Thus, in the line of cases which has followed *Goldberg*, two 1971 decisions have been helpful in shedding some light on the inherent problems of applying a balancing test. In *Bell* the Supreme Court has indicated that where the government has issued a benefit to an individual, whatever that benefit may be, it will take more than administrative and fiscal considerations to suspend or terminate that benefit without a prior hearing. In *Chenango Court* the Second Circuit illustrated that the addition of some other private interest to the state's fiscal and administrative side of the balance can be sufficient to offset the individual's interest in maintaining his state assistance and in such case no pre-termination hearing will be required.

B. Procedural Safeguards Accompanying the Right to a Hearing: A Public "Trial"

Most of the cases following *Goldberg v. Kelly*[1] have dealt only with the constitutional right to a hearing and not with the procedural safeguards which might accompany that hearing, such as a right to oral argument, presentation of witnesses, or cross-examination of witnesses. *Fitzgerald v. Hampton*[2] illustrates an increasing effort to extend *Goldberg* to require such procedural safeguards.[3] In *Fitzgerald* the District Court for the District of Columbia held that a dismissed federal employee had a constitutional right to a public dismissal hearing. While holding the position of Deputy for Management Systems of the Office of the Secretary of the Air Force, the employee had revealed, in highly publicized testimony before the Joint Economic Committee, a high cost overrun on the Air Force contract for the C5A transport aircraft.[4] The employee, a preference

1. 397 U.S. 254 (1970). See pp. 158-59 *supra*.

2. ___F. Supp. ___ (D.D.C. 1971).

3. *See, e.g.*, Intercontinental Indus., Inc. v. American Stock Exch., 452 F.2d 935, 940-43 (1971). For a listing of pending cases involving this issue, see Richardson v. Wright, ___ U.S. ___, ___n.1, *reprinted at*, 40 U.S.L.W. 4232, 4233 n.1 (U.S. Feb. 24, 1972) (Nos. 70-161 & 70-5211).

4. *Hearings Before the Subcommittee on Economy in Government of the Joint Economic Committee*, 90th Cong., 2d Sess. 2589-96 (1968).

5. See Brief for Appellant at 3, Fitzgerald v. Hampton, ___ F.2d ___ (D.C. Cir. 1971). The statutory definition of "preference eligible" is found in 5 U.S.C. § 3501(a)(3) (1970). These employees are granted a somewhat favored status. Even in reduction-in-force situations, the Civil Service Commission is directed to "give due effect to" an employee's preference eligible status. *Id.* § 3502(a)(2).

eligible,[5] was ultimately dismissed from his position through what the Air Force claimed was a routine reduction-in-force separation. Fitzgerald appealed his dismissal to the Civil Service Commission on the grounds that he had been wrongfully discharged in retaliation for his testimony. Civil Service regulations do not require a hearing for a reduction-in-force dismissal[6] but the practice of the Commission on appeal is to grant a discretionary hearing to preference eligibles.[7] The Commission, therefore, granted Fitzgerald's request for a hearing but refused to open the hearing to the public, relying on Civil Service regulations specifying that all proceedings involving appeals to the Commission of actions against employees should be closed.[8] Fitzgerald then filed a petition in the United States District Court for the District of Columbia to enjoin the administrative proceedings, contending that his separation was actually a dismissal for cause and that the due process clause of the fifth amendment not only gave him the right to a hearing for such dismissal, but also the right to have that hearing held open to the public. The Government contended that the dismissal was not for cause and that, therefore, there was no right to a hearing of any type; that the hearing held was a discretionary one; and that the Constitution did not dictate any procedures for discretionary hearings. The district court granted Fitzgerald's motion for summary judgment and permanently enjoined the Government from holding closed hearings.[9]

Although the constitutional right to have *judicial* proceedings held open to the public has long been a cornerstone of the American judicial system,[10] the availability of this right as a concomitant of an administrative hearing is not so apparent. Among the few courts which have dealt with the issue are two recent district court cases.

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6. *See* 5 C.F.R. pt. 351 (1971).

7. Brief for Appellant at 9, Fitzgerald v. Hampton, ___ F.2d ___ (D.C. Cir. 1971).

8. 5 C.F.R. § 772.305(c)(3) (1971).

9. ___ F. Supp. at ___ After notice of appeal was filed by the Government in the Court of Appeals for the District of Columbia Circuit, the district court granted a motion by the employee that open hearings be promptly resumed. District Court for the District of Columbia, Order of October 15, 1971. On the Government's request, the court of appeals granted a stay of this district court order pending appeal, but specified that the case be scheduled for argument on the merits as soon as possible. District of Columbia Circuit Court of Appeals, Order of November 8, 1971. See Brief for Appellants at 6, Fitzgerald v. Hampton, ___ F.2d ___ (D.C. Cir. 1971).

10. *See, e.g.*, 1 T. COOLEY, CONSTITUTIONAL LIMITATIONS 647 (8th ed. 1927); J. WIGMORE ON EVIDENCE § 1834 (3d ed. 1940).

Both held that a student has a constitutional right to a hearing prior to suspension but does not have a right to have that hearing held open to the public.[11] These cases are distinguishable from *Fitzgerald*, however, as they were based on what each court found to be overriding considerations: in one case, maintaining order and discipline in the proceeding,[12] and in the other, protecting the reputation of the students.[13] In 1937 the Supreme Court stated in dicta in *Morgan v. United States*[14] that, as a general rule, hearings should be open to the public. The Court noted that in administrative proceedings of a quasi-judicial character, the liberty and property of the citizen should be protected by the rudimentary requirements of fair play, and that these demanded a fair and open hearing which was essential to the legal validity and soundness of this important governmental process.[15] However, this case did not directly involve the issue of actual physical access to the proceedings, but merely upheld the appellant's right to receive a transcript of the hearing, a right now specifically granted by statute.[16] In *FCC v. Schreiber*[17] the Supreme Court held that an agency could insist upon open hearings. In that case the complainant's activities were the subject of an investigation, and he sought to have a number of documents containing trade secrets and other confidential business information reviewed *in camera* by the agency. The Court upheld the agency regulations which required disclosure of the information in a hearing open to the public, approved the presumption in favor of public proceedings which the regulations established, and stated that the presumption accorded with a general policy favoring disclosure of administrative agency proceedings. In spite of this language, however, the case might be read as authority for upholding the agency's attempt to restrict access in *Fitzgerald*, because the *Schreiber* Court stated that it could alter the agency's procedural rules only if they were arbitrary or capricious. The "arbitrary or

11. Moore v. Student Affairs Comm., 284 F. Supp. 725 (M.D. Ala. 1968); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747 (W.D. La. 1968). In the latter case the court went so far as to say that "no citation of authority has been submitted and, indeed, there is none, which necessitates a public hearing in such matters." *Id.* at 768.

12. 284 F. Supp. at 731.

13. 281 F. supp. at 768.

14. 304 U.S. 1 (1938).

15. *Id.* at 14-15.

16. 5 U.S.C. § 556(e) (1970).

17. 381 U.S. 279 (1965).

capricious" test, however, should not be applied in cases such as *Fitzgerald* where a constitutional right is involved and the agency rule does not itself favor full disclosure, as did the rule in *Schreiber*.

Procedures followed in criminal prosecutions, where a public hearing is expressly guaranteed by the sixth amendment,[18] have sometimes been transferred to the administrative setting in support of the principle of open hearings. It has been suggested that *In re Oliver*,[19] which held that due process requires a public proceeding for a judicial commitment to jail for contempt of court, is applicable to cases involving discharge from federal employment.[20] There is also nonjudicial authority indicating a preference for open hearings. The 1941 Report of the Attorney General's Committee on Administrative Procedure[21] declared that administrative hearings should be, and almost invariably were, public, and that the few exceptions should be for the benefit of the individuals involved. The Freedom of Information Act[22] was adopted primarily to facilitate public awareness of the activities of administrative agencies, and to make information about the executive branch more available to the public,[23] and the Act would seem to also support the establishment of a presumption in favor of open hearings.

The constitutional requirement for an open hearing was developed in *Fitzgerald* by a novel application of traditional concepts. The court extended the considerations originally developed to determine the need for any hearing at all[24] to support its holding that a public

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18. U.S. CONST. amend. VI.

19. 333 U.S. 257 (1948).

20. 1 DAVIS § 8.09. The suggestion, however, was specifically intended only for loyalty cases.

21. REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 68 (1941).

22. 5 U.S.C. § 552 (1970).

23. This is evident from a reading of the legislative history of the Act. H.R. REP. No. 1497, at 1. *See also* Comment, *The Freedom of Information Act: Access to Law*, 36 FORDHAM L. REV. 765, 766 (1968).

24. The right to a full trial-type hearing in administrative proceedings is generally limited to the situation where adjudicatory facts—that is, facts pertaining to a particular party—are in issue. Amos Treat & Co. v. SEC, 306 F.2d 260, 263 (D.C. Cir. 1962); DAVIS (Supp. 1970) § 7.02; *see* p. 164 *supra*. In the field of discharge from public employment, the actual right of a dismissed employee to a hearing is generally limited to the situation where the dismissal has a significant and substantial impact on the reputation of the employee which might adversely affect his ability to obtain further employment. *See, e.g.*, Cafeteria Workers Union v. McElroy, 367 U.S. 886, 898 (1961); Greene v. McElroy, 360 U.S. 474, 507 (1959); Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966).

proceeding was required. The court partially relied on the principle that where an employee's ability to earn a livelihood was affected by a discharge, more stringent due process safeguards were to be followed.[25] It then appeared to utilize, without identifying, the balancing test the Supreme Court had developed in *Goldberg v. Kelly*,[26] to decide that a *public* hearing was necessary. However, the *Fitzgerald* court failed to examine all of the countervailing interests claimed by the parties in that case. Only Fitzgerald's right to earn a livelihood was weighed against the Government's bare contention of a justification for closed hearings to protect the privacy of the employee, and the court said that from a balancing of these considerations it was clear that petitioner's interests were stronger and that he should be granted an open hearing.[27] The individual interests actually invoked by the parties in this case were less than compelling—neither the employee[28] nor the Government[29] presented a clear showing of a need for an open or closed hearing. Therefore, the *Goldberg* balancing test, even if applied to all of the interests forwarded by the parties, would yield less than conclusive results.

An additional rationale utilized by the court was the application to the administrative context of public trial concepts developed in the judicial setting. Citing *In re Oliver*[30] and *Amos Treat & Co. v. SEC*,[31]

25. See note 24 *supra*.

26. 397 U.S. 254 (1970). *See* p. 158-59 *supra*.

27. The privacy of the employee, the court felt, obviously had no validity where it was the employee himself who was demanding the open hearing. ___F. Supp. at ___.

28. Fitzgerald claimed that public scrutiny was required to clear his reputation upon which his livelihood depended, and to vindicate the right of the press and public to learn about governmental waste and inefficiency. Brief for Appellees at 15-16, Fitzgerald v. Hampton, ___F.2d___ (D.C. Cir. 1971). In answer to these contentions it should be emphasized that the hearings to be conducted in this case were not to be secret; they were to be adjudicatory proceedings with Fitzgerald represented by counsel, and the transcript was to be available to the petitioner with no restrictions on publicizing its contents. The only limitation was that the press and public were not to be admitted.

29. Civil Service Commission Chairman Hampton, subsequent to the district court's decision, attempted to list additional considerations militating in favor of limiting access to the hearings. Letter from Chairman Hampton to Senator Proxmire, June 1, 1971, in Brief for Appellant at 15-17, Fitzgerald v. Hampton, ___ F.2d ___ (D.C. Cir. 1971). These included the desirability of maintaining uncomplicated proceedings to facilitate and expedite the search for truth by creating a calm atmosphere; a lack of contempt power by the hearing examiners with which to maintain order; and a lack of ability and expertise on the part of the examiners to regulate the decorum of the hearings. As the court noted, it is difficult to see how the admittance of the public would hinder the search for truth, and there is no evidence of any threat of disruption.

30. 333 U.S. 257 (1948). See note 19 *supra* and accompanying text.

31. 306 F.2d 260 (D.C. Cir. 1962). See note 24 *supra*.

the court noted that a public hearing was a necessary ingredient of a fair trial, and that, although Fitzgerald's hearing was not prosecutorial in nature, it directly affected the rights of an individual, it was an adversary proceeding, and the final outcome would be a decision on the merits. Although the court failed to make an explicit holding that Fitzgerald's dismissal was actually for cause, its statements that the dismissal would affect his future ability to gain employment and that the employee's "right to a livelihood was at stake"[32] imply that it was adopting that factual determination and was rejecting the Government's contention that this was no more than a reduction-in-force separation.[33] Once this decision was reached, it is probable, although not altogether clear, that under existing case law a constitutional requirement for a hearing prior to separation would exist.[34] Unfortunately, the court again failed to make its holding explicit; and it is not clear whether it was holding that the hearing itself was constitutionally necessary and that the right to have it open accompanied the constitutional requirement, or whether it was holding merely that once a discretionary hearing was granted by the agency, it was constitutionally necessary to hold it open to the public and the press. It would seem that in the absence of any initial statutory[35] or constitutional right to a hearing, the policy arguments favoring open proceedings, however persuasive, would be insufficient to dictate a *constitutional* requirement that discretionary hearings be held open to the public. If the court intended to rely on a constitutional right to a hearing because of the adverse effect of the dismissal on the employee's reputation, then the requirement for an open hearing is more persuasive. The Supreme Court has analogized proceedings that affect a dismissed employee in this manner to proceedings "involving

32. ___ F. Supp. at ___

33. The ability of the court to make this finding is somewhat suspect in light of the settled principle that fact determinations, so long as they are "reasonably" made, are within the exclusive province of the administrative agency. 4 DAVIS §§ 30.02-.03. However, precisely what procedural safeguards are required in administrative hearings has traditionally been left to judicial determination. DAVIS (Supp. 1970) § 30.10.

34. *See* note 24 *supra*.

35. Although the Administrative Procedure Act does not specifically provide a statutory right to a hearing for either reduction-in-force or a dismissal for cause, internal executive regulations require an evidentiary hearing both at the employing agency level and upon appeal to the Civil Service Commission. Exec. Order No. 10,987, 27 Fed. Reg. 550 (1962). *See also* Williams v. Brown, 384 F.2d 981, 984-95 (D.C. Cir. 1967).

the imposition of criminal sanctions,"[36] and has held that due process requires the use of at least some of the same protections that the citizen would have in a criminal trial.[37] However, the extension of this line of authority might prove too inflexible. There will be circumstances where the agency is justified in holding closed hearings. Perhaps the optimum resolution of the problem would be to couple a presumption in favor of open hearings with the extension of the *Goldberg* balancing test utilized by the *Fitzgerald* court. The presumption would recognize the policy arguments favoring open hearings by shifting the burden to the Government to show a legitimate governmental interest for restricting access, and the balancing test would permit the court to weigh, on a case by case basis, the competing interests.[38]

C. USE OF HEARSAY EVIDENCE AND THE "SUBSTANTIAL EVIDENCE" STANDARD

Richardson v. Perales[1] and its attendant trilogy of lower court opinions[2] reflect the constant friction in administrative law generated by a mounting case load and a conscious effort to insure justice in each individual proceeding. The final decision established that uncorroborated hearsay can constitute "substantial evidence" sufficient to support an administrative ruling.

36. Williams v. Zuckert, 371 U.S. 531, 533-34 (1962) (Douglas, J., dissenting), *vacated and remanded*, 372 U.S. 765 (1963).

37. *See* Greene v. McElroy, 360 U.S. 474 (1958) (granting right to hearing where accusers could be confronted and cross-examined); Peters v. Hobby, 349 U.S. 331 (1955) (granting right to appeal from unfavorable agency ruling).

38. It is entirely possible that the court of appeals will not reach the issue of an open hearing on the appeal of the *Fitzgerald* decision. The doctrine that a litigant must exhaust his administrative remedies before judicial appeal, enunciated in Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1937), applies to employment-discharge cases. *E.g.*, American Fed'n of Gov't Employees v. Resor, 442 F.2d 993 (3d Cir. 1971); Hills v. Eisenhart, 256 F.2d 609 (9th Cir. 1958); Green v. Baughman, 214 F.2d 878 (D.C. Cir. 1954). The district court held that *Fitzgerald* represented one of the exceptions to the exhaustion principle—that established avenues for review may be bypassed where an adequate remedy for the issue in question would not exist after the agency action. *See* Jewel Cos. v. FTC, 432 F.2d 1155 (7th Cir. 1970). The court felt that the "probability of unfairness" presented by non-public proceedings would not lend itself to later judicial review. ___ F. Supp. at ___ The court of appeals may reverse on the exhaustion issue and remand this case to the Civil Service Commission for completion of hearings.

1. 402 U.S. 389 (1971), *noted in The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 326 (1971).

2. Cohen v. Perales, 412 F.2d 44 (5th Cir.), *rehearing denied*, 416 F.2d 1250 (1969), *noted in* 1970 *Duke Project* 153; Perales v. Secretary, 288 F. Supp. 313 (W.D. Tex. 1968).