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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:
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21 Justice, Washington, D.C.; on behalf of the
22 Petitioners.
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24 behalf of the Respondents.
25

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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
15 if --

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 Perlmutter 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 that Humphrey's
13 is good -- is controlling law. You're asking
14 us 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 --

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

13 JUSTICE SOTOMAYOR: Not yet.

14 GENERAL SAUER: And the Court does --

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

17 JUSTICE BARRETT: General Sauer --

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

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

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

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

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

1 there's another thing about holdings.

2 Certainly, the holdings of Humphrey's Executor
3 doesn't necessarily support Wiener to its
4 fullest extent.

5 GENERAL SAUER: We agree with that.

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

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

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

24 The Federal Reserve has been described
25 as sui generis. Any issues of removal

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

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

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

10 JUSTICE KAVANAUGH: Go ahead.

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

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

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

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

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

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

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

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

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

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

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

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 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 JUSTICE JACKSON: General, all --

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

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

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

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

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

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

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

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

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

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

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

1 questions. Those are hard questions.

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

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

18 So it seems to me that that greater
19 power, we should at least think about whether
20 it should include the power to determine the
21 term of office, the extent to which people can
22 be removed. And I appreciate that Article I
23 has -- Article II has some language in it that
24 you're pointing to, but, as Justice Sotomayor
25 pointed out, the Constitution does not speak

1 specifically to removal.

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

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

14 JUSTICE JACKSON: Is that because --

15 GENERAL SAUER: For Congress to --

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

23 You -- you seem to -- to think that --
24 that there's something about the President that
25 requires him to control everything as a matter

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

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

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

20 JUSTICE JACKSON: Why?

21 GENERAL SAUER: -- and confer on
22 them --

23 JUSTICE JACKSON: Why? Why does it
24 lack the -- the Constitution does not say that
25 Congress cannot create an independent agency.

1 So what is it about your argument that requires
2 us to reach that result?

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

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

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

23 GENERAL SAUER: May --

24 CHIEF JUSTICE ROBERTS: You can answer
25 the question.

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

6 CHIEF JUSTICE ROBERTS: Thank you.
7 Justice Thomas?
8 Justice Alito?

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

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

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

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

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

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

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

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

1 JUSTICE ALITO: How about Myers?

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

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

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

25 JUSTICE ALITO: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?

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

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

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

24 GENERAL SAUER: I'd say two things in
25 response to that. I think the Court was

1 correct in the following decisions: Ex Parte
2 Hennen, Parsons, Shurtleff, Myers --

3 JUSTICE SOTOMAYOR: Those all
4 involved --

5 GENERAL SAUER: -- Seila Law.

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

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

21 Why are you so sure that Congress
22 would have preferred to have the independence
23 narrowed than not to have the agency at all.
24 Some of my colleagues have suggested in prior
25 cases that we shouldn't be engaged in the

1 severability actions at all. But, here, you
2 are arguing that, no, we should be doing that.
3 Why -- are you going to be consistent?

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Justice Kagan?

24 JUSTICE KAGAN: General, would you
25 agree with me, and I hope you will agree with

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

9 Easy enough to agree with, right?

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

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

18 (Laughter.)

19 GENERAL SAUER: Or -- or a codicil.

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

22 (Laughter.)

23 JUSTICE KAGAN: -- you know, because
24 what I was saying was -- and maybe you knew
25 where this was going, so you had to have this

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

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

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

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

23 And -- and those are, although we've
24 said that this is executive power in some
25 sense, but they're legislative functions.

1 That's what rulemaking is. They're
2 adjudicative functions.

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

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

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

24 JUSTICE KAGAN: Yeah.

25 GENERAL SAUER: And -- and if the

1 Court said --

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

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

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

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

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

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

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

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

5 So the separation --

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

23 GENERAL SAUER: You have control over
24 the executive branch, which he must and does
25 have under our Constitution. And, again, if

1 that's really legislating, then there's a
2 separate constitutional problem that the
3 legislative powers also have been taken away
4 from Congress.

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

14 JUSTICE KAGAN: Thank you, General.

15 CHIEF JUSTICE ROBERTS: Justice
16 Gorsuch?

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

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

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

8 JUSTICE GORSUCH: Is the water warm?

9 GENERAL SAUER: Is the water warm?

10 JUSTICE GORSUCH: Warm.

11 GENERAL SAUER: Suffice to say -- let
12 me say one thing in response to that. The --
13 the -- it is much easier to cure -- obviously,
14 members of this Court have debated the scope of
15 the non-delegation doctrine. The challenge of
16 finding the right standard there is something
17 we've discussed in the past. Here, though,
18 this wolf comes as a wolf, right? I mean, the
19 restriction on executive power is right there
20 in the statute. It's easy to remedy by
21 excising the removal restriction in the past
22 group of cases.

23 JUSTICE GORSUCH: There are a lot of
24 wolves around here, General. The one thing our
25 Framers knew is that every political actor

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

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

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

24 JUSTICE GORSUCH: And let me ask you
25 about the judicial power. To the extent we're

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

6 Thoughts?

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

17 JUSTICE GORSUCH: They would be
18 adjunct.

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

1 JUSTICE GORSUCH: The adjudication
2 of --

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

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

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

11 JUSTICE GORSUCH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Kavanaugh?

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

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

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

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

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

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

1 some of those issues.

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

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

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

24 However, our constitutional structure
25 dictates that the President cannot do so. He

1 cannot bind the hands of his successors, or the
2 encroached-upon branch cannot consent to the
3 encroachment, you know, and -- and, therefore,
4 disrupt our constitutional structure.

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

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

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

20 GENERAL SAUER: That's exactly right.

21 JUSTICE KAVANAUGH: Okay. On stare
22 decisis, you used the word "dangerous," I
23 think, in your opening, about the independent
24 agencies. One of the things we consider are
25 the -- not only how wrong it was and reliance

1 interests but the real-world impacts. And I --
2 I think I'll just give you a little bit to
3 explain why you used the word "dangerous" when
4 talking about independent agencies, if I heard
5 that correctly.

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

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

25 The point is that power vacuums should

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

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

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

1 questions doctrine and how that fits into your
2 answer?

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

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

20 I have some real doubts about that
21 argument. We don't need to reach it, of
22 course, if we agree with you on the first
23 question. I have some doubts about that
24 because that really would be an end run around
25 the exceptions you had identified earlier for

1 the Federal Reserve or for the article --
2 non-Article III courts.

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

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

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

1 JUSTICE KAVANAUGH: Don't you have a
2 problem again here with Marbury, recognizing
3 mandamus? I mean --

4 GENERAL SAUER: Mandamus has --

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

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

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

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

20 JUSTICE KAVANAUGH: Well, they're --

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

25 And that's why the answer to that

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

8 JUSTICE KAVANAUGH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett?

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

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

1 officers didn't come within it.

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

6 Is there any reason for us to be
7 specific about it in this case?

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

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

24 So I think the text of the
25 Constitution supports what you've referred to

1 as the strong theory, and that's, I think,
2 repeated again and again in this Court's
3 decisions where it started with the Vesting
4 Clause, and, of course, it's the logic of
5 Madison's statements on the floor of Congress
6 in the Decision of 1789.

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

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

19 And it seems to me that, and there's
20 some dispute among this in the amicus briefs
21 and the scholarship about which portion of
22 Article II or if it's in the Appointments
23 Clause, would be the source of this authority.

24 And is there any reason we have to
25 decide that here given that it might be

1 relevant to some of the harder questions about
2 limiting principles?

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

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

15 JUSTICE BARRETT: So we have to do
16 Vesting Clause?

17 GENERAL SAUER: We think the Vesting
18 Clause is clearly -- provides at least the
19 clearest textual basis for it. I mean, when
20 Madison said, for example, the power of
21 overseeing and controlling those who
22 executive -- execute the laws is the
23 quintessential executive power, that's the
24 logic of it. Could the Court devise a
25 holding that -- based solely on the

1 Appointments Clause? That's possible, but --

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

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

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

21 But I guess the question that I have,
22 is that part of the bargain? Because
23 legislative vetoes were pretty ubiquitous
24 throughout the Twentieth Century. And, of
25 course, we held them unconstitutional in

1 Chadha.

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

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

21 GENERAL SAUER: Two things. INS
22 against Chadha correctly recognized that there
23 was legislative control.

24 JUSTICE BARRETT: I wasn't questioning
25 Chadha.

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

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

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

22 Justice Kagan was pointing out they
23 now exercise a lot of rulemaking power.
24 There's a lot of adjudicatory power. And I'm
25 not saying -- I'm not questioning Chadha. I

1 think Chadha rightly, as you said, made the
2 separation-of-powers point that Congress can't
3 retain this power for itself.

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

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

18 JUSTICE BARRETT: I understand that.

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

21 JUSTICE BARRETT: Let me ask you a
22 question about stare decisis. How should we
23 think about reliance interests when it comes to
24 reliance interests in government structure?

25 You know, Justice Sotomayor was

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

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

19 GENERAL SAUER: I think Justice
20 Gorsuch's opinion for the plurality in Ramos
21 addresses this when you -- when he -- when he
22 talks about how you're weighing -- you know,
23 here, you're weighing an injury to the
24 constitutional structure. That's not a valid
25 reliance interest. The relevant reliance

1 interest is the reliance of the American people
2 in separation of powers in protect -- defending
3 our liberties.

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

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

19 JUSTICE BARRETT: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Jackson?

22 JUSTICE JACKSON: So I guess I -- I
23 really don't understand why the agencies aren't
24 answering to Congress. Congress established
25 them and can eliminate them. Congress funds

1 them and can stop.

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

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

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

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

24 GENERAL SAUER: The Constitution
25 requires clear lines of political

1 accountability. So if Congress is sort of
2 informally actually controlling these -- these
3 agencies through, like, oversight --

4 JUSTICE JACKSON: Not informally. We
5 have a statute. But let me ask you another
6 question.

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

18 So having a President come in and fire
19 all the scientists and the doctors and the
20 economists and the PhDs and replacing them with
21 loyalists and people who don't know anything is
22 actually not in the best interest of the
23 citizens of the United States. This is what I
24 think Congress's policy decision is when it
25 says that these certain agencies we're not

1 going to make directly accountable to the
2 President.

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

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

19 JUSTICE JACKSON: No, we can have, but
20 I'm asking you about Congress's choice,
21 Congress's decision that, in these particular
22 areas, we would like to have independence. We
23 don't want the President controlling. I guess
24 what I don't understand from your overarching
25 argument is why that determination of Congress,

1 which makes perfect sense given its duty to
2 protect the people of the United States, why
3 that is subjugated to a concern about the
4 President not being able to control everything.

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

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

20 JUSTICE JACKSON: And what I'm -- what
21 I'm positing is that -- that Congress's
22 decision here is not shaving away the
23 President's control. You cast it as that, and
24 I appreciate that, but instead what Congress is
25 doing is saying we'd like to have independence,

1 nonpartisan experts working on certain issues
2 for the good of the American people.

3 And I understand that the President
4 would rather control them, but it's not really
5 his decision in the overall scheme of things, I
6 say. Why am I wrong about that?

7 GENERAL SAUER: Under the
8 constitutional design --

9 JUSTICE JACKSON: It is the
10 President's decision as to how the government
11 is structured and who should be doing what?

12 GENERAL SAUER: No, that is largely
13 Congress's decision with certain exceptions.
14 Congress cannot violate the separation of
15 powers and threaten all of our liberties in the
16 way that it structures the government and has
17 done so here.

18 JUSTICE JACKSON: One last question.
19 I -- I appreciate the effort to try to make
20 this not seem as big a deal as it might be by
21 focusing only on the FTC and saying this is
22 really just about what happens and we'll cross
23 the bridge of the other agencies when we get to
24 it. But can you just give us a sense, because
25 you -- I'm sure you must know this, of what

1 other agencies there are that have the kind of
2 removal protections that are at issue here?
3 There are some, what, two dozen?

4 GENERAL SAUER: That's what Seila Law
5 said. That's probably a good accounting. And
6 -- and, obviously, we -- we have challenged
7 four of them in this Court, and we're
8 challenging a handful of others in other courts
9 as well.

10 JUSTICE JACKSON: But you could -- you
11 could challenge the National Labor Relations
12 Board, the Nuclear Regulatory Commission, the
13 Commission on Civil Rights, potentially the
14 Sentencing Commission, the Occupational Self-
15 -- Safety and Health Review Commission, the
16 Product -- Consumer Product Safety Commission.
17 All of these have that kind of structure.

18 GENERAL SAUER: I don't know if all
19 those are on the list. Certainly, some of them
20 are. And some of them we're -- and many of
21 these agencies we are litigating, including in
22 this Court.

23 JUSTICE JACKSON: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Agarwal.

2 ORAL ARGUMENT OF AMIT AGARWAL

3 ON BEHALF OF THE RESPONDENTS

4 MR. AGARWAL: Mr. Chief Justice, and
5 may it please the Court:

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

18 On the merits, multi-member
19 commissions with members enjoying some kind of
20 removal protection have been part of our story
21 since 1790. So if Petitioners are right, all
22 three branches of government have been wrong
23 from the start. Congress and prior Presidents
24 have been wrong to jointly create early
25 founding-era commissions and more than two

1 dozen traditional independent agencies since
2 1887. And this Court was wrong to repeatedly
3 bless those laws and to unanimously uphold the
4 exact same removal provision at issue here in
5 Humphrey's Executor almost a century ago.

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

21 Finally, stare decisis militates
22 against overruling a century of precedent at
23 this late date. The political branches are
24 more than up to the task of finding reasonable
25 legislative solutions that strike an

1 appropriate balance. That kind of legislative
2 solution is far preferable than abandoning a
3 foundational precedent on which so much of
4 modern governance is based.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: Was Humphrey's
7 Executor an executive branch case?

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

16 JUSTICE THOMAS: Did the Court in
17 Humphrey's Executor distinguish it from Swift
18 -- from its earlier precedent in Myers?

19 MR. AGARWAL: The Court, yes,
20 absolutely distinguished --

21 JUSTICE THOMAS: And didn't it --

22 MR. AGARWAL: -- the FTC from its
23 earlier precedent in Myers.

24 JUSTICE THOMAS: Wasn't that
25 distinction based on its function more as a

1 quasi-legislative, quasi-judicial agency as
2 opposed to an executive branch agency?

3 MR. AGARWAL: It was based in part on
4 functions, Justice Thomas, but it was also
5 based on the placement of the agency and a
6 considered determination of Congress and the
7 President together that this was the kind of
8 agency that should be insulated from
9 presidential at-will removal.

10 JUSTICE THOMAS: Now, you rely on the
11 reliance interests in stare -- in the -- the
12 reliance interests of Congress and reliance
13 interests, I guess, of others, of the agency
14 heads on the structure of this agency for so
15 many years. What is it, 70 years, you say?

16 MR. AGARWAL: The -- the FTC is 111
17 years old.

18 JUSTICE THOMAS: But from Humphrey's
19 Executor?

20 MR. AGARWAL: Ninety years.

21 JUSTICE THOMAS: How would you have
22 applied that in the overruling of Swift v.
23 Tyson, your reliance interests?

24 MR. AGARWAL: Yes. So Swift v. Tyson
25 deals with a completely different kind of

1 situation with respect to the Erie doctrine.

2 It was not --

3 JUSTICE THOMAS: But -- So there was
4 no reliance interests?

5 MR. AGARWAL: So reliance interests
6 with respect to choice of law determinations?

7 JUSTICE THOMAS: Yeah, mm-hmm.

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

21 And that reliance interest would be
22 completely destroyed by retroactively
23 destroying the independence of traditional
24 independent agencies.

25 JUSTICE THOMAS: So this is -- I don't

1 know what a traditional executive --
2 administrative agency is, but could Congress
3 limit the removal authority of the President in
4 a newly created executive branch agency?

5 Let's say, for example, a few years
6 ago EPA became a -- an executive branch agency.
7 It was more of an administrative agency
8 sub-cabinet. Could it in doing that limit the
9 removal authority of the President of the head
10 of the EPA or Homeland Security?

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

15 JUSTICE THOMAS: No, I'm trying to --
16 again, the SG was asked about the logic of his
17 argument. What's the logic of yours? How far
18 does it carry you? If this is an executive
19 branch agency, in your distinction, as this is
20 a multi-member agency, why doesn't the logic
21 take you to a single-head agency also?

22 MR. AGARWAL: So you're asking whether
23 a single-headed agency could be converted into
24 a --

25 JUSTICE THOMAS: No. Well, I -- I

1 haven't gotten there yet, but that -- that
2 would be the next step in order to make them
3 removable, to make the -- the heads of the
4 agency or the principals move -- removable.

5 MR. AGARWAL: Mm-hmm. So there --
6 there are constraints. One of the constraints
7 is that the creation of the agency and the
8 insulation from presidential control cannot
9 interfere with the President's conclusive and
10 preclusive constitutional authorities.

11 JUSTICE THOMAS: But you still haven't
12 told me why can't tomorrow morning Congress
13 decide that the secretary of Congress should be
14 removable in a -- should limit the President's
15 authority to remove the Secretary of Commerce?

16 MR. AGARWAL: That would be squarely
17 foreclosed by this Court's decision in Seila
18 Law as we understand it. That is to say, this
19 Court in Seila Law held that there is a
20 particular serious threat to individual liberty
21 that is posed by single-headed agencies that
22 wield significant executive power.

23 JUSTICE KAVANAUGH: Could -- could
24 Congress convert all these --

25 JUSTICE THOMAS: The multi-member.

1 JUSTICE KAVANAUGH: -- departments
2 into multi-member commissions, the Commerce,
3 EPA, Department of Homeland Security,
4 Department of State, convert them all into
5 multi-member commissions and make them
6 removable only for cause?

7 MR. AGARWAL: No. I think, Justice
8 Kavanaugh, we're looking at three buckets here.
9 In one bucket including the Department of
10 State, you would have departments that under no
11 conceivable circumstance could practicably be
12 converted to a multi-member commission.

13 JUSTICE KAVANAUGH: Why?

14 MR. AGARWAL: Because they are
15 wielding so many of the President's conclusive
16 and preclusive constitutional authorities. But
17 that is a relatively small bucket. Let's say
18 Department of State --

19 JUSTICE KAVANAUGH: That's State,
20 Justice, and Defense?

21 MR. AGARWAL: -- Justice, Defense,
22 Homeland Security probably.

23 JUSTICE GORSUCH: Are you -- are you
24 saying, though, that -- that they're limited by
25 practical concerns or constitutional concerns?

1 MR. AGARWAL: Constitutional concerns.

2 JUSTICE GORSUCH: What -- what --

3 what --

4 MR. AGARWAL: And then practical
5 concerns will come up as well.

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

14 MR. AGARWAL: Absolutely. And the
15 constitutional problem in our view is that
16 Congress cannot limit the President's authority
17 over officers who are wielding the President's
18 conclusive and preclusive constitutional
19 powers. And that is a line that goes all the
20 way back to Marbury v. Madison. It's a through
21 line through this Court's jurisprudence.

22 JUSTICE KAVANAUGH: Does it include --

23 JUSTICE BARRETT: But the FTC has
24 the --

25 MR. AGARWAL: Justice Jackson's -- I'm

1 sorry.

2 JUSTICE BARRETT: -- the FTC has the
3 authority to enter foreign agreements, right?
4 I mean, how do you -- how do you decide what's
5 conclusive and preclusive?

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

14 JUSTICE KAVANAUGH: You talked --

15 CHIEF JUSTICE ROBERTS: So --

16 JUSTICE KAVANAUGH: -- about three --
17 I'm sorry.

18 CHIEF JUSTICE ROBERTS: I just want to
19 make sure I understand because it's fairly
20 basic.

21 I mean, there -- are there some
22 cabinet departments that you say Congress could
23 just take over? Department of Veterans
24 Affairs, Department of Education, they think,
25 well, we can do -- experts could do a better

1 job of it and so we're going to say there is
2 now an agency, the agency for education, and it
3 will be run by -- whether it's a multi-member
4 group or not, we think it's important for
5 Congress to have greater control over
6 education, so we're creating this new agency
7 and its authorities will be everything that the
8 current Department of Education has, except it
9 will be run by a commission and they can only
10 be removed for cause.

11 Is that all right?

12 MR. AGARWAL: Yeah, I think that it is
13 probably within the realm of possibility for --
14 for agencies, yes, Justice -- Chief Justice
15 Roberts. And the constraint historically has
16 been that these types of determinations have
17 been made through a process of political
18 accommodation between Congress and the
19 President, and over the course of more than 200
20 years, we have not seen --

21 CHIEF JUSTICE ROBERTS: Yeah. Well,
22 I'm sorry to interrupt, but sometimes that
23 accommodation is greater than in other times.
24 I mean, we have situations, let's say, where
25 the Congress, both houses are controlled by one

1 party and the President is of the -- the same
2 party, and they may decide that the government
3 would be structured better by -- by taking over
4 these entities.

5 And so -- so which -- which
6 departments could Congress impose a
7 multi-member commission instead of a secretary?

8 MR. AGARWAL: So -- so, if you're
9 asking about which ones could be converted
10 today --

11 CHIEF JUSTICE ROBERTS: Yeah.

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

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

23 MR. AGARWAL: Including under the --
24 the analysis that this Court set out just last
25 term in Trump v. United States where, at pages

1 620 to 621, the Court explained that the
2 President does have a conclusive and preclusive
3 authority with respect to certain criminal
4 investigations and prosecutions, and that
5 informed the Court's determination about
6 whether the acting attorney general was subject
7 to at-will presidential removal.

8 It turns out that the vast majority of
9 these executive departments do have some kind
10 of criminal investigative authority, including
11 armed law enforcement agents authorized to make
12 arrests. Now that is a -- that's a significant
13 bucket. You probably have a very --

14 JUSTICE GORSUCH: Every agency in the
15 government today has armed police officer --
16 their own police force. Is that really the
17 test of what's conclusive and preclusive?

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

19 JUSTICE GORSUCH: I mean, that -- it
20 rhymes, but I don't know what it means.

21 MR. AGARWAL: I -- Justice Gorsuch, I
22 think you're making a good point insofar as
23 you're saying there's probable -- insofar as
24 Your Honor's point is that there's a lot of
25 what these agencies do that would not be deemed

1 conclusive and preclusive, and we absolutely
2 acknowledge that. And the --

3 JUSTICE GORSUCH: So the answer to the
4 Chief Justice's question is tomorrow we could
5 have the labor commission, the education
6 commission, the environmental commission,
7 rather than departments of interior and so
8 forth, right?

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

13 JUSTICE GORSUCH: So it has -- what's
14 the percentage then?

15 MR. AGARWAL: Then -- so I -- I don't
16 want to pretend, Justice Gorsuch, that I --
17 that I have --

18 JUSTICE GORSUCH: And what -- I want
19 to know where the threshold of preclusive and
20 conclusive comes in.

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

23 JUSTICE GORSUCH: Is it a mere
24 scintilla?

25 MR. AGARWAL: I -- I think that's

1 what -- I think you would have a separation-of-
2 powers problem if an agency, even if it's a
3 vast agency wielding a broad panoply of powers,
4 if one of those powers is the President's
5 conclusive and preclusive authority and the
6 officers who are exercising that power are
7 insulated --

8 JUSTICE GORSUCH: So -- so -- so long
9 as one person in the agency's exercising
10 conclusive and preclusive, whatever that means,
11 that's enough?

12 MR. AGARWAL: Yeah. So it's enough to
13 have a separation of powers. And I wouldn't
14 just say a person. I would say a principal
15 officer. It's enough to generate a
16 separation-of-powers problem. And what is the
17 remedy for that problem, I think, is an
18 analytically more difficult question.

19 JUSTICE GORSUCH: What is the
20 different --

21 JUSTICE KAGAN: It -- it -- it strikes
22 me, Mr. Agarwal, as I listen to this, you know,
23 if you go back to let's say the Education
24 Department, what the Chief Justice -- which the
25 Chief Justice raised, that the more realistic

1 danger here is that we'll have an Education
2 Department as authorized by Congress, by law,
3 that won't have any employees in it.

4 MR. AGARWAL: I -- I think you're
5 absolutely right, Justice Kagan, that there are
6 competing dangers here, and it -- it makes a
7 whole lot of sense to us to weigh the
8 real-world dangers that we know are a virtual
9 certainty that would result from adopting
10 Petitioners' constitutional theory.

11 And to contrast those with purely
12 hypothetical risks that have never materialized
13 over the course of American history and even in
14 the unlikely event that Congress tomorrow was
15 to try to start taking cabinet departments that
16 have been around for a long time and to convert
17 them wholesale into multi-member agencies which
18 they have never tried to do before, but even if
19 they tried to do that, of course, that would be
20 subject to a presidential veto.

21 JUSTICE BARRETT: Well, I think that
22 there's one thing history shows, is we can't
23 anticipate what might happen. And so we might
24 be able to predict what is likely to happen in
25 the very short term, but we don't know. I

1 mean, if we -- if we decide this case in your
2 favor now, we don't know what a Congress in 15
3 or 20 or 30 years might do. We might be able
4 to predict what's likely in -- in the short
5 term.

6 So, I mean, this is going to have
7 longer-term implications.

8 MR. AGARWAL: So absolutely, but let
9 me make two points on that. First, there is
10 currently no constraint on -- there's currently
11 no case that has ever held that Congress cannot
12 give for-cause removal protections to principal
13 officers serving -- to a single layer of
14 for-cause removal protection for single --
15 principal officers serving on a multi-member
16 commission, and nevertheless, notwithstanding
17 the absence of any such precedent throughout
18 American history, we have not seen an epidemic
19 of these problems. In fact, we haven't seen
20 this problem materializing at all.

21 But let me make one other point about
22 the real-world danger that is imminent right
23 now that we know will happen. And that is that
24 if Petitioners get their way, everything is on
25 the chopping block. And we're not just talking

1 about the FTC. Opposing counsel said we're not
2 challenging right now the Federal Reserve.
3 We're not challenging Article I courts. But
4 there is absolutely no principled basis for
5 carving those very important institutions out
6 of their rule and --

7 JUSTICE ALITO: Well, you're right
8 that the -- the Solicitor General was pressed
9 quite legitimately about things like the Tax
10 Court and the Claims Court, et cetera, et
11 cetera. But I don't know that you can make the
12 argument that his -- the logic of his argument
13 is going to cause these allegedly revolutionary
14 results without being prepared to explain more
15 concretely than you have the limits of your own
16 argument.

17 I mean, I could go down the list with
18 you of the cabinet officers and ask you whether
19 you think they could be headed by a
20 multi-member commission whose members are not
21 subject to at -- at-will removal by the
22 President. Shall we do that? How about the --
23 how about Veterans Affairs? How about
24 Interior? Labor? EPA? Commerce? Education?
25 What am I missing?

1 JUSTICE GORSUCH: Agriculture.

2 (Laughter.)

3 JUSTICE ALITO: Agriculture.

4 JUSTICE JACKSON: Mr. Agarwal, are you
5 prepared --

6 CHIEF JUSTICE ROBERTS: I'm sorry --

7 JUSTICE ALITO: There was a question
8 -- there was a question there.

9 MR. AGARWAL: Yes. So I don't want to
10 pretend to greater certainty than I have about
11 the full gamut of statutory authorities vested
12 in all those other departments. I will say
13 that, based on a very quick preliminary
14 analysis, it appeared to us that the vast
15 majority of executive departments wield at
16 least some of the conclusive and preclusive
17 authorities that this Court has recognized in
18 the past, including criminal investigative and
19 prosecutorial authorities and also authorities
20 implicating national security and foreign
21 relations.

22 Now, that is not to say, Justice
23 Alito, I think you're absolutely right to say
24 for the -- for a lot of those, you could
25 probably take those out, and at that point

1 there's going to be a fair question about
2 whether -- whether Congress and -- Congress and
3 the President, acting together, could determine
4 at some point that there is a need for a
5 multi-member body of experts to preside over
6 certain government functions.

7 And what I would say is I don't think
8 that you should categorically rule out that
9 possibility as a matter of constitutional law.
10 And I don't -- I can't sit here today and tell
11 you that there's a distinction of
12 constitutional proportions, for example,
13 between the Department of Labor and the
14 National Labor Relations Board.

15 JUSTICE ALITO: Well, how about the --
16 the Post Office at the time of Myers? How does
17 your exclusive and preclusive theory account
18 for Myers? How can it be that the Postmaster
19 at that time exercised exclusive Article II
20 power, but a Federal Trade Commissioner does
21 not?

22 MR. AGARWAL: So I would say three
23 things about that. First, the conclusive and
24 preclusive standard does not have to be the
25 sole and exclusive limiting factor. Second,

1 there is a provision that Justice Barrett
2 referred to in the colloquy with opposing
3 counsel about the Take Care Clause. And it is
4 conceivable that at least in some circumstances
5 the Take Care Clause might itself, not always
6 but sometimes, impose a conclusive and
7 preclusive standard -- standard, for example,
8 with respect to officers like the Postmaster in
9 Myers who are deemed to -- to -- to possess
10 purely executive functions, as this Court
11 unanimously -- in *Humphrey's Executor* and then
12 again in *Wiener*, unanimously characterized the
13 functions of the Postmaster in *Myers* as purely
14 and obviously just executive.

15 So that's a second -- that's a seconds
16 constraint.

17 JUSTICE KAVANAUGH: When you answered
18 Justice Alito about the agencies exercising
19 investigative power and, thus, there would be a
20 question whether they could be made independent
21 multi-member commissions, don't a lot of the
22 now independent agencies also exercise that
23 kind of investigative power?

24 At least from my experience, it's very
25 hard to get into the weeds of the particular

1 powers exercised by the FTC and distinguish it
2 from some of the powers exercised by some of
3 the other cabinet agencies that we
4 traditionally think of as executive or the FCC
5 or the SEC. All of those seem to -- the FERC,
6 NLRB -- when you get into them all. So what's
7 your answer to that?

8 MR. AGARWAL: So my -- my answer is
9 the criminal investigative authority is
10 different. And, certainly, a lot of these
11 agencies have civil investigative authority,
12 including the FTC. As we understand it, this
13 Court's precedent just from last term in Trump
14 v. United States, criminal investigations and
15 prosecutions are in a different category at
16 least as a general matter. And if the logical
17 import of that analysis is that -- is that
18 there are certain functions that cannot be
19 wielded even by traditional independent
20 agencies, then so be it.

21 JUSTICE GORSUCH: Counsel --

22 MR. AGARWAL: That's the law of the
23 land.

24 JUSTICE GORSUCH: -- that's --

25 JUSTICE KAVANAUGH: Can I --

1 JUSTICE GORSUCH: I'm sorry.

2 JUSTICE KAVANAUGH: Go ahead.

3 JUSTICE GORSUCH: Go ahead. Please go
4 ahead.

5 JUSTICE KAVANAUGH: Go ahead.

6 JUSTICE GORSUCH: All right. I
7 understand conclusive and preclusive entirely
8 as we used it in -- when you're speaking about
9 executive power, can -- can the President
10 control what's done in his departments. I get
11 that. And criminal prosecution's a good
12 example.

13 I do not understand it as you use it.
14 Why isn't it just as conclusive and preclusive
15 to decide whether to bring charges under the
16 FTCA Act --

17 MR. AGARWAL: Civil charges.

18 JUSTICE GORSUCH: -- against somebody,
19 civil versus criminal. It's a conclusive and
20 preclusive decision about enforcement decisions
21 of a power of the federal government against
22 individuals across the country.

23 MR. AGARWAL: So there's a legal
24 answer and there's a historical answer, and
25 they might blend, Justice Gorsuch.

1 And the legal answer is that we don't
2 have any controlling authority that has ever
3 held that civil enforcement as a categorical
4 matter is the kind of thing that can never be
5 vested in a multi-member agency that enjoys a
6 modicum of insulation from political pressure.

7 And we know that, for example, from
8 this Court's unanimous decision in *Humphrey's*
9 Executor, where you had that kind of civil
10 enforcement taking place, and a unanimous
11 court, including all four justices from *Myers*,
12 said that's okay. And the kind of civil
13 enforcement that was going on there, you had
14 complaints being issued, you had
15 cease-and-desist orders --

16 JUSTICE GORSUCH: Cease-and-desist
17 orders, but -- but not lawsuits in court. They
18 had to go to court. And -- and I'm just
19 curious, though, are -- fine, I accept -- I
20 accept your point, it's a good point about
21 *Humphrey's*, but why isn't that conclusive and
22 preclusive decision whether to use the federal
23 government's full -- full power in prosecution
24 where you can seek fines and -- and incur all
25 the -- all the -- all of the penalties that are

1 associated with violating the FTC Act?

2 MR. AGARWAL: So I think part of the
3 answer is historical, and part of the answer is
4 functional. And on the historical part, we
5 have had all kinds of civil enforcement of
6 federal statutes taking place, including just
7 private statutes that authorize private
8 attorney generals, as this Court has -- has
9 recognized in many, many cases. So you have a
10 long, long history and tradition of private
11 actors wielding, kind of enforcing civilly
12 federal statutes.

13 Now, I take -- I take the point --

14 JUSTICE GORSUCH: So --

15 MR. AGARWAL: -- that civil
16 enforcement on behalf of the government of the
17 United States --

18 JUSTICE GORSUCH: That's not the
19 executive power, but criminal actions is the
20 executive power?

21 MR. AGARWAL: Yeah, I would not say
22 that it --

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

25 MR. AGARWAL: No, I would not -- I

1 would not put it that way. I would not say
2 it's not executive. And, in fact, in -- in
3 Seila Law --

4 JUSTICE GORSUCH: So it is executive?

5 MR. AGARWAL: Yeah, in Seila Law, this
6 Court said it's not only executive; it's
7 quintessentially executive. And that's okay,
8 because agencies like the FTC also engage in
9 adjudicative activities, and that would be
10 deemed quintessentially judicial and,
11 nevertheless, they're not subject to plenary
12 removal on the part of the judiciary. They
13 engage in rule-making that could be considered
14 quintessentially legislative, and,
15 nevertheless, they're not subject to plenary
16 control on the part of the legislature.

17 The issue is whether -- not whether
18 it's executive in some sense. The issue is
19 whether it's constitutionally committed to the
20 President's sole and exclusive discretion. And
21 as a matter of history and precedent, we
22 haven't gotten there yet.

23 JUSTICE GORSUCH: So even some
24 quintessentially executive functions, in your
25 view, are not vested in the President of the

1 United States?

2 MR. AGARWAL: I would not say that --
3 I would not put it in this -- I would not say
4 that that -- yes, I would -- I would say
5 they're not --

6 JUSTICE GORSUCH: You have to say yes
7 to that based on --

8 MR. AGARWAL: They're --

9 JUSTICE GORSUCH: -- what you've just
10 given us.

11 MR. AGARWAL: They're not
12 constitutionally committed to the person of the
13 President and to his sole and exclusive
14 discretion, yes.

15 JUSTICE JACKSON: Didn't we suggest as
16 much in Humphrey's? I mean, didn't we -- we
17 sort of -- we have some lines in Humphrey's
18 that say, to the extent that it exercises any
19 executive function as distinguished from
20 executive power in the constitutional sense, it
21 does so to discharge -- does so in the
22 discharge and effectuation of its
23 quasi-legislative or quasi-judicial powers.

24 So I thought that in Humphrey's we
25 recognized this idea that you could have an

1 agency that's exercising legislative or
2 judicial powers still engaging in some
3 executive function, and that doesn't make it an
4 executive agency.

5 MR. AGARWAL: That is exactly right.
6 And on top of that, we have a lot of agencies
7 over a long period of time engaging in all
8 manner of civil enforcement of federal
9 statutes.

10 And yet we do not have a single
11 example of any case from this Court in more
12 than two centuries that has ever held that a
13 single layer of for-cause removal protection
14 cannot apply to a principal officer of an
15 agency wielding that kind of civil enforcement
16 function.

17 JUSTICE JACKSON: And so I think
18 that's like your real point. In other words,
19 you're not asking for some sort of conclusive
20 or preclusive rule. That's not your burden in
21 this situation.

22 You are just saying that the way the
23 law has been interpreted by the Court here, the
24 existence of Humphrey's and Congress's reliance
25 on these kinds of multi-member agencies for

1 something like 90 years plus, that's the
2 background rule.

3 And so now it's up to the government
4 and the Solicitor General to come in to suggest
5 that there's a constitutional problem with
6 that.

7 MR. AGARWAL: That is absolutely
8 right. We have a 111-year-old statute that was
9 enacted by the people's elected
10 representatives. It was signed into law by a
11 President of the United States. It was
12 unanimously affirmed by this Court. And it's
13 been followed by every single President since
14 1935 until the present.

15 We don't need an abstract theory to
16 tell us that the FTC Act is okay. It's the
17 other side that needs to give you a really
18 compelling theory to explain why, in our view,
19 two -- 200-plus years of precedent and history
20 need to be abandoned.

21 But, in any event, even according to
22 their own -- by their own acknowledgment, we're
23 talking about the modern era of traditional
24 independent agencies, which spans more than
25 half the life of the Republic.

1 JUSTICE KAVANAUGH: Can I ask you
2 about some other limits of your argument? So
3 most of the independent agencies by statute
4 must include members of both major political
5 parties.

6 Is that a constitutional requirement?

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

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

11 MR. AGARWAL: I do think, at some
12 point, Justice Kavanaugh, that if there is not
13 sufficient mechanisms of adequate presidential
14 supervision, that you could have a problem.
15 My -- my advice to the Court --

16 JUSTICE KAVANAUGH: Why? This is
17 important.

18 MR. AGARWAL: Yeah.

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

21 MR. AGARWAL: Yeah, absolutely. So
22 there is the Take Care Clause in Article II,
23 Section 3. And we don't -- we don't dispute
24 that the activities of these agencies are
25 operating within the purview of the executive

1 branch and they should be subject to
2 constitutionally appropriate presidential
3 supervision.

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

6 MR. AGARWAL: So, in the -- in the
7 case of -- in -- in the case of the FTC, I
8 don't want -- I don't think you want to --

9 JUSTICE KAVANAUGH: And if they don't
10 have to turn over with each new President,
11 what's the difference between seven years and
12 20 years constitutionally speaking?

13 MR. AGARWAL: I think our -- our
14 position is that the FTC, no matter what kind
15 of rule that you articulate, would be okay
16 because we have the staggered terms and
17 Presidents have the opportunity as a practical
18 matter to influence the composition of the FTC.

19 You start to get into more difficult
20 line-drawing problems if you imagine
21 hypothetical scenarios where Presidents, you
22 have longer terms and maybe fewer officers, and
23 maybe Presidents in -- in that circumstance
24 don't have --

25 JUSTICE KAVANAUGH: What about the

1 chair? Usually, the chair has been removable
2 at will as chair by Presidents. But that's
3 been a matter of statute for most of these. Is
4 that constitutionally required?

5 MR. AGARWAL: No. And we know that
6 from Humphrey's Executor actually because, at
7 the time of Humphrey's Executor, the chair of
8 the FTC was not removable by the President.
9 And now it was -- in the -- in the
10 reorganization act that took place some 15
11 years later, the President now has that
12 designation authority.

13 JUSTICE KAVANAUGH: So I think putting
14 those three together, you -- your position
15 would allow Congress to create independent
16 agencies, maybe converting some of the existing
17 executive agencies into independent agencies
18 with no political balance requirement, with a
19 long term, say, 10 or more years, and with the
20 chairs not subject to removal as chair.

21 So you can imagine a situation, and I
22 just want to give you a chance to deal with the
23 hard hypothetical, a -- when both houses of
24 Congress and President are controlled by the
25 same party, them creating a lot of these

1 independent agencies with or extending some of
2 the current independent agencies into these
3 kinds of situations so as to thwart future
4 Presidents of the opposite party, and to
5 Justice Barrett's point, I don't think we can
6 just say, oh, that hasn't happened, so it'll
7 never happen.

8 MR. AGARWAL: Absolutely. And I -- I
9 don't think that you should articulate a rule
10 that categorically rules out the possibility
11 that some statute in the future might not
12 provide for adequate tools of presidential
13 supervision. This is not that --

14 JUSTICE KAVANAUGH: But what would be
15 the theory? I mean, that's what I'm getting
16 at. There's -- you know, just picking
17 something out of thin air, what is the theory?

18 MR. AGARWAL: One textual basis in the
19 Constitution for that would be the Take Care
20 Clause of Article II, Section 3, which does
21 require the President to take care that the
22 laws be faithfully executed, and this Court
23 could hold that in some -- that that requires
24 that the President have constitutionally
25 adequate means of supervision, such as those

1 that are adverted to in part 3(C)(ii) of Seila
2 Law that discusses exactly the types of
3 considerations to which Your Honor is
4 referring, the designation of the chair, the
5 staggered terms provision, and the opportunity
6 to influence the composition of the Commission,
7 budgetary tools.

8 I think all of those the FTC has, and
9 so we're on the right side of the line wherever
10 you draw that line. But I guess the -- the
11 bigger point is that historically, this is a
12 problem. This is a problem that has been
13 resolved through a process of political
14 accommodation.

15 And there's no reason to believe that
16 that process, which has been adequate for a
17 very long time, will not be adequate in the
18 future, but if it is, the Court can keep open
19 the possibility that there will be time enough
20 to decide on new constitutional rules.

21 JUSTICE KAVANAUGH: How do you answer
22 the accountability theme, which I think is the
23 theme of the other side, is that independent
24 agencies are not accountable to the people?
25 They're not elected as Congress and the

1 President are and are exercising massive power
2 over individual liberty and billion-dollar
3 industries, whether it's the FCC or the FTC or
4 whatever it might be?

5 MR. AGARWAL: May I answer?

6 CHIEF JUSTICE ROBERTS: Sure.

7 MR. AGARWAL: It is an entirely
8 legitimate concern, but there are
9 countervailing accountability and liberty
10 concerns on the other side. And so, for
11 example, you have an amicus brief that is
12 submitted by the Reporters Committee For
13 Freedom of the Press in this very case that
14 talks about real dangers to freedom of the
15 press, to individual liberty, to free speech
16 rights that would result from saying that
17 agencies like the FCC are all of a sudden
18 subject to at-will presidential removal.

19 And they discuss the history, just as
20 one example, this precious First Amendment
21 right that could in every meaningful sense be
22 jeopardized if we abandon longstanding history
23 and retroactively invalidate the independence
24 of independent agencies.

25 The last thing I would say if I -- if

1 I may, Justice Kavanaugh, in response to that
2 point on political accountability is that I
3 think it would be a really unfortunate way to
4 vindicate the principle of democratic
5 accountability for this Court to effectively
6 invalidate.

7 We're not talking about one or five or
8 10 or even 15, we're talking about more than
9 two dozen traditional independent agencies that
10 have been established by statutes, enacted by
11 the people's elected representatives and signed
12 into law, all of them, by democratically
13 elected Presidents.

14 If -- if it is really true that these
15 kinds of for-cause removal protections, which
16 after all authorize the President to fire
17 Commissioners just for good cause, if they
18 really pose this fundamental threat to the
19 Republic, Petitioners could take their argument
20 across the street and Congress could solve the
21 problem tomorrow. They're not willing to do
22 that.

23 CHIEF JUSTICE ROBERTS: Thank you.
24 Thank you, counsel.

25 You mentioned Humphrey's Executor

1 quite a bit and also Seila Law. And the one
2 thing Seila Law made pretty clear, I think, is
3 that Humphrey's Executor is just a dried husk
4 of whatever people used to think it was
5 because, in the opinion itself, it described
6 the powers of the agency it was talking about,
7 and they're vanishingly insignificant, have
8 nothing to do with what the FTC looks like
9 today. And yet it seems to be your primary
10 authority.

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

17 MR. AGARWAL: We have two other cases
18 in which the Court has had occasion to assess
19 the constitutionality of a single layer of
20 for-cause removal protection applicable to a
21 multi-member commission, and those two cases
22 are Wiener v. United States and Free Enterprise
23 Fund.

24 In both of those cases, the Court
25 unanimously concluded that a single layer of

1 for-cause removal protection does not offend
2 the separation of powers even with respect to
3 agencies that were wielding what everybody
4 today would consider significant executive
5 authority.

6 CHIEF JUSTICE ROBERTS: Well,
7 certainly, Wiener is sort of a protege of
8 Humphrey's and does exercise significant
9 authority but of an adjudicative nature. And I
10 don't know if that, again, should be considered
11 in -- in a direct line from Humphrey's or an
12 entirely different situation involving
13 adjudicative authority that the Court did not
14 say in deciding Humphrey's was at issue.

15 MR. AGARWAL: A couple of responses to
16 that, Mr. Chief Justice.

17 First, Petitioners' theory is based on
18 the assumption that anytime you have an officer
19 who is acting outside the auspices of Articles
20 I and III, no matter what kind of function they
21 are discharging, what they are doing "is and
22 must be deemed an exercise of the executive
23 power."

24 And if that is true, that sweeps in
25 the Commissioners of the War Claims Commission,

1 it sweeps in the Federal Reserve, it sweeps in
2 the Court of Appeals for the Armed Forces.
3 Their constitutional theory cannot be
4 distinguished on that basis.

5 CHIEF JUSTICE ROBERTS: Well, what
6 about the -- regarding them, as I think Justice
7 Gorsuch was discussing at one time, as adjuncts
8 to the judicial authority, which would be
9 something that would cover the Court, we think,
10 in Wiener?

11 MR. AGARWAL: If -- if this is a
12 viable distinction to say that there are
13 certain functions that are being performed that
14 are of an adjudicatory nature and that some
15 kind of exception should be carved out for
16 that, then why not for the FTC, which after all
17 does exercise adjudicative powers? Indeed, as
18 this Court explained in Axon -- Axon Enterprise
19 v. FTC, the -- the FTC --

20 CHIEF JUSTICE ROBERTS: Well, sure --

21 MR. AGARWAL: Yeah.

22 CHIEF JUSTICE ROBERTS: Go ahead.

23 MR. AGARWAL: The FTC stands in the
24 district court in such cases. It's doing
25 exactly the type of thing that district courts

1 do. It's finding facts and reaching
2 conclusions of law.

3 CHIEF JUSTICE ROBERTS: Yeah, but it
4 does a lot of stuff in addition to that
5 Wiener -- the -- the Court in Wiener did not
6 do, and many of these other entities that
7 you've been talking about with -- exercise
8 judicial responsibilities might properly be
9 considered adjuncts to the judicial power in
10 Article III as opposed to purely executive
11 power, which was not at issue in Humphrey's or
12 --

13 MR. AGARWAL: Sure.

14 CHIEF JUSTICE ROBERTS: -- or Wiener.

15 MR. AGARWAL: Two responses to that,
16 Mr. Chief Justice.

17 CHIEF JUSTICE ROBERTS: Sure.

18 MR. AGARWAL: In Wiener, the claims
19 commission members were making final and
20 unreviewable determinations with respect to
21 claims for compensation. And they were getting
22 no judicial review. That was final
23 determination. But the more important point is
24 that in Free Enterprise Fund, there was all
25 manner of executive authority that was being

1 wielded by the -- we're not talking about the
2 1935 FTC; we're talking about 2010 Securities
3 and Exchange Commission and the 2010 Public
4 Company Accounting and Oversight Board. This
5 Court's characterized the Board's functions as
6 involving enormous power to regulate an entire
7 industry. Nobody would say that that was not
8 executive. And, nevertheless, the Court
9 unanimously concluded that a single layer of
10 for-cause removal protection, exactly what we
11 have here, is constitutionally permissible.

12 On top of that, we don't, again, have
13 a single case that has ever struck down the
14 kind of removal protection we have here in more
15 than 200 years.

16 CHIEF JUSTICE ROBERTS: Thank you.

17 Justice Thomas?

18 JUSTICE THOMAS: You used -- when I
19 asked you or when a number of us asked you
20 about making some of the -- currently the
21 executive branch cabinet-level agencies
22 multi-member agencies, you resorted to the
23 functionality of the current agencies, such as
24 Commerce, as precluding that or at least as
25 being a basis for not doing that.

1 Now, moving the other direction, could
2 you -- you -- functionally, you say that as a
3 -- from a functional standpoint, the FTC had --
4 is -- is not an executive branch agency, and
5 you listed some of its functions.

6 Could that -- could Congress convert
7 the FTC to a single-member head with the same
8 protections because it -- and engaged in the --
9 discharging the exact same functions?

10 MR. AGARWAL: No, under this Court's
11 precedent in Seila Law --

12 JUSTICE THOMAS: No, could they under
13 the logic of your argument?

14 MR. AGARWAL: No. We accept Seila Law
15 as the -- as not only the law of the land but
16 as being correct.

17 JUSTICE THOMAS: So why --

18 MR. AGARWAL: And we embrace its --

19 JUSTICE THOMAS: What's the
20 limitation? You -- your argument was
21 functionality before, not necessarily
22 precedent. And I'm interested in why would the
23 FTC functionally be any different as a
24 single-member head than it is as a multi-member
25 agency?

1 MR. AGARWAL: It is because Seila Law
2 is correct, not just because it's precedent,
3 but because it's correct to hold there is a
4 particular danger to individual liberty that is
5 posed by the single-director highly anomalous
6 circumstance that had no foothold in history
7 and tradition and that vested a massive quantum
8 of power in one person who was not directly
9 accountable to the President.

10 CHIEF JUSTICE ROBERTS: I -- it's -- I
11 don't understand why that's any different from
12 a multi-member agency.

13 MR. AGARWAL: For all the reasons,
14 Justice Thomas, that this Court explicated in
15 Seila Law itself and, in particular, in parts
16 III.C.1 and III.C.2 of the decision, where the
17 Court talked about basically two categories of
18 considerations. One is the foothold in history
19 and tradition, and the second is whether the
20 configuration of the agency poses a problem for
21 structural separation of powers principles.
22 And in both of those, it -- the Court
23 explained, and elsewhere throughout the
24 opinion, the implications for individual
25 liberty of taking massive amounts of

1 governmental power and putting them in the
2 hands of one person who's not accountable to
3 the President as opposed to where you have the
4 multi-member structure as a practical matter,
5 there needs to be consensus, there needs to be
6 deliberation, there's a safety valve in terms
7 of dissenting opinions can be issued, and that
8 can provide an alert to the public that
9 something is going on.

10 So there's a whole variety of reasons
11 why single-member agencies have been
12 distinguished from multi-member commissions.
13 And we -- we think that precedent is correct
14 and should be adhered to. And I -- on that
15 point, Justice Thomas, I guess I would say one
16 more thing and that is I think it is a big
17 difference between our position and the
18 position of the Petitioners that we are asking
19 the Court to adhere to all of its precedents
20 and to give effect to the collective wisdom and
21 experience of all three branches of government.

22 On the other hand, Petitioners are
23 asking you to abandon precedent after precedent
24 after precedent. A lot of precedents would go
25 south if their constitutional theory is

1 correct. And a whole lot of history and dozens
2 of institutions that have been around for a
3 long time, that have withstood the test of
4 time, that embody a distillation of human
5 wisdom and experience, all of those would go
6 south.

7 CHIEF JUSTICE ROBERTS: Justice Alito?

8 JUSTICE ALITO: To follow up on
9 Justice Thomas's question, suppose that the --
10 suppose that the FTC did not have -- that the
11 members, the Commissioners, did not serve
12 seven-year terms, staggered seven-year terms.
13 Suppose there was not the requirement that
14 there -- that no more than four be members of a
15 single political party. Suppose that they just
16 -- they served very short terms.

17 In what -- what is the -- why does it
18 matter that it's a multi-member body as opposed
19 to a single-member body in itself? What is
20 significant about that?

21 MR. AGARWAL: The significance is the
22 distinction for purposes of individual liberty,
23 the threat that is posed to individual liberty
24 by single-headed agencies that are not
25 accountable to the President. That -- that, as

1 I understand it, Justice Alito, is the logic of
2 this Court's decision in Seila Law. And we
3 recognize that intelligent people --

4 JUSTICE ALITO: Well, Seila -- Seila
5 Law didn't --

6 MR. AGARWAL: -- can disagree about
7 that.

8 JUSTICE ALITO: -- I mean, Seila Law
9 didn't have to decide the question that's
10 before us here. I mean, suppose that the --
11 there were two FTC Commissioners and they
12 served one-year terms. And you would say,
13 well, that's okay, but there's a difference
14 between that and -- and an agency that is
15 headed by a single -- a single member.

16 MR. AGARWAL: Making the terms
17 shorter, in my view, would not raise
18 constitutional concerns because that would only
19 increase presidential opportunities to
20 influence the composition of the agency.
21 Reducing the number of Commissioners might be a
22 different type of situation. I'm not aware of
23 any two-headed agency that has ever been
24 created in the modern era or -- or throughout
25 American history.

1 JUSTICE ALITO: Well, okay. What
2 we're looking for are conceptual explanations
3 for the distinctions you're drawing, but let me
4 move on to something else.

5 Suppose the Department of Justice were
6 split into two parts. One part has the
7 authority to enforce the criminal laws, and the
8 other part has the authority to enforce civil
9 laws. Could the civil component -- could
10 Congress put at the head of the civil component
11 a multi-member commission with -- with removal
12 protection?

13 MR. AGARWAL: Justice Alito, there is
14 the -- the logically antecedent question with
15 respect to removal protection of whether
16 Congress has constitutionally enumerated
17 authority to enact the protection in the first
18 place. And as has been suggested in prior
19 colloquies, the relevant source of
20 constitutional authority would appear to be the
21 Necessary and Proper Clause in terms of
22 attaching removal restrictions to a federal
23 office that is created by Congress.

24 I don't think it's obvious that you
25 would -- you would comply with all the

1 strictures of the Necessary and Proper Clause
2 ex ante. And so it's not -- it's not obvious
3 that Congress could do that. And what we know
4 for sure is that Congress has never tried to do
5 that.

6 JUSTICE ALITO: Well, I know. You're
7 -- you keep answering it hasn't been done and
8 it's not going to be done in the future, but I
9 -- I want to understand the limits of the
10 principle that you're asking us to accept. So
11 you're not -- you are -- you -- you cannot say
12 no, that would not be permitted for this
13 reason?

14 MR. AGARWAL: Well --

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

17 MR. AGARWAL: If you wanted -- that is
18 one source of limiting principle for sure, but
19 also our argument is predicated, in part, on a
20 long historical tradition pertaining to what I
21 call --

22 JUSTICE ALITO: Okay. I understand
23 the historical -- the historical argument.
24 That wasn't what my question was getting at.

25 All of the civil enforcement laws, all

1 of the civil laws that are now enforced by the
2 Department of Justice were enacted by Congress
3 under one of its enumerated powers. Let's
4 assume that they were all constitutional. So
5 the -- the question is whether it would be
6 necessary and proper to the enforcement of
7 those to -- to -- given the understanding of
8 necessary and proper, to entrust that to a
9 multi-member commission as opposed to a single
10 officer like the attorney general? That would
11 be the question.

12 MR. AGARWAL: I don't think so. And
13 what I was trying to get at before is -- is not
14 just that there's an historical tradition, it's
15 that the historical tradition we're invoking is
16 for what are called traditional multi-member
17 regulatory commissions, and those historically
18 have never involved pure -- just purely
19 executive civil enforcement. They involve a
20 blend of lawmaking, adjudicatory, and
21 enforcement actions where the enforcement
22 authority is deemed to be reasonably ancillary
23 to the other functions.

24 So the kind of -- the kind of
25 hypothetical that you're positing, Justice

1 Alito, I think it's an absolutely legitimate
2 concern, but the historical tradition that we
3 are drawing on for purposes of our
4 constitutional liquidation argument would not
5 require you to affirm the constitutionality of
6 that kind of highly unusual structure that as
7 far as I know has never been attempted before.

8 JUSTICE ALITO: On the question of
9 giving the members of a multi-member commission
10 longer terms of office, so, here, we have seven
11 years. What if it were increased to 10 years?
12 What if it were increased to 15 years and so
13 forth? And the principle that you would have
14 us apply is whether that longer term of office
15 preserved adequate presidential supervision?
16 Is that your answer to the question?

17 MR. AGARWAL: That is one potential
18 limiting principle. I know that --

19 JUSTICE ALITO: We would have to -- in
20 each -- each of those case -- in every case in
21 which that would be involved, we would have to
22 make -- we would have to determine do I think
23 this preserves adequate presidential
24 supervision?

25 MR. AGARWAL: Our primary submission

1 to you, Justice Alito, would be that it would
2 not be the -- the -- the burden of the Court to
3 develop ahead of time constitutional --
4 heavy-handed constitutional rules that would
5 try to make constitutional distinctions
6 between, say, a seven-year term and a nine-year
7 term or an 11-year term. Those don't appear to
8 us to be distinctions of constitutional
9 proportions.

10 Members of the Federal Reserve do have
11 substantially longer terms than, say, FTC
12 Commissioners and, nevertheless, Petitioners
13 don't have -- don't seem to have a problem with
14 members of the Federal Reserve enjoying
15 statutory removal protections, but -- but our
16 position is that the Court should recognize
17 that these are really difficult line-drawing
18 problems and the way that that has historically
19 been resolved is through the political process,
20 and the political process is up to the task of
21 dealing with this problem.

22 JUSTICE ALITO: But you wouldn't say
23 that we leave it completely -- would you say we
24 leave it completely to the political process --

25 MR. AGARWAL: No.

1 JUSTICE ALITO: -- so that at no point
2 in the extension of these terms would we say:
3 Oh, there's a problem. I thought you were
4 saying we -- there is a test and it is whether
5 there's adequate presidential supervision.

6 And if that were challenged, we would
7 have to decide. We would have to exercise our
8 judgment about how much presidential
9 supervision is necessary to satisfy
10 constitutional requirements.

11 MR. AGARWAL: Absolutely. The Court
12 should not relinquish its authority to
13 establish judicially enforceable outer
14 boundaries in this context. I just don't think
15 that you're going to have to do that anytime
16 soon. And you might never have to do it. But
17 you should absolutely not relinquish your
18 authority to do it.

19 And there could be hypothetical
20 scenarios in the future in which there's an
21 arrangement that just palpably does not
22 guarantee adequate presidential supervision,
23 but that hypothetical risk, again, has to be
24 measured against the real-world chaos and
25 disruption that will be caused by taking --

1 JUSTICE ALITO: Okay. One -- one
2 other question about where your argument would
3 lead.

4 So, to go back to this issue of the
5 various departments and whether it would be
6 permissible for Congress to convert them into
7 agencies headed by multi-member commissioners,
8 by multi-member commissions with members
9 protected from plenary presidential removal
10 authority, the test would be whether some
11 unspecified -- some limit on permissible -- I'm
12 sorry -- a limit on exclusive and preclusive
13 activities was exceeded?

14 MR. AGARWAL: Oh, our primary --

15 JUSTICE ALITO: Do they go to -- if --
16 if they're exercising any power that is
17 exclusively and conclusively the President's,
18 do they -- are they exercising too much of
19 that? That would be the test in going through
20 these appointments?

21 MR. AGARWAL: No. No.

22 JUSTICE ALITO: No?

23 MR. AGARWAL: I think, if they're
24 exercising any power that is conclusive and
25 preclusive, then you have a

1 separation-of-powers problem, the solution to
2 which is not necessarily to strike down the
3 entire agency or even to eliminate the
4 for-cause removal provision. It creates an
5 analytically distinct issue about how you
6 remedy that violation.

7 But I -- I think any conclusive and
8 preclusive power that is vested in an agency
9 that is not sufficiently accountable to the
10 President is a problem and --

11 JUSTICE ALITO: Okay. I thought you
12 had answered, in -- in answer to a prior
13 question, you said a mere scintilla would not
14 be enough. But now you say a mere scintilla
15 would be enough to cause a problem.

16 MR. AGARWAL: I may have misspoken
17 before, Justice Alito, and if I did, I
18 apologize. But our position is that if a
19 multi-member agency is vested with the
20 President's conclusive and preclusive powers
21 and it is insulated from at-will presidential
22 approval -- supervision, that is a
23 separation-of-powers problem.

24 JUSTICE ALITO: Does -- it does 200
25 things and one of the 200 things involves

1 the -- the exercise of an exclusive and
2 conclusive presidential power. That would be
3 too much?

4 MR. AGARWAL: That would be too much
5 with respect to that power, but maybe the
6 solution to that is to sever out that power and
7 not to strike down the entire agency.

8 JUSTICE ALITO: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Sotomayor?

11 JUSTICE SOTOMAYOR: Counsel, Seila Law
12 involved the CFPC and it relied very heavily
13 on -- focused very heavily on the novelty of
14 the CFPC structure and the fact that it was a
15 historical anomaly, correct?

16 MR. AGARWAL: Absolutely. It was
17 an -- it was an anomalous structure that was
18 deemed to pose a significant threat to
19 individual liberty.

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

23 The Chief asked a question about
24 whether the additional powers the FTC has
25 gathered create a different situation.

1 As I see it and as the judge in the
2 district court outlined very clearly, most of
3 the original powers of the FTC when Humphrey's
4 Estate was decided exist -- are the same powers
5 of today, correct?

6 MR. AGARWAL: That is correct.

7 JUSTICE SOTOMAYOR: And there is one
8 power that I've identified that might be
9 different and that the cease -- that the FTC's
10 cease-and-desist orders have now binding effect
11 immediately, correct?

12 MR. AGARWAL: I believe that's
13 correct.

14 JUSTICE SOTOMAYOR: So I think your
15 point in response to Justice Alito is, if
16 there's a power that the FTC is wielding now
17 that trenches inappropriately, the answer is
18 not to do away with the for-cause removal but
19 to eliminate that power, that individual power,
20 correct?

21 MR. AGARWAL: Correct. And an
22 authority that is cited by Petitioners in their
23 reply brief, Barr v. AAPC, supports that
24 proposition.

25 JUSTICE SOTOMAYOR: And so that should

1 be the answer if there's been a difference in
2 the powers or an expansion of the powers
3 inappropriately?

4 MR. AGARWAL: That is our position,
5 yes. The parties have not briefed severability
6 at the merits stage of this case. And in the
7 event that the Court wants to reach that
8 question, you might consider either
9 supplemental briefing or remanding to the
10 district court to decide that issue in the
11 first instance.

12 JUSTICE SOTOMAYOR: Thank you,
13 counsel.

14 CHIEF JUSTICE ROBERTS: Justice Kagan?

15 JUSTICE KAGAN: Mr. Agarwal, it seemed
16 to me that when you were talking to Justice
17 Alito, you had more to say about this question
18 of comparative risks and how we should balance
19 the two kinds of risks and what we should be
20 thinking about now, so I wanted to give you a
21 chance to say that.

22 But -- and -- and within whatever you
23 want to say about that topic, I was wondering
24 if you could comment, a lot of these
25 hypotheticals have been about, you know, what

1 if -- what if Congress structured an
2 independent agency like this or like that.

3 I mean, most of these independent
4 agencies, Justice Sotomayor is right that the
5 CFPB was anomalous in this respect, but,
6 basically, like, the vast majority of them all
7 use the exact same structure or, if not exact,
8 near exact same structure. There are little
9 variations, but they're all set up with
10 bipartisanship. They're all set up with a
11 chair that -- that does have some greater
12 control and that is more controllable by the
13 President.

14 You know, they're all basically set up
15 the same way. So all of these hypotheticals
16 about what if Congress did this, I'm wondering
17 if you could comment in your discussion of
18 comparative risks about how we actually just --
19 why -- why it is that we actually have just
20 never seen that?

21 MR. AGARWAL: I think it's because the
22 political branches have learned from
23 experience, and experience is the great
24 teacher. There's a -- an insightful discussion
25 of the history and tradition surrounding

1 traditional independent agencies in the
2 separate opinion in the PHH case that has been
3 cited extensively by the parties, and that
4 explains that the structure that the political
5 branches have come up with honors and gives
6 effect to our constitutional values, as we
7 explain on the very first page of our brief.

8 We think that the political branches
9 have done a good job of learning from --

10 JUSTICE KAGAN: I mean, the political
11 branch is Congress. Congress, which is made up
12 of both Democrats and Republicans, who are
13 aware that neither Democrats nor Republicans
14 will control the government forever, and are
15 structuring these systems with that in mind.

16 MR. AGARWAL: That is -- I think that
17 is exactly right, Justice Kagan, that there's
18 an appreciation and an understanding that folks
19 in power today may not be in power tomorrow and
20 you want a structure that will be able to
21 withstand the test of time.

22 The other kind of interesting thing
23 about this is that it's not just Congress.
24 It's Congress acting together with the
25 President every single time. In the case of

1 the FTC Act, the Act has been amended time and
2 time and time again since this Court's decision
3 in Humphrey's Executor. Presidents are signing
4 all of those bills into law. They are
5 supporting the FTC in a myriad of ways. They
6 too have read the Vesting Clause of Article II,
7 and they too believe in preserving executive
8 power.

9 It is simply implausible to say that
10 Presidents have been supporting these
11 traditional independent agencies now for more
12 than a century and a half, and even from the
13 first Congress, George Washington signing into
14 law the Sinking Fund Commission, the
15 Revolutionary War Debts Commission, the Mint
16 Commission, it is absolutely implausible to say
17 for the entirety of American history,
18 Presidents of the United States have been
19 complicit in giving up a vital executive power
20 that is, according to Petitioners,
21 indispensable to their constitutional duty.

22 The better -- the better answer by far
23 is to say that Presidents have understood and
24 appreciated that vital interests of the
25 American people can be served by having

1 constraints on the exercise of power. That is
2 a really important part of our constitutional
3 tradition. And that is what Petitioners are
4 putting at risk.

5 JUSTICE KAGAN: You mentioned some of
6 the early history, and I think I want to give
7 you a little bit of a chance to talk about that
8 because we haven't. You know, when -- when I
9 was a young lawyer and this unitary executive
10 theory really got its start and got its legs,
11 there was a pretty simple version of the
12 history, and -- and that drove a lot of the
13 early discussion of the unitary executive, what
14 was wrong with Humphrey's Executor.

15 What have the historians been telling
16 us more recently about that sort of early
17 understanding of the history? And -- and, you
18 know, like, bring us up-to-date here a little
19 bit about where the history is, with respect to
20 these issues.

21 MR. AGARWAL: There was an insightful
22 discussion of this in an essay authored by
23 Professor Nelson that we have cited in our
24 brief and that cites recent historical
25 scholarship. And there is also many amicus

1 briefs that have been submitted in this case,
2 which basically affirm that there is a rich
3 body of recent, including post-Seila Law
4 historical scholarship, that supports the
5 conclusion that the -- that the history
6 surrounding this issue is, at a minimum,
7 contestable and that there is a whole lot of
8 history, actually, that supports the
9 proposition that the -- the first President of
10 the United States and the first Congress did
11 not believe that the President always and
12 everywhere had to have an absolute illimitable
13 indefeasible power to fire every singled head
14 of any kind of commission exercising any
15 significant governmental authority.

16 We know that from the first Congress
17 and the Sinking Fund Commission, the
18 Revolutionary War Debt Commission, the Mint
19 Commission, and I think there are some ten
20 other commissions, for example, that are
21 discussed in Professor Nourse's amicus brief,
22 just by way of example.

23 I think that's another virtue of our
24 position, that we're asking the Court to give
25 effect not just to the Decision of 1789 but

1 also to the Decision of 1790. The other side
2 is not doing that. They want you to give a
3 maximalist interpretation to, for example, the
4 Decision of 1789, which we agree settled the
5 question of whether the Senate should be able
6 to interfere with presidential removals. But
7 everything else as Professor Nelson explains,
8 as many other scholars have ably explained, is
9 highly contestable at a minimum. There's
10 actually a lot of historical evidence that goes
11 the other way.

12 That is all the more reason for this
13 Court to be cautious in developing heavy-handed
14 constitutional rules that, one, don't have a
15 clear basis in constitutional text. We
16 absolutely accept this Court's precedents that
17 interpret the Vesting Clause of Article II to
18 establish a general default presidential
19 removal power, but it cannot be said the
20 constitutional text clearly delineates the
21 boundaries between the President's power and
22 Congress's power with respect to removal.

23 Then when you add to that a growing
24 body of historical scholarship indicating the
25 original understanding from the time of the

1 first Congress and the first President was that
2 significant governmental authority absolutely
3 could be vested in commissions that were not
4 subject to plenary presidential control, that
5 every single member was not subject to
6 presidential control, and, in fact, in a lot of
7 respects, as the scholars have explained, those
8 early commissions were actually substantially
9 more independent than modern-day administrative
10 agencies.

11 For some of them, the President
12 couldn't even appoint -- he couldn't even
13 decide who would be on the commission as, for
14 example, with respect to the Sinking Fund
15 Commission, where you had the Chief Justice and
16 the Vice President were by operation of law
17 installed on those commissions. So those
18 commissions were in a lot of respects much more
19 independent than modern-day --

20 JUSTICE KAGAN: Thank you.

21 MR. AGARWAL: -- traditional
22 independent agencies.

23 CHIEF JUSTICE ROBERTS: Justice
24 Gorsuch?

25 JUSTICE GORSUCH: I just want to

1 explore, just for a brief minute, I hope, your
2 -- your scintilla of conclusive and preclusive
3 power theory. You agree, I assume, the
4 President is vested with all the executive
5 power.

6 MR. AGARWAL: Yes.

7 JUSTICE GORSUCH: You agree that he
8 has a duty to faithfully execute all the laws.

9 MR. AGARWAL: Yes.

10 JUSTICE GORSUCH: Civil and criminal.

11 MR. AGARWAL: We -- we agree that the
12 Constitution imposes on the -- on the President
13 a duty to faithfully execute the laws,
14 absolutely.

15 JUSTICE GORSUCH: All the laws?

16 MR. AGARWAL: Well --

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

20 MR. AGARWAL: The -- the Take Care
21 Clause is a duty, and it is also a power, but
22 the text of the clause does not provide that
23 the President must have at-will presidential --

24 JUSTICE GORSUCH: I didn't ask that.
25 This is -- does he have a duty to faithfully

1 execute all the laws?

2 MR. AGARWAL: We know from --

3 JUSTICE GORSUCH: Yes or no?

4 MR. AGARWAL: I -- I would say no, in
5 the sense -- in the sense --

6 JUSTICE GORSUCH: No?

7 MR. AGARWAL: -- in the sense -- let
8 me -- let me -- there's two different
9 questions, and I want to make sure that I'm
10 answering the questions.

11 JUSTICE GORSUCH: The question -- the
12 question is, does the President have a duty to
13 faithfully execute all the laws? The answer is
14 no. Why?

15 MR. AGARWAL: So he can't break the
16 law for sure. For sure. Does he have to be
17 vested with statutory authority to actually
18 enforce, directly enforce, or to exercise --

19 JUSTICE GORSUCH: I'm not asking
20 whether he has to bring the indictment. I'm
21 asking whether he has a duty to faithfully
22 execute the laws.

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

25 JUSTICE GORSUCH: Okay.

1 MR. AGARWAL: -- have to have plenary
2 power of -- of supervision, but in the case of
3 the FTC, he does have some power of
4 supervision, including if there's a
5 demonstrable, palpable violation of law, the
6 President could absolutely fire a Commissioner
7 of the FTC --

8 JUSTICE GORSUCH: All -- all right.

9 MR. AGARWAL: -- under the plain
10 language of the statute.

11 JUSTICE GORSUCH: So the answer is no,
12 I guess. But you say that he does have to --
13 he has to have direct supervision and removal
14 authority for someone who has conclusive and
15 exclusive authority to bring crime -- criminal
16 prosecutions, right?

17 MR. AGARWAL: That is our
18 understanding of this Court's decision in Trump
19 v. United States --

20 JUSTICE GORSUCH: That's --

21 MR. AGARWAL: -- yes.

22 JUSTICE GORSUCH: That's your
23 understanding?

24 MR. AGARWAL: Yes.

25 JUSTICE GORSUCH: But not civil?

1 MR. AGARWAL: That's right. And to go
2 back to your earlier --

3 JUSTICE GORSUCH: Okay. And -- and
4 just to be clear, so that means if the
5 government wants to bring a misdemeanor, that
6 person has to be reportable to the President,
7 but if the government wants to bring ruinous
8 fines and penalties and injunctions, that
9 person doesn't?

10 MR. AGARWAL: I don't know the scope
11 of this Court's holding in Trump v. United
12 States --

13 JUSTICE GORSUCH: I'm asking --

14 MR. AGARWAL: -- of how --

15 JUSTICE GORSUCH: -- you for your
16 theory because it's a very interesting theory.
17 You're building off of two words from Trump
18 versus United States and putting a gloss on it
19 that I -- I'm -- I'm not familiar with. I had
20 understood the executive power and he has
21 conclusive and preclusive -- preclusive
22 authority to that, but this line, I -- I don't
23 know where it comes from.

24 MR. AGARWAL: Your Honor --

25 JUSTICE GORSUCH: I'm wondering --

1 I'll be -- I'll put my cards on the table --
2 maybe it's a recognition that Humphrey's
3 Executor was poorly reasoned and that there is
4 no such thing in our constitutional order as a
5 fourth branch of government that's
6 quasi-judicial and quasi-legislative. Maybe
7 you're trying to back-fill it with a better new
8 theory that itself recognizes that we've got a
9 problem.

10 MR. AGARWAL: The theory that we are
11 referring to, Justice Gorsuch, as we understand
12 it, is not just based on this Court's recent
13 decision in Trump v. United States. It goes
14 all the way back to Marbury v. Madison. And
15 Marbury does not use the term "conclusive and
16 preclusive," but it absolutely says --

17 JUSTICE GORSUCH: And neither does
18 Humphrey's. It uses "quasi" things.

19 MR. AGARWAL: It talks of -- it talks
20 about the distinction between authorities that
21 are vested in the President and the President's
22 powers in the constitutional sense and
23 executive power in the constitutional sense.
24 And it actually cites Marbury v. Madison for
25 that --

1 JUSTICE GORSUCH: Sure. I would hope
2 it would.

3 MR. AGARWAL: -- for that proposition.

4 JUSTICE GORSUCH: Yeah.

5 MR. AGARWAL: And Marbury
6 distinguishes in the context of removability of
7 federal offices --

8 JUSTICE GORSUCH: I guess I'm just
9 wondering are going to get -- if we take -- if
10 we take your -- your theory to back-fill
11 Humphrey's and go down this road, how are we
12 supposed to decide which powers are exclusive
13 -- for your purposes, as you understand it, not
14 as I understand it, from -- from Trump v.
15 United States, but as you understand it, what
16 powers are going to fall in and what are going
17 to fall out? Are we going to have just as much
18 litigation over that as anything else we might
19 do in this case?

20 MR. AGARWAL: I don't think so. We've
21 had these -- this modern era of traditional
22 independent agencies for a long time. We
23 haven't had any precedent ever striking them
24 down. And this Court has not been, as far as I
25 know, overwhelmed with difficult questions of

1 line drawing. In fact, from 1935 to 2025, we
2 had pretty much unanimity among courts that
3 traditional independent agencies are fine.

4 To go back to your --

5 JUSTICE GORSUCH: We haven't had a lot
6 of limitation over Humphrey's and its limits
7 and its boundaries and -- I mean, Seila Law,
8 you invoke it as a great decision.

9 MR. AGARWAL: We -- We do invoke --

10 JUSTICE GORSUCH: You know, we've had
11 a lot of litigation.

12 MR. AGARWAL: We do invoke Seila Law
13 as a great decision --

14 JUSTICE GORSUCH: We're always going
15 to have litigation over the separation of
16 powers, aren't we?

17 MR. AGARWAL: There will always be
18 litigation --

19 JUSTICE GORSUCH: Yeah.

20 MR. AGARWAL: -- absolutely, but the
21 point is that this Court's precedents affirming
22 Congress's authority to work with Presidents to
23 create traditional independent agencies has not
24 generated any significant problems, still less
25 insurmountable problems.

1 JUSTICE GORSUCH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Kavanaugh?

4 JUSTICE KAVANAUGH: I'll try to tick
5 through a few questions here. On Justice
6 Alito's questions, you said independent
7 agencies do rule-making, enforcement and some
8 adjudicatory powers as well, but certainly the
9 traditional cabinet agencies do all that too,
10 or at least most of them do. So I'm not sure
11 that helps you distinguish the independent
12 agencies from the traditional executive
13 agencies on the earlier questions, but I'll
14 just leave that.

15 You said you agree with -- I think you
16 said you agree with all the Court's precedents.

17 MR. AGARWAL: Yes.

18 JUSTICE KAVANAUGH: That includes --
19 that includes everything in Myers.

20 MR. AGARWAL: We agree with the
21 holding of Myers.

22 JUSTICE KAVANAUGH: Do you agree with
23 the opinion in Myers?

24 MR. AGARWAL: No. A lot of the
25 reasoning in Myers went too far. And that was

1 part of what the Court decided in Humphrey's.

2 JUSTICE KAVANAUGH: On the text of
3 Article II, we haven't talked a lot about the
4 theory by which you get to the other side's
5 position from the text.

6 The first 15 words, "The executive
7 power shall be vested in a President of the
8 United States of America. For the President to
9 exercise that power he needs subordinates."
10 For him to -- and "he needs to be able to
11 supervise and direct the subordinates and to
12 supervise and direct, he must be able to remove
13 those officers at will." This is the theory.

14 Otherwise, and this is what I want to
15 get your answer to, "otherwise a subordinate
16 could ignore the President's supervision and
17 direction without fear and the President could
18 do nothing about it."

19 You agree that's the implication of
20 your theory, correct?

21 MR. AGARWAL: That the subordinate
22 could disregard the President's instruction and
23 that in some circumstances, the President could
24 do nothing about it, yes. In some
25 circumstances, but not under the FTC Act and

1 the modern era of traditional independent
2 agencies.

3 If there was anything like
4 malfeasance, if there was neglect of duty -- so
5 that would be associated with law breaking as
6 Professor Manners discusses in her amicus brief
7 on the INM standard.

8 JUSTICE KAVANAUGH: But generally if
9 the President says I wish you'd prefer --
10 pursue a more aggressive enforcement policy and
11 the head of the agency says I'm not going to do
12 that, there's nothing the President can do
13 about that, right?

14 MR. AGARWAL: If it's just a matter of
15 enforcement priority, that's right. And that's
16 for --

17 JUSTICE KAVANAUGH: Or I would want
18 you to issue a new rule, you know, in a
19 particular way that does a particular thing,
20 because I think as President it would be better
21 for the American people and the agency head
22 says I disagree with that, I'm not going to do
23 that.

24 You agree that that's okay under your
25 theory? That's --

1 MR. AGARWAL: That is -- that is okay
2 under our theory. That's the judgment of
3 Congress and the President and as -- as was
4 pointed out in In re Aiken, and as we've
5 explained in our brief. This Court's
6 precedents don't stand for the proposition
7 Justice Kavanaugh that we have to have those
8 arrangements. They just stand for the
9 proposition that the people's elected
10 representatives in Congress and their
11 democratically elected President in appropriate
12 circumstances can come together and decide that
13 vital interests of the American people,
14 including preservation of liberty, and I don't
15 think we should forget about that, including --
16 preservation --

17 JUSTICE KAVANAUGH: I agree.

18 MR. AGARWAL: Can be effectuated by
19 having these multi-member commissions that --

20 JUSTICE KAVANAUGH: Two -- two
21 real-world questions I want to -- you've
22 mentioned many times you can just go to
23 Congress to fix this.

24 Well, once the power is taken away
25 from the President, it's very hard to get it

1 back in the legislative process. Kind of the
2 flip side of what we were talking about in the
3 tariffs case because the Congress, the real
4 world of this is the independent agencies shift
5 power from the presidency to the Congress.
6 Everyone recognizes that.

7 I think Congress has more control over
8 the independent agencies than they do over the
9 executive agencies. Congress doesn't want to
10 give that up. It's hard for the President to
11 get new legislation passed that would, for
12 example, convert an independent agency to an
13 executive agency.

14 Do you have an answer to that real --
15 I mean, I think just leave it to Congress
16 ignores the reality of the legislative process
17 and Congress's desire to keep that power that
18 they have had that most people have recognized
19 over the independent agencies.

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

22 MR. AGARWAL: Yeah. I have two
23 responses to it. One is that I don't think
24 it's an accurate characterization of what's
25 going on to say that Congress is aggrandizing

1 its own power at the expense of the executive.
2 I think, in fact, exactly the opposite. And a
3 lot of these agencies --

4 JUSTICE KAVANAUGH: That famous
5 question, "the independent agencies are ours,"
6 by a leading member of Congress, that was just
7 --

8 MR. AGARWAL: I will give you an
9 example from the FTC Act itself. The operative
10 provision from the very first version of the
11 act provides that this act is all about
12 defining unfair methods of competition in
13 commerce, full stop.

14 How do you know what is an unfair
15 method of competition in commerce? The statute
16 doesn't say it. It delegates that
17 Congressional constitutionally enumerated
18 authority to an agency that the President has
19 all kinds of supervision and influence over.

20 And what is happening --

21 JUSTICE KAVANAUGH: But much less than
22 the executive agency. I -- I -- I understand
23 your point there. I think I -- I got it.

24 Your brief refers to regulatory
25 stability being a virtue served by the current

1 overarching regime. I don't think a lot of the
2 regulated parties really think stability has
3 been a virtue of the regime because it goes
4 back and forth when the agencies shift -- shift
5 power.

6 And so I think, you know,
7 "unaccountable instability" would be what they
8 might say, so can you address why you think --
9 and this is relevant to the stare decisis
10 factors, I think -- why you think regulatory
11 stability is actually occurring in a lot of
12 these independent agencies?

13 MR. AGARWAL: Yeah, absolutely. So
14 two things. One is that part of the logic of
15 that comes from this Court's decision just last
16 term in the Chevron case where the Court said
17 you can have a lot of regulatory instability if
18 every single time a new administration comes
19 into office, all of a sudden everything can
20 change.

21 Now, that is -- that is a problem on
22 steroids if Petitioners get their view because
23 you don't even have to wait for the
24 administration to change, the President could
25 just on a whim decide tomorrow that everything

1 the agency has been done doing is wrong.
2 Public reliance on stability
3 presupposes that this is the whole point of the
4 staggered terms requirement of -- that this
5 Court explained in detail in Humphrey's
6 Executor, that the whole point of this
7 structure is to guarantee a modicum of
8 stability that private regulated entities can
9 depend upon. And that is jeopardized by
10 at-will presidential removal.

11 JUSTICE KAVANAUGH: Two more quickly,
12 hopefully. You've used the phrase "chaos in
13 disruption" if you lose and don't strike down
14 the entire agency, I think you used that
15 phrase.

16 I don't think that's what would happen
17 if you lost. And I think you would agree with
18 what I'm about to say is, if you lose on the
19 merits, the proper remedy is simply to sever
20 the for-cause removal provision not to get rid
21 of the FTC.

22 Do you agree with that?

23 MR. AGARWAL: I agree with part of it
24 but know the all of it. The -- the remedy is
25 not to get rid of the FTC but I think there's

1 an analytically difficult question about
2 whether the proper remedy would be to sever the
3 for-cause removal provision as opposed to,
4 depending on the nature of the ruling, maybe
5 one isolated power that is deemed to be
6 quintessentially executive and that generates
7 the separation of powers problem.

8 JUSTICE KAVANAUGH: Okay. Last, sorry
9 about the length, of this but this is
10 important.

11 Last you said Congress has a
12 tradition, they won't depart from it, but the
13 last ten years we've seen two examples of first
14 of single-headed independent agency and
15 separately a double for-cause removal
16 provision.

17 So I don't think the idea that
18 Congress is just following the model that it's
19 used before is really sustainable in the face
20 of those two experiments that we've -- we've
21 seen in the last ten years. That's just a
22 comment from your point about oh, there's a
23 model and they just follow the model.

24 MR. AGARWAL: It is not an absolute
25 rule. And there may be times when the

1 political branches depart from an established
2 model. And when they do so in constitutionally
3 problematic ways, what we know from recent
4 history is that this Court will be there and
5 there will be time enough to decide those
6 questions.

7 JUSTICE KAVANAUGH: All right. Thank
8 you for your answers.

9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett?

11 JUSTICE BARRETT: I want to just ask a
12 quick question about history. Justice Kagan
13 was asking you about new scholarship that
14 historians have identified, which you say shows
15 that independent agencies has a longer pedigree
16 than maybe some thought originally.

17 But do you concede that the first
18 statutory -- anything that looks like a
19 statutory removal restriction, like the
20 inefficiency, neglect, malfeasance appeared in
21 the 1887 with the ICC?

22 MR. AGARWAL: I don't know if it's the
23 first, to be honest with you, Justice Kagan --
24 Justice Barrett, I'm sorry, but what I would
25 say is that as to the early commissions, I

1 think that factor actually cuts the other way
2 because there was no -- there was no provision
3 authorizing presidential removal for some
4 Commissioners. That's our point.

5 You had Commissioners like the Chief
6 Justice and the vice president who were
7 appointed by statute, and the President
8 couldn't remove them under any circumstances.

9 JUSTICE BARRETT: But they were two of
10 five. And it could remove -- he had -- he had
11 unchallenged authority to remove the other
12 three who served on that commission. I mean,
13 and -- and there's silence, there's not the
14 inclusion of statutory removal restrictions.
15 You didn't really see that until the ICC.

16 MR. AGARWAL: They -- they were
17 understood at the time to be for the officers
18 like the Chief Justice and the Vice President
19 on the Synching Fund Commission, for example,
20 to be completely insulated from presidential
21 removal.

22 It wouldn't make any sense for the
23 President to be able to remove them from the
24 Commission. That was not the understanding at
25 the time. This has been ably set up by many

1 historians.

2 But here's the bigger point is that
3 those commissions are in a lot of ways much
4 more independent than modern day independent
5 agencies. And Petitioner's theory is based on
6 the idea that any time these commissions are
7 exercising significant governmental authority,
8 every single commission member must be subject
9 to at-will presidential removal. And in that
10 respect their theory cannot be squared with
11 founding era --

12 JUSTICE BARRETT: Yeah, but counsel,
13 the Synching Fund had the Secretary of State,
14 Treasury, and the AG and there's no dispute,
15 even under your theory that the President could
16 fire those three. So, sure, the Chief Justice
17 and the Vice President, but he could very
18 easily take control over the fund. Also, we
19 distinguished that in Collins.

20 And I mean, it seems to me that these
21 early examples had very, very limited
22 authority. I mean, the Mint, you know, or --
23 or the Revolutionary War Debt Commission, there
24 were no statutory removal restrictions, and all
25 it did was settle accounts between the United

1 States and individual states after the war. I
2 mean, there's nothing that looks like the FTC
3 at the time of Humphrey's or certainly not
4 today. You have to concede at least that.

5 MR. AGARWAL: Yes, and two responses
6 -- but two -- two responses to that. I think
7 it's a fair observation, but, first, for the
8 Sinking Fund Commission, for example, maybe it
9 didn't wield the broad panoply authorities of
10 the FTC. That's fair enough. But Alexander
11 Hamilton thought that it was absolutely
12 indispensable to the health of the national
13 economy, at -- that this was about managing the
14 public debt, and he thought that it would
15 implicate the nation's stability going forward.
16 That's why they thought this governmental
17 function should be vested in this multi-member
18 commission. So it was not something that was
19 deemed to be insignificant by any stretch of
20 the imagination.

21 But one more point on the -- on the --
22 the difference between the three members and
23 the two members. We have real-world
24 evidence -- this is not an abstract thing. We
25 have real-world evidence of Chief Justice Jay,

1 I believe it was, who could make the
2 dispositive vote difference in terms of the
3 Sinking Fund Commission of when they make a
4 decision that the President's cabinet supports,
5 when they make a decision that they don't. And
6 so the fact that there are some members of the
7 Commission who are not -- who were concededly
8 not removable at -- at will by the President,
9 that just makes our point that the first
10 President of the United States and the first
11 Congress emphatically rejected the
12 constitutional theory on which Petitioners'
13 position is predicated.

14 JUSTICE BARRETT: Counsel, let me say
15 -- let -- let's say, just assume, that I
16 disagree with you about the history. Let's
17 assume that I think -- I'll -- I'll grant you
18 for this purpose that the Decision of 1789, if
19 you just took it in isolation, may be not as
20 conclusive as Myers thought it was. I'll just
21 grant that you for purposes of this question.
22 But let's say that I think the liquidation
23 argument throughout the 19th century shows
24 that, by the time of the end of the 19th
25 century, up until you get to the ICC, and the

1 emergence of what starts to look like the more
2 modern independent agency, that the government
3 has the better of the argument.

4 But let's say that in 1887 after the
5 ICC and then after the FTC and then after
6 Humphrey's when there was more the explosion of
7 independent agencies, that -- let's just
8 assume, again for this purpose, that at that
9 point, yes, you do have precedents like
10 Humphrey's. Humphrey's clearly is -- is, you
11 know, a good case for you. Do you still lose?
12 If I say as of 1887, it was liquidated, it was
13 settled, but then we did have cases and
14 congressional practices that veered from that
15 unbroken law.

16 MR. AGARWAL: No, we don't lose. We
17 don't lose on the merits and we certainly don't
18 lose on stare decisis.

19 So, on the merits, the doctrine of
20 constitutional liquidation by historical
21 practice absolutely can apply, based on the
22 last 150 years of history.

23 JUSTICE BARRETT: But, counsel, if it
24 had the first -- I mean, in -- in the -- the
25 assumptions that I've asked you to make, it was

1 liquidated as of 1887. So you think
2 liquidation can kind of get a new restart, like
3 kick-start in 1887?

4 MR. AGARWAL: That is not just my
5 view. That is the view of this Court in cases
6 like, I believe, NLRB v. Canning and Chiafalo,
7 and I would also direct the Court's attention
8 to United States versus Curtiss-Wright Export
9 Corporation, where the Court said you have 150
10 years of historical practice, that's enough.

11 JUSTICE BARRETT: Okay.

12 CHIEF JUSTICE ROBERTS: Justice
13 Jackson?

14 JUSTICE JACKSON: Really, really
15 quickly on your exchange with Justice Gorsuch,
16 your hesitancy to respond to his Take Care
17 question, I'm wondering whether that has to do
18 with the fact that prosecutorial discretion
19 exists and that the idea can't be, I think,
20 that the executive has to always enforce all
21 the laws, right?

22 MR. AGARWAL: I think that's right.
23 And the very authorities that Petitioners cite
24 in their reply brief actually stand for that
25 proposition. In cases like United States v.

1 Texas and the Heckler v. Cheney case, the Court
2 went out of its way to expressly and
3 unambiguously affirm Congress's authority to
4 regulate prosecutorial discretion by statute.

5 JUSTICE JACKSON: Let me ask you about
6 Justice Kagan's invitation to expound upon
7 comparative risks. I don't know if we got back
8 to that, but before -- before you do that, let
9 me just also focus in on Justice Kavanaugh's
10 question about losing on the merits and the
11 extent to which the answer would be just
12 striking down the for-cause removal
13 protections.

14 I mean, I -- I appreciate that, but
15 doesn't that create pretty significant risks
16 with respect to the missions of the various
17 agencies? I mean, it's not just we -- we don't
18 have for-cause removal and the agency
19 continues. That would then, I think, open the
20 door for the President to come in, each new
21 President, and clean house in terms of all of
22 the individuals who are running that agency,
23 notwithstanding their expertise and knowledge
24 and experience and the things that they are
25 doing to promote the mission of the agency,

1 and, presumably, the President could install
2 whoever he wanted in those positions, and that,
3 I think, creates risks.

4 So why don't you talk about the
5 comparative risks of your formulation or
6 understanding of the different constitutional
7 dynamics and what the government says should
8 happen in this situation?

9 MR. AGARWAL: Sure. There are
10 real-world risks that are palpable that we know
11 will -- can materialize very quickly if
12 Petitioners get their way. And think about it
13 in terms of commissions like the Federal
14 Elections Commission. Would anyone want those
15 sensitive election-related determinations to be
16 under the plenary control of a political actor?
17 Think about the Nuclear Regulatory Commission.
18 Can't Congress and the President come together
19 and say those types of technical determinations
20 that could have massive implications for the
21 public in all kinds of ways should be made by a
22 multi-member body of experts?

23 And if there's any kind of problem
24 with the way those commissions are work -- are
25 working, they can be changed by the political

1 branches in a heartbeat. And Presidents, as
2 far as we know, are not even trying to change
3 them. It's not like they're coming to this
4 Court and telling you we have a big problem,
5 we've been lobbying Congress, and Congress has
6 just -- you know, to Justice Kavanaugh's
7 earlier point, they're just not going along
8 with it and they're not doing the right thing.
9 Presidents are not even trying to go to
10 Congress to get these for-cause removals.

11 JUSTICE JACKSON: Because Presidents
12 have accepted that there could be both an
13 understanding of Congress and the presidency
14 that it is in the best interest of the American
15 people to have certain kinds of issues handled
16 by experts who -- and I think you were -- in
17 your colloquy with Justice Kagan, you
18 identified the fact that these boards are not
19 only experts, but they're also nonpartisan. So
20 the -- the seats are actually distributed in
21 such a way that we are presumably eliminating
22 political influence because we're trying to get
23 to science and data and actual facts related to
24 how these decisions are made.

25 And so the real risk, I think, of

1 allowing non -- of allowing these kinds of
2 decisions to be made by the President, of
3 saying everybody can just be removed when I
4 come in, is that we're going to get away from
5 those very important policy considerations.

6 MR. AGARWAL: It will get away from
7 those policy considerations and it will create
8 opportunities for all kinds of problems that
9 Congress and prior Presidents wanted to avoid,
10 risks that flow inevitably, just given human
11 nature, the realities of the world that we live
12 in, risks associated with extreme
13 concentrations of power in the hands of one
14 person.

15 JUSTICE JACKSON: Can you talk about
16 the FTC -- this is my final question. Why
17 would Congress have thought it important to
18 make this agency in particular independent?

19 MR. AGARWAL: I think in large part
20 because Congress had tried, it had experimented
21 with alternatives in the past. They didn't
22 just do this on a whim. They tried to -- to
23 do -- they tried to legislate on their own and
24 they determined that it was not practicable for
25 Congress to exercise its own constitutionally

1 enumerated authority to regulate commerce by,
2 for example, specifying ex ante all the
3 different things that would constitute unfair
4 methods of competition.

5 And so what they wanted was an expert
6 agency that could take on that task and that
7 would be insulated from political pressure not
8 just emanating from the President but emanating
9 from Congress too. Congress was giving away
10 its own power to some extent.

11 JUSTICE JACKSON: So your point is
12 that they were doing something important for
13 the interests of the American people, not with
14 an effort to try to strip the executive of any
15 authority or anything like that but to fulfill
16 its own Article I obligations to legislate in
17 the best interests of the American people.

18 MR. AGARWAL: Absolutely. And in a
19 lot of ways, they're giving the President more
20 power than he had before because the President
21 wouldn't have the authority to determine what
22 are unfair methods of competition all on his
23 own. And that's what will be the practical
24 result of accepting Petitioners' theory, that
25 tomorrow you'll have a situation where the

1 President can come in and unilaterally
2 decide -- this is a quintessentially lawmaking
3 function -- unilaterally decide what
4 constitutes an unfair method of competition,
5 what constitutes an unfair trade practice. If
6 that was going to be the law, why wouldn't
7 Congress just reserve that power to itself?

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Rebuttal, General Sauer?

12 REBUTTAL ARGUMENT OF GEN. D. JOHN SAUER

13 ON BEHALF OF THE PETITIONERS

14 GENERAL SAUER: Thank you, Mr. Chief
15 Justice. Two quick points.

16 On the sort of parade of horrors
17 arguments being made, I think it's very telling
18 that Mr. Agarwal, one of the last things he
19 said is that the FEC has to remain independent.
20 But, of course, the FEC does not have statutory
21 removal restrictions, and under Braidwood, the
22 President already has the -- the power to
23 remove the -- the commissioners of the FEC.
24 Therefore, the notion that, like, this is the
25 end of the world, it's going to change the

1 structure of our government, the -- the -- the
2 lead counterexample that's given is one that's
3 already been decided by this Court's cases.

4 Justice Barrett, regarding the
5 question of historical liquidation, we think
6 the case that you ought to look at is Powell
7 against McCormack. It's very analogous to the
8 sort of historical -- what happened in the
9 history here. In that case, Congress, from the
10 time of the Founding until reconstruction,
11 Congress after the Civil War, had interpreted
12 the Constitution to not allow it to refuse to
13 seat a member of Congress other than from the
14 reasons that are set forth explicitly in the
15 Constitution, the Qualifications Clause. The
16 reconstruction Congress changed that and
17 decided not to seat a couple of former members
18 who had too close ties to the Confederacy. And
19 after that, for the next 100 years or so,
20 Congress then started exercising that power,
21 not -- not often, but intermittently, to refuse
22 to seat other members.

23 And this Court said in Powell against
24 McCormack what is decisive there in that board
25 of constitutional interpretation is the

1 liquidation that occurred in -- in the 19th
2 century, not the subsequent, again, very
3 lengthy tenure of practice of Congress refusing
4 to do that, and, therefore, it -- it held that
5 Congress lacked the power to refuse to seat the
6 Congressman in that case. I mean, that's very,
7 very compelling here.

8 I think it's very telling that in this
9 particular case early on, Mr. Agarwal said
10 twice that it is within the realm of
11 possibility that Congress could take -- I am
12 not sure how many -- but a significant number
13 of cabinet-level agencies and convert them into
14 multi-member agency commissions outside the
15 government's control.

16 And how many of them it could do is
17 really a creature of not -- not a question -- a
18 constitutional question on his view. It's a
19 question of statutory accident, is are there
20 conclusive and preclusive powers in the organic
21 statute there? If there are, maybe they could
22 be excised.

23 And obviously the devil is in the
24 details here because if those conclusive and
25 preclusive are fairly broad, as the colloquy

1 about civil enforcement powers illustrates, if
2 they're fairly broad then basically we would
3 win this case and virtually every other case
4 because almost all the agencies, cabinet level
5 or independent agencies, are going to have
6 civil enforcement powers in most cases and so
7 forth. But if they are narrow, then we have a
8 situation where Congress could erect, virtual
9 -- reconstruct virtually the entire executive
10 branch outside the President's control and that
11 is not even a Republican form of government but
12 that is the logic of the position that's being
13 advanced here. That is the parade of horrors
14 the Court ought to consider. And that
15 contrasts dramatically with what, for example,
16 Madison said when he talked about the great
17 principle of unity and responsibility, the
18 chain of independence that runs from the
19 lowest, to the middle grade, to the highest, to
20 the President and the President is accountable
21 to the community, which is the voters.

22 In short, Humphrey's Executor is a
23 decaying husk with bold pretensions. It has a
24 powerful hold on the minds of some people
25 within our -- our -- our constitutional system.

1 It certainly seems to have a powerful hold on
2 the minds of lower court decisions. The Court
3 should -- lower court -- the lower courts and
4 their decisions. The Court should overrule
5 Humphrey's Executor explicitly and restore the
6 separation of powers to our government.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel. The case is submitted.

9 (Whereupon, at 12:35 p.m., the case
10 was submitted.)

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