The Second Amendment

Hearing Before the Senate Homeland Security and Government Affairs Committee

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Wednesday, April 15, 2026

Chairman Paul, Ranking Member Peters, and distinguished members of the Committee:

Thank you for the invitation to testify before the Committee today.

Of all of the conversations that we can and should be having about the U.S. Constitution today, this Committee's focus on the Second Amendment strikes me as singularly misplaced. Against mountains of evidence of unconstitutional behavior by the current administration and its officers and employees, there is, to my knowledge, virtually no evidence of the kind of widespread Second Amendment violations that would justify *any* congressional attention to the topic—let alone attention by *this* Committee.[1]

But even for those who would point to a handful of existing local and state gun control laws and claim that *they* violate the Second Amendment, the nature of such legislation makes it uniquely amenable to legal challenge—since virtually all laws regulating firearms impose the kinds of forward-looking consequences that can be challenged by those whose rights have allegedly been infringed through suits seeking prospective relief.

The same cannot be said with respect to the overwhelming majority of the current administration's unconstitutional behavior—from arrogating Congress's appropriations power to claiming the power to enter private homes without judicial warrants to chilling the constitutionally protected speech of law firms, universities, and non-citizen critics to going to war against Iran without even a scintilla of congressional authorization. Thanks to a combination of Supreme Court decisions and *in*action by Congress, one need look no further than each day's headlines to see examples not just of constitutional rights and structural mandates over which this administration is running roughshod, but of constitutional violations for which there is—and has been—no remedy whatsoever.

In my opinion, *that* is the conversation we ought to be having, and the capital that this Committee (and Congress) ought to be expending on reforms: Not to focus on a small class of local and state laws that may not actually

1. *See* U.S. Senate Homeland Security & Gov't Affairs Comm., *About—Jurisdiction and Rules* (last visited Apr. 11, 2026) (this Committee's "primary" responsibilities are "to study the efficiency, economy, and effectiveness of all agencies and departments of the federal government; evaluate the effects of laws enacted to reorganize the legislative and executive branches of government; and study the intergovernmental relationships between the U.S. and states and municipalities, and between the U.S. and international organizations of which the U.S. is a member").

violate the Second Amendment (and that have adequate remedies insofar as they do), but to look closer to home at all of the ways in which the executive branch is *currently* acting unconstitutionally while Congress sits silently on the sideline—refusing to avail itself of the political remedies that are already available, and the legal remedies for which it could easily provide.

In *Federalist 51*, James Madison argued that the Constitution would work only if the branches pushed aggressively against each other. In his words, "ambition must be made to counteract ambition."[2] We certainly have an ambitious President and an ambitious Supreme Court. We certainly *don't* have an ambitious Congress. That fecklessness has costs that go way beyond the Second Amendment, and that we (and this Committee) ignore at not only at *our* peril, but at the increasing peril of the rule of law.

I. LACK OF REMEDIES FOR INDIVIDUAL RIGHTS

I have written elsewhere, and in significant detail, about how difficult it has become for victims of constitutional violations by federal officers to pursue *any* redress.[3] Unlike what's true for state and local officers, where suits under 42 U.S.C. § 1983 remain a viable (if not robust) remedy in many cases, there is no statutory basis for bringing damages suits against *federal* officers. For most of our history, that lacuna was not decisive; victims of federal official misconduct could bring suits under *state* tort law—and, unless the officer was entitled to some kind of official immunity, could obtain damages through that mechanism. Likewise, starting with the Supreme Court's 1971 decision in *Bivens*,[4] federal courts would recognize circumstances where, just like what was (and remains) true for *injunctions*,[5] they could award damages for constitutional violations *without* an express federal cause of action authorizing such relief.

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2. THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter, ed., 1961).

3. *See, e.g.*, Steve Vladeck, *Accountability After Minneapolis*, ONE FIRST, Jan. 24, 2026, https://www.stevevladeck.com/p/204-accountability-after-minneapolis; *see also* Stephen I. Vladeck, *The Disingenuous Demise and Death of* Bivens, 2020 CATO SUP. CT. REV. 263.

4. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

5. *See* Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327 (2015) ("The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England.").

But for better or worse, Congress in 1988 took almost all of those state tort remedies away.[6] And in the decades since, the Supreme Court has narrowed *Bivens* suits to a fare-thee-well[7]—to the point where, except for a fortuitous sliver of claims that can be brought directly against the United States under the Federal Tort Claims Act, it is nearly impossible to obtain damages for constitutional violations by federal officers today.[8]

In other words, even where federal officers would *not* be entitled to qualified immunity—where their conduct was not just unconstitutional, but violated *clearly established* constitutional rights of which every reasonable officer in their position would have known—they still cannot be sued for damages today. The result has been the disappearance of any *deterrent* for unconstitutional conduct by those officers—a disappearance that has been driven home by events in Minneapolis, Chicago, Portland, and elsewhere.

Injunctive relief, of course, remains available for *ongoing* violations of the Constitution—like the Second Amendment violations about which this Committee claims to be so worried. But for most of those whose rights are violated by the government, the violations are ephemeral. Unlike a local or state gun control law, an ICE agent who enters a home without a warrant or probable cause, or who uses excessive force, cannot be sued for prospective relief. Even efforts to block what appeared to be *policy*-level decisions by ICE to engage in racial profiling of suspected undocumented immigrants in and around Los Angeles foundered in the Supreme Court last September on this precise distinction—with Justice Kavanaugh's solo concurring opinion in *Vasquez Perdomo*[9] arguing that the plaintiffs lacked standing to seek injunctive relief under the Supreme Court's 1983 ruling in *City of Los Angeles* v. *Lyons*.[10]

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6. Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 5, 102 Stat. 4563, 4564 (codified at 28 U.S.C. § 2679(b)).

7. *See, e.g.*, Goldey v. Fields, 606 U.S. 942 (2025) (per curiam); Egbert v. Boule, 596 U.S. 482 (2022); Hernández v. Mesa, 589 U.S. 93 (2020); Ziglar v. Abbasi, 582 U.S. 120 (2017). I should note that I was counsel of record for the petitioners in *Hernández*. Needless to say, nothing contained herein necessarily represents the views of my co-counsel or our clients.

8. *See* Steve Vladeck, *Damages as a Missing Deterrent*, ONE FIRST, Oct. 9, 2025, https://www.stevevladeck.com/p/bonus-182-damages-as-a-missing-deterrent.

9. Noem v. Vasquez Perdomo, 146 S. Ct. 1, 2–3 (2025) (Kavanaugh, J., concurring).

10. 461 U.S. 95 (1983).

Nor is this problem limited to misconduct by ICE. As this Committee well knows, ever since Congress significantly expanded the scope of the Foreign Intelligence Surveillance Act (FISA) after September 11, it has been exceedingly difficult for those Americans whose communications have been intercepted through warrantless electronic surveillance conducted under FISA's auspices to vindicate *their* Fourth Amendment rights, either—given the structural insufficiency of the judicial review provided by the FISA Court.[11]

Beyond the Fourth Amendment, we have also seen an unprecedented number and degree of executive branch behavior flatly inconsistent with the First Amendment's Free Speech Clause—from executive orders targeting law firms and universities to revocations of immigration status from non-citizens who have done nothing other than exercise their constitutional right to peaceably protest.[12] Although First Amendment violations, in the abstract, can often be vindicated through suits for declaratory or prospective relief, the *scale* of the administration's behavior in this context has made it all-but impossible for *everyone* whose speech has been chilled to vindicate their rights—creating much the same gap that already exists with respect to Fourth Amendment violations.

In *Marbury* v. *Madison*, Chief Justice Marshall famously quoted Blackstone's invocation of the Latin maxim *ubi jus ibi remedium*—"where there is a right, there is a remedy."[13] Although that principle has been honored in the breach for most of American history, today's jurisprudential landscape is one in which it is just not being honored at all, and in which countless constitutional rights have *no* legal remedy. That seems like a much bigger—and more immediate—problem than the one that is the putative basis for today's hearing. It's also a problem Congress could easily and quickly fix.

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11. *See, e.g.*, Steve Vladeck, *It's Time to Fix the FISA Court (the Way Congress Intended)*, NBC News, Aug. 1, 2013, https://www.nbcnews.com/id/wbna52640684.

12. *See* CTR. FOR AM. PROGRESS, PROTECTING CONSTITUTIONAL FREEDOMS OF SPEECH AND ASSEMBLY DURING THE SECOND TRUMP ADMINISTRATION (2026), https://www.americanprogress.org/article/protecting-constitutional-freedoms-of-speech-and-assembly-during-the-second-trump-administration/.

13. *See* 5 U.S. (1 Cranch) 137, 163 (1803) ("[I]t is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress." (internal quotation marks omitted)).

II. LACK OF REMEDIES FOR THE ERODING SEPARATION OF POWERS

One can make much the same point about many of the *structural* constitutional violations we've seen from this administration—especially with respect to executive branch's unprecedented arrogation of Congress's appropriations power and its increasingly alarming—if distressingly familiar—arrogation of Congress's war powers.

Taking appropriations first, as this Committee knows, the *single* power the Constitution gives to Congress and then expressly denies to any other actor is the appropriations power. Article I, Section 9, Clause 7 is explicit that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Just as the President cannot spend money Congress *hasn't* appropriated, he also can't refuse to spend appropriations that Congress had mandated.[14]

Nevertheless, this administration has engaged in an unprecedented number and degree of violations of both principles. It has regularly refused to spend money Congress required it to spend; and it has regularly spent money no statute authorized. In both cases, there has been neither a legal remedy nor a political one.

On the legal front, even after lower courts ordered the Trump administration to spend upwards of $4 billion in mandatory foreign aid funding, the Supreme Court last September issued a stay.[15] Although the Court did not write a majority opinion, its cryptic and unsigned order suggested that the lower courts had erred because only the Comptroller General could invoke the Impoundment Control Act of 1974 against the President.[16] In other words, it wasn't that the President had acted constitutionally; it was that Congress hadn't authorized *those* plaintiffs to obtain relief against his unconstitutional conduct (a conclusion that, even if it was remotely persuasive, could easily be fixed).

On the political front, well, I don't need to tell this Committee just how little Congress has stood up for its own appropriations power. But in one exchange that strikes me as especially revealing, Rep. Tom Cole, Chairman of

14. *See* Anti-Deficiency Act, 31 U.S.C. § 3141.

15. Dep't of State v. AIDS Vaccine Advisory Coalition, 146 S. Ct. 19 (2025) (mem.).

16. *Id.* at 19 ("The Government, at this early stage, has made a sufficient showing that the Impoundment Control Act precludes respondents' suit, brought pursuant to the Administrative Procedure Act, to enforce the appropriations at issue here.").

the House Appropriations Committee, suggested last January that it was perfectly fine for the President to refuse to abide by congressional appropriations—because an appropriation "is not a law"; it's just a "congressional directive."[17] Leaving aside the point that, under Article I, Section 9, Clause 7, appropriations can *only* be laws, this attitude drives home the broader problem: Congress has been not just passive, but willfully complicit, in the President's . . . appropriation . . . of the legislature's most important constitutional power.

Of course, one can tell the same story about the drift of war powers from Congress to the executive branch. Among countless other scholars of all ideological stripes, I've been arguing for decades, across multiple presidencies, of the need for more accountability in that space.[18] Indeed, the only real difference here is that the story is a longer one.[19] But the Trump administration's campaign of lethal boat strikes in international waters;[20] its invasion of Venezuela on the highly dubious ground that it needed military force to "support" law enforcement personnel as they arrested Nicolás Maduro;[21] and its large-scale uses of offensive military force against Iran[22] are all exemplars of what happens when there are neither legal nor political remedies for unconstitutional behavior by the executive branch: nothing.[23]

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17. John Fritze, *Trump's spending freeze sets up a future possible Supreme Court showdown over presidential power*, CNN.com, Jan. 28, 2025, https://www.cnn.com/2025/01/28/politics/spending-freeze-presidential-power.

18. *See, e.g.*, Stephen I. Vladeck, *Targeted Killing and Judicial Review*, 82 GEO. WASH. L. REV. ARGUENDO 11 (2014), https://www.gwlr.org/wp-content/uploads/2014/02/Vladeck_SME2.pdf; Stephen I. Vladeck, *War and Justiciability*, 49 SUFFOLK L. REV. 47 (2016).

19. *See* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1995).

20. *See* Steve Vladeck, *Five Questions About "Extrajudicial Killings,"* ONE FIRST, Nov. 6, 2025, https://www.stevevladeck.com/p/188-five-questions-about-extrajudicial.

21. *See* Steve Vladeck, *Five Questions About the Maduro Arrest Operation*, ONE FIRST, Jan. 3, 2026, https://www.stevevladeck.com/p/200-five-questions-about-the-maduro.

22. *See* Steve Vladeck, *The Supreme Court and Vietnam*, ONE FIRST, Mar. 9, 2026, https://www.stevevladeck.com/p/215-the-supreme-court-and-vietnam.

23. A good example of this nihilism can be found in Jack Goldmith, *Law Is Irrelevant to the U.S. Attack on Iran*, EXECUTIVE FUNCTIONS, Feb. 28, 2026, https://www.execfunctions.org/p/law-is-irrelevant-to-the-us-attack.

III. THE WAY FORWARD

What is perhaps most disappointing about this Committee's refusal to take up these far more important questions is that it would—and should—be remarkably easy for Congress to assert itself in each of these areas (and others), both directly and indirectly. Indeed, meaningful accountability for government officers who violate the Constitution isn't—and shouldn't be—a political or ideological issue.

One can accept that we're all going to have widely varying views on exactly which rights the Constitution protects (and how), and still believe that, whatever rights the Constitution recognizes, there ought to be a meaningful way to enforce them against all government officers—or, at the very least, against everyone other than the President himself.[24] Otherwise, what's the point of having those rights in the first place? A world in which the Constitution is only enforceable against the federal government *prospectively* is a world in which the federal government and its officers can do whatever it wants to the people—so long as the misconduct is brief and fleeting. And it's a world in which the only penalty the government pays for *violating* the Constitution is having to cease its unconstitutional behavior.

Across all of the federal accountability controversies of my professional career—torture; warrantless wiretapping; the unlawful surveillance programs leaked by Edward Snowden; drone strikes on U.S. citizens; the George Floyd protests; and on and on—it has boggled my mind that there isn't bipartisan support for such legislation. And, although this may lead members of this Committee and others to call me "partisan," it's worth stressing that, at virtually every turn, the reason why these legislative proposals haven't advanced has invariably been opposition from Republicans—not Democrats. I fear that today's hearing is, however unintentionally, an illustration of why that has been the case.

Indeed, what is especially striking about all of the unconstitutional behavior of the current administration 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

24. Even if the President is entitled to absolute immunity for official acts under the Supreme Court's decision in *Trump* v. *United States*, 603 U.S. 593 (2024), his subordinates are not. *See Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

for why Congress should loosen or repeal the various mandates that the executive branch is violating, or should authorize the unilateral conduct in which the executive branch is engaging, 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.

Nor should such a conversation be limited to new statutes Congress can (and should) pass—whether to provide more specific authorization for the executive branch's conduct or to empower *courts* to hold the executive branch more accountable for acting *without* such authority. Congress has a broad array of well-settled powers to impose such accountability directly—through its oversight function; its ability to exact concessions out of the executive branch in exchange for everything from appropriations to appointments; and, if necessary, its impeachment power. Even without going through the rigors of bicameralism and presentment, the Constitution gives Congress myriad tools to wield against a lawless President. That Congress is choosing not to wield them is a profoundly dispiriting reflection on its commitment to the separation of parties, rather than the separation of powers.

Instead, 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. And to tie this back to this Committee's actual mandate, these developments are necessarily coming at the expense of our homeland 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 the other witnesses. It seems to me, instead, that this Committee should be focused on (1) rigorous oversight hearings to document the unconstitutional behavior by the government agencies over which it has jurisdiction; (2) ways in which this Committee specifically, and Congress as a whole, can reassert legislative primacy in the area of spending and appropriations; (3) legislation to provide meaningful and adequate remedies to *everyone* whose rights are violated by

the federal government; 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. If we're going to talk about the Constitution, we should talk about why and how it is being so systemically violated by the current administration, why and how Congress is sitting idly by why that happens, and why and how a Congress that actually took its constitutional responsibility seriously should—and would—respond. After all, it just shouldn't be the case that the only way to hold the federal government accountable is to elect a new one.

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