

# 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. )  
- - - - -

Pages: 1 through 137  
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3       DONALD J. TRUMP, PRESIDENT                    )  
4       OF THE UNITED STATES, ET AL.,                )  
5                                   Applicants,                )  
6                                   v.                                ) No. 25A312  
7       LISA D. COOK, MEMBER OF THE                    )  
8       BOARD OF GOVERNORS OF THE                    )  
9       FEDERAL RESERVE SYSTEM,                    )  
10                                   Respondent.                )  
11       - - - - -  
12  
13                                   Washington, D.C.  
14                                   Wednesday, January 21, 2026  
15  
16       The above-entitled matter came on for  
17       oral argument before the Supreme Court of the  
18       United States at 10:03 a.m.  
19  
20       APPEARANCES:  
21       GEN. D. JOHN SAUER, Solicitor General, Department of  
22                   Justice, Washington, D.C.; on behalf of the  
23                   Applicants.  
24       PAUL D. CLEMENT, ESQUIRE, Alexandria, Virginia; on  
25                   behalf of the Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	GEN. D. JOHN SAUER, ESQ.	
4	On behalf of the Applicants	3
5	ORAL ARGUMENT OF:	
6	PAUL D. CLEMENT, ESQ.	
7	On behalf of the Respondent	69
8	REBUTTAL ARGUMENT OF:	
9	GEN. D. JOHN SAUER, ESQ.	
10	On behalf of the Applicants	133
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:03 a.m.)

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

6 General Sauer.

7 ORAL ARGUMENT OF GEN. D. JOHN SAUER

8 ON BEHALF OF THE APPLICANTS

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

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

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

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

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

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

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

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

3 I welcome the Court's questions.

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

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

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

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

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

15 CHIEF JUSTICE ROBERTS: I --

16 GENERAL SAUER: Now we acknowledge  
17 what the Court said in Wilcox, which is that  
18 it's a quasi-private, uniquely structured  
19 entity that stands in the distinct historical  
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 take --

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 admission,  
14   cannot fire someone for disagreeing with his  
15   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 case  
4 of reinstating someone.

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

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

12 JUSTICE SOTOMAYOR: Sorry. I  
13 misspoke.

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

20 And this Court said it could --

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

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



1 officer.

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

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

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

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

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

1       that.

2                   JUSTICE JACKSON:   Mr. Sauer --

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

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

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

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

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

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

1 JUSTICE BARRETT: Well, I'll interrupt  
2 you there to say that I don't want to be in the  
3 business of predicting exactly what the  
4 market's going to do.

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

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

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

16 GENERAL SAUER: Yes.

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

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

23 GENERAL SAUER: I think the Court has  
24 to weigh that risk against the risk that there  
25 will be a permanent damage to the Federal

1 Reserve's credibility from allowing an officer,  
2 a governor, to remain in office who's engaged  
3 in this kind of behavior before she came in  
4 office. That's --

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

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

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

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

1 negligent in getting favorable interest rates  
2 for herself.

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

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

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

23 When you look at, for example, the  
24 originalist evidence we talked about in the  
25 Decision of 1789, when everybody said or both

1 camps were saying, of course, the president can  
2 engage in suspensory removals, and we have a  
3 preliminary injunction that is conspicuously  
4 nonexistent, in your words, in CASA, you know,  
5 for 225 years of American history --

6 JUSTICE JACKSON: But, Mr. Sauer --

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

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

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

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

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

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

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

12          GENERAL SAUER: So it's about  
13   framing --

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

22          GENERAL SAUER: Among other reasons,  
23   we assert grievous irreparable injury to the  
24   public perception to the Federal Reserve of  
25   allowing her to stay in office. They argue

1     that this is going to cause the markets to  
2     tank.

3             JUSTICE JACKSON:  You have evidence  
4     related --

5             GENERAL SAUER:  When she was first  
6     removed, they didn't tank.

7             JUSTICE JACKSON:  You have evidence  
8     related to the public perception, or is this  
9     just the president's view?

10            GENERAL SAUER:  The president has made  
11     that determination.  It's reflected in the  
12     language of the dismissal order, and as I  
13     discussed remotely during this --

14            JUSTICE JACKSON:  Did the president  
15     make that --

16            GENERAL SAUER:  -- close week --

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

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

25            JUSTICE JACKSON:  No, no, no, I



1 understand -- I --

2 GENERAL SAUER: -- to obtain favorable

3 interest rates for herself --

4 JUSTICE JACKSON: You're -- you're --

5 you're repeating --

6 GENERAL SAUER: -- by seeing it so

7 low --

8 CHIEF JUSTICE ROBERTS: Counsel --

9 JUSTICE JACKSON: -- you're

10 repeating --

11 CHIEF JUSTICE ROBERTS: -- please

12 allow the Justice --

13 GENERAL SAUER: I'm sorry.

14 JUSTICE JACKSON: You're repeating the

15 allegation. What I'm asking you is the

16 evidence that supports that allegation.

17 Traditionally, when an allegation is made about

18 someone's misconduct or whatnot, there's an

19 opportunity for that person to present

20 evidence, for the other side to present

21 evidence. And even if the president was the

22 final arbiter of this, one would expect that he

23 would do so on the basis of evidence.

24 So what I'm trying to understand is

25 what is the evidence that has been presented

1 and considered with respect to Ms. Cook's  
2 alleged misconduct?

3 GENERAL SAUER: Well, the removal  
4 order addresses that because it --

5 JUSTICE JACKSON: What is the removal  
6 order? The -- the -- the Truth Social post?

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

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

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

21 JUSTICE JACKSON: In the world?

22 GENERAL SAUER: Yes.

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

1           GENERAL SAUER: Yeah.

2           JUSTICE JACKSON: -- that you're  
3 saying is -- was afforded to her in this case?

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

9           JUSTICE GORSUCH: General --

10          GENERAL SAUER: -- or -- or justifying  
11 it.

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

17          What would that hearing look like?

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

24          I think they rely heavily on  
25 Loudermill. Obviously, we dispute that there's

1 any notice and hearing requirement. But  
2 Loudermill requires only very minimal, flexible  
3 procedures.

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

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

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

24 And because it's not there, the Court  
25 has nothing to provide guidance on that point.

1 And if the Court were to conclude that, it  
2 would be up to the executive's discretion.

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

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

10 JUSTICE GORSUCH: Okay.

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

14 JUSTICE GORSUCH: Yeah.

15 GENERAL SAUER: -- between the Truth  
16 Social post and -- and the removal letter.

17 JUSTICE GORSUCH: And then --

18 JUSTICE KAGAN: But do --

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

25 GENERAL SAUER: So the contention in

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

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

22 JUSTICE KAGAN: Do -- do I understand  
23 you, General, going back to Justice Gorsuch's  
24 first question, to continue to maintain that,  
25 in fact, there is no requirement for notice and

1 opportunity for a hearing? Is that right?

2 GENERAL SAUER: Absolutely, yes.

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

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

9 JUSTICE KAGAN: But, because the --

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

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

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

1 JUSTICE KAGAN: Right.

2 GENERAL SAUER: And there was a  
3 removal with no notice or hearing. And the  
4 Court held, well, clearly, this wasn't for  
5 INM --

6 JUSTICE KAGAN: I mean, your --

7 GENERAL SAUER: -- because it was  
8 notice and a hearing.

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

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

24 On the other issues where they  
25 contended the case law all goes in one



1 direction, you have their own sources saying  
2 they're all over the map. They're directly  
3 contradictory, for example, in the Tuttle Law  
4 Review article.

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

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

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

1 consistent with -- with the time and energy  
2 being spent on determining if there's cause?

3 GENERAL SAUER: We agree. That's an  
4 alternative basis. As we say in our brief,  
5 that's reason enough to rule in our favor, and  
6 we have a holding of the Court, Sawyer. We  
7 also have this tradition I was referring to  
8 earlier of recognition that runs from the  
9 Decision of 1789 to all the opinions in Myers.  
10 It's alluded to in Wiener and so forth,  
11 recognizing the president's power of interim or  
12 suspensory removals.

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

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

24 GENERAL SAUER: There is a traditional  
25 remedy to reinstate wrong -- we don't dispute

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

15                 And, in fact, this is an ultra vires  
16    challenge, where the standard is exactly the  
17    opposite and you can't decide.

18                 CHIEF JUSTICE ROBERTS: So there's a  
19    circumstance in which a court can order the  
20    restatement of a wrongly removed officer?

21                 GENERAL SAUER: But the -- there is  
22    a -- a traditional remedy, mandamus. Here,  
23    obviously, it would be quo warranto if there  
24    were two competing claimants, but where there's  
25    just the one, that would be mandamus. And they

1 have not argued mandamus. They're trying to  
2 find their way around mandamus because the  
3 standards to prevail under mandamus are  
4 insuperable and they clearly cannot meet them.

5 JUSTICE JACKSON: But, General --

6 CHIEF JUSTICE ROBERTS: Thank you.

7 I'm sorry.

8 JUSTICE JACKSON: Oh.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Thomas?

11 Justice Alito?

12 JUSTICE ALITO: Is there any reason  
13 why this whole matter had to be handled by  
14 everybody, by the executive branch, by the  
15 district court, by the D.C. Circuit, in such a  
16 hurried manner?

17 We -- you began by laying out what you  
18 claim to be the factual basis for the for-cause  
19 removal, but no court has ever explored those  
20 facts. Are the mortgage applications even in  
21 the record in this case?

22 GENERAL SAUER: I know that the text  
23 of the social media post that screenshots the  
24 mortgage applications is in the record. But I  
25 don't recall if the -- the paperwork itself is

1 in the record, in the district court's record.

2 JUSTICE ALITO: So, when this was  
3 before the executive branch, it was handled in  
4 a very cursory manner. The district court  
5 decided the case on the ground that "for cause"  
6 doesn't mean anything that happened before the  
7 person took office. And I'll question  
8 Mr. Clement about that when he's -- when he --  
9 when he stands up.

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

15 Am I right on that?

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

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

23 GENERAL SAUER: My recollection is  
24 that the D.C. Circuit -- the Garcia opinion in  
25 the D.C. Circuit relied solely on Loudermill

1 and the due process property interest, which is  
2 baseless for the reasons we say. And now the  
3 district -- the district court relied on the --  
4 the twin grounds, both that Loudermill  
5 rationale and also the --

6 JUSTICE ALITO: All right. I stand --

7 GENERAL SAUER: Yeah, yeah.

8 JUSTICE ALITO: -- I stand corrected  
9 on that. But those are the only two issues  
10 that were decided by the lower courts?

11 GENERAL SAUER: That's correct.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Sotomayor?

14 JUSTICE SOTOMAYOR: I have a couple of  
15 follow-ups.

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

23 It was very careful to distinguish its  
24 holding from cases in which there were a  
25 tenured position and there was a for-cause

1 provision. So you're extrapolating, correct?

2 GENERAL SAUER: I disagree with that.

3 We read Reagan differently. If you have  
4 that -- those two key paragraphs in Reagan --

5 JUSTICE SOTOMAYOR: Well, we can both  
6 look at it.

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

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

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

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

1 heard of before in an informal proceeding.

2 If the president can go by social  
3 media and one believes that that is adequate  
4 notice under law, I'm hard-pressed to think a  
5 letter from a lawyer is not notice from the  
6 adversary. But we can move on from that.

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

17 As to the mortgage issue in Atlanta,  
18 Ms. Cook's lawyer represents that the papers  
19 submitted to the bank disclosed the fact that  
20 this was a vacation home, so they may not have  
21 experienced deceit.

22 If they didn't experience deceit, then  
23 you're left with gross negligence, and the  
24 question becomes, is it grossly negligent to  
25 make a mistake on a mortgage application? And



1 I don't know that gross negligence has ever  
2 risen to the level of a mistake. So there is a  
3 factual issue.

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

9 GENERAL SAUER: What was addressed  
10 below is I think exactly what I had in the  
11 exchange with Justice Alito.

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

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

21 GENERAL SAUER: If I could say two  
22 things about that.

23 First, on the -- the -- the narrow  
24 point about whether or not a letter of counsel  
25 can create a factual dispute in this context,

1     that's the holding of this Court in Codd  
2     against Velger, where the Court said that  
3     suggestions of counsel are not enough. It's  
4     the party who has to -- to do it. So there  
5     were representations of counsel there, and the  
6     Court held that that wasn't enough to bring it  
7     back --

8             JUSTICE SOTOMAYOR: That's in a legal  
9     proceeding. This is an informal proceeding. A  
10    legal proceeding.

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

18            JUSTICE SOTOMAYOR: Thank you.

19            CHIEF JUSTICE ROBERTS: Justice Kagan?

20            JUSTICE KAGAN: General, can I take  
21    you back to the Chief Justice's question, the  
22    remedial question, the last one, because, in  
23    response to him, you said kind of no worries  
24    because there's a traditional remedy of  
25    mandamus. But then pretty much in the next

1 sentence you said, but, of course, mandamus  
2 doesn't apply here because it's the president.

3 So, I mean, when we're talking about  
4 the president's removal powers, you're  
5 essentially saying that the only remedy doesn't  
6 apply. And that brings you back to the Chief  
7 Justice's question, which is, well, if -- if  
8 there's no way to reinstate, like, what does  
9 this cause requirement amount to?

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

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

23 But, if then you're saying, well, even  
24 if he flunks whatever that requirement is,  
25 there's no way to reinstate the person, there's

1 no way to use the mandamus route, what does it  
2 amount to? It seems pretty -- it seems  
3 non-effectual.

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

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

22 The president just has to say: I'm  
23 removing you for cause. You committed gross  
24 negligence.

25 GENERAL SAUER: And there's no

1 question for all the reasons we discussed in  
2 our briefing that that confers broad discretion  
3 on the president. Now there's an outer  
4 perimeter that is subject to policing by  
5 judicial review, policy disagreement, no cause  
6 at all and so forth, but that is -- confers  
7 broad discretion on the president.

8 But, even if it was de novo review  
9 here, gross negligence in a very important  
10 financial transaction that has this close nexus  
11 with what a governor does --

12 JUSTICE KAGAN: Does the president  
13 have to say what --

14 GENERAL SAUER: -- would satisfy it.

15 JUSTICE KAGAN: Does the president  
16 have to say what the gross negligence is, or  
17 can the president just say: I'm removing you,  
18 it's not for policy, it's for gross negligence?

19 GENERAL SAUER: So we have, I think,  
20 conceded in the briefing that that sort of  
21 determination would be subject to judicial  
22 review because he hasn't specified the cause.

23 Now the case law, that's a -- that's a  
24 borderline case. The case law goes in  
25 different directions on that. Garland, one of

1 the cases that we cite in our brief, kind of  
2 goes the other way, in a way that would be  
3 stronger for us, but we haven't disputed that  
4 in this case, that if it was -- there was no  
5 cause provided at all, then that would be  
6 subject to judicial review and likely an  
7 invalid removal.

8 JUSTICE KAGAN: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Gorsuch?

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

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

23 GENERAL SAUER: I think we would. Now  
24 that might be a closer case because the  
25 mandamus statement -- standard is clear and

1 indisputable right when we have conceded that  
2 policy disagreement would not be available.  
3 Actually, that might be a case where mandamus  
4 might be available with the caveat that how  
5 would Marbury apply to that. Marbury says you  
6 cannot mandamus the president in a  
7 discretionary decision.

8 And so baked into our jurisprudence  
9 from the dawn of -- of this Court --

10 JUSTICE GORSUCH: Would you say that  
11 that's not a --

12 GENERAL SAUER: -- is the notion  
13 there's going to be some things the president  
14 does that you can't dispute.

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

20 GENERAL SAUER: Essentially. The --  
21 the argument would have to be that would be  
22 ministerial within the --

23 JUSTICE GORSUCH: Yeah.

24 GENERAL SAUER: -- within the meaning  
25 of Marbury. And then I think that -- that --

1     that standard in Marbury kind of gets ported  
2     into the standard in Cheney, clear and  
3     indisputable right.

4             JUSTICE GORSUCH:  Yeah.  It -- it --  
5     it would be clear and indisputable and,  
6     therefore, could run against the president in  
7     that case?

8             GENERAL SAUER:  Hypothetically.  I'd  
9     to have do a lot more study before taking a  
10    firm position on that.

11            CHIEF JUSTICE ROBERTS:  Justice  
12    Kavanaugh?

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

19            GENERAL SAUER:  It protects the  
20    govern -- exactly reflecting the plain text of  
21    the statute, it protects the governors from  
22    removal for policy disagreement or for no  
23    reason at all.

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



1           GENERAL SAUER: To preserve the  
2       independence of the Federal Reserve.

3           JUSTICE KAVANAUGH: And what is the  
4       broader purpose of that?

5           GENERAL SAUER: Well, there is a  
6       number of reasons that are discussed by their  
7       amici and I think not disputed by us, which is  
8       that there is a -- you know, a long tradition  
9       of having this exercise of monetary policy be  
10      exercised independent of, you know,  
11      executive -- executive influence.

12           And we don't dispute that that's what  
13      Congress was doing in that statute. And,  
14      again, we have not disputed the validity of the  
15      for-cause removal restriction here.

16           JUSTICE KAVANAUGH: And why is that  
17      independence important in your view?

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

25           JUSTICE KAVANAUGH: But -- but, on

1     that, your position that there's no judicial  
2     review, no process required, no remedy  
3     available, a very low bar for cause that the  
4     president alone determines, I mean, that would  
5     weaken, if not shatter, the independence of the  
6     Federal Reserve that we just discussed.

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

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

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

1 JUSTICE KAVANAUGH: Let's talk about  
2 the real-world downstream effects of this  
3 because, if this were set as a precedent, it  
4 seems to me, just thinking big picture, what  
5 goes around comes around.

6 All of the current president's  
7 appointees would likely be removed for cause on  
8 January 20th, 2029, if there's a Democratic  
9 President or January 20th, 2033, and then we're  
10 really at at-will removal.

11 So what are we doing here?

12 GENERAL SAUER: Yeah.

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

20 So do you dispute that that is, you  
21 know, the -- the real-world effect?

22 GENERAL SAUER: I cannot predict what  
23 future presidents may or may not do, but the  
24 argument strikes me as a policy argument --

25 JUSTICE KAVANAUGH: Well, history is a

1     pretty good guide. Once these tools are  
2     unleashed, they are used by both sides and  
3     usually more the second time around. And I  
4     think that's what -- that's what we have to  
5     make sure we're -- again, that can't drive the  
6     decision necessarily. We have to be aware of  
7     what we're doing and the consequences of your  
8     position for the structure of the government.

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

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

1 and one of which --

2 JUSTICE KAVANAUGH: I agree with you  
3 that there's a balance here, and so I  
4 understand that. I'm not saying there's no  
5 interests on the other side here. I -- I get  
6 that.

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

23 I mean, again, what -- what are we  
24 doing when we have a system that -- that  
25 incentivizes that and leads to that? Now,

1 again, you can dispute that you think it's  
2 going to lead to that. And, again, I'm not  
3 talking about the facts of this case. I'm  
4 taking -- I don't know the facts of this case.  
5 I'm taking no position on that.

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

15 And so, in the hypothetical question  
16 that you pose, that hypothetical future  
17 president should also be afforded the very same  
18 sort of deference and -- and --

19 JUSTICE KAVANAUGH: But that leads --  
20 I mean, that brief, that amicus brief, cites  
21 Justice Scalia's dissent in Morrison, which is  
22 always a good place to look for wisdom, and  
23 the -- the concern that you're putting all  
24 these resources -- because you can't say it's  
25 for policy, putting all these resources, let's

1 find something, anything, about this person  
2 and -- and -- and -- and then we're good. And,  
3 by the way, there's no judicial review, so  
4 we're really good. And there's no  
5 administrative process.

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

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

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

24 One is, in Vermont Yankee, this Court  
25 said we're not going to dictate procedures to

1 executive agencies. A fortiori you should  
2 dictate procedures to the president. Our  
3 contention is that there already has been a  
4 process. There was a social media post that  
5 said, look, these two documents contradict each  
6 other. And the response was defiance. So  
7 there was a chance to tell -- in the words of  
8 Loudermill, to tell her side of the story. It  
9 just wasn't -- it wasn't adopted.

10 JUSTICE KAVANAUGH: Okay. Again --

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

17 JUSTICE KAVANAUGH: And, again, none  
18 of my questions or comments are about the facts  
19 of this case. I don't know the facts of this  
20 case. But thank you.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Barrett?

23 JUSTICE BARRETT: I want to pick up on  
24 that question about why -- Justice Kavanaugh  
25 said why are you afraid of a hearing or what



1 would there be that would be wrong with  
2 process.

3 I mean, you spent a lot of time  
4 litigating the case. You know, it's gone up  
5 from the district court to the court of  
6 appeals, and now we're here. And if there  
7 isn't anything to fear from a hearing and if  
8 you have the evidence, why couldn't those  
9 resources have been put into a hearing?

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

18 GENERAL SAUER: I don't think it's a  
19 question of resource allocation. It's our  
20 position that adequate process was already  
21 provided. So, if it's a question if the  
22 district court's order has to go further and  
23 then go further and go further again, all  
24 without any legal or constitutional authority  
25 in our view, we think that imposes irreparable

1 injury on the executive branch.

2 JUSTICE BARRETT: Well, they told you  
3 to go farther but not that much farther. I  
4 mean, okay, so there was the Truth Social posts  
5 and then, you know, burden on her to come back  
6 in five days. I understand that's your  
7 position.

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

15 GENERAL SAUER: Again, it's an  
16 intrusion on the executive branch to dictate  
17 what procedures it ought to provide --

18 JUSTICE BARRETT: So it's the standing  
19 on principle --

20 GENERAL SAUER: -- certainly to the  
21 president. And our position is he has provided  
22 process. He's provided adequate process. And  
23 if the district court said, well, that wasn't  
24 quite good enough, try again, and then we try  
25 again, and the district court says, no, that

1     wasn't quite good enough, try again, we have  
2     gone -- left Vermont Yankee way in -- in the  
3     rearview mirror.

4             JUSTICE BARRETT: Do you concede that  
5     if the statute was an INM statute that under  
6     Shurtleff you would have to provide process?

7             GENERAL SAUER: Notice and hearing,  
8     yes.

9             JUSTICE BARRETT: Yes.

10            GENERAL SAUER: We don't dispute that.

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

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

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

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

1           GENERAL SAUER: Because the case law,  
2     presumably Shurtleff, when it said that as to  
3     INM, notice -- you get notice and a hearing,  
4     was relying on what we don't dispute is a -- as  
5     far as I can tell, a pretty consistent strain  
6     in the case law that that's what that means.  
7     It gives you specified causes, like that INM,  
8     give you notice and a hearing.

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

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

22           I mean, look, I can't emphasize  
23    enough, you know, what, for example, the Tuttle  
24    Michigan Law Review article from 1905 that's  
25    heavily relied on, for example, in the Manners

1     amicus brief that they rely heavily on in their  
2     supplemental brief, it says the case law is all  
3     over the map on all of these issues. That --  
4     that treatise says the courts differ on almost  
5     every conceivable part of this question.

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

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

15            CHIEF JUSTICE ROBERTS: Justice  
16     Jackson?

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

21            I mean, I understand the Manners  
22     brief, which they rely upon, to really drill  
23     down on the various statutes related to removal  
24     and to have identified ones, for example, that  
25     have a fixed term but allowed removal only for

1     cause or had a fixed term and provided for  
2     removal at the president's discretion or didn't  
3     have a fixed cause -- a fixed term, et cetera,  
4     et cetera.

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

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

21            So what is your response to that?

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

1                   So why is the government saying  
2                   different right now?

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

10                  Her argument is gerrymandered --

11                  JUSTICE JACKSON: No, I'm talking  
12                  about -- I'm talking about the -- the  
13                  combination.

14                  GENERAL SAUER: Yes. Yes, the  
15                  combination. Right.

16                  JUSTICE JACKSON: The combination, for  
17                  cause --

18                  GENERAL SAUER: Of those four --

19                  JUSTICE JACKSON: -- and a -- and a  
20                  fixed term. So, when I look at those cases,  
21                  I'm going to find that combination, and people  
22                  are all over the map, you say?

23                  GENERAL SAUER: By our count, in  
24                  seven --

25                  JUSTICE JACKSON: Okay.

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

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

8           JUSTICE JACKSON:  All right.

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

11          JUSTICE JACKSON:  Well, let me talk  
12    about the plain text of the statute in light of  
13    its purposes.

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



1       that purpose. And you agree.

2               So I guess what I'm trying to  
3       understand is, how does reading the statute  
4       to give the president broad discretion, which  
5       you've said many times with respect to his  
6       removability of these governors, how does that  
7       further the aims of the statute?

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

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

20              And so what I'm now asking is, if we  
21      read "for cause" to ultimately reduce to the  
22      president can pick some fact that has nothing  
23      to do with their actual tenure in office,  
24      something that happened way before, and use  
25      that and say that's cause and it's not

1 reviewable and he doesn't have to show any  
2 evidence and doesn't have to give the person  
3 a hearing, basically, the president is just  
4 making the determination that Congress  
5 apparently didn't want him to have the power  
6 to make because they put "for cause" in the  
7 statute.

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

12           GENERAL SAUER: It was designed to  
13 limit the president's discretion just as far  
14 as the plain text of the statute goes.

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

22           They met in the middle with a removal  
23 standard that protects governors from removal  
24 for a policy disagreement.

25           JUSTICE JACKSON: But it only

1 protects -- it only protects them insofar as  
2 the president's determination about cause is  
3 reviewable and based on actual evidence that  
4 has been established. It doesn't protect them  
5 if the president can just make it up.

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

12 JUSTICE JACKSON: All right. One more  
13 question just about this idea of the district  
14 court's power.

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

22 We now have a fused system. Courts of  
23 equity could always be asked to step in and  
24 prevent the removal of this person. To the  
25 extent the person was claiming that they were

1 not removable, say, because the statute says  
2 they could only be removed for cause, a court  
3 of equity could be invited through this claim  
4 to come in and pause the circumstances, not  
5 allow this person to be removed until the  
6 courts of law had actually litigated the claim  
7 of removability.

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

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

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

25 JUSTICE JACKSON: Right. I'm -- I --

1 I -- I -- I --

2 GENERAL SAUER: -- with serious  
3 equitable powers --

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

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

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

25 JUSTICE JACKSON: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 General.

3 Mr. Clement.

4 ORAL ARGUMENT OF PAUL D. CLEMENT

5 ON BEHALF OF THE RESPONDENT

6 MR. CLEMENT: Mr. Chief Justice, and  
7 may it please the Court:

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

21 But despite that recognition, the sum  
22 total of the Solicitor General's arguments  
23 would reduce the removal restriction in this  
24 unique institution to something that could only  
25 be recognized as at-will employment. No

1 procedural due process before removal. No  
2 judicial review after removal. No preliminary  
3 injunction to preserve the status quo. And a  
4 conception of cause so capacious that apparent  
5 misconduct or gross negligence suffices.

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

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

19 I welcome the Court's questions.

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

25 MR. CLEMENT: So it could have been,

1 Justice Thomas. You know, in the realm of  
2 interpreting statutes, could have, should have,  
3 would have, right? But I think that you have  
4 to give faithful interpretation to what  
5 Congress actually did.

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

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

24 Now it's true that the NLRA, which was  
25 passed a month before, did specify a hearing.



1 But I think it would be a mistaken statutory  
2 interpretation to make that one express  
3 reference to a hearing sort of disable all the  
4 other old soil arguments with respect to all  
5 the other institutions where I think there's a  
6 very strong old soil argument that, whether  
7 it's INM or for cause, that means that you get  
8 notice and an opportunity --

9 JUSTICE THOMAS: With that said --  
10 with that said, what would the hearing look  
11 like and what would the review look like?

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

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

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

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

1 It was inadvertent mistake.

2 MR. CLEMENT: Well, I mean, Mr. Chief  
3 Justice, I think, in a case where the  
4 president's going to say that it's -- an  
5 inadvertent mistake is enough and the  
6 potentially removed official's going to come in  
7 and say it was an inadvertent mistake, then,  
8 you're right, I think the hearing's not going  
9 to matter that much.

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

19 CHIEF JUSTICE ROBERTS: Well, I think  
20 you're talking about the legal arguments,  
21 though, the arguments we're hearing today.

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

1 branch.

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

14 JUSTICE KAVANAUGH: Can you --

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

25 But, other than that, you defend the

1 district court's holding. Is that correct?

2 MR. CLEMENT: We -- we do defend the  
3 district court's holding on that. And I would  
4 understand that is the rule for all the  
5 statutes that have INM.

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

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

14 JUSTICE ALITO: Well, let's -- let's  
15 take your front-line -- front-line argument  
16 first and see how far you're willing to go.

17 Suppose that the office-holder was  
18 permitted to resign from a previous job under a  
19 nondisclosure agreement based on a long and  
20 egregious pattern of sexual misconduct.

21 That would not be for cause -- that  
22 would not be cause for removal?

23 MR. CLEMENT: So what I would say,  
24 Justice Alito, is I don't think that would be  
25 INM. And so, if I'm going to stick to my

1 front-line position, then that would not be for  
2 cause. It would certainly be a basis for  
3 impeachment.

4 And I think, in understanding why  
5 we've had INM for at least 90 years,  
6 probably --

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

12 MR. CLEMENT: I can only imagine --

13 JUSTICE ALITO: That must be --

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

16 JUSTICE ALITO: Well, yeah, because  
17 your position leads to --

18 MR. CLEMENT: I'm going to stick with  
19 my position.

20 JUSTICE ALITO: Well, you're -- all  
21 right.

22 MR. CLEMENT: Of course, I'm going to  
23 stick with my position and I'm going to say  
24 that's an official that would be impeached in a  
25 heartbeat, and the fact that they would be

1 impeached in a heartbeat is going to cause them  
2 to resign in half a heartbeat.

3 And this has not proven a problem. I  
4 mean, for better or for worse, whatever you  
5 think of Humphrey's Executor, we've had 90  
6 years of --

7 JUSTICE GORSUCH: Mr. Clement, what's  
8 your backup argument?

9 (Laughter.)

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

19 JUSTICE ALITO: No, it doesn't help  
20 you.

21 MR. CLEMENT: But it's not going to  
22 help me with the Justice Alito --

23 JUSTICE ALITO: It doesn't help you.  
24 It doesn't.

25 MR. CLEMENT: You know what I'm

1 saying? There's no conviction for the Hitler  
2 video.

3 JUSTICE GORSUCH: Do you have a backup  
4 to the backup?

5 MR. CLEMENT: Impeachment. It's the  
6 ultimate backup here. This is not a situation  
7 where you're being asked -- you're -- you know,  
8 have to tie yourself to the --

9 JUSTICE KAVANAUGH: We got an argument  
10 in the --

11 JUSTICE KAGAN: So why --

12 JUSTICE KAVANAUGH: -- past that  
13 impeachment doesn't cover private conduct. You  
14 obviously disagree with that then?

15 MR. CLEMENT: Well, I certainly --  
16 see, but this actually kind of makes the point  
17 about judicial review, right? I mean --

18 JUSTICE KAVANAUGH: I'm not saying I  
19 agree with that, by the way. It's been -- it's  
20 been argued.

21 MR. CLEMENT: Right. But -- but --  
22 but -- but what I -- what I absolutely agree  
23 with is the Walter Nixon case says that there's  
24 no judicial review of the impeachment  
25 determination in the end.



1                   So whatever the House and the Senate  
2                   ultimately determine, I mean, they can make  
3                   constitutional law too and they can determine  
4                   whether private conduct is or is not out. And  
5                   if they say -- and -- and with these hypos, I  
6                   mean, you know, and we can -- we can go down  
7                   the road of the hypos and they'll get worse.  
8                   I -- I am -- I am confident --

9                   JUSTICE KAVANAUGH: The backup to the  
10                  backup, to use Justice Gorsuch's term, would be  
11                  the infamous, but you don't need a conviction.

12                  MR. CLEMENT: Right. No, absolutely.  
13                  And, of course --

14                  JUSTICE KAVANAUGH: And that seems to  
15                  solve your answer -- a lot of the difficult  
16                  hypos, correct?

17                  MR. CLEMENT: Correct. But the reason  
18                  I want to spend at least a moment answering  
19                  some of the hard hypos is not because I'm a  
20                  masochist. It's just because those are -- have  
21                  got to be the answers under INM.

22                  JUSTICE KAVANAUGH: You -- your answer  
23                  is that those are funneled to the impeachment  
24                  process?

25                  MR. CLEMENT: That's right. And

1       that's -- that's the way --

2               JUSTICE KAGAN:   So why --

3               MR. CLEMENT:   -- INM has worked for  
4       150 years.   And I think it would continue to  
5       work.   It hasn't proven a problem in practice.  
6       But I'm not resisting very hard the backup to  
7       the backup on that because I don't think we're  
8       close.

9               And, of course, look, all of these are  
10      hard questions, which is all of the reasons why  
11      it's kind of crazy to decide this on an  
12      emergency application.

13              JUSTICE ALITO:   Yes.   Well, there --

14              JUSTICE KAGAN:   Why is it crazy?

15              JUSTICE ALITO:   -- are a million hard  
16      questions in this case.   And it is an emergency  
17      application and very difficult questions,  
18      either no precedent or very conflicting  
19      precedent -- or a very uncertain body of  
20      precedent, but there are two -- two things were  
21      decided by the lower courts.

22              One, that what I just explored, the  
23      district court said it's got to be in-office  
24      conduct, nothing that happened before a person  
25      took office counts.

1                   And then the D.C. Circuit said that  
2     your client had a property interest in her --  
3     in her office and, therefore, a due process  
4     right.

5                   Is that right? She had a property  
6     interest in being a -- a -- a governor on the  
7     Federal Reserve Board?

8                   MR. CLEMENT: So I think there's a  
9     perfectly reasonable argument for that, but I  
10    also think that there's a better argument  
11    that's a constitutional avoidance argument.

12                  And what the D.C. Circuit did in a per  
13    curium opinion is sort of an example of what  
14    happens when you're trying to rush all of this,  
15    which is you jump right to a constitutional  
16    holding when there may be a perfectly good  
17    constitutional avoidance statutory holding  
18    there.

19                  And I think we've now had a couple of  
20    months and a bunch of amicus briefs to  
21    ventilate some of these things, and I think you  
22    get -- with that ventilation, you get an  
23    understanding that there is a very good  
24    statutory argument --

25                  JUSTICE GORSUCH: So -- so --

1                   MR. CLEMENT:  -- and I do want to talk  
2    about us treating Shurtleff --

3                   JUSTICE GORSUCH:  -- why wouldn't  
4    that --

5                   MR. CLEMENT:  I'm sorry.

6                   JUSTICE GORSUCH:  Why wouldn't that --  
7    why wouldn't that be a basis for sending it  
8    back to consider these arguments in the first  
9    instance?  If -- if -- if you aren't prepared  
10   to defend the due process argument, then  
11   perhaps your front-line argument on -- that  
12   things that happened before employment are  
13   categorically and always off the table.

14                  If those two decisions, which, to be  
15   fair, were, of course, issued under -- under a  
16   time constraint, might have some flaws, why  
17   shouldn't it go back to reconsider it?  
18   You've -- you've advanced a lot of new  
19   arguments here.  So have your friends on the  
20   other side.

21                  MR. CLEMENT:  So it should go back.  
22   It should just not go back with an emergency  
23   stay being granted, which is extraordinary  
24   relief that depends on my friends on the other  
25   side showing extraordinary burden of

1     irreparable harm and showing that they have a  
2     likelihood of success on the merits.

3             And I think likelihood of success on  
4     the merits in this context doesn't mean just a  
5     likelihood of showing that the two grounds that  
6     were seized on in the quick briefing below are  
7     wrong but that they're actually right.

8             And I think the briefing here has done  
9     two things. I think it showed that we're  
10    right. I -- I'm not abandoning my front-line  
11    arguments, but I love my backup arguments. I  
12    think they are very strong.

13            And I think it shows the sort of --  
14    you know, the -- the problems that happen when  
15    you try to decide some of the most important  
16    issues of constitutional law in this kind of  
17    rushed way.

18            JUSTICE GORSUCH: Can I ask you about  
19    the mandamus question? Why isn't mandamus the  
20    appropriate avenue here?

21            MR. CLEMENT: It is an appropriate  
22    avenue at the end of the case. Even at the end  
23    of the case, though, I think -- and this is  
24    consistent with Professor -- what Professor  
25    Bryce says in his article. Even at the end of

1 the case, I don't think you have to leap to  
2 mandamus. I think you can have a declaratory  
3 judgment first.

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

7 Assuming there is such thing as a  
8 preliminary injunctive relief for mandamus,  
9 which I'm going to ask you if that's a thing,  
10 first of all, and, second, if it were, wouldn't  
11 the standard you'd have to show likelihood of  
12 success be the likelihood of success under the  
13 mandamus standard?

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

17 JUSTICE GORSUCH: No.

18 MR. CLEMENT: I don't think it's the  
19 right way to think about it. I think it's  
20 preliminary relief to preserve the status quo  
21 or, if you want to be more specific,  
22 preliminary relief to preserve a de facto  
23 officer in their office while the case  
24 proceeds. And that is a relief --

25 JUSTICE GORSUCH: Why isn't that

1 preliminary injunction or mandamus? I know of  
2 those two buckets. I'm not sure I'm familiar  
3 with the third one you're describing.

4 MR. CLEMENT: What I'm describing  
5 is -- is a preliminary injunction.

6 JUSTICE GORSUCH: Okay. So it is --

7 MR. CLEMENT: I'm just saying it's not  
8 a preliminary mandamus. It's a prelim --

9 JUSTICE GORSUCH: Well, wouldn't it  
10 have to be, though? If -- if your cause of  
11 action were mandamus, and let's just suppose  
12 that's what it is, it would be preliminary  
13 injunctive relief because you have the  
14 likelihood of succeeding on -- under the  
15 mandamus standard I would have thought.

16 MR. CLEMENT: Well, perhaps. I mean,  
17 two things about that. One is I'm not sure in  
18 this kind of mandamus posture, I don't think I  
19 agree with General Sauer that the standard is  
20 the standard you would have in, like, a Cheney  
21 situation.

22 I do think this kind of original  
23 mandamus as the remedy in this particular  
24 situation, I would resist the idea that that's  
25 sort of the standard more appellate mandamus

1 standard.

2 That's a debate -- even with all the  
3 briefing we've had, we haven't had a good  
4 chance to really duke it out on that. But I  
5 would say that's part of the reason I resisted  
6 the idea that you have to go to mandamus,  
7 because I do think you would have declaratory  
8 judgment. I do think declaratory judgment --

9 JUSTICE GORSUCH: I asked you -- I  
10 asked you to put that aside for the moment.

11 MR. CLEMENT: No, no, I -- and I tried  
12 to as long as I could.

13 (Laughter.)

14 JUSTICE GORSUCH: All right.

15 MR. CLEMENT: But -- but then, to  
16 answer your --

17 JUSTICE GORSUCH: Then -- then I give  
18 up. Okay.

19 MR. CLEMENT: Then, to answer your  
20 question, I really had to get to declaratory  
21 judgment.

22 I would like to say this is an issue  
23 the -- the D.C. Circuit has thought a lot  
24 about. And there's a particular case worth  
25 reading, the Swan against Clinton case. And



1     that's a case where they kind of wrestled with  
2     this question about can you -- you know, would  
3     you have mandamus against the president. At  
4     the end of the day, can you direct the  
5     president, and there's a great concurring  
6     opinion by Judge Silberman where he basically  
7     says, look, the judiciary is creative and  
8     clever enough to figure out a way to fashion  
9     injunctive relief against the lower federal  
10    officials and that solves the problem about  
11    having the relief run against the president.

12           And the reason that the D.C. Circuit  
13    has wrestled with that in a couple of contexts,  
14    and I think the Chief Justice alluded to this,  
15    if they don't really write about that, then  
16    you'd have to wrestle with this at the  
17    beginning of the case as to whether there's any  
18    redressability at the end of the case.

19           And in the Swan case and even in the  
20    Severino case, the D.C. Circuit has said  
21    there's not a redressability problem. We can  
22    figure out a way to direct the relief at the  
23    lower government officials and that will be  
24    sufficient unto the day.

25           JUSTICE JACKSON: And that happens at

1 the end of the case, right, after the whole  
2 thing has been litigated and some court,  
3 perhaps even this Court, decides the  
4 removability question. The president does not,  
5 we would say, have the right to remove her, and  
6 then we go to remedy, and the question is, is  
7 there a mandamus or not.

8 The reason why I thought mandamus  
9 wasn't on the table right now is because we're  
10 not there. We're -- we're in the middle of the  
11 case. We haven't -- no one has made a  
12 definitive determination about the president's  
13 right to remove her.

14 The question now is just in the  
15 interim, while that case is -- while -- while  
16 that issue is being litigated, what happens?  
17 And that's about the equities, that's about  
18 whether it's going to be more harmful to leave  
19 her in the position than not. That's what I  
20 thought this motion was about.

21 MR. CLEMENT: I mean, I -- I think  
22 that's right. But it's specifically about  
23 whether you can get some sort of preliminary  
24 injunctive relief to preserve the status quo  
25 and keep the de facto officer in place.

1                   And I do take Justice Gorsuch's  
2     question, which is, at the end of the rainbow,  
3     all there is is mandamus and you can't have  
4     mandamus against the president, then, at this  
5     point, you'd say what's your likelihood of  
6     success at the merits and you would say there's  
7     no likelihood of success on the merits. But I  
8     think, as I alluded to, even before that, you'd  
9     say is there any redressability here.

10                  JUSTICE JACKSON: But, wait, I'm  
11     sorry --

12                  JUSTICE GORSUCH: But, just to be  
13     clear, that wasn't --

14                  JUSTICE JACKSON: -- why would that be  
15     a merits issue?

16                  JUSTICE GORSUCH: I'm sorry.

17                  JUSTICE JACKSON: You'd have no  
18     likelihood of success on the merits? You'd  
19     just have no remedy. You would win on the  
20     merits. The merits are that -- that -- that  
21     the president wasn't supposed to remove you.  
22     But you would lose because there's -- lose  
23     ultimately in terms of not having a remedy,  
24     right?

25                  MR. CLEMENT: Well, I mean, you could

1 draw the distinction that way. I think, if you  
2 have no remedy at the end, you probably have  
3 the redressability problem at the front end,  
4 which is why the D.C. Circuit has this --  
5 addressed this on a number of bases.

6 These are not emergency application  
7 decisions. These are decisions in the D.C.  
8 Circuit. They obviously don't bind this Court.

9 But they are the considered judge --  
10 judgment of a court that's dealt with, you  
11 know, like, about, with all the removals there  
12 have been, and there haven't been a lot of  
13 them, but with respect to other officers. So,  
14 you know, I think that's --

15 JUSTICE KAGAN: Mr. Clement --

16 MR. CLEMENT: -- pretty good  
17 authority.

18 JUSTICE KAGAN: -- what would judicial  
19 review in this context look like? I mean, this  
20 is not a question about what the standard is.  
21 It's more a question about is there a kind of  
22 deference to give to the president? How does  
23 that deference operate? Whatever the standard  
24 is.

25 MR. CLEMENT: Sure. So I would divide

1     between sort of factual questions and legal  
2     questions.  As to the factual questions, I  
3     would say that there's going to be a degree of  
4     deference, and the degree of deference depends  
5     on the degree of process that's provided.

6             So, if the president wants to go full  
7     Taft, I don't think the courts are going to be  
8     in a position to second-guess the factual  
9     determinations.  If the president wants to do  
10    something more informal, that's -- he's  
11    entitled to do that, but then I would think  
12    there'd be more of a scope for, you know,  
13    having more hearing, more process in the  
14    judicial forum.

15            On the question, the legal question, I  
16    would say, in a post-Loper world, there's no  
17    deference to the legal questions, and the  
18    courts are going to have to decide ultimately  
19    what are the boundaries, the metes and bounds  
20    of for cause.

21            And the only other thing I would add  
22    is I think that you're going to want to erect  
23    meaningful standards of cause because, you  
24    know, there's kind of two options here.  You  
25    can either have judicial review that spends a

1 lot of time looking into pretext of the  
2 president, and that just doesn't seem like a  
3 good thing for the courts, for the president,  
4 or anybody, or you could erect relatively  
5 demanding standards of cause, and that's going  
6 to, I think, obviate the need for that kind of  
7 pretext inquiry.

8 JUSTICE KAGAN: Yeah. So -- so  
9 General Sauer's version of cause, which is it's  
10 not policy, it's something other than policy,  
11 why isn't that the backup to the backup of --  
12 to the backup?

13 MR. CLEMENT: Well, because it would  
14 kind of destroy the whole point of having an  
15 independent central bank in the Fed. And it  
16 just seems to me like at some point -- I mean,  
17 we're all here on the assumption for this case  
18 that the Fed is a uniquely structured  
19 institution with a distinct historical  
20 tradition. And so, if that's true and then you  
21 tick through the statute and you see all the  
22 things that Congress did, I mean, including,  
23 you know, Congress wasn't just trying to take  
24 the Fed and keep it from sort of being unduly  
25 influenced by the president when it came to

1 rates right before an election. It did the  
2 same thing to itself by limiting the power of  
3 the purse over this institution.

4 And then you go through and, you know,  
5 just every provision of the statute is trying  
6 to treat this unique institution differently.  
7 And then, at the end, you have for cause,  
8 which, I mean, could mean what General Sauer  
9 says, but if it means what General Sauer says,  
10 then the whole enterprise was in a lot of  
11 trouble for nothing.

12 JUSTICE KAVANAUGH: On the -- on the  
13 future judicial review and what that looks  
14 like, would the witnesses testify in court, or  
15 is it done on the record established by the  
16 executive branch, or does that maybe depend?

17 MR. CLEMENT: I would say it depends  
18 on what kind of process was provided by the  
19 executive. And, look, I -- I -- I agree with  
20 General Sauer. This Court's not going to  
21 dictate, like, you know, here's Robert's Rules,  
22 you know, have at it. But I think this Court  
23 can do something useful, which is essentially  
24 to create an incentive for the executive to  
25 provide something that's a little bit more

1 protective, a little bit closer to Taft than  
2 something incredibly informal by at least --

3 JUSTICE ALITO: I mean, that -- that  
4 sliding scale is extraordinarily unhelpful.  
5 What is the minimum that the executive, in your  
6 view, has to provide, the minimum type of  
7 hearing that you think is required by this  
8 statute?

9 MR. CLEMENT: So the minimum hearing I  
10 think would have three components. One is  
11 notice, and that's really not much of an issue  
12 here. I agree with that. The second is an  
13 opportunity to provide evidence to the  
14 decisionmaker, and we don't think that happened  
15 here. And then the third thing is some effort  
16 to keep the final decisionmaker from prejudging  
17 the issue.

18 And part of the problem you have in  
19 this particular case is -- is that I think the  
20 president was proceeding on the understanding  
21 of the statute that's faithfully represented  
22 here by the Solicitor General, which is he  
23 wasn't acting like a removing authority that  
24 was subject to any due process because, if I  
25 think he were -- if he were sort of subject to



1     that, he wouldn't have said in his opening  
2     tweet, you must resign, and he wouldn't have  
3     said two days later, resign or be fired.

4             I mean --

5             JUSTICE ALITO:   So that -- does that  
6     mean it has to be a body of disinterested  
7     decisionmakers?

8             MR. CLEMENT:   No.

9             JUSTICE ALITO:   People who are not  
10    part of the executive branch and can exercise  
11    independent judgment that way?   No?

12            MR. CLEMENT:   No.

13            JUSTICE ALITO:   Then what does it  
14    require?

15            MR. CLEMENT:   It -- it -- it -- it  
16    requires just what I said, notice, an  
17    opportunity to provide evidence, and a  
18    decisionmaker who hasn't prejudged the issue.  
19    That decisionmaker can be the president.   I  
20    mean, I'm not sure I'd, you know, necessarily  
21    recommend it as my choice A, but what --

22            JUSTICE GORSUCH:   Well, but how can it  
23    not be the president?   The statute authorizes  
24    the president to make the removal decision.  
25    How could it be anybody else?

1           MR. CLEMENT: Well, look, I mean, you  
2     know, if you believe in the unitary executive  
3     theory, then anybody that makes the removal  
4     decision is acting on the president's power. I  
5     think it would -- it would work -- you know, I  
6     think the way it worked for Taft is the  
7     tribunal made a recommendation and then Taft  
8     executed it.

9           JUSTICE GORSUCH: Right, the  
10    president --

11          MR. CLEMENT: So it was the  
12    president --

13          JUSTICE GORSUCH: Yeah.

14          MR. CLEMENT: -- making the decision.

15          JUSTICE GORSUCH: The president has to  
16    make the decision, right, or delegate it to  
17    somebody who he wishes to make that decision?

18          MR. CLEMENT: Yes.

19          JUSTICE GORSUCH: Who's reportable to  
20    him?

21          MR. CLEMENT: Yes. Yes.

22          JUSTICE GORSUCH: Okay.

23          MR. CLEMENT: At will.

24          JUSTICE GORSUCH: At will, yeah.

25          MR. CLEMENT: Right, absolutely.

1 JUSTICE GORSUCH: Okay.

2 MR. CLEMENT: I mean, so -- so -- and  
3 the president can be the final decisionmaker,  
4 but if he's going to be the final decisionmaker  
5 and there's a due process right, and I mean --  
6 I mean that's statutory or constitutional,  
7 then, you know, he needs to be a little bit  
8 careful and say these are the allegations. He  
9 can't start by prejudging the issue by saying  
10 resign.

11 JUSTICE BARRETT: Mr. Clement, your  
12 understanding of for cause, you know, we've --  
13 you went through hypotheticals with Justice  
14 Alito about how it doesn't cover pre-office  
15 conduct.

16 What about conduct in office that  
17 doesn't relate to the discharge of the office?  
18 Like, what if you take some of Justice Alito's  
19 examples, but it's, like, Nazi videos while the  
20 governor is in office or, you know, things that  
21 would be misdemeanors rather than infamous  
22 crimes, like shoplifting, you know, stealing  
23 things, domestic abuse? Would those things be  
24 cause for firing or that's -- they don't really  
25 seem like impeachable offenses necessarily.

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

3 JUSTICE BARRETT: Okay.

4 MR. CLEMENT: And so I don't think  
5 they would removable offenses under for cause  
6 properly construed.

7 JUSTICE BARRETT: So there's nothing  
8 that the president can do to get rid of someone  
9 who does those kinds of things while in office?

10 MR. CLEMENT: So, I mean, you know,  
11 some of the things we're talking about, you  
12 know, seem like better grounds for, like, an  
13 intervention than for removal. And so --

14 JUSTICE BARRETT: Well, I mean, I  
15 could come up with others, but --

16 MR. CLEMENT: Of -- I mean,  
17 absolutely.

18 JUSTICE BARRETT: Okay.

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

20 JUSTICE KAVANAUGH: But people --  
21 well, sorry, keep going.

22 MR. CLEMENT: You know, I'm -- I'm  
23 going to fall back on my answer, which is  
24 that's my understanding, and I think it's  
25 actually everybody's understanding, of how INM

1 works. I mean --

2 JUSTICE BARRETT: But that doesn't --  
3 it doesn't say INM. And so, I mean, I -- I --  
4 I appreciate your argument that INM and for  
5 cause are one and the same, but you also kind  
6 of pull in in your fallback some sort of like  
7 gerrymandered things like infamous crimes, but  
8 you don't have to have a conviction. I mean --  
9 so it doesn't say INM.

10 MR. CLEMENT: So a couple of things.  
11 One is, you know, I'd -- I'd resist -- I mean,  
12 you know, gerrymandering is generally not a  
13 compliment. So I -- I would sort of say that  
14 what we do is we bring in the common law, and  
15 that's what we do. And I really didn't try to  
16 gerrymander it beyond that.

17 But -- and -- and -- but let me make  
18 the argument, which I really --

19 JUSTICE BARRETT: Could I just ask one  
20 clarifying question? I thought the common law,  
21 though, required conviction.

22 MR. CLEMENT: It -- it did, and -- and  
23 that would be our -- our sort of front-line  
24 backup position, if you will.

25 JUSTICE BARRETT: Front-line backup?

1           MR. CLEMENT: I mean, but -- but  
2     the -- but the happy thing for me, I think, is,  
3     at this stage of the case, we win under all  
4     these variations. And, ultimately, you know,  
5     some court, and it may be this Court, is going  
6     to ultimately say these are the metes and  
7     bounds of for cause.

8           Now I think I have some pretty good  
9     arguments that it really is just INM plus  
10    ineligibility as kind of informed by Section  
11    244. And let me just give you, like, my best  
12    shot at it, which is this is the very unusual  
13    situation where, you know, we -- we know that  
14    Congress was literally waiting for this Court's  
15    Humphrey's Executor decision. And then it gets  
16    Humphrey's Executor's decision, and this Court  
17    in Humphrey's Executor at least three times  
18    uses "for cause" and "INM" interchangeably.  
19    And then the senators themselves in the  
20    debate -- now you got to look at the debate,  
21    but I think even Justice Scalia looks at  
22    debates for original public meaning -- the  
23    senators in the debate used the terms  
24    absolutely interchangeably.

25           And so you have two of the three

1     branches of government, original public meaning  
2     saying for cause, different words, but what it  
3     means is INM. But I don't -- I do think it --  
4     it must -- you know, you got to make sense of  
5     Section 244 of the statute, which does provide  
6     a very specific eligibility requirement.

7             And as I said before, I think, if some  
8     Fed governor was insisting that they also  
9     wanted to be a director at Chase National, they  
10    could be removed for cause for that.

11            JUSTICE BARRETT: Okay.

12            JUSTICE KAGAN: Do you think that  
13    there's a way at this posture of dealing with  
14    this case so that we don't have to confront the  
15    question of exactly what the for-cause standard  
16    means?

17            MR. CLEMENT: Is there a way to deal  
18    with it at this stage without having to  
19    ultimately say that? I mean, sure, there'd be  
20    a lot of different ways to do that. You could  
21    say that for cause -- I mean, you know, one way  
22    to come at it would be to say, at a minimum,  
23    "for cause" doesn't mean apparent misconduct or  
24    gross negligence, and I think that would be  
25    sufficient to decide the case at least at this

1        juncture.

2                    And I think you could say something  
3        more. I mean, you know, obviously, if you took  
4        my position and said it means INM plus  
5        ineligibility as informed by Section 244, I  
6        don't -- I think we'd be done here because I  
7        don't think there's an argument at least that  
8        I've heard at this juncture that the conduct  
9        that's at issue here is either INM or  
10       ineligibility.

11                   JUSTICE JACKSON: Couldn't we also  
12       resolve it by not even going to the likelihood  
13       of success on the merits element? I mean, you  
14       have -- the president would have to have all of  
15       them to get a stay. And we could do it on  
16       harm, right?

17                   MR. CLEMENT: Sure. I mean, you know,  
18       look, it's an emergency application. You could  
19       deny it without opinion. I mean, that would be  
20       a little strange at this juncture.

21                   (Laughter.)

22                   MR. CLEMENT: But there -- you know,  
23       it is -- it is an extraordinary application  
24       made on a preliminary record, and so, you know,  
25       you sort of have a lot of optionality at this



1 point.

2 But -- but I will say this. I mean,  
3 you know, I do think the briefing in this -- in  
4 this -- in this Court, which was, you know,  
5 sort of unusual, you had the application  
6 briefing, then you had amici, then you had this  
7 supplemental briefing, I think it's been  
8 incredibly helpful in excavating some of these  
9 difficult questions.

10 I mean, you know, I've looked at  
11 almost all of these common law cases. I have  
12 a different view than General Suter on --  
13 Sauer, sorry -- on -- on some of these  
14 questions.

15 And, you know, in particular, I think  
16 it's very important, and, you know, I want to  
17 get this out, that if you look at Shurtleff,  
18 one of the things in Shurtleff -- there's a --  
19 there's a -- there's a line there that says  
20 that where -- where Justice Peckham is invoking  
21 the common law, and he says that as long as  
22 there's certain causes, statutory restriction  
23 for certain causes, that's the term he uses,  
24 then there's notice and a hearing. He cites  
25 seven common law cases.

1           Now, if you look at those common law  
2 cases, three of the seven just say "for cause"  
3 and two of them say "good behavior," which is  
4 even less, and then two of them have a more  
5 specific cause.

6           So that's, to me, the best  
7 contemporaneous evidence that we're actually  
8 right about the issue, that if it just says  
9 "for cause" and it doesn't say for a particular  
10 kind of cause, you get notice and an  
11 opportunity for hearing.

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

15           CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17           I guess I get back to where I kind of  
18 started. In all this description, these are  
19 all sorts of legal issues, you don't have  
20 anything more to say on the facts, right? It  
21 was an inadvertent mistake. I don't see how  
22 you can say anything more. And the -- we've  
23 had broad range of discussion on the legal  
24 issues.

25           Now it's very helpful for us to have

1 lower court decisions on those, and maybe  
2 that's reason enough, but, again, I guess I  
3 don't quite understand what sending it back  
4 would be for other than airing of the same sort  
5 of issues that we've been airing this morning.

6 MR. CLEMENT: Well, I'm not going to  
7 resist too hard you deciding this on a more  
8 substantive ground that gives my client sort  
9 of, you know, relief that's more enduring at  
10 this stage.

11 But I will say that, you know -- you  
12 know, another one of these, like, great common  
13 law cases is the Street Commissioners of  
14 Hagerstown, which happens to be the case that  
15 Black's Law uses for its definition of "cause."

16 And one of the things it specifically  
17 says there is, like, even if you don't think  
18 the due process, the notice and a hearing is  
19 going to amount to much, it's still an error  
20 not to give it, and we're still going to  
21 essentially not allow this removal to happen  
22 because there wasn't notice and an opportunity  
23 for a hearing.

24 CHIEF JUSTICE ROBERTS: So it may  
25 not be an error to go through the -- the

1 process of your client coming in and saying:  
2 It was an inadvertent mistake; since it was  
3 inadvertent, I don't have much more to add to  
4 that.

5 And the argument on the other side  
6 being what the president has said: Well, I  
7 think this is a serious enough mistake, and so  
8 that's why I've -- I'm removing her.

9 MR. CLEMENT: Again, I -- there's only  
10 so much I can say to resist the idea that -- I  
11 mean, you know, we -- we think this was at most  
12 an inadvertent mistake. We would have liked a  
13 more -- you know, sort of opportunity to do  
14 that and present our actual evidence which  
15 would have substantiated that.

16 But we also think, at the end of the  
17 day, inadvertent mistake isn't, like, very  
18 close to for cause, particularly when you  
19 understand the unique nature of this  
20 institution.

21 CHIEF JUSTICE ROBERTS: What is your  
22 actual evidence that would substantiate the  
23 fact that it was an inadvertent mistake?

24 MR. CLEMENT: I -- I think the fact  
25 that there's an attachment to one of the

1 applications that describes it as a vacation  
2 home. And that's not --

3 CHIEF JUSTICE ROBERTS: Okay. We've  
4 got that too.

5 MR. CLEMENT: No, I -- I understand.  
6 But the president didn't. And it seems to me  
7 that, you know -- you know, usually, when  
8 there's a procedural omission, one doesn't say,  
9 well, you know, at this point, we got  
10 everything we need, so forget the procedural  
11 omission.

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

15 But, you know, it does seem to me if,  
16 you know, if -- if you want to reserve judgment  
17 on the substance or you want more briefing on  
18 the substance, you could say -- and this is,  
19 you know, the -- whether it was constitutional  
20 due process or statutory due process, I think  
21 this is the gist of the D.C. Circuit's  
22 decision, is, like, at a minimum, you didn't  
23 get the process you were supposed to, so the  
24 government doesn't get this extraordinary  
25 emergency stay.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Thomas?

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

6 MR. CLEMENT: No, I don't think so,  
7 Justice Thomas. I think you could really take  
8 any definition of "cause" that we've been sort  
9 of batting about, with the exception of  
10 General Sauer's definition, and -- and we would  
11 prevail.

12 I think the only -- and -- and -- and  
13 I do think the definition that's presented to  
14 you by the president is a pretty extraordinary  
15 one because, you know, General Sauer is a very  
16 careful lawyer. So, in his briefs, he doesn't  
17 talk about mortgage fraud. He talks about  
18 apparent mortgage fraud.

19 And when you're talking about apparent  
20 misconduct as opposed to actually found  
21 misconduct, that, A, doesn't get for cause,  
22 and, B, it sort of is a advertisement that you  
23 have a process failure. And so the fallback  
24 then is "or gross negligence."

25 So one way to think about this is, if

1 the standard of for cause is more demanding  
2 than gross negligence, then we certainly win.  
3 And we didn't even get a chance to sort of  
4 argue about gross negligence.

5 JUSTICE THOMAS: What is your -- if  
6 it's not the equivalent of INM, what is -- what  
7 are some of the other standards that you would  
8 apply that would be sufficient for you to  
9 prevail?

10 MR. CLEMENT: So I think the single  
11 best reading of the statute is INM plus  
12 ineligibility as informed by Section 244 of the  
13 statute. I think then my fallback would be  
14 then you pick up the common law. And if the  
15 common law makes you uncomfortable because of  
16 Justice Alito's hypos, you could tweak the  
17 common law. But you would then be tweaking  
18 the common law.

19 And I -- you know, that's why,  
20 honestly, at the end of the day, although it's  
21 uncomfortable for a few moments to answer some  
22 of those hypos, you always have impeachment  
23 as the backstop.

24 And we had, what was it, 90 years,  
25 plus if you go back to the Interstate Commerce

1 Commission in 1887, almost 150 years with INM,  
2 and this didn't really pose a problem in  
3 practice.

4 CHIEF JUSTICE ROBERTS: Justice Alito?

5 JUSTICE ALITO: Do you think that we  
6 should decide this case on the factual ground  
7 that what is shown by the materials that are  
8 before us shows nothing more than gross  
9 negligence, which is insufficient?

10 Should we make -- should we make that  
11 factual finding in the first instance?

12 I understood your -- I understood your  
13 answer to be you should do that if you're going  
14 to find in favor of me, but you shouldn't do it  
15 if you're going to find the other way.

16 MR. CLEMENT: I'll stand by that  
17 answer.

18 (Laughter.)

19 JUSTICE ALITO: Really? That's your  
20 answer?

21 (Laughter.)

22 MR. CLEMENT: That's my answer. I  
23 think it would be a little irregular, but this  
24 whole case is irregular. And if -- if that  
25 seems to be the path of least resistance, to



1     decide this case in a way that is going to  
2     essentially obviate the need for this Court to  
3     decide it again in a couple of years, that  
4     seems like a perfectly reasonable way to decide  
5     the case.

6             JUSTICE ALITO: Thank you.

7             CHIEF JUSTICE ROBERTS: Justice  
8     Sotomayor?

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

14            Now the question becomes -- and you  
15    answered the Chief and said, I don't have more  
16    to present. I don't know where you presented  
17    anything. You have a letter from you that  
18    basically says that the application included  
19    notice that this was a vacation home.

20            But that's never been given to the  
21    president. That's never been filed with a  
22    court or no one's ever seen it. It's just  
23    statements being made. So I don't know why a  
24    factual hearing would be irrelevant.

25            So assume, as I do for the purposes,

1     that she did fully disclose this was a vacation  
2     home. So now the question is, is this, what  
3     she did, negligence or gross negligence? Does  
4     cause include just mere negligence?

5             I think that you have a very strong  
6     argument under any reading of cause that mere  
7     negligence pre-office would not qualify,  
8     correct?

9             MR. CLEMENT: Correct.

10            JUSTICE SOTOMAYOR: All right.  
11     Because it would seem extreme to think that  
12     something separated from the functioning of the  
13     office, unrelated to the work of the office at  
14     the time it's done, that mere negligence would  
15     be enough. But the president called it gross  
16     negligence.

17            Who decides that issue, meaning who  
18     decides whether something should be called  
19     negligence or just gross negligence?

20            MR. CLEMENT: So I would think that  
21     ultimately that's a mixed question of law and  
22     fact that would be ultimately decided by the  
23     court on judicial review, assuming you're with  
24     me that there is judicial review.

25            I do think there would be an --

1     logically anterior purely legal question of  
2     whether gross negligence is sufficient for  
3     cause. And I -- just as I think I have a  
4     pretty good argument that negligence pre-office  
5     is not a sufficient basis for cause, I think I  
6     have a pretty good argument that gross  
7     negligence pre-office is not a sufficient basis  
8     for cause.

9             And, you know, in some respects, I  
10    think, in the long run, it will be better to  
11    make clear that in the context of this unique  
12    institution, with its distinct history, that  
13    for cause is several steps north of gross  
14    negligence even because that's going to make it  
15    really something that the courts aren't going  
16    to have to get dragged into on a routine basis,  
17    where I think the lower the standard is, the --  
18    the more likely you are to have removals in the  
19    future.

20            And the lower the standard, I think  
21    the greater is going to be the judicial  
22    temptation to think about pretext. And I'm not  
23    going to say that there's no role for a pretext  
24    inquiry, but it's not a happy sort of scenario  
25    for the courts to be considering pretext in the

1 context of presidential decision-making.

2 And it seems to me the way to solve  
3 that is to say the real procedural and  
4 substantive kind of bite to this term, sort of  
5 for cause. You do have to do some kind of  
6 notice and opportunity for a hearing. I mean,  
7 even if it's an hour in the Oval, that's a big  
8 imposition on the president's time, and that's  
9 going to keep some presidents from removing  
10 somebody. And if they know that it's going to  
11 be judicially reviewed, then that's going to  
12 deter most presidents most of the time.

13 And so I think kind of, you know, it's  
14 like -- what is it -- you know, high walls make  
15 for good neighbors. I mean, I -- I -- I think  
16 this is a situation where you do want to have  
17 those kind of meaningful legal requirements.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

21 MR. CLEMENT: This. I mean, you know,  
22 I don't really know. I don't think they've  
23 offered sort of a theory of gross negligence,  
24 and that's why I don't think it --

25 JUSTICE KAGAN: You think it's just a

1 label that they've put on this particular set  
2 of facts?

3 MR. CLEMENT: Sure. And if, heaven  
4 forbend, we end up with a whole common law of  
5 Fed governor removal, then we might eventually  
6 be able to sort of piece it together. But it  
7 seems to me that, you know, you can -- you  
8 could label an awful lot of things gross  
9 negligence, and that seems to be inconsistent  
10 with not just the for-cause provision but the  
11 whole structure of this statute.

12 And, I mean, Justice Kavanaugh alluded  
13 to the Morrison dissent and, you know, Justice  
14 Scalia creating this beautiful picture of some  
15 independent counsel with nothing to do but to  
16 find a crime on somebody. But, if all the  
17 independent counsel has to do is find gross  
18 negligence, then I don't think the independent  
19 counsel would need more than a couple of hours  
20 with most of us.

21 I mean, that's such an elastic  
22 standard. And I just can't imagine that's  
23 consistent with all the trouble Congress went  
24 to to make this unique entity insulated from  
25 kind of the political pressures of the day.

1 JUSTICE KAGAN: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Gorsuch?

4 Justice Kavanaugh?

5 JUSTICE KAVANAUGH: A couple things.  
6 Just to talk again about the standard, I mean,  
7 getting the definition of "for cause" right,  
8 which we may not have to do in this posture, so  
9 I take that as critical because, on the one  
10 hand, you have the independence of the Federal  
11 Reserve, which we've talked about; on the other  
12 hand, we have people who have committed --  
13 again, not talking about the facts of this  
14 case -- but serious ethical or other wrongdoing  
15 digging in and remaining in office.

16 And it seems like your two answers to  
17 that, when you said your front-line position's  
18 INM, were intervention/resignation. And I'm  
19 not sure that really works with some people who  
20 are going to just dig in. You know, they're  
21 not going to leave.

22 And then the other was impeachment,  
23 but, of course, with the two-thirds requirement  
24 in the Senate and the time constraints of the  
25 House and Senate, I'm not sure that's available

1 as often as you say.

2 All of which is getting me to the  
3 point of I don't see how the front-line  
4 position really can be the -- the final  
5 position without making -- kind of tilting the  
6 balance here too far the other direction from  
7 where the Solicitor General is.

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

11 MR. CLEMENT: Sure. I think the best  
12 thing that I haven't said already that I could  
13 add is I think, in the unique context of this  
14 particular agency, you want to strike the  
15 balance more in favor of keeping an official  
16 who maybe in a perfect world would be removed  
17 because, you know, this is the opposite of the  
18 situation in essentially all of the other  
19 situations, with the possible exception of,  
20 like, the Tax Court and the Court of Claims and  
21 the Court of Military Appeals.

22 Here, I think, you know, there -- it's  
23 less important that the president have full  
24 faith in every single governor, and it's more  
25 important that the markets and the public have

1     faith in the independence of the Fed from the  
2     president and from Congress.

3             And in this regard, I think it's --  
4     you know, this is not a situation where the --  
5     unlike Myers, which is the ultimate example,  
6     where the president's trying to arrogate some  
7     power away from the executive. This is a  
8     situation where Congress, political animals one  
9     and all, knew better than anyone that the  
10    short-term temptations to lower interest rates  
11    and have easy money was a disaster in the long  
12    term but was going to be irresistible.

13            And so they tied their own hands by  
14    taking the Fed out of the appropriations  
15    process. And they tied the president's hand.  
16    And I think they tied the president's hand in a  
17    pretty significant way.

18            And I understand the concerns about  
19    the balance, but I would say, in this one  
20    context, it probably makes more sense to, you  
21    know -- and maybe you want to, you know, bring  
22    in a little bit of common law, and that's fine  
23    with me -- but I do think you want to strike  
24    the balance so that the ultimate imperative is  
25    that the markets don't think that rates are



1     being lowered for political pressure. When  
2     rates are lowered, the markets are going to  
3     understand that that's actually prudent  
4     financial management of our monetary policy.

5             JUSTICE KAVANAUGH: In your colloquy  
6     with the Chief Justice about what a hearing  
7     would look like within the executive branch  
8     with the president or with the president's  
9     designee -- I just want to make sure I have  
10    this clear. In that hearing, you could make  
11    legal arguments as well, I assume, not just  
12    factual arguments but legal arguments, to say  
13    we don't think this rises to the level of for  
14    cause. Basically, the kinds of arguments that  
15    you've made here you could make to the  
16    president in the same way, in an impeachment  
17    proceeding, people make legal arguments to the  
18    Senate about what exactly is high crimes and  
19    misdemeanors, correct?

20            MR. CLEMENT: Correct. And,  
21    obviously, the nature of the hearing is going  
22    to inform the scope for that. If it's, you  
23    know, just half an hour with the president, I  
24    don't know how much you're going to get into  
25    sort of legal briefing.

1           But, if you did do anything like Taft  
2       or you just said, well, we've got a couple of  
3       ALJs lying around, we'll have one of them just  
4       sort of hear the evidence on this, I mean, then  
5       I would expect there to be presentation on both  
6       evidence and law.

7           JUSTICE KAVANAUGH: And just for the  
8       kind of simplest way -- and this Justice Kagan  
9       was asking -- to decide this case, I think one  
10      way would just be to say there was insufficient  
11      process and, therefore, we at this juncture  
12      deny the government's application. Thoughts?

13          MR. CLEMENT: I think that would be a  
14      very simple way to decide the -- this case. I  
15      think perhaps the defect that was alluded to in  
16      the colloquy with the Chief Justice is that  
17      probably is also, you know, the -- the way that  
18      probably maximizes the chances that it gets  
19      back here on the merits, whereas, if you  
20      decided to go a little further and say  
21      something substantive, it might bring all of  
22      this to an end. And there's probably some  
23      virtue to that. Certainly, there's some virtue  
24      to that from my client's perspective.

25          JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Barrett?

3 JUSTICE BARRETT: I'm going to ask you  
4 about irreparable harm. You were just talking  
5 to Justice Kavanaugh about the uniqueness of  
6 the Fed and its need for independence. And the  
7 government, because it has not challenged the  
8 removal restriction, for purposes of this case,  
9 I think we're all operating on that assumption.

10 When the president -- if you're  
11 thinking about the unitary executive, when the  
12 president has untrammelled authority to fire a  
13 subordinate, keeping that subordinate in  
14 office, I think, inflicts maybe a different  
15 kind of irreparable harm than the argument that  
16 the government would be able to make here  
17 because the government -- the president doesn't  
18 have the same control over the Fed at least  
19 based on the assumptions we have in this case.

20 What do you think about that? And  
21 what kind of an argument would you make for --  
22 what is your best-case argument that the  
23 president is not suffering irreparable harm by  
24 the inability -- let's assume that he has the  
25 ability to remove Governor Cook. Let's assume

1     that some of your merits arguments are going to  
2     lose. They still have to show irreparable  
3     harm.

4             So what's your best argument that he's  
5     suffering none?

6             MR. CLEMENT: Well, I think my best  
7     argument that he's not suffering irreparable  
8     harm in those circumstances is that he's --  
9     he's not suffering the unique indignity of  
10    having sort of pure executive power exercised  
11    by people that are removable at will in --  
12    outside of his control.

13            And maybe that's a little circular in  
14    the end, but -- but I think it's -- like,  
15    it's -- it's kind of why this case is, I think,  
16    problematic for the government because, you  
17    know, they -- they could have come in here and  
18    said, you know, Fed schmed, it's not that  
19    different. This is just like the FTC, and so  
20    we're suffering the same irreparable injury as  
21    in those other cases.

22            But, when they come in and say, no,  
23    we're going to accept that the Fed is different  
24    at least for purposes of this case and that we  
25    can't remove somebody just for policy

1     disagreements, then having somebody continuing  
2     in office just because you have a different  
3     conception of "for cause" than they do or than  
4     you've been able to persuade a court so far  
5     about doesn't strike me as irreparable harm.

6             And then, on the other side of the  
7     ledger, I think there are enormous irreparable  
8     harms here that really don't have an analog in  
9     most of these other situations. I don't mean  
10    to denigrate any other agency, but, you know,  
11    there's a reason that monetary policy has been  
12    treated differently for, you know, lo these  
13    many years, and there's a reason that the  
14    markets watch the Fed a little more closely  
15    than they watch really any other agency of  
16    government.

17            CHIEF JUSTICE ROBERTS: Justice  
18    Jackson?

19            JUSTICE JACKSON: So you've had a  
20    couple questions about what good is a hearing,  
21    what would a -- what would a hearing do in this  
22    situation where Ms. Cook has made a statement  
23    through her lawyer about the -- about the  
24    allegations.

25            I guess I'm wondering, setting aside

1     for a moment the standards for cause, don't we  
2     have to have a circumstance in this kind of  
3     situation in which the facts are established?

4             In other words, I thought the work of  
5     the hearing even in this situation would be to  
6     establish when these applications were signed,  
7     what she thought she was attesting to, what  
8     actually was going on with respect to these  
9     documents that the president is pointing to  
10    that says -- and he says they establish her  
11    deceit and gross negligence or whatnot, and --  
12    and I think before we even get there, we have  
13    to know what the facts are related to this.

14            Isn't that what the hearing would be  
15    about at least in part?

16            MR. CLEMENT: I -- I think it would  
17    be. And maybe, though, to try to defend my,  
18    you know, heads I win, tails you lose answer to  
19    Justice Alito, I mean, you know, you -- you  
20    could think about this by analogy. I mean,  
21    there are certain circumstances where you  
22    essentially grant a motion to dismiss for one  
23    side.

24            You basically say, look, we didn't  
25    have a hearing here, that was a mistake. But,

1 even on sort of the best reading of the  
2 evidence, this is at most an inadvertent  
3 mistake, and so there is no for-cause removal,  
4 in which case my client would win.

5 On the other hand, if, you know,  
6 normally, you have that kind of evidentiary  
7 hearing and that is to establish sort of the  
8 facts, and then you then apply the law to those  
9 facts that have been established.

10 JUSTICE JACKSON: Right.

11 MR. CLEMENT: But there are  
12 circumstances --

13 JUSTICE JACKSON: There are  
14 circumstances.

15 MR. CLEMENT: -- where you sort of  
16 don't need any more facts.

17 JUSTICE JACKSON: But -- but you --  
18 but -- but then you're in -- you're in Justice  
19 Kavanaugh's world, which is you would still at  
20 the hearing then go to the legal question of  
21 whether or not what you agree happened here  
22 counts as gross negligence. You would say it  
23 has to be at least that in order to satisfy the  
24 for-cause standard. The other side would say  
25 no.

1                   So there's something -- there's some  
2                   work to be done in a hearing?

3                   MR. CLEMENT: Absolutely. And what  
4                   I -- another way of putting it is, look, the  
5                   denial of the hearing to my client, if she does  
6                   indeed have a right to a hearing, can -- cannot  
7                   be harmless error, like it just can't, no  
8                   matter what you think of the facts.

9                   On the other hand, if you agree with  
10                  us on the law, you could still resolve this  
11                  case in her favor on the grounds that, you  
12                  know, there were two mistakes here. One, she  
13                  didn't get a hearing, but we don't have to,  
14                  like, remand for a hearing --

15                  JUSTICE JACKSON: Yeah.

16                  MR. CLEMENT: -- or any of the -- the  
17                  rest because even on the facts kind of most --  
18                  you know, in the light most favorable to the  
19                  government, this isn't a removable offense and  
20                  then we would be done.

21                  JUSTICE JACKSON: Can I go quickly to  
22                  the standards? Because, as I read the --  
23                  the -- the sort of what happened here, it  
24                  wasn't as though the district court just sort  
25                  of made it up in terms of what she thought



1     should count as for cause. My understanding is  
2     that she was looking, as you've said several  
3     times, to the common law and what courts have  
4     traditionally said.

5             And I see, for example, a court, a  
6     Maryland court, Board of State Commissioners of  
7     Hagertown -- Hagerstown in 1903, which is  
8     around the same time as the establishment of  
9     this statute, that said "the phrase 'for cause'  
10    must mean some cause affecting the ability or  
11    fitness of the incumbent to perform the duty  
12    imposed upon him."

13            And other similar courts at the time  
14    talked about pre-tenure conduct and said, if it  
15    was pre-tenure, it can't be sufficient cause  
16    unless it was serious enough to undermine the  
17    job performance.

18            A mere allegation was not enough back  
19    at common law. It had to have been tested and  
20    proven like through a conviction.

21            So these standards that were used here  
22    to determine at least at the district court  
23    level whether cause was satisfied came from  
24    somewhere, is that right?

25            MR. CLEMENT: Absolutely. And, you

1 know, I love that Hagerstown case because not  
2 only is it a very helpful common law case, but  
3 it's actually the basis for the definition in  
4 Black's Law that the government and Judge  
5 Katsas below relied on. I mean, you know,  
6 Black's Law is an unusual dictionary. It just  
7 doesn't sort of, you know, pop out the meaning  
8 from, like, Noah Webster's mind. It, like,  
9 cites cases for particular concepts.

10 And the concept -- the case it cites  
11 for "for cause" is that Hagerstown case.

12 JUSTICE JACKSON: And so all the  
13 hypotheticals, I mean, we -- we -- we see them  
14 and they might be problematic, but they would  
15 be tested against the standards that the courts  
16 have applied, right?

17 MR. CLEMENT: Absolutely. And -- and  
18 if I could just elaborate in -- in -- in one  
19 respect, I mean, you know, if you think about  
20 pre-office conduct, there's only two kinds.  
21 One, there is pre-office conduct that was  
22 disclosed to the Senate in the confirmation  
23 process. And as to that, even the government  
24 sort of says, well, you probably shouldn't let  
25 the next president sort of relitigate all of

1     that.

2                   And then the second kind is stuff that  
3     was undisclosed. And if it's as serious as  
4     we're talking about, that's essentially the  
5     nominee, you know, defrauding the -- the  
6     Senate. And so I actually think, in that  
7     respect, impeachment is probably a more fit  
8     remedy than it might be in some other  
9     circumstance because you're going to have  
10    whatever the conduct is, plus you're going to  
11    have the Senate being pretty darn vexed that  
12    that was withheld from them in the confirmation  
13    process.

14                  JUSTICE JACKSON: Final question. Do  
15    you -- I -- I -- I took you to be conceding  
16    that there was notice here, and I guess I'm a  
17    little concerned about that.

18                  I mean, do -- are you conceding that a  
19    posting on social media is sufficient notice in  
20    a situation like this when the president is  
21    seeking to remove a governor for -- for cause?

22                  MR. CLEMENT: So what -- what I would  
23    say is, you know, I -- I think --

24                  JUSTICE JACKSON: I mean, I know it  
25    happened. She got notice. We live in a world

1     that is connected, but I -- I guess isn't  
2     notice a particular thing in the common law?

3             MR. CLEMENT:   Well --

4             JUSTICE JACKSON:   Or in our law?

5             MR. CLEMENT:   -- I mean, put it this  
6     way.  Like, I -- I don't sort of resist the  
7     idea that the Truth Social post is notice  
8     because I think it's also fundamentally  
9     defective notice because it's also indisputable  
10    evidence that the president prejudged the  
11    matter.

12            JUSTICE JACKSON:   Right, because  
13    it's --

14            MR. CLEMENT:   And so it's not the kind  
15    of -- it's not the kind of notice that --

16            JUSTICE JACKSON:   I understand.  So --  
17    so hypothesize he didn't say you are fired or  
18    you should be fired.  Hypothesize he just said,  
19    you know, I have this information and I intend  
20    to fire the governor.

21            Why wouldn't he have to, like, send  
22    the letter to her?  How -- how is it that we  
23    can assume that she's on social media or has  
24    looked at the news or that that's sufficient  
25    notice even if she did turn on the news and

1 he's saying that? I -- I don't know why that  
2 would be enough.

3 MR. CLEMENT: Look, I -- I -- I  
4 might -- I might make that argument, but that  
5 doesn't seem -- you know, I mean, if he -- if  
6 he said on Truth Social that, look, here I have  
7 this allegation and I'm going to convene a  
8 hearing at, you know, the Roosevelt Room at 4  
9 p.m. tomorrow, please bring all your  
10 evidence --

11 JUSTICE JACKSON: What if she doesn't  
12 have a Truth Social account, she doesn't show  
13 up, is that enough notice?

14 MR. CLEMENT: You know, I -- I think,  
15 under those circumstances, probably not, but I  
16 think, as a practical matter, in most  
17 circumstances, the president puts it on Truth  
18 Social, most people most of the time are going  
19 to consider that to be notice.

20 Again, the -- part of the reason I'm  
21 not resisting is -- or I'm, you know, sort of  
22 moderating this is because, you know, this  
23 notice isn't the kind of notice the common law  
24 envisioned because the common law would  
25 envision notice that didn't prejudge the

1 matter.

2 JUSTICE JACKSON: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Rebuttal, General Sauer.

6 REBUTTAL ARGUMENT OF GEN. D. JOHN SAUER

7 ON BEHALF OF THE APPLICANTS

8 GENERAL SAUER: Thank you, Mr. Chief  
9 Justice.

10 Turning to the question of whether or  
11 not in-office or pre-office misconduct can  
12 constitute cause, I want to make a statutory  
13 point, which is that the INM standard is by --  
14 on its terms limited to in-office misconduct,  
15 and Congress did not adopt that here.

16 They adopted the more capacious  
17 standard, as this Court recognized in Collins  
18 against Yellen, cause gives the president more  
19 discretion and provides less protection to  
20 the -- to the officer than the INM standard  
21 does.

22 And even if we were in a situation  
23 where you're looking at the -- the -- the 19th  
24 century case law and so forth, they disregard a  
25 series of cases that hold that pre-office

1 misconduct is sufficient cause.

2           For example, In re Guden, which, you  
3 know, from New York in 1902, which involved an  
4 officer who had engaged in a kind of shenanigan  
5 in order to get the office in the first place.  
6 There was a -- a corrupt agreement to appoint  
7 somebody to a position if they supported that  
8 person politically.

9           Iowa against Walsh, which was  
10 pre-office embezzlement. Gill against  
11 Watertown, a case they rely heavily on, it was  
12 said in dicta at least that gross frauds  
13 committed before office would constitute cause  
14 to remove. So there really isn't support  
15 anywhere for this notion that pre-office  
16 misconduct can't be considered when it comes to  
17 a cause standard.

18           And -- and related to that, I thought  
19 it was very telling that Mr. Clement was saying  
20 that if it does come to pre-office misconduct,  
21 impeachment would be the only remedy that would  
22 provide it, which, if taken to its full extent,  
23 would make governors of the Federal Reserve  
24 have the kind of tenure protections that the  
25 Constitution affords to Article III judges.

1           That is not what this statute says.  
2   That is directly in the face of the statutory  
3   language, which says cause with no further  
4   restrictions. Clearly, Congress envisioned  
5   that they could be removed for a good enough  
6   reason.

7           And on that point, I just want to  
8   emphasize there was this colloquy about whether  
9   it should be sent back or decided now on the  
10   merits. Whichever way the Court comes out on  
11   that, the Court should not -- should send it  
12   back with an emergency stay, and I want to  
13   emphasize two reasons there.

14           This Court -- no court should hold  
15   that the misconduct that's alleged here, which  
16   is at least gross negligence, at least an  
17   inadvertent notation that is a grave  
18   misrepresentation on a mortgage document that's  
19   designed to determine the governor's interest  
20   rates, is not cause to remove a principal  
21   officer of the United States who sets interest  
22   rates for the entire country.

23           So all the discussion of what are the  
24   outer bounds of cause, where is judicial  
25   review, on that fundamental court, neither this



1 Court nor any other court should look at this  
2 and say this is likely not cause.

3 That sends the wrong message to the  
4 markets. It sends the wrong message to the  
5 American people, who have to make correct  
6 representations to their banks when they're  
7 getting their mortgage interest rates.

8 And the second point I would make is  
9 the remedy granted here, a preliminary  
10 injunction that runs against the president  
11 reinstating a principal officer of the United  
12 States, is something that has never been  
13 granted before 2025 in this Court or in -- in  
14 the nation's history and, in fact, contradicts  
15 a clear holding of this Court in Sawyer that a  
16 preliminary injunction is not available in  
17 equity.

18 Those two reasons alone clearly  
19 suffice to send it -- if -- if there is going  
20 to be a decision to send it back, to send it  
21 back with the emergency stay that we've asked  
22 for.

23 And then, if the Court -- if -- if --  
24 if the Court decides to sort of send the case  
25 back to have many more of these issues that

1 we've discussed today to be aired, we would  
2 urge the Court, and I think Mr. Clement  
3 wouldn't disagree, to direct the lower courts  
4 to proceed very expeditiously. Here, this  
5 is -- we are in an emergency stay posture. The  
6 executive has been suffering irreparable harm  
7 since early September, and the sooner that  
8 these issues are resolved, the better.

9 Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 The case is submitted.

13 (Whereupon, at 12:01 p.m., the case  
14 was submitted.)

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<p><b>1</b></p> <p>112 [1] 49:24  13 [1] 62:7  14 [1] 63:1  1-4 [1] 25:8  150 [2] 81:4 111:1  165 [1] 9:16  166 [1] 9:17  1789 [3] 5:2 20:25 33:9  1887 [1] 111:1  19 [1] 61:17  1902 [1] 134:3  1903 [1] 128:7  1905 [1] 59:24  1913 [3] 61:17 69:12 71:8  1935 [2] 27:23 71:8  19th [2] 60:12 133:23</p>	<p>account [3] 19:14,17 132:12  accurate [1] 54:15  accused [3] 14:15 19:11 51:15  acknowledge [1] 6:16  across [4] 19:23 27:6 28:4 57:9  act [1] 26:15  acting [3] 13:16 95:23 97:4  action [3] 49:23 53:11 86:11  actions [1] 53:13  acts [1] 34:9  actual [4] 64:23 66:3 107:14,22  actually [16] 17:15 46:3 61:8 64:14 67:6 71:5 73:2 79:16 84:7 99:25 105:7 109:20 120:3 125:8 129:3 130:6  add [3] 92:21 107:3 118:13  addition [3] 34:9 67:21 68:17  address [2] 11:9,23  addressed [5] 11:9 40:7,9 73:22 91:5  addresses [2] 25:4,10  addressing [2] 13:25 26:8  adequate [3] 39:3 56:20 57:22  adjudicatory [1] 12:5  administrative [1] 54:5  admiration [1] 77:11  admission [1] 12:13  admit [1] 31:16  adopt [1] 133:15  adopted [4] 42:10 51:21 55:9 133:16  advanced [1] 83:18  adversary [1] 39:6  advertisement [1] 109:22  affecting [1] 128:10  afforded [3] 26:3 53:10,17  affords [1] 134:25  afraid [1] 55:25  agencies [2] 26:21 55:1  agency [7] 5:8 13:2,4 63:20 118:14 124:10,15  agree [14] 18:5 33:3,13 40:17 52:2 64:1</p>	<p>72:12 79:19,22 86:19 94:19 95:12 126:21 127:9  agreed [1] 61:18  agreement [2] 76:19 134:6  aim [3] 64:9,13,14  aims [1] 64:7  airing [2] 106:4,5  alito [33] 35:11,12 36:2,21 37:6,8 40:6,11 42:13 65:17 75:15 76:6,14,24 77:7,13,16,20 78:19,22,23 81:13,15 95:3 96:5,9,13 98:14 111:4,5,19 112:6 125:19  alito's [3] 38:19 98:18 110:16  aljs [1] 121:3  allegation [5] 24:15,16,17 128:18 132:7  allegations [4] 28:8 52:18 98:8 124:24  alleged [2] 25:2 135:15  alleging [1] 21:12  allocation [1] 56:19  allow [3] 24:12 67:5 106:21  allowed [1] 60:25  allowing [4] 19:1 21:17 22:19,25  alluded [10] 33:10 68:18 71:20 75:2,6 78:12 88:14 90:8 116:12 121:15  almost [3] 60:4 104:11 111:1  alone [3] 49:4 68:22 136:18  already [5] 17:18 55:3 56:20 71:19 118:12  alternative [2] 33:4,13  although [1] 110:20  american [2] 21:5 136:5  americans [4] 19:23 20:6,11 66:11  amici [3] 48:7,20 104:6  amicus [8] 17:7 18:7,11 20:9 29:1 53:20 60:1 82:20  among [2] 22:22 54:23  amount [4] 42:9 43:2 72:14 106:19  analog [1] 124:8</p>	<p>analogous [1] 14:18  analogy [1] 125:20  animals [1] 119:8  another [5] 12:2,4,4 106:12 127:4  answer [13] 54:23 80:15,22 87:16,19 99:23 110:21 111:13,17,20,22 118:10 125:18  answered [1] 112:15  answering [1] 80:18  answers [2] 80:21 117:16  antecedent [1] 5:6  anterior [1] 114:1  anybody [4] 33:22 93:4 96:25 97:3  apartment [1] 39:12  apparent [4] 70:4 102:23 109:18,19  apparently [3] 43:9 49:13 65:5  appeals [2] 56:6 118:21  appearance [1] 19:24  appearances [1] 51:23  appears [1] 23:23  appellate [1] 86:25  applicants [1] 133:7  application [14] 12:11 39:25 68:6 70:15,18 81:12,17 91:6 103:18,23 104:5 105:14 112:18 121:12  applications [5] 25:11 35:20,24 108:1 125:6  applied [3] 49:23 54:8 129:16  apply [7] 7:5 42:2,6 45:14 46:5 110:8 126:8  appoint [1] 134:6  appointees [1] 50:7  appointment [1] 16:20  appreciate [2] 22:17 100:4  appreciated [1] 63:15  appropriate [4] 20:3 54:18 84:20,21  appropriations [2] 70:10 119:14  arbiter [1] 24:22  aren't [2] 83:9 114:15  argue [4] 22:25 34:3,4 110:4  argued [2] 35:1 79:20  arguing [1] 69:18</p>	<p>argument [44] 10:1,21 17:23 27:17 29:5 31:15 46:21 50:24,24 54:7 59:18 60:14 62:10 63:3,6,7 69:4 72:6 73:15 76:11,15 78:8,11 79:9 82:9,10,11,24 83:10,11 100:4,18 103:7 107:5 113:6 114:4,6 122:15,21,22 123:4,7 132:4 133:6  arguments [15] 69:22 72:4 74:20,21 83:8,19 84:11,11 101:9 120:11,12,14,17 123:1  around [6] 35:2 50:5,5 51:3 121:3 128:8  arrogate [1] 119:6  article [7] 6:4,5 32:4 59:24 63:4 84:25 134:25  aside [4] 61:11 85:5 87:10 124:25  assert [1] 22:23  asserting [1] 69:19  assume [6] 26:15 112:25 120:11 122:24,25 131:23  assumes [1] 77:9  assuming [4] 22:16,18 85:7 113:23  assumption [2] 93:17 122:9  assumptions [1] 122:19  asterisked [1] 61:7  atlanta [1] 39:17  attachment [1] 107:25  attention [1] 75:24  attesting [1] 125:7  attorney's [1] 38:22  at-will [2] 50:10 69:25  august [3] 17:16,24 25:8  authority [12] 5:9 6:7 9:5 19:20 32:20,24 37:19 56:24 68:20 91:17 95:23 122:12  authorized [1] 48:23  authorizes [1] 96:23  available [8] 14:22 45:22 46:2,4 49:3 67:12 117:25 136:16  avenue [2] 84:20,22  avoidance [2] 82:11,17  aware [1] 51:6  away [1] 119:7</p>
<p><b>2</b></p> <p>2025 [2] 5:2 136:13  2029 [1] 50:8  2033 [1] 50:9  20th [2] 50:8,9  225 [1] 21:5  244 [5] 71:12 101:11 102:5 103:5 110:12  25th [3] 17:16,24 25:8</p> <p><b>4</b></p> <p>4 [2] 62:6 132:8</p> <p><b>9</b></p> <p>9 [1] 62:5  90 [3] 77:5 78:5 110:24</p>	<p><b>A</b></p> <p>abandon [1] 70:16  abandoning [1] 84:10  ability [6] 8:23 10:11 20:20 69:19 122:25 128:10  able [4] 75:23 116:6 122:16 124:4  absolutely [10] 30:2 79:22 80:12 97:25 99:17,19 101:24 127:3 128:25 129:17  abuse [1] 98:23  academic [1] 5:13  accept [4] 9:18 47:14 50:16 123:23  accompanying [1] 62:6  accorded [1] 53:10</p>	<p>72:12 79:19,22 86:19 94:19 95:12 126:21 127:9  agreed [1] 61:18  agreement [2] 76:19 134:6  aim [3] 64:9,13,14  aims [1] 64:7  airing [2] 106:4,5  alito [33] 35:11,12 36:2,21 37:6,8 40:6,11 42:13 65:17 75:15 76:6,14,24 77:7,13,16,20 78:19,22,23 81:13,15 95:3 96:5,9,13 98:14 111:4,5,19 112:6 125:19  alito's [3] 38:19 98:18 110:16  aljs [1] 121:3  allegation [5] 24:15,16,17 128:18 132:7  allegations [4] 28:8 52:18 98:8 124:24  alleged [2] 25:2 135:15  alleging [1] 21:12  allocation [1] 56:19  allow [3] 24:12 67:5 106:21  allowed [1] 60:25  allowing [4] 19:1 21:17 22:19,25  alluded [10] 33:10 68:18 71:20 75:2,6 78:12 88:14 90:8 116:12 121:15  almost [3] 60:4 104:11 111:1  alone [3] 49:4 68:22 136:18  already [5] 17:18 55:3 56:20 71:19 118:12  alternative [2] 33:4,13  although [1] 110:20  american [2] 21:5 136:5  americans [4] 19:23 20:6,11 66:11  amici [3] 48:7,20 104:6  amicus [8] 17:7 18:7,11 20:9 29:1 53:20 60:1 82:20  among [2] 22:22 54:23  amount [4] 42:9 43:2 72:14 106:19  analog [1] 124:8</p>	<p>analogous [1] 14:18  analogy [1] 125:20  animals [1] 119:8  another [5] 12:2,4,4 106:12 127:4  answer [13] 54:23 80:15,22 87:16,19 99:23 110:21 111:13,17,20,22 118:10 125:18  answered [1] 112:15  answering [1] 80:18  answers [2] 80:21 117:16  antecedent [1] 5:6  anterior [1] 114:1  anybody [4] 33:22 93:4 96:25 97:3  apartment [1] 39:12  apparent [4] 70:4 102:23 109:18,19  apparently [3] 43:9 49:13 65:5  appeals [2] 56:6 118:21  appearance [1] 19:24  appearances [1] 51:23  appears [1] 23:23  appellate [1] 86:25  applicants [1] 133:7  application [14] 12:11 39:25 68:6 70:15,18 81:12,17 91:6 103:18,23 104:5 105:14 112:18 121:12  applications [5] 25:11 35:20,24 108:1 125:6  applied [3] 49:23 54:8 129:16  apply [7] 7:5 42:2,6 45:14 46:5 110:8 126:8  appoint [1] 134:6  appointees [1] 50:7  appointment [1] 16:20  appreciate [2] 22:17 100:4  appreciated [1] 63:15  appropriate [4] 20:3 54:18 84:20,21  appropriations [2] 70:10 119:14  arbiter [1] 24:22  aren't [2] 83:9 114:15  argue [4] 22:25 34:3,4 110:4  argued [2] 35:1 79:20  arguing [1] 69:18</p>	<p>argument [44] 10:1,21 17:23 27:17 29:5 31:15 46:21 50:24,24 54:7 59:18 60:14 62:10 63:3,6,7 69:4 72:6 73:15 76:11,15 78:8,11 79:9 82:9,10,11,24 83:10,11 100:4,18 103:7 107:5 113:6 114:4,6 122:15,21,22 123:4,7 132:4 133:6  arguments [15] 69:22 72:4 74:20,21 83:8,19 84:11,11 101:9 120:11,12,14,17 123:1  around [6] 35:2 50:5,5 51:3 121:3 128:8  arrogate [1] 119:6  article [7] 6:4,5 32:4 59:24 63:4 84:25 134:25  aside [4] 61:11 85:5 87:10 124:25  assert [1] 22:23  asserting [1] 69:19  assume [6] 26:15 112:25 120:11 122:24,25 131:23  assumes [1] 77:9  assuming [4] 22:16,18 85:7 113:23  assumption [2] 93:17 122:9  assumptions [1] 122:19  asterisked [1] 61:7  atlanta [1] 39:17  attachment [1] 107:25  attention [1] 75:24  attesting [1] 125:7  attorney's [1] 38:22  at-will [2] 50:10 69:25  august [3] 17:16,24 25:8  authority [12] 5:9 6:7 9:5 19:20 32:20,24 37:19 56:24 68:20 91:17 95:23 122:12  authorized [1] 48:23  authorizes [1] 96:23  available [8] 14:22 45:22 46:2,4 49:3 67:12 117:25 136:16  avenue [2] 84:20,22  avoidance [2] 82:11,17  aware [1] 51:6  away [1] 119:7</p>

<p><b>awful</b> <sup>[1]</sup> 116:8</p> <hr/> <p><b>B</b></p> <p><b>back</b> <sup>[28]</sup> 7:1,19 29:23 34:7 38:18 41:7,21 42:6 54:11 57:5 58: 12 66:19 69:11 83:8, 17,21,22 99:23 105: 17 106:3 110:25 121: 19 128:18 135:9,12 136:20,21,25</p> <p><b>background</b> <sup>[2]</sup> 31:22 59:14</p> <p><b>backstop</b> <sup>[1]</sup> 110:23</p> <p><b>backup</b> <sup>[17]</sup> 76:11 78: 8,10,11 79:3,4,6 80:9, 10 81:6,7 84:11 93: 11,11,12 100:24,25</p> <p><b>bad</b> <sup>[1]</sup> 54:21</p> <p><b>baked</b> <sup>[1]</sup> 46:8</p> <p><b>balance</b> <sup>[7]</sup> 20:12 48: 21 52:3 118:6,15 119: 19,24</p> <p><b>balanced</b> <sup>[1]</sup> 21:8</p> <p><b>bank</b> <sup>[6]</sup> 39:8,14,19 70:17 71:14 93:15</p> <p><b>banks</b> <sup>[3]</sup> 5:21 6:20 136:6</p> <p><b>bar</b> <sup>[3]</sup> 49:3,9,10</p> <p><b>barrett</b> <sup>[25]</sup> 17:3 18:1, 14,17 19:5 20:3 21: 13 55:22,23 57:2,18 58:4,9,11 98:11 99:3, 7,14,18 100:2,19,25 102:11 122:2,3</p> <p><b>based</b> <sup>[4]</sup> 23:18 66:3 76:19 122:19</p> <p><b>baseless</b> <sup>[1]</sup> 37:2</p> <p><b>bases</b> <sup>[1]</sup> 91:5</p> <p><b>basically</b> <sup>[5]</sup> 65:3 88:6 112:18 120:14 125: 24</p> <p><b>basis</b> <sup>[16]</sup> 5:6 24:23 28:7 33:4,14,16 35: 18 73:24 74:17 77:2 78:13 83:7 114:5,7, 16 129:3</p> <p><b>batting</b> <sup>[1]</sup> 109:9</p> <p><b>battle</b> <sup>[2]</sup> 60:11,13</p> <p><b>bear</b> <sup>[1]</sup> 60:13</p> <p><b>beautiful</b> <sup>[1]</sup> 116:14</p> <p><b>becomes</b> <sup>[2]</sup> 39:24 112:14</p> <p><b>began</b> <sup>[2]</sup> 7:4 35:17</p> <p><b>beginning</b> <sup>[1]</sup> 88:17</p> <p><b>behalf</b> <sup>[2]</sup> 69:5 133:7</p> <p><b>behavior</b> <sup>[3]</sup> 19:3 23: 24 105:3</p> <p><b>believe</b> <sup>[3]</sup> 21:16 28:</p>	<p>12 97:2</p> <p><b>believes</b> <sup>[1]</sup> 39:3</p> <p><b>below</b> <sup>[5]</sup> 11:18 40:7, 10 84:6 129:5</p> <p><b>best</b> <sup>[7]</sup> 101:11 105:6 110:11 118:11 123:4, 6 126:1</p> <p><b>best-case</b> <sup>[1]</sup> 122:22</p> <p><b>better</b> <sup>[8]</sup> 7:22 8:17 54: 15 78:4 82:10 99:12 114:10 119:9</p> <p><b>between</b> <sup>[7]</sup> 11:13 19: 18 28:15 42:15 51:24 65:16 92:1</p> <p><b>beyond</b> <sup>[2]</sup> 9:10 100: 16</p> <p><b>biden</b> <sup>[1]</sup> 69:13</p> <p><b>big</b> <sup>[4]</sup> 8:5 50:4 57:14 115:7</p> <p><b>bind</b> <sup>[1]</sup> 91:8</p> <p><b>bit</b> <sup>[6]</sup> 21:11 28:22 94: 25 95:1 98:7 119:22</p> <p><b>bite</b> <sup>[2]</sup> 70:14 115:4</p> <p><b>black's</b> <sup>[3]</sup> 106:15 129: 4,6</p> <p><b>board</b> <sup>[4]</sup> 29:8 36:14 82:7 128:6</p> <p><b>body</b> <sup>[2]</sup> 81:19 96:6</p> <p><b>borderline</b> <sup>[1]</sup> 44:24</p> <p><b>both</b> <sup>[6]</sup> 20:25 30:20 37:4 38:5 51:2 121:5</p> <p><b>boundaries</b> <sup>[1]</sup> 92:19</p> <p><b>bounds</b> <sup>[3]</sup> 92:19 101: 7 135:24</p> <p><b>branch</b> <sup>[10]</sup> 5:8 35:14 36:3 57:1,16 64:16 75:1 94:16 96:10 120:7</p> <p><b>branches</b> <sup>[1]</sup> 102:1</p> <p><b>brief</b> <sup>[10]</sup> 33:4 45:1 52: 8 53:20,20 60:1,2,22 62:5 63:4</p> <p><b>briefing</b> <sup>[12]</sup> 7:14 44:2, 20 84:6,8 87:3 104:3, 6,7 105:13 108:17 120:25</p> <p><b>briefs</b> <sup>[7]</sup> 17:7 18:7,11 20:9 29:1 82:20 109: 16</p> <p><b>bring</b> <sup>[6]</sup> 30:22 41:6 100:14 119:21 121: 21 132:9</p> <p><b>brings</b> <sup>[1]</sup> 42:6</p> <p><b>broad</b> <sup>[7]</sup> 9:4,11,13 44: 2,7 64:4 105:23</p> <p><b>broader</b> <sup>[3]</sup> 47:25 48: 4 64:14</p> <p><b>brought</b> <sup>[1]</sup> 17:6</p> <p><b>bryce</b> <sup>[1]</sup> 84:25</p>	<p><b>buckets</b> <sup>[1]</sup> 86:2</p> <p><b>bunch</b> <sup>[2]</sup> 61:11 82:20</p> <p><b>burden</b> <sup>[5]</sup> 10:3 57:5 60:14 63:7 83:25</p> <p><b>business</b> <sup>[1]</sup> 18:3</p> <p><b>buy</b> <sup>[1]</sup> 7:19</p> <p><b>buying</b> <sup>[1]</sup> 8:11</p> <p><b>bypass</b> <sup>[1]</sup> 29:2</p> <hr/> <p><b>C</b></p> <p><b>called</b> <sup>[2]</sup> 113:15,18</p> <p><b>calling</b> <sup>[1]</sup> 27:5</p> <p><b>came</b> <sup>[3]</sup> 19:3 93:25 128:23</p> <p><b>camps</b> <sup>[4]</sup> 21:1 42:15 51:24 65:17</p> <p><b>cannot</b> <sup>[6]</sup> 12:14 32: 16 35:4 46:6 50:22 127:6</p> <p><b>capacious</b> <sup>[3]</sup> 70:4 71: 9 133:16</p> <p><b>card</b> <sup>[1]</sup> 5:22</p> <p><b>careful</b> <sup>[4]</sup> 37:20,23 98:8 109:16</p> <p><b>casa</b> <sup>[1]</sup> 21:4</p> <p><b>case</b> <sup>[92]</sup> 5:5 6:4,23 7: 6 12:3,9 13:21 14:10, 19 15:3,10,11 17:12 19:9 21:18 22:4 26:3 27:15 31:21,22,25 32: 6 35:21 36:5 38:11 42:14 44:23,24,24 45: 4,24 46:3 47:7 53:3,4 54:21 55:19,20 56:4 59:1,6,9,14 60:2,12, 19 69:16 74:3,15 79: 23 81:16 84:22,23 85: 1,23 87:24,25 88:1, 17,18,19,20 89:1,11, 15 93:17 95:19 101:3 102:14,25 106:14 111:6,24 112:1,5,9 117:14 121:9,14 122: 8,19 123:15,24 126:4 127:11 129:1,2,10,11 133:24 134:11 136: 24</p> <p><b>cases</b> <sup>[21]</sup> 9:8,12 12:2 15:5 37:17,24 45:1 59:16 60:10 61:11 62:7,20 63:1 66:16 104:11,25 105:2 106: 13 123:21 129:9 133: 25</p> <p><b>categorically</b> <sup>[1]</sup> 83: 13</p> <p><b>cause'</b> <sup>[1]</sup> 128:9</p> <p><b>causes</b> <sup>[7]</sup> 30:22 31: 17,19 38:11 59:7 104:</p>	<p>22,23</p> <p><b>causing</b> <sup>[1]</sup> 13:2</p> <p><b>caution</b> <sup>[1]</sup> 18:22</p> <p><b>caveat</b> <sup>[2]</sup> 46:4 75:19</p> <p><b>central</b> <sup>[3]</sup> 5:5 70:17 93:15</p> <p><b>century</b> <sup>[2]</sup> 60:12 133: 24</p> <p><b>certain</b> <sup>[3]</sup> 104:22,23 125:21</p> <p><b>certainly</b> <sup>[9]</sup> 5:25 6:6 27:16 57:20 77:2 79: 15 110:2 112:12 121: 23</p> <p><b>cetera</b> <sup>[2]</sup> 61:3,4</p> <p><b>cfpb</b> <sup>[1]</sup> 42:13</p> <p><b>challenge</b> <sup>[4]</sup> 9:21,23 10:2 34:16</p> <p><b>challenged</b> <sup>[2]</sup> 6:22 122:7</p> <p><b>chance</b> <sup>[5]</sup> 28:9 55:7 57:12 87:4 110:3</p> <p><b>chances</b> <sup>[1]</sup> 121:18</p> <p><b>change</b> <sup>[2]</sup> 39:14 63: 10</p> <p><b>characterization</b> <sup>[1]</sup> 51:10</p> <p><b>chase</b> <sup>[2]</sup> 71:16 102:9</p> <p><b>cheney</b> <sup>[2]</sup> 47:2 86:20</p> <p><b>chief</b> <sup>[41]</sup> 6:15,25 8:8 24:8,11 32:18 33:15 34:18 35:6,9 37:12 41:19,21 42:6 45:9 47:11 55:21 60:15 69:1,6 73:13 74:2,19, 23 88:14 105:15 106: 24 107:21 108:3 109: 1 111:4 112:7,15 115: 18 117:2 120:6 121: 16 122:1 124:17 133: 3,8</p> <p><b>chief's</b> <sup>[1]</sup> 38:20</p> <p><b>choice</b> <sup>[2]</sup> 42:11 96: 21</p> <p><b>choices</b> <sup>[1]</sup> 12:15</p> <p><b>circuit</b> <sup>[16]</sup> 10:18,19 34:11 35:15 36:10,17, 24,25 40:14 82:1,12 87:23 88:12,20 91:4, 8</p> <p><b>circuit's</b> <sup>[1]</sup> 108:21</p> <p><b>circular</b> <sup>[1]</sup> 123:13</p> <p><b>circumstance</b> <sup>[3]</sup> 34: 19 125:2 130:9</p> <p><b>circumstances</b> <sup>[8]</sup> 61: 7 67:4 123:8 125:21 126:12,14 132:15,17</p> <p><b>cite</b> <sup>[4]</sup> 45:1 59:13 60: 10 62:6</p>	<p><b>cites</b> <sup>[4]</sup> 53:20 104:24 129:9,10</p> <p><b>city</b> <sup>[3]</sup> 15:18 29:12,13</p> <p><b>civil</b> <sup>[1]</sup> 70:10</p> <p><b>claim</b> <sup>[4]</sup> 35:18 67:3,6 68:8</p> <p><b>claimants</b> <sup>[1]</sup> 34:24</p> <p><b>claiming</b> <sup>[1]</sup> 66:25</p> <p><b>claims</b> <sup>[2]</sup> 59:11 118: 20</p> <p><b>clarifying</b> <sup>[1]</sup> 100:20</p> <p><b>clause</b> <sup>[1]</sup> 56:12</p> <p><b>clear</b> <sup>[11]</sup> 13:21 34:13 45:25 47:2,5 55:12 90:13 109:3 114:11 120:10 136:15</p> <p><b>clearly</b> <sup>[11]</sup> 6:13 8:24 10:10 25:12 31:4 35: 4 38:17 59:20 65:10 135:4 136:18</p> <p><b>clerk</b> <sup>[3]</sup> 15:16 29:12, 14</p> <p><b>clever</b> <sup>[1]</sup> 88:8</p> <p><b>client</b> <sup>[6]</sup> 38:25 82:2 106:8 107:1 126:4 127:5</p> <p><b>client's</b> <sup>[1]</sup> 121:24</p> <p><b>clinton</b> <sup>[1]</sup> 87:25</p> <p><b>close</b> <sup>[6]</sup> 7:13 19:17 23:16 44:10 81:8 107:18</p> <p><b>closely</b> <sup>[1]</sup> 124:14</p> <p><b>closer</b> <sup>[2]</sup> 45:24 95:1</p> <p><b>codd</b> <sup>[1]</sup> 41:1</p> <p><b>collins</b> <sup>[1]</sup> 133:17</p> <p><b>colloquies</b> <sup>[1]</sup> 75:7</p> <p><b>colloquy</b> <sup>[3]</sup> 120:5 121:16 135:8</p> <p><b>combination</b> <sup>[5]</sup> 62:13, 15,16,21 63:2</p> <p><b>come</b> <sup>[11]</sup> 43:16 52:15 57:5 61:11 67:4 74:6 99:15 102:22 123:17, 22 134:20</p> <p><b>comes</b> <sup>[5]</sup> 20:6 31:17 50:5 134:16 135:10</p> <p><b>coming</b> <sup>[1]</sup> 107:1</p> <p><b>comments</b> <sup>[1]</sup> 55:18</p> <p><b>commerce</b> <sup>[1]</sup> 110:25</p> <p><b>commission</b> <sup>[1]</sup> 111:1</p> <p><b>commissioner</b> <sup>[2]</sup> 15: 19 29:13</p> <p><b>commissioners</b> <sup>[2]</sup> 106:13 128:6</p> <p><b>committed</b> <sup>[4]</sup> 12:24 43:23 117:12 134:13</p> <p><b>common</b> <sup>[23]</sup> 40:17 76:12 78:11,16 100: 14,20 104:11,21,25</p>
---	--	---	---	---

<p>105:1 106:12 110:14, 15,17,18 116:4 119:22 128:3,19 129:2 131:2 132:23,24 competence [3] 8:23 10:11 32:15 competing [1] 34:24 complete [2] 51:25 65:19 compliment [1] 100:13 components [1] 95:10 compromise [3] 42:14 51:24 65:16 concede [2] 32:16 58:4 conceded [7] 9:20 12:16,21 44:20 46:1 63:17 64:13 conceding [2] 130:15, 18 conceivable [1] 60:5 concept [1] 129:10 conception [2] 70:4 124:3 concepts [1] 129:9 concern [4] 20:10 53:23 54:19 70:21 concerned [1] 130:17 concerns [1] 119:18 conclude [3] 5:7 27:12 28:1 conclusion [1] 10:8 concurring [1] 88:5 conduct [24] 5:17 8:22 10:10 11:12,14,14 19:18 21:24 23:20 32:14 40:18 75:18,21 76:8 79:13 80:4 81:24 98:15,16 103:8 128:14 129:20,21 130:10 conference [2] 27:6 28:4 conferral [1] 9:5 confers [2] 44:2,6 confidence [2] 13:11, 11 confident [1] 80:8 confirmation [3] 11:19 129:22 130:12 conflicting [2] 25:12 81:18 confront [1] 102:14 congress [22] 5:17 6:13 27:20 30:7 42:10 43:9 48:13 49:12 51:21 63:15,19,19 65:4 71:5 93:22,23 101:14</p>	<p>116:23 119:2,8 133:15 135:4 connected [1] 131:1 connection [1] 11:22 consciously [1] 51:21 consequences [1] 51:7 consider [3] 18:6 83:8 132:19 consideration [1] 13:7 considered [5] 25:1 40:18 54:18 91:9 134:16 considering [1] 114:25 consistency [1] 60:6 consistent [4] 33:1 59:5 84:24 116:23 consistently [3] 9:12 53:10,12 conspicuously [2] 5:1 21:3 constitute [5] 5:15 11:16 76:9 133:12 134:13 constitution [2] 10:24 134:25 constitutional [9] 10:17 56:24 80:3 82:11, 15,17 84:16 98:6 108:19 constitutionality [1] 47:14 constraint [1] 83:16 constraints [1] 117:24 construed [1] 99:6 contemporaneous [1] 105:7 contend [4] 6:2,10 8:20 32:13 contended [2] 7:14 31:25 contention [3] 28:25 55:3 62:4 contest [1] 25:16 context [13] 8:6 23:19 40:25 41:13 60:13 71:11,18 84:4 91:19 114:11 115:1 118:13 119:20 contexts [1] 88:13 continue [3] 22:21 29:24 81:4 continues [1] 49:25 continuing [1] 124:1 contradict [1] 55:5 contradicted [1] 7:6 contradictory [1] 32:3</p>	<p>contradicts [2] 54:9 136:14 contrary [1] 10:5 control [4] 51:25 65:19 122:18 123:12 convene [1] 132:7 conviction [6] 78:17 79:1 80:11 100:8,21 128:20 convince [1] 54:16 cook [15] 7:12 12:6,8 14:11 17:9 21:17,20 25:14 27:5 32:11 39:7 57:10,11 122:25 124:22 cook's [5] 23:20 25:1 38:22 39:18 68:6 correct [15] 10:24 12:16,17 32:19 37:11 38:1 40:8 76:1 80:16,17 113:8,9 120:19,20 136:5 corrected [1] 37:8 corrupt [1] 134:6 couldn't [3] 56:8 61:10 103:11 counsel [13] 6:25 7:12 10:16 18:21 24:8 40:24 41:3,5 105:16 116:15,17,19 133:4 count [2] 62:23 128:1 country [3] 19:23 23:23 135:22 counts [2] 81:25 126:22 couple [12] 29:16 37:14 78:18 82:19 85:14 88:13 100:10 112:3 116:19 117:5 121:2 124:20 course [10] 5:12 7:16 21:1 34:6 42:1 77:22 80:13 81:9 83:15 117:23 courts [22] 13:9 32:19 33:22 37:10 60:4 61:7,10 66:17,20,20,22 67:6 68:13 81:21 92:7,18 93:3 114:15,25 128:3,13 129:15 court's [14] 5:3 15:10 22:15 30:24 36:1 49:21 54:10 56:22 66:14 70:19 76:1,3 94:20 101:14 cover [2] 79:13 98:14 covered [1] 118:9 crazy [2] 81:11,14 create [2] 40:25 94:24</p>	<p>creating [2] 70:8 116:14 creative [1] 88:7 credibility [2] 19:1 66:10 credibly [2] 14:15 51:15 credit [1] 5:21 crime [6] 19:13,14 40:19,20 78:14 116:16 crimes [3] 98:22 100:7 120:18 critical [1] 117:9 curium [1] 82:13 current [2] 50:6 52:13 cursory [1] 36:4</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p>d.c [15] 10:18,19 35:15 36:10,17,24,25 82:1,12 87:23 88:12,20 91:4,7 108:21 dalton [2] 9:9,25 damage [1] 18:25 darn [1] 130:11 dawn [1] 46:9 day [5] 88:4,24 107:17 110:20 116:25 days [4] 7:13 17:18 57:6 96:3 de [6] 15:16,25 29:14 44:8 85:22 89:25 deal [2] 57:14 102:17 dealing [1] 102:13 dealt [1] 91:10 debate [5] 8:9 87:2 101:20,20,23 debates [1] 101:22 deceit [6] 7:5,10 39:15,21,22 125:11 decide [15] 12:12 13:6 27:14 29:12 34:17 81:11 84:15 92:18 102:25 111:6 112:1,3, 4 121:9,14 decided [9] 10:18 36:5,10 37:10 63:20 81:21 113:22 121:20 135:9 decides [5] 37:19 89:3 113:17,18 136:24 deciding [1] 106:7 decision [19] 13:22 20:25 27:9 33:9 40:5 46:7,16 51:6 54:18 67:14 96:24 97:4,14,16, 17 101:15,16 108:22 136:20 decisionmaker [6] 95:</p>	<p>14,16 96:18,19 98:3, 4 decisionmakers [1] 96:7 decision-making [1] 115:1 decisions [6] 53:9 54:15 83:14 91:7,7 106:1 declaratory [5] 85:2,5 87:7,8,20 declined [1] 53:12 deep [1] 77:10 defect [1] 121:15 defective [1] 131:9 defend [6] 57:13 75:18,25 76:2 83:10 125:17 deference [7] 8:25 53:18 91:22,23 92:4,4, 17 deferential [2] 9:24 51:20 defiance [1] 55:6 define [1] 49:19 definition [7] 11:11 106:15 109:8,10,13 117:7 129:3 definitive [1] 89:12 defrauding [1] 130:5 degree [3] 92:3,4,5 delegate [1] 97:16 delegated [1] 10:5 delgado [3] 15:10 29:2,11 demanding [2] 93:5 110:1 democratic [1] 50:8 denial [1] 127:5 denied [1] 70:15 denigrate [1] 124:10 deny [2] 103:19 121:12 department [1] 12:20 depend [1] 94:16 dependent [1] 27:14 depends [3] 83:24 92:4 94:17 derive [1] 9:1 described [2] 16:5,8 describes [1] 108:1 describing [2] 86:3,4 description [1] 105:18 deserves [1] 13:15 designed [3] 65:10,12 135:19 designee [1] 120:9 despite [2] 69:14,21 destroy [2] 52:20 93:</p>
---	---	--	--	--

<p>14  <b>deter</b> <sup>[1]</sup> 115:12  <b>determination</b> <sup>[15]</sup> 8:  14 10:9,14 11:24 23:  11,18 44:21 65:4 66:  2,7 67:18 68:10,21  79:25 89:12  <b>determinations</b> <sup>[5]</sup> 63:  22 64:17 73:8,10 92:  9  <b>determine</b> <sup>[4]</sup> 80:2,3  128:22 135:19  <b>determined</b> <sup>[1]</sup> 8:2  <b>determines</b> <sup>[1]</sup> 49:4  <b>determining</b> <sup>[1]</sup> 33:2  <b>devious</b> <sup>[1]</sup> 8:17  <b>devote</b> <sup>[1]</sup> 75:24  <b>dicta</b> <sup>[1]</sup> 134:12  <b>dictate</b> <sup>[5]</sup> 26:20 54:  25 55:2 57:16 94:21  <b>dictating</b> <sup>[2]</sup> 26:22,23  <b>dictionary</b> <sup>[1]</sup> 129:6  <b>differ</b> <sup>[1]</sup> 60:4  <b>difference</b> <sup>[3]</sup> 8:13,15  30:17  <b>different</b> <sup>[17]</sup> 11:17,22  15:7 16:2 44:25 60:  20 61:6,12,13 62:2  102:2,20 104:12 122:  14 123:19,23 124:2  <b>differently</b> <sup>[3]</sup> 38:3 94:  6 124:12  <b>difficult</b> <sup>[4]</sup> 52:18 80:  15 81:17 104:9  <b>dig</b> <sup>[1]</sup> 117:20  <b>digging</b> <sup>[1]</sup> 117:15  <b>direct</b> <sup>[3]</sup> 38:10 88:4,  22  <b>direction</b> <sup>[2]</sup> 32:1 118:  6  <b>directions</b> <sup>[1]</sup> 44:25  <b>directly</b> <sup>[3]</sup> 32:2 64:8  135:2  <b>director</b> <sup>[3]</sup> 71:14,16  102:9  <b>disable</b> <sup>[1]</sup> 72:3  <b>disabling</b> <sup>[1]</sup> 78:14  <b>disagree</b> <sup>[4]</sup> 38:2 49:7  54:6 79:14  <b>disagreeing</b> <sup>[1]</sup> 12:14  <b>disagreement</b> <sup>[8]</sup> 32:  16 44:5 46:2 47:22  49:14,17 64:10 65:24  <b>disagreements</b> <sup>[5]</sup> 43:  11,13 45:17,19 124:1  <b>disaster</b> <sup>[1]</sup> 119:11  <b>discharge</b> <sup>[1]</sup> 98:17  <b>disclose</b> <sup>[1]</sup> 113:1  <b>disclosed</b> <sup>[3]</sup> 39:19</p>	<p>77:9 129:22  <b>discretion</b> <sup>[14]</sup> 9:11,  13 10:14 28:2 44:2,7  46:18 61:2 64:4 65:9,  11,13 72:14 133:19  <b>discretionary</b> <sup>[3]</sup> 34:8  46:7,16  <b>discussed</b> <sup>[5]</sup> 23:13  44:1 48:6 49:6 67:15  <b>discussion</b> <sup>[2]</sup> 105:23  135:23  <b>disinterested</b> <sup>[1]</sup> 96:6  <b>dismiss</b> <sup>[1]</sup> 125:22  <b>dismissal</b> <sup>[1]</sup> 23:12  <b>disprove</b> <sup>[1]</sup> 52:19  <b>dispute</b> <sup>[19]</sup> 5:14 8:2  15:17 26:25 33:25  38:21 40:25 43:5 46:  14 48:12,19 50:20 51:  10 53:1 58:10 59:4,  15,21 60:11  <b>disputed</b> <sup>[4]</sup> 6:3 45:3  48:7,14  <b>disregard</b> <sup>[2]</sup> 9:16  133:24  <b>disrupt</b> <sup>[1]</sup> 13:17  <b>disruptive</b> <sup>[1]</sup> 13:18  <b>dissent</b> <sup>[2]</sup> 53:21 116:  13  <b>distinct</b> <sup>[4]</sup> 6:19 69:9  93:19 114:12  <b>distinction</b> <sup>[1]</sup> 91:1  <b>distinguish</b> <sup>[1]</sup> 37:23  <b>district</b> <sup>[20]</sup> 25:9 35:  15 36:1,4,11 37:3,3  56:5,22 57:23,25 66:  13 67:12,18 75:16 76:  1,3 81:23 127:24 128:  22  <b>divide</b> <sup>[1]</sup> 91:25  <b>doc</b> <sup>[1]</sup> 25:8  <b>document</b> <sup>[1]</sup> 135:18  <b>documents</b> <sup>[3]</sup> 7:7 55:  5 125:9  <b>doing</b> <sup>[4]</sup> 48:13 50:11  51:7 52:24  <b>domestic</b> <sup>[1]</sup> 98:23  <b>done</b> <sup>[9]</sup> 30:11 52:22  68:16 84:8 94:15  103:6 113:14 127:2,  20  <b>doom</b> <sup>[2]</sup> 17:20 18:8  <b>dovetails</b> <sup>[1]</sup> 9:25  <b>down</b> <sup>[4]</sup> 57:9 60:23  61:15 80:6  <b>downstream</b> <sup>[1]</sup> 50:2  <b>dragged</b> <sup>[1]</sup> 114:16  <b>drago</b> <sup>[1]</sup> 15:2  <b>draw</b> <sup>[1]</sup> 91:1</p>	<p><b>drill</b> <sup>[2]</sup> 60:22 61:15  <b>drive</b> <sup>[1]</sup> 51:5  <b>driving</b> <sup>[1]</sup> 52:14  <b>due</b> <sup>[13]</sup> 13:7,12 37:1  40:12 56:12 70:1 82:  3 83:10 95:24 98:5  106:18 108:20,20  <b>duke</b> <sup>[1]</sup> 87:4  <b>during</b> <sup>[2]</sup> 11:16 23:13  <b>duties</b> <sup>[1]</sup> 19:19  <b>duty</b> <sup>[2]</sup> 15:25 128:11</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>each</b> <sup>[2]</sup> 25:11 55:5  <b>earlier</b> <sup>[2]</sup> 30:11 33:8  <b>easier</b> <sup>[1]</sup> 69:16  <b>easy</b> <sup>[1]</sup> 119:11  <b>economist</b> <sup>[1]</sup> 18:19  <b>economists</b> <sup>[1]</sup> 17:8  <b>economy</b> <sup>[1]</sup> 19:21  <b>effect</b> <sup>[3]</sup> 9:15 13:18  50:21  <b>effectively</b> <sup>[1]</sup> 49:24  <b>effects</b> <sup>[1]</sup> 50:2  <b>effectual</b> <sup>[2]</sup> 43:6,7  <b>effort</b> <sup>[1]</sup> 95:15  <b>egregious</b> <sup>[1]</sup> 76:20  <b>either</b> <sup>[7]</sup> 7:10 43:16  56:11 71:8 81:18 92:  25 103:9  <b>elaborate</b> <sup>[1]</sup> 129:18  <b>elastic</b> <sup>[1]</sup> 116:21  <b>elected</b> <sup>[2]</sup> 15:18 29:  13  <b>election</b> <sup>[1]</sup> 94:1  <b>element</b> <sup>[1]</sup> 103:13  <b>eligibility</b> <sup>[1]</sup> 102:6  <b>elite</b> <sup>[3]</sup> 18:12,12 20:8  <b>embezzlement</b> <sup>[1]</sup>  134:10  <b>emergency</b> <sup>[11]</sup> 12:10  70:15,18 81:12,16 83:  22 91:6 103:18 108:  25 135:12 136:21  <b>emphasize</b> <sup>[4]</sup> 48:21  59:22 135:8,13  <b>employment</b> <sup>[2]</sup> 69:25  83:12  <b>end</b> <sup>[17]</sup> 13:20 79:25  84:22,22,25 88:4,18  89:1 90:2 91:2,3 94:  7 107:16 110:20 116:  4 121:22 123:14  <b>enduring</b> <sup>[1]</sup> 106:9  <b>energy</b> <sup>[1]</sup> 33:1  <b>engage</b> <sup>[4]</sup> 19:6 21:2  66:8 68:20  <b>engaged</b> <sup>[4]</sup> 14:15 19:  2 23:23 134:4</p>	<p><b>enormous</b> <sup>[1]</sup> 124:7  <b>enough</b> <sup>[18]</sup> 33:5 41:3,  6 57:14,24 58:1 59:  23 68:22 74:5 88:8  106:2 107:7 113:15  128:16,18 132:2,13  135:5  <b>ensuing</b> <sup>[1]</sup> 26:5  <b>ensure</b> <sup>[2]</sup> 63:18 64:  14  <b>enter</b> <sup>[1]</sup> 67:20  <b>entered</b> <sup>[1]</sup> 68:24  <b>enterprise</b> <sup>[1]</sup> 94:10  <b>entire</b> <sup>[4]</sup> 19:21 23:22  27:12 135:22  <b>entirely</b> <sup>[2]</sup> 10:4 27:13  <b>entitled</b> <sup>[1]</sup> 92:11  <b>entity</b> <sup>[7]</sup> 6:19 12:4,5  65:21 69:9 70:8 116:  24  <b>envision</b> <sup>[1]</sup> 132:25  <b>envisioned</b> <sup>[2]</sup> 132:24  135:4  <b>equitable</b> <sup>[4]</sup> 67:13,17  68:3,10  <b>equities</b> <sup>[4]</sup> 18:21 19:  15 20:13 89:17  <b>equity</b> <sup>[7]</sup> 5:1 16:20  66:20,23 67:3 68:14  136:17  <b>equivalent</b> <sup>[2]</sup> 109:5  110:6  <b>erect</b> <sup>[2]</sup> 92:22 93:4  <b>error</b> <sup>[3]</sup> 106:19,25  127:7  <b>especially</b> <sup>[1]</sup> 108:13  <b>essence</b> <sup>[1]</sup> 29:4  <b>essential</b> <sup>[1]</sup> 38:14  <b>essentially</b> <sup>[12]</sup> 5:16  18:11 29:4 42:5 46:  20 65:21 94:23 106:  21 112:2 118:18 125:  22 130:4  <b>establish</b> <sup>[3]</sup> 125:6,10  126:7  <b>established</b> <sup>[5]</sup> 59:20  66:4 94:15 125:3  126:9  <b>establishment</b> <sup>[1]</sup> 128:  8  <b>estate</b> <sup>[1]</sup> 8:11  <b>et</b> <sup>[2]</sup> 61:3,4  <b>ethical</b> <sup>[1]</sup> 117:14  <b>evaluate</b> <sup>[1]</sup> 43:21  <b>even</b> <sup>[34]</sup> 5:21,23 6:2  8:3 9:18 11:18 24:21  26:21 32:22 35:20  42:23 44:8 69:13,16  84:22,25 87:2 88:19</p>	<p>89:3 90:8 101:21  103:12 105:4 106:17  110:3 114:14 115:7  125:5,12 126:1 127:  17 129:23 131:25  133:22  <b>eventually</b> <sup>[2]</sup> 77:15  116:5  <b>ever-present</b> <sup>[1]</sup> 69:  15  <b>everybody</b> <sup>[6]</sup> 20:25  26:16 29:6 35:14 61:  18,24  <b>everybody's</b> <sup>[1]</sup> 99:25  <b>everything</b> <sup>[2]</sup> 70:9  108:10  <b>evidence</b> <sup>[28]</sup> 20:24  21:19 23:3,7,18 24:  16,20,21,23,25 25:10,  16 27:7 56:8 57:11  65:2 66:3 74:15 95:  13 96:17 105:7 107:  14,22 121:4,6 126:2  131:10 132:10  <b>evidentiary</b> <sup>[1]</sup> 126:6  <b>exactly</b> <sup>[10]</sup> 18:3 31:  14 34:16 36:16 40:10  41:14 47:20 73:14  102:15 120:18  <b>example</b> <sup>[11]</sup> 7:9 20:  23 32:3 59:23,25 60:  24 72:16 82:13 119:5  128:5 134:2  <b>examples</b> <sup>[1]</sup> 98:19  <b>excavate</b> <sup>[1]</sup> 105:13  <b>excavating</b> <sup>[1]</sup> 104:8  <b>excellent</b> <sup>[1]</sup> 5:11  <b>except</b> <sup>[2]</sup> 10:17 43:  14  <b>exception</b> <sup>[3]</sup> 78:17  109:9 118:19  <b>excess</b> <sup>[1]</sup> 10:4  <b>exchange</b> <sup>[1]</sup> 40:11  <b>exclusively</b> <sup>[1]</sup> 10:20  <b>excuse</b> <sup>[1]</sup> 21:10  <b>executed</b> <sup>[1]</sup> 97:8  <b>executive</b> <sup>[26]</sup> 5:8,16,  19,25 6:1,14 27:14  35:14 36:3 48:11,11  55:1 57:1,16 64:16  74:25 94:16,19,24 95:  5 96:10 97:2 119:7  120:7 122:11 123:10  <b>executive's</b> <sup>[1]</sup> 28:2  <b>executor</b> <sup>[3]</sup> 78:5 101:  15,17  <b>executor's</b> <sup>[1]</sup> 101:16  <b>exempt</b> <sup>[1]</sup> 70:9  <b>exercise</b> <sup>[2]</sup> 48:9 96:</p>
--	---	---	---	--

<p>10  <b>exercised</b> [2] 48:10  123:10  <b>expect</b> [2] 24:22 121:5  <b>experience</b> [1] 39:22  <b>experienced</b> [1] 39:21  <b>experiment</b> [1] 17:19  <b>explain</b> [3] 13:13 25:16 67:11  <b>explanation</b> [1] 55:13  <b>explicitly</b> [1] 30:7  <b>explored</b> [3] 35:19 63:14 81:22  <b>express</b> [1] 72:2  <b>expressing</b> [1] 77:10  <b>expressly</b> [1] 30:21  <b>extent</b> [3] 21:15 66:25 134:22  <b>extraordinarily</b> [1] 95:4  <b>extraordinary</b> [5] 83:23,25 103:23 108:24 109:14  <b>extrapolating</b> [1] 38:1  <b>extreme</b> [1] 113:11  <b>extremely</b> [1] 20:14  <b>eye</b> [1] 18:9  <b>eyes</b> [1] 66:10</p> <hr/> <p><b>F</b></p> <p><b>face</b> [3] 27:19 34:4 135:2  <b>fact</b> [13] 7:23 16:4 17:25 29:25 34:15 39:19 55:11 64:22 77:25 107:23,24 113:22 136:14  <b>facto</b> [5] 15:16,25 29:15 85:22 89:25  <b>factors</b> [3] 17:5 20:16 22:2  <b>facts</b> [17] 8:2 35:20 53:3,4 55:18,19 74:16 105:20 116:2 117:13 125:3,13 126:8,9,16 127:8,17  <b>factual</b> [16] 7:3 35:18 38:21 40:3,25 73:7,10,24 74:14 92:1,2,8 111:6,11 112:24 120:12  <b>factually</b> [1] 73:17  <b>failure</b> [1] 109:23  <b>fair</b> [2] 72:14 83:15  <b>fairly</b> [1] 18:8  <b>faith</b> [2] 118:24 119:1  <b>faithful</b> [1] 71:4  <b>faithfully</b> [1] 95:21</p>	<p><b>fall</b> [1] 99:23  <b>fallback</b> [3] 100:6 109:23 110:13  <b>familiar</b> [1] 86:2  <b>far</b> [5] 59:5 65:13 76:16 118:6 124:4  <b>farther</b> [2] 57:3,3  <b>fashion</b> [2] 72:15 88:8  <b>fast</b> [1] 19:25  <b>favor</b> [4] 33:5 111:14 118:15 127:11  <b>favorable</b> [3] 20:1 24:2 127:18  <b>fear</b> [2] 54:13 56:7  <b>fed</b> [16] 69:17,20 71:11,15 93:15,18,24 102:8 116:5 119:1,14 122:6,18 123:18,23 124:14  <b>federal</b> [30] 5:7,13,14,19,20,24 6:12 7:18 13:15 14:8 18:25 22:24 23:21 26:21 36:13 47:15,17 48:2 49:6 52:9,16 63:18 65:19 66:10 69:8 71:13 82:7 88:9 117:10 134:23  <b>fees</b> [1] 5:22  <b>few</b> [1] 110:21  <b>figure</b> [2] 88:8,22  <b>filed</b> [1] 112:21  <b>fill</b> [1] 8:10  <b>final</b> [11] 13:22 15:23 16:4 24:22 29:18 68:21 95:16 98:3,4 118:4 130:14  <b>finally</b> [2] 12:9,11  <b>financial</b> [8] 8:5 14:16,17 44:10 51:13,16 66:9 120:4  <b>find</b> [8] 35:2 52:20 54:1 62:21 111:14,15 116:16,17  <b>finding</b> [1] 111:11  <b>fine</b> [2] 56:13 119:22  <b>finished</b> [1] 28:5  <b>fire</b> [4] 12:14 46:17 122:12 131:20  <b>fireable</b> [1] 63:24  <b>fired</b> [6] 28:5 32:11 64:18 96:3 131:17,18  <b>firing</b> [1] 98:24  <b>firm</b> [1] 47:10  <b>first</b> [16] 5:12 6:20 9:2 13:9 23:5 29:17,24 40:23 61:8 67:9 76:16 83:8 85:3,10 111:11 134:5  <b>fit</b> [1] 130:7</p>	<p><b>fitness</b> [4] 8:22 10:10 32:15 128:11  <b>five</b> [1] 57:6  <b>five-day</b> [1] 28:12  <b>fixed</b> [10] 38:8,13,16 60:25 61:1,3,3,16 62:20 63:2  <b>fixes</b> [1] 61:23  <b>flaws</b> [1] 83:16  <b>flexibility</b> [1] 72:25  <b>flexible</b> [1] 27:2  <b>flunks</b> [1] 42:24  <b>follow</b> [1] 45:11  <b>following</b> [1] 60:17  <b>follow-ups</b> [1] 37:15  <b>footnote</b> [2] 62:6,7  <b>for-cause</b> [13] 27:22 35:18 37:25 47:15 48:15 50:16 63:16,25 76:7 102:15 116:10 126:3,24  <b>force</b> [1] 7:19  <b>forced</b> [1] 51:17  <b>forfend</b> [1] 116:4  <b>forget</b> [1] 108:10  <b>formal</b> [3] 25:15,18 41:13  <b>former</b> [2] 52:8,16  <b>forth</b> [5] 5:22 9:10 33:10 44:6 133:24  <b>fortiori</b> [1] 55:1  <b>forum</b> [1] 92:14  <b>found</b> [2] 14:15 109:20  <b>founding</b> [2] 54:11 69:12  <b>four</b> [2] 51:14 62:18  <b>framed</b> [1] 16:18  <b>framing</b> [1] 22:13  <b>frankfurter</b> [1] 72:21  <b>frankly</b> [2] 38:23 39:11  <b>fraud</b> [2] 109:17,18  <b>frauds</b> [1] 134:12  <b>friend</b> [1] 71:9  <b>friendly</b> [6] 16:5,8 28:23 29:19 34:10 85:16  <b>friends</b> [2] 83:19,24  <b>front</b> [1] 91:3  <b>front-line</b> [10] 76:10,15,15 77:1 83:11 84:10 100:23,25 117:17 118:3  <b>ftc</b> [1] 123:19  <b>full</b> [8] 72:18,24 73:9 75:24 92:6 105:13 118:23 134:22  <b>fully</b> [1] 113:1  <b>functioning</b> [1] 113:</p>	<p>12  <b>fundamental</b> [3] 14:20 51:19 135:25  <b>fundamentally</b> [1] 131:8  <b>funding</b> [1] 42:14  <b>funneled</b> [1] 80:23  <b>further</b> [8] 9:3,19 56:22,23,23 64:7 121:20 135:3  <b>further</b> [2] 64:8,9  <b>fused</b> [1] 66:22  <b>future</b> [5] 50:23 52:14 53:16 94:13 114:19  <b>future-justice</b> [1] 72:20</p> <hr/> <p><b>G</b></p> <p><b>garcia</b> [1] 36:24  <b>garland</b> [1] 44:25  <b>gather</b> [1] 8:11  <b>gave</b> [2] 39:8 72:17  <b>gen</b> [1] 133:6  <b>generally</b> [1] 100:12  <b>general's</b> [1] 69:22  <b>gerrymander</b> [1] 100:16  <b>gerrymandered</b> [2] 62:10 100:7  <b>gerrymandering</b> [1] 100:12  <b>gets</b> [4] 47:1 73:3 101:15 121:18  <b>getting</b> [5] 20:1 43:19 117:7 118:2 136:7  <b>gill</b> [1] 134:10  <b>gist</b> [1] 108:21  <b>give</b> [15] 28:8 43:10 51:25 59:8 64:4 65:2 70:11 71:4 72:23,24 73:9 87:17 91:22 101:11 106:20  <b>given</b> [5] 25:14,19 58:25 74:15 112:20  <b>gives</b> [4] 57:12 59:7 106:8 133:18  <b>giving</b> [1] 6:9  <b>gorsuch</b> [40] 26:9,12 27:4 28:3,10,14,17,19 45:10,11 46:10,15,23 47:4 57:8 78:7 79:3 82:25 83:3,6 84:18 85:4,17,25 86:6,9 87:9,14,17 90:12,16 96:22 97:9,13,15,19,22,24 98:1 117:3  <b>gorsuch's</b> [3] 29:23 80:10 90:1  <b>got</b> [14] 31:18 39:9,10</p>	<p>58:14 61:24 79:9 80:21 81:23 101:20 102:4 108:4,9 121:2 130:25  <b>govern</b> [1] 47:20  <b>government</b> [17] 20:16,18 51:8 56:14 62:1 88:23 102:1 108:24 115:20 122:7,16,17 123:16 124:16 127:19 129:4,23  <b>government's</b> [1] 121:12  <b>governor</b> [20] 17:8 19:2 23:22 29:9,11 36:13 44:11 57:11 69:14,20 71:13,15 82:6 98:20 102:8 116:5 118:24 122:25 130:21 131:20  <b>governors</b> [15] 14:14,16 19:22 43:8,12 47:21 51:12,15 52:8,16 63:24 64:6 65:23 66:7 134:23  <b>governor's</b> [1] 135:19  <b>grant</b> [3] 15:23 17:9 125:22  <b>granted</b> [4] 9:13 83:23 136:9,13  <b>grave</b> [1] 135:17  <b>great</b> [3] 27:17 88:5 106:12  <b>greater</b> [3] 13:14,14 114:21  <b>grievous</b> [1] 22:23  <b>gross</b> [28] 7:10 8:3 39:23 40:1 43:23 44:9,16,18 70:5 102:24 109:24 110:2,4 111:8 113:3,15,19 114:2,6,13 115:20,23 116:8,17 125:11 126:22 134:12 135:16  <b>grossly</b> [2] 19:25 39:24  <b>ground</b> [3] 36:5 106:8 111:6  <b>grounds</b> [7] 36:11 37:4 58:19,24 84:5 99:12 127:11  <b>guden</b> [1] 134:2  <b>guess</b> [9] 21:10 29:5 33:16 64:2 105:17 106:2 124:25 130:16 131:1  <b>guidance</b> [1] 27:25  <b>guide</b> [1] 51:1</p>
---	---	--	---	--

<p><b>H</b></p> <p><b>hagerstown</b> [4] 106:14 128:7 129:1,11</p> <p><b>hagertown</b> [1] 128:7</p> <p><b>half</b> [2] 78:2 120:23</p> <p><b>hand</b> [6] 117:10,12 119:15,16 126:5 127:9</p> <p><b>handled</b> [2] 35:13 36:3</p> <p><b>hands</b> [1] 119:13</p> <p><b>happen</b> [6] 11:17 45:21 50:18 76:11 84:14 106:21</p> <p><b>happened</b> [10] 17:16 18:13 36:6 64:24 81:24 83:12 95:14 126:21 127:23 130:25</p> <p><b>happens</b> [4] 82:14 88:25 89:16 106:14</p> <p><b>happy</b> [2] 101:2 114:24</p> <p><b>hard</b> [5] 80:19 81:6,10,15 106:7</p> <p><b>hard-fought</b> [2] 42:14 65:15</p> <p><b>hard-pressed</b> [1] 39:4</p> <p><b>harm</b> [16] 13:2,13 20:17 21:12 22:3,19 56:14,16 84:1 103:16 122:4,15,23 123:3,8 124:5</p> <p><b>harmed</b> [2] 13:5 21:17</p> <p><b>harmful</b> [1] 89:18</p> <p><b>harmless</b> [1] 127:7</p> <p><b>harms</b> [2] 20:20 124:8</p> <p><b>hawaii</b> [1] 53:9</p> <p><b>heads</b> [1] 125:18</p> <p><b>hear</b> [3] 28:22 57:12 121:4</p> <p><b>heard</b> [6] 10:23 25:25 39:1 61:20 103:8 112:13</p> <p><b>hearing</b> [70] 12:7 23:20 26:15,17 27:1,19,21 30:1,16,23 31:3,8,13,20 32:10 38:14,17 40:13 55:25 56:7,9,17 58:7,15,25 59:3,8,13 61:25 62:9 65:3 70:23 71:19,22,23,25 72:3,10,15,19 73:14,24 74:13,21 85:15 92:13 95:7,9 104:24 105:11 106:18,23 112:24 115:6 120:6,10,21 124:20,21 125:5,14,25 126:7,20 127:2,5,</p>	<p>6,13,14 132:8</p> <p><b>hearing's</b> [1] 74:8</p> <p><b>heart</b> [1] 73:3</p> <p><b>heartbeat</b> [3] 77:25 78:1,2</p> <p><b>heaven</b> [1] 116:3</p> <p><b>heavily</b> [5] 26:24 59:25 60:1 63:5 134:11</p> <p><b>held</b> [11] 9:12,21 14:21 16:10 22:8 29:11,13 31:4 34:11 41:6 75:17</p> <p><b>help</b> [3] 78:19,22,23</p> <p><b>helpful</b> [3] 104:8 105:25 129:2</p> <p><b>helping</b> [1] 54:14</p> <p><b>helps</b> [3] 54:16,16 78:18</p> <p><b>hence</b> [1] 5:8</p> <p><b>herself</b> [4] 7:13 20:2 24:3 57:13</p> <p><b>high</b> [4] 9:23 49:10 115:14 120:18</p> <p><b>himself</b> [1] 9:6</p> <p><b>historical</b> [4] 6:19 69:9,10 93:19</p> <p><b>historically</b> [1] 72:16</p> <p><b>history</b> [8] 5:2 21:5 43:7 50:25 51:13 69:11 114:12 136:14</p> <p><b>hitler</b> [2] 77:11 79:1</p> <p><b>hold</b> [3] 36:21 133:25 135:14</p> <p><b>holding</b> [17] 16:13,19 29:2 30:24 31:10 33:6 36:12 37:20,24 41:1 60:8 67:22 76:1,3 82:16,17 136:15</p> <p><b>home</b> [4] 39:20 108:2 112:19 113:2</p> <p><b>honestly</b> [1] 110:20</p> <p><b>honor</b> [2] 38:7 77:15</p> <p><b>host</b> [1] 53:9</p> <p><b>hour</b> [2] 115:7 120:23</p> <p><b>hours</b> [1] 116:19</p> <p><b>house</b> [2] 80:1 117:25</p> <p><b>however</b> [3] 5:17 22:4 59:16</p> <p><b>humphrey's</b> [4] 78:5 101:15,16,17</p> <p><b>hundred</b> [2] 14:6 70:16</p> <p><b>hurried</b> [1] 35:16</p> <p><b>hypos</b> [7] 77:14 80:5,7,16,19 110:16,22</p> <p><b>hypothesize</b> [2] 131:17,18</p> <p><b>hypothetical</b> [2] 53:15,16</p>	<p><b>hypothetically</b> [2] 26:13 47:8</p> <p><b>hypotheticals</b> [3] 78:18 98:13 129:13</p> <p><b>I</b></p> <p><b>idea</b> [6] 33:22 66:13 86:24 87:6 107:10 131:7</p> <p><b>identified</b> [1] 60:24</p> <p><b>identify</b> [1] 58:19</p> <p><b>ii</b> [2] 6:4,5</p> <p><b>iii</b> [1] 134:25</p> <p><b>imagine</b> [3] 11:15 77:12 116:22</p> <p><b>imagines</b> [1] 70:12</p> <p><b>immediate</b> [2] 13:2 21:20</p> <p><b>impartial</b> [1] 72:19</p> <p><b>impeachable</b> [1] 98:25</p> <p><b>impeached</b> [2] 77:24 78:1</p> <p><b>impeachment</b> [10] 77:3 79:5,13,24 80:23 110:22 117:22 120:16 130:7 134:21</p> <p><b>imperative</b> [1] 119:24</p> <p><b>implemented</b> [1] 17:21</p> <p><b>importance</b> [1] 48:19</p> <p><b>important</b> [8] 13:4 43:8 44:9 48:17 84:15 104:16 118:23,25</p> <p><b>impose</b> [1] 42:11</p> <p><b>imposed</b> [1] 128:12</p> <p><b>imposes</b> [1] 56:25</p> <p><b>imposition</b> [1] 115:8</p> <p><b>improper</b> [1] 23:23</p> <p><b>improprieties</b> [5] 14:16,17 51:13,16 66:9</p> <p><b>inability</b> [1] 122:24</p> <p><b>inadvertence</b> [1] 73:15</p> <p><b>inadvertent</b> [20] 7:6,15,17 8:4,16 55:13,14 73:19 74:1,5,7,17 105:21 107:2,3,12,17,23 126:2 135:17</p> <p><b>inappropriate</b> [1] 68:15</p> <p><b>incentive</b> [1] 94:24</p> <p><b>incentives</b> [1] 73:4</p> <p><b>incentivizes</b> [3] 52:15,19,25</p> <p><b>include</b> [2] 27:18 113:4</p> <p><b>included</b> [2] 72:20 112:18</p>	<p><b>includes</b> [1] 11:12</p> <p><b>including</b> [3] 11:11 51:14 93:22</p> <p><b>incompetent</b> [1] 12:24</p> <p><b>inconsequential</b> [1] 52:17</p> <p><b>inconsistent</b> [1] 116:9</p> <p><b>incorrect</b> [1] 62:4</p> <p><b>incredibly</b> [3] 19:19 95:2 104:8</p> <p><b>incumbent</b> [1] 128:11</p> <p><b>indeed</b> [1] 127:6</p> <p><b>independence</b> [14] 13:4,5 47:17,18 48:2,17 49:5 50:15 63:18 70:17,21 117:10 119:1 122:6</p> <p><b>independent</b> [9] 33:14,16,17 48:10 93:15 96:11 116:15,17,18</p> <p><b>indicate</b> [1] 33:20</p> <p><b>indicated</b> [1] 21:14</p> <p><b>indicates</b> [2] 21:24 27:15</p> <p><b>indicted</b> [5] 7:18 55:15 75:20,20,23</p> <p><b>indictment</b> [1] 75:23</p> <p><b>indignity</b> [1] 123:9</p> <p><b>indisputable</b> [5] 34:14 46:1 47:3,5 131:9</p> <p><b>inefficiency</b> [3] 30:15 32:7 42:18</p> <p><b>ineligibility</b> [5] 71:10 101:10 103:5,10 110:12</p> <p><b>infamous</b> [7] 19:13 40:19,20 78:14 80:11 98:21 100:7</p> <p><b>inferior</b> [1] 15:15</p> <p><b>inflicts</b> [1] 122:14</p> <p><b>influence</b> [1] 48:11</p> <p><b>influenced</b> [1] 93:25</p> <p><b>influential</b> [2] 42:15 65:16</p> <p><b>inform</b> [1] 120:22</p> <p><b>informal</b> [5] 39:1 41:9,14 92:10 95:2</p> <p><b>information</b> [2] 63:21 131:19</p> <p><b>informed</b> [3] 101:10 103:5 110:12</p> <p><b>injunction</b> [21] 14:2,22,24,24 15:8 16:3,12 21:3 22:7,19 28:21 29:5,18 67:17 68:13,24 70:3 86:1,5 136:10,16</p> <p><b>injunctive</b> [4] 85:8 86:13 88:9 89:24</p>	<p><b>injuries</b> [1] 20:20</p> <p><b>injury</b> [3] 22:23 57:1 123:20</p> <p><b>inm</b> [36] 30:21,25 31:5 42:12 51:22 58:5,15,18 59:3,7 60:7 71:10,21 72:7 76:5,25 77:5 80:21 81:3 99:2,25 100:3,4,9 101:9,18 102:3 103:4,9 109:5 110:6,11 111:1 117:18 133:13,20</p> <p><b>in-office</b> [4] 75:18 81:23 133:11,14</p> <p><b>inquiry</b> [2] 93:7 114:24</p> <p><b>insisted</b> [1] 71:15</p> <p><b>insistent</b> [1] 65:17</p> <p><b>insisting</b> [2] 67:11 102:8</p> <p><b>insofar</b> [1] 66:1</p> <p><b>instance</b> [3] 61:9 83:9 111:11</p> <p><b>instead</b> [1] 51:21</p> <p><b>institution</b> [7] 64:15 69:24 93:19 94:3,6 107:20 114:12</p> <p><b>institutions</b> [1] 72:5</p> <p><b>insufficient</b> [2] 111:9 121:10</p> <p><b>insulated</b> [1] 116:24</p> <p><b>insuperable</b> [2] 34:5 35:4</p> <p><b>insupportable</b> [1] 36:20</p> <p><b>intend</b> [1] 131:19</p> <p><b>interchangeably</b> [2] 101:18,24</p> <p><b>interest</b> [21] 7:23 8:7,17 10:21 11:3 17:7,12 19:22 20:1,18 23:22 24:3 36:12,18 37:1 82:2,6 119:10 135:19,21 136:7</p> <p><b>interests</b> [1] 52:5</p> <p><b>interim</b> [5] 29:15 33:11 67:14 68:11 89:15</p> <p><b>interpretation</b> [2] 71:4 72:2</p> <p><b>interpreting</b> [1] 71:2</p> <p><b>interrupt</b> [1] 18:1</p> <p><b>interstate</b> [1] 110:25</p> <p><b>intervention</b> [1] 99:13</p> <p><b>intervention/resignati on</b> [1] 117:18</p> <p><b>intrusion</b> [1] 57:16</p> <p><b>invalid</b> [1] 45:7</p> <p><b>investors</b> [1] 17:22</p> <p><b>invite</b> [1] 112:12</p>
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<b>invited</b> <sup>[1]</sup> 67:3 <b>invoking</b> <sup>[1]</sup> 104:20 <b>involved</b> <sup>[2]</sup> 37:22 134:3 <b>iowa</b> <sup>[1]</sup> 134:9 <b>ironclad</b> <sup>[1]</sup> 48:22 <b>irregular</b> <sup>[3]</sup> 111:23, 24 112:10 <b>irrelevant</b> <sup>[2]</sup> 33:18 112:24 <b>irreparable</b> <sup>[16]</sup> 20:17, 19 21:12 22:23 56:14, 16,25 84:1 122:4,15, 23 123:2,7,20 124:5, 7 <b>irresistible</b> <sup>[1]</sup> 119:12 <b>isn't</b> <sup>[16]</sup> 5:5,25 56:7 58:18 60:18,18 74:17 84:19 85:25 93:11 107:17 125:14 127: 19 131:1 132:23 134: 14 <b>issue</b> <sup>[22]</sup> 5:20 6:1 11: 5,9 14:18 16:11 19: 18 22:9 39:17 40:3,5 85:5 87:22 89:16 90: 15 95:11,17 96:18 98: 9 103:9 105:8 113:17 <b>issued</b> <sup>[1]</sup> 83:15 <b>issues</b> <sup>[12]</sup> 12:12 13:6, 9,21 31:24 37:9 60:3 84:16 105:19,24 106: 5 136:25 <b>issuing</b> <sup>[2]</sup> 15:7 16:2 <b>itself</b> <sup>[6]</sup> 9:4,16,24 35: 25 58:14 94:2 <hr/> <b>J</b> <hr/> <b>jackson</b> <sup>[54]</sup> 17:2 21:6, 9 22:10,14 23:3,7,14, 17,25 24:4,9,14 25:5, 14,21,23 26:2 35:5,8 60:16,17 62:11,16,19, 25 63:8,11 64:12 65: 25 66:12 67:25 68:4, 25 88:25 90:10,14,17 103:11 124:18,19 126:10,13,17 127:15, 21 129:12 130:14,24 131:4,12,16 132:11 133:2 <b>january</b> <sup>[2]</sup> 50:8,9 <b>jaundiced</b> <sup>[1]</sup> 18:9 <b>jittery</b> <sup>[1]</sup> 17:22 <b>job</b> <sup>[5]</sup> 39:9,10 75:24 76:18 128:17 <b>john</b> <sup>[1]</sup> 133:6 <b>joke</b> <sup>[1]</sup> 75:9 <b>joseph</b> <sup>[1]</sup> 69:13	<b>judge</b> <sup>[11]</sup> 16:5,5,8 18: 19 28:23 29:19 34:10 85:16 88:6 91:9 129: 4 <b>judges</b> <sup>[1]</sup> 134:25 <b>judgment</b> <sup>[10]</sup> 15:24 29:19 85:3,5 87:8,8, 21 91:10 96:11 108: 16 <b>judicial</b> <sup>[26]</sup> 8:20 44:5, 21 45:6 49:1,18 50: 17 52:21 54:3 70:2 73:6,7 75:4,5,8,13 79: 17,24 91:18 92:14,25 94:13 113:23,24 114: 21 135:24 <b>judicially</b> <sup>[2]</sup> 9:14 115: 11 <b>judiciary</b> <sup>[1]</sup> 88:7 <b>jump</b> <sup>[1]</sup> 82:15 <b>junction</b> <sup>[4]</sup> 103:1,8, 20 121:11 <b>jurisdiction</b> <sup>[5]</sup> 12:5 16:11,19 22:9 67:20 <b>jurisprudence</b> <sup>[3]</sup> 46: 8 49:21 54:10 <b>justice's</b> <sup>[2]</sup> 41:21 42: 7 <b>justifying</b> <sup>[1]</sup> 26:10 <hr/> <b>K</b> <hr/> <b>kagan</b> <sup>[29]</sup> 28:18 29: 22 30:3,9,13 31:1,6,9 32:5 41:19,20 42:16 43:14 44:12,15 45:8 71:19 79:11 81:2,14 91:15,18 93:8 102:12 115:18,19,25 117:1 121:8 <b>kagan's</b> <sup>[2]</sup> 45:12 58: 12 <b>kansas</b> <sup>[1]</sup> 129:5 <b>kavanaugh</b> <sup>[33]</sup> 47:12, 13,24 48:3,16,25 49: 15 50:1,13,25 52:2 53:19 54:12 55:10,17, 24 63:14 75:14 79:9, 12,18 80:9,14,22 94: 12 99:20 116:12 117: 4,5 120:5 121:7,25 122:5 <b>kavanaugh's</b> <sup>[1]</sup> 126: 19 <b>keep</b> <sup>[8]</sup> 16:3 34:12 60:12 89:25 93:24 95:16 99:21 115:9 <b>keeping</b> <sup>[5]</sup> 12:19 13: 1 15:6 118:15 122:13 <b>key</b> <sup>[3]</sup> 8:5 38:4 64:11	<b>kick</b> <sup>[1]</sup> 10:15 <b>kind</b> <sup>[55]</sup> 5:18 6:12 8: 21 9:24 10:7 17:18 19:3 23:19 41:23 42: 17,19 45:1 47:1 52: 19 55:14 72:22 73:10 74:12 75:9 78:14 79: 16 81:11 84:16 86:18, 22 88:1 91:21 92:24 93:6,14 94:18 100:5 101:10 105:10,12,17 115:4,5,13,17 116:25 118:5 121:8 122:15, 21 123:15 125:2 126: 6 127:17 130:2 131: 14,15 132:23 134:4, 24 <b>kinds</b> <sup>[4]</sup> 21:22 99:9 120:14 129:20 <b>klan</b> <sup>[1]</sup> 77:11 <b>known</b> <sup>[1]</sup> 11:19 <b>knows</b> <sup>[2]</sup> 27:20 30:7 <hr/> <b>L</b> <hr/> <b>label</b> <sup>[2]</sup> 116:1,8 <b>lacked</b> <sup>[1]</sup> 67:19 <b>language</b> <sup>[4]</sup> 9:2,4 23: 12 135:3 <b>last</b> <sup>[5]</sup> 9:21 13:25 41: 22 42:21 51:14 <b>later</b> <sup>[4]</sup> 15:2 16:25 75: 20 96:3 <b>laughter</b> <sup>[5]</sup> 78:9 87: 13 103:21 111:18,21 <b>law</b> <sup>[55]</sup> 13:12 27:15 31:21,22,25 32:3 39: 4 40:17 44:23,24 59: 1,6,9,14,24 60:2,12, 19 66:17,18,20 67:6 76:12 78:11,16 80:3 84:16 100:14,20 104: 11,21,25 105:1 106: 13,15 110:14,15,17, 18 113:21 116:4 119: 22 121:6 126:8 127: 10 128:3,19 129:2,4, 6 131:2,4 132:23,24 133:24 <b>laws</b> <sup>[1]</sup> 70:11 <b>lawyer</b> <sup>[6]</sup> 27:8 38:24 39:5,18 109:16 124: 23 <b>layer</b> <sup>[1]</sup> 9:19 <b>laying</b> <sup>[1]</sup> 35:17 <b>lead</b> <sup>[1]</sup> 53:2 <b>leads</b> <sup>[3]</sup> 52:25 53:19 77:17 <b>leap</b> <sup>[1]</sup> 85:1 <b>least</b> <sup>[24]</sup> 6:11 7:10,18	8:3 9:1 13:8 19:25 39:14 61:19 77:5 80: 18 95:2 101:17 102: 25 103:7 111:25 122: 18 123:24 125:15 126:23 128:22 134: 12 135:16,16 <b>leave</b> <sup>[2]</sup> 89:18 117:21 <b>leaving</b> <sup>[1]</sup> 22:3 <b>ledger</b> <sup>[1]</sup> 124:7 <b>left</b> <sup>[5]</sup> 15:6 16:15,16 39:23 58:2 <b>legal</b> <sup>[19]</sup> 7:1 41:8,10 56:24 73:12,21 74:20 92:1,15,17 105:19,23 114:1 115:17 120:11, 12,17,25 126:20 <b>legislative</b> <sup>[2]</sup> 51:23 66:7 <b>lender</b> <sup>[1]</sup> 7:21 <b>less</b> <sup>[4]</sup> 73:5 105:4 118:23 133:19 <b>letter</b> <sup>[11]</sup> 7:12 25:8 28:16 38:22,22,24 39: 5,7 40:24 112:17 131: 22 <b>level</b> <sup>[6]</sup> 33:19,20 40:2, 5 120:13 128:23 <b>life</b> <sup>[2]</sup> 37:22 39:13 <b>light</b> <sup>[2]</sup> 63:12 127:18 <b>likelihood</b> <sup>[10]</sup> 84:2,3, 5 85:11,12 86:14 90: 5,7,18 103:12 <b>likely</b> <sup>[5]</sup> 11:19 45:6 50:7 114:18 136:2 <b>limit</b> <sup>[2]</sup> 65:10,13 <b>limited</b> <sup>[1]</sup> 133:14 <b>limiting</b> <sup>[1]</sup> 94:2 <b>line</b> <sup>[3]</sup> 9:8 59:13 104: 19 <b>listening</b> <sup>[1]</sup> 27:6 <b>literally</b> <sup>[1]</sup> 101:14 <b>litigated</b> <sup>[4]</sup> 22:5 67:6 89:2,16 <b>litigating</b> <sup>[1]</sup> 56:4 <b>litigation</b> <sup>[1]</sup> 26:6 <b>little</b> <sup>[13]</sup> 7:2 21:11 28: 22 94:25 95:1 98:7 103:20 111:23 119: 22 121:20 123:13 124:14 130:17 <b>live</b> <sup>[1]</sup> 130:25 <b>lo</b> <sup>[1]</sup> 124:12 <b>loans</b> <sup>[1]</sup> 7:19 <b>logically</b> <sup>[2]</sup> 11:21 114:1 <b>long</b> <sup>[8]</sup> 21:22 27:7 48: 8 76:19 87:12 104:21 114:10 119:11	<b>look</b> <sup>[30]</sup> 13:9 17:15 20:13,15,23 26:17 38: 6 53:22 55:5 59:10, 22 62:20 72:10,11 73: 2 81:9 88:7 91:19 94: 19 97:1 101:20 103: 18 104:17 105:1 120: 7 125:24 127:4 132:3, 6 136:1 <b>looked</b> <sup>[2]</sup> 104:10 131: 24 <b>looking</b> <sup>[4]</sup> 61:22 93:1 128:2 133:23 <b>looks</b> <sup>[2]</sup> 94:13 101: 21 <b>loose</b> <sup>[1]</sup> 19:25 <b>lose</b> <sup>[4]</sup> 90:22,22 123: 2 125:18 <b>lot</b> <sup>[14]</sup> 47:9 56:3 66: 15 72:25 73:21 80:15 83:18 87:23 91:12 93:1 94:10 102:20 103:25 116:8 <b>loudermill</b> <sup>[7]</sup> 11:7 26: 25 27:2 28:6 36:25 37:4 55:8 <b>love</b> <sup>[2]</sup> 84:11 129:1 <b>low</b> <sup>[3]</sup> 24:7 49:3,9 <b>lower</b> <sup>[11]</sup> 13:9 37:10 59:10 69:15 81:21 88:9,23 106:1 114:17, 20 119:10 <b>lowered</b> <sup>[2]</sup> 120:1,2 <b>lying</b> <sup>[1]</sup> 121:3 <hr/> <b>M</b> <hr/> <b>made</b> <sup>[15]</sup> 8:6 10:9 23: 10 24:17 49:9 54:17 68:11 74:24 89:11 97:7 103:24 112:23 120:15 124:22 127: 25 <b>madison</b> <sup>[1]</sup> 34:7 <b>maintain</b> <sup>[1]</sup> 29:24 <b>malfeasance</b> <sup>[2]</sup> 12: 25 42:18 <b>management</b> <sup>[1]</sup> 120: 4 <b>mandamus</b> <sup>[54]</sup> 15:15, 24 16:4,8 28:21 29:3, 6,14,18,20 34:2,3,4,6, 8,10,13,22,25 35:1,2, 3 41:25 42:1 43:1 45: 13,21,25 46:3,6,19 66:15,17 67:11 84:19, 19 85:2,6,8,13,16 86: 1,8,11,15,18,23,25 87:6 88:3 89:7,8 90: 3,4
--	--	--	--	--

<p>manhattan [1] 71:16  manner [2] 35:16 36:4  manners [3] 59:25 60:21 61:14  manning [1] 61:14  many [8] 22:4 30:12, 12 48:20 64:5 71:22 124:13 136:25  map [4] 32:2 60:3,19 62:22  marbury [7] 9:16,17 34:7 46:5,5,25 47:1  market [2] 5:15 17:17  markets [6] 23:1 118:25 119:25 120:2 124:14 136:4  market's [1] 18:4  martin [3] 9:8 10:1 53:7  maryland [1] 128:6  masochist [1] 80:20  material [1] 8:1  materials [1] 111:7  matter [8] 8:18 35:13 74:9 75:12 127:8 131:11 132:16 133:1  maximizes [1] 121:18  maximum [1] 72:22  mean [84] 8:8 28:5 31:6,19 36:6 42:3 49:4 52:9,23 53:20 56:3 57:4,13 59:10,12,22 60:9,12,21 72:15,21 74:2 75:9 78:4 79:17 80:2,6 84:4 85:15 86:16 89:21 90:25 91:19 93:16,22 94:8,8 95:3 96:4,6,20 97:1 98:2,5,6 99:10,14,16 100:1,3,8,11 101:1 102:19,21,23 103:3,13,17,19 104:2,10 107:11 108:12 115:6,15,20,21 116:12,21 117:6 118:9 121:4 124:9 125:19,20 128:10 129:5,13,19 130:18,24 131:5 132:5  meaning [7] 12:13 46:24 71:7 101:22 102:1 113:17 129:7  meaningful [2] 92:23 115:17  means [8] 12:8 36:22 59:6 72:7 94:9 102:3,16 103:4  meant [1] 71:10  media [5] 35:23 39:3 55:4 130:19 131:23</p>	<p>meet [1] 35:4  meeting [3] 28:4 43:17 63:6  members [2] 29:7,7  mention [2] 71:21,23  mentioned [2] 28:20,23  mere [4] 113:4,6,14 128:18  merges [1] 20:18  merits [15] 19:9 20:14 84:2,4 90:6,7,15,18,20,20 103:13 105:13 121:19 123:1 135:10  message [3] 20:5 136:3,4  met [1] 65:22  metes [2] 92:19 101:6  michigan [3] 39:8,14 59:24  middle [2] 65:22 89:10  might [14] 45:18,24 46:3,4 49:17 74:13 75:21 83:16 116:5 121:21 129:14 130:8 132:4,4  military [1] 118:21  million [1] 81:15  mind [4] 16:3 34:12 60:12 129:8  minimal [1] 27:2  minimum [5] 95:5,6,9 102:22 108:22  ministerial [2] 15:25 46:22  mirror [1] 58:3  misbehavior [1] 19:7  misconduct [14] 24:18 25:2 36:19 70:5 76:20 102:23 109:20,21 133:11,14 134:1,16,20 135:15  misdemeanors [2] 98:21 120:19  misrepresentation [1] 135:18  misspoke [1] 15:13  mistake [19] 7:6 8:4,5,16 39:25 40:2 73:20 74:1,5,7,17 105:21 107:2,7,12,17,23 125:25 126:3  mistaken [2] 31:10 72:1  mistakes [1] 127:12  mixed [1] 113:21  moderating [1] 132:22</p>	<p>moment [5] 22:17 26:14 80:18 87:10 125:1  moments [1] 110:21  monetary [3] 48:9 120:4 124:11  money [2] 69:16 119:11  month [3] 27:21 30:10 71:25  months [4] 22:4 26:5 55:12 82:20  morning [1] 106:5  morrison [2] 53:21 116:13  mortgage [9] 25:11 35:20,24 39:17,25 109:17,18 135:18 136:7  most [16] 13:10,10 43:8 49:13 84:15 107:11 115:12,12 116:20 124:9 126:2 127:17,18 132:16,18,18  motion [2] 89:20 125:22  motivations [1] 53:14  mott [2] 9:9 53:7  move [3] 38:18 39:6,10  ms [14] 14:11 21:17,20 23:20 25:1,14 27:5 32:11 38:22 39:7,18 57:10 68:6 124:22  much [12] 11:12 27:7 31:16 41:25 57:3 73:16 74:9 95:11 106:19 107:3,10 120:24  murder [1] 19:11  must [7] 58:20,24 75:17 77:13 96:2 102:4 128:10  myers [2] 33:9 119:5</p> <hr/> <p><b>N</b></p> <p>narrow [2] 40:23 73:11  national [1] 102:9  nation's [2] 5:2 136:14  natural [1] 17:18  nature [4] 14:9 19:13 107:19 120:21  nazi [1] 98:19  near [1] 63:6  necessarily [5] 31:18 51:6 54:21 96:20 98:25  necessary [1] 42:20  need [13] 31:12 32:8,9</p>	<p>38:15 63:10 72:23 80:11 93:6 108:10 112:2 116:19 122:6 126:16  needs [4] 63:22 75:4,5 98:7  neglect [3] 30:15 32:7 42:18  negligence [33] 7:11 8:3 39:23 40:1 43:24 44:9,16,18 70:5 102:24 109:24 110:2,4 111:9 113:3,3,4,7,14,16,19,19 114:2,4,7,14 115:20,23 116:9,18 125:11 126:22 135:16  negligent [3] 12:24 20:1 39:24  neighbors [1] 115:15  neither [3] 30:18 69:18 135:25  never [10] 16:15,16 26:7 38:23,25 41:12 48:22 112:20,21 136:12  new [5] 38:25 39:10,13 83:18 134:3  news [2] 131:24,25  next [4] 17:17 22:3 41:25 129:25  nexus [3] 11:13 19:17 44:10  nixon [1] 79:23  nken [1] 20:15  nlra [2] 27:21 71:24  noah [1] 129:8  nominee [1] 130:5  nondisclosure [1] 76:19  none [4] 12:21 55:17 75:11 123:5  non-effectual [2] 43:3,5  nonexistent [2] 5:1 21:4  nor [2] 69:19 136:1  normally [1] 126:6  north [1] 114:13  notation [5] 7:15,17 55:14,15 135:17  note [1] 61:25  nothing [10] 16:25 27:25 52:22 64:22 76:6 81:24 94:11 99:7 111:8 116:15  notice [57] 10:22 12:6 20:4 26:15,16 27:1,19,20 29:25 30:16,23 31:3,8,12,20 32:9 38:</p>	<p>14,17 39:4,5 40:13 58:7,14,25 59:3,3,8,12 61:19,25 62:9 72:8,18 74:12 95:11 96:16 104:24 105:10 106:18,22 112:11,11,19 115:6 130:16,19,25 131:2,7,9,15,25 132:13,19,23,23,25  notified [1] 25:20  notion [3] 46:12 59:17 134:15  novo [1] 44:8  nowhere [1] 63:6  number [5] 13:3,16 34:5 48:6 91:5</p> <hr/> <p><b>O</b></p> <p>obstacles [1] 34:5  obtain [1] 24:2  obviate [2] 93:6 112:2  obviously [11] 7:11,22 9:15 20:9 26:25 34:23 73:21 79:14 91:8 103:3 120:21  offense [1] 127:19  offenses [3] 98:25 99:2,5  offered [1] 115:23  office [35] 10:11 11:6,16 12:25 13:1,16 16:13,24 19:2,4 21:25 22:20,25 36:7 38:13 40:16 43:17 64:23 75:20 77:9 78:15 81:25 82:3 85:23 98:16,17,20 99:9 113:13,13 117:15 122:14 124:2 134:5,13  office-holder [3] 75:19 76:17 77:10  officer [19] 14:3,8,23 15:2 16:1,12 19:1 20:21 29:15 32:20 34:20 67:24 71:14 85:23 89:25 133:20 134:4 135:21 136:11  officers [6] 13:19 15:17 16:21 34:2 66:19 91:13  official [2] 77:24 118:15  officials [3] 72:17 88:10,23  official's [1] 74:6  often [1] 118:1  okay [13] 28:10 55:10 57:4 62:25 73:18 86:6 87:18 97:22 98:1</p>
---	--	--	---	---

<p>99:3,18 102:11 108:3 old [7] 31:15 52:17 59: 17 60:14 63:7 72:4,6 omission [2] 108:8,11 once [5] 8:23 10:9 16: 5 19:9 51:1 one [58] 5:12 7:3 11: 15 17:15 24:22 27:21 31:21,25 33:18 34:6, 25 39:3 41:15,22 44: 25 45:18 49:12,20 51: 24 52:1 54:24 56:11, 14,15 58:12 65:18 66: 12 67:18 72:2,15 73: 25 75:19 81:22 86:3, 17 89:11 95:10 100:5, 11,19 102:21 104:18 106:12,16 107:25 108:8 109:15,25 117: 9 118:10 119:8,19 121:3,9 125:22 127: 12 129:18,21 ones [1] 60:24 one's [1] 112:22 ongoing [1] 26:6 only [23] 11:4,8 27:2 36:17 37:9,20 40:15, 19 42:5 60:6,25 65: 25 66:1 67:2,12 69: 24 77:12 92:21 107:9 109:12 129:2,20 134: 21 open [2] 5:15 45:20 opening [1] 96:1 operate [1] 91:23 operating [1] 122:9 operations [1] 5:15 opinion [10] 10:20 18: 12,12 20:8 36:24 59: 10,11 82:13 88:6 103: 19 opinions [1] 33:9 opportunities [1] 26:5 opportunity [18] 10: 23 24:19 25:15,19,25 30:1 61:19 72:8,18 74:13,14 95:13 96:17 105:11 106:22 107: 13 112:12 115:6 opposed [1] 109:20 opposite [3] 34:17 59: 9 118:17 optionality [1] 103:25 options [1] 92:24 oral [1] 69:4 order [13] 7:9 23:12 25:4,6,9 32:24 33:22 34:19 56:22 59:18 67:23 126:23 134:5</p>	<p>ordinary [5] 19:23 20: 6,11 55:15 66:11 original [4] 71:7 86:22 101:22 102:1 originalist [1] 20:24 other [46] 7:7 8:13 22: 22 24:20 25:12 29:7 31:24 33:18 34:12 45:2 52:5,13 55:6,13 59:16 65:20 72:4,5 73:17 75:25 83:20,24 91:13 92:21 93:10 106:4 107:5 110:7 111:15 117:11,14,22 118:6,18 123:21 124: 6,9,10,15 125:4 126: 5,24 127:9 128:13 130:8 136:1 others [3] 54:23 70:22 99:15 otherwise [1] 37:22 ought [4] 18:6 19:17 20:13 57:17 out [17] 8:10 20:6 27: 17 34:11 35:17 42:13 61:12 68:22 80:4 87: 4 88:8,22 104:17 118: 10 119:14 129:7 135: 10 outcome [1] 32:5 outer [3] 8:21 44:3 135:24 outside [3] 46:18 54: 17 123:12 oval [2] 43:17 115:7 over [11] 5:17 6:13 16: 19 19:20 32:2 60:3, 19 62:22 70:16 94:3 122:18 own [5] 12:13 19:6 32: 1 49:19 119:13</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p>p.m [1] 132:9 packed [2] 5:18 6:12 page [1] 62:5 pages [1] 9:16 panel [1] 36:17 paper [1] 52:21 papers [2] 8:10 39:18 paperwork [1] 35:25 paragraphs [1] 38:4 part [10] 14:10 18:22 30:23 60:5 69:10 87: 5 95:18 96:10 125:15 132:20 particular [16] 14:19 15:11 61:22 63:20 71:11 74:16,16 86:23</p>	<p>87:24 95:19 104:15 105:9 116:1 118:14 129:9 131:2 particularly [1] 107:18 party [3] 20:17 41:4, 13 passed [1] 71:25 past [1] 79:12 path [1] 111:25 pattern [1] 76:20 paul [1] 69:4 pause [1] 67:4 payne [1] 9:10 peckham [1] 104:20 pendency [1] 21:18 pending [1] 68:21 people [14] 7:17 13:15 54:17 55:15 62:21 64:17 96:9 99:20 117:12,19 120:17 123:11 132:18 136:5 per [1] 82:12 perception [2] 22:24 23:8 perfect [1] 118:16 perfectly [3] 82:9,16 112:4 perform [1] 128:11 performance [1] 128: 17 perhaps [5] 66:8 83: 11 86:16 89:3 121:15 perimeter [1] 44:4 perimeters [1] 8:21 period [2] 38:13,16 permanent [1] 18:25 permission [1] 39:8 permit [1] 40:18 permitted [2] 15:2 76: 18 permutations [1] 61:6 person [14] 24:19 36: 7 37:18 42:25 43:16 54:1 65:2 66:24,25 67:5 75:22 77:9 81: 24 134:8 personal [1] 26:7 perspective [3] 7:25 43:13 121:24 persuade [1] 124:4 phrase [2] 30:21 128: 9 pick [5] 55:23 64:22 76:12,13 110:14 picked [1] 71:12 picture [2] 50:4 116: 14 piece [2] 52:21 116:6 place [4] 15:6 53:22</p>	<p>89:25 134:5 places [1] 9:7 plain [6] 6:7 9:4 47:20 63:10,12 65:14 plainly [3] 62:4 67:19, 19 played [1] 19:25 please [4] 24:11 28:23 69:7 132:9 plenty [2] 15:5 26:5 plus [6] 71:10 101:9 103:4 110:11,25 130: 10 point [29] 5:6 10:12 13:25 14:21 26:18 27:25 31:21 38:8 40: 24 41:11,15,16 49:8, 8,9 51:19 60:6,18 68: 22 79:16 90:5 93:14, 16 104:1 108:9 118:3 133:13 135:7 136:8 pointed [3] 34:11 40:7 42:13 pointing [2] 21:23 125: 9 points [2] 27:17 51:9 policing [1] 44:4 policy [28] 12:15,21 32:16 42:11 43:11,12, 19 44:5,18 45:17,19 46:2,17 47:22 48:9 49:14,17 50:24 52:11 53:25 63:21 64:10 65:24 93:10,10 120:4 123:25 124:11 political [3] 116:25 119:8 120:1 politically [1] 134:8 pop [1] 129:7 ported [1] 47:1 pose [2] 53:16 111:2 posit [1] 75:10 posited [1] 57:8 position [27] 8:12 19: 19 21:18,21 32:6 36: 13 37:25 47:10 49:1 51:8 52:9 53:5 56:20 57:7,21 77:1,8,17,19, 23 89:19 92:8 100:24 103:4 118:4,5 134:7 position's [1] 117:17 posits [1] 68:4 possible [1] 118:19 post [6] 25:6,24 28:16 35:23 55:4 131:7 posting [1] 130:19 post-loper [1] 92:16 post-office [1] 11:14 posts [1] 57:4</p>	<p>posture [7] 18:21 19:8, 14 21:14 86:18 102: 13 117:8 potentially [1] 74:6 power [13] 5:16 6:10, 14 22:15,16 33:11 65: 5 66:14 68:23 94:2 97:4 119:7 123:10 powerful [2] 19:19,20 powers [5] 5:19 6:1 10:5 42:4 68:3 practical [1] 132:16 practice [2] 81:5 111: 3 precedent [5] 50:3 74: 11 81:18,19,20 predict [1] 50:22 predicting [1] 18:3 predictions [2] 17:20 18:8 prejudge [1] 132:25 prejudged [2] 96:18 131:10 prejudging [2] 95:16 98:9 prelim [1] 86:8 preliminary [33] 14:2, 22,23,24 15:7 16:3,7, 11 21:3 22:7 28:21 29:5,17,20 34:10 67: 17 68:13,23 70:2,18 74:24 85:8,15,20,22 86:1,5,8,12 89:23 103:24 136:9,16 pre-office [20] 11:12, 13,17,21 13:1 36:19 40:18 75:21 76:8 98: 14 113:7 114:4,7 129: 20,21 133:11,25 134: 10,15,20 prepared [1] 83:9 present [6] 24:19,20 47:13 74:14 107:14 112:16 presentation [1] 121: 5 presented [4] 23:19 24:25 109:13 112:16 preserve [5] 48:1 70:3 85:20,22 89:24 presidential [3] 65:9, 19 115:1 presidents [3] 50:23 115:9,12 president's [25] 7:9 10:14 11:24 13:13 20:20 23:9 33:11 42: 4 49:23 50:6 53:12 61:2 65:10,13 66:2</p>
--	--	---	---	--

<p>68:19 73:3 74:4 89:12 97:4 115:8 119:6, 15,16 120:8</p> <p>pressure [2] 63:23 120:1</p> <p>pressured [1] 64:15</p> <p>pressures [1] 116:25</p> <p>presumably [1] 59:2</p> <p>presumption [3] 49:22 53:11 54:8</p> <p>pre-tenure [2] 128:14, 15</p> <p>pretext [5] 93:1,7 114:22,23,25</p> <p>pretty [11] 41:25 43:2 51:1 59:5 91:16 101:8 109:14 114:4,6 119:17 130:11</p> <p>prevail [6] 33:14 35:3 59:19 109:4,11 110:9</p> <p>prevailing [1] 34:5</p> <p>prevent [2] 66:24 68:7</p> <p>prevented [1] 68:12</p> <p>prevents [1] 71:12</p> <p>previous [1] 76:18</p> <p>principal [6] 7:21,24 14:3 20:21 135:20 136:11</p> <p>principle [1] 57:19</p> <p>private [4] 5:17 65:21 79:13 80:4</p> <p>probably [12] 27:11 71:10,12 77:6 91:2 119:20 121:17,18,22 129:24 130:7 132:15</p> <p>probe [1] 53:12</p> <p>problem [7] 78:3 81:5 88:10,21 91:3 95:18 111:2</p> <p>problematic [2] 123:16 129:14</p> <p>problems [1] 84:14</p> <p>procedural [5] 70:1, 14 108:8,10 115:3</p> <p>procedure [1] 50:17</p> <p>procedures [6] 26:21, 23 27:3 54:25 55:2 57:17</p> <p>proceeding [8] 25:16, 19 39:1 41:9,9,10 95:20 120:17</p> <p>proceeds [1] 85:24</p> <p>process [41] 13:12 37:1 40:13 49:2 52:22 54:5,13,14,16,19,21, 22 55:4 56:2,12,20 57:22,22 58:6 70:1, 10 73:4 74:25 80:24 82:3 83:10 92:5,13</p>	<p>94:18 95:24 98:5</p> <p>106:18 107:1 108:20, 20,23 109:23 119:15 121:11 129:23 130:13</p> <p>professor [3] 61:14 84:24,24</p> <p>prohibition [1] 10:6</p> <p>properly [1] 99:6</p> <p>property [7] 10:21 11:3 36:12,18 37:1 82:2, 5</p> <p>proposition [2] 37:17 62:8</p> <p>protect [2] 49:12 66:4</p> <p>protecting [1] 64:9</p> <p>protection [5] 43:8,10 49:11 64:11 133:19</p> <p>protections [1] 134:24</p> <p>protective [1] 95:1</p> <p>protects [7] 47:16,19, 21 54:14 65:23 66:1, 1</p> <p>proven [4] 43:6 78:3 81:5 128:20</p> <p>provide [17] 12:11 27:20,25 29:3 30:8 32:8, 9,12 56:11 57:17 58:6 94:25 95:6,13 96:17 102:5 134:22</p> <p>provided [10] 28:12 31:20 45:5 56:21 57:21,22 61:1 74:25 92:5 94:18</p> <p>provides [5] 43:7 57:10 66:6 73:5 133:19</p> <p>provision [6] 38:1 47:15 49:24 63:16 94:5 116:10</p> <p>prudent [1] 120:3</p> <p>public [16] 16:12,20 17:7,11 20:18 21:16, 21 22:24 23:8 25:20 67:24 71:7 78:15 101:22 102:1 118:25</p> <p>public's [2] 13:10,14</p> <p>pull [1] 100:6</p> <p>pure [1] 123:10</p> <p>purely [1] 114:1</p> <p>purporting [1] 67:23</p> <p>purpose [5] 47:18,25 48:4 50:15 64:1</p> <p>purposes [5] 47:14 63:13 112:25 122:8 123:24</p> <p>purse [1] 94:3</p> <p>put [9] 8:19 52:20 56:9 63:15 65:6 85:4 87:</p>	<p>10 116:1 131:5</p> <p>puts [1] 132:17</p> <p>putting [3] 53:23,25 127:4</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p>qualification [1] 9:3</p> <p>qualified [1] 14:13</p> <p>qualify [1] 113:7</p> <p>quantifying [1] 18:18</p> <p>quasi-private [2] 6:18 70:8</p> <p>question [50] 5:11 10:18 17:4 20:7 21:15 22:18 27:16 29:24 36:7 38:19 39:24 40:4 41:21,22 42:7,21 44:1 45:13 53:15 55:24 56:19,21 60:5 61:9 66:13 67:9 68:4 75:3,6,15 84:19 87:20 88:2 89:4,6,14 90:2 91:20,21 92:15,15 100:20 102:15 112:14 113:2,21 114:1 126:20 130:14 133:10</p> <p>questions [20] 5:3 7:2 10:17 40:6 45:12 55:18 58:12 70:19 73:22, 23 81:10,16,17 92:1, 2,2,17 104:9,14 124:20</p> <p>quick [1] 84:6</p> <p>quickly [3] 13:6 60:18 127:21</p> <p>quintessential [1] 6:14</p> <p>quite [8] 8:4 11:20 14:18 38:23 51:20 57:24 58:1 106:3</p> <p>quo [4] 34:23 70:3 85:20 89:24</p> <p>quoting [1] 38:11</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p>rainbow [1] 90:2</p> <p>range [1] 105:23</p> <p>rate [2] 7:23 8:17</p> <p>rates [13] 8:7 19:22 20:1 23:22 24:3 69:15 94:1 119:10,25 120:2 135:20,22 136:7</p> <p>rather [1] 98:21</p> <p>rational [1] 70:7</p> <p>rationale [1] 37:5</p> <p>re [1] 134:2</p>	<p>read [7] 26:14 30:24 38:3 63:4 64:21 66:16 127:22</p> <p>reading [5] 64:3 87:25 110:11 113:6 126:1</p> <p>reagan [8] 30:20 31:19 37:16,19 38:3,4, 16 59:11</p> <p>real [5] 8:11 52:7 70:14 74:10 115:3</p> <p>really [33] 8:1 17:20 19:12 21:13 32:10 43:19 50:10 52:12,14 54:4 56:16 59:21 60:18,22 87:4,20 88:15 95:11 98:24 100:15, 18 101:9 108:12 109:7 111:2,19 114:15 115:22 117:19 118:4 124:8,15 134:14</p> <p>realm [1] 71:1</p> <p>real-world [2] 50:2,21</p> <p>rearview [1] 58:3</p> <p>reason [19] 32:17 33:5 34:4 35:12 37:21 47:23 63:16,17 70:7, 16 80:17 87:5 88:12 89:8 106:2 124:11,13 132:20 135:6</p> <p>reasonable [2] 82:9 112:4</p> <p>reasoning [1] 31:9</p> <p>reasons [15] 22:22 29:17 30:19 37:2 43:20 44:1 46:17 48:6,20 52:11 54:22 75:6 81:10 135:13 136:18</p> <p>rebuttal [2] 133:5,6</p> <p>recall [1] 35:25</p> <p>recently [1] 65:17</p> <p>recession [1] 17:10</p> <p>recognition [3] 14:13 33:8 69:21</p> <p>recognize [4] 15:16, 25 29:14 30:16</p> <p>recognized [4] 30:21 38:10 69:25 133:17</p> <p>recognizes [1] 69:17</p> <p>recognizing [2] 33:11 68:19</p> <p>recollection [1] 36:23</p> <p>recommend [1] 96:21</p> <p>recommendation [1] 97:7</p> <p>reconcile [1] 65:8</p> <p>reconsider [1] 83:17</p> <p>record [8] 7:7 35:21, 24 36:1,1 70:18 94:15 103:24</p>	<p>redressability [4] 88:18,21 90:9 91:3</p> <p>reduce [3] 56:15 64:21 69:23</p> <p>reenacted [1] 27:22</p> <p>reference [1] 72:3</p> <p>referring [2] 15:10 33:7</p> <p>reflected [2] 20:8 23:11</p> <p>reflecting [1] 47:20</p> <p>reflection [1] 18:12</p> <p>regard [2] 65:11 119:3</p> <p>regularity [2] 49:22 53:11</p> <p>regulations [1] 5:20</p> <p>regulators [1] 7:18</p> <p>reinstate [6] 32:20 33:25 34:1 42:8,25 66:18</p> <p>reinstated [2] 16:17 33:23</p> <p>reinstatement [2] 13:19 32:25</p> <p>reinstating [2] 15:4 136:11</p> <p>reject [1] 31:15</p> <p>relate [3] 10:10 75:17 98:17</p> <p>related [8] 17:4 21:24 23:4,8,20 60:23 125:13 134:18</p> <p>relates [1] 32:14</p> <p>relatively [1] 93:4</p> <p>released [1] 7:12</p> <p>relied [6] 10:20 36:17, 25 37:3 59:25 129:5</p> <p>relief [13] 29:4 34:14 83:24 85:8,20,22,24 86:13 88:9,11,22 89:24 106:9</p> <p>relies [1] 63:5</p> <p>relitigate [1] 129:25</p> <p>reluctant [1] 26:20</p> <p>rely [7] 11:20 26:24 29:1 36:18 60:1,22 134:11</p> <p>relying [2] 37:17 59:4</p> <p>remain [3] 19:2 21:17 22:19</p> <p>remaining [1] 117:15</p> <p>remand [1] 127:14</p> <p>remedial [1] 41:22</p> <p>remedy [20] 12:8 22:6 28:20 33:25 34:1,22 41:24 42:5 49:2 50:17 66:16,17 86:23 89:6 90:19,23 91:2 130:8 134:21 136:9</p>
---	---	--	--	--

<p><b>remember</b> [1] 41:16  <b>remotely</b> [1] 23:13  <b>removability</b> [4] 61:16  64:6 67:7 89:4  <b>removable</b> [7] 6:8 67:  1 68:9 99:2,5 123:11  127:19  <b>removal</b> [55] 5:9 6:4,  10,22 7:9 16:20 25:3,  5,9 28:16 31:3 35:19  38:12 42:4 43:10,11  45:7 47:15,22 48:15,  23 49:14 50:10,16 58:  20,24 60:23,25 61:2  63:25 64:10 65:22,23  66:24 69:18,23 70:1,  2,11,13,22 71:17 74:  12,18 75:22 76:7,22  78:13 96:24 97:3 99:  13 106:21 116:5 122:  8 126:3  <b>removals</b> [6] 13:19 21:  2 33:12 68:20 91:11  114:18  <b>remove</b> [16] 20:21 45:  16,17,19 51:12,17 69:  14,20 89:5,13 90:21  122:25 123:25 130:  21 134:14 135:20  <b>removed</b> [23] 13:23  14:4,9 17:16 23:6 32:  20,23 33:23 34:2,20  43:12 48:23 50:7 66:  8,19 67:2,5 68:12 72:  17 74:6 102:10 118:  16 135:5  <b>removing</b> [5] 43:23 44:  17 95:23 107:8 115:9  <b>renovated</b> [1] 39:11  <b>rent</b> [1] 39:8  <b>repeated</b> [1] 13:18  <b>repeating</b> [3] 24:5,10,  14  <b>reportable</b> [1] 97:19  <b>represent</b> [1] 39:15  <b>representation</b> [4] 7:  20 8:6 38:24 41:12  <b>representations</b> [3]  25:13 41:5 136:6  <b>represented</b> [1] 95:21  <b>represents</b> [1] 39:18  <b>require</b> [4] 26:15 62:9  70:23 96:14  <b>required</b> [9] 10:24 27:  8,10 38:17 49:2 61:  19 78:16 95:7 100:21  <b>requirement</b> [8] 27:1  29:25 42:9,12,12,24  102:6 117:23</p>	<p><b>requirements</b> [2] 5:21  115:17  <b>requires</b> [2] 27:2 96:  16  <b>reserve</b> [25] 5:7,13,19,  20,21,24 6:12 13:15  14:8 22:24 23:21 36:  13 47:16,17 48:2 49:  6 52:9,16 63:18 65:  20 69:8 82:7 108:16  117:11 134:23  <b>reserve's</b> [3] 5:15 19:  1 66:10  <b>residence</b> [2] 7:22,24  <b>resign</b> [5] 76:18 78:2  96:2,3 98:10  <b>resigned</b> [2] 14:17 51:  16  <b>resist</b> [6] 86:24 100:  11 106:7 107:10 108:  13 131:6  <b>resistance</b> [1] 111:25  <b>resisted</b> [1] 87:5  <b>resisting</b> [2] 81:6 132:  21  <b>resolve</b> [2] 103:12  127:10  <b>resolves</b> [1] 40:4  <b>resource</b> [1] 56:19  <b>resources</b> [3] 53:24,  25 56:9  <b>respect</b> [11] 21:11 25:  1 30:14 61:16 64:5,  17 72:4 91:13 125:8  129:19 130:7  <b>respectfully</b> [1] 62:3  <b>respects</b> [1] 114:9  <b>respondent</b> [1] 69:5  <b>response</b> [7] 41:17,23  42:20 55:6 57:12 61:  21 76:11  <b>responsible</b> [1] 18:18  <b>rest</b> [2] 39:13 127:17  <b>restatement</b> [1] 34:20  <b>restoration</b> [1] 68:5  <b>restore</b> [2] 14:23 67:  24  <b>restoring</b> [2] 14:2 16:  12  <b>restraining</b> [1] 67:23  <b>restriction</b> [10] 6:4,22  27:23 48:15 69:18,23  70:11,13 104:22 122:  8  <b>restrictions</b> [1] 135:4  <b>restrictive</b> [1] 51:22  <b>review</b> [34] 8:20 9:22  32:4 40:5 44:5,8,22  45:6 49:2,18 50:17</p>	<p>52:21 54:3 59:24 61:  10 70:2,24 72:11 73:  1,6,10,12 75:4,5,8,13  79:17,24 91:19 92:25  94:13 113:23,24 135:  25  <b>reviewable</b> [4] 9:14  11:25 65:1 66:3  <b>reviewed</b> [1] 115:11  <b>reviewing</b> [2] 10:13  61:8  <b>rid</b> [2] 43:19 99:8  <b>risen</b> [1] 40:2  <b>rises</b> [2] 40:20 120:13  <b>risk</b> [5] 18:14,18,20,24,  24  <b>road</b> [1] 80:7  <b>roberts</b> [31] 6:15,25 8:  8 24:8,11 32:18 33:  15 34:18 35:6,9 37:  12 41:19 45:9 47:11  55:21 60:15 69:1 73:  13 74:19 105:15 106:  24 107:21 108:3 109:  1 111:4 112:7 115:18  117:2 122:1 124:17  133:3  <b>robert's</b> [1] 94:21  <b>role</b> [1] 114:23  <b>room</b> [5] 27:5 43:18  57:10 73:5 132:8  <b>roosevelt</b> [4] 27:5 43:  18 57:9 132:8  <b>route</b> [1] 43:1  <b>routine</b> [1] 114:16  <b>rule</b> [3] 33:5 38:10 76:  4  <b>rules</b> [1] 94:21  <b>run</b> [4] 12:20 47:6 88:  11 114:10  <b>running</b> [1] 53:7  <b>runs</b> [2] 33:8 136:10  <b>rush</b> [1] 82:14  <b>rushed</b> [1] 84:17</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>same</b> [12] 10:8 29:4  36:11 53:17 58:21  94:2 100:5 106:4  120:16 122:18 123:  20 128:8  <b>satisfied</b> [1] 128:23  <b>satisfy</b> [2] 44:14 126:  23  <b>sauer's</b> [2] 93:9 109:  10  <b>sawyer</b> [10] 14:21,23  16:10 22:8 29:2 33:6  67:19,22 68:17 136:</p>	<p>15  <b>saying</b> [18] 21:1 26:3  32:1 42:5,23 43:18  52:4 59:18 62:1 68:  15 79:1,18 86:7 98:9  102:2 107:1 132:1  134:19  <b>says</b> [30] 6:8 7:9 20:  16 28:6 39:7 45:19  46:5,17 57:25 60:2,4  61:14,14,24 67:1 79:  23 84:25 88:7 94:9,9  104:19,21 105:8 106:  17 112:18 125:10,10  129:24 135:1,3  <b>scale</b> [1] 95:4  <b>scalia</b> [2] 101:21 116:  14  <b>scalia's</b> [1] 53:21  <b>scenario</b> [1] 114:24  <b>schmed</b> [1] 123:18  <b>scope</b> [3] 73:9 92:12  120:22  <b>screenshots</b> [1] 35:23  <b>search</b> [1] 52:19  <b>second</b> [8] 6:20 41:16  51:3 85:6,10 95:12  130:2 136:8  <b>second-guess</b> [1] 92:  8  <b>second-guessing</b> [1]  73:7  <b>secondly</b> [1] 9:7  <b>section</b> [5] 71:12 101:  10 102:5 103:5 110:  12  <b>see</b> [10] 17:24 60:8 63:  5 76:16 79:16 93:21  105:21 118:3 128:5  129:13  <b>seeing</b> [1] 24:6  <b>seek</b> [1] 12:8  <b>seeking</b> [2] 14:1 130:  21  <b>seem</b> [9] 22:1 31:22  73:16 93:2 98:25 99:  12 108:15 113:11  132:5  <b>seems</b> [15] 12:1 33:18  43:2,2 50:4 57:14 80:  14 93:16 108:6 111:  25 112:4 115:2 116:7,  9 117:16  <b>seen</b> [2] 17:24 112:22  <b>seized</b> [1] 84:6  <b>senate</b> [7] 80:1 117:  24,25 120:18 129:22  130:6,11  <b>senators</b> [2] 101:19,</p>	<p>23  <b>send</b> [6] 131:21 135:  11 136:19,20,20,24  <b>sending</b> [2] 83:7 106:  3  <b>sends</b> [2] 136:3,4  <b>sense</b> [8] 13:10 33:17  49:10 54:13,14 70:6  102:4 119:20  <b>sensitive</b> [1] 63:21  <b>sent</b> [1] 135:9  <b>sentence</b> [2] 42:1 73:  25  <b>separate</b> [1] 66:21  <b>separated</b> [1] 113:12  <b>serendipitously</b> [1]  72:20  <b>series</b> [2] 61:5 133:25  <b>serious</b> [6] 19:7 68:2  107:7 117:14 128:16  130:3  <b>service</b> [1] 70:10  <b>serving</b> [1] 71:13  <b>set</b> [3] 19:22 50:3 116:  1  <b>sets</b> [2] 23:22 135:21  <b>setting</b> [2] 61:10 124:  25  <b>seven</b> [3] 62:24 104:  25 105:2  <b>seventh</b> [1] 34:11  <b>several</b> [2] 114:13  128:2  <b>severino</b> [1] 88:20  <b>sexual</b> [1] 76:20  <b>shatter</b> [1] 49:5  <b>shenanigan</b> [1] 134:4  <b>she's</b> [11] 12:23 16:16,  23,24 21:21 22:20 26:  4 29:8,9 68:11 131:  23  <b>shoplifting</b> [1] 98:22  <b>short-term</b> [1] 119:10  <b>shot</b> [1] 101:12  <b>shouldn't</b> [6] 13:20 32:  23 58:21 83:17 111:  14 129:24  <b>show</b> [6] 10:3 56:16  65:1 85:11 123:2  132:12  <b>showed</b> [1] 84:9  <b>showing</b> [3] 83:25 84:  1,5  <b>shown</b> [1] 111:7  <b>shows</b> [2] 84:13 111:  8  <b>shurtleff</b> [13] 30:20,24  37:16,19 58:6,13,22,  23 59:2 60:8 83:2</p>
--	---	--	---	--

<p>104:17,18  <b>side</b> <sup>[10]</sup> 24:20 28:9  52:5 55:8 83:20,25  107:5 124:6 125:23  126:24  <b>sides</b> <sup>[1]</sup> 51:2  <b>signed</b> <sup>[1]</sup> 125:6  <b>significant</b> <sup>[3]</sup> 7:20 8:  9 119:17  <b>silberman</b> <sup>[1]</sup> 88:6  <b>similar</b> <sup>[2]</sup> 30:11 128:  13  <b>simple</b> <sup>[1]</sup> 121:14  <b>simplest</b> <sup>[1]</sup> 121:8  <b>simply</b> <sup>[2]</sup> 31:16 70:  16  <b>since</b> <sup>[4]</sup> 31:11 53:6  55:12 107:2  <b>single</b> <sup>[2]</sup> 110:10 118:  24  <b>sit</b> <sup>[2]</sup> 57:9 75:9  <b>sitting</b> <sup>[1]</sup> 27:6  <b>situation</b> <sup>[16]</sup> 52:13  61:15 67:13 79:6 86:  21,24 101:13 115:16  118:18 119:4,8 124:  22 125:3,5 130:20  133:22  <b>situations</b> <sup>[5]</sup> 12:4 14:  14 52:13 118:19 124:  9  <b>sliding</b> <sup>[1]</sup> 95:4  <b>social</b> <sup>[13]</sup> 25:6 28:16  35:23 39:2 55:4 57:4  112:10 130:19 131:7,  23 132:6,12,18  <b>soil</b> <sup>[6]</sup> 31:15 59:17  60:14 63:7 72:4,6  <b>solecisms</b> <sup>[3]</sup> 16:6,9  29:21  <b>solely</b> <sup>[2]</sup> 36:25 75:17  <b>solicitor</b> <sup>[3]</sup> 69:22 95:  22 118:7  <b>solve</b> <sup>[2]</sup> 80:15 115:2  <b>solves</b> <sup>[1]</sup> 88:10  <b>somebody</b> <sup>[6]</sup> 97:17  115:10 116:16 123:  25 124:1 134:7  <b>someone</b> <sup>[4]</sup> 12:14 15:  4,6 99:8  <b>someone's</b> <sup>[1]</sup> 24:18  <b>somewhere</b> <sup>[1]</sup> 128:  24  <b>sorry</b> <sup>[9]</sup> 15:12 16:6  24:13 35:7 83:5 90:  11,16 99:21 104:13  <b>sort</b> <sup>[51]</sup> 7:16 10:21  16:23 18:7 21:13 25:  15 29:2 31:21 44:20</p>	<p>49:22 51:18 53:18  72:3,17 73:2 82:13  84:13 86:25 89:23  92:1 93:24 95:25  100:6,13,23 103:25  104:5 106:4,8 107:13  109:8,22 110:3 114:  24 115:4,23 116:6  120:25 121:4 123:10  126:1,7,15 127:23,24  129:7,24,25 131:6  132:21 136:24  <b>sorts</b> <sup>[1]</sup> 105:19  <b>sotomayor</b> <sup>[26]</sup> 6:24  10:16,22 11:1,4,8 12:  18 14:6 15:1,12,21  16:15 17:6 21:23 37:  13,14 38:5,9 40:12  41:8,18 67:10 78:12  112:8,9 113:10  <b>sources</b> <sup>[2]</sup> 9:2 32:1  <b>speaks</b> <sup>[1]</sup> 20:10  <b>specific</b> <sup>[6]</sup> 10:5 21:  11 58:18 85:21 102:6  105:5  <b>specifically</b> <sup>[2]</sup> 89:22  106:16  <b>specified</b> <sup>[7]</sup> 30:22 31:  17,19 38:12 44:22 59:  7 60:7  <b>specifies</b> <sup>[1]</sup> 58:24  <b>specify</b> <sup>[1]</sup> 71:25  <b>specter</b> <sup>[1]</sup> 9:9  <b>spend</b> <sup>[1]</sup> 80:18  <b>spends</b> <sup>[1]</sup> 92:25  <b>spent</b> <sup>[2]</sup> 33:2 56:3  <b>squarely</b> <sup>[1]</sup> 22:8  <b>stack</b> <sup>[1]</sup> 8:10  <b>staff</b> <sup>[1]</sup> 29:9  <b>stage</b> <sup>[3]</sup> 101:3 102:  18 106:10  <b>stake</b> <sup>[1]</sup> 18:22  <b>stand</b> <sup>[3]</sup> 37:6,8 111:  16  <b>standard</b> <sup>[36]</sup> 9:22 11:  25 30:15,25 32:8 34:  13,16 38:25 45:25 47:  1,2 51:19,22 65:23  76:7 78:11 85:11,13  86:15,19,20,25 87:1  91:20,23 102:15 110:  1 114:17,20 116:22  117:6 126:24 133:13,  17,20 134:17  <b>standards</b> <sup>[8]</sup> 35:3 92:  23 93:5 110:7 125:1  127:22 128:21 129:  15  <b>standing</b> <sup>[1]</sup> 57:18</p>	<p><b>stands</b> <sup>[2]</sup> 6:19 36:9  <b>starkest</b> <sup>[3]</sup> 16:6,9 29:  21  <b>start</b> <sup>[3]</sup> 7:2 13:24 98:  9  <b>started</b> <sup>[3]</sup> 50:14,14  105:18  <b>starting</b> <sup>[1]</sup> 112:10  <b>state</b> <sup>[2]</sup> 42:22 128:6  <b>stated</b> <sup>[4]</sup> 30:4,6,18  31:11  <b>statement</b> <sup>[4]</sup> 14:12  26:7 45:25 124:22  <b>statements</b> <sup>[2]</sup> 9:15  112:23  <b>states</b> <sup>[8]</sup> 6:21 14:3,5  19:21 20:22 53:8  135:21 136:12  <b>status</b> <sup>[4]</sup> 69:17 70:3  85:20 89:24  <b>statute</b> <sup>[40]</sup> 6:9 10:6  12:7 15:19 30:5,7,11,  17 31:12 38:12 47:21  48:13 56:12 58:5,5,  14,17,23 61:22 63:10,  12 64:3,7 65:7,9,14,  15 67:1 70:22 93:21  94:5 95:8,21 96:23  102:5 110:11,13 116:  11 128:9 135:1  <b>statutes</b> <sup>[8]</sup> 30:12 60:  20,23 61:12 71:2,21,  22 76:5  <b>statutory</b> <sup>[10]</sup> 6:6 9:2  72:1 82:17,24 98:6  104:22 108:20 133:  12 135:2  <b>stay</b> <sup>[18]</sup> 10:20 14:1  15:3 17:5,9 18:21 19:  8,14 20:15 21:14 22:  2,25 36:17 83:23 103:  15 108:25 135:12  136:21  <b>staying</b> <sup>[1]</sup> 16:23  <b>stealing</b> <sup>[1]</sup> 98:22  <b>step</b> <sup>[2]</sup> 56:15 66:23  <b>steps</b> <sup>[1]</sup> 114:13  <b>stick</b> <sup>[3]</sup> 76:25 77:18,  23  <b>still</b> <sup>[11]</sup> 15:3 16:16 29:  8,9,10 45:21 106:19,  20 123:2 126:19 127:  10  <b>stock</b> <sup>[1]</sup> 17:17  <b>story</b> <sup>[2]</sup> 28:11 55:8  <b>stoutly</b> <sup>[1]</sup> 16:23  <b>strain</b> <sup>[1]</sup> 59:5  <b>strains</b> <sup>[1]</sup> 54:10  <b>strange</b> <sup>[1]</sup> 103:20</p>	<p><b>street</b> <sup>[1]</sup> 106:13  <b>strike</b> <sup>[3]</sup> 118:14 119:  23 124:5  <b>strikes</b> <sup>[1]</sup> 50:24  <b>strong</b> <sup>[8]</sup> 20:14 49:11  54:10 59:13 68:19  72:6 84:12 113:5  <b>stronger</b> <sup>[2]</sup> 31:16 45:  3  <b>strongest</b> <sup>[1]</sup> 49:20  <b>struck</b> <sup>[1]</sup> 48:21  <b>structure</b> <sup>[2]</sup> 51:8 116:  11  <b>structured</b> <sup>[3]</sup> 6:18 69:  9 93:18  <b>study</b> <sup>[1]</sup> 47:9  <b>stuff</b> <sup>[1]</sup> 130:2  <b>subject</b> <sup>[6]</sup> 44:4,21 45:  6 46:19 95:24,25  <b>subjective</b> <sup>[1]</sup> 53:14  <b>submitted</b> <sup>[1]</sup> 39:19  <b>subordinate</b> <sup>[2]</sup> 122:  13,13  <b>substance</b> <sup>[3]</sup> 108:14,  17,18  <b>substantiate</b> <sup>[1]</sup> 107:  22  <b>substantiated</b> <sup>[1]</sup> 107:  15  <b>substantive</b> <sup>[5]</sup> 70:14  75:3 106:8 115:4  121:21  <b>succeeding</b> <sup>[1]</sup> 86:14  <b>success</b> <sup>[8]</sup> 84:2,3 85:  12,12 90:6,7,18 103:  13  <b>succinctly</b> <sup>[1]</sup> 118:10  <b>sued</b> <sup>[1]</sup> 16:25  <b>suffering</b> <sup>[5]</sup> 122:23  123:5,7,9,20  <b>suffice</b> <sup>[2]</sup> 27:9 136:  19  <b>suffices</b> <sup>[2]</sup> 7:25 70:5  <b>sufficiency</b> <sup>[1]</sup> 32:15  <b>sufficient</b> <sup>[10]</sup> 88:24  102:25 110:8 114:2,5,  7 128:15 130:19 131:  24 134:1  <b>suggesting</b> <sup>[1]</sup> 72:23  <b>suggestions</b> <sup>[1]</sup> 41:3  <b>suggests</b> <sup>[1]</sup> 71:9  <b>sum</b> <sup>[1]</sup> 69:21  <b>supplemental</b> <sup>[3]</sup> 60:2  62:5 104:7  <b>support</b> <sup>[1]</sup> 134:14  <b>supported</b> <sup>[1]</sup> 134:7  <b>supports</b> <sup>[1]</sup> 24:16  <b>suppose</b> <sup>[4]</sup> 8:9 26:13  76:17 86:11</p>	<p><b>supposed</b> <sup>[3]</sup> 25:24  90:21 108:23  <b>surely</b> <sup>[1]</sup> 17:22  <b>surprised</b> <sup>[1]</sup> 17:25  <b>suspensory</b> <sup>[3]</sup> 21:2  33:12 68:20  <b>suter</b> <sup>[1]</sup> 104:12  <b>swan</b> <sup>[2]</sup> 87:25 88:19  <b>sweeping</b> <sup>[1]</sup> 19:20  <b>system</b> <sup>[2]</sup> 52:24 66:  22</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>table</b> <sup>[5]</sup> 27:6 28:4 57:  9 83:13 89:9  <b>tackle</b> <sup>[1]</sup> 118:8  <b>taft</b> <sup>[9]</sup> 72:16,18,24 73:  9 92:7 95:1 97:6,7  121:1  <b>tails</b> <sup>[1]</sup> 125:18  <b>talked</b> <sup>[5]</sup> 11:10 20:24  66:15 117:11 128:14  <b>talks</b> <sup>[1]</sup> 109:17  <b>tank</b> <sup>[2]</sup> 23:2,6  <b>tax</b> <sup>[1]</sup> 118:20  <b>temporal</b> <sup>[1]</sup> 11:22  <b>temporary</b> <sup>[1]</sup> 67:23  <b>temptation</b> <sup>[2]</sup> 69:15  114:22  <b>temptations</b> <sup>[1]</sup> 119:  10  <b>tenure</b> <sup>[4]</sup> 37:22 38:16  64:23 134:24  <b>tenured</b> <sup>[1]</sup> 37:25  <b>term</b> <sup>[14]</sup> 9:21 38:8,13  60:25 61:1,3,16,23  62:20 63:2 80:10  104:23 115:4 119:12  <b>terminated</b> <sup>[2]</sup> 68:7,8  <b>terms</b> <sup>[4]</sup> 90:23 101:  23 127:25 133:14  <b>test</b> <sup>[2]</sup> 43:15 45:15  <b>tested</b> <sup>[3]</sup> 45:16 128:  19 129:15  <b>testify</b> <sup>[1]</sup> 94:14  <b>text</b> <sup>[6]</sup> 35:22 47:20  62:6 63:10,12 65:14  <b>themselves</b> <sup>[1]</sup> 101:  19  <b>theory</b> <sup>[2]</sup> 97:3 115:23  <b>there'd</b> <sup>[2]</sup> 92:12 102:  19  <b>therefore</b> <sup>[7]</sup> 6:2,21 8:  1 46:19 47:6 82:3  121:11  <b>there's</b> <sup>[90]</sup> 5:13 6:6,  11 8:1,20 9:19 10:7,  12 11:2 18:14 19:24  24:18 26:7,25 28:20</p>
---	--	---	--	---

<p>31:12 32:22 33:2 34:1,18,24 36:12 38:15 41:24 42:8,17,25,25 43:14,15,15,20,25 44:3 46:13 48:21 49:1,17 50:8 52:3,4 54:3,4,22 59:15 60:11 61:5 63:2 68:18,23 70:6 72:5 73:6,16 75:8 76:6 78:13 79:1,23 82:8,10 87:24 88:5,17,21 90:6,22 92:3,16,24 98:5 99:7 102:13 103:7 104:18,19,19,22,24 107:9,25 108:8 114:23 121:22,23 124:11,13 127:1,1 129:20</p> <p>they'll [1] 80:7</p> <p>they've [4] 7:11 9:20 115:22 116:1</p> <p>thinking [6] 39:12 50:4 52:7 56:13 112:11 122:11</p> <p>third [2] 86:3 95:15</p> <p>thomas [10] 5:4,10 35:10 70:20 71:1 72:9 109:2,3,7 110:5</p> <p>thorough [1] 54:18</p> <p>though [7] 6:3 74:21 84:23 86:10 100:21 125:17 127:24</p> <p>thoughts [2] 28:24 121:12</p> <p>threat [1] 21:20</p> <p>three [10] 9:1 10:7 12:6 13:3,17 17:17 95:10 101:17,25 105:2</p> <p>thwart [1] 12:19</p> <p>tick [1] 93:21</p> <p>tie [1] 79:8</p> <p>tied [3] 119:13,15,16</p> <p>tilting [1] 118:5</p> <p>today [3] 11:10 12:10 74:21</p> <p>together [1] 116:6</p> <p>tomorrow [1] 132:9</p> <p>took [4] 36:7 81:25 103:3 130:15</p> <p>tool [1] 51:12</p> <p>tools [2] 51:1,10</p> <p>toothless [1] 70:12</p> <p>total [1] 69:22</p> <p>totally [1] 16:2</p> <p>tradition [7] 6:20 33:7 48:8 68:19 69:10,10 93:20</p> <p>traditional [9] 5:18 6:1 10:13 20:15,19 33:</p>	<p>24 34:1,22 41:24</p> <p>traditionally [2] 24:17 128:4</p> <p>traditions [1] 49:21</p> <p>transaction [1] 44:10</p> <p>transparent [1] 6:5</p> <p>treat [3] 29:8,9 94:6</p> <p>treated [1] 124:12</p> <p>treating [1] 83:2</p> <p>treatise [1] 60:4</p> <p>tribunal [3] 72:19 73:11 97:7</p> <p>tried [2] 69:14 87:11</p> <p>trigger [1] 17:10</p> <p>trivial [1] 52:17</p> <p>trouble [3] 70:7 94:11 116:23</p> <p>true [4] 15:1 37:21 71:24 93:20</p> <p>trump [2] 53:8,8</p> <p>trump's [1] 20:10</p> <p>truth [8] 25:6 28:15 57:4 112:10 131:7 132:6,12,17</p> <p>try [7] 57:24,24 58:1 63:17 84:15 100:15 125:17</p> <p>trying [7] 24:24 35:1 64:2 82:14 93:23 94:5 119:6</p> <p>turn [2] 16:22 131:25</p> <p>turning [1] 133:10</p> <p>turns [1] 16:25</p> <p>tuttle [3] 32:3 59:23 63:4</p> <p>tweak [1] 110:16</p> <p>tweaking [1] 110:17</p> <p>tweet [1] 96:2</p> <p>twelve [1] 14:7</p> <p>twice [1] 51:14</p> <p>twin [1] 37:4</p> <p>two [37] 5:11 7:13 17:13,13 25:11 30:19 34:24 36:10 37:9,17 38:4 40:21 42:15 51:9,24 54:9,22 55:5 61:23 65:16 81:20,20 83:14 84:5,9 86:2,17 92:24 96:3 101:25 105:3,4 117:16 127:12 129:20 135:13 136:18</p> <p>two-thirds [1] 117:23</p> <p>type [1] 95:6</p>	<p>80:2 90:23 92:18</p> <p>101:4,6 102:19 113:21,22</p> <p>ultra [6] 9:20,22 10:2 12:1,3 34:15</p> <p>unambiguous [1] 6:9</p> <p>unanimous [1] 31:23</p> <p>unbroken [1] 69:11</p> <p>uncertain [1] 81:19</p> <p>uncomfortable [2] 110:15,21</p> <p>unconstitutional [1] 69:19</p> <p>under [24] 8:12 11:7,25 12:7 35:3 39:4 58:5 67:19 75:22 76:7,18 80:21 83:15,15 85:12 86:14 99:2,5 101:3 113:6 132:15</p> <p>undercut [1] 66:9</p> <p>undermine [1] 128:16</p> <p>understand [20] 24:1,24 29:22 52:4 56:10 57:6 60:21 64:3 68:15 71:6 73:14 76:4 77:8 106:3 107:19 108:5 115:19 119:18 120:3 131:16</p> <p>understanding [7] 77:4 82:23 95:20 98:12 99:24,25 128:1</p> <p>understood [4] 38:21,23 111:12,12</p> <p>undisclosed [1] 130:3</p> <p>unduly [1] 93:24</p> <p>unhelpful [1] 95:4</p> <p>unique [9] 69:17,24 70:8 94:6 107:19 114:11 116:24 118:13 123:9</p> <p>uniquely [3] 6:18 69:8 93:18</p> <p>uniqueness [1] 122:5</p> <p>unitary [2] 97:2 122:11</p> <p>united [8] 6:21 14:3,4 19:21 20:21 53:8 135:21 136:11</p> <p>unleashed [2] 51:2,11</p> <p>unless [1] 128:16</p> <p>unlike [1] 119:5</p> <p>unprecedented [3] 14:2,7,9</p> <p>unrelated [1] 113:13</p> <p>unreviewable [1] 8:14</p> <p>until [3] 5:2 13:20 67:5</p> <p>unto [1] 88:24</p> <p>untrammelled [1] 122:</p>	<p>12</p> <p>unusual [3] 101:12</p> <p>104:5 129:6</p> <p>up [20] 11:20 17:6,17 28:2 36:9 45:12 52:15 55:23 56:4 60:17 66:5 71:12 76:12,13 87:18 99:15 110:14 116:4 127:25 132:13</p> <p>useful [1] 94:23</p> <p>uses [3] 101:18 104:23 106:15</p>	<p>15,16,20 45:2,2 53:7 54:3 56:14 58:2 59:16 64:24 67:14 74:24 79:19 81:1 84:17 85:19 88:8,22 91:1 96:11 97:6 102:13,17,21 109:25 111:15 112:1,4 115:2 119:17 120:16 121:8,10,14,17 127:4 131:6 135:10</p> <p>ways [3] 10:7 61:12 102:20</p> <p>weaken [1] 49:5</p> <p>weakness [1] 27:17</p> <p>webster's [1] 129:8</p> <p>week [1] 23:16</p> <p>weeks [2] 15:2 25:11</p> <p>weigh [3] 18:10,24 20:7</p> <p>weighing [2] 19:6,15</p> <p>welcome [2] 5:3 70:19</p> <p>well-established [1] 61:18</p> <p>well-settled [1] 59:20</p> <p>whatever [8] 15:19 17:23 37:18 42:24 78:4 80:1 91:23 130:10</p> <p>whatnot [2] 24:18 125:11</p> <p>whereas [2] 60:9 121:19</p> <p>wherever [1] 43:18</p> <p>whether [26] 5:14 8:15,16,22 11:11,23 12:1,4,6 13:22 16:22,24 17:19 40:24 72:6 80:4 88:17 89:18,23 108:19 113:18 114:2 126:21 128:23 133:10 135:8</p> <p>whichever [1] 135:10</p> <p>whim [1] 63:24</p> <p>whole [9] 35:13 53:9 89:1 93:14 94:10 111:24 112:9 116:4,11</p> <p>who's [3] 19:2 33:22 97:19</p> <p>wiener [1] 33:10</p> <p>wilcox [2] 6:17 13:18</p> <p>will [12] 17:20 18:25 32:17 39:15 88:23 97:23,24 100:24 104:2 106:11 114:10 123:11</p> <p>willing [1] 76:16</p> <p>wilson [1] 69:13</p> <p>win [5] 90:19 101:3</p>
---	--	--	--	--

**110:2 125:18 126:4**  
**window** <sup>[1]</sup> **28:13**  
**wisdom** <sup>[1]</sup> **53:22**  
**wishes** <sup>[1]</sup> **97:17**  
**withheld** <sup>[1]</sup> **130:12**  
**within** <sup>[6]</sup> **8:24 9:8 25:**  
**11 46:22,24 120:7**  
**without** <sup>[7]</sup> **9:3 32:6**  
**56:24 69:20 102:18**  
**103:19 118:5**  
**witnesses** <sup>[1]</sup> **94:14**  
**wondering** <sup>[2]</sup> **32:21**  
**124:25**  
**woodrow** <sup>[1]</sup> **69:13**  
**word** <sup>[1]</sup> **27:18**  
**words** <sup>[6]</sup> **8:13 21:4**  
**34:12 55:7 102:2**  
**125:4**  
**work** <sup>[7]</sup> **10:12 29:16**  
**81:5 97:5 113:13**  
**125:4 127:2**  
**worked** <sup>[2]</sup> **81:3 97:6**  
**works** <sup>[2]</sup> **100:1 117:**  
**19**  
**world** <sup>[8]</sup> **25:21 52:8**  
**67:8 74:11 92:16**  
**118:16 126:19 130:**  
**25**  
**world's** <sup>[1]</sup> **13:11**  
**worried** <sup>[1]</sup> **49:13**  
**worries** <sup>[1]</sup> **41:23**  
**worse** <sup>[2]</sup> **78:4 80:7**  
**worth** <sup>[1]</sup> **87:24**  
**wrestle** <sup>[1]</sup> **88:16**  
**wrestled** <sup>[2]</sup> **88:1,13**  
**writ** <sup>[3]</sup> **15:15 16:7 34:**  
**10**  
**write** <sup>[1]</sup> **88:15**  
**written** <sup>[2]</sup> **70:22,23**  
**wrongdoing** <sup>[1]</sup> **117:**  
**14**  
**wrongfully** <sup>[1]</sup> **34:2**  
**wrongly** <sup>[1]</sup> **34:20**  
**wrote** <sup>[1]</sup> **65:18**

---

## Y

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**yankee** <sup>[3]</sup> **26:19 54:**  
**24 58:2**  
**year** <sup>[1]</sup> **39:12**  
**years** <sup>[14]</sup> **5:18 6:13**  
**14:7 21:5 49:25 51:**  
**14 70:17 77:5 78:6**  
**81:4 110:24 111:1**  
**112:3 124:13**  
**yellen** <sup>[1]</sup> **133:18**  
**york** <sup>[3]</sup> **39:10,13 134:**  
**3**  
**yourself** <sup>[3]</sup> **11:18 42:**  
**20 79:8**