CONTRACTS, GRANTS, AND THE LIMITS OF EXECUTIVE DISCRETION

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The current Administration has made claims of vast executive discretion with respect to contracts and grants. Government contracts and grants may seem at first glance to be matters allowing broad executive discretion. One strand of doctrine, the distinction between public and private rights, might suggest as much. But the public rights characterization does not suggest unreviewable executive power. Rather, significant delegations to the Executive even with respect to public rights require procedural and substantive constraints as conditions of the delegation.

This Article looks at the traditional treatment of contracts and grants and shows how these areas were subject to requirements of nonarbitrariness. It then addresses recent National Institutes of Health (NIH) grant terminations. The district court in American Public Health Ass'n v. National Institutes of Health *correctly subjected the NIH grant terminations to the realm of reason, including by use of the Administrative Procedure Act's (APA's) arbitrary and capricious standard. A majority of the Supreme Court, however, granted a partial stay, indicating that such suits should be treated as Tucker Act claims to be heard in the Court of Federal Claims (CFC). This result undermined significant precedent and Congress's intent to make grant-in-aid disputes reviewable in the district courts under the APA. Wherever the litigation proceeds, however, the courts should employ APA standards, including review of whether the government has acted contrary to constitutional and statutory authority, and moreover, whether its actions are arbitrary and capricious.*

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INTRODUCTION

The current Administration has made claims of vast executive discretion with respect to federal contracts and grants. In a recent argument in Harvard's contest of funding cutoffs, the government's lawyer argued that the government had discretion to direct public money as it saw fit.[1] In seeking to foreclose disfavored law firms from working on matters involving government contracts, the Administration argued that it was acting "within the bounds of established executive authority," as a contractor "managing who it does business with and how, based on what it believes to be in the public interest."[2]

This Article will look at the traditional treatment of contracts and grants before addressing recent National Institutes of Health (NIH) grant terminations. Government contracts and grants at first glance may seem to be matters allowing broad executive discretion. One strand of doctrine—the distinction between public and private rights—might suggest as much. But

1. *See* Alan Blinder, *Judge Challenges Trump Administration in Hearing on Harvard Funding*, N.Y. TIMES (July 21, 2025), https://www.nytimes.com/2025/07/21/us/trump-administration-harvard-hearing.html [https://perma.cc/Z567-8GN6] ("Mr. Velchik replied that the government had discretion to direct public money as it saw fit.").

2. Perkins Coie LLP v. U.S. Dep't of Just., 783 F. Supp. 3d 105, 149 (D.D.C. 2025) (internal citations omitted) (indicating that the government defends its order as falling "within the bounds of established executive authority," and claiming that "the Executive Branch [is] acting as contractor and employer, managing who it does business with and how, based on what it believes to be in the public interest").

another strand—the nondelegation doctrine—suggests limitations on executive power with respect to contracts and grants, even if they are considered matters involving public rights.

Legal doctrine has long distinguished between public and private rights. Private rights were traditional rights belonging to individuals and included liberty (in the sense of freedom of movement) and property (particularly right-to-exclude property).[3] Public rights were those that belong to the people as a whole, such as interests in public monies and lands.[4] Public rights were often associated with the Legislature's plenary role. The principal significance of the public/private rights distinction was that Article III courts might often be dispensed with in determining disputes with respect to public rights.[5] Absent a mandatory judicial role, moreover, there might be more room for executive determination. Because governmental proprietary interests in monies and lands might be considered matters of public right, contracts and grants might appear to be areas for wide executive discretion.[6]

Cutting against broad executive discretion in areas of plenary legislative control, however, was the nondelegation doctrine. Scholars have generally given the nondelegation doctrine poor reviews.[7] Others, such as the current author, have a more favorable view of the nondelegation doctrine, pointing to its salutary effect in limiting executive discretion, including in areas that involved public rights. For example, the Legislature was thought to have plenary control of taxation, such that legislatures might even make particular tax assessment decisions.[8] Delegation from the Legislature to the Executive, however, provided an impetus for procedural due process in the area of tax assessment.[9] A similar result occurred with respect to railroad rate

3. *See* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 693 (2004) (comparing private and public rights).

4. *See, e.g.*, *id.* Public rights could include certain interests of individuals that derived from statutes—sometimes called privileges. *See* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 567 (2007).

5. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855) (illustrating there are matters "[C]ongress may or may not bring within the cognizance of the courts of the United States").

6. *Cf.* John Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV. 143, 149, 162, 180 (2019) (treating government's proprietary interests as matters of public right).

7. For example, numerous scholars claimed to find broad delegations from an early date, while others found these examples as showing much narrower or specialized delegations. *See* Ann Woolhandler, *Public Rights and Taxation: A Brief Response to Professor Parrillo*, 84 UNIV. PITT. L. REV. ONLINE 1 (2023) (citing authority) [hereinafter Woolhandler, *Public Rights and Taxation*].

8. Ann Woolhandler, *Delegation and Due Process: The Historical Connection*, 2008 SUP. CT. REV. 223, 230–31 [hereinafter Woolhandler, *Delegation and Due Process*].

9. *Id.* at 241–43.

regulation.[10] Indeed, even paradigmatic government benefits such as welfare payments became subject to agency procedural requirements.[11]

This beneficial effect of encouraging procedures in agencies manifested itself, *inter alia*, as Fifth and Fourteenth Amendment requirements as to adjudication.[12] But procedures for rulemaking as well as for adjudication became available under the Administrative Procedure Act (APA)[13] and judicial decisions. In addition to procedural review, moreover, the courts provided substantive review of agency action for conformity to the Constitution, statutes, and nonarbitrariness.

At a general level, then, the various legal constraints on agency action and the judicial review accompanying them, may be viewed as conditions of the delegations of power to the Executive. Indeed, the subject of administrative law largely consists in examining these limitations. Professors Mashaw,[14] Buzbee,[15] and others have particularly emphasized reasoned decisionmaking as a requirement of delegation. Professor Stiglitz has added that reasoned decisionmaking is not only a condition of delegation, but also a rationale for it.[16] Congress, he says, "cannot credibly commit to follow its own rules."[17] Nor can it commit to a reasoning process.[18] Delegation, however, allows for greater requirements of procedures and reasoning.

In Part I, this Article discusses government contracts.[19] While private contract disputes were treated as matters for judicial decision, government

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10. *Id.* at 241–43, 258–62.

11. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 262 (1970).

12. *See* Woolhandler, *Delegation and Due Process*, *supra* note 8, at 228, 233–34.

13. Administrative Procedure Act, 5 U.S.C. §§ 551–559, 561–570a, 701–706.

14. JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY viii (2018) ("The emphasis here is on the many ways in which American administrative law demands administrative action based on reason."); *id.* at 41 (indicating that reason-giving and reasonableness requirements "come from multiple sources—the Constitution, congressional statutes, executive orders, and administrative regulations, in addition to the case law of judicial review of administrative action").

15. William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1349, 1403–04 (2018) (particularly emphasizing requirements of reasoned decisionmaking when an agency changes prior policies).

16. EDWARD STIGLITZ, THE REASONING STATE 8–9, 47 (2022).

17. *Id.* at 8–9, 17, 39.

18. *Id.* at 9, 41, 47; *cf.* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L., ECON. & ORG. 81, 93 (1985) ("Yet it is also clear that executive branch requirements that cost-benefit analyses of agency regulations be prepared, and court demands that agency explanations for rules demonstrate a reasoned assessment of competing values, surely press agencies in the direction of cost-minimizing or welfare-enhancing action. No such constraints would operate on specific legislative choices.").

19. *See infra* Part I.

contract disputes were an area of plenary legislative power to make even individualized determinations.[20] But the primacy of the Legislature did not imply that determination of contract claims was one of mere politics or will. Rather, the determination of contract disputes was treated as a matter of obligation and justice.[21]

When Congress sought to divest itself of some of its contract dispute resolution functions, moreover, it turned to a judicialized process in the Court of Claims and added Article III review.[22] And reinforcing the role of law, the Court treated the federal government as subject to constraints similar to those that applied to states under the Contract Clause.[23]

Modern procurement contracts operate under a detailed statutory and regulatory system. While largely a regime of law, the allowance of terminations for convenience in procurement contracts provides an area for somewhat more executive discretion.[24] But the legal framework for procurement, including the provisions for termination settlements, and prohibitions on bad faith termination, have to an extent limited arbitrariness.[25]

Part II discusses grants.[26] Grants are distinguished from contracts in that they are not generally a means for the government to acquire property or services for itself, but rather entail a transfer of funds to another to engage in activities to achieve a public purpose.[27] Governments traditionally used grants to promote economic development, such as for railroad building.[28] Such grants were not mere gratuities, but rather gave rise to obligations. The courts, for example, generally did not allow the government, whether the Legislature or the Executive, to attempt to lessen its own obligations or expand those of the grantee.[29] In modern grants, the role of reason has operated pursuant to the statutes and regulations that place significant limitations on federal grant administration.[30]

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20. *See infra* Part I.A.

21. *See* Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1435 (1998).

22. *See infra* notes 71–78 and accompanying text.

23. *See infra* Part I.C.

24. Zachary Jones & Kelly Gilliam, *Termination for Convenience in Government Contracts: Legal Framework, Contractor Rights, and Strategic Considerations*, CONT. MGMT., June 2025, at 4–5.

25. *See infra* Parts I.E–F.

26. *See infra* Part II.

27. *See* 31 U.S.C. §§ 6303–6305; 2 C.F.R. § 200.1 (2025).

28. United States v. Cent. Pac. R.R., 118 U.S. 235, 237 (1886).

29. *See infra* Part II.A.

30. Eloise Pasachoff, *Federal Grant Rules and Realities in the Intergovernmental Administrative State: Compliance, Performance, and Politics*, 37 YALE J. REG. 573 (2020) (discussing the impact of modern limitations in the grant and administration systems of the federal government).

Part III focuses on NIH grants.[31] Prior to the current Administration, termination of previously awarded grants had generally been for cause and was subject to procedural constraints. In 2025, however, the Administration abruptly terminated approximately $800 million of previously awarded NIH grants.[32] In the ensuing litigation, the Administration argued that it has near unreviewable discretion with respect to grant termination, claiming power with respect to funding allocations, and under Office of Management and Budget (OMB) guidance allowing for terminations because of changes in "priorities."[33] Accepting such arguments would allow the Administration a vast self-delegation of the spending power.[34] The district court in *American Public Health Ass'n v. NIH*[35] correctly subjected the termination claims to the realm of reason, including by use of the APA's arbitrary and capricious standard.[36] The district court enjoined the grant terminations and also the guidance documents that the Administration used with respect to grant terminations.[37]

The U.S. Supreme Court subsequently stayed the district court's order with respect to grant terminations, although it denied a stay with respect to the injunction against use of the guidance documents.[38] Part IV focuses on the Supreme Court opinion.[39] A majority indicated that the district court likely lacked jurisdiction of the claims with respect to grant terminations, reasoning that those claims should be treated as Tucker Act[40] claims to be heard in the Court of Federal Claims (CFC).[41] This result undermines significant

31. *See infra* Part III.

32. *See* David Super, *The State of Impoundment Litigation Now*, BALKINIZATION (Sept. 11, 2025) (characterizing the "Administration's attempt to claw back funds already obligated" as a form of impoundment) https://balkin.blogspot.com/2025/09/the-state-of-impoundment-litigation-now.html [https://perma.cc/N8A7-LWEC]; *cf.* Eloise Pasachoff, *The President's Budget Powers in the Trump Era*, *in* EXECUTIVE POLICYMAKING: THE ROLE OF THE OMB IN THE PRESIDENCY 87 (Meena Bose and Andrew Rudalevige, eds., 2020) (discussing the first Trump Administration's expansive use of budget powers).

33. *See infra* text accompanying notes 211–218.

34. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2375 (2023) (applying the Major Questions Doctrine to disallow a debt forgiveness program).

35. 791 F. Supp. 3d 119 (D. Mass. 2025).

36. *See id.* at 185, *denying stay*, 145 F.4th 39, 44 (1st Cir. 2025), *stay granted in part and denied in part*, 145 S. Ct. 2658, 2660 (2025). The opinion also covered *Massachusetts v. Kennedy*. Massachusetts v. Kennedy, Civ. Action No. 25-10814-WGY, 2025 WL 1747213 (D. Mass. June 23, 2025).

37. Massachusetts v. Kennedy, Civ. Action No. 25-10814-WGY, 2025 WL 1747213 (D. Mass. June 23, 2025).

38. NIH v. Am. Pub. Health Ass'n, 145 S. Ct. 2658 (2025).

39. *See infra* Part IV.

40. 28 U.S.C. § 1491(a)(1).

41. *NIH*, 145 S. Ct at. 2659; *see infra* text accompanying notes 283–305; Thomas P.

precedent and Congress's intent to make grant-in-aid litigation reviewable in the district courts under the APA.[42] Wherever the litigation proceeds, however, the courts should employ APA standards, including review of whether the government has acted contrary to constitutional and statutory authority, and whether its actions are arbitrary and capricious.[43]

All in all, one can still characterize matters relating to government contracts and grants as matters of public right—in that they were areas where legislatures were thought to have broad powers even as to particularized decisions.[44] But the public rights characterization does not suggest unreviewable executive power. Rather, significant delegations to the Executive require procedural and substantive constraints as conditions of the delegation.

I. GOVERNMENT CONTRACTS

A. Traditional Treatment of Contracts

On the one hand, contractual claims as between individuals are among the common law claims traditionally litigated in the courts, and may be characterized as private rights as to which Article III requirements adhere.[45] What is more, the Constitution's Contract Clause[46] prohibits state legislative abrogation of contracts, and was particularly meant to restrain states' attempts to favor private debtors over private creditors.[47]

Schmidt & Gillian E. Metzger, *Some Realism About Constitutional Remedies*, 139 HARV. L. REV. (forthcoming 2026) (manuscript at 14) (on file with SSRN) (discussing the Supreme Court's *National Institutes of Health* (*NIH*) opinion).

42. *See infra* text accompanying notes 306–333.

43. *See* GOVERNING FOR IMPACT, *Seeking Recovery for Unlawful Grant Terminations in the Court of Federal Claims* 3–4 (2025), https://governingforimpact.org/wp-content/uploads/2025/10/CFC-Issue-Brief.pdf [https://perma.cc/K7B5-EU7Y] (making suggestions as to Court of Claims litigation, including use of an arbitrary and capricious standard through the "implied duty of good faith and fair dealing" in breach of contract claims rather than arbitrary and capricious claims under the Administrative Procedure Act (APA)).

44. *See infra* Part I.A.

45. *See* Gillian Hadfield, *Of Sovereignty and Contract: Damages for Breach of Contract by Government*, 8 S. CAL. INTERDISC. L.J. 467, 470 (1999) (characterizing government contracts as public rights claims). Hadfield was not necessarily addressing the issue of the requirements for Article III involvement, but rather the proper measure of damages. My own prior work on public and private rights has not squarely addressed government contracts. *See generally* Woolhandler, *Public Rights and Taxation*, *supra* note 7 (not addressing analysis of government contracts); Woolhandler, *Delegation and Due Process*, *supra* note 8 (not focusing on contractual analysis).

46. U.S. CONST. art. I, § 10, cl. 1.

47. *See* Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267, 280 (1988)

Matters became more complicated, however, when the contract was between a private party and government. In the Colonial and Founding Era, persons with contract claims against the government often had to receive legislative approval for their claims—reflecting sovereign immunity and legislative control over appropriations.[48] The regular court systems often were uninvolved.[49]

The absence of regular court participation, however, did not so much suggest executive discretion but rather legislative power. Legislatures could make individualized determinations when deciding whether to enter contracts and appropriate money for goods and services.[50] Professor Desan has shown that the New York colonial assembly took over more control of finances and resolving individual contract claims in the early eighteenth century,[51] a practice occurring in other colonies.[52] The legislative role was closely tied to general legislative control of the funding government.[53] For example, the New York government "depended heavily on private advances for its bare administration and essential defense."[54]

Desan's scholarship helps one to understand how legislative determinations of individual contract claims might nevertheless have been reasonably fair. The legislative role, she said, did not imply that payment was a matter of mere legislative will or grace.[55] Rather, legislative determinations were "deployed as a method of reaching outcomes that comported with notions of obligation and justice."[56] While there might be political aspects of these determinations, the "provincial government had to operate with sufficient reliability to maintain its public credit and the fidelity of its citizens."[57]

In line with such colonial practices, Congress took on the determination of contractual claims.[58] Congress referred some initial determinations to

(stating that, at a minimum, the Contract Clause was "intended to prevent the states from enacting laws retroactively relieving debtors from the payment of their private debts").

48. Once the Constitution with the Contract Clause was in place, the courts restricted state legislatures' abrogation of contracts they had entered. *See infra* Part I.B. And Congress faced similar limits on its abrogation power. *See infra* Part I.C.

49. Desan, *supra* note 21, at 1436, 1442.

50. *See* Floyd C. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 633 (1985).

51. Desan, *supra* note 21, at 1434.

52. *Id.* at 1495–99 (discussing practices in other colonies); Shimomura, *supra* note 50, at 633.

53. *See generally*, Desan, *supra* note 21, at 1434 (discussing the Public Debt Act in New York).

54. *Id.* at 1490.

55. *Id.* at 1463.

56. *Id.* at 1435.

57. *Id.* at 1490.

58. *See* Shimomura, *supra* note 50, at 634 (discussing practice under the Articles of Confederation); *id.* at 635–36 (discussing practice in the states); *id.* at 643–44 (discussing the

legislative committees[59] or Treasury officials, but Congress kept ultimate control.[60] The history of federal contract claims suggests the primacy of the legislative power, not widespread executive discretion to make binding decisions.

This was evident in the 1838 case of *Kendall v. United States ex rel. Stokes*.[61] The Postmaster General had credited the contractor Stokes & Stockton for transportation services it had provided to the government.[62] The subsequent Postmaster, Amos Kendall, reexamined the accounts and disallowed part of the credits.[63] The contractors petitioned Congress, which then passed a statute providing that the dispute be referred to the Solicitor of the Treasury for resolution, with a direction to the Postmaster to credit the amount the Solicitor determined.[64] After Kendall refused to credit the full amount as determined by the Solicitor,[65] the contractors sought mandamus to require the Postmaster to credit the full amount.[66] Kendall argued, *inter alia*, that the courts could not control him with respect to the decision; rather, he was under the control of the President.[67] The Court, however, held that Congress could place a duty (at least a ministerial one) on the Postmaster to abide by the Solicitor's determination, and that noncompliance with that duty was outside of the discretion of the President or the Postmaster.[68]

Over time, the volume of contract claims became an increasing problem for Congress.[69] In considering legislation to off-load more of its contractual

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continuation of the legislative model in Congress); *cf.* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Public Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1889 (2010) (discussing private bills).

59. *See* Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 548–49 (1838) (argument of Mr. Key for the United States) (describing claims for compensation for services and other claims "which the officers of government have refused to allow"); Pfander & Hunt, *supra* note 58, at 1889–92 (indicating that the advice of the Executive might be sought, or a committee might investigate and report).

60. *See* Shimomura, *supra* note 50, at 637 (by giving a claim-reviewing function to the Treasury, "Congress did not intend to relinquish ultimate control of claims"); *id.* at 644–45 (in later giving claims determinations duties to the Treasury, Congress still kept effective control, including by appeals from Treasury determinations).

61. 37 U.S. (12 Pet.) 524 (1838).

62. *Id.* at 608.

63. *Id.*

64. *Id.* at 608–09.

65. *Id.* at 609.

66. *Id.*

67. *Id.* at 609–11; *cf. id.* at 613 (noting that the President had not taken a position).

68. *Id.* at 610, 613–14.

69. *See* Shimomura, *supra* note 50, at 648 (noting strains on the legislative model for contract dispute determination after 1838).

dispute functions, however, Congress did not opt for the sort of executive discretion that Postmaster Kendall had claimed.[70] Rather, Congress established the Court of Claims in 1855—a body that made recommendations to Congress rather than entering judgments.[71]

In 1863, Congress authorized the Court of Claims to issue "final judgments" that could be reviewed in the Supreme Court.[72] The Supreme Court, however, held that it lacked jurisdiction to undertake review because it read the statute as allowing the Secretary of the Treasury to review the Court's determinations. This executive review, said the Court, made the Supreme Court's decision non-judicial.[73] After immediate curative legislation,[74] the Court undertook review.[75]

Professor Nelson has concluded that, at least after 1866, Congress and others generally viewed the Court of Claims as an Article III court.[76] But the Supreme Court's decision in *Ex parte Bakelite Corporation*[77] cast doubt on its Article III status—even as the Supreme Court continued to review Court of Claims decisions. Back-and-forth ensued as to the Article III status of the Court of Claims until 1982. Congress then established the CFC as a non-Article III court but with review in the newly created Article III-U.S. Court of Appeals for the Federal Circuit, whose decisions were in turn reviewable by the Supreme Court.[78]

It is clear that, despite sovereign immunity and some largely dormant potential for Congress not to pay judgments,[79] contract claims carried a strong

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70. Indeed, Congress rejected a proposal for a complete transfer to the Treasury. *Id.* at 651 (footnote omitted) ("Given its existing role over routine contract claims, complete transfer to the Treasury Department was quickly dismissed as a 'dangerous experiment.'").

71. Nelson, *supra* note 4, at 582–83 n.89 (2007) (citing Act of Feb. 24, 1855, ch. 122, § 7, 10 Stat. 612, 613–14); *cf.* Woolhandler, *Delegation and Due Process*, *supra* note 8, at 236 (discussing views that administrators might not operate wholly outside of the legislative branch).

72. Nelson, *supra* note 4, at 582–83 n.89 (citing Act of Mar. 3, 1863, ch. 92, § 3, 12 Stat. 765, 765).

73. Gordon v. United States, 69 U.S. (2 Wall.) 561 (1865); Gordon v. United States, 117 U.S. 697, 699–700 (1865) (indicating that there could be no power in the legislative or executive to interfere with the judgments of the Article III courts).

74. *See* Nelson, *supra* note 4, at 582–83 n.89 (citing Act of Mar. 17, 1866, ch. 19, § 1, 14 Stat. 9, 9).

75. *See* United States v. Jones, 119 U.S. 477 (1886); DeGroot v. United States, 72 U.S. (5 Wall.) 419 (1867).

76. *See* Nelson, *supra* note 4, at 582–83 n.89.

77. 279 U.S. 438 (1929).

78. *See* Nelson, *supra* note 4, at 582–83 n.89.

79. Congress has generally provided for the payment of judgments. *See* Shimomura, *supra* note 50, at 662. *But cf. id.* at 674–78 (noting some issues that arose as to enforceability of judgment determinations in the early twentieth century).

sense of right and obligation. Congress's handing off decisionmaking to the Court of Claims and the Federal Circuit provided reasoned government decisionmaking, consistent with Professor Stiglitz's view of delegation.[80]

B. The Contract Clause and the States

One can see the obligatory character of contract claims in cases involving application of the Contract Clause against the States. The Contract Clause might have been read as inapplicable to state contracts, given legislative control over appropriations and sovereign immunity. The Eleventh Amendment, moreover, was inspired by dissatisfaction with the Supreme Court's exercising jurisdiction in a contract claim against the State in *Chisholm v. Georgia*.[81] Nevertheless, in *Fletcher v. Peck*,[82] the Court interpreted the Contract Clause as applicable to state contracts,[83] holding that a state legislature could not abrogate an underpriced sale of land to private parties.[84]

Sovereign immunity nevertheless could be a roadblock to certain claims; it had its biggest effect in attempts to collect on sovereign debt in the form of state-issued bonds and interest coupons. A direct unconsented suit for payment by the treasury was generally unheard of.

To make state bonds more attractive, however, states sometimes made the bond coupons receivable for taxes, making the state's obligations to pay somewhat self-enforceable without resort to the courts. For example, in *Furman v. Nichol*,[85] the State had provided that Bank of Tennessee notes should be receivable for taxes and other obligations owed to the State.[86] But subsequent legislation provided that the notes would no longer be receivable for

80. *See* STIGLITZ, *supra* note 16, at 46–58 (arguing that "representative institutions counter problems of trust by delegating lawmaking authority to a constitutional *inferior* that has no independent source of legitimacy in our system").

81. 2 U.S. (2 Dall.) 419 (1793).

82. 10 U.S. (6 Cranch) 87 (1810).

83. The holding in *Fletcher v. Peck* was consistent with existing conventional opinion. *See* Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1, 28–29 (1986).

84. 10 U.S. (6 Cranch) 87 (1810). *Fletcher* involved an allegation that legislators were promised shares in the company for which they legislatively approved the sale. *See id.* at 129, 131.

85. 75 U.S. (8 Wall.) 44 (1869).

86. *Id.* at 56, 59, 61; *see also* Woodruff v. Trapnall, 51 U.S. (10 How.) 190, 206–09 (1850) (reversing the state court's denial of mandamus); Curran v. Arkansas, 56 U.S. (15 How.) 304, 309, 315 (1852) (on direct review, holding that the Court could order an equitable decree requiring the State to restore the capital stock of a bank, where the state courts had held the State was amenable to suit); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 116–17 (1997) [hereinafter Woolhandler, *Common Law Origins*] (discussing the aforementioned cases).

obligations owed to the State.[87] On direct review, the Supreme Court held that the new legislation could not apply to previously issued notes without violating the Contract Clause.[88] The Court proceeded to direct the state court to issue the existing state mandamus remedy against the collector who had refused to receive the notes.[89] Effectively the rights under the contracts still existed, and the Court could award mandamus under the existing state procedures.

State legislatures subsequently had somewhat greater success in evading their debts by abrogating certain mandamus remedies.[90] The Court, however, held that the states could not abrogate trespass remedies against tax collectors who seized property after a taxpayer's tender of the bond coupons, even though state law forbade collectors from accepting them.[91] Indeed, the Court indicated that abrogating the trespass remedy would be a due process violation.[92]

Thus, the Court treated even sovereign debt as creating an obligation that the Legislature could not abrogate, although the states might interfere with remedies.[93] The persistence of the underlying right was manifest in the Court's continuing to allow mandamus against individual officers where the remedy continued to exist under state law, and continuing to allow trespass suits against individual officers even if the State purported to withdraw the remedy.

C. Analogous Limitations on Federal Government Contracting

There was no Contract Clause applicable against the federal government. The Court nevertheless found considerable overlap between Contract Clause limitations on the states and Fifth Amendment due process limitations on the

87. *See Furman*, 75 U.S. at 57.

88. *See id.* at 63–64.

89. *See id.* at 59, 64.

90. *See* Woolhandler, *Common Law Origins*, *supra* note 86, at 118. The Court might reason that the mandamus remedy was not part of the original contract or that alternative remedies were adequate, although this result differed from cases against private parties and municipalities, where remedies existing at the time of the contract generally could not be substantially impaired. *See* Louisiana v. Pilsbury, 105 U.S. 278, 301–02 (1881) (on direct review, treating repeal of mandamus remedy against city official as a nullity); *cf.* Siegel, *supra* note 83, at 85 (noting difficulties of determining unacceptable remedial changes with respect to private contracts).

91. *See* Woolhandler, *Common Law Origins*, *supra* note 86, at 120–21 (discussing the *Virginia Coupon Cases*, 114 U.S. 269 (1884)).

92. *See id.*

93. *Cf.* Hadfield, *supra* note 45, at 480, 488–89 (stating that "[s]overeign immunity thus creates a sharp distinction between a right and a remedy," with the ability to sue the government being treated as a privilege).

federal government. Particularly, once the Court of Claims was in operation, the Supreme Court largely treated federal contractual obligations as similar to those applicable against the states.[94] Although not finding that the federal government had violated a contract in the particular case,[95] the Court in the *Sinking-Fund Cases*[96] stated, "[t]he United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen."[97]

The Court applied these principles against the government in numerous cases wherein railroads successfully claimed that the government had impermissibly sought to increase railroads' obligations stemming from government grants to build railroads.[98] Part II.A below discusses these cases.[99] Later, in *Lynch v. United States*,[100] the Court treated the congressional abrogation of a serviceman's life insurance contract as a form of taking of property.[101] And in *United States v. Winstar*,[102] the modern Court held that the government had breached its agreement to allow the use of favorable accounting rules as an inducement to take over a failing savings and loan, even though the disallowance of the accounting rules was pursuant to a subsequent federal statute.[103]

D. Some Limitations on Contract-Type Liabilities

As just noted, the Court in the contract cases sometimes stated that the government obligations were the same as those of a private party.[104] As a

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94. *See, e.g.*, Sinking-Fund Cases, 99 U.S. 700, 718–19 (1878).

95. *Id.* at 724–26 (noting reservation of rights in the charter).

96. 99 U.S. 700 (1878).

97. *Id.* at 719.

98. *See, e.g.*, United States v. Cent. Pac. R.R., 118 U.S. 235, 240–41 (1886) (indicating that the interpretation "would not only render that section a breach of faith on the part of the United States, but an invasion of the constitutional rights of the appellee").

99. *See infra* Part II.A.

100. 292 U.S. 571 (1934).

101. *See id.*; *see* Hadfield, *supra* note 45, at 488–89; *cf.* United States v. Russell, 80 U.S. (13 Wall.) 623, 631–32 (finding an implied contract when the military had told the plaintiff to carry freight of war on his steamboat, and the plaintiff could claim more than the government had paid him); United States v. Great Falls Mfg. Co., 112 U.S. 645, 658 (1884) (providing that a government taking gave rise to an implied contract under the Tucker Act); United States v. Lynah, 188 U.S. 445 (1903) (finding that the government could claim a paramount right to appropriate the property that was flooded, but the Fifth Amendment guaranteed compensation).

102. 518 U.S. 839 (1996).

103. *Id.* The Court saw the government as having taken on the risk of Congress's legal change. *Id.* at 869–70.

104. *See* Sinking-Fund Cases, 99 U.S. 700, 719 (1878).

result, governments to a large extent may be stuck with their unwise contracts—as was true in *Fletcher v. Peck*.[105] And the modern statutory and regulatory provisions governing procurement contracts reinforce that government contracting is an area of legal obligation.[106]

Nevertheless, there has been a limited police power or public trust limitation on the ability of government to alienate certain powers by contract. For example, in *Stone v. Mississippi*,[107] the Supreme Court allowed the State to retract a twenty-five-year lottery contract with a private company[108]—treating the agreement as a mere revocable license rather than a contract protected by the Contract Clause.[109] Cases such as *Stone* reflected the idea that one legislature should not be able unduly to bind the decisions of subsequent legislatures.[110] Scholars have treated contractual obligations as requiring balancing between "the role of government as an honest contractor and the role of government as a democratic legislator."[111]

Legislatively enacted corporate charter reservation clauses could place additional limitations on Contract Clause strictures. In *Trustees of Dartmouth College v. Woodward*,[112] the Marshall Court held that corporate charters could give rise to rights protected by the Contract Clause that could not necessarily be changed by later legislation.[113] An antidote was reservation clauses—

105. 10 U.S. (6 Cranch) 87, 129 (1810).

106. *See infra* Part I.E.

107. 101 U.S. 814 (1884).

108. *Id.* at 816–17; *cf.* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892) (treating as unenforceable a grant of submerged lands as to the entire Chicago waterfront), discussed in Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897*, 61 J. AM. HIST. 970, 993 (1975); Loan Ass'n v. Topeka, 87 U.S. 655, 664–65 (1876) (holding that bonds for the benefit of a manufacturer were not for a public purpose).

109. *See Stone*, 101 U.S. at 821; *see also* Siegel, *supra* note 83, at 45–46 (discussing debates as to the extent of an inalienable powers exception to the Contracts Clause, particularly with respect to tax exemptions, eminent domain, and police regulation); *cf.* McCurdy, *supra* note 108, at 993 (indicating the Supreme Court did not adopt a broad public purpose limitation on government bond issuance, as had some state courts); Caleb Nelson, *Vested Rights, "Franchises," and the Separation of Powers*, 169 U. PA. L. REV. 1429, 1435 (2021) ("[I]t was not always obvious whether a license should be regarded as a vested property right or a revocable 'privilege. . . .'").

110. *See Stone*, 101 U.S. at 817–21 (noting that a legislature cannot "give away nor sell the discretion of those that are to come after them" on matters of public health and morals).

111. Hadfield, *supra* note 45, at 467; *see* Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1561 (1992) (referring to the "need to preserve the ability of future generations to fashion policy responsive to contemporary majoritarian concerns").

112. 17 U.S. (4 Wheat.) 518 (1819).

113. *Id.* at 665–66.

providing that the legislature reserved to itself the power to revoke or modify the charter. While these reservations clauses could often obviate Contract Clause claims,[114] they were also subject to some limitations.[115] As the Court stated, "[t]he alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration."[116]

The exercise of such reserved powers, moreover, was generally a matter for the Legislature.[117] In *Union Bridge Company v. United States*,[118] however, Congress had provided in its permission to build a bridge that the Secretary of War could determine that an alteration was needed due to a significant navigation obstruction.[119] The Court approved the delegation and did not require Article III review.[120] But, the Court said that Congress "did not invest the Secretary of War with any power in these matters that could reasonably be characterized as arbitrary."[121] It referred to substantive requirements and procedures, including notice and an opportunity to be heard.[122] It

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114. *See* Miller v. State, 82 U.S. (15 Wall.) 478, 490–91, 499 (1873) (approving use of a reservation clause to allow for a legislative change in the composition of the corporate board to include more city-appointed directors, after the other shareholders had contributed less money than had been contemplated).

115. The extent of the reservations and limits remained a matter of ongoing debate. *See* Siegel, *supra* note 83, at 35–36, 87, 90–91; *id.* at 96 (noting consensus "that shareholders had property in the corporation's underlying assets and in the corporation's ordinary contracts").

116. Shields v. Ohio, 95 U.S. 319, 324–25 (1877) (holding that the conductor could not demand the prior rate once railroads were consolidated by consent under new legislation). The Court provided examples of disallowed and allowed uses of reservation clauses. *Id.* The Court cited a case holding "void" a requirement that the railroad company construct a highway across its road. *Id.* at 325 (describing Miller v. N.Y. & Erie R.R. Co., 21 Barb. 513, 518–19 (N.Y. Gen. Term Apr. 8, 1856)). It also cited a holding that it was a reasonable use of reserved power to require railroads to unite in a passenger station. *Id.* at 325 (describing Mayor & Aldermen of Worcester v. Norwich & Worcester R.R. Co., 109 Mass. 103, 112–13 (Mass. 1871)); *cf.* Sinking-Fund Cases, 99 U.S. 700, 719–20, 726 (1878) (noting the existence of a reservation clause, also finding reasonable and not a contract violation to require the railroad to establish a sinking fund to cover certain debts).

117. *See* Siegel, *supra* note 83, at 91 (referring to exercises of reserved power by legislatures); *cf.* Bridge Co. v. United States, 105 U.S. 470, 489–93 (1882) (Field, J., dissenting) (allowing Congress's exercise of a reserve power to determine if a bridge substantially obstructed navigation); *see also* Nelson, *supra* note 109, at 1464.

118. 204 U.S. 364 (1907).

119. *Id.* at 368.

120. *Id.* at 387.

121. *Id.*

122. *Id.* at 368.

added, "[n]or is there any reason to say that the Secretary of War was not entirely justified, if not compelled, by the evidence, in finding that the bridge in question was an unreasonable obstruction to commerce and navigation as now conducted."[123] Effectively, the Court provided an arbitrariness check on the exercise of reservation clauses.[124]

E. Modern Procurement Statutes and Regulations

The growth of government spending over time would increase the role of executive officials in entering and administering contracts, and in determining contract disputes. This Part of the Article particularly focuses on procurement contracts. Such contracts are controlled by elaborate statutes and regulations, both with respect to military and civil procurement.[125] The Federal Acquisition Regulation (FAR), itself resulting from detailed procedure,[126] includes provisions for competition and bidding.[127]

And, in 1978, Congress enacted the Contract Disputes Act.[128] Under the Contract Disputes Act, a contractor initially submits a dispute to the contracting officer.[129] The Act provides options for review—agency review boards, the General Accounting Office (GAO), and the CFC.[130] The continuing role of the GAO, an arm of Congress, in providing oversight, accounting, and dispute resolution, attests to the traditional legislative role in matters of contract.[131]

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123. *Id.* at 387–88.

124. *Cf.* Yick Wo v. Hopkins, 118 U.S. 356, 366 (1886) (stating that the ordinances "seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons"). The Court cited with approval a Maryland case which disallowed as a condition of a permit to operate a steam engine, that the engine was "to be removed after six months' notice to that effect from the mayor." *Id.* at 372 (discussed in Ann Woolhandler, *State Separation of Powers and the Federal Courts*, 31 WM. & MARY BILL OF RTS. J. 633, 650–52 (2023)).

125. STEVEN W. FELDMAN, PRINCIPLES OF GOVERNMENT CONTRACTS § 1.1 (7th ed. 2020) (discussing statutes of 1947 and 1949, and other statutes and regulations).

126. *See* 48 C.F.R. ch. 1 (2025); FELDMAN, *supra* note 125, §§ 1.1–1.2 (describing how the regulations are issued and maintained); W. NOEL KEYES, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATION § 1.2 (2d ed. 2003 & Supp. 2024–2025).

127. KEYES, *supra* note 126, § 33.1.

128. 41 U.S.C. §§ 7101–7109.

129. 41 U.S.C. § 7103(a)(1).

130. KEYES, *supra* note 126, § 33.1 (indicating that pre- and post-award protests can be brought before the agency, the General Accounting Office (GAO), and the Court of Federal Claims).

131. The GAO role is hedged by requirements of consent and by possibilities of judicial resolution. *See id.* § 33.3.

F. Terminations for Convenience

Doctrines such as the police power limitation on government contract liability reflected the idea that one legislature should not be able to unduly bind the decisions of subsequent legislatures. Analogous views carried over to the somewhat mundane problem that governments may at points no longer need or want goods and services they have contracted for. The Supreme Court in *United States v. Corliss Steam-Engine Company*[132] recognized that the Secretary of the Navy had power to terminate a contract to build a warship.[133] The Court did not contemplate that the government could completely stiff the contractor.[134] Rather, the Secretary had entered a settlement for the goods and services provided, and the question before the Court of Claims was whether the contractor could enforce that settlement.[135]

More generally, the law as to procurement contracts allows a termination of contracts for goods and services "for convenience."[136] And "convenience" may be largely determined within agencies.[137] The contractor is entitled to be paid for work already performed, including profits with respect to that work.[138] Initial costs incurred to perform a longer term contract can also be recovered.[139] A contractor can seek review of the agency's termination settlement in an agency review board, the GAO, or the CFC.[140]

What has largely escaped review is the agency's termination for convenience simpliciter.[141] Nevertheless, there are some restraints on government

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132. 91 U.S. 321 (1876).

133. *Id.* at 323.

134. *Id.*

135. *Id.*; *see also* Russell Motor Car Co. v. United States, 261 U.S. 512, 518 (1923) (referring to statutory provision as to modifications relating to war contracts).

136. *See* FAR §§ 49.101(b), 52.249-2(a) ("that a termination is in the Government's interest"); KEYES, *supra* note 126, §§ 49.31, 49.32. Such termination clauses are generally written into the contracts. *See* FELDMAN, *supra* note 125, § 49.7 (referring to the government's rights under the "Termination for Convenience" clause). But even without such a clause, such a clause may be read into the contract. *See id.* § 49.8.

137. KEYES, *supra* note 126, § 49.32.

138. *Id.* ("A contractor's protection on a convenience-termination is that he normally becomes entitled to the cost of the work performed plus a profit thereon and the cost of settling his proposal and subcontract claims."); *see also* Hadfield, *supra* note 45, at 532 (stating that reliance damages as opposed to expectation damages help to "maintain the symmetry between contractors and non-contractors from the point of view of the costs and benefits of government policy").

139. KEYES, *supra* note 126, § 49.32.

140. *See id.* (indicating that the submission of a settlement must reach impasse, when the contractor demands a final decision, to become a Contract Disputes Act claim).

141. *See* FELDMAN, *supra* note 125, § 49.7. Some decisions had indicated a change in circumstances would be necessary to terminate for convenience, but the Federal Circuit

arbitrariness. A practical constraint is the government's need to be a trustworthy contractor, so as to be able to obtain goods and services at reasonable costs.[142] Terminating one contract to substitute another will run into requirements of competition and bidding, and can entail award contests.[143] What is more, if the government terminates in bad faith, a contractor can seek remedies for breach and not merely a termination settlement.[144] Bad faith includes agencies never intending to fulfill a contract at the time it was entered, or terminating to attempt to substitute a political supporter.[145] It can also address political meddling and First Amendment retaliation.[146]

Thus, challenges have arisen as to the Trump Administration's seeking to cancel contracts (as well as grants) with respect to Harvard.[147] This is not to say that the prohibition on bad faith termination can always effectively address terminations motivated by political retaliation or favoritism. Perhaps even more difficult to address is a termination based on what may look like unreasonable or even bizarre factual or policy decisions, such as those cancelling certain vaccine development contracts due to concerns about the

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retreated from these decisions. *See, e.g.*, Salsbury Indus. v. United States, 905 F.2d 1518, 1521 (Fed. Cir. 1990).

142. *Cf.* Krent, *supra* note 111, at 1567–68 (stating that "the requirement to pay some damages, including profit on work performed, and the need to assure a competent pool of contractors," help to minimize abuse).

143. KEYES, *supra* note 126, § 33.1 (referring to pre- and post-award protests).

144. Abuse of contracting discretion may be considered as part of bad faith. FELDMAN, *supra* note 125, § 49.9. Sometimes an improper termination may be converted to a termination for convenience. *Id.* § 49.23.

145. *See* DAVID H. CARPENTER, CONG. RSCH. SERV., LSB11275, THE GOVERNMENT'S BROAD POWER TO TERMINATE PROCUREMENT CONTRACTS (2025), https://www.congress.gov/crs-product/LSB11275 [https://perma.cc/A2ZE-CV5R].

146. *See* DAVID H. CARPENTER, CONG. RSCH. SERV., LSB10410, AMAZON'S PROTEST OF DOD'S JEDI CLOUD COMPUTING CONTRACT: A LEGAL ANALYSIS (2020), https://www.congress.gov/crs-product/LSB10410 [https://perma.cc/78K5-R6L9]. The Amazon protest with respect to the government's Joint Enterprise Defense Infrastructure (JEDI) contract alleged that President Donald J. Trump exerted pressure to direct the contract from Amazon based on Jeff Bezos's ownership of *The Washington Post*. *See* Kate Conger, *Amazon Accuses Trump of 'Improper Pressure' on JEDI Contract*, N.Y. TIMES (May 22, 2025), https://www.nytimes.com/2019/12/09/technology/amazon-jedi-dod-contract-trump.html [https://perma.cc/Q2HD-448D].

147. *See* Alayna Treene & Andy Rose, *Trump Administration Moves to Cancel All Remaining Federal Contracts with Harvard*, CNN (May 27, 2025), https://www.cnn.com/2025/05/27/us/trump-harvard-cancel-federal-contracts [https://perma.cc/TC8V-234A]; Posting of Samuel Bagenstos, sambagen@umich.edu, to adminlaw@listserv.lsu.edu (May 17, 2025) (on file with author) (indicating that the case looked like an easy one for bad faith).

safety of mRNA vaccines.[148] But at least ordinary procurement contracts have been an area where law, rather than political will, has predominated.

II. GRANTS

A. Traditional Treatment of Grants

Grants have a "principal purpose . . . to transfer a thing of value . . . to carry out a public purpose" rather than "to acquire[] . . . property or services" for government use.[149] Grant programs may seem like a relatively late addition to government.[150] A "grant," moreover, may suggest a *gratuity* with fewer legal protections than for other types of interests.[151] Grants, however, were widely used by state and local governments during the nineteenth century to promote economic development.[152] Congress, too, passed numerous grant statutes to promote

148. *See* Patrick Wingrove, *US Cancels More than $700 Million Funding for Moderna Bird Flu Vaccine*, REUTERS (May 29, 2025), https://www.reuters.com/business/healthcare-pharmaceuticals/us-cancels-more-700-million-funding-moderna-bird-flu-vaccine-2025-05-28 [https://perma.cc/E9JN-EZXF]; Apoorva Mandavilli, *Kennedy Cancels Nearly $500 Million in mRNA Vaccine Contracts*, N.Y. TIMES (Aug. 7, 2025), https://www.nytimes.com/2025/08/05/health/rfk-jr-vaccine-funding.html [https://perma.cc/2VD9-TQ8T] (referring to "grants and contracts"); *cf.* MASHAW, *supra* note 14, at 60 (adverting to need for reasonable factual premises in agency decisionmaking).

149. JONATHAN D. SHAFFER & DANIEL H. RAMISH, FEDERAL GRANT PRACTICE § 28.2 (2025); *see* 31 U.S.C. §§ 6303–6305; 2 C.F.R. § 200.1 (2025) (distinguishing grants from other forms of financial support; a grant or grant agreement is "used to enter into a relationship the principal purpose of which is to transfer anything of value to carry out a public purpose authorized by a law of the United States . . . ; and not to acquire property or services for the Federal awarding agency or pass-through entity's direct benefit or use"); 45 C.F.R. § 75.2 (2025) (provisions with respect to the Department of Health and Human Services (HHS)). While this section focuses on grants, it may occasionally cite cases involving cooperation agreements which are somewhat differently defined. *See* SHAFFER & RAMISH, *supra* § 28.2.

150. Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 YALE L.J. 248, 261 (2014) (stating that "dedication of federal funds to grant programs is a relatively new story in the regulatory state"). That article particularly addressed grants to state and local governments. *Id.*

151. *Cf.* Matthew B. Lawrence, Eloise Pasachoff & Zachary S. Price, *Appropriations Presidentialism*, 114 GEO. L.J. ONLINE 1, 3–4 (2025) (indicating discretionary spending under annual appropriations is less entrenched than certain other claims to resources); Harrison, *supra* note 6, at 192 ("Today, Congress gives out trillions of dollars in federal funds in forms that would qualify as privileges under the nineteenth century system.").

152. McCurdy, *supra* note 108, at 970, 976 (describing states' aid to various enterprises).

railroad development.[153] These grants were largely matters for the legislature, and often gave rise to legal obligations.[154]

A typical railroad grant provided that a company that built a railroad would be entitled to alternating sections of land in the public domain along the railroad route.[155] Upon the company's completion of parts of the work, the Land Office issued patents (titles) in areas of completed work.[156]

In many of the statutes, Congress provided that the railroads "shall be public highways for the use of the government, free from all tolls or other charge for transportation of its property or troops."[157] Questions arose as to whether the government was thereby entitled to free transportation on the railroad's own trains, or only the free use of the roads (for example, using government-owned cars and engines).[158] The Supreme Court interpreted the statutes as entitling the government only to use of the roads.[159] This interpretation was not as weird as it looks. The Court examined various earlier acts using the "free from all tolls" language, and stated, "[i]t is undoubtedly familiar to most of those whose recollection goes back to that period, that railroads were generally expected to be public highways, on which every man who could procure the proper carriages and apparatus would have the right to travel."[160]

In some cases, Congress had provided for the issuance of bonds of which the proceeds would help complete the construction of certain lines. A typical provision was that "all compensation for services rendered for the government shall be applied to the payment of said bonds and interest, until the whole amount is fully paid," and that "five per centum of the net earnings of said road shall be annually applied to the payment thereof."[161] The Court held these provisions applied only with respect to the parts of the railroad

153. *Id.* at 1000.

154. Burke v. S. Pac. R.R. Co., 234 U.S. 669, 680 (1914) (rejecting the argument that the grant to the railroad was a gift).

155. *Id.* at 681.

156. *See, e.g.*, *id.* at 684–86.

157. *See, e.g.*, Lake Superior & Miss. R.R. Co. v. United States, 93 U.S. 442, 443 (1876) (appeal from the Court of Claims) ("Congress, in most of the legislative acts by which it has made donations of the public lands to the States in which they lie for the purpose of aiding in the construction of railroads, has stipulated that the railroads so aided shall be public highways for the use of the government, free from all tolls or other charge for transportation of its property or troops.").

158. *Id.* at 443. Congress in 1874 indicated agreement with the expansive interpretation of the railroad's obligations. *Id.* at 444.

159. *Id.* at 445.

160. *Id.* at 446.

161. *See, e.g.*, United States v. Cent. Pac. R.R. Co., 118 U.S. 235, 237–38 (1886).

that the government subsidized.[162] To hold otherwise "would not only render that section a breach of faith on the part of the United States, but an invasion of the constitutional rights of the appellee."[163]

Other cases arose with respect to mineral lands. The land grants excluded mineral lands from the alternate sections the railroads could claim.[164] Statutes provided that the railroads were entitled to select indemnity lands (or "lieu" or "in lieu" lands) within certain boundaries to make up for the exclusions.[165]

At the time of patenting alternate sections to the railroads, the Land Office was to determine that the land was not within the mineral exclusion.[166] The Land Office nevertheless customarily included language in patents (titles) to the railroads[167] "[e]xcluding and excepting all mineral lands should any such be found in the tracts aforesaid . . . ."[168] If read as valid, this reservation would have meant the railroads could be divested of title if minerals later were found on the granted land.

In *Burke v. Southern Pacific Railroad Co.*,[169] the Supreme Court held that this reservation was "void"[170]—a result consistent with several prior cases the Court cited.[171] The Land Office had no authority to insert qualifications on patents that were not authorized by statute.[172] Land titles would become hopelessly confused if mineral discovery could divest them. The decisions

162. *Id.* at 241; *see also* United States v. Kan. Pac. Ry. Co., 99 U.S. 455, 458 (1879) (concerning provision as to paying over 5% of net earnings). The bonds basically required the railroads to pay interest, and principal on maturity, to the United States. *See* Sinking-Fund Cases, 99 U.S. 700, 719 (1878) (describing the obligation in that case).

163. *Central Pac. R.R. Co.*, 118 U.S. at 240–41.

164. *See, e.g.*, Burke v. S. Pac. R.R. Co., 234 U.S. 669, 681–82, 684–86 (1914). Also excluded were homestead settlements, and land already reserved by government for its own use. *Id.* at 681.

165. *Id.*

166. *See id.* at 685–86.

167. *Id.* at 693–94 ("The clause relied upon is not peculiar to this patent or to those issued under this grant, but appears in all the patents issued from 1866 to 1904 under railroad land grants containing an exclusion of mineral lands.").

168. *Id.* at 673. Coal and iron land were not in the exclusion. *Id.*

169. 234 U.S. 669 (1914).

170. *Id.* at 710.

171. *Id.* at 687–91 (referring *inter alia* to *Barden v. N. Pac. R.R. Co.*, 154 U.S. 288 (1894) and *Davis v. Weibbold*, 139 U.S. 507 (1891)).

172. *See Burke*, 234 U.S. at 701–02 (quoting *Davis v. Weibbold*, 139 U.S. at 527–28). The Land Office apparently had treated the clauses as more or less ineffective. *Burke*, 234 U.S. at 696, 687–88. The claim to the lands in *Burke* was not one made by the government. *Id.* at 676, 691; *cf.* Nelson, *supra* note 109, at 1464–65 ("But once a ferry franchise had been granted, neither the legislature nor any other nonjudicial body could conclusively declare that the franchisee had acted in such a way as to forfeit it.").

against giving effect to the reservations had become part of the law of property. The Court also rejected the claim that the grantee had accepted and was bound by the terms of the patent.[173]

B. Modern Grants

Fast forward to modern federal grants.[174] Grant agreements, as noted above, have a "principal purpose . . . to transfer a thing of value . . . to carry out a public purpose[]" rather than for acquiring property or services.[175] Unlike procurement contracts described above, grants are neither covered by the FAR system nor by the Contract Disputes Act.[176]

Thus, there is a less uniform scheme as to federal grants than has developed as to procurement contracts. Different statutes may govern grants in particular areas. In addition, OMB has issued Uniform Guidance for grant administration.[177] Because these provisions are "guidance," agencies are directed to adopt their own conforming regulations.[178] But even with these variations, the congressional delegation to agencies with respect to grants, similar to the delegations to agencies as to procurement contracts, has (putting aside recent administrative actions) been subject to procedures, substantive standards, and judicial review to promote process and reason.

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173. *Burke*, 234 U.S. at 709, 711. In addition, the Court was solicitous of railroads' rights to substitute or "lieu" lands. *See, e.g.*, United States v. No. Pac. R.R. Co., 256 U.S. 51, 62, 65 (1921) (holding that if indemnity lands were insufficient at the time the government attempted to reserve the lands, its reservations would be ineffective); Payne v. Cent. Pac. R.R. Co., 255 U.S. 228, 234, 238 (1921) (holding that the government's reservation after the railroad's selection of indemnity lands was ineffective, and an injunction could issue against the Secretary of Interior's cancellation of the indemnity sections).

174. Congress provides "many hundreds of billions of dollars in federal grant funding in an ordinary year." Eloise Pasachoff, *Executive Branch Control of Federal Grants: Policy, Pork, and Punishment*, 83 OHIO ST. L.J. 1113, 1119 (2022) (footnote omitted).

175. SHAFFER & RAMISH, *supra* note 149, § 28.2.

176. *See* 41 U.S.C. §§ 7101–7109.

177. *See* 2 C.F.R. § 200.200–217 (2025); *see also* OMB Guidelines to Agencies on Government-Wide Debarment and Suspension (Nonprocurement), 2 C.F.R. §§ 180.5–180.1020 (2025).

178. *See* 2 C.F.R. § 1.105(c) (2025) (indicating the guidance is not regulatory and that agency "may give regulatory effect to the OMB guidance, to the extent that the agency regulations require compliance with all or portions of the OMB guidance").

III. RECENT NIH GRANT TERMINATIONS

A. NIH Grants Generally

This Part focuses on grants by NIH in the Department of Health and Human Services (HHS).[179] NIH is the largest source of grants for biomedical research in the United States.[180] Governing statutes provide that the HHS Secretary is to encourage and render assistance to various institutions for "research, investigations, experiments, demonstrations and studies relating to the causes, diagnosis, treatment, control, and prevention of physical and mental diseases and impairments of man . . . ."[181] NIH is to "require appropriate technical and scientific peer review";[182] scientific methods and peer review are referred to in numerous parts of the statute.[183]

Relevant to recent grant terminations, statutory provisions also direct NIH to reduce health disparities across diverse populations.[184] For example, a statute provides for the National Institute of Minority Health and Health Disparities within NIH, and directs it to "conduct and support . . . research, training, dissemination of information, and other programs with respect to minority health conditions and other populations with health disparities."[185]

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179. It alludes to cases addressing other grants. *See, e.g.*, Thakur v. Trump, 787 F. Supp. 3d 955, 968 (N.D. Cal. 2025) (involving grants by the National Science Foundation (NSF), the National Endowment for the Humanities (NEH), and the Environmental Protection Agency (EPA)), *stay partially aff'd*, 163 F.4th 1198 (9th Cir. 2025); Am. Ass'n of Colls. for Tchr. Educ. v. McMahon, 770 F. Supp. 3d 822, 833 (D. Md. 2025) (involving certain Department of Education grants), *granting stay*, 2025 WL 1232337 (4th Cir. Apr. 10, 2025). The issues surrounding modern grants and conditions reach more broadly than this Article discusses. Professor Pasachoff's work, much relied on herein, provides a more comprehensive treatment. *See generally* Pasachoff, *supra* note 174.

180. *See* Am. Pub. Health Ass'n v. NIH, 791 F. Supp. 3d 119, 130 (D. Mass. 2025). *See generally* Massachusetts v. Kennedy, Civ. Action No. 25-10814-WGY, 2025 WL 1747213 (D. Mass. June 23, 2025).

181. 42 U.S.C. § 241(a), (a)(3); *see also* §§ 284(b)(1)(A), 284(b)(2)(A) (with respect to the directors of the Institutes or Centers (ICs)).

182. *See* 42 U.S.C. § 289(a), 289a(b) (peer review requirements); *see also* 2 C.F.R. § 200.205 (2025) (the "agency must design and execute a merit review process for applications for discretionary Federal awards"); *id.* ("A merit review is an objective process of evaluating Federal award applications in accordance with the written standards of the Federal agency.").

183. *See, e.g.*, 42 U.S.C. § 284(b)(1)(B).

184. *See, e.g.*, 42 U.S.C. § 282(b)(4)(A); *see also* § 282(b)(8)(D)(ii) (directing ICs to "utilize diverse study populations, with special consideration to biological, social, and other determinants of health that contribute to health disparities").

185. 42 U.S.C. § 285t(a). The Director "shall in expending amounts appropriated under this subpart give priority to conducting and supporting minority health disparities research." 42 U.S.C. § 285t(b).

Research as to "sexual and gender minority populations" is also provided for.[186] In addition, statutory provisions encourage promoting greater participation by under-represented groups in health and science fields.[187] Studying ways to improve health among various populations, moreover, is an important feature of the public health discipline.

NIH has twenty-seven Institutes or Centers (ICs), of which over twenty award grants.[188] The procedures for grant awards at the time the new Administration took over are herein described. ICs initiated the grant process by a Notice of Funding Opportunities (NOFO), which provides requirements for the grants.[189] A scientific review group (or study group) in the IC scored applications based on criteria in the NOFO.[190] The head of the IC, a political appointee, chose the study groups under detailed criteria.[191] The study groups have generally been made up of outside scientists or academics.[192] An Advisory Committee then reviewed the scored applications.[193] The HHS Secretary chose the Advisory Committees, which have generally consisted of outside academics and scientists as well as representatives of other groups as provided by statute.[194] Recommendations by the Advisory Committee were then subject to a final determination to award the grant by the head of the IC, a political appointee.[195]

186. These include research "related to the health of sexual and gender minority populations." 42 U.S.C. § 283p. In addition, statutes direct the development of policies and priorities by strategic plans. *See* 42 U.S.C. § 282(b)(5)–(6).

187. *See, e.g.*, 42 U.S.C. § 288(a)(4); Am. Pub. Health Ass'n v. NIH, 791 F. Supp. 3d 119, 185 (D. Mass. 2025) (listing statutes).

188. *See* 42 U.S.C. § 284(a) ("The Director of the National Cancer Institute shall be appointed by the President, and [other Directors] by the Secretary, acting through the Director of National Institutes of Health.").

189. *See* 2 C.F.R. § 200.204 (2025) (providing requirements for notices of funding opportunities).

190. *See NIH*, 791 F. Supp. 3d at 129–39; Pasachoff, *supra* note 174, at 1146.

191. *See How Scientists Are Selected to Be Members of a Chartered Review Group*, NIH CTR. FOR SCI. REV. (Sept. 4, 2025, 11:02 AM), https://public.csr.nih.gov/forreviewers/becomeareviewer/charteredreviewers [https://perma.cc/U7TJ-7XAB].

192. *See id.*

193. *See* 42 U.S.C. § 284a (providing for advisory councils).

194. 42 U.S.C. § 284a(b)(1) (appointment by the Secretary); 42 U.S.C. § 284a(b)(3)(A) ("Two-thirds of the members shall be appointed by the Secretary from among the leading representatives of the health and scientific disciplines . . . ."); 42 U.S.C. § 284a(c) (providing four-year terms for advisory council members).

195. *Cf.* Pasachoff, *supra* note 174, at 1146 (indicating senior political appointees generally make the final decisions as to funding).

Political appointees obviously had a role in the process. The HHS Secretary appointed the Advisory Committees, and the Directors of the ICs (who are political appointees) appointed the study groups. What is more, the Director of the IC made the final determination on the grants after the applications were reviewed by the study group and the Advisory Committee. But at least to a significant extent in the past, this process has been one characterized by scientific merit and peer review.[196]

In addition to controls with respect to awarding grants, the termination of previously awarded grants has been limited by procedural and substantive constraints.[197] Until 2020, the OMB Uniform Guidance only allowed for termination for "fail[ure] to comply with the terms and conditions of a Federal award' and 'for cause."[198] NIH had conforming provisions. The agency was required to provide notice and an opportunity to be heard, and judicial review was available.[199]

B. The 2025 NIH Grant Terminations

In 2020, OMB replaced the "for cause" termination provision with an allowance for termination "to the greatest extent authorized by law, if an award no longer effectuates the program goals or agency priorities."[200] In November 2024, NIH promulgated conforming regulations with an effective date of October 2025.[201] According to Professor Pasachoff, a mid-grant termination due to a change in agency priorities was unheard of and even illegal before 2020,[202] and remained rare even thereafter.[203]

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196. Am. Pub. Health Ass'n v. NIH, 791 F. Supp. 3d 119, 130–31 (D. Mass. 2025).

197. Pasachoff, *supra* note 174, at 1174 (stating that terminations and debarments are procedure-heavy); *see also* 2 C.F.R. § 180.810 (2025) (opportunity to contest before a decision); § 180.820 (appearance); § 180.830 (additional proceedings to resolve disputed facts); § 180.840 (opportunity to present witnesses); § 180.845 (record for debarment).

198. Pasachoff, *supra* note 174, at 1174 (citing 2 C.F.R. § 200.339(a)(1)–(2) (2018)).

199. *See id.* (explaining that, prior to 2020, agencies could not terminate multiyear grants solely due to a change in priorities); Remedies for Noncompliance or Enforcement Actions: Suspension, Termination, and Withholding of Support, 45 C.F.R. § 75.373 (2024) (requiring NIH to provide notice of termination to a non-federal entity before terminating an award).

200. 2 C.F.R. § 200.340(a)(1)–(2) (2021).

201. *NIH*, 791 F. Supp. 3d at 184. The Court stated that 45 C.F.R. § 75.372(a) (2025) was applicable. *See id.*

202. Pasachoff, *supra* note 174, at 1184.

203. *See NIH*, 791 F. Supp. 3d at 151 (referring to testimony as to the prior rarity of terminations of existing grants); *see also* Samuel R. Bagenstos, *This Is What Democracy Looks Like: Title IX and the Legitimacy of the Administrative State*, 118 MICH. L. REV. 1053, 1060–61 (2020) (reviewing R. SHEP MELNICK, THE TRANSFORMATION OF TITLE IX: REGULATING GENERAL EQUALITY IN EDUCATION (2018)). Professor Bagenstos indicates that funding cutoffs by the

In early 2025, however, the second Trump Administration withheld funding and sent notices of terminations with respect to numerous existing grants under the rubric that the "award no longer effectuates the program goals or agency priorities."[204] Apparently grants were targeted for termination based largely on word searches for, e.g.: diversity, equity, and inclusion (DEI), transgender issues, COVID-related, vaccine hesitancy, and HIV.[205] Similar cutoffs occurred as to other grantor agencies.[206] The cutoffs relied on the "priorities" language for termination, sometimes with several sentences of boilerplate stating that a certain area of research was unscientific, unhelpful, or no longer necessary.[207] Typical of language with respect to DEI was:

> Research programs based primarily on artificial and non-scientific categories, including amorphous equity objectives, are antithetical to the scientific inquiry, do nothing to expand our knowledge of living systems, provide[] low returns on investments, and ultimately do not enhance health, lengthen life, or reduce illness. Worse, so-called diversity, equity, and inclusion (DEI) studies are often used to support unlawful discrimination on the basis of race and other protected characteristics, which harms the health of Americans. Therefore, it is the policy of NIH not to prioritize such research programs.[208]

Testimony from NIH officials indicated that officials associated with the Department of Government Efficiency (DOGE) told NIH officials which grants to terminate and provided mandatory language for the termination notices.[209] The NIH officials followed these directives and did not assess whether particular grants met the termination letters' criteria.[210]

Office of Civil Rights for violations of the agency's view of antidiscrimination provisions, such as requirements for sexual harassment hearings and bathroom access, did not generally result in actual funding cutoffs, and were subject to various checks including judicial decisions. *Id.*

204. *See NIH*, 791 F. Supp. 3d at 184.

205. *See id.* at 166–75.

206. *See* Thakur v. Trump, 787 F. Supp. 3d 955, 978 (N.D. Cal. 2025) (indicating that NSF Acting Director Brian Stone said he "us[ed] 'keyword searches and analytics'"); *id.* at 973 (noting that the government was not contesting that it used form letters as to EPA grants); Am. Ass'n of Colls. for Tchr. Educ. v. McMahon, 770 F. Supp. 3d 822 (D. Md. 2025) (granting preliminary injunction as to termination of certain education grants); *id.* at 838–39 (providing termination notices referring to diversity, equity, and inclusion (DEI)).

207. *See Thakur*, 787 F. Supp. 3d at 974.

208. *See NIH*, 791 F. Supp. 3d at 144, 150–51.

209. *See id.* at 149–52. Templates were provided by Rachel Riley from the Department of Government Efficiency who was assigned to work with HHS. *Id.* at 149–51.

210. *See id.* at 148–49 (referring to deposition testimony of Rachel Bulls, Director of the Office of Extramural Research); *see also id.* at 163–64 (referring to evidence that NIH Acting Director of Extramural Research Matthew J. Memoli approved a termination list from Riley two minutes after receiving it); *see also Thakur*, 787 F. Supp. 3d, at 983 (indicating that

C. Administration Arguments for Unreviewable Discretion

Generally. The American Public Health Association, various states, and individuals challenged the NIH grant terminations.[211] The district court granted final injunctive relief in *NIH*.[212] The Administration claimed virtually unreviewable discretion to terminate the grants.[213] NIH argued that its ability to freely terminate grants was built into the grants.[214] It argued that a change in administration was a sufficient reason for terminating grants.[215] It invoked OMB's guidance providing for terminations based on priorities.[216]

Our court system disfavors claims of broad unreviewable discretion.[217] When the legislature provides grants conditioned on engaging in activities desired by the government for the public good, the grants are not mere gratuities. Rather, they are areas of mutual obligation. The historical record as to railroad grants shows that legislatures could not significantly lessen their own obligations or expand those of grantees—much less could the Executive modify the obligations.[218]

With respect to NIH, Congress has provided for grants to be based on scientific merit and peer review.[219] Termination of previously awarded grants has been subject to regulatory requirements of substantive reasons and

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defendants' "characterization of their grant termination process as 'individualized review' is belied by the rest of the record").

211. Press Release, Researchers Challenge NIH's Politically Driven Grant Cancellations, Am. Pub. Health Ass'n (Apr. 2, 2025), https://www.apha.org/news-and-media/news-releases/apha-news-releases/researchers-challenge-nih-s-politically-driven-grant-cancellations [https://perma.cc/3MGV-3JPL].

212. *NIH*, 791 F. Supp. 3d at 185–86.

213. Brian Walsh, George E. Petel, Diane G. Holland, Tracye Winfrey Howard, Morgan W. Huston & Vaibhavi Patria, *UPDATE: Trump Administration Asks Supreme Court to Stay Order Blocking NIH Grant Cancellations*, WILEY (Aug. 1, 2025), https://www.wiley.law/alert-Trump-Administration-Asks-Supreme-Court-to-Stay-Order-Blocking-NIH-Grant-Cancellations [https://perma.cc/2Y56-DNPY].

214. *See generally NIH*, 791 F. Supp. 3d at 184–85.

215. *Id.* at 179 (referring to arguments that a "change in democratically accountable leadership . . . is not a *post hoc* rationalization; it is historical fact"); *id.* at 184 (noting officials' arguments that certain guidance was built into the grants).

216. *Id.* at 183–84; *see also Thakur*, 787 F. Supp. 3d at 982–83 (noting that the agency claimed a change in priorities, which does not constitute a reasoned explanation on its own).

217. *See NIH*, 791 F. Supp. 3d at 177; *Thakur*, 787 F. Supp. 3d at 986–87; Webster v. Doe, 486 U.S. 592, 599–604 (1988) (holding that a decision to fire a CIA employee for national security reason could be precluded with respect to a statutory claim but not the constitutional claim).

218. *See supra* Part II.A.

219. *See, e.g.*, 42 U.S.C. §§ 289(a), (b)(1), (2), 289a-1(a)(2) (1994).

procedures for notice and opportunity to be heard.[220] NIH grants have, to a large extent, been subjected to requirements of reasoning and reason giving, along the lines suggested by scholars such as Professors Mashaw and Stiglitz.[221] Reason giving, moreover, is not met by minimal rationality by which a legislature might be able to proceed.[222]

Were the Executive given largely unreviewable discretion with respect to the award and termination of billions of dollars of NIH grants, the power would violate the nondelegation doctrine. As discussed above, even delegations of power in areas of public rights, such as with respect to taxation, rate regulation, contracts, and grants, have been subject to conditions on delegation—both substantive standards and procedural requirements.

The Court has affirmed the principle that the nondelegation doctrine applies to areas involving public rights in cases utilizing the Major Questions Doctrine (MQD). In *Biden v. Nebraska*,[223] the Biden Administration claimed broad power to grant student loan forgiveness under a statute authorizing it to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs . . . as the Secretary [of Education] deems necessary in connection with a war or other military operation or national emergency."[224] Using MQD standards, the Court opined that the agency had gone well beyond its prior interpretations of these provisions, and that the action had significant political and economic effects.[225]

The Court, moreover, rejected the government's claim that the MQD had less force because "its principles apply only in cases concerning 'agency action[s] involv[ing] the power to regulate, not the provision of government benefits.'"[226] "This Court has never drawn the line the Secretary suggests—and for good reason. Among Congress's most important authorities is its control of the purse."[227]

Funding allocations. The Administration argued that grant terminations were unreviewable funding allocations committed to agency discretion.[228]

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220. *See, e.g.*, *NIH*, 791 F. Supp. 3d at 159–63.

221. *See, e.g.*, MASHAW, *supra* note 14, at 41; STIGLITZ, *supra* note 16, at 8–9, 17, 39.

222. *See* STIGLITZ, *supra* note 16, at 47.

223. 143 S. Ct. 2355 (2023).

224. *Id.* at 2363 (quoting 20 U.S.C. § 1098bb(a)(1)).

225. *Id.* at 2375.

226. *Id.* at 2374.

227. *Id.* at 2375. The Court also cited King v. Burwell, 576 U.S. 473 (2015), where the Court applied the Major Questions Doctrine so as not to give *Chevron* deference to an agency interpretation with respect to whether health insurance subsidies extended to participants in exchanges established by the federal government. *Biden v. Nebraska*, 143 S. Ct. at 2375.

228. Thakur v. Trump, 787 F. Supp. 3d 955, 986–87 (N.D. Cal. 2025).

The Court's decision in *Lincoln v. Vigil*[229] allowed unreviewable discretion in certain funding allocation decisions.[230] There, the Court held that the Executive's reallocation of an appropriation for the Indian Health Service was "agency action . . . committed to agency discretion by law" under § 701(a)(2) of the APA.[231] Congress appropriated a modest sum for the program,[232] attaching few conditions to its use.[233] By contrast, NIH awards billions of dollars in grants, and those awards are hedged in with legal requirements to assure decisions largely based on scientific merit and peer review.[234] Reference to *Lincoln v. Vigil* should not obscure that "[a]mong Congress's most important authorities is control of the purse."[235]

Priorities terminations. The government in *NIH* relied on language in OMB guidance that provided for grant termination "to the extent authorized by law, if an award no longer effectuates the program goals or agency priorities."[236] The Court dealt with the priorities termination language in part by holding that it was inapplicable to NIH.[237] The Court held that the priorities termination language only took effect as to NIH beginning in October 2025.[238] Rather, 45 C.F.R. § 75.372(a) applied and allowed termination only for cause.[239] The Court held that it was an error of law to rely on the OMB provision.[240]

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229. 508 U.S. 182 (1993), *rev'g* Vigil v. Rhoades, 953 F.2d 1225 (10th Cir. 1992).

230. *See* Lawrence et al., *supra* note 151, at 19 n.98 (alluding to *Lincoln v. Vigil* issues); Matthew B. Lawrence, *Second-Class Administrative Law:* Lincoln v. Vigil*'s Puzzling Presumption of Unreviewability*, 101 WASH. U. L. REV. 1029, 1093 (2024) (arguing that tradition did not support the *Vigil* decision and that it undermined reasoned decisionmaking).

231. *Lincoln*, 508 U.S. at 193; 5 U.S.C. § 701(a)(2). The Court described the reallocation as follows: In the "1980's, the Indian Health Service provided diagnostic and treatment services, referred to collectively as the Indian Children's Program (Program), to handicapped Indian children in the Southwest. In 1985, the Service decided to reallocate the Program's resources to a nationwide effort to assist such children." *Lincoln*, 508 U.S. at 184.

232. *See Vigil*, 953 F.2d at 1227 n.2 (referring to $292,000, $300,000, and $350,000).

233. *See Thakur*, 787 F. Supp. 3d at 987.

234. *Cf.* Maryland v. Corp. for Nat'l & Cmty. Serv., 785 F. Supp. 3d 68, 94–96 (D. Md. 2025) (distinguishing *Lincoln v. Vigil* because Congress there did place restrictions on appropriated funds); *Thakur*, 787 F. Supp. 3d at 987 (noting both statutory and regulatory limits); MASHAW, *supra* note 14, at 5 (indicating that retreat to political will or an unexplained decision is almost always unavailable to modern American administrative decisions); *id.* at 6 (indicating that reference to general statutory authorization is not sufficient; rather the agencies need reasons which include requirements for accurate factfinding and sound policy or legal analysis).

235. Biden v. Nebraska, 143 S. Ct. 2355, 2375 (2023).

236. 2 C.F.R. §§ 200.340(a)(1)–(2), (4) (2025).

237. Am. Pub. Health Ass'n v. NIH, 791 F. Supp. 3d 119, 183–84 (D. Mass. 2025).

238. *Id.* at 184.

239. *Id.* at 184–85.

240. *Id.*

Even if the goals and priorities language was applicable, the authorization would seemingly run up against statutory limits, and particularly statutory approval of studies for racial and gender minorities.[241] At least it would be hard to argue that the grants "no longer effectuate[] the program goals."[242] The Administration's termination language, however, emphasized "priorities," which might arguably allow it to choose among the statutory provisions it could favor and disfavor.[243]

Certainly priorities, including resource allocation, play a role in many government decisions, such that one cannot categorically rule out reference to priorities as a reason for agency action. In some contexts, moreover, reference to "priorities" suggests near unreviewable agency discretion. This has particularly been true as to prosecutorial discretion and decisions to initiate enforcement proceedings, as the Court discussed in *Heckler v. Chaney*.[244] The *Heckler* decision referred in part to resource allocation,[245] but with other reasons that entered into prosecutorial discretion.[246] Reasons for prosecutorial discretion have included the rule of lenity, the need to rein in possible overbreadth of laws,[247] and the need to protect the liberty interests of enforcement objects subject to the coercive power of the State.[248] These reasons supporting enforcement discretion have little application to a termination of a previous award for biomedical research.

Professor Pasachoff has argued that policymaking or prioritizing appropriately plays a role in prescribing the types of grants that an agency intends to fund, and in prescribing conditions for specific grant programs.[249] But she

241. *See supra* text accompanying notes 184–187. Challengers in fact argued that many of the grant terminations were contrary to statutory authority, but the *NIH* Court declined to reach the issue given its determination that the NIH actions were arbitrary and capricious. *See* 791 F. Supp. 3d at 185.

242. *See NIH*, 791 F. Supp. 3d at 184.

243. *See* Thakur v. Trump, 787 F. Supp. 3d 955, 978 (N.D. Cal. 2025) (quoting Sethuraman Panchanathan, *Updates on NSF Priorities*, NAT'L SCI. FOUND. (July 30, 2025), https://www.nsf.gov/updates-on-priorities#statement-of-nsf-priorities-09d [https://perma.cc/HW68-68C8]) ("research projects with more narrow impact to subgroups of people based on protected class or characteristics do not effectuate NSF priorities"); *id.* at 979 (indicating the plaintiff had shown that the NSF and the NEH "likely acted contrary to their enabling statutes").

244. 470 U.S. 821 (1985).

245. *Lincoln v. Vigil* indicates that the Executive in certain circumstances can have unreviewable discretion as to funding allocations. *See supra* text accompanying notes 229–234.

246. *See Heckler*, 470 U.S. at 831–32.

247. *See id.* at 831 (referring to technical violations).

248. *See id.* at 832.

249. Pasachoff, *supra* note 174, at 1121–22 (indicating that use of grants to make policy changes is not illegitimate). Professor Pasachoff distinguishes allowable policy from mere

also indicated that even forward-looking priorities must be consistent with statutes and the APA, and are largely subject to judicial review.[250] Professor Pasachoff, moreover, recommended getting rid of OMB's provision for grant terminations based on the language that a grant "no longer effectuates the program goals or agency priorities."[251] She correctly saw that priorities terminations would lead to arbitrary action and would defeat reliance interests.[252] She recommended that the Executive revert to the "for cause" standard that was applicable until 2020.[253]

While Professor Pasachoff was wary of courts changing the standard, still one might think that courts should perhaps be willing to treat the priorities language as inoperative. If the priorities termination is meant to signal unreviewable agency discretion, it would be a remarkable self-delegation. Courts considering the priorities termination have, however, not so much tossed out the priorities language as they have sought to bring it within the realm of reason. The *NIH* Court, for example, did not totally rule out the possibility of priorities terminations.[254] It said that "a new administration certainly is entitled to make

preferences, which she calls pork. Professor Pasachoff defines pork as "the appearance or reality of awarding grants to advance pure partisan favoritism over public values, to harm those who are denied the funding, or to transparently embrace the goal of doing either of these." *Id.* at 1118. She distinguishes appropriate policymaking through grants based on merits or need, from use of policies to punish political enemies for purposes unrelated to the grant. *Id.* at 1121.

250. *Id.* at 1124 ("When agencies implement grant statutes, there is no freestanding authority to impose conditions untethered to the language of each individual grant statute." (footnote omitted)); *see also id.* at 1126–27 (indicating the need for agencies to justify their choices under statutes and the APA).

251. *Id.* at 1198, 1203 (recommending reforms within the Executive Branch, particularly in OMB's Uniform Grant Guidance and its Guidelines on Debarment and Suspension); *cf. id.* at 1200 (arguing that agencies should be required to articulate priorities on a semi-regular basis and allow public comment).

252. *Id.* at 1184–85 ("While it is permissible and reasonable for a new administration to have new policy priorities for its grant funding, it is different to do so in the context of running new competitions, when it should be allowed, than in changing the ongoing expectations of a current grantee with reliance interests, when it is unfairly changing the rules in the middle of the game."); *id.* at 1185 ("[The change] also gives agencies a tool to enforce ideological purity."); *id.* ("This is an expansion of the termination power that fuels autocracy rather than rationality.").

253. *Id.* at 1203; *see also id.* at 1196 (stating "I am not proposing any changes to [court] doctrine," but recommending that the courts take the doctrine more seriously); *cf. id.* at 1197 (not supporting heightened nondelegation requirements).

254. *See* Am. Pub. Health Ass'n v. NIH, 791 F. Supp. 3d 119, 179 (D. Mass. 2025).

changes."[255] But such terminations would have to be subject to requirements of reason and reasoned explanation under the APA.[256]

The Administration also argued the allowance for unreviewable executive grant cancellation was a condition of the grants and should be read into them whether or not explicit in the grant documents.[257] The argument would be that the grantees had agreed to unreviewable agency cancellation. But reservation clauses, even those enacted and exercised by the legislature, could not be used to implement arbitrary action.[258] Much less should an agency's purporting to reserve for itself an unreviewable termination power be approved.[259]

A possible argument for wide discretion to terminate grants might be found in the "termination for convenience" in procurement contracts. But at least ordinary procurement contracts are hedged in by the government's need for goods and services, and various potential limits on arbitrariness described above. Grants for biomedical research provide less immediate and tangible benefits. These less certain benefits may be easier for the Executive to shrug off, if "convenience" or "priorities" were the criterion for grant termination.[260] Thus "cause" has generally been required for grant terminations. Notice and the opportunity to be heard have generally been provided.[261] And such terminations have been subject to judicial review under the APA, including arbitrary and capricious review.[262]

D. Arbitrary and Capricious Review in the District Court

After putting aside the arguments for unreviewable discretion, the *NIH* Court held that the NIH terminations were arbitrary and capricious.[263] The

255. *Id.* The *NIH* Court also noted that even the OMB guidance provided for termination "to the extent authorized by law." *Id.* at 184; *see also* 2 C.F.R. § 200.340(a)(4) (eCFR accessed on June 16, 2025, noting Title 2 was last amended on Jan. 13, 2025).

256. *NIH*, 791 F. Supp. 3d at 184; Thakur v. Trump, 787 F. Supp. 3d 955, 987 (N.D. Cal. 2025) (indicating a meaningful standard was required under priorities language); Pasachoff, *supra* note 174, at 1192 (indicating reasoned decisionmaking was required, while still suggesting that the priorities language might make it easier for agencies "to satisfy reasoned explanation requirements").

257. *NIH*, 791 F. Supp. 3d at 184–85.

258. *See supra* text accompanying notes 115–116.

259. *See supra* Part II.A.

260. True, some government contracts share these characteristics. *See* text accompanying notes 147–148.

261. *See* Pasachoff, *supra* note 174, at 1174.

262. *See* SHAFFER & RAMISH, *supra* note 149, § 49.9 (indicating that "grants rarely hold the potential for 'profit'" and that APA relief has been "the most frequently sought form of relief in grant litigation"); Pasachoff, *supra* note 174, at 1174.

263. Am. Pub. Health Ass'n v. NIH, 791 F. Supp. 3d 119, 182–83 (D. Mass. 2025).

Administration's mass terminations used a hurried and truncated process that did not promote reasoning. As noted above, officials associated with DOGE had originated grant terminations based on reprobated words.[264] The Administration used form letters, and officials within NIH implemented the termination lists without additional review.[265]

The *NIH* Court determined that the use of key words and boilerplate did not provide sufficient reasoning.[266] For example, the most common reason for termination was the Administration's recitation of a connection to DEI.[267] The *NIH* Court noted that the Administration repeatedly declined to define DEI.[268] Presumably, the Administration treated many studies of minority health as DEI, but the NIH statutes contemplated such studies and they were presumptively constitutional. The boilerplate stated that DEI encouraged violation of the federal antidiscrimination laws.[269] But, the Administration pointed to no violations of the federal antidiscrimination laws in the termination letters, nor did it produce any record evidence of such violations.[270] Without a more specific prohibition, the *NIH* Court said that the Administration was giving itself freedom to terminate grants without standards.[271]

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264. *See supra* notes 209–210 and accompanying text.

265. *See supra* notes 147–148 and accompanying text.

266. *See NIH*, 791 F. Supp. 3d at 182; *see also* Thakur v. Trump, 787 F. Supp. 3d 955, 987 (N.D. Cal. 2025).

267. Lea Skene & Lindsay Whitehurst, *Judge Largely Blocks Trump's Executive Orders Ending Federal Support for DEI Programs*, ASSOCIATED PRESS (Feb. 21, 2025), https://apnews.com/article/dei-diversity-equity-inclusion-trump-federal-judge-5b04fbc742bd32adf98ca108b4b12b37 [https://perma.cc/U798-NQX4].

268. *See NIH*, 791 F. Supp. 3d at 179–81; *Thakur*, 787 F. Supp. 3d at 971–72 (treating use of buzzwords to terminate grants in this instance as a form of viewpoint discrimination).

269. NAT'L INSTS. OF HEALTH, NOT-OD-25-090, NOTICE OF CIVIL RIGHTS TERM AND CONDITION OF AWARD (2025), https://grants.nih.gov/grants/guide/notice-files/NOT-OD-25-090.html [https://perma.cc/5KVY-677N]. Violation of federal antidiscrimination laws could presumably count as a specific prohibition, although one as to which the Executive's *ipse dixit* would seem insufficient for grant termination. Brannon P. Denning, *Ipse Dixits, Bootstraps, and Constitutional Doctrine*, 74 BAYLOR L. REV., 555, 575–76 (2022).

270. *NIH*, 791 F. Supp. 3d at 180–82 (noting that while discriminatory programs can violate federal law, there is nothing in the record demonstrating such violation in the context of DEI).

271. *See id.* at 182–83. Terminations as to, e.g., COVID research, may be better defined than DEI, but the reasoning was thin. *See id.* at 174 ("Vaccine Hesitancy: 'It is the policy of NIH not to prioritize research activities that focuses gaining knowledge on why individuals are hesitant to be vaccinated and/or explore ways to improve vaccine interest and commitment.' . . . COVID . . . : 'The end of the pandemic provides cause to terminate COVID-related grant funds. These grant funds were issued for a limited purpose: to ameliorate the effects of the pandemic. Now that the pandemic is over, the grant funds are no longer necessary.'").

Other boilerplate provided that studies associated with DEI or other reprobated categories were "unscientific."[272] The Administration, however, did not point to anything unscientific in the particular studies, nor any other individualized problem within its form letters.[273] What is more, because the NIH grants generally had previously been awarded by a detailed process focusing on scientific merits and peer review, the agency had not adequately explained its change in policy[274]—for example, why studies previously thought scientific might now be considered unscientific. And, the agency had not considered reliance interests,[275] nor the waste involved in terminating ongoing research.[276] The district court enjoined the grant terminations and also the guidance documents that the Administration used with respect to grant terminations.[277]

Thus, the *NIH* Court and several other lower courts have appropriately treated the recent grants cases as appropriate for judicial review.[278] The grant termination decisions must comport with constitutional and statutory requirements and cannot be arbitrary and capricious under APA standards.[279] To the extent the agencies adverted to priorities terminations, APA standards must still be met. In short, the courts sought to bring executive actions within the realm of reason.

IV. THE SUPREME COURT'S *NIH* DECISION

A. The Partial Stay in the Supreme Court

In *Department of Education v. California*,[280] the Supreme Court indicated that grant termination claims should be brought as Tucker Act claims in the CFC.[281] The Administration had sought an emergency stay of a preliminary injunction requiring it to restore teacher training grants that the

272. Katia Riddle, *Where Scientific Research Focused on DEI Stands After a Year*, NPR (Dec. 26, 2025), https://www.npr.org/2025/12/26/nx-s1-5652127/where-scientific-research-focused-on-dei-stands-after-a-year-of-disruption [https://perma.cc/ZKQ8-24VP].

273. *NIH*, 791 F. Supp. 3d at 181–82.

274. *See id.* at 182–83; *see also Thakur*, 787 F. Supp. 3d at 984.

275. *NIH*, 791 F. Supp. 3d at 182–83; *cf.* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1913 (2020).

276. *See Thakur*, at 787 F. Supp. 3d at 985.

277. Massachusetts v. Kennedy, Civ. Action No. 25-10814-WGY, 2025 WL 1747213, at *6 (D. Mass. June 23, 2025).

278. *See NIH*, 791 F. Supp. 3d at 177; *see also Thakur*, 787 F. Supp. 3d at 986–87.

279. *See NIH*, 791 F. Supp. 3d at 177; *see also Thakur*, 787 F. Supp. 3d at 986–87.

280. 145 S. Ct. 966 (2025) (per curiam).

281. *Id.* at 968. The decision was on the Court's emergency docket.

Administration had summarily terminated.[282] The Court stated that "the [g]overnment is likely to succeed in showing the [d]istrict [c]ourt lacked jurisdiction to order the payment of money under the APA."[283]

Subsequently in the *NIH* case, the Supreme Court, at the Administration's instance, granted a stay of the permanent injunction to restore terminated grants.[284] The Court primarily relied on *Department of Education* in indicating that the CFC was the appropriate forum.[285] It stated that the APA's "'limited waiver of [sovereign] immunity' does not provide the District Court with jurisdiction to adjudicate claims 'based on' the research-related grants or to order relief to enforce any 'obligation to pay money' pursuant to those grants."[286] Justice Barrett provided the fifth vote for the stay, and stated that the "[d]istrict [c]ourt likely lacked jurisdiction to hear the grant terminations."[287]

Justice Barrett, however, indicated that the government was not entitled to a stay of the injunctive relief with respect to the guidance documents directing the termination of grants, as to which she said there was likely district court jurisdiction.[288] Four Justices dissented from the stay with respect to grant terminations, reasoning that the district court had jurisdiction not merely with respect to the guidance treated separately, but also the resulting grant terminations.[289] Those four Justices, together with Justice Barrett, meant the decision as to the guidance documents was not stayed, but relief as to restoration of the terminated grants was stayed.

B. Statutory Provisions

Here, one needs to review statutory provisions, which might have suggested to some Justices that claims relating to any potential relief (at least to the extent it would affect monetary payouts) for grant terminations must be heard in the CFC. The Tucker Act provides for CFC jurisdiction for claims against the United States "founded either upon the Constitution, or any Act of Congress or any regulations of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in

282. *Id.* at 968–69, 972.

283. *Id.* at 968.

284. 145 S. Ct. 2658 (2025).

285. *Id.* at 2661 (Barrett, J., concurring in the partial grant of the application to stay).

286. *Id.* at 2660 (citing Dep't of Educ. v. California, 145 S. Ct. 966, 968 (2025)).

287. *Id.* at 2661 (Barrett, J., concurring in the partial grant of the application to stay).

288. *Id.* At the same time, Justice Barrett raised problems as to whether the guidance documents constituted final agency action. *Id.* at 2662. She also stated in explaining a bifurcated approach that "vacating the guidance does not necessarily void decisions made under it." *Id.* at 2661.

289. *Id.* at 2663 (Roberts, C.J., with Sotomayor, Kagan, and Jackson, JJ., concurring in part and dissenting in part); *id.* at 2666 (Jackson, J., concurring in part and dissenting in part).

cases not sounding in tort."[290] Claims within that jurisdiction are considered not to be subject to a sovereign immunity objection.[291]

The APA, the ordinary vehicle for challenging agency action, provides for judicial review and a waiver of sovereign immunity in § 702:

> *Right of review.* A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States *seeking relief other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. . . . *Nothing herein . . . (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.*[292]

Also providing for judicial review, but with a caveat, is § 704, which states, "[a]gency action made reviewable by statute and final agency action *for which there is no other adequate remedy in a court* are subject to judicial review."[293]

C. Reasoning of the Justices for the Stay

The Justices favoring the stay, with respect to grant termination claims in *Department of Education* and *NIH*, treated the claims as based on an "express or implied contract with the United States," and thus covered by the Tucker Act.[294] And they apparently saw the claims as falling under § 702's exclusion "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought"—that is, the Tucker Act impliedly excluded the APA claims.[295] And because the grant termination claims were for "money damages," they were further excluded from § 702's sovereign immunity waiver.[296]

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290. 28 U.S.C. § 1491(a)(1); *see also* 28 U.S.C. § 1346(a)(2); Gregory C. Sisk, *The Jurisdiction of the Court of Federal Claims and Forum Shopping in Money Claims Against the Federal Government*, 88 IND. L.J. 83, 88 (2013) (particularly arguing that Indian trust claims should proceed in the Court of Federal Claims (CFC)).

291. 28 U.S.C. § 1491(a)(1).

292. 5 U.S.C. § 702 (emphasis added).

293. 5 U.S.C. § 704 (emphasis added).

294. *Dep't of Educ.*, 145 S. Ct. at 968–69 (per curiam) ("[T]he Tucker Act grants the Court of Federal Claims jurisdiction over suits based on 'any express or implied contract with the United States.'"); *NIH*, 145 S. Ct. at 2665 (Kavanaugh, J., concurring in part and dissenting in part) ("The core of plaintiffs' suits alleges that the Government unlawfully terminated their grants. That is a breach of contract claim. And under the Tucker Act, such claims must be brought in the Court of Federal Claims, not federal district court.").

295. *Dep't of Educ.*, 145 S. Ct. at 968 (citing 5 U.S.C. § 702).

296. *Id.*

The Justices who favored the stays indicated that the district courts could not "order relief designed to enforce any 'obligation to pay money.'"[297] The effect of the stays apparently withheld jurisdiction from the district courts as to both prospective amounts not yet paid when the injunctions were entered as well as payments for past due amounts.[298] The opinions of those favoring the stays did not directly address whether the Tucker Act suits provided an adequate remedy under § 704.[299]

These Justices effectively treated grants claims as similar to procurement contract claims, committed to the CFC and for which injunctive relief and specific performance are generally unavailable.[300] Procurement contracts and their termination, however, are administered under a web of remedies including the Contract Disputes Act.[301] And, the government's ongoing procurement needs provide some restraint on arbitrariness. By contrast, disputes over grants are not under the Contract Disputes Act, and procurement needs provide no inherent restraints on arbitrariness.[302] In addition, grant cases are apt to involve APA standards rather than traditional contract law.[303]

D. Support for APA Review of Grant-in-Aid Decisions in the Regular Courts

Perhaps reflecting such differences, Congress apparently intended to make grant-in-aid cases reviewable when it amended § 702 in 1976, to provide for more extensive relief against the government under the APA without a potential sovereign immunity bar. The Court in *Bowen v. Massachusetts*,[304] after

297. *NIH*, 145 S. Ct. at 2660; *see Dep't of Educ.*, 145 S. Ct. at 968.

298. *Dep't of Educ.*, 145 S. Ct. at 968 (staying order that "requires the Government to pay out past-due grant obligations and to continue paying obligations as they accrue"); *NIH*, 145 S. Ct. at 2665 (Kavanaugh, J., concurring in part and dissenting in part) ("It is not evident that plaintiffs' challenge to the guidance is separable from their challenge to the grant terminations."). Justice Barrett agreed that relief as to the grant terminations was for the CFC. *See id.* at 2661 ("As today's order states, the District Court likely lacked jurisdiction to hear challenges to the grant terminations, which belong in the Court of Federal Claims (CFC).").

299. *But cf. NIH*, 145 S. Ct. at 2672–73 (Jackson, J., concurring in part and dissenting in part) (discussing § 704 and questioning the adequacy of the CFC remedy).

300. *See* SHAFFER & RAMISH, *supra* note 149, § 49.9; FELDMAN, *supra* note 125, § 33.11.

301. *See supra* Part I.E.

302. *See* Krent, *supra* note 111.

303. And procurement contractors are generally for-profit entities for which money payment may be more adequate than it is for interrupted research grants. *See* SHAFFER & RAMISH, *supra* note 149, § 49.9 (indicating that grants rarely hold the potential for profit and that APA relief has been the most frequently sought form of relief in grant litigation); Pasachoff, *supra* note 174, at 1174.

304. 487 U.S. 879 (1988).

an extensive review of legislative history, concluded that Congress intended APA review of grant-in-aid cases.[305]

Given an assumption that grant cases were included in the cases reviewable under § 702, it would seem difficult to conclude that § 702 had also, as a general matter, impliedly excluded grant cases from APA review. At a minimum, declaratory and injunctive relief would be available.[306] And it would also be odd to conclude that the Tucker Act necessarily provided adequate relief under § 704, given both congressional intent to provide APA review for grant cases and the CFC's inability to grant most injunctive relief.

If we assume that injunctive or declaratory relief is available under the APA in grant cases, what would such relief look like? Some examples are provided in so-called "disallowance" claims—which the circuit courts generally said could be brought in the lower federal courts (even well prior to *Bowen v. Massachusetts*). For example, a grantee (often a state) might contest the disallowance of reimbursement for certain services provided under Medicaid.[307] A determination that the agency violated the APA or statutory authority in withholding certain reimbursements would presumptively govern the further interactions of the parties.[308] The courts entertaining disallowance claims

305. *See id.* at 892–903 & nn.17–31; *see also* Md. Dep't of Hum. Res. v. Dep't of Health & Hum. Servs., 763 F.2d 1441, 1446–48 (D.C. Cir. 1985) (reviewing legislative history).

306. *Cf. NIH*, 145 S. Ct. at 2661 (Barrett, J., concurring in the partial grant of the application for stay) ("That the agency guidance discusses internal policies related to grants does not transform a challenge to that guidance into a claim 'founded . . . upon' a contract that only the CFC can hear.").

307. Under the Medicaid statute, decisions as to a plan's overall "conformity" with federal statutes and regulations were explicitly reviewable in the Courts of Appeals under 42 U.S.C. § 1316 (a)(1) and (a)(3). As to disallowance claims—those disallowing certain items of reimbursement—the participant could seek reconsideration in the agency, but the statute made no mention of judicial review (at least at that time). 42 U.S.C. § 1316(d). States seeking review of a disallowance claims often brought them as APA claims in the district courts. The agency might argue that there was no review at all for disallowance claims, or that a particular claim should be seen as a "conformity" claim that had to be brought in the Court of Appeals. There were numerous cases allowing for APA disallowance claims in the district courts. *See Bowen*, 487 U.S. at 882 n.1 ("Five Circuits have held that district courts have jurisdiction over a State's appeal from a federal administrative disallowance in a grant-in-aid program." (citations omitted)). *But cf.* Portsmouth Redevelopment & Hous. Auth. v. Pierce, 706 F.2d 471, 472, 475 (4th Cir. 1983) (holding that the Housing Authority's claim for withheld operating subsidies should be heard in the Court of Claims). *See generally* Michael F. Noone Jr. & Urban A. Lester, *Defining Tucker Act Jurisdiction After* Bowen v. Massachusetts, 40 CATH. U. L. REV. 571 (1991) (discussing grant cases before and after *Bowen*).

308. *See, e.g.*, Cnty. of Alameda v. Weinberger, 520 F.2d 344, 344, 346 (9th Cir. 1975) (affirming a grant of a preliminary injunction in a disallowance case to prevent further deductions and to secure release of withheld funds). And more recent cases involving administration

did not treat ongoing compliance with requirements to make monetary payments as the equivalent of a procurement contractor seeking specific performance of a contract.[309] Indeed, it appears that the courts assumed that not only prospective but also retroactive readjustments would follow if the court determination disapproved the agency disallowance.[310]

The U.S. Court of Appeals for the First Circuit decision in *Massachusetts v. Secretary of Health and Human Services* (*Bowen*)[311] presented a wrinkle that the Supreme Court would smooth out. In the First Circuit, the Administration advanced arguments that disallowance claims as a whole were in the exclusive jurisdiction of the Court of Claims.[312] *Bowen* thus presented the very issues that the Administration advanced in *Department of Education* and *NIH*.[313] The First Circuit rejected the government's claim that disallowance claims

attempts to withhold payments from sanctuary cities display a similar assumption that payments would follow if courts found the disallowances improper. *See, e.g.*, Cnty. of Santa Clara v. Trump, 275 F. Supp. 3d 1196, 1201, 1219 (N.D. Cal. 2017) (granting summary judgment and a permanent injunction against implementing an executive order directing funding cuts to sanctuary cities); City & Cnty. of San Francisco v. Trump, 897 F.3d 1225, 1231, 1245 (9th Cir. 2018) (narrowing the injunction, but affirming the grant of summary judgment and the injunction against funding cuts).

309. *See, e.g.*, Md. Dep't of Hum. Res. v. Dep't of Health & Hum. Servs., 763 F.2d 1441, 1449 (D.C. Cir. 1985) ("Although the principles of contract law undoubtedly have a role to play in such disputes, we see no reason to assume that what is involved here is a contract within the meaning of the Tucker Act." (internal citations omitted)).

310. *See, e.g.*, Mich. Dep't of Soc. Servs. v. Schweiker, 563 F. Supp. 797, 798–800 (W.D. Mich. 1983), *aff'd sub nom.* Mich. Dep't of Hum. Servs. v. Sec'y of Health & Hum. Servs., 744 F.2d 32, 35 (6th Cir. 1984) (concluding that the district court had jurisdiction to review disallowance claims, relating to disallowances in 1978–1979); Or. Dep't of Hum. Res. v. Dep't of Health & Hum. Servs., 727 F.2d 1411, 1412 & n.2, 1414 (9th Cir. 1983) (involving a claim with respect to 1980 and 1981 costs, and holding that the claim was a disallowance claim that should be heard originally in a district court); Conn. Dep't of Income Maint. v. Schweiker, 557 F. Supp. 1077, 1091 (D. Conn. 1983) ("This court trusts that HHS accordingly will assert no setoff, and will promptly restore any setoff already taken. An injunction is therefore unnecessary."), *reversed on other grounds sub nom.* Conn. Dep't of Income Maint. v. Heckler, 731 F.2d 1052, 1055–56 (2d Cir. 1984) (finding the district court has jurisdiction under the APA but holding against Connecticut on the merits), *aff'd*, 471 U.S. 524 (1985) (ruling on the merits without mention of any jurisdictional defect).

311. 816 F.2d 796 (1st Cir. 1987), *aff'd in part and rev'd in part sub nom.* Bowen v. Massachusetts, 487 U.S. 879 (1988).

312. *See Bowen*, 487 U.S. at 883 (noting that the Administration's arguments for exclusive CFC jurisdiction were relatively recent).

313. *Id.*; Dep't of Educ. v. California, 145 S. Ct. 966, 968 (2025) (per curiam); NIH v. Am. Pub. Health Ass'n, 145 S. Ct. 2658, 2666, 2668 (2025) (Jackson, J., concurring).

were solely for the CFC.[314] While holding—contrary to the federal government's argument—that the district court properly had jurisdiction over the disallowance claim and affirming the decision against the government on the merits, the Court did hold that monetary claims should go to the CFC.[315] Nevertheless it indicated that if the Administration persisted "in withholding reimbursement for reasons inconsistent with our decision," that decision would have a collateral estoppel effect in a CFC action.[316] The First Circuit decision has some resemblance to Justice Barrett's opinion in *NIH*, splitting the challenge to guidance from the claims for grant payment.[317]

On review of the First Circuit's decision, the Supreme Court affirmed the circuit court's determination that disallowance claims were reviewable in the district courts—in line with the weight of lower court authority.[318] But the Court reversed the First Circuit's decision requiring that the monetary claims must be heard in the CFC.[319] As noted above, the Court extensively reviewed the legislative history of the 1976 amendments to § 702 providing for a broad waiver of sovereign immunity.[320] It concluded that Congress intended grant-in-aid litigation to be reviewable under the APA in the regular courts.[321] It also concluded that monetary relief in grant cases—including retroactive restoration of withheld grant payments—was not within § 702's exclusion of relief for "money damages."[322] It quoted at length from Judge Bork's opinion in *Maryland Department of Human Resources v. Department of Health and Human Services*:[323]

> We are satisfied that the relief Maryland seeks here is not a claim for money damages, although it is a claim that would require the payment of money by the federal government.
>
> We begin with the ordinary meaning of the words Congress employed. The term "money damages," 5 U.S.C. § 702, we think, normally refers to a sum of money used

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314. *See Massachusetts*, 816 F.2d at 800 (quoted in *Bowen*, 487 U.S. at 890 n.13).

315. *Id.*

316. *Id.*; *see also* Minnesota v. Heckler, 718 F.2d 852, 857 (8th Cir. 1983) (dividing the remedy as had the First Circuit, but also seeming to anticipate agency compliance); *id.* at 860 n.14 ("It is apparent that cooperation from HHS would obviate the need for the state to bring a separate suit in the Claims Court to obtain monetary relief for the funds disallowed here." (citation omitted)).

317. *See* NIH v. Am. Pub. Health Ass'n, 145 S. Ct. 2658, 2661 (2025) (Barrett, J., concurring) (stating that the district court had jurisdiction to review an APA challenge to agency guidance, but the CFC had jurisdiction to review grant termination challenges).

318. *See Bowen*, 487 U.S. at 882–83.

319. *Id.* at 912.

320. *Id.* at 891–900.

321. *See id.* at 892–904 (walking through the text and legislative history of the relevant APA section). *See* 5 U.S.C. § 702.

322. *Id.* at 898–900.

323. 763 F.2d 1441 (1985).

> as compensatory relief. Damages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.' . . .
>
> In the present case, Maryland is seeking funds to which a statute allegedly entitles it, rather than money in compensation for the losses, whatever they may be, that Maryland will suffer or has suffered by virtue of the withholding of those funds.[324]

Other courts, including the Federal Circuit (which reviews transfers from the district courts to the CFC), have used similar reasoning that withheld appropriations and grant funds are not money damages.[325] In holding that the claims in *Department of Education* involved money damages, the Court relied on an Employee Retirement Income Security Act case that did not seem squarely relevant.[326]

If one accepts that Congress meant § 702 to allow grant-in-aid cases under the APA in the district courts, it seems to follow that decisions in such cases, at a minimum, would control the forward-looking payments—that is payments as

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324. *See* Bowen, 487 U.S. at 894–95 (quoting Md. Dep't of Hum. Res v. Dep't of Health & Hum. Servs., 763 F.2d 1441, 1446 (D.C. Cir. 1985)).

325. *See, e.g.*, Nat'l Ctr. for Mfg. Scis. v. United States, 114 F.3d 196, 201 (Fed. Cir. 1997) (holding that the transfer to the CFC was improper when plaintiff sought to restore a congressional appropriation for a cooperation agreement). The plaintiff was not seeking an unconditional payment as was true for contract claims. Rather, the released money would be subject to restrictions and constraints; the plaintiff would be required to use the funds "to perform the basic and applied research functions called for in the Act." *Id.*; *see also* Lummi Tribe of the Lummi Rsrv. v. United States, 870 F.3d 1313, 1315–16 (Fed. Cir. 2017) (holding that a claim that the government allocated too little grant funding for housing was not properly within CFC jurisdiction); *id.* at 1318 ("[T]he Tribes seek a nominally greater strings-attached disbursement."); *cf.* Katz v. Cisneros, 16 F.3d 1204, 1207–09 (Fed. Cir. 1994) (holding that district court incorrectly concluded that the contractual aspects of the dispute the case belonged in the CFC; the case turned on the interpretation of a federal regulation). Some courts used a two-part test to determine if claims were disguised contract claims, looking to the source of rights claimed and the type of relief sought. *See, e.g.*, Megapulse, Inc. v. Lewis, 672 F.2d 959, 968 (D.C. Cir. 1982) (working through how to classify a particular action).

326. *See generally* Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) (cited in Dep't of Educ. v. California, 145 S. Ct. 966, 968 (2025) (per curiam)). The question was whether an insurer could bring a claim to recover money it had paid to the injured party to cover medical expenses under the Employee Retirement Income Security Act, 29 U.S.C. § 1132(a)(3), after the injured party had entered a negotiated settlement with a car manufacturer. *Great-West Life Annuity Ins. Co.*, 534 U.S. at 206–08. The insurer claimed it could bring an action under § 502(a)(3), which authorizes "a civil action[] 'by a participant, beneficiary, or fiduciary. . . to enjoin any act or practice which violate[d] . . . the terms of the plan, . . . or to obtain other appropriate equitable relief." *Id.* at 208–09. The Court held that no equitable relief was involved because "[h]ere, petitioners seek, in essence, to impose personal liability on respondents for a contractual obligation to pay money." *Id.* at 210.

they came due under the grants after a court granted declaratory or injunctive relief. Nor would one read such forward-looking relief as "impliedly forbid[den]" under § 702.[327] And such relief would not be excluded as "money damages" under § 702.[328] Given limitations of CFC injunctive remedies, moreover, the grant claims likely would be included under the APA because under § 704 "no other adequate remedy in any court" would be available.[329]

The claims in *Department of Education* and in *NIH* both involved cases where some of the remedies were forward-looking at the time plaintiffs brought the cases and when the lower courts granted relief. The *Bowen* Court, moreover, had held that even retroactive relief was available.[330] And it also held that monetary relief in grant cases was not within the exclusive jurisdiction of the CFC.[331] Given the slippage from prospective to retrospective relief with delays in cases involving ongoing money payments, a unified remedy makes sense to provide for an adequate remedy.

If the cases now proceed in the CFC, it is not clear what problems those cases may face. But in all events, if the CFC hears such cases, it needs to require the reasoned decisionmaking that the regular courts have attempted to require of the federal government in cases such as *NIH*. Review would need to include the panoply of inquiries available under the APA—including review for whether the government has acted contrary to constitutional and statutory authority, and moreover, whether its actions are arbitrary and capricious.[332]

CONCLUSION

Government contracts and grants, taking their roots in legislative appropriations powers, may be characterized as involving public rights. But such

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327. 5 U.S.C. § 702.

328. *See Bowen*, 487 U.S. at 898–900.

329. *Id.* at 902–03 (rejecting the government's § 704 argument); Schmidt & Metzger, *supra* note 41, at 14 (discussing the *NIH v. American Public Health Ass'n* case, and stating that "the lack of injunctive relief makes the CFC inadequate from a systemic perspective").

330. *Bowen*, 487 U.S. at 898–900.

331. *Id.* at 910–11 n.48 ("It is often assumed that the Claims Court has exclusive jurisdiction . . . . That assumption is not based on any language in the Tucker Act. . . . If, however, § 702 of the APA is construed to authorize a district court to grant monetary relief . . . the fact that the purely monetary aspects of the case could have been decided in the Claims Court is not a sufficient reason to bar that aspect of the relief available in a district court."); *see also* Schmidt & Metzger, *supra* note 41, at 13 (stating that "the Court's insistence that district courts cannot order injunctive relief that might result in a payment of money pursuant to a grant agreement is difficult to square with *Bowen*").

332. *See* GOVERNING FOR IMPACT, *supra* note 43.

legislative power did not imply that mere political will would decide disputes as to such contracts and grants, but rather by obligation and justice.[333] What is more, when the Legislature delegated to the Executive decisions as to public rights, the Executive could be subject to more extensive procedures and substantive requirements than applied were the Legislature acting on its own.[334] Such decisions were subject to the Constitution, statutes, regulations, and reason-giving.

The *NIH* District Court and others have rejected claims for unreviewable executive discretion and have sought to maintain the role of reason with respect to grant terminations.[335] The Administration seeks to minimize the role of reason both as to its past and future decisions. HHS Secretary Robert F. Kennedy Jr. recently fired the entire Advisory Committee on Immunization Practices.[336] The Administration has proposed limiting the role of the NIH study sections in evaluating and scoring grant applications.[337] On August 7, 2025, President Donald J. Trump signed a new executive order seeking to increase political control of grantmaking.[338]

The Supreme Court has to an extent embraced unitary executive notions that would displace expertise and continuity with political accountability. But the Court should be concerned that maximizing political responsiveness may minimize reasoning, and that expertise and peer review may be important parts of a reasoning process.

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333. *See* Desan, *supra* note 21, at 1435.

334. *See supra* Part III.C.

335. *See supra* Parts III.C–D.

336. Michael Mina, *I'm a Vaccine Expert. Here's What Keeps Me Up at Night About Kennedy's Policies.*, N.Y. TIMES (June 11, 2025), https://www.nytimes.com/2025/06/11/opinion/rfk-vaccine-policy-changes.html [https://perma.cc/G72U-4HWL]; Adam Gaffney, David U. Himmelstein & Steffie Woolhandler, *The Dismantling of American Health Care*, N.Y. REV. OF BOOKS ONLINE (July 8, 2025), https://www.nybooks.com/online/2025/07/08/the-dismantling-of-american-health-care [https://perma.cc/KGF4-KWVJ] (stating that "[m]any of the replacement appointees seem distinguished mainly by their distrust of vaccines and their apparent willingness to further undermine vaccine uptake among the American public").

337. *NIH Centralizes Peer Review to Improve Efficiency and Strengthen Integrity*, NAT'L INSTS. OF HEALTH (Mar. 6, 2025), https://www.nih.gov/news-events/news-releases/nih-centralizes-peer-review-improve-efficiency-strengthen-integrity [https://perma.cc/MZU6-FZ2P]. The Administration has proposed cutting NIH funding by approximately 40%. Benjamin Mueller & Christina Jewett, *Health Cuts Would Result in Fewer Drugs for Americans, Budget Office Reports*, N.Y. TIMES (July 18, 2025), https://www.nytimes.com/2025/07/18/health/trump-nih-medical-research.html [https://perma.cc/YU2Z-NFMZ].

338. Exec. Order No. 14,332, 90 Fed. Reg. 38,929, 38,929–932 (Aug. 7, 2025).