provided a protective statute for every agency as it has for the FAA. The only solution is to either carve an exception to *Bristol-Myers*, as the alternative rationale of *Evans* does, in effect, or to find a source of protection outside the Act such as the "informant privilege."[129]

III. HEARINGS

A. RIGHT TO A HEARING

The Supreme Court in *Goldberg v. Kelly*[1] held that under the due process clause of the fourteenth amendment a welfare recipient must be afforded an evidentiary hearing prior to the termination of benefits, regardless of a statutory provision requiring a post-termination "fair hearing."[2] After an initial determination that the right-privilege distinction[3] was not applicable to the receipt of welfare benefits, the Court applied the traditional balancing test[4] to the competing interests at stake.[5] In striking a balance the Court enumerated the interests on the one side as the fundamental necessity of such payments to the eligible recipient, and the interests of the state in insuring the general welfare of its citizens.[6] The opposing interests which favored termina-

129. This has been described as the Government's privilege to withhold the identity of persons who furnish information of violations of laws, subject to judicial limitations dependent upon the needs of the defendant. Roviaro v. United States, 353 U.S. 53, 59-60 (1957). *See* Stewart & Ward, *FTC Discovery: Depositions, the Freedom of Information Act and Confidential Informants*, 37 ANTITRUST L.J. 248, 258 (1968). *See also* Comment, *An Informer's Tale: Its Use in Judicial and Administrative Proceedings*, 63 YALE L.J. 206 (1953).

1. 397 U.S. 254 (1970), *noted in* 49 J. URB. L. 186 (1971); 23 U. FLA. L. REV. 422 (1971).

2. 397 U.S. at 259-60 & n.5.

3. See Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Reich, *The New Property*, 73 YALE L.J. 733 (1964). *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

4. Justice Frankfurter first outlined the factors to be weighed in determining whether a particular proceeding was unfair, emphasizing the need to balance "the hurt complained of and good accomplished." Joint Anti-Faseist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring); *accord*, Cafeteria Workers Union v. McElroy, 367 U.S. 886 (1961); Hannah v. Larche, 363 U.S. 420 (1960); Greene v. McElroy, 360 U.S. 474 (1959).

5. ". . . consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Cafeteria Workers Union v. McElroy, 367 U.S. 886, 895 (1961). *See also* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring).

6. 397 U.S. at 264-65.

tion pending a final hearing were defined as the conservation of the government's fiscal and administrative resources. The Court went on to hold simply that "the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the state's interest that his payments not be erroneously terminated, clearly outweigh the state's competing concern to prevent increases in fiscal and administrative burdens."[7]

It is clear the Court in *Goldberg* reached its decision by application of a simple balancing test, but it was not until 1971 in *Bell v. Burson*[8] that the Court again illustrated the scope of the individual interests which would be sufficient to overbalance administrative considerations. Since the *Goldberg* decision lower courts have been trying to define the parameters that will aid in determining which private interests will be given due process protection in the form of required hearings *prior* to administrative action. This section will examine what weights the courts have been giving the various competing interests in applying the *Goldberg* balancing test and the extension made in *Bell.*

As illustrated by two late 1970 cases,[9] the circuits agree that a tenant in a federally assisted public housing project owned and operated by a local governmental housing authority is entitled by the due process clause to a hearing before an eviction determination is administratively made. Although the New York Housing Authority's procedure for terminating tenancies on the grounds of nondesirability and breach of the rules and regulations met the Department of Housing and Urban Development's standards,[10] the Second Circuit in *Escalera v. New York Housing Authority*[11] held that even if public housing could be considered a privilege,[12] the private interest in continuing the tenancy outweighed the government's desire for a summary proceeding. As noted in *Caulder v. Durham Housing Authority*,[13] the private

7. *Id.* at 266.

8. 402 U.S. 535 (1971). See notes 20-27 *infra* and accompanying text.

9. Caulder v. Housing Auth., 433 F.2d 998 (4th Cir.), *cert. denied*, 401 U.S. 1003 (1970); Escalera v. Housing Auth., 425 F.2d 853 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970).

10. *See* 425 F.2d at 861. *See generally* Thorpe v. Housing Auth., 393 U.S. 268 (1969).

11. 425 F.2d 853 (2d Cir. 1970).

12. *See* Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970); Snaidach v. Family Fin. Corp., 395 U.S. 337 (1969); Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963); Greene v. McElroy, 360 U.S. 474 (1959); Hornsby v. Allen, 326 F.2d 605, 609 (5th Cir. 1964); Van Alstyne, *supra* note 3, at 1451-54; Note, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968).

13. 433 F.2d 988 (4th Cir. 1970).

interest is also bolstered by a complementary government interest which helps to offset the government fiscal interest in a speedy adjudication:

> The program of subsidized low-cost housing has been undertaken to serve a variety of state interests. Should an eligible tenant be wrongfully evicted, some frustration of these interests will result. The impact on the tenant is no less. Not only is he, by definition, one of a class who cannot afford acceptable housing so that he is 'condemned to suffer a grievous loss,' but should it be subsequently determined that his eviction was improper the wrong cannot be speedily made right because of the demand for low-cost public housing and the likelihood that the space from which he was evicted will be occupied by others. In short, both governmental and individual interests are furthered by affording due process in the eviction process.[14]

The *Caulder* analysis, like that in *Goldberg,* indicates that the balance is not between purely private interests and state interests. In fact, in all cases involving the termination of state assistance, whether in the form of welfare payments or low cost housing, there can be little doubt that some governmental interest in continuing the benefit to an eligible recipient will always exist.

In cases like *Goldberg, Escalera,* and *Caulder,* fiscal considerations, while relevant, are seldom decisive.[15] In *Crow v. California Department of Human Resources,*[16] for example, in denying the termination of unemployment insurance[17] without providing the individual the benefit of an eligibility hearing, the district court reasoned that there are ways by which the state can protect itself or rely on recoupment measures which have already been found constitutional.[18]

While the lower courts were cautiously extending the pretermination hearing to cases involving public housing, unemployment

14. *Id.* at 1003 (footnote omitted).

15. Crow v. Department of Human Res., 325 F. Supp. 1314, 1317 (N.D. Cal. 1970).

16. 325 F. Supp. 1314 (N.D. Cal. 1970). *See also* Java v. Department of Human Res., 317 F. Supp. 875 (N.D. Cal. 1970), *aff'd on different grounds,* 402 U.S. 121 (1971).

17. While recognizing that the unemployment compensation insurance program was not based on need in the sense underlying various welfare programs, the Supreme Court noted that there is a kind of "need" present to require due process protection for the benefits just as in *Goldberg.* Department of Human Res. v. Java, 402 U.S. 121, 130-32, 135-36 (1970). *See also* Wright v. Finch, 321 F. Supp. 383 (D.D.C. 1971) (disability insurance).

18. 325 F. Supp. at 1317. The court noted that California, for example, provides that an individual who is found to have refused suitable employment in a given week, could after a fair hearing, forfeit his right to payment of unemployment insurance for as many as nine successive weeks. *Id.*

insurance, and disability payments,[19] the Supreme Court took a giant step forward this past year when it held in *Bell v. Burson*[20] that the due process clause mandated a hearing prior to the suspension of the motor vehicle registration and driver's license of an uninsured motorist under the Georgia Motor Vehicle Safety Responsibility Act.[21] The Act provides for the suspension of an uninsured motorist's license where he is involved in an accident and fails to post security to cover the amount of damages claimed by the aggrieved parties,[22] but makes no provision for the determination of fault prior to the suspension.[23] The petitioner, a Georgia clergyman whose ministry required him to travel by car through rural Georgia, argued that the accident in which he was involved was unavoidable[24] and the suspension without a finding of fault was unconstitutional. The state contended that the uninsured motorist's interest in avoiding the suspension of his license was outweighed by countervailing government interests which included the protection of a claimant from the possibility of an unrecoverable judgment and the administrative expense of such a hearing. In striking the balance in favor of the individual, the Court stated that "[o]nce licenses are issued, as in the petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees."[25] In rejecting the state's argument that it need not provide a hearing on liability because fault was irrelevant to its statutory scheme, the Court noted that if prior to the suspension there had been a release from liability executed by the injured party, or there had been an adjudication of nonliability, no

19. Wright v. Finch, 321 F. Supp. 383 (D.D.C. 1971). The Supreme Court, in a per curiam opinion, decided to withhold judicial action on the appeal pending reprocessing under new regulations issued by the Department of HEW. Richardson v. Wright, 40 U.S.L.W. 4232 (U.S. Feb. 24, 1972) (Nos. 70-161, 70-5211).

20. 402 U.S. 535 (1971).

21. GA. CODE ANN. § 92A-601 *et seq.* (1958).

22. *Id.* § 92A-605(a).

23. 402 U.S. at 536.

24. Petitioner was actually found to be free from fault in a hearing pursuant to a statutory right to appeal de novo, GA. CODE ANN. § 92A-602 (1958), and the Georgia Superior Court ordered that the license not be suspended until there was an actual suit filed against the petitioner to recover damages for the injuries sustained. The order was reversed by the Georgia Court of Appeals. 402 U.S. at 538.

25. 402 U.S. at 539. *See generally* Reich, *Individual Rights and Social Welfare*, *supra* note 3, at 1255; Reich, *The New Property*, *supra* note 3.

suspension would have been worked under the Act;[26] and, thus, the state could not, consistent with due process, eliminate consideration of the fault factor prior to suspension. The Court reasoned that where there is no reasonable possibility of a judgment being rendered against the faultless licensee, it is impossible for state interests to outweigh those of the individual.[27]

After *Bell* it would appear that only in rare instances could the government side of the balance offset the private-interest side to eliminate the need for a prior hearing, since the injury suffered by a potentially eligible benefit recipient need only be as great as the loss of one's driver's license. However, in *Langevin v. Chenango Court, Inc.*,[28] the Court of Appeals for the Second Circuit held that Federal Housing Administration approval of across-the-board rent increases of a federally subsidized project, made pursuant to a standard regulatory agreement and without a hearing, does not violate the tenant's fifth amendment right to due process. Organized in 1963 as a New York limited dividends corporation[29] for the construction of a section 221(d)(3)[30] housing complex, Chenango Court had been financially unsuccessful from its inception. In 1970 it defaulted on payments due under the terms of its below-market interest mortgage and on certain real estate taxes. The United States instituted a foreclosure action which was stayed by stipulation pending an FHA investigation of Chenango's financial affairs. To bolster its financial position Chenango Court sought to increase its rents. However, before such a measure could be initiated Chenango was required, under the standard regulatory agreement it had entered into with the FHA,[31] to file an application for

26. 402 U.S. at 541.

27. Although not touched upon by the Court, one possible factor in tipping the scale in favor of the licensee is that the suspension of one's license has always had penal connotations since it is often used as a punishment for violation of state motor vehicle laws. Whether this factor will be used to narrow the holding in *Bell* is not yet apparent.

28. 447 F.2d 296 (2d Cir. 1971).

29. N.Y. PRIV. HOUS. FIN. LAW §§ 70 *et seq.* (McKinney 1962).

30. National Housing Act § 221(d)(3), 12 U.S.C. § 1715*l*(d)(3) (1970), *formerly* 68 Stat. 599 (1954). The section 221(d)(3) program aids private industry in providing low and moderate income housing by issuing insurance on long term mortgage loans covering up to 90 percent of the project's cost and providing below-market interest rates to eligible borrowers on FHA-insured loans.

31. The regulatory agreement provided:

> No increase will be made in the amount of the gross monthly dwelling income for all units as shown on the rental schedule unless such increase is approved by the Commissioner, who will at any time entertain a written request for an increase properly supported

approval. The FHA approved the higher rents conditioned on the maintenance of services at current levels and subject to reductions at any time at the FHA's sole discretion. Many tenants refused to pay the new rents and at a meeting with regional FHA officials sought all of the information upon which the approval was based as well as an opportunity to present opposing material. The FHA denied the tenants any form of a hearing and Chenango Court instituted suit in New York courts for the rents due or the eviction of delinquent tenants. The tenants countered by filing this action seeking a temporary injunction preventing the increases and evictions, a declaration that the FHA approval without a prior hearing violated the due process clause of the fifth amendment, and an injunction against further increases except after an adjudication in accordance with the Administrative Procedure Act.[32] The district court dismissed the tenants' action for lack of jurisdiction[33] and the Second Circuit affirmed, reaching the merits in a 2 to 1 decision.

With the passage of the Housing Act of 1949,[34] Congress officially adopted a national housing policy aimed at eliminating substandard housing and achieving "a decent home and a suitable living environment for every American family."[35] One method of attaining this objective is the use of section 221(d)(3),[36] a provision "designed to assist *private industry* in providing housing for low and moderate income families and displaced families"[37] with FHA mortgage insurance[38] and below-market interest rates.[39] To administer the 221(d)(3) program, Congress conferred broad discretion on the Secretary of HUD, authorizing him to approve mortgagors and to supervise their operations "under a regulatory agreement or otherwise, as to rents, charges, and methods of operation, in such form and in such manner

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by substantiating evidence and within a reasonable time shall: (1) Approve a rental schedule that is necessary to compensate for any net increase, occurring since the last approved rental schedule, in taxes (other than income taxes) and operating and maintenance expenses over which owners have no effective control, or (2) Deny the increase stating the reasons therefor. 447 F.2d at 298.

32. 5 U.S.C. §§ 554, 556 (1970).

33. Unreported decision, *referred to in* 447 F.2d at 299.

34. 42 U.S.C. §§ 1401 *et seq.* (1970).

35. *Id.* § 1441(a).

36. 12 U.S.C. § 1715*l*(d)(3) (1970).

37. *Id.* § 1715*l*(a) (emphasis added).

38. *Id.* § 1715*l*(b).

39. *Id.* § 1715*l*(d)(5).

as in the opinion of the Secretary will effectuate the purposes of this section."[40] As a result of this legislative mandate HUD has promulgated various regulations controlling 221(d)(3) projects,[41] one of which requires that applications for rent increases be submitted to the FHA for approval based on the rental income necessary to maintain a project's economic soundness and "to provide a reasonable return on the investment consistent with providing reasonable rentals to tenants."[42] Section 221(d)(3), however, unlike other provisions of the Housing Acts,[43] does not specifically provide for a hearing.

Even in the absence of a specific statutory mandate, the courts have generally required an agency to grant a hearing where the administrative determination involved "adjudicative" rather than "legislative" facts.[44] The distinction between these two types of facts was clearly drawn by the Fifth Circuit in *Hornsby v. Allen*,[45] a case in which the petitioner was denied a liquor license without a hearing. The *Hornsby* court viewed the denial of a license as an adjudication that the applicant had not satisfied the established qualifications and requirements.[46] Since licensing was found to be adjudicative in nature, the court held the fundamental requirements of due process applicable, which necessitated a fair hearing.[47]

In a case very similar to *Chenango Court, Hahn v. Gottlieb*,[48] the Court of Appeals for the First Circuit denied tenants a right to a

40. *Id.* § 1715*l*(d)(3).

41. 24 C.F.R. §§ 221.502 *et seq.* (1971).

42. *Id.* § 221.531(c) (1971).

43. *See, e.g.*, HOUSING ACT OF 1949 § 105(d), 42 U.S.C. § 1455(d) (1970), requiring a public hearing before aid is granted to an urban renewal project.

44. *See, e.g.*, The Assigned Car Cases, 274 U.S. 564 (1927); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964); State Bd. of Milk Control v. Newark Milk Co., 179 A. 116 (N.J. Eq. 1935).

Professor Davis defines adjudicative facts as those "pertaining to the parties and their businesses and activities." 1 DAVIS § 7.02. General facts which do not concern the immediate parties and which help the tribunal decide questions of law, policy and discretion are termed legislative. It is considered impractical to let everyone have a voice in a legislative determination since many of the parties affected have little or nothing to contribute to the development of legislative facts. On the other hand, interested parties, knowing more about the facts concerning themselves and their activities than anyone else is likely to know, are in the best position to rebut or explain evidence that bears upon adjudicative facts. *Id.*

45. 326 F.2d 605 (5th Cir. 1964).

46. *Id.* at 608. On the other hand, the court noted that the prescription of the standards for obtaining a license was legislative since it created authoritative guidelines for future conduct derived from an assessment of the community needs. *Id.*

47. *Id.* *See* Opp Cotton Mills v. Administrator, 312 U.S. 126 (1941).

48. 430 F.2d 1243 (1st Cir. 1970), *noted in 1970 Duke Project* 312.

hearing, finding the approval of rent increases made on *all* the apartment units in a section 221(d)(3) housing project to be an informal rate-making process and therefore legislative in nature.[49] The court noted that when such an agency decision turns on legislative facts, a formal hearing will contribute little to the agency's understanding of the issues.[50] The *Hahn* court distinguished the proceedings in *Escalera* and *Goldberg* as being adjudicative since they involved only individual recipients of state assistance. Furthermore, the court found another significant difference between the *Hahn* proceedings and the *Goldberg* and *Escalera* cases. In the latter, the interest of the individual was directly jeopardized when the agency decided to terminate the welfare benefits, or to approve eviction. In *Hahn,* however, under the National Housing Act the primary role of the FHA is that of an insurer for private investors so that the government does not provide the assistance directly under the section 221(d)(3) program.[51] Thus the government action in *Hahn* poses a less serious threat than in *Goldberg* and *Escalera* and requires a less compelling government interest to balance that of the individual. Applying what it termed the "constitutionally relevant test,"[52] the *Hahn* court held that a hearing was not constitutionally necessary and noted that if such a requirement existed it might frustrate the government endorsed program by delaying economically necessary rent increases and discouraging private investors from entering the section 221(d)(3) program.[53]

Faced with essentially the same situation that appeared in *Hahn,* the court in *Chenango Court* reached a similar conclusion but with a different rationale. After handling the jurisdictional question which troubled the district court[54] and noting that no statutory requirement for a hearing existed,[55] the court dealt with the more difficult question

49. 430 F.2d at 1248.

50. *Id.* at 1248-49.

51. *Id.* at 1247.

52. *Id.* at 1249. The test consisted of weighing the government interest in a summary procedure for approving rent increases against the tenants' interest in greater procedural safeguards.

53. *Id.* at 1248.

54. See note 33 *supra* and accompanying text. The circuit court found that the plaintiff's claim of entitlement to a hearing before the FHA did not require a jurisdictional amount under 28 U.S.C. § 1361 (1970), because it was an "action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to plaintiff." 447 F.2d at 300.

55. The Administrative Procedure Act requires a hearing in cases of "adjudication required by statute to be determined on the record after an opportunity for agency hearing." 5 U.S.C.

of due process. Contrary to the finding in *Hahn*, the Second Circuit categorized the approval of rent increases as an adjudicative rather than a legislative proceeding, refusing to rely on the easy but unconvincing adjudicative versus legislative facts distinction. While recognizing that adjudicative action by an agency usually entitles a citizen to a hearing, the court attempted to draw a distinction between an agency *making* the adjudicative decision and an agency merely *approving* the decision already made by a private individual.[56] In other words, "the Government did not itself increase the rents but simply allowed the landlord to institute an increase upon the termination of existing tenancies, as the landlord would have been legally free to do but for its regulatory agreement with the FHA."[57] While recognizing that the National Housing Act contemplated regulatory control of section 221(d)(3) projects, the court did not consider the FHA's determination a "full fledged public utility rate proceeding"[58] nor an agency action equivalent to the ones found in *Escalera* or *Goldberg*.[59] The court's overriding consideration in holding that due process did not require a hearing before the approval of section 221(d)(3) rent increases, however, was the fear that such a hearing would discourage private investors from constructing such housing or otherwise frustrate the program.[60] As pointed out in the court's opinion, Congress clearly chose to give the FHA as much flexibility as possible to achieve a sufficient supply of homes for low and moderate income and displaced families.

In their attempt to foster the congressional objective of encouraging private enterprise to undertake the construction of 221(d)(3) housing, the Second Circuit strained to draw a distinction between the agency action in *Chenango Court* and that in *Goldberg* and *Escalera.*

§ 554 (1970). The court read section 221(d)(3) of the National Housing Act as leaving the procedure to be used open to the Secretary's discretion. 447 F.2d at 300.

56. *Id.* at 300-01.

57. *Id.* at 301.

58. *Id.*

59. Judge Oakes, dissenting, believed that the majority drew a "distinction without a difference." He argued that a tenant in a 221(d)(3) project should stand in no worse shoes than tenants in a city housing project such as *Escalera.* The mere fact that the government itself did not increase the rents but rather permitted the landlord to institute the increase was in his opinion indistinguishable. *Id.* at 304.

60. "This danger is rather vividly illustrated in the instant case where long postponement of rent increases would doubtless have led to mortgage foreclosure and evictions by a purchaser." *Id.* at 301 n. 9.

In light of recent decisions[61] it is questionable whether a difference remains between government action and a private, but regulated, individual or group. This would be especially true in *Chenango Court*, as well as *Hahn*, where the FHA regulations expressly require an agency determination before approval of a rent increase, and, therefore, call for affirmative action by the FHA.[62] The better reasoning, which the Second Circuit appeared to follow without really articulating, is the use of the balancing test which appears in *Hahn, Escalera, Goldberg* and *Bell*. The fact that *Hahn* viewed the FHA's determination as legislative while *Chenango Court* viewed a similar proceeding as adjudicative made little difference in their final decisions. Once *Chenango Court* classified the facts as adjudicative it then weighed the competing interests of the parties involved. This indicates the limitation of the adjudicative-legislative distinction and suggests that the ultimate test to be used is that of balancing the interests. The determination of the nature of the facts relied on in the agency proceeding thus becomes only a short cut to weighing the interests.

Of greater significance is the insight that *Chenango Court* gives into the interests to be balanced and the weights to be given in applying the balancing test prescribed in *Goldberg*. Since cases such as *Escalera* and *Caulder* make it clear that private concern in continuing tenancies in public housing is of sufficient magnitude to require a hearing when balanced against the government's administrative and fiscal interest, it is important to understand the true distinction in *Chenango Court*. As noted in the dissent, there is little difference between the hardship of being evicted for violation of project rules and being forced out because of the inability to meet the higher rents; and after *Bell* it is clear that the courts will not require an overwhelming private interest to tip the scale when set off against solely administrative and fiscal considerations. The difference in *Chenango Court*, therefore, is that on the government side of the balance also exists the interests of private landlords with whom government has left the responsibility to carry out the operation of the section 221(d)(3) program. This added factor, which has been recognized on several occasions, is enough to offset a very compelling private concern.

61. Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970), *noted in 1970 Duke Project* 200. *See also* Evans v. Newton, 382 U.S. 296 (1966); Public Utilities Comm'n v. Pollack, 343 U.S. 451, 462 (1952).

62. See note 42 *supra* and accompanying text.

Thus, in the line of cases which has followed *Goldberg*, two 1971 decisions have been helpful in shedding some light on the inherent problems of applying a balancing test. In *Bell* the Supreme Court has indicated that where the government has issued a benefit to an individual, whatever that benefit may be, it will take more than administrative and fiscal considerations to suspend or terminate that benefit without a prior hearing. In *Chenango Court* the Second Circuit illustrated that the addition of some other private interest to the state's fiscal and administrative side of the balance can be sufficient to offset the individual's interest in maintaining his state assistance and in such case no pre-termination hearing will be required.

B. Procedural Safeguards Accompanying the Right to a Hearing: A Public "Trial"

Most of the cases following *Goldberg v. Kelly*[1] have dealt only with the constitutional right to a hearing and not with the procedural safeguards which might accompany that hearing, such as a right to oral argument, presentation of witnesses, or cross-examination of witnesses. *Fitzgerald v. Hampton*[2] illustrates an increasing effort to extend *Goldberg* to require such procedural safeguards.[3] In *Fitzgerald* the District Court for the District of Columbia held that a dismissed federal employee had a constitutional right to a public dismissal hearing. While holding the position of Deputy for Management Systems of the Office of the Secretary of the Air Force, the employee had revealed, in highly publicized testimony before the Joint Economic Committee, a high cost overrun on the Air Force contract for the C5A transport aircraft.[4] The employee, a preference

1. 397 U.S. 254 (1970). See pp. 158-59 *supra*.

2. ___F. Supp. ___ (D.D.C. 1971).

3. *See, e.g.*, Intercontinental Indus., Inc. v. American Stock Exch., 452 F.2d 935, 940-43 (1971). For a listing of pending cases involving this issue, see Richardson v. Wright, ___ U.S. ___, ___n.1, *reprinted at*, 40 U.S.L.W. 4232, 4233 n.1 (U.S. Feb. 24, 1972) (Nos. 70-161 & 70-5211).

4. *Hearings Before the Subcommittee on Economy in Government of the Joint Economic Committee*, 90th Cong., 2d Sess. 2589-96 (1968).

5. See Brief for Appellant at 3, Fitzgerald v. Hampton, ___ F.2d ___ (D.C. Cir. 1971). The statutory definition of "preference eligible" is found in 5 U.S.C. § 3501(a)(3) (1970). These employees are granted a somewhat favored status. Even in reduction-in-force situations, the Civil Service Commission is directed to "give due effect to" an employee's preference eligible status. *Id.* § 3502(a)(2).