SECOND-CLASS ADMINISTRATIVE LAW: *LINCOLN V. VIGIL*'S PUZZLING PRESUMPTION OF UNREVIEWABILITY

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ABSTRACT

Administrative law ordinarily presumes that someone hurt by "arbitrary and capricious" agency action may seek relief in federal court unless Congress says otherwise. Administrative law does the opposite, however, when the harmful agency action happens to be one "allocating a lump-sum appropriation" (whatever that means). When it comes to spending programs that courts deem to fit in this ill-defined category, agency actions are presumptively immune from judicial review, insulated from the safeguards of administrative law no matter how arbitrary.

This Article looks behind the superficial, technocratic simplicity of the presumption of unreviewability through a novel, person-sensitive study of its origins and effects driven by the subordination question—"who pays?" This study reveals that the presumption is founded on a historical fiction—a "tradition" of refusing review that the Supreme Court invented thirty years ago (in Lincoln v. Vigil*) in order to reverse district court and appellate rulings invalidating the termination of the Indian Children's Program by President Reagan's Department of Health & Human Services. The* Vigil *presumption is far from self-executing. Instead lower courts, following the Supreme Court's lead, have in practice targeted the* Vigil *presumption toward Native Americans. Thirty-seven percent of cases to which courts apply the presumption are brought by Tribes. Fifteen percent are brought by prisoners. No other group faces the presumption with any regularity. Moreover, because the presumption is limited to discretionary spending programs, it is inherently targeted toward those who rely on such programs rather than the market or mandatory entitlements, that is, the nation's most vulnerable.*

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In light of the Article's findings about the origins and disparate impacts of the Vigil *presumption, the presumption should be considered an Indian Law doctrine, not just an administrative law doctrine—and it should be abandoned. The policy justifications that the Supreme Court offered alongside its fictitious historical claim in inventing it (which scholars have previously cited approvingly) do not actually turn out to be persuasive on their own terms, let alone in the face of the lopsided practical operation revealed by the Article. Scholars may debate how much protection administrative law should provide to people injured by agency action, but there is no good reason that we should have one administrative law for most everyone and another, second-class administrative law for Tribes, prisoners, and others who rely on discretionary federal spending programs.*

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INTRODUCTION

In 1985 President Reagan's Department of Health and Human Services decided to abruptly terminate the Indian Children's Program, which provided essential, life-changing physical and speech therapy to 426 disabled children in Native American communities across Arizona, Colorado, and New Mexico. The injured children sought recourse in federal court, arguing that the agency's decision to cut off their care was arbitrary and capricious under section 706 of the Administrative Procedure Act

(APA)—the super-statute at the center of the field of administrative law.[1] The district court and the Tenth Circuit ruled in favor of the children,[2] but a unanimous Supreme Court tossed the case without reaching the merits.[3]

It did not matter whether the agency's decision to terminate the Indian Children's Program was arbitrary and capricious or not, the Supreme Court told the aggrieved children in *Lincoln v. Vigil*, because their case involved a decision about how to spend funds appropriated by Congress. Such agency decisions, the Court explained, were "traditionally regarded as committed to agency discretion" and subject to a presumption *against* arbitrariness review.[4] Thirty years later, the niche presumption of *unreviewability* announced in *Vigil* to foreclose judicial review of the termination of the Indian Children's Program remains a rare exception to the general presumptions of judicial review[5] and trans-substantivity in administrative law.[6]

The *Vigil* presumption[7] of unreviewability is a rarity for another reason: It is perhaps the least scrutinized and least controversial doctrine in the administrative law canon. The presumption *Vigil* announced has never—never!—been questioned or even evaluated in depth in legal scholarship.[8]

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1. 5 U.S.C. §§ 551–559; *see* William N. Eskridge Jr. & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 NOTRE DAME L. REV. 1893, 1894 (2023) ("There is academic consensus that the Administrative Procedure Act of 1946 (APA) is a *super statute*, 'entrenching governmental structures and quasi-constitutional norms.'" (quoting Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2054 (2011))); Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1209–11 (2015) (characterizing APA as a superstatute).

2. Vigil v. Rhoades, 746 F. Supp. 1471 (D.N.M. 1990), *aff'd*, 953 F.2d 1225 (10th Cir. 1992), *rev'd sub nom.* Lincoln v. Vigil, 508 U.S. 182 (1993).

3. *Vigil*, 508 U.S. at 193–94.

4. *Id.* at 192.

5. *See generally* Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285 (2014) (evaluating generally applicable presumption of reviewability in administrative law).

6. The primary other exceptions are law enforcement discretion and decisions not to re-open agency proceedings once concluded. *See, e.g.*, ICC v. Bhd. of Locomotive Eng'rs, 482 U.S. 270, 282 (1987) (decisions not to re-open); Heckler v. Chaney, 470 U.S. 821, 831–33 (1985) (enforcement discretion); *cf.* Webster v. Doe, 486 U.S. 592, 603 (1988) (finding CIA decision to terminate employee due to their sexual orientation unreviewable).

7. Courts occasionally refer to the doctrine as the "*Lincoln* Rule," after the Acting Director of the Indian Health Service who was the named defendant in the case when the Supreme Court decided it. *E.g.*, Southcentral Found. v. Roubideaux, 48 F. Supp. 3d 1291, 1303 (D. Alaska 2014) (referring to the "*Lincoln* Rule"). Consistent with the Article's effort to emphasize the Indian Law origins and lived experience of the doctrine, the Article refers to the "*Vigil* presumption" to focus on the named plaintiff and class representative, Ashley Vigil. *See infra* Section I.A. (describing story of *Lincoln v. Vigil*).

8. A brief case note immediately following the decision offers the fullest discussion, but it largely repeats and endorses the pragmatic arguments offered by the Supreme Court in *Vigil* itself. *See* Stephanie Schultz, Lincoln v. Vigil*: An Exception to the Rule of Judicial Review*, 20 OHIO N.U. L. REV. 353, 363 (1993) ("The Court in *Lincoln* correctly noted that the allocation of funds from a lump sum appropriation is within the discretion of the agency.").

Law review articles, treatises, and cases routinely describe *Vigil*'s presumption of unreviewability for discretionary spending decisions as a straightforward doctrine of black letter administrative law.[9] This is despite the deep scholarly engagement in the question of the desirability of judicial review of agency action *writ large*[10] and scholars' recognition in recent years of the critical need for attention to long-neglected but fundamental questions about the administrative law of federal spending.[11] Indeed, the

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9. *See, e.g.*, KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 19.6 (6th ed. 2020) ("In *Lincoln*, the Supreme Court held that resource allocation and budgeting decisions are committed to agency discretion absent a mandatory statutory provision that compels the agency to spend specific sums for a specific purpose."); David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753, 796 (2022) ("Nor are agency spending decisions subject to regular judicial review. In *Lincoln v. Vigil*, the Supreme Court ruled that allocation of a lump-sum appropriation is a matter 'committed to agency discretion' under the APA." (quoting *Vigil*, 508 U.S. at 193)); Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1121 (2021) (describing doctrine in same terms); Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 366 (2019) (same); Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417, 464–65 (2013) (same); Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 607–08 (2007) ("[T]he allocation of [unspecified, lump-sum Congressional budget appropriations] 'is a[n] administrative decision traditionally regarded as committed to agency discretion.'" (third alteration in original) (quoting *Vigil*, 508 U.S. at 192)); United States v. Jicarilla Apache Nation, 564 U.S. 162, 182 (2011) ("[W]e have recognized that the Government has 'discretion to reorder its priorities from serving a subgroup of beneficiaries to serving the broader class of all Indians nationwide.'" (quoting *Vigil*, 508 U.S. at 195)); Shawnee Tribe v. Mnuchin, 480 F. Supp. 3d 230, 233 (D.D.C. 2020), *rev'd*, 984 F.3d 94 (D.C. Cir. 2021) ("[The Tribe] contends that this court in *Prairie Band* made a threshold error because it 'failed to consider that the APA presumes review, even where lump sum appropriations are at issue.' That argument misstates the law. In this Circuit, a 'presumption of non-reviewability' attaches to an agency's 'allocation of funds from a lump-sum appropriation.'" (citations omitted)); Serrato v. Clark, 486 F.3d 560, 567–68 (9th Cir. 2007) (describing presumption); Oceana, Inc. v. Ross, 275 F. Supp. 3d 270, 282 (D.D.C. 2017) ("An agency's allocation of funds is unreviewable, unless Congress has restricted the use of the funds by statute." (citing *Vigil*, 508 U.S. at 192–94)), *aff'd*, 920 F.3d 855 (D.C. Cir. 2019); Pol'y & Rsch., LLC v. U.S. Dep't of Health & Hum. Servs., 313 F. Supp. 3d 62, 75 (D.D.C. 2018) (same); N.M. Health Connections v. U.S. Dep't of Health & Hum. Servs., 340 F. Supp. 3d 1112, 1174 (D.N.M. 2018) (same); Samuels v. Fed. Hous. Fin. Agency, 54 F. Supp. 3d 1328, 1338 (S.D. Fla. 2014) (same); *see also* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.05 (2023) ("The *Vigil* Court . . . held that a decision by the Indian Health Service to reallocate funding resources from one program to another was not subject to judicial review because such decisions were left to agency discretion by law.").

10. *E.g.*, Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852 (2020); Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097 (2018); Daniel E. Walters, *The Judicial Role in Constraining Presidential Nonenforcement Discretion: The Virtues of an APA Approach*, 164 U. PA. L. REV. 1911 (2016); Bagley, *supra* note 5, at 1322; Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657 (2004); Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689 (1990).

11. *See* Metzger, *supra* note 9, at 1077, 1082 (contrasting the fact that "[a]ppropriations lie at the core of the administrative state" with the fact that "public law scholarship . . . has largely ignored issues of agency funding."). Metzger notes a "growing body of scholarship documenting the importance of appropriations." *Id.* at 1082–83 (citing, for example, Matthew B. Lawrence, *Disappropriation*, 120 COLUM. L. REV. 1 (2020) [hereinafter Lawrence, *Disappropriation*]; Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357 (2018); Eloise Pasachoff, *The President's*

very few articles that touch on the merits of the *Vigil* presumption—including one prior work by the author—endorse it as sensible and move on.[12]

This Article is the first to study *Vigil* and the presumption of unreviewability it created. Its novel, person-sensitive study of the presumption's origins and effects reveals three fundamental, interrelated problems: The presumption is premised on a historical fiction, has had a starkly disparate impact, and makes no sense. Accordingly, the Article's core thesis is that the *Vigil* presumption should be erased from the administrative law canon.

Vigil is premised on a legal fiction. The historical "tradition" of refusing review for "appropriations" decisions that the Supreme Court invoked as legal support for refusing to even consider whether the termination of the Indian Children's Program was an abuse of discretion did not exist prior to *Vigil*. The Article's study of the case and its history reveals there was no such thing. Indeed, in the presentation of the case before the Supreme Court the argument that decisions "allocating lump-sum appropriations" were subject to a "tradition" of refusing review was explicitly made for the first time at oral argument as a last-minute suggestion in the Solicitor General's rebuttal presentation.[13] The Justices' decision to rule on the grounds of this last-minute suggestion must have posed a drafting challenge for the clerk assigned to write the opinion, because the key sentence in Justice Souter's unanimous opinion for the Court claiming a "tradition" does not cite anything for support, at all. Support would have been difficult to find. The Article's review of case law and secondary sources predating *Vigil* finds none on point. But it finds numerous instances of courts engaging in

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Budget as a Source of Agency Policy Control, 125 YALE L.J. 2182 (2016) [hereinafter Pasachoff, *The President's Budget*]). For more recent treatments, see Eloise Pasachoff, *Executive Branch Control of Federal Grants: Policy, Pork, and Punishment*, 83 OHIO ST. L.J. 1113 (2022) [hereinafter Pasachoff, *Policy, Pork, and Punishment*]; Matthew B. Lawrence, *Subordination and Separation of Powers*, 131 YALE L.J. 78 (2021) [hereinafter Lawrence, *Subordination and Separation of Powers*].

12. The primary sustained treatment of the *Vigil* presumption in legal scholarship comes in Professor Metzger's *Taking Appropriations Seriously*, where it features as one of several instances of the marginalization of appropriations. *See* Metzger, *supra* note 9, at 1163–64. While pushing back on appropriations marginalization in other contexts, Professor Metzger tentatively concludes that "*Lincoln*'s holding that agency allocation decisions with respect to a lump-sum appropriation are nonreviewable . . . appears justified" because of the short life span of appropriations decisions and the fact that they often entail judgments about the best allocation of resources from a limited pot. *Id.* Sections III.B and III.C, *infra*, critically evaluate these and other policy justifications. I, too, have previously expressed support for the *Vigil* presumption for annual appropriations decisions. Matthew B. Lawrence, *Congress's Domain: Appropriations, Time, and* Chevron, 70 DUKE L.J. 1057, 1103 (2021).

13. *See infra* Section I.C.2 (explaining that while aspects of the government's briefs arguably implied such an argument, the government first expressly articulated this position at oral argument).

arbitrariness review of spending decisions, the "tradition" to the contrary invented by the Court notwithstanding.

Vigil has had a disparate impact. Perhaps the *Vigil* presumption of unreviewability has gone unquestioned because it is a superficially neutral administrative law doctrine that ostensibly applies based on the nature of a challenged action, not the party bringing the case. But looks can be deceiving. Focusing on the subordination question—"who pays"[14]—reveals that the doctrine's impacts are not neutral at all. The Article's study of published decisions applying *Vigil* reveals that thirty-seven percent of cases in which the *Vigil* presumption has presented a barrier to judicial review have been brought by Tribes.[15] An additional fifteen percent of cases in which the doctrine has served as an obstacle have been brought by prisoners. No other groups face *Vigil*'s presumption of unreviewability often. Indeed, Tribes face *Vigil* as an obstacle to review in federal court more often than do corporations, advocacy groups (environmental, civil rights, industrial, or otherwise), states, and localities *combined*.

The insight that a significant plurality of *Vigil* cases are brought by Tribes—and that Tribes are impacted by the doctrine more than twice as often as any other group—makes *Vigil* another illustration of Professor Blackhawk's insight that Indian Law has profoundly shaped public law.[16] Indeed, the case's origins and effects problematize the idea of trans-substantivity in administrative law, as well as any conceptual categorization of American legal scholarship that would separate "administrative law" questions from "Indian Law" questions, not to mention "health law" and "disability law" questions from "public law" questions.

Moreover, the *Vigil* presumption does not make sense, conceptually or pragmatically. It is one thing to say (as many hornbooks, articles, and cases have said in describing the presumption) that in light of *Vigil*, decisions about "allocation of lump-sum appropriations" are "committed to agency discretion by law" within the meaning of section 701(a)(2) of the APA and

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14. The "subordination question," first developed in feminist and critical race theory, asks "whether a rule of law or legal doctrine, practice, or custom subordinates important interests and concerns of racial minorities," women, or other marginalized groups. Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 88 (1994); *see also* MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 27 (2010) (applying the "race subordination question" to tort law); Gil Gott, *The Devil We Know: Racial Subordination and National Security Law*, 50 VILL. L. REV. 1073, 1073 (2005) (applying the "subordination question" to national security); Roy L. Brooks, *Feminist Jurisdiction: Toward an Understanding of Feminist Procedure*, 43 KAN. L. REV. 317, 340 (1995) (applying the subordination question to civil procedure).

15. *See infra* Section II.A.

16. *See* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1806 (2019) (describing Indian Law as central to public law and collecting examples).

so presumptively unreviewable. In application the clarity of this statement breaks down, however. The Article's study of courts' decisions applying the rule reveals three wide-open and outcome-determinative questions about its scope and effect as to which neither *Vigil* nor any other case provides guidance.[17] This may help to explain why courts have applied the doctrine most often in cases brought by Tribes—*Vigil* itself, after all, was such a case—but it makes the doctrine little more than a source of uncanalized discretion for judges to decide, for any reason or no reason, to refuse review of agency decisions related to spending. As for the policy justifications that the Supreme Court offered in support of the doctrine (which I and others have previously cited approvingly), they do not actually turn out to be persuasive on their own terms, let alone in the face of the lopsided and confused practical operation revealed by this Article. Scholars may debate how much protection administrative law should provide to parties injured by agency action,[18] but there is no good reason that we should have one administrative law for most everyone who is injured by federal agency action and another, second-class administrative law for Tribes, prisoners, and others who rely on discretionary federal spending programs.

The stakes here may not seem so big. The *Vigil* presumption operates in a tiny corner of administrative law. Whether *Vigil* is wrong or right, those who receive their wealth, health care, housing, education, transportation, or other supports through the market never need think about the case—agency actions injuring their interests are subject to administrative law's over-arching presumption of reviewability. Even those who receive their wealth, health care, housing, education, transportation, or other supports through so-called "new property" entitlements like Medicare or Social Security—mandatory spending programs[19]—need not concern themselves. As entitlement beneficiaries, they get *extra* administrative law (by virtue of the Due Process Clause),[20] not less, and even where Due Process does not apply, they remain beneficiaries of the general presumption of reviewability. *Vigil* and its presumption of unreviewability apply only to that small subset that relies on non-defense discretionary federal spending programs, which

17. These open questions about *Vigil*'s scope and effect are the following: (1) To which agency decisions about "lump-sum" appropriations does the presumption apply? (2) For purposes of the presumption, which spending statutes are "appropriations"? And (3) for purposes of the presumption, what does "lump-sum" mean? The uncertainty surrounding these questions has left advocates and courts broad discretion to apply the case, or not, in particular spending cases. *See infra* Section II.B.

18. *See supra* note 10 (collecting leading articles debating reviewability in administrative law).

19. Lawrence, *Disappropriation*, *supra* note 11, at 4 n.3 (discussing definitions of entitlements).

20. *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 783–85 (1964).

constitute about three percent of economic activity as measured by Gross Domestic Product (GDP).[21]

The *Vigil* presumption nonetheless matters. It matters for the obvious reason that what happens to the least powerful is *more* important, not less, regardless whether it affects GDP.[22] Many discretionary federal spending programs benefit the most vulnerable, least powerful groups (groups like Tribes) who lack economic power in the market and sufficient political power to secure mandatory or market entitlements.[23]

Vigil also matters for three more subtle reasons. First, *Vigil* has implications for the separation of powers. Control over discretionary spending through the annual appropriations process is today perhaps the most important tool of influence over the administrative state available to Congress.[24] The effectiveness of legislative conditions on appropriated spending depends, however, on the potential for courts to review agency judgments that those legislative conditions are met, as illustrated by the previously unnoticed role *Vigil* came to play in the Ninth Circuit litigation surrounding President Trump's construction of a wall along the southern border.[25] As an obstacle to such review, the *Vigil* presumption is an impediment to Congress's constitutional power of the purse.

Second, *Vigil* matters for the perception and reality of federal spending. Many of administrative law's most important effects lie upstream, in the *ex ante* behavior of agencies acting in the shadow of the law,[26] or in the expressive realm of how the content of administrative law shapes perceptions of government.[27] Viewed on these dimensions, *Vigil* and the law-free zone around federal spending decisions it articulates contribute to a perception of lawlessness in the administration of federal spending that

21. *See Policy Basics: Non-Defense Discretionary Programs*, CTR. ON BUDGET & POL'Y PRIORITIES (Apr. 13, 2020), https://www.cbpp.org/research/federal-budget/non-defense-discretionary-programs [https://perma.cc/F9HD-HHV9].

22. *See* Noah D. Zatz, *Supporting Workers by Accounting for Care*, 5 HARV. L. & POL'Y REV. 45, 55 (2011) (critiquing invisibility of non-economic values and activities); *see also* Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1786–94 (2020) (problematizing "twentieth-century synthesis" that gives priority to economic, measurable values).

23. Lawrence, *Subordination and Separation of Powers*, *supra* note 11, at 107–09.

24. JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS (2017) (describing importance of appropriations); Price, *supra* note 11, at 360 (describing importance of funding restrictions in particular).

25. *See infra* notes 273–75 and accompanying text.

26. *See* EDWARD H. STIGLITZ, THE REASONING STATE 50 (2022); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1239–40 (2017); *cf.* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950–52 (1979).

27. Professor Stiglitz powerfully argues that the motivating function of administrative law is to promote trust in the exercise of governmental power. *See* STIGLITZ, *supra* note 26.

itself serves as an argument against new or expanded spending programs and in favor of retrenchment.[28]

Third, *Vigil* could become preeminent in a fiscal doomsday scenario. If the nation ever finds itself in default or near it—due to hitting the debt ceiling, running out of borrowing capacity, self-imposing austerity, or for any other reason—agencies may well be faced with earth-shattering, unavoidably discretionary choices about which statutorily required spending programs to cut.[29] Courts deciding cases today that seem to deal "only" with marginalized people or parties may inadvertently be setting precedents that would determine the role of law and courts in policing arbitrariness after the fall.

The Article proceeds in five Parts. Part I centers the Article on the patients who relied on the Indian Children's Program, responding to recent calls to bring people—and especially to bring marginalized people[30]—into an administrative law canon that has tended overwhelmingly to focus on corporate entities such as those immortalized in the names of better-studied cases like *State Farm*,[31] *Chevron*,[32] *Vermont Yankee*,[33] and *Fox Television Studios*.[34] Drawing from newspaper archives, case filings, and the opinions themselves, it unearths the story of the Indian Children's Program and of *Lincoln v. Vigil*.

Part II describes the Article's study of published cases applying the *Vigil* presumption in the three decades since it was decided. The study reveals

28. *See infra* Section III.D.

29. *See* Conor Clarke, *The Debt Limit*, 101 WASH. U. L. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4454798 [https://perma.cc/L2D8-EKSX]. *But cf.* Michael C. Dorf, *Litigating Debt Ceiling Plan B*, DORF ON L. (May 10, 2023), https://www.dorfonlaw.org/2023/05/litigating-debt-ceiling-plan-b.html [https://perma.cc/G22D-NXNY] ("If the administration were to unilaterally 'prioritize,' i.e., unconstitutionally 'cut' spending appropriated by law on the ground that the government has run out of borrowing authority, entities and persons to whom the appropriated funds are due would suffer a classic pocketbook injury . . . .").

30. Bijal Shah, *Administrative Subordination*, U. CHI. L. REV. (forthcoming) (manuscript at 7), https://ssrn.com/abstract=4392123 [https://perma.cc/MS8H-ZH7B] ("[A]gencies engage in behavior, in the implementation and enforcement of regulatory law, that subordinates the interests of vulnerable and marginalized people to institutional priorities." (footnote omitted)); Justin Weinstein-Tull, *The Experience of Structure*, 55 ARIZ. ST. L.J. (forthcoming 2024) (manuscript at 1), https://ssrn.com/abstract=4484760 [https://perma.cc/GC97-WU93] ("In this Article, I make the case for centering a broad base of human experience . . . ."); Blackhawk, *supra* note 16, at 1840–42; Joy Milligan & Karen Tani, *Seeing Race in Administrative Law: An Interdisciplinary Perspective*, YALE J. ON REGUL.: NOTICE & COMMENT (Sept. 16, 2020), https://www.yalejreg.com/nc/seeing-race-in-administrative-law-an-interdisciplinary-perspective-by-joy-milligan-and-karen-tani [https://perma.cc/CM6Y-5RJ6] ("[A]dministrative law, as traditionally taught and studied, often avoids confronting questions of race and racial inequality.").

31. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins., 463 U.S. 29 (1983).

32. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

33. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978).

34. FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009).

that *Vigil* has had a disparate impact on Tribes and prisoners. Perhaps relatedly, the study also reveals that although simply stated, the *Vigil* presumption is deeply under defined—courts struggle with three key, outcome-determinative questions about its actual scope and effect—such that it leaves courts essentially unbounded discretion whether to employ the presumption, or not, to refuse review in spending-related cases. (Litigators, clerks, or judges reading the Article primarily for the doctrinal nitty-gritty will want to focus on this discussion.)

Part III turns to the normative question of the desirability of a presumption against judicial review of discretionary agency spending decisions in light of the study findings described in Part II. The *Vigil* presumption potentially implicates a broad range of normative considerations—including not just a new angle on the over-arching debate about the desirability of judicial review in administrative law but also potentially distinctive interpretive, logistical, and separation of powers considerations. Part III concludes that none of these support the presumption.

Part IV offers prescriptions. It describes how *Vigil* could be undone by courts (by adopting a narrowing reading of *Vigil* or abrogating it), administering agencies (by adopting superseding regulations), the Department of Justice (DOJ) (by changing when and how it makes *Vigil* arguments), or Congress (by legislation). If any have the will, it would not be hard to find a way.

Finally, a brief conclusion summarizes the Article's core doctrinal contribution and elaborates on the shift in theoretical and methodological perspective that makes that contribution possible. Administrative law tends to focus on agencies and courts,[35] not people,[36] leaving it blind to disparate effects of the sort uncovered by the Article. The conclusion draws suggestions from the Article's study of *Lincoln v. Vigil* for how future scholarship can better account for lived experience in the analysis of "administrative law" questions.

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35. *See, e.g.*, Pojanowski, *supra* note 10, at 853–58 (describing contemporary debate in administrative law as an "eclectic" mix of perspectives about balancing "the desire for effective and politically responsive administrative governance" with "the aspiration for a robust yet impersonal rule of law above administrative fiat").

36. *Cf.* Milligan & Tani, *supra* note 30 ("[A]dministrative law abstracts away from substantive inquiries that might vary depending on the agency's field.").

I. THE STORY OF *LINCOLN V. VIGIL*

A. *The Indian Children's Program*

The Indian Children's Program was jointly established by the Indian Health Service (of the Department of Health and Human Services (HHS)) and the Bureau of Indian Affairs (of the Department of the Interior) in 1979.[37] The aim of the program was to evaluate the need for and provide physical and speech therapy and other services to disabled children in Native American communities across Arizona, Colorado, and New Mexico.[38] These communities are rural and isolated, making specialized services otherwise difficult to reach. The program was administered through a contract with Utah State University, which built a small eleven-member staff based in Albuquerque.[39] The staff travelled to provide services to children ages three to twenty-one years with a wide range of disorders including cerebral palsy, congenital heart defects, hearing impairments, and mental health issues stemming from physical and sexual abuse.[40] Over the course of the program, 2,400 children received services to help alleviate the effects of various health conditions and improve quality of life.[41]

For example, one of the children who relied on the program was a three-year-old boy named Toby, a member of the Navajo nation who lived with his foster parents, Jane and Leonard Witter.[42] They resided in Crownpoint, New Mexico, a remote community roughly 60 miles away from the nearest Indian Health Service hospital, and 140 miles away from the Indian Children's Program's services in Albuquerque.[43] Toby suffered a stroke at age two, leaving him without the ability to walk. He was able to move only by pulling himself around on his elbows.[44] However, through medical evaluation and intervention by program therapists, Toby was able to receive ankle braces and a walker.[45] After six months of assistance from the program, Toby was able to walk, taking "short, unaided trips in the walker

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37. Laurie Asseo, *Court Hears Dispute over Cutoff of Medical Aid to Indian Children*, ASSOCIATED PRESS, Mar. 3, 1993, global.factiva.com (enter article title in quotation marks into "Free Text Search" box) [https://perma.cc/U73T-C8WV].

38. *Program to Aid Indian Children Faces Threat*, DESERET NEWS (Mar. 7, 1993), https://www.deseret.com/1993/3/7/19035831/program-to-aid-indian-children-faces-threat [https://perma.cc/N2CF-DNP7].

39. *Judge Says Program Ended Illegally*, FARMINGTON DAILY TIMES, July 12, 1990, at A5 [https://perma.cc/84HM-F7XV].

40. *Id.*

41. Asseo, *supra* note 37.

42. *Program to Aid Indian Children Faces Threat*, *supra* note 38.

43. *Id.*

44. *Id.*

45. *Id.*

the program recommended for him."[46] In newspaper coverage Ms. Witter credited the Indian Children's Program with being the impetus he needed to make real progress.[47]

Despite the value of the services that the Indian Children's Program provided to children with disabilities and their families, the Department of Health and Human Services abruptly announced it would be terminating the program in 1985.[48] The sudden cessation of supports took even the Department of the Interior's Bureau of Indian Affairs (which had helped build the program) by surprise.[49] It also cut hundreds of children off from necessary physical and health supports, without providing any alternative.[50]

The record does not reveal whether, in deciding to terminate the program and deciding to do so without prior notice, agency officials considered the reliance interests of children like Toby who had come to depend on physical therapy through the program. There is no mention of any such consideration in the agency's one-paragraph explanation of its decision.[51] In a short memorandum, HHS's Indian Health Service explained that service staff would make two additional visits to the reservations in August and September "to update programs, identify alternative resources and facilitate obtaining alternative services."[52] "In communities where there are no identified resources," the memo explained, "meetings . . . will be scheduled to facilitate . . . networking . . . to secure or advocate for appropriate services."[53]

B. District Court and Tenth Circuit Order Reinstatement

Grover and Charlene Vigil chose to advocate by suing in federal court on behalf of their daughter Ashley and a class of similarly situated children who had relied on the Indian Children's Program.[54] They alleged that the abrupt termination of the program was, among other things, arbitrary and capricious and were joined by two additional named plaintiffs.[55]

The government moved to dismiss on the ground that the Vigils (and other plaintiffs) lacked Article III standing, and on the ground that the

46. *Id.*
47. *Id.*
48. *Id.*
49. Transcript of Oral Argument at 31, Lincoln v. Vigil, 508 U.S. 182 (1993) (No. 91-1833).
50. *Program to Aid Indian Children Faces Threat*, *supra* note 38.
51. *Vigil*, 508 U.S. at 188 (repeating order).
52. *Id.*
53. *Id.*
54. Vigil v. Rhoades, 746 F. Supp. 1471, 1473–74 (D.N.M. 1990), *aff'd*, 953 F.2d 1225 (10th Cir. 1992), *rev'd*, *Vigil*, 508 U.S. 182.
55. *Id.* at 1471, 1473.

decision to terminate the Indian Children's Program was unreviewable because the relevant statutes provided "no law to apply," making the action "committed to agency discretion by law" within the meaning of section 701(a)(2) of the APA.[56] Writing for the district court, Judge Burciaga rejected both arguments. As to standing, he found that the plaintiffs' allegations of physical harm resulting from the termination of needed health services to their children sufficed to establish injury in fact.[57]

As to the government's argument that the agency's decision was unreviewable, Judge Burciaga noted that courts generally presume reviewability absent an explicit statutory command to the contrary.[58] While some agency actions may be "committed to agency discretion by law," that exception was "very narrow" and applicable only where the law delegating discretion to an agency does so in terms so vague or general that, as a practical matter, there would be "'no law to apply' by the reviewing Court."[59] (At the time of the litigation this rarely invoked "no law to apply" test was the dominant approach to assessing whether an agency action was "committed to agency discretion" and so presumptively unreviewable despite congressional silence—that is, despite the absence of a statute precluding review.)[60]

Applying this "no law to apply" test, Judge Burciaga concluded that there was "law to apply" to the termination, so it was not committed to agency discretion by law. Specifically, Judge Burciaga found that the court had explicit law to apply to the agency's action in the Snyder Act, the Education for All Handicapped Children Act, the Indian Health Care Improvement Act, and cases establishing the federal government's trust duty to Indians.[61] Therefore, the action was reviewable. For example, the Snyder Act directed the Bureau of Indian Affairs to "direct, supervise, and expend such moneys as Congress may . . . appropriate, for the benefit, care, and assistance of the Indians . . . for relief of distress and conservation of

56. *See id.* at 1474. For doctrinal background on reviewability under the APA, see *infra* Sections I.C.1, III.A.

57. *Rhoades*, 746 F. Supp. at 1477.

58. *Id.* at 1477–78.

59. *Id.* (quoting Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 410 (1971)); *see also Rhoades*, 953 F.2d at 1228.

60. *See* Levin, *supra* note 10, at 692 ("Since 1971 the primary guideline used to determine whether an agency action is 'committed to agency discretion' has been whether there is 'law to apply' to the administrative decision.").

61. *Rhoades*, 746 F. Supp. at 1479 ("In all, the Court concludes that the body of law controlling and guiding these agencies . . . is not 'so devoid of objective benchmarks' or so lacking in 'judicially manageable standards' as to consign such actions to the unreviewable discretion of the agencies." (citations omitted) (first quoting Davis Enters. v. EPA, 877 F.2d 1181, 1188 (3d Cir. 1989); and then quoting Heckler v. Chaney, 470 U.S. 821, 830 (1985))).

health."[62] Judge Burciaga concluded he could at least consider whether the agency's decision sought to advance or undermine these purposes, and that this delegation was no broader than others that the appellate courts had concluded provided "law to apply," such as a delegation to the Department of the Interior to manage wilderness areas in a manner so as not to "impair [their] suitability . . . for preservation as wilderness."[63]

While he found the action reviewable, Judge Burciaga did not actually evaluate whether it was arbitrary and capricious because he found it lacking in a more fundamental respect. In administrative law, an agency action may be "substantively" invalid because it is arbitrary and capricious, and an action may also be "procedurally" invalid (because it failed to follow proper procedure).[64] Judge Burciaga found that on the procedural front, the termination of the Indian Children's Program was a "legislative rule"[65] that should have gone through notice-and-comment rulemaking. It was invalid for failure to do so alone, Judge Burciaga ruled, making the substantive question of the arbitrariness of the decision unripe.[66]

Regarding remedy, Judge Burciaga invited briefing on whether he should order the program be reinstated in the form it existed and functioned prior to its termination in 1985.[67] In a supplemental memorandum addressing the question of whether reinstatement of the program should be compelled,[68] the agency stated that impediments to reinstating the Indian Children's Program included "the prospect of changing the *status quo*, the threat of forced termination of other 'handicapped service programs' provided pursuant to statutory schemes, the burden of hearings necessitated by curtailment of existing services, and a need to solicit competitive bids in restoring the Program."[69] Judge Burciaga was not persuaded, noting that the agency produced "virtually nothing in the way of specific facts or monetary figures to support their dire claims of 'damage the proposed injunction may cause' them."[70] After review of the supplemental briefs, Judge Burciaga ordered that the Indian Children's Program be rebuilt to equivalent staff

62. 25 U.S.C. § 13.

63. *Rhoades*, 746 F. Supp. at 1478 (quoting Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988)).

64. 5 U.S.C. §§ 706(2)(A) (arbitrary and capricious), 706(2)(D) ("without observance of procedure required by law").

65. *Rhoades*, 746 F. Supp. at 1480 (quoting Bellarno Int'l Ltd. v. FDA, 678 F. Supp. 410, 412 (E.D.N.Y. 1988)).

66. *Id.* at 1479.

67. *Id.* at 1483 ("Logic favors immediate reinstatement of a program terminated in violation of the law."); *Judge Says Program Ended Illegally*, *supra* note 39, at A5.

68. *See Rhoades*, 746 F. Supp. at 1483.

69. *Id.* at 1486.

70. *Id.* at 1485 (quoting City of Chanute v. Kan. Gas & Elec. Co., 754 F.2d 310, 312 (10th Cir. 1985)).

size, credentials, caliber, and capabilities as it existed prior to its termination.[71] It is fair to say that Judge Burciaga's remedial ruling was extremely aggressive.[72]

In light of Judge Burciaga's order compelling full reinstatement, the Center for Persons with Disabilities at Utah State University received funding to reestablish services.[73] In 1991, Utah State University received a $1 million, two-year grant funded by the Bureau of Indian Affairs and Indian Health Service to support interdisciplinary clinical teams and rebuild treatment relationships with remote Native communities.[74] The University acted as the lead contractor while working with additional teams at the University of New Mexico and Northern Arizona University to serve Navajo, Hopi, and multiple Pueblo Tribes.[75]

Although the program was reinstated, the government appealed Judge Burciaga's ruling. It framed the appeal around two issues: whether the substance of the termination decision was reviewable on the merits and whether notice and comment rulemaking procedures were required to terminate the program.[76] The Tenth Circuit affirmed Judge Burciaga's ruling on both the reviewability and the procedural questions.[77] The government sought *certiorari*, and the Supreme Court granted the petition.[78]

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71. *Id.* at 1486–87.

72. Under the APA the ordinary remedy would have been to vacate the memorandum terminating the program and remand to the agency for it to decide for itself whether to reinstate the program or offer a new explanation for refusing to do so. *See infra* notes 268–70 and accompanying text (describing remedial doctrines).

73. *USU Program Receives $1 Million Grant*, NAVAJO TIMES, May 2, 1991, at 6 [https://perma.cc/DQ55-MEU3].

74. *Id.*

75. *Id.*

76. Vigil v. Rhoades, 953 F.2d 1225, 1226 (10th Cir. 1992), *rev'd*, Lincoln v. Vigil, 508 U.S. 182 (1993).

77. Specifically, the court of appeals focused on congressional testimony showing support for the program's continuation. *Id.* at 1229. In 1984, the Department of the Interior Subcommittee of the Committee on Appropriations stated that it was "pleased to hear of the continued success of the Indian Children's Program, and expect[ed] IHS to include information in next year's budget justification regarding its participation and details of funds to be provided to this effort." *Id.* at 1230. Despite the general nature of the appropriations, the Tenth Circuit found this Congressional intent to continue the Program, combined with the special relationship between Native American Tribes and the federal government, supported review. *Id.* at 1231. Additionally, the court reiterated that under the standard put forth in *Citizens to Preserve Overton Park v. Volpe*, the exception for judicial review remains "very narrow." *Id.* at 1228 (quoting 401 U.S. 402, 410 (1971)). Lastly, the court relied on the holding in *Morton v. Ruiz*, 415 U.S. 199 (1974), to determine that notice-and-comment procedures were necessary and not followed by the agency. *Rhoades*, 953 F.2d at 1231.

78. Brief for the Petitioners, Lincoln v. Vigil, 508 U.S. 182 (1993) (No. 91-1833), 1992 WL 547219, at *1.

C. Supreme Court Forecloses Review

1. Briefs Focus on "No Law to Apply" Test

In briefing before the Supreme Court, the government described *Vigil* as presenting two questions, namely, the reviewability question whether there was "law to apply" to the termination of the Indian Children's Program (and so whether the action was unreviewable because committed to agency discretion) and the procedural question whether the agency should have gone through notice-and-comment rulemaking.[79]

The Supreme Court easily ruled in the government's favor on the procedural question—whether the termination of the Indian Children's Program was subject to APA rulemaking requirements as a "rule."[80] Judge Burciaga and the Tenth Circuit had pushed existing law in holding that the termination was a rule. Although the definition of a "rule" for APA purposes can be murky, the government had strong arguments that the termination of the Indian Children's Program was sufficiently individualized and adjudicatory in nature that it did not constitute a "rule" subject to notice and comment requirements.[81]

The question of reviewability—whether the action was "committed to agency discretion by law"—presented a more difficult question for the court. As presented by the Solicitor General (and the respondents) and analyzed in the lower courts, that question hinged on application of the "no law to apply" test.[82] But at the time the Supreme Court took up the *Vigil* case, dispute had been brewing for years about that "no law to apply" test, including both what it meant and whether it was the best way to assess the scope of the APA's "committed to agency discretion" exception.[83]

As background, the Administrative Procedure Act ordinarily provides for review of agency action unless (per section 701(a)(1) of the APA)

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79. Specifically, the government presented the issues as follows:

> 1. Whether the court of appeals erred in holding that statements made in congressional committee reports and hearings on lump-sum appropriations bills, together with general notions of the federal "trust" responsibility for Indians, constitute "law to apply" for purposes of judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 701 et seq., of agency action affecting Indians [and]
>
> 2. Whether the court of appeals erred in holding that an agency's decision to reallocate funds and personnel from a discretionary pilot project providing certain health-related services for Indians in order to provide other health-related services for Indians constitutes a rule subject to the notice-and-comment requirements of the APA, 5 U.S.C. 553.

Id., 1992 WL 547219, at *I.

80. *See Vigil*, 508 U.S. at 196–99.

81. Brief for the Petitioners, *supra* note 78, 1992 WL 547219, at *29–34.

82. *See supra* notes 56–79 and accompanying text.

83. Levin, *supra* note 10, at 692.

Congress has precluded it (and courts presume reviewability when reading ambiguous statutes).[84] But the APA's provision for judicial review also includes an exception (in section 701(a)(2)) for actions "committed to agency discretion by law." The scope of this latter exception had been one of the most hotly contested questions in administrative law (the "major questions" doctrine of its day).[85] It featured both massive stakes (reviewability determines not just the deference a court gives an agency, but whether the court reviews the agency action at all) and a central puzzle (in what way might an action be "committed to agency discretion by law," and so trigger 701(a)(2), if Congress has itself not precluded review in a way that triggered 701(a)(1))?

At the time *Vigil* arose, the Supreme Court had (in *Overton Park* and in *Heckler v. Chaney*) announced the "no law to apply" test as the generally applicable rule for determining which agency actions were "committed to agency discretion."[86] The rationale of this "no law to apply" approach is that a statute might not preclude judicial review directly but might nonetheless commit the action to agency discretion by law by delegating power to the agency in terms so broad, general, or judicially unmanageable as to leave nothing for courts to do.[87] Thus, the Supreme Court had elaborated that a statute provides "no law to apply" if there is "no meaningful standard against which to judge the agency's exercise of discretion."[88] This was the test the government referenced and purported to apply in its brief to the Court in *Vigil*.[89]

The problem facing the Court in *Vigil* was that the "no law to apply" test itself has major inherent issues. Even where a statute empowering an agency leaves extremely broad discretion, the "arbitrary and capricious" test provided by the APA provides a meaningful standard against which to judge the agency's choice that does not require the court to second-guess or revisit the wisdom of the agency's decision itself.[90] Moreover, to satisfy

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84. *See* Bagley, *supra* note 5, at 1086–87 (describing reviewability).

85. The centerpiece of the reviewability debate was a long-running exchange between Kenneth Culp Davis and Raoul Berger. *E.g.*, Raoul Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965 (1969); Kenneth Culp Davis, *Administrative Arbitrariness—A Postscript*, 114 U. PA. L. REV. 823 (1966); Raoul Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965); *see also* Levin, *supra* note 10; Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653 (1985).

86. *See* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Heckler v. Chaney, 470 U.S. 821 (1985).

87. *Heckler*, 470 U.S. at 830.

88. *Id.*

89. *See supra* note 79 and accompanying text.

90. *See* Levin, *supra* note 10, at 707. Under the Supreme Court's elaboration of the arbitrary-and-capricious test in *State Farm* in 1983, it assesses arbitrariness, not correctness, and offers its own

constitutional law's non-delegation doctrine a statute delegating discretion to an agency (as to spending or anything else) must at a minimum provide an "intelligible principle" to guide the agency's exercise of discretion.[91] Would not that principle itself necessarily provide "law to apply"?

Thus, in ruling on *Vigil* as briefed by the parties, the Supreme Court faced something of a challenge. The plaintiffs credibly argued that the "no law to apply" test was inapplicable by its terms because various laws constrained or guided the agency's discretion, including the Snyder Act, the Education for All Handicapped Children Act, the Indian Health Care Improvement Act, and cases establishing the federal government's trust duty to Indians.[92] But given the dearth of precedent on the "no law to apply" standard, it would have been very difficult for the Court to assess those arguments—let alone reverse the findings of the district court and appellate court—without admitting that the "no law to apply" standard was itself essentially meaningless.

There was a way out, however. In the years preceding *Vigil*, scholars (especially Professor Levin) and jurists (especially Justice Scalia as a judge on the D.C. Circuit) had advocated an alternative to the statute-focused "no law to apply" test for determining whether agency actions were "committed to agency discretion" and so insulated from judicial review under the APA.[93] Instead of applying the vague "no law to apply" standard to particular statutes case by case, they argued, courts might recognize categories of agency action that would be presumptively immune from review as "committed to agency discretion."[94] As for how such categories might be identified, courts might either look to pragmatic policy considerations (assessing for themselves the pros and cons of review) or to history and tradition (identifying categories of cases in which courts historically declined to engage in review prior to the APA's enactment, or perhaps later).[95] Thus, the *Vigil* Court might avoid applying the "no law to apply" test to the Snyder Act and other statutes at issue in *Vigil* by moving the law away from the "no law to apply" test itself toward either the pragmatic approach or the historical approach.

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standards for doing so that can apply to any agency action: whether the agency had support for its factual findings, considered appropriate factors, addressed alternatives, and explained itself. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 42–44 (1983).

91. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

92. Brief for the Respondents, Lincoln v. Vigil, 508 U.S. 182 (1993) (No. 91-1833), 1992 WL 512178, at *33–44.

93. Levin, *supra* note 10, at 740–50 (describing both approaches).

94. *Id.* at 740–52.

95. *Id.*

As mentioned above, the parties' briefs couched the argument in *Vigil* explicitly in terms of the "no law to apply" standard, right down to the Solicitor General's statement of the issues. They did not explicitly address the possibility suggested by Justice Scalia and Professor Levin that categorical presumptions might offer a workable alternative to "no law to apply" for determining which actions are "committed to agency discretion by law," nor did they explicitly address whether, if the Court adopted the categorical approach, it should look to pragmatic considerations or instead look to history.[96]

Opening oral argument, the government again framed its case in terms of the "no law to apply" test. The government's attorney—then-Assistant Solicitor General Ed Kneedler—did not mention the possibility the Court could shift reviewability doctrine toward the categorical approach in his opening presentation. But he found himself on the ropes early in pressing "no law to apply," confronted with just the sort of prying questions that have long bedeviled that test. Justice O'Connor in particular pressed two powerful lines of questioning. First, what would happen if the agency's reasons for terminating the program were obviously factually incorrect, because the agency ignored clear evidence? Couldn't that, at least, be considered and, if it happened, be declared arbitrary? Thus, could it really be said there was "no law to apply?"[97] Second, how was the delegation in the Snyder Act to spend funds to relieve "distress" on Tribal lands any broader than the delegation to the Department of Transportation to regulate to "meet the need for motor vehicle safety" at issue in *State Farm*, in which the Court not only engaged in substantive arbitrariness review but also articulated the governing test guiding "arbitrary and capricious review"?[98]

As the government concluded its opening presentation, no Justice had asked a question indicating support for finding there was "no law to apply" to the termination of the Indian Children's Program, and several had pressed highly skeptical questions. It appeared that the Court would hold, as the

96. Although not explicit, the government's briefs arguably implied an argument for categorical unreviewability. *See infra* Section I.C.3 (discussing implication). For example, after describing pragmatic challenges to review of funding decisions, the government's reply brief stated that "this Court and the lower federal courts have uniformly held that resource allocation decisions are committed to agency discretion," Reply Brief for the Petitioners, *Vigil*, 508 U.S. 182 (No. 91-1833), 1993 WL 669002, at *5, and cited *Community Action of Laramie County, Inc. v. Bowen*, 866 F.2d 347 (10th Cir. 1989), which had stated that "funding determinations are 'notoriously unsuitable for judicial review.'" *Id.* at 354 (quoting Alan Guttmacher Inst. v. McPherson, 597 F. Supp. 1530, 1536–37 (S.D.N.Y. 1984)). I discuss the questionable context and history of this statement in *Laramie*—which may explain why the case was not cited by the Supreme Court in its *Vigil* opinion—*infra* at note 119.

97. Transcript of Oral Argument, *supra* note 49, at 14.

98. *Id.* at 8; *see* Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 42–44 (1983).

district court and Tenth Circuit had held, that the case was at least reviewable because there was in fact "law to apply." But soon after Ashley Vigil's counsel Joel Jasperse took the podium, Justice Scalia intervened and changed the course of the case.

2. *Court Invents Tradition*

At argument, Jasperse faced skeptical questions on the notice-and-comment issue, but little questioning on the "committed to agency discretion" issue with which the government had struggled. Indeed, at one point in Jasperse's presentation Chief Justice Rehnquist went to lengths to establish the appropriate remedy in the event that the Court found in Vigil's favor on "committed to agency discretion" but found in favor of the government on the notice-and-comment issue.[99] But Justice Scalia asked a lengthy soliloquy-question that saved the government's case, and changed reviewability doctrine, by putting a new possibility on the table. Regardless of the "no law to apply" test, he pondered, the Court had previously (in *Heckler v. Chaney*) identified non-enforcement decisions as a category of agency actions committed to agency discretion because such decisions required agencies to prioritize in allocating their resources.[100] Should not decisions regarding the disbursement of benefits also fit under the holding in that case?[101]

Vigil's counsel did not pick up on the thrust of Justice Scalia's question,[102] but Kneedler followed precisely. (Recall that Judge Scalia had, on the D.C. Circuit, endorsed the categorical approach to reviewability; Kneedler's preparation is legendary.)[103] On rebuttal, Kneedler explicitly offered a new argument (or, one might say, embraced an argument implicit in the government's briefs) for the first time.[104] "[I]t's important to bear in mind that *whether there's law to apply is just one way* of getting at" the reviewability question, he explained.[105] (Contrast the Solicitor General's

99. Transcript of Oral Argument, *supra* note 49, at 42–43.

100. *Id.* at 39.

101. *Id.*

102. Justice Scalia's question was directed at the doctrinal level, raising the possibility of applying an analysis other than the "no law to apply" inquiry. Jasperse responded at the level of Vigil's case, arguing that whatever discretion the agency had, it ought to be required to exercise that discretion "in such a way that it's fair to the children." *Id.* at 40.

103. Kneedler is a long-serving, highly respected Deputy Solicitor General. *See* Robert Barnes, *Edwin Kneedler Found a Career and a Calling Arguing Before the Supreme Court*, WASH. POST (Sept. 10, 2014, 7:36 PM), https://www.washingtonpost.com/politics/courts_law/edwin-kneedler-found-a-career-and-a-calling-arguing-before-the-supreme-court/2014/09/10/bfde2bc6-345a-11e4-9e92-0899b306bbea_story.html [https://perma.cc/Y5RX-GNR4].

104. On the "explicitly" qualifier here, see *supra* note 96.

105. Transcript of Oral Argument, *supra* note 49, at 49 (emphasis added).

statement of issues in the case, which presented "law to apply" as the *sine qua non* of committed to agency discretion.)[106] "There are other factors . . . including whether the issue is one that's traditionally been regarded as committed to agency discretion, *which the allocation of appropriated funds is*."[107]

This statement—made about one minute before the close of oral argument and a few minutes after Justice Scalia asked his question of Jasperse teeing up the issue—represented the first time in its presentations to the Supreme Court in *Vigil* that the Solicitor General explicitly argued that agency actions allocating appropriated funds are presumptively unreviewable because they are "traditionally . . . regarded as committed to agency discretion."[108] Jasperse never even had the opportunity to respond at argument orally, let alone in briefing. The argument carried the day.

Just over two months later, the Supreme Court issued its unanimous opinion in *Vigil*, simultaneously changing the test for evaluating reviewability and employing this new test to end Ashley Vigil's suit: "Over the years, we have read § 701(a)(2) to preclude judicial review of certain categories of administrative decisions that courts have traditionally regarded as 'committed to agency discretion.'"[109] "The allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion."[110] In short, because the termination of the Indian Children's Program could be framed as a decision about how to allocate certain of HHS's appropriations, it was "presumptively unreviewable" unless Congress had explicitly provided otherwise.[111] Since Congress had not done so,[112] the district court and Tenth Circuit could not assess the arbitrariness *vel non* of Interior's decision to terminate the program. The Court remanded for the lower courts to dismiss the action, and they did so.[113]

It is unfortunate that the Court did not have the benefit of adversarial briefing from the parties in endorsing the Solicitor General's last-minute "tradition" argument, because insofar as the Court's opinion could be read to suggest (and has been read to suggest) the actual historical existence of a

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106. *See* Brief for the Petitioners, *supra* note 78.

107. Transcript of Oral Argument, *supra* note 49, at 49–50 (emphasis added).

108. *See id.* As discussed above, there are aspects of the government's briefs to the Supreme Court that come very close to making such an argument, without explicitly doing so. *See supra* note 96.

109. Lincoln v. Vigil, 508 U.S. 182, 191 (1993).

110. *Id.* at 192.

111. *Id.* at 191–93.

112. *Id.* at 194.

113. Vigil v. Rhoades, 2 F.3d 1161 (10th Cir. 1993) (unpublished table decision), 1993 WL 307667.

tradition of declining review for appropriations decisions, it was false. Although the Supreme Court's opinion said that agency decisions allocating lump-sum appropriations had "traditionally [been] regarded as committed to agency discretion,"[114] and although courts and scholars have taken this statement as truth in the decades since, there was, in fact, no such tradition when the Supreme Court decided *Vigil*.

One sign that *Vigil* was inventing rather than describing a historical tradition is the fact that the Court's opinion does not cite any evidence—cases, histories, etc.—in support of its assertion of the existence of a tradition of refusing review for decisions allocating lump-sum appropriations. The sentence quoted above was not followed by any citation, and the paragraph it leads goes on to make the policy argument that "the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way."[115] The merits of this policy argument are discussed below, but it does not even purport to describe prior history or precedent.

Review of secondary sources and cases in the years preceding *Vigil* further refute *Vigil*'s tradition claim. The author has not found any treatise, law review article, or other source that mentions the term "appropriations" in the context of reviewability prior to *Vigil*, let alone describes a categorical reluctance to review actions allocating appropriations.[116] Professor Levin's

114. *Vigil*, 508 U.S. at 192.

115. *Id.* The opinion also cites and quotes then-Judge Scalia's opinion in *International Union, UAW v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984), but in a way that is a non-sequitur. In *International Union* the plaintiffs had argued that statements in the legislative history should be read as law into a lump-sum appropriation, and so that congressional expectations of how funds would be spent present in the legislative history ought to be understood as *legally* binding on the agency's allocation of funds from the lump sum. *Id.* Judge Scalia rejected that assertion, explaining that a tradition (which really does exist) of non-binding congressional expectations articulated in appropriations committee reports—which expectations are enforced by Congress through future appropriations, not the courts—meant that "the legislative history . . . does not give content to an ambiguous enactment," and that "[a] lump-sum appropriation leaves it to the recipient agency *(as a matter of law, at least)* to distribute the funds among some or all of the permissible objects as it sees fit." *Id.* (emphasis added). But while the question whether legislative expectations about the purposes to which a lump-sum appropriation might be put are legally binding is an interesting and important one, it is not the question the Court answered in *Vigil*. It is one thing to say that an appropriation leaves an agency discretion to choose how best to spend funds within the scope of its authorization—just as a blanket grant of regulatory authority to promote highway safety or safeguard public health leaves it to agency discretion to choose how best to do so. Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 41 (1983). It is quite another to say that the exercise of that discretion is unreviewable, whether it is abused or not. Leaping from the more modest point to the more extreme point requires reading Scalia's "as a matter of law, at least" qualifier in *International Union* out of his opinion.

116. *Cf.* KENNETH CULP DAVIS, ADMINISTRATIVE LAW 871, 925–28 (1951); 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 47, 56, 60, 82–83 (1st ed. 1958) (indicating that prosecutorial

1990 article advancing the pragmatic approach to reviewability identified three potential categories of actions "committed to agency discretion by law" latent in the caselaw; decisions related to "spending" or "appropriations" were not among them.[117] Similarly (and of particular interest to an APA-originalist reading of the clause), the Attorney General's report preceding the APA listed just two categories of such actions: non-enforcement decisions and denials of petitions for rulemaking.[118]

The closest thing I have found to precedential support for *Vigil*'s invention is a handful of cases from the 1970s and 1980s in which judges expressed skepticism about the policy wisdom of permitting judicial review of "grant awards" to bolster their legal finding of "no law to apply" to review certain particular such awards.[119] Relatedly, Merrill and Mashaw

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discretion, "Alien cases," and Draft cases operated as special, unreviewable classes of cases); KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 512–16 (1st ed. Supp. 1982) (discussing various subject-areas of caselaw regarding § 701(a)(2)); RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 135–41 (1985) (listing only "agency decisions not to take enforcement actions" explicitly as an unreviewable class); KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 642–43 (1st ed. Supp. 1976) (noting that cases involving government-funded housing demonstrated a trend toward unreviewability as "courts are ill-equipped to superintend economic and managerial decisions" (quoting Hahn v. Gottlieb, 430 F.2d 1243, 1249 (1st Cir. 1970))).

117. Levin, *supra* note 10, at 743–46.

118. *See* S. REP. NO. 79-752, app. B at 229–30 (1945) (offering illustrative cases).

119. The three cases I have located are interconnected. First, in a challenge to a grant award to one New York agency, brought by another New York agency that had competed for the award, the majority engaged in review and upheld the award. Econ. Opportunity Comm'n of Nassau Cnty., Inc. v. Weinberger, 524 F.2d 393 (2d Cir. 1975). Judge Friendly, concurring, explained that he would have denied standing (because of the intrastate nature of the case) and denied reviewability because while the statute at issue expressly provided for review of analogous decisions, it did not expressly provide for review of the decision at issue. *Id.* at 406 (Friendly, J., concurring). In supporting the negative inference, he would have drawn from this, he highlighted policy concerns with review of grant awards, including the fact that they may arise on an annual basis, as reasons Congress may have chosen to impliedly preclude review. *Id.* Second, Judge Haight's opinion in the Southern District of New York in a 1985 case, *Guttmacher Institute*, also expressed skepticism about judicial review of grant awards. Alan Guttmacher Inst. v. McPherson, 597 F. Supp. 1530, 1536 (S.D.N.Y. 1984). That opinion described the "no meaningful standards" test as the appropriate one for assessing section 701(a)(2)'s applicability. *Id.* at 1535. The government argued this test was met, because the statute provided for awards of funds only "on such terms and conditions as [the President] may determine." *Id.* (alteration in original). The court agreed, holding that there was "no law to apply." *Id.* at 1536. In dicta, the court went on to explain that this conclusion was "reinforced by an examination of the type of action" at issue, namely, a grant award. *Id.* "Such decisions are notoriously unsuitable to judicial review," the court noted, *id.*, though it offered only one illustration to support the point—the 1969 case of *Kletschka v. Driver*, 411 F.2d 436 (2d Cir. 1969). In that pre–*Overton Park* case, the Court held that reviewability depended on the court's judgment of the "need for, [the] feasibility of, . . . and the possible disruption . . . occasioned by review." *Kletschka*, 411 F.2d at 443. It found these factors weighed against review of a VA employee's challenge to a grant denial and transfer order in light of the potential volume of such cases and the subjective judgments involved in "personnel decisions" about "professional competence." *Id.* Third and finally, *Community Action of Laramie County, Inc. v. Bowen* was a challenge by a grant holder that had violated the terms of its grant to the agency's decision to impose the sanction of termination rather than a lesser sanction. 866 F.2d 347, 354 (10th Cir. 1989). The court held that there was "no law to apply" to the agency's

(but not other sources) described a "pattern" of scrutinizing review for "discretionary grants" in the 1985 edition of their treatise and offered three cases supporting this pattern, in two of which courts found review available.[120]

These grant award cases do not support or describe a tradition of categorical unreviewability; indeed, as just noted several permitted review. Moreover, they refer not to "appropriations" but to "grants." *Vigil* did not involve a "grant," and the category of grant determinations is both narrower and broader than the category of appropriation allocation decisions articulated for the first time by *Vigil*. The most that can be said, therefore, is that *Vigil*, in common law fashion, may have drawn from, refined, expanded, and solidified a nascent trend in announcing a presumption of unreviewability for "appropriations" decisions. But it is hard to accept even this forgiving explanation for the Court's invention of the *Vigil* presumption—tying it to common law reasoning processes where judicial invention is most defensible—because the Court's articulated category was both broader and narrower than the category addressed in these cases, because the Court did not say that it was building on these cases, and because the Court did not cite *any* of the handful of then-recent grant cases.

Finally, review of actual cases in the years preceding *Vigil* puts the lie to the assertion of a tradition of non-review of discretionary spending decisions. Quite simply, in the years preceding *Vigil* courts repeatedly exercised review of discretionary agency spending decisions, including in cases involving appropriations enactments.[121] Indeed, the Supreme Court's

remedial choice whether termination or a lesser sanction was appropriate to penalize the violation in light of the agency's "unlimited discretion in selecting a remedy." *Id.* at 353. In the conclusion of that opinion, after finding that it had no manageable standards for review, the Tenth Circuit added that "Congress could have hardly intended" a contrary result. *Id.* at 354. It then quoted the language from *Guttmacher* and *Weinberger* described above articulating policy downsides of judicial review of grant awards. *Id.* ("Funding determinations are 'notoriously unsuitable for judicial review . . . .'" (quoting *Guttmacher*, 597 F. Supp. at 1536–37)). The *Brock* decision discussed below arguably also fits in this line of grant award cases. *See* Cal. Hum. Dev. Corp. v. Brock, 762 F.2d 1044 (D.C. Cir. 1985); *infra* notes 126–30 and accompanying text.

120. The second edition of Merrill & Mashaw's Administrative Law Textbook identifies several "patterns" in the cases interrogating "committed to agency discretion" it describes, including a "pattern" of cases relating to "Discretionary Grants and Government Contracts." JERRY L. MASHAW & RICHARD A. MERRILL, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 701–02 (2d ed. 1985).

121. *See Brock*, 762 F.2d at 1048 n.28 (finding law to apply regarding agency's allocation of funds under the Job Training Partnership Act of 1982 from congressional mandate and agency's promulgated rules); Johnson Oyster Co. v. Baldridge, 704 F.2d 1060, 1061–63 (9th Cir. 1983) (finding law to apply in the Commercial Fisheries Research and Development Act of 1964 despite the "broad authority" granted to the agency and the agency's insistence of "no law to apply"); Iowa *ex rel.* Miller v. Block, 771 F.2d 347, 351 (8th Cir. 1985) (finding Secretary's lack of "substantive elaboration"—which resulted in a relief program becoming "no more than 'an empty procedural shell,'" thwarting congressional

strongest defense of the generally applicable presumption of *reviewability* had come in *Bowen v. Michigan Academy of Family Physicians*,[122] a case attacking decisions of the Department of Health and Human Services regarding physician reimbursement under Medicare Part B. In *Michigan Academy*, the Supreme Court dwelled on the importance of the physicians' right to a day in court in explaining its hesitation to read even clear statutory language to bar review of the agency's choices, notwithstanding their relationship to federal spending and the necessity of difficult choices about how best to spend limited Medicare trust fund dollars. Reaching back to *Marbury v. Madison*, the Supreme Court in *Bowen* re-emphasized that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws."[123] Apparently, "every individual" did not include Ashley Vigil.

3. *"Tradition" Claim Was Either Confusion or Cover for Policymaking*

The alleged tradition on which the Supreme Court rested the decision in *Vigil* did not exist. How, then, did nine Justices sign on to an opinion saying it did? Two possibilities present themselves. First, it may be that the Solicitor General's brief gave some Justices the mistaken impression that there was in fact a historical tradition of non-review of appropriations decisions, even as it declined to explicitly advance such an argument. The brief included passages that could have been misunderstood to suggest the existence of such a tradition. One such passage was the Solicitor General's citation to, and quotation from, then-Judge Scalia's concurring opinion in the D.C. Circuit's resolution of *California Human Development Corp. v. Brock*.[124] In that opinion Judge Scalia *had* actually asserted a "tradition[]" of non-review of "grant" decisions, but he did not provide support for that assertion and seemed to use the word "tradition[]" to refer more to a pragmatic legal conclusion than a historical fact.[125]

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intent—and Secretary's broad failure to act both constituted abuses of discretion); Nat'l Wildlife Fed'n. v. Adams, 629 F.2d 587, 595 (9th Cir. 1980) (finding that the Secretary's decision to pool funds from several appropriated projects into two large projects was permissible due to a lack of statutory prohibition and that the Secretary was obligated to account for "such other pertinent factors"); NAACP v. Sec'y of Hous. & Urb. Dev., 817 F.2d 149, 157–60 (1st Cir. 1987) (finding availability of review in whether the agency's "pattern of activity reveals a failure to live up to its obligation").

122. 476 U.S. 667 (1986).

123. *Id.* at 670 (alteration in original) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).

124. 762 F.2d 1044.

125. *Id.* at 1052 (Scalia, J., concurring).

Specifically, in *Brock* the D.C. Circuit considered and rejected a challenge to the Department of Labor's allocation of funds from a lump-sum appropriation "among states to support programs serving migrant and seasonal farmworkers."[126] Judge Bazelon, for the majority, reviewed but rejected the plaintiffs' assertion that the allocation was arbitrary and capricious, concluding that "[t]he district court . . . was correct in finding that there was a reasonable relationship between the eligibility criteria and the allocation data base."[127] "The DOL's actions were rational, given the information that the DOL had at the time," and the fact that "[c]omplex decisions had to be made in a short time span."[128]

Then-Judge Scalia concurred in *Brock* because he did not think the court should have engaged in arbitrary-and-capricious review at all: "[I]t seems to me that the allocation of grant funds among various eligible recipients, none of which has any statutory entitlement to them, is traditionally a matter 'committed to agency discretion by law.'"[129] Judge Scalia did not cite any historical or precedential support for this asserted tradition, instead offering pragmatic considerations weighing against judicial review of appropriations decisions. Coupled with his "it seems to me" qualifier, it is fair to infer that Judge Scalia meant to refer more to his legal judgment than historical fact in asserting that grant allocations were "traditionally" committed to agency discretion.

The Solicitor General's brief in *Vigil* prominently cited Judge Scalia's concurrence in *Brock* and included a parenthetical quotation to the "tradition[]" language just described.[130] In doing so, however, it truncated out the "it seems to me" from the parenthetical quotation.[131] As a result, a reader of the brief might take Judge Scalia's statement of opinion (or, at least, of a legal conclusion) as a statement of historical fact, even if such a reading was not intended by either Judge Scalia or the Solicitor General. Justice Souter opted not to cite *Brock* in the opinion in *Vigil*.

Another potentially confusing passage in the Solicitor General's brief in *Vigil* is its assertion that "the courts have long declined to review agency decisions involving the termination or reallocation of agency services or resources."[132] Note how that line comes just short of asserting a tradition of non-review. To support this proposition, the brief cited four anecdotes of particular past cases finding agency actions unreviewable (three appeals and

126. *Id.* at 1045 (majority opinion).
127. *Id.* at 1051.
128. *Id.*
129. *Id.* at 1052 (Scalia, J., concurring).
130. Brief for the Petitioners, *supra* note 78, 1992 WL 547219, at *25.
131. *Id.*
132. *Id.*, 1992 WL 547219, at *25–26.

one district court),[133] involving the closure of a military base, Navy repair facility, and post office and the relocation of a customs office. Although a reader of the brief might assume that the cases in the Solicitor General's string cite were *apropos* of the *Vigil* case, they were not. Specifically: *National Federation of Federal Employees v. United States*[134] was a challenge to the constitutionality of the Base Closure and Realignment Act[135] that included an attempted APA challenge to the recommendations of the Commission on Base Realignment and Closure. The case did not mention appropriations or spending.[136] *Armstrong v. United States*[137] was a challenge to the closure of a naval repair facility that alleged (1) that the statute delegating power to close the facility to the Secretary of Defense was unconstitutional and (2) that the Secretary's order was unlawful because it failed to comply with a congressional notification requirement.[138] The Ninth Circuit found the statute constitutional and the notification requirement inapplicable.[139] The case did not mention appropriations, spending, or the APA. *Sergeant v. Fudge*[140] was a challenge to the closure of a post office.[141] The case did not mention appropriations, spending, or the APA. *Los Angeles Customs & Freight Brokers Ass'n v. Johnson*[142] was a challenge to the

133. *Id.*, 1992 WL 547219, at *26 ("See National Federation of Federal Employees v. United States, 905 F.2d 400, 405 (D.C. Cir. 1990) (decision to close military base); Armstrong v. United States, 354 F.2d 648, 649 (9th Cir. 1965), *cert. denied*, 384 U.S. 946 (1966) (decision to close Navy repair facility); Sergeant v. Fudge, 238 F.2d 916, 917 (6th Cir. 1956), *cert. denied*, 353 U.S. 937 (1957) (decision to discontinue post office); Los Angeles Customs & Freight Brokers Ass'n v. Johnson, 277 F. Supp. 525, 532 (C.D. Ca. 1967) (decision to shift location of customs office)." (footnotes omitted)).

134. 905 F.2d 400 (D.C. Cir. 1990).

135. Pub. L. No. 100-526, 102 Stat. 2623 (1988).

136. The D.C. Circuit found that this APA claim was "committed to agency discretion by law" because, based on its review of the reasons given by the commission for its recommendations, it concluded that "judicial review . . . would necessarily involve second-guessing the Secretary's assessment of the nation's military force structure and the military value of the bases within that structure."*Nat'l Fed'n of Fed. Emps.*, 905 F.2d at 406.

137. 354 F.2d 648 (9th Cir. 1965).

138. *Id.* at 649.

139. *Id.*

140. 238 F.2d 916 (6th Cir. 1956) (per curiam).

141. The Sixth Circuit held that the statute empowering the Postmaster General to close post offices "where the efficiency of the service requires" provided "no objective criterion" to guide review, leaving "the decision as to whether efficiency requires the closing of a post office solely to the judgment of the Postmaster General and his designated agents" and making that decision unreviewable. *Id.* at 917. The court based this holding primarily on *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), a sovereign immunity case that has since been superseded by the 1976 addition of a sovereign immunity waiver to the APA, for example, E.V. v. Robinson, 906 F.3d 1082, 1092 (9th Cir. 2018) ("[T]he 1976 amendment superseded the *Larson* exceptions only for suits in which the [APA] amendment's waiver provision applies . . . .").

142. 277 F. Supp. 525 (C.D. Cal. 1967).

moving of a customs office. The case did not mention appropriations, spending, or the APA.[143]

Despite the Solicitor General's reliance on these cases in *Vigil*, none suggests (or comes close to suggesting) that the fact that an agency judgment pertains to allocation of a lump-sum appropriation is itself an argument against review. Moreover, four cases declining review through application of individualized tests would not a pattern make—for that it would have been necessary to establish an absence of counter-examples engaging in review. The Solicitor General notably did not make any such assertion, and Justice Souter, in writing the *Vigil* opinion, opted not to cite any of the "long declined to review" cases offered by the Solicitor General.

Alternatively, and to come down to it, it seems probable that for at least some of the Justices who signed on to the unanimous opinion in *Vigil*, the prior existence of a tradition of refusing review was not particularly important. Immediately after describing the supposed tradition of refusing review, Justice Souter's opinion turned to pragmatic reasons a presumption of unreviewability could be desirable as a policy matter. Specifically, the Court listed two considerations that it saw as counseling against review, including the fact that "an agency's allocation of funds from a lump-sum appropriation requires 'a complicated balancing of a number of factors which are peculiarly within its expertise,'" and the fact that "an agency's decision to ignore congressional expectations may expose it to grave political consequences."[144] (If the Court felt that the interests of the Vigils in obtaining a "day in court" on behalf of their daughter and being free of arbitrary agency decision-making were irrelevant to its pragmatic calculus, actually cut against review, or were simply outweighed by the factors it identified, it did not say so.)

Recall that as an alternative to the "no law to apply" test, the categorical approach to "committed to agency discretion" had a pragmatic flavor (looking to policy arguments to identify categories of agency action to shield from review) and a historical flavor (looking to actual history in the years preceding, or perhaps following, the APA). It is reasonable to infer that, for at least some Justices, pragmatic rather than legal or historical considerations were the motivating force for the *Vigil* presumption. As such, for at least some Justices, the case and the presumption of unreviewability for spending decisions it announced were an exercise in judicial

143. The district court found the challenge barred by sovereign immunity, citing and relying heavily on *Larson*, because "[p]rohibiting the defendants . . . from implementing the move . . . would be a restraint on Government action and an interference with the public administration." *Id.* at 532.

144. Lincoln v. Vigil, 508 U.S. 182, 193 (1993) (quoting Heckler v. Chaney, 470 U.S. 821, 831 (1985)).

policymaking, and the nod to history by employing the language of "tradition" was a fig leaf.

Insofar as *Vigil* was an exercise in judicial policymaking, it is regrettable that the Supreme Court did not have before it competing arguments about the wisdom or implications of the choice it took upon itself. The Justices had nothing from the parties (or amici) to go on in considering key questions before it: What would be the scope of the category it was creating? Whose cases would be included? Whose excluded? What sorts of decisions, specifically? And would the intuitive, superficial policy arguments the Justices apparently found persuasive really stand up to scrutiny?

These questions about the scope, effect, and desirability of the *Vigil* presumption were not explored in *Vigil* itself or in the briefing materials before the Court, and they have not been explored in litigation or scholarship since. It is past time for a closer look. The next Part will describe the scope and effect of the *Vigil* presumption, and Part III will assess the presumption's desirability.

II. THE EXPERIENCE OF *LINCOLN V. VIGIL*

The availability and nature of judicial review of agency decisions related to spending are key questions with implications not only for administrative law but also for the separation of powers, as described in Part III. Understandably, then, the question of judicial review to challenge the *lawfulness* of discretionary spending decisions—especially whether or not a particular expenditure (or refusal to spend) was actually approved by Congress—has received significant attention in legal scholarship. This includes sustained studies of whether courts should give *Chevron* deference to appropriations interpretations[145] and whether Congress (or someone else) has standing to challenge allegedly unlawful agency expenditures.[146]

The question of the availability of judicial review to challenge the *substance* of discretionary spending decisions, however, (whether the agency action was arbitrary and capricious for failure to consider appropriate factors and alternatives, explain itself, etc.) has gone unstudied.

145. *See, e.g.*, Lawrence, *supra* note 12, at 1062–64; Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 DUKE L.J. 1677, 1678–86 (2017).

146. *E.g.*, Jonathan Remy Nash, *A Functional Theory of Congressional Standing*, 114 MICH. L. REV. 339 (2015); Metzger, *supra* note 9, at 1078; Bradford C. Mank, *Does a House of Congress Have Standing over Appropriations?: The House of Representative Challenges the Affordable Care Act*, 19 U. PA. J. CONST. L. 141 (2016); Katherine A. Rymal, Comment, *Litigious Legislators:* House v. Burwell *and the Justiciability of Congressional Suits Against the Executive Branch*, 89 TEMP. L. REV. 191, 220–29 (2016); McKaye Neumeister, *Reviving the Power of the Purse: Appropriations Clause Litigation and National Security Law*, 127 YALE L.J. 2512 (2018).

Since *Vigil* was decided, secondary sources and judicial opinions simply describe, and accept, the superficially straightforward proposition that agency decisions "allocat[ing] lump sum appropriations [are] committed to agency discretion"[147] and so presumptively unreviewable as a class.[148]

Careful study of published decisions applying *Vigil* reveals that the presumption is not as straightforward as it seems. Section A explains that while ostensibly neutral, the actual practical effect of the *Vigil* presumption is starkly lopsided. Section B explains that while apparently straightforward, the actual scope of the *Vigil* presumption is altogether uncertain.

A. Disparate Impact

1. The Subordination Question

In *Subordination and Separation of Powers*, I argued that courts and scholars should consider critical race and feminist theories' "subordination question"—"who pays"—in evaluating "structural" questions like the desirability of a presumption of unreviewability of lump-sum appropriations.[149] On this approach, we should not only ask whether such a presumption promotes or undermines accountability, non-arbitrariness, energetic policymaking, liberty, or other go-to "structural" values prominent in legal scholarship and separation-of-powers cases.[150] We should also ask whether the effects of the presumption "are generalized or particularized" and, if they are particularized, we should ask whom they affect.[151]

The subordination question reframes somewhat the *Vigil* presumption by centering the people it impacts rather than the nature of the actions to which it applies. It reminds us that the *Vigil* presumption is not really a barrier to judicial review for "lump-sum appropriations"—because lump-sum appropriations do not, of course, themselves seek judicial review. Rather, the *Vigil* presumption is a barrier to judicial review for people, entities, and communities affected by the agency decisions that are insulated from review by the presumption. The question, then, is who is that?

The Sections that follow answer the "who pays" question as applied to the *Vigil* presumption. They approach the question from two directions.

147. Lincoln v. Vigil, 508 U.S. 182, 192 (1993).

148. *See* sources collected *supra* note 9.

149. Lawrence, *Subordination and Separation of Powers*, *supra* note 11, at 85–86.

150. *Id.* at 91–94 (describing normative frameworks employed in separation-of-powers scholarship and cases).

151. *Id.* at 152–53.

Section 2 explores the impact of *Vigil* from the ground up, reporting on the parties in actual cases applying *Vigil* since it was decided. Section 3 connects this analysis to a survey of *Vigil*'s potential impact from the top down, mapping the universe of upstream agency decisions insulated from review by the *Vigil* presumption. Both perspectives reveal that the *Vigil* presumption does not by any means impact all Americans equally. Quite the contrary, its effects are targeted at the nation's most vulnerable, especially Tribes and prisoners.

To be clear, the fact that *Vigil* disproportionately affects Tribes and prisoners does not necessarily mean that the presumption is problematic. The findings of this Part are descriptive. Part III will turn to normative implications.

2. *Tribes and Prisoners*

One way to estimate who is impacted by the *Vigil* presumption is to review actual outcomes in published cases. As a preliminary matter, it is important to bear in mind limitations of published decisions as a window into case impacts. First, as scholars have noted, published cases substantially under-count actual case outcomes, because many cases are resolved by settlement or through unpublished decisions.[152] Confirming that the sample of published *Vigil* cases undercounts the total, several appellate *Vigil* cases address unpublished district court decisions dismissing cases on *Vigil* grounds.[153] Second, even a perfectly accurate picture of *litigated* cases would only represent the tip of the iceberg of *Vigil*'s upstream impact. A doctrine reducing plaintiffs' likelihood of success in litigation, such as the *Vigil* presumption, reduces the expected benefit of suing and so tends to discourage cases from being brought in the first place—an effect that itself depends on the relative costs and benefits of litigation to different parties.[154]

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152. *E.g.*, Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133, 1144 (1990) (noting, in the employment discrimination context, 80–90% of cases did not result in published opinion including in the LEXIS database).

153. *See* Ramah Navajo Sch. Bd., Inc. v. Babbitt, 87 F.3d 1338, 1343 (D.C. Cir. 1996); Am. Med. Ass'n v. Reno, 57 F.3d 1129 (D.C. Cir. 1995); New Jersey v. United States, 91 F.3d 463, 470 (3d Cir. 1996). As an additional example of under-counting in the sample of published cases, in *Schieber v. United States*, the D.C. Circuit recently foreclosed suit in five separate district court actions on *Vigil* grounds, but *Vigil* had not significantly featured in published decisions in the five underlying cases in district court (and so would not have been captured by a study sample limited to such cases). 77 F.4th 806, 813–15 (D.C. Cir. 2023).

154. *See* Jonah B. Gelbach, *Rethinking Summary Judgment Empirics: The Life of the Parties*, 162 U. PA. L. REV. 1663, 1671 (2014) (discussing difficulty of measuring impact of doctrinal shift given that parties' litigation behavior may itself be impacted by shift, including "plaintiff selection effect").

Looking at published cases does not tell us how many cases have been erased by the *Vigil* presumption without ever having been brought.

Relatedly, scholars well understand that administrative law's importance comes not only from changed outcomes in actually litigated cases, but also from ex ante, upstream impacts on agency behavior[155] and the public's perceptions of agency behavior (administrative law's expressive function).[156] Published cases are an awkward window into these upstream effects, because whether a suit is brought or not (and whether it leads to a published case or not) depends on a variety of factors that are not necessarily related including the arbitrariness *vel non* of agency behavior, the stakes of disputes, the wealth and cultural capital of regulated entities, and potential litigants' perceptions of their odds of success.[157]

In light of these limitations (among others),[158] the study of published decisions described here is intended to provide insight into trends in *Vigil*'s impacts, not establish with numerical precision the full extent of those impacts. For this reason, I focus here on the trends that emerge from review of published cases rather than raw numbers, though these are reported below and in the Appendix as appropriate. I also turn in the next Section to a survey of *Vigil*'s impact from the top-down perspective of its potential scope in order to provide additional context and check the reasonableness of the study described here.

The study began with all published federal cases in the Westlaw database citing *Lincoln v. Vigil*, yielding a sample of 434 total cases. It was conducted during 2022 and 2023 and is current through July 2023. A significant set of cases simply cite *Vigil* as an example of a "committed to agency discretion" case, often as part of a string cite with other cases such as *Heckler v. Cheney*,

155. *See* Metzger & Stack, *supra* note 26 (discussing the relationship between judicial review and norms); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 545–46 (2015) (discussing the role of judicial review in empowering agency staff).

156. Sidney A. Shapiro, *Law, Expertise and Rulemaking Legitimacy: Revisiting the Reformation*, 49 ENV'T L. 661 (2019).

157. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

158. The study also focuses on the effect of *Vigil* in terms of its invocation and application as a barrier to judicial review of agency actions since it was decided, not the effect of *Vigil* on net case outcomes as compared to the time period before it was decided. It is thus theoretically possible that while (as discussed above) *Vigil* is applied (much) more often in cases brought by Tribes and prisoners than in cases brought by other sorts of plaintiffs—which at the very least increases litigation costs for Tribes and prisoners in such cases given the time and energy they must expend attempting to rebut the presumption—the case has not actually impacted the ultimate "win rate" of those to whom it has been applied (perhaps those who apparently lose because of *Vigil* would have lost anyway on other grounds in bringing identically strong cases if not for the decision). *Cf.* Jonah B. Gelbach, *Material Facts in the Debate over* Twombly *and* Iqbal, 68 STAN. L. REV. 369, 424 (2016) (concluding, based on null result in 2000 case dataset of published and unpublished cases, "that it might not be possible to settle the controversy over *Twiqbal*'s quality-filtering effects using empirical evidence").

or in describing discretionary spending decisions as categorically subject to a presumption against review.[159] Accordingly, the sample was narrowed by boolean search for cases mentioning any of four terms: "Appropriat! Allocat! Spend! Fund!". This produced a total of 259 district court cases.

Each case in this sample was then reviewed to assess whether it actually addressed reviewability and relied upon *Vigil* in its discussion of reviewability. This yielded 59 cases. I consider this a comprehensive sample of *published* cases in which *Vigil* itself stood as an obstacle to review (or *Vigil* cases, for short).

Table 1 provides a breakdown of the plaintiffs in published *Vigil* cases.[160] A full table of cases appears in the Appendix. Table 1 separately provides each plaintiff type's share of all *Vigil* cases and its share of all cases ultimately found unreviewable under *Vigil*. As its bottom-line finding this Article references the first number—each plaintiff type's share of all *Vigil* cases—as more reflective of the extent to which the insulation provided by *Vigil* might influence litigation costs for plaintiffs, unreported cases, upstream agency behavior, and the case's impact on the cost and duration of litigation.[161]

TABLE 1: PLAINTIFFS IN CASES IN WHICH *VIGIL* PRESUMPTION PRESENTED OBSTACLE TO REVIEW

Plaintiff Type	**Cases**	**Reviewable/ Unreviewable**	**Percent of All *Vigil* Cases/Percent of Cases Found Unreviewable (Rounded)**
Tribe	22	14-8	37%/31%
Prisoner	9	1-8	15%/31%
Health care provider	6	6-0	10%/0%

159. *See, e.g.*, cases cited *supra* note 9.

160. The "Tribe" category includes groups suing on their own behalf and members (like Ashley Vigil) suing to advance group interests. I use the term "Tribe" rather than "nation" because this is the term that case captions overwhelmingly indicated that Native communities had used to describe themselves as plaintiffs in litigation. *Cf. The Impact of Words and Tips for Using the Right Terminology: Am I Using the Right Word?*, SMITHSONIAN NAT'L MUSEUM AM. INDIAN, https://americanindian.si.edu/nk360/informational/impact-words-tips [https://perma.cc/525G-7ZA7] ("The best term is always what an individual person or tribal community uses to describe themselves."). The "health care provider" and industry categories include both providers/corporate entities themselves and industry groups advocating on their behalf.

161. It is speculation informed by the author's time as a D.C. Circuit clerk and years practicing administrative law at the Department of Justice, but I also sensed in reading that some courts that found review available in *Vigil* cases were nonetheless influenced by the shadow of the presumption to go on to uphold agency actions that they may otherwise have scrutinized more deeply on the merits.

Industry	7	6-1	12%/4%
States	3	1-2	5%/8%
Localities	2	2-0	3%/0%
Environmental advocacy	3	2-1	5%/4%
Housing tenant/advocacy	2	1-1	3%/4%
Misc.[162]	5	0-5	8%/19%
Combined	59	33-26	100%

The findings speak for themselves (for present purposes, at least).[163] Thirty-seven percent of published *Vigil* cases are brought by Tribes and fifteen percent by prisoners. Only five percent are brought by States. Tribes face *Vigil* as an obstacle to review in federal court more often than do industry groups (including corporate entities and lobbying groups), health care providers, environmental advocacy groups, states, and localities *combined*. More than half (fifty-two percent) of all *Vigil* cases involve either Tribes or prisoners.

To avoid double counting, Table 1 reports only the ultimate ruling where a district court decision was the subject of a published opinion on appeal. That said, the makeup of the appellate *Vigil* docket provides an interesting snapshot into the sorts of cases impacted by *Vigil*. The appellate courts

162. Miscellaneous category refers to one-off plaintiff types as follows: a group of citizens joined by the Portland mint, a civil rights advocacy group, a veteran, holocaust victims seeking restitution through a State Department program, and a disappointed applicant for a Fulbright scholarship.

163. I make no claim that the observed disparity reflects animus or intention, and more qualitative and quantitative work would need to be done to establish that. Working on this Article, I have developed a few hypotheses to explain the observed disparity that further work might test. First, the explanation could lie in the organization of and knowledge flows within the Department of Justice; it may be that lawyers who tend to handle tribal cases are more likely to know about (and comfortable using) *Vigil* than others. As discussed further *infra*, it takes work by the government to try to make out a *Vigil* case by identifying an underlying appropriation and connecting a funding decision to that appropriation in briefing a case. Second, the explanation could lie in the ambiguity of the *Vigil* doctrine—given a lack of clarity, it would make sense that courts would apply the doctrine most often in cases that "look like" the one in which it originated (cases brought by Tribes), and that the doctrine's impacts might snowball in other fact patterns to which it is applied (like cases brought by prisoners). Third, the explanation could relate to underlying pressures that shape potential plaintiffs' willingness to sue; in particular, it could be that potential litigants in spending cases who are repeat players before the funding agency decline to sue for fear or provoking the ire of that agency, a "hand that feeds" issue I have described elsewhere. *See* Lawrence, *supra* note 12. On this theory, it may be that Tribes or prisoners are either on the losing end of more agency funding decisions or that they are less concerned about the risk of agency retaliation, perhaps because of already-strained relationships. Fourth, of course, may be stigma or bias against these groups, a feeling that they are "less deserving" of judicial protection than hospitals or government contractors. Any of these explanations or a combination of them may be at play, and there may be others—so establishing intent (rather than simple disparity) would require further analysis.

found review unavailable in eight of fourteen appellate cases: in cases brought by holocaust victims challenging procedural deficiencies in the resolution of their claims against France by a State Department tribunal,[164] tribal members challenging termination of a health care program in *Vigil* itself,[165] a tribe challenging Interior's decision not to allocate funds for a police program,[166] farmers challenging certain subsidy determinations,[167] a prisoner challenging the termination of a "boot camp" that would have shortened her sentence,[168] another prisoner challenging the termination of an intensive confinement center program that would have shortened her sentence (and on which she allegedly relied in agreeing to a plea),[169] the state of New Jersey (under Governor Whitman) challenging DOJ's refusal to reimburse it for immigration enforcement expenses,[170] and a county government challenging the FAA's decision to halt funding for an airport expansion (in a throwaway analysis after reviewing and upholding the simultaneous FAA decision to revoke approval for the expansion).[171]

Appellate courts considered refusing review under *Vigil*, but declined to do so, in an additional six cases including a recent case brought by a tribe challenging the data used by Interior in calculating allocations of CARES Act funding,[172] a recent case brought by housing assistance beneficiaries challenging HUD's refusal to provide relocation vouchers,[173] the case brought by the Sierra Club challenging the Trump Administration's use of funds for wall construction,[174] a case brought by a contractor challenging the Forest Service's decision not to allocate funds to rebuild a concession stand that had burned down in a fire,[175] a case brought by the American Medical Association challenging DEA fee decisions related to controlled substances diversion,[176] and a case brought by a farmer terminated from a USDA conservation program for allegedly planting wheat in a conservation field.[177]

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164. Schieber v. United States, 77 F.4th 806, 807, 813–15 (D.C. Cir. 2023).
165. Lincoln v. Vigil, 508 U.S. 182, 184 (1993).
166. Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell, 729 F.3d 1025, 1038 (9th Cir. 2013).
167. Milk Train, Inc. v. Veneman, 310 F.3d 747, 751–52 (D.C. Cir. 2002).
168. Serrato v. Clark, 486 F.3d 560, 567 (9th Cir. 2007).
169. Ojeda v. Fed. Bureau of Prisons, 225 F. App'x 285, 286 (5th Cir. 2007) (per curiam).
170. New Jersey v. United States, 91 F.3d 463, 470–71 (3rd Cir. 1996).
171. Bd. of Cnty. Comm'rs v. Isaac, 18 F.3d 1492, 1495–98 (10th Cir. 1994).
172. Shawnee Tribe v. Mnuchin, 984 F.3d 94, 100 (D.C. Cir. 2021).
173. Hawkins v. U.S. Dep't of Hous. & Urb. Dev., 16 F.4th 147, 150 (5th Cir. 2021), *withdrawn*, No. 20-20281, 2022 WL 1262100 (5th Cir. Apr. 28, 2022).
174. Sierra Club v. Trump, 929 F.3d 670, 676–77 (9th Cir. 2019).
175. Mount Evans Co. v. Madigan, 14 F.3d 1444, 1448–50 (10th Cir. 1994).
176. Am. Med. Ass'n v. Reno, 57 F.3d 1129, 1135 (D.C. Cir. 1995).
177. Payton v. U.S. Dep't of Agric., 337 F.3d 1163, 1166–68 (10th Cir. 2003).

Regarding success rates, prisoners succeeded in overcoming the *Vigil* presumption in only one of the nine cases in which they confronted it (or eleven percent of the time), whereas all other plaintiffs combined succeeded in overcoming the *Vigil* presumption in thirty-three of the fifty times they confronted it (or sixty-seven percent of the time). (It would be interesting to compare this to success rates litigating other threshold doctrines.)[178] Tribes' success rate in reported *Vigil* cases mirrored the overall win rate. About two-thirds (sixty-four percent) of all cases concluding review was unavailable under *Vigil* were brought by either Tribes or prisoners.

Health care providers, by contrast, are undefeated—when they have encountered *Vigil* as an obstacle to review, they have always overcome it. The same is almost true of industry plaintiffs, who have lost only one case (brought by thirty-one large milk producers).[179] Indeed, no published case has ever found *Vigil* to bar the courthouse doors to a traditional corporate entity or health care provider, or to an advocacy group acting on their behalf. No *Chevron* or *State Farm* or *Fox Television Studios* or *American Medical Association* here—the captions of administrative law cases held unreviewable by operation of *Vigil* have modest, human names on the plaintiff's side of the "v" of the sort all too rare in modern administrative law, names like *Los Coyotes*, *Ojeda*, and *Schieber*.

3. *How the Other 3% Live*

The stark patterns revealed by published decisions applying *Vigil* are consistent with an analytical map of the scope of agency actions potentially insulated from the threat of litigation by the doctrine. *Vigil* applies even theoretically only to a narrow corner of administrative behavior.

The *Vigil* presumption does not even nominally apply to those who obtain their resources through market entitlements; that is, it does not apply to agency decisions relating to "taxes" or command-and-control "regulation" of "private" behavior like pollution or financial accounting. Small wonder, then, that *Vigil* cases so rarely involve corporations or for-profit ventures. Relatedly, the *Vigil* presumption does not even nominally apply to those who obtain their resources through constitutional "new

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178. *Cf.* Emily Bremer, *Power Corrupts*, 41 YALE. J. REG. (forthcoming 2024) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4375200 [https://perma.cc/N5KH-XDNP] ("This paper argues that administrative law's obsession with power corrupts the field and has led slowly but inexorably to the abandonment of the core work of administration . . . ."); Girardeau A. Spann, *Color-Coded Standing*, 80 Cornell L. Rev. 1422, 1454–71 (1995) (describing "racially suspicious" standing cases).

179. *See* Milk Train, Inc. v. Veneman, 310 F.3d 747, 756 (D.C. Cir. 2002).

property" entitlements, like Medicare, Medicaid, and Social Security.[180] Though ultimately funded through appropriations, these programs curb agency discretion through specific statutory commands to pay particular individuals or entities particular amounts, triggering the enhanced procedural protections of the Due Process Clause.[181] Although in most cases agencies retain significant discretion in determining the generosity of the required payments—Medicaid waivers are one example of this discretion[182]—no court has held that the *Vigil* presumption applies to the exercise of such discretion (and even the Department of Justice, when it has asked courts to refuse review of such judgments, has invoked the "no law to apply" test rather than claim they involve lump-sum appropriations).[183]

The Section that follows discusses significant doctrinal confusion about *Vigil*, but this much is clear: The *Vigil* presumption applies only to programs in which agencies make discretionary decisions about non-entitlement spending (with the historically rare exception of disappropriation).[184] It is readily possible to describe the scope of such programs. The federal budget process considers "discretionary" programs separately from "mandatory" programs.[185] Non-entitlement spending programs in which agencies have

180. *Cf.* Reich, *supra* note 20, at 783–85.

181. *See generally* Goldberg v. Kelly, 397 U.S. 254 (1970).

182. *See* Matthew B. Lawrence, *Fiscal Waivers and State "Innovation" in Health Care*, 62 WM. & MARY L. REV. 1477, 1481 (2021).

183. *E.g.*, Beno v. Shalala, 30 F.3d 1057, 1067 (9th Cir. 1994); Stewart v. Azar, 313 F. Supp. 3d 237, 256 (D.D.C. 2018) ("The Secretary suggests that these provisions lack 'any meaningful judicial standard of review.'").

184. If an agency becomes unable to honor a mandatory spending requirement, then it is left with discretion to decide how to prioritize in allocating the funds it does have available. *See* Matthew B. Lawrence, *Medicare "Bankruptcy*,*"* 63 B.C. L. REV. 1657, 1678–79 (2022) (addressing forced prioritization). Normally that does not happen, though there have been exceptions. *See* Lawrence, *Disappropriation*, *supra* note 11, at 27–44 (listing "tribal contract support costs", the ACA's "risk corridors" and "cost-sharing reductions" provisions, CHIP, and the 2018–2019 government shutdown as examples of disappropriations). If the country were to hit the debt ceiling or enter a prolonged shutdown, courts would likely be asked to confront the applicability of *Vigil* to the resulting agency prioritization choices. *See infra* Section II.B.

185. *See* 2 U.S.C. § 633(a)(3)(B)(i) (creating mandatory/discretionary distinction); *Policy Basics: Introduction to the Federal Budget Process*, CTR. ON BUDGET & POL'Y PRIORITIES (Oct. 24, 2022), https://www.cbpp.org/research/federal-budget/introduction-to-the-federal-budget-process [https://perma.cc/F9FU-KDJP] (describing mandatory/discretionary distinction). One reason this distinction can be confusing is that agencies often have significant discretion to alter the amount or recipients even of "mandatory" entitlement programs. *E.g.*, 42 U.S.C. § 1395ww(d)(5)(I)(i) (giving Secretary of Health and Human Services authority to adjust Medicare reimbursement rates by regulation). Such programs are nonetheless counted as "mandatory" in the federal budget process, and they are ordinarily beyond the *Vigil* pale because their status as legal entitlements triggers due process protections. ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 50–54 (rev. ed. 2000); Reich, *supra* note 20, at 742, 745, 783–86.

discretion are encompassed in what is called the "discretionary" side of the federal budget, which represents about thirty percent of federal spending.[186]

Moreover, the "discretionary" budget is generally broken into two categories: "defense spending" (recently a little less than half of discretionary spending) and "non-defense spending" (a little more than half).[187] Although *Vigil* might theoretically apply to claims by defense contractors or military personnel on the "defense" side of the discretionary budget, it does not make sense to focus on defense programs in estimating who is impacted by the presumption, for three reasons. First, military personnel have available to them elaborate, specialized administrative and judicial review processes.[188] Second, separate judicial deference doctrines related to the President's Commander-in-Chief power preclude or severely limit challenges to judgments relating to military policy.[189] Third, defense contractors also have access to specialized administrative and judicial review processes associated with procurement, and voluntary contractors can insist on contractual provisions rebutting the *Vigil* presumption—or price the cost of foregoing judicial review (if any) into the bids they submit to the government.[190] In light of these considerations, it is not surprising that only two of the published *Vigil* cases described in the previous Section involved defense spending (both were challenges to President Trump's use of defense funds to construct a border wall).[191]

Thus, *Vigil*'s domain is currently limited to programs funded through the non-defense, discretionary side of the federal budget. Such programs account for about one-fifth of the federal budget, and about three percent of gross domestic product.[192] The figure below gives a sense of the programs funded in this way, and it is a breakdown that largely captures the cases described in the preceding Section. They include the Indian Health Service, housing assistance for people in poverty, veterans' health benefits, CDC and NIH public health and basic research grants, USDA farm subsidies, the Bureau of Prisons, US AID, WIC (special supplemental nutrition for

186. *See* CONG. BUDGET OFF., THE BUDGET AND ECONOMIC OUTLOOK: 2023 TO 2033 (2023), https://www.cbo.gov/publication/58848 [https://perma.cc/N6EC-N8V5].

187. *Id.* at 17.

188. *See generally In re* Navy Chaplaincy, 306 F.R.D. 33 (D.D.C. 2014) (describing processes).

189. *See, e.g.*, Stein v. Mabus, No. 12-CV-00816, 2013 WL 12092058, at *2 (S.D. Cal. Feb. 14, 2013) (applying *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), the doctrine governing review of military personnel decisions).

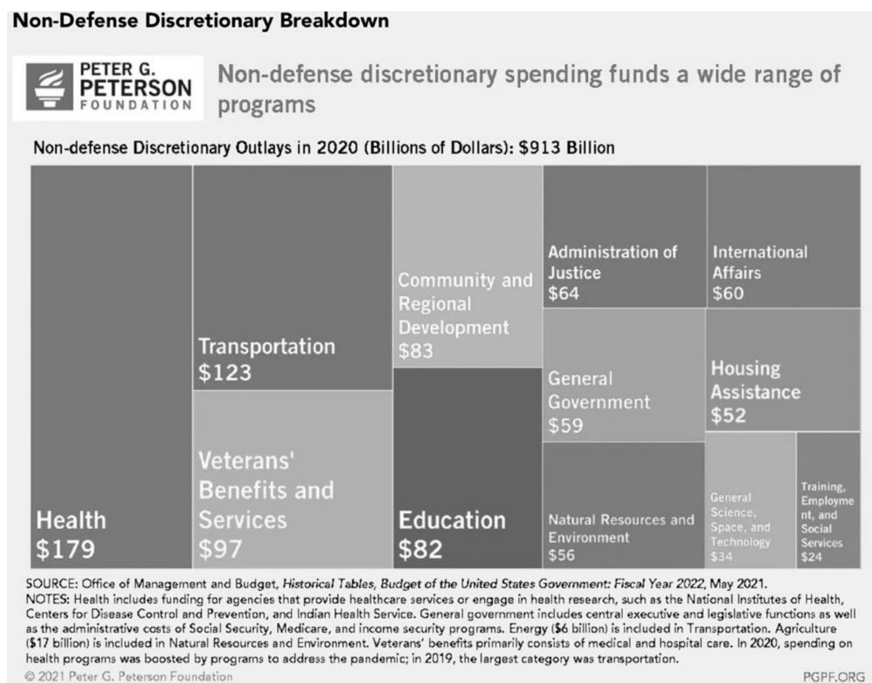
190. *Cf.* I-Tung Yang, *Impact of Budget Uncertainty on Project Time-Cost Tradeoff*, 52 IEEE TRANSACTIONS ON ENG'G MGMT. 167, 168 (2005) (finding that energy contractors price the risk of disruption from participating in annually funded (as opposed to guaranteed) program into bids).

191. Sierra Club v. Trump, 929 F.3d 670, 698 (9th Cir. 2019); California v. Trump, 379 F. Supp. 3d 928, 952–53 (N.D. Cal. 2019).

192. *See Policy Basics: Non-Defense Discretionary Programs*, *supra* note 21.

women, infants, and children), transportation, conservation and natural resource management, and education (mostly funding to help schools educate disabled and low-income students, as well as pre-K and head start programs).[193]

FIGURE 1: DISTRIBUTION OF NON-DISCRETIONARY SPENDING



Programs relied upon by society's most vulnerable (and least powerful) tend to be funded through discretionary appropriations.[194] Discretionary appropriations are a fragile way to fund a program because, as the last spending decisions made in the federal government's complicated fiscal process, discretionary appropriations represent the point where conflict with

193. *See id.*

194. *E.g.*, Andrew Hammond, *Welfare and Federalism's Peril*, 92 WASH. L. REV. 1721, 1742, 1746 (2017) (explaining that conversion of welfare programs into block grant programs disenfranchises welfare recipients); Martha T. McCluskey, *Framing Middle-Class Insecurity: Tax and the Ideology of Unequal Economic Growth*, 84 FORDHAM L. REV. 2699, 2701 (2016); Lawrence, *Subordination and Separation of Powers*, *supra* note 11, at 87.

deficit control is unavoidable.[195] Discretionary appropriations are also a fragile way to fund a program because program advocates must return to Congress for funding year after year.[196] And finally, discretionary appropriations are especially fragile because threats to such programs—in the form of shutdowns—are an important part of modern executive/legislative bargaining.[197]

Finally, comparing these figures about the overall scope of potential *Vigil* cases with the findings in the preceding Section about published *Vigil* cases reveals some consistency and some mismatch. The fact that plaintiffs in actual *Vigil* cases turn out to come from groups that rely on discretionary spending confirms that the presumption announced in the case is indeed inherently limited to such groups. At the same time, a disparity in impact persists even within the category of discretionary spending—Tribes and prisoners make up a much larger share of plaintiffs in *Vigil* cases than they do of discretionary spending, and there are groups, especially those who receive education grants, veterans' benefits, and scientific grants, that conceptually ought to face the *Vigil* presumption as an obstacle in litigation but rarely (or never) do so.[198] Indeed, while a comprehensive survey of dogs that didn't bark—potential *Vigil* cases in which the government did not choose to argue *Vigil* as an obstacle to review and the court did not raise the issue *sua sponte*—is beyond the scope of this Article, the author has located cases from these domains in which the *Vigil* presumption is not even considered as an obstacle in circumstances in which it might have been.[199]

195. When cutting taxes or increasing mandatory programs, members of Congress can always claim that they will address the country's overall fiscal health when setting that year's discretionary budget. But when it comes time to actually fund discretionary programs, the can cannot be kicked any further. *See, e.g.*, Tim Westmoreland, *Standard Errors: How Budget Rules Distort Lawmaking*, 95 GEO. L.J. 1555, 1558 (2007) (describing dynamics).

196. Lawrence, *Subordination and Separation of Powers*, *supra* note 11, at 104–06 (collecting sources).

197. Lawrence, *Disappropriation*, *supra* note 11.

198. *See supra* Table 1.

199. For example, the Government did not press *Vigil* in *People for the Ethical Treatment of Animals v. Tabak*, 662 F. Supp. 3d 581 (D. Md. 2023). There, plaintiffs challenged grant awards by NIH funding sepsis-involved research on animals, arguing such awards were an abuse of discretion because sepsis-involved research on animals is unproductive and inhumane. *Id.* at 587–88. The government objected on standing and "committed to agency discretion" grounds, but argued simply that the statute lacked sufficient standards and required a balancing of complicated factors within the agency's expertise; it did not argue that *Vigil* created a presumption that weighed against review of the grant awards. Memorandum of Law in Support of Motion to Dismiss at 2, 24–25, *Tabak*, 662 F. Supp. 3d 581, ECF No. 36–1. The court concluded that PETA had standing and that the grant awards were reviewable, in particular because PETA had alleged that NIH "entirely failed to consider an important aspect of the problem," that is, that fifteen peer-reviewed studies had concluded that "sepsis in humans fundamentally differs from sepsis in other animals." *Tabak*, 662 F. Supp. 3d at 593, 594 (quoting Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Ins., 463 U.S. 29, 43 (1983)). At this writing, the parties are exchanging

The next Section turns to another aspect of the Article's study of *Vigil* cases that may help to explain this apparent disparity in application of *Vigil*, namely, the broad and uncanalized discretion that *Vigil* left courts in determining whether the presumption it articulated actually applies in any given discretionary spending case or not. Scholars have noted that uncanalized judicial discretion can create the conditions for implicit bias or other undesirable determinants to influence case outcomes,[200] and *Vigil* may be an example of this effect.

B. Doctrinal Confusion

Review of *Vigil* cases also reveals that the doctrine is not the straightforward rule that scholars and courts have made it out to be in describing it.[201] There is pervasive confusion about when the presumption actually applies stemming from three unanswered and potentially unanswerable questions about its scope. In short and as elaborated below, none of the three terms that comprise this simply stated doctrine have a clear meaning. *Vigil* leaves courts to decide for themselves (1) what spending statutes are "appropriations," (2) what appropriations are "lump-sum," and (3) what agency decisions "allocate" appropriations.

Before digging into the confusion in the specifics of the *Vigil* presumption, however, a refresher about the presumption's place in administrative law is warranted. To briefly summarize the discussion above: Courts generally presume judicial review of agency action is available in administrative law cases.[202] Although the APA creates an exception to its general provision for judicial review of agency action for agency decisions "committed to agency discretion by law,"[203] the Supreme Court has instructed that this exception is a "narrow"[204] one that applies only when

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discovery motions in anticipation of summary judgment filings to facilitate the court's review of PETA's challenge to the grant awards for abuse of discretion. [Proposed] Stipulated Scheduling Order, *Tabak*, 662 F. Supp. 3d (No. 21-CV-02413), ECF No. 78. For additional examples, see *Sherley v. Sebelius*, 776 F. Supp. 2d 1, 22 (D.D.C. 2011) (evaluating APA challenge to change in policy regarding grant awards for stem cell research); and *Connecticut v. Spellings*, 549 F. Supp. 2d 161, 169 (D. Conn. 2008) (evaluating APA challenge to Department of Education's refusal to alter conditions on availability of federal funding for state).

200. *See, e.g.*, Danielle L. Macedo, *What Kind of* Justice *Is This? Overbroad Judicial Discretion and Implicit Bias in the American Criminal Justice System*, 24 J. GENDER, RACE & JUST. 43, 64–78 (2021) (arguing that the broad discretion afforded state-level judges creates de facto unreviewable exercises of bias).

201. *See* sources collected *supra* note 9.

202. RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 1594, 1618–45 (5th ed. 2010); Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

203. 5 U.S.C. § 701(a)(2).

204. Dep't of Com. v. New York, 139 S. Ct. 2551, 2569 (2019).

there is "no law to apply," that is, no "meaningful standard" against which to judge the agency's decision.[205] Alongside this amorphous "no law to apply" standard, the Supreme Court has identified certain categories of agency decisions that are "traditionally regarded as committed to agency discretion by law" and so presumptively unreviewable, including non-enforcement decisions and decisions not to re-open agency proceedings once closed.[206] As to such decisions, courts may review for compliance with legal and procedural requirements, but they may not engage in substantive review of whether the agency's decision was arbitrary and capricious or an abuse of discretion.[207] *Vigil* is ordinarily understood to recognize an additional category of actions "traditionally regarded as committed to agency discretion," namely, decisions allocating "lump sum appropriation[s]."[208]

A few published decisions applying *Vigil* evince confusion or disagreement about the just-stated black letter framework—they are not the focus of this Section. For now it is enough to know that these outlier cases seem to treat *Vigil* as limited to its facts, simply an application of the general "no law to apply" test in a particular scenario.[209] On this minority view, *Vigil* did not create a categorical presumption at all, and courts should assess reviewability of discretionary spending decisions just like they do any other sorts of agency decisions—presuming reviewability and finding otherwise only in the absence of "meaningful standards" to guide review. This minority reading of *Vigil* as simply one application of the "no law to apply" test conflicts with the way most scholars and courts have described the case. The Article will take up below, in Part IV, the question whether this minority reading is plausible enough for courts wishing to avoid *Vigil* to adopt it without explicitly abrogating *Vigil*.[210]

Setting the minority view to one side, there is nonetheless inherent ambiguity in the majority, strong view of *Vigil* as creating a categorical presumption. Even cases that agree about the core holding of *Vigil* and its

205. *Id.* at 2568–69.

206. *Id.*

207. *See* Lincoln v. Vigil, 508 U.S. 182, 190–95 (1993).

208. *Id.* at 192; *see supra* note 9 (collecting examples).

209. *E.g.*, Planned Parenthood of N.Y.C., Inc. v. U.S. Dep't of Health & Hum. Servs., 337 F. Supp. 3d 308, 324 (S.D.N.Y. 2018) ("[D]efendants inaccurately state that '[a]n agency's allocation of appropriated funds is typically committed to agency discretion,' and 'agencies' grant-award decisions are presumptively unreviewable.' . . . While the Supreme Court has held that certain allocations of funds from lump-sum appropriations may be committed to agency discretion, this narrow exception does not 'typically' or 'presumptively' extend to all allocations of appropriated funds." (second, third, and fourth alterations in original) (citing *Vigil*, 508 U.S. at 193)); Healthy Teen Network v. Azar, 322 F. Supp. 3d 647, 657–59 (D. Md. 2018) (distinguishing *Vigil*).

210. *See infra* Part IV.

place in administrative law evince fundamental confusion about where it actually applies.

1. What Is an "Appropriation"?

The first ambiguity surrounding the application of *Vigil* is the question whether a particular agency action involves an "appropriation" for purposes of the presumption. Depending on what counts as an "appropriation" for purposes of the *Vigil* test, its rule might apply only narrowly to annual appropriations measures making funds available for expenditure; more broadly to any appropriations measures making funds available, whether on a short-term or on a long-term (or permanent) basis; or more broadly still, to almost any decision related to spending.

As an initial cut, the scope of the *Vigil* presumption depends significantly on whether it is limited to annual appropriations or not. I have argued elsewhere that courts developing administrative law rules particular to appropriations should be mindful of the distinction between annual appropriations—which retain and enforce Congress's power of the purse—and long term (and permanent) appropriations, which do the opposite.[211] *Vigil* did not specify whether the "appropriations" it had in mind were only annual appropriations or long-term appropriations as well. That said, the case involved an annual appropriation and some of its reasoning (discussed further in Section III.C, below) depended on the political dynamics of the annual appropriations process.[212] Despite this, the D.C. Circuit and various lower courts have applied *Vigil* beyond this context to agency decisions regarding long-term appropriations,[213] without even considering whether the rule might not apply in this context.

More fundamental is the question whether for purposes of the *Vigil* rule all spending decisions are also appropriations decisions or whether, on the other hand, only some spending decisions implicate the rule. The Constitution's Appropriations Clause provides that money may not be "drawn from the Treasury, but in Consequences of Appropriations made by Law."[214] For purposes of this constitutional requirement, an appropriation is a statutory designation of (1) an amount of funds, (2) a source of funds,

211. Lawrence, *Subordination and Separation of Powers*, *supra* note 11, at 98.

212. *Vigil*, 508 U.S. at 193 (speaking of "grave political consequences" of agency defiance).

213. *See* Milk Train, Inc. v. Veneman, 310 F.3d 747, 751–52 (D.C. Cir. 2002) (finding that agency decision allocating funds from congressionally created compensation fund for losses in 1998 and 1999 was unreviewable); Bramlett v. U.S. Dep't of the Treasury, No. 16-257, 2017 WL 1048366, at *4–5 (E.D. Pa. Mar. 20, 2017) (applying *Vigil* to appropriation from self-sustaining fund and holding agency action unreviewable).

214. U.S. CONST. art. I, § 9, cl. 7.

and (3) one or more purposes for which the funds may be spent.[215] But Congress often describes some or all of the purposes to which funds may be put in an enactment (called an "authorization") that does not itself specify an amount and source of funds.[216]

Yes, appropriations law can be confusing, but this is a key point and source of that confusion. Congress might authorize (and specify purposes for) spending in permanent law that actually cannot take place until Congress subsequently enacts an additional law specifying an amount and source of funds to make the already-authorized expenditures. This splitting of constitutional appropriations into multiple statutory enactments does have a rationale: it is a way of honoring the separate jurisdiction of congressional committees (of making sure the spending committees do not take over the turf of the substantive committees)[217] and of preserving enduring, evergreen influence for each Chamber even while delegating power to an agency in permanent law.[218]

Congress's habit of delegating authority to spend and providing restrictions on the exercise of that authority in "authorizing" legislation separate from the annual measures designating an amount and source of funds creates a challenge for courts looking to apply the *Vigil* presumption. Does the presumption attach only to agency decisions allegedly abusing discretion provided and/or restricted by a statutory measure developed by the appropriations committees as part of the annual budget cycle, or also to agency decisions allegedly abusing discretion restricted by "authorizing" legislation in permanent law? *Vigil* itself characterized the case before it as an "appropriations" case subject to its presumption (as the Solicitor General had done), but the plaintiffs had pointed to permanent enactments that authorized and restricted the agency's use of funds.[219] Numerous subsequent cases, however, have found the presence of such measures sufficient to support review in discretionary spending cases.[220]

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215. U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-464SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-15 to -20 (4th ed. 2016).

216. *See* Lawrence, *Disappropriation*, *supra* note 11, at 21.

217. Per congressional rules, substantive committees create authorizations, and then appropriations committees may (or may not) provide funds for those purposes (they usually cross-reference the previously designated purposes in the enactment doing so). *See generally* Metzger, *supra* note 9, at 1089. For example, the Department of Defense has authority through a permanent "transfer" provision to put any funds appropriated to it to use for military construction. 10 U.S.C. § 2808.

218. Lawrence, *Disappropriation*, *supra* note 11, at 58.

219. Brief for the Respondents, *supra* note 92, 1992 WL 512178, at *33.

220. *See* Planned Parenthood of N.Y.C., Inc. v. U.S. Dep't of Health & Hum. Servs., 337 F. Supp. 3d 308, 325 (S.D.N.Y. 2018) ("Even if the 2018 CAA can be read to provide HHS with 'wide latitude' or 'broad leeway' in how to allocate TPP Program funding, Congress articulated restrictions and thus parameters as to how that funding may be allotted, and the Court may apply 'meaningful standards' by

Vigil did not recognize the authorization/appropriation concept. Instead, the opinion seems to assume the term "appropriation" has a settled meaning in fiscal law, which it does not. This has been discussed elsewhere,[221] but in short, conceptually speaking provisions creating, narrowing, or expanding authorized purposes in permanent law are part of the "purpose" that is itself part of a constitutional "appropriation," making it hard to develop a principled distinction between "spending" legislation and "appropriations" legislation (a fact that has bedeviled the congressional standing debate).[222] Thus, some scholars and agencies define "appropriations" to include essentially all spending provisions.[223] On the other hand, some scholars and agencies have limited the term "appropriation" to the measure that provides an amount and source of funds itself, adopting a definition of the term that aligns with the jurisdictional lines Congress has drawn between authorizing and appropriations committees.[224] It may be that the appropriate terminology depends on one's reason for drawing the distinction.

2. *What Makes an Appropriation "Lump-Sum"?*

Even more uncertainty surrounds the next precondition to application of the *Vigil* presumption—the question whether an appropriations measure is "lump-sum" or not. *Vigil* does not create a presumption of unreviewability for every "appropriation" decision to which it applies; rather, it creates a presumption only for decisions pertaining to "lump-sum" appropriations. But it is not at all clear what the *Vigil* Court meant by that term. Again, the Court seemed to assume the term had a settled meaning in fiscal law, but it does not.

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insisting that the agency follow these congressional directives."); Stewart v. Azar, 313 F. Supp. 3d 237, 255 (D.D.C. 2018) ("The Court can readily apply both standards, which are a far cry from those traditionally deemed unreviewable."); Pyramid Lake Paiute Tribe v. Burwell, No. 13-CV-01771, 2015 WL 13691433, at *1 (D.D.C. Jan. 16, 2015) ("This reading of IHS's authority runs directly contrary to both the purpose and text of ISDEAA."); Vara v. DeVos, No. 19-12175, 2020 WL 3489679, at *24 (D. Mass. June 25, 2020) ("In this case, upon review of the HEA, the 1995 borrower defense regulations, Education's published interpretations of that regulation . . . , and Education's practice of adjudicating borrower defenses, the Court concludes that there is sufficient law to apply to permit judicial review . . . .").

221. *See* Lawrence, *supra* note 12, at 1064–71; Metzger, *supra* note 9, at 1085.

222. Lawrence, *supra* note 12, at 1064–71 (discussing complicated distinction between appropriations statutes and spending statutes).

223. *E.g.*, Metzger, *supra* note 9, at 1085 ("This Article uses the term 'appropriations' expansively, including under its embrace not simply legislation allocating budget authority . . . but also administrative actions implementing those allocations and making expenditures . . . .").

224. *See, e.g.*, Use of Appropriated Funds to Provide Light Refreshments to Non-Fed. Participants at EPA Confs., 31 Op. O.L.C. 54, 62–71 (2007) (drawing distinction based on Congress's choice whether to tie restriction to appropriations provision).

Specifically, it is unclear whether any provision empowering an agency to choose among more than one purpose of project in deciding how to spend counts as "lump-sum," or rather whether the "lump-sum" label for purposes of the *Vigil* rule applies only to provisions empowering an agency especially broadly to choose among many potential purposes. Moreover, if the answer is the latter, it is not clear how broad a delegation to an agency to make a spending decision can be before it is so broad that the "lump-sum" label attaches.

The Government Accountability Office (GAO) (a congressional agency that serves as something like Congress's Inspector General on spending issues)[225] in its Principles of Appropriations Law defines a "lump-sum" appropriation to include an appropriation that leaves an agency *any* discretion regarding the choice of projects, contracts, or purposes on which to expend funds, even only a choice between two options.[226] It has done so since before *Vigil* was decided.[227] Consistent with this broad definition, some courts have found *Vigil* applicable even to exercises of spending authorities that were closely cabined by statute as compared to the facts of *Vigil*.[228] On the GAO's definition the "lump-sum" qualifier does little to restrict *Vigil*'s domain; if an agency has *any* discretion about spending, its spending decision is "lump-sum" and potentially subject to the presumption.

On the other hand, *Vigil* itself featured statutory provisions that delegated the agency fairly broad discretion to spend "[f]or relief of distress and conservation of health."[229] In keeping with the facts of the case, several courts have refused to apply the *Vigil* rule where Congress has given an agency a choice among only a few purposes, or otherwise limited agency discretion more closely than it did in *Vigil*.[230] On this approach, the *Vigil*

225. Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1587–94, 1592 n.276, 1593 n.286 (2020).

226. U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-382SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-5 (3d ed. 2006) ("A *lump-sum appropriation* is one that is made to cover a number of specific programs, projects, or items. (The number may be as small as two.) In contrast, a *line-item appropriation* is available only for the specific object described.").

227. U.S. GOV'T ACCOUNTABILITY OFF., GAO/OGC-92-13, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-158 (2d ed. 1992).

228. *See* Metzger, *supra* note 9, at 1121 n.242 (noting tension between court's application of *Vigil* to a relatively specific appropriation in *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 751–52 (D.C. Cir. 2002), and *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 100 (D.C. Cir. 2021), in which court refused to do so); *see also* South Carolina v. United States, 144 Fed. Cl. 277, 284 (2019) (citing the GAO); California v. Trump, 963 F.3d 926, 969 (9th Cir. 2020) (Collins, J., dissenting); *cf.* Pol'y & Rsch., LLC v. U.S. Dep't of Health & Hum. Servs., 313 F. Supp. 3d 62, 75 (D.D.C. 2018) ("The D.C. Circuit has extended *Lincoln*'s reasoning to agency decisions involving non-lump-sum appropriations as well.").

229. 25 U.S.C. § 13.

230. *E.g.*, California v. Trump, 379 F. Supp. 3d 928, 952–53 (N.D. Cal. 2019); Pyramid Lake Paiute Tribe v. Burwell, 70 F. Supp. 3d 534, 541 (D.D.C. 2014). Several courts have looked to the

presumption is much narrower, applying only to agency spending decisions pursuant to statutes delegating discretion to the agency in terms about as broad as those in *Vigil*. (As for the question how broad is broad enough to count as "lump-sum" on this approach, any court or scholar hoping to develop a principled answer to that question should recall that it is exactly the same question—how much delegated discretion is too much—that has bedeviled the non-delegation doctrine for decades.)[231]

3. *What Choices "Allocate" Appropriations?*

Finally, even when a court concludes that a case involves an "appropriation" that is "lump-sum," there is ambiguity about which agency decisions relating to that appropriation are presumptively unreviewable under *Vigil*. The presumption applies by its terms to agency decisions actually allocating funds (from a lump-sum appropriation) to a particular purpose. Based on the facts of *Vigil* the presumption also seemingly includes agency decisions *declining* to allocate funds for a particular purpose.[232] But many decisions made by agencies and other executive branch actors influence other decisions allocating (or declining to allocate) funds without themselves doing so. These might be called meta-allocations. Does the *Vigil* presumption apply to such meta-allocations, or only to ultimate allocation decisions?

This question has significant implications for the reach of *Vigil* and particular implications for executive power over spending. Across-the-board limitations on spending are an increasingly important tool of executive power. For example, would an agency-wide order precluding Department of Justice grant administrators from awarding funds to sanctuary cities be presumptively unreviewable (as an aspect of the

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specific features of the provision found unreviewable in *Vigil* in deciding whether to apply the presumption. *See* Castellini v. Lappin, 365 F. Supp. 2d 197, 201–02 (D. Mass. 2005); Dairy Producers of N.M. v. Veneman, No. CIV 99-568, 2001 WL 37125268, at *4–5 (D.N.M. Feb. 27, 2001); Milk Train, Inc. v. Veneman, 167 F. Supp. 2d 20, 29 (D.D.C. 2001) ("In *Lincoln*, Congress's lump-sum appropriation to the IHS was unrestricted . . . [t]he DMLA appropriation, however, was appropriated *for a specific purpose, for a specific period of time, and for a specific group of beneficiaries* . . . ." (emphasis added)); *Trump*, 379 F. Supp. 3d at 953 ("Congress's funding of the TFF arguably does not qualify as the sort of lump-sum appropriation present in *Lincoln* and *Serrato*.").

231. *See* Viktoria Lovei, *Revealing the True Definition of APA § 701(a)(2) by Reconciling "No Law to Apply" with the Nondelegation Doctrine*, 73 U. CHI. L. REV. 1047, 1049 n.16 (2006) (collecting sources noting overlap between two tests).

232. The disputed decision in *Vigil* was the decision to terminate the Indian Children's Program. Lincoln v. Vigil, 508 U.S. 182, 188 (1993).

agency's allocation choice) or not?[233] What about a government-wide restriction on spending decisions emanating from the White House, like the Mexico City policy (issued by Republican presidents to prohibit foreign entities that provide abortions from receiving federal funds)?[234] Would review of an apportionment decision from OMB imposing limits on the purposes to which an appropriation may be put beyond those created by Congress—made public due to newly enacted apportionment transparency requirements[235]—be potentially prevented by the *Vigil* rule?[236] Or, for that matter, would OMB's failure to ensure that federal relief funds intended to assist Puerto Rico's disaster recovery not be raided by bankruptcy creditors be reviewable?[237]

Again, judicial decisions applying *Vigil* come out differently on this question. In some cases, courts have simply presumed reviewability in challenges to meta-allocation decisions.[238] In others, courts have applied the

233. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (labeling municipalities that failed to satisfy certain conditions regarding immigration enforcement as "sanctuary jurisdictions" and stripping their funding).

234. Abigail Abrams, *Biden Is Rescinding the 'Global Gag Rule' on Abortions Abroad. But Undoing Trump's Effects Will Take Time*, TIME (Jan. 28, 2021, 2:44 PM), https://time.com/5933870/joe-biden-abortion-mexico-city-policy [https://perma.cc/L49K-BCPW] (describing Mexico City policy).

235. In a rare example of a Congress enacting legislation checking its same-party President, Congress recently created in the 2022 Consolidated Appropriations Act a requirement that "apportionments"—the legally binding documents through which OMB exerts control over agency spending—be made public as they are issued. Matthew B. Lawrence, *Apportionment Transparency in the 2022 CAA: The Return of Congressional Institutionalism?*, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 16, 2022), https://www.yalejreg.com/nc/apportionment-transparency-in-the-2022-caa-the-return-of-congressional-institutionalism-by-matthew-b-lawrence/ [https://perma.cc/GG74-74MB]. On recent controversies involving apportionments, see Eloise Pasachoff, *The President's Budget Powers in the Trump Era*, *in* EXECUTIVE POLICYMAKING: THE ROLE OF THE OMB IN THE PRESIDENCY 69, 69–98 (Meena Bose & Andrew Rudalevige eds., 2020).

236. Congress has shown an increasing interest in developing ways to check the executive branch's use of spending tools to influence agencies and the public. Such mechanisms bringing transparency to executive branch utilization of spending powers could quickly prompt litigation teeing up questions testing the availability of judicial review. Imagine, for example, that the apportionment halting funding for the Ukraine during President Trump's pressure campaign had been made public quickly and challenged in court (rather than serving as a basis for impeachment months later). Assuming standing and zone of interest obstacles were met, would courts have had power under the APA to review such a challenge? The answer depends on the scope of the *Vigil* presumption and its application to meta-allocations, discussed above.

237. *See* Alvin Velazquez, Grant Administration in Governmental Bankruptcy: Lessons from Puerto Rico 3 (unpublished manuscript) (on file with author) (discussing the intersection of the law governing grant administration and bankruptcy).

238. *See* Confederated Tribes of Chehalis Rsrv. v. Mnuchin, 456 F. Supp. 3d 152, 160–62, 173 (D.D.C. 2020) (holding agency determination of which Native American communities qualified as Tribes for purposes of CARES Act funds reviewable and finding that plaintiffs were likely to succeed on the merits); Ohio v. U.S. Army Corps of Eng'rs, 259 F. Supp. 3d 732, 745–48, 764 (N.D. Ohio 2017) (finding agency decision to refuse to conduct public works project until state agreed to bear costs reviewable).

Vigil presumption to such decisions without stopping to ask whether they should do so.[239]

Again, too, the *Vigil* opinion provides little guidance. As mentioned above, the case itself involved not an actual allocation decision but a decision *not* to allocate funds to a particular purpose, which indicates that the presumption must apply to at least some meta-allocations. On the other hand, one of the pragmatic considerations offered by the Court (and evaluated below)—that deciding to which purpose to put funds involves a difficult balancing among competing options—assumes an actual allocation choice, not a more abstract policy choice such as whether to forbid funding for programs that provide abortion services across the board. And, of course, if there really were a "tradition" of refusing review in this domain then courts might look to that for guidance on whether the presumption applies in meta-allocation cases, but it is hard for entities other than the Supreme Court to find answers in a tradition that did not exist.

* * *

Stepping back, as a result of these three independent doctrinal ambiguities there is a clear outer bound to *Vigil*'s reach but no clear answer as to what cases within that outer bound are subject to the presumption. Within the realm of discretionary spending decisions, *Vigil*'s domain is best represented in overlapping shades of gray associated with ambiguities surrounding the terms "allocating," "lump-sum," and "appropriations," with no clear core in which application is clear (or, perhaps, a very small core in which *Vigil* itself would not have fit).

To be clear, few courts have explicitly grappled with any of the doctrinal ambiguities described above, which are themselves *implicit* sources of complexity in the simply stated *Vigil* rule. Instead, courts have taken differing sides on each of them without acknowledgement or inquiry, or even realizing they were making a choice. Under this state of affairs, courts have total discretion in any given discretionary spending case in deciding whether to understand *Vigil*'s triggering elements narrowly (and so limit the presumption's application) or broadly (and so expand it).

III. AGAINST THE *VIGIL* PRESUMPTION

Given the fictitious origins of *Lincoln v. Vigil* discussed in Part I and its problematic effects and operation described in Part II, what should be done?

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239. *E.g.*, Milk Train, Inc. v. Veneman, 310 F.3d 747, 751–52 (D.C. Cir. 2002) (finding review of funding formula was foreclosed by *Vigil*).

For some readers, *Vigil*'s disparate impacts may be reason enough alone to abandon the doctrine. But in ordinary discrimination law, the finding of a disparate impact is the beginning of a burden-shifting analysis, not an ending: once the disparate impact is shown, it falls to defenders of a policy to proffer a substantial, legitimate explanation (and, if they can do that, the challenger may still show a failure to adopt a less-discriminatory alternative).[240] And *Vigil* itself offered facially neutral justifications for the presumption it articulated, justifications that courts and scholars (including the author) have accepted without critique for thirty years.[241]

This Part evaluates the affirmative case for the *Vigil* presumption of unreviewability and finds it wanting. That is not to say there are not plausible, neutral arguments in favor of the presumption. *Vigil* itself identified some such arguments, and I identify below several more. These arguments do not actually withstand close scrutiny, however, especially in light of the facts of *Vigil*'s actual operation described in Part II. In the terminology of disparate impact, it is possible to identify reasons for the *Vigil* presumption, but not substantial, legitimate reasons.

Section A addresses the desirability of the *Vigil* presumption from the perspective of statutory interpretation considerations—the doctrine is, after all, an interpretive presumption about how to read the APA and statutes delegating discretion to agencies on the question of the availability of review. Section B addresses logistical considerations that can be presented by review of agency spending decisions. Section C addresses the interaction of judicial review of agency spending decisions with the separation of powers, in particular Congress's power of the purse. Finally, Section D addresses the possibility that judicial review would actually harm rather than help Tribes, prisoners, and others subject to the *Vigil* presumption, such that by creating a narrow exception to the usual presumption of reviewability *Vigil* might have created a kind of *first-class* administrative law that is better, not worse, than what everyone else gets.

A. Ordinary Interpretation

The *Vigil* presumption might first be defended by reference to congressional intent. Perhaps Congress had spending decisions in mind when it exempted actions "committed to agency discretion by law" from judicial review in section 701(a)(2) of the APA.[242] Administrative law is,

240. *E.g.*, Powell v. Ridge, 189 F.3d 387, 394 (3d Cir. 1999) (discussing framework).
241. *See supra* note 9 (discussing sources).
242. 5 U.S.C. § 701(a)(2).

after all, largely an exercise in interpretation of that super-statute and underlying "enabling" measures delegating discretion to agencies.

There is a plausible basis to believe the APA's "committed to agency discretion" language was intended to capture the common law of reviewability at the time of the APA's enactment. The Attorney General's Explanatory Statement to Congress regarding the APA had suggested that the "committed to agency discretion" language in section 701(a)(2) meant to incorporate pre-APA judicial review doctrines.[243] If there really were a historical "tradition" of refusing review then the APA could be read to have incorporated it.

The problem with this argument in support of the *Vigil* presumption is not the concept that the APA might have incorporated existing, common law reviewability doctrines. The problem is the fact that, as a statement of historical fact, *Vigil*'s "tradition" assertion was erroneous. As explained in Part I, there was no such tradition when *Vigil* was decided.

Vigil also offered an intent argument based in the nature of appropriations, to wit, that something about Congress's choice to delegate discretion to an agency to spend evinces an intent to preclude judicial review of the agency's exercise of that discretion. This is a difficult justification to defend.[244] To be sure, it might theoretically be possible to infer from Congress's decision to leave an agency discretion (or a certain degree of discretion) with regard to a policy question that it intends the agency's exercise of discretion within the scope of its authority to be completely unfettered, unchecked by APA arbitrariness review. But why wouldn't such an inference apply to *every* statute delegating discretion to agencies? After all, courts make the opposite assumption—that review should be available—when it comes to every other sort of decision Congress gives to agencies; so why are appropriations different? Is there some appropriations-specific reason to infer a congressional intent that agencies' exercise of discretion be free of judicial review that is not applicable more broadly?

Alternatively, one might argue that whatever Congress might have expected when *Vigil* was decided, it is in 2023 safe to assume from congressional silence an intent to preclude review of appropriations decisions, because the *Vigil* presumption is well known. Today, if Congress

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243. *See* S. REP. NO. 79-752, app. B at 229 (1945) ("This section, in general, declares the existing law concerning judicial review.").

244. In the *Vigil* decision itself, Justice Souter noted that Congress plainly intends to give an agency discretion when it creates a lump-sum appropriation. Lincoln v. Vigil, 508 U.S. 182, 193 (1993). But that is different than an intent to preclude judicial review of the exercise of that discretion. The cases cited by the Court in *Vigil* are not to the contrary; as mentioned above, they stand for the distinct proposition that statements in legislative history about how Congress expects an agency to implement a lump-sum appropriation are not themselves enforceable. *See supra* note 115 and accompanying text.

wanted appropriations decisions reviewed, wouldn't it say something to that effect out of an awareness that, due to *Vigil*, courts might presume otherwise if it doesn't?

There are three problems with this bootstrapping argument, one general and two specific. The general problem is the one developed in Professors Gluck and Bressman's empirical study of congressional staffers: it is doubtful that congressional staff are actually aware of the *Vigil* presumption and legislate with it in mind.[245]

A specific problem is that because of the ambiguities in the actual operation of the *Vigil* presumption outlined in Section II.B, it is hard to know what even congressional staff who are aware of the presumption would understand it to mean—would they think they could rebut it by putting even a vague goal into an appropriation, as they almost always do? Or would they think they needed to include specific language providing for judicial review?

An additional specific problem with the bootstrapping argument—or with inferring anything from silence in an appropriations enactment about judicial review—has to do with the jurisdictional rules of Congress and the independent power of committee chairs as to legislation that implicates their jurisdiction (or, in political branch talk, their equities). Each committee in the House and Senate stands as an independent barrier (or vetogate) to enactment of legislation that comes within its jurisdiction.[246] Appropriations legislation falls within the ambit of the appropriations committees, and legislation addressing the availability of judicial review falls within the ambit of the judiciary committees.[247] This means that in order for a typical enactment appropriating funds to also address judicial review, it would need the approval (or at least acquiescence) of two committee vetogates, not one.

Thus, any court inclined to assume that Congress could easily include language providing for judicial review in an appropriations measure if it

245. Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 732 (2014) ("[T]here were commonly utilized canons . . . which our drafters did not know and whose assumptions were not reflected in their drafting practices . . . .).

246. *See* Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946, 1969 (2020) (detailing aspects of determining congressional committee jurisdiction and the implications thereof). Because of the possibility of "dying in committee," drafting of legislation is often informed by how its content will affect to which committees it is likely to be referred. *Id.* at 1970. Committee "[r]eferral decisions rely heavily on precedent," which can "lead to seemingly counterintuitive referrals," and, importantly, "[r]eferrals are usually invisible to the public, but they can be highly consequential." *Id.*

247. *See* STANDING RULES OF THE SENATE r. XXII(2), *reprinted in* S. Doc. No. 113-18, at 19–20, 25–26 (2013), https://www.rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf [https://perma.cc/Y239-G9AL]; HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE 80, 174, 180, 498 (Charles W. Johnson, John V. Sullivan & Thomas J. Wickham, Jr. eds., 2017). *See generally* Gould, *supra* note 246.

wanted to do so should remember that when it comes to such language Congress is not a "they" or an "it." Rather, "Congress" in this context is Richard Durbin, Chuck Grassley, or whoever else happens to be Chair of the Senate Judiciary Committee when an appropriations measure is being drafted. And it should remember, too, that it would be the rare such Senator who would surrender their vetogate at the request of the appropriations committee without something valuable in return. Relinquishing power for free is not how one becomes a Senator. As a result, there is no way to know whether silence about judicial review in an enactment appropriating funds indicates that (1) everyone in Congress except the chair of the Senate Judiciary committee wanted review or (2) nobody thought of it or (3) nobody wanted it. Given this context, a judicially invented presumption (either favoring or disfavoring review) is likely to be especially sticky.

B. Logistics

The strongest defenses of the *Vigil* presumption rest not on interpretive arguments but on policy considerations of the sort Professor Levin suggested courts should consider in identifying categories of agency decisions to presumptively insulate from judicial review as a matter of APA common law.[248] These include logistical considerations (discussed here) and separation of powers considerations (discussed below).

Three features of appropriations can create logistical complications that plausibly weigh against judicial review, and so could potentially justify presuming nonreviewability for discretionary spending decisions even while administrative law presumes the opposite for most other decisions. These are (1) the fact that decisions about lump-sum appropriations inevitably entail tradeoffs among potentially funded people, purposes, and projects; (2) the short lifespan of annual appropriations (which often expire faster than judicial review would ordinarily be completed); and (3) difficulties surrounding relief in appropriations cases if money has already been expended or if a change in the agency's judgment would upset reliance or investments founded on the initial allocation.

Some of these logistical arguments are stronger than others, but they are ultimately unpersuasive as a justification for a categorical presumption of unreviewability. As explained below, the logistical challenges of inevitable tradeoffs, short decision lifespans, and zero-sum remedies are neither present in every appropriations case nor limited to appropriations cases. As a result, administrative law already appropriately addresses each challenge

248. Levin, *supra* note 10.

through independent, generally applicable doctrines with tests that assess each case individually (including standing, mootness, remedial discretion, and deference). The challenges review of discretionary spending decisions can present are a reason that review of such decisions might (perhaps) be foreclosed or limited in particular cases by such doctrines more often than it is for other categories of cases. They are not a reason to believe that the people and communities who rely on discretionary annual appropriations should be denied the full protections of administrative law when they choose to seek judicial relief in a case that is otherwise justiciable.

1. Zero-Sum Tradeoffs

The first challenge posed by judicial review of discretionary spending decisions is the fact that such decisions can be "zero sum," entailing tradeoffs between potential awardees.[249] This concern is not always present in appropriations cases,[250] but, where it is, it creates a challenge for judicial review because the agency judgment a court must review is not simply about whether a particular program furthers the purposes of the statute. It is also a judgment about which of numerous programs, many or all of which could be beneficial, stands out as the most advantageous choice. Courts are, of course, ill-suited to make that judgment themselves.

I struggle to understand this concern as a reason to presume unreviewability, even of truly "zero sum" spending decisions to which it applies. It is difficult to think of an administrative decision that does not entail tradeoffs, or that does not involve a zero-sum choice among many options in which an agency is tasked with picking winners and losers. If the EPA makes an environmental protection more stringent, it hurts industry and helps advocates (and the environment). And vice versa. If Medicare increases reimbursement for hospitals, it hurts either other providers or insurers (if their reimbursements are cut), patients (if benefits are cut), or taxpayers and other spending programs (who must pay if Medicare becomes more generous overall). And so on. Assessing costs and benefits for various actors is a *routine* part of administration. Relatedly, it is also difficult to think of an administrative decision in which the agency did not have many options to effectuate its regulatory purpose; in fact, requiring "consideration

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249. *See Vigil*, 508 U.S. at 193 (noting this concern).

250. This challenge does not apply when an agency spending decision involves either (1) an uncapped appropriation (referred to as an "indefinite" appropriation in fiscal law) or (2) an appropriation that is capped ("definite") but subject to the possibility of either a transfer or a subsequent appropriation such that the agency does not expect to have insufficient funds. *See* U.S. GOV'T ACCOUNTABILITY OFF., POLICY AND PROCEDURES MANUAL FOR GUIDANCE OF FEDERAL AGENCIES: TITLE 7—FISCAL GUIDANCE 1, 7.2-3 (rev. ed. 1993) (describing definite and indefinite appropriations).

of alternatives" is a fundamental aspect of arbitrary-and-capricious review under *State Farm*.[251]

The fact that decisions about the allocation of lump-sum appropriations can entail difficult judgments about matters that courts are worse suited than agencies to judge is an excellent reason that courts should "not . . . substitute [their] judgment for that of the agency" in the course of judicial review, as the Court put it in setting forth the test for arbitrariness review in *State Farm*.[252] But such deference is already a fundamental part of arbitrariness review when it does take place. It is not an appropriations-specific reason that courts should refuse review altogether. Instead courts reviewing appropriations decisions can (and often have, in cases where they did not even consider *Vigil* or found its presumption rebutted) done the same thing courts do when reviewing other decisions in which they lack expertise: ensure that the agency itself took a "hard look" at the problem and made a good faith judgment by checking to ensure there is a rational connection between facts found and the choice made, that the agency considered appropriate factors, that the agency considered alternatives, and so on.[253] Indeed, it is hard to argue that courts are worse suited to review the sorts of judgments about the opportunity costs of particular allocations entailed in appropriations decisions than they are some of the other judgments that they routinely review under the APA, like the cost of environmental controls or calculation of hospital wage indices. In administrative law, judicial incompetence is a constant.

Appropriations decisions entail difficult judgments, but they are not the sort of judgments that it would be institutionally inappropriate to review, such as some questions of military judgment or foreign affairs.[254] They are also not the sort of judgments that it would actually be unmanageable to review, such as some questions involving confidential information.[255] If there were any doubt about this, the field of procurement law would put it

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251. *See* Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 50–51 (1983).

252. *Id.* at 43.

253. *E.g.*, Cal. Hum. Dev. Corp. v. Brock, 762 F.2d 1044, 1051 (D.C. Cir. 1985) (engaging in arbitrariness review of agency allocation of lump-sum appropriation and upholding agency decision).

254. El-Shifa Pharm. Indus. Co. v. United States, 402 F. Supp. 2d 267, 275 (D.D.C. 2005) (finding that bombing of pharmaceutical plant, "[wa]s this type of delicate decision regarding national security, foreign relations, and global politics that is entrusted to the sole discretion of the executive."); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1107, 1112 (2009) (discussing "black holes" in administrative law for military and foreign affairs functions and certain other emergency cases).

255. *See* Webster v. Doe, 486 U.S. 592, 603–04 (1988) (finding CIA decision to terminate employee due to his sexual orientation unreviewable).

to rest. In that field, federal and state courts routinely review agency contract awards, despite the zero-sum tradeoffs they entail.[256]

2. *Short Life Span*

Another plausible reason to believe that decisions allocating lump-sum appropriations should not be subject to judicial review is the short life span of many such decisions. Annual appropriations are often available for only a year, meaning that they may well expire before a case challenging their allocation could be litigated.

As a preliminary matter, this rationale applies only to annual appropriations. Many appropriations are available for multiple years, or even permanent.[257] So, to the extent this is the logic behind the *Vigil* presumption, that presumption should similarly be limited to annual appropriations.

Moreover, even as to measures included in annual appropriations, this short-life-span rationale is overstated. Many appropriations provisions are reenacted in identical or nearly identical form every year. These can include not only delegated authority to spend particular amounts but also riders limiting how money may be spent and general provisions that have nothing at all to do with spending but nonetheless carry a one-year shelf life.[258] Despite *Vigil* and despite the nominally short life span of such provisions, courts have often litigated challenges to them without remark. For example, the Supreme Court did so in *Harris v. McRae*, upholding the "Hyde Amendment" restricting federal funding for abortions (which actually had been passed year after year in annual appropriations measures).[259] In such

256. *See* PAE-Parsons Glob. Logistics Servs., LLC v. United States, 147 Fed. Cl. 294, 297 (2020) ("The law . . . provides disappointed bidders with an avenue through which they can challenge arbitrary and irrational government decisions . . . keeping the system under perpetual scrutiny . . . ."); Nathaniel E. Castellano, *Year in Review: The Federal Circuit's 2019 Government Contract Law Decisions*, 69 AM. U. L. REV. 1265 (2020).

257. Lawrence, *supra* note 12, at 1067 (discussing types of appropriations).

258. *See* Price, *supra* note 11, at 367 (describing congressional and presidential power generally over spending decisions and the "ingenious practice, begun with the very first Congress, of appropriating funds only one year at a time"); *see also id.* at 439 ("By rendering the president dependent on funding choices that Congress makes year after year, one year at a time, congressional control over appropriations ensures that the president's enforcement choices are subject to some ongoing constraint."). For specific examples of riders in funding legislation, see *id.* at 375–77 (discussing riders influencing the conduct of diplomacy, the appointment of White House personnel, and marijuana enforcement). *See generally* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 215, at 2-1 to -91 (providing an overview of appropriations legislation).

259. 448 U.S. 297, 303 n.4 (1980) (noting, when reviewing constitutionality of Hyde Amendment regularly included in annual appropriations measures, that "[i]n this opinion, the term 'Hyde Amendment' is used generically to refer to all three versions of the Hyde Amendment, except where indicated otherwise"); *id.* at 326 (upholding the Hyde Amendment).

cases courts have simply inferred from re-enactment in multiple years that a case implicating an annual appropriations provision will remain live (or that, where Congress substantially changes the operative provision, courts can dismiss as moot at that point).[260]

Furthermore, and remarkably given *Vigil*, appropriations law has developed an equitable interpretive doctrine, recognized by the D.C. Circuit, to address the possibility that an appropriation's period of availability might expire before a lawsuit relating to an award of funds has been completed. This doctrine developed in cases involving allocations of time-limited annual appropriations that, for one reason or another, were not precluded from review by *Vigil*. This doctrine, as explained by the D.C. Circuit, "permits a court to award funds based on an appropriation even after the date when the appropriation lapses, so long as 'the lawsuit was instituted *on or before that date*.'"[261] That said, recovery is still precluded "once the relevant funds have been obligated,"[262] in which case courts have simply dismissed implicated claims as moot.[263] But mootness is not inevitable even if a lawsuit involving a time-limited appropriation that is not re-enacted for subsequent years drags on, because appropriations often permit the agency to carry over a percentage of allocated funds to the next budget period.[264]

To put the nail in the coffin of this argument, it is worth noting that many agency decisions expire after a short period of time, and that fact surely keeps many potential litigants from even attempting to sue when disappointed by such decisions. But where litigants nonetheless seek judicial relief of time-limited agency decisions, courts respond not by refusing review altogether but by applying more tailored threshold

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260. R.T. Vanderbilt Co. v. Babbitt, 113 F.3d 1061, 1064 (9th Cir. 1997) ("Congress has not yet enacted any revisions. Instead, Congress has extended the moratorium and the accompanying grandfather clause through the present in subsequent appropriations acts, employing language with no differences relevant to this case." (citing Pub. L. No. 104-208, 110 Stat. 3009 (1996))).

261. City of Houston v. Dep't of Hous. & Urb. Dev., 24 F.3d 1421, 1426 (D.C. Cir. 1994) (quoting W. Va. Ass'n of Cmty. Health Ctrs., Inc. v. Heckler, 734 F.2d 1570, 1576 (D.C. Cir. 1984)); *see* U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 5-85 (3d ed. 2004) ("As long as the suit is filed prior to the expiration date, the court acquires the necessary jurisdiction and has the equitable power to 'revive' expired budget authority, even where preservation is first directed at the appellate level."); *see also* County of Suffolk v. Sebelius, 605 F.3d 135, 141 n.8 (2d Cir. 2010) (discussing doctrine).

262. *City of Houston*, 24 F.3d at 1426 ("[E]ven if a plaintiff brings suit before an appropriation lapses, this circuit's case law unequivocally provides that once the relevant funds have been obligated, a court cannot reach them in order to award relief.").

263. *See County of Suffolk*, 605 F.3d at 142 (dismissing case as moot because appropriation was exhausted); Promundo-US v. U.S. Dep't of Health & Hum. Servs., No. 18-CV-2261, 2019 WL 3239245, at *8 (D.D.C. July 18, 2019) (dismissing case as moot).

264. *See* Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. § 683 (describing process for rescission). For an example, see Rescissions Proposals Pursuant to the Congressional Budget and Impoundment Control Act of 1974, 83 Fed. Reg. 22525 (May 8, 2018).

mechanisms, like mootness, as appropriate. For example, the private insurance companies that participate in Medicare Part C and D do so through annual contracts that must be rebid, and reapproved, annually. In *Fox Insurance v. Centers for Medicare & Medicaid Services*, this did not stop a Medicare Part D insurer that had been terminated from the program from seeking and obtaining judicial review of the substance of the termination under the APA, and neither the parties nor the court even addressed the possibility that review should have been precluded because a one-year contract was at issue.[265] For another example, procurement contracts often involve term limits, but are nonetheless subject to judicial review. Indeed, Congress recently enacted a procurement statute providing for direct petitions to the D.C. Circuit of certain defense-related procurement decisions.[266] If the awkward issues created by a short time frame are not a barrier to giving insurance companies and military contractors their day in court (and indeed, their day in the court of appeals), then why should they keep out Tribes and prisoners?

3. *Remedial Challenges*

Third and relatedly, judicial review of annual appropriations decisions can pose remedial challenges. If a court determines that an agency decided to fund a program (or terminate it) based on an inappropriate factor, like campaign contributions to the President arranged by a politician who supported the program (or a lack of such contributions), should it vacate a decision to expend funds that have already been spent when clawing back funds is impossible? What about when any midstream change would be inherently costly and counterproductive? Should construction of a bridge be halted halfway through?

This logistical challenge is hardly unique to spending decisions (or, for that matter, inevitable in spending cases). Courts often confront situations where vacatur of an agency's decision, having been made, would be costly or counter-productive. This is precisely why "[a]n inadequately supported [decision] . . . need not necessarily be vacated."[267] Instead, courts have developed remedial tools like "remand without vacatur" whereby an agency is told to reconsider its decision but the decision is left in place while the agency does so, and the agency has the option of simply re-affirming its

265. 715 F.3d 1211 (9th Cir. 2013).

266. 41 U.S.C. § 1327(b)(1) ("Not later than 60 days after a party is notified of . . . a covered procurement action . . . , the party may file a petition for judicial review in the United States Court of Appeals for the District of Columbia Circuit claiming that the issuance of the exclusion or removal order or covered procurement action is unlawful.").

267. Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n, 988 F.2d 146, 150 (D.C. Cir. 1993).

initial choice on remand without any real-world disruption.[268] The *Allied-Signal* test by which courts decide whether vacatur or remand without vacatur is warranted—which looks to "the seriousness of the order's deficiencies . . . and the disruptive consequences of an interim change that may itself be changed"[269]—might well come up often in review of discretionary spending decisions, as it does in Medicare reimbursement cases (wherein the agency uses its power to alter the generosity of the mandatory entitlement),[270] but that is not a reason to refuse review altogether.

C. Separation of Powers

Finally, agency spending decisions *do* have distinctive implications for the separation of powers and, in particular, the "power of the purse." *Lincoln v. Vigil* was decided at a time when administrative law professors paid very little attention to spending issues. As Professor Metzger points out, appropriations were historically marginalized both in administrative law doctrine and in public law scholarship.[271] In recent years, however, appropriations and spending have been at the core of blockbuster constitutional controversies, including the suit by the House of Representatives to halt ACA payments,[272] California's suit to halt construction of a border wall,[273] several states' suit to challenge President Trump's blockade on funding for "sanctuary cities,"[274] President Trump's impeachment for holding up defense funds for Ukraine as leverage,[275] the threatened withholding of grants from "anarchist" jurisdictions that

268. *Id.* at 151 (justifying the decision to remand rather than vacate "because of the possibility that the Commission may be able to justify the Rule, and the disruptive consequences of vacating").

269. *Id.* at 150–51.

270. *E.g.*, Shands Jacksonville Med. Ctr., Inc. v. Azar, 959 F.3d 1113, 1118–20 (D.C. Cir. 2020) (partially relying on *Allied-Signal* to determine that remand, rather than vacatur, was appropriate to address arbitrary and capricious adjustment to hospital reimbursement).

271. Metzger, *supra* note 9, at 1082.

272. U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165, 168 (D.D.C. 2016).

273. California v. Trump, 379 F. Supp. 3d 928, 952–53 (N.D. Cal. 2019).

274. City & County of San Francisco v. Trump, 897 F.3d 1225, 1232–33 (9th Cir. 2018) (describing sanctuary city policy).

275. U.S. GOV'T ACCOUNTABILITY OFF., B-331564, OFFICE OF MANAGEMENT AND BUDGET—WITHHOLDING OF UKRAINE SECURITY ASSISTANCE 6 (2020), https://www.gao.gov/assets/710/703909.pdf [https://perma.cc/ZL3J-8SU5] (discussing the OMB's improper impoundment of funds designated for Ukraine).

supported Black Lives Matter protests,[276] and (more recently) several states' suit to halt President Biden's student loan forgiveness plan.[277]

In part because of these controversies, "blindness to appropriations is beginning to change, with a growing body of scholarship documenting the importance of appropriations to the administrative state."[278] Scholars advancing this emerging subfield of public law have focused on a number of important questions, including the role of spending as an evergreen source of influence for Congress over the administrative state,[279] the emergence of spending as the leading tool of federal policymaking,[280] the use of spending tools by the President to control the administrative state,[281] tactics developed by the executive branch to circumvent Congress's "power of the purse,"[282] and how the necessity of spending to alter resource allocations yielded by the market in a capitalist economy complicates and problematizes our nation's reliance on spending as a tool of influence.[283]

276. *See* Memorandum on Reviewing Funding to State and Local Government Recipients that Are Permitting Anarchy, Violence, and Destruction in American Cities, 2020 DAILY COMP. PRES. DOC. 647 (Sept. 2, 2020) (threatening to withhold funding from New York City, Washington, D.C., Seattle, Portland, and any other "anarchist jurisdictions"); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-20-36, MEMORANDUM TO THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES (2020) (implementing the "anarchist" jurisdiction order).

277. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2375 (2023).

278. Metzger, *supra* note 9, at 1082.

279. Regarding spending as a tool of influence, in her foundational article, Professor Stith highlighted a fundamental point—the Appropriations Clause allows Congress to separate the legislative power from the appropriations power, creating a statutory authorization or obligation in one (perhaps permanent) piece of legislation that itself depends on a subsequent congressional enactment for implementation. *See* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1344–46 (1988); *see also* Lawrence, *Disappropriation*, *supra* note 11, at 21 ("Appropriated Entitlements Create Dissonance Between Commitments and Expenditures."); Lawrence, *supra* note 12, at 1065 (discussing the distinction between "appropriations" and "authorizations."). As Professor Price explains, through "the ingenious practice, begun with the very first Congress, of appropriating funds only one year at a time, Congress has ensured that presidents must always come back every year seeking money just to keep the government's lights on." Price, *supra* note 11; *see also, e.g.*, Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006); CHAFETZ, *supra* note 24; Kevin M. Stack & Michael P. Vandenbergh, *Oversight Riders*, 97 NOTRE DAME L. REV. 127 (2021).

280. Jonathan S. Gould, A Republic of Spending (Aug. 2022) (unpublished manuscript) (on file with author).

281. Professor Pasachoff has published several pioneering treatments focused on the executive's (especially OMB's) use of appropriations as a tool of influence over agencies and the public. *E.g.*, Pasachoff, *The President's Budget*, *supra* note 11; Pasachoff, *Policy, Pork, and Punishment*, *supra* note 11, at 1182; Pasachoff, *supra* note 235, at 69.

282. Professor Stith focused on a question that arose out of the Iran-Contra crisis: the scope of the President's power to spend or impound without legislative authority, circumventing Congress's control. *See* Stith, *supra* note 279, at 1390–92. More recent scholarship in this vein of what might be understood as the "presidential power of the purse" includes Professor Jackson's study of executive authority to forgive student loans. Howell Jackson & Colin Mark, Opinion, *Executive Authority to Forgive Student Loans Is Not So Simple*, REGUL. REV. (Apr. 19, 2021), https://www.theregreview.org/2021/04/19/jackson-mark-executive-authority-forgive-student-loans-not-simple [https://perma.cc/LUT7-3347].

283. Lawrence, *Subordination and Separation of Powers*, *supra* note 11, at 98 (explaining that wielding the power of the purse requires threatening people and programs that rely on social supports).

The role of courts and the APA given the structural implications of federal spending has received significant attention in this growing subfield, but scholarship in this vein has focused almost exclusively on standing questions, namely, whether Congress has standing to obtain judicial review of the legality of agency spending choices that, because they do not harm any individuals, would otherwise escape review.[284] The only exception I am aware of is Professor Metzger's recent systematic treatment focused on the role of courts in mediating the power of the purse. Her article, *Taking Appropriations Seriously*, discussed implications in several areas, including *Chevron* deference, reviewability, standing, and other aspects of statutory interpretation.[285] Above all, she argues that courts should no longer marginalize appropriations by remaining willfully ignorant to the important role of appropriations in the administrative state when they decide cases and develop doctrines that implicate spending.[286]

Taking Professor Metzger's caution to heart, it is important to consider whether the *Vigil* presumption might somehow be supported by the way judicial review interacts, or could interact, with the structural constitutional role of federal spending. Applying the insights of the just-surveyed literature, I can see three overt ways that the *Vigil* presumption may interact with the power of the purse. The best arguments in favor of the presumption lie here, and so do the best arguments against it. That said, on balance I believe structural considerations undermine rather than justify the *Vigil* presumption.

First, the *Vigil* presumption makes Congress's power of the purse less effective by diluting the legal limits that Congress places in appropriations provisions. Although the presumption does not preclude review of allegedly *unlawful* actions, the legal question of an appropriation's "scope" and the substantive question of an agency's choices allocating within that "scope" are inextricably intertwined, such that review of the latter is necessary to cabin the former. (This point relates to the nature of *Chevron* step two.) An appropriation that is available for a broad range of purposes dependent on an agency's good faith judgment that some criteria is met may actually be quite limited, but it will not operate that way if the agency's judgment that triggers the availability of funds is entirely immune from review, because then the agency may use pretextual, bad faith judgments to spend on purposes beyond those permitted by Congress.

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284. For a general treatment of the subject, see Nash, *supra* note 146.

285. *See* Metzger, *supra* note 9, at 1127 (discussing statutory interpretation in appropriations law); *see also* Lawrence, *Disappropriation*, *supra* note 11, at 72 (discussing the role of courts in disappropriation).

286. Metzger, *supra* note 9, at 1082–85.

This isn't just a theoretical point. Questions about substantive judgements (or claimed judgments) related to appropriations have been at the heart of major recent appropriations controversies including the pause on Ukraine aid,[287] President Trump's effort to construct a border wall,[288] and the Trump Administration's interference with hurricane aid for Puerto Rico.[289] For example, in the wall cases, one of the authorities the government relied on in claiming the construction was lawful despite Congress's refusal to fund was a provision allowing for the transfer of funds for "military construction" that the Secretary of Defense deemed "necessary to support" the use of the armed forces necessitated with a declaration of emergency.[290] The Department of Defense issued a determination letter claiming—despite all appearances—that construction of a border wall was, indeed, not only "military construction" but also "necessary to support" the use of the armed forces along the southern border.[291] Challenges focused only on the "legal" question of whether the Secretary's judgment could hypothetically be consistent with the statute ignored, and sometimes shaded into, the "substantive" question of whether the Secretary's judgment was an abuse of discretion.[292]

Second, the *Vigil* presumption can play an expressive role, contributing to an air of illegality or even acceptance of corruption surrounding "sausage making" in the appropriations process. Studies of "presidential pork" have shown a significant trend of appropriated funds being funneled toward states and localities aligned with the incumbent president's partisan interests,

287. There was no argument that the pause exceeded the scope of the appropriation; instead, the primary argument was that the pause was motivated by the impermissible purpose of pressuring Ukraine to investigate Hunter Biden. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 275.

288. In litigation over the issue, the government argued in its briefs that the House and California's challenge was not to the *constitutionality* of the transfer of funds, but rather to the *correctness* of the agency's judgment that the statutory preconditions for transfer were met—a substance question. Response/Reply Brief for Defendants-Appellants-Cross-Appellees at *24–29, Sierra Club v. Trump, 929 F.3d 670 (9th Cir. 2019) (No. 19-16102). This was a powerful argument in part because, perhaps fearing the *Vigil* presumption, the House and California did not seriously press substantive challenges to those agency judgments. *See Sierra Club*, 929 F.3d 670.

289. *See* Arelis R. Hernández & Jeff Stein, *Dangling Disaster Relief Funds, White House to Require Puerto Rico to Implement Reforms*, WASH. POST (Jan. 15, 2020, 1:57 PM), https://www.washingtonpost.com/business/2020/01/15/dangling-disaster-relief-funds-white-house-require-puerto-rico-implement-reforms [https://perma.cc/GS68-DUCY] (detailing the pause on hurricane aid, which the government nominally justified with corruption concerns).

290. *See Sierra Club*, 929 F.3d at 679.

291. *Id.* at 680–81.

292. *Cf.* Sierra Club v. Trump, 977 F.3d 853, 898–900 (9th Cir. 2020) (Collins, J., dissenting) (reading majority to suggest that if indeed agency had broad discretion to transfer funds, then that discretion itself could violate the Appropriations Clause because of possibility it could be exercised without any check).

raising the possibility that the *Vigil* presumption could be fostering abuse.[293] Regardless whether this interaction is real[294] or perceived, perception of lawlessness undermines arguments in favor of spending through social programs.[295]

Third, an additional distinctive feature of appropriations that may justify a presumption against judicial review involves a structural feature of annual appropriations I have explored in past work, namely, the fact that Congress uses the annual appropriations process to check agency allocation choices itself.[296] Congress enforces agency implementation of annual appropriations through the threat of retribution in the next year's appropriations cycle.[297] *Vigil* obliquely referenced this fact when it pointed out that, even without judicial enforcement of legislative history, an agency that defied the expectations of the appropriations committees could expect to suffer "grave political consequences."[298]

The fact that Congress is "watching" agency appropriations choices and can enforce compliance with its expectations itself supports the *Vigil* presumption in two ways. First, it means that there is simply less need for judicial review to ensure faithful execution of the *law*. If Congress is already on the case, there is less need for courts to be. Second, judicial involvement in the annual appropriations process might well undermine the expectations of both agencies and Congress by reversing or upsetting an allocation that relevant players across the political branches agreed to, so comity to the political branches might also provide a reason for courts to stay out of Congress's domain.

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293. JOHN HUDAK, PRESIDENTIAL PORK: WHITE HOUSE INFLUENCE OVER THE DISTRIBUTION OF FEDERAL GRANTS (2014); Kevin M. Stack, *Partisan Administration* 3–4 (Ctr. for the Study of the Admin. State, Working Paper 21-45, 2021), https://administrativestate.gmu.edu/wp-content/uploads/2021/09/Stack-Partisan-Administration.pdf [https://perma.cc/9EM2-8YES].

294. *See generally* ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: MEANS OF ASCENT (1990) (describing various examples of Senator Lyndon Johnson exerting influence to steer agency approvals, licensing, contract awards, and funding decisions in exchange for political favors); Pasachoff, *Policy, Pork, and Punishment*, *supra* note 11, at 1166–71 (collecting reported examples of political interference in grant awards at Interior, EPA, US AID, Transportation, and DOJ).

295. *See, e.g.*, Matthew D. Dickerson, *6 Examples of Woke Pork Projects in Omnibus Spending Bill*, HERITAGE FOUND. (Mar. 11, 2022), https://www.heritage.org/budget-and-spending/commentary/6-examples-woke-pork-projects-omnibus-spending-bill [https://perma.cc/DU57-8VNQ].

296. Lawrence, *supra* note 12.

297. ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 271 (3d ed. 2007) ("What gives the appropriations reports special force is not their legal status but the fact that the next appropriations cycle is always less than one year away. An agency that willfully violates report language risks retribution the next time it asks for money."); *see also* Jesse M. Cross, *When Courts Should Ignore Statutory Text*, 26 GEO. MASON L. REV. 453, 488–89 (2018) (describing the same dynamic). *See generally* RICHARD F. FENNO, JR., THE POWER OF THE PURSE: APPROPRIATIONS POLITICS IN CONGRESS (1966) (describing the inner workings of the appropriations process).

298. Lincoln v. Vigil, 508 U.S. 182, 193 (1993).

In the author's judgment this is the strongest argument against judicial review of appropriations (and in favor of a *Vigil* presumption). It is worth pausing, then, to note its limits: This argument supports application of the *Vigil* presumption only to annual appropriations, not long-term or permanent appropriations, because such appropriations are not subject to the same dynamic of cyclical congressional review. Moreover, this argument applies with the most force to ultimate agency decisions actually allocating lump-sum appropriations, because the appropriations subcommittee interested in those ultimate choices has both the time and interest to monitor such decisions and the ability directly to penalize the agency for violating its will. At the same time, this argument applies with much less force (or perhaps does not apply at all) to upstream agency-wide decisions imposing conditions or restrictions on the award of grant funds, and seems completely inapplicable to government-wide White House or OMB decisions restricting the purposes to which agencies may put their funding (like the Mexico City policy).[299] Thus, a *Vigil* presumption premised on this argument would need to be narrow, limited to the facts of *Vigil*—an actual agency allocation choice in the annual appropriations context—and not extended to reach permanent appropriations or presidential administration through funding policies.

The strength of this argument depends on one's priors about the underlying purposes of administrative law, and so of judicial review of agency action. If one believes that the purpose of administrative law and judicial review is merely to ensure that agencies act within the scope of their delegated authority, then this argument that Congress is already "watching" the legality of appropriations allocations would indeed undermine the case for judicial review in this context. But, as Professor Stiglitz explains, two leading justifications for delegation to agencies (and so of administrative law) are (1) to harness agencies' expertise and (2) to shift authority for governmental decision-making to an entity that can be credibly constrained to exercise that authority in a way deserving of trust by the public.[300] Viewed in light of these purposes, congressional oversight through the appropriations process is not a substitute for arbitrariness review and, indeed, may even bolster the case for such review.

Presuming that agency decisions allocating lump-sum appropriations are unreviewable prevents the appropriations committees, and Congress, from

299. *See* Abrams, *supra* note 234 (describing Mexico City policy restricting awards for abortion services in other countries).

300. STIGLITZ, *supra* note 26, at 9 ("[Administrative law's] promise of credible reasonableness interests elected representatives precisely because the democratic organs cannot commit to procedural regularity.").

choosing to leave the choice of how to allocate the nation's limited, discretionary budget to policy expertise or to a "fair" administrative process worthy of the public's trust. Put differently, presumptively excluding agency decisions allocating lump-sum appropriations from the substantive protections of the APA means that such decisions must (almost) always come down to politics, whether Congress wants them to or not.

If lump-sum appropriations were presumptively reviewable like other sorts of agency actions, then an agency making an allocation decision would have confidence that it might be called upon to justify its choice in court, construct a record, and so on. That knowledge would give the agency reason to make a genuine choice about what purpose(s) would offer the best "bang for the buck" of its limited funding, rather than simply award its fund to the most politically advantageous purpose, because doing the latter might lead to reversal or even just undesirable judicial and public scrutiny. It would also give regulated entities greater reason to trust the agency's ultimate judgment as reflecting more than pure politics. Moreover, the potential for judicial review would give the agency a shield to use against members of Congress who sought to influence its judgments outside of the ordinary, public routes (statutes and legislative history), because the agency could object to such members that the APA required them to make a policy choice, not a political one, and point out precedent providing that extraneous congressional pressure can be subject to mandatory administrative record disclosure when outcome determinative.[301]

Congress might well *want* an agency to have such protection and, with it, reason to make funding choices based on policy rather than politics. Yet if courts refuse review of appropriations that leave agencies broad discretion, they invite politics into the allocation process, defeating the purpose of the discretionary award. Congress's only viable response,[302] in such a case, would be to attempt to rebut the *Vigil* presumption by adding specific guidance about how the appropriation should be spent—but that would eliminate agency discretion and revert the choice to the political process. The *Vigil* presumption thus leaves Congress in a kind of "Catch-22": Direct agency funding awards through the political process and thereby both restrain the agency's judgment and trigger a judicial check designed to ensure the agency exercises that judgment or grant an agency discretion and

301. *See* Sierra Club v. Costle, 657 F.2d 298, 403 (D.C. Cir. 1981) ("[T]his court has already recognized that the relative significance of various communications to the outcome of the rule is a factor in determining whether their disclosure is required.").

302. This assumes that the additional committee chair vetogate associated with incorporating a judicial review provision in an appropriation (via the judiciary committees) would prevent that option from being viable. *See supra* notes 247–48 and accompanying text.

thereby trigger the "committed to agency discretion" presumption, inviting politics into the agency's decision itself. One way or the other, *Vigil* encourages politics, not policy or expertise, to determine how the nation's limited discretionary funds are allocated.

By contrast, if courts presume that appropriations decisions are reviewable (rather than the opposite), then Congress has a genuine choice. It could make funding decisions itself through the political process—using either statutes or legislative history to itemize—or it could leave them to the agencies' judgments through broad lump-sum appropriations. The only option such a presumption would take off the table would be the option of leaving allocation choices to political pressure exerted not transparently through statutes or legislative history but secretly through lobbying of agencies.

It is, of course, difficult to speculate what Congress would want, in general or in a particular case. A reader might at this point be asking themselves "if the right approach to judicial review depends on unavoidably speculative subtleties about the interactions of committees and agencies, then perhaps we should not consider the structural position of appropriations at all when deciding whether judicial review should be available or not." Fair point; this is an additional reason to reject the argument that the structural position of annual appropriations justifies the *Vigil* presumption.

D. First-Class Administrative Law?

Finally, that there is not good reason to treat spending decisions differently from other sorts of decisions as a category does not necessarily mean judicial review of spending decisions is a good thing. That follows only if judicial review of agency action itself is generally a good thing. Administrative law assumes that it is—hence the presumption of reviewability—but administrative law scholars are not all so sure.

Professor Bagley offers a leading argument questioning the over-arching presumption of reviewability, to which *Lincoln v. Vigil* is a rare, limited exception.[303] Such a skeptic of judicial review of agency action might posit that even if there is no good reason to treat spending decisions differently from other sorts of decisions, that does not mean that the *Vigil* presumption makes those it applies to worse off. That is, perhaps by impeding judicial review of spending decisions impacting Tribes and prisoners, *Vigil* has actually created a kind of *first-class* administrative law—better, not worse, than the open-courthouse alternative.

303. Bagley, *supra* note 5, at 1322.

There is no space here to rehash the extensive debate about the desirability of judicial review of agency action. Instead, I assume for purposes of this Part that readers are persuaded by Bagley's argument in *Puzzling Presumption* and join him in skepticism of judicial review of agency action *writ large*. To those readers I say: Even taking Bagley's argument as correct, the *Vigil* presumption would still be normatively undesirable, for two reasons.

First, a core aspect of Bagley's skepticism for the presumption of reviewability applies with much less force to spending decisions. Bagley's discussion of downsides of judicial review of agency action takes as its premise that increasing the cost of agency action (which judicial review necessarily does) will promote the status quo, that is, agency inaction, and that this will make the administrative state on net less effective in advancing the public interest.[304] This premise is for the most part inapplicable to discretionary spending decisions. When Congress empowers an agency to regulate, the agency can either regulate or do nothing (preserving the status quo). When Congress appropriates funds for an agency to spend, however, the agency is legally required by the Impoundment Control Act to spend those funds.[305] The question in a discretionary spending case is not so much whether the agency will act or not, but how it will act, that is, how it will allocate funds. Moreover, inaction is much less likely in the spending realm for a second reason. The authorization of a spending program creates a powerful, concentrated interest in execution of that spending program (potential recipients or beneficiaries of the spending), whereas any remaining interest in preventing the spending is generalized. This is in contrast to command-and-control regulatory actions, where concentrated interests (the regulated industry) often work hard to prevent agency action.[306] Thus, the primary risk of judicial review that Bagley identifies does not apply to spending decisions.

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304. *Id.* ("Congress has the democratic legitimacy to strike the delicate and uncertain balance between the desirability of additional procedures and the need to assure effective and inexpensive administration.").

305. 2 U.S.C. § 683(b) ("Any amount of budget authority proposed to be rescinded or that is to be reserved as set forth in such special message shall be made available for obligation unless, within the prescribed 45-day period, the Congress has completed action on a rescission bill rescinding all or part of the amount proposed to be rescinded or that is to be reserved."); *see* Kennedy v. Mathews, 413 F. Supp. 1240, 1245 (D.D.C. 1976) ("There is no longer any doubt that in the absence of express Congressional authorization to withhold funds appropriated for implementation of a legislative program the executive branch must spend all funds." (citing 31 U.S.C § 1301)).

306. Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 103 n.38 (2003) (discussing public choice theory); *see also* Bagley, *supra* note 5, at 1322–23 ("[P]ublic-choice theory predicts that the small, discrete groups with members that are most directly affected by the legislation . . . will prove more effective than the disorganized public in the legislative process.").

Second, the fact that the potentially ephemeral nature of appropriations decisions increases the likelihood that other barriers to review (especially ripeness, standing, and mootness) will bar the courthouse doors for spending decisions increases the benefit of permitting review in those cases that survive these doctrines. A primary benefit of judicial review of agency action is the upstream impact that the threat of such review has on agency decision-making process.[307] The threat of review can empower career staff and agency counsel who tend to encourage compliance with the rule of law, and act as a shield for political staff to use to resist inappropriate pressure from lobbyists, Congress, or the White House.[308] Coupling ripeness, standing, and mootness doctrines with a presumption of unreviewability for spending decisions, however, can make this threat of review a dead letter, leaving spending decisions a law-free zone. Clarifying that spending decisions are presumptively reviewable just like any other agency decision may not open the floodgates to litigation given that it would not prevent application of these other doctrines, but it would make the threat of review significant enough to be meaningful—and actually promote regularity and legality in spending decisions—in a larger proportion of cases.

IV. PATHS FORWARD

What next? This is hardly the first law review article to criticize an existing Supreme Court precedent or the way it has been interpreted. But American law is stuck with many doctrines that scholars say are bad. In many cases, *stare decisis* counsels judges to adhere to past precedents whether they agree with them or not—right or wrong, precedents are written in pen, not pencil.[309] Even where change is possible, the only pathways may

307. *See* Mark Seidenfeld, *The Long Shadow of Judicial Review*, 32 J. LAND USE & ENV'T L. 579, 581 (2017) ("Factors that might influence how the agency proceeds are myriad, but I contend that the prospect of judicial review to any action the agency takes in following up on the remand is an important influence on how the agency is likely to proceed.").

308. For a decisionmaker presented with an attempt at influence by Congress, lobbyists, or the White House that is inappropriate, answering that a decision might be reviewed in court and that they would be legally required to explain it (and perhaps include certain communications in the administrative record, depending on the context), provides a way to push back without appearing voluntarily uncooperative. In congressional hearings on proposed legislation to add criminal sanctions to the Impoundment Control Act for individual policymakers involved in unlawful failures to spend, witnesses offered this same rationale as a justification for such a change. *Protecting Our Democracy: Reasserting Congress' Power of the Purse: Hearing Before the H. Comm. on the Budget*, 117th Cong. 68 (2021) (statement of Edda Emmanuelli Perez, Deputy General Counsel, U.S. Government Accountability Office).

309. On statutory *stare decisis*, see Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1125 (2019) ("[S]pecific interpretations of statutory provisions receive a unique, elevated form of deference . . . ."); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1361 (1988).

be blocked by unyielding decisionmakers. Is the upshot of the forgoing simply that *Vigil* should be shifted from the (short) list of uncontroversial doctrines to the (long) list of controversial ones that we appear to be stuck with?

Happily, there are four independent and realistic pathways to erasing the *Vigil* presumption, or at least mitigating its disparate impacts. The simplest path to erasing the *Vigil* presumption lies through the Department of Justice. Making a spending case a *Vigil* case is a choice that must be made first by the government in defending a case. The universe of potential *Vigil* cases includes all discretionary agency spending decisions, but in order for *Vigil* to arise as a barrier to review the government must affirmatively do the work to connect a challenged decision to a particular appropriation and raise *Vigil* as a defense.[310] Thus, courts regularly review agency spending decisions—or assess reviewability under the generally applicable "no law to apply" test—without even considering whether the *Vigil* presumption might apply.[311]

Because DOJ must do work to create a *Vigil* case—identifying an underlying appropriation and connecting a challenged spending decision to that appropriation—DOJ could address the problems with the doctrine described above by simply adopting a policy of declining to assert the presumption as a defense in APA cases. DOJ policymaking of this sort is an understudied but important feature of public law.[312] More cautiously, DOJ's Office of Legal Policy, Office of Civil Rights, or another centralized entity could engage in a systematic study of the Department's invocation of the doctrine to ensure that similar cases are being treated similarly, and that *Vigil* is not inadvertently being invoked more often in Tribal and prisoner cases than in other cases to which it might apply.[313] (This latter approach

310. Agencies do not automatically identify the appropriations connected to their spending decisions, and unlike other barriers to review (such as standing) the connection between a spending decision and an appropriation is not apparent on the face of a case unless the government raises the issue as a basis for dismissal.

311. *E.g.*, People for the Ethical Treatment of Animals, Inc. v. Tabak, 662 F. Supp. 3d 581 (D. Md. 2023).

312. *Cf.* Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1897–98 (2013) (describing actions by federal agencies, including DOJ, to interpret and apply Constitution); Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 558–59 (2003) (describing role of DOJ in steering agencies' legal arguments, including by centralizing and determining legal policy).

313. The fact that DOJ must affirmatively connect an agency action to an appropriation and assert *Vigil* as a barrier to review in order to trigger the presumption may help explain the disparate impact identified in Part II. It may simply be that DOJ lawyers accustomed to defending cases brought by Tribes or prisoners (or agency lawyers who advise them) have the expertise and familiarity with not only administrative law but agency funding protocols to invoke the doctrine, whereas DOJ and agency lawyers who typically defend other sorts of cases do not. *Cf.* Devins & Herz, *supra* note 312, at 569, 585 (explaining varying expertise of DOJ and agency attorneys).

might well address the disparate impact of *Vigil* by broadening, not narrowing, its reach, so may be favored by skeptics of judicial review who are not persuaded by the normative arguments in support of review developed in the last part.)

Second, another straightforward and readily achievable path to address *Vigil* lies through agencies. Courts have held that even a decision that has been "committed to agency discretion by law" may be rendered reviewable by an agency through the promulgation of a regulation against which to assess whether the agency's decision is arbitrary and capricious.[314] Thus, agencies could simply promulgate regulations through notice-and-comment rulemaking providing that their discretionary spending decisions must be reasoned, consider the reliance of beneficiaries on existing programs, and must consider alternatives. Any agency that did so would render the *Vigil* presumption inapplicable to its own spending decisions.[315]

This regulatory approach to addressing *Vigil* was suggested by then-Judge Jackson in her opinion in *Policy & Research, LLC v. United States Department of Health & Human Services*. Her analysis as a district court judge in that case was notably skeptical of the *Vigil* presumption, and she took the time to offer the following suggestion regarding agencies' power to supersede *Vigil* by regulation:

> Congress can, of course, "circumscribe agency discretion to allocate resources" through its statutory provisions. What is more, agencies themselves frequently cabin their own discretionary funding determinations by generating formal regulations or other binding policies that provide meaningful standards for a court to employ when reviewing agency decisions under the APA.[316]

Following then-Judge Jackson's suggestion, agencies could address *Vigil* themselves by adopting regulations superseding it.

Politically speaking, this superseding-regulation approach may be most palatable to an agency head expecting to leave office soon after

314. *E.g.*, Pol'y & Rsch., LLC v. U.S. Dep't of Health & Hum. Servs., 313 F. Supp. 3d 62, 68 (D.D.C. 2018) (finding that agency's regulations and policies did provide judicially manageable standard to apply). This logically straightforward proposition is a byproduct of the so-called *Accardi* doctrine, which provides that agencies must comply with their own regulations. *See* Thomas W. Merrill, *The* Accardi *Principle*, 74 GEO. WASH. L. REV. 569, 569 (2006).

315. As an analog to this approach, see Public Participation in Rule Making, 36 Fed. Reg. 2532 (proposed Jan. 28, 1971), discussing HHS's rule self-imposing notice-and-comment requirements despite exemption for benefit and grant determinations in 5 U.S.C. § 553(a)(2). *See also id.* ("The public benefit from such participation should outweigh any administrative inconvenience . . . which . . . result[s] from use of the APA procedures . . . .").

316. *Pol'y & Rsch.*, 313 F. Supp. 3d at 75 (Jackson, J.) (citations omitted) (quoting Lincoln v. Vigil, 508 U.S. 182, 193 (1993)) (collecting sources).

promulgation. An outgoing administration might insulate its spending programs from arbitrary termination by its successor without significantly constraining its own discretion by promulgating a regulation superseding *Vigil* shortly before relinquishing power.

Third, courts can, of course, play a lead role in revising *Vigil*. One approach would be to adopt the minority reading of *Vigil*, on which the case is merely one application of the "no law to apply" test in a particular case that did not actually create any presumption particular to spending decisions.[317] One way to conceptualize this reading would be to hold that the presence of a "meaningful standard" is itself sufficient to "rebut" any presumption created by *Vigil*. This would merge the *Vigil* presumption back into the ordinary "no law to apply" test, which focuses on the presence of such a standard.[318]

This approach strikes the author as somewhat difficult to square with the language of *Vigil* itself, but perhaps the case's strongest language might be characterized as dicta.[319] It is easier to square with the various judicial statements describing *Vigil* as having created a categorical presumption for appropriations cases, because those statements are plainly dicta.[320] Clarifying *Vigil* into obsolescence in this way would carry the rule-of-law benefit of not expressly or openly reversing an existing precedent. It is notable, in this regard, that in the Supreme Court's most recent decision listing examples of categories of cases subject to a presumption of unreviewability, Chief Justice Roberts writing for the majority omitted *Vigil*

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317. *See supra* notes 209–10 and accompanying text (describing this reading).

318. If statutory indicia sufficient to create "law to apply"—modest restraints on purposes, or other contextual or textual cues of an intent to cabin discretion—are sufficient to rebut (or render inapplicable, by making an appropriation something other than "lump-sum") the *Vigil* presumption, then the *Vigil* "rule" becomes no more than a descriptive point that some decisions about some lump-sum appropriations implicate the "no law to apply" rule. Minority rule cases might be read as taking this approach in developing a narrow understanding of the case. *E.g.*, Shawnee Tribe v. Mnuchin, 984 F.3d 94, 96 (D.C. Cir. 2021) (finding that statutory directions related to allocation choice rebutted presumption of unreviewability, despite congressional instruction that allocation be made "in such manner as the Secretary deems appropriate"); Mount Evans Co. v. Madigan, 14 F.3d 1444, 1449–50 (10th Cir. 1994) (reading various structural limitations on availability of funds to rebut presumption); Am. Med. Ass'n v. Reno, 57 F.3d 1129, 1135 (D.C. Cir. 1995) (same); Planned Parenthood of N.Y.C., Inc. v. U.S. Dep't of Health & Hum. Servs., 337 F. Supp. 3d 308, 325 (S.D.N.Y. 2018) ("In short, where there is 'meaningful law to apply' to an agency's appropriation allocation, it is reviewable, but where there is 'no relevant statutory reference point,' it is not." (citations omitted)).

319. In particular, courts and scholars that have read the case to create a presumption of unreviewability have often quoted language from the opinion's "traditional presumption" paragraph discussed above. *See supra* notes 109–12 and accompanying text. But perhaps an argument might be developed regarding this paragraph that the parties in the case conceded that the appropriation in *Vigil* was "lump-sum" and that the Supreme Court assumed based on such a concession that Congress had imposed no standards on the agency's allocation decision.

320. *Supra* note 9 (collecting sources).

from the list without comment.[321] This despite *Vigil*'s repeated inclusion in such lists in prior cases.[322]

As an alternative to re-reading *Vigil*, the Supreme Court could openly abrogate it to the extent that it created a presumption of unreviewability for discretionary spending decisions. While statutory *stare decisis* ordinarily counsels against reversing prior decisions,[323] it is subject to exceptions—and abrogating *Vigil* could be justified under several of these exceptions. First, the strong form of statutory *stare decisis* does not apply when Congress has enacted a "common law tradition" into statute,[324] and at best *Vigil* reflects just such a "common law tradition" understanding of the "committed to agency discretion" language.[325] Second, the strong form of statutory *stare decisis* is less applicable where the underlying precedent "is procedurally flawed due to poor briefing or inadequate deliberation."[326] As explained in Part I, counsel for Ashley Vigil never had the opportunity to respond to the argument for the core holding in *Vigil* (that lump-sum appropriations decisions are traditionally regarded as unreviewable) because it was not explicitly presented in the briefs but instead affirmatively articulated by the Solicitor General for the first time during rebuttal at oral argument.[327] Moreover, the assertion of a "tradition" of declining review of appropriations decisions prior to *Vigil* lacks actual historical basis,[328] a fact that might have been pointed out if briefing on the question had been permitted. Third, the Court has described a doctrine's workability (or lack thereof) as an important *stare decisis* consideration,[329] and the Article has described how *Vigil* has proven unworkable in practice due to ambiguities

321. Dep't of Com. v. New York, 139 S. Ct. 2551, 2568 (2019). While the Court repeated that "we have generally limited the exception to 'certain categories of administrative decisions that courts traditionally have regarded as "committed to agency discretion,"'" *id.*, it notably declined to include appropriations decisions in listing such categories, *id.*

322. *E.g.*, Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 370 (2018) (describing "allocation of funds from a lump-sum appropriation" as category of actions "traditionally regarded as unreviewable"); Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 607–08 (2007) (plurality opinion) (same).

323. Kozel, *supra* note 309, at 1126.

324. *See* Guardians Ass'n v. Civ. Serv. Comm'n of N.Y.C., 463 U.S. 582, 641 n.12 (1983) (Stevens, J., dissenting) (describing exception to statutory *stare decisis* for such statutes); Kozel, *supra* note 309, at 1143 ("[W]hen the Supreme Court understands a statute as requiring something akin to common law development of legal principles, it is more willing to reconsider its prior interpretation."); Eskridge, *supra* note 309, at 1378 (describing this exception).

325. *See supra* notes 84–93 and accompanying text (describing approaches to reading this language in APA).

326. Eskridge, *supra* note 309, at 1370 (describing cases).

327. *Supra* Sections I.C.1–2.

328. *Supra* Section I.C.2.

329. Citizens United v. FEC, 558 U.S. 310, 362–63 (2010).

in the terms "allocate," "lump-sum," and "appropriation."[330] Fourth, the Court has also described a doctrine's fit with developing law as an important *stare decisis* consideration,[331] and administrative law has changed in four important ways since *Vigil* that increasingly render the case an outlier: (1) the Supreme Court has narrowed the applicability of the "committed to agency discretion" exception in other contexts whereas *Vigil* broadens it,[332] and has done so specifically by analyzing "tradition" with regard to actual historical tradition (of the sort that did not exist in *Vigil*) rather than policy justifications (of the sort that seemed to motivate the Court's opinion);[333] (2) the Supreme Court has emphasized the importance of reliance interests in arbitrariness review whereas *Vigil* prevents their consideration when a program to which a court finds it applies is terminated;[334] (3) appellate courts have emphasized the importance of judicial review of appropriations decisions for the separation of powers whereas *Vigil* inhibits such review;[335] and (4) the Court has moved to bring previously exceptional areas of administrative law into the "ordinary" administrative law fold in recent years,[336] leaving *Vigil*'s domain of appropriations marginalization increasingly isolated.

Finally, although not ordinarily thought of as a *stare decisis* consideration, the values underlying the constitutional avoidance canon of statutory interpretation weigh in favor of abrogating *Vigil*. In cases where *Vigil* potentially precludes review, plaintiffs have sought to press constitutional analogues of arbitrary-and-capricious review, especially in

330. *See supra* Section II.B.

331. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 857 (1992) (discussing possibility that "evolution of legal principle" could leave holding's "doctrinal footings weaker").

332. In *Department of Commerce v. New York*, the Supreme Court reiterated that "to honor the presumption of judicial review, we have read the § 701(a)(2) exception for action committed to agency discretion 'quite narrowly.'" 139 S. Ct. 2551, 2568 (2019).

333. Specifically, in *Department of Commerce* the Court considered whether, as a historical fact, a tradition of declining review existed, and it declined to articulate a new category of presumptive unreviewability in the absence of such a tradition. *Id.* at 2568–69. Nowhere in the opinion does the Court even address pragmatic, policy-type arguments, such as the suitability of the judgments involved in writing census questions to judicial review. This is despite the fact that the Solicitor General had offered such arguments in the government's brief. Brief for the Petitioners at 24, *Dep't of Com.*, 139 S. Ct. 2551 (No. 18-966), 2019 WL 1093052, at *24. Indeed, even Justice Alito, who would have found the action unreviewable, described the test for establishing unreviewability as one focused on the historical question of "an established record of judicial review prior to the adoption of the APA" and did not wade into policy arguments. *Dep't of Com.*, 139 S. Ct. at 2603–04 (Alito, J., concurring in part).

334. *See Casey*, 505 U.S. at 856.

335. U.S. House of Representatives v. Mnuchin, 976 F.3d 1, 13 (2020) ("To put it simply, the Appropriations Clause requires two keys to unlock the Treasury, and the House holds one of those keys.").

336. *E.g.*, Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1541 (2006) (describing tax exceptionalism).

separation of powers disputes between Congress and the President.[337] Permitting arbitrary-and-capricious review could therefore save courts from being tasked with resolving difficult constitutional questions in such cases.

A fourth answer for *Vigil* lies, of course, through Congress. That said, a legislative fix is easier said than done. Congress cannot act without approval by the House, the Senate, and the President (or support in each Chamber sufficient to override a veto), a structure that strongly and by design favors maintenance of the status quo.[338] Moreover, providing for judicial review in individual cases as to a particular allocation would put enactment within the jurisdiction of the Judiciary Committees, adding an additional vetogate to passage of legislation.[339] The most likely course, then, would be for the Appropriations Committees or leadership either to force through a general provision in appropriations legislation addressing judicial review of appropriations generally (despite any jurisdictional concerns from the Judiciary Committees) or to enact permanent, authorizing legislation on the subject.

Rather than specifically provide for judicial review of spending decisions or a presumption in favor of such review (which might interact with more general questions about the scope of judicial review in ways that would complicate passage), Congress could provide for clarifying override legislation specifically disapproving of the strong reading of *Vigil*.[340] Congress has often enacted such clarifying override legislation, including in response to administrative law decisions.[341] For example, Congress might provide that "Courts shall not, in addressing the applicability of section 701(a)(2), apply any presumption against review associated with *Lincoln v. Vigil*." This would legislatively preclude the strongest reading of *Vigil* without necessarily impacting other areas of administrative law.

CONCLUSION: LOOKING FOR PEOPLE IN ADMINISTRATIVE LAW

The presumption of unreviewabilty for agency actions "allocating lump-sum appropriations" is not the straightforward, sensible doctrine that courts

337. *See, e.g.*, Sierra Club v. Trump, 929 F.3d 670, 707, 711 (2019) (Smith, J., dissenting) (criticizing majority for "turning every question of whether an executive officer exceed a *statutory* grant of power into a *constitutional* issue," and noting that if framed as a substantive challenge, suit would have been precluded by *Vigil* presumption).

338. Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59, 91–92 (2022) (describing *ex ante* barriers to lawmaking).

339. *See supra* notes 217–18 and accompanying text (describing committee jurisdiction).

340. For examples of legislative overrides, see Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1329 (2014).

341. *Id.* at 1373.

and scholars have assumed it is. Looking behind the superficial, technocratic simplicity of the presumption through a person-sensitive study of its origins and effects, the Article has revealed that it was invented through a historical fiction, has had a starkly disparate impact on Tribes and prisoners, is operationally unworkable, and lacks a persuasive policy justification. In short, the Article has shown that the presumption should be understood not just as an administrative law doctrine but also as an Indian Law doctrine (among others)—and that it should be abandoned.

The Article's understanding of *Vigil* is different because its methodology is different. Administrative law scholarship tends to focus on process[342] and power[343]—not people. With notable, pioneering exceptions, it can be hard to find law review articles (or other sources) exploring who brings administrative law cases, either in general or in particular fields.[344] It can also be hard to find law review articles (or other sources) exploring how administrative law impacts different people and groups differently—again with notable, pioneering exceptions.[345]

This Article has been narrowly focused on *Lincoln v. Vigil* and its presumption of unreviewability. This narrow focus was essential—bringing actual people into administrative law is not easy; here it entailed both a study of plaintiffs in all published *Vigil* cases and a high-level, top-down analysis of the doctrine's scope by reference to the universe of real-world agency actions within its analytic ambit. All of this entailed connecting three levels of analysis (structure, substance, and impact) that are normally separated by relegation to distinct "fields" of legal scholarship (administrative law, fiscal law, and "substantive" fields such as Indian Law, health law, and criminal law). And even still, I am mindful that more work could still be done to fully understand *Vigil*'s personal impacts.[346]

In addition to changing the way courts, scholars, and advocates think about *Vigil*, I hope the Article may help motivate and inform scholars looking to further advance administrative law's growing interest in people

342. *E.g.*, Bagley, *supra* note 9, at 351 (describing "proceduralism" in administrative law scholarship).

343. *E.g.*, Daryl J. Levinson, *Looking for Power in Public Law*, 130 HARV. L. REV. 31, 33 (2016); *see also* Bremer, *supra* note 178 (critiquing administrative law's "obsession with power").

344. The author benefitted greatly from a work in progress describing a meticulous survey of the relatively rare, "pioneering" instances of such scholarship developed by Nicholas R. Parrillo in his work in progress, Who Sues Their Regulator? A Preliminary Report 5 (May 9, 2023) (unpublished manuscript) (on file with author) (citing, e.g., David Zaring, *The Corporatist Foundations of Financial Regulation*, 108 IOWA L. REV. 1303 (2023)).

345. *E.g.*, Shah, *supra* note 30; Weinstein-Tull, *supra* note 30; Joy Milligan, Plessy *Preserved: Agencies and the Effective Constitution*, 129 YALE L.J. 924 (2020); Joy Milligan, *Subsidizing Segregation*, 104 VA. L. REV. 847 (2018); Milligan & Tani, *supra* note 30.

346. For example, see the discussion in note 163, *supra*, of possible explanations for the disparate impact of the *Vigil* presumption on Tribes and prisoners.

(including groups of people) more generally. The Article has shown that a doctrine that appears innocuous and wise from the standpoint of abstract considerations can look entirely different from the standpoint of personal impacts. And the two-front, integrative approach the Article took to revealing personal impacts—studying and connecting granular ground-level experience in published cases with top-down analysis of a "structural" doctrine's interaction with substantive law—may provide a model (or at least a stepping-stone) for other scholars looking for people in administrative law.

Case Name, Reporter Cite	**Who was the Plaintiff? (specific party)**	**Category of Plaintiff**	**Court found agency action reviewable?**	**Is this a *Vigil* case?**[347]
Oglala Sioux Tribe v. United States, No. 22-CV-05066, 2023 WL 3606098 (D.S.D. May 23, 2023).	Federally recognized tribe	Tribe	Yes	Yes
Schultz v. U.S. Dep't of State, No. 22-00059, 2023 WL 2574416 (D. Haw. Mar. 20, 2023).	Student	Misc.	No	Yes
Vara v. DeVos, No. 19-12175, 2020 WL 3489679 (D. Mass. June 25, 2020).	Students	Misc.	Yes	Yes
Sheldon v. Vilsack, No. 11-10487, 2012 WL 1068099 (E.D. Mich. Mar. 29, 2012).	Housing (loan beneficiary)	Housing tenant/ advocacy	No	Yes
Payton v. U.S. Dep't of Agric., 337 F.3d 1163 (10th Cir. 2003).	Farmer	Misc.	Yes	Yes
Stewart v. Azar, 313 F. Supp. 3d 237 (D.D.C. 2018).	Kentucky residents enrolled in state's Medicaid program	Patient (Medicaid)	Yes	Yes

347. Meaning more than merely citing; explicitly or implicitly understood for categorical presumption against review applied in case.

Case Name, Reporter Cite	**Who was the Plaintiff? (specific party)**	**Category of Plaintiff**	**Court found agency action reviewable?**	**Is this a *Vigil* case?**[347]
Shank v. U.S. Dep't of Interior, 907 F. Supp. 285 (C.D. Ill. 1995).	Federal employees	Misc.	No	Yes
Logan Farms, Inc. v. Espy, 886 F. Supp. 781 (D. Kan. 1995).	Logan Farms	Industry	Yes	Yes
King County v. Azar, 320 F. Supp. 3d 1167 (W.D. Wash. 2018).	County (local gov't)	Health care provider (reproductive)	Yes	Yes
Georgia v. Brooks-LaSure, No. 22-CV-6, 2022 WL 3581859 (S.D. Ga. Aug. 19, 2022).	State of Georgia	State	Yes	Yes
G. *ex rel*. K. v. Hawaii, No. Civ. 08-00551, 2009 WL 1322354 (D. Haw. May 11, 2009).	Disabled child on Medicaid	Misc.	Yes	Yes
C.K. v. Shalala, 883 F. Supp. 991 (D.N.J. 1995).	Recipients of benefits under state Aid to Families with Dependent Children (AFDC) program	Misc.	Yes	Yes
Beno v. Shalala, 853 F. Supp. 1195 (E.D. Cal. 1993), *rev'd*, 30 F.3d 1057 (9th Cir. 1994).	Aid to Families with Dependent Children (AFDC) recipients	Misc.	Yes	Yes

Case Name, Reporter Cite	**Who was the Plaintiff? (specific party)**	**Category of Plaintiff**	**Court found agency action reviewable?**	**Is this a *Vigil* case?**[347]
Sierra Club v. Trump, 929 F.3d 670 (9th Cir. 2019).	Sierra Club	Advocacy group	Yes	Yes
Ramah Navajo Sch. Bd., Inc. v. Babbitt, 87 F.3d 1338 (D.C. Cir. 1996).	Ramah Navajo School Board	Tribe	Yes	Yes
Lincoln v. Vigil, 508 U.S. 182 (1993).	Ashley Vigil	Tribe	No	Yes
New Jersey v. United States, 91 F.3d 463 (3rd Cir. 1996).	State of New Jersey	State	No	Yes
Ojeda v. Fed. Bureau of Prisons, 225 Fed. App'x 285 (5th Cir. 2007).	Claudia Ojeda	Prisoner	No	Yes
El Paso County v. Trump, 408 F. Supp. 3d 840 (W.D. Tex. 2019).	El Paso County, Texas, ("El Paso County") and Border Network for Human Rights	Localities	Yes	Yes
Milk Train, Inc. v. Veneman, 167 F. Supp. 2d 20 (D.D.C. 2001), *rev'd*, 310 F.3d 747 (D.C. Cir. 2002).	Milk Train et al., large dairy producers	Industry	No	Yes

Case Name, Reporter Cite	**Who was the Plaintiff? (specific party)**	**Category of Plaintiff**	**Court found agency action reviewable?**	**Is this a *Vigil* case?**[347]
Palomino v. Fed. Bureau of Prisons, 408 F. Supp. 2d 282 (S.D. Tex. 2005).	Kendra Palomino	Prisoner	No	Yes
Air Transp. Ass'n of Am. v. Export-Import Bank of the U.S., 878 F. Supp. 2d 42 (D.D.C. 2012), *rev'd sub nom.* Delta Air Lines, Inc. v. Export-Import Bank of the U.S., 718 F.3d 974 (D.C. Cir. 2013).	Industry lobby group (Air Transport Association of America)	Industry	Yes	Yes
Am. Petrol. Tankers Parent, LLC v. United States, 943 F. Supp. 2d 59 (D.D.C. 2013).	For-profit corporation (American Petroleum Tankers Parent, LLC)	Industry	Yes	Yes
Castellini v. Lappin, 365 F. Supp. 2d 197 (D. Mass. 2005).	Richard Castellini	Prisoner	Yes (though gov't still won case)	Yes
Cobell v. Babbitt, 30 F. Supp. 2d 24 (D.D.C. 1998).	Beneficiaries of Individual Indian Money (IIM) trust accounts	Tribe	Yes	Yes

Case Name, Reporter Cite	**Who was the Plaintiff? (specific party)**	**Category of Plaintiff**	**Court found agency action reviewable?**	**Is this a *Vigil* case?**[347]
Cobell v. Norton, 283 F. Supp. 2d 66 (D.D.C. 2003), *vacated in part*, 392 F.3d 461 (D.C. Cir. 2004).	Beneficiaries of Individual Indian Money (IIM) trust accounts	Tribe	Yes	Yes
Kohola v. Nat'l Marine Fisheries Serv., 669 F. Supp. 2d 1182 (D. Haw. 2009), *vacated*, 439 Fed. App'x 618 (9th Cir. 2011).	Hui Malama I Kohola, Center for Biological Diversity, and Turtle Island Restoration Network	Environmental advocacy	Yes	Yes
Dairy Producers of N.M. v. Veneman, No. CIV 99-568, 2001 WL 37125268 (D.N.M. Feb. 27, 2001).	Dairy farmers (as represented by a trade association)	Industry	Yes	Yes
NAACP v. Bureau of Census, 454 F. Supp. 3d 542 (D. Md. 2020).	National Association for the Advancement of Colored People, et al.	Advocacy group (civil rights)	No	Yes

Case Name, Reporter Cite	**Who was the Plaintiff? (specific party)**	**Category of Plaintiff**	**Court found agency action reviewable?**	**Is this a *Vigil* case?**[347]
Healthy Teen Network v. Azar, 322 F. Supp. 3d 647 (D. Md. 2018).	Recipients of Teen Pregnancy Prevention program grant (Healthy Teen Network and City of Baltimore)	Health care provider (reproductive)	Yes	Yes
Los Coyotes Band of Cahuilla & Cupeno Indians v. Salazar, No. 10cv1448, 2011 WL 5118733 (S.D. Cal. Oct. 28, 2011), *rev'd*, 729 F.3d 1025 (9th Cir. 2013).	Federally recognized tribe	Tribe	No	Yes
Lundell Farming Co. v. U.S. Army Corps of Eng'rs, 621 F. Supp. 3d 927 (E.D. Ark. 2022).	Lundell Farming Company	Farmers	Yes	Yes
Multnomah County v. Azar, 340 F. Supp. 3d 1046 (D. Or. 2018).	Multnomah County (local government)	Locality	Yes	Yes
Almanza v. Fed. Bureau of Prisons, No. Civ.A. H-05-2823, 2006 WL 44072 (S.D. Tex. Jan. 9, 2006).	Ruth Almanza, an inmate incarcerated in the United States Bureau of Prisons at the Federal Prison Camp in Bryan, Texas	Prisoner	No	Yes

Case Name, Reporter Cite	**Who was the Plaintiff? (specific party)**	**Category of Plaintiff**	**Court found agency action reviewable?**	**Is this a *Vigil* case?**[347]
Bramlett v. U.S. Dep't of Treasury, No. 16-257, 2017 WL 1048366 (E.D. Pa. Mar. 20, 2017).	Two individuals and the Portland Mint, alleging that they were improperly prevented from submitting several shipments of bent and broken coins to the U.S. Mint's Mutilated Coin Redemption Program	Misc.	No	Yes
Planned Parenthood of N.Y.C., Inc. v. U.S. Dep't of Health & Hum. Servs., 337 F. Supp. 3d 308 (S.D.N.Y. 2018).	Planned Parenthood of N.Y.C.	Health care provider (reproductive)	Yes	Yes
Colorado *ex rel.* Suthers v. Gonzales, 558 F. Supp. 2d 1158 (D. Colo. 2007).	Colorado attorney general	States	No	Yes
Samuels v. Fed. Hous. Fin. Agency, 54 F. Supp. 3d 1328 (S.D. Fla. 2014).	Low-income tenants and housing organizations	Housing tenants	No	Yes

Case Name, Reporter Cite	**Who was the Plaintiff? (specific party)**	**Category of Plaintiff**	**Court found agency action reviewable?**	**Is this a *Vigil* case?**[347]
Shoshone-Bannock Tribes of Fort Hall Rsrv. v. Shalala, 988 F. Supp. 1306 (D. Or. 1997).	Tribal organization	Tribe	Yes	Yes
Southcentral Found. v. Roubideaux, 48 F. Supp. 3d 1291 (D. Alaska 2014).	Tribal organization	Tribe	Yes	Yes
United States v. McLean, No. CR 03-30066, 2005 WL 2371990 (D. Or. Sept. 27, 2005).	Federal prisoner	Prisoner	No	Yes
Yankton Sioux Tribe v. U.S. Dep't of Health & Hum. Servs., 869 F. Supp. 760 (D.S.D. 1994).	Tribe	Tribe	Yes	Yes
Roman v. LaManna, No. 05-2806, 2006 WL 2370319 (D.S.C. Aug. 15, 2006).	Federal prisoner William Roman	Prisoner	No (because no requirement of notice and comment)	Yes
Mount Evans Co. v. Madigan, 14 F.3d 1444 (10th Cir. 1994).	Concession contractor	Industry	Yes	Yes
Hawkins v. U.S. Dep't of Hous. & Urb. Dev., 16 F.4th 147 (5th Cir. 2021).	Housing beneficiaries	Housing tenants	Yes (because of regulations)	Yes

Case Name, Reporter Cite	**Who was the Plaintiff? (specific party)**	**Category of Plaintiff**	**Court found agency action reviewable?**	**Is this a *Vigil* case?**[347]
Am. Med. Ass'n v. Reno, 57 F.3d 1129 (D.C. Cir. 1995).	Professional medical association	Industry	Yes	Yes
Concilio De Salud Integral De Loiza, Inc. v. U.S. Dep't of Health & Hum. Servs., 538 F. Supp. 2d 139 (D.D.C. 2008).	Federally qualified health centers	Health care providers	No	Yes
Cheatham v. Jackson, No. 07-13168, 2007 WL 4572482 (E.D. Mich. Dec. 27, 2007).	Tenants of low-income housing	Housing tenants	Yes	Yes
Rosebud Sioux Tribe v. United States, No. 16-CV-03038, 2017 WL 1214418 (D.S.D. Mar. 31, 2017).	Federally recognized tribe	Tribe	Yes	Yes
Viet. Veterans of Am. v. Principi, No. 04-0103, 2005 WL 901133 (D.D.C. Mar. 11, 2005).	Vietnam Veterans of America	Advocacy group (veterans)	No	Yes
McKown v. U.S. Dep't of Agric., 276 F. Supp. 2d 1201 (D.N.M. 2003).	Joe Craig McKown and Shanna Burt	Industry	Yes	Yes
Quicken Loans Inc. v. United States, 152 F. Supp. 3d 938 (E.D. Mich. 2015).	Quicken Loans, Inc.	Industry	No	Yes

Case Name, Reporter Cite	**Who was the Plaintiff? (specific party)**	**Category of Plaintiff**	**Court found agency action reviewable?**	**Is this a *Vigil* case?**[347]
Ohio v. U.S. Army Corps of Eng'rs, 259 F. Supp. 3d 732 (N.D. Ohio 2017).	State of Ohio	State	Yes	Yes
Shumaker v. Guzman, No. 21-CV-00477, 2022 WL 2902843 (S.D. Tex. Apr. 4, 2022).	Patrick Shumaker	Industry	No	Yes
Acorn v. U.S. Dep't of Hous. & Urb. Dev., No. 05 C 3049, 2005 WL 8179274 (N.D. Ill. Oct. 5, 2005).	Residents of government-subsidized housing and a nonprofit dedicated to low-income housing in Chicago	Housing tenants	No	Yes
Cordoba v. Chater, No. CIV 96-1393, 1998 WL 36030871 (D.N.M. Mar. 30, 1998).	Non-attorney representative of claimants for disability benefits and corporation	Industry	No	Yes
Netjets Aviation, Inc. v. U.S. Dep't of Agric., No. 20-cv-4464, 2021 WL 3603323 (S.D. Ohio Aug. 13, 2021).	Private aircraft providers, servicers, and management companies	Industry	Yes	Yes

Case Name, Reporter Cite	**Who was the Plaintiff? (specific party)**	**Category of Plaintiff**	**Court found agency action reviewable?**	**Is this a *Vigil* case?**[347]
Bauer v. DeVos, 325 F. Supp. 3d 74 (D.D.C. 2018).	Students and a coalition of nineteen states and the District of Columbia (challenging the delay of implementation of protections for student loan borrowers)	State	Yes	Yes
Schieber v. United States, 77 F.4th 806 (D.C. Cir. 2023).	Descendants of Holocaust victims	Misc.	No	Yes
Tex. Gray Panthers v. Thompson, 139 F. Supp. 2d 66 (D.D.C. 2001), *vacated*, 37 Fed. App'x 542 (D.C. Cir. 2002).	Low-income senior citizen Medicare beneficiaries' advocacy groups	Advocacy group (elderly health care)	Yes	No, *Vigil* used to show that agency discretion is warranted when the decisions involve a balancing of factors, which the court is unprepared to review
Cisneros v. Fed. Bureau of Prisons, No. Civ.A. H-05-3494, 2005 WL 3591012 (S.D. Tex. Dec. 30, 2005).	Federal prisoner Jennifer Cisneros	Prisoner	No	No, *Vigil* used as an example of when agency decisions are unreviewable for lack of meaningful standard

Case Name, Reporter Cite	**Who was the Plaintiff? (specific party)**	**Category of Plaintiff**	**Court found agency action reviewable?**	**Is this a *Vigil* case?**[347]
Agua Caliente Band of Cahuilla Indians v. Mnuchin, No. 20-cv-01136, 2020 WL 3250701 (D.D.C. June 15, 2020).	Federally recognized tribe	Tribe	Yes	No, *Vigil* used to show that “agency action is not subject to judicial review to the extent that such action is committed to agency discretion by law”
Shawnee Tribe v. Mnuchin, 480 F. Supp. 3d 230 (D.D.C. 2020), *rev’d & remanded*, 984 F.3d 94 (D.C. Cir. 2021).	Federally recognized tribe	Tribe	No	No, though debatable, *Vigil* was used by Defendant to justify its “reprogramming” of funds by shifting funds originally set aside for one purpose to another purpose within the same appropriation

Case Name, Reporter Cite	**Who was the Plaintiff? (specific party)**	**Category of Plaintiff**	**Court found agency action reviewable?**	**Is this a *Vigil* case?**[347]
Serrato v. Clark, No. C 05-03416, 2005 WL 3481442 (N.D. Cal. Dec. 19, 2005), *aff'd*, 486 F.3d 560 (9th Cir. 2007).	Federal prisoner Nora Serrato	Prisoner	No	No, though debatable, *Vigil* used to support proposition that the "committed to agency discretion" exception is narrow and applies where there are no meaningful standards against which the action may be judged, specifically in the context of lump-sum appropriations
Quechan Tribe of Fort Yuma Indian Rsrv. v. United States, No. CIV 10-02261, 2011 WL 1211574 (D. Ariz. Mar. 31, 2011).	Federally recognized tribe	Tribe	No	No, *Vigil* only mentioned for proposition of presumption of judicial review over agency action

Case Name, Reporter Cite	**Who was the Plaintiff? (specific party)**	**Category of Plaintiff**	**Court found agency action reviewable?**	**Is this a *Vigil* case?**[347]
Rosebud Sioux Tribe v. United States, 450 F. Supp. 3d 986 (D.S.D. 2020).	Federally recognized tribe	Tribe	Yes	No, *Vigil* mentioned only to impose a duty on defendants to provide notice and comment
Oceana, Inc. v. Ross, 275 F. Supp. 3d 270 (D.D.C. 2017), *aff'd*, 920 F.3d 855 (D.C. Cir. 2019).	Environmental advocacy organization focused on protecting oceans	Advocacy group (environmental)	No	No, *Vigil* used as an example of the narrow no-standard-to-apply exception to judicial review, which this case did not fall within
Pyramid Lake Paiute Tribe v. Burwell, 70 F. Supp. 3d 534 (D.D.C. 2014).	Federally recognized tribe	Tribe	Yes	No
Wood v. U.S. Dep't of Agric. Rural Hous. Serv., No. 19-cv-00897, 2020 WL 1521801 (S.D. W. Va. Mar. 30, 2020).	Denise Wood	Misc.	Yes	No, *Vigil* used to show that there were certain categories committed to an agency's discretion by law, including the allocation of funds from a lump-sum appropriation

Case Name, Reporter Cite	**Who was the Plaintiff? (specific party)**	**Category of Plaintiff**	**Court found agency action reviewable?**	**Is this a *Vigil* case?**[347]
Yankton Sioux Tribe v. Kempthorne, 442 F. Supp. 2d 774 (D.S.D. 2006).	Federally recognized tribe	Tribe	Yes	No, *Vigil* used to show that certain decisions may be committed to an agency's discretion by law, including lump-sum appropriations
Cobell v. Babbitt, 52 F. Supp. 2d 11 (D.D.C. 1999).	Native American beneficiaries of Individual Indian Money trust	Tribe	Yes	No
Ramah Navajo Chapter v. Salazar, 644 F.3d 1054 (10th Cir. 2011).	Federally recognized tribe	Tribe	No	No
California v. Trump, 379 F. Supp. 3d 928 (N.D. Cal. 2019), *aff'd*, 963 F.3d 926 (9th Cir. 2020).	State of California and other states	State	Yes	No
Hopkins v. G.V. (Sonny) Montgomery VA Med. Ctr., No. 21-CV-00242, 2021 WL 6773592 (S.D. Miss. June 24, 2021).	Disabled African-American veteran who for ten years had been receiving dialysis at a VA medical center	Misc.	No	No

Case Name, Reporter Cite	**Who was the Plaintiff? (specific party)**	**Category of Plaintiff**	**Court found agency action reviewable?**	**Is this a *Vigil* case?[347]**
Deanda v. Fed. Bureau of Prisons, No. Civ.A. H-05-3032, 2006 WL 696625 (S.D. Tex. Mar. 14, 2006).	Federal prisoner Thania Deanda	Prisoner	No	No
Prairie Band Potawatomi Nation v. Mnuchin, No. 20-cv-1491, 2020 WL 3402298 (D.D.C. June 11, 2020).	Federally recognized tribe	Tribe	No	No
Shawnee Tribe v. Mnuchin, No. 20-cv-1999, 2020 WL 5440552 (D.D.C. Sept. 10, 2020), *rev'd*, 984 F.3d 94 (D.C. Cir. 2021).	Federally recognized tribe	Tribe	Yes	No
Hammitte v. Leavitt, No. 06-11655, 2007 WL 3013267 (E.D. Mich. Oct. 11, 2007).	Tanya Hammitte, David Stone, Joseph Stewart, and American Indian Services	Tribe	No	No
Pol'y & Rsch., LLC v. U.S. Dep't of Health & Hum. Servs., 313 F. Supp. 3d 62 (D.D.C. 2018).	Policy and Research LLC, et al.	Health care provider (reproductive)	Yes	No
Confederated Tribes of Chehalis Rsrv. v. Mnuchin, 456 F. Supp. 3d 152 (D.D.C. 2020).	Group of federally recognized Tribes	Tribe	Yes	No

Case Name, Reporter Cite	**Who was the Plaintiff? (specific party)**	**Category of Plaintiff**	**Court found agency action reviewable?**	**Is this a *Vigil* case?[347]**
N.M. Health Connections v. U.S. Dep’t of Health & Hum. Servs., 340 F. Supp. 3d 1112 (D.N.M. 2018).	Health insurer	Health care provider (non-profit)	Yes	No
Planned Parenthood of Wis., Inc. v. Azar, 316 F. Supp. 3d 291 (D.D.C. 2018), *vacated & remanded*, 942 F.3d 512 (D.C. Cir. 2019).	Planned Parenthood	Health care provider (reproductive)	Yes	No
Pyramid Lake Paiute Tribe v. Burwell, No. 13-cv-01771, 2015 WL 13691433 (D.D.C. Jan. 16, 2015).	Federally recognized tribe	Tribe	Yes, but holding confined to specific facts	No
Lower Brule Sioux Tribe v. Deer, 911 F. Supp. 395 (D.S.D. 1995).	Federally recognized tribe	Tribe	No, said *Vigil* applied	No