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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 DONALD J. TRUMP, PRESIDENT)
4 OF THE UNITED STATES, ET AL.,)
5 Petitioners,)
6 v.) No. 25-332
7 REBECCA KELLY SLAUGHTER,)
8 ET AL.,)
9 Respondents.)
10 - - - - -

11
12 Washington, D.C.

13 Monday, December 8, 2025

14
15 The above-entitled matter came on for
16 oral argument before the Supreme Court of the
17 United States at 10:04 a.m.

18
19 APPEARANCES:

20 GEN. D. JOHN SAUER, Solicitor General, Department of
21 Justice, Washington, D.C.; on behalf of the
22 Petitioners.

23 AMIT AGARWAL, ESQUIRE, Washington, D.C.; on
24 behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 25-332, Trump
5 versus Slaughter.

6 General Sauer.

7 ORAL ARGUMENT OF GEN. D. JOHN SAUER

8 ON BEHALF OF THE PETITIONERS

9 GENERAL SAUER: Mr. Chief Justice, and
10 may it please the Court:

11 In Seila Law, this Court held that the
12 President's power to remove and thus supervise
13 those who wield executive power on his behalf
14 follows from the text of Article II, was
15 settled by the First Congress, and has been
16 confirmed by precedent, including at least nine
17 decisions of this Court from Ex Parte Hennen
18 through Trump against United States.

19 Humphrey's Executor stands as an
20 indefensible outlier from that line of
21 authority. Its holding that federal agencies
22 can exercise quasi-legislative and
23 quasi-judicial powers that form no part of the
24 executive power has not withstood the test of
25 time. That holding was gutted and refurbished

1 in Morrison, but this Court correctly rejected
2 the refurbished version as providing an
3 amorphous test with no limiting principle.
4 Respondent now proposes a third update to
5 Humphrey's, which this Court has already
6 rejected as making no logical or constitutional
7 sense.

8 Humphrey's must be overruled. It has
9 become a decaying husk with bold and
10 particularly dangerous pretensions. It was
11 grievously wrong when decided, and cases from
12 Morrison to Trump have thoroughly eroded its
13 foundations. The Court has repudiated
14 Humphrey's reasoning and confined it to its
15 facts, but it continues to generate confusion
16 in the lower courts and it continues to tempt
17 Congress to erect at the heart of our
18 government a headless fourth branch insulated
19 from political accountability and democratic
20 control.

21 As Justice Thomas wrote in *Seila Law*,
22 Humphrey's poses a direct threat to our
23 constitutional structure and, as a result, the
24 liberty of the American people. And, as *Seila*
25 *Law* held, the modern expansion of the federal

1 bureaucracy sharpens the Court's duty to ensure
2 that the executive branch is overseen by a
3 President accountable to the people.

4 I welcome the Court's questions.

5 JUSTICE THOMAS: General Sauer, could
6 you give me one example -- give us one example
7 of a permissible restriction on the authority
8 to remove a principal officer?

9 GENERAL SAUER: We don't believe there
10 are permissible restrictions on principal
11 officers of the United States who exercise the
12 executive power.

13 Now there may be separate issues --

14 JUSTICE THOMAS: Okay. Let's say a
15 principal --

16 GENERAL SAUER: -- relating to
17 particular historical pedigrees.

18 JUSTICE THOMAS: In this case, the --
19 in a multi-body agency such as the FTC, is
20 there any permissible restriction?

21 GENERAL SAUER: No. This Court in
22 Trump against United States held that the
23 President's power to remove officers wielding
24 the executive power is conclusive and
25 preclusive.

1 JUSTICE THOMAS: How far do you go
2 with that? Can it be arbitrary, completely
3 arbitrary?

4 GENERAL SAUER: It is conclusive and
5 preclusive, so any review of arguably bad
6 reasons for the President to remove an
7 executive officer would be subject to the
8 political process. It would not be subject to
9 judicial review and certainly not subject to
10 statutes regulating that.

11 CHIEF JUSTICE ROBERTS: I think there
12 are a lot of agencies in the federal government
13 where it's hard to parse whether it's an
14 executive function they're engaged in or a
15 legislative function. We obviously have the
16 Perlmuter case holding, where you do -- deal
17 with the Library of Congress, which half of
18 it's a library, half of it's things like the
19 copyright. What are we supposed to do with
20 that if you're correct?

21 GENERAL SAUER: Well, Mr. Chief
22 Justice, in Free Enterprise Fund, this Court I
23 think very aptly stated that the vast and
24 varied nature of the federal government is a
25 reason not to make general pronouncements on

1 issues that haven't been briefed and argued.
2 There are certainly -- there are certainly
3 situations where there are tough line-drawing
4 problems. You raised the Perlmutter case as
5 one that may raise arguments of that nature.

6 But, by and large, the -- the sort of
7 insight that goes from Morrison to FCC against
8 Arlington and to Seila Law recognizes that
9 these multi-member agencies that are exercising
10 what this Court has repeatedly recognized as
11 quintessential executive powers, like the
12 FTC -- rulemaking, adjudication, investigation,
13 seeking a civil enforcement power -- litigation
14 seeking civil enforcement powers or civil
15 enforcement remedies and so forth -- those are
16 not close cases.

17 CHIEF JUSTICE ROBERTS: Yeah, I -- I
18 mean, I appreciate your point about not
19 deciding cases that aren't before us, and I --
20 I -- I -- I meant the Perlmutter case as an
21 example, but I'm not sure you answered the
22 question.

23 Do -- is this a severance issue? Do
24 we -- so the agency is okay so long as, you
25 know, half of it -- half of it survives in one

1 branch and half in the other, and if so, who
2 gets to decide that?

3 GENERAL SAUER: For -- for the vast
4 majority of these agencies, I think Seila Law
5 pointed out there's maybe about two dozen
6 executive agencies that are multi-member
7 structure and have removal authority. I think
8 the logic that this Court adopted for
9 severability in Free Enterprise Fund and Seila
10 Law and Collins indicates that in the vast
11 majority of cases there would be an excision
12 just of the removal authority.

13 Now, if there are branch -- if there
14 are agencies that kind of straddle the line
15 between legislative and executive, that might
16 present harder --

17 JUSTICE SOTOMAYOR: Why is that --

18 GENERAL SAUER: -- severability kinds
19 of issues. Those haven't --

20 JUSTICE SOTOMAYOR: -- why is that
21 severability the issue? Meaning, if you think
22 they're wielding power that is inappropriate,
23 why don't we sever that power --

24 GENERAL SAUER: I think those very
25 arguments --

1 JUSTICE SOTOMAYOR: -- instead of the
2 removal power?

3 GENERAL SAUER: Well, for example,
4 consider an agency like the FTC, which is
5 before the Court. Virtually all of its
6 powers -- I can't think of a power that it
7 exercises that is not executive, so there's
8 nothing to --

9 JUSTICE SOTOMAYOR: But most of those
10 powers were part of Humphrey's. This Court
11 even in Seila Law and all of the cases you've
12 mentioned since have said that Humphrey's is
13 good -- is controlling law. You're asking us
14 to overturn a case that has been around for
15 over a hundred -- nearly a hundred years,
16 correct?

17 GENERAL SAUER: Ninety years, I
18 believe.

19 JUSTICE SOTOMAYOR: Ninety years.
20 What other cases have we overturned that have
21 had a pedigree of a hundred years?

22 GENERAL SAUER: Pennoyer against Neff
23 was overruled by Shaffer against Heitner on its
24 hundredth birthday by the --

25 JUSTICE SOTOMAYOR: That was an

1 economic case. What other case?

2 GENERAL SAUER: For example, Erie
3 against -- Erie overruled Swift v. Tyson 96
4 years later.

5 JUSTICE SOTOMAYOR: That -- that --
6 that -- so too again --

7 GENERAL SAUER: Those are two
8 examples. There's at least 13 or --

9 JUSTICE SOTOMAYOR: But which other
10 case has fundamentally altered the structure of
11 government? For over a hundred years,
12 actually, since 1887, we've had multi-member
13 boards, and that's the entire government
14 structure.

15 GENERAL SAUER: The distortion of the
16 structure of government, respectfully, that
17 Humphrey's -- the philosophy that was --

18 JUSTICE SOTOMAYOR: Doesn't -- aren't
19 we -- aren't you asking us to distort it a
20 different way?

21 GENERAL SAUER: I think we're
22 asking --

23 JUSTICE SOTOMAYOR: Neither the King
24 nor parliament nor prime ministers, England at
25 the time of the founding, ever had a

1 unqualified removal power. You're asking us to
2 say that at a time, the founding, when the
3 Constitution doesn't speak about this at all,
4 where there was robust debate over this issue
5 among legal scholars at the time, that we
6 ourselves have said repeatedly in Humphrey's
7 and other cases, Wiener, even in Myers, that
8 our -- that those cases you mentioned did not
9 establish this absolute power of the President.

10 You're asking us to destroy the
11 structure of government and to take away from
12 Congress its ability to protect its idea that
13 a -- the government is better structured with
14 some agencies that are independent.

15 GENERAL SAUER: I think we're asking
16 the Court to return to the dominant line of
17 authority that started in Ex Parte Hennen in
18 1839 when this Court said that it's a settled
19 and well-understood construction of the
20 Constitution that the President alone can
21 remove executive officials.

22 That was reaffirmed in Parsons, for
23 example, where it described it as settled
24 beyond the power of alteration, again, in
25 Shurtleff, similar language, Myers says the

1 same thing, Free Enterprise Fund, Collins,
2 Seila Law, Trump against United States, and
3 even Humphrey's Executor itself paid lip
4 service to this principle.

5 Humphrey's described this power as
6 unrestricted and illimitable in order to get
7 out of that rule which the -- the Court has
8 recognized in those nine decisions is going
9 back to 1789 --

10 JUSTICE SOTOMAYOR: You still haven't
11 answered my question. Where else have we so
12 fundamentally altered the structure of
13 government?

14 GENERAL SAUER: I think what -- the
15 fundamental alteration of the structure of the
16 government was ushered in by Humphrey's, and
17 then the Congress kind of took Humphrey's and
18 ran with it in the building of the modern
19 administrative state and the proliferation of
20 independent agencies that are insulated from
21 democratic control.

22 JUSTICE SOTOMAYOR: Independent
23 agencies have been around since the founding.
24 The Sinking Fund, the War Commission, we've had
25 independent agencies throughout our history.

1 So this is not a modern contrivance.

2 GENERAL SAUER: We disagree with that
3 as -- as -- as, in our brief, we disagree with
4 that characterization of those agencies. The
5 Sinking Fund Commission, for example, was
6 composed of three officers who are cabinet
7 secretaries, clearly removable.

8 JUSTICE SOTOMAYOR: And we have an
9 amicus that shows us how the President's will
10 could have been thwarted by that structure.

11 GENERAL SAUER: And I --

12 JUSTICE SOTOMAYOR: We have an amicus
13 brief that shows us how that the President's
14 will by that structure could have been
15 thwarted.

16 GENERAL SAUER: These kinds of
17 historical examples, I think, have been
18 considered in this Court's cases from Free
19 Enterprise Fund and Seila Law and so forth.
20 There's been a lively debate about that.

21 JUSTICE SOTOMAYOR: So what do we do
22 with Morrison?

23 GENERAL SAUER: And the Court has
24 come --

25 JUSTICE SOTOMAYOR: What do we do with

1 Morrison and Wiener and Perkins?

2 GENERAL SAUER: Well, Morrison, for
3 example, I think, is a really critical
4 precedent here because what Morrison did is it
5 repudiated the entire logic that supported the
6 holding of Humphrey's Executor. It repudiated
7 correctly the idea that there are these
8 quasi-judicial and quasi-legislative powers
9 that are outside the executive power and
10 they're wandering around the executive branch
11 and not in --

12 JUSTICE SOTOMAYOR: Yet you answered
13 Justice -- the Chief Justice by saying that
14 maybe we just need to look at each agency
15 individually. So we can't leave that area.

16 By the way, your logic you're putting
17 at risk by this. You're saying there's
18 uncertainty. I think the uncertainty in the
19 lower courts was not over Humphrey's Executor.
20 It has been over the Court's most recent
21 decisions, not because of Humphrey's Executor.

22 But you're putting at risk the
23 independence of the Tax Court, of the Federal
24 Claims Court, Article I courts. You're putting
25 at risk the civil service. I don't see how

1 your logic could be limited.

2 GENERAL SAUER: As to the non-Article
3 III courts, we haven't challenged the removal
4 restriction as to the non-Article III courts in
5 this case.

6 JUSTICE SOTOMAYOR: Not yet. Not --
7 not yet. Not yet.

8 GENERAL SAUER: And -- and we
9 recognize that there are some line-drawing
10 issues as to those that came up in cases like
11 Freytag and Ortiz. Again, those aren't --
12 those aren't presented here. Those aren't
13 briefed here.

14 JUSTICE SOTOMAYOR: Not yet.

15 GENERAL SAUER: And the Court does --

16 CHIEF JUSTICE ROBERTS: There's a
17 difference --

18 JUSTICE BARRETT: General Sauer --

19 CHIEF JUSTICE ROBERTS: -- I -- I -- I
20 suppose, between Humphrey's and Wiener, right,
21 in terms of whether you overrule one or
22 overrule the other in terms of the consequences
23 with respect to modern agencies, what the War
24 Commission in -- the War Commission in -- in --
25 in Wiener, if you think that that's more like

1 something like the Court of Appeals of the
2 Armed Forces or the Tax Court or all those
3 others. It strikes me that Humphrey's may be
4 the issue. Then it doesn't mean that Wiener
5 falls with it or that the other agencies fall
6 with it as well.

7 GENERAL SAUER: The piece, and we have
8 a footnote about this in our brief, Footnote 1
9 and we -- we invite the Court to overrule
10 Wiener as well. Part of Wiener, we think, has
11 been overruled by Braidwood, which is Wiener,
12 you know, interpreted, found a removal
13 restriction that was not in the plain text of
14 the statute, and that contradicts case law from
15 Shurtleff until Braidwood.

16 The other aspect of Wiener that we
17 think is destructive is the phrase "the
18 philosophy of Humphrey's Executor." That
19 "philosophy of Humphrey's Executor" seems to
20 have a very firm hold on Congress and a firm
21 hold on the lower courts, and that's why
22 there's been a proliferation of litigation
23 about this in multiple --

24 CHIEF JUSTICE ROBERTS: Well, there's
25 one thing about -- and -- and -- and I'll be

1 brief -- there's one thing about philosophy and
2 there's another thing about holdings.
3 Certainly, the holdings of Humphrey's Executor
4 doesn't necessarily support Wiener to its
5 fullest extent.

6 GENERAL SAUER: We agree with that.

7 JUSTICE KAVANAUGH: General Sauer, can
8 I ask you about the Federal Reserve. The other
9 side says that your position would undermine
10 the independence of the Federal Reserve and
11 they have concerns about that, and I share
12 those concerns.

13 So how would you distinguish the
14 Federal Reserve from agencies such as the
15 Federal Trade Commission?

16 GENERAL SAUER: We recognize and
17 acknowledge what this Court said in the
18 Wilcox-Harris stay opinion, which is that the
19 Federal Reserve is a quasi-private uniquely
20 structured entity that follows a distinct
21 historical tradition of the First and Second
22 Banks of the United States. There's two
23 adjectives there or adjective and an adverb,
24 unique and distinct.

25 The Federal Reserve has been described

1 as sui generis. Any issues of removal
2 restrictions as a member of the Federal Reserve
3 would raise their own set of unique distinct
4 issues, as this Court said in Wilcox against
5 Harris.

6 We have not challenged those either in
7 this case or any other case, and so it's not
8 before the Court. And I think what --

9 JUSTICE KAGAN: But I think the
10 question, General -- did you want to --

11 JUSTICE KAVANAUGH: Go ahead.

12 JUSTICE KAGAN: I think the question
13 that these questions go to, right, is, if you
14 take your logic at face value, it seems to
15 include a great many things. If I were to say,
16 you know, your fundamental proposition in your
17 briefs is that the Vesting Clause, you know,
18 how many times do you say in your brief gives
19 the executive power, all of it, to the
20 President?

21 And so, if you believe that, the fact
22 that you can say, well, this has a history and
23 that has a tradition doesn't much go to the
24 rationale that you are asking this Court to
25 accept. So, once you're down this road, it's a

1 little bit hard to see how you stop.

2 And I think that that's one question.

3 I mean, you know, there's another question
4 about whether you should start at all, but one
5 question is, if you accept that proposition,
6 which is the fundamental proposition of your
7 brief, it does not seem as though there's a
8 stopping point.

9 GENERAL SAUER: Yeah, I think it's --
10 it's a proposition of our brief, but those are
11 obviously quotes from these courts' opinions.
12 So it isn't that we have gone down this road.
13 I think the Court has been down this road.

14 The country has been down this road
15 since the Decision of 1789. Again, Ex Parte
16 Hennen describes this as settled beyond doubt.
17 Again, Parsons, which anticipates all the
18 analysis of Myers, says the very same thing,
19 and this is beyond question that there's this
20 removal power.

21 And keep in mind that's 1897. It's
22 well after the bitter interbranch disputes
23 about the Tenure of Office Act. It's after
24 Congress started engaging in this proliferation
25 of restrictions under removal of inferior

1 officers that was in --

2 JUSTICE KAGAN: Well, let me ask you
3 how you would justify and -- and how you would
4 justify consistent with the proposition that
5 all executive power is vested in the President.

6 Let's start with Article I courts.
7 How would you justify keeping those courts?

8 GENERAL SAUER: Well, those courts,
9 the determination would have to be made on a
10 court-by-court basis, so to speak, as to
11 whether or not they're engaging in the
12 executive power. There are tough -- there are
13 maybe tough line-drawing questions there we
14 have --

15 JUSTICE KAGAN: I mean, I thought that
16 one of the things that we've said, again, in
17 many, many cases is that even though they're
18 engaging in adjudicative functions, they have
19 to be executive by their nature.

20 GENERAL SAUER: There's a dispute
21 about this, I think, basically, lurking beneath
22 the surface in the discussions in Ortiz. If
23 they are indeed exercising executive functions,
24 then the logic of this logic would apply.

25 JUSTICE KAGAN: Go ahead, please. No,

1 go ahead.

2 JUSTICE THOMAS: It's all right.

3 JUSTICE JACKSON: I'll go.

4 CHIEF JUSTICE ROBERTS: Well, I'll go.

5 (Laughter.)

6 CHIEF JUSTICE ROBERTS: Is it a
7 possibility -- let's say you have an agency
8 that is, I don't know, pick a number,
9 85 percent is judicial, some of the judicial
10 entities that have been talked about in -- in
11 the briefs, and a smaller percentage is some
12 executive function that they do, whether it's
13 issuing rules or whatever.

14 Is there a principle that you would
15 sever out the smaller little tail on the dog
16 and -- and allow the judicial functions to
17 go -- go on?

18 GENERAL SAUER: Quite possibly. That
19 would be a sever -- I -- I think a unique
20 severability question that would be distinct
21 from the merits. So, if there was an agency
22 that kind of straddles the line between two
23 branches and -- that may raise a different
24 severability question. But, for the mine run
25 of these multi-member executive agencies,

1 they're clearly exercising executive power.

2 They're doing stuff that what, you know, the
3 NLRB does, that the MSPB does --

4 JUSTICE KAGAN: So how about those
5 two?

6 GENERAL SAUER: -- that, here, the FTC
7 does.

8 JUSTICE KAGAN: So you -- you --
9 you're -- you are here saying the NLRB goes
10 down, the MSPB goes down, notwithstanding that
11 they do all their work or almost all their work
12 in judicial-type proceedings.

13 GENERAL SAUER: I wouldn't say goes
14 down. I would say they are restored to
15 democratic accountability --

16 JUSTICE KAGAN: Yeah.

17 GENERAL SAUER: -- the constitutional
18 structure, but we have contended on the Court's
19 emergency docket that those --

20 JUSTICE KAGAN: The current versions
21 of those agencies goes down.

22 GENERAL SAUER: Yeah. We have
23 challenged those in this Court, NLRB and S --
24 MSPB and there -- there are others. This Court
25 in Seila Law. I mean, there's various lists

1 out there where this --

2 JUSTICE JACKSON: General, you keep --

3 JUSTICE KAGAN: How about inferior
4 officers?

5 GENERAL SAUER: We haven't challenged
6 any restriction on inferior officers of the
7 United States here.

8 JUSTICE KAGAN: Why wouldn't that also
9 have to go?

10 GENERAL SAUER: That would --
11 certainly, restrictions on inferior officers of
12 the United States would be problematic because,
13 of course, Myers involved an inferior officer.

14 JUSTICE KAGAN: Right.

15 GENERAL SAUER: The logic of Myers
16 extends to inferior officers. We acknowledge,
17 therefore, that --

18 JUSTICE KAGAN: And -- and, obviously,
19 there are all kinds of inferior officers
20 wielding executive power all over the place,
21 yeah?

22 GENERAL SAUER: There are many.

23 JUSTICE KAGAN: Yeah. So -- so it
24 seems as though executive officers.

25 How about employees?

1 GENERAL SAUER: Again, we haven't
2 challenged the restrictions on the employees,
3 but --

4 JUSTICE KAGAN: I know you haven't
5 challenged it.

6 GENERAL SAUER: Yeah.

7 JUSTICE KAGAN: It's really -- the
8 question is where does this lead, what does it
9 take you to given what your primary rationale
10 is.

11 Employees are wielding executive power
12 all over the place, and yet we've had civil
13 service laws that give them substantial
14 protection from removal for over a century.
15 How about those?

16 GENERAL SAUER: Well, we do not
17 challenge --

18 JUSTICE KAGAN: I know what you don't
19 challenge. You're missing the point.

20 GENERAL SAUER: Well, then let me
21 point the Court to -- if I could, to 7511(b),
22 you know, of the civil service laws, the CSRA
23 that we cite in our brief. That has a series
24 of exceptions in it that provides no judicial
25 relief at all to classes of employees they're

1 called. Now some of those employees are
2 clearly officers, some aren't, but, for
3 example, presidentially appointed officers,
4 Senate-confirmed officials, those who exercise
5 substantial policymaking or have confidential
6 responsibilities, you know, members of the CIA
7 for -- employees of the CIA and the Foreign
8 Service. So there's already been a -- the
9 political branches have in many ways already
10 addressed issues with employees.

11 Now this Court obviously dealt with an
12 employee issue in Lucia, and there was a
13 dispute about that, various, you know, proposed
14 lines between employee and inferior officer,
15 all --

16 JUSTICE JACKSON: General --

17 JUSTICE ALITO: Well, could I ask you
18 the maybe --

19 GENERAL SAUER: -- all for the Court
20 to decide those.

21 JUSTICE ALITO: -- could I ask you the
22 same question or maybe just a very similar
23 question in a different way? We -- you've been
24 asked about a number of different agencies. A
25 few of them are -- are likely to come before us

1 in the near future because of actions that the
2 President has taken. Others, as you point out,
3 have not feature -- have not been featured
4 in -- in litigation of which I'm aware up to
5 this point.

6 So suppose we were to decide this case
7 in your favor without reaching some of the
8 agencies that have been mentioned, like the Tax
9 Court and the Claims Court and the Court of
10 Appeals for the Armed Forces to name three.
11 Suppose we were to decide the case in your
12 favor, but we did not want to address those
13 other agencies.

14 On what ground -- one way or the
15 other, to express a view that would affect
16 those agencies either, as I said, one way or
17 the other. On what -- what would you propose
18 that we say so as to reserve a decision on
19 those agencies that may not come before us in
20 the near future or perhaps at any time in the
21 future?

22 GENERAL SAUER: I would, I think, use
23 the language that the Court used in Free
24 Enterprise Fund when it said we do not decide
25 the status of lesser functionaries. It pointed

1 out -- the dissent in that case had -- had
2 itself pointed out that the federal bureaucracy
3 is vast, and it said we don't want to decide --
4 given the size and variety of the federal
5 government, that discourages general
6 pronouncements on matters that are not briefed
7 and argued.

8 Now, as to, for example, non-Article
9 III courts, I'm not even aware of litigation
10 about those removal restrictions for any of
11 those. I'm not saying that that may not arise.

12 JUSTICE KAGAN: And you're -- where
13 logic has consequences. Once you use a
14 particular kind of argument to justify one
15 thing, you can't turn your back on that kind of
16 argument if it also justifies another thing in
17 the exact same way. And so, you know, putting
18 a footnote in an opinion saying we don't decide
19 X, Y, and Z because it's not before us doesn't
20 do much good if the entire logic of the opinion
21 drives you there.

22 GENERAL SAUER: I'm not sure that's
23 true when it comes to non-Article III courts
24 because, there, the question would be, what are
25 they doing? Is it judicial power or executive

1 power? That's a totally different set of
2 questions. Those are hard questions.

3 JUSTICE JACKSON: But I think Justice
4 Kagan -- but I think Justice Kagan's point is
5 that you're asking us to ask that question, and
6 so we have to understand -- you're -- you're --
7 you're -- you're asking us to ask the question
8 with respect to each agency, what are they
9 doing. That's the necessary result of the
10 argument that you're making in this case.

11 And I guess my point is one way to
12 avoid these difficult line-drawing problems
13 would be to let Congress decide. I mean, I
14 sort of thought that we have Article I, which I
15 think you agree gives Congress some authority
16 to set up these agencies, to determine their
17 structure, to create the offices that we're
18 talking about.

19 So it seems to me that that greater
20 power, we should at least think about whether
21 it should include the power to determine the
22 term of office, the extent to which people can
23 be removed. And I appreciate that Article I
24 has -- Article II has some language in it that
25 you're pointing to, but, as Justice Sotomayor

1 pointed out, the Constitution does not speak
2 specifically to removal.

3 You're asking us to infer this based
4 on the Constitution's structure, and I don't
5 know why we'd make that inference when the
6 power to create agencies and set everything up
7 lies with Congress.

8 GENERAL SAUER: I agree with very much
9 of what you said, and so did James Madison. So
10 he made the point in the Decision of 1789 that
11 Congress has authority to create the -- the
12 office and give it -- set its emoluments and
13 structure that office. But, once Congress has
14 done that, its power there stops.

15 JUSTICE JACKSON: Is that because --

16 GENERAL SAUER: For Congress to --

17 JUSTICE JACKSON: -- is that because
18 of your democratic accountability argument?
19 I'm trying to understand why you think that
20 Congress is somehow less democratically
21 accountable for the way in which it constructs
22 these agencies and determines the term of
23 office of the officers.

24 You -- you seem to -- to think that --
25 that there's something about the President that

1 requires him to control everything as a matter
2 of democratic accountability when, on the other
3 side, we have Congress saying we'd like these
4 particular agencies and officers to be
5 independent of presidential control for the
6 good of the people. We -- we're -- we're
7 exercising our Article I authority to protect
8 the people by creating this independent
9 structure.

10 And I don't understand why it is that
11 the thought that the President gets to control
12 everything can outweigh Congress's clear
13 authority and duty to protect the people in
14 this way.

15 GENERAL SAUER: Congress has a broad
16 authority in structuring the federal
17 government, but what it lacks authority to do
18 is to create these headless agencies, agencies
19 who have no boss and are not answerable to the
20 voters --

21 JUSTICE JACKSON: Why?

22 GENERAL SAUER: -- and confer on them
23 broad --

24 JUSTICE JACKSON: Why? Why does it
25 lack the -- the Constitution does not say that

1 Congress cannot create an independent agency,
2 so what is it about your argument that requires
3 us to reach that result?

4 GENERAL SAUER: We disagree with that.
5 We think the text of the Constitution confers
6 the executive power, all of it, on the
7 President. As Madison argued compellingly in
8 the Decision of 1789, the power to remove is an
9 aspect of the executive power. Further, the
10 text of the Constitution includes the Take Care
11 Clause. The Take Care Clause, as the Court has
12 said virtually every time it's discussed this,
13 reinforces that conclusion.

14 JUSTICE JACKSON: The text of the
15 Constitution includes the Necessary and Proper
16 Clause, which gives Congress the authority to
17 determine, set up, et cetera, these agencies to
18 protect the will -- the -- the interests of the
19 people.

20 So we have a conflict, I guess, and
21 I'm just wondering why the President's
22 interests in the way that you describe them
23 win.

24 GENERAL SAUER: May --

25 CHIEF JUSTICE ROBERTS: You can answer

1 the question, yes.

2 GENERAL SAUER: It is not proper under
3 the Necessary and Proper Clause for Congress to
4 peel away executive power from the President
5 and give it to someone who's not answerable to
6 the voters.

7 CHIEF JUSTICE ROBERTS: Thank you.

8 Justice Thomas?

9 Justice Alito?

10 JUSTICE ALITO: Let me follow up on
11 two things that have come up thus far. It
12 certainly is an interesting argument. It's an
13 interesting constitutional argument. It's an
14 interesting political science argument about
15 the -- the advantages and disadvantages of
16 allowing Congress to impose removal
17 restrictions on executive branch officers.

18 When would you say the Court crossed
19 that bridge? And what have we said about that
20 bridge in recent decisions?

21 GENERAL SAUER: Recently, the Court,
22 and -- and in many decisions, the Court has
23 pointed out that the Framers of the
24 Constitution were not trying to prioritize
25 efficiency or convenience. They were

1 deliberately creating a separation of powers
2 where the branches would check each other, and
3 that's why the Court should have sharpened
4 rather than blunted review of encroachments by
5 Congress that involve peeling away executive
6 power.

7 JUSTICE ALITO: Well, I mean, there's
8 an argument that the Constitution doesn't say
9 anything about the President's removal
10 authority and, therefore, Congress should have
11 free rein in that area -- in that -- on that
12 question. When did the Court cross that
13 bridge?

14 GENERAL SAUER: I think the Court --
15 if you're saying "crossed that bridge" meaning
16 when did the Court adopt that view --

17 JUSTICE ALITO: When did the Court say
18 that, no, Congress doesn't have plenary power
19 to impose removal restrictions on executive
20 branch officers?

21 GENERAL SAUER: No later than Ex Parte
22 Hennen in 1839, when the Court said that --
23 referring to the Decision of 1789, that this is
24 the settled and well-understood construction of
25 the Constitution that the President alone has

1 the removal power.

2 JUSTICE ALITO: How about Myers?

3 GENERAL SAUER: Myers was also very
4 clear on that in 1926. And, in fact,
5 Humphrey's Executor itself paid lip service to
6 it even though its heart was far from it.

7 JUSTICE ALITO: It's been suggested
8 that if we were to rule in your favor about the
9 Federal Trade Commission, put aside these other
10 agencies, just about the Federal Trade
11 Commission, which is the issue that's before
12 us, the entire structure of the government
13 would fall. You want to take a minute to
14 address that?

15 GENERAL SAUER: The Court in, I think,
16 Free Enterprise Fund or Seila Law talked about
17 these kind of predictions of doom, and the sky
18 did not fall when the removal restrictions were
19 removed from the CPIC and the PCAOB. So also,
20 if the FTC, the MSPB, the NLRB are made subject
21 to the political process and the political
22 discipline of being accountable to the
23 President, the sky will not fall. In fact, our
24 entire government will move towards
25 accountability to the people.

1 JUSTICE ALITO: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Sotomayor?

4 JUSTICE SOTOMAYOR: Counsel, Myers,
5 which you rely on, was signed by a number of
6 judges. One of them was Justice Sutherland,
7 and he was the author of Humphrey's Executor.
8 So four out of the nine justices who signed on
9 to Myers signed on to Humphrey's.

10 So you're thinking or you're arguing
11 that the reasoning of the more current justices
12 on this Court have more purchase than the views
13 of renowned jurists like Holmes and Brandeis,
14 who -- who dissented in Myers, of people like
15 Justice Story, who disagreed with this
16 proposition, you're suggesting that we have a
17 better view than either Congress or all of
18 those previous justices about what absolute
19 executive power means. That's basically your
20 argument.

21 All those justices in the past have
22 been wrong and the current ones are right or at
23 least the current ones of the Seila Law
24 majority.

25 GENERAL SAUER: I'd say two things in

1 response to that. I think the Court was
2 correct in the following decisions: Ex Parte
3 Hennen, Parsons, Shurtleff, Myers --

4 JUSTICE SOTOMAYOR: Those all
5 involved --

6 GENERAL SAUER: -- Seila Law.

7 JUSTICE SOTOMAYOR: -- different and
8 distinguishable situations.

9 Now, with respect to the one component
10 of government that you're not speaking about,
11 when the FTC was created, as has been the case
12 with most of these independent agencies like
13 the Federal Reserve, particularly there, but
14 not lesser -- not that much lesser with the
15 FTC, Congress emphasized the importance of
16 independency and the prestige that that
17 independence would give to the decisions of
18 agencies who are going to subject the public to
19 rules and regulations, of which there might be
20 burdens, and that independence is being taken
21 out or undercut completely.

22 Why are you so sure that Congress
23 would have preferred to have the independence
24 narrowed than not to have the agency at all?
25 Some of my colleagues have suggested in prior

1 cases that we shouldn't be engaged in the
2 severability actions at all. But, here, you
3 are arguing that, no, we should be doing that.
4 Why -- are you going to be consistent?

5 GENERAL SAUER: The prestige -- I
6 would say two things in response to that. The
7 prestige of independency is not a
8 constitutional value. The constitutional value
9 is the separation of powers and the vesting of
10 all the executive power in the President. So
11 that is the constitutional value at issue.

12 JUSTICE SOTOMAYOR: According to the
13 laws that Congress makes, and that's the point
14 Justice Jackson was emphasizing.

15 What you're saying is the President
16 can do more than what the law permits.

17 GENERAL SAUER: I think I would repeat
18 what I said before. There's a strong line of
19 precedent recognizing that the text and
20 structure of the Constitution confer on the
21 President the exclusive and illimitable power
22 to remove executive officers and, as a result
23 of that, Humphrey's should be overruled.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?

25 JUSTICE KAGAN: General, would you

1 agree with me, and I hope you will agree with
2 me because this seems to be the one thing on
3 which everybody can agree, that if there's one
4 thing we know about the founders, it's that
5 they wanted powers separated. They wanted the
6 executive, the legislative, the judicial. They
7 didn't want them all in one place. They wanted
8 them separated across the government, across
9 the different branches.

10 Easy enough to agree with, right?

11 GENERAL SAUER: I agree, with an
12 important caveat that the Court said in Seila
13 Law that the one, you know, sort of exception
14 to all this division was the presidency itself,
15 where the Framers consciously adopted a unified
16 and energetic executive.

17 JUSTICE KAGAN: Well, that's not a
18 caveat.

19 (Laughter.)

20 GENERAL SAUER: Or -- or a codicil.

21 JUSTICE KAGAN: That's actually --
22 that's like the not X to my X --

23 (Laughter.)

24 JUSTICE KAGAN: -- you know, because
25 what I was saying was -- and maybe you knew

1 where this was going, so you had to have this
2 caveat which is really a fundamental
3 contradiction, but the idea is that the
4 President was supposed to do the executing. I
5 mean, this -- and -- but he wasn't supposed to
6 do the legislating and he wasn't supposed to do
7 the judging.

8 And -- and here's, like, my next
9 proposition, which I think, like, you have to
10 agree with because we just look around the
11 government and it's obviously true.

12 Some people think it's a real
13 distortion from what the founders thought, but
14 these, what you think of as executive branch
15 agencies, including independent agencies,
16 right, they do a lot of legislating and they do
17 a lot of judging.

18 And you listed it a bunch of times.
19 You said this is obviously executive power.
20 Why is it obviously executive power? Because
21 they're doing a lot of rulemaking and they're
22 doing a lot of adjudications, leading to
23 enforcement.

24 And -- and those are, although we've
25 said that this is executive power in some

1 sense, but they're legislative functions.

2 That's what rulemaking is. They're

3 adjudicative functions.

4 And -- and isn't it problematic, given
5 what we know about the founders' vision, that
6 what this is going to amount to at the end of
7 the day is putting not only all executive power
8 in the President but an incredible amount of
9 legislative/rulemaking power and judging in the
10 President's hands?

11 GENERAL SAUER: I disagree. I got off
12 the -- I -- I -- I -- I started disagreeing
13 very early in that question, and I think I can
14 pinpoint it this way.

15 The mere fact that this Court held I
16 think every justice agreed in FCC against
17 Arlington, it's been reasserted. It -- it was
18 the vision of Morrison, it was recognized in
19 Morrison, it was reasserted again in Seila Law,
20 the mere fact that things that some of these
21 agencies do have the form of rulemaking or
22 adjudication does not make that legislating or
23 judging for constitutional purposes. That is
24 execution.

25 JUSTICE KAGAN: Yeah.

1 GENERAL SAUER: And -- and if the
2 Court said --

3 JUSTICE KAGAN: But -- but we can all
4 admit that for -- for -- whether you want to
5 call it for constitutional purposes, that in a
6 real-world kind of way, that's what they're
7 doing.

8 Now some people think that we should
9 never have gone down that road, but that's what
10 we're doing. So let me put the proposition in
11 a sort of different way.

12 Here's been the bargain over the last
13 century, and I think it has been a bargain.
14 Congress has given these agencies a lot, a lot
15 of work to do that is not traditionally
16 executive work, that is more along the lines of
17 make rules when we issue broad delegations and
18 do lots of adjudications that set the rules for
19 industries and entire bodies of governance,
20 right?

21 And they've given all of that power to
22 these agencies largely with it in mind that the
23 agencies are not under the control of a single
24 person of the President but that, indeed,
25 Congress has a great deal of influence over

1 them too.

2 And if you take away a half of this
3 bargain, you end up with just massive
4 uncontrolled, unchecked power in the hands of
5 the President. And it's really hard to effect
6 both sides of this bargain because it's already
7 been done.

8 So the result of what you want is that
9 the President is going to have massive
10 unchecked, uncontrolled power not only to do
11 traditional execution but to make law through
12 legislative and adjudicative frameworks.

13 GENERAL SAUER: The President is going
14 to have all the executive power, which is what
15 the Constitution dictates. And the way you
16 framed it there, I think, makes the
17 separation-of-powers problems in the
18 alternative view here even worse because you
19 have just described these, you know,
20 rulemakings and adjudications as really judging
21 and legislating. If they really were that,
22 which this Court has unanimously said they must
23 not be, they cannot be, but, if they were that,
24 then Congress is not just affecting the
25 executive, it's -- it's -- it's creating junior

1 varsity legislatures, which would be
2 unconstitutional under Justice Scalia's dissent
3 in Mistretta. It's peeling away adjudicative
4 authority, you know, the power -- the judicial
5 power from -- from Article III courts.

6 So the separation --

7 JUSTICE KAGAN: I -- I understand that
8 as a formal argument, and, obviously, formal
9 arguments play a significant role in this area.
10 But they shouldn't -- they shouldn't blind us
11 to the real-world realities of our -- of what
12 our decisions do, and the real-world reality of
13 this one is that when you put all of these
14 agencies under complete presidential control,
15 given what Congress has already done and will
16 not be able to take back with respect to the
17 powers that have been delegated to the
18 agencies, what you are left with is a President
19 that maybe, you know, your first sentence to
20 me, this is the kind of President you want, but
21 a President with control over everything,
22 including over much of the law-making that
23 happens in this country.

24 GENERAL SAUER: You have control over
25 the executive branch, which he must and does

1 have under our Constitution. And, again, if
2 that's really legislating, then there's a
3 separate constitutional problem that the
4 legislative powers also have been taken away
5 from Congress.

6 Now this Court has not adopted that in
7 a series of decisions, including Morrison,
8 including FCC against Arlington, including
9 Seila Law. The Court has correctly recognized
10 that all this stuff that agencies like the FTC
11 is doing is an exercise of the executive power.
12 That is fundamental to our separation of
13 powers, which is the bastion of individual
14 liberty in our constitutional structure.

15 JUSTICE KAGAN: Thank you, General.

16 CHIEF JUSTICE ROBERTS: Justice
17 Gorsuch?

18 JUSTICE GORSUCH: General, let me
19 suggest to you that perhaps Congress has
20 delegated some legislative power to these
21 agencies. Let's just hypothesize that. And
22 let's hypothesize too that this Court has taken
23 a hands-off approach to that problem through
24 something called the intelligible principle
25 doctrine, which has grown increasingly

1 toothless with time.

2 Is the answer perhaps to reinvigorate
3 the intelligible principle doctrine and
4 recognize that Congress cannot delegate its
5 legislative authority? Is the water warm,
6 General?

7 GENERAL SAUER: Sorry. What was the
8 last -- I couldn't hear the last bit.

9 JUSTICE GORSUCH: Is the water warm?

10 GENERAL SAUER: Is the water warm?

11 JUSTICE GORSUCH: Warm.

12 GENERAL SAUER: Suffice to say -- let
13 me say one thing in response to that. The --
14 the -- it is much easier to cure -- obviously,
15 members of this Court have debated the scope of
16 the non-delegation doctrine. The challenge of
17 finding the right standard there is something
18 we've discussed in the past.

19 Here, though, this wolf comes as a
20 wolf, right? I mean, the restriction on
21 executive power is right there in the statute.
22 It's easy to remedy by excising the removal
23 restriction in the past group of cases.

24 JUSTICE GORSUCH: There are a lot of
25 wolves around here, General. The one thing our

1 Framers knew is that every political actor
2 seeks to enhance its own power. We all know
3 that to be true from our own experiences. And
4 this Court, as part of this bargain, has
5 allowed these agencies to exercise both
6 executive and legislative.

7 Justice Sutherland, whose name hasn't
8 been invoked around here in quite a while,
9 his -- his language about quasi-legislative and
10 quasi-judicial and quasi-this powers, and this
11 Court has allowed that for a very long time.
12 But, if we're not going to allow it any longer,
13 I take the point -- I take the point that this
14 has allowed a bargain where a lot of
15 legislative power has moved into these
16 agencies, but, if they're now going to be
17 controlled by the President, it seems to me all
18 the more imperative to do something about it.

19 GENERAL SAUER: I agree with that.
20 And we can't -- I can't address all the wolves
21 in the world, but this wolf, when it comes to
22 constitutional structure, is Fenris, the most
23 dangerous wolf in -- in the history of Norse
24 mythology.

25 JUSTICE GORSUCH: And let me ask you

1 about the judicial power. To the extent we're
2 worried about the Tax Court or the Court of
3 Claims, maybe -- maybe, despite what people
4 think, maybe some of them might be -- I don't
5 know -- but maybe they're Article III courts
6 and the removal restrictions are impermissible.

7 Thoughts?

8 GENERAL SAUER: There are -- there
9 definitely could be arguments about that. I
10 really am not taking a position on the validity
11 or non-validity of any of those. They're not
12 presented here. But, certainly, commentators
13 have argued that things like the federal
14 magistrate judges and the bankruptcy courts
15 are -- seem to be real adjuncts to Article III
16 courts, and an argument might be made of -- of
17 that nature.

18 JUSTICE GORSUCH: They would be
19 adjunct.

20 GENERAL SAUER: Those are -- there are
21 line-drawing problems there. We haven't
22 addressed them here. I don't have the federal
23 government's concerted answer to that, but,
24 certainly, those line-drawing problems would go
25 to whether what is going on is judicial power

1 or executive power.

2 JUSTICE GORSUCH: The adjudication
3 of --

4 GENERAL SAUER: And if it is executive
5 power, the logic would follow.

6 JUSTICE GORSUCH: -- the adjudication
7 of private rights is different, we have said,
8 than the adjudication of public rights.

9 GENERAL SAUER: And, again, yes, those
10 would implicate all those line-drawing
11 problems.

12 JUSTICE GORSUCH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Kavanaugh?

15 JUSTICE KAVANAUGH: In response to
16 Justice Sotomayor's question, you have Taft and
17 Scalia, right? That's not -- not too shabby.

18 GENERAL SAUER: I -- I think those are
19 outstanding jurists and, with respect to
20 Justice Scalia in particular, one of the
21 greatest jurists in the history of the Court.

22 JUSTICE KAVANAUGH: I thought your two
23 exceptions that you've had a lot of questions
24 about, but I thought the two exceptions, the
25 categories were, one, the Federal Reserve based

1 on history and tradition and function, and the
2 other were the non-Article III courts, which
3 starts in Marbury. Marbury itself discusses
4 this. Taft discusses Marbury at length in
5 Myers on this exact point of non-Article III
6 courts being different. Taft leaves that open,
7 right, in -- in Myers.

8 And so, for a Court of Federal Claims,
9 Tax Court, the D.C. local courts -- you mention
10 this at page 23 of your brief -- it would seem
11 to me that Marbury itself says that that is a
12 line that distinguishes the non-Article III
13 courts from the position that you're taking
14 here. I know you may not agree with that, but
15 is that a principled, sensible line we could
16 draw?

17 GENERAL SAUER: Certainly, it is
18 something that the Court -- the Court could
19 look at. I don't want to take a position on
20 them. I am -- to be clear, I am not taking a
21 position on whether that line is valid. But,
22 certainly, there are arguments that could be
23 made and debated in an appropriate case about
24 where those lines should be drawn. And you do,
25 I think, reference -- correctly reference both

1 Myers as -- and Marbury itself as teeing up
2 some of those issues.

3 JUSTICE KAVANAUGH: There's been
4 debate about Marbury. Was that about D.C., or
5 was that about judicial office, but I read it
6 to be some of both, so for what that's worth.

7 Why did no President challenge this
8 structure from 1935 to 2025? We've had a lot
9 of Presidents who have had very strong views of
10 Article II. Yet, for 90 years, it stood, not
11 directly challenged. Why do you think that is?

12 GENERAL SAUER: It would be
13 speculative to answer that. I mean, one reason
14 might be that Presidents are fairly comfortable
15 with taking away tough political decisions.
16 So, as the Court has said in multiple cases, I
17 believe, one President cannot bind the hands of
18 its successors. And the President -- there's a
19 kind of responsibility that goes with the
20 authority here. The President sometimes may
21 have a political incentive to allow tough
22 decisions to be outsourced, so to speak, to
23 agencies that he doesn't have direct control
24 over.

25 However, our constitutional structure

1 dictates that the President cannot do so. He
2 cannot bind the hands of his successors, or the
3 encroached-upon branch cannot consent to the
4 encroachment, you know, and -- and -- and,
5 therefore, disrupt our constitutional
6 structure.

7 JUSTICE KAVANAUGH: One thing you've
8 said, but I want to make it crystal-clear, that
9 overruling or narrowing Humphrey's Executor
10 would not threaten the existence of these
11 agencies but only would alter how the heads of
12 those agencies can be removed, correct?

13 GENERAL SAUER: Correct. They'd be
14 political -- politically accountable to the
15 President. And this Court has in three
16 different decisions addressed these kinds of
17 broader implications, severability arguments,
18 and come down there.

19 JUSTICE KAVANAUGH: The way we've done
20 it is to sever the removal restriction, not to
21 destroy the agency, correct?

22 GENERAL SAUER: That's exactly right.

23 JUSTICE KAVANAUGH: Okay. On stare
24 decisis, you used the word "dangerous," I
25 think, in your opening about the independent

1 agencies. One of the things we consider are
2 the -- not only how wrong it was and reliance
3 interests but the real-world impacts. And I --
4 I think I'll just give you a little bit to
5 explain why you used the word "dangerous" when
6 talking about independent agencies, if I heard
7 that correctly.

8 GENERAL SAUER: And -- and maybe to
9 return to the exchange I had with Justice
10 Kagan, the real-world consequences here are
11 human beings exercising enormous governmental
12 authority with a great deal of control over
13 individuals and business -- small and large
14 businesses and so forth, who ultimately do not
15 answer to the President.

16 That's a power vacuum. The President
17 is answerable to the voters. They have no
18 boss. And regardless of what happens, when
19 there's a power vacuum, somebody is going to
20 come into that power vacuum. So is it Congress
21 that many commentators have noted actually
22 exercises substantial control over these
23 independent agencies through budgetary
24 functions and through oversight functions? Is
25 it industries engaging in industry capture of

1 the agencies?

2 The point is that power vacuums should
3 not exist in our constitutional structure
4 because, as Madison said, there's a line of
5 accountability, a chain of dependence that runs
6 from the officers to the President and he's
7 answerable to the community, which is the
8 voters, every four years.

9 JUSTICE KAVANAUGH: I want to return
10 to what Justice Kagan and Justice Gorsuch were
11 talking about with you in terms of the -- the
12 bargain, and I think broad delegations to
13 unaccountable independent agencies raise
14 enormous constitutional and real-world problems
15 for individual liberty, as you just mentioned.
16 I've obviously said that many times in prior
17 opinions.

18 I thought one aspect of that that
19 we've taken great steps to correct has been the
20 major questions doctrine over the last several
21 years to rein in what Justice Kagan was talking
22 about, these broad delegations, to make sure
23 that we are not just being casual about
24 assuming that Congress has delegated major
25 questions of political or economic significance

1 to independent agencies or to any agencies for
2 that matter. You want to speak to the major
3 questions doctrine and how that fits into your
4 answer?

5 GENERAL SAUER: Suffice to say that
6 the major questions doctrine is not a
7 substitute for the President's removal power.
8 It may have done some work in backstopping the
9 fact that we do have these independent agencies
10 without a political discipline. But the
11 President's removal power is what is dictated
12 by the Constitution, that the President must
13 have the power to control and that these
14 agencies -- the one who has the power to remove
15 is the one who -- is the person that they have
16 to fear and obey.

17 JUSTICE KAVANAUGH: Sorry to prolong
18 this, but, on your second question presented,
19 on the second question presented, I just want
20 to touch on that quickly. This is about the
21 reinstatement argument that you make.

22 I have some real doubts about that
23 argument. We don't need to reach it, of
24 course, if we agree with you on the first
25 question. I have some doubts about that

1 because that really would be an end run around
2 the exceptions you had identified earlier for
3 the Federal Reserve or for the article --
4 non-Article III courts.

5 In other words, you could just remove
6 those people. So long as you continue to pay
7 their salary, you wouldn't have to reinstate
8 them. That strikes me as really destroying the
9 categories that you had identified as potential
10 exceptions.

11 So I'm concerned about your
12 reinstatement argument on -- on Question 2 and
13 just want to give you a chance to address that.

14 GENERAL SAUER: Maybe I could just say
15 two things. I think this Court in its
16 Wilcox-Harris stay opinion said something very
17 telling. It's not binding on this issue, but
18 it's very persuasive when it talked about how,
19 when it comes to the balancing of harms, the
20 injury to the government from being forced to
21 take back into the fold an executive officer
22 that the President's really already ejected
23 from the fold outweighs the interests of the,
24 even a wrongfully removed officer as I read
25 that sentence, wrongfully removed officer from

1 continuing to exercise their statutory
2 authority.

3 JUSTICE KAVANAUGH: Don't you have a
4 problem again here with Marbury on recognizing
5 mandamus? I mean --

6 GENERAL SAUER: Mandamus has --

7 JUSTICE KAVANAUGH: -- I know a lawyer
8 never wants to hear you have a problem with
9 Marbury, but I think you have a problem with
10 Marbury on that.

11 GENERAL SAUER: Well, I think the fact
12 that it's a judicial officer there doesn't
13 raise all these separation-of-powers questions.

14 JUSTICE KAVANAUGH: Well, what's
15 the -- I mean, the other side says that's a
16 completely gerrymandered answer to the -- I
17 mean, yeah, but what's the principle on page,
18 what is it, 43?

19 GENERAL SAUER: The principle, I
20 think, is the separation of powers, right,
21 because the -- the --

22 JUSTICE KAVANAUGH: Well, they're --

23 GENERAL SAUER: -- these removals in
24 the executive branch, if you're removing a
25 judicial officer, it just doesn't raise all

1 these issues.

2 And that's why the answer to that
3 concern when it comes to Article III courts is
4 not, oh, the President doesn't have removal
5 power. It's that are these Article I or are
6 these Article III? If they're in Article --
7 I'm sorry, Article II. If they're in Article
8 II, the President has control. If they're in
9 Article I, then it may look very different.

10 JUSTICE KAVANAUGH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett?

13 JUSTICE BARRETT: So, General Sauer,
14 you argue that the removal power comes from the
15 Vesting Clause, and I understand why you make
16 that argument because that would be the
17 broadest authority because it would give -- you
18 know, that would be the full unitary executive
19 theory.

20 But there are other theories of where
21 the power could be located. For example, if it
22 was part of the Take Care Clause, then it might
23 be more limited because it might apply only or
24 give removal authority only over those officers
25 who exercise significant discretion, or it

1 might be an adjunct to the power of
2 appointment, which would mean that inferior
3 officers didn't come within it.

4 And I don't read our cases to this
5 point to really be very specific. They mention
6 all three, and they could be mutually
7 reinforcing.

8 Is there any reason for us to be
9 specific about it in this case?

10 GENERAL SAUER: I think the Court
11 ought to adopt, as I read the cases, virtually
12 every time the Court has decided this,
13 certainly, in Seila Law and Free Enterprise
14 Fund but also going back to the 19th Century
15 cases, the Court looks to both the Vesting
16 Clause and the Take Care Clause.

17 And then, in other cases, it also
18 refers to the Appointments Clause and how the
19 power to remove also flows to the power to
20 appoint. So you have three kind of mutually
21 reinforcing textual bases to place what again
22 the Court's decisions from Ex Parte Hennen
23 through Humphrey's Executor decided as a
24 settled beyond doubt, you know, exclusive and
25 illimitable power of removal.

1 So I think the text of the
2 Constitution supports what you've referred to
3 as the strong theory, and that's, I think,
4 repeated again and again in this Court's
5 decisions where it started with the Vesting
6 Clause, and, of course, it's the logic of
7 Madison's statements on the floor of Congress
8 in the Decision of 1789.

9 JUSTICE BARRETT: Well, I -- let's
10 see. I know that the -- obviously, I
11 understand that's your first-line position, and
12 I do think that you could go back through the
13 cases and find that. And I agree with you that
14 we mention the Vesting Clause. I agree with
15 you it comes up in the Decision of 1789, et
16 cetera.

17 But what I'm asking is, is there any
18 reason that we have to? Because it seems to me
19 that there are very hard questions, Justice
20 Kagan in particular was pushing you on them,
21 about what the limits of your logic would be.

22 And it seems to me that, and there's
23 some dispute among this in the amicus briefs
24 and the scholarship about which portion of
25 Article II or if it's in the Appointments

1 Clause, would be the source of this authority.

2 And is there any reason we have to
3 decide that here given that it might be
4 relevant to some of the harder questions about
5 limiting principles?

6 GENERAL SAUER: I don't dispute that
7 there might be narrower grounds on which the
8 Court could rule. But we'd encourage the Court
9 to adhere to the logic of all those decisions.
10 Again, I've discussed nine decisions from 1839
11 to 2024 that talks about this removal power as
12 exclusive and illimitable, conclusive and
13 preclusive, and so forth.

14 I mean, that really is the line of
15 this jurisprudence. It's the compelling logic
16 that Madison successfully advocated on the
17 floor of the First Congress. And we would --

18 JUSTICE BARRETT: So we have to do
19 Vesting Clause?

20 GENERAL SAUER: We think the Vesting
21 Clause is clearly -- provides at least the
22 clearest textual basis for it. I mean, when
23 Madison said, for example, the power of
24 overseeing and controlling those who
25 executive -- who execute the laws is the

1 quintessential executive power, that's the
2 logic of it. Could the Court devise a
3 holding that -- based solely on the
4 Appointments Clause? That's possible, but --

5 JUSTICE BARRETT: Well, I'm not -- I'm
6 not -- I wasn't proposing devising that
7 holding. I was just supposing -- I was just
8 proposing not being very specific about it,
9 which I think some of our prior decisions have
10 been. But -- but let me move on.

11 And, actually, this is a question I
12 truly don't know the answer to and I just
13 thought of it during the argument as we were
14 talking about bargains.

15 So both Justice Gorsuch and Justice
16 Kagan were asking you about the bargain that
17 Congress has made in creating these independent
18 agencies. And I was struck by, you know, I
19 remember Justice Gorsuch brought up in the
20 tariffs argument the fact that the tariff
21 statute had a legislative veto originally. I
22 don't know whether the original 1935 FTC Act
23 from Humphrey's did or did not.

24 But I guess the question that I have,
25 is that part of the bargain? Because

1 legislative vetoes were pretty ubiquitous
2 throughout the Twentieth Century. And, of
3 course, we held them unconstitutional in
4 Chadha.

5 And if you had a legislative veto,
6 even if Congress wasn't exerting itself the
7 authority to fire the head of an -- or one of a
8 member, a multi-member board, it could override
9 decisions that the agency made, but I think
10 I -- I gather your point, part of your response
11 to Justice Jackson about why these agencies are
12 different is it's not like they're answering to
13 Congress either. You know, Congress creates
14 them and it might put the removal restriction
15 on them, and that might limit the President's
16 authority.

17 But they're not answering to either
18 the President or to Congress. But, when the
19 legislative veto is in place, there was some
20 measure of congressional control that is
21 perhaps more significant than budgetary
22 restrictions. I just wondered if you could
23 speak to that.

24 GENERAL SAUER: Two things. INS
25 against Chadha correctly recognized that there

1 was legislative control.

2 JUSTICE BARRETT: I wasn't questioning
3 Chadha.

4 GENERAL SAUER: Yeah, yeah, yeah. And
5 Chadha, I think, very powerfully explains that
6 that's terrible. That is a huge
7 separation-of-powers problem when Congress has
8 these -- has attached a string to its
9 delegation of control to what executive
10 officers are doing.

11 And then the historical point, that in
12 Chadha, by the time of Chadha, that had been in
13 place -- legislative vetoes had been in place
14 since 1932, over 50 years. There were 295 --
15 or 196 statutes with 295 legislative vetoes,
16 and this Court said they're unconstitutional.
17 And the fact that Congress is -- likes this
18 encroachment power so much sharpens rather than
19 blunts the Court's review.

20 JUSTICE BARRETT: But I -- but that's
21 not quite the question that I had. I guess
22 what I was wondering is, do you think it's part
23 of the reason Congress was willing to infuse
24 agencies with a lot of the broad powers?

25 Justice Kagan was pointing out they

1 now exercise a lot of rulemaking power.
2 There's a lot of adjudicatory power. And I'm
3 not saying -- I'm not questioning Chadha. I
4 think Chadha rightly, as you said, made the
5 separation-of-powers point that Congress can't
6 retain this power for itself.

7 But I guess what I'm saying is, having
8 lost that check, maybe these independent
9 agencies have become something that Congress
10 didn't intend or anticipate even at the point
11 that it set it up, which is the point that
12 Justice Gorsuch made in the tariff argument
13 with respect to IEEPA.

14 GENERAL SAUER: May I just say this?
15 I believe the FTC Act, I'm not aware of it
16 having a legislative veto at any point in its
17 history. I could be wrong about that. But, as
18 Chadha points out, legislative vetoes started
19 coming in vogue in 1932, and the FTC Act goes
20 back --

21 JUSTICE BARRETT: I understand that.

22 GENERAL SAUER: -- to 1913. So I'm
23 not sure if that's part of the dynamic.

24 JUSTICE BARRETT: Let me ask you a
25 question about stare decisis. How should we

1 think about reliance interests when it comes to
2 reliance interests in government structure?

3 You know, Justice Sotomayor was
4 pushing you about had we ever overruled a case
5 that was this old, and you gave lots of
6 examples and, frankly, examples that came -- I
7 mean, Erie kind of came out of nowhere in -- in
8 overruling Swift, right, and -- and, here, I
9 would say there's been an eroding of Humphrey's
10 Executor over the years.

11 But I think what Justice Sotomayor was
12 really trying to get is not at was there an --
13 an age gap but this kind of decision. And I'm
14 not asking you whether there's been another
15 analogous decision, but I think, when we think
16 about stare decisis interests, this kind of
17 structural interest, which is really the
18 interest that's been identified on the reliance
19 side, can you think of a case that talks about
20 how the reliance factor of stare decisis plays
21 in here?

22 GENERAL SAUER: I think Justice
23 Gorsuch's opinion for the plurality in Ramos
24 addresses this when you -- when he -- when he
25 talks about how you're weighing -- you know,

1 here, you're weighing an injury to the
2 constitutional structure. That's not a valid
3 reliance interest. The relevant reliance
4 interest is the reliance of the American people
5 in separation of powers in protect -- defending
6 our liberties.

7 If you look at actually, like, human
8 reliance interests like, you know, entering in
9 a marriage, starting a small business, and so
10 forth, you don't see a lot of people making,
11 you know, decisions in reliance on the fact
12 that there are, you know, multi-member agency
13 commissions that have removal restrictions.
14 The only actor here who's arguably relying is
15 Congress.

16 And Congress's act of reliance is
17 itself the violation of the separation of
18 powers. And where that's the case, the -- the
19 supposed congressional reliance interests
20 should be given little or no weight in our
21 view. And then -- yeah, I think I'll say that.

22 JUSTICE BARRETT: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 JUSTICE JACKSON: So I guess I -- I

1 really don't understand why the agencies aren't
2 answering to Congress. Congress established
3 them and can eliminate them. Congress funds
4 them and can stop.

5 So, to the extent that we're concerned
6 that there's some sort of entity that is out of
7 control and has no control, I guess I don't
8 understand that argument.

9 GENERAL SAUER: We would say the
10 constitutional actor on the hypothetical who is
11 controlling these agencies is Congress, and
12 that is a huge separation-of-powers problem.

13 JUSTICE JACKSON: No, I understand.
14 I'm just talking about as a practical matter.
15 Part of your argument seemed to revolve around
16 this notion that there's some kind of thing
17 happening with the independent agency, that the
18 reason why the President needs to control it is
19 because they don't answer to anybody.

20 And what I guess I don't understand is
21 why they don't answer to Congress, which
22 establishes the law that they are bound to
23 follow and determines whether these agencies
24 exist, funds these agencies. All of those
25 things, it would seem to me, would be methods

1 or mechanisms of control.

2 GENERAL SAUER: The Constitution
3 requires clear lines of political
4 accountability. So, if Congress is sort of
5 informally actually controlling these -- these
6 agencies through, like, oversight queries --

7 JUSTICE JACKSON: Not informally. We
8 have a statute. But let me ask you another
9 question.

10 I'm -- I guess I have a very different
11 view of the dangers and real-world consequences
12 of your position than what you explored with
13 Justice Kavanaugh. My understanding was that
14 independent agencies exist because Congress has
15 decided that some issues, some matters, some
16 areas should be handled in this way by
17 nonpartisan experts, that Congress is saying
18 that expertise matters with respect to aspects
19 of the economy and transportation and the
20 various independent agencies that we have.

21 So having a President come in and fire
22 all the scientists and the doctors and the
23 economists and the Ph.D.s and replacing them
24 with loyalists and people who don't know
25 anything is actually not in the best interest

1 of the citizens of the United States. This is
2 what I think Congress's policy decision is when
3 it says that these certain agencies we're not
4 going to make directly accountable to the
5 President.

6 So I think there's a pretty
7 significant danger that Congress has actually
8 identified and cares about when it determines
9 that these issues should not be in presidential
10 control. So can you speak to me about the
11 danger of allowing in these various areas the
12 President to actually control the
13 transportation board and potentially the
14 Federal Reserve and all these other independent
15 agencies?

16 GENERAL SAUER: I think the Court said
17 it well in Free Enterprise Fund when it said
18 that we can have a government that functions
19 without rule by functionaries. We can have a
20 government that benefits from expertise without
21 being ruled by experts.

22 JUSTICE JACKSON: No, we can have, but
23 I'm asking you about Congress's choice,
24 Congress's decision that in these particular
25 areas we would like to have independence. We

1 don't want the President controlling. I guess
2 what I don't understand from your overarching
3 argument is why that determination of Congress,
4 which makes perfect sense given its duty to
5 protect the people of the United States, why
6 that is subjugated to a concern about the
7 President not being able to control everything.

8 I mean, I appreciate there's a
9 conflict between the two, but one would think,
10 under our constitutional design, given the
11 history of the monarchy and the concerns that
12 the Framers had about a President controlling
13 everything, that in the clash between those
14 two, Congress's view that we should be able to
15 have independence with respect to certain
16 issues should take precedence.

17 GENERAL SAUER: The constitutional
18 design sets up three branches of government.
19 It forbids Congress from controlling what the
20 executive branch does, and it also forbids
21 Congress from shaving away the President's
22 control over the unitary executive branch.

23 JUSTICE JACKSON: And what I'm -- what
24 I'm positing is that -- that Congress's
25 decision here is not shaving away the

1 President's control. You cast it as that, and
2 I appreciate that, but, instead, what Congress
3 is doing is saying we'd like to have
4 independent, nonpartisan experts working on
5 certain issues for the good of the American
6 people. And I understand that the President
7 would rather control them, but it's not really
8 his decision in the overall scheme of things, I
9 say. Why am I wrong about that?

10 GENERAL SAUER: Under the
11 constitutional design --

12 JUSTICE JACKSON: It is the
13 President's decision as to --

14 GENERAL SAUER: It is.

15 JUSTICE JACKSON: -- how the
16 government is structured and who should be
17 doing what.

18 GENERAL SAUER: No, that is largely
19 Congress's decision with certain exceptions.
20 Congress cannot violate the separation of
21 powers and threaten all of our liberties in the
22 way that it structures the government and has
23 done so here.

24 JUSTICE JACKSON: One last question.
25 I -- I appreciate the effort to try to make

1 this not seem as big a deal as it might be by
2 focusing only on the FTC and saying this is
3 really just about what happens and we'll cross
4 the bridge of the other agencies when we get to
5 it. But can you just give us a sense because
6 you -- I'm sure you must know this of what
7 other agencies there are that have the kind of
8 removal protections that are at issue here?
9 There are some, what, two dozen?

10 GENERAL SAUER: That's what Seila Law
11 said. That's probably a good accounting.
12 And -- and, obviously, we -- we have challenged
13 four of them in this Court, and we're
14 challenging a handful of others in other courts
15 as well.

16 JUSTICE JACKSON: But you could -- you
17 could challenge the National Labor Relations
18 Board, the Nuclear Regulatory Commission, the
19 Commission on Civil Rights, potentially the
20 Sentencing Commission, the Occupational Self --
21 Safety and Health Review Commission, the
22 Product -- Consumer Product Safety Commission.
23 All of these have that kind of structure.

24 GENERAL SAUER: I don't know if all of
25 those are on the list. Certainly, some of them

1 are. And some of them we're -- and many of
2 these agencies we are litigating, including in
3 this Court.

4 JUSTICE JACKSON: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Mr. Agarwal.

8 ORAL ARGUMENT OF AMIT AGARWAL

9 ON BEHALF OF THE RESPONDENTS

10 MR. AGARWAL: Mr. Chief Justice, and
11 may it please the Court:

12 The President's constitutional duty to
13 execute the law does not give him the power to
14 violate that law with impunity. But
15 Petitioners claim that the President was free
16 to fire Commissioner Slaughter without cause in
17 violation of the FTC Act as authoritatively
18 construed by this Court. And, they urge, even
19 if that firing was illegal, there is nothing
20 that any court anywhere at any time could do to
21 remedy that violation. The district court
22 correctly rejected both arguments, and its
23 judgment should be affirmed.

24 On the merits, multi-member
25 commissions with members enjoying some kind of

1 removal protection have been part of our story
2 since 1790. So, if Petitioners are right, all
3 three branches of government have been wrong
4 from the start. Congress and prior Presidents
5 have been wrong to jointly create early
6 founding-era commissions and more than two
7 dozen traditional independent agencies since
8 1887. And this Court was wrong to repeatedly
9 bless those laws and to unanimously uphold the
10 exact same removal provision at issue here in
11 *Humphrey's Executor* almost a century ago.

12 Reasonable people can and do disagree
13 about first principles, but any abstract theory
14 that would wipe away so much history and
15 precedent should be a non-starter. At a
16 minimum, Petitioners would need an air-tight
17 theory to justify the radical change that they
18 now seek, and they don't have one. No tool of
19 interpretation clearly supports the President's
20 assertion of an unrestricted and indefeasible
21 authority to fire the heads of traditional
22 independent agencies like the Federal Elections
23 Commission and the Nuclear Regulatory
24 Commission. Plus, Petitioners' theory cannot
25 be reconciled with their own apparent position

1 on the Federal Reserve and Article I courts.

2 Finally, stare decisis militates
3 against overruling a century of precedent at
4 this late date. The political branches are
5 more than up to the task of finding reasonable
6 legislative solutions that strike an
7 appropriate balance. That kind of legislative
8 solution is far preferable than abandoning a
9 foundational precedent on which so much of
10 modern governance is based.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: Was Humphrey's
13 Executor an executive branch case?

14 MR. AGARWAL: It was an executive
15 branch case, Justice Thomas, insofar as the FTC
16 is an entity that is not operating under the
17 auspices of Articles I and III, but -- but it
18 is also a case in which Congress and the
19 President coming together have determined that
20 it's not part of a traditional executive
21 department and --

22 JUSTICE THOMAS: Did the Court in
23 Humphrey's Executor distinguish it from
24 Swift -- from its earlier precedent in Myers?

25 MR. AGARWAL: The Court, yes,

1 absolutely distinguished --

2 JUSTICE THOMAS: And didn't it --

3 MR. AGARWAL: -- the FTC from its
4 earlier precedent in Myers.

5 JUSTICE THOMAS: Wasn't that
6 distinction based on its function more as a
7 quasi-legislative, quasi-judicial agency as
8 opposed to an executive branch agency?

9 MR. AGARWAL: It was based in part on
10 functions, Justice Thomas, but it was also
11 based on the placement of the agency and the
12 considered determination of Congress and the
13 President together that this was the kind of
14 agency that should be insulated from
15 presidential at-will removal.

16 JUSTICE THOMAS: Now you rely on the
17 reliance interests in stare -- in -- the
18 reliance interests of Congress and reliance
19 interests, I guess, of others, of the agency
20 heads on the structure of this agency for so
21 many years. What is it, 70 years, you say?

22 MR. AGARWAL: The -- the FTC is 111
23 years old.

24 JUSTICE THOMAS: But from Humphrey's
25 Executor?

1 MR. AGARWAL: Ninety years.

2 JUSTICE THOMAS: How would you have
3 applied that in the overruling of Swift v.
4 Tyson, your reliance interests?

5 MR. AGARWAL: Yes. So Swift v. Tyson
6 deals with a completely different kind of
7 situation with respect to the Erie doctrine.
8 It was not --

9 JUSTICE THOMAS: But -- so there was
10 no reliance interests?

11 MR. AGARWAL: So reliance interests
12 with respect to choice of law determinations?

13 JUSTICE THOMAS: Yeah, mm-hmm.

14 MR. AGARWAL: I haven't thought
15 through that systematically, Justice Thomas, to
16 tell you the truth. I do think that there is a
17 reliance interest here that is both immense and
18 undeniable, and that is the fact that Congress
19 and the President have determined that there
20 are certain statutory authorities, not
21 constitutional authorities, statutory
22 authorities that the executive branch would
23 never have in the absence of congressional
24 legislation that Congress and prior Presidents
25 thought should not be under the control, sole

1 control, of just one person.

2 And that reliance interest would be
3 completely destroyed by retroactively
4 destroying the independence of traditional
5 independent agencies.

6 JUSTICE THOMAS: So this is -- I don't
7 know what a traditional executive --
8 administrative agency is, but could Congress
9 limit the removal authority of the President in
10 a newly created executive branch agency?

11 Let's say, for example, a few years
12 ago EPA became a -- an executive branch agency.
13 It was more of an administrative agency, a
14 sub-cabinet. Could it, in doing that, limit
15 the removal authority of the President of the
16 head of the EPA or Homeland Security?

17 MR. AGARWAL: I think it is within the
18 realm of possibility, Justice Thomas. And I
19 don't think that the Court ex ante should adopt
20 any kind of categorical role precluding that --

21 JUSTICE THOMAS: No, I'm trying to --
22 again, the SG was asked about the logic of his
23 argument. What's the logic of yours? How far
24 does it carry you? If this is an executive
25 branch agency, in your distinction, as this is

1 a multi-member agency, why doesn't the logic
2 take you to a single-head agency also?

3 MR. AGARWAL: So you're asking whether
4 a single-headed agency could be converted into
5 a --

6 JUSTICE THOMAS: No. Well, I -- I
7 haven't gotten there yet, but that -- that
8 would be the next step in order to make them
9 removable, to make the -- the heads of the
10 agency or the principals move -- removable.

11 MR. AGARWAL: Mm-hmm. So there --
12 there are constraints. One of the constraints
13 is that the creation of the agency and the
14 insulation from presidential control cannot
15 interfere with the President's conclusive and
16 preclusive constitutional authorities.

17 JUSTICE THOMAS: But you still haven't
18 told me why can't tomorrow morning Congress
19 decide that the secretary of Congress should be
20 removable in a -- should limit the President's
21 authority to remove the Secretary of Commerce?

22 MR. AGARWAL: That would be squarely
23 foreclosed by this Court's decision in Seila
24 Law as we understand it. That is to say, this
25 Court in Seila Law held that there is a

1 particular serious threat to individual liberty
2 that is posed by single-headed agencies that
3 wield significant executive power.

4 JUSTICE KAVANAUGH: Could -- could
5 Congress convert all these --

6 JUSTICE THOMAS: The multi-member.

7 JUSTICE KAVANAUGH: -- departments
8 into multi-member commissions, the Commerce,
9 EPA, Department of Homeland Security,
10 Department of State, convert them all into
11 multi-member commissions and make them
12 removable only for cause?

13 MR. AGARWAL: No. I think, Justice
14 Kavanaugh, we're looking at three buckets here.
15 In one bucket including the Department of
16 State, you would have departments that under no
17 conceivable circumstance could practicably be
18 converted to a multi-member commission.

19 JUSTICE KAVANAUGH: Why?

20 MR. AGARWAL: Because they are
21 wielding so many of the President's conclusive
22 and preclusive constitutional authorities. But
23 that is a relatively small bucket. Let's say
24 Department of State --

25 JUSTICE KAVANAUGH: That's State,

1 Justice, and Defense?

2 MR. AGARWAL: -- Justice, Defense,
3 Homeland Security probably.

4 JUSTICE GORSUCH: Are you -- are you
5 saying, though, that -- that they're limited by
6 practical concerns or constitutional concerns?

7 MR. AGARWAL: Constitutional concerns.

8 JUSTICE GORSUCH: What -- what --
9 what --

10 MR. AGARWAL: And then practical
11 concerns will come up as well.

12 JUSTICE GORSUCH: Well, let's put
13 aside the practical concerns. I -- I -- I --
14 I'd like to understand just -- the answer to
15 Justice Kavanaugh, why -- why tomorrow Congress
16 couldn't transform every cabinet official into
17 a multi-member group. What's the
18 constitutional problem with that, I think, is
19 what my colleague was getting at.

20 MR. AGARWAL: Absolutely. And the
21 constitutional problem in our view is that
22 Congress cannot limit the President's authority
23 over officers who are wielding the President's
24 conclusive and preclusive constitutional
25 powers. And that is a line that goes all the

1 way back to Marbury v. Madison. It's a through
2 line through this Court's jurisprudence.

3 JUSTICE KAVANAUGH: Does it include --

4 JUSTICE BARRETT: But the FTC has
5 the --

6 MR. AGARWAL: Justice Jackson's -- I'm
7 sorry.

8 JUSTICE BARRETT: -- the FTC has the
9 authority to enter foreign agreements, right?
10 I mean, how do you -- how do you decide what's
11 conclusive and preclusive?

12 MR. AGARWAL: It does not have the
13 authority to enter into foreign agreements on
14 its own, Justice Barrett. The -- the statute
15 expressly provides that the Secretary of
16 State's approval is required before any kind of
17 agreement is executed. And the Secretary of
18 State, of course, is subject to the President's
19 plenary removal power.

20 JUSTICE KAVANAUGH: You talked --

21 CHIEF JUSTICE ROBERTS: So --

22 JUSTICE KAVANAUGH: -- about three --
23 I'm sorry.

24 CHIEF JUSTICE ROBERTS: I just want to
25 make sure I understand because it's fairly

1 basic.

2 I mean, there -- are there some
3 cabinet departments that you say Congress could
4 just take over? Department of Veterans
5 Affairs, Department of Education, they think,
6 well, we can do -- experts can do a better job
7 of it and so we're going to say there is now an
8 agency, the agency for education, and it will
9 be run by -- whether it's a multi-member group
10 or not, we think it's important for Congress to
11 have greater control over education, so we're
12 creating this new agency and its authorities
13 will be everything that the current Department
14 of Education has, except it will be run by a
15 commission and they can only be removed for
16 cause.

17 Is that all right?

18 MR. AGARWAL: Yeah, I think that it is
19 probably within the realm of possibility for --
20 for agencies, yes, Justice -- Chief Justice
21 Roberts. And the constraint historically has
22 been that these types of determinations have
23 been made through a process of political
24 accommodation between Congress and the
25 President, and over the course of more than 200

1 years, we have not seen --

2 CHIEF JUSTICE ROBERTS: Yeah. Well,
3 I'm sorry to interrupt, but sometimes that
4 accommodation is greater than in other times.
5 I mean, we have situations, let's say, where
6 the Congress, both houses are controlled by one
7 party and the President is of the -- the same
8 party, and they may decide that the government
9 would be structured better by -- by taking over
10 these entities.

11 And so -- so which -- which
12 departments could Congress impose a
13 multi-member commission instead of a secretary?

14 MR. AGARWAL: So -- so, if you're
15 asking about which ones could be converted
16 today --

17 CHIEF JUSTICE ROBERTS: Yeah.

18 MR. AGARWAL: -- I think it's probably
19 a pretty small universe in terms of the numbers
20 that could be wholesale transformed as they are
21 currently constituted. Why? Because it
22 appears that the vast majority of executive
23 departments wield at least some powers that
24 this Court would deem to be conclusive and
25 preclusive, including under the standard that

1 this Court annunciated in Trump --

2 JUSTICE KAVANAUGH: Well, how are
3 those -- I'm sorry, keep going.

4 MR. AGARWAL: Including under the --
5 the analysis that this Court set out just last
6 term in Trump v. United States, where, at pages
7 620 to 621, the Court explained that the
8 President does have a conclusive and preclusive
9 authority with respect to certain criminal
10 investigations and prosecutions, and that
11 informed the Court's determination about
12 whether the acting attorney general was subject
13 to at-will presidential removal.

14 It turns out that the vast majority of
15 these executive departments do have some kind
16 of criminal investigative authority, including
17 armed law enforcement agents authorized to make
18 arrests. Now that is a -- that's a significant
19 bucket. You probably have a very --

20 JUSTICE GORSUCH: Every agency in the
21 government today has armed police officer --
22 their own police force. Is that really the
23 test of what's conclusive and preclusive?

24 MR. AGARWAL: So we're not saying --

25 JUSTICE GORSUCH: I mean, that -- it

1 rhymes, but I don't know what it means.

2 MR. AGARWAL: I -- Justice Gorsuch, I
3 think you're making a good point insofar as
4 you're saying there's probable -- insofar as
5 Your Honor's point is that there's a lot of
6 what these agencies do that would not be deemed
7 conclusive and preclusive, and we absolutely
8 acknowledge that. And the --

9 JUSTICE GORSUCH: So the answer to the
10 Chief Justice's question is tomorrow we could
11 have the labor commission, the education
12 commission, the environmental commission,
13 rather than departments of interior and so
14 forth, right?

15 MR. AGARWAL: So I don't know that you
16 could do it tomorrow because, like I said, for
17 the vast majority of agencies, there are at
18 least some conclusive and pre --

19 JUSTICE GORSUCH: So it has -- what's
20 the percentage then?

21 MR. AGARWAL: Then -- so I -- I don't
22 want to pretend, Justice Gorsuch, that I --
23 that I have --

24 JUSTICE GORSUCH: And what -- I want
25 to know where the threshold of preclusive and

1 conclusive comes in.

2 MR. AGARWAL: Oh, yes. And so what we
3 would say is that if the agent --

4 JUSTICE GORSUCH: Is it a mere
5 scintilla?

6 MR. AGARWAL: I -- I think that's
7 what -- I think you would have a separation-of-
8 powers problem if an agency, even if it's a
9 vast agency wielding a broad panoply of powers,
10 if one of those powers is the President's
11 conclusive and preclusive authority and the
12 officers who are exercising that power are
13 insulated --

14 JUSTICE GORSUCH: So -- so -- so long
15 as one person in the agency's exercising
16 conclusive and preclusive, whatever that means,
17 that's enough?

18 MR. AGARWAL: Yeah. So it's enough to
19 have a separation of powers. And I wouldn't
20 just say a person. I would say a principal
21 officer. It's enough to generate a
22 separation-of-powers problem. And what is the
23 remedy for that problem, I think, is an
24 analytically more difficult question.

25 JUSTICE GORSUCH: What is the

1 different --

2 JUSTICE KAGAN: It -- it -- it strikes
3 me, Mr. Agarwal, as I listen to this, you know,
4 if you go back to let's say the Education
5 Department, what the Chief Justice -- which the
6 Chief Justice raised, that the more realistic
7 danger here is that we'll have an Education
8 Department as authorized by Congress, by law,
9 that won't have any employees in it.

10 MR. AGARWAL: I -- I think you're
11 absolutely right, Justice Kagan, that there are
12 competing dangers here, and it -- it makes a
13 whole lot of sense to us to weigh the
14 real-world dangers that we know are a virtual
15 certainty that would result from adopting
16 Petitioners' constitutional theory and to
17 contrast those with purely hypothetical risks
18 that have never materialized over the course of
19 American history.

20 And even in the unlikely event that
21 Congress tomorrow was to try to start taking
22 cabinet departments that have been around for a
23 long time and to convert them wholesale into
24 multi-member agencies, which they have never
25 tried to do before, but even if they tried to

1 do that, of course, that would be subject to a
2 presidential veto.

3 JUSTICE BARRETT: Well, I think
4 that --

5 JUSTICE ALITO: How does your --

6 JUSTICE BARRETT: -- there's one thing
7 history shows, is that we can't anticipate what
8 might happen. And so we might be able to
9 predict what is likely to happen in the very
10 short term, but we don't know. I mean, if
11 we -- if we decide this case in your favor now,
12 we don't know what a Congress in 15 or 20 or 30
13 years might do. We might be able to predict
14 what's likely in -- in the short term. So, I
15 mean, this is going to have longer-term
16 implications.

17 MR. AGARWAL: So absolutely, but let
18 me make two points on that. First, there is
19 currently no constraint on -- there's currently
20 no case that has ever held that Congress cannot
21 give for-cause removal protections to principal
22 officers serving on -- to a single layer of
23 for-cause removal protection for single -- for
24 principal officers serving on a multi-member
25 commission, and nevertheless, notwithstanding

1 the absence of any such precedent throughout
2 American history, we have not seen an epidemic
3 of these problems. In fact, we haven't seen
4 this problem materializing at all.

5 But let me make one other point about
6 the real-world danger that is imminent right
7 now that we know will happen, and that is that
8 if Petitioners get their way, everything is on
9 the chopping block. And we're not just talking
10 about the FTC. Opposing counsel said we're not
11 challenging right now the Federal Reserve.
12 We're not challenging Article I courts. But
13 there is absolutely no principled basis for
14 carving those very important institutions out
15 of their rule and --

16 JUSTICE ALITO: Well, you're right
17 that the -- the Solicitor General was pressed
18 quite legitimately about things like the Tax
19 Court and the Claims Court, et cetera, et
20 cetera. But I don't know that you can make the
21 argument that his -- the logic of his argument
22 is going to cause these allegedly revolutionary
23 results without being prepared to explain more
24 concretely than you have the limits of your own
25 argument.

1 I mean, I could go down the list with
2 you of the cabinet officers and ask you whether
3 you think they could be headed by a
4 multi-member commission whose members are not
5 subject to at-rule -- at-will removal by the
6 President. Shall we do that? How about the --
7 how about Veterans Affairs? How about
8 Interior? Labor? EPA? Commerce? Education?
9 What am I missing?

10 JUSTICE GORSUCH: Agriculture.

11 (Laughter.)

12 JUSTICE ALITO: Agriculture.

13 JUSTICE JACKSON: Mr. Agarwal, are you
14 prepared --

15 CHIEF JUSTICE ROBERTS: I'm sorry,
16 there's a question before --

17 JUSTICE ALITO: Well, there was a --
18 there was a question there.

19 MR. AGARWAL: Yes. So I don't want to
20 pretend to greater certainty than I have about
21 the full gamut of statutory authorities vested
22 in all those other departments. I will say
23 that based on a very quick preliminary
24 analysis, it appeared to us that the vast
25 majority of executive departments wield at

1 least some of the conclusive and preclusive
2 authorities that this Court has recognized in
3 the past, including criminal investigative and
4 prosecutorial authorities and also authorities
5 implicating national security and foreign
6 relations.

7 Now that is not to say, Justice Alito,
8 I think you're absolutely right to say for the
9 vast -- for a lot of those, you could probably
10 take those out, and at that point, there's
11 going to be a fair question about whether --
12 whether Congress and -- Congress and the
13 President, acting together, could determine at
14 some point that there is a need for a
15 multi-member body of experts to preside over
16 certain government functions.

17 And what I would say is I don't think
18 that you should categorically rule out that
19 possibility as a matter of constitutional law.
20 And I don't -- I can't sit here today and tell
21 you that there's a distinction of
22 constitutional proportions, for example,
23 between the Department of Labor and the
24 National Labor Relations Board.

25 JUSTICE ALITO: Well, how about the --

1 the Post Office at the time of Myers? How does
2 your exclusive and preclusive theory account
3 for Myers? How can it be that the Postmaster
4 at that time exercised exclusive Article II
5 power, but a Federal Trade Commissioner does
6 not?

7 MR. AGARWAL: So I would say three
8 things about that. First, the conclusive and
9 preclusive standard does not have to be the
10 sole and exclusive limiting factor. Second,
11 there is a provision that Justice Barrett
12 referred to in the colloquy with opposing
13 counsel about the Take Care Clause, and it is
14 conceivable that at least in some circumstances
15 the Take Care Clause might itself, not always
16 but sometimes, impose a conclusive and
17 preclusive stand -- standard, for example, with
18 respect to officers like the Postmaster in
19 Myers who are deemed to -- to -- to possess
20 purely executive functions, as this Court
21 unanimously in Humphrey's Executor and then
22 again in Wiener, unanimously characterized the
23 functions of the Postmaster in Myers as purely
24 and obviously just executive.

25 So that's a second -- that's a second

1 constraint.

2 JUSTICE KAVANAUGH: When you answered
3 Justice Alito about the agencies exercising
4 investigative power and, thus, there would be a
5 question whether they could be made independent
6 multi-member commissions, don't a lot of the
7 now independent agencies also exercise that
8 kind of investigative power?

9 At least from my experience, it's very
10 hard to get into the weeds of the particular
11 powers exercised by the FTC and distinguish it
12 from some of the powers exercised by some of
13 the other cabinet agencies that we
14 traditionally think of as executive or the FCC
15 or the SEC. All of those seem to -- the FERC,
16 NLRB -- when you get into them all. So what --
17 what's your answer to that?

18 MR. AGARWAL: So my -- my answer is
19 the criminal investigative authority is
20 different. And, certainly, a lot of these
21 agencies have civil investigative authority,
22 including the FTC. As we understand it, this
23 Court's precedent just from last term in Trump
24 v. United States, criminal investigations and
25 prosecutions are in a different category at

1 least as a general matter. And if the logical
2 import of that analysis is that -- is that
3 there are certain functions that cannot be
4 wielded even by traditional independent
5 agencies, then so be it.

6 JUSTICE GORSUCH: Counsel --

7 MR. AGARWAL: That's the law of the
8 land.

9 JUSTICE GORSUCH: -- that's right --

10 JUSTICE KAVANAUGH: Can I --

11 JUSTICE GORSUCH: -- that's right --
12 I'm sorry.

13 JUSTICE KAVANAUGH: Go ahead.

14 JUSTICE GORSUCH: Go ahead. Please go
15 ahead.

16 JUSTICE KAVANAUGH: No, go ahead.

17 JUSTICE GORSUCH: All -- all right. I
18 understand conclusive and preclusive entirely
19 as we used it in -- when you're speaking about
20 executive power, can -- can the President
21 control what's done in his departments. I get
22 that. And a criminal prosecution's a good
23 example.

24 I do not understand it as you use it.
25 Why isn't it just as conclusive and preclusive

1 to decide whether to bring charges under the
2 FTCA Act --

3 MR. AGARWAL: Civil charges.

4 JUSTICE GORSUCH: -- against somebody,
5 civil versus criminal. It's a conclusive and
6 preclusive decision about enforcement decision
7 of a power of the federal government against
8 individuals across the country.

9 MR. AGARWAL: So there's a legal
10 answer and there's a historical answer, and
11 they might blend, Justice Gorsuch.

12 And the legal answer is that we don't
13 have any controlling authority that has ever
14 held that civil enforcement as a categorical
15 matter is the kind of thing that can never be
16 vested in a multi-member agency that enjoys a
17 modicum of insulation from political pressure.

18 And we know that, for example, from
19 this Court's unanimous decision in *Humphrey's*
20 *Executor*, where you had that kind of civil
21 enforcement taking place, and a unanimous
22 court, including all four justices from *Myers*,
23 said that's okay. And the kind of civil
24 enforcement that was going on there, you had
25 complaints being issued, you had

1 cease-and-desist orders --

2 JUSTICE GORSUCH: Cease-and-desist
3 orders but -- but not lawsuits in court. They
4 had to go to court. And -- and I'm just
5 curious, though, are -- fine, I accept -- I
6 accept your point, it's a good point about
7 Humphrey's, but why isn't that conclusive and
8 preclusive decision whether to use the federal
9 government's full -- full power in prosecution
10 where you can seek fines and -- and incur all
11 the -- all the -- all of the penalties that are
12 associated with violating the FTC Act?

13 MR. AGARWAL: So I think part of the
14 answer is historical and part of the answer is
15 functional. And on the historical part, we
16 have had all kinds of civil enforcement of
17 federal statutes taking place, including just
18 private statutes that authorize private
19 attorney generals, as this Court has -- has
20 recognized in many, many cases. So you have a
21 long, long history and tradition of private
22 actors wielding, kind of enforcing civilly
23 federal statutes.

24 Now I take -- I take the point --

25 JUSTICE GORSUCH: So --

1 MR. AGARWAL: -- that civil
2 enforcement on behalf of the government of the
3 United States --

4 JUSTICE GORSUCH: That's not the
5 executive power, but criminal actions is the
6 executive power?

7 MR. AGARWAL: Yeah, I would not say
8 that it --

9 JUSTICE GORSUCH: That's -- that's
10 what you're asking us to think about?

11 MR. AGARWAL: No, I would not -- I
12 would not put it that way. I would not say
13 it's not executive. And, in fact, in Seila --
14 in Seila Law --

15 JUSTICE GORSUCH: So it is executive?

16 MR. AGARWAL: Yeah. In -- in Seila
17 Law, this Court said it's not only executive,
18 it's quintessentially executive. And that's
19 okay because agencies like the FTC also engage
20 in adjudicative activities, and that would be
21 deemed quintessentially judicial and,
22 nevertheless, they're not subject to plenary
23 removal on the part of the judiciary. They
24 engage in rulemaking that could be considered
25 quintessentially legislative, and,

1 nevertheless, they're not subject to plenary
2 control on the part of the legislature.

3 The issue is whether -- not whether
4 it's executive in some sense. The issue is
5 whether it's constitutionally committed to the
6 President's sole and exclusive discretion. And
7 as a matter of history and precedent, we
8 haven't gotten there yet.

9 JUSTICE GORSUCH: So even some
10 quintessentially executive functions in your
11 view are not vested in the President of the
12 United States?

13 MR. AGARWAL: I would not say that --
14 I would not put it in this -- I would not say
15 that that -- yes, I would -- I would say
16 they're not --

17 JUSTICE GORSUCH: I think you have to
18 say yes to that based on --

19 MR. AGARWAL: They're --

20 JUSTICE GORSUCH: -- what you've just
21 given us.

22 MR. AGARWAL: They're not
23 constitutionally committed to the person of the
24 President and to his sole and exclusive
25 discretion, yes.

1 JUSTICE JACKSON: Didn't we suggest as
2 much in Humphrey's? I mean, didn't we -- we
3 sort of -- we have some lines in Humphrey's
4 that say, to the extent that it exercises any
5 executive function as distinguished from
6 executive power in the constitutional sense, it
7 does so to discharge -- it does so in the
8 discharge and effectuation of its
9 quasi-legislative or quasi-judicial powers.

10 So I thought that in Humphrey's we
11 recognized this idea that you could have an
12 agency that's exercising legislative or
13 judicial powers still engaging in some
14 executive function, and that doesn't make it an
15 executive agency.

16 MR. AGARWAL: That is exactly right.
17 And on top of that, we have a lot of agencies
18 over a long period of time engaging in all
19 manner of civil enforcement of federal
20 statutes.

21 And yet we do not have a single
22 example of any case from this Court in more
23 than two centuries that has ever held that a
24 single layer of for-cause removal protection
25 cannot apply to a principal officer of an

1 agency wielding that kind of civil enforcement
2 function.

3 JUSTICE JACKSON: And so I think
4 that's like your real point. In other words,
5 you're not asking for some sort of conclusive
6 or preclusive rule. That's not your burden in
7 this situation.

8 You are just saying that the way the
9 law has been interpreted by the Court here, the
10 existence of Humphrey's and Congress's reliance
11 on these kinds of multi-member agencies for
12 something like 90 years plus, that's the
13 background rule. And so now it's up to the
14 government and the Solicitor General to come in
15 to suggest that there's a constitutional
16 problem with that.

17 MR. AGARWAL: That is absolutely
18 right. We have a 111-year-old statute that was
19 enacted by the people's elected
20 representatives. It was signed into law by a
21 President of the United States. It was
22 unanimously affirmed by this Court. And it's
23 been followed by every single President since
24 1935 until the present.

25 We don't need an abstract theory to

1 tell us that the FTC Act is okay. It's the
2 other side that needs to give you a really
3 compelling theory to explain why, in our view,
4 two -- 200-plus years of precedent and history
5 need to be abandoned.

6 But, in any event, even according to
7 their own -- by their own acknowledgment, we're
8 talking about the modern era of traditional
9 independent agencies, which spans more than
10 half the life of the Republic.

11 JUSTICE KAVANAUGH: Can I ask you
12 about some other limits of your argument? So
13 most of the independent agencies by statute
14 must include members of both major political
15 parties.

16 Is that a constitutional requirement?

17 MR. AGARWAL: I don't think so.

18 JUSTICE KAVANAUGH: Could Congress
19 create independent agencies with, let's say,
20 10- or 15- or 20-year terms?

21 MR. AGARWAL: I do think, at some
22 point, Justice Kavanaugh, that if there is not
23 sufficient mechanisms of adequate presidential
24 supervision, that you could have a problem.
25 My -- my advice to the Court --

1 JUSTICE KAVANAUGH: Why? This is
2 important.

3 MR. AGARWAL: Yeah.

4 JUSTICE KAVANAUGH: Why? You've got
5 to have a theory on that.

6 MR. AGARWAL: Yeah, absolutely. So
7 there is the Take Care Clause in Article II,
8 Section 3. And we don't -- we don't dispute
9 that the activities of these agencies are
10 operating within the purview of the executive
11 branch and they should be subject to
12 constitutionally appropriate presidential
13 supervision.

14 JUSTICE KAVANAUGH: So do they have to
15 turn over with each new President then?

16 MR. AGARWAL: So, in the -- in the
17 case of -- in -- in the case of the FTC, I
18 don't want -- I don't think you want to --

19 JUSTICE KAVANAUGH: And if they don't
20 have to turn over with each new President,
21 what's the difference between seven years and
22 20 years constitutionally speaking?

23 MR. AGARWAL: I think our -- our
24 position is that the FTC, no matter what kind
25 of rule that you articulate, would be okay

1 because we have the staggered terms and
2 Presidents have the opportunity as a practical
3 matter to influence the composition of the FTC.

4 You start to get into more difficult
5 line-drawing problems if you imagine
6 hypothetical scenarios where Presidents, you
7 have longer terms and maybe fewer officers, and
8 maybe Presidents in -- in that circumstance
9 don't have --

10 JUSTICE KAVANAUGH: What about the
11 chair? Usually, the chair has been removable
12 at will as chair by Presidents. But that's
13 been a matter of statute for most of these. Is
14 that constitutionally required?

15 MR. AGARWAL: No. And we know that
16 from Humphrey's Executor actually because, at
17 the time of Humphrey's Executor, the chair of
18 the FTC was not removable by the President.
19 And now it was -- in the -- in the
20 reorganization act that took place some 15
21 years later, the President now has that
22 designation authority.

23 JUSTICE KAVANAUGH: So I think putting
24 those three together, you -- your position
25 would allow Congress to create independent

1 agencies, maybe converting some of the existing
2 executive agencies into independent agencies
3 with no political balance requirement, with a
4 long term, say, 10 or more years, and with the
5 chairs not subject to removal as chair.

6 So you can imagine a situation, and I
7 just want to give you a chance to deal with the
8 hard hypothetical, a -- when both houses of
9 Congress and President are controlled by the
10 same party, them creating a lot of these
11 independent agencies with or extending some of
12 the current independent agencies into these
13 kinds of situations so as to thwart future
14 Presidents of the opposite party, and to
15 Justice Barrett's point, I don't think we can
16 just say, oh, that hasn't happened, so it'll
17 never happen.

18 MR. AGARWAL: Absolutely. And I -- I
19 don't think that you should articulate a rule
20 that categorically rules out the possibility
21 that some statute in the future might not
22 provide for adequate tools of presidential
23 supervision. This is not that --

24 JUSTICE KAVANAUGH: But what would be
25 the theory? I mean, that's what I'm getting

1 at. There's -- you know, just picking
2 something out of thin air, what is the theory?

3 MR. AGARWAL: It would -- one textual
4 basis in the Constitution for that would be the
5 Take Care Clause of Article II, Section 3,
6 which does require the President to take care
7 that the laws be faithfully executed, and this
8 Court could hold that in some -- that that
9 requires that the President have
10 constitutionally adequate means of supervision,
11 such as those that are adverted to in part
12 III.C.2 of Seila Law that discusses exactly the
13 types of considerations to which Your Honor is
14 referring, the designation of the chair, the
15 staggered terms provision, and the opportunity
16 to influence the composition of the Commission,
17 budgetary tools.

18 I think all of those the FTC has, and
19 so we're on the right side of the line wherever
20 you draw that line. But I guess the -- the
21 bigger point is that historically, this is a
22 problem. This is a problem that has been
23 resolved through a process of political
24 accommodation.

25 And there's no reason to believe that

1 that process, which has been adequate for a
2 very long time, will not be adequate in the
3 future, but if it is, the Court can keep open
4 the possibility that there will be time enough
5 to decide on new constitutional rules.

6 JUSTICE KAVANAUGH: How do you answer
7 the accountability theme, which I think is the
8 theme of the other side, is that independent
9 agencies are not accountable to the people?
10 They're not elected as Congress and the
11 President are and are exercising massive power
12 over individual liberty and billion-dollar
13 industries, whether it's the FCC or the FTC or
14 whatever it might be.

15 MR. AGARWAL: May I answer?

16 CHIEF JUSTICE ROBERTS: Sure.

17 MR. AGARWAL: It is an entirely
18 legitimate concern, but there are
19 countervailing accountability and liberty
20 concerns on the other side. And so, for
21 example, you have an amicus brief that is
22 submitted by the Reporters Committee For
23 Freedom of the Press in this very case that
24 talks about real dangers to freedom of the
25 press, to individual liberty, to free speech

1 rights that would result from saying that
2 agencies like the FCC are all of a sudden
3 subject to at-will presidential removal.

4 And they discuss the history, just as
5 one example, this precious First Amendment
6 right that could in every meaningful sense be
7 jeopardized if we abandon longstanding history
8 and retroactively invalidate the independence
9 of independent agencies.

10 The last thing I would say if I -- if
11 I may, Justice Kavanaugh, in response to that
12 point on political accountability is that I
13 think it would be a really unfortunate way to
14 vindicate the principle of democratic
15 accountability for this Court to effectively
16 invalidate, we're not talking about one or five
17 or 10 or even 15, we're talking about more than
18 two dozen traditional independent agencies that
19 have been established by statutes, enacted by
20 the people's elected representatives, and
21 signed into law, all of them, by democratically
22 elected Presidents.

23 If -- if it is really true that these
24 kinds of for-cause removal protections, which,
25 after all, authorize the President to fire

1 commissioners just for good cause, if they
2 really pose this fundamental threat to the
3 Republic, Petitioners could take their argument
4 across the street and Congress could solve the
5 problem tomorrow. They're not willing to do
6 that.

7 CHIEF JUSTICE ROBERTS: Thank you.
8 Thank you, counsel.

9 You mentioned Humphrey's Executor
10 quite a bit and also Seila Law. And the one
11 thing Seila Law made pretty clear, I think, is
12 that Humphrey's Executor is just a dried husk
13 of whatever people used to think it was
14 because, in the opinion itself, it described
15 the powers of the agency it was talking about,
16 and they're vanishingly insignificant, have
17 nothing to do with what the FTC looks like
18 today. And yet it seems to be your primary
19 authority.

20 It was addressing an agency that had
21 very little, if any, executive power, and that
22 may be why they were able to attract such a
23 broad support on the Court at -- at the time.
24 I mean, putting Humphrey's Executor aside,
25 what's -- what's your next good case?

1 MR. AGARWAL: We have two other cases
2 in which the Court has had occasion to assess
3 the constitutionality of a single layer of
4 for-cause removal protection applicable to a
5 multi-member commission, and those two cases
6 are Wiener v. United States and Free Enterprise
7 Fund.

8 In both of those cases, the Court
9 unanimously concluded that a single layer of
10 for-cause removal protection does not offend
11 the separation of powers even with respect to
12 agencies that were wielding what everybody
13 today would consider significant executive
14 authority.

15 CHIEF JUSTICE ROBERTS: Well,
16 certainly, Wiener is sort of a protege of
17 Humphrey's and does exercise significant
18 authority but of an adjudicative nature. And I
19 don't know if that, again, should be considered
20 in -- in a direct line from Humphrey's or an
21 entirely different situation involving
22 adjudicative authority that the Court did not
23 say in deciding Humphrey's was at issue.

24 MR. AGARWAL: A couple of responses to
25 that, Mr. Chief Justice. First, Petitioners'

1 theory is based on the assumption that anytime
2 you have an officer who is acting outside the
3 auspices of Articles I and III, no matter what
4 kind of function they are discharging, what
5 they are doing "is and must be deemed an
6 exercise of the executive power."

7 And if that is true, that sweeps in
8 the commissioners of the War Claims Commission,
9 it sweeps in the Federal Reserve, it sweeps in
10 the Court of Appeals for the Armed Forces.
11 Their constitutional theory cannot be
12 distinguished on that basis.

13 CHIEF JUSTICE ROBERTS: Well, what
14 about the -- regarding them, as I think Justice
15 Gorsuch was discussing at one time, as adjuncts
16 to the judicial authority, which would be
17 something that would cover the Court, I think,
18 would think, in -- in Wiener?

19 MR. AGARWAL: If -- if this is a
20 viable distinction to say that there are
21 certain functions that are being performed that
22 are of an adjudicatory nature and that some
23 kind of exception should be carved out for
24 that, then why not for the FTC, which, after
25 all, does exercise adjudicative powers?

1 Indeed, as this Court explained in Axon -- Axon
2 Enterprise v. FTC, the -- the F -- the FTC --

3 CHIEF JUSTICE ROBERTS: Well, sure --

4 MR. AGARWAL: Yeah.

5 CHIEF JUSTICE ROBERTS: Go ahead.

6 MR. AGARWAL: The FTC stands in the
7 shoes of the district court in such cases.
8 It's doing exactly the type of thing that
9 district courts do. It's finding facts and
10 reaching conclusions of law.

11 CHIEF JUSTICE ROBERTS: Yeah, but it
12 does a lot of stuff in addition to that that
13 Wiener -- the -- the -- the Court in Wiener did
14 not do, and many of these other entities that
15 you've talk -- been talking about with --
16 exercise judicial responsibilities might
17 properly be considered adjuncts to the judicial
18 power in Article III as opposed to purely
19 executive power, which was not at issue in
20 Humphrey's or --

21 MR. AGARWAL: Sure.

22 CHIEF JUSTICE ROBERTS: -- or Wiener.

23 MR. AGARWAL: Two responses to that,
24 Mr. Chief Justice.

25 CHIEF JUSTICE ROBERTS: Sure.

1 MR. AGARWAL: In Wiener, the claims
2 commission members were making final and
3 unreviewable determinations with respect to
4 claims for compensation and they were getting
5 no judicial review. That was final
6 determination.

7 But the more important point is that
8 in Free Enterprise Fund, there was all manner
9 of executive authority that was being wielded
10 by the -- we're not talking about the 1935 FTC;
11 we're talking about the 2010 Securities and
12 Exchange Commission and the 2010 Public Company
13 Accounting and Oversight Board. This Court
14 characterized the Board's functions as
15 involving enormous power to regulate an entire
16 industry. Nobody would say that that was not
17 executive. And, nevertheless, the Court
18 unanimously concluded that a single layer of
19 for-cause removal protection, exactly what we
20 have here, is constitutionally permissible.

21 On top of that, we don't, again, have
22 a single case that has ever struck down the
23 kind of removal protection that we have here in
24 more than 200 years.

25 CHIEF JUSTICE ROBERTS: Thank you.

1 Justice Thomas?

2 JUSTICE THOMAS: You used -- when I
3 asked you or when a number of us asked you
4 about making some of the -- currently, the
5 executive branch cabinet-level agencies
6 multi-member agencies, you resorted to the
7 functionality of the current agencies, such as
8 Commerce, as precluding that or at least as
9 being a basis for not doing that.

10 Now, moving the other direction, could
11 you -- you -- functionally, you say that as
12 a -- from a functional standpoint, the FTC
13 had -- is -- is not an executive branch agency,
14 and you listed some of its functions.

15 Could that -- could Congress convert
16 the FTC to a single-member head with the same
17 protections because it engaged in the --
18 discharging the exact same functions?

19 MR. AGARWAL: No under this Court's
20 precedent in Seila Law.

21 JUSTICE THOMAS: No, could they under
22 the logic of your argument?

23 MR. AGARWAL: No. We accept Seila Law
24 as the -- as not only the law of the land but
25 as being correct.

1 JUSTICE THOMAS: Why -- why --

2 MR. AGARWAL: And we -- we embrace its
3 reasoning.

4 JUSTICE THOMAS: What's the
5 limitation? You -- your argument was
6 functionality before, not necessarily
7 precedent. And I'm interested in why would the
8 FTC functionally be any different as a
9 single-member head than it is as a multi-member
10 agency?

11 MR. AGARWAL: It is because Seila Law
12 is correct, not just because it's precedent,
13 but because it's correct to hold that there is
14 a particular danger to individual liberty that
15 is posed by the single-director highly
16 anomalous circumstance that had no foothold in
17 history and tradition and that vested a massive
18 quantum of power in one person who is not
19 directly accountable to the President.

20 JUSTICE THOMAS: I -- it's -- I don't
21 understand why that's any different from a
22 multi-member agency.

23 MR. AGARWAL: For all the reasons,
24 Justice Thomas, that this Court explicated in
25 Seila Law itself and, in particular, in parts

1 III.C.1 and III.C.2 of the decision, where the
2 Court talked about basically two categories of
3 considerations. One is the foothold in history
4 and tradition, and the second is whether the
5 configuration of the agency poses a problem for
6 structural separation-of-powers principles.
7 And in both of those, it -- the Court
8 explained, and elsewhere throughout the
9 opinion, the implications for individual
10 liberty of taking massive amounts of
11 governmental power and putting them in the
12 hands of one person who's not accountable to
13 the President as opposed to where you have the
14 multi-member structure as a practical matter,
15 there needs to be consensus, there needs to be
16 deliberation, there's a safety valve in terms
17 of dissenting opinions can be issued, and that
18 can provide an alert to the public that
19 something is going on.

20 So there's a whole variety of reasons
21 why single-member agencies have been
22 distinguished from multi-member commissions.
23 And we -- we think that precedent is correct
24 and should be adhered to. And I -- on that
25 point, Justice Thomas, I guess I would say one

1 more thing, and that is I think it is a big
2 difference between our position and the
3 position of the Petitioners that we are asking
4 the Court to adhere to all of its precedents
5 and to give effect to the collective wisdom and
6 experience of all three branches of government.

7 On the other hand, Petitioners are
8 asking you to abandon precedent after precedent
9 after precedent. A lot of precedents would go
10 south if their constitutional theory is
11 correct, and a whole lot of history and dozens
12 of institutions that have been around for a
13 long time, that have withstood the test of
14 time, that embody a distillation of human
15 wisdom and experience, all of those would go
16 south.

17 CHIEF JUSTICE ROBERTS: Justice Alito?

18 JUSTICE ALITO: To follow up on
19 Justice Thomas's question, suppose that the --
20 suppose that the FTC did not have -- that
21 the -- the members, the Commissioners, did not
22 serve seven-year terms, staggered seven-year
23 terms. Suppose there was not the requirement
24 that there -- that no more than four be members
25 of a single political party. Suppose that they

1 just -- they served very short terms.

2 What -- I mean, what is the -- why
3 does it matter that it's a multi-member body as
4 opposed to a single-member body in itself?
5 What is significant about that?

6 MR. AGARWAL: The significance is the
7 distinction for purposes of individual liberty,
8 the threat that is posed to individual liberty
9 by single-headed agencies that are not
10 accountable to the President. That -- that, as
11 I understand it, Justice Alito, is the logic of
12 this Court's decision in Seila Law. And we
13 recognize that intelligent people of good
14 will --

15 JUSTICE ALITO: Well, Seila -- Seila
16 Law didn't --

17 MR. AGARWAL: -- can disagree about
18 that.

19 JUSTICE ALITO: -- I mean, Seila Law
20 didn't have to decide the question that's
21 before us here. I mean, suppose that the --
22 the F -- there were two FTC Commissioners and
23 they served one-year terms. And you would say,
24 well, that's okay, but there's a difference
25 between that and -- and an agency that's headed

1 by a single -- a single member.

2 MR. AGARWAL: Making the terms
3 shorter, in my view, would not raise
4 constitutional concerns because that would only
5 increase presidential opportunities to
6 influence the composition of the agency.
7 Reducing the number of Commissioners might be a
8 different type of situation. I'm not aware of
9 any two-headed agency that has ever been
10 created in the modern era or -- or throughout
11 American history.

12 JUSTICE ALITO: Well, okay. What
13 we're looking for are conceptual explanations
14 for the distinctions you're drawing, but let me
15 move on to something else.

16 Suppose the Department of Justice were
17 split into two parts. One part has the
18 authority to enforce the criminal laws, and the
19 other part has the authority to enforce civil
20 laws. Could the civil component -- could
21 Congress put at the head of the civil component
22 a multi-member commission with -- with removal
23 protection?

24 MR. AGARWAL: Justice Alito, there is
25 the -- the -- the logically antecedent question

1 with respect to any removal protection of
2 whether Congress has constitutionally
3 enumerated authority to enact the protection in
4 the first place. And, as has been suggested in
5 prior colloquies, the relevant source of
6 constitutional authority would appear to be the
7 Necessary and Proper Clause in terms of
8 attaching removal restrictions to a federal
9 office that is created by Congress.

10 I don't think it's obvious that you
11 would -- you would comply with all the
12 strictures of the Necessary and Proper Clause
13 ex ante. And so it's not -- it's not obvious
14 that Congress could do that. And what we know
15 for sure is that Congress has never tried to do
16 that.

17 JUSTICE ALITO: Well, I know.
18 You're -- you keep answering it hasn't been
19 done and it's not going to be done in the
20 future, but I -- I want to understand the
21 limits of the principle that you're asking us
22 to accept. So you're not -- you -- you -- you
23 cannot say no, that would not be permitted for
24 this reason?

25 MR. AGARWAL: Well --

1 JUSTICE ALITO: The best you can say
2 is that it might not be necessary and proper?

3 MR. AGARWAL: -- if you wanted --
4 that -- that is one source of limiting
5 principle for sure, but also, our argument is
6 predicated in part on a long historical
7 tradition pertaining to what I call --

8 JUSTICE ALITO: Okay. I understand
9 the historical -- the historical argument.
10 That wasn't what my question was getting at.

11 All of the civil enforcement laws, all
12 of the civil laws that are now enforced by the
13 Department of Justice were enacted by Congress
14 under one of its enumerated powers. Let's
15 assume that they were all constitutional. So
16 the -- the question is whether it would be
17 necessary and proper to the enforcement of
18 those to -- to -- given the understanding of
19 necessary and proper, to entrust that to a
20 multi-member commission as opposed to a single
21 officer like the attorney general? That would
22 be the question?

23 MR. AGARWAL: I don't think so. And
24 what I was trying to get at before is -- is not
25 just that there's an historical tradition, it's

1 that the historical tradition we're invoking is
2 for what are called traditional multi-member
3 regulatory commissions, and those historically
4 have never involved pure -- just purely
5 executive civil enforcement. They involve a
6 blend of law-making, adjudicatory, and
7 enforcement actions where the enforcement
8 authority is deemed to be reasonably ancillary
9 to the other functions.

10 So the kind of -- the kind of
11 hypothetical that you're positing, Justice
12 Alito, I think it's an absolutely legitimate
13 concern, but the historical tradition that we
14 are drawing on for purposes of our
15 constitutional liquidation argument would not
16 require you to affirm the constitutionality of
17 that kind of highly unusual structure that as
18 far as I know has never been attempted before.

19 JUSTICE ALITO: On the question of
20 giving the members of a multi-member commission
21 longer terms of office, so, here, we have seven
22 years. What if it were increased to 10 years?
23 What if it were increased to 15 years and so
24 forth? And the principle that you would have
25 us apply is whether that longer term of office

1 preserved adequate presidential supervision?

2 Is that your answer to the question?

3 MR. AGARWAL: That is one potential
4 limiting principle. I know that --

5 JUSTICE ALITO: We would have to -- in
6 each -- each of those -- in every case in which
7 that would be involved, we would have to
8 make -- we would have to determine do I think
9 this preserves adequate presidential
10 supervision?

11 MR. AGARWAL: Our primary submission
12 to you, Justice Alito, would be that it would
13 not be the -- the -- the burden of the Court to
14 develop ahead of time constitutional --
15 heavy-handed constitutional rules that would
16 try to make constitutional distinctions
17 between, say, a seven-year term and a nine-year
18 term or an 11-year term. Those don't appear to
19 us to be distinctions of constitutional
20 proportions.

21 Members of the Federal Reserve do have
22 substantially longer terms than, say, FTC
23 commissioners and, nevertheless, Petitioners
24 don't have -- don't seem to have a problem with
25 members of the Federal Reserve enjoying

1 statutory removal protections. But -- but our
2 position is that the Court should recognize
3 that these are really difficult line-drawing
4 problems and the way that that has historically
5 been resolved is through the political process,
6 and the political process is up to the task of
7 dealing with this problem.

8 JUSTICE ALITO: But you wouldn't say
9 that we leave it completely -- would you say we
10 leave it completely to the political process --

11 MR. AGARWAL: No.

12 JUSTICE ALITO: -- so that at no point
13 in the extension of these terms would we say:
14 Oh, there's a problem. I thought you were
15 saying we -- there is a test and it is whether
16 there's adequate presidential supervision.

17 And if that were challenged, we would
18 have to decide. We would have to exercise our
19 judgment about how much presidential
20 supervision is necessary to satisfy
21 constitutional requirements.

22 MR. AGARWAL: Absolutely. The Court
23 should not relinquish its authority to
24 establish judicially enforceable outer
25 boundaries in this context. I just don't think

1 that you're going to have to do that anytime
2 soon. And you might never have to do it. But
3 you should absolutely not relinquish your
4 authority to do it.

5 And there could be hypothetical
6 scenarios in the future in which there's an
7 arrangement that just palpably does not
8 guarantee adequate presidential supervision,
9 but that hypothetical risk, again, has to be
10 measured against the real-world chaos and
11 disruption that will be caused by taking --

12 JUSTICE ALITO: Okay. One -- one
13 other question about where your argument would
14 lead.

15 So, to go back to this issue of the
16 various departments and whether it would be
17 permissible for Congress to convert them into
18 agencies headed by multi-member commissioners,
19 by multi-member commissions with members
20 protected from plenary presidential removal
21 authority, the test would be whether some
22 unspecified -- some limit on permissible -- I'm
23 sorry -- a limit on exclusive and preclusive
24 activities was exceeded?

25 MR. AGARWAL: Oh, our primary --

1 JUSTICE ALITO: Do they go to -- if --
2 if they're exercising any power that is
3 exclusively and conclusively the President's,
4 do they -- are they exercising too much of
5 that? That would be the test in going through
6 these departments?

7 MR. AGARWAL: No. No.

8 JUSTICE ALITO: No?

9 MR. AGARWAL: I think, if they're
10 exercising any power that is conclusive and
11 preclusive, then you have a
12 separation-of-powers problem, the solution to
13 which is not necessarily to strike down the
14 entire agency or even to eliminate the
15 for-cause removal provision. It creates an
16 analytically distinct issue about how you
17 remedy that violation.

18 But I -- I think any conclusive and
19 preclusive power that is vested in an agency
20 that is not sufficiently accountable to the
21 President is a problem and --

22 JUSTICE ALITO: Okay. I thought you
23 had answered, in -- in answer to a prior
24 question, you said a mere scintilla would not
25 be enough. But now you say a mere scintilla

1 would be enough to cause a problem.

2 MR. AGARWAL: I may have misspoken
3 before, Justice Alito, and if I did, I
4 apologize. But our position is that if a
5 multi-member agency is vested with the
6 President's conclusive and preclusive powers
7 and it is insulated from at-will presidential
8 approval -- supervision, that is a
9 separation-of-powers problem.

10 JUSTICE ALITO: Does -- it does 200
11 things and one of the 200 things involves
12 the -- the exercise of an exclusive and
13 conclusive presidential power. That would be
14 too much?

15 MR. AGARWAL: That would be too much
16 with respect to that power, but maybe the
17 solution to that is to sever out that power and
18 not to strike down the entire agency.

19 JUSTICE ALITO: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Sotomayor?

22 JUSTICE SOTOMAYOR: Counsel, Seila Law
23 involved the CFPC and it relied very heavily
24 on -- focused very heavily on the novelty of
25 the CFPB structure and the fact that it was a

1 historical anomaly, correct?

2 MR. AGARWAL: Absolutely. It was
3 an -- it was an anomalous structure that was
4 deemed to pose a significant threat to
5 individual liberty.

6 JUSTICE SOTOMAYOR: All right. That's
7 not the case here because we have a precedent
8 of long standing that says this is okay.

9 The Chief asked a question about
10 whether the additional powers the FTC has
11 gathered create a different situation.

12 As I see it and as the judge in the
13 district court outlined very clearly, most of
14 the original powers of the FTC when Humphrey's
15 Estate was decided exist -- are the same powers
16 of today, correct?

17 MR. AGARWAL: That is correct.

18 JUSTICE SOTOMAYOR: And there is one
19 power that I've identified that might be
20 different and that the cease -- that the FTC's
21 cease-and-desist orders have now binding effect
22 immediately, correct?

23 MR. AGARWAL: I believe that's
24 correct.

25 JUSTICE SOTOMAYOR: So I think your

1 point in response to Justice Alito is, if
2 there's a power that the FTC is wielding now
3 that trenches inappropriately, the answer is
4 not to do away with the for-cause removal but
5 to eliminate that power, that individual power,
6 correct?

7 MR. AGARWAL: Correct. And an
8 authority that is cited by Petitioners in their
9 reply brief, Barr v. AAPC, supports that
10 proposition.

11 JUSTICE SOTOMAYOR: And so that should
12 be the answer if there's been a difference in
13 the powers or an expansion of the powers
14 inappropriately?

15 MR. AGARWAL: That is our position,
16 yes. The parties have not briefed severability
17 at the merits stage of this case. And in the
18 event that the Court wants to reach that
19 question, you might consider either
20 supplemental briefing or remanding to the
21 district court to decide that issue in the
22 first instance.

23 JUSTICE SOTOMAYOR: Thank you,
24 counsel.

25 CHIEF JUSTICE ROBERTS: Justice Kagan?

1 JUSTICE KAGAN: Mr. Agarwal, it seemed
2 to me that when you were talking to Justice
3 Alito, you had more to say about this question
4 of comparative risks and how we should balance
5 the two kinds of risks and what we should be
6 thinking about now, so I wanted to give you a
7 chance to say that.

8 But -- and -- and within whatever you
9 want to say about that topic, I was wondering
10 if you could comment, a lot of these
11 hypotheticals have been about, you know, what
12 if -- what if Congress structured an
13 independent agency like this or like that.

14 I mean, most of these independent
15 agencies, Justice Sotomayor is right that the
16 CFPB was anomalous in this respect, but,
17 basically, like, the vast majority of them all
18 use the exact same structure or, if not exact,
19 near exact same structure. There are little
20 variations, but they're all set up with
21 bipartisanship. They're all set up with a
22 chair that -- that does have some greater
23 control and that is more controllable by the
24 President.

25 You know, they're all basically set up

1 the same way. So all of these hypotheticals
2 about what if Congress did this, I'm wondering
3 if you could comment in your discussion of
4 comparative risks about how we actually just --
5 why -- why it is that we actually have just
6 never seen that?

7 MR. AGARWAL: I think it's because the
8 political branches have learned from
9 experience, and experience is the great
10 teacher. There's a -- an insightful discussion
11 of the history and tradition surrounding
12 traditional independent agencies in the
13 separate opinion in the PHH case that has been
14 cited extensively by the parties and that
15 explains that the structure that the political
16 branches have come up with honors and gives
17 effect to our constitutional values, as we
18 explain on the very first page of our brief.

19 We think that the political branches
20 have done a good job of learning from --

21 JUSTICE KAGAN: I mean, the political
22 branch is Congress. Congress, which is made up
23 of both Democrats and Republicans, who are
24 aware that neither Democrats nor Republicans
25 will control the government forever, and are

1 structuring these systems with that in mind.

2 MR. AGARWAL: That is -- I think that
3 is exactly right, Justice Kagan, that there's
4 an appreciation and an understanding that folks
5 in power today may not be in power tomorrow and
6 you want a structure that will be able to
7 withstand the test of time.

8 The other kind of interesting thing
9 about this is that it's not just Congress.
10 It's Congress acting together with the
11 President every single time. In the case of
12 the FTC Act, the Act has been amended time and
13 time and time again since this Court's decision
14 in *Humphrey's Executor*. Presidents are signing
15 all of those bills into law. They are
16 supporting the FTC in a myriad of ways. They
17 too have read the Vesting Clause of Article II,
18 and they too believe in preserving executive
19 power.

20 It is simply implausible to say that
21 Presidents have been supporting these
22 traditional independent agencies now for more
23 than a century and a half, and even from the
24 First Congress, George Washington signing into
25 law the Sinking Fund Commission, the

1 Revolutionary War Debts Commission, the Mint
2 Commission, it is absolutely implausible to say
3 for the entirety of American history Presidents
4 of the United States have been complicit in
5 giving up a vital executive power that is,
6 according to Petitioners, indispensable to
7 their constitutional duty.

8 The better -- the better answer by far
9 is to say that Presidents have understood and
10 appreciated that vital interests of the
11 American people can be served by having
12 constraints on the exercise of power. That is
13 a really important part of our constitutional
14 tradition, and that is what Petitioners are
15 putting at risk.

16 JUSTICE KAGAN: You mentioned some of
17 the early history, and I think I want to give
18 you a little bit of a chance to talk about that
19 because we haven't. You know, when -- when I
20 was a young lawyer and this unitary executive
21 theory really got its start and got its legs,
22 there was a pretty simple version of the
23 history, and -- and that drove a lot of the
24 early discussion of the unitary executive, what
25 was wrong with Humphrey's Executor.

1 What have the historians been telling
2 us more recently about that sort of early
3 understanding of the history? And -- and, you
4 know, like, bring us up to date here a little
5 bit about where the history is with respect to
6 these issues.

7 MR. AGARWAL: There was an insightful
8 discussion of this in an essay authored by
9 Professor Nelson that we have cited in our
10 brief and that cites recent historical
11 scholarship. And there is also many amicus
12 briefs that have been submitted in this case,
13 which basically affirm that there is a rich
14 body of recent, including post-Seila Law
15 historical scholarship, that supports the
16 conclusion that the -- that the history
17 surrounding this issue is, at a minimum,
18 contestable and that there is a whole lot of
19 history, actually, that supports the
20 proposition that the -- the first President of
21 the United States and the first Congress did
22 not believe that the President always and
23 everywhere had to have an absolute illimitable,
24 indefeasible power to fire every single head of
25 any kind of commission exercising any

1 significant governmental authority.

2 We know that from the first Congress
3 and the Sinking Fund Commission, the
4 Revolutionary War Debt Commission, the Mint
5 Commission, and I think there are some 10 other
6 commissions, for example, that are discussed in
7 Professor Nourse's amicus brief just by way of
8 example.

9 I think that's another virtue of our
10 position, that we're asking the Court to give
11 effect not just to the Decision of 1789 but
12 also to the Decision of 1790. The other side's
13 not doing that. They want you to give a
14 maximalist interpretation to, for example, the
15 Decision of 1789, which we agree settled the
16 question of whether the Senate should be able
17 to interfere with presidential removals. But
18 everything else, as Professor Nelson explains,
19 as many other scholars have ably explained, is
20 highly contestable at a minimum and there's
21 actually a lot of historical evidence that goes
22 the other way.

23 That is all the more reason for this
24 Court to be cautious in developing heavy-handed
25 constitutional rules that, one, don't have a

1 clear basis in constitutional text. We
2 absolutely accept this Court's precedents that
3 interpret the Vesting Clause of Article II to
4 establish a general default presidential
5 removal power, but it cannot be said the
6 constitutional text clearly delineates the
7 boundaries between the President's power and
8 Congress's power with respect to removal.

9 Then, when you add to that a growing
10 body of historical scholarship indicating the
11 original understanding from the time of the
12 first Congress and the first President was that
13 significant governmental authority absolutely
14 could be vested in commissions that were not
15 subject to plenary presidential control, that
16 every single member was not subject to
17 presidential control, and, in fact, in a lot of
18 respects, as the scholars have explained, those
19 early commissions were actually substantially
20 more independent than modern-day administrative
21 agencies.

22 For some of them, the President
23 couldn't even appoint -- he couldn't even
24 decide who would be on the commission as, for
25 example, with respect to the Sinking Fund

1 Commission, where you had the Chief Justice and
2 the Vice President were by operation of law
3 installed on those commissions. So those
4 commissions were in a lot of respects much more
5 independent than modern-day --

6 JUSTICE KAGAN: Thank you.

7 MR. AGARWAL: -- traditional
8 independent agencies.

9 CHIEF JUSTICE ROBERTS: Justice
10 Gorsuch?

11 JUSTICE GORSUCH: I just want to
12 explore just for a brief minute, I hope,
13 your -- your scintilla of conclusive and
14 preclusive power theory. You agree, I assume,
15 the President is vested with all the executive
16 power?

17 MR. AGARWAL: Yes.

18 JUSTICE GORSUCH: You agree that he
19 has a duty to faithfully execute all the laws?

20 MR. AGARWAL: Yes.

21 JUSTICE GORSUCH: Civil and criminal?

22 MR. AGARWAL: We -- we agree that the
23 Constitution imposes on -- on the President a
24 duty to faithfully execute the laws,
25 absolutely.

1 JUSTICE GORSUCH: All the laws?

2 MR. AGARWAL: Well --

3 JUSTICE GORSUCH: All -- are there
4 some laws he doesn't have to? That would be
5 news to our friends across the street.

6 MR. AGARWAL: The -- the Take -- the
7 Take Care Clause is a duty, and it is also a
8 power, but the text of the clause does not
9 provide that the President must have at-will
10 presidential --

11 JUSTICE GORSUCH: I didn't ask that.
12 This is -- does he have a duty to faithfully
13 execute all the laws?

14 MR. AGARWAL: We know from --

15 JUSTICE GORSUCH: Yes or no?

16 MR. AGARWAL: I -- I would say no in
17 the sense -- in the sense --

18 JUSTICE GORSUCH: No?

19 MR. AGARWAL: -- in the -- in the
20 sense that -- let -- let me -- there's two
21 different questions, and I want to make sure
22 that I'm answering the question.

23 JUSTICE GORSUCH: I'm -- the question
24 is, does the President have a duty to
25 faithfully execute all the laws? The answer is

1 no. Why?

2 MR. AGARWAL: So he can't break the
3 law for sure. For sure. Does he have to be
4 vested with statutory authority to actually
5 enforce, directly enforce, or to exercise --

6 JUSTICE GORSUCH: I'm not asking
7 whether he has to bring the indictment. I'm
8 asking whether he has a duty to faithfully
9 execute the laws.

10 MR. AGARWAL: I think the President
11 does not under both history and tradition --

12 JUSTICE GORSUCH: Okay.

13 MR. AGARWAL: -- have -- have to have
14 plenary power of -- of supervision, but in the
15 case of the FTC, he does have some power of
16 supervision, including if there's a
17 demonstrable, palpable violation of law, the
18 President could absolutely fire a commissioner
19 of the FTC --

20 JUSTICE GORSUCH: All right.

21 MR. AGARWAL: -- under the plain
22 language of the statute.

23 JUSTICE GORSUCH: So the answer is no,
24 I guess. But you say that he does have to --
25 he has to have direct supervision and removal

1 authority for someone who has conclusive and
2 exclusive authority to bring crime -- criminal
3 prosecutions, right?

4 MR. AGARWAL: That is our
5 understanding of this Court's decision in Trump
6 v. United States --

7 JUSTICE GORSUCH: That's --

8 MR. AGARWAL: -- yes.

9 JUSTICE GORSUCH: That's your
10 understanding?

11 MR. AGARWAL: Yes.

12 JUSTICE GORSUCH: But not civil?

13 MR. AGARWAL: That's -- that's right.
14 And to go back to your earlier --

15 JUSTICE GORSUCH: Okay. And -- and
16 just to be clear, so that means, if -- if the
17 government wants to bring a misdemeanor, that
18 person has to be reportable to the President,
19 but if the government wants to bring ruinous
20 fines and penalties and injunctions, that
21 person doesn't?

22 MR. AGARWAL: I don't know the scope
23 of this Court's holding in Trump v. United
24 States --

25 JUSTICE GORSUCH: I'm asking --

1 MR. AGARWAL: -- of how --

2 JUSTICE GORSUCH: -- you for your
3 theory because it's a very interesting theory.
4 You're building off of two words from Trump
5 versus United States and putting a gloss on it
6 that I -- I'm -- I'm not familiar with. I had
7 understood the executive power and he has
8 conclusive and preclusive authority to that,
9 but this line, I -- I don't know where it comes
10 from.

11 MR. AGARWAL: Your -- Your Honor --

12 JUSTICE GORSUCH: And I'm wondering --
13 I'll be on -- I'll put my cards on the table --
14 maybe it's a recognition that Humphrey's
15 Executor was poorly reasoned and that there is
16 no such thing in our constitutional order as a
17 fourth branch of government that's
18 quasi-judicial and quasi-legislative. Maybe
19 you're trying to backfill it with a better new
20 theory that itself recognizes that we've got a
21 problem.

22 MR. AGARWAL: The theory that we are
23 referring to, Justice Gorsuch, as we understand
24 it is not just based on this Court's recent
25 decision in Trump v. United States. It goes

1 all the way back to Marbury v. Madison. And
2 Marbury does not use the term "conclusive and
3 preclusive," but it absolutely says --

4 JUSTICE GORSUCH: And neither does
5 Humphrey's. It uses "quasi" things.

6 MR. AGARWAL: It talks of -- it talks
7 about the distinction between authorities that
8 are vested in the President and the President's
9 powers in the constitutional sense and
10 executive power in the constitutional sense.
11 And it actually cites Marbury v. Madison for
12 that --

13 JUSTICE GORSUCH: Oh, sure. I would
14 hope it would.

15 MR. AGARWAL: -- for that proposition.

16 JUSTICE GORSUCH: Yeah.

17 MR. AGARWAL: And Marbury itself
18 distinguishes in the context of removability of
19 federal offices --

20 JUSTICE GORSUCH: I guess I'm just
21 wondering are we going to get -- if we take --
22 if we -- if we take your -- your theory to
23 backfill Humphrey's and go down this road, how
24 are we supposed to decide which powers are
25 exclusive and -- for your purposes, as you

1 understand it, not as I understand it, from --
 2 from Trump v. United States, but as you
 3 understand it, what powers are going to fall in
 4 and what are going to fall out? Are we going
 5 to have just as much litigation over that as
 6 anything else we might do in this case?

7 MR. AGARWAL: I don't think so. We've
 8 had these -- this modern era of traditional
 9 independent agencies for a long time. We
 10 haven't had any precedent ever striking them
 11 down. And this Court has not been, as far as I
 12 know, overwhelmed with difficult questions of
 13 line-drawing. In fact, from 1935 to 2025, we
 14 had pretty much unanimity among courts that
 15 traditional independent agencies are fine.

16 To go back to your earlier --

17 JUSTICE GORSUCH: We haven't had a lot
 18 of litigation over Humphrey's and its limits
 19 and its boundaries and -- I mean, Seila Law,
 20 you invoke it as a great decision.

21 MR. AGARWAL: We -- we do invoke --

22 JUSTICE GORSUCH: You know, we've had
 23 a lot of litigation.

24 MR. AGARWAL: -- we do invoke Seila
 25 Law as a great decision there.

1 JUSTICE GORSUCH: We're always going
2 to have litigation over the separation of
3 powers, aren't we?

4 MR. AGARWAL: Yeah. There will always
5 be litigation --

6 JUSTICE GORSUCH: Yeah.

7 MR. AGARWAL: -- absolutely, but the
8 point is that this Court's precedents affirming
9 Congress's authority to work with Presidents to
10 create traditional independent agencies has not
11 generated any significant problems, still less
12 insurmountable problems.

13 JUSTICE GORSUCH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh?

16 JUSTICE KAVANAUGH: I'll try to tick
17 through a few questions here. On Justice
18 Alito's questions, you said independent
19 agencies do rulemaking, enforcement, and some
20 adjudicatory powers as well, but so do the
21 traditional cabinet agencies do all that too or
22 at least most of them do. So I'm not sure that
23 helps you distinguish the independent agencies
24 from the traditional executive agencies on the
25 earlier questions, but I'll just leave that.

1 You said you agree with -- I think you
2 said you agree with all the Court's precedents.

3 MR. AGARWAL: Yes.

4 JUSTICE KAVANAUGH: That includes --
5 that includes everything in Myers.

6 MR. AGARWAL: We agree with the
7 holding of Myers.

8 JUSTICE KAVANAUGH: Do you agree with
9 the opinion in Myers?

10 MR. AGARWAL: No. And the -- the -- a
11 lot of the reasoning in Myers went too far, and
12 that was part of what the Court decided in
13 Humphrey's.

14 JUSTICE KAVANAUGH: On the text of
15 Article II, we haven't talked a lot about the
16 theory by which you get to the other side's
17 position from the text.

18 The first 15 words, "The executive
19 power shall be vested in a President of the
20 United States of America." For the President
21 to exercise that power, he needs subordinates.
22 For him to -- and he needs to be able to
23 supervise and direct the subordinates and to
24 supervise and direct, he must be able to remove
25 those officers at will. This is the theory.

1 Otherwise, and this is what I want to
2 get your answer to, otherwise, a subordinate
3 could ignore the President's supervision and
4 direction without fear and the President could
5 do nothing about it.

6 You agree that's the implication of
7 your theory, correct?

8 MR. AGARWAL: That the subordinate
9 could disregard the President's instruction and
10 that in some circumstances, the President could
11 do nothing about it, yes. In some
12 circumstances, but not under the FTC Act and
13 the modern era of traditional independent
14 agencies.

15 If there was anything like
16 malfeasance, if there was neglect of duty -- so
17 that would be associated with law-breaking, as
18 Professor Manners discusses in her amicus brief
19 on the INM standard.

20 JUSTICE KAVANAUGH: But, generally, if
21 the President says: I wish you'd prefer a --
22 pursue a more aggressive enforcement policy,
23 and the head of the agency says: I'm not going
24 to do that, there's nothing the President can
25 do about that, right?

1 MR. AGARWAL: If it's just a matter of
2 enforcement priority, that's right. And that's
3 for --

4 JUSTICE KAVANAUGH: Or I -- I would
5 want you to issue a new rule in a particular
6 way that does a particular thing because I
7 think as President it would be better for the
8 American people and the agency head says: I
9 disagree with that, I'm not going to do that.

10 You agree that that's okay on your
11 theory? That's --

12 MR. AGARWAL: That is -- that is okay
13 under our theory. That's the judgment of
14 Congress and the President, and as -- as was
15 pointed out in In re Aiken and as we've
16 explained in our brief, this Court's precedents
17 don't stand for the proposition, Justice
18 Kavanaugh, that we have to have those
19 arrangements. They just stand for the
20 proposition that the people's elected
21 representatives in Congress and their
22 democratically elected President in appropriate
23 circumstances can come together and decide that
24 vital interests of the American people,
25 including preservation of liberty, and I don't

1 think we should forget about that, including
2 preservation --

3 JUSTICE KAVANAUGH: I agree.

4 MR. AGARWAL: -- that -- can be
5 effectuated by having these multi-member
6 commissions that --

7 JUSTICE KAVANAUGH: Two -- two
8 real-world questions I want to -- you've
9 mentioned many times you can just go to
10 Congress to fix this.

11 Well, once the power's taken away from
12 the President, it's very hard to get it back in
13 the legislative process. Kind of the flip side
14 of what we were talking about in the tariffs
15 case because the -- the Congress, the real
16 world of this is the independent agencies shift
17 power from the presidency to the Congress.
18 Everyone recognizes that, that Congress has
19 more control over the independent agencies than
20 they do over the executive agencies. Congress
21 doesn't want to give that up. It's hard for
22 the President to get new legislation passed
23 that would, for example, convert an independent
24 agency to an executive agency.

25 Do you have an answer to that real --

1 I mean, I think just leave it to Congress
2 ignores the reality of the legislative process
3 and Congress's desire to keep that power that
4 they have had that most people have recognized
5 over the independent agencies.

6 That's a theory out there. I just
7 want to get your response to that.

8 MR. AGARWAL: Yeah. I have two
9 responses to it. One is that I don't think
10 it's an accurate characterization of what's
11 going on to say that Congress is aggrandizing
12 its own power at the expense of the executive.
13 I think, in fact, exactly the opposite. And a
14 lot of these agencies --

15 JUSTICE KAVANAUGH: That famous
16 quotation, "the independent agencies are ours,"
17 by a leading member of Congress, that was just
18 --

19 MR. AGARWAL: I will give you an
20 example from the FTC Act itself. The operative
21 provision from the very first version of the
22 Act provides that this act is all about
23 defining unfair methods of competition in
24 commerce, full stop.

25 How do you know what is an unfair

1 method of competition in commerce? The statute
2 doesn't say. It delegates that Congressionally
3 constitutionally enumerated authority to an
4 agency that the President has all kinds of
5 supervision and influence over.

6 And what is happening in the real --

7 JUSTICE KAVANAUGH: But much less than
8 the executive agency. I -- I -- I understand
9 your point there. I think I -- I got it.

10 Your brief refers to regulatory
11 stability being a virtue served by the current
12 overarching regime. I don't think a lot of the
13 regulated parties really think stability has
14 been a virtue of the regime because it goes
15 back and forth when the agencies shift -- shift
16 power.

17 And so I think, you know,
18 "unaccountable instability" would be what they
19 might say. So can you address why you think --
20 and this is relevant to the stare decisis
21 factors, I think -- why you think regulatory
22 stability is actually occurring at a lot of
23 these independent agencies?

24 MR. AGARWAL: Yeah, absolutely. So
25 two things. One is that part of the logic of

1 that comes from this Court's decision just last
2 term in the Chevron case where the Court said
3 you can have a lot of regulatory instability if
4 every single time a new administration comes
5 into office, all of a sudden everything can
6 change.

7 Now that is -- that is a problem on
8 steroids if Petitioners get their view because
9 you don't even have to wait for the
10 administration to change, the President could
11 just on a whim decide tomorrow that everything
12 the agency has been doing is wrong.

13 Public reliance on stability
14 presupposes that this is the whole point of the
15 staggered terms requirement of -- that this
16 Court explained in detail in Humphrey's
17 Executor, that the whole point of this
18 structure is to guarantee a modicum of
19 stability that private regulated entities can
20 depend upon. And that is jeopardized by
21 at-will presidential removal.

22 JUSTICE KAVANAUGH: Two more quickly
23 hopefully. You've used the phrase "chaos and
24 disruption" if you lose and don't strike down
25 the entire agency, I think you used that

1 phrase.

2 I don't think that's what would happen
3 if you lost. And I think you would agree with
4 what I'm about to say, which is, if you lose on
5 the merits, the proper remedy is simply to
6 sever the for-cause removal provision, not to
7 get rid of the FTC.

8 Do you agree with that?

9 MR. AGARWAL: I agree with part of it
10 but not all of it. The -- the remedy is not to
11 get rid of the FTC, but I think there's an
12 analytically difficult question about whether
13 the proper remedy would be to sever the
14 for-cause removal provision as opposed to,
15 depending on the nature of the ruling, maybe
16 one isolated power that is deemed to be
17 quintessentially executive and that generates
18 the separation-of-powers problem.

19 JUSTICE KAVANAUGH: Okay. Last, sorry
20 about the length of this, but this is
21 important.

22 Last, you said Congress has a
23 tradition, they won't depart from it, but the
24 last 10 years we've seen two examples of first
25 a single-headed independent agency and

1 separately a double for-cause removal
2 provision.

3 So I don't think the idea that
4 Congress is just following the model that it's
5 used before is really sustainable in the face
6 of those two experiments that we've -- we've
7 seen in the last 10 years. That's just a
8 comment from your point about, oh, there's a
9 model and they just follow the model.

10 MR. AGARWAL: It is not an absolute
11 rule. And there may be times when the
12 political branches depart from an established
13 model. And when they do so in constitutionally
14 problematic ways, what we know from recent
15 history is that this Court will be there and
16 there will be time enough to decide those
17 questions.

18 JUSTICE KAVANAUGH: All right. Thank
19 you for your answers.

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett?

22 JUSTICE BARRETT: I want to just ask a
23 quick question about history. Justice Kagan
24 was asking you about new scholarship that
25 historians have identified, which you say shows

1 that independent agencies has a longer pedigree
2 than maybe some thought originally.

3 But do you concede that the first
4 statutory -- anything that looks like a
5 statutory removal restriction, like the
6 inefficiency, neglect, malfeasance appeared in
7 1887 with the ICC?

8 MR. AGARWAL: I don't know if it's the
9 first, to be honest with you, Justice Kagan --
10 Justice Barrett, I'm sorry, but what I would
11 say is that as to the early commissions, I
12 think that factor actually cuts the other way
13 because there was no -- there was no provision
14 authorizing presidential removal for some
15 commissioners. That's our point, that you had
16 commissioners like the Chief Justice and the
17 Vice President who were appointed by statute,
18 and the President couldn't remove them under
19 any circumstances.

20 JUSTICE BARRETT: But they were two of
21 five. And it could remove -- he had
22 unchallenged authority to remove the other
23 three who served on that commission. I mean,
24 and -- and there's silence, I mean, they're
25 not -- there's not the inclusion of statutory

1 removal restrictions. You didn't really see
2 that until the ICC.

3 MR. AGARWAL: They were -- they were
4 understood at the time to be for the officers
5 like the Chief Justice and the Vice President
6 on the Sinking Fund Commission, for example, to
7 be completely insulated from presidential
8 removal.

9 And it wouldn't make any sense for the
10 President to be able to remove them from the
11 Commission. That was not the understanding at
12 the time. This has been ably set out by many
13 historians.

14 But here's the bigger point, is that
15 those commissions are in a lot of ways much
16 more independent than modern-day independent
17 agencies. And Petitioners' theory is based on
18 the idea that anytime these commissions are
19 exercising significant governmental authority,
20 every single commission member must be subject
21 to at-will presidential removal. And in that
22 respect, their theory cannot be squared with
23 founding-era --

24 JUSTICE BARRETT: Okay, but, counsel,
25 the Sinking Fund had the Secretary of State,

1 Treasury, and the AG, and there's no dispute
2 even under your theory that the President could
3 fire those three. So, sure, the Chief Justice
4 and the Vice President, but he could very
5 easily take control over the fund. Also, we
6 distinguished that in Collins.

7 And, I mean, it seems to me that these
8 early examples had very, very limited
9 authority. I mean, the Mint, you know, or --
10 or the Revolutionary War Debt Commission, there
11 were no statutory removal restrictions, and all
12 it did was settle accounts between the United
13 States and individual states after the war. I
14 mean, there's nothing that looks like the FTC
15 at the time of Humphrey's or certainly not
16 today. You have to concede at least that.

17 MR. AGARWAL: Yes, and two
18 responses -- but two -- two responses to that.
19 I think it's a fair observation, but, first,
20 for the Sinking Fund Commission, for example,
21 maybe it didn't wield the broad panoply of
22 authorities of the FTC. That's fair enough.
23 But Alexander Hamilton thought that it was
24 absolutely indispensable to the health of the
25 national economy at -- that this was about

1 managing the public debt, and he thought that
2 it would implicate the nation's stability going
3 forward. That's why they thought this
4 governmental function should be vested in this
5 multi-member commission. So it was not
6 something that was deemed to be insignificant
7 by any stretch of the imagination.

8 But one more point on -- on the -- the
9 difference between the three members and the
10 two members. We have real-world evidence --
11 this is not an abstract thing. We have
12 real-world evidence of Chief Justice Jay I
13 believe it was, who could make the dispositive
14 vote difference in terms of the Sinking Fund
15 Commission of when they make a decision that
16 the President's cabinet supports, when they
17 make a decision that they don't.

18 And so the fact that there are some
19 members of the Commission who are not -- who
20 were concededly not removable at will by the
21 President, that just makes our point that the
22 first President of the United States and the
23 first Congress emphatically rejected the
24 constitutional theory on which Petitioners'
25 position is predicated.

1 JUSTICE BARRETT: Counsel, let me
2 say -- let -- let's say, just assume, that I
3 disagree with you about the history. Let's
4 assume that I think -- I'll -- I'll grant you
5 for this purpose that the Decision of 1789, if
6 you just took it in isolation, may be not as
7 conclusive as Myers thought it was. I'll just
8 grant that you for purposes of this question.

9 But let's say that I think the
10 liquidation argument throughout the 19th
11 century shows that by the time of the end of
12 the 19th century up until we get to the ICC and
13 the emergence of what starts to look like the
14 more modern independent agency, that the
15 government has the better of the argument.

16 But let's say that in 1887, after the
17 ICC and then after the FTC and then after
18 Humphrey's, when there was more the explosion
19 of independent agencies, that -- let's just
20 assume, again, for this purpose, that at that
21 point, yes, you do have precedents like
22 Humphrey's. Humphrey's clearly is -- is, you
23 know, a good case for you. Do you still lose
24 if I think as of 1887 it was liquidated, it was
25 settled, but then we did have cases and

1 congressional practices that veered from that
2 unbroken law?

3 MR. AGARWAL: No, we don't lose. We
4 don't lose on the merits and we certainly don't
5 lose on stare decisis.

6 So, on the merits, the doctrine of
7 constitutional liquidation by historical
8 practice absolutely can apply based on the last
9 150 years of history.

10 JUSTICE BARRETT: But, counsel, if it
11 had the first -- I mean, in -- in the -- the
12 assumptions that I've asked you to make, it was
13 liquidated as of 1887. So you think
14 liquidation can kind of get a new restart, like
15 kick-start in 1887?

16 MR. AGARWAL: That is not just my
17 view. That is the view of this Court in cases
18 like, I believe, NLRB v. Canning and Chiafalo,
19 and I would also direct the Court's attention
20 to United States versus Curtiss-Wright Export
21 Corporation, where the Court said you have 150
22 years of historical practice, that's enough.

23 JUSTICE BARRETT: Okay.

24 CHIEF JUSTICE ROBERTS: Justice
25 Jackson?

1 JUSTICE JACKSON: Really, really
2 quickly on your exchange with Justice Gorsuch,
3 your hesitancy to respond to his Take Care
4 question, I'm wondering whether that has to do
5 with the fact that prosecutorial discretion
6 exists and that the idea can't be, I think,
7 that the executive has to always enforce all
8 the laws, right?

9 MR. AGARWAL: I think that's right.
10 And the very authorities that Petitioners cite
11 in their reply brief actually stand for that
12 proposition. In cases like United States v.
13 Texas and the Heckler v. Cheney case, the Court
14 went out of its way to expressly and
15 unambiguously affirm Congress's authority to
16 regulate prosecutorial discretion by statute.

17 JUSTICE JACKSON: Let me ask you about
18 Justice Kagan's invitation to expound upon
19 comparative risks. I don't know if we got back
20 to that, but, before you do that, let me just
21 also focus in on Justice Kavanaugh's question
22 about losing on the merits and the extent to
23 which the answer would be just striking down
24 the for-cause removal protections.

25 I mean, I -- I appreciate that, but

1 doesn't that create pretty significant risks
2 with respect to the missions of the various
3 agencies? I mean, it's not just we -- we don't
4 have for-cause removal and the agency
5 continues. That would then, I think, open the
6 door for the President to come in, each new
7 President, and clean house in terms of all of
8 the individuals who are running that agency,
9 notwithstanding their expertise and knowledge
10 and experience and the things that they are
11 doing to promote the mission of the agency,
12 and, presumably, the President could install
13 whoever he wanted in those positions, and that,
14 I think, creates risks.

15 So why don't you talk about the
16 comparative risks of your formulation or
17 understanding of the different constitutional
18 dynamics and what the government says should
19 happen in this situation?

20 MR. AGARWAL: Sure. There are
21 real-world risks that are palpable that we know
22 will -- can materialize very quickly if
23 Petitioners get their way. And think about it
24 in terms of commissions like the Federal
25 Elections Commission. Would anyone want those

1 sensitive election-related determinations to be
2 under the plenary control of a political actor?
3 Think about the Nuclear Regulatory Commission.
4 Can't Congress and the President come together
5 and say those types of technical determinations
6 that could have massive implications for the
7 public in all kinds of ways should be made by a
8 multi-member body of experts?

9 And if there's any kind of problem
10 with the way those commissions are work -- are
11 working, they can be changed by the political
12 branches in a heartbeat. And Presidents, as
13 far as we know, are not even trying to change
14 them. It's not like they're coming to this
15 Court and telling you we have a big problem,
16 we've been lobbying Congress and Congress has
17 just -- you know, to Justice Kavanaugh's
18 earlier point, they're just not going along
19 with it and they're not doing the right thing.
20 Presidents are not even trying to go to
21 Congress to get these for-cause removals.

22 JUSTICE JACKSON: Because Presidents
23 have accepted that there could be both an
24 understanding of Congress and the presidency
25 that it is in the best interest of the American

1 people to have certain kinds of issues handled
2 by experts who -- and I think you were -- in
3 your colloquy with Justice Kagan, you
4 identified the fact that these boards are not
5 only experts, but they're also nonpartisan. So
6 the -- the seats are actually distributed in
7 such a way that we are presumably eliminating
8 political influence because we're trying to get
9 to science and data and actual facts related to
10 how these decisions are made.

11 And so the real risk, I think, of
12 allowing non -- of allowing these kinds of
13 decisions to be made by the President, of
14 saying everybody can just be removed when I
15 come in, is that we're going to get away from
16 those very important policy considerations.

17 MR. AGARWAL: It will get away from
18 those policy considerations and it will create
19 opportunities for all kinds of problems that
20 Congress and prior Presidents wanted to avoid,
21 risks that flow inevitably, just given human
22 nature, the realities of the world that we live
23 in, risks associated with extreme
24 concentrations of power in the hands of one
25 person.

1 JUSTICE JACKSON: Can you talk about
2 the FTC? This is my final question. Why would
3 Congress have thought it important to make this
4 agency in particular independent?

5 MR. AGARWAL: I think in large part
6 because Congress had tried, it had experimented
7 with alternatives in the past. They didn't
8 just do this on a whim. They tried to -- to
9 do -- they tried to legislate on their own and
10 they determined that it was not practicable for
11 Congress to exercise its own constitutionally
12 enumerated authority to regulate commerce by,
13 for example, specifying ex ante all the
14 different things that would constitute unfair
15 methods of competition.

16 And so what they wanted was an expert
17 agency that could take on that task and that
18 would be insulated from political pressure not
19 just emanating from the President but emanating
20 from Congress too. Congress was giving away
21 its own power to some extent.

22 JUSTICE JACKSON: So your point is
23 that they were doing something important for
24 the interests of the American people, not with
25 an effort to try to strip the executive of any

1 authority or anything like that but to fulfill
2 its own Article I obligations to legislate in
3 the best interests of the American people?

4 MR. AGARWAL: Absolutely. And in a
5 lot of ways, they're giving the President more
6 power than he had before because the President
7 wouldn't have the authority to determine what
8 are unfair methods of competition all on his
9 own. And that's what will be the practical
10 result of accepting Petitioners' theory, that
11 tomorrow you'll have a situation where the
12 President can come in and unilaterally
13 decide -- this is a quintessentially lawmaking
14 function -- unilaterally decide what
15 constitutes an unfair method of competition,
16 what constitutes an unfair trade practice. If
17 that was going to be the law, why wouldn't
18 Congress just reserve that power to itself?

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Rebuttal, General Sauer?

23 REBUTTAL ARGUMENT OF GEN. D. JOHN SAUER

24 ON BEHALF OF THE PETITIONERS

25 GENERAL SAUER: Thank you, Mr. Chief

1 Justice. Two quick points.

2 On the sort of parade of horrors
3 arguments being made, I think it's very telling
4 that Mr. Agarwal, one of the last things he
5 said is that the FEC has to remain independent.
6 But, of course, the FEC does not have statutory
7 removal restrictions, and under Braidwood, the
8 President already has the -- the power to
9 remove the -- the commissioners of the FEC.
10 Therefore, the notion that, like, this is the
11 end of the world, it's going to change the
12 structure of our government, the -- the -- the
13 lead counterexample that's given is one that's
14 already been decided by this Court's cases.

15 Justice Barrett, regarding the
16 question of historical liquidation, we think
17 the case that you ought to look at is Powell
18 against McCormack. It's very analogous to the
19 sort of historical -- what happened in the
20 history here. In that case, Congress, from the
21 time of the Founding until the reconstruction
22 of Congress after the Civil War, had
23 interpreted the Constitution to not allow it to
24 refuse to seat a member of Congress other than
25 the reasons that are set forth explicitly in

1 the Constitution in the Qualifications Clause.
2 The reconstruction of Congress changed that and
3 decided not to seat a couple of former members
4 who had too close ties to the Confederacy. And
5 after that, for the next hundred years or so,
6 Congress then started exercising that power,
7 not -- not -- not often but intermittently
8 exercising the power to refuse to seat other
9 members.

10 And this Court said in Powell against
11 McCormack what is decisive there in that point
12 of constitutional interpretation is the
13 liquidation that occurred in the -- in the 19th
14 century, not the subsequent, again, very
15 lengthy tenure of practice of Congress refusing
16 to do that, and, therefore, it -- it held that
17 Congress lacked the power to refuse to seat the
18 Congressman in that case. We think that's
19 very, very compelling here.

20 I think it's very telling that in this
21 particular case early on, Mr. Agarwal said
22 twice that it is within the realm of
23 possibility that Congress could take -- I'm not
24 sure how many -- but a significant number of
25 cabinet-level agencies and convert them into

1 multi-member agency commissions outside the
2 government's control.

3 How many of them it could do is really
4 a creature of not -- not a question -- a
5 constitutional question on his view. It's a
6 question of statutory accident, is are there
7 conclusive and preclusive powers in the organic
8 statute there? If there are, maybe they could
9 be excised.

10 And, obviously, the devil's in the
11 details here because, if those conclusive and
12 preclusive powers are fairly broad, as the
13 colloquy about civil enforcement powers
14 illustrates, if they're fairly broad, then,
15 basically, we would win this case and virtually
16 every other case because almost all the
17 agencies, cabinet-level or independent
18 agencies, are going to have civil enforcement
19 powers in most cases and so forth. But, if
20 they are narrow, then we have a situation where
21 Congress could erect virtual -- reconstruct
22 virtually the entire executive branch outside
23 the President's control, and that is not even a
24 Republican form of government, but that is the
25 logic of the position that's being advanced

1 here. That is the parade of horrors the
2 Court ought to consider. And that contrasts
3 dramatically with what, for example, Madison
4 said when he talked about the great principle
5 of unity and responsibility, the chain of
6 dependence that runs from the lowest, to the
7 middle grade, to the highest, to the President,
8 and the President is accountable to the
9 community, which is the voters.

10 In short, Humphrey's Executor is a
11 decaying husk with bold pretensions. It has a
12 powerful hold on the minds of some people
13 within our -- our -- our constitutional system.
14 It certainly seems to have a powerful hold on
15 the minds of lower court decisions. The Court
16 should -- lower court -- the lower courts and
17 their decisions. The Court should overrule
18 Humphrey's Executor explicitly and restore the
19 separation of powers to our government.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 The case is submitted.

23 (Whereupon, at 12:35 p.m., the case
24 was submitted.)

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