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Why DOGE is Unconstitutional:
Trump is acting extra-constitutionally.
Only Congress or the Supreme Court can stop him.

By Alan Charles Raul

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President Donald Trump, his appointees, acting officials and quasi-official outsiders are in the midst of a radical restructuring or termination of government employees, agencies and programs. Whether this is in all, many or some regards desirable is debatable. Also debatable is whether the 49.8 percent of the electorate who elected Trump want all of this, and whether the 50.2 percent who voted for Kamala Harris or a third-party candidate want any of it.

What is not debatable, however, is that Congress has not authorized this radical overhaul, and the protocols of the Constitution do not permit statutorily mandated agencies and programs to be transformed — or reorganized out of existence — without congressional authorization.

The Constitution is well known to interpose meaningful checks and balances and a separation of powers among the responsibilities of the executive, legislative and judicial branches. It is also well understood that the respective branches' powers and duties intersect and overlap. Fundamentally, however, all legislative power belongs to Congress, and executive power to the president. The judiciary steps in when the parameters of shared authority get complicated or confusing and constitutional lines are crossed.

The radical reorganization now underway is not just footfaulting over procedural lines; it is shattering the fundamental checks and balances of our constitutional order. The DOGE process, if that is what it is, mocks two basic tenets of our government: that we are a nation of laws, not men, and that it is Congress which controls spending and passes legislation. The president must faithfully execute Congress's laws and manage the executive agencies consistent with the Constitution and lawmakers' appropriations — not by any divine right or absolute power.

Where the president identifies policy areas that need reform or spending that needs to be supplemented, reduced or eliminated, the Constitution empowers him to recommend such measures as he finds "necessary or expedient" to Congress for it to dispose one way or the other — or, alternatively, ignore.

Yes, the president may advance his own policy agenda — including, of course, the ability to recommend reforms to Congress that he believes necessary or expedient. But there is no reading of the Constitution that allows any president to claim that a political mandate, or a political promise made, obviates or supersedes the role of Congress. It is the House and Senate that "make all laws which shall be necessary and proper for … the Government of the United States or in any Department or Officer thereof."

Even under the most aggressive view of the president's "unitary executive" control over the entire executive branch and independent agencies, it is Congress's sole authority to appropriate and legislate for our entire government. The president basically directs the executive branch within the contours prescribed by Congress, subject to constitutional checks and balances. To be sure, the president and Congress share policy responsibility because the president recommends budgets and necessary and expedient measures to Congress, whose bills the president can sign into law or veto. But in the end, the president is constitutionally stuck with the policies for the federal government that Congress enacts and appropriates. No one person in America *is* the law — not even a Trump or an Elon Musk.

So, how can the radical overhaul Trump and Musk are undertaking be reconciled with our constitutional order? Quite simply, it cannot be. Congress must step in to enact this radical transformation — or the Supreme Court must stop it.

In the past several years, the court has provided unmistakable direction that Congress, not the executive, determines the scope of federal policy. The court even narrowed the president's previously long-held entitlement to deference when interpreting ambiguous laws and policies.

Specifically, the Trump-Musk quest for government efficiency is led by a "department" that Congress did not establish, by unelected operatives who exercise overwhelming authority without appointment under the appointments clause, who are not subject apparently to any checks and balances, who are not faithfully executing the laws Congress has appropriated and legislated, and who are in the process of eliminating whole agencies, programs and millions of employees without any congressional authorization whatsoever. And they are doing so without explaining and recommending such measures to Congress (or to the public, for that matter).

If all this is not a "major question" for Congress to decide with respect to the impact and consequence for America, then nothing is.

This DOGE usurpation of the constitutional order cannot be squared with the Supreme Court's 2022 decision in *West Virginia v. EPA*. In that case, the justices struck down a Clean Air Act interpretation by the Biden administration on the grounds that it was a

"major question" of profound political and economic significance to the country at large — and that Congress had not clearly authorized those impacts. The DOGE transformation of America contemplates a much more profound change, without any authorization by the people's representatives at all.

The judicial branch cannot allow this profound political and economic program to proceed without clear congressional authorization, which to this point has been completely absent. The fact that Trump was duly elected president does not displace the role of Congress to pass laws and set policy, and the fact that some or even much of the Trump-Musk transformation might be desirable does not make it constitutional. Campaign promises requiring legislation do not become law unless and until Congress says so. Thus, the Republican- and Democratic-appointed judges who have recently reined in the U.S. DOGE Service have not rejected the Trump administration's quest for efficiency or reorganization; rather, they are insisting on holding the executive branch to long-standing constitutional, statutory and administrative rules.

What Trump may do is follow the Constitution (Art. II, Sec. 3) and law (31 U.S.C. Sec. 1111) by identifying and recommending major questions for Congress to answer. The federal judiciary must rein in agencies or officials when they overreach congressional authorization. Moreover, federal judges may no longer defer to extraordinarily expansive interpretations of executive branch authority, under DOGE or otherwise. The Supreme Court laid down that rule clearly last year when it decided *Loper Bright Enterprises v. Raimondo*. That case famously overruled the so-called Chevron deference, holding that it is the judiciary — not the executive — that gets to decide the right interpretation of the laws Congress has enacted.

If the United States is to be transformed by DOGE, the president, Congress and Supreme Court all have some work to do first.

Alan Charles Raul was associate White House counsel under President Ronald Reagan and general counsel of the Office of Management and Budget under Reagan and President George H.W. Bush. He is board secretary of the Society for the Rule of Law and a lecturer at Harvard Law School.