SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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Pages: 1 through 138

Place: Washington, D.C.

Date: January 21, 2026

HERITAGE REPORTING CORPORATION
Official Reporters
1150 Connecticut Avenue, N.W., Suite 305
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(202) 628-4888
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Wednesday, January 21, 2026

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

GEN. D. JOHN SAUER, Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Applicants.

PAUL D. CLEMENT, ESQUIRE, Alexandria, Virginia; on behalf of the Respondent.

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P R O C E E D I N G S

(10:03 a.m.)

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

General Sauer.

ORAL ARGUMENT OF GEN. D. JOHN SAUER

ON BEHALF OF THE APPLICANTS

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

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

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

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

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

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

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

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

I welcome the Court's questions.

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

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

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

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

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

CHIEF JUSTICE ROBERTS: I --

GENERAL SAUER: Now we acknowledge what the Court said in Wilcox, which is that it's a quasi-private, uniquely structured entity that stands in the distinct historical tradition of the First and Second Banks of the United States, and, therefore, we have not challenged the -- the removal restriction in this case.

JUSTICE SOTOMAYOR: Could you take --

CHIEF JUSTICE ROBERTS: Counsel, I

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

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

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

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

So it suffices from our perspective,

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

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

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

then there would be deference to the president.

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

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

But, even if the Court doesn't accept that, there's a further layer here, which is that they've conceded this is an ultra vires challenge, and this Court held last term that the standard of review of in an ultra vires challenge is very, very high for them and very deferential to the president itself. It kind

of, you know, dovetails with our Dalton and Martin argument as well.

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

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

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

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

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

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

GENERAL SAUER: It said that, yes.
JUSTICE SOTOMAYOR: All right.
GENERAL SAUER: It said there's a property interest --
JUSTICE SOTOMAYOR: That's the only issue --
GENERAL SAUER: -- in this office under Loudermill.
JUSTICE SOTOMAYOR: That's the only issue it addressed. It did not address all of the things you've talked about today: What the definition of "cause" is, including whether it includes pre-office conduct and how much or what nexus there has to be between pre-office conduct and post-office conduct.
One could imagine that what would constitute "for cause" during office would be different than what would happen pre-office. Even yourself below said, if something was known before confirmation, you likely can't rely on it. You haven't quite said that up here, but, logically, pre-office has a different temporal connection.
Then the court didn't address whether the president's determination of cause is

reviewable and under what standard.

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

You ask us today in this emergency application to provide -- to -- to finally decide these issues. I want to know why, meaning the president, by your own admission, cannot fire someone for disagreeing with his policy choices.

You've conceded that, correct?

GENERAL SAUER: Correct.

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

Now it's not as if she's been incompetent, negligent, or committed

malfeasance while in office. This is something pre-office. So keeping her in office is not causing an immediate harm to the agency.

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

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

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

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

GENERAL SAUER: Let me start by

addressing that last point.

We are seeking a stay of an unprecedent -- unprecedented preliminary injunction, restoring a principal officer of the United States after being removed by the president of the United States.

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

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

But I want to make the fundamental point that in Sawyer, this Court held that a preliminary injunction was not available to restore an officer. Sawyer was a preliminary injunction. It's a preliminary injunction

against the --

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

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

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

JUSTICE SOTOMAYOR: Sorry. I misspoke.

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

And this Court said it could --

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

GENERAL SAUER: -- grant a final judgment in mandamus to say you have a

ministerial duty to recognize the de facto officer.

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

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

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

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

So it does not turn on whether or not she's sort of, you know, stoutly staying in office or whether or not she's gone and then

sued later. That -- that doesn't -- nothing turns on that.

JUSTICE JACKSON: Mr. Sauer --

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

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

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

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

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

Surely, that if investors are jittery or whatever the argument is, you would have seen that on August 25th, and you did not see

that. In fact, you have the surprised --

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

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

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

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

GENERAL SAUER: Yes.

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

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

GENERAL SAUER: I think the Court has

to weigh that risk against the risk that there will be a permanent damage to the Federal Reserve's credibility from allowing an officer, a governor, to remain in office who's engaged in this kind of behavior before she came in office. That's --

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

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

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

The governors set interest rates for ordinary Americans all across the country.

And, here, there's the appearance of having played fast and loose or at least been grossly negligent in getting favorable interest rates for herself.

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

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

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

When you look at, for example, the originalist evidence we talked about in the

Decision of 1789, when everybody said or both camps were saying, of course, the president can engage in suspensory removals, and we have a preliminary injunction that is conspicuously nonexistent, in your words, in CASA, you know, for 225 years of American history --

JUSTICE JACKSON: But, Mr. Sauer --

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

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

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

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

in office.

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

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

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

GENERAL SAUER: So it's about framing --

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

GENERAL SAUER: Among other reasons, we assert grievous irreparable injury to the public perception to the Federal Reserve of

allowing her to stay in office. They argue that this is going to cause the markets to tank.

JUSTICE JACKSON: You have evidence related --

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

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

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

JUSTICE JACKSON: Did the president make that --

GENERAL SAUER: -- close week --

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

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

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

GENERAL SAUER: -- to obtain favorable interest rates for herself --

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

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

CHIEF JUSTICE ROBERTS: Counsel --

JUSTICE JACKSON: -- you're repeating --

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

GENERAL SAUER: I'm sorry.

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

So what I'm trying to understand is

what is the evidence that has been presented and considered with respect to Ms. Cook's alleged misconduct?

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

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

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

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

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

JUSTICE JACKSON: In the world?

GENERAL SAUER: Yes.

JUSTICE JACKSON: Like, she was supposed to post about it and that was the

opportunity to be heard --

GENERAL SAUER: Yeah.

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

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

JUSTICE GORSUCH: General --

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

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

What would that hearing look like?

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

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

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

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

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

restriction here in 1935.

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

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

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

JUSTICE GORSUCH: Okay. Okay.

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

JUSTICE GORSUCH: Yeah.

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

JUSTICE GORSUCH: And then --

JUSTICE KAGAN: But do --

JUSTICE GORSUCH: -- and then you mentioned on remedy that there's no such thing as a preliminary injunction for mandamus, and I just wanted to hear you a little bit more on

that. You mentioned Judge Friendly. Please, thoughts.

GENERAL SAUER: So the contention in the amicus briefs is that you can rely on Delgado to sort of bypass the holding of Sawyer and say that mandamus can provide the essence -- essentially, the same relief as a preliminary injunction. I guess the argument would be you'd have to mandamus everybody, so all the members of the -- other members of the Board, to treat her as she's still -- as if she's still a governor, all the staff to treat them as -- as -- as if they were still a governor, because Delgado held, where there was the city clerk who can't decide who was validly elected city commissioner, the Court held you could mandamus that clerk to recognize the de facto officer in the interim.

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

JUSTICE KAGAN: Do -- do I understand

you, General, going back to Justice Gorsuch's first question, to continue to maintain that, in fact, there is no requirement for notice and opportunity for a hearing? Is that right?

GENERAL SAUER: Absolutely, yes.

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

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

JUSTICE KAGAN: But, because the --

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

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

GENERAL SAUER: Yeah. Two reasons. In both Shurtleff and Reagan, this Court expressly recognized that that phrase, "INM," would -- or specified causes would bring with

it notice and a hearing. And that's part of the Court's holding in Shurtleff, as -- as I read it, because, there, it was an INM standard.

JUSTICE KAGAN: Right.

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

JUSTICE KAGAN: I -- I mean, your --

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

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

GENERAL SAUER: Not exactly because the old soil argument that we reject as to just simply cause is, we admit, much stronger when it comes to specified causes. So we don't think the Court necessarily got it wrong in Reagan when it said specified causes mean that notice and a hearing are provided because the case law, it's the one point on which the sort

of background case law does seem to be unanimous.

On the other issues where they contended the case law all goes in one direction, you have their own sources saying they're all over the map. They're directly contradictory, for example, in the Tuttle Law Review article.

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

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

CHIEF JUSTICE ROBERTS: General Sauer, if -- if you're correct that courts do not have the authority to reinstate a removed officer, why are we wasting our time wondering if

there's cause or not? Because, even if we say, yes, there is cause, he shouldn't have removed her, but we don't have the authority to order her reinstatement, what's the -- how is that consistent with -- with the time and energy being spent on determining if there's cause?

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

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

CHIEF JUSTICE ROBERTS: Well, it -- it's -- it's an independent basis. I guess it's not independent in the sense that, if that's right, the other one is irrelevant, right? It seems to me that, if there is any level of cause, and you indicate that there is some level of cause, right, well, then you

can't be right about the idea that a courts can't order anybody who's been removed to be reinstated.

GENERAL SAUER: There is a traditional remedy to reinstate wrong -- we don't dispute there's a traditional remedy to reinstate wrongfully removed officers, which is mandamus. But they don't argue mandamus here, and the reason they don't argue mandamus is they face a number of insuperable obstacles to prevailing in mandamus. One is, of course, going all the way back to Marbury against Madison. You can't mandamus the president in his discretionary acts. In addition to that, there is no preliminary writ of mandamus, as Judge Friendly pointed out and the Seventh Circuit has held. In other words -- and keep in mind that the standard in mandamus would be clear and indisputable right to relief.

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

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

GENERAL SAUER: But the -- there is a -- a traditional remedy, mandamus. Here, obviously, it would be quo warranto if there were two competing claimants, but where there's just the one, that would be mandamus. And they have not argued mandamus. They're trying to find their way around mandamus because the standards to prevail under mandamus are insuperable and they clearly cannot meet them.

JUSTICE JACKSON: But, General --

CHIEF JUSTICE ROBERTS: Thank you. I'm -- I'm sorry.

JUSTICE JACKSON: Oh.

CHIEF JUSTICE ROBERTS: Justice Thomas?

Justice Alito?

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

We -- you began by laying out what you claim to be the factual basis for the for-cause removal, but no court has ever explored those facts. Are -- are the mortgage applications

even in the record in this case?

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

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

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

Am I right on that?

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

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

GENERAL SAUER: My recollection is that the D.C. Circuit -- the Garcia opinion in the D.C. Circuit relied solely on Loudermill and the due process property interest, which is baseless for the reasons we say. And now the district -- the district court relied on the -- the twin grounds, both at Loudermill rationale and also the --

JUSTICE ALITO: Right. I stand --

GENERAL SAUER: Yeah, yeah.

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

GENERAL SAUER: That's correct.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

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

On Reagan and Shurtleff, you're relying on those two cases for your proposition that cause could be whatever the person, the authority, decides. But Reagan and Shurtleff were very careful in holding that the only

reason that was true was because there would be life tenure involved otherwise.

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

GENERAL SAUER: I disagree with that. We read Reagan differently. If you have that -- those two key paragraphs in Reagan --

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

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

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

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

So, if I move on from that, I go back to Justice Alito's question of you. I

thought -- and -- and the Chief's. I thought there was a factual dispute. As I understood it, Ms. Cook's letter, her attorney's letter, and, quite frankly, I've never understood that a letter from a lawyer wasn't a representation by a client. This is a new standard I've never heard of before in an informal proceeding.

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

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

As to the mortgage issue in Atlanta, Ms. Cook's lawyer represents that the papers submitted to the bank disclosed the fact that

this was a vacation home, so they may not have experienced deceit.

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

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

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

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

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

this rises to an infamous crime.

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

First, on the -- the -- the narrow point about whether or not a letter of counsel can create a factual dispute in this context, that's the holding of this Court in Codd against Velger, where the Court said that suggestions of counsel are not enough. It's the party who has to -- to do it. So there were representations of counsel there, and the Court held that that wasn't enough to bring it back --

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

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

JUSTICE SOTOMAYOR: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kagan?

JUSTICE KAGAN: General, can I take you back to the Chief Justice's question, the remedial question, the last one, because, in response to him, you said kind of no worries because there's a traditional remedy of mandamus. But then pretty much in the next sentence you said, but, of course, mandamus doesn't apply here because it's the president.

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

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

JUSTICE KAGAN: Yeah, but I think -- I think there's some kind of cause. It doesn't have to be inefficiency, neglect, malfeasance. But there is some kind of cause that's

necessary. You said that yourself in response to my last question, that the president has to state a cause.

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

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

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

reasons. There's no way for a court to evaluate that.

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

GENERAL SAUER: And there's no question for all the reasons we discussed in our briefing that that confers broad discretion on the president. Now there's an outer perimeter that is subject to policing by judicial review, policy disagreement, no cause at all and so forth, but that is -- confers broad discretion on the president.

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

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

GENERAL SAUER: -- would satisfy it.

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

GENERAL SAUER: So we have, I think,

conceded in the briefing that that sort of determination would be subject to judicial review because he hasn't specified the cause.

Now the case law, that's a -- that's a borderline case. The case law goes in different directions on that. Garland, one of the cases that we cite in our brief, kind of goes the other way, in a way that would be stronger for us, but we haven't disputed that in this case, that if it was -- there was no cause provided at all, then that would be subject to judicial review and likely an invalid removal.

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

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

That might be one. The president says: I remove you for policy disagreements.

He's open about it, let's say. It could happen, right? You would say still mandamus is not available, I think, wouldn't you?

GENERAL SAUER: I think we would. Now that might be a closer case because the mandamus statement -- standard is clear and indisputable right when we have conceded that policy disagreement would not be available. Actually, that might be a case where mandamus might be available with the caveat that how would Marbury apply to that. Marbury says you cannot mandamus the president in a discretionary decision.

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

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

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

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

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

JUSTICE GORSUCH: Yeah.

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

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

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

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

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

GENERAL SAUER: It protects the --

exactly reflecting the plain text of the statute, it protects the governors from removal for policy disagreement or for no reason at all.

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

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

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

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

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

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

GENERAL SAUER: For -- I -- I don't -- we don't dispute the importance of that for

many of the reasons that their amici say, but we emphasize that there's a balance struck here. This is not a ironclad "you can never be removed." There is a cause removal authorization to the president.

JUSTICE KAVANAUGH: But -- but, on that, your position that there's no judicial review, no process required, no remedy available, a very low bar for cause that the president alone determines, I mean, that would weaken, if not shatter, the independence of the Federal Reserve that we just discussed.

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

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

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

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

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

So what are we doing here?

GENERAL SAUER: Yeah.

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

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

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

JUSTICE KAVANAUGH: Well, history is a pretty good guide. Once these tools are unleashed, they are used by both sides and usually more the second time around. And I think that's what -- that's what we have to make sure we're -- again, that can't drive the decision necessarily. We have to be aware of what we're doing and the consequences of your position for the structure of the government.

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

And I think the more sort of

fundamental point is that cause is a standard that is quite deferential to the president. Congress consciously adopted that instead of a more restrictive standard like INM that was for, by all appearances, a legislative compromise between two camps, one of which wanted to give the president complete control and one of which --

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

But, again, thinking about the real world and the brief of the former Governors of the Federal Reserve, I mean, your position, again, because you say, well, the president can't say it's for policy reasons, which may be what's really -- again, in not talking about the current situation and other situations in the future -- what's really driving it. It incentivizes a president to come up with what -- as the Federal Reserve former Governors say, trivial or inconsequential or old allegations that are very difficult to

disprove. It incentivizes kind of the search and destroy and find something and just put that on a piece of paper, no judicial review, no process, nothing, you're done.

I mean, again, what -- what are we doing when we have a system that -- that incentivizes that and leads to that? Now, again, you can dispute that you think it's going to lead to that. And, again, I'm not talking about the facts of this case. I'm taking -- I don't know the facts of this case. I'm taking no position on that.

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

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

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

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

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

what's the concern about more process?

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

One is, in Vermont Yankee, this Court said we're not going to dictate procedures to executive agencies. A fortiori you should dictate procedures to the president. Our contention is that there already has been a process. There was a social media post that said, look, these two documents contradict each other. And the response was defiance. So there was a chance to tell -- in the words of Loudermill, to tell her side of the story. It just wasn't -- it wasn't adopted.

JUSTICE KAVANAUGH: Okay. Again --

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

JUSTICE KAVANAUGH: And, again, none of my questions or comments are about the facts

of this case. I don't know the facts of this case. But thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

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

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

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

GENERAL SAUER: I -- I don't think

it's a question of resource allocation. It's our position that adequate process was already provided. So, if it's a question if the district court's ordering us to go further and then go further and go further again, all without any legal or constitutional authority in our view, we think that imposes irreparable injury on the executive branch.

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

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

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

JUSTICE BARRETT: So it's the standing

on principle --

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

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

GENERAL SAUER: Notice and hearing, yes.

JUSTICE BARRETT: Yes.

GENERAL SAUER: We don't dispute that.

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

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

Here, the statute does say "cause." "Cause" isn't as specific maybe as INM, but it

does identify the grounds that the president must have for removal.

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

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

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

Now they dispute and they say there's some cases going the other way. However, the notion that they -- they are making an old soil

argument. They're saying, oh, this -- in order to -- to prevail on that, it has to be so well-settled and clearly established that there really wasn't a dispute about it.

And you look, I -- I -- I can't emphasize enough, you know, what, for example, the Tuttle Michigan Law Review article from 1905 that's heavily relied on, for example, in the Manners amicus brief that they rely heavily on in their supplemental brief, it says the case law is all over the map on all of these issues. That -- that treatise says the courts differ on almost every conceivable part of this question.

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

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

CHIEF JUSTICE ROBERTS: Justice Jackson?

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

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

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

Professor Manning says -- Manners says that when you drill down in this situation with respect to fixed term and removability for

cause, as of -- 1913, it was well-established, everybody agreed that that required at least notice and an opportunity to be heard.

So what is your response to that?

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

So why is the government saying different right now?

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

Her argument is gerrymandered --

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

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

JUSTICE JACKSON: The combination, for cause --

GENERAL SAUER: Of those four --

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

GENERAL SAUER: By our count, in seven --

JUSTICE JACKSON: Okay.

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

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

JUSTICE JACKSON: All right.

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

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

You explored with Justice Kavanaugh, and I appreciated this, that Congress put the for-cause provision in there for a reason, and

you conceded that the reason was to try to ensure the independence of the Federal Reserve, that we were -- we, Congress, Congress had decided that this particular agency, because of the sensitive information and policy determinations that it has to make, needs to not have the pressure of having all of its governors be fireable at the whim of the president. So in goes for-cause removal for that purpose. And you agree.

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

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

JUSTICE JACKSON: No, but that -- but you've -- but you've conceded that the aim is actually broader. The aim is to ensure that this institution is not being pressured by the executive branch, by the president, with

respect to its determinations, that people can't just be fired because the president wants them to.

And so what I'm now asking is, if we read "for cause" to ultimately reduce to the president can pick some fact that has nothing to do with their actual tenure in office, something that happened way before, and use that and say that's cause and it's not reviewable and he doesn't have to show any evidence and doesn't have to give the person a hearing, basically, the president is just making the determination that Congress apparently didn't want him to have the power to make because they put "for cause" in the statute.

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

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

The statute was a hard-fought compromise between two influential and

insistent camps, as Justice Alito recently wrote. One of them thought there should be complete presidential control of the Federal Reserve. The other thought it should essentially be a private entity.

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

JUSTICE JACKSON: But it only protects -- it only protects them insofar as the president's determination about cause is reviewable and based on actual evidence that has been established. It doesn't protect them if the president can just make it up.

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

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

You've talked a lot about mandamus being a remedy, but as I -- I read the cases

and the law, mandamus was the remedy for courts of law that were being asked to reinstate removed officers, and this was back at a time in which courts of law and courts of equity were separate.

We now have a fused system. Courts of equity could always be asked to step in and prevent the removal of this person. To the extent the person was claiming that they were not removable, say, because the statute says they could only be removed for cause, a court of equity could be invited through this claim to come in and pause the circumstances, not allow this person to be removed until the courts of law had actually litigated the claim of removability.

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

GENERAL SAUER: It is -- the

preliminary injunction is an equitable determination, and it's one that the district court plainly, under Sawyer, plainly lacked jurisdiction to -- to enter.

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

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

GENERAL SAUER: -- with serious equitable powers --

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

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

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

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, General.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE RESPONDENT

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

The Federal Reserve is a uniquely structured entity with a distinct historical tradition. Part of that historical tradition is an unbroken history going back to its founding in 1913 in which no president, from Woodrow Wilson to Joseph Biden, has ever even tried to remove a governor for cause, despite the ever-present temptation for lower rates and easier money. Even in this case, the president

recognizes the unique status of the Fed by neither arguing that the removal restriction is unconstitutional, nor asserting the ability to remove a Fed governor without cause.

But despite that recognition, the sum total of the Solicitor General's arguments would reduce the removal restriction in this unique institution to something that could only be recognized as at-will employment. No procedural due process before removal. No judicial review after removal. No preliminary injunction to preserve the status quo. And a conception of cause so capacious that apparent misconduct or gross negligence suffices.

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

But, if that removal restriction has real substantive and procedural bite, then this emergency application should be denied. There is simply no reason to abandon over a hundred

years of central bank independence on an emergency application on a preliminary record.

I welcome the Court's questions.

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

MR. CLEMENT: So it could have been, Justice Thomas. You know, in the realm of interpreting statutes, could have, should have, would have, right? But I think that you have to give faithful interpretation to what Congress actually did.

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

be removal for cause.

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

Now it's true that the NLRA, which was passed a month before, did specify a hearing. But I think it would be a mistaken statutory interpretation to make that one express reference to a hearing sort of disable all the other old soil arguments with respect to all the other institutions where I think there's a very strong old soil argument that, whether it's INM or for cause, that means that you get notice and an opportunity --

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

MR. CLEMENT: So I agree with General Sauer that the president would have a fair amount of discretion in how he or she wanted to fashion that hearing. I mean, one example we have historically is President Taft,

and he sort of gave the removed officials the full Taft, and it was notice, opportunity for a hearing before an impartial tribunal that, you know, serendipitously included future-Justice Frankfurter, and then he -- I mean, so that's kind of the maximum that the president could give. But we're not suggesting that you need to give the full Taft. The president would have a lot of flexibility on that.

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

CHIEF JUSTICE ROBERTS: I'm not sure I understand exactly what you want a hearing for. If your argument is inadvertence, it doesn't seem to me that there's much you can say

factually other than that. You can't say, well, this is why we did it and this is okay and all that. It's just an inadvertent mistake.

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

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

Now, in the -- in -- in the real world, where you have no precedent for this kind of removal, I think, if there were notice and opportunity for a hearing, there might be an opportunity to not just present the factual evidence but to also make the case, and given these particular facts about this particular

inadvertent mistake, that isn't a basis for removal.

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

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

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

JUSTICE KAVANAUGH: Can you --

JUSTICE ALITO: Well, on the question of what is for cause, what the district court

held was that it must relate solely to in-office conduct. And you defend that with one caveat that if the office-holder is indicted later for -- indicted while in office for pre-office conduct, then that might be cause for removal because a person under indicted -- indictment wouldn't be able to devote full attention to the job.

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

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

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

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

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

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

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

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

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

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

MR. CLEMENT: I can only imagine --

JUSTICE ALITO: That must be --

MR. CLEMENT: -- where these hypos are going to eventually go, Your Honor, but -- no --

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

MR. CLEMENT: But -- but -- I'm going to stick with my position.

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

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

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

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

(Laughter.)

MR. CLEMENT: My -- my backup -- my -- my backup argument is the common law standard, Justice Sotomayor alluded to it, which would be that it is -- that there's a removal basis for an infamous crime of the kind that is disabling for public office and, you know -- and at

common law, it would -- it also required a conviction. So it's -- it's an exception. It helps me with a couple of these hypotheticals.

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

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

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

MR. CLEMENT: You know what I'm saying? There's no conviction for the Hitler video.

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

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

JUSTICE KAVANAUGH: We got an argument in the --

JUSTICE KAGAN: So why --

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

MR. CLEMENT: Well, I certainly --

see, but this actually kind of makes the point about judicial review, right? I mean --

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

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

JUSTICE KAVANAUGH: Mm-hmm.

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

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

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

JUSTICE KAVANAUGH: And that seems to

solve your answer -- a lot of the difficult hypos, correct?

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

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

MR. CLEMENT: That's right. And that's -- that's the way --

JUSTICE KAGAN: So why --

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

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

JUSTICE ALITO: Yes. Well, there --

JUSTICE KAGAN: Why is it crazy?

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

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

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

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

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

And what the D.C. Circuit did in a per curium opinion is sort of an example of what happens when you're trying to rush all of this,

which is you jump right to a constitutional holding when there may be a perfectly good constitutional avoidance statutory holding there.

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

JUSTICE GORSUCH: So -- so --

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

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

MR. CLEMENT: I'm sorry.

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

If those two decisions, which, to be

fair, were, of course, issued under -- under a time constraint, might have some flaws, why shouldn't it go back to reconsider it? You've -- you've advanced a lot of new arguments here. So have your friends on the other side.

MR. CLEMENT: So it should go back. It should just not go back with an emergency stay being granted, which is an extraordinary relief that depends on my friends on the other side showing extraordinary burden of irreparable harm and showing that they have a likelihood of success on the merits.

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

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

And I think it shows the sort of -- you know, the -- the problems that happen when

you try to decide some of the most important issues of constitutional law in this kind of rushed way.

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

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

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

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

MR. CLEMENT: So a couple of things.

I mean, I -- I don't like hearing preliminary mandamus any more than Judge Friendly did.

JUSTICE GORSUCH: No.

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

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

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

JUSTICE GORSUCH: Okay. So it is --

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

JUSTICE GORSUCH: Well -- well -- well, wouldn't it have to be, though? If -- if your cause of action were mandamus, and let's just suppose that's what it is, it would be preliminary injunctive relief because you have the likelihood of succeeding on -- under the

mandamus standard I would have thought.

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

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

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

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

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

(Laughter.)

JUSTICE GORSUCH: All right.

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

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

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

I would like to say this is an issue the -- the D.C. Circuit has thought a lot about. And there's a particular case worth reading, the Swan against Clinton case. And that's a case where they kind of wrestled with this question about can you -- you know, would you have mandamus against the president. At the end of the day, can you direct the president, and there's a great concurring opinion by Judge Silberman where he basically says, look, the judiciary is creative and clever enough to figure out a way to fashion injunctive relief against the lower federal officials and that solves the problem about having the relief run against the president.

And the reason that the D.C. Circuit has wrestled with that in a couple of contexts, and I think the Chief Justice alluded to this,

if they don't really write about that, then you'd have to wrestle with this at the beginning of the case as to whether there's any redressability at the end of the case.

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

JUSTICE JACKSON: And that happens at the end of the case, right, after the whole thing has been litigated and some court, perhaps even this Court, decides the removability question. The president does not, we would say, have the right to remove her, and then we go to remedy, and the question is, is there a mandamus or not.

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

The question now is just in the

interim, while that case is -- while -- while that issue is being litigated, what happens? And that's about the equities, that's about whether it's going to be more harmful to leave her in the position than not. That's what I thought this motion was about.

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

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

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

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

JUSTICE JACKSON: -- why would that be

a merits issue?

JUSTICE GORSUCH: I'm sorry.

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

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

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

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

JUSTICE KAGAN: Mr. Clement --

MR. CLEMENT: -- pretty good authority.

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

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

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

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

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

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

MR. CLEMENT: Well, because it would kind of destroy the whole point of having an

independent central bank in the Fed. And it just seems to me like at some point -- I mean, we're all here on the assumption for this case that the Fed is a uniquely structured institution with a distinct historical tradition. And so, if that's true and then you tick through the statute and you see all the things that Congress did, I mean, including, you know, Congress wasn't just trying to take the -- Fed and keep it from sort of being unduly influenced by the president when it came to rates right before an election. It did the same thing to itself by limiting the power of the purse over this institution.

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

JUSTICE KAVANAUGH: On the -- on the future judicial review and what that looks like, would the witnesses testify in court, or

is it done on the record established by the executive branch, or does that maybe depend?

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

JUSTICE ALITO: I mean, that's -- that's sliding scale is extraordinarily unhelpful. What -- what is the minimum that the executive, in your view, has to provide, the minimum type of hearing that you think is required by this statute?

MR. CLEMENT: So the minimum hearing I think would have three components. One is notice, and that's really not much of an issue here. I agree with that. The second is an opportunity to provide evidence to the decisionmaker, and we don't think that happened

here. And then the third thing is some effort to keep the final decisionmaker from prejudging the issue.

And part of the problem you have in this particular case is -- is that I think the president was proceeding on the understanding of the statute that's faithfully represented here by the Solicitor General, which is he wasn't acting like a removing authority that was subject to any due process because, if I think he were -- if he were sort of subject to that, he wouldn't have said in his opening tweet, you must resign, and he wouldn't have said two days later, resign or be fired.

I mean --

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

MR. CLEMENT: No.

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

MR. CLEMENT: No.

JUSTICE ALITO: Then what does it require?

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

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

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

JUSTICE GORSUCH: Right, the president --

MR. CLEMENT: So it was the president --

JUSTICE GORSUCH: Yeah.

MR. CLEMENT: -- making the decision.

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

MR. CLEMENT: Yes.

JUSTICE GORSUCH: Who's reportable to him?

MR. CLEMENT: Yes. Yes.

JUSTICE GORSUCH: Okay.

MR. CLEMENT: At will.

JUSTICE GORSUCH: At will, yeah.

MR. CLEMENT: Right, absolutely.

JUSTICE GORSUCH: Okay.

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

JUSTICE SOTOMAYOR: Can --

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

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

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

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

JUSTICE BARRETT: Okay.

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

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

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

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

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

JUSTICE BARRETT: Okay.

MR. CLEMENT: Absolutely. I'm --

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

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

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

MR. CLEMENT: So a couple of things. One is, you know, I'd -- I'd resist -- I mean, you know, gerrymandering is generally not a compliment. So I -- I would sort of say that

what we do is we bring in the common law, and that's what we do. And I really didn't try to gerrymander it beyond that.

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

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

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

JUSTICE BARRETT: Front-line backup?

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

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

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

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

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

JUSTICE BARRETT: Okay.

JUSTICE KAGAN: Do you think that there's a way at this posture of dealing with

this case so that we don't have to confront the question of exactly what the for-cause standard means?

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

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

JUSTICE JACKSON: Couldn't we also resolve it by not even going to the likelihood of success on the merits element? I mean, you

have -- the -- the -- the -- the president would have to have all of them to get a stay. And we could do it on harm, right?

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

(Laughter.)

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

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

I mean, you know, I've looked at almost all of these common law cases. I have a different view than General Souter on -- Sauer, sorry -- on -- on some of these

questions.

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

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

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

But that's the kind of thing you can excavate on full briefing on the merits that I

don't think you can in a -- in an application.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

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

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

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

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

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

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

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

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

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

that and present our actual evidence which would have substantiated that.

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

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

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

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

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

I mean, again, I'm not really going to resist that, especially if you're going to,

you know, say you're with me on the substance.

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

CHIEF JUSTICE ROBERTS: Justice Thomas?

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

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

I think the only -- and -- and -- and I do think the definition that's presented to

you by the president is a pretty extraordinary one because, you know, General Sauer is a very careful lawyer. So, in his briefs, he doesn't talk about mortgage fraud. He talks about apparent mortgage fraud.

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

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

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

MR. CLEMENT: So I think the single best reading of the statute is INM plus ineligibility as informed by Section 244 of the statute. I think then my fallback would be

then you pick up the common law. And if the common law makes you uncomfortable because of Justice Alito's hypos, you could tweak the common law. But you would then be tweaking the common law.

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

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

CHIEF JUSTICE ROBERTS: Justice Alito?

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

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

I -- I understood your -- I -- I understood your answer to be you should do that

if you're going to find in favor of me, but you shouldn't do it if you're going to find the other way.

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

(Laughter.)

JUSTICE ALITO: Really? That's your answer?

(Laughter.)

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

JUSTICE ALITO: Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

JUSTICE SOTOMAYOR: This whole case is irregular, starting with the Truth Social notice or thinking of it as notice at all. It certainly didn't invite an opportunity to be

heard. But that's where we are.

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

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

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

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

MR. CLEMENT: Correct.

JUSTICE SOTOMAYOR: All right. Because it would seem extreme to think that something separated from the functioning of the

office, unrelated to the work of the office at the time it's done, that mere negligence would be enough. But the president called it gross negligence.

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

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

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

And, you know, in some respects, I think, in the long run, it will be better to make clear that in the context of this unique institution, with its distinct history, that

for cause is several steps north of gross negligence even because that's going to make it really something that the courts aren't going to have to get dragged into on a routine basis, where I think the lower the standard is, the -- the more likely you are to have removals in the future.

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

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

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

CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

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

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

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

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

Justice Kavanaugh?

JUSTICE KAVANAUGH: A couple things. Just to talk again about the standard, I mean, getting the definition of "for cause" right, which we may not have to do in this posture, so I take that as critical because, on the one hand, you have the independence of the Federal Reserve, which we've talked about; the other

hand, we have people who have committed -- again, not talking about the facts of this case -- but serious ethical or other wrongdoing digging in and remaining in office.

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

And then the other was impeachment, but, of course, with the two-thirds requirement in the Senate and the time constraints of the House and Senate, I'm not sure that's available as often as you say.

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

MR. CLEMENT: Yeah the --

JUSTICE KAVANAUGH: -- tackle that at all? I mean, you've covered it, but I want to

get it out one more time so you can succinctly answer.

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

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

And in this regard, I think it's -- you know, this is not a situation where the -- unlike Myers, which is the ultimate example, where the president's trying to arrogate some power away from the executive. This is a situation where Congress, political animals one

and all, knew better than anyone that the short-term temptations to lower interest rates and have easy money was a disaster in the long term but was going to be irresistible.

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

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

JUSTICE KAVANAUGH: In your colloquy with the Chief Justice about what a hearing would look like within the executive branch with the president or with the president's

designee -- I just want to make sure I have this clear. In that hearing, you could make legal arguments as well, I assume, not just factual arguments but legal arguments, to say we don't think this rises to the level of for cause. Basically, the kinds of arguments that you've made here you could make to the president in the same way, in an impeachment proceeding, people make legal arguments to the Senate about what exactly is high crimes and misdemeanors, correct?

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

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

JUSTICE KAVANAUGH: And just for the kind of simplest way -- and this Justice Kagan

was asking -- to decide this case, I think one way would just be to say there was insufficient process and, therefore, we at this juncture deny the government's application. Thoughts?

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

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: I'm going to ask you about irreparable harm. You were just talking to Justice Kavanaugh about the uniqueness of the Fed and its need for independence. And the government, because it has not challenged the removal restriction, for purposes of this case,

I think we're all operating on that assumption.

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

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

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

MR. CLEMENT: Well, I -- I think my best argument that he's not suffering irreparable harm in those circumstances is that

he's -- is he not suffering the unique indignity of having sort of pure executive power exercised by people that are removable at will in -- outside of his control.

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

JUSTICE BARRETT: Mm-hmm.

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

And then, on the other side of the

ledger, I think there are enormous irreparable harms here that really don't have an analog in most of these other situations. I don't mean to denigrate any other agency, but, you know, there's a reason that monetary policy has been treated differently for, you know, lo these many years, and there's a reason that the markets watch the Fed a little more closely than they watch really any other agency of government.

CHIEF JUSTICE ROBERTS: Justice Jackson?

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

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

In other words, I thought the work of the hearing even in this situation would be to establish when these applications were signed,

what she thought she was attesting to, what actually was going on with respect to these documents that the president is pointing to that says -- and he says they establish her deceit and gross negligence or whatnot, and -- and I think before we even get there, we have to know what the facts are related to this.

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

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

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

On the other hand, if, you know, normally, you have that kind of evidentiary

hearing and that is to establish sort of the facts, and then you then apply the law to those facts that have been established.

JUSTICE JACKSON: Right.

MR. CLEMENT: But there are circumstances --

JUSTICE JACKSON: There are circumstances.

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

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

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

MR. CLEMENT: Absolutely. And what I -- I -- another way of putting it is, look, the denial of the hearing to my client, if she does indeed have a right to a hearing, can --

cannot be harmless error, like it just can't, no matter what you think of the facts.

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

JUSTICE JACKSON: Yeah.

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

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

And I see, for example, a court, a Maryland court, Board of State Commissioners of

Hagertown -- Hagerstown in 1903, which is around the same time as the establishment of this statute, that said "the phrase 'for cause' must mean some cause affecting the ability or fitness of the incumbent to perform the duty imposed upon him."

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

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

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

MR. CLEMENT: Absolutely. And, you know, I love that Hagerstown case because not only is it a very helpful common law case, but it's actually the basis for the definition in Black's Law that the government and Judge Katsas below relied on. I mean, you know, Black's Law is an unusual dictionary. It just

doesn't sort of, you know, pop out the meaning from, like, Noah Webster's mind. It, like, cites cases for particular concepts.

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

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

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

And then the second kind is stuff that was undisclosed. And if it's as serious as we're talking about, that's essentially the nominee, you know, defrauding the -- the Senate. And so I actually think, in that

respect, impeachment is probably a more fit remedy than it might be in some other circumstance because you're going to have whatever the conduct is, plus you're going to have the Senate being pretty darn vexed that that was withheld from them in the confirmation process.

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

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

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

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

MR. CLEMENT: Well --

JUSTICE JACKSON: Or in our law?

MR. CLEMENT: -- I -- I mean, put it

this way. Like, I -- I don't sort of resist the idea that the Truth Social post is notice because I think it's also fundamentally defective notice because it's also indisputable evidence that the president prejudged the matter.

JUSTICE JACKSON: Right, because it's --

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

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

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

MR. CLEMENT: Look, I -- I -- I might -- I might make that argument, but that doesn't seem -- you know, I mean, if he -- if

he said on Truth Social that, look, here I have this allegation and I'm going to convene a hearing at, you know, the Roosevelt Room at 4 p.m. tomorrow, please bring all your evidence --

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

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

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

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Rebuttal, General Sauer.

REBUTTAL ARGUMENT OF GEN. D. JOHN SAUER
ON BEHALF OF THE APPLICANTS

GENERAL SAUER: Thank you, Mr. Chief Justice.

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

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

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

For example, In re Guden, which, you know, from New York in 1902, which involved a -- an officer who had engaged in a kind of shenanigan in order to get the office in the

first place. There was a -- a corrupt agreement to appoint somebody to a position if they supported that person politically.

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

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

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

reason.

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

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

So all the discussion of what are the outer bounds of cause, where is judicial review, on that fundamental court, neither this Court nor any other court should look at this and say this is likely not cause.

That sends the wrong message to the markets. It sends the wrong message to the American people, who have to make correct

representations to their banks when they're getting their mortgage interest rates.

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

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

And then, if the Court -- if -- if -- if the Court decides to sort of send the case back to have many more of these issues that we've discussed today to be aired, we would urge the Court, and I think Mr. Clement wouldn't disagree, to direct the lower courts to proceed very expeditiously. Here, this is -- we are in an emergency stay posture. The

executive has been suffering irreparable harm since early September, and the sooner that these issues are resolved, the better.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

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

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