

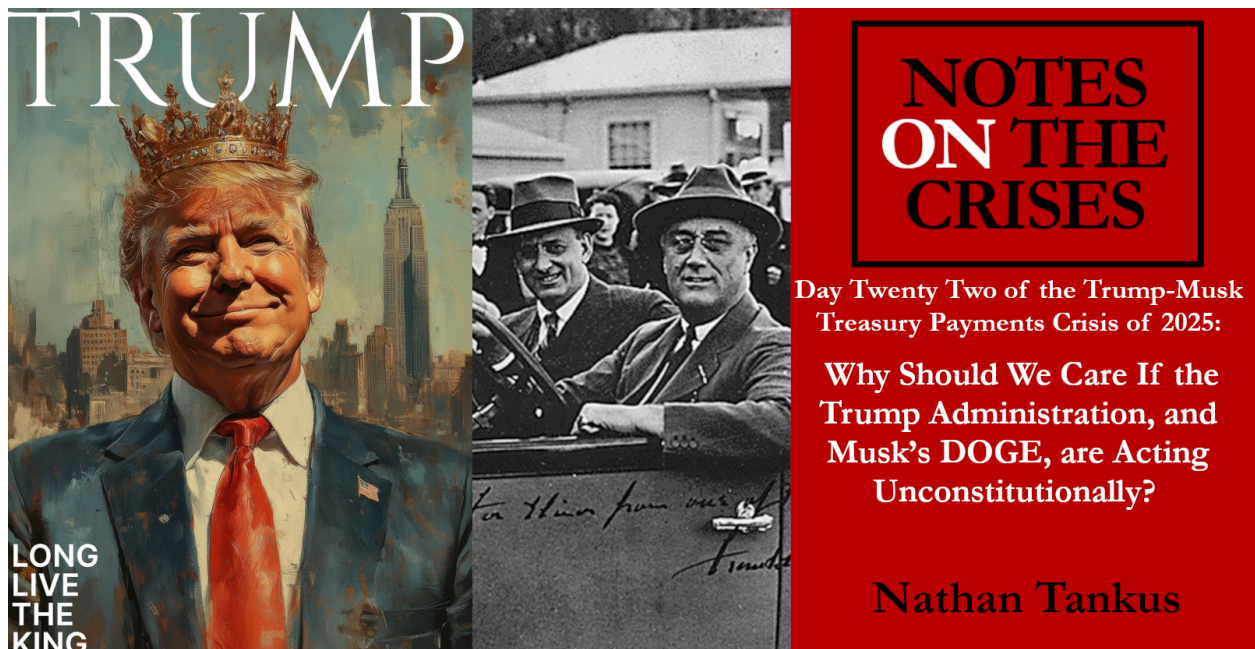
Why Should We Care If the Trump Administration, and Musk's DOGE, are Acting Unconstitutionally?

Notes on the Crises

www.crisisnotes.com/why-should-we-care-if-the-trump-administration-and-musks-doge-are-acting-unconstitutionally/

February 21st 2025, 1:15 PM

By Nathan Tankus



Notes on the Crises pivoted on February 1st into around the clock coverage of the Trump-Musk Treasury Payments Crisis of 2025. Today is Day Twenty Two

Read [Part 0](#), [Part 1](#), [Part 2](#), [Part 3](#), [Part 4](#), [Part 5](#), [Part 6](#), [Part 7](#), [Part 8](#), [Part 9](#) & [Part 10](#)

If you are a current or former career [Internal Revenue Service](#) or [Bureau of the Fiscal Service](#) Employee and especially if you are a COBOL programmer, contact me [over email](#) or over signal (a secure and encrypted text messaging app) — [linked here](#). My Signal username is "NathanTankus.01". I would also like Legal counsel sources from the Treasury and Federal Reserve as well as payments level sources at the Federal Reserve.

I am also looking for [sources at FINCEN](#). Finally If you work at any Administrative Agency and **have knowledge of the Bureau of the Fiscal Service directly stopping payments your agency has authorized**, please get in touch.

This is a free piece of Notes on the Crises. I will not be paywalling any coverage of this crisis for as long as it persists, so please [take out a paid subscription](#) to facilitate performing that public service. You can also [leave a "tip" if you want to support my work](#) but **hate emails cluttering your inbox or recurring payments**. If you're rich, take out the [Trump-Musk Treasury Payments Crisis of 2025 Platinum Tier](#) subscription. The additional thing you get is my continued work to prevent the Treasury's internal payment system from melting down, Musk taking your confidential information, along with everyone else's as well as my efforts to **contribute to the fight against the ongoing constitutional crisis**. So far, **nowhere near enough rich people are paying their fair share**.

Note to Readers: I am on [bluesky, an alternative to twitter](#). It's been hard to let go of twitter since that is where I built my following, but clearly it's becoming less usable and there are obvious concerns about getting traction [about a Musk story on the Everything Musk app](#). I have also started an instagram for Notes on the Crises [which is currently being populated with my articles](#). **Audio versions of my articles** (read by me personally) will come soon

Finally, *I'm known as a crypto skeptic, and I am*, but that doesn't mean I won't accept people giving away bitcoin to me. Here's my address: `bc1qegxarzsfga9ycesfa7wm77sqmuqqv7083c6ss6`

For almost three weeks I've spent an enormous amount of time on the details of the Bureau of the Fiscal Service, DOGE's incursion into it and the manifold dangers it poses. Today I want to step back and reemphasize the bigger picture that I started with exactly three weeks ago in [my January 31st piece](#) "Everything About the Trump Administration's Impoundment Putsch You Were Too Afraid to Ask". It's imminently understandable that after reading nearly 25,000 words- god is that really how many words it's been?- many readers do not feel like they have, or have retained, a focus on the big picture. I also haven't particularly emphasized why exactly these particular unconstitutional actions, or even unconstitutional actions in general, are undesirable or dangerous. To some, this is all painfully obvious. To others, it's much less so.

Counterintuitively, I am going to start by arguing that an action being **unconstitutional does not necessarily make it bad, or undesirable**. Take, for example, the Federal Government's repudiation of the "gold clauses" in treasury securities under the Roosevelt Administration. This meant that bondholders would be paid in dollars in the "face value" amounts listed on the bond for both principal and interest despite the fact that there were so called "gold clauses" requiring the equivalent in gold. This mattered because Roosevelt, when he got into office, increased the official dollar price of gold to 35 dollars an ounce. The Supreme Court's decision over this issue in the case *Perry v. United States* just happened to have passed its 90th anniversary on Tuesday. It is not very well known that this itself was a constitutional crisis.

In the five weeks between the beginning of oral arguments in *Perry v. United States* and the court's decision, President Roosevelt decided that regardless of the outcome he would stick to abrogating the gold clauses. Just three days after oral arguments concluded, President Roosevelt told Treasury Secretary Morgenthau, [according to his diary](#):

The President argued with me that he wanted me to **keep things on an unsettled basis until the Supreme Court handed down its decision**. He said that he wanted this for judicial and political reasons. He said the only way that **the man in a taxicab can become interested in the gold case is if we kept the story on the front page**. He said I want bonds to move up and down and Foreign Exchange. He said if we keep things in a constant turmoil if the case should go against us the man on the street will say for God's sake, Mr. President, do something about it and, he said, if I do **everybody in the country will heave a sigh of relief and say thank God** [Emphasis added, page 110 electronic pagination]

Morgenthau pushed back strongly against using induced financial instability to pressure the Supreme Court and the President decided to follow Morgenthau's advice. Nevertheless, the fact that President Roosevelt considered this strategy seriously is itself a sign of the constitutional stakes.

He even had a speech prepared in case the supreme court ruled against him that would boldly proclaim his intention to ignore the Supreme Court and to seek additional congressional legislation. Looking at Treasury Secretary Morgenthau's diary one again we find this remarkable description of Roosevelt reading the speech to him over dinner [on February 13th 1935](#):

He was like a kid about it, he was so pleased with himself and with the statement. After finishing the statement he said, "**Joe Kennedy thinks that the statement is so strong that they will burn the Supreme Court in effigy.**" [Emphasis added, page 68 electronic pagination]

The entire speech is [worth reading](#).

Roosevelt's aggressiveness regarding this issue behind closed doors can't help but raise one's eyebrows. Nevertheless, on the substance I think Roosevelt was right to be so insistent about the issue. There is no good reason to let treasury holders get 169% on the dollar simply because the United States decided to raise the price of gold and it is easy to foresee a myriad of negative consequences emanating from this. The implications of not abrogating the gold clauses would have been far more serious in the case of private contract or, more precisely, non-federal government contract and Roosevelt was right to fear mass bankruptcy if the latter's constitutionality was not held up in the case ultimately known as *Norman v. Baltimore and Ohio Railroad Co.*

This may seem to be a largely irrelevant detour to many readers. but it is not. It's important to emphasize that unconstitutionality is not ipso facto bad. Furthermore, while this incident did involve the flexing of executive power and ultimately the Supreme Court avoided ruling against the executive branch to avoid a constitutional confrontation they would likely lose, it was not actually claiming ongoing power on behalf of the executive. The issue was circumstantial- you only need to abrogate gold clauses once. Furthermore, even in Roosevelt's draft speech he planned to seek legislative

approval. The odd branch out was a notably reactionary supreme court (although in this case justices known as sympathetic to the New Deal [found themselves repulsed](#)). Judicial review is not an absolute value in my view but a highly imperfect check on the bona fide violation of rights and centralized, unaccountable power.

Judicial authority can of course, itself be centralizing and unaccountable power which violate rights individuals should otherwise have. Today we again find a reactionary supreme court limiting not just executive but even legislative power. Our recent circumstances are far more serious in fact because it is not a stodgy supreme court holding to long standing positions but instead a newly radicalized Supreme Court inventing doctrines that seem to be- and are- expressly designed to abrogate executive actions that they dislike and limit congress's legislative power. Take, for example, the invented "Major Questions Doctrine" which was explicitly embraced in the 2022 decision *West Virginia v. EPA*.

In this case striking down the Environmental Protection Agency's authority to regulate carbon dioxide emissions under the Clean Air Act, Chief Justice John Roberts [explicitly says](#):

[I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. *Utility Air*, 573 U.S., at 324. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.

While this may seem superficially reasonable, what it means in practice is that courts can reject any administrative agency action they dislike and overrule any delegation of discretion to administrative agencies by congress that they deem too sweeping. There is a reason that people like Vivek Ramaswamy- the very short-lived co-head of DOGE- [speak openly of taking the opportunity](#) the Major Questions Doctrine provides to "shut down that administrative state" and opines that the "constitutional republic" created by the founding fathers has "has three branches of government, not four".

Recognizing that the current impoundment crisis comes from the same right wing think tanks which built the modern right wing legal movement and successfully led the Supreme Court to embrace their agenda, we can see better how this all fits together. Impoundment is meant to be the final demolition of the administrative state that the Supreme Court has been building up to. Before their job was to weaken it themselves. Now the Supreme Court's job is to avoid confronting the constitutional crisis before us and let executive power take the reins, permanently demoting the previously co-equal branches. Expanding the President's executive power, embracing unitary executive theory, striking down laws passed by congress: it was all in service of eliminating administrative agencies, especially "independent" administrative agencies and shrinking Congress's ability to govern (even if, at times, it was in the name of Congress governing more). Now the baton

has been passed in service of limiting the rights of individuals, especially minorities and greatly enhancing centralized, unaccountable power.

Which brings us back to 1935. This time in the Supreme Court case *Humphrey's Executor v. United States* where President Roosevelt fired an Federal Trade Commission's commissioner for being out of step with the New Deal. The Supreme Court ruled that executive officers, whose scope for removal is determined by congressional statute, could not be removed by the president for reasons other than the statutorily provided ones. I think statutorily created administrative agencies are important and think president Roosevelt overstepped here. Independent agencies- most notably the Federal Reserve Board- can be a problem but overall it is good that we have differentiated locus of authority and some of them are insulated from day to day partisan politics. It should be no surprise that the Trump administration has explicitly stated its desire to overturn this case and on Tuesday [issued an executive order](#) called "Ensuring Accountability for All Agencies". The fact sheet's title is [even more direct](#): "President Donald J. Trump Reins in Independent Agencies to Restore a Government that Answers to the American People"



Which brings us to the answer to the question posted by the title of this piece. We should care about the unconstitutionality of the Trump administration's, and Elon Musk's DOGE, because it is furthering the centralization and expansion of unaccountable power in the service of abrogating more of our rights. Our right to clean air and water. Our right to the already too-limited protections against discrimination. Our already too-weak right to privacy. Our right not to be scammed and looted from. Our workplace protections and [our right not to die from the mishandling of the nuclear stockpile because of inept, dangerous and illegal mass firings](#). Our already weak right to an education. Most of all, our right to rebuild after the second Trump administration has smashed up so many of the tools of rebuilding. Ultimately, our right to make decisions about our own lives without being essentially micromanaged by venal billionaires. Hell, our right to have a truly different government after ["King Trump"](#).