

JUDGE RULES APPOINTMENTS CLAUSE CHALLENGE AGAINST DOGE LIKELY TO SUCCEED

You've likely heard that Judge Theodore Chuang has enjoined DOGE in the context of its destruction of USAID.

Just as importantly, he has ruled that an Appointments Clause challenge to DOGE is likely to succeed. As I have repeatedly argued, such a challenge – arguing that to wield as much power as Elon Musk does, you have to be Senate confirmed in a position created by Congress – would be most likely to survive a SCOTUS review. (It's the same basis Aileen Cannon used to throw out the Jack Smith case.)

To be sure, I'm a bit skeptical about the order and injunction. The latter only enjoins DOGE from doing anything on their own; if they get USAID approval, they can do whatever they want to do.

But the opinion notes that the Appointments ruling only applies to two things that, the record before the court shows, Elon did himself: shutting down USAID as an agency and shutting down the building. While the injunction requires USAID to stop any further terminations and let employees start accessing payment systems again, even though it notes that Gavin Kliger sent the email that terminated at least a few of the plaintiffs, those decisions involved Marco Rubio and Pete Marocco.

The opinion is most fun for the two extended sections where it dismisses the government's claim that Elon is not in charge of DOGE.

Most notably, on February 19, 2025, President Trump publicly stated, "I

signed an order creating the Department of Government Efficiency and put a man named Elon Musk in charge.” J.R. 568. Musk spoke on behalf of DOGE at a joint press conference with the President on February 11, in a joint interview with the President on February 18, and at the Cabinet meeting on February 26.

Musk’s public statements and posts on X, in which he has stated on multiple occasions that DOGE will take action, and such action occurred shortly thereafter, demonstrate that he has firm control over DOGE.

[snip]

Althought the White House announced on February 25, 2025, that Amy Gleason is now the Acting USDS Administrator, that same day, White House Press Secretary Karoline Leavitt maintained that “the president tasked Elon Musk to oversee the DOGE effort” while noting that others “are helping to run DOGE on a day-to-day basis.” J.R. 616. Notably, at the February 28, 2025 hearing on this Motion, Defendants’ counsel could not identify, despite having made an inquiry, who the USDS Administrator was before Gleason.

We shall see how this survives appeal (the suit was filed in Maryland, so it’ll go through a different Circuit than most DOGE challenges, including the New Mexico one that is closest to this stage).

But for the moment, it has held that Elon has absolutely no authority to do most of what he has done.