

**“Reining in the Administrative State:
Regulatory and Administrative Law Reform”**

Hearing Before the House Judiciary Committee

Subcommittee on the Administrative State, Regulatory Reform, and Antitrust

Tuesday, February 11, 2025

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Chairman Fitzgerald, ranking member Nadler, and distinguished members of the subcommittee,

Thank you for the opportunity to testify this morning. I must confess to at least a modicum of surprise that, of all of the topics for this subcommittee to investigate at this moment in American history, it has picked this one. Certainly, we can all agree that one of Congress’s—and this committee’s—most important constitutional functions is holding the executive branch to account. I would thus happily celebrate, if not affirmatively endorse, well-conceived efforts to “rein in” the executive branch—especially in response to specific abuses of existing statutory and constitutional arrangements.

But given what has transpired over the first three weeks of the new administration, a hearing focused on the proposed legislation that my fellow witnesses have discussed this morning, and *not* on what is actually happening across this city and across this nation as we sit here today, strikes me as far more than just a missed opportunity. Indeed, if this committee were genuinely interested in “reining in” abuses by the executive branch, it seems to me that there are at least four distinct, and far more pressing, areas to which it should focus its attention.

First, the first three weeks of the second Trump administration has witnessed a more systemic and sustained assault on Congress’s constitutional primacy with respect to appropriations and spending than anything we have ever seen before.

It would take more time than I have to list all of the examples, but from the government-wide freeze of federal grants by the Office of Management and Budget; to the 15% ceiling for “indirect costs” for NIH-funded grants; to the continuing disruption of various *mandatory* spending in the foreign aid context, we’re seeing the executive branch repeatedly violate clear statutory spending requirements and prohibitions—whether under the Impoundment Control Act of 1974, the various statutes setting up and funding the U.S. Agency for International Development, annual NIH appropriations riders that Congress has carefully negotiated, or other laws. Perhaps members of this committee are taken by novel arguments that some (or all) of those statutes are unconstitutional. But even *that* claim, which has been categorically rejected even by the Justice Department’s own lawyers for generations, would be a more profitable subject of conversation than our focus so far this morning.

We're also seeing novel assertions of power by the executive branch to impose conditions on the receipt of federal funds that find no support in the relevant appropriations statutes—such as the Secretary of Transportation's requirement that local and state governments assist with the enforcement of federal immigration law in order to receive their annual highway funding, the very kind of coercive spending condition that led the Supreme Court to invalidate the Affordable Care Act's Medicaid expansion in 2012.

The Constitution is unusually clear about appropriations, Mr. Chairman. Contrary to the comments made by Chairman Cole last week, these statutes are all laws that have binding teeth for purposes of the Constitution's Supremacy Clause. And *uniquely* with respect to appropriations, the Constitution expressly *requires* that Congress play the primary role in federal policymaking. In each of these areas, then, the executive branch is not just breaking the law; it is usurping *this* body's single-most-important policymaking power.

Second, we have also seen unprecedented efforts by the President to assert control over the entire bureaucracy—and, quite overtly, to do so in the name of loyalty to the President rather than fidelity to the Constitution.

From the termination of lawyers and law enforcement officers who were even loosely associated with the criminal investigations and prosecutions of those who attempted to overturn the 2020 election results; to the firing of more than a dozen inspectors general—including many who had been appointed *by* this President; to the reinstatement of “Schedule F,” an attempt to convert much of the non-partisan federal civil service into partisan political positions; to the misbegotten “fork in the road” program to seemingly dupe federal employees into taking unlawful buyouts; to the seizure of control of, of all things, the board of the Kennedy Center, this is a President who is running roughshod over an array of statutory restrictions and deeply entrenched norms regulating bureaucratic control of the administrative state.

Historically, one of the principal checks on the President's ability to take this kind of control has been the Constitution's Appointments Clause—which requires the Senate's advice and consent for the confirmation of all principal executive officers. But we've seen the Senate refuse, in case after case, to assert its institutional prerogative against President Trump's nominees—even when, as Senator Collins suggested, she was confident that courts would rightly block a policy that a nominee she voted for said he would pursue.

Third, and speaking of unprecedented, we have seen the President use the guise of an office located within the executive branch to take unitary control over virtually all of the federal government’s spending and personnel management functions—again, apparently in violation of an array of statutes limiting who may have access to those information systems and for which purposes. As if that wasn’t troubling enough, all of this is coming while the “Special Government Employee” who is leading those efforts appears to have *massive* conflicts of interest that ought to preclude him from having any role in the administration of government contracts that create billions of dollars in obligations to his *own* companies.

Finally, I would be remiss in not also noting the various actions this administration has undertaken against private persons that flatly contravene existing statutory and constitutional protections—such as the attempt to narrow the scope of birthright citizenship (a right that is protected not only by the Fourteenth Amendment, but by a statute Congress enacted in 1940). Other examples abound, but I suspect that the point has been made. In three weeks, we’ve seen a more sustained assault by the President on *this institution’s* constitutional prerogatives than we’ve seen in the first 250 years of our Republic.

To be sure, we’ve also seen the federal courts pushing back against these abuses, in many cases, aggressively. But the courts can’t—and shouldn’t be expected to—go it alone. Just this weekend, Vice President Vance and Elon Musk both took to social media to question the legitimacy of judicial rulings purporting to hold the executive branch to account. Of course, the historical (and correct) remedy for trial court rulings that wrongly go against the executive branch is for the government to appeal. But here, again, the new administration seems less interested in *abiding* by the separation of powers than seeking to *undermine* them.

Some have tried to defend this rash of unlawful behavior on the ground that the executive branch is rooting out fraud and other abuses. If that were actually the goal, we should’ve expected the focus of that effort to include the Department of Defense. But at a more basic level, this committee—and Congress as a whole—has spent much of the last 160 years setting up sophisticated, accountable interbranch mechanisms for holding the executive branch to account in precisely these spaces; it’s not like fraud, waste, and abuse only became problems over the last four years. That includes inspectors general *within* the executive branch to monitor for fraud and other

abuses; Justice Department offices designed to root out corruption; and civil suits from outside the executive branch. Rather than lean into those checks, the President's response has been to fire most of the inspectors general and the head of the government agency that protects whistleblowers; to shut down anti-corruption efforts within the Department of Justice; and to otherwise turn over the entire, government-wide anti-fraud enterprise to a handful of young computer programmers with no relevant prior governmental experience. Maybe there's an argument that this is good policy (I'm more than a tad skeptical), but that's an argument that should be made to this body in its consideration of new legislation—not through repeated assertions of executive fiat.

Finally, lest anyone try to respond with the superficial argument that new administrations are “entitled” to set their own agenda, it's one thing to *have* an agenda; it's quite another to impose it unilaterally, especially when it flies in the face of so many existing constitutional and statutory arrangements. Indeed, what is especially striking about all of the moves the new administration is undertaking is that they are coming not in the face of a hostile Congress, but without any attempt to even *obtain* statutory authorization—even though the President's party also controls both legislative chambers, including this committee. Instead of making the case for why Congress should loosen or repeal the various statutory mandates that the executive branch is violating, this administration is effectively thumbing its nose at our elected representatives in the House and the Senate—*i.e.*, at you. And in response, this committee chose to hold ... this hearing.

The result of the executive's assertion of authority and Congress's abdication of responsibility has been not just an unprecedented breakdown in the separation of powers; but a growing and seemingly unending list of negative, real-world impacts on everyday people—who may no longer have access to experimental medication being funded by NIH; who may no longer receive timely severe storm warnings from NOAA; who may no longer be able to receive the government-subsidized healthcare that Congress has provided for more than 60 years; and so on. Even farmers who signed contracts with the USDA to be reimbursed for modernizing their infrastructure with guarantees that the federal government would cover at least part of their costs are now on the hook for expenses they can't afford and projects they can't complete.

Everywhere you look, there are stories like that one. This is not just an administrative law crisis; it is a government credibility (and credit) crisis.

These moves are also necessarily coming at the expense of our national security—not only because our friends abroad will become increasingly reticent to trust us, but because the very government agencies tasked with defending all Americans from threats foreign and domestic are being turned into vehicles for carrying out nothing more than the President’s personal policy priorities of the day.

Against that backdrop, it strikes me as more than a little ironic that this committee believes the most important thing that it can and should be discussing today is whether to enact the legislation discussed by my colleagues. It seems to me, instead, that this committee should be focused on (1) rigorous oversight hearings to find out exactly what the executive branch is and isn’t doing, and pursuant to which legal authorities; (2) ways in which this committee specifically, and Congress as a whole, can reassert legislative primacy in the area of spending and appropriations—even if that means *approving* the current administration’s actions through new statutes and amending or repealing existing statutes; (3) standing up for the importance of an independent judiciary in our system of checks and balances—something that has been a central feature of this committee’s work for generations; and (4) more generally, underscoring the importance of the moment we find ourselves in—and the dangerous precedents we risk setting for the future, including, perhaps, when Congress and the White House are controlled by a different party than the one currently in power.

I would look forward to participating in those discussions, Mr. Chairman. As for the nominal topic of today’s hearing, it seems to me that it is sending exactly the *wrong* message at this moment in our history about the institutional autonomy, constitutional authority, and democratic responsibility of the legislature—the branch of the federal government that the Constitution, quite deliberately, put first.

Thank you again for inviting me to testify today; I look forward to your questions.