
ADMINISTRATIVE LAW & REGULATION

REDRESSING POLITICIZED SPENDING

By Daniel Z. Epstein*

Note from the Editor:

This article is about politicized spending in the federal discretionary budget. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to further discussion about discretionary spending, standards of review for agency decisions, and the constitutional issues surrounding politicized decision making. To this end, we offer links below to different perspectives on the issue, and we invite responses from our audience. To join this debate, please email us at info@fed-soc.org.

Related Links:

- Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2380 (2001): http://www.harvardlawreview.org/media/pdf/vol114_kagan.pdf
 - OFFICE OF MANAGEMENT & BUDGET, BUDGET CONCEPTS & BUDGET PROCESS (2013): <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/concepts.pdf>
 - Drew McLelland & Sam Walsh, Litigating Challenges to Federal Spending Decisions: The Role of Standing and Political Question Doctrine, Harvard Law School Federal Budget Policy Seminar Briefing Paper No. 33 (2006): http://www.law.harvard.edu/faculty/hjackson/LitigatingChallenges_33.pdf
 - Jamie Dupree, *A look at Executive Branch earmarks*, ATL. J.-CONST. (July 24, 2012): <http://www.ajc.com/weblogs/jamie-dupree/2012/jul/24/look-executive-branch-earmarks/>
-

In 2007, the Bush White House sent senior political officials to brief political appointees in federal agencies on how they could help steer federal funds to favor Republican congressional candidates.¹ In 2010, the Obama White House had direct involvement in shaping the U.S. Department of Energy (DOE) Loan Program Office's loan and loan guarantee funding decisions.²

These are not isolated anecdotes. They characterize a body of empirical evidence demonstrating that federal agencies' discretionary spending and other decisions are susceptible to capture by the political interests of Congress and especially the President.³ Politicized spending undermines transparency and the "level playing field" needed to maintain public trust and confidence in government. Furthermore, large-scale discretionary spending without an effective independent check on the government's ability to steer discretionary funds to favored firms, organizations, and individuals corrodes the foundations of any system based on principles of limited and accountable government.

For the most part, Congress has failed to cabin agency discretionary funding powers. The Office of Management and Budget (OMB) has issued guidelines for agency spending, but these merely encourage a system of merit-based discretionary decision making.⁴ And, unless backed by legislative teeth, these guidelines have proven ineffective as a check against politicized

spending.⁵

However, judicial remedies are available for persons injured when political or other biases infect federal agency discretionary spending; these remedies would ensure fairness and remedy the harms associated with overbroad agency power. Therefore, this article reviews both statutory and constitutional remedies and suggests approaches claimants can take to obtain judicial review and thereby increase agency accountability for discretionary spending decisions. Part I analyzes the rise of politicized discretionary spending. Part II examines the current standards of review for discretionary agency decisions, including the Administrative Procedure Act, the Tucker Act, implied contractual duties, and suggested improvements to redressability. Part III discusses constitutional theories for challenging politicized decision making, including *Bivens* claims and procedural due process theories. This article concludes that congressional action clarifying that persons injured by politicized agency discretionary spending have standing would be useful to help check agency overreach.

I. THE RISE OF POLITICIZED DISCRETIONARY SPENDING

In 2010 and 2011, the U.S. House of Representatives and Senate, respectively, imposed a moratorium on congressional earmarks, which are specifically tailored pieces of legislation designed to "reward" targeted congressional members with federal spending in their districts and states. Contemporaneous with these moratoriums was a shift in the system of federal spending. Federal grant spending has risen 40 percent since 2001 and has increased tenfold over the last four decades.⁶ Spread across more than 1,700 programs and 26 agencies, federal grant outlays reached \$538 billion in FY2012, trailing only Social Security

*Mr. Epstein is Executive Director at Cause of Action, a nonprofit government accountability law firm in Washington, D.C. He previously served as an investigative counsel at the Committee on Oversight and Government Reform at the U.S. House of Representatives. Special thanks to Karen Groen, Reed Rubinstein, and James Valvo for their contributions to this article.

and national defense in the federal budget.⁷ In the same year, nearly \$80 billion was allocated through discretionary, as opposed to formula-based, grants.⁸ According to the Catalogue of Federal Domestic Assistance, of the 2,240 federal assistance programs listed for 2012, 1,530 were for discretionary grants.⁹ The volume and nature of discretionary spending raises concerns of the potential for abuse.

Traditionally, concerns about politicized spending focused on congressional earmarking practices.¹⁰ Scholarship on the subject of congressional credit-claiming largely posits that members have little incentive to credit-claim based on discretionary grant awards. Professor Frances Lee, in analyzing federal domestic assistance, asserted, “most federal grant money is simply not distributed in a way that maximizes credit-claiming opportunities for individual members.”¹¹ Based on her research, Lee concluded that “[e]ven within the system of intergovernmental grants—one of the most fertile fields for credit-claiming—individual House members often find themselves unable to ‘peel off pieces of governmental accomplishment’ . . . to demonstrate that they are taking care of constituents.”¹² Therefore, the congressional earmark moratorium should have greatly reduced the politicized direction of taxpayer funds to politically expedient and self-serving projects. Yet there has been public scrutiny on a number of federal grant projects that may have provided the type of credit-claiming opportunities that drives politicized spending.¹³ Appropriations lobbyists have observed an increase in lawmakers’ writing to “federal agencies asking them to consider specific grant applications due to the earmark bans.”¹⁴

In addition to congressional intervention, the executive branch is also susceptible to politicization of spending decisions. Research from the Congressional Research Service (CRS) suggests that the President will use agency budget requests to influence agency-based discretionary spending in order to reward members of Congress for their votes on a presidential priority.¹⁵ Then-chairman of the powerful House Appropriations Committee Congressman David Obey stated that “it has been very difficult to make people understand the extent and the nature of the directed spending that is going on in the executive branch, and that directed spending—just as surely as you take your next breath—is the functional equivalent and the political equivalent of [c]ongressional earmarking.”¹⁶ That federal agencies make spending and other discretionary decisions based on the political interests of the President is well-established in the political science literature.¹⁷ John Hudak, a fellow at the Brookings Institution, found that discretionary authority over the allocation of federal dollars provides presidents with the opportunity to engage in porkbarrel politics, “strategically allocating funds to key constituencies at critical times.”¹⁸

The Bush Administration came under criticism for the politicization of discretionary spending through the steering of agency funds to politically expedient causes. In 2007, the *Washington Post* reported that Bush White House officials “conducted 20 private briefings on Republican electoral prospects for senior officials in at least 15 government agencies covered by federal restrictions on partisan political activity.”¹⁹ According to the Office of Special Counsel, officials at the General Services Administration “felt coerced into steering federal activities to

favor those Republican candidates cited as vulnerable.”²⁰ The Bush White House was also accused of sending “senior political officials to brief top appointees in government agencies on which seats Republican candidates might win or lose, and how the election outcomes could affect the success of administration policies.”²¹

Contemporaneous with these agency actions, President Bush used the budget reconciliation process to request earmarks in congressional appropriations bills.²² A House Appropriations Committee report showed that “Bush requested 17 special projects worth \$947 million, more than any single member of Congress.”²³ CRS reported that in regular appropriations bills from FY2008 through FY2010 President Obama was the “only requester” for 1,265 earmarks worth \$9.5 billion.²⁴ CRS found that in FY2010, 68 percent of all earmarks were either solely requested by President Obama or requested jointly by the President and members of Congress.²⁵ CRS also determined that “[b]oth the number and value of earmarks requested solely by the President increased since FY2008.”²⁶ The 126-percent increase in the value of President Obama’s earmarks substantially exceeds the eleven percent increase in the total value of earmarks since FY2008.²⁷ A Heritage Foundation study suggested that the current Administration has used federal discretionary spending to buy votes for contentious legislation.²⁸ The phenomenon of presidentially-requested earmarks, combined with politically-directed discretionary spending occurring subsequent to a moratorium on congressional earmarking, has been dubbed “executive-branch earmarking.”²⁹

The distribution of the significant amount of discretionary spending is thus clearly vulnerable to politicization from both Congress and the President. Under this paradigm, it seems prudent to inquire whether there is a proper judicial remedy for such politicized spending.

II. JUDICIAL REVIEW OF DISCRETIONARY DECISION MAKING

Federal agencies generally act by engaging in either informal rulemaking or adjudication.³⁰ As this article focuses on the redressability of politicized decision making affecting individual grant applicants, the relevant case law and judicial theories concern informal adjudications.³¹

The Administrative Procedure Act (APA)³² allows aggrieved parties to seek judicial review of final “agency action” so long as review is not precluded by another statute or “committed to agency discretion by law.”³³ Such decisions are unreviewable when courts lack “meaningful standard[s] against which to judge the agency’s exercise of discretion.”³⁴ However, courts will invalidate agency actions if they are arbitrary, capricious, or an abuse of discretion; contrary to a constitutional right; or in excess of statutory jurisdiction or authority (known as the *State Farm* test).³⁵ Courts have established that political interference in the discretionary decision-making process runs afoul of the APA’s standards.³⁶

The remedy for such interference is limited but palpable. Reviewing courts will remand to the agencies and instruct them to make new determinations limited to the merits and without regard to any considerations not made relevant by Congress.³⁷ This approach recognizes that not all political contact with a

decision maker *per se* taints the final decision. In determining whether political pressure overwhelmed an agency's process, the D.C. Circuit has established a bright-line standard instructing agencies to establish a "full-scale administrative record" such that if a decision is challenged, the agency can rely on the record to support its decision.³⁸ Under this standard, reviewing courts will provide the agency an opportunity to cure its politically tainted decision. Remand, "rather than a reinstatement of the untainted decisions, is the proper remedy" because, in these cases, courts cannot predict how a decision would have been properly decided on the merits and there is no reason to think that on remand the taint would necessarily occur again.³⁹

Several scholars and legal commenters, including now-Justice Elena Kagan, have found the federal courts' consideration of political influence in an arbitrary-and-capricious analysis to be unwarranted.⁴⁰ These scholars have instead advocated that reviewing courts apply *Chevron*⁴¹ deference to agency decision making when presidential influence is involved.⁴² These scholarly approaches—unlike the courts' approach to insulate decision makers from political pressure—embrace the inherent political nature of the executive branch's discretionary decisions, under a policy rationale that the President, like Congress, is accountable in ways courts are not.⁴³ However, these approaches are unlikely to gain traction in the jurisprudence, where courts have held that agency authority to act comes only from Congress.⁴⁴ In fact, the Supreme Court has held that a decision is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider."⁴⁵ The federal courts are likely to hold that if Congress wanted Presidents and other executive branch officials to incorporate political motivations into their decision-making process, Congress would have included intelligible criteria in its authorizing statutes.

A. APA Redress is Limited in Current Form

While the APA is a common means for attacking agency decisions, it is not always available to unsuccessful grant or loan applicants. Moreover, when it is available, it offers only injunctive, rather than monetary relief.⁴⁶ The APA also excludes from judicial review matters that are "committed to agency discretion by law."⁴⁷ In any case brought by an unsuccessful applicant, the agency is likely to argue that authorizing statutes for the individual discretionary grant program explicitly provide for agency discretion. Specifically, that they limit how funds may be spent or that the authority is within general welfare provisions (*e.g.*, broad statements of purpose that lack specific direction, such as "to provide support, and maintain a commitment, to eligible low-income students").⁴⁸ The answer, of course, depends on the language of the specific authorizing statute.

Respecting those discretionary grant decisions subject to judicial review, an agency action that bypasses a merit-based process in favor of political considerations would clearly violate the *State Farm* test.⁴⁹ Such politicization would also fail to demonstrate a rational connection between the facts (*i.e.*, the merit of grant applicants as determined by their scores and ranks) and the agency's selection of grant recipients. Because agencies typically do not voluntarily release the scoring and ranking numbers of grant applicants, it would be difficult to

prove that an agency decision was arbitrary and capricious without resorting to expensive and time-consuming litigation, assuming a litigant can plead the sufficient facts necessary for a court to grant a merits review.

B. Congress Could Provide "Meaningful Standards"

There are two possible legislative remedies that would enhance a litigant's ability to show that an agency was arbitrary and capricious when it allowed politicization of a spending program. First, Congress could pass a law that would require agencies to disclose the criteria by which they will evaluate grant applications, post the scores and rankings online, and disclose the methods by which they chose specific recipients. Congressman James Lankford introduced a bill in the 113th Congress to do just that.⁵⁰ The GRANT Act would require agencies to "establish and make publicly available online specific merit-based selection procedures," so that the agency, grant applicants, and the general public are all aware of how the agency will evaluate applications for grant programs.⁵¹ The bill would also require agencies to post online the "[d]ocumentation explaining the basis for the selection decision for the grant . . . [and] with respect to the proposal that resulted in the grant award, the numerical ranking of the proposal."⁵² Finally, the bill would require that in any "case in which the award of the grant is not consistent with the numerical rankings or any other recommendations made by grant reviewers" the agency must disclose "a written justification explaining the rationale for the decision not to follow the rankings or recommendations."⁵³ One shortcoming of the legislation is that it does not provide specific statutory standing for an aggrieved grant applicant who believes that his application was mishandled. However, the scores, rankings, and agency decision-making rationale would all provide exactly the type of "meaningful standards" that courts desire when they are looking for "law to apply" in an APA arbitrary-and-capricious review.

Second, Congress could also enact a "sunshine law" that would require agencies to disclose the type, amount, and frequency of political contact that members of Congress or executive branch officials made with the agency during the decision-making process.⁵⁴ This approach could amend the APA itself to mirror the disclosure requirements in the Clean Air Act during the rulemaking process.⁵⁵ The disclosure approach could be widened by statute or executive order to require that agencies include contacts and motivations for certain adjudicative actions.⁵⁶ However, this approach has serious drawbacks because agencies would have a strong incentive not to disclose the most egregious politicization of discretionary grant decisions.

C. The Potential for Tucker Act Jurisdiction

In addition to the APA, an aggrieved grant applicant could seek redress through a civil claim for damages. The federal government has sovereign immunity and may not be sued unless it waives its immunity or consents to be sued.⁵⁷ The Tucker Act waives the federal government's sovereign immunity in suits arising out of contracts to which the federal government is a party.⁵⁸ The Act grants the Court of Federal Claims jurisdiction over claims "founded upon any express or implied contract with

the United States” but the Act does not speak to the substance of the claims themselves.⁵⁹

Courts typically apply Tucker Act jurisdiction to cases arising from procurement *contracts*; although the Act also covers tax, land, and military employment actions. This should not be construed to eliminate claims by a grant or loan applicant who has a contract for the underlying award or a contract for fair consideration of his application. However, based on a theory of an implied-in-fact contract, *grant* recipients seeking review of the government’s performance of its duties under an agreement have used the Tucker Act to seek redress.⁶⁰ Even if a grant recipient is able to gain review under the Act, the government will likely take the same position that the Government Accountability Office (GAO) has when it noted that it “does not follow . . . nor has GAO or any court suggested, that all of the trappings of a procurement contract somehow attach to a grant.”⁶¹ However, if the grant or loan program itself is governed by procurement rules, then the Tucker Act’s bid protest rules should apply. GAO also argued, “it is clear that the many varied rules and principles of contract law will not be automatically applied to grants.”⁶²

While there are few examples of grant recipients using the Tucker Act to get into court, none of these cases reviewed the agency’s treatment of an application.⁶³ The implied-in-fact contract for the underlying award sufficient to gain Tucker Act jurisdiction has only been recognized once the grant is awarded. The federal government would likely respond to a suit involving the politicized nature of the grant *application process* by arguing such claims are outside of the Tucker Act’s jurisdictional grant. However, the notion that agencies have a duty to treat grant applications in an unbiased manner is well within existing precedent.⁶⁴

D. Agencies Have an Implied-in-Fact Contractual Duty to Review Submissions Fairly

An applicant who believes that politicized decision making has infected a discretionary spending program may be able to seek redress through a variety of contract law-based claims. One such claim is that when the government creates a discretionary spending program and seeks applicants to fulfill the government’s programmatic goals, the government has entered into an implied-in-fact contract to fairly consider the applications it receives.⁶⁵ This argument is well established in government contracting and there is ample basis to demonstrate that it applies in grant programs as well.

Prior to 1996, the Court of Federal Claims (and its predecessor, the United States Claims Court) used an implied-in-fact contract theory to require the government to fairly consider contract bids.⁶⁶ In 1996, Congress amended the Tucker Act to clarify that the court has jurisdiction over procurement challenges “without regard to whether suit is instituted before or after the contract is awarded.”⁶⁷ Although the 1996 Tucker Act amendments removed the need for the courts to use the implied-in-fact theory in the procurement sphere, the court’s analysis of how and why government should treat applicants fairly in the contract process is particularly useful for those seeking redress of politicizing grant spending.⁶⁸

1. An Implied Duty to Treat Applications Fairly

The Court of Federal Claims has recognized that the government has an implied duty to conduct contract-bid reviews in a fair and honest manner.⁶⁹ The government’s duty to treat the bid honestly “runs first of all to the enterprise submitting that bid.”⁷⁰ The court’s assertion that the duty runs between the applicant and the agency creates a problem for a third-party contract or grant applicant who is attempting to assert that the agency has politicized contract or grant decisions. In that situation, the “agency’s enforceable responsibility to a bidder to read or evaluate properly *his competitor’s bid* may be appreciably less” than the duty the agency owes the party directly.⁷¹ But this begs the question, if a competitor’s bid is given preference because of political intervention, how should a third-party bidder obtain relief?

If the plaintiff was seeking damages for the underlying award, it would need to show causation between the favoritism or politicization and the denial of its grant application. The unsuccessful grant applicant could do this by showing that it “would likely have received the award but for incorrect preference given his successful competitor’s bid[.]”⁷² The government has traditionally responded that “there is no assurance that any bidder would have obtained the award since the [g]overnment retains . . . the right to reject all bids without any liability.”⁷³ In such a case, the court would need to review the full administrative record to determine whether the disappointed applicant would have received federal funds if the program had not been politicized. If, however, the plaintiff was only pursuing damages for the cost of the application process, then a simple showing of politicization would be sufficient without the need to go the extra step and show that but for the unfair treatment the plaintiff would have received the award.

The *Heyer Products* line of cases is a valuable reminder that once the government holds out a contract or solicits bids for a grant or loan program, an implied duty based in contract law does arise and is not barred by sovereign immunity. Applying this rationale to a discretionary grant program is the first step toward providing redress for those injured by politicized spending programs.

At least one plaintiff has already unsuccessfully attempted to extend the *Heyer Products* rationale to loan guarantees. In *Tree Farm Development Corp. v. United States*, the unsuccessful applicant claimed that the U.S. Department of Housing and Urban Development (HUD) had an implied-in-fact contractual duty to review Tree Farm’s application on the merits.⁷⁴ However, the Court of Federal Claims found there was no showing of unfair treatment or particularly egregious behavior, only a showing that HUD ended the program before awarding the applicant a loan guarantee.⁷⁵ The court declined to extend *Heyer Products* in part because the cases “show[ed] a total absence of the arbitrary and capricious type of governmental conduct which the *Heyer* doctrine was designed to prevent.”⁷⁶ In essence, the court declined to expand the duty from one protecting against arbitrary treatment to one that would cover all applications for government programs. However, nothing in *Tree Farm* precludes a loan guarantee applicant who was rejected as a result

of political considerations from being eligible for judicial review.

In a pending case challenging the loan guarantee process of the infamous U.S. Department of Energy Advanced Technology Vehicle Manufacturing (ATVM) and loan guarantee program, XP Vehicles and Limnia have both argued that their “loan application[s] ha[ve] been ‘set aside’ in favor of applications from politically-connected government cronies and that [the Department of Energy] ha[s] ‘fixed’ the ATVM loan process to benefit political donors, cronies and insiders.”⁷⁷ These alleged abuses of discretion are exactly the type of harm that the *Heyer Products* line of case was intended to protect against.

2. Establishing a Breach of the Implied Duty

In addition to establishing that an implied duty exists, the Court of Federal Claims has set out several factors for determining whether that duty has been breached.⁷⁸ First, courts examine whether the “favoritism or discrimination stems from subjective bad faith (e.g., predetermination of the award)[.]”⁷⁹ Second, courts will find a breach if “there was ‘no reasonable basis’ for the administrative decision” denying the application.⁸⁰ Third, courts balance “the degree of proof of error necessary for recovery” against “the amount of discretion entrusted to the procurement officials by applicable statutes and regulations.”⁸¹ Fourth, a “proven violation of pertinent statutes or regulations [could], but need not necessarily, be a ground for recovery.”⁸² Additionally, courts examine the “type of error or dereliction” and whether it “occurred with respect to the claimant’s own bid or that of a competitor.”⁸³

E. Implied-In-Fact Contract for Final Award

In addition to claiming that an implied duty to fairly review an application exists, a plaintiff could also attempt to assert that the agency has entered into an implied-in-fact contract for the final grant award.⁸⁴ When the United States is a party, the Court of Federal Claims has found an implied-in-fact contract if the plaintiff shows “(1) mutual intent to contract; (2) consideration; (3) an unambiguous offer and acceptance; and (4) evidence that the government representative whose conduct is relied upon had actual authority to bind the government in contract.”⁸⁵

A party claiming that a discretionary grant decision has been politicized and that an implied-in-fact contract exists must allege (and eventually prove) all of these elements identified above. First, a plaintiff whose application has been rejected or ignored would have to show that the agency expressed the intent to contract. This element depends heavily on the circumstances surrounding each individual application; a disappointed applicant that received repeated assurances from the agency during the application process is a prime candidate for an implied-in-fact contract claim. Second, a plaintiff would need to show that sufficient consideration was exchanged between the parties.⁸⁶ The government will likely argue, as GAO has, that “a grant is a form of assistance to a designated class of recipients, authorized by statute to meet recognized needs. Grant needs, by definition, are not needs for goods or services required by the federal government itself.”⁸⁷ However, the better reasoned approach is to look at the application itself (and the

preparation expense thereof) as the consideration that flows to the government. When reviewing contract claims, courts are not concerned with the adequacy of consideration, only its presence.⁸⁸ Agencies are charged by Congress with implementing grant and loan programs to achieve some societal goal that Congress has deemed worthy of taxpayer dollars. This would be impossible, were it not for companies and organizations that are willing to put the time, money, and effort into complying with an agency’s application procedures and requirements, in the hope that they might receive a federal loan or grant. Were this of no value to Congress and the agency, no grant or loan program would exist in the first place.

III. AVENUES FOR CONSTITUTIONAL REDRESS

A. Constitutional “Tort” Claims

One potential option for unsuccessful grant applicants is the pursuit of a constitutional claim against federal officials in their personal capacities.⁸⁹ The Supreme Court has recognized that certain constitutional violations do not have a statutory remedy and thus require recognition of an implied cause of action in order to discourage the violation and compensate the victim.⁹⁰ In the over 40 years since *Bivens*, the Supreme Court has expressly extended it only twice: for employment discrimination under the Due Process Clause and for Eighth Amendment violations by prison officials.⁹¹ In both instances, the Court implied the *Bivens* remedy in very narrow circumstances, and elsewhere it has “responded cautiously” to requests for a *Bivens* remedy because “implied causes of action are disfavored.”⁹² The Court has made clear that “[*Bivens*] is not an automatic entitlement” and “in most instances [such a remedy is] unjustified.”⁹³ Courts appear loath to create *Bivens* claims when (1) an alternative process to protect the interest at issue already exists, or (2) when there are any other special factors counseling hesitation to creating the implied cause of action.⁹⁴

While *Bivens* could allow a rejected grant applicant to sue the head of a grant-making agency (or a grant program official) for violating Due Process or Equal Protection if no other remedial avenues exist, the government will likely argue that an unsuccessful grant applicant has an alternative process to protect its interest, if at all, under the APA. This argument should be rejected, however, because the APA is only a procedural mechanism for enforcing substantive rights, and does not, in itself, confer any substantive rights.⁹⁵ Additionally, the government will likely argue that the Tucker Act is a remedial scheme barring a *Bivens* remedy.⁹⁶ Both the APA and the Tucker Act fail to provide sufficient procedural and substantive rights.⁹⁷ Even though a court might eventually hold that an unsuccessful grant applicant has another remedial avenue which provides an alternative process sufficient to protect the applicant’s interest and therefore counsels against the recognition of a *Bivens*-style remedy, they can alternatively plead a claim under that remedial scheme and a *Bivens* claim in order to protect their interest until such a decision is made.

In *Ashcroft v. Iqbal*, the Supreme Court articulated that *Bivens* claims must “plausibly draw a reasonable inference that the defendant is liable for the misconduct alleged.”⁹⁸ Some

courts have since interpreted *Iqbal* to require that a *Bivens* complaint allege facts that focus on the individual's actions and "suggest that defendants acted with purposeful intent . . . to violate plaintiffs' constitutional rights."⁹⁹ A *Bivens* claim is particularly well suited to disappointed applicants who have evidence (even publicly available evidence) that a particular agency or program was politicized or run with favoritism, especially where it appears this occurred at the direction of the named defendants. Based on such evidence, a disappointed applicant should be entitled to a presumption that the general politicization and/or favoritism present infected the review of his specific application.¹⁰⁰ An applicant need only show that the claim is true on its face and courts must give the aggrieved applicant "the benefit of all inferences that can be derived from the facts alleged."¹⁰¹

Finally, government officials also enjoy protection under the doctrine of qualified immunity.¹⁰² *Bivens* claims can overcome this hurdle when the conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known."¹⁰³ The "clearly established right" test has been most frequently interpreted to protect government officials unless they knowingly violate the law.¹⁰⁴ Indeed, it is difficult for individuals that run federal loan and grant programs to argue that they were unaware that they should not use congressionally appropriated funds to advance their own political agenda.

Courts have not yet recognized a Due Process or Equal Protection violation when discretionary grants are awarded out of rank order, let alone the violation of a "clearly established" right. However, a federal official could be found liable for a *Bivens* claim if there is a finding of that official's politicizing the discretionary grant award process.

B. Procedural Due Process

A prospective grantee may also look to the Fifth Amendment's procedural due process protections to vindicate its claim.¹⁰⁵ The Due Process Clause does not bar government from intruding on protected interests, it simply requires that sufficient process is afforded before doing so.¹⁰⁶ A prospective grantee that believes it was denied a grant because of politicized spending would appear to have a viable claim for violation of due process because it was denied an impartial decision maker.¹⁰⁷ In response, the government will claim that the Supreme Court has established a "presumption of honesty and integrity" in decision makers.¹⁰⁸ The party claiming bias on the part of a decision maker needs to show a "disqualifying interest" to rebut the presumption.¹⁰⁹

The two most common grounds for establishing a biased decision maker are when the "adjudicator has a pecuniary interest in the outcome and [when] . . . he has been the target of personal abuse or criticism from the party before him."¹¹⁰ In addition to personal motivations, the Supreme Court has recognized that institutional and political pressures of public office can taint a decision maker's objectivity.¹¹¹

This jurisprudence provides two avenues for review of politicized spending. First, in the unlikely case that a decision maker in a discretionary spending program was to give a grant to a project in which he had a financial stake, the grant would

seem ripe for invalidation. Standing for such a claim would not be difficult to show if the entire decision-making process were politicized. Second, if an unsuccessful grant applicant could show that the political appointees in an agency infected the decision-making process by virtue of the institutional pressure that their dual administrative-political positions create, then he may be able to contend he was denied an impartial decision maker. As an APA claim, the remedy for either of these violations of due process would only be a reconsideration of the grantee's application by an unbiased decision maker.

V. CONCLUSION

While scholars have traditionally focused on the problems of agency capture by special interest groups, the rise of discretionary spending has raised a novel problem of agency capture by political influencers, namely Congress and the President. While Congress has acted to curtail its own credit-claiming opportunities with appropriations, Congress has not sought to prevent presidents or their appointees from abusing the delegation of congressional powers to the executive branch for political self-interest. While strategic plaintiffs and engaged courts may find a remedy to agency political capture via the Administrative Procedure Act, the Tucker Act, implied contractual duties, or constitutional theories, the need for Congress to provide additional avenues for redress is clear.

Endnotes

- 1 R. Jeffrey Smith, *Political Briefings At Agencies Disclosed*, WASH. POST, Apr. 26, 2007.
- 2 MAJORITY STAFF, COMM. ON OVERSIGHT AND GOV'T REFORM, MEMORANDUM, UPDATE ON COMMITTEE'S OVERSIGHT OF THE DOE LOAN GUARANTEE PROGRAM: NEW EMAILS SHOW PRESIDENT OBAMA, SENIOR ADMINISTRATION OFFICIALS MISLED AMERICAN PEOPLE ABOUT ROLE OF PRESIDENT AND WHITE HOUSE IN PROGRAM 2 (2012).
- 3 Sanford C. Gordon, *Politicizing Agency Spending Authority: Lessons from a Bush-Era Scandal*, 105 AM. POL. SCI. R. 717-734 (2011).
- 4 OFFICE OF MGMT. AND BUDGET, CIRCULAR A-110 § 43 (1999) available at http://www.whitehouse.gov/omb/circulars_a110.
- 5 See, e.g., 31 U.S.C. § 6301(3) ("promote increased discipline in selecting and using procurement contracts, grant agreements, and cooperative agreements, maximize competition in making procurement contracts, and encourage competition in making grants and cooperative agreements.").
- 6 Veronique de Rugy, *Fiscal Interplay Between Federal, State And Local Governments*, MERCATUS (July 30, 2012), available at <http://mercatus.org/sites/default/files/Federal-grant-aid-state-and-local-chart-analysis-pdf.pdf>.
- 7 OFFICE OF MGMT. AND BUDGET, WHITE HOUSE, PRIME AWARD SPENDING DATA: FISCAL YEAR 2012, available at USA SPENDING <http://1.usa.gov/1eqH07P>; see also NATALIE KEEGAN, CONG. RESEARCH SERV., FEDERAL GRANTS-IN-AID ADMINISTRATION: A PRIMER (2012), available at <http://www.fas.org/sgp/crs/misc/R42769.pdf>.
- 8 OFFICE OF MGMT. AND BUDGET, WHITE HOUSE, PRIME AWARD SPENDING DATA: FISCAL YEAR 2012, GRANTS, available at USA SPENDING <http://1.usa.gov/19AgXXO>.
- 9 GEN. SERV. ADMIN., CATALOG OF FED. DOMESTIC ASSISTANCE, available at <http://1.usa.gov/JGHpoE>.
- 10 Kenneth N Bickers & Robert M. Stein, *The Congressional Pork Barrel in a Republican Era*, 62 J. OF POLITICS 1070 (2008).
- 11 Frances Lee, *Geographic Politics in the U.S. House of Representatives: Coalition Building and Distribution of Benefits*, 47 AM. J. POL. SCI. 714, 715 (2003).

12 *Id.* at 726.

13 See Lachlan Markay, 'Buying' House Votes for Unpopular Legislation, HERITAGE FOUND. MORNING BELL (Feb. 21, 2012), available at <http://blog.heritage.org/2012/02/21/morning-bell-buying-house-votes-for-unpopular-legislation/>; Marlys Harris, Are 'lettermarks' Congress' new end-around on the earmarks ban? MINNPOST (Sept. 20, 2013), available at www.minnpost.com/politics-policy/2013/09/are-lettermarks-congress-new-end-around-earmarks-ban (explaining that "lettermarking" is where members of Congress write executive branch officials and "phonemarking" is where telephone calls are made in order to persuade officials to fund specific projects); Kevin Bogardus, *Keep the earmark requests coming, say some lawmakers to constituents*, THE HILL (Mar. 17, 2011), available at <http://thehill.com/business-a-lobbying/150329-keep-the-earmark-requests-coming-say-some-lawmakers-to-constituents> (citing Congressman Mike Thompson's statement that "Now that the earmark ban is in place, one option is to have communities apply for federal grants. My office has been happy to help local communities as they navigate the application process, from determining eligibility to writing the grant proposal." and Senator Sherrod Brown's statement that "Any requests that our office receives are used internally to help guide the senator as he advocates for programmatic funding levels of grant requests."); Ron Nixon, *In Post-Earmark Era, Small Cities Step Up Lobbying to Fight for Federal Grants*, N.Y. TIMES, (Feb. 2, 2012), available at http://www.nytimes.com/2012/02/03/us/in-the-post-earmarks-era-small-cities-struggle-for-federal-grants.html?_r=0; Eliza Newlin Carney, *The Earmarks Paradox*, NAT'L J. (Feb. 13, 2011), available at <http://www.nationaljournal.com/columns/rules-of-the-game/the-earmarks-paradox-20110213> ("Some argue that earmarks will now simply go underground, and that lawmakers will channel federal money to pet projects through federal grants, tax credits, and other avenues"). The foregoing examples show that executive branch earmarks are just as problematic credit-claiming opportunities as congressional earmarks.

14 Bogardus, *supra* note 13 at *id.*

15 CLINTON T. BRASS, CONG. RESEARCH SERV., DISTRIBUTION OF FY 2007 FUNDING FOR SELECTED PROGRAMS, COMPARED WITH OTHER FISCAL YEARS 6 (2008); see also 110th Cong. 1st session, Rpt. 110-187, Department of the Interior, Environment, and Related Agencies Appropriation Bill, 2008 (June 22, 2007), Supplemental Report [to accompany H.R. 2643] [Rep. Dicks, Investigators on Appropriations], Executive and Legislative Branch Projects at 15 ("Earmarking or directed spending of Federal dollars does not begin with Congress. It begins with the Executive Branch . . . The Administration, in selecting these projects, goes through a process that is the functional equivalent of earmarking").

16 Obey Press Briefing, June 11, 2007, CQ Top Docs, www.cq.com, at 10; see also CLINTON T. BRASS ET AL., CONG. RESEARCH SERV., BUSH ADMINISTRATION POLICY REGARDING CONGRESSIONALLY ORIGINATED EARMARKS: AN OVERVIEW, CRS-4, n. 13 (2008), available at <http://fpc.state.gov/documents/organization/110375.pdf>.

17 John P. Forrester, *Public Choice Theory and Public Budgeting: Implications for the Greedy Bureaucrat*, in EVOLVING THEORIES OF PUB. BUDGETING 101-24 (John Bartle ed., 2001); Christopher R. Berry et al., *The President and the Distribution of Federal Spending*, 104 AM. POL. SCI. R. 783 (2010).

18 John J. Hudak, *The Politics of Federal Grants: Presidential Influence Over the Distribution of Federal Funds at 28* (2011) (Unpublished Ph.D. dissertation, Vanderbilt University), available at <http://www.vanderbilt.edu/csd/research/CSDI-WP-01-2011.pdf>.

19 Smith, *supra* note 1 at *id.*

20 *Id.*

21 *Id.*

22 Alexander Bolton, *Bush Called Out for His Earmarks*, THE HILL, (June 28, 2007).

23 *Id.*

24 CAROL HARDY VINCENT & JIM MONKE, CONG. RESEARCH SERV., EARMARKS DISCLOSED BY CONGRESS: FY 2008-2010 REGULAR APPROPRIATIONS BILLS 7 (2010).

25 *Id.* at 8.

26 *Id.* at 15.

27 CLINTON T. BRASS, CONG. RESEARCH SERV., DISTRIBUTION OF FY 2007 FUNDING FOR SELECTED PROGRAMS, COMPARED WITH OTHER FISCAL YEARS (2010).

28 Rob Bluey and Lachlan Markay, *Buying House Votes for Unpopular Legislation*, HERITAGE FOUND., (Feb. 21, 2012).

29 See Jamie Dupree, *A look at Executive Branch earmarks*, ATL. J.-CONST. (July 24, 2012), available at <http://www.ajc.com/weblogs/jamie-dupree/2012/jul/24/look-executive-branch-earmarks/>. See also BLOG, TAXPAYERS PROTECTION ALLIANCE, *The Proliferation of Executive Branch Earmarks*, http://www.protectingtaxpayers.org/index.php?blog&action=view&post_id=222 (last visited Feb. 6, 2014).

30 *Compare* Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo., 239 U.S. 441 (1915) (discussing general rulemaking standards) and *Londoner v. City and County of Denver*, 210 U.S. 373 (1908) (discussing general adjudicatory standards); see also ANDREW F. POPPER ET AL., ADMINISTRATIVE LAW: A CONTEMPORARY APPROACH 25-31 (2d ed. 2010).

31 See SECTION OF ADMIN. LAW AND REGULATORY PRACTICE, AM. BAR ASS'N, A GUIDE TO FEDERAL AGENCY ADJUDICATION § 9.02 (Michael Asimow ed.) (2003) (stating decisions regarding "grants, benefits, loans, and subsidies" are informal adjudications).

32 5 U.S.C. §§ 500-706; see also *W. Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1123 (9th Cir. 2009).

33 5 U.S.C. § 551(13); 5 U.S.C. § 701(a). The Supreme Court has held that a decision is committed to agency discretion when "there is no law to apply," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (citing S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).

34 *Heckler v. Chaney*, 407 U.S. 821, 830 (1985).

35 5 U.S.C. § 706(2). The Supreme Court gave more definition to this test in *Motor Vehicles Mfg. Ass'n v. State Farm Mut. Auto. Ins. Co.*:

[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." . . . Normally, an agency [decision] would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

463 U.S. 29, 43 (1983).

36 In *D.C. Federation of Civic Ass'ns v. Volpe*, the D.C. Circuit Court of Appeals found that the Secretary of Transportation moved a bridge project forward too quickly because of undue pressure from a member of Congress. 459 F.2d 1231 (D.C. Cir. 1972). The court refused to allow the action to stand because "extraneous pressure intruded into the calculus of considerations on which the Secretary's decision was based." *Id.* at 1246.

37 See *id. Compare* *Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534, 1546 (9th Cir. 1993) (where the Ninth Circuit held that political interference in a formal adjudication violated the APA) and *ATX, Inc. v. U.S. Dep't of Transp.*, 41 F.3d 1522, 1527 (D.C. Cir. 1994) (where the D.C. Circuit found political pressure did influence the decision maker but instead focused not on the content of the political pressure but on "the nexus between the pressure and the actual decision maker.").

38 *Aera Energy LLC v. Salazar*, 642 F.3d 212, 222 (D.C. Cir. 2012). In *Aera Energy LLC*, the D.C. Circuit upheld a regional director's politicized decision to exclude certain oil deposits from a leasing scheme because the director admitted that if there was no political influence then he would have included the deposits based on criteria not in the statute. The court reasoned that when politics infects a decision, the remedy is not to simply provide the plaintiff with the opposite decision, but instead to remand the decision to an unbiased appeals board or administrative law judge. *Id.* at 218.

39 *Id.* at 220 (internal brackets and quotation marks omitted) (citing *Koniag, Inc. v. Uyak v. Andrus*, 580 F.2d 601, 611 (D.C. Cir. 1978)).

40 See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2380 (2001) ("A revised doctrine would acknowledge and, indeed, promote

an alternative vision centered on the political leadership and accountability provided by the President. This approach, similar to the one I have considered in discussing the *Chevron* doctrine, would relax the rigors of hard look review when demonstrable evidence shows that the President has taken an active role in, and by so doing has accepted responsibility for, the administrative decision in question”).

41 *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

42 Kagan, *supra* note 40 at 2380; *see also* Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, (1995); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986). Similarly, Yale Law Professor Kathryn Watts urged the courts to consider “the content and form of political influence” and engage in line drawing between “between permissible and impermissible political influences” because “not all political influences should be treated equal.” Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 83 (2009); *see also* Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 Mich. L. Rev. 1127 (2010). Watts advised courts to distinguish between “valid ‘political’ factors . . . [such as] political actors that speak to policy judgments or value-laden judgments [and less-valid] raw partisan politics.” *Id.*

43 *Chevron*, 467 U.S. at 855-866 (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices -- resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”).

44 *Am. Library Ass’n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005) (“It is axiomatic that administrative agencies may . . . [act] only pursuant to authority delegated to them by Congress.”).

45 *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

46 5 U.S.C. § 702.

47 5 U.S.C. § 701(a)(2).

48 Higher Education Opportunity Act, Pub. L. No. 110-315, § 404(a), 122 Stat. 3078, 3206 (2008).

49 *See Motor Vehicles Mfgs. Ass’n v. State Farm Mut. Auto. Ins. Co.* 463 U.S. 29, 43 (1983) (*see State Farm* test *supra* note 35).

50 Grant Reform and New Transparency Act of 2013 (GRANT Act), H.R. 3316, 113th Cong. (2013).

51 *Id.* at § 7402(b).

52 *Id.* at § 7404(d)(2)(C).

53 *Id.* at § 7404(d)(2)(D).

54 *See Mendelson, supra* note 42 at 1163; Nicholas Jimenez, Note, *Controlling Administrative Politics with Sunshine by Expanding the Aera Energy v. Salazar Principles*, 39 ECOLOGY L.Q. 345, 369 (2012).

55 42 U.S.C. § 7607(D); Jimenez, *supra* note 54 at 369.

56 Mendelson, *supra* note 42 at 1164.

57 *Gray v. Bell*, 712 F.2d 490, 506-507 (D.C. Cir. 1983).

58 28 U.S.C. § 1491; *see* Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 606-07 (2003).

59 28 U.S.C. § 1491(a)(1); *see* Sisk, *supra* note 58 at 612.

60 In *Pennsylvania Department of Public Welfare v. United States*, the court found that a well-pled complaint from a grant recipient alleging the existence of an implied contract with the agency could survive a jurisdictional challenge.

on Tucker Act jurisdiction by showing that a research grant satisfied all of the elements of a contract. 34 Fed. Cl. 411 (1995).

61 U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-382SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW THIRD EDITION, VOLUME II at 10-9 (hereinafter RED BOOK).

62 *Id.* at 10-12.

63 *Id.* at 10-6 to -8.

64 *See Heyer Products Co. v. United States*, 177 F. Supp. 251, 252 (Ct. Cl. 1959); *XP Vehicles, Inc., v. U.S. Dep’t of Energy*, No. 13-37 (D.D.C. filed Jan. 10, 2013); *XP Vehicles, Inc. v. United States*, No. 12-774 (Fed. Cl. filed Nov. 14, 2012).

65 17A AM. JUR. 2d *Contracts* §§ 12-18 (2013) (discussing express, implied, and constructive contracts).

66 *United States v. John C. Grimberg Co., Inc.* 702 F.2d 1362, 1367 (Fed. Cir. 1983).

67 28 U.S.C. §§ 1491(b)(1), (4).

68 *Ramcor Servs. Group v. United States*, 41 Fed. Cl. 264, 268 (1998); *see also* *MORI Assocs., Inc. v. United States*, 102 Fed. Cl. 503, 523-524 (2011) (citing 48 C.F.R. § 1.602-2(b) (explaining that this implied duty, as applied to contracting officers, is now codified by regulation)).

69 In *Heyer Products Co. v. United States*, the court held that when the government issues solicitations for contract bids, it “impliedly promise[s] that it [will] give honest and fair consideration to all bids received and [will] not reject any one of them arbitrarily or capriciously” and that it will use “its honest judgment” when doing so. 177 F. Supp. 251, 252 (Ct. Cl. 1959); *see also* *New Am. Shipbuilders, Inc. v. United States* 871 F.2d 1077, 1079 (Fed. Cl. 1989).

70 *Keco Indus., Inc. v. United States*, 492 F.2d 1200, 1205 (Ct. Cl. 1974) (emphasis added) (citing *Heyer Prod. Co. v. United States*, 140 F. Supp. 409 (Ct. Cl. 1956); *Cont’l Bus. Enter. v. United States*, 452 F.2d 1016 (Ct. Cl. 1971)).

71 *Keco Indus.* 492 F.2d at 1205.

72 *Id.*

73 *Id.* (citing *Robert F. Simmons & Assocs. v. United States*, 360 F.2d 962 (Ct. Cl. 1966) (discussing an agency’s discretion to reject all bids without breaching the implied duty to consider bids fairly)).

74 585 F.2d 493 (Ct. Cl. 1978).

75 *Id.* at 495.

76 *Id.* at 499.

77 Second Amended Verified Complaint at 6, *XP Vehicles, Inc. v. United States*, Case No. 12-774 (Fed. Cl. filed Oct. 16, 2013).

78 In *NKF Engineering v. United States*, the court held that “a breach occurs . . . if the contracting agency acts in an arbitrary and capricious, *i.e.*, irrational or unreasonable, manner . . .” 805 F.2d 372, 375-76 (Fed. Cir. 1986) (citing *Nat’l Forge Co. v. United States*, 779 F.2d 665, 667 (Fed. Cir. 1985); *CACI, Inc.-Fed. v. United States*, 719 F.2d 1567, 1573 (Fed. Cir. 1983); *Burroughs Corp. v. United States*, 617 F.2d 590, 597 (Ct. Cl. 1980); *Keco Indus.*, 492 F.2d at 1203-04).

79 In *Keco Industries, Inc. v. United States*, the court found prima facie bad faith when an agency “accepts a bid knowing that costly changes will be required” because of the competitor’s undue advantage. 492 F.2d 1200, 1205 (Ct. Cl. 1974).

80 *Id.* (citing *Cont’l Bus. Enter.*, 452 F.2d at 1021).

81 *Keco Indus.*, 492 F.2d at 1204 (citing *Cont’l Bus. Enter.*, 452 F.2d at 1021; *Keco Indus., Inc. v. United States*, 428 F.2d 1233, 1240 (Ct. Cl. 1970)).

82 *Keco Indus.*, 492 F.2d at 1204.

83 *Id. But cf. NFK Eng’g*, 805 F.2d 372 (1986) (courts did not find a breach of the implied duty when the Naval Sea Systems Command rejected a bid based on the appearance of impropriety raised by a contracting agent taking a job with one of the bidders).

84 An implied-in-fact contract is an actual, not constructive, contract, but

one that is formed through the parties' conduct, not a written document. 17A AM. JUR. 2d *Contracts* §§ 12-18 (2013); see also *Hercules, Inc. v. United States*, 516 U.S. 417, 423-24 (1996).

85 *Greer v. United States*, No. 07-123C, 2007 U.S. Claims LEXIS 469 at *5 (Fed. Cl. Aug. 1, 2007) (internal brackets and quotation marks omitted) (citing *Anderson v. United States*, 73 Fed. Cl. 199, 201 (2006); see also *New Am. Shipbuilders, Inc. v. United States*, 871 F.2d 1077, 1080 (Fed. Cir. 1989) (stating "Oral assurances do not produce a contract implied-in-fact until all the steps have been taken that the agency procedure requires; until then, there is no intent to be bound. Thus, it is irrelevant if the oral assurances emanate from the very official who will have authority at the proper time, to sign the contract or grant.").

86 A contract is not binding unless there is consideration that burdens and benefits both parties. 17A AM. JUR. 2d *Contracts* § 102 (2013).

87 RED BOOK, *supra* note 61 at 10-9. However, consider that the majority of federal grants go to charitable organizations, which receive their tax-exempt status in part because they "lessen the burden on government" by providing a service the government may otherwise have to provide. See Robert Louthian & Amy Henchey, *Lessening the Burdens of Government*, 1993 EO CPE Text, available at <http://www.irs.gov/pub/irs-tege/eotopicb93.pdf>; see also *Instrumentalities – Lessening the Burdens of Government*, 1984 EO CPE Text at 17, available at <http://www.irs.gov/pub/irs-tege/eotopicl84.pdf> ("there are . . . numerous examples of situations in which an organization was held to be charitable even though it fulfilled no charitable purpose beyond relieving the burdens of government.").

88 *Axion Corp. v. United States*, 68 Fed. Cl. 468, 476 (2005).

89 In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the Supreme Court held that an implied cause of action could be asserted against federal agents who violated the Fourth Amendment by conducting an unreasonable search and seizure. 403 U.S. 388 (1971).

90 42 U.S.C. § 1983 allows individuals to sue state or local officials who deprive them of rights protected under federal law. Until the Court's decision in *Bivens*, however, there was no similar remedy against deprivations of rights by federal officials.

91 *Davis v. Passman*, 442 U.S. 228 (1979) (employment discrimination); *Carlson v. Green*, 446 U.S. 14 (1980) (Eighth Amendment violations).

92 *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988); *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009).

93 *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (no *Bivens* remedy for retaliation against exercise of property rights); see also *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63, 66-74 (no *Bivens* remedy for mistreatment of inmate in corporate halfway house); *FDIC v. Meyer*, 510 U.S. 471, 473, 483-86 (1994) (no *Bivens* remedy for suit against federal agency); *Chilicky*, 487 U.S. at 420-29 (no *Bivens* remedy for denial of disability benefits); *Chappell v. Wallace*, 462 U.S. 296, 297-305 (1983) (no *Bivens* remedy for harms suffered by military personnel through activity incident to service); *Bush v. Lucas*, 462 U.S. 367, 368, 373-90 (1983) (no *Bivens* remedy for First Amendment violations arising in federal-employment context); *Minneci v. Pollard*, 132 S. Ct. 617 (2011) (no *Bivens* remedy against privately-employed prison guards).

94 See *Davis*, 442 U.S. at 245; *Bivens*, 403 U.S. at 396.

95 *Navab-Safavi v. Broad. Bd.*, 650 F. Supp. 2d 40, 66 (D.D.C. 2009), *aff'd*, 637 F.3d 311 (D.C. Cir. 2011).

96 See *Janicki Logging Co. v. Mateer*, 42 F.3d 561, 564 (9th Cir. 1994); *Evers v. Astrue*, 536 F.3d 651, 661 (7th Cir. 2008).

97 *Navab-Safavi*, 650 F. Supp. 2d at 71.

98 *Iqbal*, 556 U.S. at 678.

99 *Klay v. Panetta*, 924 F. Supp. 2d 8, 21-22 (D.D.C. 2013).

100 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007)).

101 *Aref v. Holder*, 2013 U.S. Dist. LEXIS 97510, No. 10-539, at *31 (D.D.C. July 12, 2013).

102 *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

103 *Id.* at 818. In *Saucier v. Katz*, the Supreme Court established that courts should first consider whether a constitutional right was violated, and second whether the right was clearly established at the time it was violated. 553 U.S. 194, 200-202 (2001).

104 *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

105 In order to raise a claim under procedural due process, a plaintiff must first show a violation of a recognized interest in life, liberty, or property. The liberty interest is the most promising avenue for a prospective grantee when he believes has been discriminated against either because he did not support the current administration or supports the opposing political party. The Court has also recognized that just because an inmate has lost some physical liberty due to incarceration, he does not sacrifice his liberty interests for purposes of a procedural due process claim; see *Vitek v. Jones*, 445 U.S. 480, 492-93 (1980). In *Bolling v. Sharpe*, the Court noted that although it had not "assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Liberty under law extends to the full range of conduct which the individual is free to pursue . . ." *United States v. Guest*, 383 U.S. 745, 758 (1966). There are several liberty interests that courts will recognize in a procedural due process claim. The right to interstate travel is a well-recognized constitutional right that implicates a liberty interest. *Wisconsin v. Constantineau* 400 U.S. 433 (1971). In some cases, government harming a citizen's reputation will constitute a violation of a liberty interest if that reputational harm implicates a different constitutional right. However, pure reputational harm alone will not suffice. "Injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest." *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (citing *Paul v. Davis*, 424 U.S. 693 (1976)). Equal protection of the laws is also a protected liberty interest. In *United States v. Windsor*, the Court wrote that the "liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws." 133 S. Ct. 2675, 2695 (2013).

106 In *Goldberg v. Kelly*, the Court broadly described the types of process that are due when protected interests are threatened. 397 U.S. 254 (1970). They include: proper notice; an opportunity to participate in the process; an opportunity present a defense by confronting adverse witnesses and rebutting evidence; retaining counsel; maintaining a record of the proceedings; and an impartial decision maker. *Id.* Subsequently, in *Matthews v. Eldridge*, the Court classified the three-part test that it would use when determining whether the amount of process was sufficient. 424 U.S. 319 (1976). First, the Court will examine:

the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. The *Goldberg* list includes the types of process that are due; the *Matthews* list is used to determine how those factors were applied.

107 *NEC Corp. v. United States*, 151 F.3d 1361, 1371 (Fed. Cir. 1998) ("The right to an impartial decision maker is unquestionably an aspect of procedural due process").

108 *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

109 *Wolkenstein v. Reville*, 694 F.2d 35, 42 (2d Cir. 1982).

110 *Withrow*, 421 U.S. at 47. For example, in *Aetna Life Insurance Co. v. Lavoie*, the U.S. Supreme Court vacated an Alabama Supreme Court decision against an insurance company because one of the Alabama justices had a pending legal action against the insurance company and was so biased as to make his participation unjustified. 475 U.S. 813 (1986).

111 In *Ward v. Monroeville*, the Court considered an Ohio statute that empowered mayors to act as judges for certain traffic offenses. 409 U.S. 57 (1972). While the Court did not object to the melding of executive and judicial functions, it found that the mayor's "responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." *Id.* at 60. This institutional pressure on one official who "perforce occupies two practically and seriously inconsistent positions, one partisan and

the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.” *Id.* (citing *Tumey v. Ohio*, 273 U.S. 510, 534 (1927)).

