William HOHRI, et al., Appellants,

v.

UNITED STATES of America.

No. 84–5460.

United States Court of Appeals,
District of Columbia Circuit.

Order May 30, 1986.

Appeal from the United States District Court for the District of Columbia (Civil Action No. 83–750).

Richard K. Willard, Asst. Atty. Gen., Dept. of Justice, Joseph E. diGenova, U.S. Atty., Washington, D.C., Jeffrey Axelrad, Barbara L. Herwig and Marc Johnston, Attys., Dept. of Justice, Washington, D.C., were on suggestion for rehearing en banc.

ON APPELLEE'S SUGGESTION FOR REHEARING EN BANC

Prior Opinion: 782 F.2d 227.

Before ROBINSON, Chief Judge; WRIGHT, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA, STARR, SILBERMAN and BUCKLEY, Circuit Judges.

ORDER

PER CURIAM.

Appellee's suggestion for rehearing *en banc* has been transmitted to the full court. A vote was requested. A majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that appellee's suggestion is denied.

Circuit Judges BORK, SCALIA, STARR, SILBERMAN and BUCKLEY would grant the suggestion for rehearing *en banc*. A statement is attached.

A statement of Circuit Judges J. SKELLY WRIGHT and GINSBURG is also attached.

BORK, Circuit Judge, with whom Circuit Judges SCALIA, STARR, SILBERMAN and BUCKLEY join, dissenting from denial of rehearing en banc:

This case should be reheard *en banc*. The panel majority has created an unprecedented rule of absolute deference to the political branches whenever "military necessity" is claimed, even where the claim is irrelevant and however spurious the claim is shown to be. The court did this, moreover, in a case in which it clearly had no jurisdiction. Both errors warrant reconsideration by the full court. I am in complete agreement with the criticisms of the majority opinion expressed in Chief Judge Markey's excellent dissent; I write separately to advance some additional grounds why the majority decision should not be allowed to stand.

Plaintiffs in this case are nineteen individuals, all of whom were either Japanese-Americans subjected to internment during World War II or the representatives of such internees. They sought money damages and a declaratory judgment on twenty-two claims, based upon a variety of alleged constitutional violations, torts, and breaches of contract and fiduciary duties. The district court dismissed each of these claims. The court of appeals affirmed, except as to one claim founded on the fifth amendment to the Constitution. With respect to that claim, virtually every step of the panel majority's reasoning either adopts broad and troublesome propositions or is plainly wrong.

I.

Plaintiffs alleged that the government internment program effected an uncompensated taking of their property. The statute of limitations requires that such claims be brought no later than six years after the right of action accrues. 28 U.S.C. § 2401(a) (1982). The alleged taking occurred approximately forty years before this lawsuit was filed. The district court properly held that the statute of limitations barred the claim. That conclusion would seem inescapable, but this court reversed and remanded.

A.

In an effort to escape the statute of limitations that plainly bars this action, the panel majority engaged in contrived reasoning that creates a rule of *absolute* and *permanent* judicial deference to any claim of "military necessity." Judges owe deference to such claims, of course, particularly in wartime, but never before has a court enunciated a deference so great that it requires utter capitulation. So sweeping is the panel majority's new rule, the executive branch may remove American citizens from their homes and impound them in camps, solely on the grounds of race, and courts will not interfere, no matter what facts are shown. So powerful is this rule that courts will not reexamine what was done even when facts establishing the absence of military necessity, or of any plausible belief in its existence, become public and the period of military emergency is long past. So potent is the rule that it applies to associated actions or neglects as to which no claim of military necessity was made or could be made.

I am certain that the majority intended none of this but that is what their argument inevitably leads to. It is easily demonstrated that I do not overstate the rule the panel majority has inadvertently created.

To summarize the majority's reasoning: In *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943), and *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), the Supreme Court upheld the racially-based curfew and the internment regulations. The Court did so because it deferred completely to the judgment of the military authorities that the programs were justified by military necessity. The Court's acceptance of the claim of military necessity for these purposes also had the effect of vitiating any future claims for compensation that might arise under the fifth amendment, since "[w]hen the government impinges on property rights in the midst of a military emergency, there is no compensable taking." *Hohri v. United States*, 782 F.2d 227, 251 (D.C.Cir.1986). However, according to plaintiffs' allegations, the government had concealed from the Supreme Court both internal memoranda disputing the necessity for the program *and* "the fact that there were no intelligence reports contradicting" those memoranda. *Id.* at 252. Had both the memoranda and the fact been disclosed, the outcomes in *Hirabayashi* and *Korematsu* would have been different and the finding of military necessity would not have been made. Therefore, the fraudulent concealment of the memoranda and the fact tolled the statute of limitations on the takings claim. Finally, since the Supreme Court had based its reasoning on an irrebuttable presumption of deference to the political branches and the military, "nothing less than an authoritative statement by one of the political branches, purporting to review the evidence when taken as a whole, could rebut" this presumption. *Id.* at 251. The required statement was made in 1980 when Congress created a Commission to investigate the internment. Thus, it was not until 1980 that the basis for this takings claim existed, and, consequently, not until 1980 that the statute of limitations began to run.

In the course of this reasoning, the panel majority remade important law in more than one way. *Hirabayashi* and *Korematsu* are read to reflect an absolute deference to military judgment, though the Supreme Court did not express any such extreme position. Moreover, military necessity is

said to justify uncompensated takings of private property even in the United States and well outside the battle zone, regardless of the fact that no one ever claimed that the *takings*, as opposed to the internment, were necessary. Third, the fact that *Hirabayashi* and *Korematsu* were decided during the height of World War II, a circumstance that must certainly figure in calculating their weight as precedent during peacetime, is overlooked in order that their supposed rationale of absolute deference may be made permanent, unless and until one of the political branches admits the absence of military necessity. Surely we must recognize that courts are likely to accord a claim of military necessity greater deference during a major war than would be proper years later when the emergency is long past and a conventional takings claim is advanced. Finally, courts may not reconsider prior holdings in light of new evidence until "released ... from the grasp" of those holdings by Congress. Statement by Circuit Judges Wright and Ginsburg at 1. This means that in this context, at least, Congress may dictate the results of lawsuits to the courts.

The truth is that, had plaintiffs filed their claim earlier, they would have been able to use the relevant documents, most of which were already in the public domain, in building their case, as well as anything else accessible through discovery. As Chief Judge Markey pointed out, the essential facts for a legal challenge were well known by 1950. *Hohri*, 782 F.2d at 261–62 (Markey, C.J., dissenting). The government would have borne the burden of persuasion in establishing its affirmative defense and it would not have been able to meet that burden simply by citing *Hirabayashi* and *Korematsu*. *See infra* p. 8. It is only by announcing that *no claim existed* until Congress opened a new inquiry that the majority is able to justify tolling the statute of limitations until 1980.

In so doing, the panel has conducted something more than a mere historical analysis of the reasoning embodied in a pair of Court decisions from the 1940's. It has indicated that the doctrine of absolute deference applies today as well. As recently as 1979, we are told, plaintiffs had no case to bring, because the law laid down in *Korematsu* would have required automatic acquiescence to the expressed judgment of the political branches regardless of whatever factual evidence plaintiffs might have brought forth. Indeed, *no* set of facts in the public domain could possibly be sufficient to form the basis of a lawsuit in the absence of some sort of political retraction.[1] The statement of Congress has therefore become a "crucial element" of the claim; without it, plaintiffs would have been unable to "survive a threshold motion to dismiss for failure to tender a claim that would advance beyond the pleading stage." *Hohri*, 782 F.2d at 249–50 & n. 57.

This means that a claim of military necessity, once made and upheld, may never be challenged in court, no matter what the facts are proved to be, until a political branch states that the claim was known to be baseless when made.[2] To make matters worse, the majority describes its rule of absolute and permanent judicial deference to claims of military necessity as resting on "constitutional underpinnings." *Id.* at 251.

This new doctrine confuses governmental decisions which warrant a degree of deference with those that are unreviewable. Until now, doctrines of deference to the Executive or Congress had never required the unthinking acceptance of unsupported assertions suggested by the majority opinion. Having now held that a statement by one of the political branches is a necessary element to any legal challenge to an assertion of military need, the majority has established a doctrine far more threatening to legitimate civil liberties and to judicial review of government action than any that would have been accomplished through an affirmance of the district court's decision.

1. And, if a statement by a political branch were required, as it clearly should not be, President Ford provided that in a Presidential Proclamation. *See* Proclamation No. 4417, 3 C.F.R. 8 (1977). The only difficulty is that the statement is inconveniently early, for the panel majority's purposes, since it was made more than six years before this suit was filed. Although the Presidential Proclamation describes the evacuation as "wrong" and a "national mistake[ ]," the panel majority found it insufficient to cure the concealment on the ground that it did not expressly declare that a *legal* wrong had been committed. This is the worst sort of hairsplitting. It is difficult to see how a declaration that the evacuation was "wrong" could fail to undercut the finding that it was "necessary." Moreover, if an "authoritative statement" is required, the clear language of this Proclamation fills the need far more naturally than the Act of Congress on which the panel majority relied.

2. This is one reason the majority's theory of fraudulent concealment seems so contrived. This doctrine, as the majority explains, concerns the concealment of "material facts," *Hohri*, 782 F.2d at 246 (*quoting Fitzgerald v. Seamans*, 553 F.2d 220, 228 (D.C.Cir.1977)), and permits the statute to be tolled only until "a 'duly diligent' plaintiff would have discovered that which was concealed." 782 F.2d at 249. That doctrine was warped badly out of shape here, for what was "concealed," apparently, was an *opinion* by Congress, rather than any material facts or information. It is the *source* of the disclosure (Congress), and not the facts themselves, on which the majority's theory rests. Congress' failure to express earlier a formal judgment questioning the justification for the internment was not concealment, and its decision to express its doubts in 1980 has no effect on the statute of limitations.

B.

A word must be said about the panel majority's Statement in response to this dissent. The Statement's attempt to resuscitate the panel majority's original decision only makes that decision's error clearer. The heart of the panel majority's Statement is that the original opinion

> most assuredly "creates [no] rule of absolute and permanent judicial deference to any claim of 'military necessity.'" ... Rather, the opinion simply describes and turns on what we find to be the situation-specific holding of *Hirabayashi v. United States*, 320 U.S. 81 [63 S.Ct. 1375, 87 L.Ed.2d 1774] (1943), and *Korematsu v. United States*, 323 U.S. 214 [65 S.Ct. 193, 89 L.Ed. 194] (1944): courts must defer to the judgment of Congress and the Executive that sufficient military necessity existed to justify the *World War II internment policy*. That Supreme Court holding seems to us clear, pin-pointed, and definite. We therefore concluded that the former internees faced an insuperable obstacle to the present suit until the "war-making branches," ... released the federal courts from the grasp of *Korematsu* and *Hirabayashi* by indicating that deference was no longer due to the wartime judgment of military necessity for the mass evacuation.

Statement at 1.

This explanation of the original opinion will not do. If the majority's holding really turned on a "situation-specific holding" of *Hirabayashi* and *Korematsu*, which is "clear, pin-pointed, and definite," then those decisions would have posed no obstacle whatever to the bringing of this action ten, twenty, thirty, or even forty years ago. *Hirabayashi* upheld a curfew imposed upon persons of Japanese descent and *Korematsu* upheld their relocation and internment. Neither case holds, or even remotely suggests, that military necessity also required that the internees' property be taken. It is, in fact, perfectly apparent that the taking of property was not the object of, nor was it in any way necessary to, the relocation program. Therefore, on the rationale of the panel majority's Statement, these plaintiffs could have made a takings claim at any time without being in the least hampered, much less absolutely barred, by the holding of *Hirabayashi* and *Korematsu*.

The majority equates the showing required to prove necessity for the internment with the showing required to render a wartime taking noncompensable. These are two distinct inquiries. The cases cited by the majority on the latter issue each dealt with property deliberately destroyed by American troops in battle in order to keep it from falling into the hands of approaching enemy troops. *United States v. Caltex, Inc.*, 344 U.S. 149, 73 S.Ct. 200, 97 L.Ed. 157 (1952); *United States v. Pacific Railroad*, 120 U.S. 227, 75 S.Ct. 490, 30 L.Ed. 634 (1887). There are other cases in which regulatory programs to ration or divert national resources in time of war have been held not to require compensation. *See, e.g., United States v. Central Eureka Mining Co.*, 357 U.S. 155, 78 S.Ct. 1097, 2 L.Ed.2d 1228 (1958). Neither of those circumstances describes the taking alleged in *Hohri*. Each involves a situation in which the taking was itself deemed necessary to the war effort. That is not the case here. No one has claimed that the government, having decided to conduct the relocation, could not have protected the property rights of those it evacuated.[3]

It seems unlikely to me, therefore, that the government could have won a takings suit on the claim of military necessity. It clearly would have been *impossible* for the government to win such a suit simply by citing *Korematsu* and moving to dismiss. Indeed, in *Central Eureka Mining Co.*, the Court emphasized that the question of whether a taking has occurred turns "upon the particular circumstances of each case." 357 U.S. at 168, 78 S.Ct. at 1104. The majority notes that certainty of success is not a necessary prerequisite to the running of the statute of limitations. *Hohri*, 782 F.2d at 253 n.68. For the panel majority to persist in stating that any such claim would have foundered at the pleading stage, it must go so far as to hold that there was certainty of defeat. That cannot be true without the sort of broad holding it now denies having made.

That being so, one of two conclusions follows. Either the panel majority rests on a narrow view of *Korematsu*, as it now claims, which means that the statute of limitations has long since run and this case was wrongly decided, or the panel majority has indeed created a rule of absolute and permanent deference to a claim of military necessity. The deference must be so sweeping that any harm attendant upon the relocation, however unnecessarily inflicted and however unrelated itself to any military necessity, is also utterly immune from any lawsuit. A principle that broad, unfortunately, is essential to the result the panel majority reached. I thus do not exaggerate the holding of this case.

The panel majority claims that a confession of error by either Congress or the Executive was necessary before the present suit could be maintained. If a takings claim had been brought years ago, and if the court did not hold that *anything* done to persons subject to relocation was immunized by *Hirabayashi* and *Korematsu*, then the government would have been put to the proof of its defenses. As I have said, I cannot imagine that the government would have claimed that military necessity also required the loss of homes and businesses. Indeed, if the government reacted as it has now, it would have had to admit that there was no evidence supporting the claim of military necessity for the relocation, much less for the taking. Thus, even if the legal justification for the relocation were identical to that needed to render a taking noncompensable, which it is not, and a statement from the political branches necessary, which it is not, and the statement from President Ford irrelevant, which it is not, the statement by one of the "war-making branches" the panel majority requires could have been extracted through litigation. This means that this suit could have been brought successfully at any time within the past forty years and that the six-year limitations period has long since passed.

* * * * * *

I am entirely confident that the panel majority would not follow its rule of absolute deference should a similar circumstance arise in the future. That prediction is certain because the rule was created to rectify, so far as that can now be done, an injustice in the past. But, if that is true, the evasion of the statute of limitations stands revealed as unprincipled. Worse, there may be other times of emergency in our future, times when racial or ethnic animosities surface, and today's precedent will be available to any court reluctant to examine a claim of military necessity supported by popular passion. The panel majority has purchased freedom from the statute of limitations at an unacceptable price. A panel majority that so obviously disapproves of the wartime internment ought to have been more reluctant to create a legal basis for rendering any similar future incident forever unreviewable in any of its consequences.

II.

There are other grounds for rehearing this case as well. This court was without jurisdiction. The majority has completely reordered Congress' division of jurisdiction between the United States Court of Appeals for the Federal Circuit and the regional courts of appeals. The panel majority's conclusion that this court had jurisdiction over the appeal rested on its construction of the Federal Courts Improvement Act, 28 U.S.C. § 1295(a)(2) (1982), which provides that the United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction over an appeal from a final decision by a district court when

> the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue shall be governed by sections 1291, 1292, and 1294 of this title.

28 U.S.C. §§ 1291, 1292, 1294 (1982) all provide for appeals to the regional courts of appeals, each provision noting as well, however, that the Federal Circuit retains jurisdiction in all cases so described in the Federal Courts Improvement Act. The jurisdictional controversy in *Hohri* arose from the fact that plaintiffs' original complaint included both a Takings Clause claim, under 28 U.S.C. § 1346(a)(2) (1982) (the Tucker Act), *and* a Federal Tort Claims Act claim, under 28 U.S.C. § 1346(b) (1982).

A.

The initial question is whether a suit based upon both the Tucker Act and the Federal Tort Claims Act must be appealed to the Federal Circuit or to a regional court of appeals. It is clear, both upon textual analysis and analysis of congressional policy, that this appeal belonged in the Federal Circuit. The majority concluded that while the general rule provides that the Court of Appeals for the Federal Circuit has exclusive jurisdiction over any appeal from a claim based "in whole or in part" on the Tucker Act—as this one was—the general rule is nevertheless inapplicable when the claim is also based in part on any of the provisions listed after the word "except" in the portion of the Federal Courts Improvement Act quoted above. Thus, the statute is read, most implausibly, to say that a suit

3. Any indication in the legislative history of the American-Japanese Evacuation Claims Act, 50 U.S.C. App. § 1981 *et seq.* (1982), that *Congress* did not believe compensation was required is of course irrelevant. The question of whether a taking has occurred is a purely legal one—unless the majority meant to suggest that absolute deference to the political branches is required in this context as well. *See Hohri*, 782 F.2d at 237–39.

based in whole or in part on the Tucker Act must be appealed to the Federal Circuit, unless it is also based in part on the Federal Tort Claims Act, in which case it must be appealed to one of the twelve regional courts of appeals. Though no coherent policy underlies such a jurisdictional scheme, this conclusion was based entirely on the majority's understanding of the "plain meaning" of the Federal Courts Improvement Act.

I believe the better, indeed the only plausible, interpretation of the "except" clause is that it states an exception, not, as the majority supposes,a new, independent, and superseding rule. The controlling sentence of the Federal Courts Improvement Act, read in its entirety, simply provides that a claim based in part on section 1346—other than those parts of section 1346 listed in the "except" clause—may only be appealed to the Federal Circuit. Save when taxation is involved, the Tucker Act is not found in the "except" clause. Therefore, the appeal in this case, which is based in part on the Tucker Act and does not involve taxation, belonged in the Federal Circuit. The majority, however, interpreted the statute so that a Federal Tort Claims Act count overrides the presence of a Tucker Act count and affirmatively requires the case to be heard by the regional courts of appeals and not by the Federal Circuit. That stands the statute on its head.

The majority's reading also fails to explain the remarkable coincidence that all the provisions listed after the word "except" are subsections of the provision listed before the word "except"—section 1346. (This is true as well of the jurisdictional grant in the preceding paragraph of the Federal Courts Improvement Act, 28 U.S.C. § 1295(a)(1) (1982), which is similarly structured and provides for exclusive jurisdiction in the Federal Circuit for appeals arising under 28 U.S.C. § 1338 (1982), *except* for certain claims arising under section 1338(a).) If the purpose of the "except" clause, as the majority believed, were to list those provisions whose presence in a complaint Congress felt ought to shift review of a suit based in part on the Tucker Act to the regional courts of appeals, there is absolutely no reason to suppose that all those provisions would happen to be found within section 1346. Under the reading I suggest, of course, it would have made no sense to include any provision outside of section 1346 in the "except" clause, since that clause simply carves out of a general rule that applies by its terms to all of section 1346 those subsections of section 1346 to which that rule is not to apply.

An examination of the provisions listed in the "except" clause demonstrates how unlikely it is that Congress intended the meaning adopted in the majority opinion. Those provisions deal with tort claims against the government, suits to quiet title, and certain types of tax cases. One of the principal purposes of the Federal Courts Improvement Act was to centralize jurisdiction in one forum "over appeals in areas of law where Congress determines there is a special need for nationwide uniformity." S. Rep. No. 275, 97th Cong., 1st Sess. 2 (1981), *reprinted in* 1982 U.S. Code Cong. & Ad. News 11, 12. Under the majority's interpretation, we must presume that the Congress thought nationwide jurisdiction and uniform decisionmaking with respect to Tucker Act claims to be so important that it provided that any case including such a claim would go, in its entirety, straight to the Federal Circuit, even though the case contains a due process claim, or an equal protection claim, or any of numerous other important constitutional and statutory claims—unless it also contains a claim to quiet title. Members of Congress must therefore have thought that the vesting of jurisdiction over appeals involving actions to quiet title in the twelve regional courts of appeals was so important that it overrode their clearly articulated desire to place Tucker Act appeals within the exclusive jurisdiction of the Federal Circuit. Such a jurisdictional scheme, as Chief Judge Markey pointed out in his dissent, would be "senseless." 782 F.2d at 257 (Markey, C.J., dissenting).

The majority opinion nonetheless seeks to bring some theoretical sense to its interpretation by suggesting that Congress placed Federal Tort Claims Act claims within the "except" clause because it "did not want to centralize adjudication of cases involving tort claims." 782 F.2d at 241 n. 30. That is undoubtedly correct, and it explains why Congress provided in the Federal Courts Improvement Act that a federal tort claim, standing alone, would be heard by the regional courts of appeals. Similarly, Congress apparently saw no need to require the centralization of actions to quiet title, or of those tax cases it exempted from the general rule by listing them in the "except" clause. The majority takes a substantial and unwarranted step, however, when it reasons that Congress not only "did not want to centralize" such claims, but affirmatively sought to *de*centralize them as well, to the point of sacrificing the principal goal of the Federal Courts Improvement Act—to centralize patent and Tucker Act claims by vesting exclusive jurisdiction over such appeals in the Federal Circuit. In so doing, the majority ignored language to the contrary in both the Senate and the House Reports accompanying the Federal Courts Improvement Act. The Senate Report expressly states that the Federal Circuit will have exclusive jurisdiction over "*all* patent appeals and *all* appeals in federal contract cases brought against the United States that are presently heard in the regional courts of appeals." S. Rep. No. 275, *supra*, at 7 1982 U.S.Code Cong. & Ad.News, at 17 (emphasis added). The House Report formulates the rule much the way I do: the Federal Courts Improvement Act "gives the Court of Appeals for the Federal Circuit jurisdiction of any appeal from a trial court where the jurisdiction of the district court was based, in whole or in part, on section 1346 of title 28, United States Code, except 1346(a)(1) and (e) (tax appeals), 1346(b) (Federal Tort Claims), 1346(f) (quiet title actions), or 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue." H.R. Rep. No. 312, 97th Cong., 1st Sess. 42 (1981). This makes it clear that the claims in the "except" clause are those whose presence do not vest jurisdiction in the Federal Circuit and not, as the majority thinks, those whose presence removes jurisdiction that would otherwise vest in that court. These congressional descriptions of the workings of the Federal Courts Improvement Act are much more consistent with the interpretation I offer than with that suggested by the majority. I think those descriptions are the correct ones. For these reasons, and for those cogently stated by Chief Judge Markey, I believe that the panel decided this issue wrongly.

B.

The majority's disposition of the jurisdictional question was wrong for an additional reason: the federal tort claim, which under the majority's analysis was the sole reason for finding jurisdiction in this court to hear the appeal, was itself dismissed by the district court for lack of jurisdiction. *Hohri v. United States*, 586 F.Supp. 769, 793 (D.D.C. 1984). That dismissal was affirmed by the panel that decided this appeal. *Hohri*, 782 F.2d at 245. Our jurisdiction to hear the entire case therefore rested entirely on a claim over which we had no jurisdiction.

The majority's rationale is impossible to understand. It held that although the court was without jurisdiction to hear the federal tort claim, that claim was not frivolous, except for the lack of jurisdiction, and therefore could serve as the predicate for jurisdiction in this circuit over the remainder of the case. The majority never justified or supported its reliance on the presumed absence of frivolity in the tort claim, regardless of its jurisdictional deficiency, in asserting jurisdiction over the

entire case by virtue of the presence of that claim in the original complaint.[4]

In any event, the federal tort claim in this case was clearly frivolous. As the panel noted, the plaintiffs failed to comply with the explicit and mandatory statutory directive requiring that federal tort claims be filed first with the appropriate government agency. It may be true, as the majority stated, that there was no bad faith involved, although the basis for that conclusion escapes me. The claim remains frivolous, however, because no non-frivolous legal arguments may be made in its defense. That is why, I suppose, the frivolity-based rule as formulated by the majority permits jurisdiction in this court when the federal tort claim is not "*substantively* farfetched." *Hohri*, 782 F.2d at 240 n.27 (emphasis added). It is thus now the law of this circuit that such claims can be predicates for jurisdiction when, as to that claim, plaintiffs lack standing, or the claim is moot, or the most basic procedural requirements are ignored, provided the merits of the *underlying* claim are not "farfetched." I cannot imagine a rationale for this inventive rule, save that it allowed the majority to decide this appeal.

C.

I think this decision was an unfortunate one, and would have preferred to see its plain errors corrected by this court sitting *en banc*. Since only five judges—one short of the necessary majority—voted to rehear, the task falls instead to the Supreme Court, or perhaps to the United States Court of Appeals for the Federal Circuit. As the majority indicates, any appeal from the proceedings on remand will be to the Federal Circuit, since the Tucker Act claim is all that remains. The majority suggested in *dicta* that its decision constitutes "law of the case," binding the Federal Circuit unless the panel of that court that hears the second appeal finds both "clear error" and "manifest injustice" in the prior opinion. *Hohri*, 782 F.2d at 241 n.31. The majority failed to consider what effect the deficiency of its *jurisdictional* holding has on the respect due its holding on the merits by another circuit court. As the Supreme Court has explained, "[l]aw of the case directs a court's discretion, it does not limit the tribunal's power." *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 1391, 75 L.Ed.2d 318 (1983). This court has held that a decision by a prior panel that subject-matter jurisdiction exists over a case may be departed from by a later panel in the same case. There need have been no intervening changes in the facts or the law; it is sufficient justification that the second panel determines that jurisdiction is lacking. *See Potomac Passengers Association v. Chesapeake & O.R.R.*, 520 F.2d 91 (D.C. Cir.1975). For much the same reason that a court will be unwilling to issue a judgment when it lacks jurisdiction itself, so too, it would seem, may it exercise its discretion to refuse to resolve a case on the basis of a prior opinion issued by another court without jurisdiction. Indeed, even within the doctrine of *res judicata*, which accords the court far *less* discretion and which generally gives preclusive effect even to judgments issued by courts without subject-matter jurisdiction, such effect will not be given when "[t]he subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority" or when "[a]llowing the judgment to stand would substantially infringe the authority of another tribunal." *Restatement (Second) of Judgments* § 12 (1982). I do not pretend to advise the Federal Circuit whether it should exercise its discretion to depart from the law of the case in circumstances such as those here. Should the proceedings on remand be appealed, the issue will undoubtedly be briefed and argued. I merely note that the matter is not at all as simple as the majority suggests, and that on this as on so many of the other issues resolved by the majority, I would have reached the opposite conclusion.

This case illustrates the costs to the legal system when compassion displaces law. The panel majority says it is not too late for justice to be done. But we administer justice according to law. Justice in a larger sense, justice according to morality, is for Congress and the President to administer, if they see fit, through the creation of new law. The wartime internment around which this case revolves is undeniably a very troublesome part of our history. It is within the authority of the political branches to make whatever reparations they deem appropriate, and it is my understanding that such legislation is presently under consideration. The issue of whether an additional remedy is available from a court, and, if so, which court, should only be resolved on the basis of a sober and fair assessment of the legal claims presented. When a court relies instead on a plainly deficient analysis, it fails to do justice to the parties before it, and inevitably establishes those deficiencies as precedent. The temptation to do so, in service of an attractive outcome, is often strong. The panel opinion in this case, which completely disrupts a carefully crafted jurisdictional scheme while establishing several unfounded and undesirable precedents as law, demonstrates why such temptations ought to be resisted.

Statement of Circuit Judge WRIGHT and Circuit Judge GINSBURG.

J. SKELLY WRIGHT and GINSBURG, Circuit Judges:

The dissenters indicate their readiness to scrutinize pleas of "military necessity" with due rigor and care, even in "times of emergency in our future," even when "utter capitulation" is "supported by popular passion." *See* diss. at 305, 309. We praise that stance, concur in it, and write only to inter the dissenters' most grave misunderstanding that our opinion holds anything to the contrary.

The panel majority opinion deals particularly-and precisely with the special facts of an extraordinary episode of injustice. It most assuredly "creates [*no*] rule of absolute and permanent judicial deference to *any* claim of 'military necessity.'" *Id.* at 305 (emphasis altered). Rather, the opinion simply describes and turns on what we find to be the situation-specific holding of *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943), and *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944): courts must defer to the judgment of Congress and the Executive that sufficient military necessity existed to justify the *World War II internment policy*. That Supreme Court holding seems to us clear, pin-pointed, and definite. We therefore concluded that the former internees faced an insuperable obstacle to the present suit until the "war-making branches," *Korematsu*, 323 U.S. at 218–19, 65 S.Ct. at 195, released the federal courts from the grasp of *Korematsu* and *Hirabayashi* by indicating that deference was no longer due to the wartime judgment of military necessity for the mass evacuation.[1]

4. The only case cited in support of this argument was *Doe v. United States Department of Justice*, 753 F.2d 1092 (D.C.Cir.1985). As the majority presumably recognized, since it cited *Doe* with a *cf.*, the case is probably inapposite. *Doe* involved the interpretation of a different statutory clause than did *Hohri*. Moreover, to the extent that it is relevant, it *undermines* the majority's frivolity-based rule, since *Doe* adopted a rule based on the presence or absence of jurisdiction. *See Von Drasek v. Lehman*, 762 F.2d 1065, 1069 (D.C.Cir.1985) (noting that in *Doe*, "[b]ecause [the district court] did not have jurisdiction to hear the back pay claim, the jurisdiction of the district court could not have been based, even in part, on the Tucker Act").

1. The dissenters also maintain that, although *Korematsu* and *Hirabayashi* may have established the military necessity of confining the Japanese-Americans to internment camps, those cases did not establish the military necessity of the takings at issue in this case. *See* diss. at 308. In making this argument, the dissenters presume that the taking of property and the confining of the Japanese-Americans are properly analyzed as separate and distinct actions. In fact, however, the taking of property was part and parcel of the internment policy; that policy included not simply confining United States citizens but, necessarily adjunct to that action, forcing them to leave their property behind under military supervision. The losses that occurred under military supervision were therefore sustained under the very internment policy that the Supreme Court held justified by military necessity.

The dissenters also argue that the wartime cases either held only that the specific—non-tak-

Our opinion, read as we conceived it and not as the dissenters would have it, does not stretch beyond the setting in which it is embedded. We did not announce a general rule of automatic judicial capitulation to the military's claims of military necessity. We ruled narrowly, specifically, and only that when the Supreme Court has definitively held that deference to a military judgment is due in a particular case, litigants may not reasonably be required to re-litigate that issue in advance of a green light from the "war-making branches."[2]

The dissenters also suggest that *Korematsu* and *Hirabayashi* may best be understood as erroneous decisions made under the pressures of wartime. If these cases had come up in peacetime or if their validity were reconsidered in peacetime, the dissenters appear to advise, the Supreme Court might well have ruled the internment policy unconstitutional. Therefore, the former internees should presumably have brought this case at some undefined point after the war when the "emergency [was] long past" and the mood of the Court had sufficiently changed. *See* diss. at 305, 306. In making that argument, the dissenters overlook this reality: litigants do not have the academic luxury of indulging the belief that they can lay a solid foundation for their in-court pleas by insisting that the Supreme Court does not really mean what it says, or that a peacetime Court should not hesitate to repudiate a wartime Court for ignoring the Constitution's requirements. The dissenters' double standard would thus preclude the former internees from ever obtaining judicial redress: the validity of the internment may have been tested originally by the deferential standard imposed by wartime pressures, but we should nonetheless measure the tolling of the statute of limitations with the dissenters' more searching standard in mind. We do not believe that the policies served by a statute of limitations inexorably require courts to subject litigants to such a vicious whipsaw.

As to remaining portions of the dissent from denial of rehearing en banc, we pass by restatements of the panel dissenter's opinion, along with much of the current dissenters' rhetorical excess, and make only these points. First, the legislative provision on the proper forum for appellate review, 28 U.S.C. § 1295(a)(2), all will agree, is densely composed. As Judge Markey observed in his dissent from the panel decision, *see Hohri v. United States*, 782 F.2d 227, 260 (D.C. Cir.1986), the section has been a source of confusion. *See Professional Mangers' Association v. United States*, 761 F.2d 740, 745 (D.C.Cir. 1985) (Section 1295(a)(2) "has recently been the source of much confusion in our court."). The differences of view presented in this case and others, *compare Squillacote v. United States*, 747 F.2d 432 (7th Cir.1984), *cert. denied*, — U.S. —, 105 S.Ct. 2021, 85 L.Ed.2d 302 (1985) (courts may depart from strict statutory language to promote statutory goals of judicial efficiency and fairness) *with Professional Managers' Association*, 761 F.2d at 745 (declining to adopt the *Squillacote* approach), suggest that Congress should attend to the technical amendment of section 1295(a)(2) that would obviate court conflicts.

The dissenters lean with a heavy hand on the district court's "lack of jurisdiction" to hear the tort claims appellants sought to present. We note that the flaw blocking presentation of the tort claims is a textbook illustration of "jurisdiction writ small." *See United States v. Kember*, 648 F.2d 1354, 1357–59 (D.C.Cir.1980). We did not label "frivolous" "[a]ppellants' failure to grasp in full the distinction between [administrative complaint] filing requirements that are non-waivable and those that are subject to waiver on equitable grounds." *Hohri*, 782 F.2d at 240 n.27. Whether we were correct or incorrect in that judgment, however, we certainly did not lay down "law of this circuit" that plaintiffs who plainly "lack standing," or present claims that are clearly "moot," or flout "the most basic procedural requirements" can nonetheless escape characterization of their case as "frivolous." *But see* diss. at 312.[3]

We note finally the dissenters' apparent misperception of Restatement black letter. The Restatement (Second) of Judgments §§ 11, 12 (1982), discourages second hearings even on questions of "subject matter jurisdiction," and warns against expansive reading of the subsections set out by the dissenters. *See* diss. at 312. Suffice it to say that the question of D.C. Circuit or Federal Circuit review with which we deal entails no "[m]anifest defect[ ]" such as the granting of a divorce by a justice of the peace, a federal court entertaining what is plainly a common law tort action between citizens of the same state, intrusion upon the jurisdiction of a tribunal of legally superior authority, improper judicial interference with a non-judicial agency, or disturbance of other interests that genuinely warrant classification as "fundamental." *See id.* at § 11 comment e; § 12 Reporter's Note. Here again we believe that the dissenters have succumbed to the temptation to overstate and overwrite. We do not think our view of this singular case warrants the extravagant attack mounted against it.

ings clause—claims then before the court were not ones upon which relief could be granted, or that courts owe absolute and permanent deference to military judgments about military necessity at all times. We have adopted neither view. Instead, we read the wartime cases to have established the military necessity of the internment policy for both the particular claims at issue in those cases and the takings clause claims now before the court. *See Hohri v. United States*, 782 F.2d 227, 250–53 (D.C.Cir.1986). We believe our reading to be historically faithful to the argument and ethos of the wartime cases, while avoiding the gross over-generalizations or artificial narrowness suggested by the dissenters.

2. The dissenters argue that President Ford's Proclamation No. 4417, 3 C.F.R. 8 (1977), provided such a green light. *See* diss. at 5 n. 1. As the panel majority opinion points out, that proclamation announces merely that the internment policy was *morally*, not legally, wrong. *See Hohri*, 782 F.2d at 253 n. 67. The dissent, however, maintains that if the policy were morally wrong, then it must not have been "necessary." Diss. at 306 n. 1. This argument confuses the nature of the "necessity" involved. It may be true, as the dissent suggests, that necessity in the sense of absolute coercion is a complete moral excuse. But the government has never claimed that it was under absolute coercion to implement the policy. Rather, the "war-making branches" made the judgment that sufficient military need existed to justify the policy. The policy was thus necessary, not in an absolute sense, but in a relative one: it was necessary to military ends then deemed important enough to outweigh the harm to the internees. Therefore, the policy may well have been both morally wrong (in the sense that the moral wrongs outweighed the military need) and legally "necessary" (in the sense that the military need outweighed the harm to legal rights).

3. On another day, in another case, the author of the present dissent from denial of rehearing en banc took his colleagues to task for extravagant attribution of significance to his panel opinion. *See Dronenburg v. Zech*, 746 F.2d 1579, 1582–84 (1984) (en banc) (separate statement of Bork, J.). We agreed with him on that occasion that the temptation to exaggerate a decision with which one disagrees, thereby to make it an easy target for slings and arrows, ought to be resisted.

Sandra BISBEY, Appellant,

v.

D.C. NATIONAL BANK.

No. 85–5900.

United States Court of Appeals, District of Columbia Circuit.

Argued May 9, 1986.

Decided June 13, 1986.

National bank customer sued bank for violation of Electronic Fund Transfer Act. The United States District Court for the District of Columbia, Thomas A. Flannery, Senior District Judge, found for bank, and customer appealed. The Court of Appeals, Harry T. Edwards, Circuit Judge, held that failing to give customer written notice of findings of no error and failing to advise

in the *LNS* case and the more focused positions of the IRS and the NTEU indicated in the briefs they filed in this court.

It is so ordered.

William FRANZ, et al., Appellants,

v.

UNITED STATES of America, et al.

No. 81-2369.

United States Court of Appeals, District of Columbia Circuit.

Argued Oct. 20, 1982.

Decided May 10, 1983.

Father of children relocated along with mother and witness pursuant to witness protection program sought declaratory and injunctive relief as well as money damages from the United States, the Department of Justice, and the Attorney General arising from alleged constitutional violations by those defendants in connection with the relocation. The United States District for the District of Columbia, Barrington D. Parker, J., 526 F.Supp. 126, granted motion to dismiss for failure to state a claim, and father appealed. The Court of Appeals, Harry T. Edwards, Circuit Judge, held that father, individually and as next friend of children, stated cause of action against administrators of witness protection program for abrogation of father's and children's constitutionally protected rights to one another's companionship without affording father requisite procedural protections, making particularized finding and showing of legitimate state interest sufficient to justify infringement, or resorting to equally effective alternative solutions that would have been less restrictive of father's and children's rights.

Reversed and remanded.

Supplemental opinion, D.C.Cir., 712 F.2d 1428.

1. Civil Rights ⇐13.12(3)

Divorced father who, individually and as next friend of children, challenged constitutionality of total and permanent severance of relationship between himself as noncustodial parent, and minor children without their participation or consent by relocation of children, along with mother and witness, pursuant to witness protection program, stated cause of action against program administrators for abrogation of father's and children's constitutionally protected rights to one another's companionship without affording father requisite procedural protections, making particularized finding and showing of legitimate state interest sufficient to justify infringement, or resorting to equally effective alternative solutions that would have been less restrictive of father's and children's rights. 18 U.S.C.A. note prec. § 3481; U.S.C.A. Const. Amend. 14.

2. Federal Courts ⇐794

Court of Appeals was bound to assume truth of facts alleged in complaint for purpose of reviewing district court's judgment that plaintiff failed to state claim.

3. Infants ⇐154

Assuming that Attorney General needed express statutory authority to effect incidental, de facto displacement of state domestic relations law implicated in relocation of children and mother to area unknown to divorced father pursuant to witness protection program, Organized Crime Control Act of 1970, which vested broad discretion in Attorney General "to provide for the security of" witnesses under program, provided such authority. 18 U.S.C.A. note prec. § 3481.

4. Criminal Law ⇐1222

Federal officials had authority, at time they consented to admission of witness and his household under witness protection program, to insist that inductees agree to accommodate in some way rights of witness' stepchildren to see their natural father and

rights of natural father. 18 U.S.C.A. note prec. § 3481.

5. United States ⇐50

Conduct of federal officials, who, by accepting children's natural mother and children into witness protection program along with witness, were largely responsible for success of natural mother's effort to deny natural father access to his offspring, and who encouraged and supported natural mother's decision to hide children from natural father, was sufficient to establish constitutionally significant link between government and alleged infringement of natural father's and children's rights so as to expose federal officials to liability under Constitution. 18 U.S.C.A. note prec. § 3481.

6. Constitutional Law ⇐254(4)

If "state action" reliably may be found upon identification of any one factor, such factor is significant governmental promotion of specific conduct by private actor that allegedly has abrogated plaintiff's rights. U.S.C.A. Const.Amends. 5, 14.

7. Constitutional Law ⇐254(4)

Constitution was designed to embody and celebrate values and to inculcate popular acceptance of them, as much as to compel governments to abide by them, and it is thus appropriate and even essential, that when expounding Constitution, Court of Appeals be alert to situations in which government, by sanctioning activities by private party that it is forbidden to do directly, undermines "constitutive" function of document. U.S.C.A. Const.Amends. 5, 14.

8. Constitutional Law ⇐82(10)

Freedom of personal choice in matters of family life, protected by Constitution as fundamental liberty interest, encompasses decision to marry, procreation, use of contraception, decision not to carry child to term, and cohabitation with members of one's extended family. U.S.C.A. Const. Amends. 5, 14.

9. Constitutional Law ⇐82(10)

Freedom of parent and child to maintain, cultivate and mold ongoing relationship is among most important liberties in matters of family life protected by Constitution. U.S.C.A. Const.Amends. 5, 14.

10. Constitutional Law ⇐82(1)

Identification of constitutional rights, unmentioned in document itself, that are nevertheless deserving of "fundamental" status is possible only through contextual analysis; Court of Appeals must take as given general features of society and polity and seek to identify freedoms and relationships that, in present environment, are crucial to self-definition and fulfillment. U.S.C.A. Const.Amends. 5, 14.

11. Constitutional Law ⇐82(10)

Strength and scope of constitutionally protected familial rights are not determined by contours of state or federal law; what is important is nature of bond in question, not way in which it had been categorized by legislature or court. U.S.C.A. Const. Amends. 5, 14.

12. States ⇐4.6

State possesses substantial and virtually exclusive regulatory authority in field of domestic relations.

13. Constitutional Law ⇐82(10)

With respect to question of constitutional status of right of noncustodial parent and his or her children not to be totally and permanently prevented from ever seeing one another, constitutional interests of noncustodial parent and children are, in critical respects, roughly comparable to interests of parent and child in viable nuclear family. U.S.C.A. Const.Amends. 5, 14.

14. Constitutional Law ⇐82(10), 274(5)

Severance of relationship between parent and child will survive constitutional scrutiny only if asserted governmental interest is compelling, there is particularized showing that state interest in question would be promoted by terminating relationship, it is impossible to achieve goal in question through any means less restrictive of rights of parent and child, and affected

parties are accorded procedural protections mandated by due process clauses. U.S.C.A. Const.Amends. 5, 14.

15. Infants ⇐155

Whatever strength of state interest necessary to justify minor or moderate interference with relationship between children and noncustodial parent, permanent termination of their bond can be justified only by promotion of compelling objective. U.S.C.A. Const.Amends. 5, 14.

16. Constitutional Law ⇐82(10)

Where witness protection program, as implemented, resulted in denial of access by particular group, i.e., nonrelocated parents of children taken into program and children themselves, to fundamental right, i.e., right to companionship of one's child or parent, program would have to be subjected to "strict scrutiny" under equal protection clause; government would have to show that discrimination between members of affected group and other parents and children was necessary to promote compelling governmental interest. 18 U.S.C.A. note prec. § 3481; U.S.C.A. Const.Amend. 14.

17. Infants ⇐154

Invasion of children's and noncustodial parent's protected interests in one another's companionship under witness protection program could not be justified on basis of government's parens patriae interest in protecting welfare of children. 18 U.S.C.A. note prec. § 3481; U.S.C.A. Const.Amend. 14.

18. Infants ⇐154

State's legitimate interests in protecting children's welfare and in promoting public health, safety, welfare and morals are sufficient to justify minor restrictions on parents' control over upbringing of their offspring. U.S.C.A. Const.Amends. 5, 14.

19. Infants ⇐156

If state can show that parent is "neglectful" or otherwise unfit to care for child, state may constitutionally sever bond between the two. U.S.C.A. Const.Amends. 5, 14.

20. Civil Rights ⇐13.13(1)

Assuming that government's interest in suppression of organized crime was sufficiently potent to justify invasion of constitutionally protected familial rights under witness protection program, government could not rely on irrebutable presumption that its interest would be promoted in given case without affording affected parties an opportunity to prove otherwise. 18 U.S.C.A. note prec. § 3481; U.S.C.A. Const. Amend. 14.

21. Constitutional Law ⇐82(1)

Avoidance of any unnecessary infringement of fundamental rights requires that government make particularized showing of advantage in every case in which it contemplates depriving someone of constitutionally protected interests. U.S.C.A. Const. Amends. 5, 14.

22. Constitutional Law ⇐82(10)

To justify invasion of constitutionally protected familial rights, Constitution requires that there be more than determination that "federal interest" would be marginally advanced by taking action in particular case; there must be showing that governmental interest would be promoted in ways sufficiently substantial to warrant overriding basic human liberties. U.S.C.A. Const.Amends. 5, 14.

23. Infants ⇐198, 203

Noncustodial parent, who was deprived of companionship of children by relocation of children, along with mother and witness, pursuant to witness protection program, was entitled to notice and opportunity to be heard prior to relocation. 18 U.S.C.A. note prec. § 3481; U.S.C.A. Const.Amends. 5, 14.

24. Constitutional Law ⇐274(5)

In those instances in which holding preentrance hearing prior to admission of informant and household under federal witness protection program would truly be impossible, requirements of due process would be merely suspended, not eliminated; as soon as practicable after admission of informant, hearing would have to be held, at least to work out some accommodation of rights of children and parent left behind.

18 U.S.C.A. note prec. § 3481; U.S.C.A. Const.Amend. 14.

25. Constitutional Law ⇐274(5)

In those instances in which holding preentrance hearing prior to admission of informant and household under federal witness protection program would truly be impossible, it would be imperative, under due process clause, that witness and adult members of household be informed, prior to their admission, that such a hearing would be held soon after their induction, and that they would be admitted only on condition that they agree to abide by whatever arrangement was worked out at such session for accommodating interests of children's noncustodial parent. 18 U.S.C.A. note prec. § 3481; U.S.C.A. Const.Amend. 14.

Appeal from the United States District Court for the District of Columbia (D.C.Civ. Action No. 81-0173).

George Kannar, American Civil Liberties Union, New York City, for appellants.

William H. Briggs, Jr., Asst. U.S. Atty., Washington, D.C., for appellees. Stanley S. Harris, U.S. Atty., Royce C. Lamberth, R. Craig Lawrence and Jason D. Kogan, Asst. U.S. Attys., Washington, D.C., were on the brief for appellees.

Before TAMM, EDWARDS and BORK, Circuit Judges.

Opinion for the Court filed by Circuit Judge HARRY T. EDWARDS.

Separate Statement, concurring in part and dissenting in part, filed by Circuit Judge BORK.

HARRY T. EDWARDS, Circuit Judge:

At issue in this case is the validity of one aspect of the administration of the federal Witness Protection Program.[1] Exercising the discretion vested in them by statute, various federal officials relocated and changed the identities of a government informant, his wife, and her three children by a former marriage, in return for the informant's testimony against alleged leaders of organized crime. Unfortunately, this routine and otherwise unassailable procedure had the effect of severing the ongoing relationship between the children and their natural father. The father brought the present suit—on behalf of himself and his children[2]—challenging the actions of the federal officials on a variety of constitutional and statutory grounds. He sought declaratory and injunctive relief to enable him to reestablish contact with his children, and damages to compensate all of them for injuries sustained as a result of their separation. The District Court dismissed the complaint for failure to state a claim upon which relief can be granted.[3]

[1] As all parties concede, resolution of this case requires a weighing of three important interests: the public interest in the suppression of organized crime; the interest of the informant, his spouse, and the children in securing protection against the threat of violent reprisal to which they are all exposed; and the interest of the children and their father in maintaining the bonds between them. The essence of the plaintiffs' claims is that, in acting *to sever totally and permanently* the relationships between a non-custodial parent and his minor children without their participation or consent, the defendants struck an impermissible balance of the foregoing interests. Although we reach no judgment on the proper

1. The statutory authority for the program is found in 18 U.S.C. *prec.* § 3481 (1976).

2. The latter portion of the suit was predicated on Fed.R.Civ.P. 17(c), which authorizes children to sue by their "next friend[s]."

3. *Franz v. United States*, 526 F.Supp. 126, 129 (D.D.C.1981). The District Court noted, in addition, that "[t]he plaintiff's [sic] cause of action presents serious procedural problems both as to venue and jurisdiction." *Id.* at 127. However, because the court's decision was founded on its conclusion that the plaintiffs failed to state a claim, we will confine our attention, for the purposes of this appeal, to that judgment. The defendants will have an opportunity on remand to raise any appropriate jurisdictional defenses.

ultimate disposition of this case, we conclude that the plaintiffs clearly have stated a cause of action sufficient to survive a motion to dismiss.

[2, 3] Taking as true the facts alleged in the complaint,[4] we find that the administrators of the Witness Protection Program abrogated the constitutionally protected rights of the plaintiffs to one another's companionship without (1) affording the father requisite procedural protections, (2) making a particularized finding and showing of a legitimate state interest sufficient to justify the infringement, or (3) availing themselves of equally effective alternative solutions to the problem before them that would have been less restrictive of the plaintiffs' rights. Accordingly, we reverse and remand for further proceedings.[5]

4. We are, of course, bound to make such an assumption for the purpose of reviewing the District Court's judgment that the plaintiffs failed to state a claim. *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 172, 87 S.Ct. 1526, 1529, 18 L.Ed.2d 704 (1967). We express no view regarding the veracity of the plaintiffs' allegations.

5. As to the only other claim asserted below that the plaintiffs press on appeal, we conclude that dismissal was proper. The plaintiffs insist that the Attorney General lacks the express statutory authority he would need to "federalize" the aspect of domestic-relations law implicated in this case. *See Ridgway v. Ridgway*, 454 U.S. 46, 54–55, 102 S.Ct. 49, 54–55, 70 L.Ed.2d 39 (1981). Assuming, *arguendo*, that the Attorney General needed such authority to effect the kind of incidental, *de facto* displacement of state law at issue here, he possessed it. *See* note 7 *infra* and accompanying text.

6. Pub.L. No. 91–452, §§ 501–504, 84 Stat. 922, 933–34. For the current codification of the provision, see note 1 *supra*. The full text of the statute reads:

> SEC. 501. The Attorney General of the United States is authorized to provide for the security of Government witnesses, potential Government witnesses, and the families of Government witnesses and potential witnesses in legal proceedings against any person alleged to have participated in an organized criminal activity.
>
> SEC. 502. The Attorney General of the United States is authorized to rent, purchase, modify, or remodel protected housing facilities and to otherwise offer to provide for the health, safety, and welfare of witnesses and persons intended to be called as Government witnesses, and the families of witnesses and persons intended to be called as Government witnesses in legal proceedings instituted against any person alleged to have participated in an organized criminal activity whenever, in his judgment, testimony from, or a willingness to testify by, such a witness would place his life or person, or the life or person of a member of his family or household, in jeopardy. Any person availing himself of an offer by the Attorney General to use such facilities may continue to use such facilities for as long as the Attorney General determines the jeopardy to his life or person continues.
>
> SEC. 503. As used in this title, "Government" means the United States, any State, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof. The offer of facilities to witnesses may be conditioned by the Attorney General upon reimbursement in whole or in part to the United States by any State or any political subdivision, or any department, agency, or instrumentality thereof of the cost of maintaining and protecting such witnesses.
>
> SEC. 504. There is hereby authorized to be appropriated from time to time such funds as are necessary to carry out the provisions of this title.

7. *See* § 501, set forth in note 6 *supra*.

I. BACKGROUND

A.

The Witness Protection Program was established as part of the Organized Crime Control Act of 1970.[6] Its purposes are to guarantee the safety of government witnesses who agree to testify against alleged participants in organized criminal activity and thereby to create an incentive for persons involved in such activities to become informants. Broad discretion is vested in the Attorney General "to provide for the security of" such witnesses.[7]

It was originally contemplated that the program would be implemented principally through the purchase and maintenance of housing facilities that would serve as more or less permanent havens for witnesses and

their families.[8] That approach soon proved impracticable and the strategy was adopted of relocating witnesses and their families and providing them with "new identities, the documents to support these new identities, as well as housing, employment, medical services and other social services." [9]

The Attorney General has delegated to the United States Marshals Service virtually all of his authority over the actual administration of the program.[10] But decisions regarding who will be accepted into the program are still made by certain direct subordinates of the Attorney General. An Order promulgated by the Justice Department in 1975 provides that a recommendation to admit a prospective witness must be made by a U.S. Attorney or Assistant U.S. Attorney and approved by the Assistant Attorney General in charge of the concerned division.[11] Only after this screening process has been completed is the Marshals Service notified and instructed to prepare for the induction of the witness.[12]

The Justice Department Order also prescribes criteria by which prospective inductees are to be evaluated. The Assistant Attorney General is instructed to admit a "proposed witness" into the program only upon satisfaction of the following conditions:

(1) The person is a qualifying witness in a specific case in process or during or after a grand jury proceeding,

(2) Evidence in possession indicates that the life of the witness and/or that of a member of the witness' family or household is in immediate jeopardy, and

(3) Evidence in possession indicates it would be advantageous to the Federal interest for the Department to protect the witness and/or a family or household member.[13]

These criteria, it will be observed, make no mention of the impact of the admission of a witness and his "family or household" on established relationships between members of that household and other persons (*e.g.*, natural parents); the Assistant Attorney General is to consider only the advantage to the "Federal interest" of accepting each candidate, not the effects upon the interests of third parties.[14]

8. *Witness Security Program: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 96th Cong., 2d Sess. 242 (1980) (statement of Howard Safir, Assistant Director for Operations, U.S. Marshals Service, Acting Chief, Witness Security Section) [hereinafter cited as 1980 *Hearings*].

9. *Id.*

10. *See* 28 C.F.R. § 0.111(c) (1982) (instructing the Director of the Marshals Service to make "[p]rovision for the health, safety, and welfare of Government witnesses and their families pursuant to sections 501–504 of Pub.L. 91–452"). Essentially the same regulation was in effect at the time the informant and his family were admitted into the program. *See* 28 C.F.R. § 0.111(c) (1977) (revised as of July 1, 1977). *See also* Affidavit of Howard Safir, ¶ 2, Appendix ("App.") 62.

11. Justice Department Order OBD 2110.2, Jan. 10, 1975, at 1–3, *reprinted in Witness Protection Program: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm.*, 95th Cong., 2d Sess. 134–36 [appendix 2] (1978) [hereinafter cited as 1978 *Hearings*].

12. *Id.* at 136. Although, as indicated, the Marshals Service does not participate in the decision whether a prospective witness qualifies for admission, individual "inspectors" in the Service do appear to make recommendations regarding "whether or not the subject will be a workable case"—*i.e.*, "whether or not [the Service] can handle it." 1980 *Hearings* at 244 (testimony of Howard Safir). These recommendations are forwarded to the "Office of Enforcement Operations" at the Justice Department, which decides whether to "approve" the witness for the program. *Id.*

13. Order OBD 2110.2, *supra* note 11, at 1–2, *reprinted in* 1978 *Hearings* at 134–35.

14. The Justice Department Order does direct U.S. Attorneys "in the field," when making a recommendation to the Assistant Attorney General of the concerned division that a particular candidate should be admitted, to specify, *inter alia*, the "[n]umber of family and/or household members to be authorized funding (name, age, relationship)." Order OBD 2110.2, *supra* note 11, at 3, *reprinted in* 1978 *Hearings* at 136. But the language of the directive strongly suggests that the only relevance of the information is to assist the authorizing agent in

Nor does it appear that peripheral familial rights are taken into account at any other point in the standard admission procedure or in the subsequent administration of a case. The one apparent (and partial) exception to this generalization turns out, in practice, to be illusory. At the time of their induction, all witnesses and adult members of their households are required to read and sign a lengthy "Memorandum of Understanding." [15] The document includes the following provisions: a warning by the Marshals Service that it "WILL NOT SHIELD witnesses from civil or criminal litigation initiated prior to or subsequent to entry into the Program"; [16] a mandate that "[a]ll court orders which are directed to the witness must be immediately brought to the attention of the ... Marshals Service" (combined with a strong suggestion that the Service will assist in their enforcement); [17] and a form authorizing either the Marshals Service or a named party to receive service of process on behalf of the witness.[18] These provisions might be interpreted as requirements that participants in the program abide by judicially ratified familial rights of third parties. Indeed, a former Director of the Marshals Service testified in 1978 that it was the current "policy" of the Service to "work to secure some accommodations so the rights of [a non-relocated parent] are protected"—specifically, to "make [the children] available [for visitation] if the circumstances are proper." [19] However, such a "policy" certainly was not implemented in this case.[20] And the defendants did not suggest, either in their brief or at oral argument, that the Service makes any affirmative effort to afford non-custodial parents access to their relocated children.[21] We are compelled to conclude, therefore, that the character and strength of familial relationships between members of a witness' household and third parties who will not be relocated are given no formal consideration either by the Justice Department officials responsible for deciding whether to admit a candidate and his "family or household" into the Witness Protection Program or by the administrators of the Marshals Service when deciding how any given case should be handled.

B.

Partly because of the preliminary stage at which the suit was dismissed, the circumstances out of which this action grows are not entirely clear. The following is a rough outline of the pertinent facts, assuming all allegations in the plaintiffs' complaint are true.

In 1966, William Franz married Catherine Mary Franz. In the ensuing years, the couple had three children: William Michael Franz, Christine Catherine Franz, and Donna Marie Franz. Sometime thereafter the

estimating the probable cost of admitting and supporting the witness and his household.

15. The Memorandum itself is reprinted as Exhibit 29 of the 1978 *Hearings* at 230–51. The procedure whereby it is presented and explained to prospective entrants is described in 1980 *Hearings* at 243–44 (testimony of Howard Safir).

16. Memorandum of Understanding at 3, *reprinted in* 1978 *Hearings* at 233 (emphasis in original).

17. Memorandum of Understanding at 7, *reprinted in* 1978 *Hearings* at 237. The provision specifically mentions "[c]ourt orders which grant custody of minor children to persons other than a witness who is being relocated" and insists that such orders "will be honored and said minor children *WILL NOT* be relocated in violation of the ... order." *Id.* (emphasis in original). It contains no comparable reference, however, to decrees awarding visitation or other non-custodial familial rights to a person who is not being relocated.

18. Memorandum of Understanding at 15, *reprinted in* 1978 *Hearings* at 245.

19. 1978 *Hearings* at 123 (testimony of William E. Hall).

20. *See* text at notes 25–27 *infra*.

21. Further evidence that the "policy" of the Marshals Service differs markedly from Hall's representations is provided by the burgeoning number of suits involving claims similar to those presented here. *See, e.g., Ruffalo v. Civiletti*, 539 F.Supp. 949 (W.D.Mo.1982), *aff'd*, 702 F.2d 710 (8th Cir.1983); *Grossman v. United States*, 80 Civ. 5589 (S.D.N.Y. dismissed without prejudice March 23, 1982).

couple separated. In February 1974, a Pennsylvania court awarded William visitation rights; Catherine appears to have had or been awarded custody of the children.[22] Between 1974 and 1978, William regularly exercised his right to visit his offspring.[23] On July 9, 1976, William and Catherine were divorced.

Sometime prior to the divorce, Catherine "developed a personal relationship" with (and later may have married) one Charles Allen.[24] Allen subsequently confessed himself to be a contract killer in the employ of leaders of organized crime in the Philadelphia area. He offered to testify in a federal criminal trial in return for the relocation and protection of himself, Catherine, and Catherine's three children. The Assistant Attorney General of the Criminal Division of the Department of Justice approved the arrangement, and in February 1978, Allen and the members of his household were accepted into the Witness Protection Program.[25] We assume that Allen and Catherine read and signed a copy of the Memorandum of Understanding described above.[26] On February 12, the Marshals Service transported Allen, Catherine, and the children from Sewell, New Jersey to an undisclosed location and provided them with new identities.

Since that date, William has been attempting, in a variety of ways, to determine the whereabouts of or to establish contact with his three children. He has repeatedly requested information from the Marshals Service. He has written his former wife (care of the Marshals Service) pleading his case. And, most recently, he has initiated litigation.[27]

22. Since the decision below, a dispute has arisen between the parties as to whether William was, in fact, awarded visitation rights by the state court. *Compare* Appellees' Brief at 5 n. 7 *with* Appellants' Reply Brief at 4 n. 1. It appears that no record of a visitation order can be found. The issue is further complicated by the possibility, raised by the plaintiffs, that William's legal rights would be even more extensive in the absence of a formal order allocating custody and visitation privileges than they would be under such an order.

We refrain from exploring this narrow but complex question for two reasons. First, the District Court assumed that William had been granted visitation rights, *see Franz v. United States*, 526 F.Supp. at 127, and we confine ourselves for the purposes of this appeal to the facts on which the court relied. Second, our disposition of the case does not turn upon nuances of the legal entitlements secured by William. *See* text at notes 74–87 *infra*.

23. Complaint at 4, *reprinted in* App. 8.

24. The character of the liaison between Catherine and Allen is not entirely clear. The plaintiffs allege their marriage only "upon information and belief." *Id.* However, we do not consider the formal status of their relationship particularly important.

25. The plaintiffs have consistently maintained that Allen and his family were admitted into the program in February 1978. *See, e.g.*, Complaint at 5, *reprinted in* App. 9. For the purpose of this appeal, we assume that date is accurate. The affidavit of Howard Safir, Assistant Director of Operations, United States Marshals Service, however, indicates that, according to his records, Allen was admitted in February 1979. App. 62–63. If this suit ever threatens to terminate in an award of damages, it will of course be necessary to determine the correct date of admission.

26. The plaintiffs' complaint does not specifically allege that Allen and Catherine read and signed the Memorandum. However, the following combination of circumstances prompts us to assume that they did so: (i) The Acting Chief of the Witness Security Section of the Marshals Service insisted in congressional hearings that all inductees are shown and agree to abide by the Memorandum, *see* note 15 *supra* and accompanying text; (ii) the plaintiffs in their brief to this court cited some of the provisions of the Memorandum, apparently assuming agreement thereto by Allen and Catherine, *see* Appellants' Brief at 7–8, and the defendants did not contest the plaintiffs' reliance on the document; (iii) the plaintiffs' lack of first-hand knowledge that Allen and Catherine agreed to the terms of the Memorandum is readily explainable by the fact that the policy of the Marshals Service is to retain the signed documents and keep them confidential. *See* Memorandum of Understanding at 21, *reprinted in* 1978 *Hearings* at 251. On remand, the defendants will have an opportunity, if they wish, to challenge our assumption.

27. Named as defendants in the suit are: the United States; the Department of Justice; the Marshals Service; former Attorney General Benjamin Civiletti; Attorney General William French Smith; Marshals Service Director William E. Hall; unknown agents of the Marshals Service; and Charles Allen. The government

The administrators of the program have not been wholly unresponsive. They have, by their own account at least, delivered William's letters to Catherine. But they appear not to have put any pressure on either Allen or Catherine to reveal to William the location of the children or otherwise to accommodate William's desires. And they have not attempted to devise any system for reconciling the conflicting interests of the affected parties. Officials of the Marshals Service acknowledge that they are capable of arranging meetings between William and his children without endangering Allen, Catherine, or the children,[28] but they refuse to establish such contacts without her consent.

II. State Action

Before turning to the assessment of the plaintiffs' various claims of constitutional violation, we must resolve a threshold question. The defendants argue that, however unfortunate the plaintiffs' injuries, they are not legally responsible for those harms. The defendants point out that it is Catherine who has decided to deny William access to his children. The defendants also insist that they have done nothing more than decline to compel her to behave otherwise. For two reasons, they contend, such inaction cannot expose them to liability under the Constitution. First, they claim they lack the authority to do otherwise; they have no power, in other words, to force Catherine to accede to visitation of the children by William. Second, they argue that, even if they had such authority, their refusal to exercise it would not be a sufficiently affirmative or efficacious act to make them responsible for the consequences of Catherine's behavior.

[4] The defendants' first argument gives us little pause. Whatever may be the legal or equitable limits on the defendants' coercive authority, arising out of the terms of the Memorandum of Understanding or other agreements entered into by the Marshals Service and Allen and Catherine,[29] the defendants clearly had the authority, at the time they consented to the admission of Allen and his household, to insist that the inductees agree to accommodate in some way the rights of William and the rights of the children to see their natural father. The Memorandum of Understanding contains several structurally similar provisions. The admittees undertook, for example, to stay away from the "danger area" unless they had the permission and protection of the Service[30] and to permit the Service (or a designated substitute) to accept service of

officials are all sued individually and in their official capacities.

28. The defendants make this acknowledgement explicit in their brief to this court, Brief at 16, and their counsel confirmed that position at oral argument. The defendants' position is consistent with previous representations made by officials of the Marshals Service. *See* 1978 *Hearings* at 122–23 (testimony of William Hall and Arthur Daniels, Chief, Witness Security Division).

29. It should be noted, the Memorandum of Understanding expressly provides that,

> since it is within the Attorney General's discretion to approve participation in the Program, the witness may be terminated from the Program when the Attorney General determines that the life or person of the witness is no longer in danger, *or for other reasons deemed appropriate* by the Attorney General or his representative.

Memorandum at 2, *reprinted in* 1978 *Hearings* at 232 (emphasis added). Although these provisions lend support to certain of the plaintiffs' claims, we are not insensitive to the defendants' arguments that their insistence at this late date that Catherine respect William's visitation rights might breach some implied promises made to the inductees that they would be guaranteed absolute anonymity indefinitely if they abided by the terms explicitly set forth in the Memorandum, and that such a breach might adversely affect the credibility of the Service in the future. From the plaintiffs' perspective, however, there remains a question whether the defendants may ever enter into such an agreement where a direct effect thereof is to totally and permanently abrogate all relationships between a non-custodial parent and his children.

30. Memorandum of Understanding at 3, *re-*

process on their behalf.[31] The sanction for violation of these and other clauses is "termination" from the program. Those provisions are undoubtedly valid and enforceable; the discretion vested in the Attorney General by statute[32] is broad enough to enable him or his representative to insist upon obedience to such terms as a condition of admission into and continuation in the program. In short, the defendants plainly cannot absolve themselves of responsibility on the ground that they have no authority to do what the plaintiffs demand.

[5] The defendants' second contention, albeit also without merit, warrants a somewhat more extended response. To evaluate it, we must venture into a sometimes obscure area of constitutional law: the doctrine relating to the degree to which a private party's behavior must be instigated by or dependent upon the exercise of governmental authority to justify attribution of the consequences of that behavior to "state action."[33] Decisions involving this issue tend to turn upon nuances in the peculiar "facts and circumstances" of the case at hand[34] and, thus, often are unusually difficult. Fortunately, the present suit does not present especially troublesome questions. Viewed from any of a number of perspectives, the conduct of the defendant officials is seen to be sufficient to establish a constitutionally significant link between the government and the alleged infringement of the plaintiffs' rights.[35]

It is clear that the defendants, by accepting Catherine and the children into the program along with Allen, are largely responsible for the success of Catherine's effort to deny William access to his offspring. Without the aid of the administrators of the program in providing her with a new identity, Catherine almost certainly would not have been able to frustrate William's attempts to exercise and enforce his visitation

printed in 1978 *Hearings* at 233.

31. Memorandum of Understanding at 15, *reprinted in* 1978 *Hearings* at 245 (discussed in the text at note 18 *supra*).

32. *See* §§ 501, 502, *reprinted in* note 6 *supra*.

33. The phrase "state action" is used here in its generic sense, to refer to action by any level of government, from local to national. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1147 n. 2 (1978). At issue in the present case is action by officials of the federal government, but doctrine developed in the context of suits involving conduct by state and municipal bodies and officials is directly relevant.

34. *See Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722, 725–26, 81 S.Ct. 856, 860, 861–62, 6 L.Ed.2d 45 (1961).

35. The fact that the suit is brought against the defendant officials and not against Catherine arguably might affect our analysis. It has been suggested that the content of the test for determining whether there has been "state action" in situations like the present ought to vary depending on whether relief is sought against the government or the private actor. *See* Brown, *State Action Analysis of Tax Expenditures*, 11 HARV. C.R.-C.L. L. REV. 97, 116–19 (1976) (advocating a lower "required level of significance" when the remedy sought is termination of the government's involvement in the activity). And a few cases seem to suggest that some kind of distinction along these lines is appropriate. *See Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2786, 73 L.Ed.2d 534 (1982) (stressing the importance of finding a "nexus" between the state and the challenged action in a situation in which the plaintiff seeks to hold the state liable for the behavior of a private party); L. Tribe, *supra* note 33, at 1148 n. 7 (suggesting some such differences might be extracted from the case law). The advocates of a two-level doctrine related to the status of the defendant are not without opponents, however. *See* McCoy, *Current State Action Theories, the* Jackson *Nexus Requirement, and Employee Discharges by Semi-Public and State-Aided Institutions*, 31 VAND.L.REV. 785, 802 (1978). And, for the most part, decisions by the Supreme Court do not seem to turn upon whether a government or a private party would be affected by successful prosecution of the suit in question. *Compare, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350–58, 95 S.Ct. 449, 453–57, 42 L.Ed.2d 477 (1974), *with, e.g., Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172–79, 92 S.Ct. 1965, 1971–74, 32 L.Ed.2d 627 (1972) (elaborating essentially identical "state action" theories despite the fact that the former sought to require a privately-owned utility to continue service while the latter sought to require a government agency to revoke the liquor license of a private club). In short, we do not think that the fact that the defendants in the instant suit are governmental officials requires that the case be accorded either specially stringent or specially lenient treatment.

rights; with that aid, she has been able to act with impunity. Such a potent contribution to the ability of one private party to infringe the legal interests of another by itself might be sufficient to give rise to "state action." [36]

[6] But there is more: this is not a case in which the government has merely provided general financial or other aid to a private party, without which he would have been unable to act as he did; rather, there is a close "nexus" between the content of the government's aid and the specific behavior that is challenged in the suit.[37] The nexus is formed principally by the defendants' encouragement and support of Catherine's decision to hide the children from William.[38] To some extent, such encouragement is embodied in the terms of the Memorandum of Understanding by which Allen and his household were informed of the nature of the program. Thus, signatories are obliged to "acknowledge[ ] the necessity to terminate correspondence, where possible, with persons known prior to entry into the Witness Security Program for reasons of security" [39] and generally not to act in any way that might "jeopardize[ ] the witness' security"; [40] such undertakings may well have made Catherine more reluctant than she otherwise would have been to keep open the channels of communication with her former husband.[41] But more importantly, encouragement of the challenged behavior inevitably has been generated by the structure of the program. The defendants have placed Catherine in a position where any effort by her to accommodate William's and the children's reciprocal rights—at least

36. *Cf. Norwood v. Harrison*, 413 U.S. 455, 466, 93 S.Ct. 2804, 2811, 37 L.Ed.2d 723 (1973) (Granting financial aid to a private party under circumstances in which "that aid has a significant tendency to facilitate, reinforce, and support private discrimination" constitutes impermissible state action.); *Smith v. Allwright*, 321 U.S. 649, 664–65, 64 S.Ct. 757, 765–66, 88 L.Ed. 987 (1944) (When a State "cast[s] its electoral process in a form which permits a private organization to practice racial discrimination in the election," it "makes the action of the [private organization] the action of the State.") (alternative rationale).

37. In recent years, the Supreme Court has emphasized the importance of the existence of a "nexus" of this sort, particularly when the subjection of a private actor to regulation or guidance by the state is the alleged source of "state action." *See Jackson v. Metropolitan Edison Co.*, 419 U.S. at 351, 95 S.Ct. at 453 ("[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself."); *Blum v. Yaretsky*, 102 S.Ct. at 2786 (quoting the foregoing language from *Jackson*).

38. The encouragement of Catherine's choice may well be the most important factor in this case. If state action reliably may be found upon the identification of any one factor, that factor is significant governmental promotion of the specific conduct by the private actor that allegedly has abrogated the plaintiff's rights. *See Blum v. Yaretsky*, 102 S.Ct. at 2786 ("[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."); *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 2771, 73 L.Ed.2d 418 (1982) (quoting the foregoing language from *Blum*); *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 357 n. 17, 95 S.Ct. at 457 n. 17 (emphasizing the fact that "there is no suggestion in this record that the [government agency] intended either overtly or covertly to encourage the [private actor's] practice"); *Moose Lodge No. 107 v. Irvis*, 407 U.S. at 176–77, 92 S.Ct. at 1973 (refusing to find state action where governmental regulation "cannot be said to in any way foster or encourage racial discrimination"); *Reitman v. Mulkey*, 387 U.S. 369, 381, 87 S.Ct. 1627, 1634, 18 L.Ed.2d 830 (1967) (an ostensibly neutral state constitutional amendment that, in practice, "will significantly encourage and involve the State in private discriminations" held to be state action).

39. Memorandum of Understanding at 8, *reprinted in* 1978 *Hearings* at 238.

40. Memorandum of Understanding at 3, *reprinted in* 1978 *Hearings* at 233.

41. It might be responded that other provisions in the Memorandum seem to urge or even require compliance with outstanding court orders. *See* notes 16–18 *supra* and accompanying text. But a closer reading suggests that those terms are concerned principally with the settlement of outstanding claims, not with the preservation of adjudicated familial rights, and they appear consistently to have been so interpreted by the Marshals Service. *See* text at notes 20–21 *supra*.

in the absence of active assistance by the Marshals Service in ensuring the secrecy and security of contacts—may well endanger the lives of her spouse, her children and herself.[42] It is hard to imagine a more powerful kind of impetus.

There is yet a third theory upon which a finding of "state action" may be based. This case involves a situation in which the plaintiffs' claims are founded in significant part upon state law governing family relationships. In particular, William asserts certain rights under Pennsylvania law to maintain contact and visitation with his minor children. *See* note 22 *supra*. Catherine clearly had no power or authority under applicable state law to enter into an arrangement with another private party to modify or vitiate the rights of William and her children to maintain their relationship. Thus, when Catherine entered the Witness Protection Program, pursuant to an agreement with the defendants, she accomplished something that was not otherwise legally achievable absent the formal intervention of the federal government. Thus viewed, this is a classic case of "government action," where a "federal statute is the source of the power and authority by which ... private rights are lost or sacrificed.... The enactment of the federal statute authorizing [the federal Witness Protection Program] ... is the governmental action on which the Constitution operates ...." *Abood v. Detroit Board of Education*, 431 U.S. 209, 218 n. 12, 97 S.Ct. 1782, 1791 n. 12, 52 L.Ed.2d 261 (1977) (quoting *Railway Employes' Department v. Hanson*, 351 U.S. 225, 232, 76 S.Ct. 714, 718, 100 L.Ed. 1112 (1956)).

Expanding our field of vision somewhat, we observe that the defendant officials and Allen and his household also are involved in a symbiotic relationship. Not only are they joint participants in a program from which they all benefit, but the advantages reaped by each group are dependent upon the activities of the other. Thus Allen, Catherine, and the children obtain protection from retaliation by organized crime, and Catherine gains the ability, in practice, to keep the children for herself. The defendants (on behalf of the government in general) not only gain the testimony provided by Allen, but also benefit from the incentive, created by their demonstrated ability to shield Allen and his household, for other potential witnesses to come forward with evidence against organized crime. To some extent, moreover, that incentive is arguably strengthened by Catherine's decision to deny William access to the children; the greater the government's ability to portray the Witness Protection Program as one in which participants are free to start a completely new life, unfettered by any prior commitments, the more effective will be their effort to recruit other informants in the future.

Interdependence of the kind just described between the government and a private actor has been held to warrant attribution to the government of the conduct of the private party.[43] This "joint-venture" doctrine derives partly from the principle that, having not only countenanced but benefited from behavior alleged to have infringed private interests, the state must accept responsibility for the injury.[44] And partly it is founded on a recognition of the probable symbolic impact of such mutually beneficial activities; the state ought not to be permitted to disclaim responsibility for the consequences of conduct with which, in the eyes of the public, it appears to be intertwined. Both of these considerations are clearly applicable to the instant case.

42. The inducement of such sentiments cannot be dismissed on the ground that they are unfortunate by-products of a program generally designed to foster the safety of all concerned. That argument goes to the question whether the particular application of the program at issue here can survive constitutional scrutiny, not to the question whether there has been sufficient "state action" to subject it to constitutional examination.

43. *See Moose Lodge No. 107 v. Irvis*, 407 U.S. at 175, 177, 92 S.Ct. at 1972, 1973 (dicta); *Burton v. Wilmington Parking Auth.*, 365 U.S. at 724–25, 81 S.Ct. at 861.

44. *See Burton v. Wilmington Parking Auth.*, 365 U.S. at 724, 81 S.Ct. at 861.

[7] Finally, we note that, in this case, the symbolic impact of the mutually beneficial activities is accentuated by the overt participation by government officials in the actions that resulted in the concealment of the children.[45] Officers of the Marshals Service obviously were heavily involved in the initial relocation of Allen and his household and they have assisted in various ways in keeping their whereabouts secret. Through such participation, the defendants at least seem to have lent their imprimatur to all efforts by Allen or Catherine to cut themselves off from people who figured in their past lives. Such apparent ratification and support add to our willingness to subject the defendants' conduct to constitutional scrutiny.

In short, many analytical roads lead to the same conclusion: the defendants are constitutionally accountable for the alleged injury to the plaintiffs.[46] We now turn to that accounting.

III. Constitutionally Protected Interests

[8, 9] It is beyond dispute that "freedom of personal choice in matters of family life is a fundamental liberty interest" protected by the Constitution. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L.Ed.2d 599 (1982).[47] That freedom encom-

45. In deciding "state action" questions, the Supreme Court has frequently attended to the presence or absence of overt participation by state officials (executive or judicial) in the activities that eventuated in the asserted injury. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936–42, 102 S.Ct. 2744, 2754–57, 73 L.Ed.2d 482 (1982); *Rendell-Baker v. Kohn*, 102 S.Ct. at 2770 n. 6; *Flagg Bros. v. Brooks*, 436 U.S. 149, 160 n. 10, 98 S.Ct. 1729, 1735 n. 10, 56 L.Ed.2d 185 (1978); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 155–56, 90 S.Ct. 1598, 1605, 1607, 26 L.Ed.2d 142 (1970); *Shelley v. Kraemer*, 334 U.S. 1, 19, 68 S.Ct. 836, 845, 92 L.Ed. 1161 (1948). The Court has never made clear why such involvement, particularly when it is only ministerial in nature, should be important—why it makes a difference, for example, whether attachment of property pursuant to a state statute is effected with or without the nondiscretionary assistance of a clerk of court and county sheriff, *compare Lugar v. Edmondson Oil Co.*, 102 S.Ct. at 2754–57, *with Flagg Bros. v. Brooks*, 436 U.S. at 160 n. 10, 98 S.Ct. at 1735 n. 10. As suggested in the text, we think the explanation is to be sought in the symbolic effect of such participation. The Constitution was designed to embody and celebrate values and to inculcate popular acceptance of them, as much as to compel governments to abide by them. *See* The Federalist No. 49, at 349 (J. Madison) (B. Wright ed. 1961); J. Madison, Speech before the House of Representatives (defending his draft of the Bill of Rights) (June 8, 1789), *reprinted in* The Mind of the Founder 221 (M. Meyers ed. 1973); Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in id.* at 207. Over the course of our history, the Constitution has continued to fill those various roles, *see* Lerner, *Constitution and Court as Symbols*, 46 Yale L.J. 1290 (1937)—arguably, (at least recently) to our considerable benefit. It is thus appropriate, even essential, that, when expounding the Constitution, we be alert to situations in which a government, by sanctioning activities by a private party that it is forbidden to do directly, undermines the "constitutive" function of the document. Ministerial involvement of governmental officials is relevant to a "state action" inquiry, in other words, because it increases the likelihood that government will be perceived as approving of the private actor's behavior and the values that underlie it.

46. Our conclusion is consistent with that recently reached by the Eighth Circuit in *Ruffalo v. Civiletti*, 702 F.2d 710 at 716–17 (8th Cir.1983).

We limit ourselves to the finding that there has been "state action" in some form in this case—*i.e.*, that the defendants, collectively, may not absolve themselves of responsibility merely by asserting that they are doing nothing more than respecting the uncoerced wishes of Catherine. We express no opinion on the question of *which* of the defendants are responsible for what aspects of the injuries to the plaintiffs. See note 12 *supra* and accompanying text for a portion of the complex and as yet unclear factual foundation of the latter issue.

47. *See also Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 554, 54 L.Ed.2d 511 (1978) (dicta); *Smith v. Organization of Foster Families*, 431 U.S. 816, 842, 97 S.Ct. 2094, 2108, 53 L.Ed.2d 14 (1977) (dicta); *Moore v. City of East Cleveland*, 431 U.S. 494, 499, 97 S.Ct. 1932, 1935, 52 L.Ed.2d 531 (1977) (plurality opinion); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40, 94 S.Ct. 791, 796, 39 L.Ed.2d 52 (1974); *Stanley v. Illinois*, 405 U.S. 645, 651–52, 92 S.Ct. 1208, 1212–13, 31 L.Ed.2d 551 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944) (dicta); *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923).

passes a wide variety of choices and activities: the decision to marry;[48] procreation;[49] the use of contraception;[50] the decision not to carry a child to term;[51] and cohabitation with members of one's extended family.[52] Among the most important of the liberties accorded this special treatment is the freedom of a parent and child to maintain, cultivate, and mold their ongoing relationship.[53]

The constitutional interest in the development of parental and filial bonds free from government interference has many avatars. It emerges in a parent's right to control the manner in which his child is reared and educated[54] and in the child's corresponding right not to have the content of his instruction prescribed by the state.[55] It contributes heavily to a parent's right to direct the religious upbringing of his child.[56] And, above all, it is manifested in the reciprocal rights of parent and child to one another's "companionship."[57]

When asserted by a parent and child in a traditional nuclear family, the foregoing rights are acknowledged to be potent. It might be argued, however, that they are less formidable when asserted by a non-custodial parent—one who retains and regularly exercises "visitation rights" but who participates little in the day-to-day care and nurturing of his children.

To assess that argument we turn first to the case law. That inquiry unfortunately proves inconclusive; while the bulk of the pertinent precedent seems to suggest that we should not differentiate between custodial and noncustodial contexts when deciding what protections are constitutionally due a parent-child relationship, each of the germane cases has dealt with a factual situation or legal issue significantly different from the problem before us.

Dicta favorable to the plaintiffs may be found in *Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978). Justice Marshall, speaking for a unanimous Court, seemed to imply that "a [once] married father who is separated or divorced from the mother and is no longer living with his child" could not constitutionally be treated differently from a currently married father living with his child. *Id.* at 255–56, 98 S.Ct.

The question of what the constitutional "protection" of this freedom entails is taken up in Part IV, *infra*.

48. *See Zablocki v. Redhail*, 434 U.S. 374, 383, 386, 98 S.Ct. 673, 679, 681, 54 L.Ed.2d 618 (1978).

49. *See Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942).

50. *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 685, 97 S.Ct. 2010, 2016, 52 L.Ed.2d 675 (1977).

51. *See Roe v. Wade*, 410 U.S. 113, 153–54, 93 S.Ct. 705, 726–27, 35 L.Ed.2d 147 (1973).

52. *See Moore v. City of East Cleveland*, 431 U.S. at 500–06, 97 S.Ct. at 1936–39 (plurality opinion).

It has been suggested that these various "familial rights" are too disparate to be fairly lumped together and that, indeed, to conflate them is dangerously to obscure differences in their status and strength. We express no opinion on the merits of the charge; in particular, we do not mean to imply that our discussion of the protections that must be accorded the reciprocal interests of parent and child in one another's companionship, *see* Part IV, *infra*, is equally applicable to other "familial rights."

53. *See Quilloin v. Walcott*, 434 U.S. at 255, 98 S.Ct. at 554 (dicta); *Wisconsin v. Yoder*, 406 U.S. 205, 232–33, 92 S.Ct. 1526, 1541–42, 32 L.Ed.2d 15 (1972); *Stanley v. Illinois*, 405 U.S. at 651, 92 S.Ct. at 1212; *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir.1977).

54. *See Parham v. J.R.*, 442 U.S. 584, 602–04, 99 S.Ct. 2493, 2504–05, 61 L.Ed.2d 101 (1979); *Ginsberg v. New York*, 390 U.S. 629, 639, 88 S.Ct. 1274, 1280, 20 L.Ed.2d 195 (1968); *Prince v. Massachusetts*, 321 U.S. at 165–66, 64 S.Ct. at 442 (dicta); *Pierce v. Society of Sisters*, 268 U.S. at 534–35, 45 S.Ct. at 573–74; *Meyer v. Nebraska*, 262 U.S. at 401, 43 S.Ct. at 627.

55. *See Prince v. Massachusetts*, 321 U.S. at 166, 64 S.Ct. at 442 (dicta).

56. *See Wisconsin v. Yoder*, 406 U.S. at 233, 92 S.Ct. at 1542.

57. *See Stanley v. Illinois*, 405 U.S. at 651, 92 S.Ct. at 1212; *Duchesne v. Sugarman*, 566 F.2d at 825.

at 554–55.[58] That suggestion is reinforced by some language in two of the Court's decisions dealing with the procedural adequacy of state laws making possible the termination of interests of non-custodial parents. In *Armstrong v. Manzo*, 380 U.S. 545, 550, 85 S.Ct. 1187, 1190, 14 L.Ed.2d 62 (1965), the Court took for granted that the interest of a divorced father in the preservation of his visitation rights is a "liberty interest" sufficient to trigger the application of procedural due process doctrine. And in *Santosky v. Kramer*, 455 U.S. at 749, 753–54, 102 S.Ct. at 1392, 1394, decided last term, the Court expressly held that the interest of a parent, who has temporarily lost custody of his child, in avoiding elimination of his "rights ever to visit, communicate with, or regain custody of the child" is important enough to entitle him to the procedural protections mandated by the Due Process Clause. The relevance of these two decisions to the instant case is limited by the fact that the establishment of a "liberty interest" sufficient to warrant application of procedural due process doctrine does not necessarily mean that that interest will be deemed "fundamental" and thereby entitled to the full panoply of substantive constitutional protections. Nevertheless, the Court's willingness, in each case, to assimilate the interests at stake to the rights enjoyed by custodial parents[59] affords some support for the proposition that, for constitutional purposes, all (exercised) parental rights should be treated as equivalent.[60]

Some language inconsistent with that proposition may be found in the two decisions rendered by the Second Circuit in the only appellate case comparable to the one before us. In *Leonhard v. Mitchell*, 473 F.2d 709 (2d Cir.), *cert. denied*, 412 U.S. 949, 93 S.Ct. 3011, 37 L.Ed.2d 1002 (1973), a father in a position similar to that occupied by William sought a writ of mandamus compelling the Marshals Service to reveal to him the whereabouts of his children. The court ruled that, in view of a state's "substantial range of authority to protect the welfare of children . . . [which] extends to the determination of parental custody and visitation rights," there is no "*clear* constitutional right to custody or visitation rights." *Id.* at 713 (emphasis added). In *Leonhard v. United States*, 633 F.2d 599 (2d Cir.1980), *cert. denied*, 451 U.S. 908, 101 S.Ct. 1975, 68 L.Ed.2d 295 (1981), a subsequent damage action growing out of the same controversy, the court concluded "that the federal officials' removal and concealment of the children on the consent of their mother and sole custodian, did not violate the children's constitutional rights . . . ." *Id.* at 620.

58. The holding in the case was that the Equal Protection Clause did *not* bar differential treatment of a married father and a father who "has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child." *Id.*

59. *See Santosky v. Kramer*, 455 U.S. at 753, 102 S.Ct. at 1394 ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life."). *See also Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27, 101 S.Ct. 2153, 2160, 68 L.Ed.2d 640 (1981) (dicta) (describing "a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' " (in a context very similar to that in *Santosky*) as "an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection' ") (quoting *Stanley v. Illinois*, 405 U.S. at 651, 92 S.Ct. at 1212, a case involving the rights of an illegitimate father who had lived with and supported his children all their lives, *id.* at 650 n. 4, 92 S.Ct. at 1212 n. 4).

60. *See also Wise v. Bravo*, 666 F.2d 1328, 1338 (10th Cir.1981) (Seymour, J., concurring in the result) (dicta); *Ruffalo v. Civiletti*, 539 F.Supp. 949, 952 (W.D.Mo.1982) (holding, in a case very similar to that before us, that "visitation rights are entitled to due process protection [substantive as well as procedural], at least when the challenged governmental interference is of a serious, continuing nature"), *aff'd on other grounds*, 702 F.2d 710 at 714–15 (8th Cir.1983) (proceeding on the assumption that the plaintiff parent had a legal right to custody of the children, and consequently declining to "decide whether a parent's visitation rights are constitutionally protected").

However, the differences between the *Leonhard* cases and the suit before us are sufficiently marked that the foregoing comments bear only lightly on the question with which we are grappling. Most importantly, in *Leonhard* there was no suggestion that the Marshals Service was capable of arranging secret meetings between the father and the children without endangering anyone's life; the court of appeals thus assumed that the defendants' only option, if they wished to protect the children, was to deny the father access to them. In the first case, the court's inquiry was further circumscribed by the nature of the remedy sought; presented with a stark choice between granting or denying an order that would reveal the location of the children, the court not surprisingly was reluctant to accord much weight to the plaintiffs' constitutional claims. In the second suit, the court's attention was deflected from the main issue by a different set of circumstances: the father's constitutional claims were, by then, time-barred and the children had been returned to him. The only remaining relevant question was whether the children were entitled to damages for the violation of their rights during the period in which they had been denied the company of their father. The court concluded that the defendants, when deciding whether to reveal the location of the children, were entitled to rely on the (putatively reliable) judgment of the mother concerning what was necessary to ensure their safety. In this action, by contrast, a safe way of affording the father access to the children does exist, the question whether the defendants should make use of it is properly before us, and the mother's awareness of the option undermines any presumption that she is acting solely in the best interests of her offspring. In short, the reflections of the Second Circuit are sufficiently intertwined with the idiosyncracies of the cases before it as to be of little moment in the present context.

To summarize, the balance of germane precedent inclines in favor of according similar constitutional status to custodial and non-custodial parent-child relations, but none of the cases is controlling. Consequently, to assess fairly the strength of the interests asserted by the plaintiffs in this case we must explore the concerns that underlie the constitutional protection traditionally accorded parental and filial bonds.

Three considerations account for the skepticism with which, when determining the constitutional validity of governmental action, we regard any interference with parent-child relations. The first is the important place such relations have long held in our culture. In the United States, parents historically have participated heavily in the rearing of their children.[61] More importantly, persons in this country traditionally have believed that parents have a *right* to maintain contact with and shape the development of their children.[62]

61. The Supreme Court made this point most vigorously in *Wisconsin v. Yoder*, 406 U.S. at 232, 92 S.Ct. at 1541:

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

The argument is somewhat overstated. In the early years of the settlement of this country, for example, many parents (particularly in the northern colonies) adhered to the practice common among English Puritans of "putting out" children—placing them at an early age in other homes where they were treated partly as foster children and partly as apprentices or farmhands. One of the motivations underlying the maintenance of this custom seems to have been the parents' desire to avoid the formation of strong emotional bonds with their offspring—bonds that might temper the strictness of the children's discipline or interfere with their own piety. *See* E. MORGAN, THE PURITAN FAMILY 32–38 (1956); Demos, *Notes on Life in Plymouth Colony*, WILLIAM & MARY Q., 3d Ser., XXII 264 (1965), *reprinted in* COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT 57, 75–78 (S. Katz ed. 1976); A. MACFARLANE, THE FAMILY LIFE OF RALPH JOSSELIN 205–10 (1970). By the eighteenth century, however, the practice seems to have died out and the "tradition" of which the Court speaks had been established.

62. *See Bellotti v. Baird*, 443 U.S. 622, 638, 99 S.Ct. 3035, 3045, 61 L.Ed.2d 797 (1979) (plurality opinion) (justifying some legal restrictions on minors' freedom of choice, partly on the basis of the need to preserve and reinforce the

The second factor consists of recognition that shielding relations between parents and children serves two complementary social functions. On one hand, it facilitates socialization of the children. We rely on parents to instill in their offspring the values and motivations necessary to develop them into "mature, socially responsible citizens."[63] We assume that this is a function the state cannot effectively perform; only parents (or some close substitute) are sufficiently sensitive to the myriad, constantly fluctuating needs and drives of children to be able to provide them the combination of support and guidance necessary to prepare them for later life.[64] Such preparation, in turn, is essential not only to enable each child to think and act independently when he comes of age,[65] but to preserve and promote our system of government[66] and our way of life.[67] On the other hand, vesting in parents primary responsibility for the upbringing of children ensures the preservation of diversity and pluralism in our culture. As the Supreme Court explained long ago:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925).[68] The undesirability of cultural homogenization would lead us to oppose efforts by the state to assume a greater role in children's development, even if we were confident that the state were capable of doing so effectively and intelligently.[69] In short, our collective wish to preserve and promote the enlivening variety of our social and political life prompts us to be wary of any tampering with our highly decentralized, substantially unregulated, parent-dominated child-rearing system.[70]

parental role in their upbringing, recognition of which is "deeply rooted in our Nation's history and tradition"); *Meyer v. Nebraska*, 262 U.S. at 402, 43 S.Ct. at 628. The technique of defining constitutionally protected interests through reference to traditional values has been adopted by the Court in dealing with many other "familial" rights. *See, e.g., Zablocki v. Redhail*, 434 U.S. at 383–86, 98 S.Ct. at 679–81; *Moore v. City of East Cleveland*, 431 U.S. at 503–05, 97 S.Ct. at 1937–38 (plurality opinion). For descriptions and defenses of this general mode of constitutional interpretation, see *Poe v. Ullman*, 367 U.S. 497, 542, 81 S.Ct. 1752, 1776, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting); *Developments in the Law—The Constitution and the Family*, 93 HARV.L.REV. 1156, 1177–87 (1980). For a criticism of it, see J. ELY, DEMOCRACY AND DISTRUST 60–63 (1980).

63. *Bellotti v. Baird*, 443 U.S. at 638, 99 S.Ct. at 3045 (plurality opinion). *See also Wisconsin v. Yoder*, 406 U.S. at 233, 92 S.Ct. at 1542; *cf. Moore v. City of East Cleveland*, 431 U.S. at 503–04, 97 S.Ct. at 1937–38 (plurality opinion) (arguing that we rely on the family—nuclear or extended—to "inculcate and pass down many of our most cherished values, moral and cultural"); S. KATZ, WHEN PARENTS FAIL 1–2, 12–13 (1971).

64. *Prince v. Massachusetts*, 321 U.S. at 166, 64 S.Ct. at 442 (dicta); C. LASCH, HAVEN IN A HEARTLESS WORLD 3–4 (1977). Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L.REV. 563, 623–24 (1977).

65. *See* J. LOCKE, TWO TREATISES OF GOVERNMENT: THE SECOND TREATISE ch. VI, at 321–36 (P. Laslett ed. 1960).

66. *See* Heymann & Barzelay, *The Forest and the Trees:* Roe v. Wade *and Its Critics*, 53 B.U.L. REV. 765, 772–73 (1973).

67. *See Smith v. Organization of Foster Families*, 431 U.S. at 844, 97 S.Ct. at 2109 (dicta).

68. *Cf. Moore v. City of East Cleveland*, 431 U.S. at 506, 97 S.Ct. at 1939 (plurality opinion) ("[T]he Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns.").

69. *See Bellotti v. Baird*, 443 U.S. at 638, 99 S.Ct. at 3045 (plurality opinion).

70. *See* B. RUSSELL, MARRIAGE AND MORALS 217–18 (2d ed. 1957); Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 893 (1975); Hirschoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Objectionable*

[10] The third consideration is our appreciation of the profound importance of the bond between a parent and a child to the emotional life of both.[71] Frequently each party to the relationship depends heavily on his ties with the other for his sense of self-worth, for his very self-definition. To rephrase the point in the language of entitlements, a parent's right to the preservation of his relationship with his child derives from the fact that the parent's achievement of a rich and rewarding life is likely to depend significantly on his ability to participate in the rearing of his offspring.[72] A child's corresponding right to protection from interference in the relationship derives from the psychic importance to him of being raised by a loving, responsive, reliable adult.[73]

[11, 12] To determine the strength of the constitutional interests asserted in the instant case, we must access the relevance of the foregoing considerations to the plaintiffs' relationship as it existed prior to the defendants' alleged interference with it. We begin by asking what features distinguish the relationship between William and his offspring from the paradigmatic parent-child bond in a nuclear family. The answer turns upon a subtle distinction. It is well established that the strength and scope of constitutionally protected familial rights are not determined by the contours of state (or federal) law; what is important is the nature of the bond in question, not the way in which it has been categorized by a legislature or court. *See Smith v. Organization of Foster Families*, 431 U.S. 816, 845, 97 S.Ct. 2094, 2110, 53 L.Ed.2d 14 (1977) (dicta); *Stanley v. Illinois*, 405 U.S. 645, 651–52, 92 S.Ct. 1208, 1212–13, 31 L.Ed.2d 551

Instruction?, 50 S.CAL.L.REV. 871, 905–09 (1977); Moskowitz, *Parental Rights and State Education*, 50 WASH.L.REV. 623, 635–36 (1975); Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN.L.REV. 985, 992 (1975); *The Constitution and the Family*, *supra* note 62, at 1186 n. 171, 1215 & n. 111, 1354 & n. 23.

71. *See Smith v. Organization of Foster Families*, 431 U.S. at 844, 97 S.Ct. at 2109 (dicta) (stressing the importance of the "emotional attachments" arising out of the "familial relationship"); *Stanley v. Illinois*, 405 U.S. at 652, 92 S.Ct. at 1213 (recognizing the importance of the warmth of a familial bond); B. RUSSELL, *supra* note 70, at 183–88, 194–95, 202–03. *Cf. Moore v. City of East Cleveland*, 431 U.S. at 505, 97 S.Ct. at 1938 (plurality opinion); *id.* at 508, 97 S.Ct. at 1940 (Brennan, J., concurring) (both opinions emphasizing the strength of the emotional ties between members of an extended family).

72. *See* Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S.CAL.L.REV. 769, 806–07 (1978); Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U.L.REV. 605, 626–29; *The Constitution and the Family*, *supra* note 62, at 1353.

We intend our observations about the importance of contact with his children to a parent's emotional equilibrium to be comments, not about human nature, but about life in the United States today. Identification of constitutional rights, unmentioned in the document itself, that are nevertheless deserving of "fundamental" status is possible only through contextual analysis; in other words, we must take as given the general features of our society and polity and seek to identify the freedoms and relationships that, in the present environment, are crucial to self-definition and fulfillment. *Cf. Duncan v. Louisiana*, 391 U.S. 145, 149 & n. 14, 88 S.Ct. 1444, 1447 & n. 14, 20 L.Ed.2d 491 (1968) (When determining whether the Fourteenth Amendment obliges states to abide by one of the restrictions on criminal procedure embodied in the Bill of Rights, the pertinent question is not whether the limitation at issue is "necessarily fundamental to fairness in every criminal system that might be imagined but [whether it] is fundamental in the context of the criminal processes maintained by the American States."). Thus, for present purposes, we pay no heed to the argument that our political and economic order induces us to place undue weight on intra-familial relations and that, in a better organized society, public life would absorb some (even most) of the energy presently invested in children and the home. *See, e.g.*, J. ROUSSEAU, THE SOCIAL CONTRACT bk. III, ch. 15, at 93 (G.D.H. Cole trans. 1950); M. WALZER, RADICAL PRINCIPLES 39–40 (1980).

73. *See Duchesne v. Sugarman*, 566 F.2d at 825; J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 9–64 (1973); Garvey, *supra* note 72, at 815–17; Goldstein, *Medical Care for the Child at Risk: On State Supervision of Parental Autonomy*, 86 YALE L.J. 645, 649–50 (1977); *The Constitution and the Family*, *supra* note 62, at 1353–54.

(1972).[74] It is equally well established, on the other hand, that the state possesses substantial—and virtually exclusive—regulatory authority in the field of domestic relations. *See Sosna v. Iowa*, 419 U.S. 393, 404, 95 S.Ct. 553, 559, 42 L.Ed.2d 532 (1975). Thus, there is no question that the Pennsylvania court in the instant case had authority to vest in Catherine custody over the children and to award William no more (and no less) than visitation rights.[75] What this means is that, for the purpose of weighing the plaintiffs' constitutional interests, we should eschew inferences drawn from the manner in which the state *describes* their rights or deals with them in other contexts,[76] but we must consider carefully the manner in which state law defines and limits William's access to and responsibility for the children.

A nuanced analysis of the sort just indicated would require detailed knowledge of domestic relations law in Pennsylvania—specifically of the practical concomitants of the terms "custody" and "visitation rights." We lack such knowledge and the parties have made little effort to educate us. For reasons that will become apparent, however, we believe that our inquiry may proceed upon two crude assumptions:[77] (1) The non-custodial parent in a legally reorganized family generally spends considerably less time with his children than the custodial parent. (2) The custodial parent legally has the principal, if not exclusive, authority to make decisions regarding the child's education, religious training, and discipline[78] and, in practice, is usually the dominant force in the child's upbringing, but the non-custodial parent (assuming he exercises his visitation rights) in most instances retains some influence over the child's intellectual and moral development. On the basis of these rough generalizations, how should the reciprocal constitutional interests of a non-custodial parent and his children in one another's companionship be measured?

The first of the three factors discussed above—the existence of a tradition of respect for the institution in question—provides us little guidance. It seems undeniable that recognition of the sanctity of the bond between a child and his non-custodial parent is far less firmly embedded in our cultural heritage than respect for the autonomy of the relations between a child and parent in a nuclear family. But that discrepancy is readily explainable on the basis of the relative rarity, in United States society in the past, of regularly exercised "visitation rights." That situation is rapidly changing, however; the hegemony of the nuclear family is steadily being undermined. It has been predicted that the proportion of marriages fated to end in divorce will soon reach forty percent.[79] In light of

74. *See also The Constitution and the Family*, *supra* note 62, at 1277–78, for a sound argument as to why "liberty interests" of this sort should not be defined by positive law. The difference between the treatment of familial rights and other liberty interests that have been held to be more dependent upon positive law, *see, e.g., Meachum v. Fano*, 427 U.S. 215, 226–28, 96 S.Ct. 2532, 2539–40, 49 L.Ed.2d 451 (1976) (convicted prisoner's interest in avoiding adverse changes in his conditions of confinement); *Paul v. Davis*, 424 U.S. 693, 710–12, 96 S.Ct. 1155, 1164–65, 47 L.Ed.2d 405 (1976) (reputation), may be explained by the "fundamental" (and arguably pre-social) character of the former.

75. As indicated above, we are assuming for the purpose of this appeal that the state court indeed did so. *See* note 22 *supra*.

76. Thus, for example, the fact that the state permitted the termination of "visitation rights" upon a lesser showing of neglect or unfitness than it required for the termination of "custody" would be irrelevant to our inquiry.

77. If, on remand, these assumptions are shown to be inaccurate, the District Court may be compelled to reconsider some of our conclusions.

78. *See In re Wesley J.K.*, 299 Pa.Super. 504, 445 A.2d 1243, 1248 (Pa.Super.Ct.1982) ("Legal custody" is defined by Pennsylvania statute as "[t]he legal right to make major decisions affecting the best interests of a minor child, including but not limited to, medical, religious and educational decisions.").

79. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDIES, SERIES P–23, No. 84, DIVORCE, CHILD CUSTODY, AND CHILD SUPPORT 1 (1979). In 1978 there were 2.2 million marriages and 1.1 million divorces. *Id.*

the fact that a divorced parent who is not granted custody is routinely awarded visitation rights,[80] the result will be a large and growing number of children whose time and affection are divided between a custodial and a non-custodial parent.[81] In short, the institution of the "broken" family is becoming ever more socially important. To rely on the absence of a strong tradition of respect for one of the constituent relationships of that institution in determining its constitutional status seems senseless. Recognition of the need to adjust the meaning of the Constitution to conform to changes in social life[82] requires, in this instance, that we eschew reliance on history.

Reference to the second of the three factors is more productive of insight. Neither of the two complementary social functions fulfilled by traditional parent-child relations would appear to be specially dependent upon non-interference with the bond between a child and his non-custodial parent. Socialization of the children in such situations presumably can be adequately performed by the custodial parent (with or without the aid of a new spouse). And the values transmitted by a custodial parent are likely to be as distinctive as those transmitted by a non-custodial parent; vesting exclusive responsibility in the former for the child's upbringing, consequently, would not affect the overall diversity of the society. These points should not be overstated. To the extent that a child remains emotionally dependent upon a non-custodial parent, cutting off his access to that parent will be painful and disorienting and will in some measure reduce his ability to absorb any system of values.[83] But, on balance, it would appear that, insofar as our willingness to use the Constitution to shield parental and filial bonds from state interference derives from our recognition of the social needs served by those relations, we would be warranted in according diminished protection to the relation between a child and his non-custodial parent.

The force of the third consideration in the present context is somewhat harder to assess. The emotional importance of the bond between some parents and their children diminishes following the disintegration of the original family unit and the parent's loss of custody.[84] For others, however, the relationship remains important—even intensifies in response to the disruption or termination of other attachments.[85] Moreover, there is considerable evidence that the emotional stability of children of divorced parents is often tied to the quality of their continuing relationships with their non-custodial parent.[86] On this point, in short, it appears impossible to say with any confidence that the concerns that underlie our willingness to accord "fundamental" status to parent-child bonds are any less telling when the relationship in question consists of mere "visitation."

Our analysis thus far appears inconclusive. One of the two relevant factors suggests that the plaintiffs are entitled to only diminished constitutional protection; the other would place them on a par with parents and children in traditional settings. To choose between those options, we must examine more closely both the particularities of the case before us and the practical implications of attempting to differentiate it from a nuclear family.

80. *See* 2 W. NELSON, DIVORCE AND ANNULMENT 275 (1961).

81. *See* BUREAU OF THE CENSUS, *supra* note 79, at 3, 11; Glick, *Children of Divorced Parents in Demographic Perspective*, J.Soc.Issues, Fall 1979, at 170, 171–72.

82. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 102, 97 S.Ct. 285, 290, 50 L.Ed.2d 251 (1976).

83. *See* note 86 *infra* and accompanying text.

84. *See* J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP 122–46, 235–57 (1980); R. WEISS, MARITAL SEPARATION 187–98 (1975).

85. *See* J. WALLERSTEIN & J. KELLY, *supra* note 84, at 122–46, 235–39, 257–63; R. WEISS, *supra* note 84, at 187–98.

86. *See* J. WALLERSTEIN & J. KELLY, *supra* note 84, at 218–19; Hess & Camara, *Post-Divorce Family Relationships as Mediating Factors in the Consequences of Divorce for Children*, J.Soc.Issues, Fall 1979, at 79, 92–94.

We observe, to begin with, that *the alleged "infringement" in this case is no mere disruption or curtailment of the parent-child relation but its permanent termination.* Under these circumstances, the "emotional-attachments" consideration seems especially relevant and *equally* relevant to situations involving custodial and non-custodial parents. Arguably, state regulation of, for example, a child's education or religious upbringing threatens only moderately the emotional ties between the child and his parents—and is less likely significantly to affect the relations between the child and a non-custodial parent than the relations between the child and a custodial parent. Severance of the filial bond, on the other hand, obviously cuts deeply into the emotional interests of both parent and child—and may well be as painful and disorienting to a non-custodial parent as to one with whom the child enjoyed more frequent contact.

The foregoing generalization will not always hold. But to determine the severity of the emotional damage likely to be caused by any *particular* severance would be extremely difficult. The strength and psychic significance of a specific familial relation would be very hard to assess. Certainly no one objective index (such as frequency of visitation or degree of financial support) would be reliable. Moreover, the thorough inquiry necessary to make even a competent judgment of this sort would be time-consuming, degrading to the parties, and itself highly disruptive of the relationship in question.[87]

[13] In light of these considerations, we conclude that the constitutional interests asserted by the plaintiffs are, in critical respects, roughly comparable to the interests of a parent and child in a viable nuclear family. We stress, however, that our analysis extends only to the question of the constitutional status of the right of a non-custodial parent and his or her children not to be totally and permanently prevented from ever seeing one another. In other words, we are considering here a narrow factual situation in which the government has acted to sever completely all ties between a non-custodial parent and his children without their participation or consent. In addressing this specific situation, we do not mean to suggest that a parent (or child) has a "fundamental right" to maintain visitation privileges in any particular way.

It is undisputed that the plaintiffs' protected interests have been invaded. We have established that the defendants are constitutionally responsible for that invasion. *See* Part II. *supra.* We now turn to the question whether, on the facts as alleged in the complaint, the defendants can justify their actions and the effects thereof.

IV. Governmental Ends and Means

[14] Rights of the sort asserted by the plaintiffs are not absolute; when incompatible with sufficiently potent public interests, they must give way. But such situations arise infrequently. Severance of the relationship between a parent and his child will survive constitutional scrutiny only if four requirements are met: (a) the asserted governmental interest must be compelling; (b) there must be a particularized showing that the state interest in question would be promoted by terminating the relationship; (c) it must be impossible to achieve the goal in question through any means less restrictive of the rights of parent and child; and (d) the affected parties must be accorded the procedural protections mandated by the Due Process Clauses.

These requirements, and the degree to which the defendants in the instant case have complied with each, are considered in order below. Our conclusion is that the plaintiffs have stated a cause of action in at least three of the four dimensions. We

87. Our reluctance to mandate such an inquiry into the dynamics of a particular parent-child relationship is analogous to the distaste with which we contemplate the prospect of an inevitably disruptive inquiry into the workings of a religious institution. *See, e.g., Roemer v. Board of Pub. Works,* 426 U.S. 736, 748–51, 761–65, 96 S.Ct. 2337, 2345–47, 2351–53, 49 L.Ed.2d 179 (1976) (plurality opinion) (dicta); *Lemon v. Kurtzman,* 403 U.S. 602, 619–22, 91 S.Ct. 2105, 2114–15, 29 L.Ed.2d 745 (1971).

offer a relatively detailed analysis to explain our conclusion in the hope of preventing similar debacles in the future. Cases such as this can be avoided only through the promulgation of executive or congressional guidelines governing the administration of the Witness Protection Program that ensure the identification and accommodation of interests like those of the plaintiffs. The formulation of such guidelines may be difficult; the following discussion is intended to facilitate their development.

A.

[15, 16] The first and most important implication of our finding that the plaintiffs' stake in one another's companionship must be deemed a "fundamental liberty interest" is that the government must have a very good reason for abrogating their rights. Whatever may be the strength of the state interest necessary to justify a minor or moderate interference with their relationship,[88] it is clear that *permanent termination* of their bond can be justified only by the promotion of a "compelling" objective.[89]

The defendants might point to two objectives in an effort to provide a compelling justification for their conduct in this case:[90] promotion of the "best interests" of the

88. Individual Supreme Court Justices have openly advocated a "sliding-scale" approach when analyzing infringements of fundamental interests like those asserted here; the greater the impairment, the more substantial the state interest promoted by the action must be to justify it. *See Zablocki v. Redhail*, 434 U.S. 374, 396, 98 S.Ct. 673, 686, 54 L.Ed.2d 618 (1978) (Stewart, J., concurring in the judgment); *Williams v. Illinois*, 399 U.S. 235, 260, 262–63, 90 S.Ct. 2018, 2031, 2032–33, 26 L.Ed.2d 586 (1970) (Harlan, J., concurring in the result); *Shapiro v. Thompson*, 394 U.S. 618, 663, 89 S.Ct. 1322, 1346, 22 L.Ed.2d 600 (1969) (Harlan, J., dissenting). Some such doctrine might be inferred from the case law. *See* P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 988–90 (1975). In the present context, we need not decide whether or how to adopt the approach.

89. For the general principle that abrogation of a fundamental right can be justified only by a "compelling state interest," see, *e.g.*, *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686, 97 S.Ct. 2010, 2016, 52 L.Ed.2d 675 (1977); *Roe v. Wade*, 410 U.S. 113, 155, 93 S.Ct. 705, 727, 35 L.Ed.2d 147 (1973). For application of that principle to termination of parent-child relationships, see *Alsager v. District Court*, 545 F.2d 1137, 1137 (8th Cir.1976) (per curiam) (adopting the relevant portions of the district court's decision, 406 F.Supp. 10, 21–22 (S.D. Iowa 1975)); *Roe v. Conn*, 417 F.Supp. 769, 777 (M.D.Ala.1976); *The Constitution and the Family*, *supra* note 62, at 1235–38.

The same result might be reached by a more circuitous route: the "fundamental rights" branch of equal protection doctrine. We observe that the Witness Protection Program, as implemented, results in the denial of access by a particular group (namely, the non-relocated parents of children taken into the program and the children themselves) to a fundamental right (the right to the companionship of one's child or parent). Accordingly, the Program should be subjected to "strict scrutiny" under the Equal Protection Clause. In other words, the government must show that discrimination between members of the affected group and other parents and children is necessary to promote a "compelling governmental interest." *See Dunn v. Blumstein*, 405 U.S. 330, 334–43, 92 S.Ct. 995, 999–1003, 31 L.Ed.2d 274 (1972); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 626–28, 89 S.Ct. 1886, 1889–90, 23 L.Ed.2d 583 (1969). If there is any difference in practice between this approach and the simpler one described in the text, it is that equal protection analysis is more rigid, less sensitive to variations in the degree to which access to or exercise of the right at stake has been impaired. *See The Constitution and the Family*, *supra* note 62, at 1193–97. *But see* Note, *Equal Protection and Due Process: Contrasting Methods of Review Under Fourteenth Amendment Doctrine*, 14 HARV.C.R.—C.L.L.REV. 529, 561–65 (1979) (suggesting that the two approaches, as applied, are functionally indistinguishable). Thus, though equal protection theory has, on occasion, been invoked in dealing with familial rights, *see Zablocki v. Redhail*, 434 U.S. at 383–91, 98 S.Ct. at 679–83, and might be adapted to fit the instant case, we see no need to rely upon it. *Cf. Zablocki v. Redhail*, 434 U.S. at 395–96, 98 S.Ct. at 685–86 (Stewart, J., concurring in the judgment); *Williams v. Illinois*, 399 U.S. at 259–60 (Harlan, J., concurring in the result) (both arguing that "substantive due process" analysis, despite its negative connotations, is more honest and discriminating).

90. In point of fact, the defendants fail to offer any justification, relying for their defense to the plaintiffs' constitutional claims solely on the theory that they are not responsible for the severance of the relationship between William and the children. Appellees' Brief at 14–17. Having rejected the one argument advanced by

children themselves or advancement of the public interest in the suppression of organized crime.

[17] The first argument merits only brief attention. For two reasons, invasion of the plaintiffs' protected interests cannot be justified on the basis of the government's *parens patriae* interest in protecting the welfare of the children.[91] First, the Supreme Court has made plain, albeit in dictum, that a government could not break up a "natural family" solely on the basis of a determination that the children's "best interest" would be served thereby, absent a showing that the parents were "unfit" to care for their offspring. *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 554, 54 L.Ed.2d 511 (1978) (quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 862–63, 97 S.Ct. 2094, 2119, 53 L.Ed.2d 14 (1977) (Stewart, J., concurring in the judgment)). The relations between William and his offspring are entitled to no less protection. *See* Part III, *supra*. Second, the only plausible basis for a justification related to the "best interests" of the children would be the possibility that their lives would be endangered if William were allowed to see them.[92] That argument, however, is seriously weakened by the fact that the government itself must bear at least some responsibility for creating any such danger. By inducing Allen to come forward with evidence against leaders of organized crime, it has created a situation in which the children are potential targets of retaliation. Invasion of the plaintiffs' rights should not be legitimated by the need to solve a problem the defendants themselves have generated.

The second argument available to the defendants is much more substantial. Organized crime, they might point out, is a serious problem in the United States today. Moreover, its very "organization," and the code of secrecy by which its participants are bound, hamper the efforts of law enforcement agencies to obtain the evidence necessary to stop or curtail it. Evidence against organization leaders is particularly hard to come by. The police therefore must rely heavily on testimony provided by informants—people formerly or currently involved in organized criminal activity. Securing the aid of such persons is not easy; they are aware that by providing evidence against their former partners or employers, they place their own lives and the lives of their families in jeopardy. If the government were unable to guarantee their safety, they would rarely come forward. In sum, suppression of organized crime requires that the government be empowered, in its discretion, to relocate informants and members of their households and to maintain the secrecy of their new identities. And that, in turn, requires that the government be free, when it deems appropriate, to terminate contacts between witnesses or members of their families and people who figured in their past lives.

The foregoing justification clearly has some force. Whether it would be sufficient to warrant severance of the bond between a child and his natural parent we find it impossible, at this point, to say. Our inability to resolve this issue derives partly from the paltriness of the pertinent precedent. The lack of guidance afforded us by the case law results, in turn, principally from the frequency with which we and other courts have employed a convenient device for evading questions like that before us. Faced with a conflict between an important individual right and a powerful state inter-

the defendants, *see* Part II. *supra*, we might reverse the judgment of the District Court without further ado. Our desire to help chart this hitherto little explored legal territory, however, prompts us to proceed.

91. For a good discussion of this source of state authority to intervene in familial relations, see *The Constitution and the Family*, *supra* note 62, at 1221–42.

92. For the purpose of pursuing this portion of the analysis, we assume that such a danger would inevitably be associated with accommodation of William's rights. The significance of the availability of a procedure by which the government could achieve its objectives and still afford William some access to the children without placing them at risk is taken up in Part IV.C. *infra*.

est that allegedly warrants infringement of the right, courts have been prone to hypothesize that the state's objective would prevail if the challenged statute directly and effectively promoted it, and then go on to examine the closeness of the "fit" between the statute and the asserted objective—in general and in the case at bar. The usual conclusion is that the enactment, in fact, would do little to advance the asserted end. Its principal justification thus undercut, the enactment collapses when subjected to constitutional attack. *See, e.g., Carey v. Population Services International*, 431 U.S. 678, 690–91, 694–96, 97 S.Ct. 2010, 2018–19, 2021–22, 52 L.Ed.2d 675 (1977); *Moore v. City of East Cleveland*, 431 U.S. 494, 500, 97 S.Ct. 1932, 1936, 52 L.Ed.2d 531 (1977) (plurality opinion).[93]

In the following sections, we follow a similar analytical path.[94] But, though that analysis suffices to decide the case before us, it leaves unresolved one important question likely to be presented in similar cases in the future (and thus that must be addressed by the draftsmen of guidelines for dealing with situations like this): if, in a particular instance, government officials demonstrate that the testimony of an informant is *essential* to the prosecution of an important leader of organized crime and that the interests of a non-custodial parent and members of the informant's household cannot be accommodated without risking human life, may the government go ahead, accept the informant and his family into the program, and subsequently deny the parent access to the children?

[18, 19] Courts' traditional reluctance to confront questions of this order means that we have very little to go on. We know, of course, that a state's legitimate interests in protecting children's welfare and in promoting the public health, safety, welfare and morals are sufficient to justify minor restrictions on parents' control over the upbringing of their offspring. *Wisconsin v. Yoder*, 406 U.S. 205, 233, 92 S.Ct. 1526, 1542, 32 L.Ed.2d 15 (1972) (dicta); *Prince v. Massachusetts*, 321 U.S. 158, 166–70, 64 S.Ct. 438, 442–444, 88 L.Ed. 645 (1944). And, if it can show that a parent is "neglectful" or otherwise unfit to care for a child, a state may sever the bond between the two. *Stanley v. Illinois*, 405 U.S. 645, 652, 92 S.Ct. 1208, 1213, 31 L.Ed.2d 551 (1972) (dicta).[95] But there are few other features on this doctrinal map. Without any markings to assist us in getting our bearings, our answer to the aforementioned question might turn solely upon whether we felt that the suppression of organized crime was sufficiently important to be fairly described as "compelling."

Any inclination we might have to speculate on that issue is dissipated by the paucity of relevant evidence in the record before us and the inconclusiveness of the data available from other sources. Observers and scholars continue to disagree not only over the likelihood that an informant will be "disciplined" by those he implicates[96]

93. This general mode of analysis is discussed and criticized in Linde, *Due Process of Law Making*, 55 NEB.L.REV. 197, 207–13 (1976); *The Constitution and the Family*, *supra* note 62, at 1211 n. 95.

94. *See* Parts IV.B. and IV.C. *infra*.

95. The guidance we might gain from this rule is limited by the fact that a finding of neglect or unfitness not only strengthens the state's *parens patriae* interest in the child's welfare, but strongly suggests that the bond between the parent and child has already atrophied. The rule thus tells us little regarding what is necessary to warrant termination of a healthy, ongoing relationship.

96. *Compare* J. ALBINI, THE AMERICAN MAFIA 267–69 (1971) (If a participant breaks the code of silence and reveals facts that "might be legally devastating to important syndicate participants, he probably will be killed. The latter is almost always the case when an informant gives evidence resulting in the indictment or conviction of an important syndicate functionary. We say almost always because in some cases, social conditions [such as fear of a police crack-down prompted by adverse publicity] may warrant against it.") *with* F. IANNI & E. REUSS-IANNI, A FAMILY BUSINESS 146–49 (1972) (study of one Italian-American crime family yielded no evidence of the use of "coercive sanctions" for violations of "rules of conduct" (including the "rule of secrecy"), though "it would be naïve to suggest that such sanctions

(and thus the need for a Witness Protection Program), but also over the nature and scope of the activities conducted by organized crime[97] and the seriousness of the threat that such activities pose to law-abiding citizens and to the integrity of our economic and political systems.[98] Given the range of respectable opinions on these crucial issues, we must decline to say more than that the assessment of the relative strength of the government's interest and the parent's and children's rights will be a difficult task for the body that ultimately must undertake it.

B.

[20, 21] Assuming, *arguendo*, that the government's interest in the suppression of organized crime is sufficiently potent to justify invasion of constitutionally protected familial rights, the government may not rely on an irrebuttable presumption that its interest would be promoted in a given case, without affording the affected parties an opportunity to prove otherwise. *Stanley v. Illinois*, 405 U.S. 645, 657–58, 92 S.Ct. 1208, 1215–16, 31 L.Ed.2d 551 (1972).[99] In part, this principle is an outgrowth of the doctrine of procedural due process.[100] In part, it is a corollary of the doctrine of substantive due process:[101] avoidance of any unnecessary infringement of fundamental rights requires that the government make a *particularized* showing of advantage in every case in which it contemplates depriving someone of constitutionally protected interests.[102]

do not exist") *and* R. CLARK, CRIME IN AMERICA 73 (1970) ("discipline" is not as strict as it once was).

97. *Compare* PRESIDENT'S COMM. ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 187–96 (1967) (describing a vast and expanding network of illegal operations) *with* R. CLARK, *supra* note 96, at 73 ("The wealth and income of organized crime are exaggerated beyond reason.").

98. For a spectrum of views, see PRESIDENT'S COMM., *supra* note 97, at 187–88 ("The millions of dollars [organized crime] can spend on corrupting public officials may give it power to maim or murder people inside or outside the organization with impunity, to extort money from businessmen, to conduct businesses in such fields as liquor, meat, or drugs without regard to administrative regulations, to avoid payment of income taxes, or to secure public works contracts without competitive bidding. The purpose of organized crime is not competition with visible, legal government but nullification of it. When organized crime places an official in public office, it nullifies the political process. When it bribes a police official, it nullifies law enforcement."); J. ALBINI, *supra* note 96, at 55–78 (Organized crime serves Americans' apparently ineradicable need for "illicit" goods and services, but does so partly through infiltration and corruption of the political system.); *id.* at 269–83 ("[V]iolence or the threat of it" is used extensively to eliminate competition in illegal activities but seemingly not to enter legitimate businesses; extension and collection "in kind" of illegal, usurious loans is sometimes used to take over, in whole or in part, legitimate businesses.); F. IANNI & E. REUSS-IANNI, *supra* note 96, at 89–106 (study of one crime family revealed extensive and growing involvement in "legitimate" as well as "illegitimate" businesses and substantial indirect transfers of funds from the latter to the former but little if any of the (once common) use of extortion and other illegal methods to expand "legitimate" operations and drive out competition); D. SMITH, THE MAFIA MYSTIQUE 331–35 (1975) (The threatening aspect of organized crime derives largely from our fear that it will undermine our belief in and commitment to ideals such as democracy and "equal justice"; such a perception is misleading insofar as it focuses attention and animus on one of the products, not the cause, of forces and practices that are undermining our values.).

99. *See also Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 644–48, 94 S.Ct. 791, 798–800, 39 L.Ed.2d 52 (1974); *In re Linehan*, 280 N.W.2d 29, 32–33 (Minn.1979); *State v. Robert H.*, 118 N.H. 713, 393 A.2d 1387, 1391 (1978); Disanto & Podolski, *The Right to Privacy and Trilateral Balancing—Implications for the Family*, 13 FAM.L.Q. 183, 209–10 (1979).

100. *See* Part IV.D. *infra*.

101. *See* Part IV.A. *supra*.

102. In recent years, the Supreme Court has sharply curtailed the scope of the "irrebuttable presumption" doctrine. *See Weinberger v. Salfi*, 422 U.S. 749, 770–85, 95 S.Ct. 2457, 2469–76, 45 L.Ed.2d 522 (1975). The Court has made clear, however, that the doctrine remains viable when fundamental rights are at stake. *See Turner v. Department of Employment Sec.*, 423 U.S. 44, 46, 96 S.Ct. 249, 250, 46 L.Ed.2d 181 (1975) (per curiam); *Weinberger v. Salfi*, 422 U.S. at 771–72, 95 S.Ct. at 2469–70.

[22] In this case, there *may* have been such a particularized determination; the governing Justice Department Order instructs the Assistant Attorney General in charge of the concerned division to admit a witness and his household into the program only upon a finding that (among other things) admission "would be advantageous to the Federal interest."[103] But, putting aside for the moment the high risk of error in such an *ex parte* judgment made by an interested party,[104] there is no indication in the record that the Assistant Attorney General was ever aware that induction of Allen, Catherine and the children would have the effect of terminating the relationship between the children and their natural father. The Constitution requires that there be more than a determination that the "Federal interest" would be marginally advanced by taking action in a particular case; there must be a showing that the governmental interest would be promoted in ways sufficiently substantial to warrant overriding basic human liberties. That requirement has not been met in this case.

C.

To justify restriction of constitutionally protected activity, the government must do more than show that such curtailment would promote, in a particular case, compelling governmental interests.

> [I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means."

Dunn v. Blumstein, 405 U.S. 330, 343, 92 S.Ct. 995, 1003, 31 L.Ed.2d 274 (1972) (quoting *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960)). This principle has been repeatedly reaffirmed when constitutionally protected familial rights have been threatened. *See Carey v. Population Services International*, 431 U.S. at 686, 97 S.Ct. at 2016; *Doe v. Bolton*, 410 U.S. 179, 194–95, 93 S.Ct. 739, 748–49, 35 L.Ed.2d 201 (1973); *Roe v. Wade*, 410 U.S. 113, 155, 93 S.Ct. 705, 727, 35 L.Ed.2d 147 (1973).

In this case, the defendants concede that they were and are capable of arranging secret meetings between William and the children.[105] They acknowledge that such contacts would not jeopardize the safety of the children, Catherine or Allen. And, whatever may be the legal or equitable constraints on their ability, at this juncture, to demand that Catherine permit the children to see their father, it is beyond dispute that they had the authority, at the time they accepted Allen and his family into the program, to insist that Catherine agree to such an arrangement.[106] There is no suggestion in the record that the defendants would have been unable to induce Allen to testify had they demanded that the rights of the plaintiffs be accommodated in the aforementioned manner. In short, the defendants apparently had ready access to a "less drastic means" for achieving their goals. Their decision not to avail themselves of that option was inconsistent with their duty under the Constitution.

D.

> It is beyond dispute that
> state intervention to terminate the relationship between [a parent] and [a] child must be accomplished by procedures meeting the requisites of the Due Process Clause.

Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L.Ed.2d 599 (1982) (quoting *Lassiter v. Department of Social Services*, 452 U.S. 18, 37, 101 S.Ct. 2153, 2165, 68 L.Ed.2d 640 (1981) (Blackmun, J., dissenting)).[107] Conformity with the princi-

103. See text at note 13 *supra*.

104. That risk is considered in Part IV.D. *infra*.

105. See text at note 28 *supra*.

106. See text at notes 29–32 *supra*.

107. *See also Lassiter v. Department of Social Servs.*, 452 U.S. at 27–32, 101 S.Ct. at 2159–62; *id.* at 59–60, 101 S.Ct. at 2176 (Stevens, J., dissenting); *Rivera v. Marcus*, 696 F.2d 1016, 1028–29 (2d Cir.1982) (removal of foster chil-

ples of procedural due process, in this context, serves three independent functions. First, by exposing to adversarial testing the government's asserted rationale for its action, it reduces the likelihood of error—*i.e.*, the risk that the government will act on the basis of what, in reality, is an insufficient justification.[108] Second, it permits the adversely affected parties to inform the government of ways in which the government's objectives might be achieved through means less restrictive of their rights. Third, it accords the affected parties some measure of dignity; it enables them to participate in and understand the process whereby their interests are assessed and, if necessary, restricted.[109]

[23] It is clear that "the requisites of the Due Process Clause" were not satisfied in the instant case. The defendants have never provided William with any kind of notice or opportunity to be heard. The Constitution certainly requires that much.[110]

How much more the Constitution requires in situations like that before us is far from clear. Set forth below are some of the major considerations that must be taken into account when designing a system for dealing with cases of this sort. Formulation of the details we must leave to a body with greater knowledge than we possess of the ways in which the Witness Protection Program does or might operate.

We begin with the principle that,

> *[b]efore* a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event."

Board of Regents v. Roth, 408 U.S. 564, 570 n. 7, 92 S.Ct. 2701, 2705 n. 7, 33 L.Ed.2d 548 (1972) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971)) (emphasis added). Holding the hearing before execution of the decision is particularly important where, as here, the deprivation of the protected interest might be irrevocable or might cause irreparable harm and where the decision will not turn on judgments that can sensibly be made on the basis of written submissions.[111]

At oral argument, the defendants' counsel argued that the need for secrecy and speed in the admission of witnesses might make a pre-entrance hearing of any sort impracticable. In some cases that may well be true, but it appears that in the majority of cases the Attorney General's office now informs the Marshals Service of a decision to admit an informant at least three work-

dren from the custody of their half-sister can be accomplished only in accordance with procedural due process).

108. For explication of this error-avoidance function, see *Fuentes v. Shevin*, 407 U.S. 67, 80–81, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556 (1972).

109. *See* Michelman, *Formal and Associational Aims in Procedural Due Process*, XVIII NOMOS 126 (1977); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 502–03 (1978).

110. *See Armstrong v. Manzo*, 380 U.S. 545, 550, 85 S.Ct. 1187, 1190, 14 L.Ed.2d 62 (1965) (a divorced father may not be deprived of his visitation rights (through adoption of the child by the mother's new spouse) without, at a minimum, "notice and opportunity for hearing appropriate to the nature of the case") (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950)).

111. The Supreme Court, in *Mathews v. Eldridge*, 424 U.S. 319, 340–45, 96 S.Ct. 893, 905–07, 47 L.Ed.2d 18 (1976), justified postponing an evidentiary hearing until after the termination of social security disability payments largely on the grounds that (i) the decision was easily reversible, (ii) retroactive payment of any erroneously withheld benefits would avoid any irreparable harm, and (iii) the decision in question depended almost entirely on a medical judgment that could be made competently (at least temporarily) on the basis of written submissions by the recipient's doctor. In this situation, by contrast, (i) it is likely to be unfeasible for the government to revoke a decision to admit a witness and his family into the program, (ii) without advance planning it may be difficult or impossible after the fact to accommodate the rights of the non-relocated parent (or periodic secret meetings may be an inadequate substitute for the relationship he formerly enjoyed with his children), and (iii) written submissions could not adequately inform a decisionmaker.

days prior to the scheduled pick-up.[112] It seems to us not inconceivable that, sometime during those three days, a secret meeting might be held to hear and evaluate the government's assertions of need and the objections and claims of the non-relocated parent.

[24, 25] In those instances in which holding such a hearing would truly be impossible, the requirements of the Due Process Clause would be merely suspended, not eliminated;[113] as soon as practicable after the admission of the informant, a hearing would have to be held, at least to work out some accommodation of the rights of the children and the parent left behind.[114]

Envisioning what a pre-admission (or post-admission) hearing might look like is no easy task. The affected parties would be entitled to no more (and no less) than a hearing "appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). The situation before us is so idiosyncratic that it is difficult to predict the kind of "process" that both would be workable and would fulfill the three functions described above. We are unable to do more than offer the following suggestions:

(1) The irrevocability of decisions to admit witnesses and their households, combined with the virtual impossibility of obtaining meaningful judicial review of such judgments, strongly suggests that those determinations should be made in accordance with a standard set of basic procedures, not processes developed and modified on a case-by-case basis. *Compare Santosky v. Kramer*, 455 U.S. at 757 & n. 9, 102 S.Ct. at 1396 n. 9 (procedural "rules of general application" necessary when appellate review would be insufficient to ensure "fundamental fairness"), *with Lassiter v. Department of Social Services*, 452 U.S. at 31–32, 101 S.Ct. at 2162 (procedures determined on a case-by-case basis suffice when appellate review would be an adequate check).

(2) This is not to say that those procedures should be highly formal; quite the contrary. The need for confidentiality and some measure of speed, combined with the value of encouraging the parties to speak freely with one another in working out a mutually satisfactory solution to their common problem, argues in favor of an informal setting. Some kind of neutral arbiter might have to be present, but the emphasis should be on negotiation and accommodation, not confrontation.

(3) In deciding more specific questions relating to the form of the proceeding—*e.g.*, whether the parties should have a right to be represented by counsel, should be able to present or cross-examine witnesses, etc. —reference should be made to the three factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), for the selection of a procedure that optimally balances the reduction of the risk of error and the burdensomeness of additional safeguards.[115] Reliance on those con-

112. *See* Order OBD 2110.2, *supra* note 11, at ¶¶ 7b–7c, *reprinted in* 1978 *Hearings* at 136; 1980 *Hearings* at 243–44 (testimony of Howard Safir).

113. *See Boddie v. Connecticut*, 401 U.S. at 379, 91 S.Ct. at 786; *Duchesne v. Sugarman*, 566 F.2d 817, 826, 828 (2d Cir.1977).

114. In such circumstances, it would also be imperative that the witness and the adult members of his household be informed, *prior* to their admission, that such a hearing would be held soon after their induction. Moreover, they would be admitted only on the condition that they agree to abide by whatever arrangement is worked out at that session for accommodating the interests of the children's other parent. An additional provision in the standard Memorandum of Understanding might suffice for these purposes.

115. The Supreme Court there held:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, 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 fi-

siderations should be tempered, however, by sensitivity to (a) the need to foster negotiation and compromise and (b) the importance of involving the non-relocated parent in the decisionmaking process.[116]

CONCLUSION

For the foregoing reasons, the District Court's decision that the plaintiffs failed to state a claim for which relief could be granted is reversed. The case is remanded for further proceedings consistent with this opinion.

Because of the posture in which the suit has appeared before us, we express no opinion on the truth of the allegations in the complaint. We also decline to reach a host of other issues that further prosecution of the case may raise: the merits of the defendants' various jurisdictional defenses; whether some or all of the defendants are immune from liability; and the form or measure of relief that might be appropriate. These are all matters that might be addressed on remand.

As to the propriety and utility of pressing onward in litigation, we venture our opinion that ultimate resolution of this controversy by a court may not be the ideal solution for any of the parties. As the disputants conceded at the outset, this case involves a conflict between several powerful, legitimate interests. Guided by the foregoing clarification of their respective claims, the parties are likely to be better able than a judge to work out an arrangement for reconciling—or at least compromising between—their various needs and desires.

With regard to the general problem presented by this case, we reiterate our plea that either Congress or the administrators of the Witness Protection Program develop a set of guidelines that would facilitate the detection and accommodation of interests like those of the plaintiffs.

Reversed and remanded.

nally, 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, 96 S.Ct. at 903. *See also Santosky v. Kramer*, 455 U.S. at 754, 102 S.Ct. at 1394; *Lassiter v. Department of Social Servs.*, 452 U.S. at 27–31, 101 S.Ct. at 2159–61; *Smith v. Organization of Foster Families*, 431 U.S. 816, 848–49, 97 S.Ct. 2094, 2112, 53 L.Ed.2d 14 (1977).

116. *See* text at note 109 *supra*.

UNITED STATES of America, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, Respondent,

American Telephone and Telegraph Company, United States Independent Telephone Association, Southern Pacific Communications Company, People's Counsel of Maryland, Intervenors.

No. 81-1751.

United States Court of Appeals, District of Columbia Circuit.

Argued May 5, 1982.

Decided May 13, 1983.

Governmment petitioned for review of an order of the Federal Communications Commission setting a rate of return for the interstate and foreign operations of a telephone company. The Court of Appeals, Harold H. Greene, District Judge, sitting by designation, held that the agency adequately and rationally explained its choice of 17.4% as the company's cost of equity.

Affirmed.

William FRANZ, et al., Appellants,

v.

UNITED STATES of America, et al.

No. 81-2369.

United States Court of Appeals,
District of Columbia Circuit.

Argued Oct. 20, 1982.

Decided May 10, 1983.

Father of children relocated along with mother and witness pursuant to witness protection program sought declaratory and injunctive relief as well as money damages from the United States, the Department of Justice, and the Attorney General arising from alleged constitutional violations by those defendants in connection with the relocation. The United States District Court for the District of Columbia, Barrington D. Parker, J., 526 F.Supp. 126, granted the defendants' motion to dismiss for failure to state a claim, and the plaintiff appealed. The Court of Appeals, 707 F.2d 582, reversed and remanded. In an addendum to the court's opinion, the Court of Appeals, Harry T. Edwards, Circuit Judge, further held that: (1) nothing in the Organized Crime Control Act purports to limit the discretion of the Attorney General when provision for protection of government witness and his family implicates rights of noncustodial parent; and (2) although, in establishing program designed to protect witnesses against organized crime, Congress did not intend to "federalize" domestic-relations law, Congress meant to authorize Attorney General to act, on occasion, in manner that might be at odds with visitation rights created by state law.

Ordered accordingly.

Bork, Circuit Judge, concurred in part and dissented in part and filed opinion.

1. Criminal Law ⇐1222

Nothing in Organized Crime Control Act purports to limit discretion of Attorney General when provision for protection of government witness and his family implicates rights of noncustodial parent. Organized Crime Control Act of 1970, § 502, 18 U.S.C.A. note prec. § 3481.

2. States ⇐4.12

Although, in establishing program designed to protect witnesses against organized crime, Congress did not intend to "federalize" domestic-relations law, Congress meant to authorize Attorney General to act, on occasion, in manner that might be at odds with visitation rights created by state law. Organized Crime Control Act of 1970, § 502, 18 U.S.C.A. note prec. § 3481.

Appeal from the United States District Court for the District of Columbia (D.C. Civil Action No. 81-0173).

Before TAMM, EDWARDS and BORK, Circuit Judges.

Addendum to the Opinion for the Court, in which Circuit Judge TAMM concurs, filed by Circuit Judge HARRY T. EDWARDS on June 20, 1983.

Separate Statement, concurring in part and dissenting in part, filed by Circuit Judge BORK on June 15, 1983.

HARRY T. EDWARDS, Circuit Judge: *

The opinion for the court in this case was issued on May 10, 1983, and reported at 707 F.2d 582. Now, more than a month after the original decision, a separate statement, concurring in part and dissenting in part [hereinafter referred to as "the Separate Statement"], has been filed. At this juncture, a full response to the arguments advanced therein would not be productive. However, to ensure that the opinion for the court is neither misunderstood nor misapplied, it is necessary to call attention to the most important of the misstatements and the most troubling of the suggestions contained in the Separate Statement.

* *Circuit Judge* TAMM concurs in this Addendum to the Opinion for the Court.

I

The Separate Statement initially objects to consideration of the constitutional claims made by the appellants, on the ground that the case should have been remanded to allow the parties to present evidence concerning Congress' intent to "preempt" state domestic-relations law. This strained effort to avoid the difficult questions raised by the appeal cannot withstand critical scrutiny.

[1, 2] The language and legislative history of the Organized Crime Control Act of 1970 ("the Act") make perfectly clear that the Attorney General has been vested with discretionary authority sufficiently expansive to empower him to ignore state-created entitlements to the extent that he has in this case. The Act affords the Attorney General broad authority "to provide for the security of Government witnesses" and their families in the Witness Protection Program. *See* 707 F.2d at 586 n. 6. Nothing in the statute purports to limit the discretion of the Attorney General in circumstances when provision for the protection of a Government witness and his family implicates the rights of a non-custodial parent. There is no doubt that, in establishing a program designed to protect witnesses against organized crime, Congress did not intend to "federalize" domestic-relations law. It seems equally plain, however, that Congress meant to authorize the Attorney General to act, on occasion, in a manner that might be at odds with visitation rights created by state law.

To suggest otherwise, as the Separate Statement seemingly does, is to be blind to the obvious. It is inconceivable that Congress did not anticipate that the implementation of the Witness Protection Program might adversely affect the rights of third parties (such as creditors and non-custodial parents). The Program always has contemplated a change of identity and a relocation of participants to protect against their discovery. Inherent in any such scheme is the possibility that participants will be lost to third parties seeking to collect debts, enforce visitation rights, or the like. Despite these obvious problems, Section 502 of the Act unequivocally states that the Attorney General may include a potential witness and his family in the Program "whenever, *in his judgment*, testimony from, or a willingness to testify by, such a witness would place his life or person, or the life or person of a member of his family or household, in jeopardy." (Emphasis added). Furthermore, under Section 502, participation in the Program may continue "*for as long as the Attorney General determines* the jeopardy to [the inductee's] life or person continues." (Emphasis added).

We need not look solely to the explicit language of the statute, or to the consistent practices of the Government officials who have implemented the Witness Protection Program,[1] in order to understand congressional intent. The legislative history makes evident that Congress meant to empower the Attorney General to act in whatever way he saw fit to alleviate what it regarded as the pressing problem of retaliation against persons who provided evidence against organized crime. In the form in which it was originally introduced, the portion of the Organized Crime Control Act dealing with the protection of witnesses was somewhat less explicit than the final version in granting discretionary authority to the Attorney General. The Justice Department, in its extensive comments on the original bill, "wholeheartedly support[ed] the theory behind" the proposed protection program, but suggested, *inter alia*, that the provision be clarified to ensure that the Attorney General was not fettered in any way in deciding how to act in particular cases.

> [W]e believe that there should be authorization of appropriations for the care and protection of such witnesses to be

1. *See* U.S. GAO, REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES, CHANGES NEEDED IN WITNESS SECURITY PROGRAM, GAO/GGD-83-25, at 14, 18-27 (1983) (describing how, over the course of the 12 years in which the program has been in operation, relocation of witnesses and their households has frequently resulted in frustration of the rights of creditors and relatives of the inductees) [hereinafter cited as "GAO Report"].

used *in whatever manner is deemed most useful under the special circumstances of each case.* Such a provision would provide the *necessary flexibility* to adequately deal with this problem.

Department of Justice Comments on S. 30, *reprinted in* S.REP. No. 617, 91st Cong., 1st Sess. 112 (1969) (emphasis added). The pertinent provisions in the proposed statute were subsequently altered in accordance with the Justice Department's suggestions, whereupon the Department expressed its support for the bill. S.REP. No. 617, *supra*, at 60. The final Senate and House reports leave no doubt as to the outcome of the exchange; both reports stress the extent of the discretionary power the Attorney General was to enjoy:

> *Section 501.*—This section authorizes the Attorney General to provide security for potential witnesses and their families in organized crime proceedings. The proceedings themselves need not be criminal.... It is necessary only that legal proceedings be involved and that the underlying factual situation embrace organized criminal activity.
>
> *Section 502*—This section gives the Attorney General *broad authority* to determine the particular facility to be afforded and the length of time the facilities should be available. *This authority extends* to providing for the health and welfare, and *to offering all needed facilities to witnesses, and to their families or members of a household.* Use of such facilities may continue so long as necessary for protection, and the grant of authority is sufficiently broad to allow for relocation. There is no requirement that anyone accept such an offer by the Attorney General.

Id. at 150 (emphasis added). (The corresponding discussion in the House Report is substantially identical, *see* H.R.REP. No. 1549, 91st Cong., 2d Sess. 48 (1970).)

Recent legislative initiatives seeking to modify the power of the Attorney General in implementing the Witness Protection Program also illuminate Congress' understanding of the extent of the discretionary authority enjoyed by the Attorney General under the statute as it now stands. In recent years, due to increasing concern over the inability of third parties to enforce judgments against Program participants, *see* GAO Report, *supra* note 1, at 14, 18–27, several bills have been introduced in Congress to address this issue. As noted in the GAO Report,

> [i]n general, each bill required the Attorney General to take affirmative actions to urge the relocated person to comply with the judgment and to determine whether the relocated person had made reasonable efforts to comply with the judgment. If the Attorney General determined that the relocated person did not make reasonable efforts to comply with the judgment, *he could, at his discretion, after weighing the danger to the person relocated, disclose the identity and location of that person* to the plaintiff attempting to enforce the judgment.

Id. at 30 (emphasis added). What is noteworthy about these legislative proposals—all of which have been designed to *limit the discretion* of the Attorney General—is that none would *mandate* the disclosure of the identity of a person in the Witness Protection Program when the rights of a non-custodial parent were at stake. Rather, even under the most sweeping of the bills, the Attorney General would still retain the discretion to withhold the identity and location of a Program participant "after weighing the danger to the person." This is clearly consistent with the discretion given to and exercised by the Attorney General under the present Program.[2]

2. The most comprehensive of these bills, H.R. 7039, 97th Cong., 2d Sess. (1982), clearly covers suits by third parties against Program participants seeking to enforce familial rights, *see id.* at § 101 (proposing enactment of 18 U.S.C. § 3521(e))—though, as indicated in the text, it would not *require* the Attorney General to disclose the identity of a participant who refused to comply with such a demand.

Equally telling, in terms of Congress' understanding of the power presently enjoyed by the Attorney General, is the *absence of any provision* for the safeguarding of third-party familial rights in a bill introduced earlier in 1982. One of the purposes of this bill, S. 2420, 97th Cong., 2d Sess. (1982), in the form in which it emerged from the Senate Judiciary Committee, was to increase the ability of third parties to enforce claims against persons accepted into the Program. *See* S.Rep. No. 532, 97th Cong., 2d Sess. 26 (1982), U.S.Code Cong. & Admin.News 1982, p. 2515. Such increased protection was confined, however, to "civil cause[s] of action, arising prior to [the inductees'] relocation, for damages resulting from bodily injury, property damage, or injury to business," *id.* at 5; despite the wide publicity that had been accorded the numerous instances in which acceptance of witnesses and their households into the Program had resulted in disruption of familial relations, nothing in the bill was designed to compel the Attorney General to take into account the potential for such disruption when deciding whom to admit (or when deciding whether to reveal the location or new identity of an admittee). [In October 1982, S. 2420 was enacted into law. Prior to its passage, however, the provisions pertaining to the Witness Protection Program were deleted, pending completion of a study by a Presidential Task Force and "broader examination of the operation of the current program." *See* 128 CONG.REC. S13,063–64 (daily ed. Oct. 1, 1982) (statement of Sen. Heinz).]

In sum, all of the recent legislative initiatives in this area take for granted that the Attorney General currently has statutory authority to act in the fashion he has in this case.

In light of the foregoing, it is quite plain that the Attorney General always has had broad authority under the Organized Crime Control Act to adhere to the practices heretofore followed in the Witness Protection Program. This authority is supported by the clear language and legislative history of the Act. We conclude, therefore, that the Separate Statement's reliance on arguments focused on preemption doctrine is nothing more than a failing attempt to put a square peg in a round hole.[3]

II

The objections advanced in the Separate Statement to the majority's substantive due process analysis merit only brief attention. The Separate Statement is ingenuous enough to admit that its dissatisfaction with the majority's interpretation of the doctrine derives more from distaste for substantive due process theory in general than from disagreement regarding whether the principles established by the Supreme Court are fairly applicable to the instant case. However, a few comments contained in the Separate Statement should not be allowed to pass unchallenged.

First, the suggestion that "the majority has created a fundamental right or interest by predicting a tradition that will spring to life in the future" is plainly wrong. Relying on a demographic study by the U.S. Bureau of the Census, the majority observed that non-custodial familial relations are becoming ever more common in American society. It then reasoned that the absence of a strong tradition recognizing the sanctity of such relationships, which is readily explainable by the relative rarity of "broken families" in American society in the past, should not result in *denial* of constitutional protection for such relationships as they become increasingly prevalent, 707 F.2d at 601, any more than the non-existence of telephones or electronic eavesdropping devices at the time the Fourth Amendment was ratified should be invoked to deny constitutional protection today against

3. Finally, it should be noted that, in the extensive congressional hearings held in 1978 and 1980 to evaluate the operation of the Witness Protection Program, in which the problems generated when admission of witnesses' households disrupted other familial relations were discussed at length, *see Hearings* cited at 707 F.2d at 587 nn. 8, 11, no one suggested that the Attorney General lacked statutory power to admit persons into the Program under such circumstances.

It is somewhat ironic to note that the theory of this case suggested by the Separate Statement is potentially much more drastic than anything envisioned by the majority. Because the Separate Statement urges a preemption analysis in all-or-nothing terms, a finding that Congress had not evinced a desire to "override" state law would render illegal the acceptance of *any* witness (and his or her household) into the Witness Protection Program when the effect thereof would be to disrupt non-custodial familial relations. Alternatively, a finding that Congress *did* intend to "preempt" state law would require us to consider once again the question of Congress' constitutional power to do so. In short, the solution proffered by the Separate Statement would either impose a drastic set of constraints on the Marshals Service or would simply postpone consideration of the difficult constitutional questions that lie at the core of this case.

warrantless "wiretapping" by the police, *cf. Katz v. United States*, 389 U.S. 347, 353, 88 S.Ct. 507, 512, 19 L.Ed.2d 576 (1967). In short, neither the absence of a strong tradition of respect nor a "prophecy" of the development of such a tradition was relied upon in the majority opinion to "*create*" a constitutional right; rather, the absence of the tradition, linked as it is to a social structure different from the present, was not allowed to *defeat* the right.

Second, it is difficult to take seriously the suggestion in the Separate Statement that severance of the bond between a minor child and his or her parent is constitutionally indistinguishable (under the terms of the majority's analysis) from severance of the bond between an adult draftee and his (or her) parent. When children grow up, their dependence on their parents for guidance, socialization, and support gradually diminishes. At the same time, the strength and importance of the emotional bonds between them and their parents usually decrease. Concededly, the bond between a parent and child when the child is an adult usually bears some resemblance to the same bond when the child was a minor. But, as a long line of Supreme Court cases attests, *see* 707 F.2d at 595 & nn. 53–57, the differences between the two stages of the relationship are sufficiently marked to warrant sharply different constitutional treatment.

Finally, the claim made in the Separate Statement that the result of our decision will be to "federalize[ ]" the "entire body of state domestic relations law" surely is a false alarm. Supreme Court decisions have long established that, when regulating the relations between parents and children, states must abide by certain minimal constitutional requirements—both substantive and procedural. *See Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L.Ed.2d 599 (1982); *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 554, 54 L.Ed.2d 511 (1978) (dicta); *Smith v. Organization of Foster Families*, 431 U.S. 816, 842, 97 S.Ct. 2094, 2108, 53 L.Ed.2d 14 (1977) (dicta); *Stanley v. Illinois*, 405 U.S. 645, 651–52, 92 S.Ct. 1208, 1212–13, 31 L.Ed.2d 551 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944) (dicta); *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35, 45 S.Ct. 571, 573–74, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). The opinion for the court in this case, limited as it is to situations in which government officials permanently sever "all ties between a non-custodial parent and his children without their participation or consent," 707 F.2d at 602, will not significantly tighten the constraints within which the states must operate.[4]

III

The Separate Statement, finally, takes issue with the brief discussion in the concluding section of the majority opinion regarding the relevance of procedural due process doctrine to this case. With a bit of hyperbole, the Separate Statement suggests that the majority opinion is "wholly inadequate to meet the majority's own concerns, much less to deal with other serious problems."

The bulk of the comments made in the Separate Statement are founded on one or more of three serious misinterpretations of the majority opinion. First, the Separate Statement presumes that the opinion for the court "prescribes" a set of procedures for future use in situations resembling this case. The opinion for the court does nothing of the kind. It holds simply that the appellants have not been accorded the procedural protections required by the Constitution and then goes on to identify "some of the major considerations that must be taken into account when designing a system for dealing with cases of this sort." 707 F.2d at 608. The majority opinion disavows any intent (as the Separate Statement puts it) to "take the lead in devising the necessary procedures." The proposals made in the majority opinion are deliberately styled "suggestions" to "a body with greater knowledge than we possess of the ways in which the Witness Protection Program does or might operate." 707 F.2d at 608. To characterize the majority's analysis as the formulation of a rigid set of procedures, with which the Marshals Service henceforth must comply, is wholly without justification.

Second, the Separate Statement conveniently ignores one of the suggestions that the opinion for the court does make. The majority ventures a guess that an "informal" procedure would be likely to work best in this peculiar context. 707 F.2d at 609. To read the Separate Statement, one would think that the majority opinion mandates a full-blown judicial proceeding. The Separate Statement expends considerable effort in demonstrating that such a procedure would likely be both unworkable and unhelpful—effort that, insofar as it is designed to topple a portion of the opinion for the court, is entirely wasted.

Finally, the suggestion in the Separate Statement that the opinion for the court would require proof, in each instance, that "the testimony of [the] informant is *essential* to the prosecution of an important leader of organized crime and that the interests of [the] noncustodial parent and members of the informant's household cannot be accommodated without risking human life" is folderol. The quoted language is taken from the section of the majority opinion that discusses (without resolving the question) whether, in a situation in which the Marshals Service could not arrange secret meetings and in which induction of a witness and his household would entail, consequently, permanent severance of the bond between a non-custodial parent and his offspring, the strongest governmental objective imaginable would be sufficient to justify abrogation of the parent's and children's rights. 707 F.2d at 607. Never is it suggested that, in every case in which a witness and his household were accepted into the program, the government would in the future be required to demonstrate the existence of the conditions described above. The opinion for the court ventures no ruling on the issue of what precisely would have to be proved in each case. The refusal to do so was deliberate; as the majority pointed out (and as the Separate Statement appears to agree), we simply lack sufficient evidence at this juncture to make judgments of this sort.

In many respects, the discussion in the last section of the Separate Statement is highly unfortunate. Some of the comments in the Separate Statement, regarding the practicability of various procedural options, are both insightful and perfectly consistent with views espoused in the majority opinion. Sadly, however, these comments are often obscured by overstatements and misstatements. For example, the Separate Statement confidently asserts that non-custodial parents whose former spouses become affiliated with members of organized crime are more likely than average non-custodial parents to be themselves affiliated with organized crime. There is no reason for making such an assumption, and the Separate Statement certainly offers none.

Similarly, when the Separate Statement finds inconvenient the assertions by the Marshals Service that it is capable of arranging secret meetings between children in the Program and their non-custodial parents, it simply refuses to accept them. This cavalier repudiation of statements made by (a) the defendants in their brief, (b) the defendants' counsel at oral argument, and (c) the Director of the Marshals Service and the Chief of the Witness Security Division in hearings before a Senate Subcommittee, insisting not only that they are capable of arranging such meetings but that they have done so in the past, *see* 707 F.2d at 590 & n. 28 (and *Hearings* cited therein), makes it extremely difficult to engage in a legitimate discussion of the issues.

CONCLUSION

The Separate Statement is no doubt correct in observing that the factual basis of this case has not been fully developed. A host of questions will have to be explored

4. The suggestion that a requirement that government demonstrate a good reason before severing the bond between a child and his non-custodial parent will "undermine the institution of the intact marriage" is sufficiently ludicrous as to merit no rebuttal.

before the case is concluded. At this point, however, we are obliged only to decide the issues presented on this appeal. The District Court, 526 F.Supp. 126, dismissed the suit for failure to state a claim on which relief can be granted. We have been asked whether, on the facts as alleged in the complaint, that ruling was correct. Neither impatience with the "legal and factual mess" out of which the dispute arises nor uneasiness at the prospect of dealing with the ungainly constitutional doctrines implicated by the case relieves us of our duty to answer the question presented. For the reasons stated in the opinion for the court, we have *enough* information to determine whether the appellants have stated a claim, and we conclude that they have.

BORK, Circuit Judge, concurring in part and dissenting in part:

I agree that the judgment must be reversed. The complaint states a claim for relief and should not have been dismissed. I can, however, agree to very little else in the majority opinion. The majority has passed by the threshold legal issue in this case in order to create a new constitutional right and invent a new procedure to protect it. The result is not a happy one. The right is dubiously grounded and the procedure protects very little. In my view of this case, we are a long way from having to deal with the issues the majority reaches for.

I.

The Organized Crime Control Act of 1970 created the Witness Protection Program. Under the program, the testimony of witnesses against participants in organized crime is obtained by the promise of relocation to protect witnesses and their families from reprisal. Complete secrecy concerning the whereabouts and new identities of the relocated persons is essential. So far as appears, neither Congress nor the Executive foresaw or grappled with the problems created when relocation sunders family ties and breaches rights created by state law. Such cases have begun to surface. This may be one. William Franz, who brings this action on behalf of his children and himself, married Catherine Mary Franz. The couple had three children but later separated and, still later, divorced. Catherine, who had custody of the children, began to live with, and may have married, Charles Allen. Allen, apparently a contract killer for organized crime figures, agreed to testify in a federal criminal trial if he, Catherine, and the three children were admitted to the Witness Protection Program. The government met Allen's condition, and William Franz has been unable to find his children since. Through this litigation, he seeks to vindicate the right to visit them.

The legal and factual background against which this action must be judged is less than clear. This case has gone forward on the assumption that in February, 1974, after the separation but before the divorce, a Pennsylvania court gave William visitation rights with respect to the children and gave Catherine custody, if she did not already have it. It is suggested in this court, however, that William may not have been awarded visitation rights, and no record of a visitation order has been found. We do not know whether, if there was no visitation order, William would nevertheless have visitation rights under Pennsylvania law, assuming that law to be controlling. We do not know what defenses Pennsylvania law provides Catherine in an action brought by William to enforce his visitation rights. Nor do we know whether persons (such as the defendants here) violate state law when they assist the custodial parent in defeating the visitation rights of the other parent. *See generally* Novinson, *Post-Divorce Visitation: Untying the Triangular Knot*, 1983 U.Ill.L.Rev. 121; Campbell, *The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings*, 1983 U.Ill.L.Rev. 229, 247–56. In fact, given the absence of any decree, we are not even certain that Catherine had legal custody of the children. Moreover, the legislative history of the Witness Protection Program has been so little explored that we do not know whether Congress ever considered the problem of state rights of visitation,

and we most certainly have no inkling what impact giving effect to such rights would have on the federal interest in the successful operation of the program. If I am right that answers to these questions are crucial, the short of the matter is that we know almost nothing that we need to know to decide the merits of this case. The case should be remanded so that the district court can determine the answers and proceed accordingly.

II.

Assuming that William Franz and his children have a right under state law to see one another, there is no doubt that that right has been destroyed by Catherine Franz with the assistance of officers of the United States purporting to act under the authority of a statute of the United States. If Pennsylvania law recognizes a tort of interference with visitation rights, or provides some other remedy to William, the question in this case is then simply whether the Organized Crime Control Act shields the United States and the defendant officers of the United States from liability. As the record now stands, I think the Act probably does not. But I stress that further development of the legislative history and of the effect enforcing visitation rights would have upon the Witness Protection Program might change my mind.

Congress, in creating the Witness Protection Program, apparently did not consider whether the federal interest in combatting organized crime required it to displace the interest of the states in regulating family relations. We have been shown no direct evidence of any congressional intent to oust state laws in the area. This is not an end to the matter, however, for it is well-established that federal legislation may oust state law where evidence of such an intent, real or presumed, may be garnered indirectly—from, for example, the pervasiveness of the scheme of federal regulations, the dominance of the federal interest, or the inconsistency of state law with the federal law. *See generally* Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 Colum.L.Rev. 623 (1975).

It is relevant to this determination that the state laws here in question regulate family relations, a subject that lies at the core of the police powers of the states. As the Supreme Court observed in *Sosna v. Iowa*, 419 U.S. 393, 404, 95 S.Ct. 553, 559, 42 L.Ed.2d 532 (1975), the field of domestic relations "has long been regarded as a virtually exclusive province of the States." Congress has evidenced a similar understanding of the allocation of powers between the nation and the states by generally avoiding direct interference with state regulation of family relationships. So strong has this tradition been that it was long simply a given that federal power could not touch this area of life. Thus, Justice Holmes regarded this as axiomatic in an argument concerning the reach of the commerce clause: "Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce." *Northern Securities Co. v. United States*, 193 U.S. 197, 402, 24 S.Ct. 436, 468, 48 L.Ed. 679 (1904) (Holmes, J., dissenting).

Today, the commerce power attaches to effects on commerce that are no more direct or substantial than those in Holmes' hypothetical; yet it remains true that family law continues to be regarded as almost entirely a state matter. Whatever current constitutional limits to federal power may be, it is absolutely clear that federal preemption in areas of family law must, at the very least, meet stringent standards to succeed. In *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S.Ct. 802, 808, 59 L.Ed.2d 1 (1979), the Supreme Court stated:

> Insofar as marriage is within temporal control, the States lay on the guiding hand. "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593–594 [10 S.Ct. 850, 852–853, 34 L.Ed. 1500] (1890). Federal courts repeatedly have declined to assert jurisdiction over di-

vorces that presented no federal question. See, *e.g., Ohio ex rel. Popovici v. Agler*, 280 U.S. 379 [50 S.Ct. 154, 74 L.Ed. 489] (1930). On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be pre-empted. *Wetmore v. Markoe*, 196 U.S. 68, 77 [25 S.Ct. 172, 176, 49 L.Ed. 390] (1904). A mere conflict in words is not sufficient. State family and family-property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that state law be overridden. *United States v. Yazell*, 382 U.S. 341, 352, 86 S.Ct. 500, 506, 15 L.Ed.2d 404 (1966).

The majority opinion brushes these constitutional concerns aside with the remark, "Assuming, *arguendo*, that the Attorney General needed such authority to effect the kind of incidental, *de facto* displacement of state law at issue here, he possessed it." Maj. op., 707 F.2d at 586 n. 5. The authority cited for this is section 501 of the federal statute. Pub.L. No. 91–452, § 501, 84 Stat. 922, 933 (1970) (codified at 18 U.S.C. *prec.* § 3481 (1976)). It will not do to shrug off the most fundamental precepts of federalism so casually. The displacement of state law may be incidental to a federal program, but that does not enhance an inference of preemption; indeed, it weakens the inference that it was Congress' purpose to preempt state laws. *See Hines v. Davidowitz*, 312 U.S. 52, 70, 61 S.Ct. 399, 406, 85 L.Ed. 581 (1941); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Preemption is more likely to be inferred where the displacement of state law is of central rather than peripheral importance. Nor is it clear why the nullification of law is *de facto* rather than *de jure*, much less why such a characterization makes the nullification constitutionally less suspect. The truth is that a federal officer needs authority to set at naught the legal commands of a state government, and no such authority is explicit in section 501. That provision states:

> SEC. 501. The Attorney General of the United States is authorized to provide for the security of Government witnesses, potential Government witnesses, and the families of Government witnesses and potential witnesses in legal proceedings against any person alleged to have participated in an organized criminal activity.

That is authority to run the program to protect witnesses. It cannot be taken as the authority to override state family law that *Hisquierdo* requires. The statute probably does not even create a "mere conflict in words." Most certainly section 501's text does not justify a conclusion that "Congress has 'positively required by direct enactment' that state law be preempted." It is possible that state visitation rights would "do 'major damage' to 'clear and substantial' federal interests," but the government has not urged that in this court and we have no way of knowing. If preemption is to be found, the government should give us the factual basis upon which to rest such a conclusion.

It appears, so far as we are informed, that Congress has not addressed the extent to which, if at all, it wishes to oust state domestic relations law for the greater efficiency of the Witness Protection Program, or considered what accommodations might be possible between the interests thus brought into conflict. Under these circumstances, we should not infer an intent to preempt that may be entirely fictitious.

The district court relied upon *Leonhard v. United States*, 633 F.2d 599 (2d Cir.1980), *cert. denied*, 451 U.S. 908, 101 S.Ct. 1975, 68 L.Ed.2d 295 (1981), in dismissing William Franz's complaint. Though the father there was in a position like William's here (seeking to vindicate both his own and his children's rights) and had state court decrees awarding visitation and then custody, he relied solely, and unsuccessfully, on the due process clause of the fifth amendment. My analysis at this stage of the case rests entirely upon a tentative conclusion that rights assumed to have been given by state law have not been extinguished by Congress. That issue was not present in *Leonhard* and that decision does not, therefore, justify dismissing the complaint here.

The correct resolution of the issues here is to remand the case for a determination of the state legal rights involved. The district court should determine whether William Franz has a state law right to visit his children, whether state law provides a remedy against third parties (here federal officers) who assist in the frustration of that right, whether there are defenses available to those who oppose visitation, defenses such as, perhaps, the safety of the children or the safety of their mother and stepfather. Doubtless, other issues may be presented for legal and factual determination. For example, plaintiffs pleaded a claim under the Administrative Procedure Act, 5 U.S.C. § 706 (1976), which has not been addressed. Because this appeal has somewhat refocussed the issues, had my view prevailed the government would also have been given the opportunity to establish preemption.

It would be premature to specify the details of possible remedies until we know more of the legal and factual terrain on which any remedy must operate. This is particularly true in light of the difficulties and complications discussed in Section III of this opinion.

It would be inappropriate to speculate now about the constitutionality of the nullification of state visitation law should further evidence require a finding of attempted preemption by the Witness Protection Program or, assuming an attempt to preempt is not inferred, if some presently unpredictable congressional response occurs. Should Congress desire to override some aspects of state domestic relations law in the interests of the program, it will be time enough to decide if there are limits to federal power in this area.

III.

Because the majority opinion takes an altogether different tack from mine and creates new law, it is necessary that I state the reasons why I do not join my colleagues. These reasons have to do with my brethren's unduly expansive discussion of state action, their suggestion that a congressional factual determination may be wrong, the infirmities of their substantive due process analysis, and the difficulties, amounting to impossibilities, with the procedures they find necessary to protect the right they create.

A.

In the view I take of this case, there is no need to ask whether "state action" exists. The majority, because it assumes that the Witness Protection Program makes irrelevant William's rights under state law, must find action by the United States before it can proceed to construct a constitutional right. That there is state action here seems indisputable. Officers of the United States, acting under color of federal law, have removed William's children from their prior residence to a place where William cannot find them, have provided Catherine with the means to keep the children's whereabouts secret, and continue to frustrate William's efforts to locate his children. All this is done in furtherance of a federal program, since, if William could find his children, the protected witness might be less safe and potential witnesses in the future might be unwilling to testify because of the diminished protection the program affords. William's injury, therefore, flows directly from deliberate governmental decisions and actions that inflict the injury for governmental purposes. There seems no question in these circumstances that the complained of injury can be "fairly attributable to the state." *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). *Compare Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982).

So plain is that conclusion that there is no need for the proliferation of theories of state action, some with no definable limits to them, in the majority opinion. These theories are unnecessary to decide this case and some of them appear to have worrisome ramifications. I regret that the majority has gone out of its way to endorse

them because the expansion of amorphous state action theories results in constitutionalizing more and more aspects of life, thereby increasingly substituting rule by judges for rule by other institutions and by private individuals.

B.

It is not to be doubted by an inferior court that substantive due process is part of our constitutional law. The Supreme Court has made it so, and that must be enough for us. Though the doctrine fell into general disrepute after decisions such as *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. (1897), and *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), it was revived by the Court, with a decidedly different content, in decisions such as *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). The majority is quite correct in saying that the Court has fashioned both a substantive and procedural constitutional law of family relations in cases such as *Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978). *See also* Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 Mich.L. Rev. 463 (1983).

To recognize this is one thing; to go further than the Supreme Court ever has and create for a non-custodial parent a new substantive right to visit his or her children is quite another. The majority emphasizes that the infringement alleged is not merely a curtailment or disruption of the parent-child relation but its permanent termination. The constitutional right is to continue visits in order to avoid that termination. I cannot agree that the Constitution of its own force establishes any such right for a non-custodial parent.

It is always somewhat difficult to criticize substantive due process decisions with any degree of rigor precisely because they proceed, necessarily, by rather amorphous generalizations concerning such matters as tradition, the desirability of cultural heterogeneity, and the like. There is much discussion of that sort in the majority opinion here. I do not disagree with many of the general sentiments expressed, but that does not mean those sentiments add up to a constitutional right.

As ill-defined as the mode of reasoning appropriate to substantive due process is, there are, or ought to be, limits to what a court can accomplish with that type of argument. Since the Constitution itself provides neither textual nor structural guidance to judges embarked upon this chartless sea, it behooves us to be cautious rather than venturesome. I think the majority is unduly bold in what it does here. The Supreme Court has established procedural constitutional protections for various relationships within the family. The Court has never enunciated a substantive right to so tenuous a relationship as visitation by a non-custodial parent. The reason for protecting the family and the institution of marriage is not merely that they are fundamental to our society but that our entire tradition is to encourage, support, and respect them. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 232–33, 92 S.Ct. 1526, 1541–42, 32 L.Ed.2d 15 (1972), and *Bellotti v. Baird*, 443 U.S. 622, 638–39, 99 S.Ct. 3035, 3045–46, 61 L.Ed.2d 797 (1979) (plurality opinion). *See generally* Hafen, *supra*, 81 Mich.L.Rev. 463. That cannot be said of broken homes and dissolved marriages. In fact, to throw substantive and not simply procedural constitutional protections around dissolved families will likely have a tendency further to undermine the institution of the intact marriage and may thus partially contradict the rationale for what the Supreme Court has been doing in this area.

Indeed, the majority takes the usual argument for creating fundamental rights and runs it backwards. Fundamental rights are usually grounded in the existence of a tradition of respect for the cultural institution in question. The majority notes that there is no comparable tradition of respect for the bond between a child and his non-custodial parent. Maj. op. at 600. That would seem a considerable difficulty for fundamental rights analysis. But the majority turns the difficulty to advantage by prophesying a continuing trend toward divorce and hence the increased social importance of the "broken" family. This, the majority declares, is sufficient to permit ignoring the absence of a strong tradition with respect to non-custodial parents. In effect, the majority has created a fundamental right or interest by predicting a tradition that will spring to life in the future. Courts have enough trouble identifying and deriving specific meaning from traditions that are real and have been with us for centuries past without imagining traditions that have yet to exist.

The argument of the majority opinion also rests heavily upon the importance of the emotional bond between the non-custodial parent and the child. No doubt there is usually such a bond and the termination of the relation between the parent and the child will cause considerable distress. It would be well, however, if there were some additional analysis indicating how this form of emotional distress differs from others that the majority does not, I assume, wish to make the foundation for additional fundamental rights. Suppose, for example, that a mother brought suit protesting her son's induction into a dangerous branch of the armed services. In such a case, there would be at least a temporary and quite possibly a permanent severance of the relation. Moreover, there would be in that case, as there is not in this, a strong tradition of respect for the relationship. And, since the majority mentions the promotion of cultural heterogeneity as a factor to be promoted, it may be noted that the armed services tend to foster cultural homogeneity. Though the majority emphasizes the narrowness of its reasoning, *see, e.g.*, maj. op. at 602, it does so merely by assertion; it does not identify any limiting principles that would prevent its reasoning from being applied to situations like the one just described. The majority's reasoning, in short, lacks rigor and, on its own terms, could produce quite surprising results.

The decisive argument against judicial creation of a substantive constitutional right of a non-custodial parent to visit his or her children is that it is likely to make many state law denials of a right of visitation, or of custody, subject to federal constitutional challenge—a challenge based not upon the need for adequate procedures but upon some federal substantive standard. The majority states that its principle is limited to cases of *permanent* severance of the relation between parent and child, but it is doubtful that the underlying rationale permits the principle so to be confined. The rationale is the protection of the emotional bond between parent and child. A temporary severance of significant length is likely in many cases to destroy the emotional bond. Thus, on the majority's rationale, a denial of visitation rights or of custodial rights, if it lasted a significant period of time, should fall within their principle of constitutional protection. Once this substantive right is in place, a state will have to muster a "compelling need" whenever it wishes significantly to deny visitation rights or custody to one parent. The major component of the necessary showing would be, one assumes, the "best interests of the child." Such determinations would be subject to constitutional challenges in federal courts and so we would come to have a constitutional law of what constitutes the best interests of the child. This entire body of state domestic relations law would be federalized. It would be difficult to imagine a subject less appropriate for constitutional law and the federal judiciary.

C.

Also troubling is the majority's willingness to enter upon the topic of the propensity of organized crime leaders to eliminate potential witnesses and to retaliate against those who have already testified. Although the majority states that it declines to speculate because of the paucity of relevant evidence in the record and the inconclusiveness of data available from other sources, it does conclude that the matter is in sufficient doubt that "the assessment of the relative strength of the government's interest and the parent's and children's rights will be a

difficult task for the body that must ultimately undertake it." Maj. op. at 606. This clearly indicates that some undefined "body" may decide that the evidence of organized crime's propensity to kill potential and actual witnesses is too weak to justify ending the newly constitutionalized visitation rights of a non-custodial parent. If that "body" is Congress, I have no problem with the suggestion. But, since the observation is made in connection with a discussion of the compelling interest that must be shown to overcome a "fundamental liberty interest," it appears that the majority is suggesting that a court or some other arbiter may decide that Congress has insufficient evidence about organized crime to make the choice. If so, the suggestion is extraordinary. Congress has already decided that persons engaged in organized crime kill witnesses. That is an entirely reasonable judgment and it is conclusive upon us and upon any other tribunal that may become involved in this area.

D.

The majority's reasoning is weakest when it prescribes a hearing "to work out some accommodation of the rights of the children and the parent left behind." Maj. op. at 609. Initially, I wish to show that this "hearing" cannot accomplish the results the majority intends and is wholly inadequate to the grave issues the majority says must be reconciled. But I do not rest upon that point, since it would be possible to devise a better hearing, though that, too, would face difficulties so grave that an appellate court, working with a record as devoid of information as the one we have here, ought not to take the lead in devising the necessary procedures. That task should, at least in the first instance, be undertaken by Congress or the Executive. With the record made, the problems and possible solutions explicated, judicial review could apply constitutional values to a real rather than a hypothetical set of procedures.

The hearing the majority has devised is to be held within the three-day period between a decision to admit an informant to the Witness Protection Program and the execution of that decision by the Marshals Service. It is to be secret, because secrecy is essential to the safety of everyone involved. It is to be informal and is to stress "negotiation and accommodation" between the custodial and non-custodial parents as well, one assumes, as among these and the informant, whose life is at stake, and the children. It is also to determine whether, in the particular case, the government has shown that its compelling interest outweighs the constitutional right of the non-custodial parent to visitations with the children. We are told that the government is to make a particularized showing of advantage in the specific case, maj. op. at 606, which seems to mean a showing that "the testimony of an informant is *essential* to the prosecution of an important leader of organized crime and that the interests of a non-custodial parent and members of the informant's household cannot be accommodated without risking human life." Maj. op. at 605 (emphasis in original).[1] This means the government will have to lay out its case against the organized crime leader and show both the figure's importance and the necessity of the informant's testimony. It will also have to show the absence of any effective alternative that is less restrictive of visitation rights. The majority concedes that judicial review of the decision made will be virtually impossible. In short, the hearing is to be hasty, secret, informal, and unreviewable, but nonetheless charged with the determination of what the majority conceives to be the most fundamental human rights. It does not sound promising.

Some problems are created because the majority has confined its prescribed hearing

1. It should be noted that the majority has, without explanation, imposed three major additional limits on a statute that itself requires only that the person be a witness or potential witness in "legal proceedings against any person alleged to have participated in an organized criminal activity." The statute does not require that the witness' testimony be "essential," that the legal proceeding be a "criminal prosecution," or that the proceeding be against an "important leader" of organized crime.

to the three-day period between the decision to admit the witness to the program and the execution of that decision by the Marshals Service. This hearing apparently will consist of two proceedings that, because of the time constraint, will often have to go forward simultaneously. One will be the attempt to negotiate a compromise secure enough to guarantee the relocating family's safety and open enough to allow the non-relocating parent a good chance of maintaining his bonds with his children. As I will discuss below, the relocating family is likely to think, with some justification, that any visitation rights, certainly any rights to visit frequently enough to sustain the emotional bond that the majority seeks to protect, will be unacceptably dangerous. The non-custodial parent, on the other hand, is likely to insist on the maximum amount of visitation, or at least the amount he could get, or has already gotten, from a divorce court. Nor is that parent likely to agree to fly to a series of changing locations around the country in order to enhance security. If the emotional bond is the crux of the matter, he will want the children brought to his home so that the visit can take place in an atmosphere conducive to the maintenance of that bond. Aside from the objective differences in the parties' real interests, it must be remembered that the separated parents are unlikely to be friends eager to accommodate one another and that the subject matter of this meeting will be emotionally highly divisive. If that were not enough to preclude compromise, the non-custodial parent will simultaneously be engaged in an adversarial proceeding with the government, a proceeding in which the relocating family will be ranged on the government's side. The prospects for agreement would be dim at best, but they are made worse by the setting and the time constraints on the proceedings.

Some of this could be cured. There is no reason to accept as unalterable the present administrative practices of the Marshals Service. If the hearing were placed in an absolutely secure setting, such as a military base, the non-custodial parent could be given adequate notice and the hearing itself could take as long as required. But even then the hearing would be unlikely to produce the conciliation that the majority hopes will make the problem go away. Moreover, though the difficulties of the adversarial process would be mitigated by advance notice and a lengthier hearing, they would remain substantial and perhaps fatal to the purposes the majority hopes to serve. Supposedly, the non-custodial parent is to be given the opportunity to challenge the government's showing that some third person not present is a leader of organized crime and that he can be convicted only if the informant testifies. The government can hardly be expected to make public its case against the leader of organized crime in advance of his prosecution and to explain what the witness will testify to and why a conviction is impossible without that testimony. Every hearing of the sort mandated would impose a significant risk that all of that information would become public.

On the other side, the non-custodial parent, even assisted by able counsel, would have an enormously difficult task in meeting the government's case. Presumably, he will have no way of showing that the absent person is not a leader of organized crime. He will have no way of rebutting a showing that the witness' testimony is essential. To do these things, the non-custodial parent would have to engage in extensive prehearing discovery into the workings of organized crime and would have to be able to summon his own witnesses and cross-examine the government's witnesses. These are rights he can hardly be accorded and would not have the resources to pursue in any event. The non-custodial parent is placed in a position of having to conduct a defense of the absent person the government wishes to prosecute to show his unimportance as well as a prosecution to show the witness is unnecessary. This is all highly unrealistic. The government's showing of a compelling interest will usually go virtually uncontested. That will be true regardless of the amount of notice given or the length of the hearing. Without the right to discovery, without the right to

summon witnesses, without the right to effective cross-examination, without anything we believe the ordinary litigant absolutely requires, the non-custodial parent, even with the ablest counsel, will usually be helpless. His only contribution will be to lend legitimacy to the process by his presence.

There are many things we are not told about the hearing the majority requires—the official, if any, who is to preside, the need for counsel, the standard of proof the government must meet, the level of inquiry into the non-custodial parent's fitness and trustworthiness, and the rules of procedure that will govern. The one thing we may be sure of is that the hearing will not be adequate to make a fair and accurate assessment of the issues the majority would entrust to it.

The problem is greater than this, however. It may be that the issues necessarily involved in the situation we are confronting simply do not lend themselves to judicialization or to a solution that satisfactorily balances the interests necessarily in conflict. I will try to suggest the problems that may lead to that conclusion, though I do so very tentatively because I know much too little to make any confident statements about this subject.

The focus of any hearing, as the majority notes, must be whether the non-custodial parent's visitation rights are to be terminated or given effect through meetings arranged by the Marshals Service. The primary issue will be the safety with which such meetings can be arranged. Counsel for the government has stated to us that the Marshals Service can arrange such meetings safely. I am unwilling to give dispositive weight to that concession without greater consideration of the practicalities than is possible on the record before us. For one thing, I am not sure that, with respect to people already in the program, we should accept the statement of the Marshals Service as conclusive if the people whose lives are at stake disagree. We do not know why Catherine has refused to allow visits to be arranged. Beyond that, and taking into account other cases as well as this one, there seems to me good reason to be skeptical about the Service's statement that it can conduct adequate visitations safely.

It is reasonable to believe that leaders of organized crime will be assiduous in their efforts to find witnesses hidden by the Witness Protection Program. Aside from ordinary motives of vengeance, leaders of organized crime surely have a strong and continuing "business incentive" to kill former witnesses or members of their families even years after the testimony has been given. The success of such reprisals would demonstrate to potential future informers that the Witness Protection Program is not a safe harbor for turncoats.

Where safety from the vengeance of organized crime is the issue, as it must be if the federal interest is to be served, a central concern must be the character and trustworthiness of the non-custodial parent. The hearing officer must of course determine whether the non-custodial parent is motivated—perhaps because of vindictiveness or perhaps because he is assisting leaders of organized crime—by a desire to make the location of the informant known. That motivation is by no means impossible. One district court has found in a case like this that a parent's effort to find her children was a "vehicle of intended homicide." *Ruffalo v. Civiletti*, 565 F.Supp. 34 (W.D.Mo. 1983). Non-custodial parents whose estranged spouses take up with organized crime figures are more likely than a random sample of all non-custodial parents themselves to have some connection or acquaintance with organized crime. The hearing officer will often have grave difficulty in estimating the real motivations of non-custodial parents.

But the problems are grave even when the non-custodial parent's motives are entirely pure, as usually they will be. If the parent should learn or allow himself to learn the location of his former wife from the children, he may be subject to bribery, coercion, or other pressure from criminals bent on reprisal. He may inadvertently let slip that location or the fact that he knows

it. Making reliable judgments about a person's ability to avoid learning what he should not know and to maintain silence about what he knows is obviously an almost impossible task. If the arbiter, whoever he or she may be, makes a mistake about the character or motives of the non-custodial parent and grants visitation rights that should have been withheld, the results may well be the deaths of the relocated family members.

Problems of a different sort may be imagined. As noted, a non-custodial parent who is truly interested in maintaining an emotional bond to his children will require frequent visits and will want them at his home, not a hotel in some distant city or a room at some airport. Thus, to take a plausible hypothetical, the non-custodial father may seek and be granted weekly or monthly visits at his home. If these are to continue for, say, ten years, the cost will be enormous, though that is not my main point. Instead, what must be recognized is that 520 or 120 visits present an enormous security problem. The Marshals Service will have to make sure that the father does not learn the location of the relocated family, as he well might from small children, or, if he should learn the location that he, too, is guarded. The Service will also have to ensure that, despite the frequency and hence predictability of the visits, the children are safe from kidnapping.

It may be that I have exaggerated the dangers in the situation; it may also be that I have underestimated them. The point is that I do not know, and that no judge on this court knows. We have at present no basis for making any judgment. I set out my doubts about the hearing prescribed by the majority and their reliance upon counsel's assertion that visits can be safely arranged simply because we are deciding matters of enormous difficulty in the abstract, without full knowledge of what the problems are or what the government's range of solutions might be. Instead of plunging ahead to devise a procedure that has little chance of being useful, we ought to insist that those with the capacity to gather the relevant information and to provide the resources for a solution address the problem and do so expeditiously.

IV.

This case presents issues of human rights but it does so against a background that is, to put it bluntly, a legal and factual mess. The one thing I am sure of is that the majority has reached issues that are not ripe for resolution and prescribed a remedy that is wholly inadequate to the gravity of the majority's concerns and that may prove a disaster for both the individuals involved and the Witness Protection Program. Had the case been decided on the grounds I urge, and had federal preemption of state domestic relations law not been shown, the situation would have been put squarely where it belongs, in Congress. Congress may well have overlooked the problem of state custody and visitation rights in establishing the Witness Protection Program. If so, Congress should decide whether it really wants to preempt state law in this area and whether it wants to provide procedures to balance the rights of non-custodial parents and the federal interest.

If preemption has occurred, so that state rights of visitation are nullified, and if the majority wishes to stand by its construction of a new constitutional right of visitation, the proper course would be to stop the program until either Congress or the Executive had worked out better procedures, ones more sensitive to the problem, than they have constructed or can construct in the abstract. Meanwhile, the district court should have been instructed to take evidence relating to the problems of a remedy and devised visitation rights for William Franz. If the new substantive constitutional right had not been constructed, William would still have had a liberty interest requiring due process, a right which, if he had no state or federal substantive right, would have been vindicated by a process designed to determine whether the Attorney General, through his delegate, had acted within the ambit of the authority granted by Congress.

Instead, the majority, in a footnote, offhandedly finds federal preemption of state domestic relations laws, and does so without heeding Supreme Court precedent; innovates in creating a new fundamental right out of a tradition that does not exist; casts doubt on the validity of Congress' determination that organized crime leaders kill witnesses against them; limits the coverage of the statute creating the Witness Protection Program; and requires hearings, many of whose major features are not described, and which are, in any event, wholly inadequate to meet the majority's own concerns, much less to deal with other serious problems. Perhaps the Attorney General can figure out what he may lawfully do next. I cannot.

John BRIGGS, et al., Appellants,

v.

Guy GOODWIN, et al.

No. 80-2269.

United States Court of Appeals, District of Columbia Circuit.

July 8, 1983.

Before GINSBURG, Circuit Judge, and BAZELON and MacKINNON, Senior Circuit Judges.

ORDER

PER CURIAM.

Upon consideration of the petition for rehearing filed herein, and this Court having entered a judgment on January 11, 1983, 698 F.2d 486, reversing the decision of the United States District Court for the District of Columbia for the reasons set forth in an opinion for the Court filed that same day, and this Court being of the view that its earlier disposition should be set aside, it is

ORDERED, by this Court, that appellee's petition for rehearing is granted and this Court's judgment and opinion filed herein on January 11, 1983 are hereby vacated, for the reasons set forth in an opinion for the Court filed this date.

John BRIGGS, et al., Appellants,

v.

Guy GOODWIN, et al.

No. 80-2269.

United States Court of Appeals, District of Columbia Circuit.

July 8, 1983.

A *Bivens* type action was brought against a special prosecutor charging violations of the Sixth Amendment based on an alleged misrepresentation that a witness who had been summoned before a grand jury was not a government informant. The United States District Court for the District of Columbia, 384 F.Supp. 1228, denied a motion to dismiss. The Court of Appeals, 569 F.2d 10, affirmed. On remand, the District Court, Aubrey E. Robinson, Jr., Chief Judge, rendered summary judgment for the United States attorney, and appeal was taken. The Court of Appeals, 698 F.2d 486, reversed and remanded. Upon a ruling of the Supreme Court, supplemental briefing was ordered and a rehearing was granted. The Court of Appeals, Bazelon, Senior Circuit Judge, held that a United States attorney who allegedly gave false sworn testimony before a district court during grand jury proceedings enjoyed absolute immunity as a witness.

Affirmed.

MacKinnon, Senior Circuit Judge, concurred and filed an opinion.

1. District and Prosecuting Attorneys ⇐10

United States attorney enjoyed absolute immunity at time he allegedly knowingly gave false sworn testimony at hearing on motion during grand jury proceedings, despite plaintiff's claim that false testimony violated his Sixth Amendment rights. U.S. C.A. Const.Amend. 6.

2. United States ⇐50

Rationale behind allowing police and other government witnesses testifying in their official capacity to have absolute immunity in civil suit for damages for allegedly giving perjured testimony, that absence of immunity would interfere with ability of judicial proceedings to determine where truth lies, applies with equal force whenever witness testifies in judicial proceeding the function of which is to ascertain factual information.

On Petition for Rehearing.

Robert Boehm, Washington, D.C., Morton Stavis, Hoboken, N.J., Cameron Cunningham, East Palo Alto, Cal., Brady Coleman, Austin, Tex., Jack Levine, and Philip J. Hirschkop, Alexandria, Va., were on the Supplemental Memorandum for appellants.

Robert F. Muse and Jacob A. Stein, Washington, D.C., were on the Petition for Rehearing and Supplemental Memorandum for appellees.

Before GINSBURG, Circuit Judge, and BAZELON and MacKINNON, Senior Circuit Judges.

Opinion for the Court filed by Senior Circuit Judge BAZELON.

Opinion concurring in the judgment filed by Senior Circuit Judge MacKINNON.

BAZELON, Senior Circuit Judge:

The allegations in this case raise troubling issues of law: Appellant Briggs alleges that appellee Goodwin, a United States Attorney, knowingly gave false sworn testimony before a district court, which resulted in a violation of appellant's constitutional rights. Appellee asserts entitlement to absolute immunity from civil liability arising from his testimony. This court rejected that claim. Thereafter the Supreme Court decided *Briscoe v. LaHue*[1] and we granted rehearing to reconsider the issue in light of that decision. Upon such reconsideration, we are compelled to the conclusion that *Briscoe* entitles appellee to absolute immunity as a witness.

I

The factual background and procedural history in this case have been fully detailed in our earlier opinions, *Briggs v. Goodwin*, 698 F.2d 486 (D.C.Cir.1983) ("*Briggs II*"); *Briggs v. Goodwin*, 569 F.2d 10 (D.C.Cir. 1977), *cert. denied*, 437 U.S. 904, 98 S.Ct. 3089, 57 L.Ed.2d 1133 (1978) ("*Briggs I*"); only a brief review is required here.

The case arises out of a grand jury proceeding in which several grand jury witnesses, including appellant Briggs, were represented by the same counsel.[2] In response to rumors that some of the grand jury witnesses were government informants, the witnesses filed a motion in district court to compel the government to disclose whether any government informants were among the witnesses represented by group counsel. At the hearing on the motion, appellee Goodwin, who was the prosecutor in charge of the grand jury investigation, took the stand and was asked under oath whether any of the witnesses represented by group counsel were government informants. Goodwin answered, "No." Appellant Briggs alleges that Goodwin's response was false, that Goodwin knew it to be false, and that the allegedly false statement caused Briggs to share defense strategy with an informant, who passed it back into the hands of the government.

1. — U.S. —, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983).

2. For a more detailed account, see *Briggs I*, 569 F.2d 10, 13–14 (D.C.Cir.1977).

level, but abandoned that approach in favor of criminal contempt.[52] Appellants were then in prison, as they were throughout Coachman's trial, serving the sentences imposed upon their guilty pleas to the false-claims charges.[53] Consequently, "the threat of immediate confinement for civil contempt would have provided little incentive for them to testify." [54] Absent that incentive, the public interest in obedience to lawful judicial commands could be vindicated only by punishment for criminal contempt.

The judgments appealed from are *Affirmed.*

PARALYZED VETERANS OF AMERICA, American Coalition of Citizens with Disabilities, American Council of the Blind, Petitioners,

v.

CIVIL AERONAUTICS BOARD, Federal Aviation Administration, United States Department of Transportation, Respondents,

Regional Airline Association, Intervenor.

No. 83-1055.

United States Court of Appeals, District of Columbia Circuit.

Argued Oct. 31, 1983.

Decided Jan. 18, 1985.

Opinion on Denial of Rehearing and Rehearing En Banc April 26, 1985.

Organizations representing disabled citizens challenged final regulations of the Civil Aeronautics Board implementing Rehabilitation Act of 1973 with respect to commercial airlines. The Court of Appeals, Bazelon, Senior Circuit Judge, held that: (1) statute which prohibits exclusion of qualified handicapped individual from participation in program receiving federal financial assistance applies to all commercial air carriers; (2) regulation which extends, but limits, discretion to airlines to make demands or requests of handicapped persons is not unreasonable; and (3) regulation which permits airlines to require all handicapped passengers who will need extensive special assistance to notify airline 48 hours in advance of their flight is not unreasonable.

So ordered.

Bork, Circuit Judge, dissented from denial of rehearing en banc and filed an opinion, in which Scalia and Starr, Circuit Judges, joined.

1. Civil Rights ⇐9.16

Although operating certificates, special investment tax credits against federal income tax, and air traffic control services, are not "federal financial assistance" within meaning of Rehabilitation Act of 1973, prohibition against exclusion of otherwise qualified handicapped individual from participation in program receiving federal financial assistance is applicable to all commercial air carriers with respect to treatment afforded passengers, based on federal funding of airports and "airways," their integration with all commercial air carriers, and clear intent of Congress; overruling *Angel v. Pan Am. World Airways, Inc.*, 519 F.Supp. 1173. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

See publication Words and Phrases for other judicial constructions and definitions.

2. Aviation ⇐101

Although record suggested that in its promulgation of specific, substantive regulations, Civil Aeronautics Board worked conscientiously and, in area characterized by great individual variability and acute sensitivity, managed reasonably to resolve many difficult problems with respect to treatment of handicapped individuals as air passengers, regulations were required to be remanded, where certain aspects of challenged rules would have been drafted differently if Board had properly construed scope of its rule-making authority. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

3. Aviation ⇐101

Vesting some discretion in airline personnel to make case-by-case determinations with respect to services available to qualified handicapped individuals is unavoidable due to unique nature of every individual and infinite variety of disabling conditions and varying extent to which they may handicap particular person. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

4. Aviation ⇐101

Regulations under Rehabilitation Act of 1973 with respect to identification of "qualified handicapped individual" reasonably extend, but limit, discretion to air carrier, by precluding refusal of transportation unless designated employee who is familiar with carrier's standards reasonably believes that person is not qualified makes decision and by requiring that any request made of handicapped person be reasonable and either safety related or necessary for provision of air transportation. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

5. Civil Rights ⇐9.16

Regulation which permits airlines to require all handicapped passengers who will need extensive special assistance to notify airline 48 hours in advance of their flight, but prohibits carriers from refusing assistance on ground of inadequate notice if service or equipment is available with lesser notice given, is reasonable. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

6. Administrative Law and Procedure ⇐799

Where agency's statement on its regulatory jurisdiction has been inconsistent, construing its own authority first broadly, then narrowly, court's obligation of independent inquiry on review is greater still, and any deference due agency on jurisdictional issue is correspondingly minimized.

Petition for Review of an Order of the Civil Aeronautics Board.

Douglas L. Parker, Washington, D.C., with whom Karen Peltz Strauss, Washington, D.C., was on the brief, for petitioners.

David Schaffer, Atty., C.A.B., Washington, D.C., with whom William Bradford Reynolds, Asst. Atty. Gen., Dept. of Justice, Ivars V. Mellups, Acting Gen. Counsel and Thomas L. Ray, Asst. Gen. Counsel, C.A.B., Washington, D.C., were on brief, for respondents. Robert B. Nicholson and Margaret G. Halpern, Attys., Dept. of Justice, Washington, D.C., also entered appearances for respondents.

Calvin Davison, Washington, D.C., for intervenor. David H. Solomon, Washington, D.C., also entered an appearance for intervenor.

Before WALD and MIKVA, Circuit Judges, and BAZELON, Senior Circuit Judge.

Opinion for the Court filed by Senior Circuit Judge BAZELON.

BAZELON, Senior Circuit Judge:

Petitioners Paralyzed Veterans of America (PVA) and other organizations representing disabled citizens [1] challenge final regulations of the Civil Aeronautics Board (CAB or Board) implementing section 504 of the Rehabilitation Act of 1973 (the Act) with respect to commercial airlines.[2] The

52. Appendix for Appellants 24-30.

53. See text *supra* at notes 5-7.

54. *United States v. Wilson, supra* note 35, 421 U.S. at 317 n. 9, 95 S.Ct. at 1807 n. 9, 44 L.Ed.2d at 193 n. 9 (parties already incarcerated when contemptuous acts occurred).

1. Joining PVA as petitioners in this case are the American Coalition of Citizens with Disabilities, Inc., a nationwide coalition of 127 organizations representing all major disability groups, and the American Council of the Blind. PVA is comprised of veterans of the United States Armed Forces who have suffered spinal cord injury or disease.

2. Joining respondent CAB in this case are the Federal Aviation Administration and the United States Department of Transportation. Intervenor in this case on behalf of respondents is the Regional Airline Association, the trade association of the regional/commuter air carrier industry, representing approximately 130 airline members. Because the CAB ceased operations on December 31, 1984, pursuant to the Airline Deregulation Act of 1978 and the Civil Aeronautics Board Sunset Act of 1984, *see infra* notes 212-214 and accompanying text, references in this opinion to the CAB or Board should be

regulations were designed to prevent discrimination against handicapped persons in air transportation. The most important issue presented by this case concerns the scope of the CAB's Amended Final Rule, which the Board has applied only to certain small airlines receiving direct federal subsidies. Petitioners maintain that the Board is required by law to apply its regulations to all commercial air carriers. We agree. As to the substance of those regulations, however, which petitioners challenge on account of the CAB's definition of "qualified handicapped individual" and aspects of its 48-hour advance notice provision, we find respondents' position more persuasive. Accordingly, we vacate the regulations in part and remand them in part.

I. Background

A. *From Statute to Rulemaking*

Section 504 of the Rehabilitation Act of 1973 (section 504) provides:

> No otherwise qualified handicapped individual ... shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[3]

As enacted, the statute did not provide for administrative implementation of section 504's mandate; it was silent as to the exercise of regulatory authority.[4] In 1976, however, the President issued Executive Order 11,914, requiring the Secretary of Health, Education and Welfare (HEW) to coordinate the implementation and enforcement of section 504 by all federal agencies.[5] In 1977, prodded by an order of our district court,[6] HEW did adopt regulations implementing section 504 as it applied to those programs and activities for which HEW was itself a source of federal financial assistance.[7] Finally, on January 13, 1978, the Secretary of HEW issued guidelines directing other federal agencies to begin their own rulemaking proceedings within ninety days and to issue final regulations no later than one hundred thirty-five days following the close of the comment periods for the proposed rules.[8]

The Civil Aeronautics Board commenced its rulemaking proceedings on June 6, 1979.[9] Because of the complexities of the issues in this case, both jurisdictional and substantive, it will be helpful to summarize those proceedings in considerable detail.

In its Notice of Proposed Rulemaking the Board proposed "new rules to prohibit unlawful discrimination against disabled travelers and to implement section 504 of the Rehabilitation Act of 1973."[10] Although the CAB noted that "[t]his proceeding began at the Board's initiative and with a petition for rulemaking filed by the National Federation of the Blind,"[11] petitioners observe, and respondents do not dispute, that "the Board's initiative" was prompted at least in part by pressure from HEW Secretary Joseph Califano.[12] In its discussion of the proposed new rules' "Introduction and Background," however, the Board's position was a strong one:

> A review of the problems that have been presented to the Board regarding difficulties encountered by handicapped persons in air transportation demonstrates not only a need for regulations under section 504 of the Rehabilitation Act, but also a significant need for the handicapped to receive adequate, nondiscriminatory service in air transportation in general.... Therefore, we have decided that the scope of this rulemaking should include any discrimination against passengers and prospective passengers on the basis of a handicapping condition, and the availability of adequate, reasonable service to handicapped persons. We believe that the burden of showing that airline service to handicapped persons cannot be provided should be on the air carrier.[13]

Also included in the Board's "Introduction and Background" discussion were several important references to the agency's statutory authority. First, the CAB wished to "emphasize that the handicapped are protected by the adequacy of service and antidiscrimination provisions of section 404 of the Federal Aviation Act [49 U.S.C. § 1374], which are applicable to all air carriers, whether or not receiving Federal financial assistance."[14] It relied upon this fact as a partial justification for declining to propose any regulation of airline employment practices, noting that other agencies, such as the Department of Labor or the Justice Department, would have "the experience and skill necessary to do the job effectively."[15] Moreover, the CAB reasoned:

> The Board extends direct Federal subsidies only to a small number of air carriers, so that the reach of our section 504 jurisdiction would not have a significant effect on industry employment. While we can prevent discrimination in air transportation under section 404 of the Federal Aviation Act without clear section 504 jurisdiction, the same is not true of employment. The Board would have no authority to regulate employment practices of unsubsidized carriers unless those practices somehow caused discrimination in transportation.[16]

The CAB's initial efforts to implement section 504 were further constrained by its decision "not to propose to require structural modifications of aircraft at this time" on the ground of its having insufficient information regarding alternatives, costs, and benefits.[17] Nevertheless, the Board

construed, where appropriate, to include the CAB's successor agency, the Department of Transportation.

3. Rehabilitation Act of 1973, Pub.L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (Supp. V 1981)). Title V of the Act also required federal agencies and federal contractors undertaking contracts in excess of $2,500 to take affirmative action to employ handicapped individuals. Sections 501, 503, 29 U.S.C. § 791. In addition, and of considerable relevance to the case before us, *see infra* notes 150, 154, 174 and accompanying text, section 502 established the Architectural and Transportation Barriers Compliance Board in an effort to lower the "architectural, *transportation* and attitudinal barriers" confronting handicapped citizens. 29 U.S.C. § 792 (emphasis added).

4. *See* Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 Cornell L.Rev. 401, 411-12 (1984).

5. Exec.Order No. 11,914, 41 Fed.Reg. 17,871 (1976).

6. *Cherry v. Mathews*, 419 F.Supp. 922 (D.D.C. 1976). The court found "that Congress contemplated swift implementation of § 504 through a comprehensive set of regulations." *Id.* at 927.

7. *See* 42 Fed.Reg. 22, 676 (1977); *see also* Note, *Ending Discrimination Against the Handicapped or Creating New Problems? The HEW Rules and Regulations Implementing Section 504 of the Rehabilitation Act of 1973*, 6 Fordham Urb.L.J. 399 (1978); Note, *Administrative Action to End Discrimination Based on Handicap: HEW's Section 504 Regulations*, 16 Harv.J. on Legis. 59 (1979).

8. Implementation of Executive Order 11,914, Nondiscrimination on the Basis of Handicap in Federally Assisted Programs, 43 Fed.Reg. 2132, 2137 (1978) (codified at 45 C.F.R. § 85 (1982)). When Congress divided HEW into two new agencies in 1979, both the Department of Education and the Department of Health and Human Services (HHS) republished regulations implementing section 504 within the agencies themselves. Authority for coordinating the implementation and enforcement of section 504 throughout the executive branch was transferred first to HHS, then to the Department of Justice, where it currently resides. *See* C.F.R. § 41 (1982) (guidelines published by Department of Justice pursuant to Exec.Order No. 12,-250, 3 C.F.R. 298 (1981)). The original guidelines promulgated by HEW to assist other agencies in implementing section 504 are now deemed to have been issued by the Attorney General and it is clear, as one commentator has noted, that "[i]n the future the Department of Justice will play a leading role in the interpretation of § 504." Wegner, *supra* note 4, at 417 n. 42.

9. Notice of Proposed Rulemaking, Part 382, Nondiscrimination on the Basis of Handicap, 44 Fed.Reg. 32,401 (1979) [hereinafter cited as Proposed Rule].

10. *Id.*

11. *Id.*

12. As the proceedings continued, further prompting was apparently necessary before the Board would adopt final rules. In addition to Secretary Califano's letter of January 29, 1979 urging the CAB to give the matter a high priority, the Board's slow pace elicited a formal request from the White House in November, 1980 that the CAB's section 504 obligations be fulfilled. "When the CAB still had not issued final rules by July 2, 1981, a district court ordered the agency to inform all of its subsidized carriers of their obligation to comply with the requirements of Section 504. *Paralyzed Veterans of America, et al. v. William French Smith, et al.*, No. 79-1979 (C.D.Cal. July 2, 1981). The CAB complied with this order by sending a letter on June 12, 1981 to all carriers receiving federal payments under Section 419 of the Federal Aviation Act." Petitioner's Brief at 7 n. 4 [hereinafter cited as PVA Brief].

13. Proposed Rule, 44 Fed.Reg. 32,401 at 32,402.

14. *Id.* at 32,401-02.

15. *Id.* at 32,402.

16. *Id.*

17. *Id.* Some implications of this limitation pertaining to recent case law in this area are discussed *infra* at note 155.

proposed, and invited public comment upon, regulations that would apply "to all certificated carriers and air taxis [commuter carriers] in their operations with aircraft of more than 30-seat passenger capacity." [18] Conceding that "some aspects of the rules would merely make explicit what is already implicitly required by section 404," [19] and that they might prove too burdensome or impractical for certain small carriers, the Board went on to suggest regulations that it believed

> strike a reasonable balance among the interest of handicapped persons in the greatest possible convenience and freedom of choice in their use of air transportation services, the legitimate requirements of air safety, and the economic reality that costs incurred by carriers will be passed on to consumers in the form of higher air fares, or to the handicapped in the form of special charges.[20]

B. *The Proposed Rules: Substance and Scope*

The regulations developed by the CAB were tripartite. Subpart A—"General Provisions"—prohibited "discrimination in air transportation against qualified handicapped persons." [21] It stated that the CAB's purpose in adding a new Part 382—"Nondiscrimination on the Basis of Handicap"—to Chapter II of Title 14, Code of Federal Regulations was

> to ensure: (a) That handicapped persons receive reasonable access to commercial air transportation, (b) that certain specific practices are prohibited, and (c) that certain specific changes in service are made. The part is designed to ensure that transportation of handicapped persons is integrated into the overall air transportation system as much as possible.[22]

Section 382.4 of Subpart A—a single sentence titled "Prohibition against discrimination"—provided:

> A carrier shall not, on the basis of handicap, exclude any qualified handicapped persons from participation in, deny them the benefits of, or otherwise subject them to discrimination in the provision of air transportation or related services.[23]

Section 382.5 of Subpart A prohibited air carriers from providing "different or separate" transportation services to qualified handicapped persons, or from denying any services available to other passengers, unless such actions were "reasonably necessary." [24] Subpart A left the specific words "reasonably necessary" undefined, but did, in section 382.3, define the terms "Carrier," [25] "Conditions for air transportation," [26] "Facility," [27] "Handicapped person," [28] and "Qualified handicapped person," [29] each of which assumes considerable significance in the controversy before us.

Subpart B—"Specific Requirements"—provided detailed guidelines to be followed by each carrier with regard to accessibility of facilities and services,[30] the availability of information,[31] refusal of service,[32] guide dogs,[33] the use of Braille,[34] and service to be provided to incontinent passengers and to passengers unable to feed themselves.[35] Subpart B also specifically prohibited carriers from conditioning the carriage of handicapped passengers or their baggage, including wheelchairs, on any waiver of liability for personal injury or property damage and forbade "any limitation of liability

18. *Id.*

19. *Id.*

20. *Id.* at 32,402-03.

21. *Id.* at 32,405.

22. *Id.*

23. *Id.* at 32,406.

24. *Id.* Section 382.5(a) permits different or separate service if "reasonably necessary to provide a qualified handicapped person with access to air transportation or related services or if requested by such a person." Section 382.5(b) permits carriers to deny transportation or services available to other passengers if "such action is reasonably necessary to accommodate the handicapped passenger in order to comply with the conditions for air transportation." *Id.*

25. In this Notice of Proposed Rulemaking, the CAB defined "carrier" as including "(1) any holder of a certificate of public convenience and necessity issued by the Board authorizing the transportation of passengers, and (2) any air taxi operator" using aircraft seating more than thirty passengers. Although the Notice was explicit about its applicability "to all certificated carriers," i.e., major commercial airlines, it specifically invited comment on the subject of commuter carriers; indeed, it included language for an alternative regulation that would *not* routinely exempt aircraft with fewer than thirty seats. *Id.* at 32,405.

26. To be "qualified," a handicapped person was required to satisfy these conditions, defined as:

> the tender of payment for air transportation, the absence of any indication that air transportation of the passenger will jeopardize flight safety, and the absence of any indication that the passenger is unwilling or unable to comply with reasonable requests of airline personnel. Any request of airline personnel that is inconsistent with this part will not be considered reasonable for the purposes of this definition.

Id.

27. "'Facility' means all or any portion of a carrier's aircraft, buildings, structures, equipment, roads, walks, parking lots, and other real or personal property, normally used by passengers or prospective passengers, or interest in such property." *Id.*

28. "'Handicapped person' means a person who (i) has a physical or mental impairment that substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." *Id.*

29. "'Qualified handicapped person' means a handicapped person who has satisfied all the conditions for receiving air transportation services ('conditions for air transportation') that are required for the non-handicapped." *Id.* at 32,405-06.

30. As to accessibility, § 382.10 did not require "that every facility or every part of the facilities for each flight be made accessible to or usable by handicapped persons," but did mandate that "[e]ach carrier's facilities and services, when viewed in their entirety, shall be reasonably accessible to and usable by handicapped persons." *Id.* at 32,406.

31. Paragraph (a) of § 382.11 required that carriers "establish a method for ensuring that deaf passengers receive necessary information in emergencies" and that necessary information be provided "in a timely manner ... by use of written material, signs, placards, flashing signal lights, or other means." *Id.* Paragraph (b) provided that any information available to passengers on printed emergency cards must also be made available to blind passengers in Braille. *Id.*

32. Appropriately, the "refusal of service" regulations of § 382.12 were the most lengthy and detailed of any in the Notice. Although they explicitly granted carriers the right to refuse transportation to "handicapped persons who are intoxicated by alcohol or drugs, who are seriously ill with a condition that may require immediate treatment, who have a contagious disease, who would endanger flight safety, or whose condition results in disruptive behavior by the handicapped person," § 382.12(a), they equally explicitly established the following presumption and elaborated upon its proper application in practice:

> Handicapped persons shall be presumed to meet all conditions for the provision of air transportation. A carrier shall not refuse transportation to a handicapped person in accordance with this paragraph unless it reasonably believes that the person does not meet those conditions. If the handicapped person presents a medical certificate from a licensed physician that the person is eligible for air transportation, a carrier shall not refuse transportation without compelling evidence to the contrary.

Id.

Paragraph (b) of § 382.12 permitted carriers to require that a personal nurse or attendant accompany "a handicapped person who needs extraordinary care during flight" or who "would need substantial assistance to deplane in an emergency" or who would necessarily, because of the aircraft's structure, "obstruct the emergency deplaning of other passengers." The paragraph pointedly provided, however, that a carrier "shall not require persons who are blind or deaf but not both, or persons who are unable to walk but who can deplane reasonably expeditiously in an emergency by using their arms, to have attendants for that reason." *Id.*

33. Blind and deaf passengers were permitted by § 382.13, "Guide dogs and personal equipment," to be accompanied on aircraft by guide dogs, and to use canes or crutches and "to keep those aides near them at all times." Paragraph (c) of § 382.13 further required carriers to permit handicapped persons to take folding wheelchairs aboard and to stow the wheelchairs in the passenger compartment, and paragraph (d) required carriers to "accept as baggage battery-powered wheelchairs and personal oxygen supplies of handicapped passengers" to the extent that such storage and baggage-carrying did not violate Federal Aviation Regulations or Department of Transportation regulations for the transportation of hazardous materials (49 C.F.R. Parts 172, 173, and 175). *Id.*

34. *See supra* note 31.

35. According to § 382.12(c):

> A carrier shall not refuse transportation to, or require attendants for, persons because they are unable to feed themselves, if they elect not to eat during the flight. A carrier shall not refuse transportation to or require attendants for, persons because they are incontinent or persons who are unable to use the restrooms without assistance, if they have made adequate alternative arrangements for waste disposal.

Id.

that is stricter than the limitations applied to all passengers and baggage." [36] That section of Subpart B with which the instant case is most concerned, however, and which serves as an important illustration of the specificity and detail of the regulations at issue, was section 382.14, "Availability of services and equipment," providing in pertinent part as follows:

> (a) Carriers shall ensure the availability of:
>
> (1) Necessary life-support systems, such as oxygen, for on-board use; and
>
> (2) Personnel and equipment to assist in boarding, moving to restrooms, deplaning, baggage handling, and making ground connections, including ground wheelchairs, aisle chairs and, if necessary, mechanical boarding lifts.
>
> (b) Carriers shall not establish advance notice requirements for the provision of special assistance unless that assistance is extensive. Carriers may establish reasonable advance notice requirements of up to 48 hours for the provision of extensive special assistance. For the purposes of this paragraph, carrier-provided wheelchairs, oxygen for on-board use, and mechanical boarding lifts will be considered extensive special assistance.[37]

Subpart C of the regulations initially proposed by the Board—"Compliance"—mandated that each carrier provide formal assurances to the CAB "that it will comply with this part" [38] and specified the means for so doing. Each carrier, for example, was required to "maintain an employees' manual containing company rules for accommodating handicapped passengers," [39] to formally designate "at least one person ... to coordinate its efforts to comply with this part," [40] and not only to "[e]valuate its current policies and practices and effects for compliance" but also to "[e]stablish a system for periodically reviewing and updating the evaluation." [41] The requisite "evaluation and modification of practices" was to include "a reasonable effort to consult, with and obtain the views of handicapped persons and experts on handicapping conditions." [42]

In addition, under Subpart C, every carrier was required, within 180 days after the effective date of the proposed regulations, to "adopt a plan that provides for the prompt and equitable resolution of complaints alleging any action prohibited by this part ...." [43] Such a complaint might be filed by any person who believed "that he or she has been a victim of discriminatory action" by a carrier.[44] Finally, section 382.26 of Subpart C, Procedures for noncompliance," authorized the Director of the Bureau of Consumer Protection to institute enforcement proceedings. If, after notice and opportunity for a hearing, such proceedings "[f]ound a failure by the carrier to comply with a requirement of this part," the Board was empowered to "order suspension or termination of, or refuse to grant or continue Federal financial assistance" to the offending carrier, or to "use any other means authorized by law to ensure compliance." [45]

> A carrier may refuse transportation to a person who will need extensive special assistance from the carrier, such as the provision of wheelchairs, oxygen, or mechanical boarding lifts, if the person fails to comply with advance notice requirements established by the carrier in accordance with § 382.14(b).
>
> *Id.*

36. Exceptions to these prohibitions were contained in § 382.15(b), which permitted carriers to "insist upon a waiver of liability for injury that: (1) Results from a handicap traveling with which presents an extraordinary hazard, and (2) Occurs despite the exercise of due care by the carrier." *Id.* at 32,407.

37. *Id.* at 32,406. Additional paragraphs of § 382.14 permitted carriers to charge handicapped passengers "the costs of the assistance including a reasonable profit," § 382.14(c), and enjoined carriers from forcing special assistance upon a handicapped person "who does not request it, unless the assistance is reasonably necessary to physically accommodate the passenger or to enable the passenger to meet the conditions for air transportation," § 382.14(d). *Id.* Supplementing § 382.14's definition of "extensive special assistance," the Subpart B guidelines on "refusal of service" provided in § 382.12(d) as follows:

38. *Id.* at 32,407 (§ 382.20).

39. *Id.* (§ 382.21).

40. *Id.* (§ 382.23).

41. *Id.* (§ 382.22).

42. *Id.*

43. *Id.* (§ 382.24).

44. *Id.* (§ 382.25).

45. *Id.* (§ 382.26).

In response to its request for comments on its proposed regulations, the CAB received a large number of suggestions and criticisms from airlines, airline trade associations, flight crew unions, government agencies, disabled individuals and organizations representing handicapped persons, including petitioners.[46]

C. *The Final Rules: Comment, Compromise, and Constriction*

In general, the airlines objected to the adoption of the proposed regulations, arguing that such rules were inconsistent with recent congressional initiatives aimed at reducing regulation of the air transport industry and that they were unduly burdensome and duplicative.[47] At least one commenting airline contended "that unjust discrimination on the basis of handicap does not exist" and that the proposed rulemaking of the Board was not only "unnecessary" but "would cause confusion and ambiguous interpretation with the undesired result of diminished special service to handicapped persons." [48] While representatives of commuter airlines could see some merit in the proposed regulations as they applied to the large certificated carriers, they concluded that "if applied to commuter air carriers, [the rules] would result in a substantial burden on such carriers. The mere recitation of the detail and scope of the proposed requirements is staggering." [49] The larger airlines, through the comments of the Air Transport Association and several individual companies, contended not only that the proposed regulations were "redundant, confusing, and. in some cases, conflicting," but that the CAB was without jurisdiction to apply them to any airlines but those few (generally smaller ones) that received direct money subsidies from the Board.[50]

This jurisdictional contention was vigorously opposed by groups representing handicapped citizens. all of which supported the CAB's initial assertion of rulemaking authority over every certificated carrier. As to the scope of rulemaking, these groups criticized the agency, if at all, for its tentative proposal to exempt from its regulations those small commuter or air taxi opertors using aircraft of fewer than thirty seats.[51] Although the substantial submission of the Disability Rights Center and eight other groups [52] did address the legal issue of the proper reach of section 504—arguing that all airlines, whether subsidized or not, received "federal financial assistance" in the form of development grants to airports, the federal air traffic control system, exclusive operating certificates, and special investment tax credits—the vast majority of comments were directed to the substance of the rules themselves.[53]

46. Additional groups included the National Association of the Deaf, the National Capital Chapter of the National Multiple Sclerosis Society, the Disability Rights Center, the National Center for Law and the Deaf, and the National Association for Retarded Citizens.

47. American Airlines argued, for example, that "[t]he FAA currently enforces its own regulations regarding accommodating handicapped travelers. These regulations are both comprehensive and reasonable. There is no need, therefore, for the Board to involve itself in duplicating the efforts of the FAA, particularly when it lacks the FAA's technical expertise." Comments of American Airlines, Inc. before the Civil Aeronautics Board, Aug. 31, 1971, J.A. at 154, 156; *see also* Respondents' Brief at 10.

48. Comments of Pacific Southwest Airlines before the Civil Aeronautics Board, Sept. 4, 1979, J.A. at 137, 139.

49. Comments of Commuter Airline Association of America, Inc. before the Civil Aeronautics Board, Sept. 4, 1979, J.A. at 98, 102.

50. Nondiscrimination on the Basis of Handicap, Final Rule, 47 Fed.Reg. 25,936 (1982) (codified at 14 C.F.R. Part 382) [hereinafter cited as Final Rule].

51. *See, e.g.*, Comments of PVA before the Civil Aeronautics Board, Sept. 5, 1979, J.A. at 83, 85 (citing the increasing frequency of such flights, noting their importance in making mid-route connections, and arguing that "[a]t most, these carriers should be individually and temporarily exempted"); regarding the CAB's concern on this score see note 25. *supra*.

52. These included the three petitioners in this case and the groups enumerated in note 46 *supra*.

53. *See* J.A. at 111; Final Rule, 47 Fed.Reg. at 25,937.

In this regard the rulemaking proceeding below appears to have been an exemplary one. The record contains many examples of difficult and sensitive issues being painstakingly resolved, of diverse viewpoints being conscientiously considered. For example, the Board redrafted its rules to eliminate any reference to medical certificates,[54] agreeing with commenters representing the disabled who argued that terms like "reasonable belief" and "compelling evidence" were too vague, that travelers were the best judges of their own medical status and ability to fly as far as their own risk was concerned, and that the requirement might discriminate in practice between those in whom a handicap was apparent and those in whom it was not.[55] In cases where risks to other passengers are potentially involved, however, such as where "the likelihood that aggravation of the passenger's condition will cause an in-flight emergency or unscheduled landing," the Board concluded "that airlines must make determinations of flight worthiness." [56] This was to be accomplished not on the basis of a required medical certificate from "passengers' doctors [who, the airlines contended] are generally inexpert in aerospace medicine, and, therefore, unqualified to determine whether the passenger can fly" but rather "on the basis of standards clearly related to flight safety, applied in a nondiscriminatory manner by personnel who are assigned specific responsibility for this task." [57]

In general the Board's response to the comments it received upon specific provisions of the proposed rules resulted in its granting enhanced discretion to the regulated carriers. For example, a proposed rule requiring Braille information cards [58] was dropped in favor of a section that, according to the Board, "now clearly states the airlines' obligation to provide both emergency and important non-emergency information to blind or deaf passengers, but allows more flexibility in choosing methods for providing it." [59] Similarly, in dismissing the objection of several commentators to the use of the phrase "reasonably accessible" in sections 382.1 and 382.11 of the proposed rules rather than of the words "readily accessible" (the standard of the HHS guidelines in 14 C.F.R. § 85.57(a)), the Board concluded that its original language reflected "the accessibility standard most appropriate to the airline industry." [60] In such areas of evident concern to handicapped persons as the storage of blind travelers' canes [61] and in-flight wheelchair policy,[62] the Board's decisionmaking resulted in Final Rules that appear to have successfully balanced the felt necessities of the handicapped with the requirements of the airlines for flexibility and the need for deference to the expertise of agencies that are charged more directly with ensuring the safety of air transportation.[63]

Nevertheless, the Board's determinations regarding two specific aspects of the Final Rules have been challenged by petitioners in this case. The first involves the CAB's definition, in its Amended Final Rule, of "Qualified Handicapped Person," to which petitioners object on two grounds: that it "unlawfully allow[s] airlines to selectively impose requirements on disabled passengers which are not required of all other passengers" and that it lacks "objective guidelines and criteria to ensure that airlines do not arbitrarily impose unnecessary conditions on disabled passengers," thus rendering the definition "vague and confusing for both airline personnel and disabled travelers." [64] Petitioners' second specific

54. *See supra* note 32.

55. Final Rule, 47 Fed.Reg. at 25,942 (discussing proposed § 382.12 (now § 382.13)).

56. *Id.*

57. *Id.*

58. *See supra* note 31.

59. Final Rule, 47 Fed.Reg. at 25,941.

60. *Id.* at 25,940.

61. "The question of whether a blind person may have his cane during flight," according to a "Fact Sheet" submitted to the Board by the National Federation of the Blind, "is no exception to th[e] chaotic configuration of procedures and practices by the airlines." Noting that many airlines treated canes as any other carry-on baggage to be stowed at the discretion of the carrier, the Federation noted that "[t]he white cane is of functional necessity to its owners just as the guidedog is inextricably bound to its master," placing it "entirely out of the category of portable hardware when it comes to the importance that the white cane holds for blind persons. The white cane represents one of two full-proof methods of independent travel for the blind, and is therefore symbolic of the mobility and self-sufficiency which blind people strive for. Stowing a blind person's cane in some far-off closet is not like doing so to another person's extra clothes bag." J.A. at 174.

On this subject, the Board, in explaining its Final Rule, noted that the "primary authority" on the matter was the Federal Aviation Administration [FAA], which "has considered the air safety implications" [45 Fed.Reg. 75,138 (1980)] and "determined that the stowage of travel canes under passenger seats is consistent with its safety mandate provided that the cane is placed flat on the floor and does not protrude into an aisle or exit row." The Board therefore amended its Final Rule § 382.14[b] to require carriers to permit stowage of travel canes whenever the FAA's conditions can be met. Final Rule, 47 Fed.Reg. at 25,943–44.

62. The proposed rules would have required airlines to carry folding wheelchairs in the passenger compartment if permissible under FAA and Department of Transportation [DOT] regulations—a proposal that was warmly embraced by commenters representing the handicapped and strongly criticized by the airlines, flight attendants' unions, and the Aerospace Industries Association. The critics contended that passenger-area storage space was too limited and that folding wheelchairs could be "doortagged" (taken from the passenger and stored in the plane's belly just before boarding and returned just after deplaning). Advocates of the proposed rule, however, argued that chairs were more likely to be damaged by such a procedure and that passenger-compartment stowage was much less uncomfortable because it permitted use of a personal chair for the longest possible time. *Id.* at 25,944.

In its Final Rule, the CAB decided "that airlines need more flexibility" and modified its proposed rule "to require carriers to make reasonable efforts to provide passenger-area storage, and otherwise to doortag," stating its expectation that airlines would make "good faith efforts to accommodate folding wheelchairs in the passenger compartment when possible." *Id.* On the other hand, the Board refused to cede to the airlines' request that it further relax its proposed § 382.13(d), which required airlines to carry battery-operated wheelchairs in the baggage compartment to the extent permitted by DOT rules on the carriage of hazardous materials. It noted that any need for more flexibility here was offset by the "strong countervailing interest" of the handicapped traveler's access to such "extremely important belongings." *Id.*

63. A final illustration involves paragraphs (b) and (c) of proposed § 382.12 (now § 382.13), which permitted airlines to require handicapped passengers to travel with attendants when nursing or other extensive personal care would be necessary during flight and when a passenger would require assistance to exit during an emergency. Responding to comments seeking greater specificity in the rules, the Board in its Final Rule sought to "make clear that minor assistance with meals, such as opening silverware packages or telling a blind passenger what is being served and where each item is located on the tray, should not be considered feeding assistance requiring a passenger to travel attended or forego food." *Id.* at 25,942. Otherwise the Board relied on what it in another context termed the airlines' "courtesy and common sense." *Id.* at 25,941. Thus:

> The normal range of flight attendant services, including the occasional modest extra efforts provided for some passengers—escorting them to seats, providing games to restless children, soothing first-flight anxieties—can be easily distinguished from the kind of time-consuming attention or specialized services (such as administering injections or assisting a passenger in the lavatory) that passengers would not expect as a matter of course.

Id. at 25,942.

As to the requirement of an attendant when necessary for emergency deplaning, the Board concluded that airlines should be permitted to require this "substantial logistical and financial barrier to travel;" *id.*, only "when reasonably necessary for the safety of other passengers, in accordance with the regulations and policies of the FAA." *Id.* at 25,943. Noting that the FAA had still not resolved the question to its own satisfaction, but had found in a preliminary study that " 'the potential for handicapped passengers delaying aircraft evacuations would appear minimal,' " the Board concluded that

> [a]s with decisions on refusing service, decisions requiring attendants must be made by designated personnel. The name of the designated person must be made known to any person that requests it. Additionally, we will expect airlines to be able to provide specific justifications for their determinations that safety requires a passenger to be attended.

Id.

64. PVA Brief at 51. When its Final Rule was published, the Board noted that "[i]n order to aid in any revisions or analysis that may be necessary, we are leaving this rulemaking docket open for further comments on possible changes .... 42 Fed.Reg. at 25,948. Such comments were in fact received from the Department of Justice and several groups representing the handicapped, resulting in some minor changes discussed *infra* at note 179. The amendments, characterized by the CAB as "interpretative" and promulgated without notice or public comment, were published on November 18, 1982. Nondiscrimination on the Basis of Handicap, Amendment No. 1 to Part 382, 47 Fed.Reg. 51,857 (1982) [hereinafter cited as Amended Final Rule].

objection is to section 382.15(c) of the Final Rule, which allows airlines to require all passengers who will need "extensive special assistance" to notify the airline 48 hours in advance of their flight.[65] This provision, petitioners contend, is "especially arbitrary" and "overly broad" and "inconsistent with Section 504" because it would permit airlines "to circumvent their Section 504 responsibilities." [66]

A discussion of the administrative background of these disputed sections of the Final Rule, and of the arguments advanced for and against their validity by the parties to this case, is best deferred until a related and more fundamental question has been resolved: What airlines, in fact, *have* section 504 "responsibilities"? The question arises because the CAB, having engaged in the extensive and apparently scrupulous rulemaking procedure only partially summarized in the foregoing paragraphs and notes, decided that the rules it was making could, as a matter of law, be applied only to a small fraction of commercial airlines actually engaged in transporting handicapped travelers.

This interpretation of the extent of its regulatory authority represented a substantial constriction of the CAB's original position as expressed in its 1979 Notice of Proposed Rulemaking.[67] There the Board had interpreted the scope of its rulemaking authority broadly, emphasizing that such regulation of air transportation could be based not only upon section 504 of the Rehabilitation Act but also upon the adequacy of service and antidiscrimination provisions of section 404 of the Federal Aviation Act, 49 U.S.C. § 1374.[68] To the extent to which the Board expressed any doubt as to the reach of its regulatory authority or the wisdom of applying the proposed rules to all carriers, it was hesitant only with regard to the employment practices of airline companies,[69] the imposition of structural requirements for aircraft,[70] and the possibility that regulations reasonably applied to most established airlines and large aircraft might prove too burdensome or impractical for certain small carriers.[71] By the time it issued its Final Rule in 1982, however, the Board was evidently hesitant to apply any specific requirements at all. Although it reaffirmed its reliance upon section 504 and upon section 404 of the Federal Aviation Act as "the requisite authority" for applying Subpart A of the rule—the general antidiscrimination provision—to all carriers,[72] it construed its statutory power to regulate discriminatory practices as extending no further:

> The specific requirements in Subparts B and C of this rule ... will apply only to those carriers receiving subsidy from the Board under sections 406 or 419 of the Act, in recognition of the limited jurisdictional basis of section 504. Those carriers subject only to the general provisions of Subpart A should look to the specific requirements of Subpart B as guidance for meeting their general obligation not to discriminate.[73]

In promulgating its Final Rule, the Board reasoned that because section 504 prohibits discrimination "under any program or activity receiving Federal financial assistance," [74] it was powerless, in implementing the statute, to "reach" any program or activity that was *not* receiving such assistance. "In our view," the Board announced, "only subsidy paid under either sections 406 or 419 of the Federal Aviation Act qualifies" as federal financial assistance.[75] In consequence, as petitioners note, the specific provisions of the rules designed to protect handicapped travelers apply only to those carriers receiving subsidies for the transportation of mail,[76] and to several small local and regional air carriers directly subsidized with federal funds for providing essential air-transportation to small communities.[77] As a practical matter, it is undisputed that in 1983 the CAB did not require any airline with regularly scheduled flights across the United States or overseas to comply with Subparts B or C of the regulations.[78]

Petitioners argue, in general, that the CAB's interpretation of its rulemaking authority under section 504 is excessively narrow, and that its construction of the scope of the Rehabilitation Act of 1973 is inconsistent with the intent of Congress, the regulations of other agencies, and controlling legal precedent.[79] In particular, in addition to their challenge of two specific provisions of the rules,[80] petitioners urge on several grounds that the agency erred as a matter of law in failing to apply its rules to all commercial airlines, "because these airlines receive federal financial assistance sufficient to bring them within the scope of section 504 of the Rehabilitation Act." [81] It is this last but most fundamental issue which, in our discussion of the considerable complexities involved in this petition for review, shall be first.[82]

65. PVA Brief at 60; *see* Final Rule, 47 Fed.Reg. at 25,949.

66. PVA Brief at 61–62.

67. *See supra* notes 9–20 and accompanying text.

68. Proposed Rule, 44 Fed.Reg. 32, 401–02.

69. *See supra* notes 14–17 and accompanying text. "The Board did not propose provisions governing employment because it did not consider employment to be covered by Section 504 .... A recent decision by the Supreme Court, *North Haven Board of Education v. Bell* [456 U.S. 512, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982)], however, caused the Board to reverse this view." Final Rule, 47 Fed.Reg. at 25,947.

70. *See supra* note 17 and accompanying text.

71. *See supra* notes 18 and 25 and accompanying text.

72. Final Rule, 47 Fed.Reg. at 25,937.

73. *Id.* at 25,937–38.

74. 29 U.S.C. § 794 (Supp. V 1981).

75. Final Rule, 47 Fed.Reg. at 25,937.

76. At the time this petition for review was filed, three carriers were so subsidized: Frontier Airlines, Piedmont Airlines, and Republic Airlines. Under the original section 406 program of the Federal Aviation Act, certain airlines were compensated by the federal government for the transportation of mail. *See* 49 U.S.C. § 1376(c), *as amended* (Supp. V 1981). This program was supplanted by a more limited program in 1982 (shortly after the CAB's Final Rules were promulgated) as part of the congressional plan to "deregulate" air transport and to "sunset" the CAB. *See* PVA Brief at 10; *see also infra* notes 212, 213 and accompanying text.

77. Under the section 419 program, airlines providing essential air service to a small community received federal subsidies under sections 419(a)(5) or (b)(6) of the Federal Aviation Act. In its Final Rule, the CAB noted that these small local and regional carriers would be required to comply with Subparts B and C of the nondiscrimination rule. In addition to the three carriers noted in note 76, *supra*, the Board identified Ozark, Air Midwest, Skywest, Alaska Airlines, Wien Air Alaska and Kodiak Western as carriers which, by virtue of their receipt of federal subsidies, would be subject to the specific requirements and compliance provisions of the rule. Final Rule, 47 Fed.Reg. at 25,938.

Curiously, the CAB elected *not* to apply Subparts B and C to air carriers receiving compensation retroactively for losses incurred when they have been required to continue providing services which they have requested authority to terminate. Such retroactive compensation, pursuant to section 419(a)(7), was deemed "short term and after-the-fact," making compliance "impractical." *Id.* By contrast, the Department of Justice's Civil Rights Division believed the retroactivity of the compensation did not justify different treatment of such carriers. *See* J.A. at 59; PVA Brief at 11.

78. Examples of major commercial air carriers that have no legal obligation to comply with Subparts B and C, in the Board's view, are American, Delta, Eastern, Northwest, Pan American, Trans World, and United Airlines.

79. *See, e.g.*, PVA Brief at 19.

80. *See supra* notes 64–66 and accompanying text.

81. PVA Brief at 12.

82. Jurisdiction in this case is provided by 49 U.S.C. § 1486(a) (1976):

> Any order ... issued by the Board ... shall be subject to review by the court ... upon petition, filed within sixty days after the entry of such order, ... After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Respondents argue that petitioners' filing for review in this case six months after the CAB's promulgation of its Final Rule precludes judicial review entirely. They suggest, moreover, that the Board's amendments to its Final Rule, which were issued on November 18, 1982 after further comment to the Board from the Department of Justice and disabled citizens, 47 Fed. Reg. 51,857, *see infra*, notes 179, 202 and accompanying text, were merely interpretive, so that judicial review remains time-barred.

It is undisputed that petitioners did file for review within sixty days of the Board's promulgation of its Amended Final Rule. More importantly, the CAB explicitly left its rulemaking docket open in order to receive additional comments from the public as well as from the Department of Justice. Final Rule, 47 Fed.Reg. at 25,948. Aware that the rule might be undergoing modification, and unable to predict how extensive any modification would be, petitioners elected to wait until the regulation was in final form before seeking review. Indeed, PVA and other groups representing the handicapped submitted comments to the Board during this

II. Discussion

A. *The Scope of Section 504: Defining "Federal Financial Assistance" in Context*

The Rehabilitation Act of 1973 established "a comprehensive federal program aimed at improving the lot of the handicapped."[83] Section 504 of the Act represented an effort, closely modeled upon civil rights legislation already in force, to offer handicapped individuals an opportunity to pursue employment, educational, and recreational goals free of the additional handicap of discrimination against them.[84] Aware that with section 504 Congress intended "to eradicate the longstanding prejudice against the handicapped,"[85] courts have duly noted the extent to which the language of the section corresponds to that of Title VI of the Civil Rights Act of 1964[86] and Title IX of the Education Amendments of 1972,[87] frequently applying the case law developed in those areas to the resolution of problems arising under the Rehabilitation Act.[88] In our review of the rulemaking proceeding below, and particularly in our analysis of what constitutes sufficient federal "financial assistance" to bring a "program or activity" within the reach of section 504, we shall do the same.

We emphasize at the outset, however, the extent to which the issue of discrimination against the handicapped, particularly in 'the complex realm of commercial air transportation, is *sui generis*.[89] Accordingly, our holding today is a narrow one which must be understood in the unique context of two intersecting considerations. First, we are interpreting a statute that was explicitly addressed not merely to enhancing employment and ending discrimination but to expanding the mobility of handicapped persons, to reducing barriers to transportation. Second, we are concerned with the appropriate regulation of an industry that is an integral part of a "program in activity" of a very special kind. In fact, the analysis of what constitutes "federal financial assistance" in this case, and the related question of how properly to apply section 504 to the airline industry, turn in significant part upon the specific and "special" ways in which, whether directly subsidized or not, all air carriers are inextricably intertwined with the federally-funded "program or activity" of commercial air transportation. Even at its most doctrinal, this is a case, above all, about access to airplanes and the Rehabilitation Act of 1973.

period, *see supra* note 64, and it was entirely reasonable of them to expect the agency to "respond in a reasoned manner to the comments received...." Action on Smoking and *Health v. CAB*, 699 F.2d 1209, 1216 (D.C.Cir. 1983); *Rodway v. Department of Agriculture*, 514 F.2d 809, 817 (D.C.Cir.1975) (citations omitted). Any delay simply served properly to exhaust petitioners' administrative remedies, and to conserve the resources of both the litigants and this court. Reasonable grounds having been shown, we grant review in this case pursuant to 49 U.S.C. § 1486(a).

83. *Consolidated Rail Corporation v. Darrone*, — U.S. —, 104 S.Ct. 1248, 79 L.Ed. 568 (1984).

84. *See generally* White House Conference on Handicapped Individuals Act, Pub.L. 93-651, § 301, 80 Stat. 2 *et seq.* (1974), 29 U.S.C.A. § 701 (historical note); S.Rep. No 1297, *reprinted in* 1974 U.S.Code Cong. & Ad News at 6406.

85. Wegner, *supra* note 4, at 403.

86. Title VI provides: "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Civil Rights Act of 1964, § 601, Pub.L. No. 88-352, 78 Stat. 252 (codified at 42 U.S.C. § 2000d (1976); *cf. supra* text accompanying note 3.

87. Title IX provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ...." Education Amendments of 1972, Pub.L. No. 92-318, § 901(a), 86 Stat. 373 (codified at 20 U.S.C. § 1681(a) (1982)).

88. *See, e.g., Brown v. Sibley*, 650 F.2d 760, 767 (5th Cir.1981); *see also*, Wegner, *supra* note 4.

89. The difficult choices necessitated by the idiosyncratic nature and extent of any particular individual's disability and the peculiar requirements of air safety make rulemaking in this area especially delicate, as our review of the background of this case in Part I suggests. Even in the arguably less complicated area of ground transportation, it may be no simple task to determine what section 504's deceptively clear mandate requires:

> What must be done to provide handicapped persons with the same right to utilize mass transportation facilities as other persons? Does each bus have to have special capacity? Must each seat on each bus be removable? Must the bus routes be changed to provide stops at all hospitals, therapy centers and nursing homes? Is it required that buses be able to accommodate bedridden persons? Is it discriminatory to answer any of these questions in the negative? Will the operation of hydraulic lifts on buses involve stigmatizing effects on the persons who use them? If so, is that a discrimination solely by reason of handicap within the meaning of § 504?

Atlantis Community, Inc. v. Adams, 453 F.Supp. 825, 831 (D.Colo.1978). *See also Dopico v. Goldschmidt*, 687 F.2d 644, 652 (2d Cir.1982); *American Public Transit Ass'n v. Lewis*, 655 F.2d 1272, 1281 (D.C.Cir.1981) (Edwards, J., concurring).

1. *Exclusive Operating Certificates*

In its rulemaking proceeding the CAB properly disposed of the argument made by petitioners and others that all certificated air carriers should be subject to section 504 because they receive federal financial assistance in the form of "operating certificates giving exclusive domain over valuable air routes."[90]

> While an operating certificate may be of some value, it no longer gives airlines exclusive domain over routes, see section 1601(a)(1)(C) of the Act. It therefore presents a situation similar to *Gottfried v. Federal Communications Commission*, 655 F.2d 297 (D.C.Cir.1981), wher it was held that broadcast licenses do not count as financial assistance within the meaning of section 504.[91]

As appropriate as the Board's reliance upon our holding in *Gottfried* was, however, that case merits a brief discussion here, not only because it represents an important earlier construction of the statute, but also because its holding must be understood in its appropriate—and somewhat limited—context.

In *Gottfried* this court remanded to the FCC a challenge to the license renewal of a public television station on the ground that the Commission had failed to inquire specifically into the station's efforts to meet the programming needs of the hearing impaired.[92] Its obligation to do so, the court noted, was founded upon section 504 of the Rehabilitation Act, to which the public station was bound by virtue of its receipt of federal financial assistance.[93] The court expressly held, however, that Congress did not "intend broadcast licenses to count as 'financial assistance' within the meaning of section 504."[94] Accordingly, it declined to remand a parallel challenge to the license renewal of seven commercial stations to which, it concluded, section 504 did not apply.[95]

In so doing, this court in *Gottfried* reviewed the "legislative heritage" of section 504 and of the Civil Rights Act of 1964 upon which it was modeled and discovered "no reference to the FCC or to any other government program involving issuance of federal licenses."[96] Moreover, we noted that in its original regulations issued for the guidance of all federal agencies, HEW "never explicitly classified broadcast licenses as financial assistance,"[97] even though not only federal "funds" but "services of Federal personnel" and "real and personal property or any interest in or use of such personal property" and other less obviously "financial" assistance was so included.[98] Finally, we observed that the Justice Department, which had recently been designated by Executive Order as the agency responsible for coordinating federal efforts to implement section 504, had specifically held that "'[t]he term "Federal financial assistance" ... does not include licenses, for example, since licenses are not Federal

90. Final Rule, 47 Fed.Reg. at 25,937.

91. *Id.*

92. *Gottfried v. Federal Communications Comm'n*, 655 F.2d 297 (D.C.Cir.1981), *rev'd on other grounds, sub nom. Community Television of S. Cal.*, 459 U.S. 498, 103 S.Ct. 885, 74 L.Ed.2d 705 (1983).

93. The assistance in *Gottfried* was both indirect ("congressional appropriations channelled ... through ... the Department of Commerce and the Corporation for Public Broadcasting"), *id.* at 655 F.2d 306, and "more direct and traditional" (restricted program grants to the particular station from particular federal agencies), *id.* at 307.

94. *Id.* at 312.

95. *Id.* at 301, 312.

96. *Id.* at 312, 313.

97. *Id.* at 314 n. 63.

98. *Id.* at 314, *citing* 45 C.F.R. §§ 84.3(h), 85.3(c) (1979).

assistance grants, contracts, loans, or cooperative agreements.' " [99]

In relying upon *Gottfried* to justify its rejection of the argument that operating certificates granted to carriers constitute "federal financial assistance" within the meaning of section 504, therefore, the Board was correct.[100] The license-specific nature of *Gottfried*'s holding and rationale, however, limits its applicability when considering other types of federal financial assistance.[101]

2. *Favorable Tax Treatment*

Petitioners note that "[f]rom its inception, the commercial aviation industry has received substantial direct and indirect assistance from the federal government," and that "[m]ost of the major airlines" received direct subsidies "in their early years." [102] Currently, they argue, such federal financial assistance takes the form not only of money subsidies under certain sections of the Federal Aviation Act but also of special investment tax credits made available to "certain railroads and airlines" by the Internal Revenue Code, 26 U.S.C. § 46(a)(8) (1976 & Supp. V 1980). Respondents, by contrast, find it "inconceivable, that Congress "intended to place nondiscrimination obligations on every commercial enterprise enjoying some form of favorable tax treatment." [103]

Petitioners find support for their position in *McGlotten v. Connally*, 338 F.Supp. 448 (D.D.C.1972) (three-judge court), which held "that assistance provided through the tax system is within the scope of Title VI of the 1964 Civil Rights Act," since

> [i]n the absence of strong legislative history to the contrary, the plain purpose of the statute is controlling. Here that purpose is clearly to eliminate discrimination in programs or activities benefitting from federal financial assistance. Distinctions as to the method of distribution of federal funds or their equivalent seem beside the point .... [104]

The three-judge court in *McGlotten* ruled that the tax exemption provided fraternal orders by section 501(c)(8) of the Internal Revenue Code, "[s]ince it is available only to particular groups ... operates in fact as a subsidy in favor of the particular activities these groups are pursuing. It thus falls within the coverage of the Civil Rights Act." [105] By direct and legitimate analogy, petitioners suggest, the investment tax credit available to railroads and airlines *in particular* by section 46(a)(8) constitutes sufficient federal financial assistance to airlines so "subsidized" [106] to trigger coverage by section 504.

99. *Id.* at 314 n. 65 (quoting Nondiscrimination Based on Handicap in Federally Assisted Programs—Implementing Section 504 of the Rehabilitation Act of 1973 and Executive Order 11914, 45 Fed.Reg. 37,620, 37,632 (June 3, 1980)).

100. This is not to say that broadcast or other federal licenses cannot be of great value. It has been suggested that even twenty years ago television broadcast licenses were worth $1,500,000, *see* Levin, *Economic Effects of Broadcast Licensing*, 72 J.Pol.Econ. 151 (1964), and it has been argued that granting such a license is the functional equivalent of "Government subsidization of broadcasters," *Columbia Broadcasting Syst., Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 174 n. 5, 93 S.Ct. 2080, 2122 n. 5, 36 L.Ed.2d 772 (1973) (Brennan, J., dissenting). Our holding in *Gottfried* was made in the face of such suggestions and arguments, which are less weighty here, since airline operating certificates are not longer exclusive.

101. *See, e.g., infra* notes 144–147 and accompanying text (discussion of *Angel v. Pan Am. World Airways, Inc.*).

102. PVA Brief at 13.

103. Respondents' Brief at 29.

104. *McGlotten v. Connally*, 338 F.Supp. 448, 461 (D.D.C.1972) (three-judge court).

105. *Id.* at 462. *McGlotten* noted also that the deductibility of charitable contributions to § 501(c)(8) fraternal orders "operates in effect as a Government matching grant," *id.* (citations omitted) and therefore, like the exemption available to such groups, constitutes a "grant of federal financial assistance." *Id.* The court concluded that the fraternal organizations in *McGlotten*, which excluded nonwhites from membership, were subject to Title VI.

106. *McGlotten* observed that "the deductions provided in the Code are not all cut from the same cloth. Most relate primarily to the operation of the tax itself, and thus would not constitute a grant of federal financial assistance." *Id.* at 461. In this case, however, the Code provision is highly specific, relating not to the "tax itself" but to "airline property ... used by the taxpayer directly in connection with ... the furnishing or sale of transportation as a common carrier by air subject to the jurisdiction of the Civil Aeronautics Board or the Federal Aviation Administration." 26 U.S.C. § 46(a)(8)(E) (1976 & Supp. V 1980).

In its rulemaking proceeding the CAB failed to address the tax subsidy argument. To this court, respondents argue that *McGlotten* is petitioners' "sole authority," that it "has had no case law progeny," that its discussion of Title VI and "federal financial assistance" was merely "dictum" in a case that was really about the state action doctrine and the equal protection clause, and that in its recent decisions holding that tax exemptions and tax deductibility do indeed constitute "a form of subsidy that is adminsitered through the tax system," *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 544, 103 S.Ct. 1997, 2000, 76 L.Ed.2d 129 (1983), the Supreme Court "conspicuously failed to invoke" *McGlotten*.[107] None of these arguments is convincing. Both in *Regan* and *Bob Jones University v. United States*, 461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983), the Supreme Court affirmed *McGlotten*'s fundamental approach. More important, we think, is the possibility that Congress did not intend, by granting a limited tax incentive to a particular industry or group, to thereby encompass every such industry or group, or, for that matter, individual within some ever-widening and potentially almost limitless definition of "federal financial assistance."

It is true that the industry-specific nature of the accelerated depreciation allowance permitted airline property may obviate that danger in this case. But it is also true that the exemptions and deductions at issue in *McGlotten*, *Bob Jones*, and *Regan* were of a much more fundamental nature than the modest incentive to capital expenditures to which petitioners point here.[108] To find that the government could force an airline to comply with a federal antidiscrimination mandate solely because it takes advantage of section 46(a)(8) tax credits would be to find the government impotent to compel such compliance if any airline should elect to forego such credits. If Congress did intend handicapped citizens to have access to air transportation and to apply the nondiscrimination principles of section 504 to all carriers, we would violate that intent by holding that a carrier could avoid compliance through its accountant, or that Congress would be giving a green light to discrimination if it ever chose to enhance federal revenues in this deficit-plagued era by closing tax loopholes or simplifying the Code.

3. *The National Air Traffic Control System*

If interpreting every *de minimis* tax incentive as sufficient "federal financial assistance" to trigger the coverage of federal antidiscrimination statutes would be overbroad in its consequences and reach, petitioners' argument that the government's expenditure of some two billion dollars annually to provide airlines with a national system of air traffic control seems, by contrast, appropriately narrow and specific.[109] This program employs, on a twenty-four hour basis, highly-trained air traffic management personnel who monitor and control takeoffs, landings, and en route flights of civil and military aircraft in order to assure safe and expeditious air transportation. By directly financing the operation of twenty-five control centers, more than four hundred terminal control facilities, and additional flight service stations, as well as by administering its flight standards and medical fitness programs, petitioners argue, the federal government provides financial assistance that is "absolutely critical to the operation of the airlines." [110]

107. Respondents' Brief at 29 n. 17. Respondents fail to note that a crucial companion case to *Regan* prominently credits *McGlotten* with prompting Congress to enact a Code provision denying tax subsidies to segregated social clubs. *Bob Jones Univ. v. United States*, 461 U.S. 574, 601 n. 26, 103 S.Ct. 2017, 2033 n. 26, 76 L.Ed.2d 157 (1983) ("Section 501(i) was enacted primarily in response to that decision.").

108. We note, for example, that the discussion of charitable exemptions and deductions in *Bob Jones* emphasizes their historic importance and fundamental nature, and that neither *Regan* nor *Bob Jones* discusses any (of the multitude of) Code provisions other than plenary exemptions and deductibility of the sort applied exclusively to non-profit organizations.

109. In 1983 and 1984 the federal government allocated $2.2 billion and $2.3 billion, respectively, for the operation, installation and maintenance of the air traffic control system. Executive Office of the President, Office of Management and Budget, Appendix to the Budget of the United States Government, 1984 at I-Q27.

110. *See* PVA Brief at 14.

It cannot be seriously disputed that the safe and efficient operation of commercial air transportation depends in great measure (if not, as petitioners assert, "entirely") upon "the proper functioning of the national air traffic control system." [111] One can scarcely imagine a modern airline representing to its customers that a regularly scheduled flight will leave at a time certain and arrive reliably at its destination if this "essential service" [112] provided by the FAA did not exist. Moreover, this crucial assistance may reasonably be considered "financial." Definitions of "federal financial assistance" issued by both the Department of Health and Human Services and the Department of Justice state explicitly that the term encompasses

> any grant, loan, contract, ... or any other arrangement by which the agency provides or otherwise makes available assistance in the form of: (1) Funds; (2) Services of Federal personnel; or (3) Real and personal property or any interest in or use of such property ...[113]

Consequently, petitioners' argument that the federal air traffic control system is an "arrangement" that "provides or otherwise makes available assistance in the form of ... services of Federal personnel" leads reasonably to the conclusion that the system does indeed constitute federal financial assistance to all commercial air carriers. It follows, therefore, that any and all carriers making use of the federal air traffic control system should be subject to any regulations promulgated under section 504.

Respondents attack this argument on several grounds. First, they contend that "regulatory history and common sense" make it clear that the current "services of Federal personnel" language really means "the loan or detail of Federal personnel to carry out functions which private (*i.e.*, airline) employees would otherwise have to perform, *e.g.* fly airplanes." [114] We are not persuaded, however, that the language of the Justice Department's implementing regulations should be taken to signify anything less than the plain meaning of the words themselves. "As a general matter, courts eschew narrow interpretations of remedial statutes. Instead, remedial statutes are normally accorded broad construction in order to effectuate their purpose." [115] As the Senate report on the 1974 amendments to the Rehabilitation Act explained, "section 504 was enacted to prevent discrimination against all handicapped individuals ... in relation to Federal assistance in employment, housing, *transportation*, education, health services, or any other Federally-aided programs." [116] To that end, section 504 and the civil rights statutes with which it shares a common language and heritage must "be liberally construed in order that their beneficent objectives may be realized to the fullest extent possible." [117]

Respondents' more substantial line of attack reiterates a point first articulated by the Board in justifying its Final Rule below: "It is the position of the FAA, with which we concur, that its air traffic control services are not financial assistance to air-

111. *Id.* at 18.

112. *United States v. Professional Air Traffic Controllers Org.*, 653 F.2d 1134, 1141 (7th Cir.1981), *cert. denied*, 454 U.S. 1083, 102 S.Ct. 639, 70 L.Ed.2d 617 (1981).

113. 28 C.F.R. § 41.3(e) (1983) (Department of Justice). Most federal agencies construe "federal financial assistance" at least as broadly. *See, e.g.*, 10 C.F.R. Part 1040.3(o) (1984) (Department of Energy); 22 C.F.R. § 142.3(h) (1983) (Department of State); 29 C.F.R. § 32.3 (1983) (Department of Education); 38 C.F.R. § 18.403(h) (1983) (Veterans Administration).

114. Respondents' Brief at 25.

115. *Jones v. Metropolitan Atlanta Rapid Transit Auth.*, 681 F.2d 1376, 1380 (5th Cir.1982), *cert. denied*, — U.S. —, 104 S.Ct. 1591, 80 L.Ed.2d 123 (1984); *accord, Peyton v. Rowe*, 391 U.S. 54, 65, 88 S.Ct. 1549, 1555, 20 L.Ed.2d 426 (1968); *Ayers v. Wolfinbarger*, 491 F.2d 8, 16 (5th Cir. 1974).

116. S.REP. No. 1297, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.CODE CONG. & AD.NEWS 6373, 6388 (emphasis added); *see also* S.REP. No. 1149, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S. CODE CONG. & AD.NEWS 7312, 7404.

117. *United States v. El Camino Community College Dist.*, 454 F.Supp. 825, 829 (C.D.Calif.1978), *aff'd*, 600 F.2d 1278 (9th Cir.1979), *cert. denied*, 444 U.S. 1013, 100 S.Ct. 661, 62 L.Ed.2d 642 (1980), *citing* SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 72.05 at 392 (4th ed. 1974) ("To this end, courts favor broad and inclusive application of statutory language by which coverage of legislation to protect and implement civil rights is defined."); *see also Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

lines. Rather, they are services provided to the public generally to ensure flight safety." [118] The federal air traffic control and safety programs, respondents suggest to this court, must be considered

> in the general category of "public goods." They are the goods and services from which all citizens and businesses benefit.... Thus, for example, the government may assure clean air through a variety of means, Federally financed or operated. But the recipient of the benefit cannot be precisely located, and no one enjoys an exclusive benefit. The air controllers help to assure "safe skies"; this "assists" airlines more directly than it assists other enterprises; yet it also assists all enterprises that use the airlines or fly private planes in the course of their business. It also protects those on the ground from plane crashes. It does not, however, amount to "Federal financial assistance."
>
> If, as PVA seems to assume, Congress had wanted to cover every enterprise benefitting from a federal program, it would have said so, but it did not.[119]

It is true that in important respects the provision of air traffic controllers might be analogized to the provision of highway patrolmen or traffic signs or signal; federal funding of such programs would not be likely to be considered the sort of "Federal financial assistance" sufficient to bring every private trucking business or other enterprise that used the highways within the scope of section 504. On the other hand, respondents concede that the air controller program "assists" airlines more directly and extensively and specifically than other enterprises. Moreover, as petitioners observe, it would be absurd to exempt a federally-funded local transit authority or school system from compliance with section 504 on the ground that public transportation benefits passengers as well as transit systems and, like public education and safe air travel, it is a "public good." [120] The fact is that the air traffic control system is *indispensable* to the *very existence* of modern commercial aviation, and that if it were not provided by the federal program now in place, it would have to be provided, and paid for, by the airlines themselves.[121]

It is at this juncture, however, that our analysis must be informed by the Supreme Court's resolution of a related problem in a case that has been decided since we heard oral argument in this matter. In *Grove City College v. Bell*, — U.S. —, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984), the Court construed the language of Title IX's prohibition against sex discrimination in any "education program or activity" that is "receiving Federal financial assistance" in a manner that compels us to focus less on the mode of assistance than on the "program or activity" being assisted. In particular, although the Court warned that nothing in Title IX justified "making the application of the nondiscrimination principle dependent on the manner in which a program or activity receives federal assistance," [122] it emphasized as well that an agency's authority to regulate under Title IX was limited by "the program specific nature of the statute." [123] Thus, even if the "economic ripple effects" of federal financial aid to a college's students resulted in additional funds for the institution's general operating budget, a plurality of the Court held, per Justice White, that only "the College's

118. Final Rule, 47 Fed.Reg. at 25,937.

119. Respondents' Brief at 27, 28 (citations omitted).

120. *See* PVA Reply Brief at 8–11.

121. *See id.* Indeed, some recent proposals to substitute a privately owned and operated system of air traffic control would lead, presumably, to just such a result—that is, airlines would contract with and pay for the services of the private program operator(s). The "assistance" provided the airlines in the form of the FAA's flight standards program, however—certifying aircraft, pilot competence, etc.—is more purely regulatory in nature, and therefore more analogous to the *Gottfried* analysis, *see supra* at notes 90–101 and accompanying text. To require a private company to acquire a license or adhere to a federal standard, and then to call the costs of regulation and of monitoring compliance a "benefit" to the regulated company which amounts to "financial assistance," would constitute bootstrapping and would exceed the boundaries of liberal statutory construction in the interests even of remedial action and civil rights.

122. *Grove City College v. Bell*, — U.S. —, 104 S.Ct. 1211, 1217, 79 L.Ed. 516 (1984).

123. *Id.* at 1221.

own financial aid program ... may properly be regulated under Title IX." [124]

The implications of the *Grove City* analysis for the case before us are not completely clear. To the extent to which petitioners argue that a national air traffic control system would have to be provided at the airlines' own expense if it were not provided by the federal government (*i.e.*, that this federal program has "economic ripple effects" that make additional funds available for other airline operations), the *Grove City* plurality would appear to be unsympathetic. And if the federal air traffic control system is the "program or activity" which is deemed to receive "federal financial assistance," then the program-specific mandate of *Grove City* would imply that only that particular system—its personnel practices and physical facilities, for example—could be regulated under section 504. If, on the other hand, the "program or activity" at issue is deemed to be that of commercial air transportation as engaged in by the air carriers, and if the air traffic system is deemed—via its personnel and facilities—to *be* the "federal financial assistance" provided to that program, then any "program specificity" problem with petitioners' argument is avoided.

[1] Such a problem is not before us in the instant case, however, because we need not reach it to hold that the CAB erred as a matter of law in failing to apply its section 504 regulations to all commercial air carriers. We base this holding upon the federal government's funding of airports and "airways," upon the necessary and inextricable integration of these facilities with all commercial air carriers and, above all, upon the clear intent of Congress in passing the Rehabilitation Act of 1973 and the effort of appropriate agencies to effectuate the mandate of section 504 in the unique context of commercial air transportation.

4. *Federally Assisted Airports*

The Airport and Airway Development Act of 1970, 49 U.S.C. § 1714, *as amended*, authorized the Secretary of Transportation "to make grants for airport development" in order "to bring about, in conformity with the national airport system plan, the establishment of a nationwide system of public airports adequate to meet the present and future needs of civil aeronautics...." [125] To this end Congress established the Airport and Airway Trust Fund, monies from which are used to construct, acquire, lease and improve facilities and equipment used in civil aviation, currently in the amount of several billion dollars annually.[126] Grants received by airports are not "earmarked" but are "obtained through the use of a single project application to cover all airport improvement projects contained in the airport's annual expenditure program." [127] Typical capital projects undertaken with the substantial federal financial assistance so obtained have been airport land acquisition, runway construction, passenger terminals, airport lighting, airport access and service roads, electronic and visual approach aids, taxiway construction, obstruction removal, and fire/rescue equipment and buildings.[128] It is undisputed that this extensive federal financial assistance to airports subjects them to the nondiscrimination mandate of the federal civil rights laws, including section 504 of the Rehabilitation Act of 1973.[129]

124. *Id.* at 1221, 22. Otherwise, the plurality reasoned, "an entire school would be subject to Title IX merely because one of its students received a small BEOG [Basic Educational Opportunity Grant] or because one of its departments received an earmarked federal grant. This result cannot be squared with Congress' intent ... [W]e have found no persuasive evidence suggesting that Congress intended that the Department's regulatory authority follow federally aided students from classroom to classroom, building to building, or activity to activity." *Id.*

125. 49 U.S.C. § 1714(a), *as amended* (1976 & Supp. V 1981).

126. 49 U.S.C. § 1742, *as amended* (1976 & Supp. V 1981).

127. Between 1982 and 1984 an estimated $17 billion were available for apportionment by the Secretary. Estimates of actual disbursements, consistent with a statutory formula now based, *inter alia*, upon the number of passengers emplaned at a particular airport, were about one third that amount. *See* PVA Brief at 17 n. 14; 49 U.S.C.A. § 2206(a)(1) (West Supp.1984) (codifying the Airport and Airway Improvement Act of 1982, Pub.L. 97-248, 96 Stat. 671, Sept. 3, 1982).

128. National Transportation Policy Study Commission Final Report, *National Transportation Policies Through the Year 2000* (June 1979) at 187-88.

129. *See, e.g.*, Respondents' Brief at 29, 30 (citing the Title VI regulations of DOT and FAA and DOT's section 504 regulation).

The critical question then becomes whether, as respondents contend, the scope of section 504 "extends to the threshold of the planes themselves, but not beyond." [130] Such a result is required, respondents argue, by virtue of "longstanding administrative interpretation," Supreme Court precedent, and a case in our own district court which "has squarely held" that the indirect assistance provided airlines using federally-funded airports did not trigger the coverage of section 504.[131] We consider, and reject, each of these arguments in turn.

First, the longstanding and, until this proceeding, consistent interpretation of federal civil rights statutes has supported the position not of respondents but of PVA. For example, in applying its Title VI regulations to federally assisted airports, the Department of Transportation explicitly included

> restaurants, snack bars, gift shops, ticket counters, baggage handlers, car rental agencies, limousines and taxis franchised by the airport sponsor, insurance underwriters, and other businesses catering to the public at the airport.[132]

If these businesses are construed as receiving federal financial assistance by virtue of federal aid to airports, it is nonsensical to exclude the air carriers themselves, which surely are businesses "catering to the public at the airport." Indeed, in its own section 504 rulemaking, DOT explained that its regulations apply, *inter alia*, to ticket counters, boarding devices, baggage check-in and retrieval, and teletypewriters, "all of which are owned and operated by the airlines at most airports." [133] DOT's decision in 1979 *not* to extend its own rules to air carriers' in-flight activities obviously was a result of the CAB's assertion of such authority at that time, and of DOT's commendable effort to avoid redundant, overlapping regulations:

> Following publication of [DOT's] NPRM, representatives of the DOT, FAA, HEW and the Civil Aeronautics Board (CAB) met to discuss the respective legal authority and responsibilities for improving the accessibility of air travel to handicapped persons. Following this meeting, the CAB determined that it had statutory authority to issue regulations governing air transportation of handicapped persons.... *Action by the CAB ... would ensure the uniform provision of services and equipment by the airlines, needed to accomplish accessibility to air travel for handicapped persons....*[134]

Of course, the CAB's initial interpretation of its rulemaking authority under section 504 was consistent with this expectation. Its Notice of Proposed Rulemaking assumed that all certificated carriers would be covered, and invited comment specifically *only* as to whether small commuter carriers with planes of fewer than thirty seats should be exempted.[135] This initial position of the CAB was in fact consistent with its own "longstanding administrative interpretation" of its Title VI regulations as covering programs "including"—but not limited to—those receiving direct money subsidies, and as applying not only to "money paid" but to "other federal financial assistance extended." [136] The Board's sudden reversal in this regard was contrary not only to the interpretation of other agencies in this context, but to its own.

A more substantial argument advanced by respondents is based upon two recent Supreme Court cases, one of which was *sub judice* at the time the instant petition for review was heard. In *North Haven Board of Education v. Bell*, 456 U.S. 512,

130. *Id.* at 30.

131. *Id.* at 30-31.

132. 49 C.F.R. Part 21, Appendix C (1984).

133. Nondiscrimination on the Basis of Handicap in Federally-Assisted Programs and Activities Receiving or Benefitting from Federal Financial Assistance, 44 Fed.Reg. 31,442, 31,451 (May 31, 1979) [hereinafter cited as DOT Section 504 Rules].

134. *Id.* at 31,451 (emphasis added).

135. *See supra* note 35; Proposed Rule, 44 Fed. Reg. at 32,405. Commenting in this regard on the CAB's proposed section 504 rules, DOT urged the more inclusive coverage: "We do not believe application of Part 382 should be limited .... DOT believes that handicapped travelers should not be deprived of air transportation [on planes of less than 30 seats], unless a carrier can show that, because of aircraft structure restrictions, certain types of handicapped passengers cannot be safely accommodated." Comments of the U.S. Department of Transportation before the Civil Aeronautics Board at 4, 5 (Sept. 13, 1979), J.A. 78, 79.

136. 14 C.F.R. § 379.2 (1983).

102 S.Ct. 1912, 72 L.Ed.2d 299 (1982), the Court concluded "that an agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§ 901 and 902." [137] Thus, respondents argue, "[w]hile an airline may utilize a federally-funded program, *i.e.*, airport operations, it is not a federally funded program itself by virtue of the airport's receipt of aid." [138] *North Haven*'s emphasis upon "program specificity" was, as we have noted, reaffirmed by the Court's more recent decision in *Grove City College v. Bell*.[139] But it is also true that in its *North Haven* opinion the Court expressly did "not undertake to define 'program' " [140] and that in *Grove City* the plurality emphasized not only that the student financial aid at issue was "*sui generis*" but that the intent of Congress in passing Title IX was central to its analysis.[141] In considering what we believe must also be termed the *sui generis* nature of commercial air transportation, as well as the intent of Congress in passing the Rehabilitation Act of 1973, combined with the postenactment administrative and legislative construction of section 504, we find that the regulations promulgated in this case must be applied to all air carriers using federally-funded airports in their "program or activity" of providing commercial air transportation.

Airports and airlines are inextricably intertwined.[142] The indissoluble nexus between them is the provision of commercial air transportation. Although airports may lease space to gift shops and airlines may publish inflight magazines or own a chain of resort hotels, when it comes to the "program or activity" of providing air transportation to the traveling public, the two entities are so functionally integrated that they become one. While it *may* be the case, as respondents urge, that the *airline* as a corporate entity does not become a federally-assisted "program" by virtue of its use of federally-assisted airports, its "program or activity" of providing commercial air transportation certainly does. Thus, section 504 may or may not reach the practices of a hotel owned and operated by an airline company; but it certainly must reach, in our view, the treatment afforded a passenger who boards that company's aircraft at, deplanes to, and reaches his destination safely and efficiently only because of, a federally-funded airport. Just as the plurality in *Grove City* distinguished the college's financial aid program from other programs within the institution, an airline's commercial aviation program, its activity in actually carrying passengers from one place to another, may be distinguished from its other programs or activities.

Respondents attempt to avoid this holding, finally, by pointing to a case in our district court which "squarely held" [143] that to "hold that commercial airlines fall within section 504 merely because of assistance provided to airports would expand improperly the accepted proposition that section 504 is limited to direct recipients of Federal funds." [144] The Board quoted in full and explicitly relied upon this language from *Angel v. Pan American World Airways, Inc.*[145] We reject it on at least three grounds, and declare *Angel* squarely overruled.

137. 456 U.S. at 538, 102 S.Ct. at 1926.

138. Respondents' Brief at 32.

139. — U.S. —, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984).

140. 456 U.S. at 540, 102 S.Ct. at 1927.

141. 104 S.Ct. at 1221, 23.

142. For example, as the Board itself has observed, at some airports "a single airline may have its own terminal building" and substantial parts of the airport's physical plant may be "carrier-owned." In other cases "the design of most of the facilities, perhaps even including parking facilities, may well be under the airlines' control [including control "over their selection, design, construction or alteration"], even if the property is leased from an airline authority." Final Rule, 47 Fed.Reg. at 25,940. Especially in the case of the larger, most widely used airports and air carriers, the structural, and *a fortiori* the functional, integration of airport and air carrier is self-evident. As has been noted, "in the airline industry, two inputs (airline services and airport services) are required to produce a single output (air transportation)." Note, *Airline Deregulation and Airport Regulation*, 93 YALE L.J. 319 n. 1 (1983). See also the Board's initial definition of "facility" in its Proposed Rule, *supra* note 27.

143. Respondents' Brief at 30.

144. *Angel v. Pan Am. World Airways, Inc.*, 519 F.Supp. 1173, 1178 (D.D.C.1981).

145. Final Rule, 47 Fed.Reg. at 25,937.

First, even if "airlines" on a company-wide basis are not covered by section 504, we believe their programs and activities providing commercial air transportation are, as noted above. Second, *Grove City* directly undermines any notion that coverage of federal antidiscrimination statutes is in any way—much less as an "accepted proposition"—"limited to direct recipients of Federal funds." As the Court held unambiguously in *Grove City:*

> Nothing ... suggests that Congress elevated form over substance by making the application of the nondiscrimination principle dependent on the manner in which a program or activity receives federal assistance. There is no basis in the statute for the view that only institutions that themselves apply for federal aid or receive checks directly from the federal government are subject to regulation.[146]

Third, *Angel* depends for its holding upon an unjustifiably broad reading of *Gottfried v. FCC*, a case which, as we have discussed in some detail, is license-specific in its holding and rationale, and which in the consideration of federal financial assistance to airports and air transportation is thoroughly inapposite.[147]

5. *Additional Considerations: The Special Administrative and Legislative Context*

Our holding today that section 504 of the Rehabilitation Act of 1973 applies to all commercial air carriers and that the CAB erred in restricting the application of its section 504 regulations to those few small carriers receiving direct money subsidies is buttressed by several unique features of this case. These include the particular concern evidenced by Congress for the right of handicapped persons to travel and to have the greatest possible access to employment opportunities, the regulatory inconsistencies manifested by the Board in the proceedings below, and the recent reaffirmation by Congress of its commitment in this area through its passage of the Civil Aeronautics Board Sunset Act of 1984.

Our starting point in this case must be not only the statutory language,[148] which in the case of section 504 must be accorded "the scope that its origins dictate, ... a sweep as broad as its language," [149] but the statute as a whole. So concerned was the Rehabilitation Act of 1973 *with transportation in particular* that it "established within the Federal Government the Architectural and Transportation Barriers Compliance Board" composed of, among others appointed by the President, the heads of the Departments of Health, Education, and Welfare, Transportation, Housing and Urban Development, Labor, Interior, Defense, and of the General Services Administration, Postal Service, and Veterans Administration. This Board [hereinafter ATBCB] was charged particularly with the task of reducing "architectural, transportation, and attitudinal barriers" in, *inter alia*, "public transportation (including air, water, and surface transportation whether interstate, foreign, intrastate or local)." [150] Consequently, it was not surprising that a 1974 Senate report should list transportation as one of five itemized areas to which section 504 was meant to apply.[151]

146. 104 S.Ct. at 1217.

147. *See supra* notes 90–101 and accompanying text. Similarly, respondents' reliance upon *Disabled in Action v. Mayor and City Council of Baltimore*, 685 F.2d 881 (4th Cir.1982), must fail, not for one but for at least three reasons. First, in holding that the Baltimore [Orioles] Baseball Club, as a nonexclusive lessee of a federally-assisted municipal stadium, was not subject to section 504 obligations, the *Disabled* court pointed repeatedly to *Angel*, which we have criticized, and to the "indirect" nature of the aid involved, which cannot be weighted so heavily after *Grove City*. Second, the court's analysis in *Disabled* centered upon problems of enforcement and compliance, implicating issues not only of "directness" but of "affirmative action" not present in the instant case (Club legally powerless to make "extensive physical alterations demanded by plaintiffs," *id.* at 685). Third, in no sense was access to baseball games as central a concern of Congress in enacting the Rehabilitation Act of 1973 as was nondiscriminatory access to vital modes of transportation and, thereby, to employment opportunities that might otherwise be denied solely on account of handicap. *See infra* notes 148–156 and accompanying text.

148. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520, 102 S.Ct. 1912, 1917, 72 L.Ed.2d 299 (1982); *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330, 98 S.Ct. 2370, 2375, 57 L.Ed.2d 239 (1978).

149. 456 U.S. at 421, 102 S.Ct. at 1918, *citing United States v. Price*, 383 U.S. 787, 801, 86 S.Ct. 1152, 1160, 16 L.Ed.2d 267 (1966).

150. 29 U.S.C. § 792(a), (b)(2) (Supp. V 1981).

151. *See supra* note 116 and accompanying text.