and the implicit balance struck with such procedure. This is so, it seems to me, because a balancing analysis makes the subjectiveness of the balancing process vivid, and the Court has long recognized that such subjective judgments are best left to the legislative process.

III. THE ARGUMENT FOR THE NEUTRAL MAGISTRATE RULE

A. Its Certainty

The Mathews v. Eldridge balancing test has the virtue of most ad hoc balancing tests—it is honest. Such balancing of competing interests does inform the intuition of fairness or reasonableness, however inarticulate, on which legislative policy is made and on which it is challenged in the name of unfairness or unreasonableness by the disgruntled citizen. It also has its vice—it is unpredictable. Its great subjectiveness leads to unpredictable results—results that seem unjudicial in character. Witness Justice Harshbarger’s remark about “judicial sophistry” in Yanero. This vice leads to one of two results, depending on the nature of the policy being examined. Either it leads to slavish deference to the legislative judgment, or, where conditions are right, it leads to

---

the “objective facts” on which probable cause was based.

45 See Mackey v. Montrym, 443 U.S. 1, 10-19.
46 See text accompanying note 32, supra.
47 See text accompanying note 12, supra.
a rule—a rule based on balancing, yet balancing in advance, not so called "ad hoc balancing." The "clear and present danger test" is such a rule. The bill of rights is replete with constitutional rules governing the criminal process. A challenged law is examined, not by determining whether or not the legislature struck a reasonable balance, but whether it satisfies a constitutional rule—a rule that is the product of balancing, yet a "rule" nonetheless.

In developing constitutional doctrine courts naturally gravitate toward constitutional rules. If an area, such as substantive due process, will not yield a rule, then little constitutional supervision occurs and the doctrine whithers away. The development of civil procedural due process doctrine is now at the crossroad. That part which yields a rule will survive, and the rest will fall into disuse. Since on the criminal side of procedural due process, there is a well-developed rule applying to pretrial seizures, and since this rule makes sense on the civil side, i.e., its workable and strikes the proper balance, the Court is in the process of adopting it. It is, of course, the neutral magistrate rule of the fourth amendment. Although, as seen in the two recent license suspension cases, this rule will be fairly flexible on the administrative side, on the judicial side Mitchell and Di-Chem Inc. dictate a strict rule which includes the requirements of a factual, not conclusory, affidavit and a judicial officer making an independent judgment of probable cause for the attachment. A prompt post-seizure probable cause hearing must follow. It only remains for us to examine somewhat more fully its workability and justice, because regardless of what the United States Supreme Court does, the West Virginia Supreme Court of Appeals need not comply if the state standard it sets is at least as strict as the federal standard.

B. Its Simplicity

A factual affidavit is presently required. Judicial officers and

---

See text accompanying note 13, supra.

See Mitchell v. W. T. Grant Co., 416 U.S. at 618-19, 625 (Powell, J., concurring). Remember the balancing is built into the rule, i.e., the rule itself is a product of balancing but nefarious, sophistry-generating ad hoc balancing is avoided.
a procedure for a timely hearing are presently available. All that is needed for the West Virginia attachment and garnishment and detinue statutes to pass federal constitutional muster is for the judicial officer—a circuit court judge or a magistrate—to make an independent finding of probable cause to issue the attachment or garnishment based on the sworn facts within the affidavit(s). The probable cause finding will have two elements in the usual attachment/garnishment situation: (a) That the plaintiff will succeed on the merits, and (b) that defendant’s assets, from which a judgment might be satisfied, will disappear if not immediately seized.69 In West Virginia, the various reasons for feeling insecure about assets are listed in the statute. The underlying facts from which plaintiff has inferred that a statutory ground exists must be detailed so that the neutral magistrate may make an independent judgment that the statutory ground is satisfied. It is this independent judgment—the inference of a neutral party—that protects the defendants from mistaken deprivations based on a creditor’s biased inferences. This process works in the search warrant area; it ought to work here.

C. Its Fairness

This rule strikes a fair balance between a creditor’s interest in avoiding the dissipation of assets legally answerable to her claim and a debtor’s interest in not having the use of his property mistakenly interrupted. Notice before initial seizure may, in Justice White’s words, “itself ... furnish a warning to the debtor acting in bad faith.”70 “The danger of destruction or alienation cannot be guarded against if notice and a hearing before seizure are supplied.”71 On the other hand, if the _ex parte_ seizure period is _very brief_, and mistakes for even this brief interruption of use are guarded against by the neutral findings of probable cause based on sworn facts, then the defendant’s interest is adequately protected. Moreover, a bond is required to compensate defendants for any mistake actually made.

---

69 Where plaintiff claims an ownership interest in the thing to be attached, through a lien or security interest, then probable cause as to the merits of the claim should be sufficient.

70 416 U.S. at 609.

71 _Id._
The neutral judgment of probable cause protects the property owner from mistaken intrusion caused by biased inferences of probable cause. The zealous creditor's bias may cause him to make false inferences of both the conscious and unconscious variety. By requiring a sworn statement of specific facts to be read by a judicial officer, consciously false factual conclusions should largely be prevented. It is easy to swear to a false legal conclusion: "Well it was my opinion that he was about to flee the state and everyone is entitled to his or her opinion and how can you prove it wasn't my opinion," might say the false swearer. But if required to swear that "I saw defendant on High Street at 3:00 p.m., Feb. 4, 1980, coming out of the travel agency at 414 High Street," an objective fact, not an opinion, perjury can be proven. One is more hesitant to give testimony constituting perjury.

However, it is the unconsciously false inference that the neutral magistrate chiefly prevents. Assuming the primary facts to be true, bias can lead to false inferences of further fact. In common parlance it is called "jumping to conclusions" or "being paranoid." Fear, anxiety, desire, etc., can skew one's judgments about what facts "mean." The neutral magistrate can correct the skewed judgment of the anxious creditor's "paranoid" reading of his debtor's activity or the zealous collector's wishful reading of the merits of his claim.

It is true that bias can lead to misperception of the primary facts and only an evidentiary hearing can correct that. That is why a prompt hearing must follow. Even so, the neutral magistrate provides protection in the interim that is good enough for the brief intrusion.

Moreover, a neutral official does something more than provide increased accuracy in the finding of probable cause; the independent judgment of the neutral official also tends to promote confidence in the fairness of the system. This is deemed important by the Supreme Court, especially the Stewart led minority. While accuracy is the primary, perhaps sole, purpose of procedural due process—accuracy in applying general policy (law) to concrete events (fact)—it is not merely abstract accuracy as viewed by a judge, however informed by analysis and statistics,72 but also

72 See 424 U.S. 319.
the perception of accuracy by the average person that is essential. The vernacular for this feeling of inaccuracy is "unfair!" or "unjust!" In Fuentes v. Shevin, where the Court was groping toward the new doctrine of procedural due process, it spoke of preventing "unfair and mistaken deprivations." I take it the word "unfair" is a response to the feeling of fairness a system should engender. Justice Stewart said recently in dissent: "[Due Process] protects not simply against the risk of an erroneous decision. It also protects a 'vulnerable citizenry from the overbearing concern for efficiency . . . that may characterize praiseworthy government officials no less . . . than mediocre ones.' If the "vulnerable citizenry" feels "overborn" by official action, i.e., feels unfairly treated because her claim gets cavalier treatment in the name of efficiency, she loses respect for government. Thus, not only is engendering a feeling of fairness in the citizenry an end in itself, it also promotes a respect for, and thus peaceful acceptance of, governmental decision-making.

In other words, if a legislature or reviewing court is persuaded that a procedure is 100% accurate, the inquiry does not stop there. How that procedure will be viewed by the general public must also be gauged. If that public views it as only 50% accurate (no matter how erroneous that judgment might be) and thus views it as "unfair," then the procedure should probably be rejected. This is not unlike the lawyerly concern for not only impropriety but for the appearance of impropriety.

In our tradition of justice, a hearing is the best guarantee that the person adversely affected will feel fairly treated. Apparently, what divides the United States Supreme Court right now relates to the relative importance of this "feeling of fairness" as an ingredient of procedural due process and how well that "feeling" can be appeased with something other than a hearing. The majority apparently values the "feeling" of the citizenry somewhat lower than the minority does or feels that a hearing is somewhat less essential to the "feeling of fairness" than does the mi-

---

74 443 U.S. at 20 (Stewart, J., dissenting). See also Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). Justice Marshall states that "[a neutral hearing officer] preserves both the appearance and reality of fairness, 'generating the feeling, so important to popular government, that justice has been done,' Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)."
nority, or, as I suspect, a little of each.

A minority of four holds out for a preseizure hearing in every case, while the majority finds the neutral magistrate (or neutral official in the administrative setting) adequate for short deprivations. History, common sense, and legislative judgment tend to support the notion that the neutral magistrate promotes the feeling of fairness. The history of the warrant issued by the neutral magistrate is ancient and revered. It is central to fourth amendment protection against unreasonable searches and seizures. Furthermore, it makes sense that a debtor whose property is taken briefly without a hearing will feel better if he knows the state has at least evaluated the asserted grounds for taking and not acted merely as an agent for the private creditor. Finally, the legislature's judgment at both the federal and state levels has consistently favored no more than the neutral magistrate's judgment for brief ex parte intrusions, whether for warrants, temporary restraining orders, or attachments. In West Virginia less than the neutral magistrate has long been allowed for attachments.

Since judging the community's sense of fairness is a highly subjective matter, it naturally should be left to the legislature and checked only when patently without a rational basis. Less deference should be paid to rules generated by the administrative process, however.

Finally, in *Mitchell v. W. T. Grant Co.*, Justice White voiced two concerns about requiring a hearing before even temporary deprivations: (1) it might increase the price of credit and (2) increase the use of self-help repossession. Since then in *Flagg Bros., Inc. v. Brooks* the United States Supreme Court has held such self-help remedies not to be state action and thus immune from due process scrutiny. The West Virginia Supreme Court of Appeals had previously reached the same decision. The sad irony is that many efforts to relieve debtors in individual cases result in a general reduction in the availability of credit—the more difficult to collect the more reluctant to lend. And credit dries from the bottom up. It would be sad irony, indeed, if a deci-

---

75 416 U.S. at 618 including n.13.
77 *Cook v. Lilly*, 208 S.E.2d 784 (W. Va. 1974).
sion, like State ex rel. Yanero v. Fox,\textsuperscript{78} designed to protect debtors, resulted in less credit, obtainable only where a security interest was provided, thus guaranteeing no protection at all before seizure.

IV. Conclusion

The fourteenth amendment requires the independent judgment of probable cause by a neutral magistrate based on sworn \textit{ex parte} facts before even a brief seizure of property takes place. Persinger v. Edwin Associates, Inc.\textsuperscript{79} was wrongly decided. This neutral magistrate rule is a simple rule, requiring no balancing; the balancing of interests is built into the rule. It promotes the twin procedural due process ends of sufficient accuracy under the circumstances and the perception of accuracy called here the "feeling of fairness." History, commonsense, and legislative judgment support its fairness and reasonableness. It strikes a proper balance. The alternative of a hearing everytime will make credit less available to the poor and then mostly on self-help repossession terms, providing no protection at all. State ex rel. Yanero v. Fox goes farther than is necessary or wise. Hopefully, the legislature will give the courts of West Virginia some new legislation in the near future, bringing under one simple but comprehensive regulation all the prejudgment remedies.\textsuperscript{80}

\textsuperscript{78} 256 S.E.2d 751 (W. Va. 1979).
\textsuperscript{79} 230 S.E.2d 460 (W. Va. 1978).
\textsuperscript{80} See Mitchell v. W.T. Grant Co., 416 U.S. at 618, n. 13 for a listing of some of the studies and proposals for such a law.