No. 25-332

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, *et al.*,

Petitioners,

v.

REBECCA KELLY SLAUGHTER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* PROFESSOR JANE MANNERS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Page(s)

Statutes

Page(s)

Page(s)

Other Authorities

Page(s)

Page(s)

Page(s)

INTEREST OF AMICUS CURIAE

Amicus curiae Jane Manners is an Associate Professor of Law at Fordham University School of Law. Professor Manners teaches and writes extensively on early American understandings of presidential power, including the evolution of laws governing officer removal. She holds a J.D. and B.A. from Harvard University and a Ph.D. in American history from Princeton University.

Professor Manners submits this brief to inform the Court of the centuries-long history of the "inefficiency, neglect of duty, or malfeasance in office" removal language Congress has used when creating independent agencies, which defines faithful execution and accommodates the President's constitutional duty to faithfully execute the law. Professor Manners has no personal interest in the outcome of this case.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1914's Federal Trade Commission Act, Congress permitted the President to remove a Federal Trade Commissioner for "inefficiency, neglect of duty, or malfeasance in office." These words allowed the President to fulfill his constitutional duty to ensure

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[1] No party or counsel for any party authored this brief in whole or in part, and no person other than Amicus and undersigned counsel made a monetary contribution intended to fund the preparation or submission of this brief. This brief does not purport to convey the position of New York University School of Law.

that the laws are faithfully executed by authorizing the President to remove an officer who had failed to do so.

This Court in *Seila Law* identified the loss of the history of the terms inefficiency, neglect, and malfeasance, noting that no "workable standard" derived from the terms had been identified. *Seila Law LLC v. CFPB*, 591 U.S. 197, 229-30 (2020). This brief presents the history of the provisions, supplies the missing standard, and demonstrates why the provisions are fully consistent with the President's constitutional duty to see that the laws are faithfully executed.

It has become common to refer to the provisions in question as *protections* for officers against at-will removal. But inefficiency, neglect, and malfeasance historically were *permissions* authorizing the removal of officers who were otherwise not removable. Their statutory inclusion accommodated a long-dominant legal norm – that a fixed-term office was inviolable short of impeachment or other extraordinary measure – to an evolving American desire to hold public officials accountable through executive oversight.

Neglect of duty means a failure to perform one's duties in a way that causes specific harm to the entity – town, person, or agency – to which the duty is owed. Malfeasance connotes the commission of an unlawful act in the performance of one's duties. English and American courts and legislatures have used these two terms for hundreds of years to define what it means to violate the duty of faithful execution. Inefficiency, meanwhile, refers to wasteful government administration caused by inept officers.

When Congress used these terms in establishing the Federal Trade Commission, it employed language crafted to enable the President to fulfill his duty to take care that the laws are faithfully executed. This brief relates the history of those terms.

A. To start: Offices granted for a fixed term had, since long before the Founding, been understood to be unremovable. British law treated such offices as the property of the holder, whom even the King could not ordinarily dispossess. The early American States continued to treat fixed-term offices as inviolable short of impeachment or other extraordinary measure. At the time of the Founding, this understanding was well established. *See* pp. 5-8, *infra*.

B. The Constitution's ratification did not eliminate the significance of a fixed-year term. In the Constitution, the Framers did not address the question of how unremovable, fixed-term offices would accord with presidential power over the executive branch. But this does not suggest, as Petitioners argue, that the Framers assumed an absolute and illimitable removal power was inherent in the "Executive power" they vested in the President. That is not how the Framers would have understood or used that term. In the models available to them, "executive power" coexisted with the norm of unremovable offices.

Instead, the Framers expected Congress to set the terms and conditions of executive offices. And from the start Congress did just that, creating fixed-term

offices combined with permissions that authorized the President to remove those officers. *See* pp. 8-11, *infra*.

C. The constitutional question is thus whether the removal provisions chosen by Congress for the Federal Trade Commission ("FTC") impede the President's ability to perform his constitutional duty to take care that the laws are faithfully executed. They do not.

Indeed, the removal provisions fully accommodate attempts to ensure that officers faithfully execute the law. When Congress employed "inefficiency, neglect of duty, or malfeasance in office" in 1887 to create the first federal independent agency, the terms would have been deeply familiar to members of Congress, none of whom raised any constitutional concern. Congress went on to create dozens more independent agencies, including the FTC, 15 U.S.C. § 41, using the then-familiar structure of fixed-term offices subject to removal for inefficiency, neglect, or malfeasance. As their history shows, these terms supply a clear, workable standard by which the President and Court may judge whether a Commissioner is removable. *See* pp. 12-25, *infra*.

D. Congress has not been on a 150-year unconstitutional legislating spree. The inefficiency, neglect, or malfeasance standards do not interfere with the President's constitutional duty, since the President may remove any officer who, as judged under that clear standard, is not faithfully executing the law, thereby fulfilling his own duty to ensure that the laws are faithfully executed. *See* pp. 25-28, *infra*.

The removal language in the FTC Act and dozens of similar agencies strikes an appropriate balance

between officer independence and the President's constitutional duty.

ARGUMENT

A. The Pre-Constitutional Norm Was that Offices Granted for a Fixed Term Were Not Removable Short of Impeachment

Critical to appreciating the historical legal significance of the inefficiency, neglect, and malfeasance provisions is an understanding of the default rule they helped moderate: offices granted for a fixed term were not removable. This default rule was well established in British law, continued in early American law, and firmly in place at the Founding.

In early modern England, offices were frequently granted for a period of years and considered property. A fixed term office was its holder's property and could be sold or inherited.[2] The King had no general right to dispossess the holder of his office, and the officeholder could not be removed absent impeachment or other extraordinary measure.[3] Even high-level executive officers, including regulators of

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[2] Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 Colum. L. Rev. 1, 18-20 (2021); *see also* 3 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 734 (1740) (explaining that term of years is so secure it should be granted only to ministerial rather than judicial offices, since the holder could not be removed for misconduct, and if the officeholder died during their term, the office could be vacant during probate); Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 Stan. L. Rev. 175, 204-14 (2021).

[3] Manners & Menand, *supra* note 2, at 18-19.

trade, commerce, and infrastructure, could be removed by the King only for cause, if at all.[4] Parliament even established independent commissions to investigate abuses of office or compensate citizens, with commissioners appointed by Parliament and unremovable by the King.[5]

Following the American Revolution, the early States continued to use fixed-term offices. The States experimented with various ways to ensure good behavior, such as requiring an oath or bond conditioned on "faithful execution" of the duties of office.[6] But even as the States looked for ways to ensure accountability, no State chose to eliminate

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[4] Birk, *supra* note 2, at 204-214; *see also* Jed H. Shugerman, *Venality: A Strangely Practical History of Unremovable Offices and Limited Executive Power*, 100 Notre Dame L. Rev. 213, 258-68 (2024) (identifying department heads that were unremovable by the King).

[5] Birk, *supra* note 2, at 182-83, 225-28.

[6] *See, e.g.*, Act of Mar. 12, 1784, ch. 44, § 1, *reprinted in* 1 THE GENERAL LAWS OF MASSACHUSETTS, FROM THE ADOPTION OF THE CONSTITUTION, TO FEBRUARY, 1822 WITH THE CONSTITUTIONS OF THE UNITED STATES AND OF THIS COMMONWEALTH, TOGETHER WITH THEIR RESPECTIVE AMENDMENTS, PREFIXED 129 (Theron Metcalf ed., 1823) (requiring every sheriff to give sufficient security for the faithful performance of the duties of his office and to answer for the malfeasance and misfeasance of all his deputies); Act of July 14, 1699, ch. 9, § 1, *reprinted in* 1 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY: TO WHICH ARE PREFIXED THE CHARTERS OF THE PROVINCE WITH HISTORICAL AND EXPLANATORY NOTES, AND AN APPENDIX 381, 381 (1869) (requiring sheriff to give security "unto the king's majesty" at the discretion of the sessions for the due and faithful discharge of his office).

fixed offices or give its executive a general power of removal.[7]

The firmly-established legal rule was that an officer appointed to a fixed term has "a vested legal right" to serve "of which the executive cannot deprive him." *Marbury v. Madison*, 5 U.S. 137, 172 (1803). As Chief Justice Marshall explained:

> The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where, by law, the officer is not removable by him. . . . [A]s the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of this country.

Id. at 162.

This understanding of fixed-term offices was uncontroversial and widely accepted. It is reflected in

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[7] *See* Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. Pa. J. Const. L. 323, 338-44 (2016) (detailing the weak removal authority that early state constitutions gave their chief executive officers).

subsequent case law[8] and treatises.[9] Amicus has found no nineteenth-century case disavowing this understanding.

B. The Framers Assumed Congress Would Legislate Terms of Office and Removal

In the Constitution, the Framers did not resolve the question of how the norm of unremovable, fixed-term offices would accord with Presidential power over the executive branch. There was no debate at the Constitutional Convention over removal, and the Framers did not assign a removal power to either

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[8] *See, e.g.*, *Townsend v. Kurtz*, 34 A. 1123, 1123-24 (Md. 1896) (fixed-term office was removable by language providing "unless sooner removed by the governor, treasurer, and comptroller"); *Speed v. Common Council of City of Detroit*, 57 N.W. 406, 408 (Mich. 1894) (fixed-term office without qualification is not removeable, even for cause); *Stadler v. City of Detroit*, 13 Mich. 346, 347 (1865) (Cooley, J.) (appointment of new marshal halfway through incumbent's two-year term did not remove incumbent, as "[t]he term of the office being for two years, the council had no power to limit it to one").

[9] 2 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 791 (1911) ("[T]he general rule is that where the power of appointment is conferred in general terms and without restriction, the power of removal . . . is implied and always exists, unless restrained [by another law,] or by appointment for a fixed term.") (emphases omitted); JAMES HART, TENURE OF OFFICE UNDER THE CONSTITUTION: A STUDY IN LAW AND PUBLIC POLICY 64-65 (1930) (recognizing "different degrees of independence of tenure" including "relative independence when the officer is chosen for a fixed term of years, and liable only to impeachment" and a "lower order . . . where the officer is subject to removal, but only for specified causes, after notice and public hearing").

branch, apart from giving Congress the power of impeachment.

Petitioners argue that by vesting the "Executive power" in the President, the Framers implicitly and necessarily granted an illimitable power of removal. But that is not the way the Framers would have understood and used the term. The Framers, well versed in British law and state practice,[10] would have understood the norm of fixed-term, unremovable offices. Every model of executive power available to them, from the King to the State governors, accommodated the existence of unremovable offices. Blackstone's Commentaries, which "constituted the preeminent authority on English law for the founding generation,"[11] described the royal prerogatives of the King as including appointment, but not removal.[12]

When the Framers vested the "Executive power" in the President, they therefore used a term that accommodated the norm of unremovable offices. The suggestion that "executive power" necessitates illimitable removal power would have been entirely

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[10] British statute books served as references in the library at the Constitutional Convention and were discussed during ratification and in the Federalist Papers. *See* James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 Harv. L. Rev. 1613, 1660-61 (2011). Not one of the Founders' reference books suggested that the executive had, or should have, an exclusive or illimitable power to remove executive officers. Shugerman, *supra* note 4, at 212-14.

[11] *Alden v. Maine*, 527 U.S. 706, 715 (1999).

[12] 1 WILLIAM BLACKSTONE, COMMENTARIES *272.

novel.[13] And the suggestion that the President must have greater power over officers than even the King would have drawn outrage and fierce debate by Antifederalists in the Constitutional Convention and ratification debates.[14]

We can see these understandings at work in the legislation the First Congress passed. The First Congress created fixed-term offices,[15] and when it

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[13] As James Madison wrote, "[W]e may define a republic to be . . . a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. . . . The tenure of the ministerial offices generally will be a subject of legal regulation, conformably to the reason of the case, and the example of the State Constitutions." THE FEDERALIST NO. 39 (James Madison).

[14] *See* Caleb Nelson, *Congress, The President & The Courts*, DEMOCRACY PROJECT (Sep. 29, 2025) ("Even if removal authority was part of the royal prerogative, most members of the founding generation did not think they were giving the President the royal prerogative, and the Vesting Clause of Article II does not do so."), https://democracyproject.org/posts/must-administrative-officers-serve-at-the-presidents-pleasure [https://perma.cc/H47U-BKVY]; Jed H. Shugerman, *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 Yale J. of L. & the Humanities 125, 131 (2022) ("[W]hy would [the Framers] have reduced and divided up so many of the explicit powers derived from Blackstone's list of the king's prerogatives (like war, treaty, and appointment)" but then given the President more power than the King with respect to removal, which was "not listed by Blackstone at all[?]").

[15] *See* CARL RUSSELL FISH, THE CIVIL SERVICE AND THE PATRONAGE 82-86 (1905); *see also generally* Victoria F. Nourse, *The New History of Multi-Member Commissions at the Founding, 1789-1840* (forthcoming 2025), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3703&context=facpub/.

intended those officers to be removable at will, it said so explicitly. In the Judiciary Act of 1789, for example, Congress established that "a marshal shall be appointed in and for each district for the term of four years, but shall be removable from office at pleasure."[16] The second clause and use of the word "but" underscores the need to spell out the removal authority, which was not implied. These actions by the First Congress, "many of whose members had taken part in framing" the Constitution, provide "contemporaneous and weighty evidence," *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (quotations omitted), that the Constitution does not foreclose Congress's power to regulate removal.[17]

Congress used the same formulation in the Four Years' Law of 1820, which created dozens of jointly appointed officers, including district attorneys and customs collectors, who were "appointed for the term of four years, but shall be removable from office at pleasure."[18] Again, the inclusion of the second clause and the word "but" was required to clarify that the terms would not be inviolable, as would otherwise be assumed. Instead, Congress was specifying that *despite* the fixed term, the President could remove the officer at pleasure.

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[16] Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87.

[17] For a historical analysis demonstrating that most members of the First Congress rejected the argument that Article II contains an indefeasible presidential removal power, *see* Jed. H. Shugerman, *The Indecisions of 1789: Inconsistent Originalism and Strategic Ambiguity*, 171 U. Pa. L. Rev. 753, 783-96 (2023).

[18] Four Years' Law of 1820, ch. 102, § 1, 3 Stat. 582, 582.

C. The History of the Inefficiency, Neglect, and Malfeasance Removal Provisions Provides a Clear and Workable Standard

When Congress began to define the offices that would comprise the modern administrative state, it drew on legal understandings that had been developing for centuries. Critical among them were the concepts of inefficiency, neglect, and malfeasance. Courts and legislatures had used the terms "neglect" and "malfeasance" for hundreds of years to liquidate the meaning of faithful execution.[19] More recently, state legislatures had added "inefficiency" to broaden the circumstances warranting an officer's removal. Combined with fixed-term tenures, these removal provisions struck a balance, protecting the officer from political interference yet enabling the executive to remove officers whose substandard performance imperiled the agency's important work. As their history shows, these terms supply a clear, workable standard by which the President and Court may judge whether a Commissioner is removable.

1. English Case Law

The terms "neglect of duty" and "malfeasance in office" were used in early modern English common law to define conduct that breached the terms of an office.[20] Early modern courts treated municipal offices as property that could not be taken away for anything

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[19] Manners & Menand, *supra* note 2, at 18.

[20] *See id.* at 28-33.

short of a conviction in a court of law.[21] In 1728, however, King's Bench held that a power of removal "is incident to the corporation." *Lord Bruce's Case*, 93 Eng. Rep. 870, 870 (K.B. 1728). Thereafter, municipal corporations had the power to remove an officer who violated his oath and the duties of his office. *Rex v. Richardson,* 97 Eng. Rep. 426, 438 (K.B. 1758).

Subsequent case law made clear that such removals had to follow two basic principles. *First*, officer removal generally required "some act of ceremony,"[22] including notice and opportunity to be heard. The officer could not be removed by declaration. A "formal" process was required,[23] involving legal notice and "a proper opportunity of

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[21] The conviction could be either for an infamous crime such as perjury, forgery, or conspiracy, the taint of which would render the officer unfit for any public office, or for an offense that involved the violation of his corporate duty, such as defacing the borough charter. *Rex v. Plymouth (Bagg's Case)*, 77 Eng. Rep. 1271, 1279 (K.B. 1615); *see also* Manners & Menand, *supra* note 2, at 30.

[22] *See Rex v. Ponsonby*, 30 Eng. Rep. 201, 204 (K.B. 1755); *see also Avery v. Inhabitants of Tyringham*, 3 Mass. 160, 181-82 (1807) (while misfeasance or nonfeasance might "cause a forfeiture of the office," parishioners cannot appoint a new minister without process); *cf. Rex v. Mayor of London*, 100 Eng. Rep. 96, 98 (K.B. 1787) (suspension of officer holding a *quamdiu* office without first summoning him to answer to the charge was not improper in light of his "extremely reprehensible" conduct and the fact that the suspension could still be rescinded).

[23] *Ponsonby*, 30 Eng. Rep. at 204.

making a defence to the charge upon which he is removed."[24]

Second, removal required misbehavior significant enough to cause meaningful harm to the municipality's wellbeing.[25] One instance of knowingly neglecting to perform a corporate duty, at least where it had not been shown that the failure had interfered with the business of the corporation, was not enough. *Richardson*, 97 Eng. Rep. at 439. And the harm had to be to the municipality, rather than a superior officer, since the officer owed his duties to the municipality. Giving advice against the mayor's admonition, for example, was not a breach of corporate duty, because that duty was to the town, not the mayor. *Rex v. Corporation of Wells*, 98 Eng. Rep. 41, 44 (K.B. 1767). Disruptive words of contempt, even against "the chief officer," were "scornful" and "worthy of punishment" but not misconduct warranting removal. *Bagg's Case*, 77 Eng. Rep. at 1274, 1278.

A separate line of early English cases established the enforceability of statutory constraints on removal.[26] The seminal case is *Harcourt v. Fox.*

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[24] *Mayor of London*, 100 Eng. Rep. at 98 (quoting *Rex v. Mayor of Liverpool*, 97 Eng. Rep. 533, 539 (K.B. 1759)); *see also Reg v. Bailiffs of Gippo*, 92 Eng. Rep. 313, 317 (Q.B. 1705) (notice must be given); *City of Exeter v. Glide*, 90 Eng. Rep. 992, 992 (K.B. 1691) (requiring notice of the particular charge).

[25] *See Rex v. Leicester*, 98 Eng. Rep. 88, 89 (K.B. 1767) (four-month absence insufficient).

[26] Manners & Menand, *supra* note 2, at 33-37; *see generally* Birk, *supra* note 2 (describing various legislative protections against removal).

Simon Harcourt was appointed by the Earl of Clare as county clerk, but ousted when a new Earl sought to install his own clerk. *Harcourt v. Fox (Harcourt II)*, 89 Eng. Rep. 720, 730 (K.B. 1693). Parliament had created the clerk position as a lifetime appointment upon good behavior, and the court found that Harcourt had indeed "well behave[d] himself" in the job. *Id.* The court acknowledged that the new Earl might know best who "is most fit and proper" to do the job. *Id.* at 732. It nevertheless enforced the legislative protections. The court found that Parliament, in creating a lifetime position subject to good behavior, had encouraged "the faithful execution of the office" and "put [the clerk] out of fear of losing" the office "for any thing but his own misbehavior in it." *Id.* at 734. Parliament had thus designed the structure to advance "the public good . . . for it was a great mischief to have the office so easily vacable." *Id.*

Harcourt II was well known on both sides of the Atlantic for its assertion of legislative authority to limit an appointer's removal power. *E.g.*, *In re Hennen*, 38 U.S. 230, 236-37, 254-56 (1839) (recognizing the "English doctrine" that where an office was created by Parliament "the tenure of the office is determined by the meaning and intention of the statute"). Legislatures could provide an officeholder with a secure, fixed-term tenure and also permit the removal of such an official, specifying the grounds for such removal. In this way, the common law sought to ensure "faithful execution" by protecting officers from political interference while permitting their removal for demonstrated misbehavior.

2. Early State Use of Removal Structures

The post-Revolution period reflected the influence of this early modern English law. Early States employed a range of methods to hold officers accountable, including requiring a bond to ensure the "faithful execution" of the duties of office.[27] As courts adjudicated suits filed on these bonds, they turned to the well-defined concepts "neglect of duty"[28] and "malfeasance in office"[29] to liquidate the meaning of faithful execution. Did a coroner breach his bond of faithful performance by seizing a wagon that he erroneously believed to belong to a debtor against whom he was to execute a writ?[30] Had a constable

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[27] Manners & Menand, *supra* note 2, at 39-42.

[28] *See People ex rel. Kellogg v. Schuyler*, 4 N.Y. 173, 180 (1850) ("Where the duty exists, and it is neglected, or performed in an improper manner, the sureties upon principle should be liable, otherwise not."); *id.* at 192 ("There is clearly a duty resting upon the sheriff, not only to return the writ but to return it truly. If he should fail to do so, it would most clearly be a violation of official duty."); *People v. Spraker*, 18 Johns. 390, 396 (N.Y. 1820) (examining whether a sheriff's alleged neglect of duty by failing to execute a writ must be "judicially ascertained").

[29] *See Harris v. Hanson*, 11 Me. 241, 245-46 (1834) (holding that "[i]t is malfeasance [in office], if the officer under color of his office does what the law prohibits" and that "[m]alfeasance in office is . . . a breach of the condition for faithful performance"); *Skinner v. Phillips*, 4 Mass. 68, 73 (1808) (concluding that malfeasance in office violates the defendant's oath to "faithfully execute all the duties of his office" and that "the condition of the bond is broken by the malfeasance of the sheriff in his office").

[30] *See Harris*, 11 Me. at 245-46 (holding that defendant's act constituted malfeasance in office and thus breached the condition of his bond); *Kellogg*, 4 N.Y. at 178-83 (finding that a sheriff who seized the wrong person's goods had committed

breached his official duty by seizing property whose value exceeded the maximum he was permitted to seize under the statute?[31] In determining whether an officeholder who had engaged in such "misbehavior" had breached the condition of his bond, judges engaged in the ongoing, mutually constitutive process by which courts and legislatures gave shape and color to the meaning of an officer's faithful execution.

State legislatures, in turn, incorporated the concepts into statutes to ensure faithful execution. Pennsylvania made officers of various tenures liable for fines or forfeiture for "neglecting" or "refusing" to execute their offices.[32] New York employed a similar mechanism for various state and local officers, who were either made subject to specific fines and penalties for neglect or "fraud" or made liable to suit by the government.[33] Virginia imposed monetary

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official misconduct in breach of his bond); *see also Lammon v. Feusier*, 111 U.S. 17, 21(1884) (citing cases affirming the liability of the sureties of an officer).

[31] *City of Lowell v. Parker*, 51 Mass. 309, 313 (1845) (finding that constable took property by color of office and therefore engaged in misconduct in violation of his bond).

[32] *See, e.g.*, Act of Mar. 27, 1784, ch. 1089, § 6, *reprinted in* 11 THE STATUES AT LARGE OF PENNSYLVANIA 293 (2001) (appraisers); Act of Sept. 12, 1783, ch. 1020, §§ 10, 27, *reprinted in* 2 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA FROM THE FOURTEENTH DAY OF OCTOBER, 1700, TO THE SIXTH DAY OF APRIL, 1802, 418-29 (1803) (burgesses, constables, and supervisors of the highways); Act of Mar. 21, 1783, ch. 1022, § 10, *reprinted in* 11 THE STATUES AT LARGE OF PENNSYLVANIA 95 (2001) (officers in the militia).

[33] Act of Mar. 26, 1803, ch. 58, §§ 3-4, *reprinted in* 3 LAWS OF THE STATE OF NEW YORK 243 (Albany, Charles R. and George Webster 1804) [hereinafter LAWS OF NEW YORK] (firemen); Act of

forfeiture on officials who neglected or refused to perform their duties.[34]

As the nineteenth century advanced and states began to commission officers to oversee more complex and expensive infrastructural projects like schools, prisons, railroads, and canals, they incorporated the terms neglect and malfeasance into statutes as grounds for removing officers otherwise tenured for a term of years.[35] In 1828, for example, a New York commission proposed a novel tenure to secure both the independence and the accountability of prison clerks, who handled prison accounts. On the one hand, it proposed re-assigning the appointment of the term-of-years clerks to the governor with consent of the

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Feb. 22, 1803, ch. 14, § 3, *reprinted in* LAWS OF NEW YORK 325-26 (highway superintendents); Act of Apr. 9, 1804, ch. 98, § 11, *reprinted in* LAWS OF NEW YORK 633 (meat inspectors); Act of Feb. 20, 1784, ch. 4, § 3, *reprinted in* 1 LAWS OF THE STATE OF NEW YORK 592 (Albany, Weed, Parsons and Co. 1886) (public auctioneers).

[34] Act of Dec. 10, 1793, ch. 9, § 2, *reprinted in* 1 STATUTES AT LARGE OF VIRGINIA, FROM OCTOBER SESSION 1792, TO DECEMBER SESSION 1806, INCLUSIVE 229 (1835) (sheriffs); Act of Dec. 24, 1792, ch. 55, § 6, *reprinted in* 1 STATUTES AT LARGE OF VIRGINIA, FROM OCTOBER SESSION 1792, TO DECEMBER SESSION 1806, INCLUSIVE 163 (1835) (justices of the peace); *A Table of Fines, Forfeitures, Penalties and Amercements*, *reprinted in* 2 COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA OF A PUBLIC AND PERMANENT NATURE AS HAVE PASSED SINCE THE SESSION OF 1801, 218 (1808) (inspectors of fish).

[35] *See, e.g.*, Safety Fund Act of 1829, ch. 91, § 23, *reprinted in* LAWS OF THE STATE OF NEW YORK 171 (Albany, Wm. Gould and Co. 1829) (permitting the governor to remove the state's three banking commissioners before their terms ended for "misconduct or neglect of duty").

Senate, away from the prison inspectors for whom the clerks worked.[36] On the other, it suggested that the inspectors should have the "power to remove [a clerk] for misconduct or neglect of duty."[37] By giving the clerks a fixed term and by separating the power of removal from the power of appointment, the commissioners hoped to make the inspectors and the clerks checks on each other, aligning the clerks' accountability in a way that would maximize oversight and minimize opportunities for corruption.

As courts decided cases concerning removals under such statutory schemes, they further developed the body of law interpreting removal provisions.[38]

By the mid-nineteenth century, neglect and malfeasance had well-settled meanings. "Neglect" meant a sustained failure to perform one's official duties resulting in specific harm to the entity to which the duty is owed. And "malfeasance" connoted the

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[36] *See* Manners & Menand, *supra* note 2, at 43-44 (citing B.F. BUTLER & J.C. SPENCER, REPORT OF THE COMMISSIONERS APPOINTED TO REVISE THE STATUTE LAWS OF THIS STATE, pt. 4, ch. 3, tit. 2, art. 1, § 14, at 15 (1828)).

[37] *Id.*

[38] *See, e.g.*, *Page v. Hardin*, 47 Ky. 648, 672-77 (1848) (ruling that secretary of state serving "during good behavior" "is not removeable either at the pleasure of the Governor, or on his judgment for a mis-demeanor . . . in office"); *Commonwealth ex rel. Bowman v. Slifer*, 25 Pa. 23, 28 (1855) (concluding that "omission to give bond" was "not a neglect of official duty for which the governor is authorized to remove an incumbent duly commissioned for a term of years").

commission of an unlawful act in the performance of one's official duties.

3. Addition of the Concept of Inefficiency

The third permission, inefficiency, was incorporated in mid-nineteenth century statutes as state governments sought to tackle ineffective, wasteful spending.

Indiana offers an illustrative example. In 1843, in debt after fraud and waste depleted its investments in canals and railroads, the state reformed its constitution to try to stem such profligate spending.[39] It created new state officers who would serve for a term of years, subject to removal under varying standards.[40] For two particularly sensitive positions, it made the officers subject to removal for "inefficiency," "misconduct" or "neglect of duty."[41] These were positions where competence and honesty were at a premium: The superintendent of prisons, who oversaw an institution that took up a sizable chunk of state resources and who was rumored to do so in a reckless (if not corrupt) manner;[42] and the court's sheriff, whose role in serving writs of attachment was key to the state's ability to collect on its debts.[43] Adding inefficiency to the lexicon of

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[39] *See* Manners & Menand, *supra* note 2, at 45-49.

[40] *See id.*

[41] *See id.* at 46-47.

[42] 1843 Ind. Rev. Stat., ch. 4, § 37.

[43] *Id.* § 47.

removal law was an effort to relieve Indiana's financial burdens by ensuring that its officers did their jobs competently and without waste.[44]

The addition of inefficiency broadened the permission structure beyond the baseline permissions of neglect of duty and malfeasance in office, making it easier to remove an officer whose conduct imperiled effective administration. "Inefficiency" was understood to address the waste of government resources, especially where that waste resulted from ineptitude. A lawyer drunk at his client's trial for murder, for example, was labeled "inefficien[t],"[45] as was a city engineer who constructed a faulty arch using bad material.[46] Yet inefficiency was not broad enough to encompass minor shortcomings or policy disagreements. To be found inefficient, it was not enough that an officer was believed to be less "efficient" than another. Rather, an inefficient officer was one whose actions demonstrated that he could not be relied on to do the job he was hired to do.[47]

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[44] *See* Manners & Menand, *supra* note 2, at 49; *see also Efficient*, Merriam-Webster, https://www.merriamwebster.com/dictionary/efficient [https://perma.cc/Z9E9-8UFL] (defining "efficiency" as "productive of desired results; especially: capable of producing desired effects with little or no waste (as of time or materials)").

[45] *Hudson v. State*, 76 Ga. 727, 731 (1886).

[46] *People ex rel. Campbell v. Campbell*, 82 N.Y. 247, 252 (1880).

[47] *See, e.g.*, *Smith v. Whitney*, 116 U.S. 167, 169, 182 (1886) (declining to prohibit court-martial from trying a Navy officer on a charge of "culpable inefficiency in the performance of duty" for unlawfully altering terms of supplier contracts); *Providence Tool Co. v. Norris*, 69 U.S. 45, 54 (1864) (Field, J.) (ruling that an agreement promising compensation upon the procurement of a

4. Congress's Use of the Inefficiency, Neglect, and Malfeasance Removal Structure

By the end of the nineteenth century, the inefficiency, neglect, and malfeasance concepts were firmly established. It was well understood that neglect or malfeasance meant unfaithful execution of the law, and that any of the three could provide grounds for removal.

It is thus unsurprising that no constitutional concern was raised when Congress incorporated the standards into the Interstate Commerce Act in 1887.[48] Early drafts of the Act established fixed, five-year commissioner terms. After months of debate, Congress added that commissioners could be "removed by the President for inefficiency, neglect of duty, or malfeasance in office."[49] Neglect of duty and malfeasance formed the necessary baseline for ensuring faithful execution of the law, and inefficiency provided an additional degree of presidential oversight. Congress thus struck a balance: it gave the commissioners a measure of independence from political interference while empowering the President

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government contract to furnish war supplies is unenforceable, as such agreements "directly lead to inefficiency in the public service" and instead suggesting such contracts go to "those . . . who will execute them most faithfully, and at the least expense").

[48] Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887).

[49] Manners & Menand, *supra* note 2, at 57 (citing A Bill to Regulate Commerce, S. 1093, 49th Cong. § 6 (1886)).

to remove a commissioner who failed to competently and faithfully execute his duties.[50]

Despite the obvious importance of this first federal independent agency, no member of Congress raised concerns about limits on presidential power.[51] The Act was intensely studied and debated. Members knew it gave the President only limited authority to remove commissioners, and that this limitation secured the commissioners' autonomy from presidential control. Yet not one legislator suggested that the neglect, malfeasance, and inefficiency removal limits might be unconstitutional.[52]

Congress's silence on this constitutional question cannot be attributed to inattention or a lack of awareness of the significance of removal authority. As Congress was putting the finishing touches on the Interstate Commerce Act, the Senate debated whether to repeal the Tenure of Office Act. That Act required the President to obtain Senate consent before removing any executive branch officer jointly

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[50] *Id.* at 58; *see also* CHARLES FRANCIS ADAMS, JR., RAILROADS: THEIR ORIGIN AND PROBLEMS 133-34 (1878); Edward S. Corwin, *Tenure of Office and the Removal Power under the Constitution*, 27 Colum. L. Rev. 353, 356 (1927).

[51] Manners & Menand, *supra* note 2, at 58; *see also* Aditya Bamzai, *Taft, Frankfurter, and the First Presidential For-Cause Removal*, 52 U. Rich. L. Rev. 691, 714 (2018) (observing the same absence of concern over the Board of General Appraisers, created by Congress in 1890 to oversee tariff disputes, a similar structure but without fixed-year terms).

[52] Manners & Menand, *supra* note 2, at 59.

appointed by the President and the Senate.[53] The debate brought intense attention to the question of Presidential removal.[54] Senator George Hoar argued that the Act unconstitutionally abridged the President's duty to ensure faithful execution of the law.[55] Senator William Evarts agreed, but made an important distinction between the requirement that the Senate consent to all removals, which Evarts believed was unconstitutional, and the "right to impress upon an office an indelible durability according to the will of the law-making power,"[56] with which Evarts saw no constitutional problem. Evarts had served as chief counsel for President Andrew Johnson during his Senate impeachment trial for, among other offenses, violating the Tenure of Office Act, yet even he had "never been able . . . to conclude that a law which should affix a certain degree of durability in tenure of an office was in and of itself unconstitutional."[57] If the public interest required a fixed-term office with limited or no presidential removal, Evarts believed, this raised no constitutional concern because the power to specify such terms lay "in the very bed of law-making authority."[58] No

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[53] Interstate Commerce Act, ch. 104, § 11, 24 Stat. 379, 383 (1887).

[54] Manners & Menand, *supra* note 2, at 59-61. Likewise, in a debate concerning a District of Columbia board of education just one month before the ICA's passage, Congress gave considerable attention to the issue of removal power. *Id.*

[55] 18 Cong. Rec. 141 (1886).

[56] *Id.* at 216 (statement of Sen. Evarts).

[57] *Id.* at 217.

[58] *Id.* at 216.

senator spoke against Evarts's constitutional argument, which was fully consistent with the history of American removal law.[59]

Congress used the same structure – appointments to fixed terms subject to removal for inefficiency, neglect, or malfeasance – in the early twentieth century to create the FTC and the Tariff Commission, among other agencies.[60] Throughout the twentieth century, Congress created over a dozen agencies with fixed terms and some combination of the three removal permissions.[61]

This longstanding historical practice, stretching from the First Congress to the present, is due "significant weight" in determining "the allocation of power between two elected branches of Government." *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014).

D. The Federal Trade Commission Removal Provisions Are Fully Consistent with the President's Duty of Faithful Execution

Section 41 of the FTC Act is constitutional because the inefficiency, neglect of duty, and malfeasance removal standards are consistent with, and do not impede, the President's ability to fulfill his

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[59] Manners & Menand, *supra* note 2, at 61.

[60] Federal Trade Commission Act, ch. 311, § 1, 38 Stat. 717, 717-18 (1914) (codified as amended at 15 U.S.C. § 41); Revenue Act, ch. 463, § 700, 39 Stat. 756, 795 (1916).

[61] *See* Manners & Menand, *supra* note 2, at 63-64 (listing agencies).

constitutional duty to take care that the laws be faithfully executed.

The FTC removal standards allow removal of a Commissioner who engages in wasteful or incompetent mismanagement of government resources (inefficiency), fails to perform her duties in a way that causes serious harm to the government (neglect), or acts unlawfully in the performance of her official duties (malfeasance). The standards give the President and courts plain guidance on when a Commissioner may be removed. Congress, in employing such well-developed legal terms, "presumably knows and adopts the cluster of ideas" attached to the terms. *Morissette v. United States*, 342 U.S. 246, 263 (1952). In transplanting the "old soil" from the long history of the terms, Congress drew on centuries of precedent employing the terms neglect and malfeasance to liquidate the meaning of faithless execution of the law. *Sekhar v. United States*, 570 U.S. 729, 732-733 (2013) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

The President's duty to take care that the laws are faithfully executed can be squared with independent agencies by recognizing that Congress granted the President removal permissions keyed to terms that courts and legislatures have long used to determine the scope of unfaithful execution: neglect of duty and malfeasance in office.[62] The removal provisions do not

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[62] *See* Nelson, *supra* note 14 ("[I]f Congress reasonably decides that the President should be able to remove some duly appointed officers only for certain causes and through certain processes, the President could discharge his obligations under the Take Care

mean the FTC or other independent agencies operate without oversight. While the standards do not permit removal for political or policy differences, the buck still stops with the President to ensure faithful execution. Congress has empowered the President to terminate a Commissioner whose inefficient or unfaithful performance interferes with that obligation, thus safeguarding "the President's ability to perform his constitutional duty" to see that the laws are faithfully executed. *Morrison v. Olsen*, 487 U.S. 654, 691 (1988); *see also Seila Law*, 591 U.S. at 263 (Kagan, J., concurring in part) ("If a removal provision violates the separation of powers, it is because the measure so deprives the President of control over an official as to impede his own constitutional functions."). The chain of authority that runs from the people to the President remains unbroken.

To borrow Chief Justice Roberts's hypothetical,[63] a President who ran on a consumer protection platform could not unilaterally terminate an FTC officer with an opposite policy perspective – any more than he could unilaterally change consumer protection laws or create a new consumer protection agency – so long as the officer is faithfully executing the law. Neither Congress nor the Constitution gave the President such unilateral power. But the President could terminate an officer who, by

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Clause by going through those processes when warranted. . . . [T]he Take Care Clause does not imply that the President must be able to fire all executive officials at will, any more than it guarantees the President the ability to imprison officials who do not do what the President says.").

[63] *See Seila Law*, 591 U.S. at 225.

inefficiency, malfeasance, or neglect, fails to faithfully execute the laws Congress did enact. The President could also work with Congress to change the law or change the independent agency structure if there is collective will to do so. This accords precisely with the Constitution's design: Congress passes laws and the President executes them, both exercising powers derived from the American people.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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