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DUE PROCESS AND FEDERAL GRANT TERMINATION: CHALLENGING AGENCY DISCRETION THROUGH A REASONS REQUIREMENT

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> This spectacular expansion of both the size and scope of grant programs engendered surprisingly little case law on the administration of federal grants. However, there is no doubt that an ever increasing number of cases in this area will be presented . . . . [T]here currently is a need for a fuller body of law concerning this slumbering giant.[1]

I. INTRODUCTION

These words have certainly proven to be prophetic. Growth in federal grant expenditures has been exponential.[2] In 1950 federal expenditures for grant programs were only 2.2 billion dollars.[3] Expenditures for fiscal year 1981, according to current budgetary estimates, will reach 96.3 billion dollars.[4] This figure, moreover, reflects federal grant

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1. Southern Mut. Help Ass'n v. Califano, 574 F.2d 518, 522 (D.C. Cir. 1977) (the author was counsel for plaintiff).

2. Mason, *Current Trends in Federal Grant Law—Fiscal Year 1976,* 35 FED. B.J. 164 (1976).

3. Boasberg & Feldesman, *The Washington Beat: Federal Grant Law and Administration,* 7 URB. LAW. 556 (1975).

4. OFFICE OF MANAGEMENT AND BUDGET, *Special Analysis H: Federal Aid to State and*

assistance[5] to state and local governments only. It represents an increase of 7.4 billion dollars over estimated expenditures for fiscal year 1980 and 13.5 billion dollars over fiscal year 1979 expenditures,[6] and these figures do not include the amount of local matching funds that are required under most grant programs. The Office of Management and Budget estimates these funds to be 25% of federal expenditures.[7]

Federal grant expenditures have increased significantly, not only in absolute dollar amounts, but in relative terms as well. From fiscal year 1958 to fiscal year 1978, grants to state and local governments grew at an annual rate of 14.6%.[8] These grants represented 5.3% of the total budgetary outlays of the federal government in fiscal year 1950, peaked at 17.3% of budgetary outlays in fiscal year 1978, and then slipped back to an estimated 15.6% of budgetary outlays for fiscal year 1981.[9]

Detailing the dimensions of grant assistance to state and local governments by no means reveals the full extent of federal grant activities. Not even all public sector grants are included in the 96.3 billion dollar figure. A major example of such public sector grants is payments for research and development conducted by public universities.[10]

Of far greater importance than grants for university research, however, is the grant assistance provided by the federal government to nongovernment grant recipients. These recipients include hospitals, foundations, community groups, profit and nonprofit organizations, and even some individuals.[11] Although the Office of Management and

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Local Governments, in SPECIAL ANALYSIS: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1981, at 239 (1981) [hereinafter cited as *Special Analysis H*].

5. The term federal grant applies to any disbursement of monies or property by the federal government in support of programs that benefit the public and are carried out by the several states, their political subdivisions, public and private subdivisions, public and private institutions, and private individuals. *See* D. WRIGHT, FEDERAL GRANTS-IN-AID: PERSPECTIVES AND ALTERNATIVES 18 (1968).

6. *Special Analysis H*, *supra* note 4, at 239.

7. R. CAPPALLI, RIGHTS AND REMEDIES UNDER FEDERAL GRANTS 11 (1979).

8. *Special Analysis H*, *supra* note 4, at 239.

9. *Id.*

10. *Id.* at 260. Payments for research and development at public universities are excluded from the budget definition of grants because they are considered to have the character of government procurements of services rather than the character of grant aid. Such payments are, however, included in the census series and national income and product accounts (NIA) series definitions of grants. The federal government budgeted $4.6 billion for research and development at all colleges and universities (including medical schools) for fiscal year 1981. OFFICE OF MANAGEMENT AND BUDGET, *Special Analysis K*, in SPECIAL ANALYSIS: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1981, at 310 (1981).

11. Mason, *supra* note 2, at 164.

Budget does not keep a tally of these private sector outlays, they are believed to total some 30% of grant payments to state and local governments.[12] Given the 96.3 billion dollars of grant funds devoted to state and local governments, this means an additional 28.9 billion dollars are budgeted for private grantees.

A parallel to growth in gross expenditures for grants is the growth in the number of grant programs.[13] It has been estimated that the number of institutions and agencies receiving financing under federal grants has mushroomed to the incredible total of 112,520.[14] This figure includes some 8,000 community nonprofit organizations and some 900 community action agencies.[15] Ten years ago, there were 500 federal grant programs.[16] Now, 57 federal agencies administer 1123 programs.[17] One author has "crudely guess[ed]" that the federal government is involved in some 300,000 grant agreements with public and private grantees each year.[18]

Just as important as the size and scope of federal grant programs is their prominent role in furthering and implementing national policies established by Congress. Grant programs have come to represent "the preferred *modus operandi* of the federal government in carrying out most of its education, health, social welfare, housing, environmental, and transportation programs."[19] Congress has utilized the grant mechanism to promote national goals as fundamental and varied as antipoverty projects and urban housing, criminal justice and law enforcement, and pollution control and solid waste disposal.[20]

The large size, wide scope, and vital importance of federal grant activity is not matched by a similarly comprehensive body of law and

12. *Id.* n.5. One author estimated grants to nongovernment entities at $20 billion to $30 billion for fiscal year 1979 when grants to 3454 state and local governments totaled $82.9 billion. This is roughly in keeping with the 30% estimate. Madden, *The Right to Receive Federal Grants and Assistance*, 37 FED. B.J. 17, 20 n.24 (1978).

13. Mason, *supra* note 2, at 172.

14. R. CAPPALLI, *supra* note 7, at 8.

15. *Id.*

16. Wallick & Montalto, *Symbiosis or Domination: Rights and Remedies Under Grant-Type Assistance Programs,* 46 GEO. WASH. L. REV. 159, 164 n.21 (1978).

17. OFFICE OF MANAGEMENT AND BUDGET, 1980 CATALOG OF FEDERAL DOMESTIC ASSISTANCE 11.

18. R. CAPPALLI, *supra* note 7, at 17.

19. Boasberg & Hewes, *The Washington Beat: Federal Grants and Due Process*, 6 URB. LAW. 339, 402 (1974).

20. *Id.* at 402.

legal analysis.[21] Surprisingly, the tremendous growth in grant making has seen little corresponding development of federal grant law, either in the form of judicial decisions[22] or scholarly articles[23] addressing the legal nature of the federal grant process, the problems of administrative agency discretion, and the procedural due process rights of federal grantees. Despite huge expenditures and the ever expanding role of federal grantees in executing congressional policies, it can still be stated accurately that federal grant law today is but a "slumbering giant"[24] only now reluctantly awakening.

Federal grants-in-aid traditionally have been viewed as mere conditional gifts or items of federal largess.[25] Grantees therefore have had none of the rights and safeguards afforded those carrying out congressional programs under contract, for whom general contract law applies.[26] Instead, the grantee "is most often looked upon as an object of

21. One commentator has written bluntly, "Grant law is a discipline that does not yet exist." Mason, *supra* note 2, at 164. *See also* Wallick & Montalto, *supra* note 16, at 162 n.12. Professor Cappalli inquires what it is about the field that causes lawyers to look the other way. R. CAPPALLI, *supra* note 7, at 362.

22. Very little litigation has been brought in the area of federal grants. *See* Southern Mut. Help Ass'n v. Califano, 574 F.2d 518 (D.C. Cir. 1977); National Ass'n of Regional Councils v. Costle, 564 F.2d 583 (D.C. Cir. 1977); National Ass'n of Neighborhood Centers v. Mathews, 551 F.2d 321 (D.C. Cir. 1976); National Consumer Information Center v. Gallegos, 549 F.2d 822 (D.C. Cir. 1977); Mil-ka-ko Research & Dev. Corp. v. Office of Economic Opportunity, 352 F. Supp. 169 (D.D.C. 1972), *aff'd mem.*, 492 F.2d 684 (D.C. Cir. 1974).

23. Only recently has a small body of scholarly material been published. *See* Boasberg & Feldesman, *supra* note 3; Brown, *Federal Funds and National Supremacy: The Role of State Legislatures in Federal Grant Programs*, 28 AM. U.L. REV. 279 (1979); Brown, *Federal Funds and Federal Courts—Community Development Litigation As A Testing Ground for the New Law of Standing*, 21 B.C.L. REV. 525 (1980); Cappalli, *Federal Grant Disputes: The Lawyer's Next Domain*, 11 URB. LAW. 377 (1979); Catz, *Standing to Challenge Federal Grant Termination*, 19 URB. L. ANN. 87 (1980); Conway, *The Federal Grant: An Administrative View*, 30 FED. B.J. 119 (1971); Mason, *supra* note 2; Tomlinson & Mashaw, *The Enforcement of Federal Standards in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement*, 58 VA. L. REV. 600 (1972); Wallick & Montalto, *supra* note 16; Whelan & Smith, *Contracts Under Grants-in-Aid—An Aspect of Federal-State-Local Relations*, 6 HASTINGS CONST. L.Q. 751 (1979); Wilcox, *The Function and Nature of Grants*, 22 AD. L. REV. 125 (1970).

24. The metaphor was coined by U.S. Circuit Judge Tamm in Southern Mut. Help Ass'n v. Califano, 574 F.2d 518, 522 (D.C. Cir. 1977).

25. *See* Boasberg & Hewes, *supra* note 19, at 400; Mason, *supra* note 2, at 181. For a viewpoint characterizing the notion of grants as conditional gifts as "pernicious," see Wallick & Montalto, *supra* note 16, at 161.

26. When disputes arise in defense contracts, for example, the disputes clause controls, and it provides (in pertinent part), "In connection with any appeal proceeding under this clause, the contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal." 32 C.F.R. § 7.103.12 (1979). Regarding due process rights of bidders on federal con-

federal charity, without any legal 'right' to agency largess."[27] This view of grant making and grantees may now be yielding to a growing recognition of the importance of federal grants that parallels their growth in fiscal dimensions. There is increasing awareness that grantees deserve legal protection because of the potentially disastrous results of unfavorable action by the federal grantor.[28]

Cognizant of their vital role in implementing federal policies and of the inherent risks of dealing with the federal bureaucracy, grantees "more and more feel they have a right to the benefits to be obtained under grants and the courts more and more tend to agree with them."[29]

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tracts, see Note, *Due Process in Public Contracts: Pre-Award Hearings to Determine Responsibility of Bidders*, 5 PAC. L.J. 142 (1974).

27. Boasberg & Hewes, *supra* note 19, at 400. *See also* Cahn & Cahn, *The New Sovereign Immunity*, 81 HARV. L. REV. 929, 934 (1968). Not all grants are of one type: two basic varieties are formula grants and project grants.

> Formula grants are distributed to all states according to a predetermined formula spelled out in the enabling statute. A state must normally submit a plan for approval by the federal agency administering the program in order to qualify for its share of the funds. . . . Because a state which has an approved plan on file with the federal agency is entitled as a matter of right to the continued payment of its share of any funds authorized and appropriated by Congress for the program, formula grants are sometimes referred to as mandatory grants.
>
> Project grants are disbursed to eligible recipients for specific projects on the basis of project applications . . . . Recipients are usually local units of government or private entities rather than states, as in the case of formula grants. Project grants rely on local initiative and local sensing of needs in requesting funds and in following up applications. Often referred to as discretionary grants, project grants are far more flexible than formula grants and allow federal administrators considerable discretion in deciding which project applications deserve funding.

Tomlinson & Mashaw, *supra* note 23, at 600-01. It is the project grant that is most often perceived as a gift, but note that the line between project and formula grants is not always distinct. *Id.* at 601.

28. Boasberg & Hewes, *supra* note 19, at 402. If, for example, a grant received annually in the past is not renewed, "[e]xperienced professional staff must be abruptly laid off; office leases terminated; equipment and furnishings returned; and often the grantee itself must go out of business." *Id.* In addition to these substantial fiscal injuries, sudden nonrenewal may cause substantial injury by foreclosing future opportunities of the grantee and causing it certain "stigmatic effects." R. CAPPALLI, *supra* note 7, at 212.

29. Mason, *supra* note 2, at 181. The author continues:

> This concept of a right to a grant derives from several sources. The first is the constitutional necessity of treating all people similarly situated equally. . . . [Grantees] have a right to some objective assurance that the discretion in awarding the grant has been exercised fairly and even-handedly.
>
> A second element that goes into the drive towards entitlement is the strong value we place on established patterns. If a grantee has received a grant, he expects when renewal time comes to get a renewal and his expectation of renewal is not without jurisprudential value. . . .
>
> The third is the simple political fact that the grantee's bargaining position may be very great.

Id.

It should also follow that if a colorable argument can be made that there is a right to federal grants, meaningful remedies to protect that right should be made available.[30]

Although there has been no express, unequivocal judicial recognition of a grantee's right to a due process hearing,[31] some federal agencies' regulations provide for grant termination hearings.[32] It has been observed, however, that even those agency regulations that allow for administrative hearings often "do not accord the grantee with many traditional due process rights."[33]

Confronted by a reticent judiciary and confounded by the inadequacy of administrative remedies, "[t]here are growing indications . . . that the grantees and beneficiaries of many grant programs are without recourse in the face of autocratic decisions or indifference by federal administrators, who are unaccountable to a popular constituency and may be insensitive or unsympathetic to local problems and conditions."[34]

Unable to enforce due process rights at the administrative level, disappointed grantees have turned to the courts as the next logical place to seek relief.[35] In fact, as federal grant-in-aid programs continue to expand, the question of grantee rights has surfaced as an issue the federal courts are being asked to address with increasing frequency.[36]

This Article focuses on two potential sources of a grantee's right to

30. Wallick & Montalto, *supra* note 16, at 161.

31. Boasberg & Hewes, *supra* note 19, at 405-06. *Cf.* Wallick & Montalto, *supra* note 16, at 186 (such due process safeguards as are available to the grantee will tend to vary with the context in which they are asserted). Somewhat more due process will be available to a grantee facing termination of his grant than to a would-be grantee facing an unfavorable decision on his initial grant-application. Between these extremes there will likely be numerous other gradations. *Id.*

32. *See* notes 306-16 *infra* and accompanying text.

33. Boasberg & Hewes, *supra* note 19. "For example, there is no right to an independent hearing examiner . . . no grantee right to make depositions of agency officials . . . or to inspect internal agency documents . . . [n]or is there a requirement that the agency make its program officers available at the hearing." *Id.* at 405-06. *See, e.g.*, 45 C.F.R. § 1067.2-4 (1980), which allows for "informal" "show cause" hearings when the Community Services Administration denies refunding applications of grantees receiving funding under the Community Services Act of 1974.

34. Tomlinson & Mashaw, *supra* note 23, at 618-19. *See also* Cahn & Cahn, *supra* note 27.

35. Regarding possible consequences of a due process litigation explosion, see Mason, *supra* note 2, at 183 n.107 and accompanying text.

36. Southern Mut. Help Ass'n v. Califano, 574 F.2d 518, 522 (D.C. Cir. 1977). *See* National Consumer Information Center v. Gallegos, 529 F.2d 822 (D.C. Cir. 1977); Red School House, Inc. v. Office of Economic Opportunity, 386 F. Supp. 1177 (D. Minn. 1974); Mil-ka-ko Research &

some kind of hearing to review a federal agency's decision to terminate the grant relationship. The main objective is to demonstrate that the grantee has a property and/or liberty interest in the grant, which triggers procedural due process guarantees, and that the process due is notice of the possible deprivation of the grant and a pretermination hearing. The grantee of federal assistance programs has more than a mere expectancy of continued funding.[37] Although the source of a claim of entitlement may not be explicit in the statutes and rules dealing with assistance programs, it is implicit in the overall operation of the particular government programs.[38]

II. The Nature of and Congressional Purpose Behind Federal Grants

Neither the statutes creating the various federal assistance programs nor the agency regulations implementing those programs give a precise definition of the term "grant." Congress has recently attempted to provide some guidelines for characterizing the relationships between the federal government and the recipient of assistance and for distinguishing those relationships from ones created by government contracting. The Federal Grant and Cooperative Agreement Act of 1977[39] states that a procurement contract shall be used whenever the principal purpose is the acquisition by purchase, lease, or barter of property or services for the direct benefit or use of the federal government.[40] The Act does not define the term "grant," but it states that a type of grant agree-

Dev. Corp. v. Office of Economic Opportunity, 352 F. Supp. 169 (D.D.C. 1972), *aff'd mem.*, 492 F.2d 684 (D.C. Cir. 1974).

37. Mason, *supra* note 2, at 181. The Supreme Court has held that a mere "unilateral expectation" of a benefit does not confer a property interest. Rather, there must be "a legitimate claim of entitlement to it." Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

38. Entitlement to a particular benefit or status may be very real even though not explicit. For example, a person's interest in retaining state funded employment "is a 'property' interest for due process purposes if there are . . . rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." Perry v. Sinderman, 408 U.S. 593, 601 (1972). *See also* Goss v. Lopez, 419 U.S. 565 (1975) (statutory claim of entitlement arising from state laws establishing public schools and requiring attendance defines a property interest protected by due process); Bell v. Burson, 402 U.S. 335 (1971) (entitlement in driver's license prohibits revocation absent due process).

39. 41 U.S.C. §§ 501-509 (1976).

40. 41 U.S.C. § 503 (1976). The Act does not actually define a procurement contract but instead provides that executive agencies shall use a type of procurement contract as the legal instrument which reflects the relationship between the federal government and the other party whenever the principal purpose of that relationship is as mentioned in the text. The Act also

ment is to be used whenever federally authorized public service programs are to be implemented through the transfer of property, services, money, or other items of value to any nonfederal recipient, ranging from a state government to a private individual.[41]

The Act was a direct result of the recommendations of the Report of the Commission on Government Procurement issued in December 1972.[42] The Commission recommended legislation that would differentiate between procurement relationships and assistance relationships by limiting the use of the terms "grant," "grant-in-aid," and "cooperative agreement" to the latter, while reserving use of the term "contract" solely to the former. The Commission further recommended a comprehensive study to examine alternative means of implementing federal assistance programs and to determine the feasibility of developing a system of guidance for the use of grants, cooperative agreements, and other forms of assistance in carrying out federal assistance programs.[43]

The Commission found that grant-type activities clearly impinged on procurement issues because grants and contracts can be used interchangeably. The Commission considered the extent to which procurement rules and regulations are or should be applied to grant-type assistance. It found that federal grant activities comprise a vast array of assistance programs, functioning inconsistently and lacking central guidance. This lack of organization frequently leads to federal agencies using grants to eliminate competition or to achieve objectives better met by procurement contracts. The Commission thought these agency practices to be inappropriate.[44]

As mentioned earlier, the Act was primarily intended to distinguish between federal grant/cooperative agreement relationships and federal procurement activities. By doing so, it was hoped that the Act would

provides for the use of procurement contracts whenever a federal agency determines in a specific instance that its use is appropriate. *See* Wallick & Montalto, *supra* note 16, at 162-63.

41. 41 U.S.C. § 504(1) (1976).

42. "The Commission was created by Public Law 91-129 in November 1969 to study and recommend to Congress methods to promote 'the economy, efficiency, and effectiveness' of procurement by the executive branch of the Federal Government." S. REP. No. 449, 95th Cong., 1st Sess. 3, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 11, 13.

43. 3 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 162, 168 (1972) [hereinafter cited as REPORT OF THE COMMISSION]. Subsequently, these recommendations were embodied in S.1437, the forerunner of the Federal Grant and Cooperative Agreement Act. S. REP. No. 449, *supra* note 42, at 3.

44. S. REP. No. 449, *supra* note 42, at 7. *See* 3 REPORT OF THE COMMISSION, *supra* note 43, at 153-75.

begin to alleviate confusion as to the characteristics of the various legal instruments used in transactions involving the government. Accompanying the elimination of confusion would be a reduction in ineffectiveness and waste. Additionally, the Act defines the relationship between the federal government and nonfederal agencies.[45]

Sections 503, 504, and 505 require that the legal instruments used to effect transactions between nonfederal recipients and the federal government correspond to the types of relationships established.[46] Congress hoped that through the enactment of a statute providing these guidelines, executive agencies would be required to make conscious decisions that reasonably could be justified on the basis of the instruments chosen to reflect the basic nature of the relationship.[47] The three sections set uniform statutory guidelines on when executive agencies should use a grant rather than a contract. Their requirements are aimed at reducing confusion, preventing certain abuses, and reordering inconsistent practices that have resulted from the dearth of central legislative direction.[48] The Act further establishes guidelines to ensure that the appropriate type of legal instrument is selected for use in any given transaction. Through standardization both of the selection of instruments and of the terminology used therein, the Act is intended to define clearly the roles and responsibilities of the respective parties to the transaction.[49]

Possibly more important than the specific provisions of the Act itself is its requirement that a comprehensive two-year study be undertaken both to examine other ways of administering federal assistance programs and to explore the possibility of creating a comprehensive system for directing and overseeing the use of grants, cooperative agreements, and other forms of assistance in carrying out federal assistance programs.[50] The study may be important with regard to the rights of the grantee because there are indications that Congress intended that the study, through developing a comprehensive system of guidance for assistance programs, should give attention to problems faced by voluntary human services organizations, the burden of unnecessary adminis-

45. S. REP. No. 449, *supra* note 42, at 2.

46. *Id.* at 8. Note that the criteria spelled out in these sections do not determine the exact clauses and conditions contained in the instruments. *Id.*

47. *Id.* at 9.

48. *Id.* at 2.

49. *Id.*

50. 41 U.S.C. § 507 (1976). *See also* REPORT OF THE COMMISSION, *supra* note 43, at 168.

trative standards, and the rights of such organizations in event of disputes.[51] The study is to consider carefully the findings and recommendations of the Commission on Government Procurement, and will examine the possibility of developing a centralized system.[52]

Although Congress recognized that there were problems in the grant process and that it needed to develop devices to protect grantees' rights in event of disputes, the Act represents only an initial step in bringing some order to the grant process. Any further steps, especially in the area of grant disputes and protection for grantees, await further congressional action.

In general, then, a grant is "an award of assistance authorized, and meeting an express need recognized, by statute."[53] The grant does not necessarily fill a specified requirement or need of the government, but it helps the grantee or third party in an undertaking of his own that the government aids because of a generally defined and created congressional policy.[54] Every grant, however, does have stated objectives and limiting terms and conditions with which the grantee must comply, even though his specific goals may predominate.

Federal assistance programs typically are classified according to three types of grants: (1) categorical grants, (2) block grants, and (3) general revenue sharing.[55] Categorical grants are themselves divided into four areas: (1) formula grants, (2) project grants,

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51. S. REP. No. 1180, 94th Cong., 2d Sess. (1976), *excerpted in* S. REP. No. 449, *supra* note 42, at 32.

Similar legislation was introduced in the 93rd Congress, H.R. 9060 and S. 3514, and in the 94th Congress, H.R. 15499 and S. 1437. Congress unanimously passed the Federal Grant and Cooperative Agreement Act of 1976 on October 1, 1976, and the President pocket vetoed the bill. In the 95th Congress, the House and Senate reintroduced legislation that had passed in the 94th Congress: H.R. 7691, 95th Cong., 1st Sess. (1978); S. 431, 95th Cong., 1st Sess. (1978). *See* H.R. REP. No. 481, 95th Cong., 1st Sess. (1978); S. REP. No. 1180, 94th Cong., 2d Sess. (1976), *reaffirmed by* S. 431, 95th Cong., 1st Sess. (1978); S. REP. No. 1239, 93d Cong., 2d Sess. (1974), *reaffirmed by* S. 431, 95th Cong., 1st Sess. (1978).

For the complete legislative history, see S. REP. No. 449, *supra* note 42, at 3-6.

52. 41 U.S.C. § 507 (1976).

53. Mason, *supra* note 2, at 166.

54. *Id.* The authorizing statute may, in fact, be drawn in very broad and general terms—one reason being that Congress may have no idea of the manner in which the problem should be attacked. This may allow for grantee experimentation and flexibility in structuring the program, but it may also have the unfortunate result, from the grantee's viewpoint, of giving broad discretion to the grantor agency.

55. Madden, *supra* note 12, at 37 (citing ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, CATEGORICAL GRANTS: THEIR ROLE AND DESIGN 5 (1978) [hereinafter cited as A.C.I.R.]).

(3) formula-project grants, and (4) open-ended reimbursement grants.[56] The categorical project grant is the primary focus of this Article because broad discretion is delegated to the federal agencies in awarding or terminating these grants. These grants can be viewed as being discretionary because the group of potential recipients may be large or small, because funds may be available for a great many grants or merely a few, and because requirements and conditions of the grant may be provided for in the statute, implied in the legislative history, or left primarily to agency discretion.[57] The Federal Grant and Cooperative Agreement Act treats the categorical project grant as a grant-type assistance relationship.[58] It is from this type of assistance that most nonpublic institutional grantees receive their support from the federal government.

Perhaps because of the wide discretion given the federal agencies in administering such grant programs, the government continues to perceive the assistance as a conditional gift to the grantee who is the recipient of federal charity.[59] The government views the grant not as owned by or vested in the grantees, but rather as held conditionally with the conditions ensuring the fulfillment of the obligations by the grantee.[60] As a result, grantees have none of the rights or safeguards of those who carry out congressional directives under contract. Although the substantive law of general contracting applies nicely to government contracts, federal grantees are seen as objects of federal charity, without

56. *Id.* For a further discussion of the different types of grants and their uses, see A.C.I.R., *supra* note 55, at 5. For a discussion of the features of block grants and revenue sharing that are not covered here because they usually involve state and local governments, see Madden, *Future Directions for Federal Assistance Programs: Lessons from Block Grants and Revenue Sharing*, 36 FED. B.J. 107 (1977).

57. Wilcox, *supra* note 23, at 128. When a potential grantee challenged the awarding of grants by the Environmental Protection Agency, the court found Congress had placed the decision to award grants squarely within the discretion of the Secretary of Commerce and the EPA to determine the method of testing applications and to make the ultimate determination of approving the grants on the basis of the testing. Clark v. Richardson, 431 F. Supp. 105 (D.N.J. 1977).

58. 41 U.S.C. § 504 (1976). OMB Circular A-110, Grants and Agreement with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations—Uniform Administrative Requirements, 41 Fed. Reg. 32,016 (1976), defines grant to mean money or property provided in lieu of money paid or furnished by the federal government to recipients under programs that provide financial assistance or that provide support or stimulation to accomplish a public purpose. The OMB has a separate definition for grants-in-aid when the recipient is a state or local government.

59. *See* notes 25-27 *supra* and accompanying text.

60. Reich, *The New Property*, 73 YALE L.J. 733, 768-71 (1964).

any legal rights to the continued receipt of grant funds.[61]

As a result of this traditional governmental view of grants as conditional gifts, certain equitable obligations fall on the grantee.[62] Because the gift has been accepted, the terms and conditions of the gift have been accepted. These, according to the government, are enforceable against the grantee in any subsequent litigation. The United States also holds the power to revoke the grant. Thus, should the granting agency determine that grant funds are being used for purposes other than those intended, the agency may demand return of the funds to the federal government.[63] At the same time, the grantee has no rights or interests in the selection of grantees or continued funding beyond the grant period.

Arguably, such a view is inconsistent with the realities of the situation and subverts the constitutional doctrine of federalism. The power of the federal government to impose reasonable conditions on the use of federal funds, property, or privileges is well established.[64] However, there has been a growing recognition that federal grant making is no less important than federal contracting and, accordingly, that grantees should be provided with comparable safeguards. Even the government recognizes that "[n]o grant is a pure gift, unburdened with enforceable obligations. Some grantor-grantee interactions are always present. Every grant has stated objectives and limiting terms, and conditions, and every grant involves a grantor commitment of support."[65]

The grant should not be treated as a mere gift. The purpose of the

61. Boasberg & Hewes, *supra* note 19, at 400. *See* Cahn & Cahn, *supra* note 27, at 934.

62. *See* Conway, *supra* note 23, at 122-25; Wallick & Montalto, *supra* note 16, at 165-68; Wilcox, *supra* note 23, at 127-31.

63. Conway, *supra* note 23, at 123. It is a typical case of the agency wanting its cake and eating it, too. The agency retains all rights to grant funds and property, yet it does not want to give any rights to the grantee, which it views merely as a conduit.

64. King v. Smith, 392 U.S. 309, 333 (1967); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958); Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127, 143 (1947).

65. Wallick & Montalto, *supra* note 16, at 166. "The grantor can terminate only for cause or with mutual consent—otherwise the transaction has become wholly illusory and no valid commitment of government funds has been made." Mason, *supra* note 2, at 167. *See* G.A.O. ACCOUNTING PRINCIPLES AND STANDARDS FOR FEDERAL AGENCIES, 16.8(c), at 2-53 (1972) [hereinafter cited as G.A.O.]. *See generally* Burke v. Southern Pac. R.R., 234 U.S. 669 (1914). A statute was enacted stating if railroads would locate, construct and put into operation a designated line of railroad, then patents would be issued to the company confirming in it the right and title to the public lands falling within the descriptive terms of the grant. When the railroad performed its part, it was entitled to the issuance of the patents; the government could not treat the lands as a gift, yet to be delivered.

grant is to carry out some public interest, as defined by Congress, with the resulting advantages to the government and the public.[66] That public interest, as defined by Congress, signifies a congressional determination that public funds should be expended to accomplish a particular public purpose and/or policy but that they should be handled through private means.[67] Even though the government limits the grantee's grant funds by expecting the grantee to act as an agent of the public interest and in conformity with the grant's specific requirements, the government still aids the grantee in an undertaking of its own in which its goals structure the program.[68] The grantee has a right to complete his undertaking and to see that his goals are accomplished. A refusal to renew a grant, or its termination, or a similar action taken unilaterally, may deprive the grantee of this right and may destroy the grantee's autonomy and freedom in structuring the program, the very interests Congress sought to promote when it created the grant.[69]

In view of these important interests—that of the federal government in achieving the implementation of congressionally ordained policies and that of the grantee in achieving fulfillment of its public service mission—the network of expectations created by the establishment of grant programs should not be disturbed lightly by unilateral actions. This is

66. Helvering v. Davis, 301 U.S. 619 (1936); Burke v. Southern Pac. R.R., 234 U.S. 669 (1914). It is a carrying out of a congressional determination of a national purpose. Some criticism may be leveled at the use of older cases here and in the notes to follow since they all dealt with land grants to corporations or institutions. Because the land grant was the only transaction between the grantor and the grantee, there was no continuous relationship between the two as there is in today's grants. The land grant, however, was subject to conditions, and the government could have the land returned to them for a failure to comply with those conditions. The basic relationship involved is similar enough to apply some of the principles.

67. This Article focuses on discretionary grants, most of which go to a nonpublic institutional grantee. *See* text accompanying note 57 *supra*.

68. Mason, *supra* note 2, at 167.

69. That grants are intended to marshal and enlist federal resources in support of projects deemed worthy of federal resources is often implicit in the statutory language authorizing grant aid. Professor Cappalli in describing project grants gives an example of one such statute, the Solid Waste Disposal Act of 1976:

> The Administrator . . . shall conduct, and encourage, cooperate with, and render financial and other assistance to appropriate public . . . authorities, agencies and institutions, private agencies and institutions, and individuals in the conduct of, and promote the coordination of, research, investigations, experiments, training, demonstrations, surveys, public education programs, and studies . . . .

42 U.S.C. § 6981(a) (Supp. III 1979). *See* R. CAPPALLI, *supra* note 7, at 43. As one commentator has written, "The grant is dominated by the grantee's goal and his autonomy. . . . The grant is assistance to an autonomous grantee. The grantee is not an arm, agent or instrumentality of the grantor." Mason, *supra* note 2, at 167.

especially important because in most cases, adverse grantor decisions are based on a finding of some kind of grantee misconduct that, given the complex nature of the grant field, may be open to considerable doubt.[70] When important interests are at stake and the possibility of mistake is substantial, common sense suggests devising some procedural protections to guard against unwise grant decisions.[71] Before these procedural protections can be devised, however, the exact nature of the interest held by federal grantees must be determined. This issue necessarily precedes resolution of the question of how best to protect due process rights.

III. FEDERAL GRANTEE RIGHTS: TRADITIONAL THEORIES

As long as the grantee is seen as having no rights in the grant, both the legal and the political basis for government power at the expense of the grantee's autonomy and freedom are increased.[72] Because this characterization of the grantee's interest is often perceived as creating inequities, courts and legal scholars in recent years have advanced the

70. Professor Cappalli notes, "Grantees are usually sophisticated and wise enough to avoid obvious violations of the grant. Most of the alleged illegalities will stem from unclear federal policies or a confusing backdrop of facts. In more cases than not, noncompliance allegations are likely to be highly debatable." R. CAPPALLI, *supra* note 7, at 217.

71. Of course, no procedures can guarantee decision making that is wholly error-free, but when, as here, "[t]he risk of error is not at all trivial, . . . it should be guarded against if that may be done without prohibitive cost or interference with" the grant process. Goss v. Lopez, 419 U.S. 565, 580 (1975).

72. Reich, *supra* note 60, at 749. The focus of Professor Reich's article is on what he calls "government largess," the entire class of benefits and status flowing from government to individuals. Although he believes these items can help to promote abundance in society, he is concerned that they may simultaneously cause an imbalance in the political relations between government and citizens. To meet the problem, Professor Reich suggests that a new theory of property and property rights be developed. It is time, he writes,

> for us to remember what the framers of the Constitution knew so well—that "a power over a man's subsistence is a power over his will." We cannot safely entrust our livelihoods, and our rights to the discretion of authorities, examiners, boards of control, character committees, regents or license commissioners. . . .
>
> If the individual is to survive in a collective society, he must have protections against its ruthless pressures.

Id. at 787. The problem in the grant context is to find a proprietary interest in the grantee that entitles him to procedural protections. The problem can overlap with questions of substantive due process. When an agency can terminate a grant without any statement of reasons or without providing a hearing, the termination may be based on the exercise of constitutional rights. Denial of employment or property based upon an exercise, for example, of the right of association protected by the first amendment is impermissible. *See generally* Kirk, *Massive Subsidies and Academic Freedom*, 28 L. & CONTEMP. PROB. 607 (1963).

idea that the grantee does have at least some rights in the grant.[73]

A. *The Contract Theory of Federal Grant Law*

One theory that provides grantees with vested rights in the grant is the contract theory. The grantor-grantee relationship has been viewed as fulfilling all the classic elements of a contract.[74] Competent parties, proper subject matter, sufficient consideration, and consent are all present in the grant relationship.[75] The government seeks a result that furthers some national legislative purpose. In return for providing the money or property to accomplish this purpose, the grantee agrees upon the acceptance of the grant to use it for the grant purpose in accordance with grant rules,[76] thereby following the classic offer and acceptance model of contract law. By viewing the grant in this manner, a promissory commitment may be found in nearly every grant relationship.[77]

Federal assistance often is given subject to specific conditions that run with the grant. When the recipient accepts the grant, he also accepts the obligation to act in accordance with these conditions.[78] Execution of a grant agreement or approval of an application establishes a commitment of funds, and the agreement, application, or similar document is the obligating instrument that binds the United States government to disburse the grant funds unconditionally or under conditions solely within the control of the grantee.[79] By acting in the mode contemplated by such an instrument, the parties are brought into a contractual relationship within the terms of the proposal, which is obligatory on both.[80] Although the relationship between grantor and

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73. *See* notes 29-30 *supra* and accompanying text.

74. United States v. San Francisco, 310 U.S. 316 (1940); Burke v. Southern Pac. R.R., 234 U.S. 669 (1914); McGee v. Mathis, 71 U.S. 142 (1856). *See generally* 1 S. WILLISTON, TREATISE ON CONTRACTS § 18 (3d ed. 1957).

75. McGee v. Mathis, 71 U.S. 143, 155 (1866).

76. Mason, *supra* note 2, at 167. Examples of the various rules the grantor must follow are: (1) he must submit to an audit, 44 U.S.C. § 393(g) (1976); (2) he must give and live up to civil rights assurances, merit system, and fair personnel practices requisitions, 42 U.S.C. § 2000(d) (1976); and (3) he must follow work hour and minimum pay requirements that protect employees, 40 U.S.C. §§ 276(a), 326 (1976). *Id.* at 176-77.

77. Wilcox, *supra* note 23, at 126.

78. United States v. Frazer, 297 F. Supp. 319, 322 (M.D. Ala. 1968).

79. Mason, *supra* note 2, at 167 n.25 (citing G.A.O., *supra* note 65, at 1-53).

80. Note, however, that a grantee may terminate unilaterally, whereas the grantor may terminate only for cause or with mutual consent. Of course, should the grantee terminate, it surrenders its right to further funding. Mason, *supra* note 2, at 167. *But see* EPA, General Grant Regulation and Procedures, which provide that a grantee may not unilaterally terminate the project work for

grantee varies significantly from that of the parties in a procurement contract, both are essentially contractual in nature.[81] Every grant agreement expresses objectives and contains limiting terms and conditions that are enforceable against the grantee.[82] Similarly, in every case the grantor commits itself to providing support to the grantee.[83] Early cases seemed to hold that grants created an obligation by which the grantee could seek enforcement against the federal government as grantor.[84]

In one line of cases, the United States Court of Claims concluded that it had jurisdiction under the Tucker Act[85] when an aggrieved grantee sought enforcement of a grant against a federal agency.[86] It is unclear, however, whether the court exercised jurisdiction on the basis of a contract or under a statute or regulation.[87] The court said that the

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which a grant has been awarded, except for good cause. 40 C.F.R. § 30.920-2 (1981). Even if the grantee should breach this duty, however, the only apparent sanction is for the EPA itself to terminate the grant. *Id.* Upon termination the grantee must refund remaining grant funds. 40 C.F.R. § 30.920-4 (1981).

81. Wallick & Montalto, *supra* note 16, at 166.

82. King v. Smith, 392 U.S. 309 (1968). A state "substitute father" regulation denying AFDC payments to children of a mother who cohabits with an able-bodied man was held invalid because it defined "parent" in a manner inconsistent with federal law. State enforcement of the regulation was found a breach of a federally imposed obligation to furnish aid to eligible individuals that the state assumed by participating in the federal program. The case demonstrates how such a grant-in-aid program can be treated similarly to a contract. The ruling in *Smith* was handed down before the Court placed some limitations on the grant conditions that could be imposed on states in National League of Cities v. Usery, 426 U.S. 833 (1976). In Rosado v. Wyman, 397 U.S. 397 (1970), the Court, citing *Smith*, noted that, although participating states were obliged to comply with the terms of federal legislation, participation itself was "basically voluntary." 397 U.S. at 408.

83. Wallick & Montalto, *supra* note 16, at 166.

84. Helvering v. Davis, 301 U.S. 619 (1936); Burke v. Southern Pac. R.R., 234 U.S. 669 (1914); McGee v. Mathis, 71 U.S. 143 (1866). *See* notes 66 & 75 *supra* and accompanying text. The cases involved land grants to states or railroads with improvement or development of the land as the main objective.

85. 28 U.S.C. § 1491 (1976). The Tucker Act grants the United States Court of Claims jurisdiction to render judgment upon any claim against the United States founded upon the Constitution or any act of Congress, or any regulation of an executive agency, or upon any express or implied contract with the United States.

86. California v. United States, 551 F.2d 843 (Ct. Cl. 1976) (jurisdiction under the Federal Aid to Highways Act, 23 U.S.C. § 101 (1976)), *cert. denied,* 434 U.S. 857 (1977); Texas v. United States, 537 F.2d 466 (Ct. Cl. 1976) (jurisdiction under the Disaster Relief Act, 42 U.S.C. § 4401 (1976)); Whitecliff, Inc. v. United States, 536 F.2d 347 (Ct. Cl. 1976) (jurisdiction under the Medicare portion of the Social Security Act, 42 U.S.C. § 1395 (1976)), *cert. denied,* 430 U.S. 969 (1977).

87. *See, e.g.,* Whitecliff, Inc. v. United States, 536 F.2d 347 (Ct. Cl. 1976), in which the Court of Claims expresssly held that 28 U.S.C. § 1491 (1976) was the basis for its jurisdiction both on

assistance relationship and the documents in support of it created a contract.[88] Although the purposes behind a procurement contract and grant-type assistance differ substantially, the grantee still has a vital role and a major stake in the various grant programs and their administration.[89] In consideration, courts and grantor agencies have increasingly referred to the federal procurement model for resolving controversies under grant programs.[90]

The Federal Grant and Cooperative Agreement Act[91] may be viewed as providing some support for a contract analysis of the grant field. As previously discussed, the Act establishes uniform criteria for the selection of appropriate legal instruments with which to formalize relationships between the federal government and private contractors, state and local governments, and other entities that receive federal funds, property, or services. Congress identified a need to distinguish procurement relationships from assistance relationships[92] and hoped development of such criteria would meet this need. Execution of "a type of grant agreement"—the instrument the Act specifies for the crea-

account of the plaintiff's contract claim against the government and because of its claim under federal law. 536 F.2d at 351.

88. *See, e.g.,* California v. United States, 551 F.2d 843, 850 (Ct. Cl. 1976), *cert. denied,* 434 U.S. 857 (1977). *See also* Wallick & Chamblee, *Bridling the Trojan Horse: Rights and Remedies of Colleges and Universities Under Federal Grant-Type Assistance Programs*, 4 J.C. & U.L. 241 (1977).

89. In general, the grantee must submit a detailed proposal outlining how he will go about accomplishing the general goal the agency or Congress has set for the program. The grantee puts the flesh on the skeleton of a grant-in-aid program in a manner of speaking. The grantee invests considerable amounts of time and energy that should not go unrecognized. The grantee upon receiving the grant will hire staff members, enter into contracts and leases extending over several years, purchase any needed equipment, and make the other usual plans for staying in business.

90. An award of a grant has been held to create a relationship between grantor and grantee that is contractual, not donative. *See, e.g.,* Arizona v. United States, 494 F.2d 1285 (Ct. Cl. 1974). Under a Federal-Aid Project Agreement that expressly included a utility adjustment provision, and in view of payment of state's claim certifying that such amount was approved for payment and was justly due, the federal government had a contractual obligation to pay the state its proportionate share of the gas company's relocation costs incident to construction of an interstate highway. *Id.* at 1288.

In Texas v. United States, 537 F.2d 466 (Ct. Cl. 1976), valid execution of a document entitled "Federal-State Disaster Assistance Agreement," providing that disaster relief funding be made available, created a binding contract that obligated the United States to provide such assistance as was called for in the assistance agreement. *Id.* at 468.

91. 41 U.S.C. §§ 501-509 (Supp. III 1979). For discussion of the Act and its origins, see notes 39-54 *supra* and accompanying text.

92. 41 U.S.C. § 501e(a)(1) (Supp. III 1979).

tion of grant relationships[93]—will tend, by its form and content, to give a contractual gloss to a transaction. The legal instrument, combined with the ease with which one can find a promissory commitment in almost every grant,[94] renders the transaction similar to a formal contract proceeding between the parties.

Thus the perception of a grant as a gift is no longer legally sound; the law enforces the mutual undertakings in a contractual sense. The Federal Grant and Cooperative Agreement Act makes perception of the grant as a gift unnecessary and outdated by recognizing grants as a special category of assistance relationships. Furthermore, the perception of the grant as a gift is unrealistic, unwise, and unnecessary in a world of nearly 100 billion dollars of federal grant support.[95]

The principal purposes behind federal contracts and federal grants-in-aid are, however, generally different. Although the grantor-grantee relationship is in many ways similar to the contract relationship, there are several distinguishing factors. One distinguishing factor is the difference in purpose behind the two systems of transferring money, property, or services. Procurement contracts acquire property or secure services for the direct benefit or use of the federal government.[96] Grants or grant-type assistance, on the other hand, involve a transfer of anything of value to accomplish a public purpose authorized by statute.[97] This suggests another distinguishing factor: federal grant law is

93. 41 U.S.C. § 504 (Supp. III 1979). This section provides:

Use of grant agreements.

Each executive agency shall use a type of grant agreement as the legal instrument reflecting a relationship between the Federal Government and a State or local government or other recipient whenever—

(1) the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the State or local government or other recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; and

(2) no substantial involvement is anticipated between the executive agency, acting for the Federal Government, and the State or local government or other recipient during performance of the contemplated activity.

Id.

94. Wilcox, *supra* note 23, at 126.

95. Perception of grants as conditional gifts is subversion of our constitutional federalism. *See generally* 3 REPORT OF THE COMMISSION, *supra* note 43, at 153.

96. 41 U.S.C. § 503 (Supp. III 1979). Ordinary government contracts are for the purpose of procuring facilities, goods, and services for administering the needs of the federal government. Conway, *supra* note 23, at 121.

97. 41 U.S.C. § 504 (Supp. III 1979). "A grant is an award of assistance authorized, and meeting a need recognized, by statute." Mason, *supra* note 2, at 166.

purely statutory and therefore, in contrast to contract law, necessarily involves statutory interpretation.

A further distinguishing factor is that the rights and responsibilities of the parties are primarily established by instruments outside the agreement.[98] The grant statute, which has authorized the particular activity, and the regulations promulgated by the administrative agency to implement the program are the principal sources of both the objectives and the limiting terms and conditions of the grant. This contrasts with an ordinary contract situation in which the written instrument will normally contain all the terms and conditions defining the relationship. The grant agreement plays only the limited role of signaling the start of the relationship and fixing terms such as the project period, the grant amount, and the budget.[99] Although the grant agreement may or may not incorporate the statutory and regulatory standards by reference, those standards will apply, in any event, by their own force and not because they are mentioned in the agreement.[100] Often, federal grant programs are described in extremely vague terms because in many cases flexibility or experimentation in the implementation of grant projects is consciously sought.[101] Again, this contrasts to the specificity sought in the drafting of contracts to cover any possible situation. A further difference is that the grantee typically is not liable for failure to perform.[102] Finally, the grantee may, in most cases, terminate the project at will.[103] This is hardly the case in the contract setting.

The obligations between the grantor and grantee differ substantially from those customary in federal contracts. The obligation of the grantee in the use of the grant is to act as the agent of the public interest rather than solely in the service of his own self interest.[104] This obliga-

98. R. CAPPALLI, *supra* note 7, at 177.

99. *Id.* at 380.

100. *Id.* at 54.

101. *Id.* at 57-58.

102. Wilcox, *supra* note 23, at 129-30. The Office of Management and Budget considers nonliability one of the essential features of a project grant. OMB, CATALOG OF FEDERAL DOMESTIC ASSISTANCE XIX (1978).

103. Rubinstein v. Mayor of Baltimore, 295 F. Supp. 108, 111 (D. Md. 1969). *See also* Mason, *supra* note 2, at 166. In order to terminate the project at will the grantee must return any federal funds and property that remain. 34 C.F.R. § 75.496(a)(2) (1981) (Dep't of Education).

104. The public interest for which the grantee is an agent is not merely abstract. "Every grant program creates benefits not only for the direct recipient of the grant but also for third parties who have certain enumerated rights under the grant program." Madden, *supra* note 12, at 49. As a consequence, the due process issues that are the focus of this Article may be relevant vis-a-vis

tion is the most significant limitation on the use of federal funds. A contractee, on the other hand, merely provides a service or product for the government because it furthers his own interest in making a profit.

B. *The Trust Theory of Federal Grant Law*

Another commonly advanced theory that provides the grantee some rights in the grant is the trust theory.[105] A grant upon conditions is analogous to a trust, and acceptance of the grant places the grantee under an equitable obligation to abide by its conditions. This equitable obligation is independent of any express agreement on the grantee's part. The General Accounting Office has concluded that federal grant funds are held in trust by the grantee.[106]

The courts have equated grants to trusts by holding that equitable obligations devolve on the grantee through the grant relationship because grants are conditional gifts whose conditions have been accepted.[107] The United States is equated with the settlor, because it "retains an interest in any grant funds such that if the granting agency determines that the funds are not being used for the purpose of the

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more than one type of party. One commentator asks, "When the federal government takes unfavorable action on a grant, to whom is process owed?" R. CAPPALLI, *supra* note 7, at 36. Although the answer to this question, like most others in the grant field, is anything but clear, "numerous courts have recognized that the rights vested by law in . . . third parties are judicially enforceable." Madden, *supra* note 12, at 50. In support of this proposition, Madden cites Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (action brought by black students, citizens, and taxpayers in which the court found HEW had the duty to initiate fund termination proceedings against several public universities for the failure to comply with Title VI), and Brown v. Weinberger, 417 F. Supp. 1215 (D.D.C. 1976) (court directed HEW to enforce Title VI mandates within specified periods of time). Madden, *supra* note 12, at 50 n.208. Note, however, that plaintiffs were third party beneficiaries of civil rights legislation that they sought to enforce against federal grantees. They did not claim a right to due process review of grant fund termination. For a discussion of the role and rights of third party beneficiaries of federal grants, see R. CAPPALLI, *supra* note 7, at 35-36, 230-33; Madden, *supra* note 12, at 49-59.

105. Two commentators who support the trust theory try to measure grantee rights by comparing them to those of a trustee holding funds or property. *See* Conway, *supra* note 23; Wilcox, *supra* note 23.

106. 51 Comp. Gen. 162 (1971); 47 Comp. Gen. 81 (1967); 42 Comp. Gen. 289 (1962). Note, however, that opinions of the Comptroller General may also be cited in support of the contract analogy and the proposition that once a grant is "offered and accepted, a contractual obligation exists between the Government and the grantee." 51 Comp. Gen. at 166.

107. Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1957). Conditional grants were equated with trusts in Oregon & Cal. R.R. v. United States, 238 U.S. 393 (1915); Wyoming *ex rel.* Wyoming Agriculture College v. Irvine, 206 U.S. 278 (1907); Stearns v. Minnesota, 179 U.S. 223 (1900).

grant they must be returned to the Federal Government."[108] According to this trust analogy, the grantee receives legal title to the funds, facilities, or property,[109] and as such may have a sufficient property interest and thus fall within the protection from arbitrary government action afforded by the due process clause.[110]

Grantees have not, however, been held to the high fiduciary standard of responsibility and accountability that is normally applied to a trustee's handling of the *res* of a trust.[111] "The courts have not [even though equating the grant relationship to the trust relationship] found it necessary either to apply attenuated trust principles when enforcing obligations created by grants or to hold grantees to the inappropriately high fiduciary standards . . . typical of trust relationships."[112] Beyond living up to the grant conditions, the grantee is not made accountable for either the quantity or the quality of his performance.[113]

The factors that set the grantor-grantee relationship apart from the federal contracting model[114] apply with equal force to distinguish the relationship from a trust. A trust may occur either by a formal agreement or simply by holding property upon conditions agreed upon orally. When disputes arise between parties in a contract or trust situation, they are settled either by a provision in the agreement or by applicable principles from, for the most part, the common law. By contrast, federal grant law is purely statutory.[115] It is a complex set of rules and regulations that govern grant activity. Disputes that arise between the federal grantor and the nonpublic grantee are settled by reference to

108. Conway, *supra* note 23, at 123.

109. *Id.* at 124.

110. Flemming v. Nestor, 363 U.S. 603, 611 (1960) (old-age benefits under Social Security Act).

111. OMB Circular A-110, *supra* note 58. Attachment A-2 establishes as a general rule that grant funds do not have to be segregated from other funds belonging to the grantee.

112. Wallick & Montalto, *supra* note 16, at 168.

113. *See, e.g.,* Oregon & Cal. R.R. v. United States, 238 U.S. 393 (1915). Lands were granted to the railroad to aid in the construction of a railroad and telegraph line and upon completion patents would issue to the railroad company. The company was made a trustee of the lands granted and the conditions in the grants were treated as covenants and thus enforceable by the grantor. In Wyoming *ex. rel.* Wyoming Agricultural College v. Irvine, 206 U.S. 278 (1907) the Court held that land grants made for establishment of agricultural colleges, the disposition of the interest on the land grant fund, and the appropriation must be in accordance with the trust imposed upon it by the acts of Congress. *See generally* Catz, *Land Grant Colleges and Mechanization: A Need for Environmental Assessment*, 47 GEO. WASH. L. REV. 747 (1979).

114. *See* notes 25-27 *supra* and accompanying text.

115. R. CAPPALLI, *supra* note 7, at 177. *See also* Wilcox, *supra* note 23.

the grant statute or the rules and regulations promulgated by the administrative agency authorized to implement the statute. The grantee's nonliability for failure to perform, and his ability to terminate the project at will, are also not typical of a trust relationship. Grant administration has to be looked upon as a specialized branch of administrative law that, at this time, has little legal authority to guide it.[116]

C. *Shortcomings of Both Contract and Trust Theories as Applied to Federal Grants*

While both contract and trust theories[117] posit the grantee with rights in the grant, it has not been determined judicially whether these rights would reach the status of an entitlement and thereby trigger the protections of procedural due process. Even if such rights were considered an entitlement under either theory, neither theory by its own force would give any rights to a potential grantee whose application has been turned down, to a grantee who is merely not funded again for the next year,[118] or to a grantee whose grant has been terminated for cause.[119] Disputes that arise between the granting agency and grantee seem to

116. *See* notes 25-27 *supra* and accompanying text.

117. There has been some mention of a third theory, a partnership theory of grants, but there is little discussion of it in the literature. The theory can be dismissed summarily notwithstanding such purely superficial support for the theory as appears in the Urban Mass Transportation Assistance Act of 1970, 49 U.S.C. § 1601a (1976). There, reference is made to the purpose of the Act being "to create a partnership" that can meet urban transportation needs. For the most part, however, "[n]othing in existing statutes suggests that Congress mean[t] to place upon the federal grantor the obligations and liabilities assumed by partners in the commercial sense. Courts have been rightfully unwilling to impose the general liability of a partner upon the federal grantor." Wallick & Montalto, *supra* note 16, at 168-69. *See, e.g.,* United States v. Orleans, 425 U.S. 807 (1976), which held that a community action agency receiving federal funds from the Office of Economic Opportunity was not a federal agency, nor were its employees federal employees for the purposes of liability under the Federal Torts Claims Act. In ruling that the federal government was not liable for the alleged torts of its grantees, the Court held that the real issue was "not whether the community action agency receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." 425 U.S. at 815. *See also* Forsham v. Harris, 445 U.S. 169, 180-81 (1980) (award of federal grant does not create partnership relationship between government and grantee).

118. This is the situation in which the plaintiffs found themselves in Southern Mut. Help Ass'n v. Califano, 574 F.2d 518 (D.C. Cir. 1977). For a detailed discussion of this case see notes 127-48 *infra* and accompanying text.

119. Although many agencies do provide the grantee with a hearing, there are no minimal requirements that apply to all grant projects. Not all agencies require a hearing process. Furthermore, each agency has discretion to determine when it will terminate the relationship and possibly avoid any hearing process. Health and Human Services (HHS) (formerly HEW) has established a Department of Grant Appeals Board, 46 Fed. Reg. 43,816 (1981) (to be codified in 45 C.F.R.

center around these three funding decisions in which the grantee is provided with no procedural safeguards or constitutional rights. Neither theory can be seen as affording protection to grantees in any realistic sense because neither has been accepted by the Supreme Court, or by the government, in litigation over funding disputes.

IV. On What Basis is Process Due?

Notwithstanding the importance of determining the precise nature of the relationship between the government and the grantee, that determination remains of only secondary importance to the issue of whether due process principles apply to the given situation. In making this determination, one must "look not to the 'weight' but to the *nature* of the interest at stake."[120] Courts afford due process to protected liberty and property rights in acknowledgement of the fact that "the Constitution recognized higher values than speed and efficiency."[121] These higher values do not ensure that grant benefits conferred by the federal government may not be terminated or abridged, but, if such benefits constitute protected interests, the fifth amendment provides procedural safeguards. Moreover, in the grant field, as in other contexts, it truly may be said that "[i]t is procedure that spells much of the difference between rule by law and rule by whim or caprice."[122]

> When statutory benefits are at issue, and they may be discontinued only on the occurrence of specified reasons or for cause, the existence of such reasons or cause may be established only after the recipients of those benefits are given some form of hearing. The essence of due process is that legally generated expectations of continued receipt of government benefits may not be summarily denied by arbitrary administrative action. Notice and an opportunity to be heard enable the recipient of government benefits to retain their benefits by proving to the administrative agency that specified reasons or causes for termination of benefits have not occurred.[123]

§ 16). The EPA has set up a similar board to review disputed grant decisions. 40 C.F.R. § 1.20 (1980).

120. Board of Regents v. Roth, 408 U.S. 564, 571 (1972), *quoted in* Goss v. Lopez, 419 U.S. 565, 575-76 (1975). *Accord,* Fuentes v. Shevin, 407 U.S. 67, 86 (1972), *cited with approval in* Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Goldberg v. Kelly, 397 U.S. 254, 263 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337, 340 (1969).

121. Stanley v. Illinois, 405 U.S. 645, 656 (1972).

122. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., concurring).

123. Klein v. Califano, 586 F.2d 250, 258 (3d Cir. 1978) (en banc) (residents of nursing home

The crucial issue in fifth amendment analysis concerns whether parties seeking its protections have a legitimate claim to government program benefits and whether their claim may be justified objectively. For example, tenants of a federally financed housing project have a valid, statutorily created interest in the receipt of low cost housing benefits. Since their expectancy of continued receipt of those benefits may be justified objectively, their claim is cognizable under the fifth amendment. Tenants are entitled to notice of rent increases, an opportunity to make written objections, and receipt of a concise statement from the Federal Housing Authority stating the reasons for its actions.[124]

In the grant context, one must inquire whether and to what extent the grantee possesses similar interests. A right to due process for the federal grantee is predicated on a showing of a legitimate claim of entitlement to grant benefits. Furthermore, any effort to characterize the grantee's interest in grant benefits raises another closely related question: what is an appropriate funding period? The nature of grant programs causes some projects to extend longer than one or even two years.[125] Some degree of certainty about the continuity of project funding is desirable, because it permits the project investor to plan more adequately, to attract better assistants, and to make more judicious use of resources. The grant project may be planned to last over several

receiving medicaid funding had property interest in continued occupancy and were entitled to hearing prior to fund termination). *Klein* was subsequently overruled by the Supreme Court in a companion case, Town Court Nursing Center v. Beal, 586 F.2d 266 (3d Cir. 1978) (en banc), *rev'd sub nom.* O'Bannon v. Town Court Nursing Center, 444 U.S. 819 (1980) (patients have no interest in a particular health facility that entitles them to a pre-transfer hearing). *See also* Schwartz v. Federal Energy Regulatory Comm'n, 578 F.2d 417 (D.C. Cir. 1978) (when one has no procedural due process rights apart from those that the agency has chosen to create by its own regulations, scrupulous compliance with those regulations is required to avoid any injustice).

124. Geneva Towers Tenant Organization v. Federated Mortgage Investors, 504 F.2d 483, 489, 492 (9th Cir. 1974). Note that, prior to deciding the precise procedures federal housing officials were required to provide, the circuit court first had to determine whether the deprivation allegedly threatened concerned a specific benefit Congress had intended to bestow on the plaintiff tenants.

125. Professor Cappalli has observed that the standard practice of grantor agencies is to limit project periods to a single year notwithstanding that the nature of a program may logically require a longer project period. At the same time, many grantor agencies have recognized that no allowance for multi-year funding would impose artificial limitations on some grantees. R. CAPPALLI, *supra* note 7, at 301. A regulation promulgated by the Office of Education in 1976 governing projects awarded for the Consumers' Education Program is illustrative of this purpose: "While grant applications may be filed proposing multi-year projects, it is expected that a substantial proportion of projects funded by the Commissioner in any fiscal year will have a project duration of only one year." 45 C.F.R. § 160e.5(a) (1976) (removed 1979).

years, but the budgetary process occurs on an annual basis.[126] Even though the grantor agency and the grantee expect the project to last over several years, the grantee must have his grant renewed each year. Should the funding period be matched with the project period, or should it be the same as the budget period? Problems arise when the grantee's expectations for an appropriate funding period do not coincide with the agency's treatment or view of the funding period.

A. *Due Process on Non-Constitutional Grounds*

It was confusion over project periods and funding periods, combined with disagreement about the extent of a grantee's entitlement to the continued receipt of grant benefits, that led to litigation in *Southern Mutual Help Association v. Califano*.[127] The plaintiff in the case was Southern Mutual Help Association (SMHA), a nonprofit corporation organized under the laws of Louisiana to provide social services to sugarcane cutters and migrant workers. In 1971, under authority of the Migrant Health Act,[128] the Department of Health, Education, and Wel-

126. Annual budgeting is a consequence of a budgetary process tied to the congressional appropriations processes. Although a grantor agency may commit itself to a multiyear project, there is real difficulty—and hesitancy—in guaranteeing funding beyond one year, given the vagaries of congressional appropriations. R. CAPPALLI, *supra* note 7, at 302.

The limitations that are part of any award of grant funds are typified by the following regulation promulgated by the Public Health Service in 1976 that is applicable to grants for community health services: "Neither the approval of any project not any grant award shall commit or obligate the United States in any way to make any additional, supplemental, continuation, or other award with respect to any project or portion thereof. For continuation support, grantees must make separate application." 42 C.F.R. § 51c.106(c) (1980). Given that any commitment for multi-year funding is "highly conditional," the decision of whether to award a grantee a so-called continuation grant presents the federal grantor with an additional opportunity for the exercise of discretion. R. CAPPALLI, *supra* note 7, at 302. The Office of Education's regulations governing the National Reading Improvement Program, for example, set forth several typical bases of review relevant to a determination of whether Reading Improvement Projects should be continued. They include: Grantee compliance with applicable regulations, project effectiveness, and the extent to which a continuation of assistance furthers the involvement in the project of additional schools and students. *See* 45 C.F.R. § 162.17(e) (1978).

127. 574 F.2d 518 (D.C. Cir. 1977).

128. 42 U.S.C. § 242(h) (1970) (current version at 42 U.S.C. § 247(d) (1976)). That section (in pertinent part) authorized the Secretary of what was then the Department of Health, Education and Welfare (HEW):

> (1) to make grants to public and other non-profit agencies, institutions, and organizations for paying part of the cost of (i) establishing and operating family health service clinics for domestic agricultural migratory workers and their families . . . and (ii) special projects to improve . . . the health conditions of domestic agricultural migratory workers and their families . . . and (2) to encourage and cooperate in programs for the pur-

fare (HEW) awarded SMHA a grant to establish and operate a family health service clinic for migrant farmworkers and sugarcane cutters in southwestern Louisiana. Along with a letter announcing the award of the grant, SMHA received an HEW form entitled "Notice of Grant Awarded" that established a five-year "project period" and "grant period" of July 1, 1971, to June 30, 1976. The notice also referred to an approved one-year "budget period" of July 1, 1971 to June 30, 1972.[129] SMHA filed applications required for continued refunding in fiscal years 1972 and 1973, and these applications were approved. In both years, SMHA received a revised "Notice of Grant Award," again indicating the same five-year project period as well as the fiscal year budget period. These revised notices did not mention a "grant period" or "grant expiration date."[130]

On June 6, 1974, HEW informed SMHA that its 1974 application for continued funding was not to be approved.[131] The Department decided to award funding to a competing applicant because of what was termed SMHA's "cumbersome and unresponsive project administration."[132] The Department listed six areas of concern motivating its decision.[133]

Although SMHA notified HEW of its intention to challenge and appeal the adverse decision, HEW informed the grantee on June 25, 1974, that HEW's nonrenewal decision did not constitute grant termination and that for this reason rules governing grant termination procedures were inapplicable. The HEW Grant Appeals Board dismissed a formal application for review for want of jurisdiction on the ground that the denial of continued funding was not termination of an existing grant, but rather a pre-award decision relating to application for an addi-

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pose of improving health services, for or otherwise improving the health conditions of domestic agricultural migratory workers and their families.

Id. This section was subsequently renumbered and amended, in 1974 and 1975 respectively. *See* 42 U.S.C. § 247(d) (1976). It was the 1970 version of the section that governed SMHA's grant, however, and, of course, the *Southern Mutual* court relied on that version in its decision. This is in contrast to mandatory block formula, and open-ended reimbursement grants, in which Congress establishes conditions and directs that payments be made to all members of the eligible class who meet those conditions. These types of grants can be described as "entitlement grants." Their intended beneficiaries may demand participation as a legal right.

129. 574 F.2d at 520.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 521-22.

tional grant.[134]

On August 28, 1974, SMHA brought suit in U.S. District Court for the District of Columbia seeking declaratory and injunctive relief and money damages. SMHA argued that HEW regulations, the Administrative Procedure Act (APA), and the due process clause of the fifth amendment required the defendants to provide a hearing prior to any decision against continued funding. SMHA appealed the district court's grant of the defendants' motion for summary judgment.[135]

The core of the dispute involved a disagreement about the extent and duration of the grant benefits SMHA was entitled to receive. The specific issue was whether the challenged HEW decision divested SMHA of a vested present interest in the continued receipt of grant benefits or whether that decision pertained to a new and independent grant of additional benefits in which SMHA had no present entitlement. Resolution of this issue was a prerequisite to the question of whether the plaintiff was entitled to procedural protections.

After considering and rejecting appellee HEW's contention that SMHA lacked standing to sue,[136] the circuit court examined the merits of the plaintiff's claims, the first being that HEW departmental regula-

134. *Id.* at 521. For jurisdiction of the Grant Appeals Board, see 45 C.F.R. § 16.5 (1980).

135. 574 F.2d at 521.

136. *Id.* at 522-25. In addressing the standing issue, the court in *Southern Mutual* focused on two standing requirements: the Article III case or controversy requirement and the nonconstitutional prudential requirement.

As to the Article III limitation, the court cited Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26 (1976), for the proposition that a plaintiff has standing to assert an otherwise justifiable claim when he "has shown an injury to himself that is likely to be redressed by a favorable decision." 426 U.S. at 38. The court held that SMHA had met this 'injury in fact' requirement for standing by its allegation that the HEW action it challenged had damaged its reputation and good name. Because reputation was found to be a key element in agency grant decisions, the court was able to find that the cloud HEW had placed over SMHA might lead to an "inhospitable reception" for the plaintiff's future grant applications, thereby threatening the "very lifeblood" of SMHA's existence. 574 F.2d at 524. Because this alleged injury could be redressed by a judicial remedy, SMHA was able to meet the Article III standing test.

In regard to the nonconstitutional prudential standing limitation, the circuit court cited Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970). *Camp* established, apart from any case or controversy test, a requirement that the interest a plaintiff seeks to protect be "arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153. As applied to SMHA, the "zone test," which was held to be "a quite generous standard," required scrutiny of the Migrant Health Act. *See* note 128 *supra* and regulations issued under authority of the Act. The circuit court found that Congress, in that Act, had recognized that conduit organizations such as SMHA were necessary "to deliver the services contemplated." Accordingly, the court had "no trouble" in concluding

tions required a hearing prior to adverse action. HEW argued that the action it had taken "was not 'termination', but rather a 'pre-award decision to an application for the additional grant.' "[137] It stated that although it had approved SMHA for a five-year project in 1971, the project was made up of five separate and individual one-year grants and corresponding budget periods. SMHA was required to reapply each year for each one-year grant. Thus the 1974 decision not to refund was not a termination at all because the grant for fiscal 1974 was unaffected and grants for the final two years had not yet vested.[138]

The court rejected this argument, holding that the case was an inappropriate one in which to give deference to an agency's interpretation of its own rules.[139] Instead, the court took notice of the logic behind the establishment of the HEW grant appeals process: "to afford to aggrieved grantees maximum due process."[140] Regulations providing for this grant appeals process defined "termination" as "the termination of the grantee's authority to charge allowable costs to a grant prior to the grant expiration date in the grant award document."[141] The court held that the grant expiration date in the grant award document was June 30, 1976—the date appearing originally in SMHA's 1971 award notice. This finding led to the conclusion that the decision not to refund SMHA for fiscal 1974 was, as the grantee asserted, a termination and not a pre-award decision.[142]

Having accepted SMHA's assertion that its grant had been terminated by HEW, the court agreed that the HEW Grant Appeals Board,

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that SMHA had asserted an interest that was "arguably within the zone of interests" protected by that Act. 574 F.2d at 523.

For a more detailed examination of the standing issues as they affect grantees generally, and as they arose in *Southern Mutual* particularly, see Catz, *supra* note 23.

137. 574 F.2d at 526.

138. *Id.* HEW in its argument relied on 42 C.F.R. § 56.107(a) (1974). For the text of a very similar regulation, see note 126 *supra*. That this reliance may have been misplaced is indicated by the court's awareness that the regulation had been rescinded. 574 F.2d at 526 n.41. Note, however, that another similar regulation was included in the same Part 56 in 1976. 42 C.F.R. § 56.106(c) (1980).

139. 574 F.2d at 526-27.

140. *Id.* at 525 (quoting 37 Fed. Reg. 24,676 (1972)).

141. 45 C.F.R. § 16.3(i) (1975).

142. 574 F.2d at 527. The court also noted that a finding of termination was in accord with another definition in Title 45: " 'Termination' means the cancellation of Federal Assistance, in whole or in part, under a grant at any time prior to the date of completion." 45 C.F.R. § 74.110 (1976). This regulation has since been revised in such a way as to make a finding of termination in a situation like *Southern Mutual* much less likely.

established "for the purpose of reviewing and providing hearings upon post-award disputes,"[143] had jurisdiction over SMHA's challenge of its grant termination.[144] Accordingly, the court held that HEW's own regulation required that it provide SMHA with a hearing. The court vacated judgment and remanded the case with instructions that a formal hearing be held before the Grant Appeals Board. This was to provide SMHA with an opportunity to rebut the allegations against it. If SMHA could rebut the allegations, they were to be stricken from the record to the extent that they were without basis.[145] Because the court was able to dispose of the case on narrow regulatory grounds, it declined to consider the plaintiff's due process constitutional claim.[146]

In a dissent, Judge Wilkey expressed disagreement with the court on both the standing issue[147] and the merits.[148] The essence of Wilkey's argument concerned the HEW regulations. He maintained that it was appropriate to defer to HEW's interpretation of its own regulations rather than to apply the doctrine of *contra proferentem*. The two reasons advanced in favor of deference to the departmental construction were that it was reasonable and that it was consistent with congressional intent in enacting the Migrant Health Act that migratory workers rather than health care delivery agencies be benefited.[149] Another concern articulated by Judge Wilkey was that providing broad procedural protections to grantees such as SMHA might entrench a private bureaucracy "beyond effective government control" and thus "perhaps superordinate the interests of the grantees over those of the beneficiaries."[150]

In *Southern Mutual*, the grantee was able to secure due process protections by demonstrating that it had a legitimate claim of entitlement to grant benefits. The ability to make this showing, however, rested not on anything intrinsic to the nature of grants, but rather on an award document that bestowed a present vested interest in continued receipt of grant benefits until June 30, 1976. Moreover, SMHA was forced to rely on regulations defining adverse action of the type taken against it

143. 45 C.F.R. § 16.1 (1980).
144. 574 F.2d at 525, 528.
145. *Id.* at 528.
146. *Id.*
147. *Id.* at 528-32 (Wilkey, J., dissenting).
148. *Id.* at 532-34 (Wilkey, J., dissenting).
149. *Id.* at 533 (Wilkey, J., dissenting).
150. *Id.* at 534 (Wilkey, J., dissenting).

as a termination. This case therefore demonstrated that a federal grantor, by the simple expedient of a narrow revision of its regulations, could obviate the necessity of providing due process.[151] In order to guarantee that a grantee's procedural rights cannot be legislated or regulated away, it is necessary to establish that these rights are constitutionally protected interests.

B. *Due Process on the Basis of a Property Interest*

One of the bases upon which a grantee may claim the guarantee of procedural due process is that the grantee possesses a protected property interest. Property represents a relationship between wealth and owner.[152] Traditionally, a person obtained the item of wealth in the form of a tangible good and gained certain legal rights with respect to that item. Among these was the constitutional right not to be deprived of that item of wealth without due process of law. In the seminal case of *Goldberg v. Kelly*, however, the Supreme Court adopted the concept of entitlements, the more important of which are statutory entitlements that flow from government.[153] The Court held that a termination of welfare benefits, absent an opportunity for a prior evidentiary hearing, was a denial of procedural due process in violation of the fourteenth amendment.[154] Although the Court did not precisely limit the definition of constitutionally protected property interests under the label of entitlement, the Court in subsequent cases made it clear that a recipient's expectation of the continued receipt of a benefit may qualify as a legitimate claim of entitlement if this expectation is based on an objective source such as a statute, rule, or policy.[155] The government in some manner must have indicated that the recipient could rely on the continuation of the benefit absent some cause for termination and that the recipient must now in fact rely on continued receipt in his daily life.

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151. This type of revision has already been made. *See* note 140 *supra* and the regulations cited therein.

152. The proposition that property represents a relation between a thing and its owner has been recognized numerous times in dicta. *See, e.g.,* Button v. Drake, 302 Ky. 517, 522, 195 S.W.2d 66, 69 (1946); *In re* Marriage of Breen, 560 S.W.2d 358, 363 (Mo. Ct. App. 1977); Senior v. Braden, 128 Ohio St. 597, 608, 193 N.E. 614, 618 (1934). *See also* Reich, *supra* note 60, at 739.

153. Goldberg v. Kelly, 397 U.S. 254, 263 (1970). The entitlement that the government dispenses usually take the form of rights or status. *See* Reich, *supra* note 60.

154. 397 U.S. at 263.

155. *See, e.g.,* Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

Thus, termination of an entitlement to government benefits "adjudicates important rights."[156] By conferring an entitlement on a recipient, the government is obliged to provide benefits to which the recipient is entitled as of right. "The concept of equal treatment also inheres in entitlement and argues against basing eligibility on special statutes . . . ."[157] Recent case law confirms that individuals in whom statutory entitlements are vested cannot be deprived of their government benefits without due process of law.[158] The same safeguards have been held to

156. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1256 (1965).

157. *Id.*

158. *See* note 38 *supra* and cases cited therein. Two major schools of interpretation have emerged from the line of cases exemplified by Goldberg v. Kelly, 397 U.S. 254 (1970). One view is that the due process clause will serve as a general prohibition against government arbitrariness, requiring fair procedures whenever the state acts to the detriment of an individual. A second interpretation regards these cases as deciding a very narrow constitutional issue. *See* notes 120-22 *supra* and accompanying text. The first view was apparently rejected in Board of Regents v. Roth, 408 U.S. 564 (1972). There the Court noted that although there were no "rigid or formalistic limitations on the protection of procedural due process," it was still necessary to observe "certain boundaries." 408 U.S. at 572. These "boundaries," of course, are the outer limits of the terms "liberty" and "property." Regardless of which view is the correct one, it is clear that *Goldberg* and its progeny have advanced the boundaries of "property" to include those government benefits in which persons have a statutory entitlement. This should ensure that no one is arbitrarily deprived of a benefit to which the government has said he is entitled. Note, however, that the fact that property interests are created by independent sources other than the Constitution, 408 U.S. at 577, does not make due process protections contingent on whether the interest asserted is considered an entitlement as defined by federal, state, or local governments. Allowing government entities to decide this question would defeat the guarantees of the fifth and fourteenth amendments by allowing government to decide when due process protections apply. *But see* Justice Rehnquist's plurality opinion in Arnett v. Kennedy, 416 U.S. 134 (1974). Justice Rehnquist, writing for himself and two other justices, determined that a nonprobationary federal employee did have a property interest in a position from which the statute provided he could not be removed other than for "such cause as will promote the efficiency of [the] service." 416 U.S. at 151-52. However, Justice Rehnquist also decided that the procedure to which the employee was entitled for the determination of "cause" was subject to whatever limitations Congress had imposed in the section that conferred the property interest. The entitlement conferred by statute was "not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedure which Congress has designated for the determination of cause." 416 U.S. at 152. Six justices indicated their disagreement with this view that the government, in creating a statutory right, could simultaneously limit the procedural protections which attend it. As Justice Powell wrote in an opinion concurring with the result:

> While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.

416 U.S. at 167 (Powell, J., concurring). Regarding the development of Justice Powell's views on this subject, see Goss v. Lopez, 419 U.S. 565, 586-87 (1975) (Powell, J., dissenting).

apply where statutory entitlements in government benefits have been conferred on institutions.[159]

Federal grant-type assistance is plainly wealth, but is it property? Is there that relationship between the wealth and the grantee? Absolute ownership of property has never been a prerequisite for due process protections to come into play, and there is no doubt that the grantee does not have complete ownership of the grant funds. Fortunately for grantees, however, ownership of grant funds is not the deciding factor in determining whether there is a property interest in a particular grant. Rather, the key question is the nature of the grantee's relationship to the grant, the item of wealth. The answer determines whether a protected property interest exists. For many grantees, the status that is

159. In an action by grantees to review a decision denying the application to refund a project under E.O.A., it was held that the grantees were not intended to have a continuing property interest in funds and equipment, and in absence of an informal agreement or an intention to chill constitutional freedoms, grantees were not entitled to due process procedures on denial of funding. The denial was not considered a termination of the grant. Mil-Ka-Ko Research & Dev. Corp. v. Office of Economic Opportunity, 352 F. Supp. 169 (D.D.C. 1972), *aff'd mem.* 497 F.2d 684 (D.C. Cir. 1974).

A state statute prohibited the revocation, suspension, limitation, or annulment of a nursing home's certificate of operation without a hearing. Nursing homes are entitled to a hearing before the termination of their participation in the Medicaid program when the state agency's refusal to waive fire codes would operate as an effective limitation on the operating certificate of the nursing home. Maxwell v. Wyman, 458 F.2d 1146 (2d Cir. 1972).

A nursing home operator who received Medicaid payments on behalf of the nursing home residents was held to have a property right in her expectation of continued receipt of Medicaid payments as long as the home complied with state and federal requirements. Such property could not be taken without due process of law, which requires, at a minimum, notice and a hearing. Hathaway v. Mathews, 546 F.2d 227 (7th Cir. 1976).

A recipient such as a grantee was entitled to certain forms of notice and opportunities to be heard in connection with suspension or termination hearings concerning its grant. Such recipients had ascertainable and identifiable interests in the grant and the right to demand that O.E.O. comply with its published regulations. Red School House, Inc. v. Office of Economic Opportunity, 386 F. Supp. 1117 (D. Minn. 1974).

When plaintiff was no longer to be funded as an independent organization but would be merged with legal services organization in another county, it was held that this did not involve an interest that comes under the protection of the due process clause for a full and fair hearing. The decision, although constituting the merger as a denial of refunding rather than termination, held that due process still required reasonable notice and an opportunity to show cause. Monmouth Legal Servs. Organization v. Carlucci, 330 F. Supp. 985 (D.N.J. 1971).

There is a right of notice and a pretermination hearing prior to cut-off of Medicaid payments when the state manual provides for such notice and hearings in the event the state intends to terminate a provider for reasons other than violation of federal law. Briarcliff Haven, Inc. v. Department of Human Resources, 403 F. Supp. 1355 (N.D. Ga. 1975).

conferred by the very fact that the government has chosen to award a grant constitutes a property interest.

Status may be the main source of subsistence for a person.[160] The benefits the federal government dispenses, in large part, take the form of status.[161] The argument that a person has no constitutional right to be a grantee ignores the real issue. The problem is not whether a person has a right to a particular status, but whether once a person acquires such status through government action he should be provided with certain safeguards before he is deprived of that status by government action.[162] As indicated, the consequences of deprivation may be

160. *See* Reich, *supra* note 60, at 738. Recognition that status could be the main source of someone's subsistence was shown by the Supreme Court in Goldberg v. Kelly, 397 U.S. 254 (1970). The decision in that case was motivated in part by an appreciation of the possible consequences of a summary termination of the *Goldberg* plaintiffs' status as Aid to Families of Dependent Children recipients. 397 U.S. at 264.

161. *See* Reich, *supra* note 60, at 739.

162. *See, e.g.,* Greene v. McElroy, 360 U.S. 474 (1959). In *Greene*, the Court was confronted with the interest of an aeronautical engineer in a government security clearance allowing him access to classified defense materials. Greene's employer, a firm principally engaged in work on defense contracts, was required by the terms of its contracts with the military to exclude from its projects any employee denied or deprived of a security clearance by defense department officials. In accordance with procedures devised by the Secretary of Defense and the individual Armed Services, it was concluded that Greene's " 'continued access to Navy classified security information [was] inconsistent with the best interests of National Security.' " *Id.* at 481. His security clearance was therefore revoked. The contractual necessity to exclude from defense projects employees without clearance resulted in Greene's dismissal. Greene was unable thereafter to secure a new position in aeronautical engineering, and was finally reduced to accepting employment at less than one quarter of his previous salary. Although Greene was afforded a hearing at which to challenge the deprivation of his status as "loyal," at no time did he have an opportunity to confront or cross-examine government informants who furnished information against him. Indeed, it was apparent from the record that officials who conducted the hearing and made the decision adverse to Greene had never personally examined these informants, but had relied instead on an investigator's summary report of what the informants had said.

The Court readily agreed that revocation of Greene's government conferred security clearance had affected fifth amendment "liberty" and "property" by impinging on "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference." *Id.* at 492. The necessity for a constitutional decision as to whether the procedures afforded Greene denied him due process was avoided when the Court held that, absent an explicit authorization by Congress or the President, the procedures employed in Greene's case were insufficient to revoke a security clearance. *Id.* at 507-08. Had the Court found explicit authorization, it would have been required, of course, to determine whether the defense department's procedures passed constitutional muster. Dictum that the opportunity to confront and cross-examine accusers was among "[c]ertain principles [that] have remained relatively immutable in our jurisprudence," *Id.* at 496, strongly implies these procedures would have been disapproved. *Greene* is therefore significant because it suggests that status to which an individual obviously has no abstract right, namely a security clearance, once conferred assumes the attributes of a government entitlement. Similarly, in Goss v. Lopez, 419 U.S. 565 (1975), it was held that status as public school pupils, to

very grave. When, for example, a grant is terminated or re-funding is refused, the result is the same regardless of the terminology: the livelihood of the grantee's employees may be jeopardized, and the very existence of the grantee itself and its programmatic mission may be endangered.[163]

If the grantee has more than a mere unilateral expectation of its continued status as a grantee, and if there are rules and mutual understandings as to a continued status, then the grantee deserves the rights and safeguards that are connected with an entitlement. The government does recognize that the grantee has certain rights and has therefore established certain guidelines for hearings concerning grant termination.[164] The denial of a grantee's application[165] or a failure to

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which there is no constitutional right, *id.* at 572, once it has been advanced by the state, cannot be revoked or even suspended "absent fundamentally fair procedures." *Id.* at 574. Appellees in *Goss* were public high school students who had received ten day suspensions from school for their alleged misconduct. No opportunity to challenge the suspensions at a hearing was afforded. Appellees therefore alleged a denial of procedural due process guaranteed them by the fourteenth amendment.

Admitting there was no constitutional right to a public school education, the Supreme Court nonetheless held that Ohio statutes directing local officials to provide free education to resident children and providing for compulsory attendance vested in appellees "legitimate claims of entitlement." *Id.* at 573. Although the Court was willing to concede that a ten day suspension was a mild deprivation in relative terms, it rejected the appellants' view that it was de minimus. *Id.* at 576.

The temporary deprivation of student status faced by the *Goss* appellees was not held to require all traditional safeguards such as the right to counsel or to confront and cross-examine witnesses. *Id.* at 583. Students were, however, to be informed of the misconduct with which they were accused and to be given an opportunity to be heard in their own defense, either before or soon after the suspension. *Id.* at 581-83. The decision in *Goss* indicates the recipient of government conferred status has received an interest of constitutional dimensions. It also indicates an unwillingness to accept the premises underlying the plurality opinion in Arnett v. Kennedy, 416 U.S. 134 (1973). *See* note 155 *supra*.

163. *See* note 13 *supra* and accompanying text.

164. OMB Circular A-110, *supra* note 58, § 3, Attachment L "Suspensions and Termination Procedures." This sets out three alternatives for grantors who wish to suspend or terminate a grant:

1. After reasonable notice, a grantor may suspend a grant for cause, that is, because of a grantee's failure to comply with the terms of the grant or other agreement, conditions or standards.
2. If a grantor determines a recipient has failed to comply with its requirement, the grantor may terminate a grant for cause by sending a notice. The letter must set out the reasons for the termination.
3. There may be a termination made by mutual agreement of grantor and grantee, labeled as a termination convenience.

Id. These provisions give the grantee more than unilateral expectation of continued funding, an interest that should be protected by at least the minimal safeguards required by due process. *See also* note 17 *supra* and accompanying text.

renew his grant, that is, the failure to re-fund, directly involves the

165. Logic suggests that a grantee with a present vested interest in a grant will be more likely to have success in pressing due process claims than will a disappointed grant applicant. *See* note 16 *supra*. The rights of applicants for government benefits are held more tenuously than those of persons in whom such benefits are vested. The decision in Goldberg v. Kelly, 397 U.S. 254 (1970), protected the due process rights of welfare recipients facing a termination of AFDC. At issue was "the withdrawal of public assistance benefits," *id.* at 262, and not the decision of whether to advance the benefits. In the grant context, a federal circuit court of appeals has refused to hold that disappointed applicants have standing to challenge federal grant decisions. The court distinguished the level of damage resulting from the interruption of an existing grant relationship as compared to the harm worked by the denial of a grant application. Southern Mut. Help Ass'n v. Califano, 574 F.2d 518, 525 (D.C. Cir. 1977).

Recently, however, a precedent has been established for affording due process rights to aggrieved applicants for government benefits. This precedent, if followed, may presage a major expansion of the scope of statutory entitlements and could have significant implications in the grant field. The case, which held that California laws had created legitimate claims of entitlement in applicants for General Relief Program benefits, is Griffeth v. Detrich, 603 F.2d 118 (9th Cir. 1979), *cert. denied sub nom.* Peer v. Griffeth, 445 U.S. 970 (1980).

Griffeth was a class action suit on behalf of persons whose applications for General Relief (GR) benefits had been or would in the future be denied by the San Diego County Department of Welfare. Brought under 42 U.S.C. § 1983 (1976), the plaintiffs' suit challenged the constitutional adequacy of county procedures for reviewing GR applications. The plaintiffs appealed the grant by a federal district court of summary judgment for the defendants on the ground that an applicant had neither a property interest nor a legitimate claim of entitlement to the benefits desired. Griffeth v. Detrich, 448 F. Supp. 1137, 1141 (S.D. Cal. 1978).

California statutes required that each county in the state provide relief for all incompetent, incapacitated, poor, and indigent persons who were legal residents within the county and who were without alternative means of support. It was also provided by statute that each county's board of supervisors, or an authorized agency, adopt regulations by which to administer the General Relief Program. CAL. WELF. & INST. CODE §§ 17000-17001 (Deering 1979). The circuit court ruled that these statutes, and regulations promulgated under their authority, "define[d] the eligibility conditions for obtaining benefits" under the GR program. 603 F.2d at 120. Each county was able to exercise discretion in setting eligibility standards as long as these were consistent with the statute and " 'reasonably necessary to effectuate its purpose.' " *Id.* (citing Mooney v. Pickett, 4 Cal. 3d 669, 679, 483 P.2d 1231, 1237, 94 Cal. Rptr. 279, 285 (1971)). In San Diego County, the board of supervisors adopted basic policies, and a Department of Public Welfare was empowered to issue implementing regulations, which it then administered. A program guide incorporating the regulations set forth criteria and procedures for establishing GR eligibility.

The plaintiffs' representative party applied to the Department for general relief on August 18, 1976. She had been fired from her waitress job for alleged improper dress, although she denied this impropriety at her screening interview. Plaintiff's application was, nevertheless, denied because "she was 'apparently fired for cause.' " Griffeth v. Detrich, 603 F.2d at 120. At a requested administrative review, a supervisor reviewed plaintiff's file and a single attempt to reach her former employer was unsuccessful. The application was again denied.

In federal court, the plaintiff and others in her position argued that San Diego County, in providing administrative review for the denial of GR applications, had failed to satisfy the requirements of procedural due process. They asserted that their interest in general relief benefits were protected by the fourteenth amendment.

The circuit court, in considering the plaintiffs' claim, examined the interest asserted "to deter-

grantee with the government, subject to the rules the latter has estab-

mine whether applicants for general relief have a 'legitimate claim of entitlement' to such benefits." *Id.* Finding that plaintiffs had such a claim, the court relied primarily on the Supreme Court's decision in Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979). *Greenholtz* involved a challenge to the constitutional adequacy of the procedures by which the Nebraska Board of Parole made discretionary parole release determinations. In a narrow decision the court rejected the assertion by plaintiff inmates that a state, by merely holding out the possibility of parole, conferred an interest of constitutional dimensions. Some merit was found, however, in an alternative argument that "the Nebraska statutory language itself create[d] a protectable expectation of parole," and the Court held that "the expectancy of relief provided in this state is entitled to some measure of constitutional protection." *Id.* at 11-12.

The holding in *Greenholtz* followed from an analysis of the statutory language that defined the asserted interest. The circuit court's own statutory analysis in *Griffeth* revealed that "[h]ere the authorizing statute also uses mandatory language." 603 F.2d at 121. California had *required* each county to provide general relief. Moreover, San Diego County had adopted by regulation "specific objective eligibility criteria for the receipt of aid" that significantly restricted the discretion intake eligibility workers were able to exercise. *Id.* Indeed, the county's GR program guide provided that "[i]f there is a stated policy, procedure or regulation a judgmental decision is *neither* required *nor* permitted." *Id.* (emphasis in original). Therefore, based on its analysis of California law, the circuit court held that "[t]he authorizing statute coupled with the implementing regulations of the county creates a legitimate claim of entitlement and expectancy of benefits in persons who claim to meet the eligibility requirements." *Id.* In deciding the case, the circuit court was unwilling to be persuaded by Zobriscky v. Los Angeles County, 28 Cal. App. 3d 930, 105 Cal. Rptr. 121 (1972), a state court case on which the district court had relied. The flaw in *Zobriscky* was the state court's focus, in deciding the right to a due process hearing, on the applicant-recipient distinction rather than on whether "the applicants have a legitimate expectation of receiving benefits." 603 F.2d at 1122.

In the Supreme Court, Justice Rehnquist dissented from a denial of a petition for certiorari. Peer v. Griffeth, 445 U.S. 970, 970 (1980) (Rehnquist, J., dissenting). Justice Rehnquist regarded the circuit court decision in *Griffeth* as "a significant step . . . to expand the ruling of this Court in Goldberg v. Kelly, 397 U.S. 254 (1970)," which he believed warranted "plenary consideration" by the Court. 445 U.S. at 970 (Rehnquist, J., dissenting). The dissent, citing Zobriscky v. Los Angeles County, 28 Cal. App. 3d 930, 105 Cal. Rptr. 121 (1972), noted the California courts' unwillingness to extend hearing rights to disappointed general relief applicants because of their refusal to deem general relief a protected property interest. 445 U.S. at 970 (Rehnquist, J., dissenting). Justice Rehnquist conceded that "[o]bviously this Court cannot parse every state-law provision to determine whether it creates a protected 'property interest,'" but thought the extent of the *Goldberg* expansion warranted Supreme Court review in this case. 445 U.S. at 970-71 (Rehnquist, J., dissenting). Quoting the district court decision in *Griffeth*, the Justice highlighted the difference between the right to a pretermination hearing for an AFDC recipient of the type *Goldberg* mandated and a similar hearing right for a disappointed general relief applicant. *Id.* at 971 (citing Griffeth v. Detrich, 448 F. Supp. 1137, 1139 (S.D. Cal. 1978)) (Rehnquist, J., dissenting).

No other Justice joined Justice Rehnquist in his dissent to the denial of certiorari. Moreover, it is common that a dissenter will state in very broad terms the significance of the case that has allegedly been decided erroneously. Nevertheless, there are good reasons for attaching some weight to Justice Rehnquist's opinion as to the importance of *Griffeth v. Detrich*. In the first place, the distinction between *Goldberg* and *Griffeth* does seem clear enough to preclude describing the latter as a natural extension of the former. Second, Justice Rehnquist is likely to be sensitive to any extension of *Goldberg* because, during his tenure on the Court, he has consistently shown

lished. This situation is similar to one in which state action interferes with an individual's right to engage in an occupation or profession, a right viewed as sufficiently substantial to require that the government afford due process protections.[166]

One can draw an analogy to the award of government contracts, in which the courts have held that bidders have an entitlement to due process and that a public officer may not operate arbitrarily with regard to a bid.[167] "The [agency] has the right to be wrong, dead wrong, but not unfairly, arbitrarily wrong."[168] The right to a fair consideration of an application for a grant or renewal may be insufficient to compel a hearing. When coupled with the ease of abuse of unchecked administrative discretion and the difficulties in remedying such abuse, however, the argument for a right to procedural safeguards is strengthened greatly.[169]

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hostility to the expansion of procedural due process. *See, e.g.,* Paul v. Davis, 424 U.S. 693 (1976); Arnett v. Kennedy, 416 U.S. 134 (1973).

For recent cases discussing the principles at issue in *Griffeth*, see Jacobson v. Hannifin, 627 F.2d 177 (9th Cir. 1980) (Nevada Gaming Control Act does not contain mandatory language such as will provide the applicant for licensing as a casino landlord an expectation of entitlement rising to the level of a property interest); Baker v. Cincinnati Metropolitan Hous. Auth., 490 F. Supp. 520 (S.D. Ohio 1980) (housing authority could not refuse applications for rental assistance under the Community and Urban Development Act of 1974 from persons currently residing in housing authority's conventional housing).

166. "[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." Greene v. McElroy, 360 U.S. 474, 492 (1959). *Accord,* Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (due process clause cannot be contravened when a state excludes a person from the practice of law); Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926) (a certified public accountant within the class of those entitled to be admitted to practice before the U.S. Board of Tax Appeals may not be denied admission absent fair procedures). *See also* Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) (a state must provide procedural due process before it can exclude a person from the practice of law).

167. *See* Note, *supra* note 26, at 159.

168. Housing Auth. v. Pittman Constr. Co., 264 F.2d 695, 703 (5th Cir. 1959) (board of city housing authority abused its discretion by deciding a low bidder is an irresponsible bidder without giving the low bidder an opportunity to disprove charges of irresponsibility).

169. "The grant, denial, revocation, and administration of all types of government largess should be subject to scrupulous observance of fair procedures." Reich, *supra* note 60, at 783. "The great purpose of the requirement [of due process] is to exclude everything that is arbitrary and capricious in legislation [or agency action] affecting the right of the citizen." Dent v. West Virginia, 127 U.S. 114, 124 (1889). "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process." Greene v. McElroy, 360 U.S. 474, 507 (1959).

C. *Due Process on the Basis of a Liberty Interest*

If the interest at stake is determined not to constitute a property interest within the meaning of the fifth amendment, it is necessary to determine whether it constitutes a liberty interest such as will trigger due process safeguards. In this context, "liberty" refers to more than a persons's interest in freedom from bodily restraint. The Supreme Court has widened the scope of protected liberty interests well beyond mere corporeal movement.[170] Although traditionally perceived as protecting the accused in criminal proceedings, a liberty interest in due process has been thought to attach whenever "grievous loss of any kind" has been threatened whether or not the "stigma and hardships of a criminal conviction" will ensue.[171]

In *Wisconsin v. Constantineau*,[172] the Supreme Court explicitly recognized that a liberty interest in due process could be present even when proposed government action entailed no criminal penalties, but rather merely reputational stigma. In this case the Court held, per Justice Douglas, that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[173]

The *Constantineau* principle was limited significantly in *Paul v. Davis*.[174] In an opinion by Justice Rehnquist, the Court held that "reputation alone, apart from some more tangible interests such as employment, is [n]either 'liberty' [n]or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause."[175] Thus an assertion that government action has injured a reputational liberty interest cannot by itself, under the strict rule of *Paul v. Davis*,[176] sustain a successful claim to procedural due process. The *Davis* Court required instead that the due process claimant show harm to "reputation plus"; that is, to "some more tangible interest" as well.[177] Note, however, that the "plus" part of this requirement need not involve injury to

170. R. CAPPALLI, *supra* note 7, at 212.

171. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

172. 400 U.S. 433 (1971).

173. *Id.* at 437.

174. 424 U.S. 693 (1976).

175. *Id.* at 701.

176. 424 U.S. 693 (1976).

177. *Id.* at 701.

another constitutionally protected liberty or property interest.[178] Accordingly, federal courts have found liberty interests implicated when claimants have alleged an injury to reputation in conjunction with an injury to another protected interest—even if that interest does not assume constitutional dimensions.

For example, in *Colaizzi v. Walker*,[179] the United States Court of Appeals for the Seventh Circuit considered whether an action alleging the deprivation of a constitutionally protected liberty interest could be maintained under 42 U.S.C. § 1983. Plaintiffs in *Colaizzi* had been employees of the Illinois Department of Labor. The defendants, the governor of the state and other officials, had discharged the plaintiffs on the basis of investigatory findings that plaintiffs had abused their official positions by attempting to force a company they supervised to drop criminal proceedings against a former employee. At the same time plaintiffs' cause of action was dismissed, the defendants allegedly issued press releases detailing the misconduct and abuse for which plaintiffs allegedly were responsible. The complaint stated that the plaintiffs had not been afforded notice or a hearing. The circuit court saw the issue as "whether Governor Walker's published allegations under the circumstances of this case deprived plaintiffs of a liberty interest without due process."[180] Citing *Constantineau*,[181] the circuit court found that the charges contained in the press releases had indeed impugned the plaintiffs' reputations and good names. Although acknowledging that under *Davis*, an injury to reputation alone was not itself a deprivation of liberty,[182] the court distinguished *Davis* on its facts, pointing out that Davis had not suffered any job loss. In *Colaizzi*, however, the plaintiffs had suffered job loss, and the circuit court therefore held that "infliction of a stigma to reputation accompanied by a failure to rehire (or *a fortiori*, by a discharge) states a claim for deprivation of liberty without due process within the meaning of the Fourteenth Amendment."[183]

178. *See, e.g.*, Marrero v. City of Hialeah, 625 F.2d 499, 513 n.17 (5th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981); Colaizzi v. Walker, 542 F.2d 969, 973 (7th Cir. 1976), *cert. denied*, 430 U.S. 960 (1977).

179. 542 F.2d 969 (7th Cir. 1976).

180. *Id.* at 972.

181. Wisconsin v. Constantineau, 400 U.S. 433 (1971).

182. 542 F.2d at 973.

183. *Id.* In distinguishing *Davis*, the circuit court focused on that case's treatment of language in Board of Regents v. Roth, 408 U.S. 564 (1972), in which the *Roth* Court refused to find a

Citing *Colaizzi* approvingly, the Fifth Circuit, in *Marrero v. City of Hialeah*,[184] found that a liberty interest is implicated by an injury to reputation plus injury to a tangible interest other than employment. The plaintiffs in that case, owners and operators of a jewelry store in Hialeah, Florida, appealed the lower court decision dismissing their 42 U.S.C. § 1983 action for failure to state a claim. The plaintiffs alleged that police officers of the defendant city, along with an assistant state's attorney, had entered and searched their store pursuant to a warrant authorizing a search for stolen jewelry. This search uncovered no item listed in the warrant, but one of several victims of local robberies brought in to identify stolen goods identified a single item as stolen. Plaintiffs thereupon were arrested and nearly their entire stock of jewelry seized. It was further alleged that representatives of local television stations arrived at plaintiffs' store simultaneously with the police and the prosecutor, who then announced the plaintiffs' arrest and the recovery of $75,000 in stolen property. The police were also alleged to have issued to local print and broadcast media an announcement that stolen property had been recovered from the plaintiffs' store and was available for identification. Although plaintiffs were charged with receipt of stolen property, all jewelry seized was returned to them after a state court judge granted their motion to suppress the evidence. As of the date of their filing in district court, no further action on state charges against the plaintiffs had been taken. Their complaint alleged an illegal search and seizure in violation of their fourth amendment rights, plus slander of their business and personal reputations in violation of the fourteenth amendment. Plaintiffs alleged that these actions destroyed their business and personal reputations and deprived them of their right to earn a living.

Among the issues addressed on appeal was whether the plaintiffs'

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deprivation of reputational liberty, because "[t]he State, in declining to rehire [Roth], did not make any charge against him that might seriously damage his standing and associations in his community." *Id.* at 573. Seizing on this linkage of stigma and job loss, the *Davis* Court concluded:

> While *Roth* recognized that governmental action defaming an individual in the course of declining to rehire him could entitle the person to notice and an opportunity to be heard as to the defamation, its language is quite inconsistent with any notion that a defamation perpetrated by a government official but unconnected with any refusal to rehire would be actionable under the Fourteenth Amendment.

Paul v. Davis, 424 U.S. at 709. In other words, job loss accompanied with government infliction of injury to reputation is a deprivation of liberty that requires due process protections.

184. 625 F.2d 499 (5th Cir. 1980), *cert. denied,* 450 U.S. 913 (1981).

allegation of injury to reputation was sufficient to state a cause of action under section 1983 or whether it was insufficient to do so because, as defendant-appellees argued, such an injury did not amount to a constitutionally protected liberty interest. The circuit court noted that *Paul v. Davis* was "of seminal importance"[185] but nevertheless decided that *Davis* could be limited and distinguished:

> *Paul* simply holds that no liberty or property interest is infringed when the *only* loss suffered at the hands of the government is damage to personal reputation if personal reputation is not recognized by the relevant state law as a liberty or property interest. The holding of *Paul* does not require the dismissal of appellants' claim of injury to their personal and business reputations because, on at least four independent grounds, appellants' claims, unlike those in *Paul*, do involve deprivations of constitutionally protected interests.[186]

In specifying the independent grounds on which the plaintiffs' claims involved protected interests, the circuit court cited two distinct theories, both of which involved reputation plus "some more tangible interests":[187] injury to reputation "plus" loss of good will, and injury to reputation "plus" violation of fourth amendment rights.[188] The former, reputation plus loss of good will, refers not only to injury to a personal and/or business reputation,[189] which was the kind of abstract harm the *Davis* Court found too insubstantial to implicate a constitutional liberty interest, but rather to a more tangible interest in the good will of an individual's business. In this context, business good will refers to "the value inhering in the favorable consideration of customers arising from a business' reputation as being well established and well conducted."[190] The circuit court, in reviewing state cases, found that this interest in good will is a protected property interest under Florida law, of which Florida may not deprive anyone without due process.[191] Here, by falsely stating over television that nearly the entire inventory

185. *Id.* at 512.

186. *Id.* at 513 (emphasis added). *See* note 175 *supra* and accompanying text for a discussion of whether the "plus" part of "reputation plus" must itself be a constitutionally protected interest.

187. Paul v. Davis, 424 U.S. 693, 701 (1976).

188. 625 F.2d at 515-19.

189. Regarding "business reputation" and the extent of its tangibility, *see generally id.* at 516 n.22.

190. *Id.* at 515.

191. *Id.* at 514-15. *See also* NAACP v. Webb's City, Inc., 152 So. 2d 179, 182 (Fla. Dist. Ct. App. 1963), *vacated as moot,* 376 U.S. 190 (1964); Paramount Enterprises, Inc. v. Mitchell, 104 Fla. 407, 417, 140 So. 328, 332 (1932).

of plaintiffs' store consisted of stolen merchandise, state and local officials implied that plaintiffs "dealt in stolen goods." The circuit court therefore held that to the extent such statements "resulted in injury both to appellants' personal and/or business reputations and to their goodwill, the stigma-plus requirement of *Davis* has been satisfied."[192]

The injury to reputation plus violation of fourth amendment rights that the circuit court found in *Marrero* met the strict "stigma-plus" test of *Davis* in a way that the facts alleged in the latter case could not. Although the Supreme Court believed that *Davis* had "state[d] a classical claim for defamation,"[193] that alleged defamation was deemed to stand "alone and apart from any other governmental action with respect to him."[194] In *Marrero*, on the other hand, allegations of defamation did not stand alone. Rather, if taken as true, "the defamation was intimately connected with the unlawful arrest of appellants and the unlawful search and seizure of practically the entire inventory of their store."[195] Because the circuit court found that "the defamation alleged here occurred in connection with the alleged violation of appellant's fourth amendment rights,"[196] it held the alleged injury to personal and business reputations would, if proven, constitute the deprivation of liberty interests.[197]

Colaizzi and *Marrero*[198] show that *Paul v. Davis* has not had the effect of completely shutting off all claims asserting deprivations of "liberty" interests by government action that affects reputation. Grantees who seek due process protections when confronted with the adverse actions of federal grantors may take some encouragement from that

192. 625 F.2d at 516.

193. Paul v. Davis, 424 U.S. at 697.

194. *Id.* at 694.

195. 625 F.2d at 517.

196. *Id.* at 519. The fourth amendment to the Constitution prohibits the federal government from undertaking "unreasonable searches and seizures" of "persons, houses, papers and effects," U.S. CONST. amend. IV, and has been made applicable to the states through the fourteenth amendment.

197. 625 F.2d at 519. In order to reach this result, the court found it necessary to consider whether *Davis* required that defamatory statements be held to implicate liberty interests only when they *cause* injury to an interest more tangible than reputation, or whether a liberty interest could be found when defamation was merely *connected* to the injury of a more tangible interest. *Id.* at 517-19. The court determined that "it is sufficient that the defamation occur in connection with, and be reasonably related to, the alternation of the right or interest." *Id.* at 519.

198. *See also* Owen v. City of Independence, 445 U.S. 622 (1980); Larry v. Lawler, 605 F.2d 954 (7th Cir. 1978); Dennis v. S. & S. Consol. Rural High School Dist., 577 F.2d 338 (5th Cir. 1978).

fact. That adverse grantor actions work deprivations of grantee liberty interests even under *Davis* is certainly an arguable proposition, because, as indicated,[199] such actions "can have disastrous consequences."[200] First, there is a "stigma," because these adverse actions are most often predicated on findings of grantee misconduct.[201] Following the stigma, there is the "plus": injury to more tangible interests, be they denial of the future opportunity to receive grant funds,[202] impossibility of fulfilling the grantee "mission,"[203] or even "the grantee itself [having to] go out of business."[204]

Finally, a recent case, *Old Dominion Dairy Products, Inc. v. Secretary of Defense*,[205] significantly enhances the likelihood that grantees can secure due process protections for themselves by asserting the deprivation by government action of a constitutional liberty interest. Although a federal contractor rather than a grantee was the litigant, the analogy between grants and contracts makes this an important case in the development of federal grant law.[206]

The case[207] concerned the effects of Department of Defense (DOD) decisions that a defense contractor lacked integrity and responsibility.[208] Plaintiff-appellant, Old Dominion Dairy Products, Inc., (ODDPI), was a largely family-owned business that manufactured and

199. *See* notes 7-28 *supra* and accompanying text.

200. *See* Boasberg & Hewes, *supra* note 19, at 402.

201. *See* note 7 *supra* and accompanying text. In this context, note that the grantee may not be heard to complain of the stigma attaching from an accurate finding of misconduct. Rather, the grantee's argument is that, absent fundamentally fair procedures, there is an unacceptable risk that such a stigma (and all the consequences that attend it) will follow an inaccurate finding of misconduct.

202. *See* notes 122-48 *supra* and accompanying text.

203. *See* notes 7 & 19 *supra* and accompanying text.

204. Boasberg & Hewes, *supra* note 19, at 402.

205. 631 F.2d 953 (D.C. Cir. 1980). *Accord,* Transco Security, Inc., v. Freeman, 639 F.2d 316, 321 (6th Cir. 1981) (relying on *Old Dominion*, government contractor may not be blacklisted without being afforded due process procedural safeguards including notice of the charges, an opportunity to rebut the allegations of impropriety, and if necessary, a hearing).

206. For arguments supporting the grant-contract analogy, see notes 72-92 *supra* and accompanying text. Regarding distinctions between grants and contracts, see notes 74-104 *supra* and accompanying text. *See generally* Wallick & Montalto, *supra* note 16, at 165-68. These authors accept the analogy principally because grants and contracts are both seen as involving enforceable obligations, and they cite in particular United States v. San Francisco, 310 U.S. 16 (1940), and McGee v. Mathis, 71 U.S. 143 (1866).

207. Old Dominion Dairy Prods., Inc. v. Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980).

208. *Id.* at 956-57. The basis for this conclusion was a determination that ODDPI had tried "to recoup undue monies under the contract." Although the factual issues of alleged misconduct or lack of integrity were not resolved in judicial proceedings, there are indications that the dispute

processed dairy products. Nearly all of its sales resulted from DOD-awarded contracts to supply these products to overseas military bases.[209] Before the controversy that led to this litigation, DOD regularly invited ODDPI to bid on military procurement contracts, and DOD had never previously alleged or determined that ODDPI lacked integrity or responsibility.

In February 1979, however, DOD conducted an audit of ODDPI's home office. The report of the analyst who participated in the audit noted three "irregularities" in ODDPI's performance on one of its DOD contracts, that it was concluded, "show[ed] a lack of business integrity."[210] Almost simultaneously, ODDPI had been solicited and was in the process of submitting a bid on a new DOD contract. Regulations required that the contract officer make an award only to a contractor determined to be "responsible."[211] Information provided to the contract officer of results from the ODDPI audit led him to conclude that ODDPI had not dealt "honestly" with the government. He therefore determined that ODDPI "lacked integrity" within the meaning of DOD regulations and consequently was "not 'responsible.' "[212] The contract office, despite having had opportunities to do so, at no time notified ODDPI that its responsibility or integrity was in question. The office placed a written determination of nonresponsibility in ODDPI's contract file, and on the following day, DOD awarded the contract to a contractor whose bid exceeded that of ODDPI, the low bidder, by almost 1.4 million dollars.[213]

During that same winter of 1979, ODDPI had also been invited to bid on another DOD contract. Once again, the contract officer requested data on ODDPI's performance on its existing contracts, and on the basis of the audit report and the determination that ODDPI lacked integrity, the officer concluded that ODDPI was "a nonresponsible contractor." Again ODDPI was never informed of the allegations against it. The award thereafter was made to another contractor, notwith-

involved conflicting interpretations of complex and ambiguous contract language. *Id.* at 956-57 & n.6.

209. *Id.* at 956.

210. 631 F.2d at 957. *See* Defense Acquisition Regulation (DAR) 1-904.1, 32 C.F.R. § 1-904.1 (1979).

211. 631 F.2d at 957. *See* Defense Acquisition Regulation (DAR) 1-903.1, 32 C.F.R. § 1-903.1 (1979).

212. 631 F.2d at 957.

213. *Id.* at 958-59.

standing that ODDPI was the low bidder.[214]

After receiving notice that its bids had been turned down, ODDPI sought a statement of reasons. It was informed only that the determination of nonresponsibility was based on the unsatisfactory record of integrity. The DOD refused to re-award the contracts to ODDPI and indicated that it could not remove the nonresponsibility determination from the files.[215] The circuit court later determined that "the record here is clear that, but for the finding of a lack of integrity, Old Dominion would otherwise have received the . . . contract[s]. The Government has never suggested that any other reason motivated the award to . . . a substantially higher bidder."[216]

Faced "with a total loss of its primary source of business,"[217] ODDPI filed suit in U.S. District Court for the District of Columbia, alleging that DOD contract officers had "no rational basis" for determining that ODDPI lacked integrity and that in making such a determination without affording notice or an opportunity to respond, the DOD had denied ODDPI due process of law. The plaintiff sought declaratory and injunctive relief. Specifically, the company prayed for a declaration that it did not lack integrity, and the cancellation of the previous contract awards for re-award to ODDPI.[218]

The court dismissed ODDPI's complaint[219] on the ground that "[n]ecessarily . . . a contracting officer enjoys a very wide range of discretion," such that disappointed bidders challenging adverse action must demonstrate "bad faith" or the "lack of any reasonable basis" for the officers' decision.[220] The plaintiff, however, presented "absolutely no evidence" that would support such a showing. Moreover, the DOD was deemed to have an "ample basis" for its actions, which were "clearly reasonable under all the circumstances."[221]

The court held that ODDPI's due process claim was "without

214. *Id.* at 958.

215. *Id.*

216. *Id.* at 959.

217. *Id.* On the same day an evidentiary hearing was to begin in district court, ODDPI was notified of its formal suspension from bidding on DOD contracts in accordance with Defense Acquisition Regulation (DAR) 1-605, 32 C.F.R. § 1-605 (1979). 631 F.2d at 959.

218. Old Dominion Dairy Prods., Inc. v. Brown, 471 F. Supp. 300 (D.D.C. 1979), *rev'd,* 631 F.2d 953 (D.C. Cir. 1980).

219. 471 F. Supp. at 303.

220. *Id.* at 302.

221. *Id.* at 302-03. In this connection the court cited Board of Regents v. Roth, 408 U.S. 564, 576-78 (1972).

merit."[222] It also determined that ODDPI's related claim of *de facto* debarment from government contracting was "most certainly premature."[223] For these reasons, the district court declined to afford ODDPI any of its requested relief.

The plaintiff's cause fared much better in the circuit court. Although the first argument raised on appeal, that it was error to find that the DOD had a rational basis for determining ODDPI lacked integrity, was summarily rejected,[224] the circuit court gave more careful consideration to the second argument: that it was error to hold plaintiff had no due process right to notice and an opportunity to respond to charges before denial of government contracts. The basis of ODDPI's due process claim was not an alleged deprivation of a property interest but rather deprivation of a liberty interest. In opposition to this claim, the government offered three arguments.[225] First, it argued that corporations do not possess liberty interests or rights of constitutional dimension that require due process protection. Second, even if there are such rights, the government contended that no injury to a cognizable liberty interest had been shown by ODDPI's allegations. Third, even if ODDPI was entitled to due process, DOD suspension regulations provided adequate procedural protections. The circuit court considered each of these arguments.

Respecting the first argument, that corporations do not possess liberty interests within the meaning of the due process clause, the government's position was held to be "without merit."[226] This determination allowed ODDPI to pursue its due process claim notwithstanding the absence of any property interest in the disputed contract awards.

Disposition of the government's first argument allowed the circuit court to decide the central issue in the appeal: whether the actions of

222. 471 F. Supp. at 303.

223. *Id.* On appeal the circuit court, citing Keco Indus., Inc., v. United States, 492 F.2d 1200, 1203 (Ct. Cl. 1974), stated that the proper test for deciding the propriety of decisions by government contract officers was " 'whether the Government's conduct was arbitrary and capricious toward the bidder-claimant.' " It held that, given the lengthy hearings conducted below, there was no justification for disturbing the district court's decision that there was a "reasonable basis" for the contract officers' actions respecting ODDPI. Old Dominion Dairy Prods., Inc. v. Secretary of Defense, 631 F.2d 953, 960 (D.C. Cir. 1980).

224. 631 F.2d at 960.

225. *Id.* at 961. In support of its conclusion, the circuit court cited Meyer v. Nebraska, 262 U.S. 390, 399 (1923), and Grosjean v. American Press Co., 297 U.S. 233, 244 (1936), for the language that "a corporation is a 'person' within the meaning of the . . . due process [clause]."

226. 631 F.2d at 963.

the DOD injured a cognizable liberty interest of ODDPI. The court recognized that the DOD's determination of nonresponsibility had caused ODDPI to lose two contracts "which it would otherwise have received." It also recognized that because the determination of nonresponsibility would likely be reviewed by government contract officers on all subsequent ODDPI contract bids, the DOD's action had "effectively put Old Dominion out of business."[227] Accepting the nub of ODDPI's argument, that it had a right "to be free from 'stigmatizing' governmental defamation having an immediate and tangible effect on its ability to do business," the circuit court held that ODDPI's allegations implicated a cognizable liberty interest.[228]

The court distinguished[229] the Supreme Court's decision in *Board of Regents v. Roth* because in that case the state university's refusal to rehire a nontenured instructor was not coupled with "any charge against him that might seriously damage his standing and associations in his community. . . . [f]or example, that he had been guilty of dishonesty, or immorality."[230] Moreover, as the circuit court noted, the actions challenged in *Roth* had not imposed on the instructor any "stigma or other disability" that would foreclose chances to take advantage of future opportunities.[231] ODDPI, however, had alleged facts that, as the circuit court pointed out, the Supreme Court agreed would make for "a different case."[232]

The distinctions between *Roth* and *Old Dominion* were apparent primarily in two respects. First, because of the conclusions of the DOD's contract officers and audit report, there was "no doubt that Old Dominion's good name and integrity were at stake, or that Old Dominion was in effect charged with dishonesty."[233] Second, as to future opportunities, the DOD's determination that plaintiff was dishonest "effectively foreclosed Old Dominion's freedom to take advantage of other Government employment opportunities, and barred ODDPI from all public employment."[234] These distinctions caused the circuit court to hold that the case, far from being controlled by the *Roth* holding, paralleled

227. *Id.* at 962-63.
228. 408 U.S. 564 (1972).
229. 631 F.2d at 963 (citing Board of Regents v. Roth, 408 U.S. 564, 573 (1972)).
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.* at 964.
234. *Id.*

the situation outlined in *Roth*'s dicta as requiring a different result.[235]

The Government, in support of its contention that no cognizable liberty interest had been implicated in the case, argued that the alleged injury was essentially one to ODDPI's reputation, which, under *Paul v. Davis*, did not assume constitutional proportions.[236] The circuit court found reliance on *Davis* "totally misplaced," believing instead that cases distinguished in the *Davis* decision were more nearly on point.[237] Because the court read the *Davis* Court's refusal to advance due process protections to Davis as predicated on allegations of mere defamation without more, it found that "it is clear . . . the opinion in *Paul v. Davis* supports the [due process] claim of ODDPI in this case."[238]

The Government's final argument was that even if a constitutional liberty interest of ODDPI had been injured, the procedures afforded by the DOD were sufficient to satisfy due process requirements. Since it was not disputed that ODDPI had received no prior notice of the charges against it before its contract bids were rejected, either during the pendency of the nonresponsibility determination or afterward, the government's position was that suspension proceedings initiated subsequently provided adequate procedural protections.[239]

It remained for the circuit court, having determined that ODDPI had a right to due process, to decide what process was due. This decision involved a balancing of the interest of a government contractor such as the plaintiff, in its economic survival as a functioning business concern, against the need of federal agencies "to be free to conduct Government business effectively and efficiently."[240] The court was cognizant of the "potentially crippling effect" of imposing too stringent procedural re-

235. *Id.* at 964-65. In this connection the circuit court cited United States v. Lovett, 328 U.S. 303 (1946) (act of Congress directed at named government employees that prohibited future payments to them of any compensation such as to effectively bar them from any future government employment served to stigmatize them and impair their chance to earn a living in an unconstitutional manner). *See* Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) (discharge of an employee of a Navy contractor without hearing, for failure to meet naval installation security requirements, did not violate due process requirements absent showing that stigma of disloyalty would impair future employment opportunities); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (*cited in* Paul v. Davis, 424 U.S. 693, 703-05 (1976).

236. 631 F.2d at 966. Here again, the court made reference to the virtual debarment from government contracting that resulted from the DOD's actions vis-à-vis ODDPI.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

quirements.[241] In striking the balance, the court held that where no formal suspension or debarment has been initiated, the Government must, as soon as is practicable, notify the contractor of "the specific charges concerning the . . . alleged lack of integrity" such that the contractor may utilize any available opportunities to respond to and defend against the specified charges "before adverse action is taken."[242] This minimum requirement—no obligation to provide a formal hearing at this stage was imposed—was described as imposing "absolutely no burden" on the government. Indeed, the court indicated that the procedure it required could benefit and protect the interests of both parties involved by allowing for the clarification of mistakes and misunderstandings before the interests of either were injured.[243]

In this case, ODDPI had failed to receive the prior notice to which the circuit court held it was entitled. The court was, however, apparently at a loss as to what relief should be fashioned. It could find no basis upon which to vacate the awards made on contracts ODDPI had lost and to re-award them to the plaintiff. At the same time, the court was ignorant of developments in the case subsequent to the district court proceedings. Although it had held that the belated suspension proceedings would not adequately safeguard the plaintiff, it recognized that such proceedings might, so many months after the fact, be the only available remedy. In light of the circumstances, the cause was remanded to the district court for further proceedings, with instructions to structure a remedy that would allow ODDPI "to clear its name and reestablish its integrity."[244]

D. *Property and Liberty Interests in the Federal Grant Context*

Consideration of whether any government action affects a property or liberty interest requires that the conceptual distinction between the two be kept clearly in mind. Injury sustained from a deprivation of property is sustained because of the taking itself. A deprivation of reputational liberty, on the other hand, involves harm to future opportunities.[245] The latter concerns "not the debilitating present effects of

241. *Id.*
242. *Id.*
243. *Id.*
244. *Id. See also* Conset Corp. v. Community Administration, 655 F.2d 1291, 1296-97 (D.C. Cir. 1981).
245. R. CAPPALLI, *supra* note 7, at 212.

the property deprivation but the loss of future opportunities caused by the badge of dishonor."[246]

The importance of due process protections when a deprivation of a reputational liberty interest is threatened may be very substantial in the grant field. "A decision by the Federal Government to suspend, terminate, or void a grant necessarily involves a tentative or final determination that the grantee organization has engaged in some misconduct whether malfeasance or nonfeasance."[247] The adverse consequences of such a determination might very well attach not only to the personnel of the grantee organization but to the "unworthy" grantee itself.

One adverse consequence resulting from a determination of grantee noncompliance or misconduct is the effect of such a determination on future opportunities to obtain federal grant funds. Courts have recognized that the reputation a grantee acquires in performing on past grants "is a key element in agency grant decisions, and an organization that acquires a bad reputation in the grant community based on poor performance will have a difficult burden to overcome in securing new grants."[248] The very real possibility that such destructive results could follow from federal actions taken unilaterally and without procedural safeguards suggests a liberty deprivation even under the strict rule of *Paul v. Davis*[249] because the complaint of injury to reputation would be accompanied by injury to more tangible interests as well.

While impact on future funding opportunities may be the most serious and direct consequence of federal action that damages a grantee's reputation, other deleterious effects may also result. Most federal grantees exist to perform a service for, or provide a benefit to, the community. One author calls this the grantee's "public service mission."[250] A determination by a federal grantor of grantee misconduct or noncompliance with grant conditions may, depending on the seriousness of the violation and on the publicity that attends the grantor's action, dry up sources of private funds, damage grantee standing in the local political and business communities, affect the ability to retain and recruit competent personnel, and weaken the support of the grantee's benefici-

246. *Id.*

247. R. CAPPALLI, *supra* note 7, at 214.

248. Southern Mut. Help Ass'n v. Califano, 574 F.2d 518, 524 (D.C. Cir. 1977). For further discussion of *Southern Mutual* see notes 124-51 *supra* and accompanying text.

249. 424 U.S. 693 (1976). *See* notes 73-92 *supra* and accompanying text.

250. R. CAPPALLI, *supra* note 7, at 219.

ary population. Should these things occur, the grantee's ability to fulfill its "mission" may be destroyed.

V. What Process is Due to the Federal Grantee?

Once it has been determined that government action has caused a deprivation of a liberty or property interest, it is next necessary to decide what procedural safeguards should apply.

The Supreme Court has consistently held that some kind of hearing[251] is required at some point before a person is permanently deprived of a property or liberty interest.[252] To weigh properly the requested procedure, it is necessary to identify the purposes a fair procedure is supposed to serve. One purpose is to protect persons against arbitrary or erroneous deprivations of property or liberty once it is determined that such interests are involved.[253] A second purpose is to foster the general feeling, important to a popular government, that justice has been done.[254] The Court in *Mathews v. Eldridge* held that the right to a pretermination hearing is inextricably bound to the threatened deprivation of a person's livelihood or means of continued existence.[255] Moreover, it must be recognized that the variety of costs imposed by requiring such a hearing procedure cannot be the sole basis of a denial of various procedural protections.[256] When a property or liberty interest is involved, the person is guaranteed some minimal due process protections, involving at least notice and an opportunity to be heard. The exact nature of the procedure used will vary according to the circumstances.

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251. *See generally* Friendly, *Some Kind of Hearing,* 123 U. Pa. L. Rev. 1267 (1975).

252. Fuentes v. Shevin, 407 U.S. 67 (1972). *See generally* Catz & Robinson, *Due Process and Creditors' Remedies: From* Sniadach *and* Fuentes *to* Mitchell, North Georgia *and Beyond,* 28 Rutgers L. Rev. 541 (1975).

253. Morrissey v. Brewer, 408 U.S. 471, 480-84 (1975) (a parolee must be treated with basic fairness in terminating his parole); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951).

254. Goldberg v. Kelly, 397 U.S. 254 (1970). *See* notes 150-51 *supra* and accompanying text.

255. 424 U.S. 319, 348-49 (1976).

256. *Id.* at 348. Since its decision in *Mathews v. Eldridge*, the Court has regularly resorted to the test developed in that case. *See, e.g.,* Mackey v. Montrym, 443 U.S. 1, 10 (1979) (Massachusetts statute mandating suspension of driver's license for refusal to take a breath-analysis test upon arrest for driving under influence of intoxicating liquors does not violate requirement of procedural due process in failing to provide for a presuspension hearing); Parham v. J.R., 442 U.S. 584, 599-600 (1979) (state procedures for voluntary commitment of minor children to state mental hospitals comport with procedural due process requirements by providing for a neutral, independent medical decision maker, and do not require a more formal judicial-type hearing).

Mathews v. Eldridge, which outlines the prevailing test for making this determination,[257] involved the claim of a recipient of Social Security disability payments. The state agency administering the federal programs under which he received benefits had determined that the recipient had ceased to be disabled. This determination was adopted by the Social Security Administration, which notified the recipient that his benefits would be terminated. Rather than pursuing his administrative post-termination appeals remedies, the recipient filed an action in United States District Court "challeng[ing] the constitutionality of the procedures employed by the Secretary of Health, Education, and Welfare to terminate disability benefits."[258] The plaintiff sought an immediate reinstatement of his benefits pending a disability hearing. Relying largely on the Supreme Court's decision in *Goldberg v. Kelly*,[259] both the district court and the court of appeals upheld the plaintiff's due process claim.[260] Because disability determinations may involve "subjective judgments" based on conflicting evidence, the district court held that prior to termination of his disability benefits, the plaintiff was entitled to a *Goldberg*-type evidentiary hearing.[261]

On certiorari review, the Supreme Court, after disposing of a threshold jurisdictional question,[262] declared that "[t]he dispute centers upon what process is due prior to the initial termination of benefits, pending review."[263] In assessing the requirements of due process generally, the Court began with the "truism" that due process "is not a technical conception with a fixed content unrelated to time [and] place,"[264] but, rather, it is "flexible and calls for such procedural protections as the particular situation demands."[265] No single formulation of due process safeguards could be appropriate to every case. Therefore a test by which to identify the "specific dictates" of due process would require consideration of three distinct factors:

First, the private interest that will be affected by the official action; sec-

257. 424 U.S. 319, 324-25 (1976).

258. Eldridge v. Weinberger, 361 F. Supp. 520 (W.D. Va. 1973), *aff'd*, 493 F.2d 1230 (4th Cir. 1974).

259. 397 U.S. 254 (1970).

260. Eldridge v. Weinberger, 493 F.2d 1230 (4th Cir. 1974); Eldridge v. Weinberger, 361 F. Supp. 520 (W.D. Va. 1973), *aff'd*, 493 F.2d 1230 (4th Cir. 1974).

261. 361 F. Supp. at 528.

262. 424 U.S. 319, 326-32 (1976).

263. *Id.* at 333.

264. *Id.* at 334 (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).

265. *Id.* at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

> ond, 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.[266]

The Court's assessment of the three factors it had delineated in its test for determining what process is due was complemented in *Mathews v. Eldridge* by an assumption made by the Court as to the kinds of procedures that are appropriate in different contexts.[267] The Court quoted with approval Mr. Justice Frankfurter's opinion that the nature of administrative agencies and administrative adjudication "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts."[268] Therefore, ordering a judicial-style hearing was not "a required, nor even the most effective method of decision-making in all circumstances."[269] All that was and is required for due process claimants is a "meaningful opportunity to present their case."[270] The Court determined that for Mr. Eldridge, this did not mean a pretermination evidentiary hearing.

In the grant context, however, the opposite is true. In order to protect against an erroneous deprivation of grantee liberty or property, the grantee should be afforded an evidentiary hearing *before* adverse grantor actions such as termination or denial of refunding are taken. Many of the distinctions drawn by the Court in distinguishing *Goldberg* from *Mathews* will serve equally well to distinguish grant disputes from the latter case. In assessing the three factors that constitute the test for required procedures developed in *Mathews* in light of the interests that clash in the typical grant dispute, a conclusion similar to that reached in *Goldberg* is warranted.

The first factor under *Mathews* is the degree of potential deprivation. In *Goldberg*, the Court was struck by the "brutal need" of the plaintiffs,

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266. *Id.* at 335.

267. *Id.* at 340-42.

268. *Id.* at 348 (quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940)).

269. *Id.* at 348.

270. *Id.* at 349. These factors are: the importance of the private interest to be affected by the official action; the risk of an erroneous deprivation through the procedures used as against the probable value, if any, of additional or alternative procedural safeguards; and the governmental interest involved including the additional costs and burdens of requiring new procedures. *See* note 266 *supra* and accompanying text.

welfare recipients, whose situation upon a termination "becomes immediately desperate."[271] Of course, it is obvious that the dilemma facing indigents whose welfare benefits have been terminated is of a different character than the crisis faced by amorphous "grantee persons" upon the loss of grant benefits. However, because the federal grant relationship and the attendant funding may be the very flesh and blood of the grantee, termination of federal support can have the severest possible consequences.[272] Grantees who lose federal benefits may not face the Hobson's choice of indigents who can afford food or rent but not both. Nevertheless, a grantee may not have the other sources of support to which the recipient of disability benefits may have access. In this respect, the grantee may be living closer to the *Goldberg* margin than the plaintiff in *Mathews v. Eldridge*. The plaintiff in *Mathews*, the Court found, likely would be able to fall back on "other forms of government assistance [which] will become available" after the termination of disability benefits.[273] It is not likely that a grantee, whose future opportunities have been harmed by adverse grantor action predicated on a nonreviewable finding of grantee misconduct, will have such a safety net.

The second prong of the "what process is due" analysis involves balancing the fairness and reliability of existing procedures against the probable worth of alternative procedures. Here again, it appears that grant disputes are the appropriate subjects of *Goldberg*-type hearings. In seeking to determine the exact quantum of procedural rights conferred on grantees, "[p]erfect consistency is, of course, not to be found."[274] As a general principle, however, federal grantors "have traditionally assumed the power to terminate a grant without a prior hearing if the award was discretionary and if the agency was in possession of evidence indicating noncompliance."[275] Yet such a prior hearing was held to be an absolute necessity in *Goldberg*. The proposed termi-

271. Goldberg v. Kelly, 397 U.S. at 254, 261, 264.

272. Injuries to federal grantees resulting from deprivations of government-conferred liberty and property interests include: inability to perform the grantees contracts; to retain personnel; to withstand the stigma resulting from summary findings of misconduct; to capitalize on future grant opportunities; to fulfill the grantee "mission" in the community; and even to remain in business as a functioning entity.

273. Mathews v. Eldridge, 424 U.S. 319, 342 (1976).

274. R. CAPPALLI, *supra* note 7, at 249.

275. *Id.* at 272. Notwithstanding this generalization that grantees are not afforded customary due process rights, numerous federal grant programs do allow for procedural protections before

nation of welfare benefits in that case is analogous to the federal grantor's proposed termination of grant assistance because both terminations often rest on "incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases."[276] This contrasts sharply with the disability payment termination at issue in *Mathews v. Eldridge*, which depended simply on the presence or absence of a medically determinable health impairment that would make gainful employment impossible. This involves a "more sharply focused and easily documented decision"[277] than one pertaining to a grant dispute arising out of a confusing and often hotly contested fact situation.[278]

The same considerations suggest why the process afforded to grant-

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adverse actions are taken against grantees. These safeguards are sometimes part of a statutory scheme, more often part of a regulatory scheme.

One area notable for authorizing due process protections to grantees by statute is the field of anti-poverty legislation. *Id. See, e.g.,* Economic Opportunity Amendments of 1967, § 604, 42 U.S.C. § 2944 (1976 & Supp. III 1979):

> (3) financial assistance under . . . subchapter II of this chapter [relating to financial assistance to community action programs and related activities] shall not be terminated for failure to comply with applicable terms and conditions unless the recipient agency has been afforded reasonable notice and opportunity for a full and fair hearing.

See also 42 U.S.C. § 2991h (1976) (relating to financial assistance to Native American Projects) and 42 U.S.C. § 2996j (1976 & Supp. III 1979) (relating to financial assistance for providing legal assistance for indigents).

As for regulatory schemes, the most important is the one promulgated by the Department of Health, Education and Welfare (now Health and Human Services) in 1975 providing for a Department Grant Appeals Board. 45 C.F.R. §§ 16.1-.91 (1980). These regulations are important because they establish "a procedure for a full adjudicative hearing" and because they apply to a wide variety of grant programs. R. CAPPALLI, *supra* note 7, at 281. For a comprehensive listing of programs to which these regulations apply, see 46 Fed. Reg. 43,821-22 (1981) (to be codified in 45 C.F.R. § 16, app. A). *See also* note 16 *supra* and accompanying text. *But see* the OMB regulation quoted in note 164 *supra*, which does not require a due process hearing before grant suspension or termination.

Two significant limitations on the protections afforded grantees by statutes or regulations mandating grant dispute procedures should be noted. First, these protections will more often be provided for recipients of mandatory formula grants (*e.g.,* states) than for the private recipients of discretionary grants with whom this Article is principally concerned. Second, it is obvious that if Congress and administrative agencies see fit to advance procedural rights to grantees, they may just as easily see fit not to advance such rights until and unless they are put on a constitutional basis.

276. Goldberg v. Kelly, 397 U.S. 254, 268 (1970).

277. Mathews v. Eldridge, 424 U.S. 319, 343 (1976).

278. Obvious instances of noncompliance with grant conditions are usually avoided. Therefore, "[m]ost of the alleged illegalities will stem from unclear federal policies or a confusing background of facts. In more cases than not, noncompliance allegations are likely to be highly debatable." R. CAPPALLI, *supra* note 7, at 217.

ees should require oral presentations rather than written submissions. The latter were held adequate in *Mathews* for the purpose of ascertaining medical facts based on a physician's findings. Grant disputes, however, because they involve *Goldberg*-type situations in which "credibility and veracity are at issue," cannot be satisfactorily resolved on written submissions. They "do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important."[279]

Grantees should also be afforded a procedural protection closely associated with oral presentation; that is, the opportunity to confront and cross-examine adverse witnesses. "In almost every setting where important decisions turn on questions of fact, due process requires" such an opportunity.[280] Any time serious deprivations are threatened and their reasonableness depends on findings of fact, the safeguards of confrontation and cross-examination have been required—"not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny."[281]

The procedural safeguards whereby a grantee accused of misconduct would, before adverse action is taken, be afforded an evidentiary hearing at which an oral presentation could be made and adverse witnesses confronted and cross-examined would likely reduce substantially the risk of an erroneous deprivation of constitutionally protected liberty and property interests.[282] Certainly the risk would be less than that arising from grant dispute decisions that may be decided, absent statutory or regulatory prohibition, *ex parte*, unilaterally, and arbitrarily. The final factor under *Mathews* is the government's interest in the controversy. This includes the "administrative burden and other societal costs," fiscal or otherwise, that the alternative or substitute procedures would entail.[283] In assessing this factor, it is acknowledged that "[f]inancial cost alone is not a controlling weight in determining

279. Goldberg v. Kelly, 397 U.S. 254, 269 (1970).

280. *Id.*

281. *Id.* at 270 (quoting Greene v. McElroy, 360 U.S. 474, 497 (1959)).

282. Several other procedural protections required by *Goldberg* were discussed by the Court in only a cursory way. They include: timely and adequate notice of the proposed adverse action and the reasons for it; a statement of reasons for the ultimate decision that is based on the law and evidence adduced at the hearing; an impartial decision maker; and the right to be represented by retained counsel. 397 U.S. at 271. It is assumed that any situation found to require that a *Goldberg*-type hearing be afforded would also require these specific safeguards.

283. Mathews v. Eldridge, 424 U.S. 319, 347 (1976).

whether due process requires a particular procedural safeguard prior to some administrative decision."[284] Nevertheless, the *Mathews* Court was concerned that the benefits of additional procedural protections, such as an evidentiary hearing prior to the termination of disability payments, might be outweighed by administrative costs.[285] References by the Court to the increases in expenditures that would be necessitated by requiring a greater number of due process hearings and in continuing disability payments pending a final decision suggest that "financial cost alone" significantly influenced the ultimate decision of the case.

Higher costs would also result if grantee hearing rights were upgraded and improved. The *Mathews* situation, however, is distinguishable. In *Goldberg*, "governmental interests in conserving fiscal and administrative resources" were also asserted to be an adequate basis for denying hearing rights.[286] Yet these interests were held to be "not overriding" in the context of the case. Although the Court recognized that affording pretermination hearings to welfare recipients "doubtless involves some greater expense," it found that "the State is not without weapons to minimize these increased costs."[287] The same weapons are available to the federal grantors. Indeed, the existence of hearing procedures for many grant programs mandated either by statute or by regulation belies the argument that procedural safeguards in this context are necessarily so fiscally and administratively burdensome as to be impractical.

Moreover, an asserted interest in conserving fiscal and administrative resources is not the only governmental or public interest that should be scrutinized. The opinion in *Goldberg* cited public interests in making correct eligibility determinations and in avoiding erroneous terminations of welfare assistance as factors weighing in favor of providing increased due process protections.[288] These same factors should also be considered as factors favoring *Goldberg*-type hearings in grant disputes.

As indicated, federal agencies administering grant programs are implementing an express congressional decision that public funds should be advanced to a private entity in order to achieve a public purpose.[289]

284. *Id.* at 348.
285. *Id.*
286. Goldberg v. Kelly, 397 U.S. 254, 265 (1970).
287. *Id.* at 266.
288. *Id.*
289. *See* notes 67-68 *supra* and accompanying text.

Adverse action taken against the grantee, such as termination, "guarantees frustration of statutory purpose."[290] If a grant is terminated and then re-awarded to a competing grantee, additional costs are incurred when the former closes down and the latter starts up. A limited supply of funds, personnel, and time may be jeopardized just as seriously by abrupt, unilateral grantor actions as by affording *Goldberg*-type hearings in cases of grant disputes, especially when these disputes arise from complex or confusing fact situations or involve interpretation of ambiguous grant conditions.

A good example of a grant dispute in which an application of the *Mathews* test would lead to the conclusion that due process requires a *Goldberg*-type hearing is the controversy in *Southern Mutual Help Association v. Califano*,[291] which was discussed earlier. The charges of misconduct, noncompliance, and conflict of interest in that case[292] threatened not only to prevent SMHA from retaining its grant, but also to damage SMHA's reputation and perhaps thereby foreclose its opportunity to be awarded future grants.[293] In addition to the important interests SMHA could assert in favor of its argument for a pretermination hearing, it could also be argued that the fairness and reliability of a due process hearing was necessary in order to avoid the risk that the unilateral decision arrived at by HEW worked an erroneous deprivation of liberty and/or property interests. At the same time, no significant governmental interest in a need to conserve fiscal and administrative resources could be asserted as reasons for denying SMHA a hearing. As the disposition of the case makes clear, a hearing mechanism was available,[294] and transfer of the grant from SMHA to another grantee involved its own separate costs.

The *Southern Mutual* case qualifies for a prior evidentiary hearing on all three prongs of the *Mathews* test. Of course, the test is a constitutional one, and the decision in *Southern Mutual* was based on nonconstitutional grounds. Another factor in the case, however, unrelated to uniquely constitutional purposes, makes *Southern Mutual* a proper

290. R. CAPPALLI, *supra* note 7, at 94. Professor Cappalli notes that fiscal sanctions against grantees can be "paradoxically self-defeating" and that therefore grantors will generally attempt to secure compliance with grant conditions through voluntary efforts, resorting to coercive measures only when these efforts fail. *Id.* at 93-95.

291. 574 F.2d 518 (D.C. Cir. 1977). *See generally* notes 127-51 *supra* and accompanying text.

292. 574 F.2d at 520-21.

293. *Id.* at 524.

294. *Id.* at 528.

subject for a *Goldberg*-type hearing. That factor is the existence of the disputed factual issues that underlie the termination of funding for SMHA.

One scholar has suggested that there are two principal kinds of hearings: argument and trial-type hearings.[295] The latter kind of hearing was the kind required by the Court in *Goldberg v. Kelly*.[296] There, a trial-type hearing was appropriate because material issues of fact were in dispute: there was a question as to whether the plaintiff welfare recipients in that case were ineligible to receive AFDC. Similarly, issues of fact were at the heart of the *Southern Mutual* controversy: the issues were whether SMHA was guilty of a conflict of interest and whether SMHA failed to provide for participation by its target population, among other charges.

The disputed issues of fact in *Goldberg* and *Southern Mutual* concerned adjudicative facts. These are "facts about the parties and their activities, businesses and properties . . . roughly the kind of facts that go to a jury in a jury case."[297] Such facts generally should not be decided without allowing the parties involved an opportunity to see and hear the evidence against them and to rebut, refute, or explain that part of the evidence that is unfavorable to them. Allowing such an opportunity makes sense because the parties involved are in a unique position to know and understand the facts relating to themselves and their activities and to provide relevant information about them.[298]

In addition to adjudicative facts, there are also legislative facts. These "do not usually concern the immediate parties," involving instead more general information, which can help the decision maker decide general questions of law and policy.[299] When legislative facts are in controversy, they need not be developed by means of a trial-type hearing. Rather, it is sufficient that the hearing take the form of an

295. K. DAVIS, ADMINISTRATIVE LAW TEXT 157 (3d ed. 1972).

296. 397 U.S. 254 (1970).

297. K. DAVIS, *supra* note 295, at 160.

298. *Id.*

299. *Id.* Professor Davis gives an illustration of the distinction between adjucative and legislative facts. If the question of whether a potential draftee should be admitted into the army depends on allegations concerning his past behavior then adjucative facts are at issue. If, however, he has 20-350 vision and the question is whether the minimum requirement should be 20-300 or 20-400, then legislative facts concerning general information about the needs of the army are at issue. *Id.* at 160-61.

argument—"a presentation of ideas as distinguished from evidence."[300]

If, on the other hand, adjudicative facts are in controversy, a trial-type hearing of the kind ordered in *Goldberg* is properly required. The virtue of a trial-type hearing in determining adjudicative facts is that it allows for the support, explanation, or rebuttal of disputed facts and for the direct and cross-examination of witnesses by parties who will likely have access to relevant information. Most grant disputes will, like *Southern Mutual*, involve controversies over adjudicative facts. Consequently, trial-type hearings are appropriate fora in which to resolve such disputes. When, however, a grant controversy involves a dispute over legislative facts, the need for the type of evidentiary hearing argued for here may be substantially less.

In arguing that disappointed federal grantees should be afforded the type of hearing ordered in *Goldberg v. Kelly*, there is no intent to imply that the exact procedural content of such a hearing has been solidly fixed by the enumeration in *Goldberg* of certain specific safeguards and the omission of others.[301] It may be misleading to consider the specific elements of a due process hearing in isolation from one another. Thus, "[i]f an agency chooses to go further than is constitutionally demanded with respect to one item, this may afford good reason for diminishing or even eliminating another."[302] For example, the *Goldberg* Court held that an impartial decision maker was essential,[303] and Judge Friendly suggests that there is less need for procedural safeguards and formalities when the decision maker is more removed from the interested administrative agency.[304] Similarly, it is fundamental to due process that there be timely notice of proposed adverse governmental actions and of the grounds for such proposed actions. Notice in the *Goldberg* case was not found to be constitutionally deficient. When an agency provides

300. *Id.* at 157. Typically, a hearing before an appellate court will be of the argument, not trial, type.

301. The principal procedural safeguards mandated in *Goldberg* that the hearing be afforded prior to adverse governmental action, that an opportunity for an oral presentation be afforded, and that there be an opportunity to confront and cross examine adverse witnesses doubtless must be carried over to the grant field if *Goldberg*-type hearings are found to be constitutionally mandated in this context. Certain safeguards omitted in *Goldberg*—for example, formal findings of fact and conclusions of law, and a record of proceedings—may be necessary or appropriate in a given grant dispute. Regarding the importance of a record, see notes 351-56 *infra* and accompanying text.

302. Friendly, *supra* note 251, at 1279.

303. Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

304. Friendly, *supra* note 251, at 1279.

more than the minimum notice required by the constitution, a forceful argument for relaxing other procedural requirements can be made.[305]

The grant appeal procedures devised by the Department of Health and Human Services (formerly Health, Education, and Welfare) provide an excellent model of a constitutionally sound due process review mechanism. As originally promulgated in 1975, the regulations established a Departmental Grant Appeals Board that was responsible for reviewing post-award disputes involving federal grantees. Additionally, the regulations provided explicit procedural requirements to be followed in the grant dispute adjudication process.[306] These regulations gave the Board jurisdiction to adjudicate a variety of grant disputes, including those arising over termination of a grant. In *Southern Mutual Help Association v. Califano*, the court held that these regulations provided a hearing right for the plaintiff grantee.[307]

Consistent with the Reagan Administration's desire to simplify government, the Grant Appeals Board regulations recently have been revised into a new, highly streamlined set of procedures.[308] Although the impact of these new regulations is yet unknown, the regulations appear to afford the grantee most of the same fundamental due process guarantees provided by the 1975 regulations. A party wishing to appeal an adverse grant decision must within thirty days thereafter submit a written notice of appeal to the Board.[309] The respondent then has thirty days in which to submit documents that support its position, to which the appellant may reply.[310] Following receipt of the parties' written appeal files, the Board chooses the form of review that will take place:

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305. *See generally id.* at 1281. One of the procedural requirements that Judge Friendly discusses is the need for an oral presentation. *Goldberg* ordered that the plaintiff welfare recipients in that case be afforded an opportunity to present arguments orally. 397 U.S. at 268-69. Judge Friendly, although he has "no quarrel" with that aspect of the *Goldberg* decision, "would object to requiring oral presentation as a universal rule." Friendly, *supra* note 251, at 1281. Professor Davis, on the other hand, defines the word "hearing" itself as "any oral proceeding before a tribunal." K. DAVIS, *supra* note 295, at 157. Judge Friendly notes this definition, but sees "no reason why in some circumstances a 'hearing' may not be had on written materials only." Friendly, *supra* note 251, at 1270. The conclusion here is that for most grant disputes in which adjudicatory facts are in controversy a due process hearing must afford the grantee an opportunity to make an oral presentation.

306. 45 C.F.R. §§ 16.1-.91 (1980). These regulations have been superseded by the 1981 regulations discussed at text accompanying notes 308-16 *infra*.

307. 574 F.2d 518, 528 (D.C. Cir. 1977). *See also* notes 127-51 *supra* and accompanying text.

308. 46 Fed. Reg. 43,817-22 (1981) (to be codified in 45 C.F.R. §§ 16.1-.23).

309. *Id.* at 43,818 (to be codified in 45 C.F.R. § 16.7).

310. *Id.* (to be codified in 45 C.F.R. § 16.8).

determination on the written record alone; "informal conference," which may involve a telephone conference call between the parties and a Board member; mediation, which is a new feature of the 1981 regulations; or, when required, a formal hearing.[311]

Because of the time and expense involved in formal hearings, the regulations require that the Board use special "expedited procedures," which replace hearings with less formal mechanisms for disputes involving less than $25,000.[312] Although the minimum dollar amount seems to discriminate against recipients of smaller grants, the regulations, which authorize the Board to hold a hearing "[i]f there are unique or unusually complex issues involved, or other exceptional circumstances,"[313] at least provide the capacity to alleviate concerns as to possible unfairness. How frequently the Board will use this escape clause to provide hearings in cases involving smaller claims remains to be seen.

If the Board ultimately approves an appellant's request for a hearing, or if a hearing is required by law, the Board holds a prehearing conference, which is intended to explore the possibility of a settlement, simplify and clarify issues, draw stipulations and admissions from the parties, and place limitations on the evidence to be presented.[314] The Board then conducts the hearing in as informal a manner as is reasonably possible, "keeping in mind the need to establish an orderly record."[315] Although there is no explicit requirement that the Board make findings of fact and conclusions of law following the hearing, this requirement seems implicit within the regulations that outline the hearing procedures.[316]

311. *Id.* (to be codified in 45 C.F.R. § 16.4).

312. *Id.* at 43,819-20 (to be codified in 45 C.F.R. § 16.12).

313. *Id.* at 43,820 (to be codified in 45 C.F.R. § 16.12(b)).

314. *Id.* at 43,819 (to be codified in 45 C.F.R. § 16.11(b)).

315. *Id.* (to be codified in 45 C.F.R. § 16.11(c)).

316. *Id.* (to be codified in 45 C.F.R. § 16.11(e)). Goldberg v. Kelly, 497 U.S. 254 (1970), mentions the need for a statement of reasons that "need not amount to . . . even formal findings of fact and conclusions of law." *Id.* at 271. No reference is made, however, to a need for a record. Judge Friendly discusses the record and statement of reasons together "since they are closely associated with judicial review." Friendly, *supra* note 251, at 1291. As between the two, he clearly believes the latter is more important than the former. Absent administrative or judicial review, Judge Friendly sees "no need for any 'record' in the typical mass justice case." *Id.* Non-American jurisdictions, he notes, place far less importance on the need for a record of proceedings. A written statement of reasons, on the other hand, is deemed to be "almost essential" for judicial review and also "desirable on many other grounds." *Id.* at 1292. The need to justify an adminis-

The Departmental Grant Appeals Process procedures outlined here represent a demonstrably feasible method of affording due process to federal grantees. Other procedures modeled on them very likely would be sufficiently similar to the procedural requirements mandated by *Goldberg* as to pass constitutional muster. Conversely, a procedure that omitted a substantial number of the safeguards required by this regulatory scheme could arguably be open to a successful constitutional challenge. Federal grantors therefore may wish to follow the example of the Department of Health and Human Services in order to meet their obligation to afford grantees their due process rights.

VI. Protections Provided Grantees by the Administrative Procedure Act

The thesis of this Article is that a federal grantee has a due process right to a fair hearing prior to adverse grantor action. Yet if it were determined that there is no such constitutional right, the determination alone would not completely dispose of the grantee's claim to a prior hearing. Procedural fairness should be the norm under our system, not an exception that occurs when a clever party manages to slip through a loophole before a vigilant government agency can shut it off. Indeed, the Supreme Court has expressed a "concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition."[317] Therefore, apart from any hearing rights conferred by the fifth amendment or by a regulatory scheme of a grantor agency, it is contended here that a grantee's right to a hearing is implicit in statutory principles.

The Administrative Procedure Act (APA)[318] implicitly provides a statutory hearing right that requires a grantor agency acting adversely toward a grantee to employ methods comporting with fundamental principles of fairness. First enacted in 1946,[319] the APA had its genesis in the administration of Franklin Roosevelt, a time of "growth and intensification of administrative regulation of private enterprise and

trative decision "is a powerful preventive of wrong decisions." *Id.* Moreover, requiring a statement of reasons "is not burdensome." *Id.*

317. Greene v. McElroy, 360 U.S. 474, 508 (1959).

318. 5 U.S.C. §§ 551-559, 701-706 (1976).

319. Pub. L. No. 79-404, 60 Stat. 237 (1946) (current version at 5 U.S.C. §§ 551-706 (1976 & Supp. IV 1980)).

other phases of American life."[320] There was concern that administrative agencies, perceived as a relatively new feature of the national government, combining quasi-legislative and quasi-judicial functions with purely administrative ones, might, if uncontrolled, adversely affect private rights. Accordingly, Congress enacted the APA as "an outline of minimum essential rights and procedures . . . afford[ing] private parties a means of knowing what their rights are and how they may protect them, while administrators are given a simple framework upon which to base such operations as are subject to the provisions of the [Act]."[321]

The APA has provisions pertaining to the publication of public information by administrative agencies, to the proper scope of agency records and access to them, to open meetings, to rulemaking, and to adjudications. Provisions that are most directly relevant to a grantee seeking a pretermination hearing, however, are those pertaining to judicial review.[322]

The Act confers a right to judicial review on a person suffering legal wrong as a result of agency action within the meaning of a relevant statute.[323] "Agency action" is defined as including "the whole or a part of an agency rule, order license, sanction, relief, or the equivalent or denial thereof, or failure to act."[324] A grantor agency's refusal to refund a grant or decision to terminate it would clearly count as agency

320. H.R. REP. No. 1980, 79th Cong., 1st Sess., *reprinted in* [1946] U.S. CODE CONG. & AD. NEWS 1195.

321. *Id.* at 1205.

322. 5 U.S.C. §§ 701-706 (1976).

323. 5 U.S.C. § 702 (1976).

> Right of review.
> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other [than] money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color or legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Id. This language reflects amendments made in the Administrative Procedure Act Amendments of 1976, Pub. L. No. 94-574, § 1, 90 Stat. 2721.

324. 5 U.S.C. § 551(13) (1976). Terms within this definition are also defined in 5 U.S.C. § 551

action because it would constitute either an agency sanction or order or the denial of relief. A grantee who thereby suffered a legal wrong or was adversely affected or aggrieved by such an action would be entitled to seek judicial review. The APA provisions allowing for judicial review were recently amended so as to remove the defense of sovereign immunity as a bar to review.[325] Expressions of the legislative intent behind this amendment serve to illuminate the purposes and policies furthered by affording judicial review. It was not thought that eliminating the defense of sovereign immunity would create "undue interference with administration action," but rather that it would be "a safety-valve to ensure greater fairness and accountability in the administrative machinery of Government."[326] The congressional concern expressed was that

> [a]s Government programs grow, and agency activities continue to pervade every aspect of life, judicial review of the administrative actions of Government officials becomes more and more important. Only if citizens are provided with access to judicial remedies against Government officials and agencies will we realize a government truly under law.[327]

The principal reason for having "limited judicial review of administrative action is to insure that the decision makers have (1) reached a reasoned and not unreasonable decision, (2) by employing the proper criteria, and (3) without overlooking anything of substantial relevance."[328] Anything less "would abandon the interests affected to the absolute power of administrative officials."[329] Thus, when federal administrators act adversely to a person's interest, for example, by denying grant refunding, the possibility of judicial review tends to ensure that such an action tracks authorized processes and is undertaken in a procedurally fair manner.[330]

(1976). "Agency" is defined for purposes of the chapter of the APA relating to judicial review by 5 U.S.C. § 701(b)(1) (1976).

325. Administrative Procedure Act Amendments of 1976, Pub. L. No. 94-574, § 702, 90 Stat. 2721.

326. H.R. REP. No. 1656, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6121, 6129.

327. *Id.* at 6130.

328. Covington v. Harris, 419 F.2d 617, 621 (D.C. Cir. 1969).

329. *Id.*

330. "A reviewing court would be doing less than its duty if it failed to set aside the agency action [ignoring the purpose of the controlling statute]. By holding an agency accountable to its lawful duties, the administrative process will be vindicated." International Union of Operating Eng'rs Local 627 v. Arthurs, 355 F. Supp. 7, 9 (W.D. Okla.) *aff'd,* 480 F.2d 603 (10th Cir. 1973).

Indeed, the value of judicial review is considered so basic that there is a strong presumption that it is available.[331] The APA provides that agency actions be subject to judicial review, but it does specify two exceptions to the general rule.[332] These exceptions are for statutes precluding judicial review and for "agency action . . . committed by law to agency discretion."[333] Yet, because of the presumption that judicial review is available, even the specified exceptions are construed narrowly. Accordingly, judicial review "will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress."[334] "[J]udicial review of . . . administrative action is the rule, and nonreviewability an exception which must be demonstrated."[335]

No statute creating a grant program specifically precludes a grantee from judicial review of a denial of grant refunding, and thus no such statute comes within the exception to judicial review contained in 5 U.S.C. § 701(a)(1). Silence in such a statute, however, on the subject of judicial review hardly represents the "plainest manifestation" of a congressional intent to preclude review. "Only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."[336]

The second exception in the APA to the remedy of judicial review provided by that Act does, however, pose a problem within the grant context. This exception, found in 5 U.S.C. § 701(a)(2), pertains to agency action committed to agency discretion. It will be remembered that the grants which are the principal focus of this Article are project

331. "There is no presumption against judicial review and in favor of administrative absolutism unless that purpose is fairly discernable in the statutory scheme." Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 157 (1970) (citation omitted). "The mere failure to provide specifically by statute for judicial review is certainly no evidence of intent to withhold review." H.R. REP. No. 1980, 79th Cong., 2d Sess. 41 (1946), *quoted in Camp*, 397 U.S. at 157.

332. 5 U.S.C. § 701(a) (1976).

333. Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967).

334. *Id.* In Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964), a case in which the plaintiffs' debarment from participation in contracting with the Department of Agriculture was challenged on due process grounds, the defendant-appellant argued that the challenged agency action was not subject to judicial review because it was within the exceptions to the right of review specified in the APA. Rejecting this argument the D.C. Circuit held, per Judge (now Chief Justice) Burger, who was then serving on the circuit court bench, that agency action challenged as a denial of due process "could be immune from judicial review, if ever, only by the plainest manifestation of congressional intent to that effect." *Id.* at 575.

335. Barlow v. Collins, 397 U.S. 159, 166 (1969).

336. *Id.*

grants and that these are often referred to as discretionary grants.[337] In administering discretionary or project grants it is customary that the grantor agency exercise a wide range of discretion as to many aspects of the program, including decisions on refunding and termination. Challenges of grantor actions have been held exempt from the judicial review and other requirements of the APA.[338] This grant exemption from the judicial review requirements of the APA may be quite broad.[339] There is, however, considerable authority for construing the exception for action committed to agency discretion quite narrowly.[340] Moreover, the presumption of judicial review is strongest, and, therefore, the discretionary exception is narrowest, when agency action is "challenge[d] as a denial of due process."[341] Similarly, even when an agency's discretion "may be broad," it will be, if taken in the domestic

337. *See* note 12 *supra*.

338. In St. Louis Univ. v. Blue Cross Hosp. Serv., 537 F.2d 283, 284 (8th Cir.), *cert. denied,* 429 U.S. 977 (1976), it was held that agency discretion in determining reasonable charges under Medicare was sufficient to preclude judicial review. In Kendler v. Wirtz, 388 F.2d 381 (3d Cir. 1968), the court declined to review an arrangement approved by the Secretary of Labor in connection with federal grants-in-aid to state agencies on the allegation of certain railway employees that their interests had not been adequately protected in the arrangement.

339. In this regard, however, note that 5 U.S.C. § 553(a)(2) (1976) specifically and expressly exempts "a matter relating to . . . grants" from APA procedures for rulemaking, but that no similar provision specifically and expressly exempts agency actions pertaining to grants from judicial review.

340. A nonstatutory review of an HEW order suspending Medicare payments to a provider of health services for the purpose of recouping allegedly erroneous payments is available under 5 U.S.C. § 703 (1976). Silence of Medicare amendments on the availability of review for determination other than those specified in 42 U.S.C. § 1395ff(c) (1976) is not a manifestation of congressional intent to preclude review of such controversies. Mount Sinai Hosp., Inc. v. Weinberger, 376 F. Supp. 1099 (S.D. Fla.), *rev'd on other grounds,* 517 F.2d 329 (5th Cir. 1975).

No federal court may entertain a pre-enforcement declaratory judgment action against a federal agency to which 5 U.S.C. §§ 701-706 (1976) apply if Congress intended to prohibit such judicial review, but judicial review of final agency action affecting an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. Standard Oil Co. v. Federal Energy Administration, 440 F. Supp. 328 (N.D. Ohio 1977).

> It was the intent of Congress that the provisions of the . . . [APA] were to have wide application to actions of the federal agencies and that reviewability of agency actions was to be the rule not the exception. . . . 'To preclude judicial review . . . if not specific in withholding such review, [the statute] must upon its face give clear and convincing evidence of intent to withhold it.

Paramount Farms, Inc. v. Morton, 384 F. Supp. 1294, 1296 (W.D. Wis. 1974) (quoting H.R. REP. No. 1980, 79th Cong., 2d Sess. 41 (1946), *aff'd,* 527 F.2d 1301 (7th Cir. 1975). Prohibition against judicial review extends to agency action that is committed to agency discretion by law. Hospital Ass'n of New York State, Inc. v. Tora, 438 F. Supp. 866 (S.D.N.Y. 1977).

341. Aquavilla v. Richardson, 437 F.2d 397, 402 (2d Cir. 1971), *quoted in* Caulfield v. Board of Educ., 449 F. Supp. 1203, 1224 (E.D.N.Y. 1978).

rather than foreign affair or national security spheres, "subject to judicial review for arbitrariness and abuse of discretion."[342] This possibility of limited review may be especially important for grantees challenging adverse actions described as "discretionary" and taken without any procedural safeguards.[343]

Of course, all agency action requires the exercise of discretion, whether it involves the grant process or not. It therefore should be self-evident that Congress did not intend to make all agency actions unreviewable. The presence of even broad discretion is not dispositive of reviewability.[344] Delegated power may not be exercised arbitrarily, and abuse of discretion is necessarily excluded from the compass of a grant of discretion. Discretion means sound discretion not exercised arbitrarily. The general rule has been and remains that although courts will not interfere with the sound exercise of discretion, they will review administrative action to ascertain whether it has a rational basis and is reasonable or whether it is arbitrary.[345]

Certainly, grantees may argue that notwithstanding the need for grantor discretion in administering grant programs, such discretion must be exercised in a fair and reasonable manner. As indicated, the specific exemption of grants from APA rulemaking procedures in 5 U.S.C. § 553(a)(2) makes it difficult to infer an implied exemption of grants from APA provisions respecting judicial review.[346] Moreover, even when the scope of available review has been truncated by legislative action vesting a wide range of discretion in an administrative agency, the APA review provisions still require that agency actions be held "unlawful" and "set aside" when, for example, an abuse of discretion is found. Consequently, the courts have displayed a willingness to review agency action at least for the limited purpose of discovering

342. Peoples v. United States Dep't of Agriculture, 427 F.2d 561, 567 (D.C. Cir. 1970).

343. Regarding the discretionary exception to the judicial review provisions of the APA, see, e.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

344. Ferry v. Udall, 336 F.2d 706, 711 (9th Cir. 1964), *cert. denied,* 381 U.S. 904 (1965). The circuit court opinion notes the "analytical problem" that inheres in the distinction between action committed to agency discretion and such action that merely "involves" the exercise of discretion. 336 F.2d at 711.

345. Krueger v. Morton, 539 F.2d 235, 238-39 (D.C. Cir. 1976); Peoples v. United States Dep't of Agriculture, 427 F.2d 561, 567 (D.C. Cir. 1970).

346. *See* notes 331-43 *supra*.

agency abuses or arbitrariness.[347]

What does the fact that a grantee may be able to establish a right to some quantum of judicial review of an agency decision not to refund or to terminate its grant have to do with establishing the grantee's right to a pretermination agency hearing? Through judicial review, a grantee may demonstrate that he wrongfully was denied his grant, but, in the meantime, the grant was awarded to someone else. Although the grantee may be able to establish that he should have continued to receive the grant, he cannot expect to receive monies already expended.[348] Furthermore, the time and expense may be too prohibitive for the grantee to establish his right to the grant through the judicial process. There is an important and growing body of law that calls for public standards to define and control the exercise of agency discretion.[349] A hearing involves cost and delay, but so do protracted court proceedings and appeals to decide whether a hearing is necessary.

The value of a complete adjudicatory hearing for grantees facing ad-

347. [W]hile review is not granted for action "by law committed to agency discretion," as noted in section 701(a)(2), review is expressly provided for when there is an abuse of that discretion . . . .

. . . [T]he courts will not invade the domain of this discretion, but neither can the agency or official be allowed to exceed the legal perimeter thereof.

Scanwell Laboratories, Inc. v. Schaffer, 424 F.2d 859, 874 (D.C. Cir. 1970).

Review of Medicare appeal board's decision on provider's reimbursement rights is limited to determining constitutional questions, errors of law, and determining whether findings "are arbitrary or capricious or unsupported by substantial evidence." Overlook Nursing Home, Inc. v. United States, 556 F.2d 500, 502 (Ct. Cl. 1977).

When plaintiff sought to enjoin the Office of Economic Opportunity from implementing a decision that plaintiff would no longer be funded as an independent entity, but would instead be merged with another legal services organization, allegations that agency action was arbitrary and capricious entitled plaintiff to "some measure of judicial review, limited though it may be." Monmouth Legal Serv. Organization v. Carlucci, 330 F. Supp. 985, 992 (D.N.J. 1971).

Grantees seeking review of decision denying application to refund their projects, although not entitled to plenary review, were entitled to a review of whether the administrative decision maker acted arbitrarily or capriciously or failed to articulate factors relevant to the agency's decision. Mil-Ka-Ko Research & Dev. Corp. v. Office of Economic Opportunity, 352 F. Supp. 169, 173 (D.D.C. 1972), *aff'd,* 497 F.2d 684 (D.C. Cir. 1974).

348. In Southern Mut. Help Ass'n v. Califano, 574 F.2d 518 (D.C. Cir. 1977), the plaintiff's eventual post-hearing goal and requested remedy was reinstatement of the final two years of its grant. The circuit court, however, was of the opinion that such a remedy "no longer exist[ed]" because the fiscal years had past and the successor grantee had provided the health services. *Id.* at 522-23 n.22.

349. "Courts have increasingly found that applicants have the right to have their grant applications rationally considered in accordance with law and have applied the standards of 5 U.S.C. § 706 to determine whether denials of grants are arbitrary, capricious, or not in accord with law or procedural requirements." Madden, *supra* note 12, at 38.

verse grantor action is that it will sharpen the issues presented to federal courts exercising their jurisdiction under the APA. Judicial review implies just that: review. In this day of crowded federal dockets, the necessity for a reviewing court to launch an exhaustive de novo inquiry into the often complex and hotly contested fact situations that may underlie an agency's adverse grant decision challenged as arbitrary and capricious, or as an abuse of discretion, may make truly egregious demands on what are already strained judicial resources. Given even the limited judicial review of discretionary grantor decisions authorized by the APA, it is clear that the denial, revocation, termination, and administration of a grant should be subject to the scrupulous observance of fair procedures. Actions undertaken for obscure or undisclosed reasons should not be tolerated. Therefore, in order properly to guard against an abuse of discretion and to minimize the costs of review, the APA should be deemed to require a prior hearing for grantees who allege they are "adversely affected or aggrieved by agency action."[350]

By requiring some kind of hearing, an agency is forced to make a record. This, in turn, provides something substantial for a court to review and may altogether obviate the necessity of taking evidence to resolve disputed issues of historical fact.[351] Without the aid of a record, it is difficult to see how courts satisfactorily can review agency decisions that are required by the APA.[352]

Judge Friendly, in his discussion of procedural hearing safeguards, treats the making of a record together with the need for a statement of reasons because both "are closely associated with judicial review."[353] He places an even higher value on the latter than on the former because a written statement of reasons, in addition to serving other ends,

350. *See* note 322 *supra*.

351. The Supreme Court has recognized the difficulty of reviewing administrative action based on an administrative record not before it. When there are no formal agency findings, "it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971) (requiring a hearing on the record may make it unnecessary to call federal administrators to court for their testimony). *See also* Camp v. Pitts, 411 U.S. 138 (1973).

352. Judicial review of administrative action in refusing to process and approve applications under the Housing Act of 1959 for direct, low interest, long term loans to provide housing for the elderly and whether such loans were terminated for program related reasons, should normally be based on the full administrative record that was before the decision maker at the time the challenged action was taken and not on a de novo inquiry into the facts by the district court. Cooperative Servs., Inc. v. U.S. Dep't of Hous. and Urban Dev., 562 F.2d 1292 (D.C. Cir. 1977).

353. Friendly, *supra* note 251, at 1291.

is "almost essential if there is to be judicial review."[354] A statement of reasons is often crucial for the very simple reason that the court needs to know what the agency really has determined and why in order to understand precisely what must be reviewed. "Reviewing courts would face an impossible task if agencies reached decisions without making and recording clear findings."[355] By articulating reasons for its actions, an agency affords the public and itself a safeguard against arbitrariness and carelessness and helps develop greater consistency in its decision making.[356]

In *Environmental Defense Fund, Inc. v. Ruckelshaus*,[357] the D.C. Circuit Court of Appeals reviewed an administrative order refusing to suspend federal pesticide registration. The court remanded the cause for further proceedings on the ground that there was an inadequate explanation of the administrative decision being challenged. Writing for the court, Chief Judge Bazelon reasoned that it was "necessary, but not sufficient, to insist on strict judicial scrutiny of administrative action."[358] There were limitations on the efficacy of that kind of scrutiny:

> For judicial review alone can correct only the most egregious abuses. Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible. Rules and regulations should be freely formulated by administrators, and revised when necessary. Discretionary decisions should more often be supported with findings of fact and reasoned opinions. When administrators provide a framework for principled decision-making, the result will be to diminish the importance of judicial review by enhancing the integrity of the administrative process, and to improve the quality of judicial review in those cases where judicial review is sought.[359]

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354. *Id.* at 1291.

355. International Union of Operating Eng'rs Local 627 v. Arthurs, 355 F. Supp. 7, 16 (W.D. Okla.), *aff'd*, 480 F.2d 602 (10th Cir. 1973).

356. Citizens Ass'n of Georgetown, Inc. v. D.C. Zoning Comm'n, 477 F.2d 402, 408 (D.C. Cir. 1973).

357. 439 F.2d 584 (D.C. Cir. 1971).

358. *Id.* at 598.

359. *Id.* (footnotes omitted). The reasoning of *Environmental Defense Fund* was recently followed in Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839 (E.D. Va. 1980), in which the idea that federal administrators articulate the standards governing their exercise of discretion was described as "a fundamental principle linked with due process." *Id.* at 854. *See also* Matlovich v. Secretary of the Air Force, 591 F.2d 852, 857 (D.C. Cir. 1978), and the cases cited therein.

VII. CONCLUSION

The thesis of this Article is that only a prior hearing of the *Goldberg*-type, such as provided by the Department of Health and Human Services Department Grant Appeals Board, can provide grantees with the kind of record and statement of reasons that are an essential requisite to the federal courts' ability to discharge adequately their constitutional obligation of judicial review. A hearing at which a grantee may controvert allegations of misconduct, present evidence in its own behalf, and question the assumptions underlying agency action will lead to a record enabling a reviewing court to identify the proper standards for appraising the action of the grantor agency. Moreover, requiring such a hearing will necessarily promote an atmosphere of fairness and tend to encourage improved grantor-grantee relations in what are acknowledged to be cooperative enterprises. It may even be that the increased perception (and reality) of procedural fairness in grant decision making may so mollify even disappointed grantees that hearing decisions unfavorable to them will not lead to court challenges. Yet, regardless of whether such hearings can suffice as final adjudications that need not be reviewed by an overworked judiciary, they would inevitably serve to advance, throughout the field of federal grant making, the cause of administrative fairness and accountability that was made a national policy by congressional enactment of the APA.

Some may consider the central theme of this Article a somewhat technical aspect of the subject of procedural due process in the federal grant context. Although an analysis of procedural safeguards might appear an extremely technical exercise, history has shown that such safeguards provide the best protection against the excesses of the arbitrary use of power by the government.[360] To the extent that procedural due process protections succeed in opening the federal grant system to the light of public inquiry, it will have done so largely by securing grantees with safeguards necessary to secure fair and reasoned decisions at the hands of federal grantors. This will be particularly critical as we enter a period of finite and limited government resources.

360. "The history of liberty has largely been the history of observance of procedural safeguards." McNabb v. United States, 318 U.S. 332, 347 (1943).