CHALLENGING DOGE

February 2025
Issue Brief

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I. INTRODUCTION

On Day 1 of his second term, President Trump created Elon Musk's so-called Department of Government Efficiency, or DOGE, by renaming the U.S. Digital Service within the Office of Management and Budget (OMB) as the U.S. DOGE Service (USDS) and "establish[ing]" it "in the Executive Office of the President."[1] DOGE has since worked to insinuate itself into many federal agencies, with personnel reportedly accessing governmental systems (including, in some cases, sensitive or classified systems)[2] and issuing directives to agency staff.[3] Although Executive Order 14158 described USDS's mandate as "modernizing Federal technology and software to maximize governmental efficiency and productivity,"[4] it appears that DOGE has driven many of the Trump administration's most controversial and unlawful decisions, including the administration's efforts to impound federal funds[5] and disrupt the civil service.[6]

[1] *Establishing and Implementing the President's "Department of Government Efficiency,"* Exec. Order 14158 § 3(a) (Jan. 20, 2025), https://www.federalregister.gov/documents/2025/01/29/2025-02005/establishing-and-implementing-the-presidents-department-of-government-efficiency. The new USDS "shall be established within the Executive Office of the President," with its own "Administrator" who reports to the White House Chief of Staff. *Id.* The executive order directs the USDS administrator to implement a "Software Modernization Initiative." *Id.* § 4.

[2] *See, e.g.*, Abigail Williams et al., *USAID Security Leaders Removed After Refusing Elon Musk's DOGE Employees Access to Secure Systems*, NBC News (Feb. 3, 2025), https://www.nbcnews.com/politics/national-security/usaid-security-leaders-removed-refusing-elon-musks-doge-employees-acce-rcna190357.

[3] *See, e.g.*, Katelyn Polantz & Phil Mattingly, *Musk Associates Sought to Use Critical Treasury Payment System to Shut Down USAID Spending, Emails Show*, CNN (Feb. 6, 2025), https://www.cnn.com/2025/02/06/politics/elon-musk-treasury-department-payment-system/index.html; Tweet from Matt Berg (Feb. 11, 2025), https://perma.cc/R8QY-YDYP.

[4] Exec. Order 14158 § 1.

[5] *See* Polantz & Mattingly, *supra* note 3.

[6] *See* Benjamin Siegel et al., *'What's Going to Break?' DOGE Staffers 'Scorching the Earth' as they Reshape Federal Government*, ABC News (Feb. 6, 2025), https://abcnews.go.com/Politics/whats-break-doge-staffers-scorching-earth-reshape-federal/story?id=118536035.

Litigants have responded in kind. Parties immediately filed three cases challenging the extent to which DOGE constitutes an unlawful federal advisory committee,[7] and have since filed suit to forestall USDS's efforts to gain access to systems at the Treasury,[8] Labor,[9] and Education[10] departments, as well as the Consumer Financial Protection Bureau.[11] Many other early lawsuits focus on various decisions in which USDS may have been involved.[12] Further suits will likely be necessary to challenge individual actions related to DOGE, and those cases will necessarily continue to reference certain subject-matter specific statutes and doctrines — for example, the Privacy Act with respect to records systems, or the Impoundment Control Act with respect to efforts to withhold funds.

The scale of DOGE's reported involvement in federal operations, however, might warrant a legal strategy designed to take USDS head-on. This Issue Brief therefore identifies certain overarching flaws concerning USDS's authority, appropriations, and personnel arrangements that litigants might assert, including in challenges to more specific actions. After providing background on USDS's legal status and appropriations, this Issue Brief explains why USDS lacks any lawful authority to act as an agency. The Trump administration's rejoinder will likely be that USDS is not an agency at all — that it exists

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[7] *See, e.g.*, *Public Citizen v. Trump*, No. 1:25-cv-164 (D.D.C. filed Jan. 20, 2025), https://www.courtlistener.com/docket/69559444/public-citizen-inc-v-trump/; *Lentini v. DOGE*, No. 1:25-cv-166 (D.D.C. filed Jan. 20, 2025), https://www.courtlistener.com/docket/69559476/lentini-v-department-of-government-efficiency/; *Am. Pub. Health Ass'n v. Office of Mgmt. & Budget*, No. 1:25-cv-167 (D.D.C. Jan. 20, 2025), https://www.courtlistener.com/docket/69559460/american-public-health-association-v-office-of-management-and-budget/.

[8] *See Alliance for Retired Ams. v. Bessent*, No. 1:25-cv-313 (D.D.C. filed Feb. 3, 2025), https://www.courtlistener.com/docket/69607077/alliance-for-retired-americans-v-bessent/; *New York v. Trump*, No. 1:25-cv-1144 (S.D.N.Y. filed Feb. 7, 2025), https://www.courtlistener.com/docket/69623558/state-of-new-york-v-donald-j-trump/.

[9] *See AFL-CIO v. Dep't of Labor*, No. 1:25-cv-339 (D.D.C. filed Feb. 5, 2025), https://www.courtlistener.com/docket/69613359/american-federation-of-labor-and-congress-of-industrial-organizations-v/.

[10] *Univ. of Cal. Student Ass'n v. Carter*, No. 1:25-cv-354 (D.D.C. filed Feb. 7, 2025), https://www.courtlistener.com/docket/69620025/university-of-california-student-association-v-carter/.

[11] *See Nat'l Treasury Emps. Union*, No. 1:25-cv-380 (D.D.C. filed Feb. 9, 2025), https://www.courtlistener.com/docket/69624412/national-treasury-employees-union-v-vought/.

[12] *See Litigation Tracker: Legal Challenges to Trump Administration Actions*, Just Security, https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration/.

solely to advise and assist the President. But that dubious assertion, even if true, would only create a separate problem: it would mean that USDS lacks the ability to enter into the resource-sharing agreements that appear to be a primary means by which it intends to fund its operations, and by which it details employees to other agencies to effectuate its agenda. The Trump administration is therefore caught in a bind. Whatever arguments the administration makes regarding USDS's legal status, its very structure and operations are susceptible to legal challenge.

This Issue Brief also identifies several ways in which litigants might seek discovery into DOGE's operations, even in the context of challenges to specific DOGE actions. Specifically, litigants might be able to obtain discovery for the purposes of crafting injunctive relief, confirming whether the Trump administration is complying with existing injunctions, exposing whether DOGE has issued directives to agencies behind closed doors, supporting constitutional claims, and identifying when an agency's official rationale is simply a pretext for DOGE's influence. Although the public record often provides ample foundation to plausibly allege DOGE's unlawful activities, discovery may help to substantiate the evidentiary basis for these claims and further hold DOGE to account.

II. BACKGROUND ON USDS'S LEGAL STATUS AND APPROPRIATIONS AND THE ECONOMY ACT

President Trump's executive order refashioning the U.S. Digital Service as the U.S. DOGE Service provided that USDS "shall be established within the Executive Office of the President," with its own "Administrator" who "shall report to the White House Chief of Staff."[13] The executive order further established a "temporary organization" within USDS, pursuant to 5 U.S.C. § 3161, known as "the U.S. DOGE Service Temporary Organization."[14] The temporary organization "shall be dedicated to advancing the President's 18-month

[13] Exec. Order 14158 § 3(a), (b).

[14] *Id.* § 3(b).

DOGE agenda," and the USDS administrator shall more generally implement a "Software Modernization Initiative."[15]

Whereas the U.S. Digital Service previously existed within OMB, public reporting indicates that USDS is now its own "component" within the Executive Office of the President (EOP). Leaked emails state that USDS has been "split from OMB" and is now a "new EOP component," and USDS representative Katie Miller confirmed that "[]DOGE was reorganized under the Executive Office of the President and subject to Presidential Records."[16] Indeed, as Miller indicates, it appears that the Trump administration may have pursued this arrangement in an effort to subject USDS to the Presidential Records Act and avoid requirements under the Freedom of Information Act (FOIA) and the Federal Records Act,[17] which apply to OMB.

In general, EOP components fall into two categories: (1) those that have "substantial independent authority;" and (2) those whose "sole function is to advise and assist the President," and as a result are subject to the Presidential Records Act instead of the Federal Records Act, and are not subject to FOIA.[18] EOP components in the first category are all established by law, have statutory duties, and qualify as "agencies" for purposes of various federal laws.[19] EOP components in the second category have long been held not to be "agencies" for purposes of federal laws.[20] The Trump administration has now asserted

[15] *Id.* § 4.

[16] Jason Koebler & Joseph Cox, *DOGE Employees Ordered to Stop Using Slack While Agency Transitions to a Records System Not Subject to FOIA*, 404 Media (Feb. 5, 2025), https://www.404media.co/doge-employees-ordered-to-stop-using-slack-while-agency-transitions-to-a-records-system-not-subject-to-foia/; Tweet from Katie Miller (Feb. 5, 2025), https://perma.cc/AS5Z-33KA.

[17] *See* Minho Kim, *Trump's Declaration Allows Musk's Efficiency Team to Skirt Open Records Laws*, N.Y. Times (Feb. 10, 2025), https://www.nytimes.com/2025/02/10/us/politics/trump-musk-doge-foia-public-records.html; *see also* 5 U.S.C. § 552 (FOIA); 44 U.S.C. § 3101 et seq. (Federal Records Act).

[18] *Armstrong v. Executive Office of the President*, 90 F.3d 553, 558 (D.C. Cir. 1996). The first category of EOP components includes the Office of Management and Budget, the Council on Environmental Quality, the Office of Science and Technology Policy, the Office of the United States Trade Representative, and the Office of the National Cyber Director. The second category includes the White House Office, the Office of Administration, the Executive Residence, the National Security Council, and the Council of Economic Advisors.

[19] *See, e.g.*, 31 U.S.C. § 501 (OMB); 42 U.S.C. § 4342 (CEQ); 42 U.S.C. § 6611 (OSTP).

[20] *See, e.g.*, *Armstrong*, 90 F.3d 553 (FOIA); *In Re: Executive Office of the President*, 215 F.3d 20 (D.C. Cir. 2000) (Privacy Act); *Haddon v. Walters*, 43 F.3d 1488 (D.C. Cir. 1995) (Title VII); Gov't

that USDS falls into the second category — EOP components that solely advise and assist the President.[21]

Regardless of USDS's precise legal status, it must possess a valid appropriation to fund its operations. Under the Constitution and the Anti-Deficiency Act, the Executive Branch may not spend funds absent an appropriation from Congress.[22] And when Congress appropriates funds, an agency may not spend the money until OMB has "apportioned" the funds to the agency.[23] As a new component that did not exist at the time the current government funding acts were passed, USDS does not have any funds directly appropriated to it. Nevertheless, USDS has received a series of apportionments as of the publication of this Issue Brief that, in total, purport to provide it with tens of millions of dollars.

On January 27, 2025, USDS received an apportionment of $750,000.[24] Parsing that apportionment and a related document regarding money appropriated to the "Information Technology Oversight and Reform" (ITOR) fund,[25] it appears that the $750,000 permissibly came from ITOR.

On January 30, USDS received an additional apportionment of $6,000,000 for "Antic colls, reimbs, other," which a footnote indicates includes "anticipated reimbursements from agencies in support of [the] Software Modernization Initiative."[26] It is likely that this $6 million reflects anticipated reimbursements from other agencies pursuant to agreements

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Accountability Office, *Argus Secure Technology, LLC*, B-419422; B-419422.2 (Competition in Contracting Act of 1984).

[21] *See* Tweet from Katie Miller, *supra* note 16.

[22] U.S. const. art. I, sec. 9, cl. 7; 31 U.S.C. § 1341(a)(1)(A).

[23] 31 U.S.C. § 1517(a).

[24] *FY 2025 Apportionment for USDS*, https://openomb.org/file/11409026#tafs_11409026—011-0041—1—2025 (last visited Feb. 12, 2025).

[25] *FY 2025 Apportionment for Information Technology Oversight & Reform*, https://apportionment-public.max.gov/Fiscal%20Year%202025/Executive%20Office%20of%20the%20President/Excel/FY2025_Agency%3DEOP_Bureau%3DUNAN_TAFS%3D011-X-0036_Iteration%3D2_2025-01-27-20.29.xlsx (showing transfer out of ITOR of $750,000) (last visited Feb. 12, 2025).

[26] *FY 2025 Apportionment for USDS*, https://apportionment-public.max.gov/Fiscal%20Year%202025/Executive%20Office%20of%20the%20President/Excel/FY2025_Agency%3DEOP_Bureau%3DUNAN_TAFS%3D011-X-0041_Iteration%3D2_2025-01-30-16.51.xlsx (last visited Feb. 12, 2025).

under the Economy Act of 1932, 31 U.S.C. § 1535, including agreements to detail USDS employees to an outside federal agency.[27] For both this apportionment and the prior one, the Treasury Appropriation Funds Symbol (TAFS) includes an "X" rather than a year, which means that the money is "no year" money that is available until expended and does not expire.

On February 8, USDS received additional apportionments.[28] Notably, the apportionment document now expressly lists the Economy Act, 31 U.S.C. § 1535, as a source of USDS's funds.[29] In the TAFS for no-year money, $5,572,245 was added to the line for "Antic colls, reimbs, other" that seems to correspond to Economy Act agreements, and $2,120,902 was allocated to a line that, per Appendix F of OMB Circular A-11, corresponds to "offsetting collections."[30] In a separate TAFS for money that was appropriated and expires in Fiscal Year 2025, USDS was apportioned $13,967,242 from apparent Economy Act agreements.[31] In two more TAFS — one for funds that were appropriated in FY2024 and expire in FY2028, and the other for funds that were appropriated in FY2022 and expire in FY2031 — USDS received $2,559,689[32] and $8,151,078[33] respectively, both for offsetting collections. At present it is not clear if the amounts for offsetting collections reflect reimbursements from Economy Act agreements or some other source of authority for transferring funds.

The Economy Act therefore appears to be a primary means by which USDS has sought to fund its operations.[34] The Economy Act specifies that, in certain circumstances, one

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[27] *See, e.g.*, Decl. of Adam Ramada, *AFL-CIO v. Dep't of Labor*, 1:25-cv-00339-JDB (D.D.C. Feb. 6, 2025, ECF No. 16-1 (USDS employee detailed to Department of Labor), https://perma.cc/3YTM-MA6V.

[28] *FY 2025 Apportionment for USDS*, https://openomb.org/file/11410065#tafs_11410065--011-0041--3--2025 (last visited Feb. 12, 2025).

[29] *Id.*

[30] *Id.*; *see Circular A-11, Preparation, Submission, and Execution of the Budget*, OMB (July 2024), https://bidenwhitehouse.archives.gov/wp-content/uploads/2018/06/a11.pdf.

[31] *FY 2025 Apportionment for USDS*, https://openomb.org/file/11410066#page-footnote-funds (last visited Feb. 12, 2025).

[32] *FY 2025 Apportionment for USDS*, https://openomb.org/file/11410064 (last visited Feb. 12, 2025).

[33] *FY 2025 Apportionment for USDS*, https://openomb.org/file/11410067 (last visited Feb. 12, 2025).

[34] The existence of agreements between USDS and individual agencies has also been reported publicly. *See, e.g.*, Jason Leopold & Evan Weinberger, *DOGE-Backed Halt at CFPB Comes Amid Musk's Plans for 'X' Digital Wallet*, Bloomberg (Feb. 10, 2025),

"agency" may request that another "agency" provide "goods and services" to help the requesting agency accomplish its statutory duties.[35] The requesting agency must then reimburse the performing agency for the cost of the goods and services.[36] However, the "Economy Act does not give a performing agency any authority that it would not otherwise have."[37] The Economy Act is the default mechanism by which one federal agency provides reimbursable goods and services to another agency, absent a specific statutory authority authorizing such agreements for a particular agency or program.

III. DOGE LACKS LAWFUL AUTHORITY TO ACT AS AN AGENCY

One potential legal claim would assert that DOGE, as embodied in USDS, lacks any statutory authority. Under the Constitution, "[a]dministrative agencies are creatures of statute," not executive action alone, and "possess only the authority that Congress has provided."[38] Agencies "literally ha[ve] no power to act … unless and until Congress confers power upon [them]."[39]

However, no statute created the new USDS, and no statute confers any authorities, functions, or duties upon it. The government will likely try to avoid this problem by asserting that the President may create EOP components that are not "agencies" but rather

https://www.bloomberg.com/news/features/2025-02-10/doge-backed-halt-at-cfpb-comes-amid-musk-s-plans-for-x-digital-wallet.

[35] 31 U.S.C. § 1535(a).

[36] *Id.* § 1535(b).

[37] GAO-08-978SP, Principles of Federal Appropriations Law at 12-28 (citing 18 Comp. Gen. 262, 266 (1938)).

[38] *Nat'l Fed. of Indep. Bus. v. OSHA*, 595 U.S. 109, 117 (2022).

[39] *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). In addition, when agencies "exercise powers of vast economic and political significance," courts expect "Congress to speak clearly" in providing the requisite authorization. *NFIB*, 595 U.S. at 117 (quoting *Alabama Ass'n of Realtors* v. *HHS*, 594 U.S. 758, 764 (2021) (per curiam)).

have the "sole function … to advise and assist the President."[40] As discussed above, the administration has taken the position that USDS now is one such component, including by asserting that USDS is now subject to the Presidential Records Act.[41]

But that assertion — that USDS exists solely to advise and assist the President — is implausible. By all accounts, DOGE, through USDS, is reportedly exercising significant authority by directing agencies to implement various policies,[42] superintending personnel decisions,[43] purporting to close federal agencies,[44] acquiring access to sensitive databases,[45] and threatening agency officials who fail to comply.[46] These are not the actions of a merely "advisory" body. And these are not functions that any statute expressly assigns to USDS. Simply put, if USDS is neither itself a statutorily created entity nor housed within another such entity (as it used to be within OMB), then USDS lacks any statutory authority to act as an agency. Thus, all of USDS's efforts might plausibly be challenged as *ultra vires*.

For many of the same reasons, Appointments Clause challenges might also be asserted against certain officials associated with DOGE, most notably Elon Musk. An individual requires appointment consistent with the Appointments Clause if they "occupy a 'continuing' position" and "exercis[e] significant authority pursuant to the laws of the United States,"[47] and requires nomination by the President and confirmation by the Senate

[40] *Armstrong*, 90 F.3d at 568.

[41] Tweet from Katie Miller, *supra* note 16; Kim, *supra* note 17; *see Armstrong*, 90 F.3d at 568.

[42] *See* Polantz & Mattingly, *supra* note 3.

[43] *See* Siegel et al., *supra* note 6.

[44] *See* Will Steakin et al., *Turmoil Inside USAID as Musk Calls the Agency 'Criminal' and Says It 'Has to Die,'* ABC News (Feb. 3, 2025), https://abcnews.go.com/Politics/turmoil-inside-usaid-doge-reps-offices-senior-officials/story?id=118368900.

[45] *See Federal Judge Blocks DOGE from Accessing Sensitive U.S. Treasury Department Material*, AP (Feb. 8, 2025), https://www.npr.org/2025/02/08/g-s1-47350/states-sue-to-stop-doge-accessing-personal-data.

[46] *See* Abigail Williams et al., *USAID Security Leaders Removed After Refusing Elon Musk's DOGE Employees Access to Secure Systems*, NBC News (Feb. 2, 2025), https://www.nbcnews.com/politics/national-security/usaid-security-leaders-removed-refusing-elon-musks-doge-employees-acce-rcna190357.

[47] *Lucia v. SEC*, 585 U.S. 237, 245 (2018).

if determined to be a principal officer.[48] Musk's allegedly extensive and unprecedented role in the federal government, which involves purportedly directing many of the initiatives described above, might be deemed to trigger these requirements.[49] If so, any actions that he took might be invalidated, which is the typical remedy in cases involving "a Government actor's exercise of power that the actor did not lawfully possess."[50]

IV. DOGE CANNOT ENTER ECONOMY ACT AGREEMENTS IF IT IS NOT AN AGENCY

Even if the government were correct that USDS is solely advisory and does not exercise the kind of authority that would make it an "agency," that would only create a separate problem for USDS: USDS would not be able to use the Economy Act agreements that appear to be providing much of USDS's funding and by which USDS employees are detailed to other agencies to effectuate the DOGE agenda. If USDS's Economy Act agreements are invalid, then any USDS obligations in excess of the amounts it received from non-Economy Act sources would violate the Appropriations Clause and the Anti-Deficiency Act. Such obligations could include obligations (both completed and future) for staff salaries or software or other goods and services. Moreover, any actions taken by unlawfully detailed USDS employees might be subject to challenge as well.

The Economy Act allows one "agency" to provide goods and services to another "agency."[51] But, as explained above, the Trump administration has attempted to characterize USDS as something *other* than an agency — i.e., as an EOP component that solely advises and assists

[48] *See Edmond v. United States*, 520 U.S. 651, 661 (1997).

[49] *See, e.g.*, David Ingram, *With Elon Musk Watching, Trump Says He's Giving DOGE Even More Power*, NBC News (Feb. 11, 2025), https://www.nbcnews.com/politics/doge/elon-musk-trump-doge-executive-order-rcna191751.

[50] *Collins v. Yellen*, 594 U.S. 220, 258 (2021).

[51] 31 U.S.C. § 1535(a).

the President — to avoid the issues posed by USDS's lack of authority and because the administration does not wish to subject USDS to transparency laws such as FOIA.

It is difficult to imagine a compelling argument why USDS should be considered an agency for purposes of the Economy Act if it is not an agency for purposes of FOIA and other federal laws. As originally enacted, the Economy Act's scope was limited to "[a]ny Executive department or independent establishment of the Government,"[52] components also covered by FOIA, 5 U.S.C. § 552(f)(1). In 1982, Congress altered the language to cover an "agency,"[53] but that was pursuant to a recodification to "revise, codify, and enact *without substantive change* certain general and permanent laws … as title 31."[54] Courts have repeatedly held that changes to statutory language pursuant to recodifications with this proviso do not change the statute's meaning.[55] If the Economy Act was intended to be limited to Executive departments and independent establishments, and USDS is not such an entity for purposes of myriad other laws, it should not be for purposes of the Economy Act either.

Even if one were to ignore this history and look instead to the definition of "agency" that generally applies to title 31 of the U.S. Code, where the Economy Act is now codified, nothing in that definition would support treating USDS as an agency if it is not for other purposes. Under the 31 U.S.C. § 101, an "agency" includes "a department, agency, or instrumentality of the United States Government."[56] USDS is not a "department," and it is not specified as an "agency" under any other provision of law. Nor is USDS an "instrumentality," which typically refers to a specialized entity established by Congress to carry out certain functions.[57]

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[52] Act of June 30, 1932, ch. 314, § 601, 47 Stat. 417, https://uscode.house.gov/statviewer.htm?volume=47&page=417.

[53] Pub. L. 97–258, 96 Stat. 933, 935 (1982), https://www.govinfo.gov/content/pkg/STATUTE-96/pdf/STATUTE-96-Pg877.pdf.

[54] *Id.*, 96 Stat. at 877 (emphasis added); *see id.*, 96 Stat. at 1067.

[55] *See, e.g.*, *Soto v. United States,* 92 F. 4th 1094, 1100 (Fed. Cir. 2024); *Newton v. FAA*, 457 F. 3d 1133, 1143 (10th Cir. 2006); *Rymes Heating Oils v. Springfield Term Railway*, 358 F. 3d 82, 90 n.7 (1st Cir. 2004).

[56] 31 U.S.C. § 101.

[57] *See, e.g.*, Home Owners' Loan Act of 1933, c. 64, § 1, 48 Stat. 128 (establishing Home Owners' Loan Corporation as an "instrumentality of the United States"); *see also What Are Government Entities and Their Federal Tax Obligations?*, IRS, https://www.irs.gov/government-entities/federal-state-local-

What's more, the relevant body to consider for Economy Act purposes may be the "temporary organization" that Executive Order 14158 established, to the extent that the provision of goods and services (including the detailed personnel) comes from the temporary organization's staff. In fact, the statute allowing for temporary organizations, 5 U.S.C. § 3161, treats *the temporary organization* as the relevant unit for purposes of detailing employees; it permits any agency to detail employees *to* a temporary organization.[58] It is farfetched that a temporary organization itself meets the title 31's definition of an agency, particularly where § 3161(c) contrasts "any agency or department" from a "temporary organization."

Even if it were ambiguous whether USDS falls under title 31's definition of an agency, the Economy Act should not be read to allow a component that exists solely to advise and assist the President to provide "goods and services" to outside agencies. As explained above, the Economy Act permits a performing agency (here, USDS) to provide goods and services to a requesting agency in support of the latter's statutory duties. For USDS's Economy Act agreements to be valid, USDS must be providing goods and services in direct support of external agencies' statutory operations. It is a contradiction for a body that exists solely to advise and assist the President to assist an outside agency in carrying out its statutory duties.[59]

Litigants might consider asserting these claims in a challenge to USDS's actions under the Appropriations Clause or the Anti-Deficiency Act. Such claims might seek to enjoin USDS from undertaking any future activities without sufficient appropriations to fund those activities, or to undo actions USDS has already taken when it lacked appropriations. There is limited authority on the remedy for an Appropriations Clause or Anti-Deficiency Act

governments/government-entities-and-their-federal-tax-obligations (last visited Feb. 11, 2025) ("Generally, an instrumentality performs governmental functions, but does not have the full powers of a government.").

[58] 5 U.S.C. § 3161(c).

[59] In *CREW v. Office of Administration*, 559 F. Supp. 2d 9, 16, 37 (D.D.C. 2008), the court noted that the Office of Administration within EOP has entered Economy Act agreements with outside agencies, and the court held that this fact was not determinative of whether the Office of Administration was subject to FOIA because the statutes employ different definitions of an "agency." But the court did not address whether the Office of Administration actually qualifies as an agency under the Economy Act. Moreover, the Economy Act services the Office of Administration was providing to other agencies were still plausibly in direct assistance of the President, because they were all on the White House complex to support the EOP. *Id.* at 16.

violation, but the Fifth Circuit and President Trump himself have asserted that actions taken without valid appropriations should be undone. In *Community Financial Service Association of America v. CFPB*, the Fifth Circuit held that the plaintiffs were "entitled to a rewinding of" agency actions that the court held were taken in violation of the Appropriations Clause.[60] And in his prosecution in Florida, then-defendant Trump relied on this opinion to assert that an agency cannot retroactively "cure [an] Appropriations Clause defect," but instead "the remedy in those cases" must be "invalidation of the unlawful actions."[61]

If USDS is not an agency that may enter into Economy Act agreements, that would also mean USDS's detail of its employees to other agencies would be invalid. The same provision of the Economy Act that allows USDS to obtain reimbursements from other agencies is the one that allows USDS to detail employees to provide services to other agencies — and that provision is, as explained above, inapplicable to USDS as the administration has described it.[62] On this basis, litigants could potentially seek to compel USDS to recall its personnel from other agencies and to unwind any actions that the detailed personnel took at those agencies.

To reiterate: the Trump administration cannot have it both ways. If it attempts to characterize USDS as something other than an agency to avoid the issues posed by its lack of authority, or to circumvent FOIA, then it runs headlong into the limitations of the Economy Act. Either way, USDS is operating unlawfully.

V. DISCOVERY AGAINST DOGE

Aside from these overarching structural claims, litigants might also consider whether to seek discovery into USDS's operations. Such discovery might be particularly appropriate to the extent USDS operatives are attempting to circumvent court orders or drive agency decision-making behind closed doors. "[I]n reviewing agency action, a court is ordinarily

[60] 51 F.4th 616, 643 (5th Cir. 2022), *rev'd on other grounds*, 601 U.S. 416 (2024).

[61] Pres. Trump's Reply Br. at 7, *United States v. Trump*, No. 9:23-cr-80101-AMC (S.D. Fla. Mar. 24, 2024), ECF No. 414, https://perma.cc/2E4W-HCCR.

[62] 31 U.S.C. § 1535(a).

limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record."[63] Although courts generally do not pry into "'the mental processes of administrative decisionmakers,' … [o]n a 'strong showing of bad faith or improper behavior,' such an inquiry may be warranted and may justify extra-record discovery."[64] Applying these principles, there are at least five contexts in which litigants might seek discovery into USDS's operations.[65]

Remedy. Litigants might seek discovery to inform the appropriate tailoring of the relief they would pursue. The Administrative Procedure Act's (APA) limitations on extra-record evidence are weakest where questions unrelated to the substance or correctness of the agency's decision are at issue. In particular, courts have long held that extra-record evidence may be appropriate "in cases where relief is at issue, especially at the preliminary injunction stage."[66] Such evidence might be especially relevant to determining "the appropriate relief,"[67] including who might need to be expressly bound by the injunction to ensure complete relief (e.g., USDS staff) or the specific actions that might need to be enjoined (e.g., USDS actions).

Compliance. By the same token, discovery might be appropriate in circumstances where there is substantial doubt about whether agency officials have complied with an injunction. The APA's limitations on consideration of extra-record evidence do not apply to "a court's monitoring of compliance with its own orders."[68] After all, "[e]quity would not be achieved if a court decided simply to rubber-stamp an enjoined party's unsupported self-assessment

[63] *Dep't of Commerce v. New York*, 588 U.S. 752, 780 (2019).

[64] *Id.* at 781 (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)).

[65] The various circuits have generally converged on the same lists of circumstances in which extra-record evidence is permissible. *See, e.g.*, *Murphy v. Comm'r of Internal Revenue*, 469 F.3d 27, 31 (1st Cir. 2006); *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005); *Com. Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998); *Nat'l Audubon Soc. v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997).

[66] *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989) (quotation omitted); *see, e.g.*, *Am. Rivers v. U.S. Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 247 (D.D.C. 2003) (otherwise, "defendants could easily defeat requests for relief in almost all cases"); *U.S. Olympic & Paralympic Museum v. Small Bus. Admin.*, 2024 WL 3694462, at *3 (D.D.C. Aug. 7, 2024).

[67] *Nat'l Tr. for Historic Pres. v. Blanck*, 938 F. Supp. 908, 916 n.10 (D.D.C. 1996), *aff'd*, 203 F.3d 53 (D.C. Cir. 1999).

[68] *Nat'l L. Ctr. on Homelessness & Poverty v. U.S. Dep't of Veterans Affs.*, 842 F. Supp. 2d 127, 131 (D.D.C. 2012).

of its compliance with a court order."[69] Such discovery might also extend to USDS officials as "persons who are in active concert or participation" with any enjoined agency officials.[70] To use the impoundment litigation as an example, USDS officials at Treasury allegedly sought to obtain access to payment systems to effectuate President Trump's efforts to impound federal funds.[71] Those reported efforts might run afoul of any applicable injunctions restricting agencies from pausing funding, and thereby warrant discovery into "just what Musk et al. are doing, who is involved, what are the limitations on their access to federal databases, and whether they in fact have been granted the tools to stop payments."[72]

Agency action. Courts have also permitted discovery (sometimes categorized as "jurisdictional" discovery) into whether an agency has taken an action or changed its policies, notwithstanding the agency's denials.[73] To the extent there is a factual basis to believe that USDS operatives have promulgated hidden policies or issued directives to agencies behind closed doors — e.g., to pause funding or terminate civil servants — litigants

[69] *Id.*; *see, e.g.*, *Texas v. Biden*, 2021 WL 5399844, at *4 (N.D. Tex. Nov. 18, 2021) (permitting discovery into whether agency complied with injunction requiring it to implement Migrant Protection Protocols "in good faith"); *NRDC v. EPA*, 2020 WL 2849624, at *4 (D.D.C. June 2, 2020) (permitting discovery into whether agency had "act[ed] diligently"); *Abdi v. McAleenan*, 2019 WL 1915306, at *2 (W.D.N.Y. Apr. 30, 2019) (permitting discovery and collecting additional cases); *cf. In re U.S. Dep't of Educ.*, 25 F.4th 692, 703 (9th Cir. 2022) (agreeing that "agency acted in bad faith" by acting inconsistently with proposed settlement, thereby warranting discovery, but reversing order permitting deposition of Secretary of Education).

[70] Fed. R. Civ. P. 65(d)(2)(C).

[71] *See* Polantz & Mattingly, *supra* note 3.

[72] Samuel Bagenstos, *Why Write About the Illegality of What Trump and Musk Are Doing?*, Inside/Outside (Feb. 2, 2025), https://buttondown.com/sbagen/archive/why-write-about-the-illegality-of-what-trump-and/.

[73] *See, e.g.*, *Hisp. Affs. Project v. Acosta*, 901 F.3d 378, 388 (D.C. Cir. 2018) (noting that, where plaintiffs had alleged pattern of agency decisions, the district could permit "further discovery 'to ascertain the contours of the precise policy at issue'") (quoting *Venetian Casino Resort, LLC v. EEOC*, 409 F.3d 359, 367 (D.C. Cir. 2005)); *Florida v. United States*, 2022 WL 2431442, at *2 (N.D. Fla. June 6, 2022) ("[B]ecause Defendants deny the existence of the non-detention policy, Florida cannot be constrained by an administrative record as to that alleged policy."); *Doe 1 v. Nielsen*, 2018 WL 4266870, at *2 (N.D. Cal. Sept. 7, 2018) (permitting "jurisdictional discovery" into the "nature of the agency action"); *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 149 (D.D.C. 2018) (finding that plaintiffs had sufficiently alleged existence of policy, although "[d]iscovery may show otherwise"); *cf. United Student Aid Funds, Inc. v. Devos*, 237 F. Supp. 3d 1, 5 (D.D.C. 2017) (permitting admission of extra-record evidence regarding whether agency document announced a "new rule").

might be able to seek discovery into the existence and contours of those policies. For example, the White House Press Secretary asserted that, although the Office of Management and Budget had rescinded its controversial M-25-13 memorandum pausing federal financial assistance, there was "NOT a rescission of the federal funding freeze" itself.[74] Discovery might be an appropriate tool for probing the meaning and consequences of that assertion.

Constitutional claims. Although there is some disagreement, many courts have held that "extra-record discovery may be appropriate where the plaintiff mounts a constitutional challenge to agency action."[75] These cases tend to involve claims under the First Amendment, equal protection, or due process.[76] However, discovery might conceivably be warranted in the context of other constitutional claims, including claims under the Appointments Clause,[77] which require a demonstration that a given official has "exercise[d] significant authority pursuant to the laws of the United States,"[78] or under the Take Care Clause,[79] which involves an analysis of whether the Executive Branch is "faithfully execut[ing]," or instead sabotaging, a statutory scheme.[80]

Pretextual reasoning. Even in the context of arbitrary-and-capricious claims under the APA, discovery might be available to probe whether an agency's stated reasons for action are pretextual. In the citizenship question case, for example, the Supreme Court held that the district court's decision to order discovery before production of the administrative

[74] Tweet by Karoline Leavitt (White House Press Secretary) (Jan. 29, 2025), https://perma.cc/4HU4-VZ4G.

[75] *Baltimore v. Trump*, 429 F. Supp. 3d 128, 138 (D. Md. 2019) (collecting cases); *see also Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979) ("The intent of Congress in 5 U.S.C. § 706(2)(B) was that courts should make an independent assessment of a citizen's claim of constitutional right when reviewing agency decision-making.").

[76] *See, e.g.*, *Murthy v. Missouri*, 603 U.S. 43, 54 (2024) (First Amendment); *Cook County v. Wolf*, 461 F. Supp. 3d 779, 795 (N.D. Ill. 2020) (equal protection); *Immigrant Defs. L. Ctr. v. Mayorkas*, 2024 WL 2103964, at *10 (C.D. Cal. Apr. 2, 2024) (due process).

[77] U.S. Const. art. II, § 2, cl. 2.

[78] *Lucia*, 585 U.S. at 245 (quotation omitted).

[79] U.S. Const. art. II, § 3.

[80] *Cf. Texas v. DHS*, 2023 WL 2842760, at *3 (S.D. Tex. Apr. 7, 2023) (permitting discovery on an *ultra vires* claim); *NAACP v. Bureau of Census*, 382 F. Supp. 3d 349, 384 (D. Md. 2019) (permitting discovery into whether lack of funding for census violated the Enumeration Clause).

record was premature, but ultimately appropriate, because it revealed that the agency's public rationale — the need to enforce the Voting Rights Act — in fact "played an insignificant role in the decisionmaking process."[81] The same might be true with respect to decisions in which USDS is involved. For example, an agency's assertion that a grant no longer serves the purposes of the underlying statute or program might simply be a pretext for USDS's underlying agenda of cutting government spending. In such cases, discovery might serve to illuminate the true basis for the agency's decision or expose a truncated or improper decisionmaking process.

* * *

Nevertheless, litigants might do well to recall that in APA cases the admission of extra-record evidence remains "the exception, not the rule."[82] And even where discovery is permitted, courts impose limitations on the scope, extent, and form of discovery.[83] Discovery against the government also implicates certain privileges, such as the deliberative process privilege, which shields "predecisional, deliberative documents" in the interest of facilitating frank communication among agency officials.[84] Litigants might think carefully about what discovery would be most helpful and propose a reasonable approach that a court would be inclined to accept.

[81] *New York*, 588 U.S. at 782; *see, e.g.*, *Club v. Angelle*, 2021 WL 9526861, at *4 (E.D. La. Mar. 4, 2021) (permitting discovery into whether agency considered other materials); *Sweet v. DeVos*, 495 F. Supp. 3d 835, 846 (N.D. Cal. 2020) (permitting discovery based on "strong showing of agency pretext"); *Cook Cnty., Illinois v. Wolf*, 2020 WL 3975466, at *2 (N.D. Ill. July 14, 2020) (permitting discovery into whether fiscal rationale was "pretext for discrimination"); *cf. Stand Up for California! v. U.S. Dep't of Interior*, 315 F. Supp. 3d 289, 296 (D.D.C. 2018) (permitting discovery where review process suggested prejudgment by agency officials).

[82] *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010).

[83] *See, e.g.*, *In re U.S. Dep't of Educ.*, 25 F.4th at 700 ("Discovery beyond the administrative record does not necessarily include the deposition of a cabinet secretary."); *Cherokee Nation v. Dep't of Interior*, 2021 WL 3931870, at *3 (D.D.C. Sept. 2, 2021) ("That the Court allows some discovery, however, does not imply endless discovery."); *Nat'l Urb. League v. Ross*, 508 F. Supp. 3d 663, 705 (N.D. Cal. 2020) (imposing "significant limits" on depositions and document discovery).

[84] *Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021).

VI. CONCLUSION

Given the extent of DOGE's reported involvement in federal policy — including many of the largest controversies of the first few weeks of the Trump administration — litigants are likely to continue challenging actions related to DOGE in court. That litigation will naturally focus on the specifics of those actions and why they run afoul of numerous constitutional, statutory, and regulatory requirements. But rather than playing whack-a-mole every time DOGE tries to break part of the federal government, litigants might also consider using litigation to mount a more fundamental challenge to DOGE's unprecedented role in our government, as embodied in the likely unlawful structure of USDS.