

Executive Branch Control of Federal Grants: Policy, Pork, and Punishment

ELOISE PASACHOFF*

High-profile controversies in each of the last several administrations have involved the extent of Executive Branch control over federal grants. These challenges were particularly pronounced during the Trump Administration, when it seemed that each month brought a new grant-related controversy, from the opening week's attempts to withhold funding from sanctuary cities to the last months' effort to deny funding to "anarchist" jurisdictions. The aftermath of the Trump Administration thus provides an important opportunity to assess the bounds of Executive Branch control over federal grants writ large. In doing so, this Article makes three contributions. First, as a descriptive matter, it maps the terrain of Executive Branch control over federal grants, illustrating how this control operates at three distinct moments in the grant lifecycle: the policy stage, the award stage, and the enforcement stage. Second, as a normative matter, the Article argues that for the most part, robust Executive Branch control over federal grants in all three of these arenas is good, against a current trend seeking to reduce Executive Branch control to transmission-belt status. At the same time, the award stage includes dangerous opportunities to transform neutral awards into partisan pork, while the enforcement stage includes dangerous opportunities to transform neutral enforcement into political retribution. Third, through a thick case study

* Professor of Law and Anne Fleming Research Professor, Georgetown University Law Center. For excellent research assistance, I thank Jose Gabriel Almaro, Danette Blain, Clara Malkin, Max Rosenthal, and Isabella Solorzano, as well as the Georgetown Law Library staff. Thank you also to the Agnes N. Williams family and the Georgetown Law 2020 Summer Corps program for generous research support. I am grateful for the opportunity to present this project at the Georgetown Law faculty workshop, the Power in the Administrative State workshop, and the Brookings Institution National Budget Roundtable, and I appreciate the many helpful comments I received from workshop participants and colleagues elsewhere, including Laurel Blatchford, Pam Bookman, Bill Buzbee, Josh Chafetz, Laura Donohue, Bridget Dooling, Brian Feinstein, Brian Galle, Andrew Hammond, Chris Havasy, Matt Lawrence, Jaynie Lilley, Tony McCann, Gillian Metzger, Nick Parillo, Shalini Ray, Shalev Roisman, Andrew Rudalevidge, Ilya Somin, Glen Staszewski, David Super, David Vladeck, Tim Westmoreland, and David Zaring. I am also grateful to Douglas Kriner and Andrew Reeves for engaging with this Article in their incisive response essay and to the editors of the *Ohio State Law Journal* for their careful editorial work. Finally, many thanks to the American Constitution Society for selecting this Article as the winner (lawyer category) of the 2022 Richard D. Cudahy Writing Competition on Regulatory and Administrative Law. Errors are mine alone.

of the Trump Administration's engagement with federal grants, the Article demonstrates what happens when a boundary-pushing President is confronted with the core framework for Executive Branch control of federal grants. The case study reveals that courts and norms do a good job of cabining abuses in the policy arena, but that courts, norms, and politics struggle with cabining abuses in the arenas of pork and punishment. The outsize attention paid to the Trump Administration's efforts to withhold funding from sanctuary cities and anarchist jurisdictions thus misses the most dangerous opportunities for Executive Branch abuse of federal grants. These opportunities can and should be limited through reforms to grant law in OMB and Congress rather than through doctrinal changes.

TABLE OF CONTENTS

I. INTRODUCTION.....	1115
II. POLICY	1121
A. <i>Tools, Norms, Law, Merits</i>	1122
1. <i>Tools and Norms</i>	1122
2. <i>Law</i>	1124
3. <i>Merits</i>	1125
B. <i>The Trump Administration's Moves</i>	1130
1. <i>Ordinary Policy Moves</i>	1130
a. <i>Specifying Priorities for Competitive Grants and Conditioning Formula Grants</i>	1130
b. <i>Conditioning Overall Agency Funding</i>	1133
c. <i>Conditioning Overall Federal Funding</i>	1136
2. <i>Extraordinary Policy Moves</i>	1138
C. <i>Cabining Abuse</i>	1140
1. <i>Legal Limits</i>	1141
2. <i>Politics and Norms</i>	1143
III PORK.....	1145
A. <i>Tools, Law, Norms, Merits</i>	1146
1. <i>Tools</i>	1146
2. <i>Law</i>	1147
3. <i>Norms</i>	1150
4. <i>Merits</i>	1153
B. <i>The Trump Administration's Moves</i>	1157
1. <i>Ordinary Presidential Pork</i>	1157
2. <i>Ordinary or Extraordinary?</i>	1158
a. <i>Changing Procedures</i>	1159
b. <i>Making Awards</i>	1162
3. <i>Extraordinary Presidential Pork</i>	1164

C. <i>Cabining Abuse</i>	1166
1. <i>Problems with Incentive to Sue</i>	1167
2. <i>Problems with Stating a Claim</i>	1167
3. <i>Problems with Establishing Improper Political Influence</i> ...	1169
4. <i>Politics and Norms</i>	1171
IV. PUNISHMENT.....	1173
A. <i>Tools, Law, Norms, Merits</i>	1173
1. <i>Tools</i>	1173
2. <i>Law</i>	1174
3. <i>Norms and Merits</i>	1175
B. <i>The Trump Administration's Moves</i>	1178
1. <i>Ordinary Enforcement</i>	1178
2. <i>Extraordinary Enforcement</i>	1179
a. <i>Imposing Specific Conditions</i>	1180
b. <i>Withholding and Terminating Grants</i>	1182
c. <i>Initiating Debarment Proceedings</i>	1188
C. <i>Cabining Abuse</i>	1190
1. <i>Reviewability Problems</i>	1190
2. <i>Arbitrary and Capricious Review Problems</i>	1191
3. <i>Selective Enforcement Problems</i>	1192
4. <i>Inconsistent Sanctions Problems</i>	1193
5. <i>Remedial Problems</i>	1193
6. <i>Politics and Norms</i>	1193
V. REFORM.....	1196
A. <i>Courts</i>	1196
B. <i>Executive Branch</i>	1198
1. <i>Pre-Federal Award Requirements</i>	1200
2. <i>Enforcement Procedures</i>	1202
3. <i>Suspension and Debarment Procedures</i>	1203
C. <i>Congress</i>	1204
1. <i>Legislation</i>	1204
2. <i>Appropriations</i>	1207
3. <i>Oversight</i>	1208
VI. CONCLUSION.....	1210

I. INTRODUCTION

High-profile controversies in each of the last several administrations have involved the extent of Executive Branch control over federal grants. Consider, for example, President George W. Bush's initiative to expand federal funding for faith-based programs, which critics charged played favorites with religious

organizations and violated the Establishment Clause.¹ President Obama attempted to remake education law by granting states conditional waivers from No Child Left Behind, which critics argued improperly seized control of a local issue and violated the Spending Clause and federal statutes.² President Trump's term was rife with such controversy, from the first week's effort to cut off all federal funding to sanctuary cities to his last months' effort to cut off federal funds to left-leaning "anarchist" jurisdictions, which critics labeled as weaponizing and lawless.³ President Biden, too, is not immune from the attractions of using grant funds to accomplish his goals or from charges that his efforts to do so are illegal; the Supreme Court held a special emergency session in January 2022 to determine whether Health and Human Services ("HHS") could require health care workers in Medicaid-funded facilities to receive the COVID-19 vaccine, or whether this represented an impermissible expansion of federal authority.⁴

These challenges were particularly pronounced during the Trump Administration, when it seemed that each month brought a new grant-related controversy—not only attempting to withhold funding from sanctuary cities and anarchist jurisdictions, but also abruptly canceling grants to Planned Parenthood and others in a teen pregnancy prevention program;⁵ forbidding federal grantees from using funding to support racial sensitivity trainings;⁶ threatening to

¹ See *White House Faith-Based & Community Initiative*, THE WHITE HOUSE, <https://georgewbush-whitehouse.archives.gov/government/fbci/president-initiative.html> [<https://perma.cc/EKK9-68P5>]; *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 592, 595 (2007).

² See, e.g., Derek W. Black, *Federalizing Education by Waiver?*, 68 VAND. L. REV. 607, 613, 615, 658 (2015).

³ See, e.g., Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8799 (Jan. 25, 2017); Annie Correal, *Trump Can Withhold Millions from 'Sanctuary' States*, *Court Rules*, N.Y. TIMES (Feb. 26, 2020), <https://www.nytimes.com/2020/02/26/nyregion/sanctuary-cities-funding.html> [<https://perma.cc/32UX-KZCR>]; Maggie Haberman & Jesse McKinley, *Trump Moves to Cut Federal Funding from Democratic Cities*, N.Y. TIMES (Sept. 2, 2020), <https://www.nytimes.com/2020/09/02/us/politics/trump-funding-cities.html> [<https://perma.cc/7N2R-FUZC>].

⁴ See *Biden v. Missouri*, 142 S. Ct. 647, 650 (2022). The Court narrowly upheld this power, in contrast to its decision about OSHA's authority (outside the context of grant funding) to impose a vaccine-or-test mandate more generally on large businesses. See Greg Stohr, *Biden Health-Care Vaccine Mandate Survives Supreme Court Appeal*, BLOOMBERG L. (Oct. 3, 2022), <https://news.bloomberglaw.com/us-law-week/biden-health-care-vaccine-mandate-survives-supreme-court-appeal> [<https://perma.cc/P6V4-62QB>]; *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 662–63, 665–66 (2022).

⁵ See, e.g., *Healthy Teen Network v. Azar*, 322 F. Supp. 3d 647, 649 (D. Md. 2018), *appeal dismissed*, No. 18-1709, 2018 WL 11450389 (4th Cir. Sept. 18, 2018); *Planned Parenthood of Greater Wash. & N. Idaho v. HHS*, 337 F. Supp. 3d 976, 979 (E.D. Wash. 2018), *rev'd*, 946 F.3d 1100 (9th Cir. 2020).

⁶ See, e.g., *Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump*, 508 F. Supp. 3d 521, 528, 531 (N.D. Cal. 2020).

withhold disaster relief from California for apparently political reasons;⁷ keeping Puerto Rico from receiving hurricane aid Congress had specifically appropriated;⁸ and more. The aftermath of the Trump Administration thus provides a timely opportunity to assess the bounds of Executive Branch control over federal grants.

In doing so, this Article makes three contributions. First, as a descriptive matter, it maps the terrain of Executive Branch control over federal grants. It illustrates that this control comes at three distinct moments of operation: the *policy stage*, when the Executive Branch defines conditions to attach to funding; the *award stage*, when the Executive Branch makes allocational decisions about which entities will receive funding; and the *enforcement stage*, when the Executive Branch determines how to respond to noncompliant grantees. In administrative law terms, these stages correspond to rulemaking, adjudication, and enforcement. This framework provides a helpful way of understanding the legality and legitimacy of different administrative actions, because different sets of law and norms apply to each stage.

The Article's second contribution is normative, arguing that for the most part, robust Executive Branch control over federal grants is good. There has been pushback against Executive Branch control over policy decisions made in the context of federal grants, with critics arguing that only Congress can and should make policy decisions under only the clearest of clear statements, and that the only role for the Executive Branch in this context is as a transmission belt.⁹ Critics have also suggested that the Executive Branch has too much power to decide who should get grants at the award stage¹⁰ and have argued that the Executive Branch's ability to cut off funds is coercive and wrong.¹¹

⁷ See, e.g., Adam Aton & Mark K. Matthews, *Trump 'Weaponized' Disaster Aid Against Political Opponents*, E&E NEWS (Jan. 10, 2019), <https://www.eenews.net/articles/trump-weaponized-disaster-aid-against-political-opponents/> [<https://perma.cc/69YY-VPQP>]; Juliet Eilperin & Dino Grandoni, *Trump Officials Threaten to Withhold Highway Funding from California for its 'Chronic Air Quality Problems,'* WASH. POST (Sept. 24, 2019), <https://www.washingtonpost.com/climate-environment/2019/09/24/trump-officials-threaten-withhold-highway-funds-california-its-chronic-air-quality-problems/> [<https://perma.cc/4SP2-Y2G6>].

⁸ See, e.g., Christopher Flavelle & Patricia Mazzei, *Biden to Free Up Billions in Delayed Puerto Rico Storm Aid*, N.Y. TIMES, <https://www.nytimes.com/2021/02/01/climate/puerto-rico-maria-federal-aid.html> [<https://perma.cc/DTG4-9WNE>] (Apr. 8, 2021).

⁹ See, e.g., PHILIP HAMBURGER, PURCHASING SUBMISSION: CONDITIONS, POWER, AND FREEDOM 121–22 (2021); Ilya Somin, *Making Federalism Great Again: How the Trump Administration's Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State Autonomy*, 97 TEX. L. REV. 1247, 1248, 1265 (2019); *Ohio v. Yellen*, 547 F. Supp. 3d 713, 729 (S.D. Ohio 2021), *rev'd in part, vacated in part*, 53 F.4th 983 (6th Cir. 2022); *Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 561 (4th Cir. 1997); *cf.* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675–76 (1975).

¹⁰ See, e.g., *infra* notes 249–57 and accompanying text.

¹¹ See, e.g., *infra* notes 410–20 and accompanying text.

Instead, I defend Executive Branch control of grants at each stage. In the grant-related policy space, I argue that executive action is both normatively good in the abstract and also better than the alternatives. In the grant award space, I argue that Executive Branch control is in general good and also inevitable, so the real question is how to prevent appropriate award-making from becoming dangerous presidential pork. I define that latter term 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. In the grant enforcement space, I argue that punishment is not an appropriate hook, but that the general tools of grant enforcement—including funding cut-offs—are normatively desirable, even though there is a need for further safeguards against their abuse. Hence in my tripartite division, policymaking through grants is appropriate, but most pork and punishment are not, as pork and punishment are corrupted versions of the appropriate tools of grant awards and enforcement.

The third contribution of the Article is a thick case study of the Trump Administration's engagement with federal grants, gleaned from published accounts of grant-related controversies during the Administration's four years. What happens when a boundary-pushing President is confronted with the core framework for Executive Branch control of federal grants? One might think that the extent of litigation and losses around these actions reflects the Administration's vast norm-breaking and extraordinary extralegal operation. In fact, however, the lawsuits reveal the application of ordinary principles of administrative law rather than wholesale extraordinary action.¹² The troublesome issues emerge where courts are absent, in contexts where the Trump Administration's actions uncover broader concerns about grant control that transcend this particular administration.

More specifically, the case study reveals that both the legal limits and the norms around grant policy actions are strong; the litigation and the Administration's losses demonstrate that the system is working well, although there remain opportunities to strengthen it.¹³ In the arena of grant awards, the case study illustrates that the legal limits, norms, and political pressure preventing partisan pork are less strong, but that the Trump Administration's actions violated rhetorical norms more than any legal limits or distributional norms.¹⁴ In the arena of enforcement, the case study shows that the weak limits and norms preventing improper punishment are the most concerning, as many of the Administration's actions took useful tools and abused them in bad faith, with insufficient restrictions from law, politics, or norms.¹⁵

The post-Trump presidency is not only an opportune moment to assess the extent of Executive Branch control over federal grants but also a particularly

¹² See *infra* Part IV.B.

¹³ See *infra* Part II.B.

¹⁴ See *infra* Part III.B.

¹⁵ See *infra* Part IV.B.

vital time to do so, given the increasing importance of federal funding to the accomplishment of federal policy goals and the ability to meet critical needs across all spheres of government.

Congress legislates less and less frequently but appropriates annually,¹⁶ providing many hundreds of billions of dollars in federal grant funding in an ordinary year,¹⁷ and even more during the years of the pandemic,¹⁸ with additional new funding and new grant programs being implemented through the American Rescue Plan Act of 2021,¹⁹ the Infrastructure Investment and Jobs Act of 2021,²⁰ and the Inflation Reduction Act of 2022.²¹ Grants are not a side show when it comes to federal policy but a key part of how policy gets achieved across a wide range of areas. Consider these figures: in 2021, grants to state and local governments surpassed \$1.2 trillion, up from a pre-pandemic \$750 billion in 2019, itself representing steady growth from \$285 billion in 2000, \$428 billion in 2005, \$608 billion in 2010, and \$624 billion in 2015.²² Since 2000,

¹⁶ See, e.g., Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1828–33 (2015); see *Appropriations and Budget Resources*, CONGRESS.GOV, <https://www.congress.gov/help/appropriations-and-budget> [<https://perma.cc/6AYV-QB27>].

¹⁷ JULIE M. LAWHORN, CONG. RSCH. SERV., R40638, FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS: A HISTORICAL PERSPECTIVE ON CONTEMPORARY ISSUES 1, 5 tbl.2 (2019).

¹⁸ U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-551, CONTINUED ATTENTION NEEDED TO ENHANCE FEDERAL PREPAREDNESS, RESPONSE, SERVICE DELIVERY, AND PROGRAM INTEGRITY 3, 10 fig.6 (2021).

¹⁹ See generally American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4. See also, e.g., JULIE M. LAWHORN, CONG. RSCH. SERV., IN11712, THE ECONOMIC DEVELOPMENT ADMINISTRATION'S AMERICAN RESCUE PLAN (ARP) ACT GRANT PROGRAMS 1 (2021); KATIE JONES, LIBBY PERL & MAGGIE MCCARTY, CONG. RSCH. SERV., IN11641, HOUSING FUNDING IN THE AMERICAN RESCUE PLAN ACT OF 2021, at 2–3 (2021); JOHNATHAN H. DUFF, ET AL., CONG. RSCH. SERV., R46834, AMERICAN RESCUE PLAN ACT OF 2021 (P.L. 117-2): PUBLIC HEALTH, MEDICAL SUPPLY CHAIN, HEALTH SERVICES, AND RELATED PROVISIONS 4–7 tbl.1 (2021).

²⁰ See generally Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021). See also, e.g., RACHEL Y. TANG, CONG. RSCH. SERV., IN11864, INFRASTRUCTURE INVESTMENT AND JOBS ACT (IIJA) AND AIRPORT FUNDING 2 (2022); ELENA H. HUMPHREYS & JONATHAN L. RAMSEUR, CONG. RSCH. SERV., R46892, INFRASTRUCTURE INVESTMENT AND JOBS ACT (IIJA): DRINKING WATER AND WASTEWATER INFRASTRUCTURE 1–3 (2022); ROBERT S. KIRK & WILLIAM J. MALLETT, CONG. RSCH. SERV., IF12099, INFRASTRUCTURE INVESTMENT AND JOBS ACT: HIGHWAY BRIDGES 1 (2022).

²¹ See generally Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818. See also, e.g., JIM MONKE, KELSIE BRACMORT, MEGAN STUBBS & KATIE HOOVER, CONG. RSCH. SERV., IN11978, INFLATION REDUCTION ACT: AGRICULTURAL CONSERVATION AND CREDIT, RENEWABLE ENERGY, AND FORESTRY 1 (2022); ANGELA C. JONES, CONG. RSCH. SERV., IN11987, INFLATION REDUCTION ACT OF 2022: U.S. ENVIRONMENTAL PROTECTION AGENCY AND SELECTED OTHER ENVIRONMENTAL PROVISIONS 1–2 tbl.1 (2022).

²² OFF. OF MGMT. & BUDGET, OFF. OF THE PRESIDENT, ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOVERNMENT FISCAL YEAR 2023, at 206 tbl.14–1 (2022); LAWHORN *supra* note 17, at 1.

grants have ranged from between 12% and 18% of all federal outlays.²³ From the perspective of state and local governments, grant funding is central, constituting around 20% of all state and local expenditures in an ordinary year of the 21st century, rising to 25% in 2010 (after the stimulus bill of 2009 in response to the Great Recession), 27% in 2020 (the first year of the pandemic), and an unprecedented 38% in 2021.²⁴ These grants run the gamut of policy areas, from transportation to agriculture, from community development to education, from health to income security, from natural resources and the environment to the administration of justice.²⁵ Grants come in a variety of forms, including major entitlement programs like Medicaid, large-scale annual formula grants like funding for highways and K-12 education, emergency programs like disaster relief run by the Federal Emergency Management Agency (“FEMA”), and competitive grants like funding for policing and violence prevention run by the Department of Justice (“DOJ”).²⁶

To be sure, federal funding comes in more forms than only grants; it includes some direct funding of federal programs as well as other forms of assistance such as loans and other tools such as procurement contracts.²⁷ At the same time, federal grants are an important mechanism across a huge swath of policy domains—to be used when “the principal purpose of the relationship” between the “United States Government and a State, a local government, or other recipient . . . is to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States”²⁸—that remains less well understood than it should be.²⁹ Developing a framework that accounts for Executive Branch action in this space is thus an important task.

²³ OFF. OF MGMT. & BUDGET, *supra* note 22, at 206 tbl.14–1.

²⁴ *Id.* For a discussion of grant funding in the stimulus bill of 2009, see generally Timothy J. Conlan, Paul L. Posner & Priscilla M. Regan, *Managing the Great Recession: A Stress Test for Modern Governance*, in GOVERNING UNDER STRESS: THE IMPLEMENTATION OF OBAMA’S ECONOMIC STIMULUS PROGRAM 1 (Timothy J. Conlan, Paul L. Posner & Priscilla M. Regan eds., 2017).

²⁵ OFF. OF MGMT. & BUDGET, *supra* note 22, at 206 tbl.14–1, 212–23 tbl.14–2.

²⁶ See LAWHORN, *supra* note 17, at 2–3, 5–6; KARMA ESTER, CONG. RSCH. SERV., R46671, FEDERAL SUPPORT FOR LAW ENFORCEMENT: SELECTED DEPARTMENT OF JUSTICE PROGRAMS 1 (2021).

²⁷ 2 C.F.R. § 200.1 (2021) (definition of “Grant agreement” as distinguished from financial support offered through “(i) Direct United States Government cash assistance to an individual; (ii) A subsidy; (iii) A loan; (iv) A loan guarantee; or (v) Insurance”); see also, e.g., Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, in THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE 21, 21 tbl.1–5 (Lester M. Salamon ed., 2002).

²⁸ 31 U.S.C. § 6304.

²⁹ Cf. Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1082–83 (2021); Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 YALE L.J. 248, 256–58 (2014).

This study also provides a significant corrective to a frequent claim made during the Trump presidency that the Administration was weaponizing grant funding.³⁰ While the claim was driven by policy disputes, it often took on the flavor of critiquing the mechanism by which the policy choices were being made, as though the use of federal grants to promote policy change was itself illegitimate. As I will argue below, however, we need this tool of government, and we need it in each arena in which the Executive Branch operates; we simply need to do it right, and to assess its weaknesses and potentials for abuse rather than castigating the mechanism wholesale.

That is, the Executive Branch can develop policy through federal grants to flesh out broad statutory terms in service of important policy goals as permitted by law—or it can attempt to manipulate or evade the law by imposing conditions untethered to Congress's terms or without adequate justification. The Executive Branch can make grant awards to needy jurisdictions and for promising research developments—or it can attempt to reward cronies and co-partisans without attending to merit or need. The Executive Branch can enforce grant agreements to ensure compliance with agreed-upon conditions and to foster judicial resolution of contested terms so that federal funding is not wasted—or it can attempt to use enforcement to punish political enemies for purposes unrelated to the grant in question. At each stage, it is worth disaggregating the relevant tools to promote their use for good government, not destructive power grabs.

In service of this goal, Parts II, III, and IV each assesses one of the three arenas for Executive Branch control over federal grants: first policy, then awards, then enforcement. Each follows a similar path: first, a description of the specific tools each arena provides, along with the norms for their use, the law within which they operate, and the merits of each tool; second, a case study of the Trump Administration's use of the tools in each arena; and third, the extent to which law, norms, and politics can constrain abusive practices in each arena. Drawing on the lessons of these parts, Part V sketches potential reforms, rejecting the utility of constraining abuses through doctrinal changes and instead focusing on opportunities through internal administrative actions and congressional work.

II. POLICY

The first arena in which administrations work with grants is the policy stage, at which they elucidate upfront conditions on the receipt of federal funds, further defining the contours of the grant program as set in statute.

Part II.A argues that the legal framework governing Executive Branch operations over policymaking through federal grants is fairly well settled and that the norms are fairly well agreed upon. While there is some contested space, most policymaking through grants does not raise these issues, either in general or during the Trump Administration. The Trump Administration's actions in

³⁰ See, e.g., Correal, *supra* note 3; Aton & Matthews, *supra* note 7.

this arena raised great controversy, as the case study in Part II.B shows, but the controversy was really about the underlying policies rather than the structural use of the grant tool; both legal boundaries and the power of norms reveal a generally well-functioning system, as Part II.C illustrates.

A. *Tools, Norms, Law, Merits*

1. *Tools and Norms*

There are four central tools that agencies use in overseeing the policy dimensions of federal grants that are ordinary examples of filling in gaps and that can additionally further the priorities of the current presidential Administration.

The first tool is specifying policy priorities and conditions for an agency's competitive grants, those grants with a limited pot of money for which applicants must compete.³¹ Sometimes these priorities are announced agencywide. The Department of Education, for example, routinely issues Secretarial Priorities in the Federal Register, laying out priorities that the agency's offices can use in any relevant grant program where it has the authority to select from among applicants.³² Not surprisingly, priorities tend to differ from administration to administration.³³ Other times, these priorities or conditions are for one specific grant program at a time. HHS's Title X spending rule is a good illustration of this category, where the Reagan Administration implemented conditions on what family-planning providers receiving this funding could say to clients about abortions, conditions that subsequent Democratic and Republican administrations variously rejected or enhanced.³⁴

The second tool is placing conditions on specific formula grants, those grants to which applicants (typically state, local, or tribal jurisdictions) are entitled as long as they establish eligibility.³⁵ During the Clinton Administration, for example, the Department of Education read the Individuals with Disabilities Education Act's ("IDEA") guarantee of a "free appropriate public education" to each child with a disability to require states to provide educational services to such children even when they were suspended or expelled for disciplinary reasons, making the receipt of IDEA formula funding

³¹ See LAWHORN, *supra* note 17, at 2.

³² See, e.g., Final Priorities and Definitions—Secretary's Supplemental Priorities and Definitions for Discretionary Grant Programs, 86 Fed. Reg. 70,612 (Dec. 10, 2021) (to be codified at 34 C.F.R. pt. 75).

³³ Compare, e.g., Secretary's Final Supplemental Priorities and Definitions for Discretionary Grant Programs, 79 Fed. Reg. 73,426 (Dec. 10, 2014), with Discretionary Grant Programs, 71 Fed. Reg. 60,046 (Oct. 11, 2006).

³⁴ See, e.g., *Mayor of Balt. v. Azar*, 973 F.3d 258, 267–72 (4th Cir. 2020) (en banc), cert. dismissed *per stipulation, sub nom.* *Becerra v. Mayor of Balt.*, 141 S. Ct. 2170 (2021) (mem.).

³⁵ See LAWHORN, *supra* note 17, at 3.

turn on compliance with that requirement.³⁶ As another example, during the Obama Administration, the Department of Education read the waiver provision in No Child Left Behind broadly to permit it to attach detailed alternative requirements for states wishing to escape the draconian consequences of failure to make Adequate Yearly Progress on standardized tests.³⁷

The third tool is placing conditions on all or most funding from an agency, typically by implementing “cross-cutting” statutes, like civil rights statutes, that attach broadly to the receipt of federal funding.³⁸ Consider the Department of Education’s construction of Title IX, which requires nondiscrimination on the part of any educational program or activity receiving federal funding.³⁹ Over the decades since Congress passed Title IX in 1972, the Department of Education has issued, and revised under different administrations, requirements related to athletics, pregnant and parenting students, sexual harassment and violence on campus, and treatment of LGBTQ+ students, subjecting any entity receiving education funding to these requirements.⁴⁰ As another example, consider the Department of Housing and Urban Development’s (“HUD”) implementation of the Fair Housing Act’s requirement that the agency “affirmatively . . . further” fair housing.⁴¹ HUD has largely implemented this requirement through conditions placed on recipients of agency funding in different ways under different administrations.⁴²

The final tool is placing conditions on all federal funding or on a large subset of funds across multiple agencies, again often through implementing cross-cutting statutes. Here, consider the Department of Justice’s policies governing Title VI of the 1964 Civil Rights Act, which prohibits all federal funding recipients from discriminating on the basis of race, color, or national origin.⁴³ DOJ has issued implementing regulations for Title VI that incorporate a

³⁶ Va. Dep’t of Educ. v. Riley, 106 F.3d 559, 560 (4th Cir. 1997); see also Thomas Hehir, *IDEA and Disproportionality: Federal Enforcement, Effective Advocacy, and Strategies for Change*, in RACIAL INEQUITY IN SPECIAL EDUCATION 219, 224–26 (Daniel J. Losen & Gary Orfield eds., 2002).

³⁷ See, e.g., Black, *supra* note 2, at 659–79. Fiscal waiver authorities are another related tool in this category that different administrations have pursued in different ways. See Matthew B. Lawrence, *Fiscal Waivers and State “Innovation” in Health Care*, 62 WM. & MARY L. REV. 1477, 1509–10 (2021).

³⁸ See, e.g., Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861, 912–16 (2013) [hereinafter Bagenstos, *Anti-Leveraging*].

³⁹ 20 U.S.C. § 1681.

⁴⁰ See, e.g., Samuel R. Bagenstos, *Legitimacy and Agency Implementation of Title IX*, 43 HARV. J.L. & GENDER 301, 301 (2020) [hereinafter Bagenstos, *Legitimacy*]; Madeline E. McNeeley, Note, *Title IX and Equal Educational Access for Pregnant and Parenting Girls*, 22 WIS. WOMEN’S L.J. 267, 272 (2007).

⁴¹ 42 U.S.C. § 3608(e)(5).

⁴² Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30,779–83 (June 10, 2021) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

⁴³ 42 U.S.C. § 2000d.

disparate impact standard, even though the statute itself, according to the Supreme Court, prohibits only disparate treatment.⁴⁴ Different administrations have articulated different approaches to implementing Title VI in specific contexts.⁴⁵

These tools can be used more or less expansively, and in more or less ideologically contested ways, but use of these tools in general is a well-worn path.

2. Law

These tools also fit into a generally well-known legal framework. When agencies implement grant statutes, there is no freestanding authority to impose conditions untethered to the language of each individual grant statute.⁴⁶ There is nothing unique about grant statutes in this regard; this is just the ordinary principle that agencies must have the statutory authority to act.⁴⁷ To be sure, there is a special question for Spending Clause statutes about whether grant recipients had clear notice of the condition the Executive Branch wants to impose, but in many instances the clear notice rule is simply a tool of statutory interpretation rather than an unusual limitation of authority.⁴⁸

Other standard administrative law requirements apply: the Executive Branch action must not be arbitrary and capricious,⁴⁹ it must be implemented in compliance with the procedural requirements of the Administrative Procedure Act (“APA”),⁵⁰ and it must be consistent with the agency’s own internal rules.⁵¹ Because the APA exempts matters involving grants from notice-and-comment rulemaking, at times the procedural regularity question is diminished, but many agencies have either waived the exemption, have a statutory obligation to conduct notice-and-comment rulemaking for their grant statutes, or choose to engage in notice-and-comment rulemaking for a particular grant, so in many

⁴⁴ C.R. DIV., U.S. DEP’T OF JUST., TITLE VI LEGAL MANUAL § VII, at 2–3 (2021); see JARED P. COLE, CONG. RSCH. SERV., R45665, CIVIL RIGHTS AT SCHOOL: AGENCY ENFORCEMENT OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, at 5–7 (2019).

⁴⁵ Compare U.S. Dep’t of Educ. Off. for C.R., Notice (Aug. 28, 2008), <https://www2.ed.gov/about/offices/list/ocr/letters/raceassignmentese.html> [<https://perma.cc/8JFF-VQ7H>], with U.S. Dep’t of Educ., Off. for C.R. & U.S. Dep’t of Just., C.R. Div., Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools (2011), <https://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf> [<https://perma.cc/9GWV-RC9W>].

⁴⁶ See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 12, 15–17 (1981).

⁴⁷ See, e.g., Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1144 n.26 (2014).

⁴⁸ See generally Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345 (2008).

⁴⁹ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 44–45 (1983).

⁵⁰ See *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 523–24 (1978).

⁵¹ See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266–67 (1954).

cases the general requirements of § 553 apply.⁵² At the same time, many agencies announce requirements for a particular year's funding cycle through less formal means: Notices of Funding Availability or Funding Opportunity Announcements.⁵³ In these instances, the requirements of § 553 do not apply.⁵⁴

Of course, policymaking through the grant process has to comply with constitutional limits. It cannot, for example, force grantees to profess beliefs in violation of the First Amendment⁵⁵ or violate Equal Protection.⁵⁶ In classic Spending Clause parlance, conditions must also support the general welfare, be stated unambiguously, be germane to the point of the funding, and not coerce recipients into taking it.⁵⁷

Admittedly, there are some open legal questions in the Spending Clause arena. How clear must the conditions be?⁵⁸ Can executive interpretation cure an unclear statute?⁵⁹ At what point does inducement cross into compulsion?⁶⁰ But in the mine run of instances of Executive Branch statements of policy through federal grants, these edge questions are not presented.

3. *Merits*

Implementation of policy choices through grant statutes is not simply routine and generally legal; it also plays a valuable role in the administrative state. The reasons why stem from familiar administrative law principles, including delegation, expertise, accountability, and rationality.

Grant statutes, like many other statutes, are not self-implementing. Congress often explicitly delegates to agencies to fill in details by, for example, directing further rulemaking, specifying the development of secretarial priorities, or requiring secretarial approval of submissions.⁶¹ Some additional delegation may

⁵² 5 U.S.C. § 553(a); *see also* Jeffrey S. Lubbers, *Approaches to Regulatory Reform in the United States: A Response to the Remarks of Professors Levin and Freeman*, 83 WASH. U. L.Q. 1893, 1894–95 (2005).

⁵³ *See, e.g.*, JOHNATHAN D. SHAFFER & NORA K. BRENT, FEDERAL GRANT PRACTICE § 20.2, Westlaw (database updated June 2021); 2 C.F.R. § 200.204 (2021).

⁵⁴ *See* 2 C.F.R. § 200.204 (2021).

⁵⁵ *See, e.g.*, Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 221 (2013).

⁵⁶ *See, e.g.*, CHRISTINE J. BACK & APRIL J. ANDERSON, CONG. RSCH. SERV., LSB10631, THE AMERICAN RESCUE PLAN ACT: EQUAL PROTECTION CHALLENGES 1–2 (2021).

⁵⁷ *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 580 (2012); South Dakota v. Dole, 483 U.S. 203, 207 (1987); *see also* Douglas M. Spencer, *Sanctuary Cities and the Power of the Purse: An Executive Dole Test*, 106 IOWA L. REV. 1209, 1244–49 (2021).

⁵⁸ *See, e.g.*, Bagenstos, *supra* note 48, at 393–403.

⁵⁹ *See, e.g.*, Ohio v. Yellen, 547 F. Supp. 3d 713, 737 (S.D. Ohio 2021), *rev'd in part, vacated in part*, 53 F.4th 983 (6th Cir. 2022).

⁶⁰ *See, e.g.*, Sebelius, 567 U.S. at 585.

⁶¹ *See, e.g.*, 42 U.S.C. § 300(b); 49 U.S.C. § 5311(b)(2)–(3), (c)(1).

be seen as implicit,⁶² as, for example, when general terms need elucidation,⁶³ or when apparently interlocking statutes need clarification about how particular elements of each fit together.⁶⁴ And, as the well-known argument goes, it makes sense that Congress delegates these tasks to agencies, as agencies have the right expertise to make these detailed choices, especially as circumstances develop on the ground over time,⁶⁵ and can be held accountable to political overseers in the White House and in Congress, and therefore to the people.⁶⁶

Agencies' need to justify their choices through reason-giving tied to the underlying statute further supports their work in this space, as explanations rooted in rationality and non-arbitrariness help support legitimacy.⁶⁷ These requirements also help limit regulatory instability in spending programs. As the previous subpart explained, agencies cannot simply change requirements by fiat overnight; instead, they must find substantive authority in the governing statute; follow procedures mandated by the statute, the APA, and both specific and agencywide regulations; and "fairly address the factual underpinnings and reasoning behind the earlier policy action, and justify the new action with 'good reasons.'"⁶⁸ Even in those policy statements that are not subject to notice-and-comment, agencies may not attach any conditions to current uses of grant funding, but may only make their requirements apply to the next annual funding cycle.⁶⁹ Concerns about "regulatory whim" or program instability writ large stemming from executive conditions are thus overstated.⁷⁰

These same legal requirements that constitute what William Buzbee calls "the tethered president" also help mitigate concerns about agencies stretching statutory language too much in ways that prioritize the Administration's values

⁶² See, e.g., *Chevron v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

⁶³ For example, what does the term "supplement, not supplant," as used in different federal education statutes, mean? See Nora Gordon & Eloise Pasachoff, *Fiscal Compliance Rules for Federal Funding of Elementary and Secondary Education*, in *THE OXFORD HANDBOOK OF U.S. EDUCATION LAW* 135, 140 (Kristine L. Bowman ed., 2018).

⁶⁴ For example, how do school-based disability services in the Individuals with Disabilities Education Act interact with a parent's Medicaid benefits? See Assistance to States for the Education of Children with Disabilities, 78 Fed. Reg. 10,525, 10,525–26 (Feb. 14, 2013) (to be codified at 34 C.F.R. pt. 300).

⁶⁵ See, e.g., *Chevron*, 467 U.S. at 864–66; see also ELIZABETH FISHER & SIDNEY A. SHAPIRO, *ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW* 44–60 (2020).

⁶⁶ See, e.g., *Chevron*, 467 U.S. at 864–66. See generally Samuel R. Bagenstos, *This is What Democracy Looks Like: Title IX and the Legitimacy of the Administrative State*, 118 MICH. L. REV. 1053, 1054–55 (2020); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2250–52 (2001).

⁶⁷ See generally, e.g., JERRY L. MASHAW, *REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT* (2018).

⁶⁸ See William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357, 1426–27 (2018).

⁶⁹ See 2 C.F.R. §§ 200.202 to .204 (2021).

⁷⁰ See Buzbee, *supra* note 68, at 1360–65, 1390–408.

over statutory values, including federalism values.⁷¹ Courts are well able to determine whether an executive condition is untethered to these requirements, as discussed more in Part II.C below.

Furthermore, there is nothing wrong with presidents trying to implement the policy agendas on which they ran for office through the legal opportunities that are available to them.⁷² To be clear, I speak here of *policy* agendas, not private goals that advance no realistic conception of the public interest (such as self-dealing, electoral entrenchment, or rewarding campaign contributors).⁷³ While agendas rooted in little more than “raw politics”⁷⁴ and based on “dissembling”⁷⁵ can be troublesome from rule-of-law and accountability perspectives, even deeply ideologically contested, partisan-aligned policy agendas can be structurally acceptable as the natural consequence of elections. Such policy agendas can further the values on which the President ran for office, and as long as the agendas are operationalized in ways that are consistent with the underlying statute, procedural requirements, and reasoned decision-making, there is no cause for alarm at the mere fact of the ability to implement those agendas.⁷⁶

Agency policy choices made through grant statutes are no more dangerous when the choice grows out of an implicit delegation rooted in general statutory language than an explicit delegation to regulate.⁷⁷ It is common for agencies to be faced with decisions about whether an action a grantee or applicant wants to take is within or outside the scope of the statute. For example, agencies must decide how to define eligibility and evaluation criteria for competitive grants when Congress has created a program targeting a particular policy area and funded it with a lump sum;⁷⁸ whether states have satisfied the statutory

⁷¹ Compare, e.g., *id.*, with Bijal Shah, *Statute-Focused Presidential Administration*, 90 GEO. WASH. L. REV. 1165, 1168–69 (2022). See Somin, *supra* note 9, at 1248, 1265.

⁷² See, e.g., JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 152–56 (1997); Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REGUL. 549, 573 (2018).

⁷³ See, e.g., Kevin M. Stack, *Partisan Administration* 2 (Ctr. for the Study of the Admin. State, Geo. Mason Univ., Working Paper No. 21-45, 2021), <https://administrativestate.gmu.edu/wp-content/uploads/sites/29/2021/09/Stack-Partisan-Administration.pdf> [<https://perma.cc/RP9Q-WUNG>]; Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1141, 1144 (2010).

⁷⁴ Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 149–51 (2012); see, e.g., Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 9 (2009).

⁷⁵ Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1789 (2021); see, e.g., Lisa Heinzerling, *The FDA’s Plan B Fiasco: Lessons for Administrative Law*, 102 GEO. L.J. 927, 958–59 (2014).

⁷⁶ See Mendelson, *supra* note 73, at 1175–77; Seidenfeld, *supra* note 74, at 148–51.

⁷⁷ *Contra* Spencer, *supra* note 57, at 1215, 1247.

⁷⁸ See SHAFFER & BRENT, *supra* note 53, § 24.2.

requirements in submitting applications for a formula grant;⁷⁹ and whether beneficiary complaints or grantee requests for technical assistance reveal an open question that needs policy resolution in some way.⁸⁰

As an example of the latter, consider the Clinton-era example from the formula grant IDEA.⁸¹ Disability advocates in the state of Virginia complained that the state was denying the statutorily required “free appropriate public education” (“FAPE”) to children with disabilities who had been suspended or expelled, putting the Department of Education in the position of needing to decide whether the statute in fact required serving students in that position.⁸² Whether it answered yes or no, the agency would have been making a policy choice. And such a policy choice can be affirmed or rejected both by courts and by Congress via subsequent legislation or appropriations language.

If every time the agency is faced with such a question, it must say no unless the statute provides a literal word-for-word answer, it would be forced into a cramped reading of statutes that may not align with its view of what the best answer really is—or of what Congress’s view is.⁸³ (Indeed, in the example of incarcerated students with disabilities, Congress ultimately disagreed with the Court’s rejection of the agency’s decision and revised the statute to make explicit what had been the agency’s original conclusion.⁸⁴) Requiring the agency to always say no would also entrench subordination of beneficiaries as compared to grantees (typically jurisdictions or nonprofit organizations with comparatively greater resources than the beneficiaries they serve); if Congress writes language that generally protects beneficiaries but the Executive Branch is powerless to implement the full extent of that protection, the agency will be forced to always favor the stingiest grantee over the neediest beneficiaries.⁸⁵ This is especially problematic for those statutes that draw on a Fourteenth Amendment justification as well as a Spending Clause one.⁸⁶

Of course, these views about delegation and executive conditions are not uniformly shared, either as to the Executive Branch in general or as to conditional spending in particular. They implicate deeply contested themes in

⁷⁹ *Id.* § 16.5.

⁸⁰ *See id.* § 35.19.

⁸¹ *See supra* note 36 and accompanying text.

⁸² *See Hehir, supra* note 36, at 224–26.

⁸³ This observation is related to the *Pennhurst-Chevron* problem, which presents “the statutory interpretation question whether the *Pennhurst* clear statement rule for conditions on federal spending or *Chevron* deference rule for agency interpretations of statutes should apply.” *See Lawrence, supra* note 37, at 1486–87 n.13. But even accepting clear notice as the driving requirement, the observation underscores that determining what and whether notice is clear is itself an interpretive task. *See, e.g., Bagenstos, supra* note 48, at 393–408.

⁸⁴ *See Hehir, supra* note 36, at 225–27.

⁸⁵ *Contra* Matthew Lawrence, *Subordination and Separation of Powers*, 131 *YALE L.J.* 78, 121–22 (2021).

⁸⁶ *See, e.g., Bagenstos, Anti-Leveraging, supra* note 38, at 912–16; *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 305–06 (2006) (Ginsburg, J., concurring).

contemporary administrative and constitutional law about the legitimacy of the administrative state;⁸⁷ about the growth of presidentialism;⁸⁸ and about the role of conditional spending.⁸⁹

This is not the place to attempt to resolve these enduring debates; I have a more limited argument in mind here.

First, if there are contested edges, the typical instance of administrative involvement is straightforward. Of more than a thousand grant programs from twenty-six agencies approximating \$750 billion awarded to state, local, and tribal governments each year,⁹⁰ most do not involve controversy. Agencies do much more work in elucidating how complicated statutory schemes interlock or in clarifying compliance obligations than they do in arrogating power to define core obligations attaching to funding. From a grantee perspective, most programs are stable; grantees voice more complaints about the burdens of paperwork and about shifting appropriations amounts than about flip-flopping on substantive requirements.⁹¹ We should not let concern about worst-case scenarios eliminate the Executive Branch's ability to exercise its core administrative function of making grant programs work.

Second, as I will contend in the next two subparts, nothing about the Trump Administration's efforts to effectuate its policy choices through federal grants should change your prior views about conditional spending. If you believe that grant funding is an important policymaking tool and that there are salutary functions to the Executive Branch's further involvement, the Trump Administration's use of grants as policy tools reveals more in common with previous administrations than it represents a break, and courts and norms both played an important role in cabinining the Administration's excesses.⁹² If, on the other hand, you are concerned that conditional funding has run amok, the key lesson is the latter one about the ready constraints that exist to cabin abuse.⁹³

Third, allowing the Executive Branch to explain its policy views in transparent, clearly articulated ways is better than the alternative. If the

⁸⁷ Compare, e.g., PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014), with Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

⁸⁸ Compare, e.g., STEPHEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008), with PETER M. SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* (paperback ed. 2016).

⁸⁹ Compare, e.g., Michael S. Greve, *Coercion, Conditions, and Commandeering: A Brief Note on the Medicaid Holding of NFIB v. Sebelius*, 37 HARV. J.L. & PUB. POL'Y 83, 84–85, 87–90 (2014), with Samuel R. Bagenstos, *Viva Conditional Federal Spending!*, 37 HARV. J.L. & PUB. POL'Y 93, 93–94, 96–97 (2014).

⁹⁰ See *Grant-Making Agencies*, GRANTS.GOV, <https://www.grants.gov/learn-grants/grant-making-agencies.html> [<https://perma.cc/S7EF-27HU>]; LAWHORN, *supra* note 17, at 1, 9.

⁹¹ See, e.g., Eloise Pasachoff, *Federal Grant Rules and Realities in the Intergovernmental Administrative State: Compliance, Performance, and Politics*, 37 YALE J. ON REGUL. 573, 576–78 (2020).

⁹² See *infra* Parts II.B–C.

⁹³ See *infra* Part II.C.

Executive Branch is restricted from doing so, it is likely that these policy views will end up submerged but nonetheless effectuated as the Executive Branch makes award decisions and judgments about enforcement efforts.⁹⁴ As I illustrate in Parts III and IV below, these two stages provide more opportunity for Executive Branch abuse than the policy stage does, with less opportunity to cabin.

B. *The Trump Administration's Moves*

When the Trump Administration used federal grants to announce policy, it faced many claims that its controversial policies were a form of weaponizing funding.⁹⁵ It also faced many lawsuits challenging the legality of its moves, and it repeatedly (although not entirely) lost these challenges in court.⁹⁶ These facts often make it seem as though the Trump Administration's moves in this space were unusual, norm-breaking, or otherwise structurally out of bounds.

This subpart makes the case, however, that the Administration's actions in this arena for the most part fell well within structural norms. The controversies largely reflected straightforward policy disagreements as well as legal disagreements over ordinary administrative law issues.⁹⁷ To be sure, there were exceptions where the Administration's actions went beyond the norm. But, as Part II.C shows, these exceptions fell within the scope of judicial redress. The many controversies in this category thus reflect a well-functioning system that is protected from presidential overreach by both law and norm reinforcement.

1. *Ordinary Policy Moves*

Many of the Trump Administration's moves reflected ordinary uses of the four central tools for implementing policy through federal grants described above.⁹⁸

a. *Specifying Priorities for Competitive Grants and Conditioning Formula Grants*

Start by considering two high-profile controversies that extended throughout the Administration, eventually ending up in the Supreme Court before the Biden Administration asked the Court to dismiss them: HHS's family planning program requirements under Title X of the Public Health Services Act restricting what grantee health care providers may say to patients about

⁹⁴ See, e.g., Lawrence, *supra* note 37, at 1532–41.

⁹⁵ See, e.g., *supra* notes 3, 7 and accompanying text.

⁹⁶ See *infra* Part II.B.

⁹⁷ See *infra* Part II.B.

⁹⁸ See *supra* notes 31–45 and accompanying text.

pregnancy termination,⁹⁹ and DOJ's conditions on the Byrne JAG grant that functionally limited sanctuary cities from receiving the grants.¹⁰⁰

Each of these relied on an ordinary tool of policy implementation through grants. The HHS example illustrates the agency's specifying policy priorities and conditions for a particular competitive grant, the first tool described above.¹⁰¹ HHS did so first by announcing new review criteria that would weigh more heavily applications from family planning programs that emphasized abstinence over contraception,¹⁰² and then by changing the underlying regulations governing program eligibility to prohibit health care professionals working within organizations receiving Title X funding from discussing abortion.¹⁰³ It relied on statutory language preventing program funds from being used "in programs where abortion is a method of family planning" in the Public Health Services Act, and argued that its interpretation did not run afoul of an appropriations rider requiring that "all pregnancy counseling shall be nondirective" or the Affordable Care Act's provision banning HHS regulations from "interfer[ing] with communications regarding a full range of treatment options."¹⁰⁴

For its part, the DOJ example illustrates the agency's interpreting a particular formula grant to allow or require it to impose conditions on the receipt of that grant's funding, the second tool described above.¹⁰⁵ In promulgating the requirements, DOJ relied on statutory language tying the grant's funding to applicants' compliance with "other applicable laws," which the agency interpreted to include a provision in the immigration code prohibiting government entities or officials from declining to share information with federal immigration authorities about individuals' citizenship status.¹⁰⁶ DOJ also relied on other statutory provisions for locating its authority to attach conditions, including a provision enabling the Assistant Attorney General to "exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to this chapter or by delegation of the Attorney General, including

⁹⁹ See, e.g., *California by and through Becerra v. Azar*, 950 F.3d 1067, 1085–86 (9th Cir. 2020) (en banc), *cert. dismissed per stipulation, sub. nom. Oregon v. Becerra*, 141 S. Ct. 2621 (2021) (mem.).

¹⁰⁰ See, e.g., *City & County of San Francisco v. Barr*, 965 F.3d 753, 758–60 (9th Cir. 2020), *cert. dismissed per stipulation, sub. nom. Wilkinson v. City & County of San Francisco*, 141 S. Ct. 1292 (2021) (mem.).

¹⁰¹ See *supra* notes 31–34 and accompanying text.

¹⁰² See *Planned Parenthood of Wis., Inc. v. Azar*, 316 F. Supp. 3d 291, 294 (D.D.C. 2018), *vacated*, 942 F.3d 512 (D.C. Cir. 2019).

¹⁰³ See *Mayor of Balt. v. Azar*, 973 F.3d 258, 271 (4th Cir. 2020) (en banc), *cert. dismissed per stipulation, sub nom. Becerra v. Mayor of Balt.*, 141 S. Ct. 2170 (2021) (mem.).

¹⁰⁴ *Becerra*, 950 F.3d at 1076, 1078, 1091–92.

¹⁰⁵ See *supra* notes 35–37 and accompanying text.

¹⁰⁶ See, e.g., *New York v. U.S. Dep't of Just.*, 951 F.3d 84, 104–11 (2d Cir. 2020), *cert. dismissed per stipulation*, 141 S. Ct. 1291 (2021) (mem.).

placing special conditions on all grants, and determining priority purposes for formula grants.”¹⁰⁷

Critics and litigants challenged the HHS and DOJ actions both as bad policy and as illegal, at times with rhetoric that also made it sound as though the actions were a structural abuse of power.¹⁰⁸ But whether the underlying policy choices are “good” ones and whether the individual grant statutes permit these particular policy choices are fundamentally different questions from whether in principle it is permissible and normal for agencies to make these moves of specifying program priorities and conditions for competitive grants and elucidating formula grants with conditions.

The answer to the latter questions is undoubtedly yes. Agencies routinely develop priorities for how to weigh different applications and interpret the underlying grant statutes to allow certain requirements. In fact, each of these two examples from the Trump Administration has an analogue in previous administrations. The Trump Administration’s efforts to flesh out requirements around abortion counseling under Title X dates back to the Reagan Administration, and both Democratic and Republican administrations since then have offered different policy choices based on different interpretations of what the law allows.¹⁰⁹ It was the Obama Administration’s DOJ that first identified the provision in the immigration code as an example of required compliance under the Byrne JAG program.¹¹⁰

The Obama Administration was full of such examples, including ones that were controversial as matters of policy, interpretation, and scope. In the Department of Education alone, consider the expansive development of the Race to the Top competitive grant program from a few thin lines in the Recovery Act,¹¹¹ the capacious interpretation of its waiver authority under the formula grant No Child Left Behind to enable it to exchange new conditions for states wholesale in place of the statutory ones,¹¹² and its attempts to read statutory instructions on a funding formula in ways that seemed to conflict with both the language itself and the clear intent of the law.¹¹³ These are all examples of an

¹⁰⁷ See, e.g., *id.* at 101–02.

¹⁰⁸ See, e.g., Correal, *supra* note 3.

¹⁰⁹ See, e.g., *Mayor of Balt. v. Azar*, 973 F.3d 258, 267–72 (4th Cir. 2020) (en banc), *cert. dismissed per stipulation, sub nom. Becerra v. Mayor of Balt.*, 141 S. Ct. 2170 (2021) (mem.).

¹¹⁰ See, e.g., Letter from Peter J. Kadzik, Assistant Att’y. Gen., U.S. Dep’t of Just., to John A. Culberson, Chairman, U.S. House of Rep. Comm. on Appropriations (July 7, 2016), <https://s3.documentcloud.org/documents/3525556/2016-7-7-Section-1373-Doj-Letter-to-Culberson.pdf> [<https://perma.cc/X8XL-G89H>].

¹¹¹ See, e.g., Joseph P. Viteritti, *The Federal Role in School Reform: Obama’s “Race to the Top.”* 87 NOTRE DAME L. REV. 2087, 2100–02 (2012).

¹¹² See, e.g., Black, *supra* note 2, at 659–79.

¹¹³ James S. Liebman & Michael Mbikiwa, *Every Dollar Counts: In Defense of the Obama Department of Education’s “Supplement Not Supplant” Proposal*, 117 COLUM. L. REV. ONLINE 36, 49–50 (2017).

administration aggressively reading a grant statute to allow it to further its policy goals in ways that were not shared by all of the jurisdictions that would ordinarily receive funding. The Trump Administration's efforts to do the same were a continuation of this trend rather than any norm breaking.

To be sure, the Trump Administration's interpretations of its authority under Title X and the Byrne JAG grant programs faced significant legal challenges, and the Administration lost a fair amount in court.¹¹⁴ But that is not to say that its arguments were frivolous. The fact that circuit splits arose on both of these sets of litigation is one indication of this point.¹¹⁵ Nor was there concern that the actions reflected private interests rather than public ones;¹¹⁶ the actions clearly reflected different policy choices about abortion and immigration, respectively, that were publicly articulated and debated. It is also notable that none of these cases involved challenges to the underlying mechanism; the legal question for each was simply whether the particular policy choices at issue could be justified as consistent with the statute and with arbitrary and capricious review.¹¹⁷ The same was true in many other examples where the Administration's policy choices under different formula or competitive grant statutes were contested.¹¹⁸ Occasionally issues about compliance with procedural or Spending Clause requirements emerged, but the cases were largely not about the scope of authority to take this kind of action in principle; they raised ordinary, rather than extraordinary, administrative law concerns.¹¹⁹

b. *Conditioning Overall Agency Funding*

The Trump Administration also engaged in controversial moves under the third policy tool identified above, placing conditions on all or most funding from an agency,¹²⁰ that again were structurally well within the norm. Consider two

¹¹⁴ See, e.g., *New York v. U.S. Dep't of Just.*, 964 F.3d 150, 153 (2d Cir. 2020) (Lohier, J., concurring in order denying rehearing en banc).

¹¹⁵ On Title X, compare *Mayor of Baltimore v. Azar*, 973 F.3d 258, 226 (4th Cir. 2020) (en banc), *cert. dismissed per stipulation, sub nom.* *Becerra v. Mayor of Balt.*, 141 S. Ct. 2170 (2021) (mem.), with *California by and through Becerra v. Azar*, 950 F.3d 1067, 1105 (9th Cir. 2020) (en banc), *cert. dismissed per stipulation, sub nom.* *Oregon v. Becerra*, 141 S. Ct. 2621 (2021) (mem.). On sanctuary cities, compare, for example, *City of Chicago v. Barr*, 961 F.3d 882, 931, 937 (7th Cir. 2020), with *New York v. U.S. Department of Justice*, 951 F.3d 84, 90 (2d Cir. 2020), *cert. dismissed per stipulation*, 141 S. Ct. 1291 (2021) (mem.).

¹¹⁶ See *supra* notes 72–76 and accompanying text.

¹¹⁷ See, e.g., *New York v. U.S. Dep't of Justice*, 964 F.3d at 150–51 (Cabranes, J., concurring in order denying rehearing en banc); *Mayor of Balt.*, 973 F.3d at 266.

¹¹⁸ See, e.g., *City of Los Angeles v. Barr*, 929 F.3d 1163, 1169–70 (9th Cir. 2019) (on DOJ's COPS grant); *Michigan v. DeVos*, 481 F. Supp. 3d 984, 988–90 (N.D. Cal. 2020) (on Department of Education's CARES Act grant); *Multnomah County v. Azar*, 340 F. Supp. 3d 1046, 1050–53 (D. Or. 2018) (on HHS's Teen Pregnancy Prevention grant).

¹¹⁹ Cf. Heinzerling, *supra* note 75, at 958–59.

¹²⁰ See *supra* notes 38–42 and accompanying text.

rules in HHS that, among other things, sought to shift the balance between protections for religious grant recipients and LGBTQ+ beneficiaries.

An update to the HHS Grants Regulation relaxed antidiscrimination rules that had previously forbid HHS grantees from discriminating on the basis of gender identity and sexual orientation, instead now explaining that grantees need comply only with those nondiscrimination requirements required by statute.¹²¹ Because no federal statute explicitly bans discrimination on the basis of LGBTQ+ status,¹²² this change had the effect of removing antidiscrimination requirements on that basis. The update also deleted requirements to “treat as valid the marriages of same-sex couples,” effectively permitting individual grantees to refuse do so.¹²³

A separate rule implemented the “conscience statutes,” a series of laws that provide various protections to medical professionals and health care entities receiving HHS health care funding who object to performing, and in some instances to providing referrals for, abortions or other procedures such as sterilization, assisted suicide, and gender-affirming surgery.¹²⁴ Among other things, the Conscience Rule included a number of expansive definitions (such as what it means to “assist in the performance” of a procedure or activity) and required lengthy certifications of compliance with the Rule and the underlying statutes.¹²⁵ The Rule specified that grantees that did not comply with the Rule risked losing all of their HHS funding.¹²⁶

District courts in the Second and Ninth Circuits struck down the Conscience Rule on many grounds, and the appeals were pending when the Biden Administration took office.¹²⁷ A complaint challenging the HHS Grants Regulation was pending when the Biden Administration took office.¹²⁸ Even had this rule been struck down eventually, too, however, the rules were structurally well within the norm of what previous administrations had done. In fact, each rule was a mirror image of an Obama-era rule. The Obama

¹²¹ Health and Human Services Grants Regulation, 86 Fed. Reg. 2257, 2263 (Jan. 12, 2021) (to be codified at 45 C.F.R. pt. 75).

¹²² Katy Steinmetz, *Why Federal Laws Don't Explicitly Ban Discrimination Against LGBT Americans*, TIME (Mar. 21, 2019), <https://time.com/5554531/equality-act-lgbt-rights-trump/> [<https://perma.cc/ZMC4-JUPV>].

¹²³ *Id.*

¹²⁴ See Protecting Statutory Conscience Rights in Health Care, 84 Fed. Reg. 23,170 (May 21, 2018) (to be codified at 45 C.F.R. pt. 88).

¹²⁵ See 45 C.F.R. §§ 88.2, .4 (2021).

¹²⁶ See 45 C.F.R. § 88.7(i)–(j) (2021).

¹²⁷ *New York v. HHS*, 414 F. Supp. 3d 475, 496–97, 580 (S.D.N.Y. 2019), *appeal withdrawn*, Nos. 19-4254, 20-31, 20-32, 20-41, 2022 WL 17974424 (2d Cir. Dec. 8, 2022); *City & County of San Francisco v. Azar*, 411 F. Supp. 3d 1001, 1026 (N.D. Cal. 2019), *appeal dismissed*, Nos. 20-15398, 20-15399, 20-35044, 2020 WL 3053625 (9th Cir. June 1, 2020); *Washington v. Azar*, 426 F. Supp. 3d 704, 708, 722 (E.D. Wash. 2019), *appeal filed*, No. 20-35044 (9th Cir. Jan 12, 2020).

¹²⁸ Complaint for Declaratory and Injunctive Relief at 1–2, *Facing Foster Care in Alaska v. HHS*, 1:21-cv-00308 (D.D.C., filed Feb. 2, 2021).

Administration had seen no statutory hook for an overall conscience rule applying to all HHS funding, so it withdrew a Bush-era conscience rule, which the Trump Administration then revived and expanded.¹²⁹ In turn, the Trump Administration saw no statutory hook for an overall rule banning discrimination on the basis of sexual orientation and gender identity, so it withdrew the Obama-era rule imposing one.¹³⁰ In each case, the Administration appeared to find statutory authorization for an agencywide rule when it would serve its policy purposes and to find no such authorization when that lack would serve its policy purposes. Neither administration was acting out of private, self-interested gain, but rather out of different and transparently debated conceptions of how to serve the public interest.¹³¹

The Trump and Obama Administrations also were mirror images when it came to withholding all agency funding for noncompliance. While the Trump Administration's conscience rule was the only one that said so explicitly,¹³² the Obama Administration's antidiscrimination rule would have had the same effect in practice, as no entity could receive any HHS funding if it did not certify compliance with the rule's antidiscrimination requirements.¹³³

The fact that the conscience rule was struck down does not indicate that it was outside the norm for such rules elucidating conditions on agencywide funding. Where a constitutional statute authorizes it, there is nothing unusual about an administration's placing conditions on all funding agencywide.¹³⁴ Setting aside the substantive merits of any individual policy choice, or legality of any particular administrative decision under a specific statutory scheme, the effort itself to elucidate requirements is not untoward. Grantees have clear notice of statutory requirement *X*, and they want to know whether action *Y* is encompassed in that requirement. Explaining that connection is a common task of agencies.¹³⁵ To the extent that requirement *X* permits different answers depending on the policy preferences of agencies, it has long been understood to be part of an administration's authority to provide an answer in keeping with

¹²⁹ Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968, 9968 (Feb. 23, 2011) (to be codified at 45 C.F.R. pt. 88); *see* Protecting Statutory Conscience Rights in Health Care, 84 Fed. Reg. 23,170 (May 21, 2018) (to be codified at 45 C.F.R. pt. 88).

¹³⁰ Health and Human Services Grants Regulation, 86 Fed. Reg. 2257, 2262 (Jan. 12, 2021) (to be codified at 45 C.F.R. pt. 75).

¹³¹ *See supra* notes 72–76 and accompanying text.

¹³² *See* Health and Human Services Grants Regulation, 86 Fed. Reg. at 2263.

¹³³ *See* Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. at 9969–70.

¹³⁴ *See supra* notes 38–42 and accompanying text.

¹³⁵ *See* Bagenstos, *supra* note 48, at 393–403; Bagenstos, *Legitimacy*, *supra* note 40, at 317–18.

that preference (at least under current doctrine on delegation, statutory interpretation, and arbitrary and capricious review¹³⁶).

c. Conditioning Overall Federal Funding

The Trump Administration also engaged in controversial but ultimately normal efforts to impose conditions on all or vast swaths of federal funding, the fourth policy tool described above.¹³⁷ Consider the Divisive Concepts Executive Order, issued two months before the 2020 election.¹³⁸ The Order directed agency heads to review all of their grant programs and to identify those “for which the agency may, as a condition of receiving such a grant, require the recipient to certify that it will not use Federal funds to promote” certain concepts that the order elsewhere labeled “divisive concepts.”¹³⁹ The order defined “divisive concepts” to include both ideas that reflect “race or sex stereotyping” and “race or sex scapegoating.”¹⁴⁰ The latter phrase seemed designed to stamp out work on white privilege and male privilege.¹⁴¹

Disagreement about the underlying policy choice and the Administration’s rhetoric, along with the Executive Order’s much broader implications for federal contractors, caused much of the negative response.¹⁴² (In that regard, it is worth noting that again, in the controversy over the policy, there was no sense that the Administration was effectuating private interests rather than a deeply contested version of the public interest.¹⁴³) Setting aside the policy choice, however, and looking at the Executive Order’s direction on federal grants as a legal maneuver in the abstract, it appears much more ordinary.

The Executive Order focused not on what federal grantees could do or say as their own entities with their own money, but only on what they could do or say with their federal grant. The Supreme Court blessed this distinction in two cases considering conditions on federal grants. In *Rust v. Sullivan*, the Court rejected a First Amendment challenge to the Reagan Administration’s speech limits on Title X funding on the ground that the regulation did not require the grantee to give up its protected speech, but merely required the grantee to use its own funds to engage in abortion-related advocacy.¹⁴⁴ The Court made a

¹³⁶ See generally, e.g., Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1.

¹³⁷ See *supra* notes 43–45 and accompanying text.

¹³⁸ Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 22, 2020).

¹³⁹ *Id.* at 60,685–87.

¹⁴⁰ *Id.* at 60,685.

¹⁴¹ See *id.*

¹⁴² The Executive Order also directed agencies to take similar steps with their federal contracts but required contractors to comply as entities beyond the scope of their federal contract, while the EO focused on grantees’ use of their grant funding only. Compare *id.* at 60,685–86 (sections 1 and 4), with *id.* at 60,686–87 (section 5).

¹⁴³ See *supra* notes 72–76 and accompanying text.

¹⁴⁴ *Rust v. Sullivan*, 500 U.S. 173, 196–97, 203 (1991).

similar distinction in *Agency for International Development v. Alliance for Open Society*, explaining that “the relevant distinction . . . is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.”¹⁴⁵ The Divisive Concepts Executive Order appeared to try to follow this distinction by not limiting what grantees themselves could do but simply what they spend relevant federal funding on.

Moreover, placing overall limits on how federal funds may be spent is an ordinary use of administrative authority. Longstanding Office of Management and Budget (“OMB”) grant management rules called “cost principles” cover how grantees may use their federal dollars.¹⁴⁶ For the most part, the cost principles are fairly technical, although the Obama Administration added some cost principles with the stated goal of “Encouraging Nonfederal Entities to Have Family-Friendly Policies” by making certain childcare costs allowable to increase the number of women pursuing careers in science, technology, engineering, and math.¹⁴⁷ While there is a danger in hiding substantive policy choices behind the cost principles and other seemingly technocratic grant management rules, the more open the decision is, the less concerning, because it allows public debate.¹⁴⁸ From this perspective, the Divisive Concepts Executive Order limitation on grant funding falls right in line with the Executive Branch’s traditional role in promulgating cost principles, including the Obama Administration’s incorporation of a substantive value-based choice into the cost principles.

None of this is to bless the ultimate legality of the specifics of this Executive Order, which was challenged on a number of grounds, and on which a district court granted a preliminary injunction before the Biden Administration rescinded it.¹⁴⁹ The point instead is to argue that the core grant-related maneuver in the Executive Order itself is not illegitimate. It may well be a valuable tool in a whole-of-government agenda towards an administration’s policy goals. For example, if, as part of a coordinated response to the climate crisis, President Biden wanted to direct federal agencies to add a certification requirement (where underlying legal authorities permitted it) that grantees could not spend federal grant dollars to promote climate denialism, that ought to be permitted.

¹⁴⁵ *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214–15 (2013).

¹⁴⁶ See Pasachoff, *supra* note 91, at 588–89.

¹⁴⁷ *Id.* at 622.

¹⁴⁸ *Id.* at 623–25.

¹⁴⁹ *Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump*, 508 F. Supp. 3d 521, 528, 535–39 (N.D. Cal. 2020); Jordan Williams, *Biden Reverses Trump Executive Order Restricting Diversity Training*, HILL (Jan. 20, 2021), <https://thehill.com/homenews/administration/535135-biden-reverses-trump-executive-order-on-diversity-training/> [<https://perma.cc/NZL7-GAAX>].

2. Extraordinary Policy Moves

While most of the Trump Administration's policymaking moves through federal grants were substantively controversial but within structural norms, some of the Trump Administration's actions were, in fact, structurally extraordinary even as they continued to try to implement the Administration's same controversial policy positions. Consider two such efforts, both stemming from Executive Orders attempting to place a condition on all federal funding.

The first effort to restrict funding to sanctuary cities followed this path. Five days after taking office in January 2017, President Trump issued an Executive Order that declared very broadly that "[i]t is the policy of the executive branch to . . . [e]nsure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law."¹⁵⁰ As such an applicable law, the Executive Order singled out § 1373, a provision requiring government entities to share information about people's citizenship status with immigration authorities, then clarified that "jurisdictions that willfully refuse to comply with 8 U.S.C. § 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary [of Homeland Security]."¹⁵¹

After a district court preliminarily enjoined the Executive Order's condition as *ultra vires*,¹⁵² the Attorney General issued an interpretive memorandum purporting to limit the scope of the Executive Order; pointing to the savings clause ("to the extent consistent with law"¹⁵³), the memorandum downplayed the scope of potential funds to be affected.¹⁵⁴ But the plain language of the Executive Order spoke more broadly, repeatedly referencing "Federal funds" in general as on the line, with the only stated exception being those "mandated by law" or those "deemed necessary for law enforcement purposes."¹⁵⁵ The implication was clear: the Administration was trying either to get sanctuary cities to stop being sanctuary cities or to keep sanctuary cities from getting federal funding.

This interpretive memorandum did not save the Executive Order from being further enjoined, and the Ninth Circuit subsequently affirmed the injunction.¹⁵⁶ There is no freestanding authority for the Executive Branch to impose conditions on federal funding, and the Administration's effort to do so, regardless of the substance of the conditions, cannot be justified by law. It is one thing for an administration to flesh out the terms of a Spending Clause statute

¹⁵⁰ Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

¹⁵¹ *Id.* at 8801; 8 U.S.C. § 1373.

¹⁵² *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 507–09, 540 (N.D. Cal. 2017), *appeal dismissed as moot*, No. 17-16886, No. 17-16887, 2018 WL 1401847 (9th Cir. Jan. 4, 2018).

¹⁵³ *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1232, 1239 (9th Cir. 2018).

¹⁵⁴ *See id.* at 1240.

¹⁵⁵ Exec. Order No. 13,768, 82 Fed. Reg. at 8799–801.

¹⁵⁶ *City & County of San Francisco v. Trump*, 897 F.3d at 1245.

that applies to all federal funding; that is an ordinary administrative action.¹⁵⁷ It is another thing entirely to try to create a funding condition where none exists; that is a separation of powers issue with respect to Congress's power of the purse.

Almost four years later, the Administration pursued a related move in the "Anarchist Jurisdictions" memorandum, trying to restrict funds from going to specific jurisdictions that the Administration declared were making disfavored policy choices.¹⁵⁸ The term "anarchist jurisdictions" referred to those cities that were experiencing intense and long-lasting protests against police brutality in the wake of George Floyd's death at the knee of a police officer and other highly publicized police killings of Black men and women in 2020.¹⁵⁹ The memorandum called out several cities by name—New York, Seattle, Portland, and Washington, D.C.—and declared that "[m]y Administration will not allow Federal tax dollars to fund [these] cities that allow themselves to deteriorate into lawless zones."¹⁶⁰

Among other steps, it ordered the OMB Director to issue guidance to all agencies "on restricting eligibility of or otherwise disfavoring, to the maximum extent permitted by law, anarchist jurisdictions in the receipt of Federal grants that the agency has sufficient lawful discretion to restrict or otherwise disfavor anarchist jurisdictions from receiving."¹⁶¹ OMB Director Russell Vought subsequently explained that OMB was "look[ing] at every grant program in which we have discretionary authority," including "community economic development" and "public transportation grants," and that the Administration was considering inserting the term "lawlessness" as a general condition that would restrict eligibility from all federal grants.¹⁶²

Although the Anarchist Jurisdiction memorandum was in some sense narrower than the Sanctuary Cities one, targeting named jurisdictions rather than a broader policy-based category, it was extraordinary in a similar way in that it purported to create a condition across a wide swath of federal funding with no underlying statutory authority. Targeting named jurisdictions made the memorandum extraordinary in a different way, gesturing towards punishing these disfavored jurisdictions and away from making a generalized policy

¹⁵⁷ See *supra* notes 46–48 and accompanying text.

¹⁵⁸ Memorandum on Reviewing Funding to State and Local Government Recipients of Federal Funds That Are Permitting Anarchy, Violence, and Destruction in American Cities, 2020 DAILY COMP. PRES. DOC. 1 (Sept. 2, 2020) [hereinafter Memorandum on Reviewing Funding].

¹⁵⁹ See Lauren Aratani, *DOJ Labels New York, Portland and Seattle 'Anarchist Jurisdictions,'* GUARDIAN (Sept. 21, 2020), <https://www.theguardian.com/us-news/2020/sep/21/doj-new-york-portland-seattle-trump-bill-barr> [<https://perma.cc/DL5Z-6FBA>].

¹⁶⁰ Memorandum on Reviewing Funding, *supra* note 158, at 1–2.

¹⁶¹ *Id.* at 3.

¹⁶² Russ Vought (@RussVought45), TWITTER (Sept. 22, 2020, 9:54 AM), <https://twitter.com/RussVought45/status/1308404322837901313?s=20> (on file with the *Ohio State Law Journal*).

choice.¹⁶³ The memorandum also sidestepped the ordinary process for limiting particular entities or jurisdictions from receiving federal grants: the rules governing suspension and debarment of grantees, which mandate exclusion from grant eligibility based only upon specific findings accompanied by procedural protections.¹⁶⁴ This is a finely calibrated procedure that does not contemplate that a President or the Attorney General can designate by fiat certain jurisdictions to be ineligible—or even disfavored—in receiving future federal grants.

It would not have been any less extraordinary if the memorandum had only identified the metrics rather than the named jurisdictions and left the Attorney General to assess which jurisdictions should be excluded, because the metrics are still disconnected from any authorizing source of law. “Lawlessness” is not based in any overarching statute. This is a point that extends beyond this particular policy choice; think about an alternative “whole of government” policy that President Biden might want to advance, such as equity. There would be no freestanding authority for President Biden to deny federal funds to all jurisdictions not pursuing the Administration’s vision of what “equity” means.

Several named “anarchist jurisdictions” filed a lawsuit challenging it on numerous grounds, including the absence of any statutory authority.¹⁶⁵ While the lawsuit was dismissed after the Biden Administration withdrew the memorandum, it seems likely that the memorandum would have been enjoined just as the Sanctuary Cities one was.¹⁶⁶

C. *Cabining Abuse*

That likelihood of enjoining is precisely the point: no matter how extraordinary these efforts to create policy conditions across federal grants, the courts are well equipped to cabin such abuse. Norms function well in this context, too. Thus, overall, the lesson of this case study of the Trump Administration’s efforts to create policies through federal grants is that this category of action is not too worrisome in the hands of a boundary-pushing President—certainly not as concerning as the next two categories of action prove to be.

¹⁶³ *Cf. supra* notes 72–76.

¹⁶⁴ *See* 2 C.F.R. §§ 180.700, .760, .800, .865 (2021); *see also infra* notes 395–98 and accompanying text.

¹⁶⁵ Complaint for Declaratory and Injunctive Relief at 2–4, *City of Seattle v. Trump*, No. 2:20-cv-01560-BHS (W.D. Wash. Mar. 5, 2021).

¹⁶⁶ Notice of Voluntary Dismissal at 2, *City of Seattle v. Trump*, No. 2:20-cv-1560-BHS (W.D. Wash. Mar. 5, 2021).

1. Legal Limits

Existing doctrine had no trouble limiting Executive Branch moves that violated the law in this space. At least some court struck down every single move discussed above with the exception of the Anarchist Jurisdiction Executive Order, and that absence was perhaps just a function of time.¹⁶⁷

The success of the courts was due to the ordinariness of the legal issues raised. Many turned on questions of statutory interpretation or authority: Was there justification in the language of an underlying statute for the agency's interpretation?¹⁶⁸ Did that language provide the clear notice required by the Spending Clause?¹⁶⁹ Others turned on standard arbitrary and capricious review: Had the agency articulated a satisfactory explanation for its answer, including a rational connection between the facts found and the choice made?¹⁷⁰ Still others turned on familiar Spending Clause constitutional doctrine: Was the threat to withhold 100% of an agency's funding for noncompliance coercive?¹⁷¹ Were the requirements sufficiently related to the purpose of the funding?¹⁷² Even the Administration's extraordinary moves in the Sanctuary Cities and Anarchist Jurisdiction Executive Orders were subject to the ordinary proposition that administrative action must be rooted in some source of statutory authority.

The Supreme Court's recent embrace of the Major Questions Doctrine could, in the future, allow courts to find many interpretations leading to new grant conditions as beyond the scope of delegated authority.¹⁷³ If the Court continues further down its path of tightening constraints on the Executive Branch,¹⁷⁴ any future administration's efforts to abuse policymaking through grants would face even more difficulty.¹⁷⁵ For example, if the Court reinvigorates the nondelegation doctrine, as it may be poised to do, many of the delegations under which the Executive Branch expounds grant conditions could be deemed unconstitutional.¹⁷⁶ If the Court overrules *Chevron*, as it may be also be poised to do, there would be even less room for an administration to push

¹⁶⁷ See *supra* notes 102–03, 114, 118, 127, 149, 154 and accompanying text.

¹⁶⁸ See, e.g., *Multnomah County v. Azar*, 340 F. Supp. 3d 1046, 1062–69 (D. Or. 2018).

¹⁶⁹ See, e.g., *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 644–47 (E.D. Pa. 2017), *appeal dismissed, sub nom.* *City of Philadelphia v. Att'y Gen. U.S.*, No. 18-1103, 2018 WL 3475491 (3d Cir. July 6, 2018).

¹⁷⁰ See, e.g., *Mayor of Balt. v. Azar*, 973 F.3d 258, 275–83 (4th Cir. 2020) (en banc), *cert. dismissed per stipulation, sub nom.* *Becerra v. Mayor of Balt.*, 141 S. Ct. 2170 (2021) (mem.).

¹⁷¹ See, e.g., *New York v. HHS*, 414 F. Supp. 3d 475, 569–71 (S.D.N.Y. 2019), *appeal withdrawn*, Nos. 19-4254, 20-31, 20-32, 20-41, 2022 WL 17974424 (2d Cir. Dec. 8, 2022).

¹⁷² See, e.g., *Colorado v. U.S. Dep't of Just.*, 455 F. Supp. 3d 1034, 1054–56 (D. Colo. 2020), *appeal dismissed*, No 20-1256, 2021 WL 3026820 (10th Cir. May 6, 2021).

¹⁷³ See *West Virginia v. EPA*, 142 S. Ct. 2587, 2607–09 (2022).

¹⁷⁴ See generally Metzger, *supra* note 136.

¹⁷⁵ I do not advocate such a move. See *infra* Part V.A.

¹⁷⁶ See, e.g., Metzger, *supra* note 136, at 38–39.

hard at ambiguous statutory language.¹⁷⁷ If the Court applies the clear notice rule more stringently, many executive conditions could not survive.¹⁷⁸

To be sure, some cases faced initial justiciability hurdles. Is a Funding Opportunity Announcement a final agency action such that the timing is right to bring a case challenging its policy choices before any grants have been awarded?¹⁷⁹ Are policy choices in such announcements committed to agency discretion by law and thus unreviewable?¹⁸⁰ Does a prospective grantee who has not applied because it does not want to comply with the policy conditions have standing to challenge such an action?¹⁸¹ Yet despite these preliminary questions some of the cases presented, none of the Trump Administration's actions described above ultimately foundered on such justiciability problems.

Thus, the Trump Administration's actions in the grant policymaking space faced the constraints that Bethany Noll has found limited the Administration's regulatory actions in general.¹⁸² Her study demonstrates that "rather than winning most legal challenges to agency actions, as was the historical norm, the Trump Administration's win rate was 23% on aggregate."¹⁸³ As Noll explains,

Trump Administration agencies acted in ways that were contrary to law, both by failing to provide a reasoned explanation for their actions and by ignoring their statutory mandates. That courts have kept these violations in check is a powerful rejoinder to those who would say that judicial review of agency action is toothless.¹⁸⁴

The Trump Administration's efforts in making policy through federal grants fall well within this conclusion.

This is not a story about judges appointed by Democratic Presidents striking down the Trump Administration's actions; the Administration even lost a majority of the time before judges appointed by Republican Presidents, a much higher loss rate than previous studies have found in assessing partisan affiliation against agency success rates.¹⁸⁵ Its win rate in front of judges appointed by President Trump, either as the assigned district judge or as a member of an appellate panel, was only 50%.¹⁸⁶

¹⁷⁷ See *id.* at 3–4.

¹⁷⁸ See Bagenstos, *supra* note 48, at 351–52, 393–409.

¹⁷⁹ See, e.g., *Multnomah County v. Azar*, 340 F. Supp. 3d 1046, 1050, 1056–61 (D. Or. 2018).

¹⁸⁰ See, e.g., *Planned Parenthood of N.Y.C., Inc. v. HHS*, 337 F. Supp. 3d 308, 324–26 (S.D.N.Y. 2018), *appeal withdrawn*, No. 18-3361, 2019 WL 5618617 (2d Cir. June 14, 2019).

¹⁸¹ See *Planned Parenthood of Greater Wash. & N. Idaho v. HHS*, 337 F. Supp. 3d 976, 982–88 (E.D. Wash. 2018), *rev'd*, 946 F.3d 1100, 1106–09 (9th Cir. 2020).

¹⁸² See generally Bethany A. Davis Noll, "Tired of Winning": *Judicial Review of Regulatory Policy in the Trump Era*, 73 ADMIN. L. REV. 353 (2021).

¹⁸³ *Id.* at 357.

¹⁸⁴ *Id.* at 414.

¹⁸⁵ *Id.* at 393.

¹⁸⁶ *Id.* at 395.

In acknowledging the illegality of so many of the Trump Administration's actions in this policy-laden sphere, I don't mean to diminish their illicitness (although it is also true that several of the most-contested policy decisions had divided circuit courts and may well have ultimately survived Supreme Court review had they not been dismissed under the Biden Administration¹⁸⁷). It is difficult, time-consuming, and expensive for litigants to bring these cases to protect their rights and ensure the lawfulness of government activity. Repeated findings of unlawful conduct can also do damage to the overall perception that the government in general acts lawfully, which can undercut trust in government.¹⁸⁸

I do, however, want to underscore that the Trump Administration's actions do not call into question the underlying utility of Executive Branch control over grants at the policy stage. Even though the extent of the Administration's violations were exceptional, the substance of the underlying violations presented standard administrative law issues rather than any particular grant-inflected flavor of abuse.¹⁸⁹ The underlying violations also related to efforts to implement public policies that may have been controversial but that were actual policies, rather than covers for private gain.¹⁹⁰ Had the underlying statutes been written slightly differently, or had the Administration offered different justifications, the Administration's actions might have survived review; nothing about the underlying mechanism of the grant makes the policy choice more problematic. Hence labeling the Administration's underlying moves as an improper use of the grant tool or as weaponizing funding serves to delegitimize the grant mechanism, making government action along these lines seem nefarious,¹⁹¹ even when there is nothing wrong with the mechanism and the ultimate disagreement is simply a policy one based in different values. It is important for the legitimacy of government action in general and the grant mechanism in particular that these questions are distinguished.

2. *Politics and Norms*

Politics did not do much work to cabin the Trump Administration's efforts to advance its policy priorities through federal grants, likely because the core debates were over deeply contested policy issues around which Republican congressional majorities were sympathetic. But norms appeared to do some work inside the Executive Branch in constraining its excesses.

Daphna Renan argues that the presidency's institutional surrounding, including intra-branch actors, helps preserve the structural norms of the

¹⁸⁷ See *supra* notes 99–100, 115 and accompanying text.

¹⁸⁸ See *infra* note 283 and accompanying text.

¹⁸⁹ Cf. Heinzerling, *supra* note 75, at 958–59.

¹⁹⁰ See *supra* notes 72–76 and accompanying text.

¹⁹¹ See *supra* note 3 and accompanying text.

presidency.¹⁹² That the Administration's efforts in advancing its policy priorities through grants largely fell within the norms for how to do so may illustrate that lawyers throughout the Executive Branch were able to channel broad policy goals through structurally appropriate means, thus furthering the broader norm of a deliberative presidency constrained by law.¹⁹³ Given the extent of the Administration's losses in court, it may seem odd to suggest that the lawyers played a constraining role, but keeping policy changes to normal practices of finding statutory authority to support them is, in fact, constraining.¹⁹⁴

The Administration's response to fairly clear-cut losses in district court provides support for this proposition as well. In a number of cases, the Administration accepted the judicial determination that its efforts had no statutory support and agreed to comply.¹⁹⁵ In other instances, the Administration responded to precedent by drafting subsequent policies in a way that appeared to try to fix previously identified legal problems.¹⁹⁶ These choices suggested that at least some legal actors inside the Executive Branch were responsive to at least some form of accepting the judicial branch's legal determinations, furthering the norm of judicial supremacy.¹⁹⁷

Renan also posits that certain structural norms of the presidency are more robust when they are enforced by pluralist communities.¹⁹⁸ That theory is well illustrated by the concern across the political spectrum with the Administration's initial effort to limit sanctuary jurisdictions from receiving *any*

¹⁹² Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2204–05, 2223 (2018).

¹⁹³ *See id.* at 2221–23.

¹⁹⁴ *See id.*

¹⁹⁵ In addition to dropping the appeals of the Sanctuary Cities Executive Order, *see infra* note 201, the Administration also dropped appeals of initial losses in cases involving the Teen Pregnancy Prevention Program and CARES Act education funding. *See* Press Release, Mich. Dep't of Att'y Gen., Secretary DeVos Concedes Defeat in Fight Against AG Nessel, Others Over CARES Act Funding for Public Schools (Sept. 29, 2020), <https://www.michigan.gov/ag/news/press-releases/2020/09/29/secretary-devos-concedes-defeat-in-fight-against-ag-nessel-others-over-cares-act-funding> [<https://perma.cc/PF7J-3URW>]; *County Secures Complete Victory Against Trump Administration Attempt to Redirect Teen Pregnancy Prevention Funds to Abstinence-Only Programs*, MULTNOMAH COUNTY (Mar. 20, 2019), <https://www.multco.us/multnomah-county/news/county-secures-complete-victory-against-trump-administration-attempt-redirect> [<https://perma.cc/T5PW-J7VS>].

¹⁹⁶ For example, the Administration dropped the Sanctuary Cities Executive Order appeal to focus on the imposition of grant conditions through more ordinary means, *see infra* note 201; the Divisive Concepts Executive Order seemed designed to comply with Supreme Court precedent on conditions governing grantees versus program funding, *see supra* notes 144–45; and the Anarchist Jurisdiction memorandum did not take the broad tack of purporting to apply to all funding that the Sanctuary Cities Executive Order had, *see supra* notes 150, 161.

¹⁹⁷ *See* Renan, *supra* note 192, at 2230–31.

¹⁹⁸ *Id.* at 2203.

federal grant.¹⁹⁹ Pushback from politically diverse critics underscored the norm that the President has no autocratic power over funding and must ground his authority to control funding to the states in a statute.²⁰⁰ After trying to limit the breadth of the Executive Order through the Attorney General's interpretation, the Administration dropped the effort and narrowed the scope of its attention towards finding such a specific statute in which to root its action.²⁰¹

While law and norms both constrained the Administration's actions in making policy through grants, there are opportunities to strengthen the guardrails surrounding such Executive Branch action, as I will discuss in Part V. But although these efforts of the Trump Administration got most of the attention in the press and in the courts, this is not where the structural dangers of Executive Branch control over federal grants lie.

III. PORK

"Pork" typically refers to the targeting of spending to a specific jurisdiction in order to bring about electoral benefits for the legislator who facilitated the spending.²⁰² While pork is usually associated with Congress, recent work in political science has uncovered a sizeable role for "presidential pork,"²⁰³ the subject of this Part.

By presidential pork, I mean Executive Branch decisions to award federal grants in ways that further the political interests of the President and his party. Presidential pork is a contested type of the more neutral concept of award decisions or grant allocations.²⁰⁴ With formula grants and entitlement programs, applicants are entitled to the funding as long as they meet the criteria, so agencies do not typically select from among applicants.²⁰⁵ With competitive grants, however, some applicants are selected to receive funding while others are rejected.²⁰⁶ Because presidential pork is possible only in the context of significant executive discretion at the allocation stage, this Part (unlike the rest of the analysis in the Article) focuses solely on competitive grants.

Part III.A illustrates that the Executive Branch's tools for making grant awards are themselves reasonable, while actions that shade neutral awards into presidential pork have a less clear legal framework and set of norms than the policy stage does. Part III.A also makes the case that while some aspects of

¹⁹⁹ See, e.g., Somin, *supra* note 9, at 1284, 1288–90, 1291–94.

²⁰⁰ See, e.g., *id.* (Part of Texas Law Review Symposium "Reclaiming—and Restoring—Constitutional Norms.").

²⁰¹ See *id.* at 1252–53.

²⁰² See ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 244–49 (3d ed. 2007).

²⁰³ See, e.g., JOHN HUDAK, *PRESIDENTIAL PORK: WHITE HOUSE INFLUENCE OVER THE DISTRIBUTION OF FEDERAL GRANTS* 4–5 (2014).

²⁰⁴ See generally SHAFFER & BRENT, *supra* note 53, § 24.

²⁰⁵ See LAWHORN, *supra* note 17, at 2–3.

²⁰⁶ See *id.*

presidential pork are tolerable at the margins, presidential pork is dangerous when it implements pure partisan favoritism, when it is rooted in an invidious desire to harm a disfavored group, when it is transparently embraced, or when the appearance of any of these other factors exists. Part III.B shows that while some of the Trump Administration's use of the tools of grant awards fell within the norm and raise few concerns, many others of them illustrate the destructive potential of dangerous presidential pork to undercut both the perception and reality of legitimate government action. At the same time, as Part III.C demonstrates, there are few tools available to cabin such abuse.

A. *Tools, Law, Norms, Merits*

1. *Tools*

The Executive Branch has three tools it uses at the award decision stage. All bear on the ability to implement the preferences and goals of the administration.

First, agencies design and implement processes to review grant applications.²⁰⁷ Often agency program staff conduct an initial review for eligibility.²⁰⁸ Subject matter experts, either inside or outside the agency or both, then review applications for their technical merit, often providing numerical rankings along different metrics described in the application announcement.²⁰⁹ Senior staff members in the agency then make final recommendations to the ultimate decisionmaker.²¹⁰ Because procedure can affect substance, setting and implementing the procedure to make these awards can account for the administration's goals—for example, by selecting what kind of expertise in external reviewers is valuable.²¹¹

The decision about which applications to fund is the second tool. Because there are typically more qualified applicants than available funding,²¹² this tool provides another opportunity to implement an administration's preferences—for example, by elevating a particular application over another.²¹³

In most instances, funding statutes and agency regulations leave the final decision within the agency, generally to a senior political appointee.²¹⁴ In the special context of disaster funding, however, the Stafford Act and its implementing regulations leave the decision as to whether a jurisdiction qualifies to the President himself.²¹⁵ Unlike with traditional competitive grants,

²⁰⁷ SHAFFER & BRENT, *supra* note 53, § 24:4.

²⁰⁸ *Id.* § 24:12.

²⁰⁹ *Id.* §§ 24:15, :24.

²¹⁰ *Id.* §§ 24:10, :26.

²¹¹ *See id.* §§ 24:21 to :23.

²¹² HUDAK, *supra* note 203, at 178–79.

²¹³ *Id.* at 170.

²¹⁴ SHAFFER & BRENT, *supra* note 53, § 24:10; HUDAK, *supra* note 203, at 164.

²¹⁵ *See infra* notes 237–40 and accompanying text.

in this context the President does not select winners in a time-limited competition from a restricted pot of money, because of the historical generosity and ongoing nature of congressional appropriations for disaster relief.²¹⁶ Still, in practice, the ability to decide when a jurisdiction qualifies for a disaster declaration, with few statutory or regulatory constraints, gives the President the opportunity to incorporate political utility into the decision-making process.²¹⁷

In the third tool at the award decision stage, agencies announce their decisions. In addition to notifying applicants directly, agencies post the decisions in press releases and on government websites.²¹⁸ Beyond these more ordinary announcements, sometimes political appointees or the President make a grant announcement that highlights the award in a politically or electorally useful way—for example, announcing an award to a swing state in a campaign stop shortly before an election.²¹⁹

2. Law

While it is clear that the tools of the award decision stage provide opportunities for an administration to implement its preferences, the law also constrains the extent to which agencies may use the awards process to further partisan political goals, as opposed to policy goals. At the same time, this law has not historically been well-defined or uniform in its approach.

Grant award decisions fall into the category of informal adjudication, covered by the thin procedural requirements of the APA²²⁰ and thicker internal requirements.²²¹ One such internal requirement is a joint regulation adopted in 2016 by nine leading grant-making agencies requiring that “decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference.”²²² This regulation was developed in the aftermath of a controversy during the Obama Administration in which the National Endowment for the Arts and the White House Office of Public Engagement hosted a phone call for artists and other cultural leaders during which the federal officials on the call urged the participants to create art that

²¹⁶ See WILLIAM L. PAINTER, CONG. RSCH. SERV., R45484, THE DISASTER RELIEF FUND: OVERVIEW AND ISSUES 13–19 (2022); Andrew Hammond, *On Fires, Floods, and Federalism*, 111 CALIF. L. REV. (forthcoming 2023) (manuscript at 14 n.77) (on file with the *Ohio State Law Journal*).

²¹⁷ See RUTHERFORD H. PLATT, DISASTERS AND DEMOCRACY: THE POLITICS OF EXTREME NATURAL EVENTS 20 (1999).

²¹⁸ See 2 C.F.R. §§ 200.211 to .212(a) (2021); USASPENDING.GOV, <https://www.usaspending.gov/> [<https://perma.cc/SL7A-DKUQ>].

²¹⁹ See HUDAK, *supra* note 203, at 29–30.

²²⁰ See MICHAEL ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 2–6, 40–52 (2019).

²²¹ See *id.* at 89–91.

²²² Federal Agency Final Regulations Implementing Executive Order 13,559, 81 Fed. Reg. 19,355, 19,356, 19,369–70 (Apr. 4, 2016) (to be codified at 45 C.F.R. pts. 87, 1050).

would highlight the President's initiatives.²²³ First clarified in a White House Counsel memo,²²⁴ then an executive order,²²⁵ and finally this joint rulemaking (part of a much larger joint rulemaking on the government's involvement with faith-based organizations), the prohibition remained in place during the Trump Administration even as the Trump Administration revised other aspects of the joint rule.²²⁶

This ban on political interference, although relatively new, appears on its face to be quite clear. But what does political interference mean? The context in which the ban developed suggests that it includes, at least, urging grant applicants to connect their work to further the administration's agenda. But what about less blatant political involvement, such as a political official's behind-the-scenes selection of a particular applicant over another because of that applicant's political ties to the administration?

It is helpful to see the 2016 ban against the backdrop of arbitrary and capricious review, which governs instances of informal adjudication such as grant award decisions.²²⁷ A long line of cases makes clear that an agency decision may be arbitrary and capricious if political pressure influenced the decision in a way that is outside the contemplation of the relevant statute and regulations.²²⁸

The variety of what the relevant statutes and regulations require or forbid contributes to the murkiness of the seeming clarity of the 2016 political interference ban. For example, the concept of merit review appears consistently throughout disparate aspects of federal grant law, wherever grants are to be competitively awarded.²²⁹ The goal of awarding grants based on meritorious

²²³ Jeff Zeleny, *Agencies Instructed to Separate Politics from Grant Awards*, N.Y. TIMES (Sept. 22, 2009), <https://www.nytimes.com/2009/09/23/us/politics/23grants.html> [<https://perma.cc/MN29-TX7H>]; Mike Boehm, *Texas Senator Warns Obama Against 'Politicization of the NEA'*, L.A. TIMES (Sept. 10, 2009), <https://www.latimes.com/archives/blogs/culture-monster-blog/story/2009-09-10/texas-senator-warns-obama-against-politicization-of-the-nea> [<https://perma.cc/QPD4-W2PZ>].

²²⁴ Memorandum from Gregory Craig & Norman Eisen, Counsel to the President, on Guidelines for Public Outreach Meetings to White House Staff and Agency and Department Heads (Sept. 22, 2009), https://web.archive.org/web/20091004154906/http://www.whitehouse.gov/assets/documents/WH_COUNSEL_MEMO_GUIDELINES_FOR_PUBLIC_OUTREACH_MEETINGS.pdf [<https://perma.cc/NW8W-UNK7>].

²²⁵ Exec. Order No. 13,559, 75 Fed. Reg. 71,319, 71,321 (Nov. 17, 2010).

²²⁶ Equal Participation of Faith-Based Organizations in the Federal Agencies' Programs and Activities, 85 Fed. Reg. 82,037, 82,126–27 (Dec. 17, 2020) (to be codified at 45 C.F.R. pt. 87).

²²⁷ See ASIMOW, *supra* note 220, at 48–52.

²²⁸ See, e.g., *Connecticut v. U.S. Dep't of Interior*, 363 F. Supp. 3d 45, 63–64 (D.D.C. 2019); *XP Vehicles, Inc. v. Dep't of Energy*, 118 F. Supp. 3d 38, 78–80 (D.D.C. 2015); *Aera Energy LLC v. Salazar*, 642 F.3d 212, 220–24 (D.C. Cir. 2011); *ATX, Inc. v. U.S. Dep't of Transp.*, 41 F.3d 1522, 1527–30 (D.C. Cir. 1994); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246–48 (D.C. Cir. 1972).

²²⁹ See, e.g., 41 U.S.C. § 3105(a)(2); 2 C.F.R. § 200.205 (2021).

applications stands in some tension with the concept of awarding grants to political favorites.

But nothing requires that competitive grants be awarded solely on merit. For example, OMB's Uniform Grant Guidance requires agencies to convey to applicants in advance "the merit *and other review criteria* that evaluators will use to judge applications," which may include "any statutory, regulatory, or *other preferences*."²³⁰ Further, depending on the review criteria, there may be no one meaning of a meritorious application. Agencies recognize the breadth of merit review by clarifying that rank ordering of applications is only among the aspects that it may use to determine which applications to grant.²³¹ Together, these realities mean that many decisions can be technically justified, even if some appear to be pork-inflected. Defining political "interference" under the 2016 ban may not be as simple as it sounds.

The Hatch Act presents another set of ambiguities governing presidential pork. On the one hand, the Hatch Act prohibits federal employees—including political appointees—from "us[ing their] official authority or influence for the purpose of interfering with or affecting the result of an election."²³² A concerted effort to ensure that grants are allocated to politically valuable jurisdictions for electoral gain would fall afoul of this restriction.²³³

Far from cementing an anti-pork principle for the Executive Branch, however, the Hatch Act does not apply to the President or Vice President, so its restrictions do not limit their decisions and actions.²³⁴ The Hatch Act also prohibits concerted effort to influence an election but says nothing about actions that happen to help do so, or those political decisions that take place in the aftermath of an election. Moreover, the Hatch Act permits political officials to announce grant awards at campaign events, thus blurring lines between the campaign and the government, as long as the campaign (or the political official) pays for the travel,²³⁵ and as long as the announcement does not explicitly tie the award to a rationale for voting.²³⁶

Finally, the legal framework governing disaster declarations provides capacious responsibility to the President to make decisions, thus leaving the door open for presidential pork. The relevant law is the Stafford Act, which leaves to the "direction of the President" whether the conditions for an emergency or major disaster are met.²³⁷ The governor of each affected state must make a formal request to the President for such a declaration, but after that

²³⁰ 2 C.F.R. pt. 200, app. I, ¶ E.1 to .2 (2021) (emphasis added).

²³¹ See, e.g., 34 C.F.R. § 75.217 (2021).

²³² 5 U.S.C. § 7323(a)(1).

²³³ See U.S. Off. Special Couns., OSC Advisory Regarding Political Briefings in the Federal Workplace (Oct. 6, 2011).

²³⁴ 5 U.S.C. § 7322(1).

²³⁵ See U.S. Off. Special Couns., OSC Advisory Regarding Mixed Travel by Presidentially-Appointed / Senate Confirmed (PAS) Employees (Oct. 6, 2011).

²³⁶ See 5 U.S.C. § 7323(a)(1).

²³⁷ 42 U.S.C. §§ 5121(a)–(b), 5152, 5170(a), 5170b(a).

request, the President “may declare” that a major disaster or emergency exists—but need not, with no additional statutory constraints.²³⁸ FEMA regulations provide a set of elements the agency considers in advising the President as to when a disaster declaration is appropriate, but nonetheless the final decision is up to the President.²³⁹ The Stafford Act provides that after such a declaration, “[t]he Federal share of assistance . . . shall be not less than 75 percent of the eligible cost of such assistance” with no further elaboration on when a greater federal share is appropriate.²⁴⁰ Under this framework, there is no requirement for identical treatment of jurisdictions during a disaster or emergency.

The overall legal framework governing grant award decisions thus has some bright-line edges against presidential pork but a lot of play in the joints.

3. Norms

The norms around presidential pork are contested. On the one hand, allegations of Executive Branch pork are styled as exposés.²⁴¹ Officials tend to distance themselves from evidence of presidential pork or to deny that pork explains decisions.²⁴² After all, of the rationales understood to undergird federal funding programs—compensating for federal spillovers, relying on the federal government’s superior fiscal capacity, and providing policy leadership to jurisdictions²⁴³—none is rooted in rewarding the President’s political supporters. Indeed, an important development of the last hundred years has been the professionalization of the civil service and a move away from the spoils-based regimes of the 19th century.²⁴⁴ When officials distance themselves from potential presidential pork, they are tapping into the sense that making discretionary grant decisions for political reasons smacks of corruption.²⁴⁵

This understanding is rooted in one of the primary narratives about the structure of American government: presidential universalism, the idea that the President is the one nationally elected leader who can be trusted to look beyond

²³⁸ See 42 U.S.C. §§ 5170(a), 5191(a).

²³⁹ 44 C.F.R. § 206.48 (2021).

²⁴⁰ 42 U.S.C. §§ 5170b(b), 5193(a).

²⁴¹ See, e.g., Ernest Holsendolph, *Chicago Facing U.S. Fund Loss, Rebuff to Mayor*, N.Y. TIMES, Nov. 21, 1979, at A1; Michael Grunwald, *Billions for Inside Game on Reading*, WASH. POST, Oct. 1, 2006, at B1, B4; George F. Will, *Artists in Harness*, WASH. POST, Sept. 17, 2009, at A25.

²⁴² See, e.g., J. Theodore Anagnoson, *Federal Grant Agencies and Congressional Election Campaigns*, 26 AM. J. POL. SCI. 547, 547 (1982); Grunwald, *supra* note 241, at B4; Zeleny, *supra* note 223.

²⁴³ David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2571–79 (2005).

²⁴⁴ See generally NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940* (2013).

²⁴⁵ Cf. SUSAN ROSE-ACKERMAN & BONNIE J. PALIFKA, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* 99–109 (2d ed. 2016).

narrow-minded jurisdictional self-interest for the good of the country.²⁴⁶ This narrative is used to justify the presidential control model in the administrative state in both its strong (unitary executive)²⁴⁷ and weaker (presidential administration)²⁴⁸ forms. As applied to pork, and turning from the normative to the issue of electoral incentives, the narrative would suggest that, in contrast to individual legislators, “a president seeking to maximize his electoral prospects need not pander to narrow geographic constituencies; rather, presidents need only respond to centrist opinion and pursue policies that maximize outputs for the greatest number of people.”²⁴⁹

On the other hand, a recent spate of empirical studies in political science has revealed that presidential pork is, in fact, a standard phenomenon in our political system. “Divide-the-dollar politics” is not limited to Congress.²⁵⁰ To the contrary, Presidents appear to be even more successful in targeting spending than legislators are.²⁵¹ As John Hudak puts it, “federal grants function as an incumbent-controlled pool of campaign funds that presidents and their subordinates are able to allocate strategically.”²⁵²

Douglas Kriner and Andrew Reeves have uncovered evidence of three forms of “presidential particularism” in the allocation of federal grants: *electoral particularism*, where Presidents target funds to swing states in an effort to secure reelection or the election of their same-party successors; *partisan particularism*, where Presidents target funds to reward their core voters; and *coalitional particularism*, where Presidents target funds to members of Congress and governors who share their party affiliation to shore up support for presidential policy preferences.²⁵³ Across a wide variety of data sets, covering all manner of grant-giving agencies and Presidents for the last several decades, studies consistently reveal that jurisdictions of importance to the President disproportionately receive somewhere between 2% and 7% more

²⁴⁶ See Jide Nzalibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1218–30 (2006).

²⁴⁷ See *id.* at 1260–65.

²⁴⁸ See *id.* at 1226–27.

²⁴⁹ DOUGLAS L. KRINER & ANDREW REEVES, THE PARTICULARISTIC PRESIDENT: EXECUTIVE BRANCH POLITICS AND POLITICAL INEQUALITY 11–18 (2015).

²⁵⁰ Douglas L. Kriner & Andrew Reeves, *Presidential Particularism and Divide-the-Dollar Politics*, 109 AM. POL. SCI. REV. 155, 155–56 (2015).

²⁵¹ KRINER & REEVES, *supra* note 249, at 11.

²⁵² HUDAK, *supra* note 203, at 61.

²⁵³ KRINER & REEVES, *supra* note 249, at 30–47, 124–46; see also Christopher R. Berry, Barry C. Burden & William G. Howell, *The President and the Distribution of Federal Spending*, 104 AM. POL. SCI. REV. 783, 797 (2010); Dino P. Christenson, Douglas L. Kriner & Andrew Reeves, *All the President’s Senators: Presidential Copartisans and the Allocation of Federal Grants*, 42 LEGIS. STUD. Q. 269, 270 (2017); Valentino Larcinese, Leonzio Rizzo & Cecilia Testa, *Allocating the U.S. Federal Budget to the States: The Impact of the President*, 68 J. POL. 447, 449–50 (2006).

grant funding—potentially hundreds of millions of dollars—than they otherwise would have.²⁵⁴

Disaster relief is no exception to this overall trend. While “objective measures of need predict disaster declarations” in general, once controlling for damage, weather, and need, it appears that “counties in swing states, core states, and districts represented by members of Congress from the president’s party have a higher probability of receiving a disaster declaration.”²⁵⁵ Moreover, targeting disaster aid is even higher in election years.²⁵⁶

In light of the consistency and depth of these findings, it cannot be said that there is a strong norm against presidential pork. To the contrary, as Berry, Burden, and Howell summarize in their important paper beginning the recent round of studies in this area, “For an artful president intent upon redirecting federal outlays to a preferred constituency, ‘the opportunity for mischief is substantial.’”²⁵⁷

Opportunities for presidential pork increased after Congress banned legislative earmarks starting in 2011 in response to bribery scandals.²⁵⁸ While legislators gave up the opportunity to target funding to specific jurisdictions in appropriations laws, they continued to voice their opinions about how agencies should make allocational decisions, both in committee report language and through letters and more informal contacts with agency staff.²⁵⁹ This move gave

²⁵⁴ KRINER & REEVES, *supra* note 249, at 105–08, 130; *cf.* HUDAK, *supra* note 203, at 16, 18, 164–67, 169–70. In addition to varying the size of a grant award in correlation with political benefits for the President, it appears that agencies may also vary the length of time it takes to make grant award decisions, speeding up overall processing time in presidential election years and varying the length of processing time to favor presidential supporters over non-supporters during midterm years. *See* John A. Hamman & Jeffrey E. Cohen, *Reelection and Congressional Support: Presidential Motives in Distributive Politics*, 25 AM. POL. Q. 56, 64–67 (1997). There is also evidence that the extent of political control in agencies is positively correlated with distributional outcomes. *See* Christopher R. Berry & Jacob E. Gersen, *Agency Design and Political Control*, 126 YALE L.J. 1002, 1031–33 (2017); David E. Lewis, *Political Control and the Presidential Spending Power* 4, 17 (Ctr. for the Study of Democratic Insts., Vand. Univ., Working Paper No. 1-2017).

²⁵⁵ KRINER & REEVES, *supra* note 249, at 95–96; *see also* Steven Horwitz & E. Frank Stephenson, *The Politicization of Disaster Relief*, REGULATION, Summer 2020, at 4–5.

²⁵⁶ KRINER & REEVES, *supra* note 249, at 98–101.

²⁵⁷ Berry, Burden & Howell, *supra* note 253, at 783, 786 (quoting LOUIS FISHER, PRESIDENTIAL SPENDING POWER 88 (1975)).

²⁵⁸ *See, e.g.*, Brian M. Kuhn, *The End of the Earmark Era: The New Politicization of Federal Agency Spending* 1–4 (Dec. 2017) (M.P.A. thesis, Graduate College of Bowling Green State University) (on file with the *Ohio State Law Journal*); MATTHEW B. DICKERSON, RETURN OF THE SWAMP: EARMARKS WOULD BE A COSTLY MISTAKE 2–3 (Heritage Found., Backgrounder, Ser. No. 3602, March 2021), <https://www.heritage.org/sites/default/files/2021-03/BG3602.pdf> [<https://perma.cc/Q59V-JVE4>].

²⁵⁹ *See, e.g.*, Tom Scheck & Kelly Busche, *How Congress, Trump and Obama Played Favorites with Transportation Money*, APMREPS. (May 23, 2019), <https://www.apmreports.org/story/2019/05/23/congress-earmarks-tiger-build-grants> [<https://perma.cc/MG6R-H3LS>].

the agency the opportunity to choose whom to reward and to tie these decisions to being responsive to its funders.²⁶⁰

Still, if there is no strong norm against presidential pork, the recent political science work suggests three features of presidential pork that seem to constitute a softer norm. First, presidential pork appears only at the margins. Politically useful jurisdictions appear to receive somewhere between 5% and 7% more funding than they otherwise would, while jurisdictions that are not politically useful are not even close to being cut out from receiving funding.²⁶¹

Second, the existence of presidential pork tends to be implicit, not explicitly proclaimed, a norm that Adrian Vermeule might label a “convention[] against *saying* things” rather than a “convention[] against *doing* things.”²⁶² When announcing grants, Presidents and their appointees talk about the amount of funding that has gone to the jurisdiction and underscore the way the administration is working on their behalf; they do not articulate an overt offer of funding for votes or a draw a blatant connection between past votes received and awards made.²⁶³

Third, where Presidents and appointees do publicly allude, even if obliquely, to the idea of presidential pork, they tend to frame it as a reward for supporters and a lever to gain support from politically useful allies, rather than as a punishment for jurisdictions who vote for the other party.²⁶⁴ Grant announcements are proudly made in battleground states in the run-up to an election; no one travels to a state not in play to point out grant denials.²⁶⁵

4. *Merits*

The tools of Executive Branch allocation decisions themselves are useful; the soft norms governing presidential pork are acceptable; but the potential for expansive and destructive presidential pork is dangerous.

The tools themselves are useful because Congress cannot possibly make all specific allocation decisions itself. Even at the height of the legislative earmark era, much discretion resided in Executive Branch decisions.²⁶⁶ Nor, of course, would it remove politics if Congress were to make the allocation decisions itself. If federal grants are to exist, delegating award decisions to the Executive Branch is reasonable, especially against pre-articulated, transparently disclosed grant requirements and award priorities, per the norm of Funding Opportunity Announcements explained in Part II.²⁶⁷ Making award decisions is quintessential program administration. There is also the opportunity to require

²⁶⁰ *See id.*

²⁶¹ KRINER & REEVES, *supra* note 249, at 130, 180–81; HUDAK, *supra* note 203, at 178.

²⁶² Adrian Vermeule, *The Third Bound*, 164 U. PA. L. REV. 1949, 1950 (2016).

²⁶³ *See* KRINER & REEVES, *supra* note 249, at 8–10, 164.

²⁶⁴ *See id.*

²⁶⁵ *See id.*

²⁶⁶ *See id.* at 103–08.

²⁶⁷ *See supra* notes 31–34, 53 and accompanying text.

more reasoned explanation from the Executive Branch's allocation decisions than from congressional earmarks.²⁶⁸

Political oversight of this process is acceptable as well. Not all decisions at the end of the review process will be technical ones; at bottom, there will be some value judgments about which entities should receive funding.²⁶⁹ Dispassionate analysis and advice from civil servants and outside experts, followed by a final decision by a politically accountable official, is part of the basic model of reasoned decision-making and democratic accountability that helps justify the structure of American government.²⁷⁰

Developing internal procedures to govern the procedures behind evaluating grant applications is also a sensible task for agencies to engage in. To the extent an agency can reasonably explain why it is making a procedural change in the spirit of rationality (such as improving efficiency or fairness or furthering statutory goals), it is the kind of competent internal governance that agencies routinely do, and should be encouraged to do.²⁷¹

Making public announcements of the winners of federal grants is also a salutary tool. When political officials announce and take ownership of policy goals and successes, it can further accountability, allowing voters to hold them responsible for accomplishing those goals. The accountability implications are not different simply because the policy result is connected to funding. There are some policy choices that require funding, after all: roads have to be built; broadband has to be connected; health clinics have to be set up; schools have to hire staff to serve students' needs. Voters can assess for themselves whether they like these outcomes and express their views at the ballot box.

That the tools governing awards decisions are beneficial in their pure form does not mean that presidential pork writ large is beneficial, however. Four elements characterize dangerous presidential pork.

First, presidential pork is dangerous when it implements pure partisan favoritism and raw politics rather than a conception of the public interest or

²⁶⁸ See MASHAW, *supra* note 67, at 3–4.

²⁶⁹ Consider, for example, the general selection criteria from among which the Secretary of Education may in the end decide to make an award: the need for the project, the significance of the project, the quality of the project design, the quality of the project services, the quality of the project personnel, the adequacy of the project resources, the quality of the management plan, the quality of the project evaluation, and the strategy to scale the project. 34 C.F.R. § 75.210 (2021). Even if each of these criteria is worth the same number of points, and even if external reviewers present a ranked order of proposals to the Secretary for decision, the Secretary may find that a project received low marks for a criterion that is less important under the circumstances—perhaps a zero on the strategy to scale the project but a twenty on the quality of the project personnel is worth more in a given case than a twenty on a strategy to scale the project but a zero on the project personnel. In other words, there may end up being a lot of flexibility even in a highly specified process.

²⁷⁰ See, e.g., DONALD F. KETTL, *POLITICS OF THE ADMINISTRATIVE PROCESS* 81–92 (8th ed. 2021); MASHAW, *supra* note 67, at 161–62.

²⁷¹ See Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1250–56 (2017).

public values.²⁷² Such implementation undermines the ideal of fair competition against publicly stated selection criteria before an unbiased decisionmaker. It also undercuts another goal of the federal grant process, to implement controls in order to limit “fraud, waste, and abuse.”²⁷³ When civil servants’ technical or policy concerns are ignored because the administration wants to fund a favored group, it is not good for the public fisc or the ability to reach the program’s intended outcome. Where presidential pork cannot be connected to different public values (even if those values align with ideology), but instead seems largely to result from plain-vanilla tribalism, it is difficult to defend allocation decisions either on accountability grounds or as reasoned decision-making. As Kevin Stack has argued, such distributional choices are a form of “partisan administration,” which has “no public virtues.”²⁷⁴

Second, presidential pork is dangerous when it is rooted in an invidious desire to harm those who are denied the funding. Tradeoffs are a normal part of decision-making, and harm may be an unfortunate byproduct of one choice or another.²⁷⁵ But a decision rooted in an intent to harm transforms a government decision from one that promotes some version of the general welfare to one that unfairly targets disfavored groups or political opponents for worse treatment.²⁷⁶ Such a motive entrenches subordination²⁷⁷ and disrupts the crucial democratic premise that the political opposition is legitimate.²⁷⁸

To be sure, there can be slippage between using funds to harm and to reward, if using funds to reward allies ultimately diminishes the availability of funds for non-allies. There may also be slippage between politically disfavored status and conduct, as presumably jurisdictions could make different policy choices and change their political status. But as a general matter, the use of presidential pork to harm jurisdictions as enemies of the President—or at least to give the perception of doing so—undermines the functioning of the democratic system.

Third, presidential pork is dangerous when it is transparently embraced as part of pay-to-play decision-making. When public officials emphasize that they have the power to make allocation decisions based on their own personal desires, rather than on objective criteria or on assessments of the public good, they destabilize the foundation of American government: that we have a government of laws, not of men, and that no one is above the law.²⁷⁹ The public nature of the claim can have an iterative effect that can further undercut the

²⁷² See, e.g., Watts, *supra* note 74, at 9; Mendelson, *supra* note 73, at 1144–45.

²⁷³ See, e.g., Pasachoff, *supra* note 91, at 577.

²⁷⁴ Stack, *supra* note 73, at 2, 9–13, 29–30.

²⁷⁵ See, e.g., Mendelson, *supra* note 73, at 1176–78.

²⁷⁶ See, e.g., Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 496 (2003); Shalev Gad Roisman, *Presidential Motive*, 108 IOWA L. REV. 1, 30–31 (2022).

²⁷⁷ Cf. Lawrence, *supra* note 37, at 121–22.

²⁷⁸ See Renan, *supra* note 192, at 2240.

²⁷⁹ See *id.*

functioning of government.²⁸⁰ The more the public believes that this is how government operates, the more they are likely to engage in conduct that buys into it (such as prioritizing connections or engaging in tit-for-tat favors over working to create substantively good grant applications and pursuing the ordinary procedures).²⁸¹ And the more the public believes that this is how government operates, the less they are likely to accept losing, whether on any particular grant, any other policy choice, or an election itself.²⁸²

Together or individually, the presence of these elements undermines the legitimacy of government in the sociological sense: the idea that people support the legitimacy of a legal regime based in part on a perception that authorities are trustworthy and procedures are fair.²⁸³ The importance of sociological legitimacy highlights a fourth element of dangerous presidential pork: the extent to which it *appears* that any of the other three elements is present, regardless of whether it is. This is because appearance does a lot of the harmful work. If officials appear to make award decisions purely on the basis of partisan favoritism or with the intent to harm a disfavored group, or proclaim that they are doing so, it will undermine trust in government even if the awards actually are based on objective criteria.

In between these two poles—the baseline value of the tools of grant allocation and the elements of dangerous presidential pork—the soft norms of presidential pork described above are broadly tolerable.

That presidential pork appears to be at the margins of general distributional trends means that competition is generally fair, especially since at least some partisan-aligned distribution is likely attributable to different policy choices made up front. As Kriner and Reeves acknowledge, “inequalities in the allocation of federal resources along partisan lines may naturally arise when presidents of different parties pursue different policy agendas formed by competing views of the [national] interest.”²⁸⁴ Moreover, to the extent that some presidential pork is correlated with the election cycle, it means (assuming that different parties hold the presidency at different times) that no jurisdiction or set of grantees is permanently cut out.²⁸⁵

That the existence of presidential pork tends to be implicit, rather than explicitly proclaimed, avoids suggesting, much less embracing, that the game is rigged. Denying the existence of a quid pro quo of funding for votes can help foster acceptance of the decisions in light of the reality that many legitimate outcomes for discretionary funding decisions are possible. Being forced to

²⁸⁰ See Roisman, *supra* note 276, at 130–31.

²⁸¹ See, e.g., ROSE-ACKERMAN & PALIFKA, *supra* note 245, at 11.

²⁸² Roisman, *supra* note 276, at 131, 135.

²⁸³ See, e.g., RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 21–24 (2018); Ming H. Chen, *Beyond Legality: The Legitimacy of Executive Action in Immigration Law*, 66 SYRACUSE L. REV. 87, 101–05 (2016).

²⁸⁴ KRINER & REEVES, *supra* note 249, at 90.

²⁸⁵ See *id.* at 47.

articulate rational, nonpartisan reasons for awards can also help limit partisan decisions from being made in the first place.²⁸⁶

That presidential pork is framed as a reward rather than a denial when it is obliquely acknowledged supports a positive vision of government as attempting to respond to human need instead of purposely hurting citizens. Using funds to build support for policy positions can also be seen as incentivizing grantees to make certain choices, in line with how Congress itself uses its spending authority.²⁸⁷

If all three soft norms are generally acceptable, however, where these soft norms start to shade into the dangerous version of presidential pork, trouble lies ahead.

B. *The Trump Administration's Moves*

The Trump Administration made ready use of all three tools of grant awards. The public announcement of awards fell into the category of the ordinary use of the tool and raised no strong concerns about dangerous presidential pork. It was less clear whether agencies' changes to their award procedures and their final award decisions reflected ordinary or extraordinary uses of these tools, but even if these actions were ordinary, at least some appeared to promote an undesirable vision of grant funding as partisan favoritism and the desire to harm disfavored groups. As for the President's own disaster funding, his rhetoric made important awards both extraordinary and troublesome on their merits for these same reasons.

1. *Ordinary Presidential Pork*

The Administration announced several grant awards in a manner that may have implied a connection to electoral rewards. For example, Interior Department Secretary Ryan Zinke traveled to the swing state of Pennsylvania shortly before a special election for a House seat in that state, where he announced \$56 million in new grant awards, in the presence of the Republican candidate, later appearing on Fox News to discuss the election.²⁸⁸ Transportation Secretary Elaine Chao announced a multi-million-dollar grant in Nevada while touting the ability of the state's incumbent Republican senator, whose seat was in jeopardy in the upcoming midterms, to secure transportation funding.²⁸⁹ President Trump announced nearly \$10 billion in FEMA aid for long-term hurricane relief in Puerto Rico, a move that many observers saw as

²⁸⁶ See Vermeule, *supra* note 262, at 1960–62.

²⁸⁷ Cf. Super, *supra* note 243, at 2571–79.

²⁸⁸ See Anthony Adragna, *Democrats Seek Probe into Whether Zinke Violated Hatch Act*, POLITICO (Mar. 7, 2018), <https://www.politico.com/story/2018/03/07/ryan-zinke-hatch-act-democrats-444362> [<https://perma.cc/4TET-279C>].

²⁸⁹ Scheck & Busche, *supra* note 259.

an attempt to gain support from Florida's Latino voters in the imminent 2020 election.²⁹⁰

Although these actions raised eyebrows at the time, they appear to be within the soft norms for award announcements, and on reflection raise few true concerns. The announcements reflect grant awards at the margins; there was no indication that the awards were disproportionate to the jurisdictions' needs or the amount of funding available.

The announcements also avoided explicitly tying the funding to a vote. For example, Secretary Chao's praise of the Senator's "strong voice in infrastructure and transportation investment" does not sound enough like a campaign speech to trigger the Hatch Act.²⁹¹ The Office of Special Counsel found no Hatch Act violation in Secretary Zinke's announcement.²⁹² While the Hatch Act does not apply to the President,²⁹³ when asked whether the timing of his announcement was connected to his interest in getting votes in Florida, the President deflected the question rather than owning any electoral connection, just as most officials would.²⁹⁴

Moreover, the announcements further reflect the norm of using funding as a reward rather than taunting disfavored jurisdictions with the absence of funds. These announcements are thus in keeping with the tradition common to all recent administrations of using grant announcements as an understated election-year strategy without raising significant concerns about promoting a spoils-based regime.²⁹⁵

2. Ordinary or Extraordinary?

If grant announcements appeared to fall within the norm for presidential pork and to raise few overall concerns, it is less clear whether the Administration's efforts to change grant award procedures and to affect ultimate

²⁹⁰ Seung Min Kim, Josh Dawsey & Jose A. Del Real, *Trump Announces Aid Package for Puerto Rico in a Campaign Year Reversal Democrats Call Brazenly Political*, WASH. POST (Sept. 18, 2020), https://www.washingtonpost.com/politics/trump-puerto-rico-election/2020/09/18/00ee5a2a-f9ba-11ea-be57-d00bb9bc632d_story.html [https://perma.cc/2ALT-DKET].

²⁹¹ Scheck & Busche, *supra* note 259; see U.S. Off. Special Couns., *supra* note 235.

²⁹² Rachel Frazin, *Zinke Cleared of Violating Federal Rules Tied to Pennsylvania Special Election*, HILL (Mar. 12, 2019), <https://thehill.com/policy/energy-environment/overnights/433719-zinke-cleared-of-violating-federal-rules-pertaining-to> [https://perma.cc/8FHT-UKXX].

²⁹³ See *supra* note 234 and accompanying text.

²⁹⁴ Peter Baker & Patricia Mazzei, *Trump Declares He is Now 'the Best Thing That Ever Happened' to Puerto Rico*, N.Y. TIMES (Sept. 18, 2020), <https://www.nytimes.com/2020/09/18/us/politics/trump-puerto-rico-florida.html> [https://perma.cc/4GXS-HEWA].

²⁹⁵ See KRINER & REEVES, *supra* note 249, at 164; Katheryn Houghton, *Biden Administration Focuses on Rural Health Care in Midterm Push*, TAMPA BAY TIMES (Apr. 14, 2022), <https://www.tampabay.com/news/nation-world/2022/04/14/biden-administration-focuses-on-rural-health-care-in-midterm-push/> [https://perma.cc/2PT3-H65G].

grant decisions were ordinary or extraordinary. Either way, though, they were problematic.

a. *Changing Procedures*

The Administration engaged in a number of changes to the review process that arguably embraced the idea of grants as spoils. For example, at the Environmental Protection Agency (“EPA”) and Interior, the Administration placed political officials without substantive policy knowledge in charge of the agencies’ entire grant review process to “ensure funding is in line with the Agency’s mission and policy priorities.”²⁹⁶ At the United States Agency for International Development (“USAID”), senior aides in Vice President Pence’s office newly involved that office in the awards process.²⁹⁷

The Administration also appeared to restructure specific aspects of the process to make it easier for preferred applicants to win. For example, one DOJ office began to screen the social media accounts of potential peer reviewers to ensure ideological alignment before approving them to review applications.²⁹⁸ In addition, there was some evidence that the Department of Transportation (“DOT”) set up a special process to preference applications from Kentucky, the home state of then-Senate Majority Leader Mitch McConnell (and Secretary Chao’s husband).²⁹⁹

The Administration appeared to embrace overall weaknesses in the grant application review process that allowed it to give short shrift to merit review while privileging applicants of interest to the Administration for other reasons. The most prominent instance was in the Department of Transportation, whose

²⁹⁶ Juliet Eilperin, *EPA Now Requires Political Aide’s Sign-Off for Agency Awards, Grant Applications*, WASH. POST (Sept. 4, 2017) [hereinafter Eilperin, *EPA*], https://www.washingtonpost.com/politics/epa-now-requires-political-aides-sign-off-for-agency-awards-grant-applications/2017/09/04/2fd707a0-88fd-11e7-a94f-3139abce39f5_story.html [https://perma.cc/2RJT-BA3Z]; Juliet Eilperin, *Interior Puts Grants Worth Hundreds of Millions of Dollars Through Political Review*, WASH. POST (Jan. 9, 2018) [hereinafter Eilperin, *Interior*], https://www.washingtonpost.com/politics/interior-puts-grants-to-nonprofits-universities-through-political-appointee-review/2018/01/08/ec7140b2-f4bc-11e7-beb6-c8d48830c54d_story.html [https://perma.cc/UJ36-BWK4].

²⁹⁷ Yeganeh Torbati, *How Mike Pence’s Office Meddled in Foreign Aid to Reroute Money to Favored Christian Groups*, PROPUBLICA (Nov. 6, 2019), <https://www.propublica.org/article/how-mike-pences-office-meddled-in-foreign-aid-to-reroute-money-to-favored-christian-groups> [https://perma.cc/PXT8-7DQS].

²⁹⁸ Sarah N. Lynch, *Union Says Trump Appointee May be Improperly Influencing Justice Department Crime Victim Grants*, REUTERS (Sept. 4, 2019), <https://www.reuters.com/article/us-usa-justice-grants/union-says-trump-appointee-may-be-improperly-influencing-justice-department-crime-victim-grants-idUSKCN1VP28C> [https://perma.cc/JH85-N2J9].

²⁹⁹ Tucker Doherty & Tanya Snyder, *Chao Created Special Path for McConnell’s Favored Projects*, POLITICO (June 10, 2019), <https://www.politico.com/story/2019/06/10/mcconnell-elaine-chao-1358068> [https://perma.cc/843Q-HK85].

inconsistent and nontransparent practices were ultimately subject to a lengthy critique from the Government Accountability Office (“GAO”).³⁰⁰

At one point, the Administration appeared to use the threat of losing access to federal grants to punish a Republican senator for insufficient loyalty. After Senator Lisa Murkowski of Alaska provided the final vote against the health care bill that would have repealed the Affordable Care Act, President Trump tweeted opposition to her.³⁰¹ EPA then put a hold on all grants to Alaska,³⁰² while Interior Secretary Zinke called both senators from Alaska to let them know that Murkowski’s vote had “put Alaska’s future with the [A]dministration in jeopardy.”³⁰³

It is debatable whether these actions were outside or inside the norm.³⁰⁴ On the one hand, as to the soft norms, these processes appeared to be totalizing, rather than affecting decisions only at the margins; in at least some of the instances, the Administration seemed to admit the connection between politics and the award of grants; and at least in the threat to Alaska, the connection took the form of a punishment rather than a reward. In addition, former officials who served in other (Democratic) administrations highlighted some particular ways in which these moves were different, especially office by office; for example, the DOJ office had never before screened the social media accounts of outside reviewers,³⁰⁵ and the Vice President’s office had never gotten involved in the specifics of USAID grant review.³⁰⁶ In these ways, the actions appear to be outside the norm.

On the other hand, more generally, while it may sometimes be poor management to place inexperienced campaign staffers or childhood friends in senior agency roles to oversee consequential processes, campaign work is a common path into a political job,³⁰⁷ and senior leadership often brings trusted

³⁰⁰ U.S. GOV’T ACCOUNTABILITY OFF., GAO-19-541, DISCRETIONARY TRANSPORTATION GRANTS: ACTIONS NEEDED TO IMPROVE CONSISTENCY AND TRANSPARENCY IN DOT’S APPLICATION EVALUATIONS 18, 25–26 (2019).

³⁰¹ Dino Grandoni & Juliet Eilperin, *Murkowski Not Swayed by Intense Pressure from Trump Administration on Health Care*, WASH. POST (July 28, 2017), https://www.washingtonpost.com/politics/murkowski-not-swayed-by-intense-pressure-from-trump-administration-on-health-care/2017/07/28/eb6c9d16-73d8-11e7-8839ec48ec4cae25_story.html?utm_term=.2ba4d47f4978&tid=a_inl_manual [<https://perma.cc/25M9-MPPB>].

³⁰² Eilperin, *EPA*, *supra* note 296.

³⁰³ Erica Martinson, *Trump Administration Threatens Retribution Against Alaska over Murkowski Health Votes*, ANCHORAGE DAILY NEWS, <https://www.adn.com/politics/2017/07/26/trump-administration-signals-that-murkowskis-health-care-vote-could-have-energy-repercussions-for-alaska/> [<https://perma.cc/U3HL-HSN2>] (Dec. 2, 2017).

³⁰⁴ See Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 130–32 (2017); Renan, *supra* note 192, at 2202.

³⁰⁵ See Lynch, *supra* note 298.

³⁰⁶ See Torbati, *supra* note 297.

³⁰⁷ See, e.g., *A Quick Guide to Working on Political Campaigns*, HARV. L. SCH., <https://hls.harvard.edu/bernard-koteen-office-of-public-interest-advising/a-quick-guide-to-working-on-political-campaigns/> [<https://perma.cc/4MPP-SHQY>].

support from pre-political life.³⁰⁸ There are many examples throughout agency practice of stacking a decision-making body with deciders thought to be favorable to the administration's policy goals.³⁰⁹ GAO included the Obama Administration in its critique of the Department of Transportation's grant processes³¹⁰ and has repeatedly found that agencies across administrations should improve their merit review processes.³¹¹ As for the threats to senators, the Trump Administration's actions followed the typical path for such threats, where a public threat to use the denial of grant funds as punishment is swiftly shut down.³¹² Shortly after the threat became news, the Senator and the Secretary smoothed things over while posing with Alaskan beers.³¹³

Ultimately, whether these moves were inside or outside the norm matters less than whether such actions are troublesome. And they are: they gave the impression that grant decisions were based on partisan favoritism more than merit or need. Placing a political official with detailed, start-to-finish oversight of the grant review process, passing all (not just the most meritorious) grant applications on for final political review, and claiming the authority to withhold grants to a state based on political officials' disagreement with the Administration's priorities might suggest to the public and to civil servants that merit-based grant review is a meaningless charade. There may be no standard for how many meetings is too many with one state of particular interest to the agency's leadership,³¹⁴ but the perception that some states receive special treatment undermines trust in government. Even if some aspects of these actions find analogues in previous administrations, they nonetheless crossed the line from tolerable to destructive presidential pork.

³⁰⁸ See, e.g., BILL CLINTON, *MY LIFE* 13–14 (2004); ARTHUR M. SCHLESINGER, JR., *ROBERT KENNEDY AND HIS TIMES* 228–32 (40th anniversary ed. 2018).

³⁰⁹ See, e.g., Heinzerling, *supra* note 75, at 941–42; Emily S. Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, 69 *DUKE L.J.* 1749, 1783 (2020).

³¹⁰ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 300, at 22.

³¹¹ See generally U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-113, *GRANTS MANAGEMENT: SELECTED AGENCIES SHOULD CLARIFY MERIT-BASED AWARD CRITERIA AND PROVIDE GUIDANCE FOR REVIEWING POTENTIALLY DUPLICATIVE AWARDS* (2017).

³¹² See *supra* notes 241–42 and accompanying text.

³¹³ Erica Martinson, *After Health Vote Drama, Zinke and Murkowski Meet Over Alaska Ales*, ANCHORAGE DAILY NEWS, <https://www.adn.com/politics/2017/08/03/after-last-weeks-controversy-murkowski-and-zinke-meet-up-to-share-alaska-ales/> [<https://perma.cc/EMX3-5TW5>] (Aug. 4, 2017).

³¹⁴ Letter from Mitch Behm, Deputy Inspector Gen., U.S. Dep't of Transp., to Peter DeFazio, Chairman, Comm. on Transp. & Infrastructure, U.S. House of Representatives 2–3 (Mar. 2, 2021) [hereinafter Letter from U.S. Dep't of Transp.], https://www.oig.dot.gov/sites/default/files/DOT%20OIG%20Letter%20to%20Chairman%20Peter%20DeFazio_2021-03-02.pdf [<https://perma.cc/P4RJ-9HPD>].

b. *Making Awards*

The Administration also made a number of award decisions that appeared to further the idea of grants as spoils.

One set of moves appeared to award funds to lower-ranked applicants with political connections or whose missions better aligned with the Administration's views. For example, an office in DOJ funded two organizations that had received low marks from external reviewers but that were ideologically aligned with the Administration, while rejecting two long-established nonprofits that were at the top of the list but had taken public stands against the Administration.³¹⁵ Similarly, the involvement of the Vice President's staff in USAID grant review led to funding decisions that preferenced Christian minorities even when career staff expressed concern about the applicants' capacities and qualifications.³¹⁶

A second set of agency moves appeared to direct grant funds to favored jurisdictions. For example, critics charged that the special process the Department of Transportation set up for grant applicants from Kentucky ended up funding projects that might not otherwise have been funded.³¹⁷ Critics also calculated that DOT used its key discretionary grant program to disproportionately award funds to electorally important jurisdictions.³¹⁸

As with changing award procedures, it is debatable whether these decisions fell outside or inside the norm. On the one hand, as to the soft norms, the USAID and DOT examples appeared to be all-encompassing rather than at the margins, while the DOJ example arguably reflected the intent to harm the two organizations that had opposed the Administration rather than only to reward political friends. In addition, longstanding civil servants in both DOJ and USAID raised concerns that the political officials making decisions were not following standard operating procedure.³¹⁹

On the other hand, in keeping with the soft norms, the officials denied that intentional partisan goals drove their decisions. The DOJ office justified its elevation of lower-ranked applicants as appropriate in order to distribute funds across as many states as possible, noting that no higher-ranked applicants in those states were rejected.³²⁰ The goal of furthering geographic distribution is a

³¹⁵ See Sarah N. Lynch, *Justice Department Anti-Human Trafficking Grants Prompt Whistleblower Complaint*, REUTERS (Feb. 10, 2020), <https://www.reuters.com/article/us-usa-justice-grants-exclusive/exclusive-justice-department-anti-human-trafficking-grants-prompt-whistleblower-complaint-idUSKBN20425G> [<https://perma.cc/LV2D-32EZ>].

³¹⁶ Torbati, *supra* note 297.

³¹⁷ Tucker Doherty & Tanya Snyder, *Chao's Team Helped McConnell's State Win Its Largest DOT Grant*, POLITICO (Dec. 17, 2019), <https://www.politico.com/news/2019/12/17/chao-mcconnell-transportation-kentucky-086343> [<https://perma.cc/6AN9-FQLR>].

³¹⁸ Scheck & Busche, *supra* note 259.

³¹⁹ Torbati, *supra* note 297; Lynch, *supra* note 315.

³²⁰ Lynch, *supra* note 315.

standard one.³²¹ At USAID, career staffers “helped educate” the Administration about persecution against another religious group in the region, and eventually, the Administration began to make grant decisions to fund that group.³²² It is not unusual for administrations to have different preferences about what to fund within broadly worded statutes, nor is it unusual for political officials to incorporate learning from civil servants over time. As to DOT awards, the agency’s inspector general turned up no evidence of irregularities raised in interviews with DOT staff,³²³ and the overall concerns about DOT awards encompassed the Obama years as well as the Trump years.³²⁴

Yet also as with changing award procedures, these actions were troublesome even if they were arguably at some level within the norm because they gave the appearance that grant award decisions were tied more to partisan favoritism than to merit. The DOJ office did not explain its geographical preference contemporaneously as part of a reasoned decision-making process, but instead offered it as an apparent post hoc public relations defense by the political official, which undercut the explanation.³²⁵ Meanwhile, at USAID, a senior civil servant who had been responsible for initially rejecting applications from groups the agency deemed unqualified was removed from her position and shuffled into a non-grant-making role, apparently after Vice President Pence’s Chief of Staff demanded that someone be punished for not aiding Christian groups quickly enough.³²⁶ Such apparent punishment of staff for not doing the Administration’s bidding furthered the view that partisanship was driving grant-making. As for DOT, press reports confirmed that Secretary Chao had approved several questionable Kentucky-based projects³²⁷ while leaders in some large Democratic states had a hard time even getting meetings with her.³²⁸

These facts all gave the appearance of improper partisan operations even if there were justifiable reasons for the decisions. The more it seems that grants are simply given to friends and denied to enemies, the less legitimate government action looks.

³²¹ See 2 C.F.R. pt. 200, app. I, ¶ E.1 to .2 (2021).

³²² Torbati, *supra* note 297.

³²³ See Letter from U.S. Dep’t of Transp., *supra* note 314, at 2–3.

³²⁴ See Scheck & Busche, *supra* note 259; U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 300, at 25.

³²⁵ See Lynch, *supra* note 315.

³²⁶ See Torbati, *supra* note 297.

³²⁷ Doherty & Snyder, *supra* note 317; Doherty & Snyder, *supra* note 299.

³²⁸ Tanya Snyder, Tucker Doherty & Arren Kimbel-Sannit, *Elaine Chao Favored Kentuckians in Meeting with Officials Seeking Grants*, POLITICO (Oct. 7, 2019), <https://www.politico.com/news/2019/10/07/elaine-chao-kentucky-officials-grants-028412> [<https://perma.cc/4TLM-QV75>].

3. *Extraordinary Presidential Pork*

President Trump engaged in at least three instances of presidential pork that were rhetorically extraordinary even if the actual awarding of funds was arguably in line with norms. All three instances concerned FEMA funding, and all created at the very least the appearance of dangerous presidential pork.

First, FEMA's disparate responses to three back-to-back hurricanes in 2017 raised the inference that harmful presidential interference was involved. Despite the greater scope of the tragedy in Puerto Rico, FEMA's immediate funding and staffing in Texas and Florida were proportionally greater.³²⁹ While FEMA eventually offered neutral explanations for the disparities, the President's public disparaging of Puerto Rico's Democratic leadership raised questions about whether the slower response in providing emergency relief to Puerto Rico had a more sinister explanation.³³⁰ Several years later, as President Trump made the election-year announcement of funding for Puerto Rico discussed above, he flipped positions and positioned himself as the island's personal savior, calling himself "the best thing that ever happened to Puerto Rico."³³¹

President Trump took a similar aggressor-to-savior stance with disaster aid for California, which, over the course of 2018 and 2019, was grappling with the most serious forest fires in its history.³³² President Trump repeatedly and publicly threatened to prevent FEMA from awarding any more funds to California, with whose Democratic governor he was feuding.³³³ Read generously, his tweets offered a policy rationale for this threat: the state was not engaging in proper forest management. But the policy rationale had a questionable basis in fact³³⁴ and appeared to be a cover for political attacks.³³⁵ Later, when FEMA recommended denying funds to California for a new set of

³²⁹ Charley E. Willison, Phillip M. Singer, Melissa S. Creary & Scott L. Greer, *Quantifying Inequities in US Federal Response to Hurricane Disaster in Texas and Florida Compared with Puerto Rico*, 4 *BMJ GLOB. HEALTH* 1, 2–3 (2019), <https://gh.bmj.com/content/bmjgh/4/1/e001191.full.pdf> [<https://perma.cc/R5R4-9GHL>].

³³⁰ See Danny Vinik, *How Trump Favored Texas Over Puerto Rico*, *POLITICO* (Mar. 27, 2018), <https://www.politico.com/story/2018/03/27/donald-trump-fema-hurricane-maria-response-480557> [<https://perma.cc/8ND6-JH4X>].

³³¹ See Kim, Dawsey & Del Real, *supra* note 290; Baker & Mazzei, *supra* note 294.

³³² See Tim Arango & Jennifer Medina, *California Fire Now the Largest in State History: 'People Are on Edge'*, *N.Y. TIMES* (Aug. 7, 2018), <https://www.nytimes.com/2018/08/07/us/california-fires-mendocino.html> [<https://perma.cc/US5B-HHEP>]; Valerie Richardson, *Gavin Newsom-Donald Trump Feud Threatens FEMA California Wildfire Funds*, *WASH. TIMES* (Jan. 9, 2019), <https://www.washingtontimes.com/news/2019/jan/9/gavin-newsom-donald-trump-feud-threatens-fema-cali/> [<https://perma.cc/FB94-BE8G>].

³³³ Aton & Matthews, *supra* note 7; Richardson, *supra* note 332.

³³⁴ See Aton & Matthews, *supra* note 7.

³³⁵ See Gwynedd Stuart, *A Former Administration Official Says Trump Told FEMA to Withhold California Fire Relief Out of Spite*, *L.A. MAG.* (Aug. 17, 2020), <https://www.lamag.com/citythinkblog/miles-taylor-trump-dhs-video/> [<https://perma.cc/V4LX-C46L>].

fires, President Trump intervened to reverse positions, treating the reversal as an act of presidential beneficence.³³⁶

Third, the President and his advisors appeared to manipulate FEMA's pandemic funding in ways that at times seemed to favor certain Republican states and at times seemed arbitrary. After initially funding 100% of the National Guard's coronavirus response in any state that requested it, the President reduced coverage to 75% for all states but Florida and Texas, which retained their 100% coverage.³³⁷ The President's statements distinguishing blue states and red states supported an inference that he was rewarding his supporters with this aid.³³⁸ Administration officials instructed governors to reach out to the President directly to plead their case,³³⁹ advice that furthered the image of the President as savior. President Trump went on to extend the 100% coverage for several more states, including states that voted Democratic, but for varying amounts of time, with no explanation.³⁴⁰ Observers' concerns then shifted from partisan politics to the arbitrary distribution of aid.³⁴¹

While some aspects of this presidential pork were arguably in line with distributional norms around disaster aid, overall the episodes were both extraordinary and deeply troubling.

As noted above, there is a long history of Presidents using disaster aid to bolster their political fortunes.³⁴² Allegations that disaster declaration decisions are arbitrary are also nothing new; a review conducted by Pew's Stateline project during the Obama Administration raised a similar concern.³⁴³ In addition, the sums of money here could be considered on the margins, in keeping

³³⁶ See Thomas Frank, *Trump Bypassed Rules on Calif. Disaster Approval*, E&E NEWS (Oct. 19, 2020), <https://www.eenews.net/stories/1063716473> (on file with the *Ohio State Law Journal*).

³³⁷ See Alice Miranda Ollstein, *Trump Spares Only Texas and Florida in Cutting Funds for National Guard*, POLITICO (Aug. 4, 2020), <https://www.politico.com/news/2020/08/04/08/04/trump-texas-florida-national-guard-funds-391535> [<https://perma.cc/H59E-H9UM>]; *White House: No More State Exceptions to Covid-19 Cost Share*, NAT'L GUARD ASS'N OF U.S. (Sept. 15, 2020), <https://www.ngaus.org/about-ngaus/newsroom/white-house-no-more-state-exceptions-covid-19-cost-share> [<https://perma.cc/2TLL-P8C9>].

³³⁸ See Philip Bump, *Trump Blames Blue States for the Coronavirus Death Toll—but Most Recent Deaths Have Been in Red States*, WASH. POST (Sept. 16, 2020), <https://www.washingtonpost.com/politics/2020/09/16/trump-blames-blue-states-coronavirus-death-toll-but-most-recent-deaths-have-been-red-states/> [<https://perma.cc/S6XS-7MWZ>].

³³⁹ Alice Miranda Ollstein & Max Cohen, *Biden Hits Trump for Shortchanging States on National Guard Costs*, POLITICO (Aug. 7, 2020), <https://www.politico.com/news/2020/08/07/trump-national-guard-deployment-payment-exemptions-392583> [<https://perma.cc/F3P7-3T69>].

³⁴⁰ *White House: No More State Exceptions to Covid-19 Cost Share*, *supra* note 337.

³⁴¹ Ollstein & Cohen, *supra* note 339.

³⁴² See *supra* notes 255–56 and accompanying text.

³⁴³ Daniel C. Vock & Jim Malewitz, *Disaster Declaration Denials Exasperate Governors*, PEW CHARITABLE TRS. (Aug. 13, 2013), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/08/23/disaster-declaration-denials-exasperate-governors> [<https://perma.cc/J4FE-3P6G>].

with the soft norms of presidential pork, as compared to all federal grant funding going to each of these jurisdictions; the difference between 75% and 100% of the National Guard's pandemic response is likely at the margins even as compared only to pandemic aid going to each jurisdiction (and in the end, both Puerto Rico and California received the funding in question).

At the same time, considering the two other soft norms of presidential pork, President Trump's actions are extraordinary. Far from distancing himself from presidential pork, he instead embraced the idea that funding was contingent on his political preferences, on personal whim rather than rational decision-making. Nor was there any apparent meaningful public interest reason for acting as he did.³⁴⁴ And unlike the typical framing of presidential pork as a reward, the Puerto Rico and California examples illustrate the use of presidential pork with intent to harm a disfavored jurisdiction instead. It is the language around the presidential decisions that made them so abnormal. All three instances also illustrated the President's instincts as a partisan leader against leaders of the other party, leaning in to being the President of the red states while distancing himself from being responsible for the blue states.³⁴⁵

Presidential pork that is a result of the President's vitriol, disconnected from real policy considerations, raises significant concerns about fair and legitimate government. This is so even if no change in the actual distribution of funds results from the President's vitriol. If the President promotes the idea that he makes funding decisions based simply on his personal and partisan views, or embraces the idea of using federal funds to harm his political enemies, the existence of a rational government starts to disintegrate into authoritarianism. In this way, President Trump's actions underscore that presidential accountability is insufficient to ensure administrative legitimacy.³⁴⁶

C. *Cabining Abuse*

Despite the danger of presidential pork, there are few tools to cabin it. In contrast to the policy space, in which lawsuits challenged essentially every controversial grant-related move during the Trump Administration, no lawsuit was filed challenging any of the above aspects of presidential pork. This fact alone illustrates the difficulty of relying on courts to limit the destructive potential of presidential pork; it is not easy to get into court or prove legally cognizable violations. There are also few reliable opportunities for extrajudicial norm enforcement, given a lack of shared agreement about what is acceptable.

³⁴⁴ See Roisman, *supra* note 276, at 106, 136–38.

³⁴⁵ See Peter Baker, *For Trump, It's Not the United States, It's Red and Blue States*, N.Y. TIMES, <https://www.nytimes.com/2020/09/17/us/politics/trump-america.html> [<https://perma.cc/Z7VB-7YYW>] (Sept. 24, 2020).

³⁴⁶ See, e.g., Bressman, *supra* note 276, at 514–15.

1. *Problems with Incentive to Sue*

Frustrated grant applicants have few incentives to challenge a denial of their applications even if they believe that the political decks were stacked against them. For one thing, even though courts can review the denial of a grant application where the claim is that the “agency has transgressed a constitutional guarantee or violated an express statutory or procedural directive,”³⁴⁷ applicants operate against the presumption that grant allocation decisions are unreviewable,³⁴⁸ making litigation in this context far from a default expectation. Applicants may also worry about looking like difficult grantees, which could hinder their chances at obtaining future grants.³⁴⁹

Applicants may also deem the potential remedy not worth the effort. Even if they were to prevail in a claim that the application process was improperly tainted by political bias, the court would not order the agency to award the grant to the petitioner but rather to make a new determination based strictly on legitimate reasons.³⁵⁰ The agency would then be free to reach the same outcome as long as it did not demonstrate any reliance on illegitimate considerations. And the whole process would take a long time—potentially years, at which point the need for the grant may be moot.³⁵¹

2. *Problems with Stating a Claim*

Even if a grant applicant wants to file a lawsuit, it is difficult to state a claim about many aspects of presidential pork, since the legal framework that theoretically limits presidential pork does not actually ban much of it in a way that is easily judicially cognizable.

In addition to the capaciousness of the Hatch Act standard,³⁵² there is no private right of action for its violation, leaving enforcement entirely to the Office of Special Counsel³⁵³ and, for senior officials, to the President himself.³⁵⁴ Moreover, the Hatch Act appears to be irrelevant to the issue of revising internal agency procedures governing the grant decision-making process, as these

³⁴⁷ *Apter v. Richardson*, 510 F.2d 351, 355 (7th Cir. 1975).

³⁴⁸ *See Cal. Hum. Dev. Corp. v. Brock*, 762 F.2d 1044, 1052 (D.C. Cir. 1985) (Scalia, J., concurring).

³⁴⁹ *Cf. Apter*, 510 F.2d at 353.

³⁵⁰ *Alan Guttmacher Inst. v. McPherson*, 805 F.2d 1088, 1096 (2d Cir. 1986); *see D.C. Fed’n Civic Ass’ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1972).

³⁵¹ *See, e.g., XP Vehicles, Inc. v. U.S. Dep’t of Energy*, 118 F. Supp. 3d 38, 45 (D.D.C. 2015); *Aera Energy LLC v. Salazar*, 642 F.3d 212, 213–15 (D.C. Cir. 2011).

³⁵² *See supra* notes 234–36 and accompanying text.

³⁵³ 5 U.S.C. § 1212; *see also Citizens for Resp. & Ethics in Wash. v. U.S. Off. of Special Couns.*, 480 F. Supp. 3d 118, 123 (D.D.C. 2020).

³⁵⁴ *See, e.g., Byron Tau, Top Government Officials Rarely Punished Under Hatch Act*, WALL ST. J. (Aug. 26, 2020), <https://www.wsj.com/articles/top-government-officials-rarely-punished-under-hatch-act-11598471184> [<https://perma.cc/XWA4-ZW3U>].

processes are too far removed from “interfering with or affecting the result of an election” to be encompassed in its framework.³⁵⁵

The Stafford Act provides no opportunity to challenge the President’s decisions in court, and in any event, given the breadth of the substantive standards,³⁵⁶ his decision to grant or deny disaster funds for any reason is likely within the scope of the statute. Nor is any arbitrary and capricious challenge possible, since the APA does not govern the President’s decisions.³⁵⁷ Neither would an APA action against the FEMA administrator work as a stand-in; courts routinely accept FEMA’s assertion that its awards of disaster funding are unreviewable discretionary decisions.³⁵⁸

To be sure, the 2016 regulation governing nine primary grant-making agencies does require that grant allocation decisions “be free from political interference or even the appearance of such interference,” and, in principle, a grant applicant could bring an *Accardi* claim against the agency for violating it.³⁵⁹ But it is striking that critics did not pursue this avenue to challenge agencies’ grant award decisions during the years of the Trump Administration even while voicing numerous concerns about politicized grant-making.³⁶⁰

The recency of the ban may have played a role in why this is so; many potential litigants may simply not have known about it. Given the savviness of litigants in the grant policy space, however, and the sophistication of public complaints around grant awards, this answer is perhaps less satisfying than a substantive alternative: that potential litigants saw the legal limits around presidential pork as less than clear.

This likely concern is especially easy to see in the context of agencies changing award procedures in ways that raise concerns about troublesome presidential pork. While in some ways the actions described above seem to easily violate the requirement that decisions about grant awards avoid even the appearance of political interference, in other ways the actions are much less clearly illegal. Is it interference or accountability to put trusted political compatriots in charge of the agency grant award process? Is it interference or good management to screen social media accounts of potential external grant reviewers, especially in the absence of any particular qualification requirement

³⁵⁵ 5 U.S.C. § 7323(a)(1).

³⁵⁶ See *supra* notes 237–40 and accompanying text.

³⁵⁷ *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

³⁵⁸ See *Hammond*, *supra* note 216, at 34–35.

³⁵⁹ Federal Agency Final Regulations Implementing Executive Order 13,559, 81 Fed. Reg. 19,355, 19,357 (Apr. 4, 2016) (to be codified at 45 C.F.R. pts. 87, 1050); see *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266–67 (1954).

³⁶⁰ There appears to be one reported case in which litigants challenged an agency grant decision under this regulation, but the real objection was to the agency’s announced policy choices in the Funding Opportunity Announcement; the court decided the case on statutory grounds instead, concluding that conditions in the agency’s Funding Opportunity Announcement did not comply with the statutory language governing the program. See *Multnomah County v. Azar*, 340 F. Supp. 3d 1046, 1069–70 (D. Or. 2018).

to be a reviewer?³⁶¹ Is it interference or poor management to run an award process with a multitier merit review matrix that provides so much information to the final decisionmaker that it effectively leaves it to her discretion?³⁶² Is it interference or just transitory political posturing to threaten a wayward senator with the prospect of limiting access to grant funding when the posturing is almost immediately publicly reversed?

These difficulties help explain why no lawsuit challenged grant announcements, presidential decisions on disaster funding, or agencies' changed grant review procedures during the Trump Administration.

3. *Problems with Establishing Improper Political Influence*

The absence of challenges to agencies' grant denials based on political interference is likely due to another reason: the problem of proof. A disappointed grant applicant would likely struggle to establish improper political influence in the award decision. Review of agency action is traditionally limited to the administrative record and afforded a presumption of regularity.³⁶³ If the four corners of the agency's explanation why it denied the grant application is itself rational—and given the extent of factors the agency can consider, there will almost always be some valid reason for choosing one application over another—a court would be hard pressed to look behind the veil.³⁶⁴ In principle, a court may order extra-record discovery into the mental processes of decisionmakers on a strong showing of bad faith,³⁶⁵ but in practice, this bar is almost never met.³⁶⁶

Moreover, the line between legitimate and illegitimate political influences that lie behind the veil can be easy to obfuscate, even to oneself. Consider Kathryn Watts's definition of the line (in the context of informal rulemaking): "legitimate political influences can roughly be thought of as those influences that seek to further policy considerations or public values, whereas illegitimate political influences can be thought of as those that seek to implement raw politics or partisan politics unconnected in any way to the statutory scheme being implemented."³⁶⁷ Making an award to a politically useful jurisdiction explicitly for that political reason would fall on the illegitimate side; making an award to the same jurisdiction to balance out awards geographically or because it is a better applicant would fall on the legitimate side. Agencies know this, and it is easy to frame the same outcome in a more palatable way.

³⁶¹ Cf. SHAFFER & BRENT, *supra* note 53, §§ 24:21 to :23.

³⁶² Cf. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 300, at 22.

³⁶³ See *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

³⁶⁴ See *id.* at 142–43.

³⁶⁵ See *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573–74 (2019).

³⁶⁶ See, e.g., *Eidelson*, *supra* note 75, at 1792; *Heinzerling*, *supra* note 75, at 976–82.

³⁶⁷ *Watts*, *supra* note 74, at 9.

The difficulty of establishing political interference is well illustrated by examining the context of the questionable awards discussed above. Even after looking behind the veil and conducting numerous interviews with political officials and civil servants, the DOT Inspector General found no evidence that any particular award to Kentucky was tainted or of improper steering in general.³⁶⁸ At DOJ, even though two lower-ranked ideological compatriots were elevated over two higher-ranked political opponents, the proffered rationale of furthering the geographic distribution of grants was a neutral explanation whose reasonableness was strengthened by the fact that the two demoted applicants received funding from the same office in other competitions around the same time.³⁶⁹ There is a difference between blacklisting entities and passing over them in a given competition. Both of these examples show the difficulty of developing enough evidence to support a political interference claim.

As to DOT's varying its awards to electorally important jurisdictions in ways that differed between the Trump and Obama years, the variations appeared to be due not to naked spoils but to transparently articulated preference criteria under broadly worded congressional appropriations language, each of which had the effect of prioritizing its voters (the Trump Administration prioritizing rural projects, the Obama Administration prioritizing mass transit).³⁷⁰ And at USAID, the Administration eventually broadened its view of persecuted minorities, ultimately expanding the types of religious groups receiving funds.³⁷¹ Both of these examples show the difference between implementing raw partisanship and implementing different understandings of the statute at hand.

Of course, some of these explanations could be pretextual. Yet even here, the degree to which pretextual decisions are impermissible is unclear. The closest the Supreme Court has come to resolving this issue was in the context of the Trump Administration's decision to ask a question about citizenship status on the Census, and that decision produced a fractured majority barely holding that a pretextual justification could render arbitrary and capricious an otherwise

³⁶⁸ See Letter from U.S. Dep't of Transp., *supra* note 314, at 2–3.

³⁶⁹ Compare U.S. DEP'T OF JUST., HOUSING ASSISTANCE GRANTS FOR VICTIMS OF HUMAN TRAFFICKING, OVC FY 2020 COMPETITIVE GRANT SOLICITATION 17–18 (2019), <https://ovc.ojp.gov/funding/opportunities/ovc-2020-17755> [<https://perma.cc/B9NT-MQSM>], with Lynch, *supra* note 315.

³⁷⁰ See DAVID RANDALL PETERMAN, CONG. RSCH. SERV., R45916, THE TIGER/BUILD PROGRAM AT 10 YEARS: AN OVERVIEW 6–10 (2019); U.S. Secretary of Transportation Elaine L. Chao Announces \$900 Million Historic Investment in American Infrastructure, U.S. DEP'T OF TRANSP. (Nov. 12, 2019), <https://www.transportation.gov/briefing-room/us-secretary-transportation-elaine-l-chao-announces-900-million-historic-investment> [<https://perma.cc/D2SD-6TY6>] (“DOT has awarded 50% of BUILD Transportation grant funding to projects located in rural areas.”); *Public Transportation: Priorities and Challenges for Reauthorization: Hearing Before the S. Comm. on Banking, Hous. & Urb. Affs.*, 112th Cong. 5–6 (2011) (statement of Roger M. Rogoff, Administrator, Federal Transit Administration).

³⁷¹ See Torbati, *supra* note 297.

satisfactory explanation.³⁷² Whether that addition to the doctrine will survive is uncertain, since the five-justice majority it relied upon no longer exists.³⁷³ In addition, the pretext framework is permissive, requiring that the agency's stated reason for action be entirely "contrived" in order to fall, even though it is acceptable for an agency to have "both stated and unstated reasons for a decision."³⁷⁴

This is why, even if courts continue to entertain pretext claims going forward, the standard will be hard to meet for all but the very worst cases. Indeed, Benjamin Eidelson's recent defense of the pretext doctrine suggests that courts may best accommodate it and other accountability-forcing doctrines by reserving them for cases involving the most important policy questions.³⁷⁵ The run-of-the-mill potentially politicized award decision, and even the troublesome examples from DOT, DOJ, and USAID during the Trump Administration, would face difficulty being constrained by this standard.

4. *Politics and Norms*

While the soft norms have historically played an important role in constraining presidential pork, it is difficult to see how norms would meaningfully constrain a President intent on pushing these boundaries into destructive partisan pork.

The rise in partisanship and the decline of "pluralist norm enforcers" mean that there is little agreement in how the norms apply in any given context.³⁷⁶ Relying on statements from agency officials in a previous administration to establish the boundaries of the norm raises the possibility that the public will perceive the charges as political.³⁷⁷ Former Obama and Clinton officials lambasted the Trump Administration's grant oversight as unprecedented.³⁷⁸ That may well be true, but may easily be perceived as part of a political game rather than part of dispassionate administrative analysis.³⁷⁹

There may also be different views on what standard practice entails even from within the same administration and policy area.³⁸⁰ For example, distinguishing the Trump Administration's practices from those of the Bush Administration, in which she served as EPA administrator, Christine Todd Whitman explained: "We didn't do a political screening on every grant, because many of them were based on science, and political appointees don't have that

³⁷² See *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2562–63, 2574–76 (2019).

³⁷³ See Metzger, *supra* note 136, at 26.

³⁷⁴ *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573–76 (2019).

³⁷⁵ See Eidelson, *supra* note 75, at 1811–13.

³⁷⁶ Renan, *supra* note 192, at 2279.

³⁷⁷ *Cf. id.* at 2206.

³⁷⁸ See Eilperin, *Interior*, *supra* note 296.

³⁷⁹ *Cf.* Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715, 1751 (2016).

³⁸⁰ See Renan, *supra* note 192, at 2230.

kind of background.”³⁸¹ In contrast, the Bush-era chair of the White House’s Council on Environmental Quality framed as routine the Trump Administration’s efforts to make political decisions about federal grants.³⁸²

John Hudak suggests that true abuse of presidential pork will result in pushback from voters and/or Congress.³⁸³ But relying on elections and Congress to cabin the excesses of a president proudly embracing presidential pork to punish his enemies is insufficient.³⁸⁴ Voters need to believe that government matters in order to want to vote, and a government that appears rooted in favoritism may make voters less interested in participating—or it may shift the composition of voters, encouraging those who want the President to punish ideological opponents to come to the polls at the expense of those who find the prospect of using government this way distasteful. For its part, a Congress that shares the politics of the President may do little work to discipline him.

Josh Chafetz and David Pozen suggest that executive actions that publicly flout a norm may be less dangerous than those that subtly eat away at a norm by expanding the scope of what may be thought of as norm-compliant.³⁸⁵ The idea is that a flagrant violation allows immediate pushback that can shut down the flouting.³⁸⁶ As they acknowledge, however, this idea relies on the existence of a generally well-functioning set of democratic and civic institutions.³⁸⁷ One problem with the President’s public embrace of presidential pork is that it works to corrode these institutions and expectations of these institutions. The very fact of norm-flouting can help change the perception of what the norm is. Presidential speech is “not only a form of ‘communication,’ it is also a way of constituting the people to whom it is addressed.”³⁸⁸ When President Trump spoke, he conveyed “this is who we are,” where who we were apparently believed in the justness of the President’s ability to dole out money as he saw fit.³⁸⁹

Because a full-throated embrace of presidential pork is dangerous, the absence of tools to meaningfully constrain it is concerning.

³⁸¹ Eilperin, *EPA*, *supra* note 296.

³⁸² *Id.*

³⁸³ *See* HUDAK, *supra* note 203, at 198.

³⁸⁴ *Cf.* Renan, *supra* note 192, at 2204–06.

³⁸⁵ Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 *UCLA L. REV.* 1430, 1447–48 (2018).

³⁸⁶ *Id.* at 1448.

³⁸⁷ *Id.* at 1449–50.

³⁸⁸ JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 203 (Princeton Classics ed. 2017).

³⁸⁹ *Cf.* Paul Waldman, “*This is Not Who We Are.*” *Or Is It?*, *AM. PROSPECT* (July 21, 2019), <https://prospect.org/power/this-are.-it/> [<https://perma.cc/RF83-ZPBB>].

IV. PUNISHMENT

“Punishment” is a particular variety of the more neutral grant enforcement stage, which includes a range of options for securing grantee compliance with grant conditions once funding has been awarded.

Part IV.A demonstrates that the tools of grant enforcement exist in a relatively clear legal framework with relatively clear norms; further, the tools all serve a valuable purpose when used to rehabilitate noncompliant grantees and deter other grantees from noncompliance, although it is inappropriate to use the tools for retribution or incapacitation of disfavored grantees. Part IV.B shows that while several of the Trump Administration’s grant enforcement actions fall within the norms for appropriate use, many other instances of grant enforcement reveal significant and extraordinary abuses. Yet, as Part IV.C argues, there are few ways to push back effectively on these abuses. Many of the instances of grant enforcement abuse turn on motive, which administrative law has a difficult time cabining. Nonjudicial cabining depends on contingent political alignments that are increasingly out of reach in a divided America. Because of these difficulties, the opportunities for using grant enforcement as improper punishment makes it the most worrisome category of Executive Branch control of grants.

A. *Tools, Law, Norms, Merits*

1. *Tools*

The enforcement framework for federal grants is laid out in OMB’s Uniform Grant Guidance, which outlines different actions that agencies may take in response to noncompliant grantees.³⁹⁰

As an initial matter, an agency may impose “specific conditions” on a noncompliant grantee, such as requiring the grantee to accept technical assistance from the agency or from other sources, to receive its funding as reimbursement rather than advance payments, or to obtain additional layers of agency approval before the grantee can act.³⁹¹ If the agency determines that special conditions will not remedy the noncompliance, then it may take additional actions, including temporarily withholding funding until the grantee remedies its noncompliance; terminating the grant, whether in whole or in part; or declining to provide future awards to the grantee.³⁹² An agency may also require repayment of a sum the grantee has spent that was ineligible for grant

³⁹⁰ 2 C.F.R. § 200.339 (2021).

³⁹¹ *See id.*; *id.* § 200.208(c).

³⁹² *Id.* § 200.339(a), (c), (e).

funding.³⁹³ More generally, the agency may “take other remedies that may be legally available,” such as referral to the Department of Justice for litigation.³⁹⁴

Even more significant consequences that an agency may impose are suspension and debarment,³⁹⁵ which keep a recipient from obtaining any federal grants from any agency for several years.³⁹⁶ These are both “serious action[s]” that reach beyond noncompliance with any particular grant.³⁹⁷ Instead, these are reserved for substantial misconduct, including fraud or other indications of “a lack of business integrity or business honesty that seriously and directly affects [the grantee’s] present responsibility.”³⁹⁸

2. Law

All of these enforcement tools exist within each agency’s grant dispute resolution system, which in turn is part of each agency’s general dispute resolution system.

Agencies range in the rigor of their grant dispute resolution systems, although all of them are more rigorous than their processes for making grant awards in the first instance. Like grant award decisions, grant enforcement actions are instances of informal adjudication under the APA,³⁹⁹ but some grant dispute resolution systems, particularly for grant termination and suspension/debarment, are heavy on procedure.⁴⁰⁰ There is more standardization across agencies’ suspension and debarment procedures, likely because these procedures were centrally developed from the start, and because OMB now requires more uniform procedures for these serious actions.⁴⁰¹ All agencies’ procedures for suspension and debarment require evidentiary hearings.⁴⁰²

Grantees may petition courts for review of final agency actions such as grant termination decisions and decisions about suspension and debarment.⁴⁰³ Courts review such decisions under ordinary arbitrary and capricious review.⁴⁰⁴ Where relevant, courts may also, of course, assess the agency’s actions for procedural regularity, the agency’s statutory interpretation, or the constitutionality of the underlying statute.⁴⁰⁵

³⁹³ See *id.* § 200.339(b).

³⁹⁴ *Id.* § 200.339(f); Pasachoff, *supra* note 29, at 282.

³⁹⁵ 2 C.F.R. § 200.339(d) (2021).

³⁹⁶ *Id.* §§ 180.125, .940.

³⁹⁷ *Id.* § 180.125.

³⁹⁸ *Id.* §§ 180.700, .800.

³⁹⁹ See 5 U.S.C. § 554.

⁴⁰⁰ See ASIMOW, *supra* note 220, at 89–91, app. A-5 at 135.

⁴⁰¹ See Exec. Order No. 12,549, 51 Fed. Reg. 6370 (Feb. 18, 1986); 2 C.F.R. § 200.101 (2018).

⁴⁰² ASIMOW, *supra* note 220, at app. A-3 at 120, 122.

⁴⁰³ Pasachoff, *supra* note 29, at 282–83.

⁴⁰⁴ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 44–45 (1983).

⁴⁰⁵ See *id.* at 330.

In principle, then, courts should be capable of cabining abuse of these enforcement tools, just as courts are capable of doing so in the context of agencies' policy choices. As Part IV.C below makes clear, however, there are a number of hurdles for judicial cabining of agency abuse in grant enforcement.

3. Norms and Merits

Agencies' different grant enforcement tools are used with varying frequency, but overall, all are part of the ordinary system of grant enforcement. The tools also play a valuable role in ensuring that federal funding serves its purpose.

Imposing specific conditions and disallowing certain costs are especially routine.⁴⁰⁶ The practice of imposing specific conditions allows the government to tailor conditions for high-risk grantees while still allowing the grantee to have access to needed funds.⁴⁰⁷ This practice benefits both the federal government (as it protects the public fisc while also furthering the purposes of the grant) and the grantee and its beneficiaries (as it allows the grantee to access funding rather than just be deemed too risky a recipient). For its part, disallowance appropriately allows the government to insist that the grantee spends federal dollars only in accordance with the terms of the rules, again protecting the public fisc while allowing the grantee to spend the money properly.

Suspension and debarment play a similar role, protecting the public interest and the integrity of federal programs by making sure that only "presently responsible" entities are able to receive funding.⁴⁰⁸ Referral to DOJ makes particular sense where there is an important legal question that makes sense to resolve in court first or with a higher level of interagency coordination. The use of these tools is also ordinary where merited.⁴⁰⁹

While the overall merits of these tools are not seriously contested, withholding funding or terminating a grant entirely are more controversial tools that have typically been disfavored.⁴¹⁰ As I have previously argued, however, the controversy around funding cutoffs has been overblown.⁴¹¹

One oft-invoked argument against funding cutoffs is that loss of funding will hurt needy beneficiaries of the grant.⁴¹² This is essentially an argument that incapacitation, one possible purpose of a penalty regime, is inappropriate for funding cutoffs because grantees should not be stopped from serving their

⁴⁰⁶ See ROBERT M. LLOYD, A PRACTICAL GUIDE TO FEDERAL GRANTS MANAGEMENT 63 (3d ed. 2020).

⁴⁰⁷ See 2 C.F.R. § 200.208 (2021).

⁴⁰⁸ *Id.* § 180.125(a)–(b).

⁴⁰⁹ See *Exclusions*, SAM.GOV, <https://sam.gov/content/exclusions> [<https://perma.cc/2L3Q-6TZ7>]; Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345, 1345 (2000).

⁴¹⁰ Pasachoff, *supra* note 29, at 252–54.

⁴¹¹ *Id.* at 254–55.

⁴¹² *Id.* at 285–86.

beneficiaries.⁴¹³ But incapacitation need not define the purpose of a funding cutoff. To the contrary, a grantee's inappropriate or inadequate use of grant funding also hurts grant beneficiaries, and the possibility of a termination may induce better compliance.⁴¹⁴ Beneficiaries may be especially protected where agencies target withholding rather than terminate wholesale, or where agencies redistribute the withheld funding to a different grantee serving the same or other needy beneficiaries.⁴¹⁵

A second traditional argument against funding cutoffs is that federal enforcement of state and local government grantees' use of funding programs undercuts federalism.⁴¹⁶ This is essentially an argument that retribution, another possible purpose of a penalty regime, is inappropriate for funding cutoffs because sovereign states should not be punished for exercising their own policy choices.⁴¹⁷ But retribution, no less than incapacitation, need not define the purpose of a funding cutoff. To the contrary, if a point of federalism is to enhance individual liberty, and the federal program is furthering individual liberty (e.g. helping beneficiaries have enough food to feed their families, access transportation to take them to jobs, or have sufficient access to health care to allow independence), then inappropriate use of federal funds by state or local government grantees should not be countenanced in the name of federalism.⁴¹⁸ This is especially true in the many instances where the federal grant program allows state and local variation, and it is the state and local governments' own policy choices with which the grantees are failing to comply.⁴¹⁹ Where an interpretative question is at issue, a threatened funding cutoff can provide a focal point for clarification.⁴²⁰

If incapacitation and retribution are inappropriate rationales on which to base a funding cutoff, however, rehabilitation and deterrence provide appropriate rationales.⁴²¹ Withholding grant funds can rehabilitate a previously noncompliant grantee by inducing it to keep up its side of the grant agreement, thus better serving its intended beneficiaries.⁴²² Withholding grant funds can also deter other grantees from engaging in noncompliant behavior, thus strengthening grant compliance all around.⁴²³ Against the rationales of rehabilitation and deterrence, withholding and termination can play a valuable role in the grant enforcement toolbox.

⁴¹³ *Id.* at 317–18.

⁴¹⁴ *Id.* at 286–93.

⁴¹⁵ *See id.*

⁴¹⁶ Pasachoff, *supra* note 29, at 293–94.

⁴¹⁷ *See id.* at 317–18.

⁴¹⁸ *See id.* at 294–97.

⁴¹⁹ *See id.* at 300–01.

⁴²⁰ *Id.* at 303–04.

⁴²¹ *Id.* at 318; *see also* Max Minzner, *Why Agencies Punish*, 53 WM. & MARY L. REV. 853, 904–13 (2012).

⁴²² Pasachoff, *supra* note 29, at 318.

⁴²³ *Id.*

While motive is difficult to identify in grant enforcement actions, the historical norm appears to be rooted in goals of rehabilitation and deterrence rather than incapacitation and retribution.⁴²⁴ That is, agencies do not typically appear to use these tools for retaliation against disfavored grantees.⁴²⁵ Nor is a desire for incapacitation typically afoot; even in the most serious instances of grant termination or debarment, the goal has not been to incapacitate the grantee but rather to protect the federal government's fisc from irresponsible or law-flouting actors.⁴²⁶ Instead, grant enforcement actions tend to be designed to incentivize the grantee in question to comply with the grant requirements and to signal to other grantees that the agency is serious about such compliance; disputes tend to be rooted in genuine disagreements about what the law requires.⁴²⁷

What explains this norm? Limited agency capacity and motivation have long provided one answer.⁴²⁸ Grant programs do not tend to have enforcement attorneys; program offices are designed to give money away, not take it away, so withholding and termination have been reserved for significant acts of noncompliance or clashes about what such compliance entails.⁴²⁹

Political limits have also traditionally played an important role in limiting overactive agency efforts on grant enforcement. As the standard story goes, agencies are responsive to pressure from the congressional delegation whose constituents' funds might be at issue.⁴³⁰ Agencies are also responsive to pressure from the White House to tread lightly on grant enforcement, given potential White House interest in satisfying complaining members of Congress from that jurisdiction, concerned state officials, or voters worried about hurting needy beneficiaries or about federalism concerns.⁴³¹ Given these dynamics, agencies have been generally unlikely to use grant enforcement for improper targeting.

In this way, while there are substantive and structural differences between grant enforcement and other kinds of agency enforcement,⁴³² norms around agency grant enforcement have long paralleled other executive enforcement norms, where the White House plays an important role in matters of overall enforcement policy but not in matters of individual prosecutorial decisions.⁴³³ In that regard, it is worth underscoring the inappropriateness of retribution as an overall enforcement rationale; enforcing the law to pay back political enemies

⁴²⁴ See *id.* at 283–84, 319–21.

⁴²⁵ See *id.* at 317–19.

⁴²⁶ See *id.*

⁴²⁷ See *id.*

⁴²⁸ Pasachoff, *supra* note 29, at 304–12.

⁴²⁹ *Id.* at 281–83.

⁴³⁰ *Id.* at 312–13.

⁴³¹ *Id.*

⁴³² For example, in addition to the fact that grant program offices tend not to have separate enforcement offices or attorneys, no fines are available. See *id.* at 278–83.

⁴³³ See, e.g., Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1101 (2013); Renan, *supra* note 192, at 2207–15.

of the President would entrench partisan administration and corrupt self-interest, reflecting a biased decisionmaker rather than dispassionate implementation of the statute.⁴³⁴

B. *The Trump Administration's Moves*

Some of the Trump Administration's grant enforcement actions fit within the ordinary framework of law and norms, despite the controversy they engendered. In many instances, however, the Administration's grant enforcement actions were both extraordinary and raise serious concerns on their merits.

1. *Ordinary Enforcement*

When agencies took steps to withhold funding from noncompliant grantees based on a new interpretation of law, that was entirely consistent with regular practice.

For example, the Trump Administration's HHS found that California was out of compliance with the Weldon Amendment, which prohibits discrimination against health care entities for lacking abortion coverage, because the state forbid insurance companies from offering plans that did not cover abortion care.⁴³⁵ HHS announced that it would withhold \$200 million from California's Medicaid funding every quarter until the state came into compliance with HHS's reading of the statutory language.⁴³⁶

In another instance, the Trump Administration's Department of Education notified several school districts in Connecticut that if they did not change their transgender-friendly policies for sports teams, they would no longer be eligible for their grant under the Magnet Schools Assistance Program because they could not, under the Department's reading of Title IX, truthfully certify compliance with that law.⁴³⁷

While both HHS and the Department of Education saw significant pushback to their enforcement work, with some critics suggesting that this kind of

⁴³⁴ See Minzner, *supra* note 421, at 906; Stack, *supra* note 73, at 2–3; Renan, *supra* note 192, at 2210.

⁴³⁵ Press Release, HHS, HHS Issues Notice of Violation to California for its Abortion Coverage Mandate (Jan. 24, 2020), <https://www.hhs.gov/about/news/2020/01/24/hhs-issues-notice-of-violation-to-california-for-its-abortion-coverage-mandate.html> [<https://perma.cc/UY4D-W4QR>].

⁴³⁶ Press Release, HHS, HHS to Disallow \$200M in California Medicaid Funds Due to Unlawful Abortion Insurance Mandate (Dec. 16, 2020), <https://www.hhs.gov/about/news/2020/12/16/hhs-disallow-200m-california-medicaid-funds-due-unlawful-abortion-insurance-mandate.html> [<https://perma.cc/9VWH-E8QA>].

⁴³⁷ See U.S. Dep't of Educ., Off. for C.R., Revised Letter of Impending Enforcement Action (Aug. 31, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf> [<https://perma.cc/YE8H-6GBD>].

enforcement move was inappropriate,⁴³⁸ in fact this kind of move is both appropriate and well within the norm for such action. Each agency was simply offering a new interpretation of the relevant statutory language.⁴³⁹ Trying to bring these grantees into compliance with that interpretation and to signal to other grantees that the agencies were serious about enforcement are valid and ordinary uses of the withholding tool.⁴⁴⁰

Of course, one can disagree over the merits of the interpretations and of the underlying policy choices, but there are ready examples of equivalent, although essentially opposite, agency actions in other administrations. Consider, for example, the Obama Administration's competing efforts to read the Weldon Amendment to permit grantees to enforce their own laws requiring equity of treatment with abortion coverage⁴⁴¹ or to enforce Title IX by reading it to protect against discrimination on the basis of gender identity.⁴⁴² Or, in another contested policy area, consider the Biden Administration's move to recoup or withhold millions of dollars in pandemic aid from states seeking to undercut school districts' mask mandates based on a reading of what the text of the American Rescue Plan required.⁴⁴³

In other words, whether courts would ultimately conclude that the particular statutory readings were valid is a separate question from whether it was appropriate and normal for agencies to attempt to enforce funding laws by engaging in such statutory reading. As to that latter question, such agency action is indeed both appropriate and well within the norm, and courts are well equipped to grapple with these questions as a matter of course.

2. *Extraordinary Enforcement*

In many other instances, however, the Trump Administration used the ordinary tools of grant enforcement in extraordinary and troubling ways to

⁴³⁸ See, e.g., NAT'L WOMEN'S LAW CTR., THE TRUMP ADMIN. WEAPONIZED THE WELDON AMENDMENT: IT'S TIME FOR IT TO GO 1 (Feb. 2021), <https://nwlc.org/wp-content/uploads/2020/12/WeaponizingWeldon-1.pdf> [<https://perma.cc/FYB9-YBSV>]; Emily Hays, *Cost to Fight Trans Sports Ban: Up To \$99K*, NEW HAVEN INDEP. (Sept. 21, 2020), https://www.newhavenindependent.org/index.php/archives/entry/draft_trans_athletes1/ [<https://perma.cc/CR8T-PUS8>].

⁴³⁹ It is well established that agencies may do this in adjudication as well as in rulemaking. See *Sec. Exch. Comm'n v. Chenery*, 332 U.S. 194, 202 (1947).

⁴⁴⁰ See *supra* note 420 and accompanying text.

⁴⁴¹ See Bethany Lee, *The Fight Over California's Abortion Coverage Mandate*, REGUL. REV. (Feb. 3, 2021), <https://www.theregreview.org/2021/02/03/lee-fight-over-california-abortion-coverage-mandate/> [<https://perma.cc/HFH5-G78V>].

⁴⁴² See, e.g., Bagenstos, *Legitimacy*, *supra* note 40, at 308–11.

⁴⁴³ *Ducey v. Yellen*, No. CV-22-00112-PHX-SPL, 2022 WL 2817710, at *1–2 (D. Ariz. July 19, 2022); Alan Rappoport, *Arizona Sues to Stop Treasury from Recouping Relief Funds*, N.Y. TIMES (Jan. 21, 2022), <https://www.nytimes.com/2022/01/21/us/politics/arizona-sues-covid-masks.html> [<https://perma.cc/988P-W8HJ>].

engage in retaliation, retribution, and incapacitation, rather than in rehabilitation and deterrence.

a. *Imposing Specific Conditions*

Start with an example of specific conditions being imposed on a jurisdiction in seemingly pretextual ways in apparent response to the President's personal antipathy. HUD and FEMA's treatment of Puerto Rico in the wake of the devastating hurricanes of 2017 illustrates this point.

Congress appropriated tens of billions of dollars under HUD and FEMA grant programs for Puerto Rico through several emergency supplemental appropriations bills.⁴⁴⁴ But each agency found ways to condition Puerto Rico's funds in a way that no other jurisdiction similarly battered by the hurricanes experienced. For example, after a long delay in publishing the Federal Register notice that would have outlined the steps Puerto Rico needed to take in order to access the funding, HUD imposed a series of onerous financial and administrative restrictions unique to the island.⁴⁴⁵ For its part, FEMA instituted a burdensome process for reimbursement and a new methodology for funding the reconstruction work.⁴⁴⁶ These actions meant that Puerto Rico did not receive the vast majority of its funding for the entire Trump Administration.⁴⁴⁷

Agency political appointees offered neutral justifications for their actions rooted in the special dangers of corruption on the island and the island's capacity limitations.⁴⁴⁸ Indeed, a corruption scandal was eventually uncovered,⁴⁴⁹ and

⁴⁴⁴ See Continuing Appropriations Act, 2018 and Supplemental Appropriations for Disaster Relief Requirements Act, 2017, Pub. L. No. 115-56, div. B, 131 Stat. 1129, 1136–39; Bipartisan Budget Act of 2018, Pub. L. No. 115-123, tit. III, 132 Stat. 64, 118–20; Additional Supplemental Appropriations for Disaster Relief Act, 2019, Pub. L. No. 116-20, tit. XI, 133 Stat. 871, 896–901.

⁴⁴⁵ See Lola Fadulu & Mark Walker, *Trump Attaches Severe Restrictions to Puerto Rico's Long-Delayed Disaster Aid*, N.Y. TIMES (Jan. 15, 2020), <https://www.nytimes.com/2020/01/15/us/politics/trump-puerto-rico-disaster-aid.html> [<https://perma.cc/B3Y7-R9TP>]; OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOUS. & URB. DEV., No. 2019SU008945I, REVIEW OF HUD'S DISBURSEMENT OF GRANT FUNDS APPROPRIATED FOR DISASTER RECOVERY AND MITIGATION ACTIVITIES IN PUERTO RICO, at iii (Apr. 2021), https://www.hudoig.gov/sites/default/files/2021-04/HUD%20OIG%20Final%20Report_2019SU008945I.pdf [<https://perma.cc/E4ME-DGNB>].

⁴⁴⁶ See Vinik, *supra* note 330; U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-256, STATUS OF FEMA FUNDING, OVERSIGHT, AND RECOVERY CHALLENGES 12 (2019).

⁴⁴⁷ Flavelle & Mazzei, *supra* note 8.

⁴⁴⁸ See Nicole Acevedo, *HUD Officials Knowingly Failed 'to Comply with the Law,' Stalled Puerto Rico Hurricane Relief Funds*, NBC NEWS (Oct. 18, 2019), <https://www.nbcnews.com/news/latino/hud-officials-knowingly-failed-comply-law-stalled-puerto-rico-hurricane-n1068761> [<https://perma.cc/P6B6-W424>].

⁴⁴⁹ See Jeff Stein & Josh Dawsey, *Puerto Rico Corruption Scandal Ripples Through Washington as White House, Congress Call for Greater Spending Scrutiny*, WASH. POST (July 11, 2019), <https://www.washingtonpost.com/business/2019/07/11/puerto-rico-corruption-scandal-ripples-through-washington/> [<https://perma.cc/RF3S-7PVS>].

the island's agencies had documented capacity difficulties.⁴⁵⁰ But other states receiving equivalent disaster funding had more public corruption cases and yet less federal oversight of their funds.⁴⁵¹ For example, HUD's Office of Inspector General identified similar capacity concerns in state agencies in Florida and Texas and yet those states were not subjected to such draconian oversight.⁴⁵²

The overall context raised concerns that the agencies were burdening Puerto Rico because of the President's animus. For example, President Trump repeatedly complained that Puerto Rico's (Democratic) government was incompetent and ungrateful.⁴⁵³ He exaggerated how much aid Puerto Rico had received and repeatedly complained that that amount of money was "more money than has ever been gotten for a hurricane before," even though recovery funding after Hurricane Katrina was far greater.⁴⁵⁴ He also decided without evidence that Puerto Rico was improperly using its federal disaster funds to pay down its debt.⁴⁵⁵ Reports emerged that the President thought that no amount of money could fix the island's problems and asked about selling or trading it, using what a former acting cabinet secretary called "divisive" language rooted more in "ideology instead of deliberation" about a rational recovery plan.⁴⁵⁶

⁴⁵⁰ See Alejandra Rosa & Patricia Mazzei, *Video Reveals Unused Earthquake Aid in Puerto Rico: 'We Are Outraged'*, N.Y. TIMES (Jan. 20, 2020), <https://www.nytimes.com/2020/01/20/us/puerto-rico-protests-emergency-supplies.html> [<https://perma.cc/342A-3HWN>].

⁴⁵¹ See Peter T. Leeson & Russell S. Sobel, *Weathering Corruption*, 51 J.L. & ECON. 667, 667–69 (2008); Emily Cochrane & Mark Walker, *House to Vote on Disaster Aid Package for Puerto Rico After Earthquakes*, N.Y. TIMES (Jan. 16, 2020), <https://www.nytimes.com/2020/01/16/us/politics/puerto-rico-disaster-relief.html> [<https://perma.cc/U78R-JUKD>].

⁴⁵² Nicole Acevedo, *Audit Shows Persistent Disparity in Puerto Rico Post-Hurricane Housing Aid Versus Florida, Texas*, NBC NEWS (Mar. 20, 2020), <https://www.nbcnews.com/news/latino/audit-shows-persistent-disparity-puerto-rico-post-hurricane-housing-aid-n1164416> [<https://perma.cc/JF5W-UPDY>].

⁴⁵³ See Annie Karni & Patricia Mazzei, *Trump Lashes Out Again at Puerto Rico, Bewildering the Island*, N.Y. TIMES (Apr. 2, 2019), <https://www.nytimes.com/2019/04/02/us/trump-puerto-rico.html> [<https://perma.cc/8BGP-XUCE>].

⁴⁵⁴ Aaron Rugar, *Trump's Latest Outburst Against Puerto Rico, Explained*, VOX (Apr. 2, 2019), <https://www.vox.com/2019/4/2/18291975/trump-puerto-rico-disaster-relief-funding-bill-explained> [<https://perma.cc/6G7X-6954>].

⁴⁵⁵ Jonathan Swan, *Trump Wants No More Relief Funds for Puerto Rico*, AXIOS, <https://www.axios.com/donald-trump-federal-funding-puerto-rico-hurricane-maria-c9e4edc8-2365-40be-af36-8d91463578d6.html> [<https://perma.cc/8B9H-MN95>] (Nov. 11, 2018).

⁴⁵⁶ See Michael D. Shear, *Leading Homeland Security Under a President Who Embraces 'Hate-Filled' Talk*, N.Y. TIMES, <https://www.nytimes.com/2020/07/10/us/politics/elaine-duke-homeland-securitytrump.html> [<https://perma.cc/ZJ8K-QM92>] (July 28, 2020); Jeff Stein & Josh Dawsey, *Puerto Rico Faces Food-Stamp Crisis as Trump Privately Vents About Federal Aid to Hurricane Maria-Battered Island*, WASH. POST (Mar. 25, 2019), https://www.washingtonpost.com/business/economy/puerto-rico-faces-food-stamps-crisis-as-trump-privately-vents-about-federal-aid-to-hurricane-maria-battered-island/2019/03/25/ade500fe-4cb3-11e9-b79a-961983b7e0cd_story.html [<https://perma.cc/Q7EK-NS7N>].

Inferences that the agencies' actions were connected to the President's negative feelings about Puerto Rico were strengthened by reports that he sought ways to send Puerto Rico's funds to Florida and Texas instead.⁴⁵⁷ It appeared that OMB had led the push to require FEMA's alternative procedures.⁴⁵⁸ OMB's general counsel was reported to be involved in creating the legal logic behind HUD's delays.⁴⁵⁹ When HUD imposed its conditions—conditions that HUD's senior grants administrator called “excessive” after leaving the government⁴⁶⁰—the new conditions were said to stem from direct presidential requests⁴⁶¹ and were intended to be politically difficult for Puerto Rico itself to implement and designed to provide a cover for the goal of withholding the aid.⁴⁶² When the HUD Inspector General began to investigate potential improprieties in HUD's own handling of disaster relief in Puerto Rico, Administration officials stonewalled her.⁴⁶³ The HUD IG ultimately found that the agency's career officials viewed OMB as holding the funds “hostage.”⁴⁶⁴

There were thus many reasons to suspect that the special conditions on Puerto Rico's funding were based more on incapacitation of a political enemy than on furthering the statutory purpose of the funding, protecting against waste, fraud, and abuse, or incentivizing beneficial change in the island's actions.

b. *Withholding and Terminating Grants*

The Trump Administration also engaged in three different kinds of extraordinary moves around funding cut-offs.

⁴⁵⁷ See Tracy Jan, Arelis R. Hernández, Josh Dawsey & Damian Paletta, *After Butting Heads with Trump Administration, Top HUD Official Departs Agency*, WASH. POST (Jan. 16, 2019), https://www.washingtonpost.com/business/economy/top-hud-officials-departure-follows-disagreements-over-housing-policy-and-puerto-rico-disaster-funds/2019/01/16/e6ba5be4-1839-11e9-9ebf-c5fed1b7a081_story.html [https://perma.cc/H9DT-2A6U].

⁴⁵⁸ See Vinik, *supra* note 330.

⁴⁵⁹ Erica Werner, Jeff Stein & Josh Dawsey, *Hard-Charging White House Budget Lawyer in Middle of Ukraine Decision Has Pushed Legal Limits for Trump*, WASH. POST (Jan. 28, 2020), <https://www.washingtonpost.com/us-policy/2020/01/28/hard-charging-white-house-budget-lawyer-middle-ukraine-decision-has-pushed-legal-limits-trump/> [https://perma.cc/MFM9-UFDC].

⁴⁶⁰ Flavelle & Mazzei, *supra* note 8.

⁴⁶¹ Jeff Stein & Josh Dawsey, *Trump Administration to Place New Restrictions on Billions in Aid for Puerto Rico Amid Island's Political Crisis*, WASH. POST (Aug. 5, 2019), <https://www.washingtonpost.com/business/2019/08/01/trump-administration-place-new-restrictions-billions-aid-puerto-rico-amid-islands-political-crisis/> [https://perma.cc/UPW6-C2VG].

⁴⁶² Fadulu & Walker, *supra* note 445.

⁴⁶³ Tracy Jan & Josh Dawsey, *HUD's Top Watchdog: Agency Impeded Probe into Puerto Rico Hurricane Aid*, WASH. POST (Apr. 30, 2019), <https://www.washingtonpost.com/business/2019/04/30/huds-top-watchdog-agency-is-impeding-probe-into-puerto-rico-hurricane-aid/> [https://perma.cc/S2EV-37R3].

⁴⁶⁴ OFF. OF INSPECTOR GEN., *supra* note 445, at 28–32.

First, President Trump made a number of threats to withhold funds from entities taking an action that displeased him: a liberal university that had canceled a speech by a conservative speaker in the wake of violent protests;⁴⁶⁵ public schools using the New York Times' Pulitzer Prize-winning *1619 Project* to teach about America's history of slavery;⁴⁶⁶ public schools planning to hold remote or hybrid learning during the pandemic;⁴⁶⁷ and states seeking to expand mail-in voting for the 2020 election as a pandemic-related public health measure.⁴⁶⁸ These statements, typically offered via tweet, made vague threats to withhold funding without identifying the specific funds at issue or a mechanism that would allow the funds to be withheld.

While it is neither illegal nor completely out of the norm for a President to point out the connection between federal funding and expected grantee conduct, these statements went beyond that. The President was not reminding grantees to comply with requirements of particular grant programs but rather gesturing towards a universe in which the general existence of federal funding allows the President to impose requirements of his own on grantee conduct—and to punish grantees for not complying. These threats also personalized the matter: “I will ask to hold up funding to Michigan”; “I can hold up funds” to Nevada.⁴⁶⁹

That these threats did not appear to be backed up with any agency action does not make them any less dangerous. The problem is not that any individual grantee may suffer, but rather that the atmospherics of democracy and the legitimacy of government action take a hit when gestures towards autocratic power appear again and again, seemingly normalized.⁴⁷⁰

In the second kind of extraordinary move around funding cut-offs, agencies terminated multiyear grants by explaining that the Administration's priorities had changed while appearing to target or scapegoat ideological foes.

HHS canceled the final two years of a five-year award for eighty-one grantees of the Teen Pregnancy Prevention Program based only “a policy shift” away from comprehensive sex education and towards an abstinence-only

⁴⁶⁵ See Rebecca Savransky, *Trump Threatens Funding Cut If UC Berkeley 'Does Not Allow Free Speech,'* HILL (Feb. 2, 2017), <https://thehill.com/homenews/administration/317494-trump-threatens-no-federal-funds-if-uc-berkeley-does-not-allow-free> [<https://perma.cc/7JBA-YRED>].

⁴⁶⁶ Kevin Liptak, *Trump Says Department of Education Will Investigate Use of 1619 Project in Schools,* CNN (Sept. 6, 2020), <https://www.cnn.com/2020/09/06/politics/trump-education-department-1619-project/index.html> [<https://perma.cc/UER7-3M36>].

⁴⁶⁷ See Associated Press, *Trump Threatens to Cut Federal Aid If Schools Don't Reopen,* L.A. TIMES (July 8, 2020), <https://www.latimes.com/politics/story/2020-07-08/trump-threatens-to-cut-federal-aid-if-schools-dont-reopen> [<https://perma.cc/4BEL-Z525>].

⁴⁶⁸ Amy Gardner, Josh Dawsey, Jeff Stein & John Wagner, *Trump Escalates Campaign to Discredit Mail Balloting, Threatening Federal Funds to Two Battleground States,* WASH. POST (May 20, 2020), https://www.washingtonpost.com/politics/trump-threatens-funding-for-michigan-nevada-over-absentee-mail-in-voting-plans/2020/05/20/2f86d078-9aa2-11ea-ac72-3841fcc9b35f_story.html [<https://perma.cc/PK22-H3S6>].

⁴⁶⁹ *Id.* (emphasis added).

⁴⁷⁰ See *supra* note 283 and accompanying text; cf. Roisman, *supra* note 276, at 130–31.

education.⁴⁷¹ EPA canceled the final four years of a six-year grant to the *Bay Journal*, a newspaper covering environmental issues in the Chesapeake Bay region, on the basis of a “shift in priorities,” which appeared to include general opposition to the press and political distaste for the idea of funding a newspaper.⁴⁷² Early in the pandemic, the National Institutes of Health (“NIH”) terminated the final four years of a five-year grant to the EcoHealth Alliance for research on coronaviruses on the ground that the agency “does not believe that the current project outcomes align with the program goals and agency priorities,” although it was clear that the President had directed the termination in response to allegations circulating in conservative media that the grantee’s research partner in China was to blame for the release of the virus from its labs.⁴⁷³

Terminating multiyear grants simply because of a claimed change in priority was previously unheard of. Before 2020, in fact, it was clearly illegal. Up until that year, OMB’s Uniform Grant Guidance contained only two options for agencies to unilaterally terminate a grant: if the grantee “fails to comply with the terms and conditions of a Federal award” and “for cause.”⁴⁷⁴ Relying on these terms, several district courts in 2018 concluded that HHS’s termination of the Teen Pregnancy Prevention Program grantees could not be sustained.⁴⁷⁵ However, in 2020, the Trump Administration’s OMB deleted the “for cause” option,⁴⁷⁶ replacing it with an option for an agency to terminate unilaterally “if an award no longer effectuates the program goals or agency priorities.”⁴⁷⁷

This is a troublesome development. It opens the door for a grantee who is otherwise in compliance to lose its funding just because the President or other senior political officials say so, even if they say so only because a media mob is coming after the grantee in question. 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

⁴⁷¹ See *Pol’y & Rsch., LLC v. HHS*, 313 F. Supp. 3d 62, 67 (D.D.C. 2018), *appeal dismissed*, No. 18-05190, 2018 WL 6167378 (D.C. Cir. Oct. 29, 2018); *Healthy Futures of Tex. v. HHS*, 326 F.R.D. 1, 4–5, 8–9 (D.D.C. 2018).

⁴⁷² See Dino Grandoni, *The Energy 202: EPA Cuts Funding to Newspaper Reporting on It*, WASH. POST (Sept. 6, 2017), <https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2017/09/06/the-energy-202-epa-cuts-funding-to-newspaper-reporting-on-it/59aef5a330fb04264c2a1ce9/> [<https://perma.cc/W8HC-5JHH>].

⁴⁷³ See Beth Mole, *White House Ordered NIH to Cancel Coronavirus Research Funding, Fauci Says*, ARS TECHNICA (June 24, 2020), <https://arstechnica.com/science/2020/06/white-house-ordered-nih-to-cancel-coronavirus-research-funding-fauci-says/> [<https://perma.cc/PJ7T-SSW4>].

⁴⁷⁴ See 2 C.F.R. § 200.339(a)(1)–(2) (2018).

⁴⁷⁵ See, e.g., *Healthy Teen Network v. Azar*, 322 F. Supp. 3d 647, 656–57 (D. Md. 2018), *appeal dismissed*, No. 18-1709, 2018 WL 11450389 (4th Cir. Sept. 18, 2018).

⁴⁷⁶ Guidance for Grants and Agreements, 85 Fed. Reg. 49,506, 49,508, 49,559 (Aug. 13, 2020) (to be codified at 2 C.F.R. pts. 25, 170, 183, 200).

⁴⁷⁷ *Id.* at 49,507, 49,559; 2 C.F.R. § 200.340(a)(1)–(2) (2021).

reliance interests, when it is unfairly changing the rules in the middle of the game. This change also gives agencies a tool to enforce ideological purity. If a grantee that once was favored strays from the party line, it could now face termination. This is an expansion of the termination power that fuels autocracy rather than rationality.

In the third kind of extraordinary move around funding cut-offs, agencies appeared to allege grantee noncompliance as a pretext for retaliation against a disfavored jurisdiction.

In two separate instances, agencies took steps to withhold funding from California, whose Democratic governor was an outspoken political opponent of President Trump and whose policies were often framed in explicit opposition to the President's.⁴⁷⁸ The Department of Transportation canceled a grant of almost a billion dollars to the state's high-speed rail agency, an action that is essentially unheard of without first attempting intermediate efforts such as imposing specific conditions.⁴⁷⁹ The EPA then threatened to withhold California's federal highway funding under the Clean Air Act and signaled the possibility of withholding funds or imposing financial sanctions under other EPA statutes as well.⁴⁸⁰

The agencies used neutral language to describe the state's apparent violation of the requirements on which the grant funding was based. DOT alleged that California had repeatedly failed to submit required deliverables and make adequate progress on the project.⁴⁸¹ DOT also suggested that the Governor had retreated from the long-term vision of a statewide high-speed rail system, thereby supposedly frustrating the purpose of the federal funding.⁴⁸² For its part, the EPA alleged that California had "failed to carry out its most basic tasks under the Clean Air Act" by failing to submit meritorious State Implementation Plans covering its local air districts.⁴⁸³

⁴⁷⁸ See, e.g., Eilperin & Grandoni, *supra* note 7; Ralph Vartabedian, *Trump's Plan to Take Back \$2.5 Billion in California's High-Speed Rail Funding 'Unprecedented,'* L.A. TIMES (Feb. 21, 2019), <https://www.latimes.com/local/lanow/la-me-trump-high-speed-rail-money-20190221-story.html> [<https://perma.cc/WR2Q-V5KC>]; Melanie Mason, *With Gavin Newsom as Governor, California's Battle with Trump Intensifies,* L.A. TIMES (Nov. 6, 2018), <https://www.latimes.com/politics/la-pol-ca-trump-newsom-relationship-20181106-story.html> [<https://perma.cc/YWF9-BX7Q>].

⁴⁷⁹ See Vartabedian, *supra* note 478.

⁴⁸⁰ See Eilperin & Grandoni, *supra* note 7.

⁴⁸¹ Letter from Ronald L. Batory, Adm'r, Fed. R.R. Admin., to Brian Kelly, Cal. High-Speed Rail Auth. 1 (May 16, 2019), https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/18618/CHSRA%20-%20FY%2010%20Agreement%20-%20Final%20Decision%20-%20Signed%20-%2016-2019.pdf [<https://perma.cc/8YDK-MLN3>].

⁴⁸² *Id.* at 23–24.

⁴⁸³ Letter from Andrew R. Wheeler, Adm'r, EPA, to Mary D. Nichols, Chair, Cal. Air Res. Bd. (Sept. 24, 2019), https://www.epa.gov/sites/default/files/2019-09/documents/california_naaqs_sip.pdf [<https://perma.cc/5AJM-MQDU>].

But, as with the conditions on Puerto Rico's disaster relief funding, the broader context suggested that the efforts to withhold funds were a pretext to retaliate against the state for actions unrelated to the grant funding in question.

DOT's Notice of Intent to Terminate came out of the blue to the state agency, without prior staff-level communications, days after a Twitter war between the Governor and the President in which each disparaged the other's policies and motives.⁴⁸⁴ The dueling tweets explicitly connected the cost of the high-speed rail project to the state's new lawsuit opposing the President's maneuvers to gain access to funding to build a wall at the southern border.⁴⁸⁵ At the same time, DOT had repeatedly approved the state's periodic reports on the rail project as though it was making adequate progress, casting doubt on the agency's justification for the termination.⁴⁸⁶ DOT also contemporaneously granted the state's application to assume environmental review obligations for the ongoing part of the high-speed rail project, action that appeared to conflict with the agency's claim that the state rail authority suffered from poor performance.⁴⁸⁷

The context around the EPA's threats similarly suggested that the proffered justification was pretextual.⁴⁸⁸ At the time, California had taken several steps to go its own way as the Trump Administration's weakening of Obama-era

⁴⁸⁴ See Letter from Brian P. Kelly, Chief Exec. Officer, Cal. High-Speed Rail Auth., to Jamie Rennert, Director, Off. of Program Delivery, Fed. R.R. Admin. 2 (Mar. 4, 2019) [hereinafter Letter from Cal. High-Speed Rail Auth.], https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/18606/Exhibit%20D_CHSRA%20Response%20to%20Rennert%20%203.4.19.pdf [<https://perma.cc/F7VS-ADNF>]; Kathleen Ronayne, *California Governor, Trump Spar Over Bullet Train Money*, BOSTON GLOBE (Feb. 14, 2019), <https://www.bostonglobe.com/news/politics/2019/02/14/california-governor-trump-spar-over-bullet-train-money/G7J84b8p3BpjHz9jf38GtL/story.html> [<https://perma.cc/5Q7C-44BY>].

⁴⁸⁵ See, e.g., Annie Karni & Jennifer Medina, *Trump Administration Wants California to Pay Back \$2.5 Billion for High-Speed Rail*, N.Y. TIMES (Feb. 19, 2019), <https://www.nytimes.com/2019/02/19/us/trump-cancels-california-high-speed-rail-grant.html> [<https://perma.cc/7VRR-AMLT>].

⁴⁸⁶ See Letter from Cal. High-Speed Rail Auth., *supra* note 484, at 2. Jennifer Medina, *California v. Trump, Round 51. This Time It's over \$1 Billion in High-Speed Rail Funding*, N.Y. TIMES (May 16, 2019), <https://www.nytimes.com/2019/05/16/us/california-high-speed-rail.html> [<https://perma.cc/G5DV-MBFC>]; Complaint for Declaratory and Injunctive Relief at 10, *California v. U.S. Dep't of Transp.*, No. 3:19-cv-02754-JD (N.D. Cal. May 21, 2019), 2019 WL 2265334 (voluntarily dismissed June 10, 2021).

⁴⁸⁷ See Tim Sheehan, *Bullet Train Clears Hurdle as Trump Administration OKs State Environmental Oversight*, FRESNO BEE (July 25, 2019), <https://www.fresnobee.com/news/local/high-speed-rail/article233115545.html> (on file with the *Ohio State Law Journal*); Letter from Ronald L. Batory, *supra* note 481.

⁴⁸⁸ See Letter from Eric Schaeffer, Exec. Dir. & Mary Greene, Deputy Dir., Env't Integrity Project to Elijah Cummings, Chairman & Jim Jordan, Ranking Member, House Comm. on Gov't Oversight & Gov't Reform (Oct. 10, 2019) [hereinafter Letter from Env't Integrity Project], <https://www.environmentalintegrity.org/wp-content/uploads/2019/10/Letter-to-U.S.-House-Protesting-Trump-EPA-Threats-against-CA.pdf> [<https://perma.cc/VK9L-V92D>].

pollution standards under the Clean Air Act was pending.⁴⁸⁹ Most significantly, California had just announced a deal with four of the world's largest car manufacturers to reduce vehicle emissions, undercutting the Administration's pending rule by agreeing on a standard that the carmakers would apply nationwide to their fleets.⁴⁹⁰ The White House was reportedly "blindsided" and the President "enraged" by the deal and looking for ways to retaliate.⁴⁹¹ Indeed, President Trump told reporters that the EPA would put California on notice for its pollution problems even before officials had decided on what legal authority the Administration would rely, raising the inference that the agency provided sanitized rationales for what was at bottom presidential revenge.⁴⁹²

These instances of grant termination and threatened withholding are troublesome examples of using the executive's enforcement power for political payback. Such instances of enforcement-as-retaliation were not isolated to the grant enforcement context; the Administration took other actions in response to California's environmental decisions that also appeared retaliatory.⁴⁹³ But given the infrequency with which agencies typically cut off funding, the move towards doing so for retaliatory purposes is a new development that raises questions about the structural controls on the grants enforcement system.

⁴⁸⁹ See generally, e.g., Meghan Claiborne, *The SAFE Vehicles Rule: How the Trump Administration's Course Change on Vehicle Emissions Reflects a Larger Policy Shift Away from Environmentally Friendly Regulations*, 6 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 9 (2019).

⁴⁹⁰ See, e.g., Coral Davenport & Hiroko Tabuchi, *Automakers, Rejecting Trump Pollution Rule, Strike a Deal with California*, N.Y. TIMES (July 25, 2019), <https://www.nytimes.com/2019/07/25/climate/automakers-rejecting-trump-pollution-rule-strike-a-deal-with-california.html> [<https://perma.cc/L4UM-3MRA>].

⁴⁹¹ See, e.g., Coral Davenport & Hiroko Tabuchi, *Trump's Rollback of Auto Pollution Rules Shows Signs of Disarray*, N.Y. TIMES, <https://www.nytimes.com/2019/08/20/climate/trump-auto-emissions-rollback-disarray.html> [<https://perma.cc/W2XF-3NNZ>] (Aug. 28, 2019).

⁴⁹² See Juliet Eilperin, Brady Dennis & Josh Dawsey, *EPA Tells California it Is 'Failing to Meet Its Obligations' to Protect the Environment*, WASH. POST (Sept. 26, 2019), https://www.washingtonpost.com/climate-environment/epa-tells-california-it-is-failing-to-meet-its-obligations-to-stem-water-pollution/2019/09/26/b3ffca1e-dfac-11e9-8dc8-498eabc129a0_story.html [<https://perma.cc/4E37-WPXZ>].

⁴⁹³ See, e.g., Juliet Eilperin & Steven Mufson, *Justice Dept. Launches Antitrust Probe of Automakers over Their Fuel Efficiency Deal with California*, WASH. POST (Sept. 6, 2019), https://www.washingtonpost.com/climate-environment/justice-dept-launches-antitrust-probe-of-automakers-over-their-fuel-efficiency-deal-with-california/2019/09/06/29a22ee6-d0c7-11e9-b29b-a528dc82154a_story.html [<https://perma.cc/DMY8-ZAX3>]; Coral Davenport, *Trump to Revoke California's Authority to Set Stricter Auto Emissions Rules*, N.Y. TIMES, <https://www.nytimes.com/2019/09/17/climate/trump-california-emissions-waiver.html> [<https://perma.cc/WF6Y-CDM8>] (Sept. 20, 2019); Marianne Lavelle, *How Trump Is Using Environment Law to Attack California. It's Not Just About Auto Standards Anymore.*, INSIDE CLIMATE NEWS (Nov. 5, 2019), <https://insideclimatenews.org/news/05112019/trump-war-california-auto-standards-environment-violations-justice-department-wildfires/> [<https://perma.cc/K4TK-TJR7>].

c. Initiating Debarment Proceedings

The Trump Administration also used the ordinary tool of debarment in extraordinary fashion in an effort to shut down a politically disfavored entity. The U.S. Agency for Global Media, which oversees American-inflected media programs abroad,⁴⁹⁴ turned to debarment as the final move in its apparent effort to incapacitate its grantee Open Technology Fund (“OTF”).⁴⁹⁵ Largely funded by federal grants, OTF is itself a grant-making organization that supports projects promoting internet freedom overseas.⁴⁹⁶

The Agency initially fired all of OTF’s board members and replaced them with appointees sympathetic to the President as part of a broader purge of staff and board members at the nonpartisan and journalistically independent media networks overseen by the Agency.⁴⁹⁷ Then, as lawsuits over that action were pending, the Agency stopped providing regular installments of grant funding to OTF.⁴⁹⁸ OTF told most of its projects to stop work because it was not sure it would be able to satisfy its financial commitments,⁴⁹⁹ at which point the Agency ordered it to restart all of its projects, threatening to cancel the grant agreement if OTF did not take satisfactory action within ten days.⁵⁰⁰ The Agency also demanded the return of all grant funding so that the Agency itself could make internet freedom awards directly, and then proceeded to make an award to the parent company of an entity whose founder took public pro-Trump stances.⁵⁰¹

⁴⁹⁴ See *Who We Are*, U.S. AGENCY FOR GLOB. MEDIA, <https://www.usagm.gov/who-we-are/> [<https://perma.cc/2BG5-T9LE>].

⁴⁹⁵ See Jessica Jerreat, *USAGM Proposes Cutting Federal Funding to Open Technology Fund*, VOICE OF AM. (Dec. 21, 2020), <https://www.voanews.com/press-freedom/usagm-proposes-cutting-federal-funding-open-technology-fund> [<https://perma.cc/2HZ9-UC5E>].

⁴⁹⁶ See *Open Technology Fund*, U.S. AGENCY FOR GLOB. MEDIA, <https://www.usagm.gov/networks/otf/> [<https://perma.cc/RJ52-M8B8>].

⁴⁹⁷ See Anne Applebaum, *Analysis: The Voice of America Will Sound Like Trump*, GOV’T EXEC. (June 22, 2020), <https://www.govexec.com/management/2020/06/analysis-voice-america-will-sound-trump/166310/> [<https://perma.cc/3FL9-EMSS>]; *Who We Are*, *supra* note 494.

⁴⁹⁸ See Daniel Lippman, *Funding Fight Threatens to Halt U.S. Internet Freedom Projects*, POLITICO (July 30, 2020), <https://www.politico.com/news/2020/07/30/internet-freedom-projects-funding-388983> [<https://perma.cc/LS4S-5BNH>].

⁴⁹⁹ *Id.*

⁵⁰⁰ See Michelle Quinn, *Open Technology Fund Sues USAGM, Alleges Breaching \$18 Million in Contracts*, VOICE OF AM. (Aug. 20, 2020), <https://www.voanews.com/press-freedom/open-technology-fund-sues-usagm-alleges-breaching-18-million-contracts> [<https://perma.cc/6PMH-ESUH>].

⁵⁰¹ See, e.g., Daniel Lippman, *U.S. Global Media Agency Demanded Outlets Return Money for Internet Freedom Projects*, POLITICO (Aug. 13, 2020), <https://www.politico.com/news/2020/08/13/us-global-media-agency-return-money-395147> [<https://perma.cc/7CJE-CE82>]; Pranshu Verma, *Trump Appointee Seeks to Cut Off Funding for Global Internet Access Group*, N.Y. TIMES (Dec. 19, 2020), <https://www.nytimes.com/2020/12/19/us/politics/trump-appointee-seeks-to-cut-off-funding-for-global-internet-access-group.html> [<https://perma.cc/>].

Finally, the Agency issued a Notice of Proposed Debarment listing four rationales.⁵⁰² First, the Notice asserted that OTF was created without proper congressional authorization.⁵⁰³ Second, the Notice stated OTF had a conflict of interest in spending, as documented in a 2015 audit.⁵⁰⁴ Third, the Notice alleged that OTF had materially breached its grant agreement by refusing to provide information the Agency had requested for oversight purposes.⁵⁰⁵ Finally, the Notice claimed that “OTF ha[d] used grant funds for projects that ha[d] no apparent impact on internet freedom.”⁵⁰⁶ The Notice gave OTF thirty days to respond, saying that any hearing would be held one day after the response was received.⁵⁰⁷ This timing meant that the debarment decision could be made immediately before the Biden Administration took office.

There is nothing wrong with using debarment (or suspension) where a grantee is “not presently responsible.”⁵⁰⁸ But this case shows the potential for abuse from an Administration wishing to punish political enemies, even though the rules specifically preclude debarment for the purposes of punishment.⁵⁰⁹ If the Agency were truly concerned about whether OTF had appropriate congressional authorization, it could have worked to ensure that it did. The issues documented in the 2015 audit had been long resolved—and audit problems are such a common occurrence that making them debarment-worthy vastly expands the universe of what constitutes present responsibility.⁵¹⁰ A dispute over the relevance of turning over information does not easily fit into the kinds of serious ongoing problems that typically serve as grounds for debarment.⁵¹¹ And the charge that OTF was funding projects with no apparent impact on internet freedom sounds more like an issue with whether the grantee should receive future funding, not about the grantee’s lack of present responsibility.

X5XF-47GV]; David Folkenflik, *Falun Gong, Steve Bannon And The Trump-Era Battle Over Internet Freedom*, NPR (Apr. 14, 2021), <https://www.npr.org/2021/04/14/986982387/falun-gong-steve-bannon-and-the-trump-era-battle-over-internet-freedom> [<https://perma.cc/Q3F3-N7T2>].

⁵⁰² Letter from Michael Pack, Chief Exec. Officer, U.S. Agency for Glob. Media, to Nathaniel Kretchun, Open Tech. Fund 1 (Dec. 15, 2020), <https://int.nyt.com/data/documenttools/otf-debarment-1215/b80304334f27921b/full.pdf> [<https://perma.cc/9QWW-RKBZ>].

⁵⁰³ *Id.*

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.* at 2.

⁵⁰⁸ See 2 C.F.R. § 180.125(a)–(b) (2021).

⁵⁰⁹ *Id.* § 180.125(c).

⁵¹⁰ See DAN LIPS & DEEPESH CHAUDHARI, LINCOLN NETWORK, THE OPEN TECHNOLOGY FUND: STRENGTHENING U.S. CAPACITY TO COUNTER DIGITAL AUTHORITARIANISM 10–12 (2022), <https://lincolnpolicy.org/wp-content/uploads/2022/05/Whitepaper-OTF-05.23.2022.pdf> [<https://perma.cc/SQ7X-VRPM>]. See generally Pasachoff, *supra* note 91.

⁵¹¹ See 2 C.F.R. § 180.800 (2021).

The effort to debar OTF appeared to be less about whether it was actually a responsible entity than about the Agency's effort to reclaim OTF's funding in order to use it to support friends of the Administration.

C. *Cabining Abuse*

Taken together, these three kinds of extraordinary moves in grant enforcement—misusing special conditions, funding cut-offs, and debarment—fall outside the ordinary and valuable uses of these tools to incentivize compliance. Instead, these examples illustrate the use of these tools for retaliation, retribution, and incapacitation, all invalid uses of the agency grant enforcement power.

Yet there are few ways to cabin abuses in grant enforcement. While there is much clearer norm violation in this context than in the policy-setting stage or the award stage, courts remain almost powerless to redress these violations.⁵¹² Indeed, the violations are not even clearly illegal, even though they are contrary to the rule-of-law ideal.⁵¹³ Nor can extrajudicial sources provide a reliable backstop, given the current state of partisan polarization.

1. *Reviewability Problems*

Many of these abuses are not reviewable by courts. For example, the President's actions are not reviewable under the Administrative Procedure Act.⁵¹⁴ Nor are the President's vague threats to disfavored entities actionable.

Some of the agency actions would not be reviewable either because they are not final. The EPA's threats to withhold funding from California clearly fall into this category. The imposition of special conditions on Puerto Rico likely does as well. While the imposition of such conditions does seem to represent the agency's determination of "rights or obligations" with which the grantee must comply, thus suggesting some degree of finality, agencies treat such conditions as intermediate steps rather than as the "consummation" of a decision-making process.⁵¹⁵ Such conditions are routinely referred to as "remedial action short of a remedy";⁵¹⁶ they may be lifted once the grantee fixes whatever problems caused the imposition of the conditions in the first place.⁵¹⁷ That sounds less than final.

⁵¹² See Pasachoff, *supra* note 91, at 603–04.

⁵¹³ Cf. Renan, *supra* note 192, at 2274–78.

⁵¹⁴ See *supra* note 357 and accompanying text.

⁵¹⁵ See *Sackett v. EPA*, 566 U.S. 120, 126–27 (2012); *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016).

⁵¹⁶ See, e.g., SHAFFER & BRENT, *supra* note 53, §§ 47:4 to :8.

⁵¹⁷ See 2 C.F.R. § 200.208 (2021).

In addition, any challenge to HUD's dragging its feet on publishing the requirements that would apply only to Puerto Rico would be rooted in delay and therefore inaction, which is presumptively not reviewable.⁵¹⁸

2. *Arbitrary and Capricious Review Problems*

For those agency actions that are reviewable, the capaciousness of the arbitrary and capricious standard makes it difficult for grantees to build a successful claim even where abusive grant enforcement practices are afoot. Given the presumption of regularity, which has particular bite in the enforcement context, a court could accept the rationale as long as the agency were able to provide a facially reasonable explanation for its actions.⁵¹⁹ In the context of withholding, there are so many conditions a grantee must satisfy—including substantive and procedural conditions imposed by the underlying grant statute as well as OMB and agency procedural requirements⁵²⁰—that it would be surprising if for many grantees there were not some problem somewhere that an agency intent on enforcing could reasonably seize on.

Much of the pushback against the Administration's enforcement actions sounded in pretext, the idea that the actions were cover for political antipathy.⁵²¹ But even if pretext remains a component of arbitrary and capricious review, its requirement that the agency's stated reason for action be entirely "contrived" is a high bar to meet.⁵²² The fact that an agency had unstated reasons as part of its calculus to use its grant enforcement tools would not be evidence of impermissible pretext, as long as the agency also had a facially reasonable explanation for its action.⁵²³ Given the scope of agency discretion to use these enforcement tools, such explanations are typically readily available.⁵²⁴

This is not to say that the most egregious cases could never be successful under the current doctrine.⁵²⁵ It seems quite possible, for example, that California could have prevailed in its suit against the Department of Transportation for termination of the high-speed rail grant, given the amount of circumstantial evidence of pretext, had the Biden Administration not reinstated

⁵¹⁸ See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

⁵¹⁹ See *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); see also Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571, 1578 (2016).

⁵²⁰ See generally Pasachoff, *supra* note 91.

⁵²¹ See Complaint for Declaratory and Injunctive Relief at 19, *California v. U.S. Dep't of Transp.*, No. 3:19-cv-02754-JD (N.D. Cal. May 21, 2019), 2019 WL 2265334 (voluntarily dismissed June 10, 2021); Letter from Env't Integrity Project, *supra* note 488; Acevedo, *supra* note 448.

⁵²² See *supra* notes 372–74 and accompanying text.

⁵²³ See *supra* note 374 and accompanying text.

⁵²⁴ See, e.g., *supra* note 519 and accompanying text.

⁵²⁵ See *supra* note 375 and accompanying text.

the grant after taking office.⁵²⁶ But the flexibility of the doctrine makes it possible in general that enforcement actions taken with improper motive will nonetheless be approved.

The Administration's revision to the grant termination standards in the Uniform Grant Guidance poses another difficulty for a successful arbitrary and capricious claim. To terminate an award unilaterally, an agency needs now to specify only how "an award no longer effectuates the program goals or agency priorities"⁵²⁷ in order to satisfy reasoned explanation requirements.⁵²⁸ To the extent those explanations were reasoned (and also in line with statutory expectations for the funding), a court could much more easily accept the midstream termination as compliant with the law, even though the grantees had done nothing wrong.

3. *Selective Enforcement Problems*

Several of the concerns about abuses in grant enforcement center on selective enforcement, the idea that the grantee was singled out for poor treatment above other grantees because of the President's dislike.⁵²⁹ Even if these concerns are well founded as a factual matter, it is difficult as a legal matter to succeed on a selective enforcement defense to an enforcement action.⁵³⁰ Because nonenforcement is presumptively non-reviewable, and because law enforcement is at the core of executive authority, courts are reluctant to second guess an agency's decision to take enforcement action against one regulated entity over another.⁵³¹ A grantee would have to show "clear evidence" displacing the presumption of regularity.⁵³² Claims rooted in selective prosecution on the basis of impermissible considerations such as race or religion, although in principle available, have largely failed, on comparative institutional competence grounds.⁵³³ A claim rooted in selective prosecution on the basis of partisan targeting is likely to meet a similar fate.

⁵²⁶ See Derek Francis, Kanishka Singh & David Shepardson, *Biden Restores \$929 Mln for California High-Speed Rail Withheld by Trump*, REUTERS (June 11, 2021), <https://www.reuters.com/world/us/biden-administration-restores-929-mln-california-high-speed-rail-2021-06-11/> [https://perma.cc/PSS7-ZSCQ].

⁵²⁷ See 2 C.F.R. § 200.340(a)(2) (2021); see also *supra* notes 474–77 and accompanying text.

⁵²⁸ See *Fed. Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–15 (2009).

⁵²⁹ See, e.g., Cochrane & Walker, *supra* note 451; Letter from Env't Integrity Project, *supra* note 488.

⁵³⁰ See, e.g., Price, *supra* note 519, at 1580.

⁵³¹ *Id.* at 1578–81.

⁵³² *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999).

⁵³³ See Price, *supra* note 519, at 1580.

4. *Inconsistent Sanctions Problems*

Another concern animating opposition to the administration's grant enforcement abuses is the idea of inconsistent sanctions, that a particular grantee is facing enforcement action when others similarly situated are not simply because the targeted grantee is disfavored.⁵³⁴ But courts do not tend to find favor with claims for inconsistent sanctions.⁵³⁵ Unless uniformity in sanctions is a requirement of the statute—which is rarely, if ever, the case in grant enforcement⁵³⁶—courts treat “[t]he fashioning of an appropriate and reasonable remedy [as] for the Secretary, not the court.”⁵³⁷ As long as the scope of the sanction is within the discretion contemplated by the statute, courts will not deem it invalid.⁵³⁸

5. *Remedial Problems*

There will undoubtedly be times when a grantee is able to establish that an agency's enforcement action was improper.⁵³⁹ In these instances, sometimes setting aside the agency decision will be a sufficient remedy. But sometimes the agency's actions may cause the ruination of the grantee in the meantime. The Open Technology Fund case illustrates this danger. While the proposed debarment did not actualize (for reasons discussed below), had it done so, OTF could have challenged the decision as arbitrary and capricious. But whether the court could remedy the institutional damage from an improper entity-wide debarment is another question when the agency withholds funds during the pendency of the debarment action, which could take many months before even getting to court.⁵⁴⁰ Depending on the scope of funding, its loss during that time period could be disastrous.

6. *Politics and Norms*

Historically, politics have done more work than judicial review has to constrain abusive grant enforcement practices and reinforce norms.⁵⁴¹ Congress did play such a role in several instances of the Trump Administration's abusive grant enforcement practices. For example, pressure from Maryland's delegation

⁵³⁴ See *supra* notes 448–52 and accompanying text; Letter from Env't Integrity Project, *supra* note 488.

⁵³⁵ See *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 186–87 (1973).

⁵³⁶ See, e.g., Pasachoff, *supra* note 29, at 328–29.

⁵³⁷ *Butz*, 411 U.S. at 188–89.

⁵³⁸ See *id.* at 189.

⁵³⁹ See, e.g., *Pol'y & Rsch., LLC v. HHS*, 313 F. Supp. 3d 62, 70–71, 82–84 (D.D.C. 2018), *appeal dismissed*, No. 18-05190, 2018 WL 6167378 (D.C. Cir. Oct. 29, 2018).

⁵⁴⁰ See 2 C.F.R. §§ 200.339(a), 180.820, 180.830, 180.870, 180.875 (2021).

⁵⁴¹ See *supra* notes 264–65, 430–31 and accompanying text.

led EPA to reinstate the *Bay Journal's* grant.⁵⁴² Consistent efforts by California's senators⁵⁴³ appeared to lead the EPA's regional administrator in California to take no further action against the state for its alleged Clean Air Act violations.⁵⁴⁴ Bipartisan majorities in both houses of Congress responded to OTF's proposed debarment by authorizing OTF's existence into statute, extending its time to respond to the debarment notice into the Biden Administration, and taking OTF's side as to which kind of grantees to pursue.⁵⁴⁵

But these examples depend on contingencies. Timing is one such contingency. Congress took speedy action against the OTF debarment as part of giant must-pass bills that were already pending.⁵⁴⁶ It would have been more difficult for Congress to act quickly at another time. Similarly, extending OTF's time to respond to the debarment notice is a tactic that only works at a moment of administration transition.

Another contingency is the political power of the grantee. On this point, comparing Puerto Rico's experience with California's and Maryland's is

⁵⁴² See, e.g., Juliet Eilperin & Dino Grandoni, *Under Pressure from Senate Democrats, EPA Restores Funding for the Bay Journal*, WASH. POST (Mar. 1, 2018), <https://www.washingtonpost.com/news/energy-environment/wp/2018/03/01/under-pressure-from-senate-democrats-epa-restores-funding-for-the-bay-journal/> [<https://perma.cc/M74L-H5DB>].

⁵⁴³ See, e.g., Letter from Dianne Feinstein, Sen., U.S. Senate, to Charles Sheehan, Deputy Inspector Gen., EPA (Sept. 27, 2019), https://www.feinstein.senate.gov/public/_cache/files/f/c/fcbf953e-c764-4cf5-8f25-bba09d0d7ae4/A925F49F56735E611474F480FAF595CC.0927-2019-letter-to-epa.pdf [<https://perma.cc/ZBA9-MVZ4>]; Letter from Dianne Feinstein, Sen. & Kamala Harris, Sen., U.S. Senate, to Charles Sheehan, Acting Inspector General, EPA (Oct. 3, 2019), https://www.feinstein.senate.gov/public/_cache/files/3/5/3584a2bd-ce0d-4c87-9ffb-6dc013675bb7/A1785A4075E2B0970E5EC6E5D52DB15F.2019.10.03-epa-ig-letter.pdf [<https://perma.cc/9UGA-PY3Q>]; Letter from Dianne Feinstein, Sen. & Kamala Harris, Sen., U.S. Senate, to Sean O'Donnell, Inspector General, EPA (May 21, 2020), https://www.feinstein.senate.gov/public/_cache/files/4/a/4ad39f92-12c3-49b8-aad4e944455b407e/33A2709CD220C6D6B03793E83801CA03.2020.05.21-epa-ig-response-letter.pdf [<https://perma.cc/7DB4-P45T>].

⁵⁴⁴ See Dustin Gardiner, *Trump's EPA Cites 'Great Progress' in Air-Quality Fight with California*, S.F. CHRON. (Jan. 6, 2020), <https://www.sfchronicle.com/politics/article/Trump-s-EPA-cites-great-progress-in-14954193.php> [<https://perma.cc/9DHN-V6EY>]. The EPA regional administrator was fired, and he alleged that his firing was due to his new reputation for being bipartisan (notwithstanding the fact that he had been one of the initial instigators of the "Lock Her Up!" chant at the 2016 Republican National Convention). Susanne Rust, *Ousted EPA Official in California Says He Was Pushed Out for Being Too Bipartisan*, L.A. TIMES (Feb. 6, 2020), <https://www.latimes.com/california/story/2020-02-06/dismissed-epa-official-suggests-bipartisanship-killed-his-job> [<https://perma.cc/2XP2-5K87>]. But despite this potentially retaliatory move against the regional administrator, the Administration took no further steps to withhold highway funds from California.

⁵⁴⁵ See Consolidated Appropriations Act, 2021, Pub. L. No. 116–260, § 1301, 134 Stat. 1182, 2158 (2020); William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116–283, § 1299P, 134 Stat. 3388, 4016–20.

⁵⁴⁶ See Consolidated Appropriations Act, 2021, Pub. L. No. 116–260, § 1301, 134 Stat. 1182, 2158 (2020).

instructive. Puerto Rico does not have full representation in Congress,⁵⁴⁷ and its experience of disaster funding took place against the backdrop of less generous federal benefits statutes overall,⁵⁴⁸ necessitating division of its political attention.⁵⁴⁹ It was therefore in a compromised position in its efforts to leverage political support to get its funding released without conditions, and its supporters in Congress had their own power diluted to assist in this effort, in contrast to the success the states saw.⁵⁵⁰

Plausible bipartisan appeal is yet another contingency. OTF had broad bipartisan support in its fight against censorship and internet suppression in repressive regimes abroad.⁵⁵¹ An effort to debar, say, Planned Parenthood would surely face less consensus.

Still another contingency is the extent of complicated internal politics within and around the grantee. California's experience with its high-speed rail grant illustrates this point well. While the project had been initiated by a Republican governor and enthusiastically embraced by subsequent Democratic governors, the project tended to be supported by Democrats more than Republicans.⁵⁵² But even Democrats were divided among other policy priorities.⁵⁵³ For their part, many Republicans in Congress saw the project as a "boondoggle."⁵⁵⁴ Homeowners and business owners whose property would be affected by the statewide line often objected on NIMBY grounds.⁵⁵⁵ Without a consistent, neatly aligned ideological story about the grantee, there was little opportunity for building a neat bipartisan defense in Congress.

⁵⁴⁷ See, e.g., Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639, 1662–63 (2021).

⁵⁴⁸ See, e.g., *United States v. Vaello Madero*, 142 S. Ct. 1539, 1539 (2022); see also generally Hammond, *supra* note 547.

⁵⁴⁹ At the same time Puerto Rico was struggling to get HUD and FEMA to release its already appropriated disaster funding, it was also facing political battles in Congress to reauthorize its food stamp program and its Medicaid funding. See Stein & Dawsey, *supra* note 456; Rachana Pradhan, *Trump Slashed Puerto Rico's Medicaid Money as Part of Budget Deal*, POLITICO (Dec. 17, 2019), <https://www.politico.com/news/2019/12/17/trump-puerto-rico-medicaid-budget-086674> [<https://perma.cc/5NK7-2JW2>]. See generally Hammond, *supra* note 547, at 1666–72.

⁵⁵⁰ See *supra* notes 542–44 and accompanying text.

⁵⁵¹ See, e.g., Verma, *supra* note 501.

⁵⁵² See Adam Nagourney, *A \$100 Billion Train: The Future of California or a Boondoggle?*, N.Y. TIMES (July 30, 2018), <https://www.nytimes.com/2018/07/30/us/california-high-speed-rail.html> [<https://perma.cc/VW5L-KJR3>].

⁵⁵³ Ralph Vartabedian, *Will 'Amtrak Joe' Biden Bail out California's Troubled Bullet Train? Don't Bet on It*, L.A. TIMES (Nov. 17, 2020), <https://www.latimes.com/california/story/2020-11-17/california-bullet-train-project-joe-biden> [<https://perma.cc/P6MV-CBEK>].

⁵⁵⁴ Reid Wilson, *California GOP Asks Trump to Halt High-Speed Rail Grants*, HILL (Feb. 7, 2017), <https://thehill.com/homenews/state-watch/318324-california-gop-asks-trump-to-halt-high-speed-rail-grants> [<https://perma.cc/GDE9-W5B5>].

⁵⁵⁵ See Ralph Vartabedian, *State Audit Blames Bullet Train Mismanagement for Delays and Price Hikes*, L.A. TIMES (Nov. 15, 2018), <https://www.latimes.com/local/california/la-me-bullet-train-audit-20181115-story.html> [<https://perma.cc/4W96-9E4Y>].

The bottom line is that political protection against abusive grant enforcement practices depends on contingencies that make consistent protection difficult. In particular, as America's partisan divide deepens, the political guardrails that have historically cabined such practices appear to work less well. The more an administration divides the country into ideological allies and ideological foes, the more plausible it is that the administration will impose specific conditions, cut off funds, or debar an entity for retaliatory reasons, and the more troublesome it is that there are few tools to respond.

V. REFORM

Given these challenges, which aspects of executive control of federal grants require reform? As Part II argued, the policy space imposes the fewest dangers, and so requires the least intervention, although there are nonetheless opportunities to regularize the policymaking process with more formalization of grant policy statements. Part III illustrated that the process of reaching decisions requires changes to limit the appearance and reality of awarding grants to advance pure partisan favoritism over public values, to harm those who are denied the funding, and to transparently embrace the goal of doing either of these. Part IV demonstrated the need to cabin opportunities to use the tools of grant enforcement for retaliation, retribution, and personal animus, or at the very least to limit the consequences on grantees of doing so.

This Part sketches opportunities for reform in each arena. Of course, the same political realities that make it difficult for politics and norms to constrain individual abusive actions may limit these proposed wholesale reforms from being undertaken. Still, when policy windows open,⁵⁵⁶ these proposed reforms are the right ones to pursue.

A. Courts

I am not proposing any changes to doctrine. This choice might seem odd given the persistent theme earlier of the ways that doctrine limits courts' ability to cabin abuse in the pork and punishment arenas. But courts are not the right institution on which to focus, and not simply because they are able to constrain excesses at the policy stage.

First, it is not that anything goes as to pork and punishment. Existing doctrine allows review of final agency action, and agencies' final decisions must satisfy reasoned decision-making requirements. Courts need not revise the doctrine as much as take it seriously, applying it without rubberstamping questionable agency decisions, such as the Department of Transportation's termination of the billion-dollar high-speed rail grant.⁵⁵⁷ The framework

⁵⁵⁶ See JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 20 (2d ed. 2010).

⁵⁵⁷ See *supra* notes 525–26 and accompanying text.

provided above, cataloguing appropriate and inappropriate, ordinary and extraordinary actions in the pork and punishment arenas, can help point the way.

While courts are limited in constraining pork and punishment by reviewability, finality, and regularity doctrines, changing these doctrines would be a blunt tool with unnecessary implications far beyond the grant-making context. Better than such a court-driven blunt tool would be grant-specific positive law that would both limit bad acts *ex ante* and allow for targeted review *ex post*;⁵⁵⁸ I make recommendations for such positive law developments in the next two subparts.

Changing the doctrine to respond to courts' difficulties in constraining abuse via pork and punishment would create problems of its own. Ten years ago, Thomas McGarity identified a disturbing trend in high-stakes rulemaking that he called "administrative law as blood sport," a phenomenon in which "the players in the implementation game no longer make a pretense of separation between the domains of politics and administrative law."⁵⁵⁹ This trend appears to be expanding to political players' use of courts, where challenging an administration's actions, including on grounds of bad faith, has become *de rigueur*.⁵⁶⁰ If, for example, the presumption of regularity were loosened, or if finality requirements were limited, the courts themselves could well be used as tools of abuse in an effort to gum up the works even on reasonable administrative action.

Nor do the limitations of courts in constraining pork and punishment provide support for the Supreme Court's move towards heightened nondelegation requirements or the Major Questions doctrine.⁵⁶¹ These revised doctrines would in reality do the most work at the policy stage, where courts are

⁵⁵⁸ Cf. Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 663 (2021).

⁵⁵⁹ Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1679–81 (2012).

⁵⁶⁰ In the first two years of the Biden Administration, for example, the federal government has been sued about its regulatory decisions by multistate coalitions more than 50% more times than during eight years of the Reagan Administration; more than 200% more than during the four years of the George H.W. Bush Administration; slightly more than the entire total of eight years of the Clinton Administration; and more than two-thirds as much as during the entire eight years of the George W. Bush and Obama Administrations. See *Multistate Lawsuits Against the Federal Government During the Biden Administration*, BALLOTPEDIA, https://ballotpedia.org/Multistate_lawsuits_against_the_federal_government_during_the_Biden_administration [https://perma.cc/A5V4-J37C]; see also Chris Cillizza, *California Has Now Sued the Trump Administration 100 Times*, CNN (Sept. 1, 2020), <https://www.cnn.com/2020/09/01/politics/california-ag-xavier-becerra-sue-donald-trump/index.html> [https://perma.cc/5BRW-DFMC]; Neena Satija, Lindsay Carbonell & Ryan McCrimmon, *Texas vs. the Feds—A Look at the Lawsuits*, TEX. TRIB. (Jan. 17, 2017), <https://www.texastribune.org/2017/01/17/texas-federal-government-lawsuits/> [https://perma.cc/DNG2-FN74].

⁵⁶¹ See generally, e.g., Lisa Heinzerling, *Nondelegation on Steroids*, 29 N.Y.U. ENV'T L.J. 379 (2021).

already working fine to cabin inappropriate Executive Branch action;⁵⁶² they would have less bearing on agencies' ability to make award and enforcement decisions, which would continue to be core Executive Branch discretionary functions even with increased statutory limitations, given the inability to fund every applicant and enforce every violation. Whatever effect these doctrines would have on punishment could indeed be detrimental, to the extent they undercut the agency's overall ability to enforce run-of-the-mill violations by unduly restricting the statutory language.⁵⁶³ If revising reviewability or finality doctrine is a blunt instrument, then, these doctrines would be even more overkill. More generally, part of the goal of this Article is to show why Executive Branch discretion at each stage of grant-making generally is valuable overall, even while acknowledging the opportunities to abuse that discretion.⁵⁶⁴ Removing the discretionary ability of agencies to act is the wrong lesson from this study.

B. *Executive Branch*

Even where doctrine permits, most administrative actions never see the light of a court filing. Internal administrative procedure and operationalized norms provide the first line of defense.⁵⁶⁵ It is within the Executive Branch, then, that the most promising reforms lie.

Within the Executive Branch, OMB is the institution with the clearest path for reform. It is OMB that oversees the Uniform Grant Guidance, which has in different forms been the central organizing principle for agencies' grant processes for decades.⁵⁶⁶ The Uniform Grant Guidance consists of more than 130 pages in the Code of Federal Regulations outlining three sets of requirements for agencies' work on grants: administrative requirements, which cover what agencies must do before and after awarding grants; cost principles, which cover allowable uses of federal grant dollars; and audit requirements, which cover steps agencies, auditors, and grantees must take to ensure the integrity of federal awards.⁵⁶⁷ OMB also oversees Guidelines to Agencies on

⁵⁶² See *supra* notes 167–78 and accompanying text. As further illustration of this point, one of the dissents in *Biden v. Missouri*, when evaluating the vaccine mandate implemented under Medicaid and Medicare funding discussed at note 4, *supra*, would have applied the Major Questions doctrine to reject the agency's rule, but mentioned the doctrine only as a final additional argument after concluding the vaccine mandate could not survive ordinary statutory interpretation. *Biden v. Missouri*, 142 S. Ct. 647, 658 (2022) (Thomas, J., dissenting). The other dissent did not rely on the Major Questions doctrine at all. 142 S. Ct. at 659–60 (Alito, J., dissenting). Now that the Supreme Court has named and entrenched the Major Questions doctrine in *West Virginia v. EPA*, 142 S. Ct. 2587, 2607–09 (2022), it remains to be seen how far the doctrine will extend.

⁵⁶³ See, e.g., Heinzerling, *supra* note 561, at 391–92.

⁵⁶⁴ See *supra* notes 61–94, 266–87, 406–34 and accompanying text.

⁵⁶⁵ See, e.g., Metzger & Stack, *supra* note 271, at 1253.

⁵⁶⁶ Pasachoff, *supra* note 91, at 595–96.

⁵⁶⁷ 2 C.F.R. §§ 200.0 to .520 (2021).

Government-Wide Debarment and Suspension (Non-procurement) in another twenty-five pages of the C.F.R.⁵⁶⁸ These trans-substantive requirements, which agencies must codify in their own governing regulations,⁵⁶⁹ are like an Executive Branch version of a grants-specific Administrative Procedure Act.

While each of the last few administrations has tweaked the Uniform Grant Guidance to further its substantive policy goals, for the most part this document has been both remarkably consistent and relatively technocratic and nonpartisan.⁵⁷⁰ Congress has repeatedly tasked OMB with developing government-wide grant policy.⁵⁷¹ Any effort to reform these processes throughout the Executive Branch ought to start with the Uniform Grant Guidance and the rules governing suspension and debarment.

A skeptical reader may well ask why, given OMB's problematic involvement in some of the Trump Administration's actions described above, OMB ought to be given more power over agencies' grant operations. The answer is simple: none of the suggestions below would give OMB more power over agencies or over grantees. Instead, the suggestions are for how agencies themselves should implement improvements to their own grant procedures, and because of the trans-substantive and all-encompassing nature of the Uniform Grant Guidance and the suspension and debarment guidelines, those improvements would best be accomplished through OMB's centralized document governing grant procedures. The recommendations are for how to strengthen agency controls in already existing provisions of OMB's guidance and weaken opportunities to exploit gaps in the requirements, rather than accreting more power to OMB directly.

Because the Uniform Grant Guidance and the Guidelines on Debarment and Suspension are subject to periodic update as a matter of course, it is not difficult to imagine OMB adopting these reforms in ordinary practice. The Biden Administration's OMB might be especially interested in adopting the reforms as part of an effort to restore OMB's institutional reputation after the Trump Administration's boundary-pushing actions.⁵⁷² OMB has a strong tradition of protecting the institution of the presidency even as it also serves the president, a duality sometimes framed as the tension between "neutral competence" and "responsive competence," and these proposed reforms fall easily within OMB's institutional identity of neutral competence without undercutting its ability to serve the policy (not personal) goals of the president.⁵⁷³ OMB may also wish to

⁵⁶⁸ *Id.* §§ 180.5 to .885.

⁵⁶⁹ *Id.* §§ 180.20, 200.106.

⁵⁷⁰ Pasachoff, *supra* note 91, at 586–92.

⁵⁷¹ *Id.*

⁵⁷² See, e.g., Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 891 (2009).

⁵⁷³ See Matthew J. Dickinson, *Guarding the Emperor's New Clothes: OMB, the Presidency, and the "Problem" of Neutral Competence in the Era of Trump*, in EXECUTIVE POLICYMAKING: THE ROLE OF THE OMB IN THE PRESIDENCY 233, 238, 258–60 (Meena Bose & Andrew Rudalevige eds., 2020).

entrench limits on agencies' ability to abuse their power over grants to target political enemies and reward political friends in anticipation that a future administration may renew the efforts.⁵⁷⁴

To be sure, such a future administration could well seek to undo these changes, raising questions about the Executive Branch's ability to constrain itself across administrations. Yet wholesale undercutting of these provisions would likely raise questions that could not be successfully justified in an arbitrary-and-capricious suit after agencies implemented OMB's changes (because "OMB made us do it" would not be a sufficient response, and there are likely to be few reasoned explanations for why removing barriers on grant politicization is necessary). In the meantime, agencies would have to follow the requirements.⁵⁷⁵

Moreover, in general, the requirements of the Uniform Grant Guidance have been very sticky, with a slow accretion of long-lasting, good-government, financial management obligations developed starting in the late 1960s, as the Great Society's grant programs began.⁵⁷⁶ As I have previously argued, agencies also take very seriously the compliance-oriented requirements of the Uniform Grant Guidance (sometimes even to the detriment of accomplishing the harder-to-achieve, outcome-oriented goals of their grant statutes).⁵⁷⁷ There is thus every reason to think that modifying the Uniform Grant Guidance and the suspension and debarment guidelines would do significant work to constrain abusive grant practices.

OMB should expand and clarify three different sets of requirements: those governing the process leading up to making awards; those governing the enforcement procedures; and those governing suspension and debarment.

1. *Pre-Federal Award Requirements*

To the detailed requirements already governing agencies' "program planning, announcement, application and award processes,"⁵⁷⁸ OMB ought to add the following.

First, OMB ought to require that agencies articulate overall priorities for discretionary grants on a semi-regular basis and allow the public to comment on proposed priorities. Having such statements would limit a president's ability to command that certain policy priorities be attached wholesale immediately. It would also further agencies' commitment to reasoned administration, requiring agencies to articulate rationales in a way that grant policy statements can sometimes avoid because of their general exemption from notice-and-comment rulemaking. Such an articulation would additionally make agencies more

⁵⁷⁴ See, e.g., Magill, *supra* note 572, at 888–89.

⁵⁷⁵ See *id.* at 889.

⁵⁷⁶ Pasachoff, *supra* note 91, at 582–83, 586–87.

⁵⁷⁷ *Id.* at 601–08.

⁵⁷⁸ 2 C.F.R. §§ 200. to .216 (2021).

transparent and responsive, providing an opportunity to weigh in on policy directions instead of simply pronouncing policy piecemeal through individual funding announcements.

OMB also ought to incorporate the joint rule against political interference and the appearance of political interference in grant award decisions into the Uniform Grant Guidance, making it apply to all twenty-six grant-making agencies instead of only the nine that adopted it originally.⁵⁷⁹ As a technical matter, the Uniform Grant Guidance is the federal government's primary statement of its unified policy on grant operations, and any broadly applicable policy ought to be incorporated into this document, as one of its goals is to streamline and unify trans-substantive grant policies and procedures.⁵⁸⁰ As a substantive matter, there is no reason why the requirement to limit the appearance and reality of political interference in grant award decisions is limited only to some agencies.

Such incorporation ought to give further content to the proscription. One important limit would forbid *ex parte* communications about individual grant applicants between the agency and anyone outside the agency other than the applicant and to require disclosure of any such efforts, akin to the limits the APA provides for formal adjudication.⁵⁸¹ This limit would help ensure that decisions about individual applications are made on the merits rather than on pressure from the White House (or Congress or anyone else). Another limit would require agencies to explain in the administrative record any deviation from the rank ordering of applicants provided by reviewers. This contemporaneous notation, codifying recommendations from GAO,⁵⁸² would help restrain unjustified elevation and demotion while also providing evidence a reviewing court could examine in an arbitrary-and-capricious challenge to politicized decision-making.

OMB should additionally require more detail in agencies' merit review plans, instead of leaving it to agencies to work out entirely what should be in those plans.⁵⁸³ For example, OMB ought to require that agencies create procedures for how outside reviewers will be selected; for accepting meetings with applicants during the review process; for requesting additional information from applicants and, if reaching out to only some applicants for this information, documenting why; and for when the agency may deviate from awarding grants based solely on the merit score. Agencies should also be required to articulate in each Notice of Funding Opportunity the weight each merit criterion will receive. These changes would limit on-the-fly decision-making and require

⁵⁷⁹ Federal Agency Final Regulations Implementing Executive Order 13,559, 81 Fed. Reg. 19,355, 19,355 (Apr. 4, 2016) (to be codified at 45 C.F.R. pts. 87, 1050).

⁵⁸⁰ See Pasachoff, *supra* note 91, at 586.

⁵⁸¹ See 5 U.S.C. § 557(d).

⁵⁸² See GOV'T ACCOUNTABILITY OFF., *supra* note 300, at 15–21, 26.

⁵⁸³ Cf. 2 C.F.R. § 200.205 (2021).

agencies to make transparent decisions that further the appearance and reality of fairness.

OMB currently requires agencies to assess applicants for the risks they pose before making any awards but does not provide any opportunities for applicants to receive the results of any risk assessment, to challenge the assessment, or to correct specific identified risks.⁵⁸⁴ Yet risk assessment can become a convenient, seemingly technical front for treating disfavored entities differently because of animus. OMB ought to require agencies to provide these opportunities and to explain, upon request, why different applicants received different risk assessments, to the extent such comparative information would not reveal confidential information about other applicants. This would not actually prevent agencies from making justified differential-risk assessments but would limit the appearance of bias while also providing prospective and ongoing grantees with information about how to change their internal practices to achieve a different risk assessment. Where agencies are making unjustified differential-risk assessments, it might limit such decisions, to the extent that having to justify their actions can make agencies change them and that making public their reasoning can produce public pushback that helps revise it.

OMB should also clarify that agencies must be prepared to give disappointed grant applicants a reason why they were not selected. In principle, Section 555 of the Administrative Procedure Act already requires the availability of such reasons,⁵⁸⁵ but the Uniform Grant Guidance makes no mention of such an obligation, and agencies differ in the extent to which they provide an explanation as a matter of course.⁵⁸⁶ To balance fairness and transparency to applicants with agency capacity, these reasons need not be lengthy; they could be basic, even standardized, in the first instance, with an opportunity for a more detailed explanation upon request. In addition to giving prospective grantees information about how they can do better next time, the goal is to require agencies to articulate how they are not rejecting grant applicants for improper reasons.

2. Enforcement Procedures

Most of the detailed requirements the Uniform Grant Guidance provides for the Post-Award stage govern grantees themselves, including requirements for their fiscal and management controls.⁵⁸⁷ The section on “Remedies for Noncompliance,” however, governs agencies.⁵⁸⁸ To this section, OMB ought to add the following.

⁵⁸⁴ *Id.* § 200.206(b).

⁵⁸⁵ 5 U.S.C. § 555(e).

⁵⁸⁶ SHAFFER & BRENT, *supra* note 53, §§ 28:1, 28:5 to :6.

⁵⁸⁷ 2 C.F.R. §§ 200.300 to .246 (2021).

⁵⁸⁸ *Id.* §§ 200.339 to .243.

OMB should clarify that ordinarily agencies should not move to withhold or terminate funds until less drastic steps have been taken, including the possibility of imposing specific conditions and requiring certain steps to come into compliance. OMB should also specify a minimum amount of time that agencies should offer to grantees within which to come into compliance before taking steps to withhold or terminate, and that time ought to be a reasonable amount of time within which a diligent grantee could actually take effective action. The goal is to eliminate the possibility that an agency seeking to punish a political enemy could impose financial ruin in a matter of weeks.

Agencies should be further required to explain in writing why they are imposing particular specific conditions, and ought to be required to explain upon a grantee's request why the specific conditions were applied in that case but not another case, again to the extent that such information does not reveal any confidential information about another grantee. As with pre-award risk assessment, the imposition of special conditions opens an avenue for animus-based abuse, and so agencies should have to justify their actions without being limited from making justified ones.

When an agency does move to withhold or terminate a grant, OMB should require that agencies provide opportunities for grantees to request a hearing before an impartial factfinder, with an opportunity for an internal appeal for grants over a certain amount, before the agency can terminate or withhold. In addition, the status quo of funding should be maintained during the pendency of any internal appeal, with the potential for requiring the grantee to repay the funding on losing the appeal and any court challenge. Some agencies already do require some of these steps,⁵⁸⁹ but the absence of these procedures in every agency provides an opportunity for a biased decisionmaker to impose financial ruin.

OMB should also revert to the previous version of justifications for termination, reinstating the "for cause" standard rather than allowing unilateral termination on the government's part upon belief that the award "no longer effectuates the program goals or agency priorities."⁵⁹⁰ Agencies can reasonably change priorities before making new awards, but it is not fair (or an effective use of government funds) for grantees to live in fear that their awards will be pulled simply because the agency changed its mind.

3. *Suspension and Debarment Procedures*

OMB should require that agencies separate several roles that currently fall under the unified charge of the Suspending or Debarment Official. Such an official is either the agency head or an official designated by the agency head⁵⁹¹ and is tasked with notifying the grantee of the proposed suspension or

⁵⁸⁹ See Pasachoff, *supra* note 29, at 281–83.

⁵⁹⁰ See *supra* notes 474–77 and accompanying text.

⁵⁹¹ 2 C.F.R. § 180.930 (2021).

debarment, conducting any hearing, and making the final decision. The official may, but need not, refer disputed material facts to another official for findings of fact.⁵⁹² This system provides too many opportunities for a biased decisionmaker. Instead, the tasks of notifying the grantee of the proposed suspension or debarment ought to be separated from making the final decision, to avoid prejudging the evidence.⁵⁹³ Where there are disputed findings of fact, an impartial decisionmaker separate from the debarring official ought to be required to issue findings in the first instance.

In addition, OMB ought to clarify the circumstances when an agency may stop funding a grantee during the pendency of debarment proceedings. There are reasons why the government may legitimately wish to halt funding to a grantee whose overall level of “present responsibility” is at issue, unlike the more granular question of compliance with a particular grant requirement. At the same time, if the government’s assessment of present responsibility is compromised by politicized decision-making, a grantee may legitimately wish to maintain the status quo until judicial review. At the very least, the debarring official ought to justify why withholding funding during the pendency of the proceeding is appropriate in the Notice of Proposed Debarment.⁵⁹⁴

C. Congress

Congress can help prevent executive abuses in grant implementation while at the same time respecting appropriate Executive Branch action. It can do so through its legislation, appropriations, and oversight authority—of course, as stated above, as circumstances permit.⁵⁹⁵

1. Legislation

Congress should remove the wholesale exemption for grants from notice-and-comment rulemaking,⁵⁹⁶ as the Administrative Conference of the United States and the American Bar Association have urged for decades, because it does not reflect the modern prominence of federal grant-making.⁵⁹⁷ The

⁵⁹² *Id.* § 180.845(c).

⁵⁹³ See generally MICHAEL ASIMOW, GREENLIGHTING ADMINISTRATIVE PROSECUTION: CHECKS AND BALANCES ON CHARGING DECISIONS (Jan. 2022), https://www.acus.gov/sites/default/files/documents/greenlighting-administrative-prosecution_0.pdf [https://perma.cc/QRD7-TG8X].

⁵⁹⁴ 2 C.F.R. § 180.805 (2021).

⁵⁹⁵ See KINGDON, *supra* note 556, at 20.

⁵⁹⁶ 5 U.S.C. § 553(a).

⁵⁹⁷ Admin. Conf. of the U.S., Elimination of Certain Exemptions from the APA Rulemaking Requirements (Recommendation No. 69-8), 38 Fed. Reg. 19,782, 19,784–85 (July 23, 1973); AM. BAR ASS’N, HOUSE OF DELEGATES RESOLUTION 106B (adopted Feb. 8, 2016), <https://www.acus.gov/sites/default/files/documents/ABA-Resolution-106B-and-Report.pdf>

provision made more sense when the APA was passed in 1946, when little policymaking was done through federal grants.⁵⁹⁸ Although many agencies have waived their exemption in response to a decades-old recommendation by the Administrative Conference, they have done so to different degrees, and some have rescinded their waiver in order to obtain more freedom in their operations.⁵⁹⁹ Yet it is this exemption that makes it easy for a boundary-pushing president to assert overall policy priorities to be implemented through grants, as with sanctuary cities and anarchist jurisdictions. Given the contemporary extent of grant-making to conduct the nation's business, and given its potential for presidential abuse, this exemption is no longer worth retaining.⁶⁰⁰

Congress should also improve transparency and fairness in the grant award process by passing a version of the Grant Reform and New Transparency Act of 2016, or the GRANT Act.⁶⁰¹ Among other things, this Act would have required agencies to develop standards for external grant reviewers, to publish an explanation of whether and why agencies made selections out of order from the numerical rankings while avoiding sharing sensitive or adverse information, and to provide explanations for applicants whose proposals were not funded.⁶⁰² This bill was reported out of committee with bipartisan approval but never received a vote.⁶⁰³ These proposals would take helpful steps to remedy both the appearance of and potential for politicized decision-making in the awards process.

Congress should also require that agencies report decisions to terminate funding, withhold funding, or debar entities to the relevant legislative

[<https://perma.cc/8DNJ-M9YR>]; *Proceedings of the 1981 Annual Meeting of the House of Delegates*, 106 ANN. REP. A.B.A. 541, 549 (1981); *Report of the Section of Administrative Law Section of Corporation, Banking, and Business Law Joint Recommendation to the House of Delegates*, 106 ANN. REP. A.B.A. 783, 783, 788 (1981).

⁵⁹⁸ See Bernard W. Bell, *Revisiting APA Section 553*, YALE J. ON REGUL.: NOTICE & COMMENT (Nov. 30, 2016), <https://www.yalejreg.com/nc/revisiting-apa-section-553-by-bernard-w-bell/> [<https://perma.cc/TD7G-XU9C>].

⁵⁹⁹ See, e.g., Lubbers, *supra* note 52, at 1894–95.

⁶⁰⁰ To ensure that agencies could continue to award funding for one-time or smaller programs within the fiscal year without getting bogged down by the requirements of notice-and-comment, some common-sense limits could be put in place. For example, the requirements of § 553 could apply only to programs still in existence after a first competition has taken place (which the statute governing the Department of Education's rulemaking authority requires, see 20 U.S.C. § 1232(d)), or only to programs over a certain dollar threshold or those raising novel legal or policy issues (akin to OIRA's review requirements for significance, see Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993)). The good-cause exemption in § 553(b)(B) could also play a role where notice-and-comment would be "impracticable, unnecessary, or contrary to the public interest." See Admin. Conf. of the U.S., *Elimination of Certain Exemptions from the APA Rulemaking Requirements* (Recommendation No. 69-8), 38 Fed. Reg. at 19,785.

⁶⁰¹ S. 2972, 114th Cong. (2016); S.2972 - GRANT Act, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/2972> (on file with the *Ohio State Law Journal*).

⁶⁰² S. 2972 § 2.

⁶⁰³ S. REP. NO. 114-407 (2016); S.2972 - GRANT Act, *supra* note 601.

committees, and that such decisions would not become effective until thirty days after the report. Modeled after requirements in Title VI and Title IX that agencies must take these steps before finally terminating or withholding funds for violations of these statutes or implementing regulations,⁶⁰⁴ the requirement provides an opportunity for subject-matter committees to become aware of and respond to politicized enforcement decisions.

Congress should also strengthen limits on disaster programs to cabin the potential for abuse. For example, because the Stafford Act leaves so much to the president's unreviewable discretion,⁶⁰⁵ opportunities to sideline disfavored jurisdictions are rife. While Congress has been reluctant to take political discretion out of the process, despite many recommendations for doing so over the years, preferring instead to leave discretion at each stage of the political process (local authorities, governors, members of Congress themselves, and the president),⁶⁰⁶ at the very least Congress ought to put more definitional limits and procedural requirements in place for exercising that discretion. Requiring the president to engage in an interagency, intergovernmental deliberative process and to provide a formal statement of reasons for each grant or denial, tied to the statutory goals and to previous decisions to grant or deny, would not be unduly burdensome, and it could have a meaningful effect on limiting decisions based only on whim or (dis)favoritism.⁶⁰⁷

Similarly, one of the reasons that HUD was able to delay getting emergency funding to Puerto Rico is that there is no generally applicable regulation governing the Community Development Block Grant Disaster Relief program.⁶⁰⁸ HUD's Inspector General has urged the agency to promulgate such a regulation, noting that its absence not only causes delay in getting disaster funding out the door but also poses challenges to grantees, who must wade through multiple Federal Register notices with overlapping but not identical requirements.⁶⁰⁹ A program regulation would streamline the process and would also remove the agency's ability to single out jurisdictions for slow-walked or particularly harmful burdens. Yet HUD apparently does not believe that the

⁶⁰⁴ Cf. 42 U.S.C. § 2000d-1; 20 U.S.C. § 1682.

⁶⁰⁵ *How a Disaster Gets Declared*, FEMA, <https://www.fema.gov/disaster/how-declared> [<https://perma.cc/S3VM-DURF>] (Jan. 4, 2022); see *supra* notes 356–58 and accompanying text.

⁶⁰⁶ See FRANCIS X. MCCARTHY, CONG. RSCH. SERV., RL34146, FEMA'S DISASTER DECLARATION PROCESS: A PRIMER 6–8 (2011); PLATT, *supra* note 217, at 285–86.

⁶⁰⁷ For useful discussions of the permissibility and utility of cabining the president's *ex ante* discretion in general, not limited to the disaster space, see Shalev Roisman, *Presidential Law*, 105 MINN. L. REV. 1269, 1318–20, 1331–35 (2021), and Matthew Steilen, *Presidential Whim*, 46 OHIO N.U. L. REV. 489, 498–508 (2020).

⁶⁰⁸ See OFF. OF INSPECTOR GEN., *supra* note 445, at 10.

⁶⁰⁹ See OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOUS. & URB. DEV., 2018-FW-0002, OFFICE OF BLOCK GRANT ASSISTANCE: COMMUNITY DEVELOPMENT BLOCK GRANT DISASTER RECOVERY PROGRAM 6–13 (July 2018), <https://www.hudoig.gov/sites/default/files/documents/2018-FW-0002.pdf> [<https://perma.cc/UC8R-ZDZP>].

Stafford Act provides the authority to issue such regulations.⁶¹⁰ Congress should specifically grant this authority and should further require HUD to promulgate program regulations within a realistic timeframe. The Reforming Disaster Recovery Act of 2021, introduced though not acted upon in both the House and Senate, contains such a valuable provision.⁶¹¹

2. Appropriations

The 117th Congress has already taken one helpful step to reign in executive abuses in grant awards by reviving legislative earmarks.⁶¹² Although often maligned as fostering corruption and waste,⁶¹³ an earmarks regime with front-end limits and back-end auditing need do neither, and instead makes it easier for members of both parties to vote for spending bills, making government shutdowns less likely and helping move past gridlock.⁶¹⁴ Moreover, the absence of legislative earmarks between 2011 and 2021 simply shifted the allocational power to the Executive Branch.⁶¹⁵ The return of legislative earmarks should be embraced for helping to reduce opportunities for political enemies of the president to be disfavored in executive grant allocation decisions. With appropriate limits on overall amounts available for earmarking and requirements for transparency, the advantages outweigh the disadvantages in staff time and the opportunities for inappropriate legislative choices.

Congress should also, where possible, further specify policy limits in lump-sum appropriations.⁶¹⁶ When Congress gives only a general goal in an appropriation, the Executive Branch has maximum discretion in how to allocate it.⁶¹⁷ When Congress puts more specifics into appropriations language, it

⁶¹⁰ *Id.* at 6.

⁶¹¹ See Reforming Disaster Recovery Act, S. 2471, 117th Cong. §§ 6, 7 (2021); Reforming Disaster Recovery Act, H.R. 4707, 117th Cong. §§ 6, 7 (2021). The Senate's version of the HUD Appropriations Act for Fiscal Year 2023 incorporates this Act. See Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2023, S. 4670, 117th Cong. tit. V (2022). As of October 2, 2022, no vote had been taken on it.

⁶¹² See, e.g., John Hudak, *Earmarks Are Back, and Americans Should Be Glad*, BROOKINGS (Mar. 17, 2021), <https://www.brookings.edu/blog/fixgov/2021/03/17/earmarks-are-back-and-americans-should-be-glad/> [<https://perma.cc/M536-YKTA>].

⁶¹³ See, e.g., DICKERSON, *supra* note 258, at 2.

⁶¹⁴ See, e.g., Hudak, *supra* note 612; John Hudak, *Lessons from the Shutdown: Pork and Earmarks Help Break Gridlock*, BROOKINGS (Oct. 30, 2013), <https://www.brookings.edu/blog/fixgov/2013/10/30/lessons-from-the-shutdown-pork-and-earmarks-help-break-gridlock/> [<https://perma.cc/4J6Q-E6R6>].

⁶¹⁵ See, e.g., ZACHARY COURSER & KEVIN R. KOSAR, AM. ENTER. INST., RESTORING THE POWER OF THE PURSE: EARMARKS AND RE-EMPOWERING LEGISLATORS TO DELIVER LOCAL BENEFITS (Feb. 2021), <https://www.aei.org/wp-content/uploads/2021/04/Restoring-the-power-of-the-purse-3.pdf?x91208> (on file with the *Ohio State Law Journal*).

⁶¹⁶ Cf. KRINER & REEVES, *supra* note 249, at 180–81.

⁶¹⁷ See *Lincoln v. Vigil*, 508 U.S. 182, 190–93 (1993).

reduces the opportunity for the Executive Branch to make choices that favor only its preferred constituencies. Where concerns about executive funding abuses exist, such specificity should be embraced.

This recommendation need not completely transform the practice of needing some level of generality in appropriations to reach timely agreement and avoid government shutdowns;⁶¹⁸ even incremental changes to criteria in limited numbers of programs would help constrain administrative excess. Consider, for example, the ongoing changes to the Department of Transportation's largest discretionary grant program. While the funding began by directing the DOT to "ensure an equitable geographic distribution," subsequent appropriations acts—reacting to administrative choices, first in the Obama era and then in the Trump era—added additional requirements, initially to "ensure an appropriate balance in addressing the needs of urban and rural areas," and then to limit the distribution to rural areas to 50% and to change the definition of what counts as rural and urban.⁶¹⁹ These limits had the effect of curbing the range of the Administrations' choices.⁶²⁰ As another example, consider the appropriations act's limits on the Teen Pregnancy Prevention Program.⁶²¹ The limits, while still highly general, required that 75% of the available funding be awarded to "replicate" "programs" "proven effective through rigorous evaluation," language that was specific enough that courts found that the Trump Administration's Funding Opportunity Announcements did not comply.⁶²² In both cases, even slightly more specificity in appropriations language played a role in constraining the Administration's ability to award funding merely to its friends.

3. Oversight

Finally, Congress should use its oversight authority to investigate the most troubling aspects of Executive Branch control over federal grants. In part, this recommendation is less one about reform than about staying the course. Even given the limits of politics and norms in constraining pork and punishment wholesale as discussed above,⁶²³ individual hearings and pressure from delegations can sometimes stop the Executive Branch from taking the harmful actions it has planned (as happened with the EPA's termination of the grant to the *Chesapeake Bay Journal*)⁶²⁴ or can lay the groundwork for legislation or

⁶¹⁸ See SCHICK, *supra* note 202, at 214–32.

⁶¹⁹ See PETERMAN, *supra* note 370, at 5–10.

⁶²⁰ See *id.* at 14–15.

⁶²¹ See ADRIENNE L. FERNANDES-ALCANTARA, CONG. RSCH. SERV., R45183, TEEN PREGNANCY: FEDERAL PREVENTION PROGRAMS 6–7 (2020).

⁶²² *Planned Parenthood of Greater Wash. & N. Idaho v. HHS*, 946 F.3d 1110, 1112–15 (9th Cir. 2020); *Planned Parenthood of N.Y.C. v. HHS*, 337 F. Supp. 3d 308, 331–42 (S.D.N.Y. 2018), *appeal withdrawn*, No. 18-3361, 2019 WL 5618617 (2d Cir. June 14, 2019).

⁶²³ See *supra* notes 376–89, 541–55 and accompanying text.

⁶²⁴ See *supra* note 542 and accompanying text.

appropriations that can require it to do so (as happened with the debarment of the Open Technology Fund).⁶²⁵ Even where hearings do not have the desired immediate effect, they can lay the groundwork for remedial action down the line (as with Puerto Rico, where hearings did not prompt the Trump Administration to release the funds, but rather established the record of impropriety that encouraged the Biden Administration to work to release the funds within days of taking office).⁶²⁶

In addition to work by authorization committees, appropriations committees, and congressional delegations reacting in the moment to individually troubling executive actions, Congress can take proactive steps to increase oversight over the system of grant awards and enforcement as a whole. The House and Senate government oversight committees should add the grant award process and grant enforcement to the regular work they conduct on grant oversight. In recent years, major topics in grant reform in these committees have been streamlining grants management and reducing improper payments.⁶²⁷ These are both important topics, but it is worth adding regular oversight on grant awards and enforcement to the roster.

GAO could assist by providing a regular report on agencies' grant award and enforcement efforts, following the model of the way its work on improper payments and streamlining grants management has played a central role on congressional oversight and reform in these areas.⁶²⁸ Examining grant awards and enforcement in general, outside the context of specific controversies, would help establish norms, making it easier to spot and perhaps reach agreement in the future on deviation from those norms.

⁶²⁵ See *supra* note 545 and accompanying text.

⁶²⁶ See Flavelle & Mazzei, *supra* note 8; Nicole Acevedo, *New Probe Confirms Trump Officials Blocked Puerto Rico from Receiving Hurricane Aid*, NBC NEWS, <https://www.nbcnews.com/news/latino/new-probe-confirms-trump-officials-blocked-puerto-rico-receiving-hurri-rcna749> [<https://perma.cc/6UJS-6JNS>] (Apr. 23, 2021).

⁶²⁷ See, e.g., *Follow the Money: Tackling Improper Payments*, HOUSE COMM. ON OVERSIGHT & REFORM (Mar. 31, 2022), <https://oversight.house.gov/legislation/hearings/follow-the-money-tackling-improper-payments> [<https://perma.cc/UQ4W-PGGV>]; *Subcommittee on Intergovernmental Affairs Hearing: Federal Grant Management*, HOUSE COMM. ON OVERSIGHT & REFORM (July 25, 2018), <https://oversight.house.gov/legislation/hearings/subcommittee-on-intergovernmental-affairs-federal-grant-management> [<https://perma.cc/TKS7-7RNT>]; *Pandemic Response and Accountability: Reducing Fraud and Expanding Access to COVID-19 Relief through Effective Oversight*, SENATE COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFS. (Mar. 17, 2022), <https://www.hsgac.senate.gov/hearings/pandemic-response-and-accountability-reducing-fraud-and-expanding-access-to-covid-19-relief-through-effective-oversight> [<https://perma.cc/QUK9-8LRA>].

⁶²⁸ See generally U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-676T, GRANTS MANAGEMENT: OBSERVATIONS ON CHALLENGES AND OPPORTUNITIES FOR REFORM (July 2018); *Improper Payments*, U.S. GOV'T ACCOUNTABILITY OFF., <https://www.gao.gov/improper-payments> [<https://perma.cc/9ZBY-3RJ8>].

VI. CONCLUSION

Federal grants are a critical tool for implementing the nation's important policy goals. While the Executive Branch plays a valuable role in effectuating grants, it can nonetheless abuse its position. This study has shown that abuses in the policy space are relatively easily cabined by courts and norms, and so are less concerning than abuses in the award and enforcement process, which courts, politics, and norms are less successful in limiting. A series of reforms inside agencies and from Congress could help limit the potential for abuse in these spaces. At the same time, this study has articulated ways to assess abuse that should help clarify the choices for a conscientious Executive Branch official faced with decisions around grant policy, pork, and punishment.