

**FEDERAL BAR ASSOCIATION
Government Contracts Section
Federal Grants Committee**

SIGNIFICANT DEVELOPMENTS IN FEDERAL GRANTS LAW IN THE PAST YEAR

National Grants Management Association 25th Annual Training Conference
Washington, D.C. April 2004

The Grants Committee of the Federal Bar Association is pleased to provide conference attendees highlights in grants law from the past year. This document discusses several major cases that have arisen, and provides limited information about some other cases of potential interest to the Federal grants community. This document does not cover all grants-related cases, but provides an illustrative selection. The information provided does not constitute legal advice. Readers should consult source documentation or legal counsel to verify information about the specific cases mentioned. In addition, please note that the information provided here is intended to be factual, not viewpoint-oriented.

PART I

Part I, written by FBA member Ed Levin, is copyrighted by Management Concepts, Inc. and used with permission. The material comes from Management Concepts' "Federal Grants Update 2004" course. The Federal Bar Association Grants Committee thanks Management Concepts for this significant contribution.

Supreme Court Cases

U.S. v. American Library Association, 539 U.S. 194 (2003).

Management Concepts provides information on this case in its course. As FBA Grants Committee member Nancy Weiss was involved in litigation of the case, this handout uses Ms. Weiss' summary, which starts on page 7.

Locke v. Davey, 124 S.Ct. 1307 (2004).

In a 7-2 opinion written by Chief Justice Rehnquist, the U.S. Supreme Court upheld a Washington State law that offered scholarships to college students *except* those pursuing a degree in "devotional theology," *Locke v. Davey*, Case No. 02-1315, decided February 25, 2004. A student pursuing such a degree had argued that the Washington law singled out religion for unfavorable treatment in violation of the clause of the First Amendment to the Constitution forbidding laws "prohibiting the free exercise" of religion. The U.S. Justice Department supported the student's claim.

The Court's opinion held that including theology students in the scholarship program was permitted by the First Amendment's clause forbidding the "establishment" of religion, but was not required by the "free exercise" clause; it was therefore up to the state whether to include or exclude such students. This is an important clarification of the interplay between the two First Amendment clauses, and suggests that in the absence of applicable statutes, it is up to each agency (or presidential administration) to decide whether federal grants available to other parties are available to entities with significantly religious purposes.

The opinions in the case, including the dissents of Justices Scalia and Thomas, are available on the Internet: <http://www.supremecourtus.gov/opinions/03pdf/02-1315.pdf>

Cheney v. U.S. District Court for the District of Columbia.

The U.S. Supreme Court is scheduled to issue a decision at the end of this term which could clarify the extent to which participation by non-federal employees in the determinations made by a group exclusively comprising full-time federal officers and employees invokes the provisions of the Federal Advisory Committee Act (FACA). FACA, among other things, requires advisory committees to make public all reports, records, or other documents used by the committee provided they do not fall within any Freedom of Information Act exemptions. It is possible the final decision could have an impact on selection processes for grant programs, which often use both Federal and non-Federal reviewers.

Shortly after his inauguration, President Bush established a National Energy Policy Development Group, chaired by Vice President Cheney, with only federal officers and employees as members. After the Group issued its report,

two advocacy organizations, Judicial Watch and the Sierra Club, brought separate actions in the Federal District Court charging FACA violations, because non-federal employees--including particularly energy company executives and lobbyists--fully participated in the Group's deliberations. To substantiate their charges, as part of their "discovery" process, the organizations sought extensive internal records of the Group's proceedings, including particularly the names of those who attended each meeting. Federal Group participants other than the Vice President's Office responded with thousands of pages of material, but the VP's office asserted "executive privilege" and resisted compliance with an order of the District Court to supply the information. Instead, Vice President Cheney petitioned the Court of Appeals to vacate the District Court's discovery order.

The Court of Appeals for the D.C. Circuit, in a 2-1 decision, rejected the appeal in July 2003, asserting that the District Court could adequately protect against any "excessive discovery." In December, Cheney's petition was granted to have the matter reviewed by the Supreme Court, with oral arguments in the Spring of 2004. A decision is likely by the end of June. The case is procedurally very complex and it is unlikely that the Supreme Court's decision will resolve underlying issues of executive privilege. Nevertheless, it is at least possible that some light will be shed on the often murky area of the rules covering situations--including competitive assistance project selection--where non-governmental employees contribute to governmental decisions.

The Court of Appeals decision can be viewed at: <http://laws.lp.findlaw.com/dc/025354a.html>
The Supreme Court's docket for the case can be viewed at: <http://www.supremecourtus.gov/docket/03-475.htm>

Impact of *Guillen*

As reported in last year's Federal Grants Update material, early in 2003 the U.S. Supreme Court decided *Pierce County, Washington v. Guillen*, 537 U.S. 129 (1993). That case upheld the constitutionality of a statute providing that accident site information could not be introduced in lawsuits if the information was compiled by state agencies solely to comply with a statutory grant condition. While not expressly so stating, the decision necessarily implied that the federal statute pre-empted a state's public disclosure law (equivalent to the federal Freedom of Information Act). [An earlier Tennessee Court of Appeals decision had specifically decided that the federal law pre-empted the Tennessee Public Records Act, thus barring disclosure of such records. *Seaton v Johnson*, 898 SW2d 232 (Tenn. App 1995).] Now, since the U.S. Supreme Court decision, courts in Kansas and New York have held that the federal law does not pre-empt their states' freedom of information law, in cases where newspapers requested the accident site information from the state departments of transportation. *Telegram Publishing Co., Inc. v. Kansas Dept. of Transportation*, Kansas Supreme Court, Case No. 86,767, May 30, 2003; *Matter of Newsday, Inc. v State of N.Y. Dept. of Transp.* 2003 NYSlipOp 23800, Oct. 8, 2003. In each case, the information was ordered to be disclosed. Thus, the full significance and impact of the U.S. Supreme Court's *Guillen* decision are yet to be determined.

The Kansas decision is available on the internet, at:
<http://www.kscourts.org/kscases/supct/2003/20030530/86767.htm>
The New York opinion is available on the internet, at:
http://www.courts.state.ny.us/reporter/3dseries/2003/2003_23800.htm

U.S. General Accounting Office Actions

--Red Book Revisions

Volume I of the General Accounting Office's authoritative five-volume *Principles of Federal Appropriation Law* has been revised, in a third edition completed earlier this year. The *Principles*, commonly known as the "GAO Red Book," are available in book form from the Government Printing Office, and on the internet, through <http://www.gao.gov> (clicking on "GAO Legal Products", and then on the desired *Principles* volume). Included in the new edition of Volume I (the second edition of which was published in 1991), are revised chapters on the availability of appropriations as to purpose and time, as well as general material on the legal framework of appropriations and agency regulations and administrative discretion.

The third edition of Volume II--the second edition of which was published in December 1992--is scheduled for publication in 2005. That volume contains, among other material, chapters on the availability of appropriations as to amount, and on federal assistance through grants and cooperative agreements.

--GAO Decisions B-300480 and B-300480.2.

The Corporation for National and Community Service operates the AmeriCorps program, which awards grants to organizations that in turn offer a stipend, health care, and childcare benefits to enrollees who perform various

national service activities. Those who successfully complete a required term of service also earn a national service educational award of up to \$4,725 that can be used to pay for college, graduate school, an approved school-to-work program, or qualified student loans. In its grants, the Corporation authorizes enrollment of a specified number of participants.

For some years, with the apparent blessing of the Office of Management and Budget in both the Clinton and Bush Administrations, the Corporation obligated the anticipated current costs of the program--e.g., stipends, administrative cost, health care--at the time of grant award, but not the full potential education benefits. Rather, the Corporation recorded education award obligations on an outlay basis, that is, at the time the education award funds were claimed.

In April 2003, the General Accounting Office issued an opinion letter rejecting both Corporation's outlay approach, and a proposal by the Corporation to obligate, at the time of grant agreement, the Corporation's "best estimate" of the likely amount of education award funds that would be claimed by the participants to be enrolled under that agreement. GAO concluded instead that, at the time the Corporation enters into a grant agreement that conditionally promises future educational benefits to enrollees in the grantee's program, the Corporation incurs a legal duty to pay for the subsequent educational benefits and must obligate sufficient funds to satisfy the entire potential future liability. In failing to do so, while nevertheless obligating the full amount of appropriated funds for the AmeriCorps' program, the Corporation had been in violation of the Antideficiency Act, 31 U.S.C. 1341(a).

In June 2003, GAO issued a follow-up opinion letter reiterating its previous conclusion (in the face of a contrary opinion letter from OMB), and offered clarifications of its April letter. After restating that the Corporation had to obligate sufficient funds to satisfy its entire potential future liability, GAO noted,

As more information is known, for example, when an approved participant fails to enroll or a volunteer drops out of the program, the Corporation may adjust the obligation, i.e., deobligate funds or increase the obligational level, as needed. Because funds in the Trust are available without fiscal year limitation, the deobligated funds can be reobligated and used for future education benefits.

GAO also observed that, as an alternative to seeking sufficient appropriated funds to cover the full potential costs of enrolling participants in the AmeriCorps program, the Corporation could seek legislation to permit it to use the "estimation" model that the Corporation (and OMB) preferred to use to cover future educational benefits. It does not appear, however, that the corporation has sought such authority from the Congress.

Both opinion letters are available through the GAO Legal Products internet site noted in the preceding section.

Developments in the Area of Faith Based Initiatives

While there has been no recent major legislation passed in this area, there has been some significant activity in each of the three branches of government.

--Congressional Action

In July 2003, the House of Representatives passed and sent to the Senate HR 2210, reauthorizing the Head Start program. Before passing the bill, the House rejected a proposed amendment that, in the words of its sponsor, would "strike a provision in the bill which would allow faith-based providers of Head Start services to discriminate based on religion against employees who are paid with public funds." In February 2004, the House passed and sent to the Senate, HR 3030, Community Service Block Grant (CSBG) amendatory legislation, after rejecting proposed amendments to the legislation that would have (1) prohibited organizations from using CSBG funds to discriminate in hiring on the basis of religion, and (2) required that organizations offering religious services or activities, do so separately from programs that use CSBG funds. There will undoubtedly be efforts in the Senate to reconsider these issues.

Information on all pending legislation, including text, status, committee action, and votes, is available on the internet, through <http://thomas.loc.gov>.

--Judicial Action

The Supreme Court rendered its decision in *Locke v. Davey*, noted above, and court challenges may be expected in such key areas as religious discrimination in the hiring of persons solely to administer federal grants, and the propriety of awarding grants to improve structures being used for religious purposes. Executive branch action is discussed in the following sections.

--Executive Action HUD and HHS Final Rules

On September 30, 2003, the Departments of Housing and Urban Development and of Health and Human Services issued final regulations in the *Federal Register* to allow faith-based organizations to retain their religious identity while applying for and operating numerous grant programs. 68 FR 56395-408 (HUD); 68 FR 56430-70 (HHS). These final regulations implement rules proposed in January 2003 and December 2002, respectively.

- The final HUD rule clarifies what had been originally proposed by confirming that statutory non-discrimination requirements are unaffected by the rule, that funds cannot be used to construct or rehabilitate any room that is the principal place of worship of the recipient, and that recipient funds can be used to supplement HUD-assisted activities, but that if the funds are commingled the same restrictions as apply to the HUD funds will apply to all of the commingled funds.

In its final form, the rule states that faith-based organizations are fully eligible for assistance so long as the federal funds are not used for "inherently religious" activities, that any such activities be conducted separately in time and location from HUD-funded activities, and that participation be voluntary. The rule does not specifically address religious discrimination in hiring for exclusively grant-related activities, but states that the relevant executive orders (E.O. 11246 and E.O. 13279) which themselves do not specifically address that issue are applicable "to the same extent that [they] would otherwise apply."

The rule applies to eight HUD programs (HOME Investment Partnerships, Community Development Block Grants, HOPE 3 Hope for Homeownership of Single Family Homes, Housing Opportunities for Persons with AIDS, Emergency Shelter Grants, Shelter Plus Care, Supportive Housing, and Youthbuild), involving an estimated \$7.5 billion in federal funds.

- The final HHS rules amend the regulations implementing "Charitable Choice" laws intended to assure that program beneficiaries have the option of choosing faith-based providers under various social service programs. The new regulations cover the Substance Abuse and Mental Health Services Administration (SAMHSA), the Temporary Assistance for Needy Families (TANF) program, and the Community Services Block Grant (CSBG) program. Under the Charitable Choice laws, which have been in effect since the mid-1990s, faith-based organizations have access to nearly \$20 billion in social service grants.

The HHS final regulations are not significantly different from the December 2002 proposals. An area of some complexity is the applicability of state and local constitutional and statutory requirements that restrict assistance to religious organizations. While the regulations specifically state that such state and local requirements are unaffected by the HHS rules, they provide that commingled funds are subject to the federal interpretations of applicability.

--Proposed DOL, Justice, ED, and VA Regulations

On September 30, 2003, the same day that final HUD and HHS regulations were published, proposed regulations were published in the *Federal Register* by the Departments of Labor (68 FR 56386-93), Justice (68 FR 56409-15), Education (68 FR 56417-23), and Veterans' Affairs (68 FR 56425-8). The most significant of these affecting faith-based activities are the following:

- The proposed Department of Labor rules would apply to the Workforce Investment Act (WIA), expanding the choices under Individual Training Accounts (equivalent to vouchers), so program beneficiaries may be employed and receive training at religious institutions, so long as the training is the result of free choice and the provider is on a state or local list of eligible providers.
- The proposed Justice Department rules would repeal a policy rule that prohibited community groups that receive forfeited property from the government from using the property for religious purposes, in perpetuity. The proposed new rule would only restrict the use of the property to specific social services uses for five years. The existing rule was undoubtedly based on the Supreme Court's holding in *Tilton v. Richardson*, 403 U.S. 672 (1971) prohibiting the use of federally supported buildings from ever being used for religious purposes and the new policy is in direct variance with that holding.
- The proposed Department of Education rules specifically include faith-based organizations as eligible for assistance, and remove a prohibition on the use of ED funds for "an activity of a school or department of divinity." This would, however, leave in place the general prohibition on the use of ED funds for any "inherently religious purpose."
- The proposed Department of Veterans Affairs rule similarly provides that faith-based organizations are fully eligible to participate in VA programs, but may not use direct financial assistance to pay for religious worship, instruction, or proselytization, or equipment or supplies used for any of those activities. The

- proposed rule would also eliminate hiring restrictions, based on religion, from the existing regulation.
- An extensive scholarly discussion of these and other provisions of the new regulations, by Georgetown University law professors Ira C. Lupu and Robert W. Tuttle, *The State of the Law 2003: Developments in the Law Concerning Government Partnerships with Religious Organizations*, is available on the internet: http://www.religionandsocialpolicy.org/docs/legal/reports/12-2-2003_state_of_the_law.pdf

--Proposed USDA Regulations

On March 5, 2004, the U.S. Department of Agriculture published a proposed regulation in the Federal Register (69 FR 10354-7) similar to that issued the preceding September by the Departments of Education and Veterans Affairs (described above). The proposed USDA rule would prohibit the use of any direct federal funds for an "inherently religious purpose," and prohibit any discrimination against a beneficiary on the basis of religious belief, but would specifically include faith-based organizations as eligible for assistance, and apparently permit hiring restrictions, based on religion, in the administration of grant funds. While the body of the proposed regulation simply states that a recipient organization's existing exemption from the statutory prohibition on religious discrimination in employment "is not forfeited when an organization receives USDA assistance," the introduction states, the proposed regulation reflects Congress's recognition that a religious organization may determine that, in order to define or carry out its mission, it is important that it be able to take its faith into account in making employment decisions. It may be significant that the proposed USDA rule was issued one month after the U.S. House of Representatives passed a reauthorization measure, described above in section 3.2, including a provision to allow faith-based providers to discriminate based on religion in hiring employees to administer Head Start projects.

--Grant for Old North Church

The Department of Interior awarded a \$317,000 grant in May 2003 to rehabilitate Old North Church in Boston, site of the signal lanterns for Paul Revere's ride in 1775. The award was made under the Save America's Treasures Historic Preservation Fund Grants Program, and would be unexceptional except that the property is still being used as a church. Until that award, historically significant properties that were also used for religious purposes had been ineligible to receive historic preservation grants.

The Office of Legal Counsel of the Justice Department issued a detailed legal opinion supporting the award, stating that it did not violate the Establishment Clause of the First Amendment to the Constitution. The opinion acknowledged that Supreme Court decisions from the 1970's, *Tilton v. Richardson*, cited above in section 3.4, and *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), restricted the use of government funds to aid religious properties. The Justice Department opinion stated that the doctrine behind those decisions is that religion is so pervasive in certain religious institutions that the government cannot support even their secular activities "no longer enjoys the support of a majority of the Court." The full DOJ opinion is available on the internet: <http://www.usdoj.gov/olc/OldNorthChurch.htm>

--Other Initiatives

Extensive information is now available to assist faith-based and community organizations to become aware of, and apply for, federal grant programs. Guidance, workshops, brochures, and program listings are offered through the White House website: <http://www.whitehouse.gov/government/fbci/>

One of the most controversial of the Administration's proposals is the elimination of restrictions on religious discrimination in hiring staff to administer federal grants. In support of its position, in June 2003 the White House Office of Faith Based and Community Initiatives published a 9-page booklet, *Protecting the Civil Rights and Religious Liberties of Faith-Based Organizations*, subtitled, *Why Religious Hiring Rights Must be Preserved*. It is available through the Internet site in the preceding paragraph.

A number of advocacy organizations challenge the Administration's position on this and other faith-based organization initiatives. The organizations include OMB Watch, <http://www.ombwatch.org/>; the American Civil Liberties Union, <http://www.aclu.org/>; and Americans United for the Separation of Church and State, <http://www.au.org>. Support for the Administration's positions has come from numerous religious groups as well as advocacy organizations such as the Heritage Foundation, <http://www.heritage.org/>.

PART II Information in Part II was contributed by several Federal Bar Association members, as indicated.

Governmentwide Debarment and Suspension (Nonprocurement); Final Rule (68 Fed. Reg. 66534).

By Eric Moll, Office of the General Counsel, U.S. Department of Commerce.

On November 26, 2003, over thirty Executive branch agencies issued a common final rule making substantive changes and amendments to the common rule on Governmentwide Debarment and Suspension (Nonprocurement). The Interagency Suspension and Debarment Committee coordinated the publication of the final rule. Highlights of the final rule include the following:

1. Adopting a different approach to the structure and format of the common rule. It is formatted so that matters common to a particular class of readers, or to a particular subject, appear together. This allows readers easy access to information that may be of particular importance to them. The final rule uses fewer legal terms, and uses more commonly understood words along with shorter sentences. It also presents information in a question-and-answer format.
2. Incorporating some changes that are designed to bring the procurement and nonprocurement debarment rules into greater conformity with each other. For example, Section __.220 of the final rule brings the common rule into closer conformity with the Federal Acquisition Regulation (FAR) by limiting the mandatory down-tier application of an exclusion under the common rule to the first procurement level. However, agencies may choose the option of extending down tier application of an exclusion to subcontracts under a procurement which equal or exceed \$25,000. In addition, the threshold level for application of an exclusion for all procurement-type transactions under a nonprocurement transaction is set at \$25,000, the same amount in the FAR. Section __.860 of the final rule is new to the common rule. This section identifies factors that a debarring official may regard as mitigating or aggravating factors. It includes factors that currently appear under § 9.406-1(a) of the FAR.
3. Making several modifications to the existing common rule to enhance the effectiveness of, or clarify, requirements and processes.
 - a. For example, under the final rule, a new term is used to refer to ineligibility that arises from sources other than discretionary actions taken under either the common rule or the FAR. This type of ineligibility may arise by operation of a statute, executive order, or other directive and may not be subject to the discretion of the agency suspending or debarring official. The final rule refers to these and other forms of ineligibility as "disqualifications." For discretionary actions that result in ineligibility under the suspension and debarment procedures covered by the common rule and the FAR, the final rule uses the term "exclusion." Therefore, an ineligibility may result from either a disqualification or an exclusion.
 - b. A significant change to the definitions under the final common rule relates to the term "conviction." Previously, the common rule defined conviction as a judgment that had to be "entered" by the court before it was recognized as constituting a ground for suspension or debarment. In recent years, courts have used many vehicles to conclude criminal matters short of "entry" of a judgment of conviction. Under the final rule, the suspending or debarring official will be able to consider criminal matters resolved by means short of dismissal as final so that appropriate administrative action can be taken or a remedial plan of compliance concluded.
 - c. The final rule also eliminates a requirement under the current rule that the exclusion of suspended or debarred persons from participating in covered transactions be enforced through a chain of paper certifications submitted to an agency or between participants under a covered transaction. Advancements in technology allow anyone with access to a personal computer to receive up-to-date information about a person's eligibility by accessing the GSA List on line. This makes the certification process largely obsolete. The final rule allows agencies to employ any method of enforcement of the GSA List that is administratively and commercially feasible. For instance, to communicate the requirements to participants, an agency could include a term or condition in the transaction requiring the participant's compliance and requiring them to include a similar condition in lower-tier covered transactions.
 - d. Finally, the final rule includes new provisions related to suspension and debarment actions. The final rule authorizes an agency to use facsimile and e-mail transmissions to notify respondents of suspension and proposed debarment actions. The final rule also imposes new requirements on respondents to proposed debarment and suspension actions to provide certain information in their responses to those actions. The final rule now requires a respondent to identify specific facts that contradict the statement of facts in the notice and prohibits general denials of the facts in the notice. The respondent is also required to disclose any prior, current and proposed actions under the Executive order authorizing the suspension and debarment

system and any similar actions by a Federal, State or local authority, all criminal and civil proceedings not included in the notice of suspension or proposed debarment and the names and addresses of all of the respondent's affiliates.

U.S. v. American Library Association, 539 U.S. 194 (2003).

By Nancy Weiss, General Counsel, Institute of Museum and Library Services.

On June 23, 2003, the U.S. Supreme Court upheld the validity of the Children's Internet Protection Act (CIPA), *U.S. v. American Library Association*, Case No. 02-361, against a facial First Amendment challenge. Two federal statutes provide federal financial support to public libraries to assist them in acquiring computers and obtaining Internet access. CIPA conditions the receipt of the assistance upon the installation of filters or blocking devices on all of the libraries' Internet-connected computers (those acquired by non-federal funds as well as with federal funds) to protect against (1) access by all persons to "visual depictions" that are "obscene" or "child pornography," and (2) access by minors to "visual depictions" that are "harmful to minors." The American Library Association, joined by other groups, sued to invalidate CIPA as unconstitutional on its face because they argued that (1) any public library that complied with CIPA would be restricting access to a public forum based on the content of material, in violation of the freedom of speech protections of the First Amendment to the Constitution, and (2) while protecting children from pornography was a worthy objective, the software filters requirement wasn't narrowly tailored enough to be constitutional. The complainants' further contended that the filters blocked perfectly acceptable material (e.g., flesh tones from great art as well as from pornography; language suitable to discussions of sexually transmitted diseases as well as to salacious writing), could not block some unacceptable material (proscribed words could be turned into icons not recognized by filters), and could not readily be turned off to permit lawful use of the computers.

A special three-judge Federal District Court (E. Pa.) panel ruled for the Library Association, but the Supreme Court reversed. In an opinion joined by three other justices, Chief Justice Rehnquist addressed the public forum argument and asserted that it would be permissible for libraries, on their own initiative, to install such filters. Therefore, requiring libraries to install the filters, as a condition of receiving federal assistance, is itself permissible. The Chief Justice's opinion concluded: Because public libraries' use of Internet filtering software does not violate their patrons' First Amendment rights, CIPA does not induce libraries to violate the Constitution, and is a valid exercise of Congress' spending power.

The Chief Justice reasoned as follows: Public forum analysis and heightened judicial scrutiny are incompatible with the broad discretion that public libraries must have to consider content in making collection decisions. Libraries provide access to the Internet to facilitate research, learning, and recreational pursuits, rather than to create a public forum for expression. The Chief Justice relied on "two analogous contexts" that sustained the government's "broad discretion to make content-based judgments in deciding what private speech to make available to the public" on public television or to fund with grants from the National Endowment for the Arts. The Chief Justice held that public-forum principles, including heightened scrutiny, do not apply in this context because Internet access at libraries is not a traditional public forum.

While reaching his decision, the Chief Justice concluded that concerns about erroneous blocking "are dispelled by the ease with which patrons may have the filtering software disabled." CIPA expressly authorizes library officials to disable a filter altogether "to enable access for bona fide research or other lawful purposes." The Chief Justice also concluded that CIPA does not prevent public libraries from fulfilling their traditional role of obtaining material of requisite and appropriate quality for education and information purposes, and is not, therefore an "unconstitutional condition." He found that CIPA does not "penalize" libraries that choose not to install software or deny them the right to provide their patrons with unfiltered Internet access because they "are free to do so without federal assistance." "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."

Justices Kennedy and Breyer, in concurring opinions, agreed that it would be improper to block access to the full internet on the part of adults, but so long as the filters could readily be unblocked on request, the compelling interest of protecting minors outweighed any inconvenience to library patrons. If it proved difficult or burdensome to unblock the filters, they said, CIPA could be challenged as unconstitutional, not on its face but as applied. Justice Breyer opined that the Court should apply a form of heightened scrutiny--"whether the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives." CIPA satisfies this test in his view.

Justice Stevens dissented, terming CIPA an "obnoxious" abridgement of speech, that imposed an unconstitutional

burden on grantee libraries. He also concluded that CIPA imposes an unconstitutional condition of the libraries' receipt of federal funds because it forces libraries to act in a manner inconsistent with their traditional role. In a separate opinion, Justice Souter, joined by Justice Ginsburg, agreed with the arguments of Justice Stevens, and added that CIPA would inevitably deny adults convenient access to constitutionally protected materials, thus imposing a form of government censorship impermissible even if public libraries did it voluntarily, without the threat of withheld federal grant funds.

The opinions in the case are available on the Internet:

<http://a257.g.akamaitech.net/7/257/2422/23jun20030800/www.supremecourtus.gov/opinions/02pdf/02-361.pdf>

Center for Public Integrity v. Department of Energy, 191 F.Supp.2d 187 (D.D.C. 2002).

By Steven Laughton, Office of the General Counsel, U.S. Department of Treasury.

The Department of Energy (DOE) issued a solicitation of offers for the sale of federal land, which the government ultimately sold. Thereafter, an entity filed a FOIA request with DOE seeking: (1) the names of all entities that submitted bids; and (2) the amounts of all bids. DOE denied the FOIA request, in part, on the grounds that the records sought were exempt from disclosure under FOIA Exemption 4. Specifically, DOE argued that records requested may be withheld under Exemption 4 because they are likely to: (1) cause substantial competitive harm to the competitive position of the person from whom the information was obtained; and (2) impair the government's ability to obtain necessary information in the future. DOE further argued that release of the identity of a bidder will cause competitive harm because it will inform the bidder's competitors that the bidder is likely to be a competitor in future solicitations of the same type. The court rejected DOE's arguments, and ordered disclosure of the records requested.

While the case does not involve federal grants, the decision suggests that where there is a FOIA request seeking the names of applicants for federal grants and the amounts applied, an agency will have a difficult burden in withholding such information under FOIA Exemption 4.

The following cases were collected by Jana Gagner, Office of the General Counsel, U.S. Department of Commerce.

Appeals Court Cases

Legal Services Corp. v. Client-Centered Legal Services of Southwest Virginia, Inc., 2003 U.S. App. LEXIS 21364 (4th Cir. Oct. 22, 2003).

As part of the agreement for receiving Federal grant funds from the Legal Services Corporation (LSC), Client-Centered Legal Services (CCLS) signed an agreement that contained grant assurances, which required the grantee to return property purchased with Federal funds under certain conditions. The grantee purchased an office property with part of the Federal funds. A few years after the property purchase, the LSC ceased to grant funds to CCLS and chose another legal services corporation to provide legal services in that community. The LSC then filed an action for return of the office property that the grantee had purchased earlier with the funds. The court rejected grantee's argument that the grant assurances did not apply to the property and that the grant assurances were invalid because of "unclean hands," due to the selection of another grantee.

Sherbrooke Turf, Inc., v. Minn. Dep't of Transportation, 345 F.3d 964 (8th Cir. Oct. 6, 2003).

This case related to state grantee implementation of set-asides for construction contracts. A major transportation funding law provided for a 10 percent of federal highway construction funds to be paid to small businesses owned and controlled by socially and economically disadvantaged individuals. The district courts concluded that the program as implemented in Minnesota and Nebraska satisfied strict scrutiny review, both facially and as applied. In consolidated appeals, the court affirmed, holding that the program satisfied strict scrutiny. The contractors did not challenge that the statute furthered a compelling interest. The court also found that the program was narrowly tailored on its face and as applied in both cases. The federal regulations implementing the program placed strong emphasis on using race-neutral means to increase minority business participation in government contracting, contained substantial flexibility, tied the program's goals to the relevant labor markets, and took steps to minimize the race-based nature of the program. The program was also narrowly tailored as applied in each case because each state had attempted to discern the appropriate participation level and set its goals accordingly.

Dubbs v. Head Start, Inc., 336 F.3d 1194 (10th Cir. July 21, 2003).

Head Start parents signed no form giving explicit authorization to conduct general well-child exams of any sort. A district court erred in holding that it was objectively reasonable for the Federal grantee to believe that it had consent to authorize exams.

***Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075 (Fed. Cir. July 3, 2003).**

The Department of the Interior Board of Contract Appeals determined that the Secretary of Health and Human Services breached a Native American Tribe's contracts by failing to pay the full indirect costs of administering federal programs. The Secretary sought review. The program statute required the Secretary to provide funds for the full administrative costs for formerly federally-run programs to tribes undertaking their own education, health, and job-training programs subject to the availability of appropriations. The Tribe entered into contracts with the Secretary to operate hospitals, health clinics, dental services, mental health programs, and alcohol and substance abuse programs, all formerly operated by the Secretary. The Secretary did not pay the required amounts in full. The Tribe sought administrative relief. The court held that there were available appropriations to pay the Tribe its full indirect costs, that there were no statutory caps on funding in the appropriations acts for the relevant fiscal years, and that the Secretary had not shown that full payment would require the Secretary to reduce funding for programs, projects, or activities serving another tribe. The court affirmed the judgment of the Interior Board of Contract Appeals. The case has been appealed to the U.S. Supreme Court, which accepted it for review in March 2004.

***Experience Works, Inc. v. Chao*, 267 F. Supp. 2d 93 (D.C.Cir. June 17, 2003).**

An organization sought to prohibit the U.S. Department of Labor (DOL) from completing its current grant-making cycle for the community service employment program authorized by the Older Americans Act, 42 U.S.C. § 3056. The organization was a non-profit that offered training, employment, and community service opportunities for older workers. The organization's primary argument was that the DOL was violating the Older Americans Act by providing, for the first time, for a national competition of funds. According to the organization's interpretation of the statute, incumbent grantees could not be subjected to national competition unless they failed to meet national performance measures for the last two years. The court held that there was no question that the reduction in funding was a serious financial blow to the organization, a blow whose impact the court did not underestimate. However, the reality was that all applicants for federal funds ran this kind of risk of decreased funding. The organization did not suggest that this particular loss in funds, significant as it was, so devastated its ability to carry out its mission that it was unable to accept and implement the grant it did receive. Furthermore, none of the other elements required for an injunction were met. The public interest would be served by permitting the program to go forward in the most orderly and organized manner. The request to halt the competition was denied.

***Bronx Legal Services v. Legal Services Corp.*, 2003 U.S.App. LEXIS 10299 (2d Cir. May 22, 2003).**

A New York law bars attorneys from revealing client confidences or secrets except when, among other reasons, disclosure is required by law or court order. A federal law requires that recipients of Legal Services Corporation funds provide time records, retainer agreements, and client names except for reports or records subject to the attorney-client privilege. A Federal regulation that was in place when Congress passed the LSC law requires that retainer agreements clearly identify the matter in which representation is sought and the nature of the legal services to be provided. Thus, when Congress passed the law requiring that grantees provide both retainer agreements and client names, it required by law the disclosure of any client secrets that might be revealed if a client name were connected to information on the nature of the representation. Grantees recipients of LSC funds argued that the Federal law did not require disclosure of client names when such disclosure might reveal client secrets, it was unconstitutional if it did require such disclosure, and the LSC's request for information was not "reasonable and necessary" as required by the applicable contracts. The court found that summary judgment was appropriate because (1) providing client names did not conflict with the New York law, and (2) under the grantees' contracts, they were obligated to provide the names. The disclosure of client names did not violate any disciplinary rule, and the contracts unambiguously required that the grantees provide time records, retainer agreements, and client names. The contract condition that they were obligated to respond to only "reasonable and necessary" information requests was meritless because the condition requiring disclosure expressly overrode the first condition.

***In Re Lan Tamers, Inc. v. Ostrander*, 329 F.3d 204 (1st Cir. May 19, 2003).**

Although this case did not involve a Federal grant, the court's analysis included citations to several bankruptcy cases involving Federal grants. A city brought an adversary bankruptcy proceeding, alleging that funds due to the debtor under a federal program for reimbursement to the city for installation and maintenance of internet networks

at the city's schools were property of the city rather than the bankruptcy estate. The trustee appealed the District Court ruling that upheld the city's title to the funds. The debtor, an internet service provider, performed installation and maintenance of internet networks at the city's schools and received payment from the city for such services. Under a federal program implementing the Telecommunications Act of 1996, the city was eligible for reimbursement of a portion of the cost of the debtor's services but payment from the program could only be made to the debtor, which would then pay the funds to the city. However, before the debtor was paid by the program, the debtor filed a bankruptcy petition and the trustee claimed that funds due from the program were property of the debtor's bankruptcy estate. The appellate court held that the funds belonged to the city and were not the property of the estate. The debtor was merely a vehicle for delivering the reimbursement to the city, as evidenced by the acknowledgment executed by the debtor indicating that the debtor was required to remit funds to the city and that the debtor disclaimed any beneficial interest in the funds. Further, the program was subject to a substantial degree of federal regulatory control and the funds were expressly intended to assist schools in obtaining internet access. The city's entitlement to the reimbursement funds was upheld.

***Planned Parenthood of South Carolina, Inc. v. Rose*, 361 F.3d 786 (4th Cir. March 22, 2004).**

Although this case related to whether a State is authorized to issue a specialty license plate bearing the message "Choose Life," a situation that does not involve a grant program, part of the court's analysis included a discussion of past grant law cases. The court ultimately determined that the license plate situation did not involve a government program, and for a number of reasons, the plate was deemed unconstitutional. In the course of this analysis, the court cited a number of prominent grants-related cases, such as *Rust v. Sullivan*, 500 U.S. 173 (1991) and *Rosenberger v. Rector*, 515 U.S. 819 (1995), seeking to make the point that when the government creates and manages its own program, it may determine the contents and limits of that program. The government's broad discretion is justified in such instances because when the government speaks to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. Further, if the citizenry objects, newly elected officials later could espouse some different or contrary position. In short, government speech is necessary to achieve the objectives approved through the ballot box, but the government must remain accountable to the citizenry for what it says. At the same time, neither the latitude allowed for government speech nor the rationale for that latitude applies to all cases where the government funds speech.

Lower Court Cases

***Applera Corp. v. MJ Research, Inc.* 2004 U.S. Dist. LEXIS 3837 (D.C.Conn. Mar. 3, 2004).**

In a patent infringement case, the parties disputed a proposed jury instruction regarding the universities' use of "experimental use" licenses; the status of Federal grantees and contractors in such cases was one of the issues addressed. The proposed instruction would have indicated that "[t]here are classes of end-users who, as a matter of law, cannot infringe a patent... (1) The United States government and its agencies and instrumentalities, and contractors and grantees who perform research 'by' or 'for' the United States, all of whom cannot infringe a patent as a matter of law pursuant to sovereign immunity principles..." The objection to this instruction was that it appeared "to assume that all activities by U.S. government contractors or grantees constitute use 'for' the United States and that all government contracts and grants provide the 'authorization and consent' of the United States, which are necessary predicates for exemption of third parties from liability for patent infringement..." The court concluded that a party could not advance at trial the argument that the other party's customers are exempt from liability for patent infringement under Federal statute merely on the basis of their status as government contractors or grantees without proving the infringing use was "for" the United States and with the "authorization or consent" of the United States.

***Mair v. City of Albany*, 303 F.Supp.2d 237 (N.D.N.Y., Jan. 22, 2004)**

A neighborhood association claimed that a city had a practice of violating the Residential Lead-Based Paint Hazard Reduction Act (RLPHRA) and the Community Development Act (CDA) and its implementing regulations. Because Congress had not manifested an unambiguous intent to confer individual rights in the statutory provisions of the RLPHRA and CDA, those federal funding provisions provided no basis for private enforcement under a Federal law allowing civil actions for deprivations of rights. Among the issues discussed:

--The case involved a program statute that states that before a grant applicant is approved, it must certify to the satisfaction of the Secretary of Housing and Urban Development that it will comply with the provisions of the chapter and with other applicable laws. While the obligation is stated in mandatory terms, it is an obligation of the grantee to the Secretary, not of the grantee to individuals whose homes were or will be abated using funds under

the Community Development Act; accordingly, affected persons may challenge the Department of Housing and Urban Development's approval of a grant application, but not the manner in which the grantee, after approval, uses the funds in its lead-based paint abatement program.

--As a general rule, a party who contracts with a government agency to do an act or render a service is generally not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform, unless the agreement provides for such liability.

--"Make whole" remedies are not ordinarily appropriate in private actions seeking relief for violations of statutes passed by Congress pursuant to its power under the Spending Clause to place conditions on the grant of federal funds. If the grant recipient is unable or unwilling to comply, the Department of Housing and Urban Development is the entity with recourse against the grantee on the basis of the grant agreement. Giving such recourse to the tail-end homeowners who eventually have their homes abated under the programs funded by the grants, however, is an entirely different matter.

--The United States Supreme Court has made clear that unless Congress speaks with a clear voice, and manifests an unambiguous intent to confer individual rights, federal funding provisions provide no basis for private enforcement in a civil rights action

***Nat'l Head Start Ass'n v. Dep't. of Health and Human Services*, 297 F. Supp. 2d 242 (D.C.Cir. Jan. 20, 2004).**

The National Head Start Association (NHSA) sought a temporary restraining order (TRO) to prevent defendant, the Department of Health and Human Services (HHS), from requiring NHSA member organizations to complete a survey regarding the compensation of their senior managers for purposes of the Head Start Act's financial record-keeping and reporting rules. The survey at issue was not expressly contemplated by any statute or regulatory provision. Rather, it was generated by HHS in response to a letter request from certain members of Congress who were concerned over potential administrative misuse of Head Start funds. The letter requested information on the salaries and benefits of the top 25 Head Start executives and the amount of their salary and benefits financed using federal Head Start dollars, as well as the amount of money spent by the 25 grantees spending the most Federal Head Start dollars on meetings and conference travel. With regard to the TRO, none of the statutory arguments proffered by NHSA persuaded the court that NHSA was substantially likely to succeed on the merits in its case. Moreover, the court was not persuaded that the survey exceeded the bounds of the applicable statute by requiring disclosure of non-Head Start expenditures. Similarly unavailing was NHSA's argument that the survey impermissibly imposed a burdensome, retroactively-effective requirement without notice or opportunity for comment. The court rejected NHSA's irreparable harm argument. The public's interest in transparency was predominant. The court denied the request for a TRO.

***Planned Parenthood of Central Texas v. Sanchez*, 280 F. Supp. 2d 590 (W.D. Tex. Aug. 4, 2003).**

A state appropriations law prohibited facilities providing family planning services from obtaining federal funds if they provided abortions. The non-profit corporations who provided such services filed suit challenging the law's constitutionality. The court granted the non-profit corporations' motion for a preliminary injunction. The court found that the non-profit corporations were likely to succeed on their claim that the law violated the Supremacy Clause because it placed an additional eligibility requirement on recipients of federal funds so that even if the facility met the federal eligibility requirements of not using those federal funds to perform abortions, it would not receive federal funding if it performed abortions with private funds. The non-profit corporations were also likely to succeed on their Fourteenth Amendment claim because the state law withheld funding from them because they engaged in a constitutionally protected activity, and therefore imposed an unconstitutional condition. The non-profit corporations would suffer irreparable harm if the injunction was not granted, including having to close clinics and lay off staff, which outweighed any harm suffered by the state health commissioner.

***Donaldson v. United States*, 268 F. Supp. 2d 812 (D.C.E.D. Mich. June 24, 2003).**

An applicant for Rural Business Enterprise grants brought an action alleging that the United States improperly denied his applications and asked the court to prohibit grant awards to other applicants. The applicant contended that the United States improperly applied its scoring system in reviewing the pre-application of the applicant for grants to expand Internet and similar services to rural communities, and that grants were awarded to entities whose proposals were ineligible. The court first held that the applicant's requests for grants were properly denied since there was no evidence that the United States failed to consider all of the relevant factors or committed a clear error of judgment when scoring the grant applications, and the United States appropriately interpreted, followed, and faithfully applied its regulations. Further, evaluating the merit of the applicant's proposals in relation to other applications, which were not before the court, was within the discretion of the United States, and there

was no showing that the applicant was treated unfairly or differently than other applicants. Also, the applicant lacked standing to seek injunctive relief since the prevention of awards for allegedly ineligible proposals would not necessarily result in awards to the applicant and, in any event, the applicant failed to show that other proposals were in fact ineligible.

Gaffney v. United States Dep't. of Transportation, 01-10656 B, AP 02-1238 B, 42 Bankr. Ct. Dec. 93 (Bankr. W.D.N.Y. Jan. 6, 2004).

This dispute involves a claim of the Federal Aviation Administration to an equitable lien on land that the debtor acquired through a Department of Transportation grant. As a condition of the grant, the grantee, Premier Airways, promised never to sell, mortgage or encumber the facility. In the event that the newly acquired parcels were no longer used as an airport, Premier was obliged to return a proportionate part of the proceeds of sale to the FAA, for re-deposit into the Airport and Airway Trust Fund, for future use according to the same regulations which controlled the grant to Premier. The bankruptcy court held that the proceeds from the sale of the real property at issue were property of the bankruptcy estate, free of any secured claim or equitable lien of the FAA. Accordingly, the FAA held only the status of a general unsecured creditor. The court distinguished the case at hand from a prominent case involving bankrupt Federal grantees, *In re Joliet-Will County Community Action Agency*, 847 F.2d 430 (7th Cir. 1988).

Medicare Prescription Drug, Improvement, and Modernization Act of 2003—Use of appropriated funds for flyer and print and television advertisements, B-302504, 2004 U.S. Comp. Gen. LEXIS 57 (Mar. 10, 2004).

Members of Congress sought a Comptroller General opinion regarding whether the Department of Health and Human Services's (HHS) use of appropriated funds to produce and distribute a flyer and print and television advertisements concerning the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 constitutes a violation of the "publicity or propaganda" prohibitions in the Consolidated Appropriations Act. The opinion concluded that HHS's use of its appropriations to produce and disseminate the materials at issue did not violate the publicity or propaganda prohibitions, although the HHS materials had notable omissions and other weaknesses.

Executive Branch Actions and Other Items of Interest

New Requirements from the Office of Management and Budget (OMB)

OMB issued a number of significant new requirements in the past year, which are available on the OMB web site: http://www.whitehouse.gov/omb/grants/grants_docs.html. The documents are as follows:

- Office of Federal Financial Management Policy Directive on Use of Grants.Gov FIND (October 8, 2003)
- Proposed Information Collection, OMB Circular A-133 Data Collection Form (SF-SAC) (August 15, 2003)
- Audits of States, Local Governments, and Non-Profit Organizations (Revision of Circular No. A-133) (June 27, 2003) [68 FR 38401]
- Use of a Universal Identifier by Grant Applicants (June 27, 2003) [68 FR 38402] Final Policy Directive on Financial Assistance Program Announcements (June 23, 2003) [68 FR 37370]
- Standard Data Elements for Electronically Posting Synopses of Federal Agencies' Financial Assistance Announcements at Grants.gov FIND (June 23, 2003) [68 FR 37379]
- Notice of Proposed Policy Guidance for Use of Grants.gov FIND (June 23, 2003) [68 FR 37385]
- Notice of Proposed Relocation of Policy Guidance for Grants and Other Agreements (June 6, 2003) [68 FR 33883]

Department of Defense (DOD) Grant and Agreement Regulations; Final Rule, 68 FR 47149, Aug. 7, 2003 (new class of financial assistance instruments--Technology Investment Agreements).

DOD added new part to its Grant and Agreement Regulations to incorporate policies for administering a relatively new class of financial assistance instruments that it calls technology investment agreements (TIAs). DoD uses TIAs to support or stimulate defense research projects involving for-profit firms, especially commercial firms that do business primarily in the commercial marketplace. The rules allow DoD agreements officers greater flexibility to negotiate award provisions in areas that can present barriers to those commercial firms (e.g., intellectual property, audits, and cost principles).

Nondiscrimination on the Basis of Race, Color, National Origin, Handicap, or Age in Programs or Activities Receiving Federal Financial Assistance; Final Rule, 68 FR 51333, August 26, 2003.

Federal agencies amended their regulations implementing Title VI of the Civil Rights Act of 1964 ("Title VI"), section 504 of the Rehabilitation Act of 1972 ("section 504"), and the Age Discrimination Act of 1975 ("Age Discrimination Act"). Together, these statutes prohibit discrimination on the basis of race, color, national origin, disability, and age in programs or activities that receive federal financial assistance. In 1988, the Civil Rights Restoration Act ("CRRRA") added definitions of "program or activity" and "program" to Title VI and added a definition of "program or activity" to section 504 and the Age Discrimination Act. The added definitions were designed to clarify the broad scope of coverage of recipients' programs or activities under these statutes. These amendments incorporate the CRRRA's definitions of "program or activity" and "program" into Title VI, section 504, and Age Discrimination Act regulations of the Agencies, and promote consistent and adequate enforcement of these statutes by the Agencies.

GSA-Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, Notice of interim final policy guidance document, 68 FR 43519, July 23, 2003.

The General Services Administration (GSA) published for public comment interim final policy guidance on Title VI's prohibition against national origin discrimination as it affects limited English proficient (LEP) persons.

The Federal Bar Association Government Contracts Section Grants Committee

The Grants Committee of the Federal Bar Association's Government Contracts Section hopes you find this handout helpful. If you are an attorney, we invite you to join us. If you are not an attorney, encourage the attorneys you encounter who practice in the grants law field to join us.

As the professional organization for private and government lawyers and judges involved in Federal practice, the FBA has offered an unmatched array of leadership opportunities and services for more than 75 years.

The Committee sponsors a variety of programs, including a panel presentation on a timely legal issue at the National Grants Management Association's annual training conferences. The Committee also distributes a list of cases of interest from the past year at this annual conference. In addition, the Committee sponsors an Internet listserv on grants law matters, to which non-members may also subscribe. Each month the Committee also holds an informal "brown bag" luncheon meeting to discuss committee business and legal cases and situations of interest.

The Grants Committee's "brown bag" lunches are currently held at the offices of Schnader, Harrison, Segal & Lewis, 2001 Pennsylvania Avenue, NW, Suite 300, Washington, D.C. (Metro stop is Farragut West on the Blue-Orange line). The meetings are ordinarily the first Thursday of the month at noon, but are occasionally changed to accommodate scheduled speaking events. There will be no meeting in May 2004 due to participation in the NGMA Convention on April 29. As the meetings are "brown bag," please bring your own lunch.

For further information

To join the Committee, or for more information, contact Co-Chair Edward Sharp, at (301) 713-2175, or e-mail esharp@doc.gov. You may also contact Co-Chair Jana Gagner, 301-975-5035, jana.gagner@nist.gov.

To join the listserv, send an e-mail to esharp@doc.gov, with a message stating your e-mail address and asking to join the listserv.