

# **SUPREME COURT OF THE UNITED STATES**

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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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Pages: 1 through 136

Place: Washington, D.C.

Date: January 21, 2026

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## **HERITAGE REPORTING CORPORATION**

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3       DONALD J. TRUMP, PRESIDENT                   )  
4       OF THE UNITED STATES, ET AL.,                )  
5   )  
6   ) No. 25A312  
7       LISA D. COOK, MEMBER OF THE                )  
8       BOARD OF GOVERNORS OF THE                 )  
9       FEDERAL RESERVE SYSTEM,                    )  
10    )  
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 PROCEEDINGS

(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

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.

12 JUSTICE SOTOMAYOR: Sorry.

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 starker of solecisms. Or, sorry, there is  
6   no such thing as a preliminary writ of  
7   mandamus. Judge Friendly described that as the  
8   starker 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?

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.

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 starker 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 --

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?

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.

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.

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.

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

22 JUSTICE JACKSON: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,

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?

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?

22 JUSTICE GORSUCH: Right, the President  
23 --

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 untrammeled 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, lo 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 Hagerstown -- 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 a 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?

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 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.)

24

25

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