

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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DONALD J. TRUMP, PRESIDENT)
OF THE UNITED STATES, ET AL.,)
Applicants,)
v.) No. 25A312
LISA D. COOK, MEMBER OF THE)
BOARD OF GOVERNORS OF THE)
FEDERAL RESERVE SYSTEM,)
Respondent.)
- - - - -

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Place: Washington, D.C.
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5 Applicants,)
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7 LISA D. COOK, MEMBER OF THE)
8 BOARD OF GOVERNORS OF THE)
9 FEDERAL RESERVE SYSTEM,)
10 Respondent.)
11 - - - - -
12
13 Washington, D.C.
14 Wednesday, January 21, 2026
15
16 The above-entitled matter came on for
17 oral argument before the Supreme Court of the
18 United States at 10:03 a.m.
19
20 APPEARANCES:
21 GEN. D. JOHN SAUER, Solicitor General, Department of
22 Justice, Washington, D.C.; on behalf of the
23 Applicants.
24 PAUL D. CLEMENT, ESQUIRE, Alexandria, Virginia; on
25 behalf of the Respondent.

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

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 25A312, Trump
5 versus Cook.

6 General Sauer.

7 ORAL ARGUMENT OF GEN. D. JOHN SAUER

8 ON BEHALF OF THE APPLICANTS

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

11 Deceit or gross negligence by a
12 financial regulator in financial transactions
13 is cause for removal. In a two-week period in
14 2021, Lisa Cook submitted mortgage applications
15 for two properties in Michigan and Georgia. In
16 both, she told the lender that, within 60 days,
17 she would occupy that property for one year as
18 her principal residence.

19 As President Trump stated in removing
20 her, it is inconceivable that she intend -- she
21 was unaware of the first commitment when making
22 the second, and it is impossible that she
23 intended to honor both. Such behavior impugns
24 Cook's conduct, fitness, ability, or competence
25 to serve as a governor of the Federal Reserve.

1 The American people should not have their
2 interest rates determined by someone who was,
3 at best, grossly negligent in obtaining
4 favorable interest rates for herself.

5 Cook's conception of cause contradicts
6 the term's longstanding meaning and overrides
7 Congress's deliberate decision not to impose
8 the inefficiency, neglect, or malfeasance
9 standard here. Her claim that she has a
10 property interest in her public office was
11 roundly rejected by the founding generation as
12 pernicious in a republican system of
13 government.

14 Her claim that the statute grants her
15 notice and a hearing contradicts this Court's
16 cases requiring very clear and explicit
17 language to restrict the President's removal
18 power. And any such process would be futile
19 because, for months, she has never personally
20 disputed the substantial truth of the material
21 in question.

22 Finally, the remedy she obtained, a
23 preliminary injunction countermanding the
24 President's decision and reinstating her to
25 office, violates longstanding principles of

1 equity and was conspicuously nonexistent in our
2 nation's history from 1789 until 2025.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: General Sauer, the --
5 this isn't central to the case, but it is an
6 antecedent point. On what basis are we to
7 conclude that the Federal Reserve is an
8 executive branch agency and, hence, that the
9 President does have removal authority?

10 GENERAL SAUER: Justice Thomas, an
11 excellent question. I would say two things
12 about that. The first one is, of course, that
13 the Federal Reserve -- there's an academic
14 dispute about whether or not the Federal
15 Reserve's open market operations constitute
16 executive power or something else, essentially
17 private conduct. However, Congress has, over
18 the years, kind of packed on traditional
19 executive powers on the Federal Reserve. So
20 the Federal Reserve can issue regulations about
21 reserve requirements in banks and even credit
22 card fees and so forth.

23 So, even if the Court were to think
24 that some of what the Federal Reserve does
25 isn't executive at all, certainly, there are

1 traditional executive powers at issue here,
2 and, therefore, we contend that this -- even
3 though we haven't disputed the validity of the
4 Article II removal restriction here, this case
5 is not transparent to Article II.

6 And, certainly, there's a statutory
7 authority that's very plain here because it
8 says removable for cause by the President, so
9 the statute is unambiguous, giving the
10 President removal power. And we contend that
11 there -- there -- at least there's -- what's
12 kind of been packed on to the Federal Reserve
13 over the years by Congress is clearly
14 quintessential executive power.

15 CHIEF JUSTICE ROBERTS: I --

16 GENERAL SAUER: Now we acknowledge
17 what the Court said in Wilcox, which is that
18 it's a quasi-private, uniquely structured
19 entity that stands in the distinctive sort of
20 tradition of the First and Second Banks of the
21 United States, and, therefore, we have not
22 challenged the -- the removal restriction in
23 this case.

24 JUSTICE SOTOMAYOR: Could you --

25 CHIEF JUSTICE ROBERTS: Counsel, I

1 want to -- before we get back to the legal
2 questions, I want to start with a little
3 factual one.

4 You -- you began by talking about
5 deceit. Does what you said after that apply in
6 the case of an inadvertent mistake contradicted
7 by other documents in the record?

8 GENERAL SAUER: We would say yes. For
9 example, the President's removal order says
10 either this is deceit or at least it's gross
11 negligence. And now, obviously, they've
12 released their letter of counsel, not from Cook
13 herself, you know, two days before the close of
14 briefing here, where they contended that it was
15 an inadvertent notation.

16 But, of course, it's the sort of
17 inadvertent notation that people could be
18 indicted for or at least the federal regulators
19 would force you to buy back your loans. It's a
20 very significant representation that, to the
21 lender, this is going to be my principal
22 residence because, obviously, you get a better
23 interest rate if that is, in fact, your
24 principal residence.

25 So it suffices from our perspective,

1 and, therefore, there's really no material
2 facts in dispute that the President determined
3 that this is at least gross negligence. Even
4 if it was inadvertent or a mistake, it's quite
5 a big mistake, so to speak, in a key financial
6 representation made in -- in the context of
7 interest rates.

8 CHIEF JUSTICE ROBERTS: Well, I mean,
9 I suppose we can debate that, how significant
10 it is in a stack of papers you have to fill out
11 when you're buying real estate. But I gather,
12 under your position, it doesn't make a
13 difference, right? In other words, the
14 determination of cause is unreviewable, right?
15 So it doesn't make a difference whether this
16 was an inadvertent mistake or whether it was a
17 devious way to get a better interest rate. It
18 doesn't matter for you, right?

19 GENERAL SAUER: Let me put it this
20 way. We would contend there's judicial review
21 kind of at the outer perimeters of cause,
22 whether something goes to conduct, fitness,
23 ability, or competence at all. But, once
24 you're within that, and we clearly are here,
25 then there would be deference to the President.

1 And we derive that from at least three
2 sources. First of all, the statutory language,
3 "cause," without further qualification, is
4 itself on its plain language a broad, you know,
5 conferral of authority on the President
6 himself.

7 Secondly, we think that places that
8 within the line of cases going from Martin
9 against Mott through Dalton against Specter and
10 beyond Payne and so forth, where the President
11 has broad discretion, and the Court has
12 consistently held in those cases where the
13 President is granted this broad discretion and
14 that's not judicially reviewable. And there
15 are statements to that effect obviously in
16 Marbury itself that they disregard, pages 165
17 and 166 of Marbury.

18 But, even if the Court doesn't accept
19 that, there's a further layer here, which is
20 that they've conceded this is an ultra vires
21 challenge, and this Court held last term that
22 the standard of review of in an ultra vires
23 challenge is very, very high for them and very
24 deferential to the President itself. It kind
25 of, you know, dovetails with our Dalton and

1 Martin argument as well.

2 In an ultra vires challenge, the
3 burden on -- would be on them to show that what
4 the President did is entirely in excess of his
5 delegated powers and contrary to a specific
6 prohibition in the statute.

7 So there's kind of three ways to get
8 to the same conclusion there, which is that
9 once the President has made a determination, it
10 clearly does relate to conduct, fitness,
11 ability, or competence for that office.

12 Then, at that point, there's no work
13 for the reviewing court to do. The traditional
14 discretion to the President's determination
15 would kick in.

16 JUSTICE SOTOMAYOR: Counsel, were any
17 of these questions, except the constitutional
18 question, decided by the D.C. Circuit?

19 GENERAL SAUER: The D.C. Circuit, in
20 its stay opinion, relied exclusively on the
21 sort of property interest argument.

22 JUSTICE SOTOMAYOR: Notice and an
23 opportunity to be heard, that's what it said
24 the Constitution required, correct?

25 GENERAL SAUER: It said that, yes.

1 JUSTICE SOTOMAYOR: All right.

2 GENERAL SAUER: It said there's a
3 property interest --

4 JUSTICE SOTOMAYOR: That's the only
5 issue --

6 GENERAL SAUER: -- in this office
7 under Loudermill.

8 JUSTICE SOTOMAYOR: That's the only
9 issue it addressed. It did not address all of
10 the things you've talked about today: What the
11 definition of "cause" is, including whether it
12 includes pre-office conduct and how much or
13 what nexus there has to be between pre-office
14 conduct and post-office conduct.

15 One could imagine that what would
16 constitute "for cause" during office would be
17 different than what would happen pre-office.
18 Even yourself below said, if something was
19 known before confirmation, you likely can't
20 rely on it. You haven't quite said that up
21 here, but, logically, pre-office has a
22 different temporal connection.

23 Then the court didn't address whether
24 the president's determination of cause is
25 reviewable and under what standard.

1 Ultra vires seems to me to be whether
2 or not another -- and that's all our cases
3 have ever said about ultra vires case --
4 situations -- whether another entity, another
5 adjudicatory entity, has jurisdiction or we do;
6 and, three, whether Cook has a right to notice
7 and a hearing under the statute and what that
8 means; and what remedy, if any, Cook can seek
9 now or finally in the case.

10 You ask us today in this emergency
11 application to provide -- to -- to finally
12 decide these issues. I want to know why.

13 Meaning, the president, by your own
14 admission, cannot fire someone for disagreeing
15 with his policy choices.

16 You've conceded that, correct?

17 GENERAL SAUER: Correct.

18 JUSTICE SOTOMAYOR: All right. So
19 it's not as if keeping her is going to thwart
20 any right he has to run the department because
21 he has none. He's conceded that. On policy,
22 he does not.

23 Now it's not as if she's been
24 incompetent, negligent, or committed
25 malfeasance while in office. This is something

1 pre-office. So keeping her in office is not
2 causing an immediate harm to the agency.

3 Number three, we know that the
4 independence of the agency is very important
5 and that that independence is harmed if we
6 decide these issues too quickly and with not
7 due consideration.

8 So waiting, to me, to have at least
9 the lower courts look at these issues first
10 makes most -- the most sense to the public's
11 confidence and to the world's confidence about
12 the due process of law.

13 Explain to me why the president's harm
14 is greater than the public's, greater than the
15 Federal Reserve, who deserves to have people
16 acting that have been in office, and, number
17 three, why we should disrupt, as we said in
18 Wilcox, the disruptive effect of repeated
19 removals and reinstatement of officers.

20 Why shouldn't we wait until the end of
21 this case, where all the issues are clear and
22 where we make a final decision as to whether
23 she should have been removed or not?

24 GENERAL SAUER: Let me start by
25 addressing that last point.

1 We are seeking a stay of an
2 unprecedented preliminary injunction, restoring
3 a principal officer of the United States after
4 being removed by the President of the United
5 States.

6 JUSTICE SOTOMAYOR: A hundred and
7 twelve years, and it's unprecedented that any
8 Federal Reserve officer has ever -- has ever
9 been removed. So the unprecedented nature of
10 this case is a -- is a part of what the
11 president did, not what Ms. Cook did.

12 GENERAL SAUER: I think that statement
13 has to be qualified by the recognition that
14 there have been situations where governors have
15 been credibly accused or found to have engaged
16 in financial improprieties and those governors
17 have resigned for financial improprieties
18 that are quite analogous to what is at issue
19 in this particular case.

20 But I want to make the fundamental
21 point that in Sawyer, this Court held that a
22 preliminary injunction was not available to
23 restore an officer. Sawyer was a preliminary
24 injunction. It's a preliminary injunction
25 against the --

1 JUSTICE SOTOMAYOR: That's true. But
2 weeks later, in Drago, we permitted an officer
3 who was still there to stay. So that was a
4 case of reinstating someone.

5 We have plenty of cases that say
6 keeping someone in place who hasn't left yet
7 is different than issuing a preliminary
8 injunction.

9 GENERAL SAUER: I think the
10 Court's referring to the Delgado case, and in
11 that particular case --

12 JUSTICE SOTOMAYOR: Sorry.

13 GENERAL SAUER: -- it was a -- there,
14 it was a writ of mandamus to an inferior there,
15 the clerk, to recognize the -- the de facto
16 officers when there was a dispute about who had
17 been validly elected to be the city
18 commissioner or whatever the statute was.

19 And this Court said it could --

20 JUSTICE SOTOMAYOR: But this is --
21 this is not --

22 GENERAL SAUER: -- grant a final
23 judgment in mandamus to say you have a
24 ministerial duty to recognize the de facto
25 officer.

1 That is totally different than issuing
2 a preliminary injunction. Keep in mind there
3 is no such thing as final mandamus. In fact,
4 Judge -- Judge Friendly once described that as
5 the starkest of solecisms. Or, sorry, there is
6 no such thing as a preliminary writ of
7 mandamus. Judge Friendly described that as the
8 starkest of solecisms.

9 What this Court held in Sawyer is
10 there is no jurisdiction to issue a preliminary
11 injunction restoring a public officer to
12 office, and -- and that's a holding of the
13 Court.

14 JUSTICE SOTOMAYOR: She never left.
15 She never left. She's still there.

16 GENERAL SAUER: She is reinstated.
17 What -- what the Court -- the Court framed its
18 holding as, there is no jurisdiction over the
19 appointment or removal in equity of public
20 officers.

21 So it does not turn on whether or not
22 she's sort of, you know, stoutly staying in
23 office or whether or not she's gone and then
24 sued later. That -- it doesn't -- nothing
25 turns on that.

1 JUSTICE JACKSON: Mr. Sauer --

2 JUSTICE BARRETT: General Sauer, can
3 I ask you a question that's also related to the
4 stay factors?

5 Justice Sotomayor brought up the
6 public interest here, and we have amicus briefs
7 from economists who tell us that if Governor
8 Cook is -- if we grant you your stay, that it
9 could trigger a recession.

10 How should we think about the public
11 interest in a case like this?

12 GENERAL SAUER: Yeah. Two -- two
13 things to say about that.

14 One is, if you look at what actually
15 happened here, she was removed on August 25th
16 and the stock market went up for the next three
17 days. So we've already had a kind of natural
18 experiment, so to speak, about whether or not
19 the predictions of doom will really be
20 implemented.

21 Surely, that if investors are jittery
22 or whatever the argument is, you would have
23 seen that on August 25th, and you did not see
24 that. In fact, you have the surprised --

25 JUSTICE BARRETT: Well, I'll interrupt

1 you there to say that I don't want to be in the
2 business of predicting exactly what the
3 market's going to do.

4 GENERAL SAUER: I agree. And that's
5 why I think the Court ought to consider all
6 those amicus briefs and their sort of, you
7 know, predictions of doom with a fairly
8 jaundiced eye.

9 What the Court has to do is weigh --
10 essentially, you have those amicus briefs as a
11 reflection of very elite opinion, elite opinion
12 that what's happened here --

13 JUSTICE BARRETT: But there's a risk,
14 General Sauer.

15 GENERAL SAUER: Yes.

16 JUSTICE BARRETT: I don't want to be
17 responsible for quantifying that risk. I'm a
18 judge, not an economist.

19 But, if there is a risk, doesn't that
20 counsel in the stay posture, when the equities
21 are at stake, caution on our part?

22 GENERAL SAUER: I think the Court has
23 to weigh that risk against the risk that there
24 will be a permanent damage to the Federal
25 Reserve's credibility from allowing an officer,

1 a governor, to remain in office who's engaged
2 in this kind of behavior before she came in
3 office. That's --

4 JUSTICE BARRETT: Well, do we also
5 engage in some weighing of our own about how
6 serious we think the misbehavior was in the
7 stay posture, not -- and I'm not talking about
8 once the case was here on the merits.

9 But, you know, if -- if she were
10 accused of murder or something like that, if
11 we're talking about something that was really
12 an infamous crime, should we take the nature of
13 the crime into account in the stay posture in
14 the weighing of the equities?

15 GENERAL SAUER: I think what the Court
16 ought to take into account is the close nexus
17 between the conduct at issue here and the
18 duties of this incredibly powerful position
19 that has sweeping, powerful authority over the
20 entire United States economy.

21 The governors set interest rates for
22 ordinary Americans all across the country.
23 And, here, there's the appearance of having
24 played fast and loose or at least been grossly
25 negligent in getting favorable interest rates

1 for herself.

2 JUSTICE BARRETT: So it's appropriate
3 to take notice --

4 GENERAL SAUER: What's the message to
5 ordinary Americans that comes out of that is
6 the question for the Court and how do you weigh
7 that against the elite opinion that's reflected
8 in the amicus briefs. Obviously, President
9 Trump's voice speaks to that concern of
10 ordinary Americans.

11 I think, when you balance the
12 equities, what the Court ought to do is look at
13 the merits, which are extremely strong for us,
14 and then look at its traditional Nken stay
15 factors. The Court says, when the government
16 is a party, the irreparable harm to the
17 government merges with the public interest.
18 And, here, we have traditional irreparable
19 harms, injuries to the President's ability to
20 remove a principal officer of the United
21 States.

22 When you look at, for example, the
23 originalist evidence we talked about in the
24 Decision of 1789, when everybody said or both
25 camps were saying, of course, the president can

1 engage in suspensory removals, and we have a
2 preliminary injunction that is conspicuously
3 nonexistent, in your words, in CASA, you know,
4 for 225 years of American history --

5 JUSTICE JACKSON: But, Mr. Sauer --

6 GENERAL SAUER: -- that's how it
7 should be balanced.

8 JUSTICE JACKSON: General Sauer,
9 excuse me, I -- I guess I think you may have to
10 be a little bit more specific with respect to
11 the irreparable harm that you are alleging
12 because, really, as Justice Barrett sort of
13 indicated, we are in a stay posture here.

14 So the question is, to what extent do
15 we believe that the president or the public is
16 harmed by allowing Ms. Cook to remain in her
17 position for the pendency of this case?

18 I'm not sure that we have evidence
19 here that Ms. Cook is an immediate threat to
20 the public, that she's been in this position
21 for a long time, the kinds of things that
22 you're pointing to, as Justice Sotomayor
23 indicates, are not related to conduct while
24 in office.

25 So it would seem to me that on the

1 stay factors, you would have to say more about
2 the harm of leaving her there for the next
3 however many months while this case is being
4 litigated.

5 GENERAL SAUER: We have a remedy here,
6 which is a preliminary injunction, and this
7 Court squarely held in Sawyer there was no
8 jurisdiction to issue.

9 JUSTICE JACKSON: Yeah, but I'm not
10 talking about the --

11 GENERAL SAUER: So it's not --

12 JUSTICE JACKSON: -- I'm not talking
13 about the Court's power to do it. I'm talking
14 about assuming we have the power for the
15 moment, I appreciate that you say we don't, but
16 assuming that we do, the question is what is
17 the harm of allowing that injunction to remain
18 because she's in office now and would just
19 continue.

20 GENERAL SAUER: Among other reasons,
21 we assert grievous irreparable injury to the
22 public perception to the Federal Reserve of
23 allowing her to stay in office. They argue
24 that this is going to cause the markets to
25 tank.

1 JUSTICE JACKSON: You have evidence
2 related --

3 GENERAL SAUER: When she was first
4 removed, they didn't tank.

5 JUSTICE JACKSON: You have evidence
6 related to the public perception, or is this
7 just the President's view?

8 GENERAL SAUER: The President has made
9 that determination. It's reflected in the
10 language of the dismissal order, and as I
11 discussed earlier --

12 JUSTICE JACKSON: Did the President
13 make that --

14 GENERAL SAUER: -- it was closely --

15 JUSTICE JACKSON: Did the President
16 make that determination based on evidence
17 presented to him in the context of some kind of
18 hearing related to Ms. Cook's conduct?

19 GENERAL SAUER: A Federal Reserve
20 governor who sets interest rates for the entire
21 country appears to have engaged in improper
22 behavior --

23 JUSTICE JACKSON: No, no, no, I
24 understand -- I --

25 GENERAL SAUER: -- to obtain favorable

1 interest rates for herself --

2 JUSTICE JACKSON: You're -- you're --
3 you're repeating --

4 GENERAL SAUER: -- by seeing it so
5 low --

6 CHIEF JUSTICE ROBERTS: Counsel --

7 JUSTICE JACKSON: -- you're
8 repeating --

9 CHIEF JUSTICE ROBERTS: -- please
10 allow the Justice --

11 GENERAL SAUER: I'm sorry.

12 JUSTICE JACKSON: You're repeating the
13 allegation. What I'm asking you is the
14 evidence that supports that allegation.
15 Traditionally, when an allegation is made about
16 someone's misconduct or whatnot, there's an
17 opportunity for that person to present
18 evidence, for the other side to present
19 evidence. And even if the President was the
20 final arbiter of this, one would expect that he
21 would do so on the basis of evidence.

22 So what I'm trying to understand is
23 what is the evidence that has been presented
24 and considered with respect to Ms. Cook's
25 alleged misconduct?

1 GENERAL SAUER: Well, the removal
2 order addresses that because it --

3 JUSTICE JACKSON: What is the removal
4 order? The -- the -- the Truth Social post?

5 GENERAL SAUER: It's the -- no. It's
6 the August 25th letter. I think it's Doc 1-4
7 in the district court. But the removal order
8 addresses that. The evidence is you have
9 mortgage applications within two weeks of each
10 other that make clearly conflicting
11 representations.

12 JUSTICE JACKSON: Was Ms. Cook given
13 the opportunity in some sort of formal
14 proceeding to contest that evidence or explain
15 it?

16 GENERAL SAUER: Not a formal
17 proceeding. She was given an opportunity in
18 public because she was notified --

19 JUSTICE JACKSON: In the world?

20 GENERAL SAUER: Yes.

21 JUSTICE JACKSON: Like, she was
22 supposed to post about it and that was the
23 opportunity to be heard --

24 GENERAL SAUER: Yeah.

25 JUSTICE JACKSON: -- that you're

1 saying is -- was afforded to her in this case?

2 GENERAL SAUER: Yes, and she's had
3 plenty of opportunities in the ensuing months
4 where we've had ongoing litigation where
5 there's never been a personal statement
6 addressing that --

7 JUSTICE GORSUCH: General --

8 GENERAL SAUER: -- or -- or justifying
9 it.

10 JUSTICE GORSUCH: General, let's --
11 let's -- just suppose with me hypothetically
12 for the moment that the Court read the -- the
13 act to require notice and a hearing. I assume
14 everybody has notice now. Here we are.

15 What would that hearing look like?

16 GENERAL SAUER: I would point to what
17 the Court has said in Vermont Yankee, which
18 this Court is very reluctant to dictate
19 procedures to even federal agencies. And,
20 here, the Court would be dictating or a court
21 would be dictating procedures to the President.

22 I think they rely heavily on
23 Loudermill. Obviously, we dispute that there's
24 any notice and hearing requirement. But
25 Loudermill requires only very minimal, flexible

1 procedures.

2 JUSTICE GORSUCH: That would be
3 calling Ms. Cook into the Roosevelt Room,
4 sitting across a conference table, listening
5 for I don't know how long, how much evidence,
6 is a lawyer required, and then -- and then
7 making a decision? Could that suffice, you
8 think? What would -- what would be required?

9 GENERAL SAUER: It would probably be
10 entire -- if -- if the Court were to conclude
11 that, it would be -- have to be entirely
12 dependent on the executive to decide, and
13 that's what the case law indicates.

14 Certainly -- and I think the question
15 points out a great weakness in their argument,
16 which is that the word "cause" does not include
17 notice and a hearing by -- on its face.
18 Congress knows how to provide notice and a
19 hearing. It did so in the NLRA one month
20 before it -- it reenacted the for-cause
21 restriction here in 1935.

22 And because it's not there, the Court
23 has nothing to provide guidance on that point.
24 And if the Court were to conclude that, it
25 would be up to the executive's discretion.

1 JUSTICE GORSUCH: So just -- just --
2 just a meeting across a conference table
3 finished with "you're fired"? I mean --

4 GENERAL SAUER: All Loudermill says is
5 that you have to be told of what the basis is
6 of the allegations against you and give a
7 chance to tell your side --

8 JUSTICE GORSUCH: Okay.

9 GENERAL SAUER: -- of the story. We
10 believe that was provided in the five-day
11 window --

12 JUSTICE GORSUCH: Yeah.

13 GENERAL SAUER: -- between the Truth
14 Social post and -- and the removal letter.

15 JUSTICE GORSUCH: And then --

16 JUSTICE KAGAN: But do --

17 JUSTICE GORSUCH: And then you
18 mentioned on remedy that there's no such thing
19 as a preliminary injunction for mandamus, and I
20 just wanted to hear you a little bit more on
21 that. You mentioned Judge Friendly. Please,
22 thoughts.

23 GENERAL SAUER: So the contention in
24 the amicus briefs is that you can rely on
25 Delgado to sort of bypass the holding of Sawyer

1 and say that mandamus can provide the
2 essence -- essentially, the same relief as a
3 preliminary injunction. I guess the argument
4 would be you'd have to mandamus everybody, so
5 all the members of the -- members of the Board,
6 to treat her as she's still -- as if she's
7 still a governor, all the staff to treat them
8 as -- as -- as if they were still a governor,
9 because Delgado held where there was the city
10 clerk who can't decide who was validly elected
11 city commissioner, the Court held you could
12 mandamus that clerk to recognize the de facto
13 officer in the interim.

14 And that doesn't work for a couple
15 reasons. First of all, this is a preliminary
16 injunction. Mandamus would have to be a final
17 judgment. And that's what Judge Friendly said.
18 There is no preliminary mandamus. That's the
19 starkest of solecisms.

20 JUSTICE KAGAN: Do -- do I understand
21 you, General, going back to Justice Gorsuch's
22 first question, to continue to maintain that,
23 in fact, there is no requirement for notice and
24 opportunity for a hearing? Is that right?

25 GENERAL SAUER: Absolutely, yes.

1 JUSTICE KAGAN: And -- and -- and why
2 is that? Just because it's not stated in the
3 statute?

4 GENERAL SAUER: It's not stated
5 explicitly in the statute, and Congress knows
6 how to provide that because --

7 JUSTICE KAGAN: But --

8 GENERAL SAUER: -- it did so a month
9 earlier in a similar statute and has done so in
10 many, many statutes.

11 JUSTICE KAGAN: It -- it doesn't do
12 that -- yeah, I thought that with respect to
13 the neglect, inefficiency standard, you do
14 recognize notice and a hearing for that but not
15 in this statute. Why the difference? Because
16 neither is stated.

17 GENERAL SAUER: Yeah. Two reasons.
18 In both Shurtleff and Reagan, this Court
19 expressly recognized that that phrase, "INM,"
20 would or specified causes would bring with it
21 notice and a hearing. And that's part of the
22 Court's holding in Shurtleff, as -- as I read
23 it, because, there, it was an INM standard.

24 JUSTICE KAGAN: Right.

25 GENERAL SAUER: And there was a

1 removal with no notice or hearing. And the
2 Court held, well, clearly, this wasn't for
3 INM --

4 JUSTICE KAGAN: I mean, your --

5 GENERAL SAUER: -- because it was
6 notice and a hearing.

7 JUSTICE KAGAN: I think your reasoning
8 would be that that was a mistaken holding
9 because it -- since it's not stated in the
10 statute, there's no need for notice and a
11 hearing.

12 GENERAL SAUER: Not exactly because
13 the old soil argument that we reject as to just
14 simply cause is, we admit, much stronger when
15 it comes to specified causes. So we don't
16 think the Court necessarily got it wrong in
17 Reagan when it said specified causes mean that
18 notice and a hearing are provided because the
19 case law, it's the one point on which the sort
20 of background case law does seem to be
21 unanimous.

22 On the other issues where they
23 contended, the case law all goes in one
24 direction. You have their own sources saying
25 they're all over the map. They're directly

1 contradictory, for example, in the --

2 JUSTICE KAGAN: But the outcome of
3 your position is that in this case, without --
4 where you don't have the inefficiency, neglect
5 standard, the President need not provide any
6 notice, the President need not provide any
7 hearing; the President just really has to say,
8 Ms. Cook, you're fired?

9 GENERAL SAUER: He has to provide a
10 cause. We contend that there has to be a
11 cause, something that relates to conduct,
12 fitness, sufficiency, or competence. We
13 concede it cannot be for policy disagreement
14 or -- or for no reason at all or at will.

15 CHIEF JUSTICE ROBERTS: General Sauer,
16 if -- if you're correct that courts do not have
17 the authority to reinstate a removed officer,
18 why are we wasting our time wondering if
19 there's cause or not? Because, even if we say,
20 yes, there is cause, he shouldn't have removed
21 her, but we don't have the authority to order
22 her reinstatement, what's the -- how is that
23 consistent with -- with the time and energy
24 being spent on determining if there's cause?

25 GENERAL SAUER: We agree. That's an

1 alternative basis. As we say in our brief,
2 that's reason enough to rule in our favor, and
3 we have a holding of the Court, Sawyer. We
4 also have this tradition I was referring to
5 earlier of recognition that runs from the
6 decision of 1789 to all the opinions in Myers.
7 It's alluded to in Wiener and so forth,
8 recognizing the President's power of interim or
9 suspensory removals.

10 So we agree that's an alternative.
11 That's an independent basis for us to prevail.

12 CHIEF JUSTICE ROBERTS: Well, it's an
13 independent basis. I guess it's not
14 independent in the sense that, if that's right,
15 the other one is irrelevant, right? It seems
16 to me that if there is any level of cause, and
17 you indicate that there is some level of cause,
18 right, well, then you can't be right about the
19 idea that courts can't order anybody who's been
20 removed to be reinstated.

21 GENERAL SAUER: There is a traditional
22 remedy to reinstate wrong -- we don't dispute
23 there's a traditional remedy to reinstate
24 wrongfully removed officers, which is mandamus.
25 But they don't argue mandamus here, and the

1 reason they don't argue mandamus is they face a
2 number of insuperable obstacles to prevailing
3 in mandamus. One is, of course, going all the
4 way back to Marbury against Madison. You can't
5 mandamus the president in his discretionary
6 acts. In addition to that, there is no
7 preliminary writ of mandamus, as Judge Friendly
8 pointed out and the Seventh Circuit has held.
9 In other words -- and keep in mind that the
10 standard in mandamus would be clear and
11 indisputable right to relief.

12 And, in fact, this is an ultra vires
13 challenge, where the standard is exactly the
14 opposite and you can't --

15 CHIEF JUSTICE ROBERTS: So there's a
16 circumstance in which a court can order the
17 restatement of a wrongly removed officer?

18 GENERAL SAUER: But the -- there is
19 a -- a traditional remedy, mandamus. Here,
20 obviously, it would be quo warranto if there
21 were two competing claimants, but where there's
22 just the one, that would be mandamus. And they
23 have not argued mandamus. They're trying to
24 find their way around mandamus because the
25 standards to prevail under mandamus are

1 insuperable and they clearly cannot meet them.

2 JUSTICE JACKSON: But, General --

3 CHIEF JUSTICE ROBERTS: Thank you.

4 I'm sorry.

5 JUSTICE JACKSON: Oh.

6 CHIEF JUSTICE ROBERTS: Justice

7 Thomas?

8 Justice Alito?

9 JUSTICE ALITO: Is there any reason
10 why this whole matter had to be handled by
11 everybody, by the executive branch, by the
12 district court, by the D.C. Circuit, in such a
13 hurried manner? We -- you began by laying out
14 what you claim to be the factual basis for the
15 for-cause removal.

16 But no court has ever explored those
17 facts. Are the mortgage applications even in
18 the record in this case?

19 GENERAL SAUER: I know that the text
20 of the social media post that screenshots the
21 mortgage applications is in the record. But I
22 don't recall if the -- the paperwork itself is
23 in the record, in the district court's record.

24 JUSTICE ALITO: So, when this was
25 before the executive branch, it was handled in

1 a very cursory manner. The district court
2 decided the case on the ground that "for cause"
3 doesn't mean anything that happened before the
4 person took office. And I'll question
5 Mr. Clement about that when he's -- when he --
6 when he stands up.

7 The D.C. Circuit decided it on two
8 grounds, the same as the district court, and
9 that there's a property interest in holding the
10 position of governor of the Federal Reserve
11 Board.

12 Am I right on that?

13 GENERAL SAUER: Not exactly. The --
14 the D.C. Circuit stay panel relied only on the
15 property interest, did not rely on the
16 pre-office misconduct, and that's
17 insupportable. We --

18 JUSTICE ALITO: Well, did it not hold
19 that that's what "for cause" means?

20 GENERAL SAUER: My recollection is
21 that the D.C. Circuit -- the Garcia opinion in
22 the D.C. Circuit relied solely on Loudermill
23 and the due process property interest, which is
24 baseless for the reasons we say. And now the
25 district -- the district court relied on the --

1 the twin grounds, both that Loudermill
2 rationale and also the --

3 JUSTICE ALITO: All right. I stand --

4 GENERAL SAUER: Yeah, yeah.

5 JUSTICE ALITO: -- I stand corrected
6 on that. But those are the only two issues
7 that were decided by the lower courts?

8 GENERAL SAUER: That's correct.

9 CHIEF JUSTICE ROBERTS: Justice
10 Sotomayor?

11 JUSTICE SOTOMAYOR: I have a couple of
12 follow-ups.

13 On Reagan and Shurtleff, you're
14 relying on those two cases for your proposition
15 that cause could be whatever the person, the
16 authority, decides. But Reagan and Shurtleff
17 were very careful in holding that the only
18 reason that was true was because there would be
19 life tenure involved otherwise.

20 It was very careful to distinguish its
21 holding from cases in which there were a
22 tenured position and there was a for-cause
23 provision. So you're extrapolating, correct?

24 GENERAL SAUER: I disagree with that.
25 We read Reagan differently. If you have

1 that -- those two key paragraphs in Reagan --

2 JUSTICE SOTOMAYOR: Well, we can both
3 look at it.

4 GENERAL SAUER: -- Your Honor, they
5 don't talk about fixed term at that point.

6 JUSTICE SOTOMAYOR: I think the
7 direct -- but the Court recognized the rule,
8 and I'm quoting from the case, "where causes of
9 removal are specified by statute, as also where
10 the term of office is for a fixed period,
11 notice and hearing are essential."

12 Here, you need for cause and there's a
13 fixed period of tenure. And Reagan very
14 clearly said notice and a hearing are required.

15 So, if I move on from that, I go back
16 to Justice Alito's question of you. I
17 thought -- and -- and the Chief's. I thought
18 there was a factual dispute. As I understood
19 it, Ms. Cook's letter, her attorney's letter,
20 and, quite frankly, I've never understood that
21 a letter from a lawyer wasn't a representation
22 by a client. This is a new standard I've never
23 heard of before in an informal proceeding.

24 If the president can go by social
25 media and one believes that that is adequate

1 notice under law, I'm hard pressed to think a
2 letter from a lawyer is not notice from the
3 adversary. But we can move on from that.

4 The letter from Ms. Cook says: The
5 Michigan bank gave me permission to rent
6 because I got a job in Washington. I had to
7 move from New York when I got my job in
8 Washington, and, frankly, I renovated my
9 apartment the year before, thinking I would be
10 in New York for the rest of my life. Things
11 change, and the bank in Michigan, at least they
12 represent, will say there was no deceit of
13 them.

14 As to the mortgage issue in Atlanta,
15 Ms. Cook's lawyer represents that the paper
16 submitted to the bank disclosed the fact that
17 this was a vacation home. So they may not have
18 experienced deceit.

19 If they didn't experience deceit, then
20 you're left with gross negligence, and the
21 question becomes, is it grossly negligent to
22 make a mistake on a mortgage application? And
23 I don't know that gross negligence has ever
24 risen to the level of a mistake. So there is a
25 factual issue.

1 Now the question is, who resolves that
2 issue, the level of review of that decision,
3 and those are all questions, as Justice Alito
4 pointed to, have not been addressed below,
5 correct?

6 GENERAL SAUER: What was addressed
7 below is I think exactly what I had in the
8 exchange with Justice Alito.

9 JUSTICE SOTOMAYOR: Just the due
10 process right to notice and a hearing by the
11 circuit court and for cause being something
12 that has to be only what's at the time of in
13 office.

14 I do agree with you, common law did
15 permit pre-office conduct to be considered but
16 only if for an infamous crime. I don't think
17 this rises to an infamous crime.

18 GENERAL SAUER: If I could say two
19 things about that. First, on the -- the -- the
20 narrow point about whether or not a letter of
21 counsel can create a factual dispute in this
22 context, that's the holding of this Court in
23 Codd against Velger, where the Court said that
24 suggestions of counsel are not enough. It's
25 the party who has to -- to do it. So there

1 were representations of counsel there, and the
2 Court held that that wasn't enough to bring --

3 JUSTICE SOTOMAYOR: That's in a legal
4 proceeding. This is an informal proceeding. A
5 legal proceeding.

6 GENERAL SAUER: Yeah. The point was
7 there had never been any representation by --
8 by the party in any context, formal or
9 informal. And we -- that's exactly what we
10 have here. That's the one point. I can't
11 remember the second point I was going to make
12 in response to that.

13 JUSTICE SOTOMAYOR: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice Kagan?

15 JUSTICE KAGAN: General, can I take
16 you back to the Chief Justice's question, the
17 remedial question, the last one? Because, in
18 response to him, you said kind of no worries
19 because there's a traditional remedy of
20 mandamus.

21 But then pretty much in the next
22 sentence you said, but, of course, mandamus
23 doesn't apply here because it's the president.

24 So, I mean, when we're talking about
25 the president's removal powers, you're

1 essentially saying that the only remedy doesn't
2 apply. And that brings you back to the Chief
3 Justice's question, which is, well, if -- if
4 there's no way to reinstate, like, what does
5 this cause requirement amount to?

6 GENERAL SAUER: Well, Congress adopted
7 a policy choice to impose on the president a
8 cause requirement and not an INM requirement.
9 As Justice Alito pointed out in the CFPB
10 funding case, this was a hard-fought compromise
11 between two influential camps.

12 JUSTICE KAGAN: Yeah, but I think -- I
13 think there's some kind of cause. It doesn't
14 have to be inefficiency, neglect, malfeasance.
15 But there is some kind of cause that's
16 necessary. You said that yourself in response
17 to my last question, that the president has to
18 state a cause.

19 But, if then you're saying, well, even
20 if he flunks whatever that requirement is,
21 there's no way to reinstate the person, there's
22 no way to use the mandamus route, what does it
23 amount to? It seems pretty -- it seems
24 non-effectual.

25 GENERAL SAUER: It is a -- if it is

1 non-effectual, which we dispute, we think it's
2 very effectual. And it's proven to be
3 effectual in history because it provides the
4 governors with the most important protection,
5 which is that Congress apparently wanted to
6 give them, which is removal for -- protection
7 against removal for policy disagreements. And
8 governors have not been removed for policy
9 disagreements. That has been the perspective.

10 JUSTICE KAGAN: Except there's no
11 way -- there's no way to test that. There's no
12 way either that the person can come in and have
13 that meeting in the Oval Office or the
14 Roosevelt Room or wherever else, saying I think
15 you're really getting rid of me for policy
16 reasons.

17 There's no way for a court to evaluate
18 that. The president just has to say: I'm
19 removing you for cause. You committed gross
20 negligence.

21 GENERAL SAUER: And there's no
22 question for all the reasons we discussed in
23 our briefing that that confers broad discretion
24 on the president. Now there's an outer
25 perimeter that is subject to policing by

1 judicial review, policy disagreement, no cause
2 at all and so forth, but that is -- confers
3 broad discretion on the president.

4 But, even if it was de novo review
5 here, gross negligence in a very important
6 financial transaction that has this close nexus
7 with what a governor does --

8 JUSTICE KAGAN: Does the president
9 have to say what --

10 GENERAL SAUER: -- would satisfy it.

11 JUSTICE KAGAN: Does the president
12 have to say what the gross negligence is, or
13 can the president just say: I'm removing you,
14 it's not for policy, it's for gross negligence?

15 GENERAL SAUER: So we have, I think,
16 conceded in the briefing that that sort of
17 determination would be subject to judicial
18 review because he hasn't specified the cause.

19 Now the case law, that's a -- that's a
20 borderline case. The case law goes in
21 different directions on that. Garland, one of
22 the cases that we cite in our brief, kind of
23 goes the other way, in a way that would be
24 stronger for us, but we haven't disputed that
25 in this case, that if it was -- there was no

1 cause provided at all, then that would be
2 subject to judicial review and likely an
3 invalid removal.

4 JUSTICE KAGAN: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Gorsuch?

7 JUSTICE GORSUCH: I -- just to follow
8 up on Justice Kagan's questions, I -- I think
9 in them was the question, if you think mandamus
10 doesn't apply to the president at all, ever,
11 how could you ever test the things you say can
12 be tested? He has to remove for cause. He
13 can't remove for policy disagreements.

14 That might be one. The president
15 says: I remove you for policy disagreements.
16 He's open about it, let's say. It could
17 happen, right? You would say still mandamus is
18 not available, I think, wouldn't you?

19 GENERAL SAUER: I think we would. Now
20 that might be a closer case because the
21 mandamus statement -- standard is clear and
22 indisputable right when we have conceded that
23 policy disagreement would not be available.
24 Actually, that might be a case where mandamus
25 might be available with the caveat that how

1 would Marbury apply to that. Marbury says you
2 cannot mandamus the president in a
3 discretionary decision.

4 And so baked into our jurisprudence
5 from the dawn of -- of this Court --

6 JUSTICE GORSUCH: Would you say that
7 that's not a --

8 GENERAL SAUER: -- is the notion
9 there's going to be some things the president
10 does that you can't dispute.

11 JUSTICE GORSUCH: Would you say that's
12 not a discretionary decision? If the president
13 says: I fire you for -- for policy reasons,
14 that that would be outside of his discretion
15 and, therefore, subject to mandamus?

16 GENERAL SAUER: Essentially. The --
17 the argument would have to be that would be
18 ministerial within the --

19 JUSTICE GORSUCH: Yeah.

20 GENERAL SAUER: -- within the meaning
21 of Marbury. And then I think that -- that --
22 that standard in Marbury kind of gets ported
23 into the standard in Cheney, clear and
24 indisputable right.

25 JUSTICE GORSUCH: Yeah. It -- it --

1 it would be clear and indisputable and,
2 therefore, could run against the president in
3 that case?

4 GENERAL SAUER: Hypothetically. I'd
5 to have do a lot more study before taking a
6 firm position on that.

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh?

9 JUSTICE KAVANAUGH: For present
10 purposes, you accept the constitutionality of
11 the for-cause removal provision for the Federal
12 Reserve, and that is what protects the
13 independence of the Federal Reserve. What, in
14 your view, is the purpose of that independence?

15 GENERAL SAUER: It protects the --
16 exactly reflecting the plain text of the
17 statute, it protects the governors for removal
18 for policy disagreement or for no reason at
19 all.

20 JUSTICE KAVANAUGH: And what is the
21 broader purpose of that?

22 GENERAL SAUER: To preserve the
23 independence of the Federal Reserve.

24 JUSTICE KAVANAUGH: And what is the
25 broader purpose of that?

1 GENERAL SAUER: Well, there is a
2 number of reasons that are discussed by their
3 amici and I think not disputed by us, which is
4 that there is a -- you know, a long tradition
5 of having this exercise of monetary policy be
6 exercised independent of, you know,
7 executive -- executive influence. And we don't
8 dispute that that's what Congress was doing in
9 that statute. And, again, we have not disputed
10 the validity of the for-cause removal
11 restriction here.

12 JUSTICE KAVANAUGH: And why is that
13 independence important in your view?

14 GENERAL SAUER: For -- I -- I don't --
15 we don't dispute the importance of that for
16 many of the reasons that their amici say, but
17 we emphasize that there's a balance struck
18 here. This is not a ironclad "you can never be
19 removed." There is a cause removal authorized
20 in --

21 JUSTICE KAVANAUGH: But, on that, your
22 position that there's no judicial review, no
23 process required, no remedy available, a very
24 low bar for cause that the president alone
25 determines, I mean, that would weaken, if not

1 shatter, the independence of the Federal
2 Reserve that we just discussed.

3 GENERAL SAUER: We disagree with that.
4 And I would point to the point that -- the
5 point you made that this is a low bar for
6 cause. In a sense, it's a very high bar. It's
7 a very strong protection because it does
8 protect them from the one thing that Congress
9 was apparently most worried about, which is a
10 removal for policy disagreement.

11 JUSTICE KAVANAUGH: But it would be in
12 the view of the president, the president who
13 might have a policy disagreement, and there's
14 no judicial review, and the president can just
15 define it on his or her own, right?

16 GENERAL SAUER: One of the strongest
17 traditions in this Court's jurisprudence is
18 the -- the sort of presumption of regularity to
19 the president's action. That has applied to
20 this provision, I think, effectively for 112
21 years and it continues to do so.

22 JUSTICE KAVANAUGH: Let's talk about
23 the real-world downstream effects of this
24 because, if this were set as a precedent, it
25 seems to me, just thinking big picture, what

1 goes around comes around.

2 All of the current president's
3 appointees would likely be removed for cause on
4 January 20th, 2029, if there's a Democratic
5 President or January 20th, 2033, and then we're
6 really at at-will removal. So what are we
7 doing here?

8 GENERAL SAUER: Yeah.

9 JUSTICE KAVANAUGH: What is -- you
10 know, we started -- that's why I started with
11 what's the purpose of the independence in the
12 for-cause removal. If we accept all these no
13 procedure, no judicial review, no remedy, you
14 know, that's what's going to happen, I think,
15 and then -- then where are we?

16 So do you dispute that that is, you
17 know, the -- the real-world effect?

18 GENERAL SAUER: I cannot predict what
19 future presidents may or may not do, but the
20 argument strikes me as a policy argument --

21 JUSTICE KAVANAUGH: Well, history is a
22 pretty good guide. Once these tools are
23 unleashed, they are used by both sides and
24 usually more the second time around. And I
25 think that's what -- that's what we have to

1 make sure we're -- again, that can't drive the
2 decision necessarily. We have to be aware of
3 what we're doing and the consequences of your
4 position for the structure of the government.

5 GENERAL SAUER: Two points there. I
6 dispute the characterization that these tools
7 have been unleashed. The president has always
8 had this tool to remove governors for -- for --
9 for financial improprieties. Now the history
10 is, including twice in the last four years,
11 governors who have been credibly accused of
12 financial improprieties have resigned. They
13 haven't forced the president to remove them.

14 And I think the more sort of
15 fundamental point is that cause is a standard
16 that is quite deferential to the president.
17 Congress consciously adopted that instead of a
18 more restrictive standard like INM that was
19 for, by all appearances, a legislative
20 compromise between two camps, one of which
21 wanted to give the president complete control
22 and one of which --

23 JUSTICE KAVANAUGH: I agree with you
24 that there's a balance here, and so I
25 understand that. I'm not saying there's no

1 interests on the other side here. I -- I get
2 that.

3 But, again, thinking about the real
4 world and the brief of the former Governors of
5 the Federal Reserve, I mean, your position,
6 again, because you say, well, the president
7 can't say it's for policy reasons, which may be
8 what's really -- again, in not talking about
9 the current situation and other situations in
10 the future -- what's really driving it. It
11 incentivizes a president to come up with
12 what -- as the Federal Reserve former governors
13 say, trivial or inconsequential or old
14 allegations that are very difficult to
15 disprove. It incentivizes kind of the search
16 and destroy and find something and just put
17 that on a piece of paper, no judicial review,
18 no process, nothing, you're done.

19 I mean, again, what -- what are we
20 doing when we have a system that -- that
21 incentivizes that and leads to that? Now,
22 again, you can dispute that you think it's
23 going to lead to that. And, again, I'm not
24 talking about the facts of this case. I'm
25 taking -- I don't know the facts of this case.

1 I'm taking no position on that.

2 GENERAL SAUER: This Court has since
3 Martin against Mott, running all the way
4 through Trump against United States, Trump
5 against Hawaii, a whole host of decisions,
6 accorded, consistently afforded the president
7 the presumption of regularity in his action and
8 consistently declined to probe a president's
9 actions for, you know, their -- for their
10 subjective motivations.

11 And so, in the hypothetical question
12 that you pose, that hypothetical future
13 president should also be afforded the very same
14 sort of deference and -- and --

15 JUSTICE KAVANAUGH: But that leads --
16 I mean, that brief, that amicus brief, cites
17 Justice Scalia's dissent in Morrison, which is
18 always a good place to look for wisdom, and
19 the -- the concern that you're putting all
20 these resources -- because you can't say it's
21 for policy, putting all these resources, let's
22 find something, anything, about this person
23 and -- and -- and -- and then we're good. And,
24 by the way, there's no judicial review, so
25 we're really good. And there's no

1 administrative process.

2 GENERAL SAUER: And, again, I disagree
3 with that. I think that the -- that argument,
4 that presumption, when applied to the
5 president, contradicts a very, very -- two very
6 strong strains in this Court's jurisprudence
7 that go back to the founding.

8 JUSTICE KAVANAUGH: And what's the
9 fear of more process here? In the sense that
10 process protects you, in the sense of helping
11 you make better, more accurate decisions, and
12 it helps -- process helps you then convince
13 people on the outside that you've made a
14 considered, thorough, appropriate decision,
15 what's the concern about more process?

16 GENERAL SAUER: I don't think we think
17 that process is necessarily bad. In this case,
18 there's two reasons why, you know, process is
19 not the right answer, among others.

20 One is, in Vermont Yankee, this Court
21 said we're not going to dictate procedures to
22 executive agencies. A fortiori you should
23 dictate procedures to the president. Our
24 contention is that there already has been a
25 process. There was a social media post that

1 said, look, these two documents contradict each
2 other. And the response was defiance. So
3 there was a chance to tell -- in the words of
4 Loudermill, to tell her side of the story. It
5 just wasn't -- it wasn't adopted.

6 JUSTICE KAVANAUGH: Okay. Again --

7 GENERAL SAUER: And, in fact, there
8 hasn't been for months since then any clear
9 explanation other than it was an inadvertent
10 notation. It's just the kind of inadvertent
11 notation that ordinary people can be indicted
12 for.

13 JUSTICE KAVANAUGH: And, again, none
14 of my questions or comments are about the facts
15 of this case. I don't know the facts of this
16 case. But thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett?

19 JUSTICE BARRETT: I want to pick up on
20 that question about why -- Justice Kavanaugh
21 said why are you afraid of a hearing or what
22 would there be that would be wrong with
23 process.

24 I mean, you spent a lot of time
25 litigating the case. You know, it's gone up

1 from the district court to the court of
2 appeals, and now we're here. And if there
3 isn't anything to fear from a hearing and if
4 you have the evidence, why couldn't those
5 resources have been put into a hearing?

6 I understand you think that you don't
7 have to provide one either because of the
8 statute or because of the Due Process Clause.
9 And that's fine. But, in thinking about
10 irreparable harm to the government, if one way
11 to -- one step you could take to reduce your
12 irreparable harm, to show that there really was
13 cause is just to have a hearing, why not?

14 GENERAL SAUER: I don't think it's a
15 question of resource allocation. It's our
16 position that adequate process was already
17 provided.

18 So, if it's a question if the district
19 court's order has to go further and then go
20 further and go further again, all without any
21 legal or constitutional authority in our view,
22 we think that imposes irreparable injury on the
23 executive branch.

24 JUSTICE BARRETT: Well, they told you
25 to go farther but not that much farther. I

1 mean, okay, so there was the Truth Social posts
2 and then, you know, burden on her to come back
3 in five days. I understand that's your
4 position.

5 But, you know, Justice Gorsuch posited
6 sit down across the table in the Roosevelt
7 Room, where the president provides Ms. Cook,
8 Governor Cook, with the evidence and waits to
9 hear what her response is, gives her a chance
10 to defend herself. I mean, that just wouldn't
11 be that big a deal, it seems, if that's enough.

12 GENERAL SAUER: Again, it's an
13 intrusion on the executive branch to dictate
14 what procedures it ought to provide --

15 JUSTICE BARRETT: So it's the standing
16 on principle --

17 GENERAL SAUER: -- certainly to the
18 president. And our position is he has provided
19 process. He's provided adequate process. And
20 if the district court said, well, that wasn't
21 quite good enough, try again, and then we try
22 again, and the district court says, no, that
23 wasn't quite good enough, try again, we have
24 gone -- left Vermont Yankee way in -- in the
25 rearview mirror.

1 JUSTICE BARRETT: Do you concede that
2 if the statute was an INM statute that under
3 Shurtleff you would have to provide process?

4 GENERAL SAUER: Notice and hearing,
5 yes.

6 JUSTICE BARRETT: Yes.

7 GENERAL SAUER: We don't dispute that.

8 JUSTICE BARRETT: And I want to go
9 back to one of Justice Kagan's questions.

10 She said, well, in Shurtleff, the
11 statute itself didn't say that you got notice
12 and a hearing for INM, but the Court said that
13 you did.

14 Here, the statute does say "cause."
15 "Cause" isn't as specific maybe as INM, but it
16 does identify the grounds that the president
17 must have for removal.

18 Why shouldn't we do the same thing
19 that the Shurtleff court did and say that,
20 well, as we said in Shurtleff, when a statute
21 specifies the grounds for removal, there must
22 be notice and a hearing given?

23 GENERAL SAUER: Because the case law,
24 presumably Shurtleff, when it said that as to
25 INM, notice -- you get notice and a hearing,

1 was relying on what we don't dispute is a -- as
2 far as I can tell, a pretty consistent strain
3 in the case law that that's what that means.
4 It gives you specified causes, like that INM,
5 give you notice and a hearing.

6 The case law on cause is the opposite.
7 I mean, look at the lower court opinion in
8 Reagan, in the court of claims opinion, where
9 they say cause does not mean you get a notice
10 and a hearing. And we cite a strong line in
11 the -- in the background case law as well.

12 Now they dispute and they say there's
13 some cases going the other way. However, the
14 notion that they -- they are making an old-soil
15 argument. They are saying, oh, this -- in
16 order to -- to prevail on that, it has to be so
17 well-settled and clearly established that there
18 really wasn't a dispute about it.

19 I mean, look, I can't emphasize
20 enough, you know, what, for example, the Tuttle
21 Michigan Law Review article from 1905 that's
22 heavily relied on, for example, in the Manners
23 amicus brief that they rely heavily on in their
24 supplemental brief, it says the case law is all
25 over the map on all of these issues. That --

1 that treatise says the courts differ on almost
2 every conceivable part of this question.

3 The only point of consistency is that
4 specified cause is INM, which also, as we can
5 see, is a holding of the Court in Shurtleff,
6 whereas "cause" just doesn't mean that.

7 We cite all these cases that they
8 dispute, and there's this battle about what did
9 the 19th century case law mean. Keep in mind,
10 in the context of that battle, they bear the
11 burden of making the old-soil argument.

12 CHIEF JUSTICE ROBERTS: Justice
13 Jackson?

14 JUSTICE JACKSON: Just following up
15 really quickly on that point, isn't -- isn't
16 the case law all over the map because the
17 statutes were different?

18 I mean, I understand the Manners
19 brief, which they rely upon, to really drill
20 down on the various statutes related to removal
21 and to have identified ones, for example, that
22 have a fixed term but allowed removal only for
23 cause or had a fixed term and provided for
24 removal at the president's discretion or didn't
25 have a fixed cause -- a fixed term, et cetera,

1 et cetera.

2 There's, like, a series of
3 permutations. And in those different
4 circumstances, courts, which, asterisked, were
5 actually reviewing this, so that in the first
6 instance makes me question your view that
7 courts couldn't review it, but setting that
8 aside, we have a bunch of cases that come
9 out different ways because the statutes are
10 different.

11 Professor Manning says -- Manners says
12 that when you drill down in this situation with
13 respect to fixed term and removability for
14 cause, as of 19- -- 1913, it was
15 well-established, everybody agreed that that
16 required at least notice and an opportunity to
17 be heard.

18 So what is your response to that?

19 We're looking at a particular statute
20 that does two things: Fixes the term and has
21 for cause. She says everybody said, got to
22 have a notice and a hearing.

23 So why is the government saying
24 different right now?

25 GENERAL SAUER: Respectfully to her,

1 that contention is plainly incorrect. So, if
2 you go to our supplemental brief, page 9,
3 Footnote 4, in the accompanying text, we cite
4 Ulrich and then 13 more cases in that footnote
5 for the proposition that "for cause" does not
6 require notice and a hearing.

7 Her argument is gerrymandered --

8 JUSTICE JACKSON: No, I'm talking
9 about -- I'm talking about the combination.

10 GENERAL SAUER: Yes. Yes, the
11 combination. Right.

12 JUSTICE JACKSON: The combination for
13 cause --

14 GENERAL SAUER: Of those four --

15 JUSTICE JACKSON: -- and a -- and a
16 fixed term.

17 So, when I look at those cases, I'm
18 going to find that combination, and people are
19 all over the map, you say?

20 GENERAL SAUER: By our count, in
21 seven --

22 JUSTICE JACKSON: Okay.

23 GENERAL SAUER: -- of those 14 cases,
24 it's a combination. There's also a fixed term.

25 So that argument just -- again, that

1 brief, you know, read the Tuttle article that
2 it relies so heavily on and you'll see this
3 argument. They're nowhere near meeting the
4 burden of an old-soil argument.

5 JUSTICE JACKSON: All right.

6 GENERAL SAUER: And that's what they
7 need to change the plain text of the statute.

8 JUSTICE JACKSON: Well, let me talk
9 about the plain text of the statute in light of
10 its purposes.

11 You explored with Justice Kavanaugh,
12 and I appreciated this, that Congress put the
13 for-cause provision in there for a reason, and
14 you conceded that the reason was to try to
15 ensure the independence of the Federal Reserve,
16 that we were -- we, Congress, Congress had
17 decided that this particular agency, because
18 of the sensitive information and policy
19 determinations that it has to make, needs to
20 not have the pressure of having all of its
21 governors be fireable at the whim of the
22 president. So in goes for-cause removal for
23 that purpose. And you agree.

24 So I guess what I'm trying to
25 understand is, how does reading the statute

1 to give the president broad discretion, which
2 you've said many times with respect to his
3 removability of these governors, how does that
4 further the aims of the statute?

5 GENERAL SAUER: It directly furthers
6 the -- furthers the aim of protecting them from
7 removal for policy disagreement, which would be
8 the key protection that --

9 JUSTICE JACKSON: No, but that -- but
10 you've -- but you've conceded that the aim is
11 actually broader. The aim is to ensure that
12 this institution is not being pressured by the
13 executive branch, by the president, with
14 respect to its determinations, that people
15 can't just be fired because the president wants
16 them to.

17 And so what I'm now asking is, if we
18 read "for cause" to ultimately reduce to the
19 president can pick some fact that has nothing
20 to do with their actual tenure in office,
21 something that happened way before, and use
22 that and say that's cause and it's not
23 reviewable and he doesn't have to show any
24 evidence and doesn't have to give the person
25 a hearing, basically, the president is just

1 making the determination that Congress
2 apparently didn't want him to have the power
3 to make because they put "for cause" in the
4 statute.

5 So how do you reconcile your vision
6 of presidential discretion with a statute that
7 was clearly designed to limit the president's
8 discretion in this regard?

9 GENERAL SAUER: It was designed to
10 limit the president's discretion just as far
11 as the plain text of the statute goes.

12 The statute was a hard-fought
13 compromise between two influential and
14 insistent camps, as Justice Alito recently
15 wrote. One of them thought there should be
16 complete presidential control of the Federal
17 Reserve. The other thought it should
18 essentially be a private entity.

19 They met in the middle with a removal
20 standard that protects governors from removal
21 for a policy disagreement.

22 JUSTICE JACKSON: But it only
23 protects -- it only protects them insofar as
24 the president's determination about cause is
25 reviewable and based on actual evidence that

1 has been established. It doesn't protect them
2 if the president can just make it up.

3 GENERAL SAUER: It also provides a
4 legislative determination that governors could
5 be and perhaps should be removed if they engage
6 in financial improprieties that undercut the
7 Federal Reserve's credibility in the eyes of
8 ordinary Americans.

9 JUSTICE JACKSON: All right. One more
10 question just about this idea of the district
11 court's power.

12 You've talked a lot about mandamus
13 being a remedy, but as I -- I read the cases
14 and the law, mandamus was the remedy for courts
15 of law that were being asked to reinstate
16 removed officers, and this was back at a time
17 in which courts of law and courts of equity
18 were separate.

19 We now have a fused system. Courts of
20 equity could always be asked to step in and
21 prevent the removal of this person. To the
22 extent the person was claiming that they were
23 not removable, say, because the statute says
24 they could only be removed for cause, a court
25 of equity could be invited through this claim

1 to come in and pause the circumstances, not
2 allow this person to be removed until the
3 courts of law had actually litigated the claim
4 of removability. I think that's the world
5 we're in.

6 This was the very first question that
7 Justice Sotomayor asked you. And so can you
8 just explain why you're insisting that mandamus
9 is the only thing available to the district
10 court in this situation when this is an
11 equitable decision in the interim in the way
12 that I discussed?

13 GENERAL SAUER: It is -- the
14 preliminary injunction is an equitable
15 determination, and it's one that the district
16 court plainly, under Sawyer, plainly lacked
17 jurisdiction to -- to enter.

18 And, again, I also -- in addition to
19 the holding of this Court in Sawyer that a
20 temporary restraining order purporting to
21 restore a public officer --

22 JUSTICE JACKSON: Right. I'm -- I --
23 I -- I -- I --

24 GENERAL SAUER: -- with serious
25 equitable powers --

1 JUSTICE JACKSON: My question posits
2 that we're not talking about restoration.
3 We're talking about Ms. Cook's application to
4 the court before she was terminated to prevent
5 being terminated because her claim is that I'm
6 not removable.

7 That's an equitable determination.
8 It's being made in the interim. She's not yet
9 been removed because the court prevented that
10 with its preliminary injunction. Courts of
11 equity did that all the time. So I don't
12 understand why you're saying it's inappropriate
13 for that to be done now.

14 GENERAL SAUER: Sawyer, in addition to
15 that, as I alluded to before, there's this
16 strong tradition of recognizing the president's
17 authority to engage in suspensory removals
18 pending the -- the final determination. And
19 that alone would -- is enough to point out that
20 there's no -- no power to do the preliminary
21 injunction that was entered here.

22 JUSTICE JACKSON: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 General.

25 Mr. Clement.

1 ORAL ARGUMENT OF PAUL D. CLEMENT

2 ON BEHALF OF THE RESPONDENT

3 MR. CLEMENT: Mr. Chief Justice, and
4 may it please the Court:

5 The Federal Reserve is a uniquely
6 structured entity with a distinct historical
7 tradition. Part of that historical tradition
8 is an unbroken history going back to its
9 founding in 1913 in which no president, from
10 Woodrow Wilson to Joseph Biden, has ever even
11 tried to remove a governor for cause, despite
12 the ever-present temptation for lower rates and
13 easier money. Even in this case, the president
14 recognizes the unique status of the Fed by
15 neither arguing that the removal restriction is
16 unconstitutional, nor asserting the ability to
17 remove a Fed governor without cause.

18 But despite that recognition, the sum
19 total of the Solicitor General's arguments
20 would reduce the removal restriction in this
21 unique institution to something that could only
22 be recognized as at-will employment. No
23 procedural due process before removal. No
24 judicial review after removal. No preliminary
25 injunction to preserve the status quo. And a

1 conception of cause so capacious that apparent
2 misconduct or gross negligence suffices.

3 That makes no sense. There's no
4 rational reason to go through all the trouble
5 of creating this unique quasi-private entity
6 that is exempt from everything from the
7 appropriations process to the civil service
8 laws just to give it a removal restriction that
9 is as toothless as the president imagines.

10 But, if that removal restriction has
11 real substantive and procedural bite, then this
12 emergency application should be denied. There
13 is simply no reason to abandon over a hundred
14 years of central bank independence on an
15 emergency application on a preliminary record.

16 I welcome the Court's questions.

17 JUSTICE THOMAS: But, if there was
18 such concern for independence, could the
19 removal statute have been written as others
20 have been written to require a hearing and
21 review?

22 MR. CLEMENT: So it could have been,
23 Justice Thomas. You know, in the realm of
24 interpreting statutes, could have, should have,
25 would have, right? But I think that you have

1 to give faithful interpretation to what
2 Congress actually did.

3 And I think, if you understand the
4 original public meaning of "for cause" in
5 either 1913 or 1935, I do not think it was as
6 capacious as my friend suggests. I think it
7 probably meant INM plus ineligibility, and in
8 the context of the Fed in particular, it
9 probably picked up Section 244, which prevents
10 a federal governor from also serving as a
11 director and an officer of a bank. So, if
12 they're a Fed governor that insisted on being a
13 director of Chase Manhattan, I think that would
14 be removal for cause.

15 And then, on the context of the
16 hearing, and I think Justice Kagan already
17 alluded to this, but there are all these
18 statutes about INM that don't mention a
19 hearing, and there are many statutes that talk
20 about cause and don't mention a hearing.

21 Now it's true that the NLRA, which was
22 passed a month before, did specify a hearing.
23 But I think it would be a mistaken statutory
24 interpretation to make that one express
25 reference to a hearing sort of disable all the

1 other old-soil arguments with respect to all
2 the other institutions where I think there's a
3 very strong old-soil argument that, whether
4 it's INM or for cause, that means that you get
5 notice and an opportunity --

6 JUSTICE THOMAS: With that said --
7 with that said, what would the hearing look
8 like and what would the review look like?

9 MR. CLEMENT: So I agree with
10 General Sauer that the president would have a
11 fair amount of discretion in how he or she
12 wanted to fashion that hearing. I mean, one
13 example we have historically is President Taft,
14 and he sort of gave the removed officials the
15 full Taft, and it was notice, opportunity for a
16 hearing before an impartial tribunal that, you
17 know, serendipitously included future-Justice
18 Frankfurter, and then he -- I mean, so that's
19 kind of the maximum that the president could
20 give. But we're not suggesting that you need
21 to give the full Taft. The president would
22 have a lot of flexibility on that.

23 I think -- you asked what the review
24 would look like, and I think that actually sort
25 of gets to the heart of where the president's

1 incentives would be. I think the more process
2 that the president provides, the less room
3 there's going to be for judicial review and
4 judicial second-guessing of factual
5 determinations. So, if a president wants to
6 give the full Taft, I think the scope for
7 review of factual determinations by that kind
8 of tribunal would be very narrow, but I do
9 think there would be legal review.

10 CHIEF JUSTICE ROBERTS: I'm not sure I
11 understand exactly what you want a hearing for.
12 If your argument is inadvertence, it doesn't
13 seem to me that there's much you can say
14 factually other than that. You can't say,
15 well, this is why we did it and this is okay
16 and all that. It's just an inadvertent
17 mistake.

18 Now there obviously are a lot of legal
19 questions to be addressed, but, again, those
20 are questions for the court, a court, and not
21 the basis for a factual hearing. You don't
22 have anything -- you have one sentence to say:
23 It was inadvertent mistake.

24 MR. CLEMENT: Well, I mean, Mr. Chief
25 Justice, I think, in a case where the

1 president's going to say that it's -- an
2 inadvertent mistake is enough and the
3 potentially removed official's going to come in
4 and say it was an inadvertent mistake, then,
5 you're right, I think the hearing's not going
6 to matter that much.

7 Now, in the -- in -- in the real
8 world, where you have no precedent for this
9 kind of removal, I think, if there were notice
10 and opportunity for a hearing, there might be
11 an opportunity to not just present the factual
12 evidence but to also make the case, and given
13 these particular facts about this particular
14 inadvertent mistake, that isn't a basis for
15 removal.

16 CHIEF JUSTICE ROBERTS: Well, I think
17 you're talking about the legal arguments,
18 though, the arguments we're hearing today.

19 MR. CLEMENT: I -- I think that's
20 right, Mr. Chief Justice, and I do think those
21 could be made in a preliminary way in the
22 process that was provided by the executive
23 branch.

24 But, as I alluded to, I do think, on
25 the substantive question of what's for cause,

1 there needs to be judicial review. And I think
2 there needs to be judicial review of that
3 question for all the reasons that were alluded
4 to in the various colloquies because, if
5 there's no judicial review, then this is all
6 kind of a joke. I mean, we can -- we can sit
7 here and posit that, well, this would be for
8 cause and that would be for cause, but none of
9 it would matter because there would be no
10 judicial review.

11 JUSTICE KAVANAUGH: Can you --

12 JUSTICE ALITO: Well, on the question
13 of what is for cause, what the district court
14 held was that it must relate solely to
15 in-office conduct. And you defend that with
16 one caveat that if the office-holder is
17 indicted later for -- indicted while in office
18 for pre-office conduct, then that might be
19 cause for removal because a person under
20 indicted -- indictment wouldn't be able to
21 devote full attention to the job.

22 But, other than that, you defend the
23 district court's holding. Is that correct?

24 MR. CLEMENT: We -- we do defend the
25 district court's holding on that. And I would

1 understand that is the rule for all the
2 statutes that have INM.

3 JUSTICE ALITO: There's nothing
4 when -- under a for-cause removal standard,
5 there is no pre-office conduct that could
6 constitute cause?

7 MR. CLEMENT: That is my front-line
8 response. I happen to have a backup argument,
9 which is, if you pick up the common law, then
10 you would pick up the --

11 JUSTICE ALITO: Well, let's -- let's
12 take your front-line -- front-line argument
13 first and see how far you're willing to go.
14 Suppose that the office-holder was permitted to
15 resign from a previous job under a
16 nondisclosure agreement based on a long and
17 egregious pattern of sexual misconduct. That
18 would not be for cause -- that would not be
19 cause for removal?

20 MR. CLEMENT: So what I would say,
21 Justice Alito, is I don't think that would be
22 INM. And so, if I'm going to stick to my
23 front-line position, then that would not be for
24 cause. It would certainly be a basis for
25 impeachment.

1 And I think, in understanding why
2 we've had INM for at least 90 years,
3 probably --

4 JUSTICE ALITO: All right. I
5 understand your position. How about if, after
6 the person assumes office, videos are disclosed
7 in which the office-holder is expressing deep
8 admiration for Hitler or for the Klan?

9 MR. CLEMENT: I can only imagine --

10 JUSTICE ALITO: It must be --

11 MR. CLEMENT: -- where these hypos are
12 going to eventually go, Your Honor, but --

13 JUSTICE ALITO: Well, yeah, because
14 your position leads to --

15 MR. CLEMENT: I'm going to stick with
16 my position.

17 JUSTICE ALITO: Well, you're -- all
18 right.

19 MR. CLEMENT: Of course, I'm going to
20 stick with my position and I'm going to say
21 that's an official that would be impeached in a
22 heartbeat, and the fact that they would be
23 impeached in a heartbeat is going to cause them
24 to resign in half a heartbeat.

25 And this has not proven a problem. I

1 mean, for better or for worse, whatever you
2 think of Humphrey's Executor, we've had 90
3 years of --

4 JUSTICE GORSUCH: Mr. Clement, what's
5 your backup argument?

6 (Laughter.)

7 MR. CLEMENT: My -- my backup -- my
8 backup argument is the common law standard,
9 Justice Sotomayor alluded to it, which would be
10 that it is -- that there's a removal basis for
11 an infamous crime of the kind that is disabling
12 for public office and, you know -- and at
13 common law, it would -- it also required a
14 conviction. So it's -- it's an exception. It
15 helps me with a couple of these hypotheticals.

16 JUSTICE ALITO: It doesn't help you.
17 It doesn't help you.

18 MR. CLEMENT: -- for the Hitler video.

19 JUSTICE GORSUCH: Do you have a backup
20 to the backup?

21 MR. CLEMENT: Impeachment. It's the
22 ultimate backup here. This is not a situation
23 where you're being asked, you're -- you know,
24 have to tie yourself to the --

25 JUSTICE KAGAN: So why do you --

1 JUSTICE KAVANAUGH: Past that
2 impeachment doesn't cover private conduct. You
3 obviously disagree with that then?

4 MR. CLEMENT: Well, I certainly --
5 see, but this actually kind of makes the point
6 about judicial review, right, I mean --

7 JUSTICE KAVANAUGH: I'm not saying I
8 agree with that, by the way. It's -- it's been
9 argued.

10 MR. CLEMENT: Right. But -- but --
11 but -- but what I -- what I absolutely agree
12 with is the Walter Nixon case says that there's
13 no judicial review of the impeachment
14 determination in the end.

15 So whatever the House and the Senate
16 ultimately determine, I mean, they can make
17 constitutional law too. And they can determine
18 whether private conduct is or is not out. And
19 if they say -- and -- and with these hypos, I
20 mean, you know, and we can -- we can go down
21 the road of the hypos and they'll get worse.
22 I -- I am -- I -- I am confident --

23 JUSTICE KAVANAUGH: The backup -- the
24 backup, to use Justice Gorsuch's term, would be
25 the infamous, but you don't need a conviction.

1 MR. CLEMENT: Right, I know,
2 absolutely. And of course --

3 JUSTICE KAVANAUGH: And that seems to
4 solve your answer -- a lot of the difficult
5 hypos, correct?

6 MR. CLEMENT: Correct. But the reason
7 I want to spend at least a moment answering
8 some of the hard hypos is not because I'm a
9 masochist, it's just because those are -- have
10 got to be the answers under INM.

11 JUSTICE KAVANAUGH: You -- your answer
12 is that those are funneled to the impeachment
13 process?

14 MR. CLEMENT: That -- that's --

15 JUSTICE KAGAN: So why is it --

16 MR. CLEMENT: -- right. And that's --
17 that's the way INM has worked for 150 years.
18 And I think it would continue to work. It
19 hasn't proven a problem in practice. But I'm
20 not resisting very hard the backup to the
21 backup on that because I don't think we're
22 close.

23 And of course -- look, all of these
24 are hard questions, which is all of the reasons
25 why it's kind of crazy inform decide this on an

1 emergency application.

2 JUSTICE ALITO: Yes, well there --

3 JUSTICE SOTOMAYOR: So why is it, Mr.

4 Clement --

5 JUSTICE ALITO: -- are a million hard
6 questions in this case. And it is an emergency
7 application. And very difficult questions,
8 either no precedent or very conflicting
9 precedent -- or very uncertain body of
10 precedent but there are two -- two things were
11 decided by the lower courts.

12 One, that what I just explored, the
13 district court said it's got to be in-office
14 conduct, nothing that happened before a person
15 took office counts.

16 And then the D.C. Circuit said that
17 your client had a property interest in her --
18 in her office and therefore a due process
19 right.

20 Is that right, she had a property
21 interest in being a -- a -- a governor on the
22 Federal Reserve Board?

23 MR. CLEMENT: So I think there's a
24 perfectly reasonable argument for that but I
25 also think that there's a better argument

1 that's a constitutional avoidance argument.

2 And what the D.C. Circuit did in a per
3 curium opinion is sort of an example of what
4 happens when you're trying to rush all of this,
5 which is you jump right to a constitutional
6 holding when there may be a perfectly good
7 constitutional avoidance statutory holding
8 there.

9 And I think we've now had a couple of
10 months since a bunch of amicus briefs to
11 ventilate some of these things. And I think
12 you get -- with that ventilation, you get an
13 understanding that there is a very good
14 statutory argument --

15 JUSTICE GORSUCH: So -- so --

16 MR. CLEMENT: -- and I do want to talk
17 about Shurtleff --

18 JUSTICE GORSUCH: -- why wouldn't --

19 MR. CLEMENT: I'm sorry.

20 JUSTICE GORSUCH: Why wouldn't that --
21 why wouldn't that be a basis for sending it
22 back to consider these arguments in the first
23 instance. If -- if -- if you aren't prepared
24 to defend the due process argument, then
25 perhaps your front line argument on -- that

1 things that happened before employment are
2 categorically and always off the table.

3 If those two decisions, which, to be
4 fair, of course, were issued under -- under a
5 time constraint, might have some flaws. Why
6 shouldn't it go back to reconsider it?
7 You've -- you've advanced a lot of new
8 arguments here. So have your friends on the
9 other side.

10 MR. CLEMENT: So it should go back.
11 It should just not go back with an emergency
12 stay being granted, which is extraordinary
13 relief that depends on my friends on the other
14 side showing extraordinary burden of
15 irreparable harm. And showing that they've a
16 likelihood of success on the merits.

17 And I think likelihood of success on
18 the merits in this context doesn't mean just a
19 likelihood of showing that the two grounds that
20 were seized on in the quick briefing below are
21 wrong, but that they're actually right.

22 And I think the briefing here has done
23 two things.

24 I think it showed that we're right.
25 I -- I'm not abandoning my front-line

1 arguments. But I love my backup arguments. I
2 think they are very strong.

3 And I think it shows the sort of --
4 you know, the -- the problems that happen when
5 you try to decide some of the most important
6 issues of constitutional law in this kind of
7 rushed way.

8 JUSTICE GORSUCH: Can I ask you about
9 the mandamus question? Why -- why isn't
10 mandamus the appropriate avenue here?

11 MR. CLEMENT: It is an appropriate
12 avenue at the end of the case. Even at the end
13 of the case, though, I think -- and this is
14 consistent with Professor -- what Professor
15 Bryce says in his article. Even at the end of
16 the case, I don't think you have to leap to
17 mandamus. I think you can have a declaratory
18 judgment first.

19 JUSTICE GORSUCH: Well, let's put the
20 declaratory judgment issue aside, because we
21 can talk about mandamus for a second.

22 Assuming there is such thing as a
23 preliminary injunctive relief for mandamus,
24 which I'm going to ask you if that's a thing,
25 first of all, and, second, if it were, wouldn't

1 the standard you'd have to show likelihood of
2 success be the likelihood of success under the
3 mandamus standard?

4 MR. CLEMENT: So a couple of things.
5 I mean, I -- I don't like hearing preliminary
6 mandamus any more than Judge Friendly did.

7 JUSTICE GORSUCH: No.

8 MR. CLEMENT: I don't think it's the
9 right way to think about it. I think it's
10 preliminary relief to preserve the status quo,
11 or if you want to be more specific, preliminary
12 relief to preserve a de facto officer in their
13 office while the case proceeds.

14 And that is a relief --

15 JUSTICE GORSUCH: Why -- why isn't
16 that preliminary injunction or mandamus? I
17 know of those two buckets. I'm not sure I'm
18 familiar with the third one you're describing.

19 MR. CLEMENT: What I'm describing
20 is -- is a preliminary injunction.

21 JUSTICE GORSUCH: Okay.

22 MR. CLEMENT: I'm saying it's not a
23 preliminary mandamus. It's a --

24 JUSTICE GORSUCH: Well, wouldn't it
25 have to be, though? If -- if your cause of

1 action were mandamus, and let's just suppose
2 that's what it is, it would be preliminary
3 injunctive relief because you have likelihood
4 of succeeding on -- under the mandamus standard
5 I would have thought.

6 MR. CLEMENT: Well, perhaps. I mean,
7 two things about that. One is, I'm not sure in
8 this kind of mandamus posture, I don't think I
9 agree with General Sauer that the standard is
10 the standard you would have in like a Cheney
11 situation.

12 I do think this kind of original
13 mandamus as the remedy in this particular
14 situation, I would resist the idea that that's
15 sort of the standard more appellate mandamus
16 standard.

17 That's a debate even with all the
18 briefing we've had. We haven't had a good
19 chance to really duke it out on that. But I
20 would say that's part of the reason I resisted
21 the idea that you have to go to mandamus.
22 Because I do think you would have declaratory
23 judgment. I do think declaratory judgment --

24 JUSTICE GORSUCH: I asked you -- I
25 asked you to put that aside for the moment.

1 MR. CLEMENT: No, no I -- and I tried
2 to as long as I could.

3 (Laughter.)

4 JUSTICE GORSUCH: All right.

5 MR. CLEMENT: But -- but --

6 JUSTICE GORSUCH: Then -- then I give
7 up. Okay.

8 MR. CLEMENT: But then to answer
9 your -- then to answer your question I really
10 had to get to declaratory judgment.

11 I would like to say, this is an issue
12 the -- the D.C. Circuit has thought a lot
13 about. And there's a particular case worth
14 reading, the Swan against Clinton case. And
15 that's a case where they kind of wrestled with
16 this question about can you -- you know, we've
17 got mandamus against the President.

18 At the end of the day, can you direct
19 the President, and there's a great concurring
20 opinion by Judge Silverman where he basically
21 says, look, the judiciary is creative and
22 clever enough to figure out a way to fashion
23 injunctive relief against the lower federal
24 officials and that solves the problem about
25 having the relief run against the President.

1 And the reason that the D.C. Circuit
2 has wrestled with that in a couple of contexts,
3 and I think the Chief Justice alluded to this,
4 they don't really write about that, then you'd
5 have to wrestle with this at the beginning of
6 the case as to whether there's any
7 redressability at the end of the case.

8 And in the Swan case, and even in the
9 Severino case, the D.C. Circuit had said
10 there's not a redressability problem. We can
11 figure out a way to direct the relief at the
12 lower government officials and that will be
13 sufficient onto the day.

14 JUSTICE JACKSON: And that happens at
15 the end of the case, right, after the whole
16 thing has been litigated and some court,
17 perhaps even this court, decides the
18 removability question. The President does not,
19 we would say, have the right to remove her, and
20 then we go to remedy. And the question is, is
21 there a mandamus or not?

22 The reason why I thought mandamus
23 wasn't on the table right now is because we're
24 not there. We're -- we're in the middle of the
25 case. We haven't -- no one has made a

1 definitive determination about the President's
2 right to remove her.

3 The question now is just in the
4 interim, while that case is -- while -- while
5 that issue is being litigated, what happens?
6 And that's about the equities, that's about
7 whether it's going to be more harmful to leave
8 her in the position than not.

9 That's what I thought this motion was
10 about.

11 MR. CLEMENT: I mean, I -- I think
12 that's right. But it's specifically about
13 whether you can get some sort of preliminary
14 injunctive relief to preserve the status quo
15 and keep the de facto officer in place.

16 And I do take Justice Gorsuch's
17 question, which is at the end of the rainbow,
18 all there is is mandamus and you can't have
19 mandamus against the President, then at this
20 point, you'd say what's your likelihood of
21 success at the merits and you would say there's
22 no likelihood of success in the merits. But I
23 think, as I alluded to, even before that, you'd
24 say is there any redressability here?

25 JUSTICE JACKSON: But, wait --

1 JUSTICE GORSUCH: Mr. Clement, but
2 wasn't --

3 JUSTICE JACKSON: -- why wouldn't that
4 be a merits issue?

5 JUSTICE GORSUCH: I'm sorry.

6 JUSTICE JACKSON: You'd have no
7 likelihood of success on the merits? You'd
8 just have no remedy. You would win on the
9 merits. The merits are that -- that -- that
10 the President wasn't supposed to remove you.
11 But you would lose because there's -- lose
12 ultimately in terms of not having a remedy,
13 right?

14 MR. CLEMENT: Well, I mean, you could
15 draw the distinction that way. I think if you
16 have no remedy at the end, you probably have
17 the redressability problem at the front end
18 which is why the D.C. Circuit has this --
19 addressed this on a number of bases.

20 These are not emergency application
21 decisions. These are decisions in the D.C.
22 Circuit. They obviously don't bind this Court.

23 But they are the considered judge --
24 judgment of a court that's dealt with, you
25 know, like about, with all the removals there

1 have been, and there haven't been a lot of
2 them, but with respect to other officers. So,
3 you know, I think that's --

4 JUSTICE KAGAN: Mr. Clement --

5 MR. CLEMENT: Pretty good authority.

6 JUSTICE KAGAN: -- what would judicial
7 review in this context look like? I mean, this
8 is not a question about what the standard is.
9 It's more a question about is there a kind of
10 deference to give to the President? How does
11 that deference operate? Whatever the standard
12 is.

13 MR. CLEMENT: Sure. So I would divide
14 between sort of factual questions and legal
15 questions. As to the factual questions, I
16 would say that there's going to be a degree of
17 deference, and the degree of deference depends
18 on the degree of process that's provided.

19 So if the President wants to go full
20 Taft, I don't think the courts are going to be
21 in a position to second-guess the factual
22 determinations. If the President wants to do
23 something more informal, that's -- he's
24 entitled to do that, but then I would think
25 there'd be more of a scope for, you know,

1 having more hearing, more process in the
2 judicial forum.

3 On the question, the legal question, I
4 would say in a post-Loper world, there's no
5 deference to the legal questions, and the
6 courts are going to have to decide ultimately
7 what are the boundaries, the metes and bounds
8 of for cause.

9 And the only other thing I would add
10 is I think that you're going to want to erect
11 meaningful standards of cause because, you
12 know, there's kind of two options here. You
13 can either have judicial review that spends a
14 lot of time looking into pretext of the
15 President, and that just doesn't seem like a
16 good thing for the courts, for the President,
17 or anybody, or you could erect relatively
18 demanding standards of cause. And that's going
19 to, I think, obviate the need for that kind of
20 pretext inquiry.

21 JUSTICE KAGAN: Yeah. So -- so
22 General Sauer's version of cause, which is it's
23 not policy, it's something other than policy,
24 why isn't that the backup to the backup of --
25 to the backup?

1 MR. CLEMENT: Well, because it would
2 kind of destroy the whole point of having an
3 independent central bank in the Fed. And it
4 just seems to me like at some point -- I mean,
5 we were all here on the assumption for this
6 case that the Fed is a uniquely structured
7 institution with a distinct historical
8 tradition. And so if that's true, and then you
9 tick through the statutes, you can see all the
10 things that Congress did, I mean, including --
11 you know, Congress wasn't just trying to take
12 the Fed -- Fed and keep it from sort of being
13 unduly influenced by the President when it came
14 to rates right before an election. It did the
15 same thing to itself by limiting the power of
16 the purse over this institution.

17 And then you go through and, you know,
18 just every provision of the statute is trying
19 to treat this unique institution differently.
20 And then at the end, you have for cause, which,
21 I mean, could mean what General Sauer says, but
22 if it means what General Sauer says, then the
23 whole enterprise was a lot of trouble for
24 nothing.

25 JUSTICE KAVANAUGH: On the -- on the

1 future judicial review and what that looks
2 like, would the witnesses testify in court or
3 is it done on the record established by the
4 executive branch or does that maybe depend?

5 MR. CLEMENT: I would say it depends
6 on what kind of process was provided by the
7 executive. And, look, I -- I -- I agree with
8 General Sauer. This Court is not going to
9 dictate, like, you know, here is Roberts Rules,
10 you know, have at it. But I think this Court
11 can do something useful, which is essentially
12 to create an incentive for the executive to
13 provide something that's a little bit more
14 protective, a little bit closer to Taft than
15 something incredibly informal. That's --

16 JUSTICE ALITO: But that -- that
17 sliding scale is extraordinarily unhelpful.
18 What is the minimum that the executive, in your
19 view, has to provide? The minimum type of
20 hearing that you think is required by this
21 statute?

22 MR. CLEMENT: So the minimum hearing I
23 think would have three components. One is
24 notice, and that's really not much of an issue
25 here. I agree with that. The second is an

1 opportunity to provide evidence to the
2 decisionmaker. And we don't think that
3 happened here. And then the third thing is
4 some effort to keep the final decisionmaker
5 from prejudging the issue.

6 And part of the problem you have in
7 this particular case is -- is that I think the
8 President was proceeding on the understanding
9 of the statute that's faithfully represented
10 here by the Solicitor General, which is he
11 wasn't acting like a removing authority that
12 was subject to any due process.

13 Because if I think he were -- if he
14 were sort of subject to that, he wouldn't have
15 said in his opening tweet, you must resign.
16 And he wouldn't have said, two days later,
17 resign or be fired. And then --

18 JUSTICE ALITO: So that -- does that
19 mean it has to be a body of disinterested
20 decisionmakers?

21 MR. CLEMENT: No.

22 JUSTICE ALITO: People who are not
23 part of the executive branch and can exercise
24 independent judgment that way? No?

25 MR. CLEMENT: No.

1 JUSTICE ALITO: Then what does it
2 require?

3 MR. CLEMENT: It -- it requires just
4 what I said, notice and opportunity to provide
5 evidence and a decisionmaker who hasn't
6 prejudged the issue. That decisionmaker can be
7 the President. I mean, I'm not sure I'd, you
8 know, necessarily recommend it as my choice A,
9 but what --

10 JUSTICE GORSUCH: But well, how can it
11 not be the President? The statute authorizes
12 the President to make the removal decision.
13 How could it be anybody else?

14 MR. CLEMENT: Well, look, I mean, you
15 know, if you believe in the unitary executive
16 theory, then anybody that makes the removal
17 decision is acting on the President's power. I
18 think it would -- it would work -- you know, I
19 think the way it worked for Taft is the
20 tribunal made a recommendation and then Taft
21 executed it.

22 JUSTICE GORSUCH: Right, the President
23 --

24 MR. CLEMENT: So it was the President
25 --

1 JUSTICE GORSUCH: Yeah.

2 MR. CLEMENT: -- making the decision.

3 JUSTICE GORSUCH: The President has to
4 make the decision, right? Or delegate it to
5 somebody who he wishes to make that decision?

6 MR. CLEMENT: Yes.

7 JUSTICE GORSUCH: Who's reportable to
8 him?

9 MR. CLEMENT: Yes. Yes.

10 JUSTICE GORSUCH: Okay.

11 MR. CLEMENT: At will.

12 JUSTICE GORSUCH: At will, yeah.

13 MR. CLEMENT: Right, absolutely.

14 JUSTICE GORSUCH: Okay.

15 MR. CLEMENT: So -- so -- and the
16 President can be the final decisionmaker, but
17 if he's going to be the final decisionmaker and
18 there's a due process right, and I mean -- I
19 mean that's statutory or constitutional, then,
20 you know, he needs to be a little bit careful
21 and say these are the allegations. He can't
22 start by prejudging the issue by saying resign.

23 JUSTICE BARRETT: Mr. Clement, your
24 understanding of for cause, you know, we've --
25 you went through hypotheticals with Justice

1 Alito about how it doesn't cover pre-office
2 conduct.

3 What about conduct in office that
4 doesn't relate to the discharge of the office?
5 Like, what if you take some of Justice Alito's
6 examples, but it's, like, Nazi videos while the
7 governor is in office or, you know, things that
8 would be misdemeanors rather than infamous
9 crimes, like shoplifting, you know, stealing
10 things, domestic abuse? Would those things be
11 cause for firing? Or that's -- they don't
12 really seem like impeachable offenses
13 necessarily.

14 MR. CLEMENT: So I don't think those
15 would be removable offenses under INM.

16 JUSTICE BARRETT: Okay.

17 MR. CLEMENT: And so I don't think
18 they would removable offenses under for cause
19 properly construed.

20 JUSTICE BARRETT: So there's nothing
21 that the President can do to get rid of someone
22 who does those kinds of things while in office?

23 MR. CLEMENT: So, I mean, you know,
24 some of the things we're talking about, you
25 know, seem like better grounds for, like, an

1 intervention than for removal. And so --

2 JUSTICE BARRETT: Well, I mean, I
3 could come up with others, but --

4 MR. CLEMENT: Of -- I mean,
5 absolutely.

6 JUSTICE BARRETT: Okay.

7 MR. CLEMENT: Absolutely. I'm --

8 JUSTICE KAVANAUGH: People -- sorry,
9 keep going.

10 MR. CLEMENT: You know, I'm -- I'm
11 going to fall back on my answer, which is
12 that's my understanding, and I think it's
13 actually everybody's understanding, of how INM
14 works.

15 JUSTICE BARRETT: But that doesn't --
16 it doesn't say INM. And so, I mean, I -- I
17 appreciate your argument that INM and for cause
18 are one and the same, but you also kind of pull
19 in, in your fallback, some sort of like
20 gerrymandered things like infamous crimes but
21 you don't have to have a conviction. I mean --
22 so it -- it doesn't say INM.

23 MR. CLEMENT: So a couple of things.
24 One is, you know, I'd -- I'd resist -- I mean,
25 you know, gerrymandering is generally not a

1 compliment. So I -- I would sort of say that
2 what we do is bring in the common law, and
3 that's what we do. And I really didn't try to
4 gerrymander it beyond that.

5 But -- and -- but let me make the
6 argument, which I really --

7 JUSTICE BARRETT: Could I just ask one
8 clarifying question? I thought the common law,
9 though, required conviction.

10 MR. CLEMENT: It -- it did, and -- and
11 that would be our -- our sort of front-line
12 backup position if you will.

13 JUSTICE BARRETT: Front-line backup?

14 MR. CLEMENT: But -- but the happy
15 thing for me, I think, is at this stage of the
16 case, we win under all these variations. And,
17 ultimately, you know, some court, and it may be
18 this Court, is going to ultimately say these
19 are the metes and bounds of for cause.

20 Now, I think I have some pretty good
21 arguments that it really is just INM plus
22 ineligibility as kind of informed by Section
23 244. And let me just give you, like, my best
24 shot at it, which is this is the very unusual
25 situation where, you know, we -- we know that

1 Congress was literally waiting for this Court
2 Humphrey's Executor decision. Then it gets
3 Humphrey's Executor's decision, and this Court
4 in Humphrey's Executor at least three times
5 uses "for cause" and INM interchangeably. And
6 then the senators themselves in the debate --
7 now you got to look at debate, but I think even
8 Justice Scalia looks at debates for original
9 public meaning -- the senators in the debate
10 used the terms absolutely interchangeably.

11 And so you have two of the three
12 branches of government, original public meaning
13 saying for cause, different words, but what it
14 means is INM. But I do think it must -- you
15 know, you got to make sense of Section 244 of
16 the statute, which does provide a very specific
17 eligibility requirement.

18 And as I said before, I think if some
19 Fed Governor was insisting that they also
20 wanted to be a director at Chase National, they
21 could be removed for cause for that.

22 JUSTICE BARRETT: Okay.

23 JUSTICE KAGAN: Do you think that
24 there's a way at this posture of dealing with
25 this case so that we don't have to confront the

1 question of exactly what the for cause standard
2 means?

3 MR. CLEMENT: Is there a way to deal
4 with it at this stage without having to
5 ultimately say that? I mean, sure, there'd be
6 a lot of different ways to do that. You could
7 say that for cause -- I mean, you know, one way
8 to come at it would be to say at a minimum for
9 cause doesn't mean apparent misconduct or
10 grossly negligent. And I think that would be
11 sufficient to decide the case at least at this
12 juncture.

13 And I think you could say something
14 more. I mean, you know, obviously if you took
15 my position and said it means INM plus
16 ineligibility as informed by Section 244, I
17 don't -- I think we'd be done here because I
18 don't think there's an argument, at least that
19 I've heard at this juncture, that the conduct
20 that's at issue here is either INM or
21 ineligibility.

22 JUSTICE JACKSON: Couldn't we also
23 resolve it by not even going to the likelihood
24 of success on the merits element? I mean, you
25 have -- the President would have to have all of

1 them to get a stay. And we could do it on
2 harm, right?

3 MR. CLEMENT: Sure. I mean, you know,
4 look, it's an emergency application. You could
5 deny it without opinion. I mean, that would be
6 a little strange at this juncture.

7 (Laughter.)

8 MR. CLEMENT: But there -- you know,
9 it is -- it is an extraordinary application
10 made on a preliminary record. And so, you
11 know, you sort of have a lot of optionality at
12 this point.

13 But -- but I will say this, I mean,
14 you know, I do think the briefing in this -- in
15 this -- in this Court, which was, you know,
16 sort of unusual, you had the application
17 briefing, then you had amici, then you had this
18 supplemental briefing, I think it's been
19 incredibly helpful in excavating some of these
20 difficult questions.

21 I mean, you know, I've looked at
22 almost all of these common law cases. I have
23 a different view than General Suter on --
24 Sauer, sorry -- on -- on some of these
25 questions.

1 And, you know, in particular I think
2 it's very important, and, you know, I -- I -- I
3 want to get this out, that if you look at
4 Shurtleff, one of the things in Shurtleff --
5 there is a -- there is a line there that says
6 that where -- where Justice Peckham is invoking
7 the common law. And he says that as long as
8 there's certain causes, statutory restriction
9 for certain causes, that's the term he uses,
10 then there's notice and a hearing. He cites
11 seven common law cases.

12 Now, if you look at those common law
13 cases, three of the seven just say "for cause."
14 And two of them say "good behavior," which is
15 even less. And then two of them have a more
16 specific cause.

17 So that's, to me, the best
18 contemporaneous evidence that we're actually
19 right about the issue; that if it just says for
20 cause, and it doesn't say for a particular kind
21 of cause, you get notice and an opportunity for
22 hearing.

23 But that's the kind of thing you can
24 excavate on full briefing on the merits that I
25 don't think you can in a -- in an application.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 I guess I get back to where I kind of
4 started. In all this description, these are
5 all sorts of legal issues, you don't have
6 anything more to say on the facts, right? It
7 was an inadvertent mistake. I don't see how
8 you can say anything more. And the -- we've
9 had broad range of discussion on the legal
10 issues.

11 Now, it's very helpful for us to have
12 lower court decisions on those, and maybe
13 that's reason enough, but, again, I guess I
14 don't quite understand what sending it back
15 would be for, other than airing of the same
16 sort of issues that we've been airing this
17 morning.

18 MR. CLEMENT: Well, I'm not going to
19 resist too hard you deciding this on a more
20 substantive ground that gives my client sort
21 of, you know, relief that's more enduring at
22 this stage.

23 But I will say that, you know -- you
24 know, another one of these, like, great common
25 law cases is the Street Commissioners of

1 Hagerstown which happens to be the case that
2 Black's Law uses for its definition of cause.

3 And one of the things it specifically
4 says there is, like, even if you don't think
5 the due process, the notice and the hearing is
6 going to amount to much, it's still an error
7 not to give it, and we're still going to
8 essentially not allow this removal to happen,
9 because there wasn't notice and an opportunity
10 for a hearing.

11 CHIEF JUSTICE ROBERTS: So it may
12 not be an error to go through the -- the
13 process of your client coming in and saying:
14 It was an inadvertent mistake; since it was
15 inadvertent, I don't have much more to add to
16 that.

17 And the argument on the other side
18 being what the President has said: Well, I
19 think this is a serious enough mistake, and so
20 that's why I've -- I'm removing her.

21 MR. CLEMENT: Again, I -- there's only
22 so much I can say to resist the idea that -- I
23 mean, you know, we -- we think this was at most
24 an inadvertent mistake. We would have liked a
25 more -- you know, sort of opportunity to do

1 that and present our actual evidence, which
2 would have substantiated that.

3 But we also think, at the end of the
4 day, inadvertent mistake isn't, like, very
5 close to for cause, particularly when you
6 understand the unique nature of this
7 institution.

8 CHIEF JUSTICE ROBERTS: What is your
9 actual evidence that would substantiate the
10 fact that it was an inadvertent mistake?

11 MR. CLEMENT: I -- I think the fact
12 that there is an attachment to one of the
13 applications that describes it as a vacation
14 home. And that's not --

15 CHIEF JUSTICE ROBERTS: Okay. We've
16 got that too.

17 MR. CLEMENT: No, I understand. But
18 the President didn't. And it seems to me that,
19 you know -- you know, usually when there is a
20 procedural omission, one doesn't say, well, you
21 know, at this point we got everything we need,
22 so forget the procedural omission.

23 I mean, again, I'm not really going
24 to resist that, especially if you're going to,
25 you know, say you're with me on the substance.

1 But, you know, it does seem to me if,
2 you know, if -- if you want to reserve judgment
3 on the substance or you want more briefing on
4 the substance, you could say -- and this is,
5 you know, the -- whether it was constitutional
6 due process or statutory due process, I think
7 this is the gist of the D.C. Circuit's
8 decision, is, like, at a minimum, you didn't
9 get the process you were supposed to, so the
10 government doesn't get this extraordinary
11 emergency stay.

12 CHIEF JUSTICE ROBERTS: Justice
13 Thomas?

14 JUSTICE THOMAS: Just so I'm clear,
15 for you to prevail, we would have to say cause
16 is the equivalent of INM?

17 MR. CLEMENT: No, I don't think so,
18 Justice Thomas. I think you could really take
19 any definition of cause that we've been sort of
20 batting about, with the exception of
21 General Sauer's definition, and then -- and we
22 would prevail.

23 I think the only -- and -- and -- and
24 I do think the definition that's presented to
25 you by the President is a pretty extraordinary

1 one, because, you know, General Sauer is a very
2 careful lawyer. So in his briefs he doesn't
3 talk about mortgage fraud. He talks about
4 apparent mortgage fraud.

5 And when you're talking about apparent
6 misconduct as opposed to actually found
7 misconduct, that, A, doesn't get for cause;
8 and, B, it sort of is advertisement that you
9 have a process failure. And so the fallback
10 then is "or gross negligence."

11 So one way to think about this is if
12 the standard of for cause is more demanding
13 than gross negligence, then we certainly win.
14 And we didn't even get a chance to sort of
15 argue about gross negligence.

16 JUSTICE THOMAS: What is your -- if
17 it's not the equivalent of INM, what is -- what
18 are some of the other standards that you would
19 apply that would be sufficient for you to
20 prevail?

21 MR. CLEMENT: So I think the single
22 best reading of the statute is INM plus
23 ineligibility as informed by Section 244 of the
24 statute. I think then my fallback would be,
25 then you pick up the common law. And if the

1 common law makes you uncomfortable because of
2 Justice Alito's hypos, you could tweak the
3 common law. But you would then be tweaking
4 the common law.

5 And, I -- you know, that's why,
6 honestly, at the end of the day, although it's
7 uncomfortable for a few moments to answer some
8 of those hypos, you always have impeachment
9 as the backstop.

10 And we had, what is it, 90 years,
11 plus if you go back to the Interstate Commerce
12 Commission and 1887, almost 150 years with INM,
13 and this didn't really pose a problem in
14 practice.

15 CHIEF JUSTICE ROBERTS: Justice Alito?

16 JUSTICE ALITO: Do you think that we
17 should decide this case on the factual ground
18 that what is shown by the materials that are
19 before us shows nothing more than gross
20 negligence, which is insufficient?

21 Should we make -- should we make that
22 factual finding in the first instance?

23 I understood your -- I understood your
24 answer to be, you should do that if you're
25 going to find in favor of me, but you shouldn't

1 do it if you're going to find the other way.

2 MR. CLEMENT: I'll stand by that
3 answer.

4 (Laughter.)

5 JUSTICE ALITO: Really? That's your
6 answer?

7 (Laughter.)

8 MR. CLEMENT: That's my answer. I
9 think it would be a little irregular, but this
10 whole case is irregular. And if -- if that
11 seems to be the path of least resistance, to
12 decide this case in a way that is going to
13 essentially obviate the need for this Court to
14 decide it again in a couple of years, that
15 seems like a perfectly reasonable way to decide
16 the case.

17 JUSTICE ALITO: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor?

20 JUSTICE SOTOMAYOR: This whole case
21 is irregular, starting with the Truth Social
22 notice or thinking of it as notice at all. It
23 certainly didn't invite an opportunity to be
24 heard. But that's where we are.

25 Now the question becomes -- and you

1 answered the Chief and said, I don't have more
2 to present. I don't know where you presented
3 anything. You have a letter from you that
4 basically says that the application included
5 notice that this was a vacation home.

6 But that's never been given to the
7 President. That's never been filed with a
8 court or no one's ever seen it. It's just
9 statements being made. So I don't know why a
10 factual hearing would be irrelevant.

11 So assume, as I do for the purposes,
12 that she did fully disclose this was a vacation
13 home. So now the question is, is this, what
14 she did, negligence or gross negligence? Does
15 cause include just mere negligence?

16 I think that you have a very strong
17 argument under any reading of cause that mere
18 negligence pre-office would not qualify,
19 correct?

20 MR. CLEMENT: Correct.

21 JUSTICE SOTOMAYOR: All right.
22 Because it would seem extreme to think that
23 something separated from the functioning of the
24 office, unrelated to the work of the office at
25 the time it's done, that mere negligence would

1 be enough. But the President called it gross
2 negligence.

3 Who decides that issue; meaning, who
4 decides whether something should be called
5 negligence or just gross negligence?

6 MR. CLEMENT: So I would think that
7 ultimately that's a mixed question of law and
8 fact that would be ultimately decided by the
9 court on judicial review, assuming you're with
10 me that there is judicial review.

11 I do think there would be an --
12 logically anterior purely legal question of
13 whether gross negligence is sufficient for
14 cause. And I -- just as I think I have a
15 pretty good argument that negligence pre-office
16 is not a sufficient basis for cause, I think I
17 have a pretty good argument that gross
18 negligence pre-office is not a sufficient basis
19 for cause.

20 And, you know, in some respects, I
21 think, in the long run, it will be better to
22 make clear that in the context of this unique
23 institution, with its distinct history, that
24 for cause is several steps north of gross
25 negligence even because that's going to make it

1 really something that the courts aren't going
2 to have to get dragged into on a routine basis,
3 where I think the lower the standard is, the --
4 the more likely you are to have removals in the
5 future.

6 And the lower the standard, I think
7 the greater is going to be the judicial
8 temptation to think about pretext. And I'm not
9 going to say that there's no role for a pretext
10 inquiry, but it's not a happy sort of scenario
11 for the courts to be considering pretext in the
12 context of presidential decision-making.

13 And it seems to me the way to solve
14 that is to say the real procedural and
15 substantive kind of bite to this term, sort of
16 for cause. You do have to do some kind of
17 notice and opportunity for a hearing. I mean,
18 even if it's an hour in the Oval, that's a big
19 imposition on the president's time, and that's
20 going to keep some presidents from removing
21 somebody. And if they know that it's going to
22 be judicially reviewed, then that's going to
23 deter most presidents most of the time.

24 And so I think kind of, you know, it's
25 like -- what is it -- you know, high walls make

1 for good neighbors. I mean, I -- I -- I think
2 this is a situation where you do want to have
3 those kind of meaningful legal requirements.

4 CHIEF JUSTICE ROBERTS: Justice Kagan?

5 JUSTICE KAGAN: What do you understand
6 the government to mean by "gross negligence"?

7 MR. CLEMENT: This. I mean, you know,
8 I don't really know. I don't think they've
9 offered sort of a theory of gross negligence,
10 and that's why I don't think it --

11 JUSTICE KAGAN: You think it's just a
12 label that they've put on this particular set
13 of facts?

14 MR. CLEMENT: Sure. And if, heaven
15 forfend, we end up with a whole common law of
16 Fed governor removal, then we might eventually
17 be able to sort of piece it together. But it
18 seems to me that, you know, you can -- you
19 could label an awful lot of things gross
20 negligence, and that seems to be inconsistent
21 with not just the for-cause provision but the
22 whole structure of this statute.

23 And, I mean, Justice Kavanaugh alluded
24 to the Morrison dissent and, you know, Justice
25 Scalia creating this beautiful picture of some

1 independent counsel with nothing to do but to
2 find a crime on somebody. But, if all the
3 independent counsel has to do is find gross
4 negligence, then I don't think the independent
5 counsel would need more than a couple of hours
6 with most of us.

7 I mean, that's such an elastic
8 standard. And I just can't imagine that's
9 consistent with all the trouble Congress went
10 to to make this unique entity insulated from
11 kind of the political pressures of the day.

12 JUSTICE KAGAN: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Gorsuch?

15 Justice Kavanaugh?

16 JUSTICE KAVANAUGH: A couple things.
17 Just to talk again about the standard, I mean,
18 getting the definition of "for cause" right,
19 which we may not have to do in this posture, so
20 I take that as critical because, on the one
21 hand, you have the independence of the Federal
22 Reserve, which we've talked about; on the other
23 hand, we have people who have committed --
24 again, not talking about the facts of this
25 case -- but serious ethical or other wrongdoing

1 digging in and remaining in office.

2 And it seems like your two answers to
3 that, when you said your front-line position's
4 INM, were intervention/resignation. And I'm
5 not sure that really works with some people who
6 are going to just dig in. You know, they're
7 not going to leave. And then the other was
8 impeachment, but, of course, with the
9 two-thirds requirement in the Senate and the
10 time constraints of the House and Senate, I'm
11 not sure that's available as often as you say.

12 All of which is getting me to the
13 point of I don't see how the front-line
14 position really can be the -- the final
15 position without making -- kind of tilting the
16 balance here too far the other direction from
17 where the Solicitor General is.

18 You just want to tackle that at all?
19 I mean, you've covered it, but I want to get it
20 out one more time so you can succinctly answer
21 it.

22 MR. CLEMENT: Sure. I think the best
23 thing that I haven't said already that I could
24 add is I think, in the unique context of this
25 particular agency, you want to strike the

1 balance more in favor of keeping an official
2 who maybe in a perfect world would be removed
3 because, you know, this is the opposite of the
4 situation in essentially all of the other
5 situations, with the possible exception of,
6 like, the Tax Court and the Court of Claims and
7 the Court of Military Appeals.

8 Here, I think, you know, there -- it's
9 less important that the president have full
10 faith in every single governor, and it's more
11 important that the markets and the public have
12 faith in the independence of the Fed from the
13 president and from Congress.

14 And in this regard, I think it's --
15 you know, this is not a situation where the --
16 unlike Myers, which is the ultimate example,
17 where the president's trying to arrogate some
18 power away from the executive. This is a
19 situation where Congress, political animals one
20 and all, knew better than anyone that the
21 short-term temptations to lower interest rates
22 and have easy money was a disaster in the long
23 term but was going to be irresistible.

24 And so they tied their own hands by
25 taking the Fed out of the appropriations

1 process. And they tied the president's hand.
2 And I think they tied the president's hand in a
3 pretty significant way.

4 And I understand the concerns about
5 the balance, but I would say, in this one
6 context, it probably makes more sense to, you
7 know -- and maybe you want to, you know, bring
8 in a little bit of common law, and that's fine
9 with me -- but I do think you want to strike
10 the balance so that the ultimate imperative is
11 that the markets don't think that rates are
12 being lowered for political pressure. When
13 rates are lowered, the markets are going to
14 understand that that's actually prudent
15 financial management of our monetary policy.

16 JUSTICE KAVANAUGH: In your colloquy
17 with the Chief Justice about what a hearing
18 would look like within the executive branch
19 with the president or with the president's
20 designee -- I just want to make sure I have
21 this clear. In that hearing, you could make
22 legal arguments as well, I assume, not just
23 factual arguments but legal arguments, to say
24 we don't think this rises to the level of for
25 cause. Basically, the kinds of arguments that

1 you've made here you could make to the
2 president in the same way, in an impeachment
3 proceeding, people make legal arguments to the
4 Senate about what exactly is high crimes and
5 misdemeanors, correct?

6 MR. CLEMENT: Correct. And,
7 obviously, the nature of the hearing is going
8 to inform the scope for that. If it's, you
9 know, just half an hour with the president, I
10 don't know how much you're going to get into
11 sort of legal briefing.

12 But, if you did do anything like Taft
13 or you just said, well, we've got a couple of
14 ALJs lying around, we'll have one of them just
15 sort of hear the evidence on this, I mean, then
16 I would expect there to be presentation on both
17 evidence and law.

18 JUSTICE KAVANAUGH: And just for the
19 kind of simplest way -- and this Justice Kagan
20 was asking -- to decide this case, I think one
21 way would just be to say there was insufficient
22 process and, therefore, we at this juncture
23 deny the government's application. Thoughts?

24 MR. CLEMENT: I think that would be a
25 very simple way to decide the -- this case. I

1 think perhaps the defect that was alluded to in
2 the colloquy with the Chief Justice is that
3 probably is also, you know, the -- the way that
4 probably maximizes the chances that it gets
5 back here on the merits, whereas, if you
6 decided to go a little further and say
7 something substantive, it might bring all of
8 this to an end. And there's probably some
9 virtue to that. Certainly, there's some virtue
10 to that from my client's perspective.

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett?

14 JUSTICE BARRETT: I'm going to you ask
15 you about irreparable harm. You were just
16 talking to Justice Kavanaugh about the
17 uniqueness of the Fed and its need for
18 independence. And the government, because it
19 has not challenged the removal restriction for
20 purposes of this case, I think we're all
21 operating on that assumption.

22 When the president -- if you're
23 thinking about the unitary executive, when the
24 president has untrammelled authority to fire a
25 subordinate, keeping that subordinate in

1 office, I think, inflicts maybe a different
2 kind of irreparable harm than the argument that
3 the government would be able to make here
4 because the government -- the president doesn't
5 have the same control over the Fed at least
6 based on the assumptions we have in this case.

7 What do you think about that? And
8 what kind of an argument would you make for --
9 what is your best-case argument that the
10 president is not suffering irreparable harm by
11 the inability -- let's assume that he has the
12 ability to remove Governor Cook. Let's assume
13 that some of your merits arguments are going to
14 lose. They still have to show irreparable
15 harm.

16 So what's your best argument that he's
17 suffering none?

18 MR. CLEMENT: Well, I think my best
19 argument that he's not suffering irreparable
20 harm in those circumstances is that he's --
21 he's not suffering the unique indignity of
22 having sort of pure executive power exercised
23 by people that are removable at will in --
24 outside of his control.

25 And maybe that's a little circular in

1 the end, but -- but I think it's -- like,
2 it's -- it's kind of why this case is, I think,
3 problematic for the government because, you
4 know, they -- they could have come in here and
5 said, you know, Fed, schmed, it's not that
6 different. This is just like the FTC, and so
7 we're suffering the same irreparable injury as
8 in those other cases.

9 But, when they come in and say, no,
10 we're going to accept that the Fed is different
11 at least for purposes of this case and that we
12 can't remove somebody just for policy
13 disagreements, then having somebody continuing
14 in office just because you have a different
15 conception of "for cause" than they do or than
16 you've been able to persuade a court so far
17 about doesn't strike me as irreparable harm.

18 And then, on the other side of the
19 ledger, I think there are enormous irreparable
20 harms here that really don't have an analog in
21 most of these other situations. I don't mean
22 to denigrate any other agency, but, you know,
23 there's a reason that monetary policy has been
24 treated differently for, you know, 10 these
25 many years, and there's a reason that the

1 markets watch the Fed a little more closely
2 than they watch really any other agency of
3 government.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

6 JUSTICE JACKSON: So you've had a
7 couple questions about what good is a hearing,
8 what would a -- what would a hearing do in this
9 situation where Ms. Cook has made a statement
10 through her lawyer about the -- about the
11 allegations.

12 I guess I'm wondering, setting aside
13 for a moment the standards for cause, don't we
14 have to have a circumstance in this kind of
15 situation in which the facts are established?

16 In other words, I thought the work of
17 the hearing, even in this situation, would be
18 to establish when these applications were
19 signed, what she thought she was attesting to,
20 what actually was going on with respect to
21 these documents that the President is pointing
22 to that says -- and he says they establish her
23 deceit and grossly negligence or whatnot, and
24 -- and I think before we even get there, we
25 have to know what the facts are related to

1 this.

2 Isn't that what the hearing would be
3 about, at least in part?

4 MR. CLEMENT: I -- I think it would
5 be. And maybe, though, to try to defend my,
6 you know, heads I win, tails you lose answer to
7 Justice Alito, I mean, you know, you -- you
8 could think about this by analogy. I mean,
9 there are certain circumstances where you
10 essentially grant a motion to dismiss for one
11 side.

12 You basically say look, we didn't have
13 a hearing here, that was a mistake. But even
14 on sort of the best reading of the evidence,
15 this is at most an inadvertent mistake, and so
16 there is no for cause removal, in which case my
17 client would win.

18 On the other hand, if, you know,
19 normally you have that kind of evidentiary
20 hearing and that is to establish sort of the
21 facts. And then you then apply the law to
22 those facts that have been established.

23 JUSTICE JACKSON: Right.

24 MR. CLEMENT: But there are
25 circumstances --

1 JUSTICE JACKSON: There are
2 circumstances.

3 MR. CLEMENT: -- which you don't need
4 any more facts.

5 JUSTICE JACKSON: But -- but you --
6 but -- but then you're in, you're in Justice
7 Kavanaugh's world which is you would still at
8 the hearing then go to the legal question of
9 whether or not what you agree happened here
10 counts as gross negligence. You would say it
11 has to be at least that in order to satisfy the
12 for cause standard, the other side would say
13 no.

14 So there's something -- there's some
15 work to be done in a hearing?

16 MR. CLEMENT: Absolutely. And what I
17 -- I -- another way of putting it is, look, the
18 denial of the hearing to my client, if she does
19 indeed have a right to a hearing, can -- cannot
20 be harmless error, like it just can't, no
21 matter what you think of the facts.

22 On the other hand, if you agree with
23 us on the law, you could still resolve this
24 case in her favor on the grounds that, you
25 know, there were two mistakes here. One, she

1 didn't get a hearing, but we don't have to like
2 remand for a hearing --

3 JUSTICE JACKSON: Yeah.

4 MR. CLEMENT: -- or any of the rest
5 because even on a facts kind of most -- you
6 know, in the light most favorable to the
7 government, this isn't a removable offense --

8 JUSTICE JACKSON: Can I go quickly to
9 the standards? Because as I read the -- the --
10 the sort of what happened here, it wasn't as
11 though the district court just sort of made it
12 up in terms of what she thought should count as
13 for cause. My understanding is that she was
14 looking, as you've said several times, to the
15 common law, and what courts have traditionally
16 said.

17 And I see, for example, a court, a
18 Maryland court, Board of State Commissioners of
19 Hagertown -- Hagerstown in 1903, which is
20 around the same time as the establishment of
21 the statute, that said, quote, "the phrase 'for
22 cause' must mean some cause affecting the
23 ability or fitness of the incumbent to perform
24 the duty imposed upon him."

25 And other similar courts at the time

1 talked about pre-tenure conduct and said if it
2 was pre-tenure, it can't be sufficient cause
3 unless it was serious enough to undermine the
4 job performance.

5 A mere allegation was not enough back
6 at common law. It had to have been tested and
7 proven like through a conviction. So these
8 standards that were used here to determine at
9 least at the district court level whether cause
10 was satisfied came from somewhere.

11 Is that right?

12 MR. CLEMENT: Absolutely. And, you
13 know, I love that Hagerstown case because not
14 only is it a very helpful common law case, but
15 it's actually the basis for the definition in
16 Black's Law that the government and Judge Katz
17 below relied on. I mean, you know, Black's Law
18 is an unusual dictionary. It just doesn't sort
19 of, you know, pop out the meaning from like
20 Noah Webster's mind. It like cites cases for
21 particular concepts.

22 And the concept -- the case it cites
23 for for cause is that Hagerstown case.

24 JUSTICE JACKSON: And so all the
25 hypotheticals, I mean, we -- we see them and

1 they might be problematic but they would be
2 tested against the standards that the courts
3 have applied, right?

4 MR. CLEMENT: Absolutely. And -- and
5 if I could just elaborate in -- in -- in one
6 respect, I mean, you know, if you think about
7 pre-office conduct, there's only two kinds.
8 One, there is pre-office conduct that was
9 disclosed to the Senate in the confirmation
10 process.

11 And it's to that, even the government
12 sort of says, well, you probably shouldn't let
13 the next President sort of relitigate all of
14 that. And then the second kind is stuff that
15 was undisclosed.

16 And if it's as serious as we're talking
17 about, that's essentially the nominee, you
18 know, defrauding the -- the Senate. And so I
19 actually think in that respect, impeachment is
20 probably a more fit remedy than it might be in
21 some other circumstance because you're going to
22 have whatever the conduct is, plus you're going
23 to have the Senate being pretty darn vexed that
24 that was withheld from them in the confirmation
25 process.

1 JUSTICE JACKSON: Final question. Do
2 you -- I -- I -- I took you to be conceding
3 that there was notice here. And I guess I'm a
4 little concerned about that.

5 I mean, do -- are you conceding that a
6 posting on social media is sufficient notice in
7 a situation like this when the President is
8 seeking to remove a governor for -- for cause?

9 MR. CLEMENT: So what -- what I would
10 say is, you know, I -- I think --

11 JUSTICE JACKSON: I mean, I know it
12 happened. She got notice. We live in a world
13 that is connected, but I -- I guess isn't
14 notice a particular thing in the common law?

15 MR. CLEMENT: Well --

16 JUSTICE JACKSON: Or in our law?

17 MR. CLEMENT: -- I mean, me put it
18 this way. Like I -- I don't sort of resist the
19 idea that the Truth Social post is notice
20 because I think it's also fundamentally
21 defective notice because it's also indisputable
22 evidence that the President prejudged the
23 matter.

24 JUSTICE JACKSON: Right. Because it's
25 --

1 MR. CLEMENT: So it's not -- it's not
2 the kind of notice that --

3 JUSTICE JACKSON: So -- so hypothesize
4 he didn't say you are fired or you should be
5 fired. Hypothesize he just said, you know, I
6 have this information and I intend to fire the
7 governor.

8 Why wouldn't he have to, like, send
9 the letter to her? How -- how is it that we
10 can assume that she's on social media or has
11 looked at the news or that that's sufficient
12 notice even if she did turn on the news and
13 he's saying that? I -- I don't know why that
14 would be enough.

15 MR. CLEMENT: Look, I -- I -- I
16 might -- I might make that argument but that
17 doesn't seem -- you know, I mean, if he -- if
18 he said on Truth Social that, look, here I have
19 this allegation and I'm going to convene a
20 hearing at, you know, the Roosevelt Room at 4
21 p.m. tomorrow, please bring all your evidence.

22 JUSTICE JACKSON: What if she doesn't
23 have a Truth Social account, she doesn't show
24 up, is that enough notice?

25 MR. CLEMENT: You know, I -- I think

1 under those circumstances, probably not, but I
2 think as a practical matter in most
3 circumstances, the President puts it on Truth
4 Social, most people most of the time are going
5 to consider that to be notice.

6 Again, the -- part of the reason I'm
7 not resisting is -- or I'm, you know, sort of
8 moderating this is because, you know, this
9 notice isn't the kind of notice the common law
10 envisioned because the common law would
11 envision notice that didn't prejudge the
12 matter.

13 JUSTICE JACKSON: Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Rebuttal, General Sauer.

17 REBUTTAL ARGUMENT OF GEN. D. JOHN SAUER

18 ON BEHALF OF THE APPLICANTS

19 GENERAL SAUER: Thank you, Mr. Chief
20 Justice.

21 Turning to the question of whether or
22 not in-office or pre-office misconduct can
23 constitute cause, I want to make a statutory
24 point which is that the INM standard is by --
25 on its terms limited to in-office misconduct

1 and Congress did not adopt that here.

2 They adopted the more capacious
3 standard as this Court recognized in Collins
4 against Yellen cause gives the President more
5 discretion and provides less protection to the
6 -- to the officer than the INM standard does.

7 And even if it were in a situation
8 where you're looking at the -- the -- the 19th
9 Century case law and so forth, they disregard a
10 series of cases that hold that pre-office
11 misconduct is sufficient cause.

12 For example, in Ray Gooden -- you
13 know, from New York in 1902 which involved an
14 officer who engaged in a kind of shenanigan in
15 order to get the office in the first place.
16 There was a -- a corrupt agreement to appoint
17 somebody to a position if they supported that
18 person politically.

19 Iowa against Walsh, which was
20 pre-office embezzlement. Gill against
21 Watertown, a case they rely heavily it was said
22 in dicta, at least, that gross fraud is
23 committed before office would constitute cause
24 to remove. So there really isn't support
25 anywhere for this notion that pre-office

1 misconduct can't be considered when it comes to
2 a cause standard.

3 And -- and related to that, that was
4 very telling that Mr. Clement was saying that
5 it does come to pre-office misconduct,
6 impeachment would be the only remedy that would
7 provide it, which if taken to its full extent
8 would make Governors of the Federal Reserve
9 have the kind of tenure protections that the
10 Constitution affords to Article III judges.
11 That is not what this statute says.

12 That is directly in the face of the
13 statutory language which says cause, but no
14 further restrictions. Clearly Congress
15 envisioned that they could be removed for a
16 good enough reason.

17 And on that point, I just want to
18 emphasize, there is this colloquy about whether
19 it should be sent back or decided now on the
20 merits. Whichever way the Court comes out on
21 that, the Court should not -- should send it
22 back with an emergency stay and I want to
23 emphasize two reasons there.

24 This Court -- no Court should hold
25 that the misconduct that's alleged here, which

1 is at least gross negligence, at least an
2 inadvertent notation that is a grave
3 misrepresentation on a mortgage document that's
4 designed to determine the governor's interest
5 rates is not cause to remove a principal
6 officer of the United States who sets interest
7 rates for the entire country.

8 So all the discussion of what are the
9 outer bounds of cause, whether it's judicial
10 review, on that fundamental court, neither this
11 Court nor any other court should look at this
12 and say this is likely not cause.

13 That sends the wrong message to the
14 markets. It sends the wrong message to the
15 American people who have to make correct
16 representations to their banks when they're
17 getting their mortgage interest rates.

18 And the second point I would make is
19 the remedy granted here, a preliminary
20 injunction that runs against the President
21 reinstating a principal officer of the United
22 States is something that has never been granted
23 before 2025 in this Court or in the -- the
24 nation's history. And, in fact, contradicts a
25 clear holding of this Court in Sawyer that a

1 preliminary injunction is not available in
2 equity.

3 Those two reasons alone clearly
4 suffice to send it -- if -- if there is going
5 to be a decision to send it back, to send it
6 back with the emergency stay that we've asked
7 for.

8 And then if the Court -- if -- if --
9 if the Court decides to sort of send the case
10 back to have many -- many more of these issues
11 that we discussed today to be aired, we urge
12 the Court, and I think Mr. Clement wouldn't
13 disagree, to direct the lower courts to proceed
14 very expeditiously. Here this is -- we are in
15 an emergency stay posture. The executive has
16 been suffering irreparable harm since early
17 September, and the sooner that these issues are
18 resolved, the better.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel. The case is submitted.

22 (Whereupon, at 12:01 p.m., the case
23 was submitted.)
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