GOVERNING FOR IMPACT

Challenging Federal Award Terminations

Overcoming the Tucker Act

March 2025
Issue Brief

I. INTRODUCTION

In its first two months, the Trump Administration has carried out an unprecedented campaign of terminating contracts, grants, and cooperative agreements, en masse, where the awards purportedly reflect policies disfavored by the President. Lawsuits have followed in short order, including those asserting claims under the Administrative Procedure Act (APA). A principal defense of the Administration in these suits is that the plaintiffs cannot bring their claims in district court because the Tucker Act creates exclusive jurisdiction for these sorts of claims in the Court of Federal Claims (CFC). This defense has had mixed success thus far, with several district courts declining injunctive relief based on this defense and others rejecting the defense.[1] In one case where the district court issued a temporary restraining order against the freezing of United States Agency for International Development (USAID) grants and contracts, the Supreme Court notably declined the Administration's stay application, which was based largely on a Tucker Act defense, although four Justices agreed with the Administration that the Act likely precluded district court jurisdiction.[2]

This Issue Brief explains the claims and arguments that litigants might advance to ensure the best chance of remaining in district court. Maintaining an action in district court may be important given several downsides to proceeding in the CFC. First, if the case relates to a procurement contract, a contractor must proceed through the Contract Disputes Act's administrative exhaustion process before filing in the CFC. Second, in a case relating to a contract termination (as opposed to a bid protest), the CFC generally can award only money damages and not equitable relief such as a preliminary injunction. Third, as described below, contractors cannot raise most constitutional and statutory claims in the CFC.

[1] *Compare, e.g.*, Mem. Order, *U.S. Conf. of Catholic Bishops v. Dep't of State*, No. 1:25-cv-465-TNM (D.D.C. Mar. 11, 2025), ECF No. 37 (denying injunction over terminated grants because Tucker Act likely precluded jurisdiction), https://perma.cc/P6TM-QJ9C, *with* Mem. Op. & Order, *AIDS Vaccine Advocacy Coalition v. Dep't of State*, No. 1:25-cv-400-AHA (D.D.C. Mar. 10, 2025), ECF No. 60 (holding that Tucker Act likely did not preclude jurisdiction over APA challenges to freeze of USAID contracts and grants), https://perma.cc/K85H-TPU2.

[2] Order, *Dep't of State v. Aids Advocacy Coalition*, No. 24A831 (U.S. Mar. 5, 2025), https://www.supremecourt.gov/opinions/24pdf/24a831_3135.pdf.

We identify several potential arguments for why district courts maintain jurisdiction over APA claims in the context of federal award terminations. These include arguments that: (1) grants and cooperative agreements are not "contracts" subject to the Tucker Act at all; (2) APA claims predicated on relevant provisions of the constitution and statutes must be actionable in district court because the provisions are not "money-mandating," meaning the CFC would not have jurisdiction to adjudicate claims over them; and (3) under Supreme Court precedent, APA claims that seek specific equitable relief rather than compensatory damages may be brought in district court (although precedent in several circuits may make that argument challenging in those jurisdictions).

We also note that the Administration has conceded in at least one case that its Tucker Act defense *does not apply to nonstatutory claims not brought under the APA* — for example, claims that government action was *ultra vires* because it violated the constitutional separation of powers. Thus, where appropriate, litigants might consider asserting at least one claim that the challenged freeze or termination of a federal award was *ultra vires* under separation-of-powers principles. As we have previously explained, the Executive Branch has no constitutional authority to block, amend, or subvert appropriations enacted into law by Congress. Governing for Impact, *Challenging Unlawful Impoundments* 8-11 (Feb. 2025), https://perma.cc/2NQM-RX2M.

II. BACKGROUND ON RELEVANT STATUTORY SCHEMES

The United States generally enjoys sovereign immunity from suit unless Congress waives that sovereign immunity by statute. *See, e.g.*, *Maine Cmty. Health Options v. United States*, 590 U.S. 296, 321 (2020). The APA, the Tucker Act, and the CDA each waive sovereign immunity for specific types of claims seeking specific types of relief. Below, we describe the claims that are actionable and the relief that plaintiffs might seek under each statute.

A. The Administrative Procedure Act

The APA provides that persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,"

are "entitled to judicial review," and waives sovereign immunity for claims that "seek[] relief other than money damages." 5 U.S.C. § 702. But § 702 also specifies that it does not "confer[] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Id.* Notwithstanding this proviso, there is a "strong presumption of reviewability" under the APA. *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 601 (D.C. Cir. 2007) (quotation omitted).

The APA separately provides that final agency actions are "subject to judicial review" under the Act, but only where "there is no other adequate remedy in a court." 5 U.S.C. § 704. The D.C. Circuit has held that § 704 "determine[s] whether there is a cause of action under the APA, not whether there is federal subject matter jurisdiction," and that § 704 does not "limit" the waiver "of immunity in § 702." *Perry Cap. LLC v. Mnuchin*, 864 F.3d 591, 621 (D.C. Cir. 2017).

Finally, the APA provides that courts shall "compel agency action unlawfully withheld or unreasonably delayed," and "hold unlawful and set aside agency action" that is arbitrary and capricious or contrary to law (including the Constitution, statutes, or regulations), among other bases for setting aside agency action. 5 U.S.C. § 706(1)-(2). Litigants may seek injunctive and declaratory relief in furtherance of these remedies. *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988). But, as mentioned, the APA's waiver of sovereign immunity does not extend to claims for "money damages." As described further below, a number of decisions address whether particular relief constitutes "money damages" in determining whether claims must be brought in the CFC instead of in district court.

B. The Tucker Act

As relevant here, the Tucker Act provides two different grants of subject matter jurisdiction in the CFC. First, the CFC has "jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States," or upon certain constitutional or statutory provisions that mandate the payment of money, as described below. 20 U.S.C. § 1491(a)(1). Second, where the CDA requires contractors to exhaust administrative appeals before turning to court, the Tucker Act gives the CFC "jurisdiction to render judgment upon any claim by . . . a contractor" after the agency proceedings have concluded, "including a dispute concerning termination of a contract." *Id.* § 1491(a)(2).

"The Tucker Act is merely a jurisdictional statute and does not create a substantive cause of action." *Rick's Mushroom Serv., Inc. v. United States*, 521 F.3d 1338, 1343 (Fed. Cir. 2008); *see Maine Cmty.*, 590 U.S. at 321. "Therefore, the plaintiff must look beyond the Tucker Act to identify a substantive source of law that creates the right to recovery of money damages against the United States." *Rick's Mushroom Serv.*, 521 F.3d at 1343. Contractors typically can bring causes of action for breach of contract in the CFC because federal common law creates a right of action for breach of contract. *See Maine Cmty.*, 590 U.S. at 333 (Alito, J., dissenting). And "when a breach of contract claim is brought in the Court of Federal Claims under the Tucker Act, the plaintiff comes armed with the presumption that money damages are available." *Holmes v. United States*, 657 F.3d 1303, 1314 (Fed. Cir. 2011).

To bring a constitutional or statutory claim in the CFC, plaintiffs must establish that the particular provision is "money-mandating." *Maine Cmty.*, 590 U.S. at 322-23. The Supreme Court employs a "fair interpretation" test to determine whether a provision is "money-mandating." *Id.* (quotation omitted). A plaintiff may bring suit in the CFC for violation of a constitutional or statutory provision only if the provision "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Id.* (quotation omitted). This test is met "when the text of a statute creates an entitlement by leaving the Government with no discretion over the payment of funds." *Hous. Auth. of City of New Haven v. United States*, 140 Fed. Cl. 773, 788 (2018) (quotation omitted). The test can also be met in "limited situations" where "the Government retains discretion over the disbursement of funds but the statute: (1) provides clear standards for paying money to recipients; (2) states the precise amounts that must be paid; or (3) as interpreted, compels payment on satisfaction of certain conditions." *Id.* (quotation omitted).

The Takings Clause is a constitutional provision that has been found to be money-mandating. *See, e.g.*, *Jan's Helicopter Serv., Inc. v. FAA*, 525 F.3d 1299, 1309 (Fed. Cir. 2008). In contrast, the Federal Circuit has held that the CFC lacks jurisdiction over claims under the Due Process Clause, the Equal Protection Clause, and the First Amendment — as well as the doctrine of separation of powers — because they do not mandate the payment of money to specific persons as damages for violations of the provisions. *See LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995) (collecting cases).

Examples of money-mandating statutes include the Back Pay Act, which requires payments to individuals when certain conditions are met, *see* 5 U.S.C. § 5596, and 37 U.S.C. § 242, since repealed, which mandated compensation to specified prisoners of war. *See Bowen*, 487 U.S. at 905 n.42. But, for example, an appropriations act was determined not to

be money-mandating because it left the agency discretion in how to distribute funds. *Hous. Auth. of City of New Haven*, 140 Fed. Cl. at 788-89.

Plaintiffs usually can seek *only* monetary damages in contract actions filed in the CFC. The CFC does have limited authority to grant equitable relief where it is "an incident of and collateral to" a money judgment. 20 U.S.C. § 1491(a)(2). Such equitable relief must be "tied and subordinate to a money judgment," *James v. Caldera*, 159 F.3d 573, 580 (Fed. Cir. 1998) (quotation omitted), a standard that is rarely met. In addition, with respect to cases "within its jurisdiction," the CFC has "the power to remand appropriate matters to any administrative or executive body or official with such direction as" the court "may deem proper and just." 28 U.S.C. § 1491(a)(2); *see IAP Worldwide Servs., Inc. v. United States*, 160 Fed. Cl. 57, 65 (2022).

C. The Contract Disputes Act

The Contract Disputes Act imposes a mandatory process for claims related to contracts that are for the procurement of goods or services or for the disposal of personal property, among other things. 41 U.S.C. §§ 7101 *et seq.*; *see id.* § 7102(a). Contracts subject to the CDA thus are a subset of the contracts over which the Tucker Act affords the CFC jurisdiction.

Under the CDA, "[e]ach claim by a contractor . . . relating to" a covered contract must first be submitted to the agency contracting officer for a decision. *Id.* § 7103(a)(1). If the claims are for less than $100,000, the contracting officer must render a decision within 60 days. *Id.* § 7103(f)(1). For claims of more than $100,000, the contracting officer must, within 60 days, *either* issue a decision or notify the contractor of a time when a decision will be issued. *Id.* § 7103(f)(2). Thus, there is no set timeframe under which a contracting officer must issue a decision for larger claims, although a "contractor may request the tribunal concerned to direct a contracting officer to issue a decision in a specified period of time . . . in the event of undue delay." *Id.* § 7103(f)(3).

After the contracting officer issues a decision, the contractor has two options for seeking further review. The contractor may either appeal to the agency's board of contract appeals, *id.* § 7104(a), or may file suit in the CFC, *id.* § 7104(b)(1). If the contractor proceeds before an agency's board of contract appeals, the losing party to that appeal can file a further appeal in the Federal Circuit. *Id.* § 7107(a)(1).

There appears to be a circuit split on the scope of claims that are considered "relating to a contract" and that therefore must proceed through the CDA process. *Id.* § 7103(a)(1). At least four circuit courts have held that the test for whether claims must proceed through the CDA is the same as one of the tests for whether the CFC has jurisdiction under the Tucker Act — whether the claim is "essentially contractual." *See United Aeronautical Corp. v. United States Air Force*, 80 F.4th 1017, 1038 (9th Cir. 2023) (Collins, J., dissenting) (describing decisions of the Second, Fourth, Sixth, and D.C. circuits applying this test to determine CDA coverage). The Ninth Circuit, however, takes a far broader view of claims "relating to" a contract and subject to the CDA. That court has held that any claims that bear "some relationship to the terms of performance of the contract" must go through the CDA process. *Id.* at 1023 (quotation omitted). Litigants seeking to file claims in district court regarding a federal procurement contract therefore might file in jurisdictions other than the Ninth Circuit.

III. STAYING IN DISTRICT COURT

Plaintiffs and the government frequently battle over whether the CFC's jurisdiction deprives a district court of jurisdiction to hear APA claims. The case law on this question has been inconsistent over the years, sometimes within the same court. Prospective litigants seeking to advance APA claims in district court with respect to contracts, grants, and cooperative agreements might carefully study the precedents across jurisdictions and the available arguments in each jurisdiction before deciding where to file.

Before turning to that analysis, though, it bears emphasis that these issues — and the government's Tucker Act defense in award termination cases more generally — should be relevant only to APA claims, and not to constitutional claims not brought under the APA. Indeed, in a recent oral argument, counsel for the government conceded that the Tucker Act defense does not apply to a nonstatutory cause of action seeking to enjoin an official's actions for violating the constitutional separation of powers. *See* 3/8/25 Tr. at 87, *AIDS Vaccine Advocacy Coalition*, No. 1:25-cv-400, ECF No. 56 (The Court: "The sovereign immunity arguments you're making are kind of explicitly grounded in the text of the APA . . . so they wouldn't apply -- if they foreclosed the APA claims, they wouldn't apply to the separation of powers claims? . . . [Counsel for the Government]: Yes, that's right."). And in a separate case, the government raised the Tucker Act as a defense only to plaintiffs' APA

arbitrary and capricious claim, and not to plaintiffs' claim under the Appropriations Clause. Defs.' Mem. in Opp'n to Pls.' Mot. for TRO at 13, 19-20, *Amica Ctr. for Immigrant Rights v. Dep't of Justice*, No. 1:25-cv-298-RDM (D.D.C. Mar. 5, 2025), ECF No. 35, https://perma.cc/D967-TF28.

The government makes this concession for good reason. The government's argument as to why the Tucker Act deprives district courts of jurisdiction rests on the APA's waiver of sovereign immunity in 5 U.S.C. § 702, which does not apply where another statute "impliedly forbids" the APA relief sought. *Id.* at 21 (quotation omitted). However, a nonstatutory cause of action, such as a claim that government action is *ultra vires*, need not rely upon the APA's waiver of sovereign immunity but can instead rely on the *Larson-Dugan* exception to sovereign immunity. *See, e.g.*, *Schilling v. United States House of Representatives*, 102 F.4th 503, 506 (D.C. Cir. 2024) (describing the exception). Specifically, where an "'officer is not doing the business which the sovereign has empowered him to do,'" "there is no sovereign immunity to waive—it never attached in the first place." *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1329 (D.C. Cir. 1996) (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949)). For that reason, "if the federal officer, against whom injunctive relief is sought, allegedly acted in excess of his legal authority, sovereign immunity does not bar a suit." *Id.* (citing *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963)). Thus, litigants bringing claims against the freezing or termination of their awards might consider asserting at least one nonstatutory separation-of-powers cause of action.

As to APA claims, as described below, the Supreme Court has explained that Tucker Act jurisdiction is *not* exclusive over contract-related claims, such that district court jurisdiction exists as long as the plaintiff seeks relief that is not "money damages" stemming from final agency action. But case law in several circuit courts is inconsistent with the Supreme Court's admonition. Litigants outside these circuits might point to Supreme Court decisions on this point.

Regardless, broadly speaking, there are at least four arguments litigants might make to stand the best chance of remaining in district court, rather than the CFC: (A) their grants and cooperative agreements are not "contracts" subject to the Tucker Act; (B) a district court must have jurisdiction over their constitutional and statutory claims, because those claims could not be brought in the CFC; (C) they seek equitable relief rather than money damages; and (D) their claims are not "in essence" contract claims.

A. Is the CFC's Jurisdiction Actually "Exclusive?"?

A key threshold question often overlooked in the district court-versus-CFC case law is whether the CFC's jurisdiction is actually "exclusive," such that claims otherwise actionable under the APA cannot be brought in district court if the CFC would have jurisdiction over some version of the claims. In APA parlance, the question is whether the existence of CFC jurisdiction "impliedly forbids" invoking the APA's waiver of sovereign immunity. 5 U.S.C. § 702.[3]

The Supreme Court has strongly suggested — and perhaps held — that CFC jurisdiction is not exclusive. In *Bowen*, 487 U.S. 879, the Supreme Court held that a district court had jurisdiction to decide an APA challenge to the Department of Health and Human Services' decision not to reimburse certain Medicaid expenditures. As discussed in more detail below, the Court held that the plaintiff could bring APA claims seeking "specific relief" through an injunction or declaratory judgment, and that such relief does not constitute "money damages" under § 702 even if it results in the government having to "pay money" to the plaintiff. *Id.* at 893-900. In reaching this holding, the Court stated:

> It is often assumed that the Court of Federal Claims has exclusive jurisdiction of Tucker Act claims for more than $10,000. . . . That assumption is not based on any language in the Tucker Act granting such exclusive jurisdiction to the Claims Court. Rather, that court's jurisdiction is "exclusive" only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court. If, however, § 702 of the APA is construed to authorize a district court to grant monetary relief — other than traditional "money damages" — as an incident to the complete relief that is appropriate in the review of agency action, the fact that the purely monetary aspects of the case could have been decided in the Claims Court is not sufficient reason to bar that aspect of the relief available in a district court.

[3] In contrast to CFC jurisdiction under 28 U.S.C. § 1491(a)(1), the CDA does clearly forbid APA jurisdiction for claims related to procurement contracts and subject to the CDA. Few, if any, grants and cooperative agreements will qualify as procurement contracts, though.

Id. at 910 n.48. The Court also approvingly quoted a district court opinion stating that: "The policies of the APA take precedence over the purposes of the Tucker Act. In the conflict between two statutes, established principles of statutory construction mandate a broad construction of the APA and a narrow interpretation of the Tucker Act." *Id.* at 908 n.46 (quotation omitted).

The Supreme Court recently reaffirmed this framing in *Maine Community Health Options*, 590 U.S. 296. There, the Court held that "[t]he Tucker Act *yields* when the obligation-creating statute provides its own detailed remedies, *or when the Administrative Procedure Act . . . provides an avenue for relief*." *Id.* at 323-34 (emphasis added).

Despite the Supreme Court's framing, several courts of appeals — including the Second, Ninth, Tenth, and D.C. Circuits — have held post-*Bowen* that the Tucker Act is exclusive and takes precedence over the APA, even if the other criteria for bringing APA claims are met. These courts have rested their conclusion on 5 U.S.C. § 702's "impliedly forbids" clause, holding that the Tucker Act "impliedly forbids" districts courts from granting APA relief on claims that are "essentially contractual." *Perry Cap.*, 864 F.3d at 618-19; *see N. Star Alaska v. United States*, 9 F.3d 1430, 1432 (9th Cir. 1993) (en banc); *Robbins v. U.S. Bur. of Land Mgmt.*, 438 F.3d 1074, 1082 (10th Cir. 2006); *Presidential Gardens Assocs. v. U.S. ex rel. Sec'y of Hous. & Urb. Dev.*, 175 F.3d 132, 143 (2d Cir. 1999). The D.C. Circuit notably has recognized that these decisions are hard to reconcile with *Bowen*. That court has explained that there is "a strong case that, after *Bowen*, the Tucker Act should not be read to 'impliedly forbid' under the APA the bringing in district court of contract actions for specific relief." *Transohio Sav. Bank v. Dir., Off. of Thrift Supervision*, 967 F.2d 598, 612-13 (D.C. Cir. 1992). But because *Bowen* did not explicitly discuss the "impliedly forbids" clause of § 702, and the D.C. Circuit had "very specific holdings" concerning that clause, the court did not overturn its pre-*Bowen* decisions. *Id.* at 613; *see Yee v. Jewell*, 228 F. Supp. 3d 48, 54-56 (D.D.C. 2017).

As the D.C. Circuit recognized, it is at minimum extremely difficult to reconcile *Bowen* with the notion that § 702 "impliedly forbids" APA claims even where the APA claims do not request money damages. *Bowen* held that "a federal district court has jurisdiction" to review APA claims where the plaintiff requests "specific relief" in the form of an injunction or a declaratory judgment. 487 U.S. at 882, 888-901. And the Court rested this holding, in part, on the supposition that CFC jurisdiction is not exclusive; the Court explained that district courts have jurisdiction over APA claims seeking equitable relief even if the "monetary aspects of the case could have been decided in the Claims Court." *Id.* at 910 n.48. It is hard to see how *Bowen*'s jurisdictional holding could stand true if CFC jurisdiction

over a claim "forbids" a plaintiff from bringing a related, equitable claim in district court under the APA.

Litigants bringing cases outside of the Second, Ninth, Tenth, and D.C. circuits, and perhaps within those circuits, might consider arguing that these circuits' holdings are inconsistent with *Bowen* and should not be controlling.

B. Grants and Cooperative Agreements Might Not Be Contracts

Regardless of the circuit, however, litigants suing with respect to grants and cooperative agreements might have strong arguments that the Tucker Act poses no barrier to proceeding in district court because their grants and cooperative agreements simply are not "contracts" under 28 U.S.C. § 1491. To qualify as a "contract" covered by the Tucker Act, some courts have held that grants and cooperative agreements "must contain the four required elements of offer, acceptance, consideration, and proper government authority." *Am. Near E. Refugee Aid v. U.S. Agency for Int'l Dev.*, 703 F. Supp. 3d 126, 132 (D.D.C. 2023) (quotation omitted). The "consideration" element requires that the agreement "render a benefit to the government," which must be "tangible and direct, rather than generalized or incidental." *Id.* (quotation omitted). Merely advancing U.S. "policy interests" or providing a "generalized benefit" for the public good does not qualify as a benefit to the government in the Tucker Act context; the benefit must be more direct, such as providing a "financial benefit." *Id.* at 133-34.

Most grants and cooperative grants do not provide such direct benefits to the government. Indeed, "[t]he entire purpose" of a grant or cooperative agreement "is to transfer a thing of value *to* the [recipient] from the executive agency." *St. Bernard Parish Gov't v. United States*, 134 Fed. Cl. 730, 736 (2017). The courts in *American Near East Refugee Aid* and *St. Bernard* had little difficulty concluding that the plaintiffs' claims were not subject to the CFC's jurisdiction because the relevant cooperative agreements provided no direct benefit to the federal government. *See Am. Near E. Refugee Aid*, 703 F. Supp. 3d at 132-34; *St. Bernard Parish Gov't*, 134 Fed. Cl. at 736. Thus, unless a grant or cooperative agreement is unusually structured, recipients of these funding instruments might assert that their APA claims are not precluded by the Tucker Act because their grants and cooperative agreements are not "contracts."

C. Some APA Claims Cannot Be Filed in the Court of Federal Claims

Another argument that might be available in any circuit is that plaintiffs may assert APA claims grounded in certain constitutional and statutory provisions in district court because the CFC would lack jurisdiction over claims based on those provisions. In this regard, the D.C. Circuit has favorable precedent "categorically reject[ing] the suggestion that a federal district court can be deprived of jurisdiction by the Tucker Act when no jurisdiction lies in the Court of Federal Claims." *Tootle v. Sec'y of the Navy*, 446 F.3d 167, 176 (D.C. Cir. 2006); *see also Yee*, 228 F. Supp. 3d at 56 (explaining that "an action must be brought under the Tucker Act in the Court of Federal Claims" only "if the Court of Federal Claims would have jurisdiction over the matter").

Recall that the CFC lacks jurisdiction over constitutional or statutory claims unless the constitutional or statutory provisions are "money-mandating." The constitutional or statutory provisions that would form the predicate for APA claims challenging the termination of grants and contracts — e.g., constitutional separation-of-powers, the relevant appropriations or authorizing statutes, and/or the Impoundment Control Act — are, as explained above, typically not money-mandating as that phrase has been narrowly interpreted. *See supra* page 4. If a district court dismissed APA claims grounded on these provisions on the basis of the Tucker Act, and the plaintiff then re-filed them in the CFC, the CFC would likely dismiss the claims for lack of jurisdiction as well. The plaintiff would be left with no recourse, precisely the outcome that *Tootle* "categorically reject[ed]." 446 F.3d at 176.

This is one reason that the recent district court decision in *Catholic Bishops*, No. 1:25-cv-465-TNM, https://perma.cc/P6TM-QJ9C, was incorrect. The plaintiff there did not bring contractual claims based on the terms and conditions of its awards, but instead alleged that the termination of its awards violated the Refugee Act of 1980 and the Impoundment Control Act. *Id.* at 6. The court held that the plaintiff was unlikely to establish jurisdiction because the court perceived the plaintiff to be seeking "specific performance" of a contract, which in the court's view is a request that "must be resolved by the Claims Court." *Id.* at 10. But the court failed to grapple with the fact that the plaintiff's claims *cannot be* resolved by the CFC, because the CFC lacks jurisdiction to hear claims predicated on the relevant statutory provisions. The court's holding was therefore erroneous under *Tootle*.

D. Plaintiffs Are Not Seeking Money Damages

Grantees and contractors can make an additional argument, based on *Bowen*, that they are not seeking "money damages" for purposes of § 702 where they are seeking the unfreezing or restoration of their award. As mentioned, *Bowen* held that plaintiffs may bring APA claims seeking "specific relief" via an injunction or declaratory judgment, even if it results in the government having to "pay money" to the plaintiff. 487 U.S. at 893-901. Such relief does not constitute "money damages" for purposes of § 702: "[m]oney damages" reflect compensation as a "substitute" for the government's performance of its obligations, whereas specific relief provides the plaintiff "the very thing to which [it is] entitled," even if the government's performance will result in the payment of money. *Id.* at 895, 901, 910 (quoting *Md. Dep't of Human Resources v. Dep't of Health & Human Servs.*, 763 F.2d 1441 (D.C. Cir. 1985) (Bork, J.)). The Court further held that the prospect of filing suit in the CFC did not provide an "adequate remedy" under § 704, including because the CFC typically cannot grant equitable relief. *Id.* at 901-08.

Applied here, the argument under *Bowen* is straightforward: an injunction unfreezing or restoring a grant or contract provides the plaintiff specific relief to which it is entitled, even if a "byproduct" of the injunction will be that the government makes a "payment of money" to the plaintiff. *Id.* at 900-01, 910. Providing this relief would not represent "money damages" because it is not "compensation" to serve as a "substitute" for the government performing as required. *Id.* at 893-95. For the reasons already described, this argument may be more difficult in certain circuits given their post-*Bowen* precedents. But it is correct under *Bowen* and therefore plaintiffs might consider advancing it regardless of the jurisdiction.

E. Claims That Are Not "In Essence" Contract Claims

Finally, an action may be filed in district court rather than the CFC where it is not "essentially a contract action." *Yee*, 228 F. Supp. 3d at 56. Some courts, including the D.C. Circuit, have applied a two-part inquiry to determine whether claims are essentially contractual. These courts assess: (1) the "source of the rights" for the claims, and (2) the "type of relief sought." *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982).

These two factors may cut in opposite directions with claims seeking the unfreezing or restoration of grants and contracts, at least in the D.C. Circuit. On the first factor, the source of the rights for plaintiffs' claims are not contractual where the APA claims are

predicated on the Constitution or federal statutes and not the terms and conditions of the award. That counsels in favor of the district courts having jurisdiction. *See Transohio*, 967 That court has held that where the relief sought is something comparable to "specific performance" of a contract, including reinstatement of a terminated contract, the relief sought can be effectively money damages and therefore weighs in favor of jurisdiction lying in the CFC. *See, e.g.*, *Ingersoll-Rand Co. v. United States*, 780 F.2d 74, 79-80 (D.C. Cir. 1985).

There do not appear to be any cases from the D.C. Circuit or elsewhere addressing how to resolve the two-part inquiry when the two factors cut in opposite directions. The district court in *Catholic Bishops* treated the failure to meet either prong as sufficient to defeat jurisdiction in district court, as the court held jurisdiction likely lacking based solely on the second prong. Mem. Order at 9. But that may not be the correct approach. If the purpose of the inquiry is to determine whether the "essence" of the clam is contractual, it may make more sense to holistically evaluate both prongs together and assess the essence of the claim in light of both considerations.

IV. CONCLUSION

The government's Tucker Act defense in cases challenging the termination of grants and contracts presents a serious issue, but one that litigants might often be able to overcome with the right arguments and framing of their claims. Litigants might carefully study the relevant case law in deciding where to file their claims and advancing the best jurisdictional arguments once filed.