



Recent Grants Law Cases

**National Grants Management Association
Training Luncheon**

February 10, 2005

Federal Bar Association

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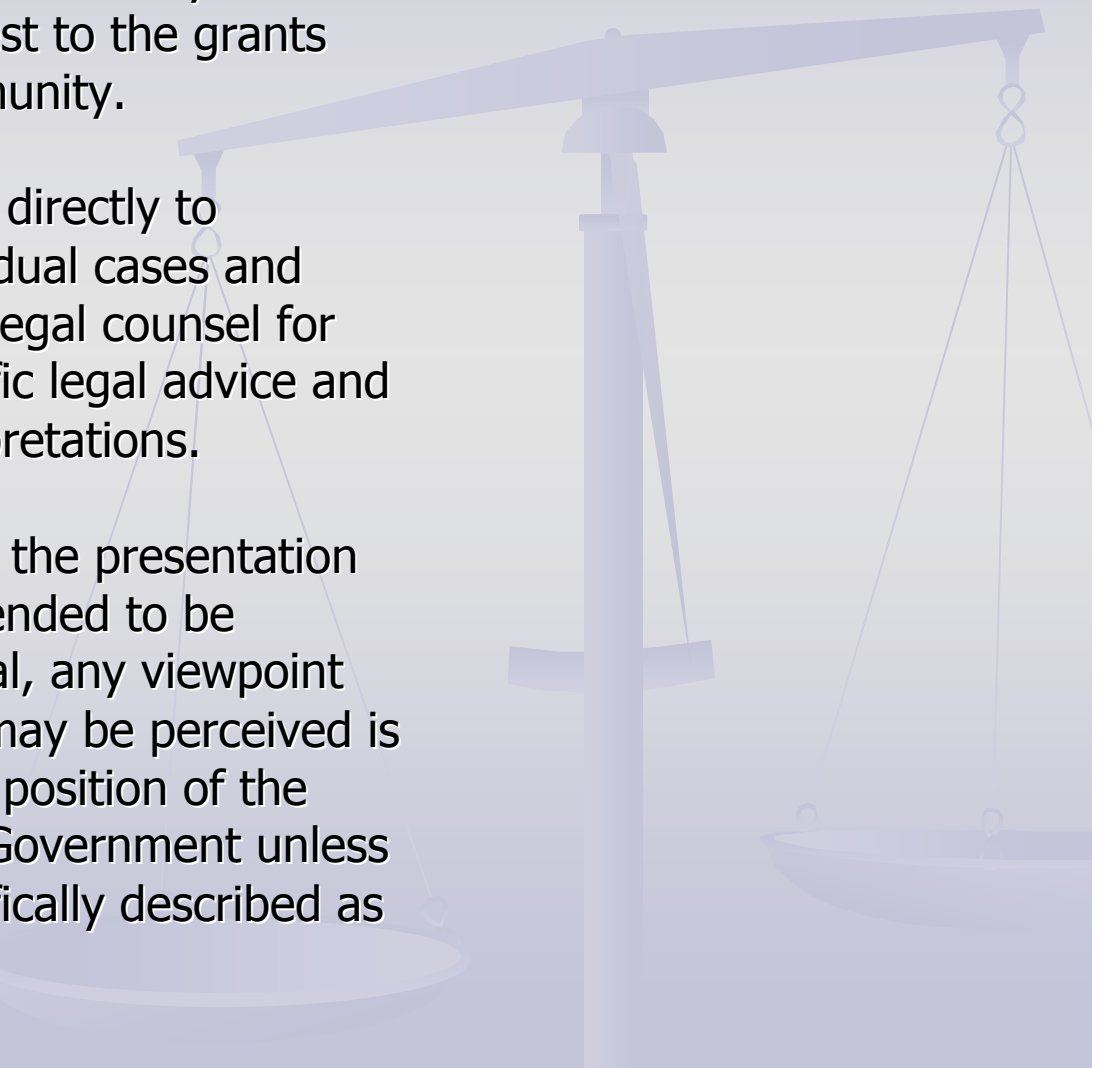
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The following are examples of cases from the past year involving issues that may be of interest to the grants community.

Refer directly to individual cases and your legal counsel for specific legal advice and interpretations.

While the presentation is intended to be factual, any viewpoint that may be perceived is not a position of the U.S. Government unless specifically described as such.



U.S. Department of Education's Use of Fiscal Year Appropriations to Award Multiple Year Grants

U.S. General Accountability Office (GAO), B-289801, Dec. 30, 2002

- Case re-interprets bona fide need (BNR) rule towards grants; differs from contracts
- BNR says that appropriations can only be used for agency needs in the period of availability of the funds
- Severability rule says that funds from one fiscal year which fund an activity can be used in a subsequent fiscal year only if the work is non-severable.

***U.S. Department of Education's Use of Fiscal Year Appropriations
to Award Multiple Year Grants***

GAO, B-289801, December 30, 2002 (cont.)

- The opinion discusses two previous cases:
- A 1985 decision (64 Comp. Gen. 359) prohibited NIH research grants from being funded for 3 years from 1985 appropriations because the activities were severable. Funds could only be obligated for one year.
- A 1988 GAO decision (B-229873, November 29, 1988) undercut the analysis of the 1985 case and concluded that the SBA could use money from one fiscal year into the next; severability not relevant to the cooperative agreement.

U.S. Department of Education's Use of Fiscal Year Appropriations to Award Multiple Year Grants

GAO, B-289801, December 30, 2002 (cont.)

- In the 2002 case, GAO reaffirms the 1988 SBA decision with the rationale that grants are not the same as contracts, they are providing assistance, so that it isn't essential when the tasks are complete. Purpose met when award is made.

- So, the general rule for grants, in contrast to contracts:
 - Principle of severability is irrelevant to a bona fide need determination;
 - Bona fide need is met when funds are obligation within period of availability.

- If an agency has a rule against awards running more than 12 months, this case would be a basis for changing that practice.

San Juan City College, Inc. v. U.S.

391 F.3d 1357 (Fed. Cir. 2004)

U.S. Court of Appeals for the Federal Circuit December 9, 2004

- Appeal of a lower court case: *San Juan City College, Inc., et. al. v. U.S.*, 58 Fed. Cl. 26 (Fed. Cl. 2003)
- The court ruled that grant recipients could claim damages against a Federal agency for that agency's actions on a grant.
- The Dept. of Education suspended payments to plaintiff (a for-profit college) on a grant for approximately 4 months, incorrectly believing that the school had ceased doing business.
- Payments were resumed but the College went out of business the following year. The College sued for damages, including profits that they said they lost

San Juan City College, Inc. v. U.S.

391 F.3d 1357 (Fed. Cir. 2004) (cont.)

- The lower court held that to award money damages:

would in effect be to create a remedy for what amounts to agency negligence...Every violation of an agreement to abide by the law would carry the same risk of collateral damage. If Congress wished to expand government liability for what amounts to routine, albeit perhaps erroneous, administrative decision making, it must do so more clearly.

- The appeals court reversed and said, after reviewing several Supreme Court cases related to this issue:

There is no reason to believe that, because federal grant programs may be “in the nature of a contract,” special and different rules govern the determination of damages for a breach of a formal written contract that involves a federal grant of funds to educational institutions.

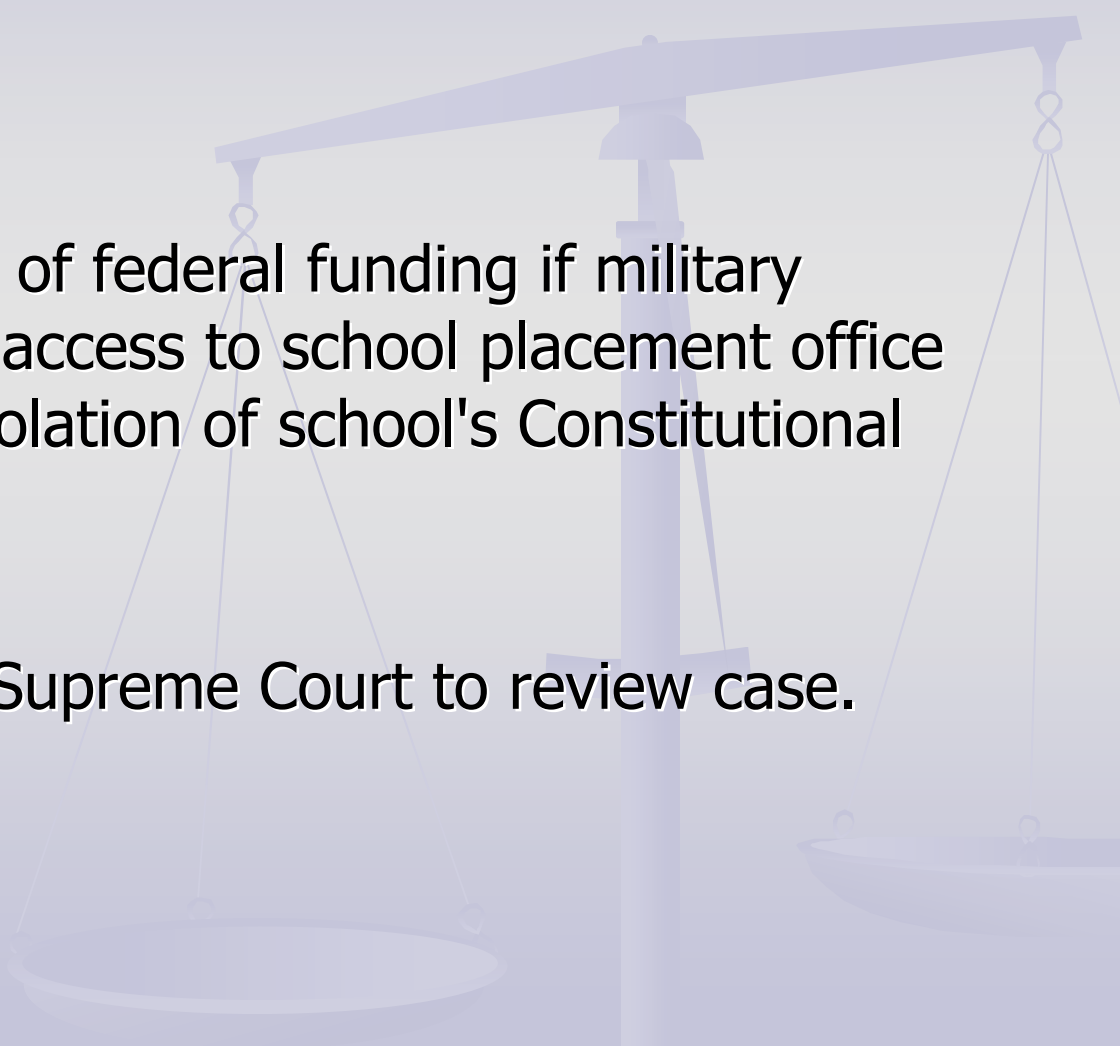
- Conclusion of this case: contracts and grants are not different in being open to damage awards, including lost profits.

Kelo v. City of New London
U.S. Supreme Court Docket No. 04-108

- Case to be argued February 22, 2005, will decide whether Fifth Amendment to the U.S. Constitution permits property to be condemned for economic development purposes
- Decision will affect administration of Housing and Urban Development, Agriculture, and Commerce financial assistance programs that support community and economic development projects

FAIR v. Rumsfeld

390 F.3d 219 (3rd Cir., 2004)

- Statute requiring loss of federal funding if military recruiters are denied access to school placement office facilities held to be violation of school's Constitutional free speech rights.
 - Government will ask Supreme Court to review case.
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ACLU v. Mineta

319 F.Supp.2d 69 (D.D.C. 2004)

- Statute threatened to cut off transit funds to any grantee that accepted advertisements urging any relaxation of U.S. anti-drug policy. When Washington area Metro refused such an ad, ACLU sued.
- District Court enjoined enforcement of the condition, and Justice Department later withdrew its appeal

Dobbins v. Legal Services Corporation

or *Velazquez v. LSC*, 349 F.Supp.2d 566 (E.D.N.Y. 2004)

U.S. District Court, Eastern District of New York December 20, 2004

- Legal aid lawyers, largely dependent on federal grants from Legal Services Corporation, had been forbidden by law to bring class-action lawsuits, even if using non-federal funds to do so, unless the legal aid grantee set up an entirely independent entity to pursue the case. The District Court enjoined LSC from enforcing that requirement, but the grantee still must carefully account for the separate funding and must use separate office space. The government may appeal the decision.
- This and the *FAIR* and *ACLU v. Mineta* cases, all in one year, are three rare cases of grant conditions being struck down as violative of the First Amendment to the Constitution.

Mark Your Calendars

- The Federal Bar Association Grants Committee will sponsor a panel at the National Grants Management Association's Annual Training Conference
- Faith Based Grants Law Update, 11:15 a.m. on May 3, 2005
- International Trade Center/Ronald Reagan Building, Washington, D.C.
- Register at www.ngma.org
- FBA Grants Committee will update "Grants Law Year in Review" handout and distribute at this seminar

Recent Legal Cases Involving the Federal Faith-Based Funding Initiative

- Impartial Legal Updates from the Roundtable on Religion and Social Welfare Policy, State University of New York
- Analysis from two George Washington University Law Professors, Ira Lupu and Robert Tuttle
- Web Site:
http://www.religionandsocialpolicy.org/legal/legal_updates.cfm
- Professor Lupu or Tuttle, as well as other legal experts taking “pro” and “con” sides, will speak at the FBA panel at the NGMA conference in May

Freedom from Religion Foundation v. Towey

January 18, 2005, U.S. District Court, Western District of Wisconsin

- A June 17, 2004 lawsuit challenged the constitutionality of the Federal “faith-based initiatives” program. The initial suit was broad. In November 2004, it was narrowed to two programs.

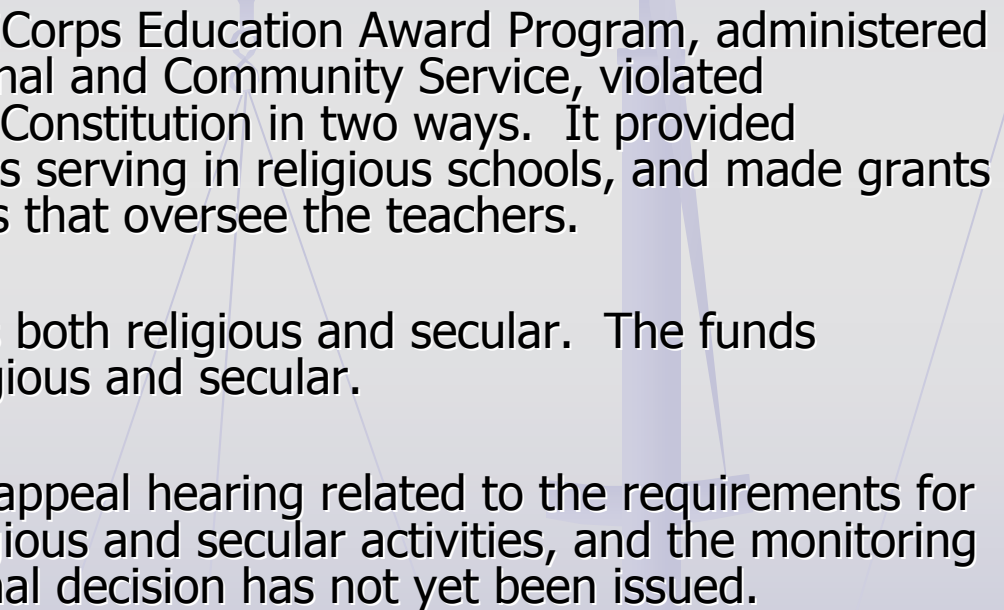
--Interfaith Health Partners at Emory University is a health care subgrant program in which the University had acknowledged a preference for religious grantees when making other awards with non-Federal funds, and where all the Federally-funded projects went to religious groups.

--MentorKids is a program in Phoenix in which evangelical Christians are recruited as mentors for children of prisoners, and encouraged to use evangelical activities when mentoring. For example, Bible study was an integral part of the program.

- On January 18, 2005, a court ruled that (1) the Emory program was legally supportable because the subgrant criteria were religion-neutral, and (2) the MentorKids program was not legally supportable, because it was clear under the facts that religious indoctrination was occurring with Federal funds.
- Analyzing this case, legal experts Lupu and Tuttle recommend that Federal regulations provide greater clarity to grantees regarding what is permissible and what is not.

American Jewish Congress v. Corporation for National and Community Service

323 F.Supp.2d 44 (D.D.C. 2004) July 2, 2004 District of Columbia
Appeal heard January 14, 2005

- A judge ruled that the AmeriCorps Education Award Program, administered by the Corporation for National and Community Service, violated Establishment Clause of the Constitution in two ways. It provided education awards to teachers serving in religious schools, and made grants to the religious organizations that oversee the teachers.
 - The instruction involved was both religious and secular. The funds involved were also both religious and secular.
 - The issues discussed at the appeal hearing related to the requirements for separation between the religious and secular activities, and the monitoring of those requirements. A final decision has not yet been issued.
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Lown v. The Salvation Army, Inc.

June 21, 2004 U.S. District Court, Southern District of New York

- A pending lawsuit alleges that the Salvation Army, using funds from New York State and City, recently and dramatically reemphasized its religious mission, resulting in unlawful changes in its employment practices. The professional employees, mostly child welfare workers, say a religiously hostile environment resulted for many employees, and some were constructively discharged.
- In addition to the employment discrimination issue, the employees are arguing that the public funding makes the grantee, the Salvation Army, an arm of the state.
- The extent to which employment discrimination among religious employers is allowed with Federal funds is one of the most contested issues in the faith-based public funding debate.
- Source: Lupu and Tuttle

Freedom From Religion Foundation, Inc. v. Montana Office of Rural Health

October 26, 2004

Federal Court, Butte, Montana

- U.S. Department of Health and Human Services issued a grant to the Montana Office of Rural Health for a program to run a partnership between government agencies and faith-based health care providers.
- A Federal magistrate judge found the state's implementation of the grant a violation of the constitution's requirement to separate church and state in several ways. Most significantly, the program issued a non-competitive grant to a college program that trained nurses to provide health care while also providing religious services, such as communion distribution.
- In addition, the program director was overtly religious in program administration, and the program preferred providers that integrated religious experience into health care.
- Source: Lupu and Tuttle

Doe v. Norton

Filed December 3, 2004 U.S. District Court for the District of Columbia

- Americans United for the Separation of Church and State filed suit to block a law that provides \$10 million in Federal assistance to restore and repair 21 mission churches in California, including religious symbols and artwork, 19 of which are owned by the Roman Catholic Church and have active congregations.
- Proponents of the aid argue that the missions and their artifacts are historic and should be preserved with Federal funds.
- An opinion has not yet been issued.
- Sources: <http://www.washingtonpost.com/wp-dyn/articles/A29742-2004Dec2.html>
<http://www.commondreams.org/news2004/1203-09.htm>

U.S. v. Harvard College

323 F.Supp.2d 151 (D.Mass. 2004)

June 28, 2004 Boston

- The United States brought an action against Harvard and two employees involved in an Agency for International Development project to aid in reform of the Russian market system, alleging breach of a contractual provision barring project employees from conducting business and investment activities that could give rise to conflicts of interest, and violations of the False Claims Act.
- Among other things, the District Court held that the cooperative agreements between the government and the university were “contracts,” and the university was liable for breaches of contract by personnel in one of its divisions, away in Russia.

U.S. v. Harvard College

323 F.Supp.2d 151 (2004) (cont.)

- The court discussed the Federal Grant and Cooperative Agreement Act, and past cases on whether grants and cooperative agreements are “contracts.” It agreed with *Thermalon Industries v. United States*, 34 Fed. Cl. 411 (1995): just because a cooperative agreement is an assistance instrument, that does not mean it is not an enforceable contract.
- The court also discussed the relevance of the separate division in Russia serving as signatory on the cooperative agreement, and whether the staff there had authority to sign for the award. The court found that the division had adequate authority, and even if those staff were not designated or described as employees, that is immaterial if an employer-employee relationship exists.

U.S. ex rel. Totten v. Bombardier Corp.

380 F.3d 488 (C.A.D.C. 2004)

August 27, 2004 District of Columbia
rehearing en banc denied Dec. 8, 2004

- In a False Claims Act case, an individual alleged that a contractor submitted false claims to Amtrak to obtain payment for allegedly defective railroad cars. In False Claims cases, the false claim must be submitted to the Federal government.
- The Appeals Court agreed with a lower court conclusion that Amtrak was a Federal grantee, and presenting a false claim to a grantee is not presenting a false claim to the Federal government.
- In most cases, courts will say that a grantee is not the Federal government, but watch these cases closely. Depending on whether the circumstance involves false claims, torts, freedom of information, employment, breach of contract, etc., results may vary.

Salt Institute v. Thompson

345 F.Supp.2d 589 (E.D. Va. 2004)

Nov. 15, 2004 Alexandria

- A trade association for the salt business brought an action against the National Heart, Lung, and Blood Institute, stemming from a failure to disclose the data and methods a grantee used in preparing a dietary study recommending moderation of salt intake. The court determined that the Salt Institute lacked a private right of action under the Information Quality Act (IQA); that law provides for administrative remedies.
- In addition, the Salt Institute did not state a claim properly under the "Shelby Amendment," the law that specifically allows public access to grantee data, because it asserted that Health and Human Services exceeded its discretion, when the Office of Management and Budget was the source of the specific implementation of the requirement.
- The court also determined that the Salt Institute didn't establish that it had been harmed, it didn't have "standing," or the legal right to sue as an organization, and the study was not reviewable under the Administrative Procedure Act.

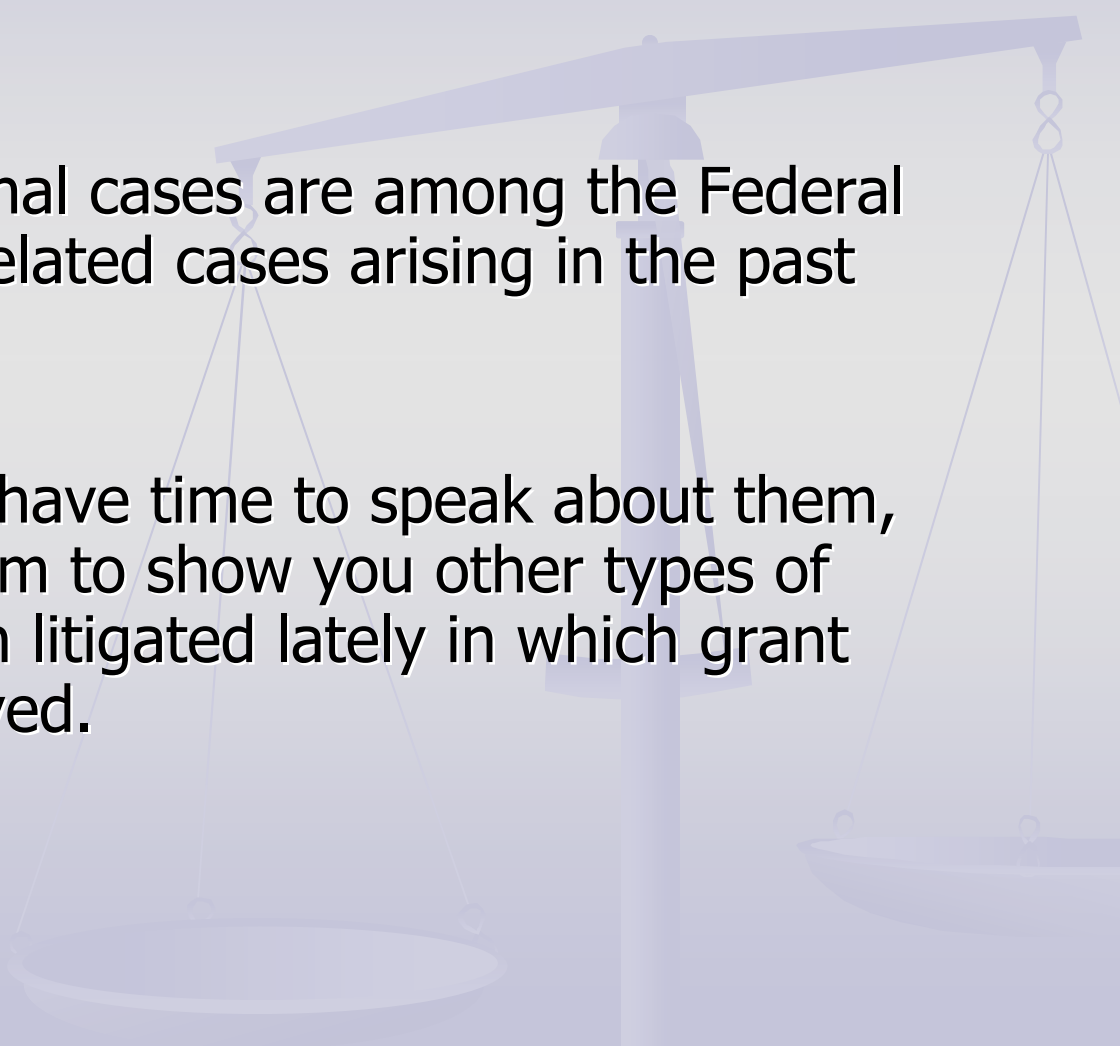
Barbour v. Washington Metropolitan Area Transit Authority

374 F.3d 1161 (D.C. Cir. 2004)

Rehearing En Banc Denied Sept. 1, 2004

- An employee sued the Washington Metropolitan Area Transit Authority (WMATA), alleging he was terminated from his job there on the basis of disability in violation of the Rehabilitation Act. The WMATA argued that, as a government entity, it was immune from being sued under the Eleventh Amendment to the Constitution, which relates to immunity of states.
- The United States Court of Appeals for the D.C. Circuit held that (1) a Federal civil rights law conditions a state agency's acceptance of Federal funds on its waiver of Eleventh Amendment immunity, and (2) the public transit authority's acceptance of Federal grant funds resulted in a waiver of its immunity to the Rehabilitation Act claim.

Other Federal Cases of Interest

- The following additional cases are among the Federal financial assistance-related cases arising in the past year.
 - We probably will not have time to speak about them, but we are listing them to show you other types of issues that have been litigated lately in which grant programs were involved.
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John Doe #1 v. Veneman

380 F.3d 807 (5th Cir. 2004)

August 4, 2004 Texas

- Ranchers and farmers entered into cooperative agreements with the Agriculture Department to protect livestock from wildlife damage by using collars on livestock that would poison coyotes who bite them. An animal advocacy group filed a Freedom of Information Act request seeking information about the program, including names of the grantees.
- The farmers and ranchers brought a class action suit to preclude the government from releasing information identifying the grantees on a voluntary basis in settlement of the suit.
- Ordinarily, grantee names are required to be released. In this case, the program statute was interpreted as requiring them not to be released. Among other things, the Appeals Court held that the information came within a statutory bar exempting them from disclosure.
- Programs should exercise caution in interpreting any program-specific FOIA exemptions.

Fenn v. Yale University

2004 WL 2793274 (D. Conn. Sept. 24, 2004)

- A professor brought a suit against Yale alleging theft, unfair trade, and other claims regarding a chemical mass spectrometry invention and its patent, issued to him in 1992. Yale counterclaimed with similar allegations and a breach of contract claim.
- The court found for Yale on many counts, but some issues remained. In this discussion of a procedural motion, the court provides useful background information on the Bayh-Dole Act, which covers patents for Federal grants.
- The case also involved a letter regarding the patent from the professor to the National Institutes of Health, in which an NIH employee was asked to countersign an acknowledgement related to the patent.

Public Utility Dist. No. 1 of Snohomish County, Washington v. Federal Emergency Management Agency

371 F.3d 701 (9th Cir. 2004)

June 14, 2004 Washington State

- FEMA demanded refunds from a public utility after conducting an audit of a disaster relief grant. The grantee sued. An Appeals Court upheld a lower court decision favoring FEMA.
- The Court held that grantee's use of a particular percentage as a fringe benefit overhead rate for overtime labor in its proposal was not a term of the grant that would preclude reduction in a subsequent audit;
 - "res judicata," or, the legal principle that the matter has already been decided, did not apply to FEMA's initial calculation of "amounts eligible;"
 - FEMA acted reasonably by reducing the grant upon finding that the actual fringe rate was ten percent, not 36 percent;
 - and FEMA also acted reasonably by reducing the grant based on findings concerning labor costs for maintenance, credits for reimbursable costs, and proceeds from the sales of scrap materials.

Richardson v. Philadelphia Authority for Industrial Development

2004 WL 1614882 U.S. District Court, Eastern District of Pennsylvania
July 16, 2004 Philadelphia

- A person slipped and fell on a sidewalk on U.S. Army property in Philadelphia, and sued for damages over the resulting injury. Maintenance of the property was the responsibility of the Philadelphia Authority for Industrial Development, a non-profit economic development corporation, which had a “cooperative agreement” with the Army, and among its responsibilities was maintenance for that land.
- Under the Federal Tort Claims Act, liability can be imposed against the United States only for negligence of its officers acting within the scope of their employment; this is the major waiver of the Federal government’s immunity from liability due to its status as a sovereign state. Contractors are not Federal officials, so the Federal Tort Claims Act would not apply to them.
- If the Federal government exercises day-to-day control over the so-called contractor, a court may deem a contractor to be a Federal employee. In this case, the Court determined that the “independent contractor” test was met.
- This case was one of many examples in which litigation occurs involving a funding instrument that is described as a Federal grant or cooperative agreement, and it is unclear whether the court or the parties had any understanding of the difference between Federal financial assistance and contracts and whether it would have affected the decision.

Three Rivers Center for Independent Living v. Housing Authority of City of Pittsburgh

382 F.3d 412 (3d Cir. 2004)

August 30, 2004 Pittsburgh

- A disabled person sued the city of Pittsburgh because it was not complying with HUD regulations that required public housing to be accessible to the disabled. HUD was not enforcing its regulations on the grantee, and the issue before the court, in an opinion by Judge Chertoff (later nominated to be Homeland Security Secretary) was whether the disabled had a private “right of action” against the city.
- Upholding a lower court decision, the Appeals Court determined there was no such right in this case. The Rehabilitation Act and other applicable laws did not provide for private lawsuits to enforce the regulations; the regulations were more directed at the grantee’s conduct and obligations, rather than the beneficiary’s entitlements.
- Comment: a beneficiary may be more successful challenging HUD’s actions as arbitrary and capricious under the Administrative Procedure Act and asking a court to require HUD to enforce its regulations.

Walker v. U.S. Dep't. of Housing and Urban Development

326 F.Supp.2d 773 (N.D. Tx. 2004)

March 18, 2004 Dallas

- This case is an example of how programs can be required to meet constitutional anti-discrimination standards.
- Prospective residents sued HUD and a city housing authority because of the city's practice of providing public facility financial assistance in a certain housing program ("Section 8") only within city limits, and some beneficiaries wanted to live in the suburbs.
- The housing authority was required under the Fourteenth Amendment of the Constitution to provide the financial assistance outside the city limits, since the authority was obligated to remedy the effect of past housing discrimination, and Section 8 was a race-neutral remedy that allowed market forces and personal preferences rather than racial criteria to guide the homemaking decisions.

Fenslow v. Chicago Mfg. Center, Inc.

384 F.3d 469 (7th Cir. 2004)

Sept. 2, 2004 Chicago

- A grantee employee was fired. He sued, claiming that he was fired after becoming a “whistleblower” and reporting false claims by the grantee to the government.
- While this case was remanded for further development of facts, it did note that the employee was not required to go to the Federal government to retain whistleblower protections, as internal complaints within a corporation may also count.
- The false claim allegation in this case relates to diverting funds from the non-profit grantee to for-profit information technology firms in which some of the non-profit executives had a stake.
- If the case is not settled, a later decision on the merits might raise issues regarding misappropriations of funds or conflicts of interest involving grantee contracts.

Bill v. Berkeley United School Dist.

2004 WL 2075447 (N.D. Cal., 2004)

Sept. 16, 2004 California

- An African-American minister was assigned to develop and run a school program in Berkeley for at-risk youth who cut classes, funded under Federal and state grant programs designated to assist with special educational needs of African-American and Hispanic students. He allegedly discovered federal funds set aside for at-risk and minority youth were being spent on services for other students; he objected, and his position was eliminated due to a lack of funds. The position was later filled with a white male.
- A similar thing happened to him in his next position. This case was dismissed in part and remanded in part; if it is not settled, there is the possibility that a later decision on the merits may discuss the misappropriations of funds.

Federal Bar Association Grants Committee

http://www.fedbar.org/govtcontracts_section.html

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<http://www.commondreams.org/news2004/1203-09.htm>