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COMMENTARY

DUE PROCESS AND FEDERAL GRANT TERMINATION: SOME OBSERVATIONS

EDGAR S. CAHN*

Professor Catz's article, *Due Process and Federal Grant Termination: Challenging Agency Discretion Through a Reasons Requirement*,¹ provides an invaluable summary of the lines of grant termination case law and at the same time argues persuasively that provision of a quasi-adjudicative pretermination hearing is necessary and desirable to protect the rights and interests articulated in that case law.

Yet, even as the article's very publication indicates that grant law has begun to come of age, other events pose the question of whether we are witnessing the dawn or the twilight of this area of the law. The following constitutes at best a partial listing of those developments.

(1) Discretionary grants themselves are being radically reduced in number and are a prime target for budget cutting under the present administration.

(2) Grants that were previously awarded on an individual, discretionary basis are being combined into consolidated block grants to states, where the allocation and award of discrete portions will be the product of each state's political process and where internal governmental structure award decisions will be less susceptible to review or challenge than the quasi-adjudicative determinations involved in grant determinations.

(3) The entities receiving grants are less and less the kind of non-profit, grass roots corporations that feature so prominently in some of the cases discussed by Professor Catz. Rather, state agencies and departments are becoming more and more the vehicle for distribution of federal funds to further public policies. These agencies are shielded from scrutiny by a virtually irrebutable presumption of competence and by a judicial deference to federalism that will make courts less hos-

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1. 59 WASH. U.L.Q. 1067 (1982).

pitiable fora for those who seek to challenge the capacity, integrity, or capability of state agencies.

(4) Massive use by the Office of Management and Budget of the process of deferral of expenditures keeps all grantees—public and private—in a state of uncertainty regarding the ultimate amount or uses of a grant award. This strategy is tantamount to impoundment, yet it complies sufficiently with the procedural and notice requirements of the Impoundment Control Act of 1964 as to make assembly of the facts necessary to mount a challenge virtually impossible.

(5) Termination of grants increasingly partakes of quasi-legislative determinations about the merits of entire programs and strategies. As a result, grant termination is far less susceptible of assessment in terms of the kinds of standards and procedures that Professor Catz properly observes have the greatest, if not exclusive, applicability when individual grantees are affected.

(6) Tax credits and incentives are now being cited as a vehicle for addressing social problems by creating incentives for the private sector to address many of those problems that grant programs had previously sought to alleviate.

(7) Reorganization of the federal government, involving transfers of programs, reductions in force, increases in the number of political appointees, and use of reforms in civil service enacted to enhance bureaucratic accountability, combined with budget cuts, attrition, layoffs, and furloughs, has created an atmosphere of uncertainty and instability that makes it difficult to obtain information or determine who the decision maker is or the process by which a decision was made.

Several larger propositions emerge from the foregoing. First, as a general proposition, the meeting of any rule or norm depends upon the institutional environment of that rule of law. The definition of “grant law” or “regulatory law” thus necessarily must be expanded to include at least two additional areas of law: the law governing the budgetary process and the law governing civil service personnel. Thus, for instance, the most recent attempt to save some of the remaining War on Poverty programs housed in the Community Services Administration, *National Council of CSA Locals v. Schweiker*,² took the form of an action by federal employees to ensure that they, as advocates of those programs with a unique composite institutional memory, had a prefer-

2. 526 F. Supp. 861 (D.D.C. 1981).

ential right of transfer when those programs were transferred to the Department of Health and Human Services. In that case the employees were successful in invoking a little known provision of the Veterans Preference Act of 1944, which extended preferential consideration previously limited to veterans to all present incumbents of competitive civil service positions. The court enjoined a layoff of all employees, stating:

Congress has not exempted the transfer of anti-poverty programs from the Community Services Administration to the Department of Health and Human Services, *see* Omnibus Budget Reconciliation Act of 1981, from the coverage of the Veterans Preference Act of 1944, as amended, 5 U.S.C. § 3503. This being the case the defendants must select any employees pursuant to the preference accorded under the Veterans Preference Act of 1944.³

Second, the proliferation of grant programs should be understood in context as an attempt by society to permit and foster piecemeal renegotiation of the terms of the social contract between and among different groups with a view toward enhancing egalitarian objectives. It is no accident that contract law as applied to federal contractors and to private parties was extended by analogy to provide protection for a new class of persons deemed eligible for the first time to enter into the body politic. In effect, we have been observing the rise, and now the possible demise, of an attempt to alter status relationships by a shift from status to contract and back again to status of a new and more equal nature. Grant law is part of that attempt. Affirmative action efforts represent another and closely related aspect. A shift away from grants is in fact a shift away from efforts to alter status relationships. It remains to be seen whether the shifts in status that did take place as a result of the utilization of contract law (not only with respect to federal grants but also in the area of landlord tenant law, employment law, and consumer law) were on a scale sufficient to effect permanent change and lay the basis for continuing renegotiation of the social contract with new parties to that social compact who can, over time, assert their more equal status.

Third, the grant law described seeks to protect not only the grantee, but also the intended beneficiary of the grant. In this sense, the concept of "trust" and the use of trust law is highly significant. Just as the parties affected become the beneficiaries of a trust (rather than merely

3. National Council of CSA Locals v. Schweicker, 526 F. Supp. 861, 866 (D.D.C. 1981).

third-party beneficiaries to a contract), so too the judge becomes a chancellor sitting in equity rather than a judge in a court of law. This is why we witnessed the emergence of what Abram Chayes described so insightfully as a new “public law” model of litigation. In such cases, entire executive branch agencies were put into a kind of judicial receivership in which the remedy fashioned underwent constant change to meet constantly changing circumstances in order to surmount new and unforeseen obstacles and evasatory tactics. It would be inappropriate simply to dismiss such a development as judicial activism. The phenomenon is an essential reaction to the rate of change that became an accepted and even cliché fact of life with the publication of Toffler’s *Future Shock* and *The Third Wave*. Regardless of the fate of grant law per se, it is clear that dispute resolution institutions, capable of shaping new, flexible, and effective remedies, have become increasingly essential. The model of judicial behavior posited in Chayes’ seminal piece is part of a larger phenomenon by which society seeks to create new problem-solving institutions that look less and less to the past and rely far less on concepts of fault as the touchstone for determining remedy. In this respect, the new Bankruptcy Code, with the greater protection it affords consumers and the range of powers it affords the trustee in bankruptcy, may be of equal or greater importance (symbolically and pragmatically) to the extent that responsibility for social problems has genuinely shifted to a private sector that is itself in fragile condition.

Finally, it should be noted that whatever gains have been secured for the poor and disenfranchised, the procedural protections and doctrines described in this important article by Professor Catz partake of a much older tradition—the tradition by which the rule of law circumscribes the capacity of the sovereign to act capriciously and even despotically. The prospects for democracy and for individual liberty may be grim. The rate of change tends to concentrate power and resources in the executive branch, simply as a matter of national survival.

Our Constitution sought to check executive branch despotism by a separation of powers and by a federal system. National panic over inflation, unemployment, a negative balance of trade, or a decline in international prestige and power cannot, however, save the people from themselves. The first victims are likely to be the poor, the disenfranchised, the most recently enfranchised, and the defenders of unpopular causes. It is in this context that one must regard Professor Catz’ piece as part of that great tradition that so far has protected us

from the return of the Star Chamber, the days of McCarthy, or the more recent peril of Watergate. His final emphasis on the substantive importance of procedure may far outweigh the possibly ephemeral fate of grant law. This is the true nobility of the piece, one that evokes echoes of the exchange between Sir Thomas More and Roper in *A Man for All Seasons*:

More: What would you do? Cut a great road through the law to get after the Devil?

Roper: I'd cut down every law in England to do that!

And Moore replies:

Oh? And when the law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—Man's laws not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law for my own safety's sake.

There is more at stake, quite literally, in the Catz article than the future of grant law.

