

Is DOGE Breaking the Law?

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[00:00:00.3] Jeffrey Rosen: Elon Musk and the newly created Department of Government Efficiency have been freezing federal spending and laying off federal employees, raising questions about the scope of their legal authority. Hello, friends. I'm Jeffrey Rosen, President and CEO of the National Constitution center, and welcome to We The People, a weekly show of constitutional debate. The National Constitution center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. This week I'm delighted to welcome two leading legal thinkers to debate whether or not the Department of Government Efficiency or DOGE has acted lawfully. Kate Huddleston is Senior Legal Counsel for Litigation at the Campaign Legal Center. A graduate of Princeton and Yale Law School, she clerked for Judge Stephen Reinhardt of the Ninth Circuit and Justice Goodwin Liu of the Supreme Court of California. Before joining CLC, she worked in impact litigation at the ACLU in Texas and Arizona. Kate and CLC are suing Elon Musk and DOGE in the DC District Court. Kate, it is wonderful to welcome you to We The People.

[00:01:13.2] Kate Huddleston: Thank you so much. Thank you so much for having me here today.

[00:01:16.5] Jeffrey Rosen: And Michael McConnell is the Richard and Francis Mallory professor and Director of the Constitutional Law center at Stanford Law School and a Senior Fellow at the Hoover Institution. He served as judge on the US Court of Appeals for the 10th Circuit, is co-chair of the Meta Oversight Board, and a great friend of We The People. Michael, it is always wonderful to welcome you back.

[00:01:37.4] Michael McConnell: Yeah, thanks for having me back, Jeff.

[00:01:40.3] Jeffrey Rosen: Well, let's begin with a simple but perhaps useful question, Kate. What does DOGE actually do and what is its legal authority?

[00:01:50.5] Kate Huddleston: Great question. So DOGE, the so-called Department of Government Efficiency, is not a federal executive department. It is instead an organization that is

the renamed US Digital Service, created purportedly with a very narrow focus of updating technology. In practice, DOGE and Elon Musk at its head are engaged in a lawless, expansive role in the federal government. So DOGE and Mr. Musk are terminating and canceling federal grants and contracts, working to stop federal disbursements, terminating federal workers and reducing the federal workforce, and dismantling federal agencies.

[00:02:34.1] Jeffrey Rosen: Thank you so much for that. Michael, what would you say about what DOGE does and what its legal authority is?

[00:02:40.3] Michael McConnell: So DOGE is an entity within the Executive Office of the President, a rename from the old Digital Service and they are people who are hired. They are hired by individual agencies as special government employees within the agencies, and they have access to the actual operational details of what's going on. So they look at actual payment systems. They look at where the money is actually going down at the granular level. And then there is also within every agency, one DOGE person who is kind of at the top of the pyramid who advises the agency head. And the executive order requires the agency head to consult with that person on a variety of things. Now, DOGE has no authority whatsoever except to investigate, to look, they have access to what's going on in the agencies. And then the guys down at the bottom filter information up to the fellow at the top who then advises the agency head. DOGE does not cut spending. DOGE does not fire people. DOGE does not cancel contracts. What DOGE does is it advises the agency head and the agency head then exercises the authority that's been vested in him or her under the statutes. Now, it is true that DOGE is extremely influential, but DOGE does not actually do the canceling and the firing and the reductions.

[00:04:23.9] Jeffrey Rosen: Many thanks for that. Well, let's now turn to the lawsuit that CLC has filed challenging DOGE's legality. There are four counts. First, that DOGE has no legal authority under the US Constitution to direct cuts to the federal budget. Second, that it violates the separation of powers. Third, that it violates the Appointments Clause. And fourth, that it violates the Administrative Procedure Act. I want to delve into each of those, but let's begin with the Appointments Clause. The Appointments Clause of the Constitution requires that principal officers be nominated by the President and confirmed by the US senate. And Kate, your complaint argues that Elon Musk is exercising significant authority and is acting as a principal officer of the United States, but hasn't been confirmed by the Senate in violation of the Appointment clause. Tell us more about that claim.

[00:05:16.3] Kate Huddleston: Sure. So our complaint argues that Elon Musk is exercising significant authority in the US Government in excess of a principal officer in some instances, and certainly to the degree of a principal officer. So significant authority under the Appointments Clause includes determinations about eligibility for funds such as contracts or purposes, and also carrying out important functions with significant discretion. Elon Musk is engaged in all of those

actions. It is clear from his Twitter that he is engaged in lawlessly dismantling federal agencies and that he is directly engaged in both the termination of federal grants and contracts and also in clawing back federal funds. All of that is authority that is significant, and that would require Senate confirmation under the Appointments Clause of the Constitution. So the Appointments Clause is very clear that principal officers must be appointed by the President with the advice and consent of the Senate. Elon Musk has no lawful authority to exercise this degree of power without Senate confirmation.

[00:06:32.1] Jeffrey Rosen: Thank you for emphasizing that idea of significant authority. As your brief argues, the Supreme Court has laid out two requirements for an individual to qualify as an officer. First, he or she has to occupy a continuing position. And second, he or she has to exercise significant authority. Michael, what is your response to Kate's claim and her complaint that Elon Musk is a principal officer and therefore must be confirmed by the US senate?

[00:07:00.1] Michael McConnell: Well, first, let's note that there's a lot of extravagant rhetoric that comes from both the President and Elon Musk about what they are doing. And it's often loose language and makes it sound as though they are actually doing things that they have no authority to do, and they're not doing them. What they're doing is advising. So Elon Musk has significant influence, but no authority. I did take a quick glance at Kate's complaint. I don't know it very well, so I don't know the details of it, but it quite properly uses the term de facto authority. And that is what Elon Musk has. Not official authority, not legal authority, but de facto authority. He's very much like figures we've had quite frequently in the recent past. We often call them czars, where the President appoints someone like to be the energy Czar who will direct policy having to do with energy or the immigration czar, or, you know, we have a number of these people. None of them are ever appointed pursuant to the Appointments Clause, but what they do is they represent the administration's policy in a particular area and the agency heads do what they say, not because they're in the chain of command, but because they know that this person has the ear of the President and reflects the policy of the President. So what they have is advisory authority. And such people have never been subject to the Appointments Clause.

[00:08:35.1] Jeffrey Rosen: Thank you so much for that, Kate. Supporting Michael's arguments, the government argues in response to your Appointments clause argument that Mr. Musk does not, in fact, wield power without proper appointments, there's no office whose authority he allegedly wields. And that they also note the history of presidential advisors dating back to Andrew Jackson, who have advised the President without a formal role. This tracks long standing historical practice. The government argues since at least the time of President Jackson, presidents have convened advisory groups composed of private citizens to meet periodically. Hence the term kitchen Cabinet. What's your response to all that?

[00:09:20.4] Kate Huddleston: Sure. So two sets of responses there. The first is purely factual. It is clear that Mr. Musk and DOGE are exercising actual directive authority in the United States government. And one example I would point to is in our complaint, and it's an email exchange within the Consumer Financial Protection Bureau, the CFPB, an agency targeted by DOGE. And so in that email exchange, a CFPB employee emailed the CFPB Chief Operating Officer saying that he wanted to clarify the level of support that we should be providing, despite the fact that CFPB had been directed not to perform any work tasks and suggested a list of minimum tasks that included supporting us DOGE members with requests. Then the Chief Operating Officer of the CFPB responded, that is all correct. The USDS team will let you or me know if any other work is needed. So that's just one example. Our brief is replete with them. There are many examples of DOGE and Mr. Musk indicating and individuals within the federal government indicating that in fact, DOGE and Mr. Musk are providing directives rather than merely providing advice. So that's on a factual level and then more deeply on the point of advice again, versus directives.

[00:10:52.4] Kate Huddleston: What we have here is a position that the administration is really playing a bit of a shell game. So Mr. Musk has repeatedly said he is the head of DOGE. President Trump said at the joint address to Congress that Mr. Musk was the head of DOGE, that he had put Mr. Musk in charge of DOGE. Meanwhile, the administration has stated in court that there is a different individual also named in our complaint as a defendant who is the US digital services administrator. Nevertheless, Mr. Musk is exercising the authority within DOGE or the authority over DOGE commensurate with being the head of DOGE. And what we argue in our complaint is that the administration essentially can't have it both ways. Mr. Musk is, in fact, operating DOGE, and the courts should recognize that accordingly. The other thing I note is just on the advisory point, Mr. Musk initially was named as someone who would be working outside of government in an advisory capacity to the administration. That was back in November 2024, when President Trump first said he was creating the Department Of Government efficiency, that Mr. Musk and Vivek Ramaswamy would be outside of government. Nevertheless, Mr. Musk has in fact been named to a position within government, and he is operating internally in the federal government from that position of authority.

[00:12:27.9] Jeffrey Rosen: Thank you so much for that, Michael, your response.

[00:12:32.5] Michael McConnell: So, Kate is right that the White House says things that are not exactly the thing that's going on legally. So, yes, Trump says that Musk is heading up DOGE, but in fact, Musk isn't heading up DOGE. He's not the administrator. Musk's official position is he is senior advisor to the President. And that's all that he is. Now, Kate gives us an elaborate factual example from the CFPB. If that's the best example she has, this lawsuit does not have much behind it, because if you listen to what she said, this is an employee at CFPB who has been instructed to give support to the DOGE of people. Well, surely the President has the power to tell

an agency that they need to support the advisors. So what he's done is he's sent these people into the various agencies to try to figure out what they're actually doing on the ground. Now, this is actually, I think, not a bad idea, because very typically, and this is based on my experience in the federal government too, very typically, the agency head does not know what's going on on the ground. There are layers of bureaucrats between the agency head and the actual operations.

[00:13:54.9] Michael McConnell: And the agency head will ask, well, you know, what's actually happening. But the people who respond up through the chain of command are the very people whose actions are under scrutiny. So the theory here is to send some outsiders in to find out what is really happening and report up without, not outside of the usual bureaucracy, to the DOGE advisor at the top, who can then tell the agency head what is happening. And the one power, one actual authority that the DOGE people have is to get access to that information. And that's what the CFPB employee was apparently asking about, is how much support, how much do we have to give to the DOGE person who's trying to find out what's going on deep in the bowels of the bureaucracy? I don't understand what could possibly be wrong with that.

[00:14:51.8] Jeffrey Rosen: Kate, your response?

[00:14:53.6] Kate Huddleston: Yes. So that's just one example. Other examples that we describe in the complaint are, for example, on X, Mr. Musk's social media platform, he amplified a post stating that DOGE terminated a \$2.3 million contract for a military training course, implicitly confirming that information and saying, can you believe they were spending your tax dollars on this poop emoji? Another example. So we discuss how DOGE was described as terminating funding that was, "to fund condoms in Gaza," according to the White House press secretary. Now, it has later come out that that was, in fact, funding for tuberculosis and HIV health care in the Gaza province of Mozambique. In a press conference in the Oval Office, Mr. Musk confirmed that he was the source of this claim, saying some of the things I state will be incorrect, and also indicated that he made the decision based on a substantive evaluation of the value of the funding. Mr. Musk has also said in a Cabinet meeting that they accidentally cut off funding for Ebola prevention. So there have been many statements by Mr. Musk by the White House. The White House press secretary has described DOGE as stopping payments from going out the door, and we believe that those statements should be taken at their word.

[00:16:24.7] Kate Huddleston: We have requested expedited discovery to gain more information about the ways in which DOGE and Mr. Musk are exercising authority in the federal government. But those statements are statements that have been made by Mr. Musk in his governmental capacity by the White House press secretary, and they are statements that should be taken at face value by the American people.

[00:16:51.8] Jeffrey Rosen: Michael how is the Supreme Court likely to evaluate the Appointments Clause claim? This comes under the background of a series of Justices who have expressed skepticism about the *Morrison v. Olson* case. That was a case from 1988 that upheld the independent counsel and allowed a special court to recommend the appointment of a counsel on the recommendation of the Attorney General. The court in *Morrison* employed a functionless multi factor analysis for deciding whether someone was an inferior officer, including his removability, duties, jurisdiction and duration. Justice Clarence Thomas, among others, has questioned *Morrison* and sided with Justice Scalia and his dissent. How do you see the justices on the Court evaluating the Appointments Clause claim in light of their formalist or functionalist approach to the question?

[00:17:46.0] Michael McConnell: Well, first, let's be really clear about what's going on here. The DOGE people recommend various changes to the agency head and then they claim, and then the agency head is the person who actually puts them into effect. Then, of course, on Twitter or X or in press statements, Musk and DOGE and the White House claim credit for that. They say DOGE did something, when in fact what DOGE did is DOGE found, uncovered what was going on and made the recommendation that the person with authority to do it do it. And there have been mistakes which, to Musk's credit, they've admitted that there have been some mistakes. But that doesn't actually, you know, the fact that on X they claim credit does not mean that they actually have legal authority. And that's all that the courts are going to care about as to what the Supreme Court is going to do. There has never been a case *Morrison v. Olson* with all respect, Jeff, *Morrison v. Olson* has nothing to do with this. There has never been a case in the Supreme Court where anyone has ever claimed that an advisor to the President has to go through advice and consent, even though he has no statutory authority.

[00:19:06.1] Michael McConnell: The Appointments Clause is about offices, and offices are vested by Congress with statutory authority. They have nothing to do with White House people who have significant influence. White House Chief of Staff doesn't go through the Appointments Clause, but surely that person has significant authority. That person can pick up the phone and tell the Secretary of HUD what the President wants and it's going to happen. But that is not what the Appointments Clause is about. It would be astonishing for the Supreme Court to get involved in that.

[00:19:45.9] Jeffrey Rosen: Kate, do you think that the debate over *Morrison v. Olson* and whether there should be a functionalist or formal approach to these questions may play out on the Supreme Court? And how do you see the US Supreme Court evaluating your Appointments Clause claim?

[00:20:02.8] Kate Huddleston: So I would say first, we are very early on in this litigation and there is no guarantee that it will go to the US Supreme Court. We're currently in District Court in

DC. We certainly think that the formalist versus functionalist distinction with respect to the Appointments Clause will likely be relevant as the litigation unfolds. And I think to that end, what you're seeing in this discussion that we're having is very much fact based, evidentiary inquiry as well. And we think that is really going to be critical here to get to the bottom of what is happening with DOGE and Mr. Musk. As you can tell from this discussion, DOGE and Mr. Musk have not been transparent. They have in fact obfuscated the actions that DOGE is undertaking. It is clear that there are some really significant actions. So for one example, the late February executive order regarding cutting costs, including DOGE, directs that agency heads must consult with the agency's DOGE team lead about any individualized or categorical exceptions to a freeze on all agency employee credit cards.

[00:21:17.8] Kate Huddleston: So DOGE is exercising authority over federal spending, whether a federal employee can use an agency credit card, and that kind of exercise of authority is in our view, very significant to this overarching question and really the kind of thing that requires in the gap between what Professor McConnell is describing and in fact, what both the administration and Mr. Musk are describing publicly. We believe that we have by far the better of that argument, but it really is grounded in a factual question that I think goes to the functional nature of the Appointments Clause inquiry.

[00:22:05.2] Jeffrey Rosen: Thank you for that, Michael. Just to Wrap up the Appointments Clause discussion. The government argues that Elon Musk is a special government employee who doesn't occupy a continuing position. He doesn't exercise authority, he only has influence. And that even if he could be said to have directed some of the decisions involving DOGE in a functional sense, as Kate alleges, that wouldn't establish an Appointment Clause violation. As long as a duly authorized agency official takes formal responsibility for these decisions, the Appointments Clause is satisfied. Is that your position? And how do you think the US Supreme Court will evaluate it?

[00:22:47.3] Michael McConnell: Well, that's exactly right. The only actual authority that the DOGE people have is to be able to get information and then to advise the agency at even what Kate just told us was that the lead DOGE person within the agency has to be consulted before the agency head does something about the credit card use of the employees. Well, surely the agency head has control over how employees can use official credit cards. And if the President wants to ask to require, the agency has to consult with somebody who's been looking into that. Again, I don't see how there could possibly be anything wrong with that. And if so, who knows? I mean, I don't think there's any chance that the Supreme Court is going to hold that mere advisory officials are subject to the Appointments Clause. And we do know, but it hasn't gotten to them. That did get to the DC Circuit in a case called Andrade back in 1987 in which there was a very similar claim made and the DC Circuit held exactly that, that the Appointments Clause doesn't

apply to advisory people, even when you can show factually that the agency heads are doing or taking the advice taking from the advisory person.

[00:24:20.2] Jeffrey Rosen: Well, let's turn now to the separation of powers claim. Kate, your complaint argues that Congress, not the executive branch, holds legislative power and the executive branch has no power to enact, to amend or to repeal statutes, including appropriations statutes. You say that the government has violated the separation of powers by directing and causing the termination of grants and contracts under previously appropriated funds, firing federal workers, reducing the size of the workforce, abolishing federal departments, and refusing to spend money appropriated by Congress. Tell us more about your separation of powers claim.

[00:24:55.9] Kate Huddleston: So our separation of powers claim is exactly that, that Congress has the power of the purse. Congress has the power to make federal spending decisions, And DOGE and Mr. Musk have co-opted that power to make federal spending decisions themselves. As we describe in the complaint. It is clear that there is no authority for DOGE or Mr. Musk to impound federal funds. It is clear that Congress has the power in this context, and the Supreme Court has previously held that Congress has the power in this area and that the executive does not have power to enact, amend or repeal statutes, which includes appropriation statutes.

[00:25:47.6] Jeffrey Rosen: Michael, Kate's brief has lots of examples of DOGE enforced freezes on federal spending, which she calls impoundment. I think you've argued that DOGE has not, in fact, attempted to impound money and that much of what Elon Musk has interfered with are discretionary government grants. Tell us about your response to the separation of powers claims.

[00:26:08.7] Michael McConnell: Well, Kate is entirely correct. Congress has the power of the purse. The executive does not have the authority to countermand that. But let's talk about how these things are done. Congress creates agencies and has appropriations for certain purposes. Congress does not actually specify what the grants are going to be, who should get the contracts. Those are left to the discretion of the executive branch, and they can be given or taken away in accordance with executive branch policy. And that's all that's been going on so far, is that what the DOGE people have done is that they've looked at what the actual grants and contracts are doing, and some of them, they believe, do not comport with proper policy and they have been canceled. That is not impoundment. It is simply the exercise of the executive part of the function. Impoundment is when the executive actually refuses to spend the sum appropriated by Congress, but the sum does not have when Congress passes an appropriation bill, it doesn't have to be spent the following Monday. The executives can take their time in spending it to make sure that the spending accords with their understanding of what would be a good way to carry out the congressional action.

[00:27:37.5] Michael McConnell: Now, I do know, we know from public statements that the head of the OMB, and perhaps President Trump himself, may have in mind a constitutional challenge to the Impoundment Control Act. I know a fair amount about this, and I don't think they have a proper basis for that. I'm pretty confident that the Impoundment Control Act will be upheld as constitutional. But so far there hasn't been any impoundment. Maybe they're setting us up for a constitutional challenge down the road, but that is so far the cancellation of grants and contracts is not an impoundment.

[00:28:15.8] Jeffrey Rosen: Kate, Michael has just said that he thinks that the Impoundment Control Act is, in fact, constitutional. A significant statement, but this is not impoundment because the president has a lot of discretion about what grants satisfy foreign policy. And it would be impoundment if he didn't spend money at all. But it's not impoundment when he cancels a particular grant.

[00:28:35.9] Kate Huddleston: Yes. So I completely agree as to the constitutionality of the Impoundment Control Act. The question of what is happening right now, it is clear that DOGE and Mr. Musk's actions are attempting to effectuate an end run around Congress and our impoundment. So Mr. Musk has, for example, stated that he dismantled USAID and that he fed the agency into the wood chipper. He has also repeatedly stated that he and DOGE have canceled or directed the cancellation of federal grants and contracts related to foreign aid on the basis that he disagrees with those contracts as a policy matter and that the scope of the actions is not small. The scope of the actions is, functionally speaking, to impair the spending of the money appropriated by Congress on a massive scale in particular areas that Mr. Musk disfavors. And so what we are seeing is, functionally speaking, impoundment.

[00:29:48.1] Jeffrey Rosen: Michael, we're hearing again this distinction between formal and functional government actions. How relevant is that? What's your response to Kate's claim that given the scale of these decisions not to spend money, it is functionally empowerment? And tell us about how a challenge to the Impoundment Control act itself might work its way through the courts.

[00:30:10.2] Michael McConnell: So I don't question we should look at this functionally, what's actually happening, but what's actually happening is, and it is widespread. Kate is right about this. It's really pretty astonishing. And politically, I might, you know, I'm not a huge supporter of a lot of these things. On the matter of policy, we're talking about law here. And the President does have the power not only to do little things, but to do big things as long as it's within the scope of executive discretion. Now, as to the Impoundment Control Act, what this does is that it provides that the President cannot refuse to spend appropriated funds. And if he does that, first of all, the Comptroller General will issue an opinion that the act was violated. And the statute gives the Comptroller General, who is a congressional officer, by the way, standing to bring an action

in court. But also recipients of the money have standing. When President Clinton did not spend a great deal of money appropriated by Congress because he thought he had authority under another statute not to do that, it went up to the Supreme Court, and the Supreme Court held that President Clinton had exceeded his authority in not spending that money. I assume that a challenge today would operate exactly the same way as it has in the past.

[00:31:50.4] Jeffrey Rosen: Kate, how are these impoundment claims likely to be resolved by the US Supreme Court, and how do they interact with the impoundment challenge that's working its way up? Just last week, we had Judge Amir Ali with a temporary restraining order. The US Supreme Court refused to block that by a 5 to 4 vote. And the question there was whether or not the decision to cancel USAID violated impoundment. So tell us about the relationship between those cases.

[00:32:28.2] Kate Huddleston: Yeah. So there are a wide range of impoundment cases that are working their way through the federal courts. The conventional wisdom is that one or more of these cases will likely come before the Supreme Court. That obviously remains to be seen on the merits. But there are cases related to the OMB federal funding freeze. So this was the OMB memo that created an across the board, blanket "pause" or "freeze" on federal funding. There's a case involving private plaintiffs, and then there's also a case brought by state plaintiffs. There are a variety of cases that raise impoundment issues specific to individual agencies. So, for example, the USAID case you just discussed, and then there is the DOGE set of impoundment issues as well. So I think it's likely that one or more of those ends up before the Supreme Court. On the merits, it remains to be seen, but I think on the merits, it is very clear that Congress has the power of the purse and that these cases have the better of the argument.

[00:33:36.2] Jeffrey Rosen: Michael, in that USAID case that the US Supreme Court issued an opinion on last week, Justice Alito, in his dissent from the denial of cert, joined by Justices Thomas, Gorsuch and Kavanaugh, said today the Court makes a most unfortunate misstep that rewards an act of judicial hubris and imposes a \$2 billion penalty on American taxpayers. Tell us what Justice Alito was getting at and what that says about the Court's approach to impoundment cases more generally.

[00:34:08.5] Michael McConnell: So in this case, the district court had a very broad and difficult to understand order requiring that the government send out, like, \$2 million to grantees, even though the President had determined that those grants should be terminated. That goes up to the Supreme Court, and I think the Court is trying its best to deal with these in a judicious way. What the Court said is it would not stay that decision, but it did tell the judge that he needed to go back and rethink and be clearer about it. It then went back down to the judge, and just a couple of days ago, the judge was issued a more detailed order. But whether that's going to be upheld even by the Court of Appeals is quite up in the air. Who knows what's going to happen? I

interpreted Roberts' order asking him to rethink as expressing considerable skepticism as to whether maybe he had gotten it wrong the first time, but in a typical John Roberts gentle way, giving him a chance to rethink. There's another USAID case in the District Court in District of Columbia which is also interesting. This is the AFS decision.

[00:35:41.4] Michael McConnell: And in this case, the district court issued a temporary restraining order with respect to USAID. And then upon finding out what the actual facts were, he withdrew. This judge dissolved his own temporary restraining order, saying that the various claims of harm that he had honored for temporary purposes long enough to look at them, he said that they were highly unlikely. Others were overstated, and some were too hypothetical to warrant relief. And one of the last lines in the opinion is that the agency referring to USAID is still standing. So when Musk says it's been dismantled, well, again, this is political hyperbole. USAID has not been dismantled. It has been folded in with the State Department and given new leadership rather than its old independent leadership. And that is not dismantling the organization. Let me just say one more thing about USAID. This is a foreign policy based organization. Their grants are supposed to be in service of US Foreign policy. This means that the President has an unusually large degree of discretion because he does get to decide policy. So, I mean, just to give a single example about this, quite a lot of what the Biden administration wanted to spend, give grants about had to do with things like climate change.

[00:37:13.3] Michael McConnell: And for better or worse, and I'm not arguing the policy here, for better or worse, this administration does not believe that climate change is a major part of our foreign policy, and so it has canceled the grants that supported that policy. And for a US District judge to say that the money still needs to flow is, I think, at least highly unusual.

[00:37:40.7] Jeffrey Rosen: Let's turn to the Administrative Procedure Act. Judge Ali in the USAID case hung his hat on the fact that the Administrative Procedure act forbids arbitrary and capricious judgments. He said defendants haven't offered any explanation for why a blanket suspension, suspension of all congressionally appropriated foreign aid is rational as opposed to arbitrary and capricious. And Kate, one of your claims is that the Trump administration has violated the Administrative Procedure Act by terminating grants and contracts in arbitrary and capricious ways. And you say they're arbitrary and capricious. Because they're illogical and rational, fail to acknowledge important aspects of the problem, such as the consequences for public safety, fail to account for reliance interests, and depart from prior policy without acknowledgment or reasoned explanation. Tell us more about your Administrative Procedure act claim for sure.

[00:38:37.9] Kate Huddleston: For sure. And this really dovetails on the USAID issue. So just to sort of go back to that for a second, one of the aspects of USAID that was particularly troubling, DOGE reportedly sought access to the US Treasury's payments system to stop all

authorized payments certified by USAID. And so that action itself is deeply troubling and unusual as well. There is a lot of unusual activity directed by DOGE and Mr. Musk at agencies, and that activity has led to illogical, irrational consequences that, as we describe in our complaint, as you said, depart from prior policies and also fail to take into account interests like safety. So just to provide sort of one example, to put a little bit more bones on the safety issue, one of our plaintiffs is Sierra Club, which has trips that it organizes to national parks, national forests, and federal lands throughout the country. In those trips, Sierra Club depends on the availability of search and rescue support at parks like Yosemite. That search and rescue support is being dismantled by DOGE and Mr. Musk's actions within the National Park Service and then further depends on reports of the weather from the National Weather Service.

[00:40:08.5] Kate Huddleston: Likewise, a lot of National Weather Service employees have been terminated and that has led to issues with weather reporting, issues with reporting or the deployment of certain balloons, for example, in areas that Sierra Club members frequent. And so that's the aspect that these agencies in implementing, to the extent that they are implementing, DOGE and Mr. Musk's actions are failing to go through the reasoned decision making process that the Administrative Procedure act requires.

[00:40:46.7] Jeffrey Rosen: Michael, what is your response to Kate's claim that many of Elon Musk's actions violate the Administrative Procedure Act's prohibition against arbitrary and capricious action?

[00:40:57.4] Michael McConnell: So I have to say I'm not an administrative law scholar, but I have studied it and had some cases. I have not ever heard of contractor grants or employment cases being challenged under the Administrative Procedure Act, and I suspect it won't happen. Congress has set up specific ways in which that kind of agency action is going to be challenged. So, for example, if workers have been terminated, they have a right to go to the Merit Systems Protection Board and up. If a contractor has been canceled, they have the right to bring their claim in a court of claims. Grantees can go to court if there's been an unconstitutional way in which their grant has been dealt with, but I don't believe it has ever been under the Administrative Procedure Act. And the reason why that matters is that this standard of arbitrary and capriciousness should not, and I don't believe ever has been applied to fully discretionary actions of the executive branch. And when the President determines that the foreign policy interests of the United States are not furthered by particular grants or contracts within AID, that is a presidential decision to be made.

[00:42:21.2] Michael McConnell: Whether Kate thinks that some of these are irrational or not very well thought through or have safety implications or so forth is essentially irrelevant because it is the President who makes decisions, not the courts. Courts do not make that kind of decision. Now, Kate has mentioned some examples of Search and rescue and weather balloons. You

know, I confess I don't know anything about the facts here, but I'd be really surprised if search and rescue has ended in the national parks. I'd be really surprised if weather balloons are not being used by the Weather Bureau. My guess, not knowing, again, anything about what Kate has done, my guess is that there were probationary employees who have been severed that happen to work for those particular agencies. And one thing that the Trump administration is trying to do is to bring down our enormous budget deficit by reducing the federal workforce. And some of those might actually be in Search and Rescue, for all I know.

[00:43:32.9] Jeffrey Rosen: Kate, anything more on the Administrative Procedure Act claim? And then I want you to introduce your fourth and final claim, which is that Elon Musk is operating without legal authority under the US constitution or federal statutes to direct cuts to the federal budget and federal spending. And therefore, his actions are what you call ultra vires.

[00:43:58.6] Kate Huddleston: For sure. So first, I would note that EPA claims are ordinary when agencies act in excess of statutory authority, when agencies act in an arbitrary and capricious manner. There are EPA claims in other cases challenging actions by, for example, the Office of Personnel Management, right now challenging other actions by other government agencies. What Professor McConnell is referring to about channeling is something that happens for federal employees. But our plaintiffs are instead individuals who have been harmed by agency action but are not themselves employed by the federal government. And so the EPA claims challenging the agency's actions in implementing Mr. Musk and DOGE's actions are entirely appropriate in this context. And that really brings us to the ultra vires claim, which I think is in some ways the heart of the lawsuit. It is that Mr. Musk and DOGE are operating without any lawful authority so there is no statute that authorizes Mr. Musk or DOGE's actions. There is no lawful authority, no legal authority for Mr. Musk or DOGE to direct cuts to the federal budget and federal spending. There's no authorization for them to terminate federal grants and contracts, and there's no authorization for them to direct the termination of federal employees.

[00:45:26.1] Kate Huddleston: Again, all of this factually speaking, we have alleged in our complaint and we describe in our complaint how Congress has instead allocated the authority that Mr. Musk and DOGE purport to exercise to other parts of the government. So for example, the Office of Personnel Management has control over personnel management in the federal executive branch. The Director and the Deputy Director of the Office of Personnel Management, those are both Senate confirmed positions. Those are both positions that Congress has created and that require Senate confirmation. And this is an important part of our government right that Congress has set up this office separate and apart from other portions of the executive branch. Congress has created executive departments, executive agencies. This is one of them. And I think the Office of Personnel Management is a really good example of why not losing sight of Congress's role in all of this, including in executive departments and agencies within the

executive Branch is so important. So the Office of Personnel Management grew out of it. It's from the 1970s, but it grew out of an office that was created in the 1880s in The Pendleton Civil Service Reform Act that replaced the Spoils system of the 1800s.

[00:46:56.6] Kate Huddleston: So this is a revolution in the federal bureaucracy. And under, back in the 1800s, under the Spoils System, basically what Presidents had done is they had put bureaucrats in place as a reward for different political actions. And in 1883, Congress said it's time to create a merit based system. The Office of Personnel Management is the instantiation of that merit based system and a judgment by Congress that there need to be protections for federal employees. This is just one example. We also, as we discuss in our complaint, describe how Congress has created an audit system. None of this is under the purview of DOGE. None of this is under the purview of Mr. Musk. Congress has set up departments and agencies to undertake these functions. And Mr. Musk and DOGE are really co-opting those functions and co-opting those other portions of government to exercise sweeping lawless power throughout the executive branch. And this is really not legally permissible. And there's just no legal authority for them to undertake these actions.

[00:48:12.2] Jeffrey Rosen: Michael as Kate says the Pendleton Act was the culmination of the main post war 19th century reform movement which was to eliminate the Spoils system and create civil service protections. Kate said that Congress has acted on that movement by vesting in the Office of Personnel Management the Framework for the Management of Federal Employees. It hasn't authorized DOGE to cut spending of appropriated funds. And as a result, DOGE is ultra vires because it has no legal authority to operate. What is your response?

[00:48:47.6] Michael McConnell: Well, you know, Kate is right about the law on all of these points, but it simply doesn't describe the authority of DOGE. The personnel implications here have nothing to do with the Spoils system. Trump isn't hiring Republicans here. What he's doing is he's trying to reduce the size of the federal workforce, and that is not contrary to civil service reform. The executive branch has authority to decide how many people it needs in order to carry out the functions that Congress has created for it. But the general ultra vires point is, Kate says, and she's absolutely right, DOGE does not have authority to do any of these things. And in fact, DOGE doesn't do any of these things. The only authority DOGE has is to advise the agency heads who do have authority to do all of these things. And the President has a perfect right to tell his agency heads that they ought to consult with whomever he wants. But in this case, he set up a system so that we have independent folks who go down and find out what's really happening on the ground. Where is the money actually going? Who's actually getting the grants? What are those grants for?

[00:50:17.0] Michael McConnell: Are they going? Are payments being made to people who really need or entitled to it for what they're doing? Do the grants serve the administration's

understanding of the way these programs should be properly implemented? And then that information gets funneled directly up to the top through the DOGE advisor at the top of the agency. And if the agency head then issues an order based upon that advice, there is nothing contrary to the law in that the agency head has not only the authority to do what Congress has put in that person's hand, but also has the authority to take advice from whomever he wants. And actually, what that means in practice is whomever the President tells him to take advice from.

[00:51:09.9] Jeffrey Rosen: Kate, he agrees with you that DOGE doesn't have legal authority, but says it's not exercising it and it's just advising the agency heads.

[00:51:17.1] Kate Huddleston: Yes. So I think, first of all, DOGE and Mr. Musk have said repeatedly that they're engaged in an auditing process. That auditing process is likewise lawless. So Congress has created a comprehensive system for reviewing federal spending, and that is through the Government Accountability Office, which is a legislative branch agency. It's the chief auditor for the federal government. And it, like the Office of Personnel Management, is led by someone who is confirmed by the Senate, in this case, the Comptroller General. And Congress has set up an entire system of federal audits that runs through GAO that's led by the Comptroller General. And that system set up by Congress includes agencies to some extent. It often includes agency inspectors general. It doesn't include DOGE, it doesn't include Mr. Musk. So this is another example of Mr. Musk and DOGE lawlessly taking over the authority of other federal departments and agencies. Just on the facts, again, Professor McConnell and I have a fundamental disagreement, it sounds like, as to what is actually happening on the ground. Again, we take the statements of DOGE and the statements of Mr. Musk at face value to show that DOGE and Mr. Musk are engaged in a really expansive role throughout the federal government, including directing the termination of federal ransom contracts and directing personnel decisions.

[00:52:47.4] Kate Huddleston: Another example I would point to is Mr. Musk's fork in the Road email, which echoes an email that was sent to Twitter shortly after Mr. Musk took over that company. That's the "deferred resignation email". There are a lot of debates over whether on an employment side, that email is permissible, but it's certainly not within the authority of DOGE or Mr. Musk to create this kind of program or to direct personnel decisions. And it's clear from the totality of the circumstances that's, in fact, what's happened. Similarly, the five things email that Mr. Musk stated he was directing on Twitter is now a regularly scheduled part of government activity. And these are just a couple of the examples of the ways in which DOGE and Mr. Musk, on a factual basis, we think it's clear that they are, in fact, driving decision making, that they are directing decision making, and that this is no mere sort of like, recommendation or advisory role.

[00:53:53.8] Jeffrey Rosen: Very interesting. It is also interesting how this distinction between functional and formal exercise of authority has recurred throughout our conversation. And in all four of these categories, Kate is arguing that functionally, Mr. Musk is exercising this authority.

And Michael, I think you're arguing for a more formalistic approach, but what's your final response on the ultra vires point?

[00:54:16.6] Michael McConnell: Well, I would just counsel against taking political rhetoric on X at face value, which is what Kate has said they're doing. The question is not what kinds of extravagant claims Elon Musk or Donald Trump are making about things. The question is, what is actually going on as a legal matter? And as a legal matter, agency heads are issuing the orders that Kate objects to. And the agency heads may very well be taking the advice from the DOGE people, but agency heads can take advice from whomever they want to.

[00:54:54.3] Jeffrey Rosen: Thank you for that. A practical question, and then we'll sum up. Kate, if the US Supreme Court agrees with you on any of these claims, what's likely to happen if they agree on the Appointments Clause claim? Could President Trump simply nominate Elon Musk and have him confirmed by the Senate? Is the Supreme Court or other courts likely, in fact, to order the dispensation of funds, or could the president get around a ruling like that? I know our listeners want to know, but as you think about the culmination of these claims, how much in practice might judges ultimately constrain President Trump?

[00:55:33.2] Kate Huddleston: So I think there's a significant constraint in place, which is that Elon Musk currently is not acting in any sort of Senate confirmed position. And so as to the Appointments Clause claim, he would need to be nominated and then he would need to be confirmed by the Senate. Similarly, as to the impoundments claims, I think there are a variety of ways in which courts can fashion relief to ensure that Congress retains the federal spending power. And just to the sort of point we had earlier about the role of the courts in all of this, the role of the courts is fundamentally to ensure that the allocation of authority among the branches of the federal government, the allocation of authority in the federal government overall is consistent with law and the Constitution. That is the role of the courts to see what the law is. And so we expect that as these cases go forward, there is a significant role for the courts to play and that the way that these cases turn out will in fact impact the actions of the federal government, of the federal executive branch. And you know, fundamentally this is about one, the lawless operations of a "shadow department" that is not, in fact a department and that has not been created by Congress, that does not have any authority pursuant to federal statute, pursuant to constitutional allocation of power over spending.

[00:57:13.4] Kate Huddleston: And this goes back to, in the end, the lawless exercise of power by the executive branch. This is absolutely a place where courts have a role to play. We cited at the beginning of our complaint, Trump versus United States and Justice Chief Justice Roberts' statement there that the decision in Korematsu was repugnant and that the presidential directive at issue in World War II forcibly relocating a discrete minority group, Japanese Americans. One of our plaintiffs is the Japanese American Citizens League, that that directive was morally

repugnant, objectively unlawful, outside the scope of presidential authority. This is absolutely an area where the courts can and should weigh in the scope of presidential authority. It's something that has been critical throughout the history of our democracy, and it's something that is critical at this time as well.

[00:58:16.5] Jeffrey Rosen: Thank you so much for that, Michael, as you look forward to how the lower courts and the US Supreme Court might evaluate these claims involving DOGE's authority, the president's power to spend money or not, and the efforts to shrink the size of the federal government, what legitimate role do you think the courts do have to play? Are there aspects where you think they can and should meaningfully check the president, or do you expect the US Supreme Court to uphold all this in the end?

[00:58:45.6] Michael McConnell: Well, as to the Appointments Clause, the president, the courts are not going to order the president to appoint Musk. There's no office to which to appoint him. Congress would have to create that. Nor are the courts going to instruct the agency heads that they have to stop listening to advisors who have not been appointed through the Appointments Clause. That is a completely preposterous suggestion. Now, if the administration violates the Impoundment Control Act and does not spend money as appropriated by Congress, I would fully expect the courts to step in in order that that be rectified. But the courts are not going to tell the executive Branch which grants, which grantees it has to go to, what contractors it has to go to, or how many employees there are going to be employed in the course of that. And they're certainly not going to do what I think functionally, as a good description of the district court order from Judge Ali, they're not going to order the current administration to continue the policies of the past administration. The administration has a right to change its policies and to change the way in which grants and contracts are being dispersed in light of that.

[01:00:11.3] Michael McConnell: So, yes, the administration is going to have to spend all monies appropriated by Congress. But so far there's no evidence that they're not going to do that, other than the fact that I do understand that the administration is likely to suggest to Congress that Congress reduce a number of appropriations. There are portions of the Reconciliation Act that are now under debate in Congress that would do just that. But yes, Congress has control over how much money will be spent. The administration has the control over how to spend it within the very broad purposes that Congress sets.

[01:00:52.8] Jeffrey Rosen: Thank you so much, Kate Huddleston and Michael McConnell for a sober, civil, and illuminating discussion. This is a highly charged area of the law, and you've helped our listeners understand the best arguments on both sides of this case with reason and clarity in the best traditions of We the People. Kate Michael, thank you so much for joining.

[01:01:15.1] Michael McConnell: Thank you, Jeff.

[01:01:16.1] Kate Huddleston: Yes, thank you very much.

[01:01:22.1] Jeffrey Rosen: This episode was produced by Samson Mostashari and Bill Pollock. It was engineered by Bill Pollock. Research was provided by Yara Daraiseh, Samson Mostashari, and Gyuha Lee. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional illumination, civil dialogue, and thoughtful debate. Check out the new Constitution 101 course at constitutioncenter.org/khan101 Sign up for the newsletter at constitutioncenter.org/connect and always remember that the National Constitution center is a private nonprofit. This podcast and all of our work is possible thanks to the generosity of devoted We The People listeners. Friends I'm so grateful to you for our learning journey together and so looking forward to our continued learning in the years ahead. Please continue supporting our efforts by donating today at constitutioncenter.org/donate on behalf of the National Constitution Center, I'm Jeffrey Rosen.