

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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DONALD J. TRUMP, PRESIDENT )  
OF THE UNITED STATES, ET AL., )  
Petitioners, )  
v. ) No. 25-332  
REBECCA KELLY SLAUGHTER, )  
ET AL., )  
Respondents. )  
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# 1 PROCEEDINGS

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument this morning in Case 25-332, Trump  
5 versus Slaughter.

6 General Sauer.

7 ORAL ARGUMENT OF GEN. D. JOHN SAUER

8 ON BEHALF OF THE PETITIONERS

19 Humphrey's Executor stands as an  
20 indefensible outlier from that line of  
21 authority. Its holding that federal agencies  
22 can exercise quasi-legislative and  
23 quasi-judicial powers that form no part of the  
24 executive power has not withstood the test of  
25 time. That holding was gutted and refurbished

1 in Morrison, but this Court correctly rejected  
2 the refurbished version as providing an  
3 amorphous test with no limiting principle.  
4 Respondent now proposes a third update to  
5 Humphrey's, which this Court has already  
6 rejected as making no logical or constitutional  
7 sense.

8 Humphrey's must be overruled. It has  
9 become a decaying husk with bold and  
10 particularly dangerous pretensions. It was  
11 grievously wrong when decided, and cases from  
12 Morrison to Trump have thoroughly eroded its  
13 foundations. The Court has repudiated  
14 Humphrey's reasoning and confined it to its  
15 facts, but it continues to generate confusion  
16 in the lower courts and it continues to tempt  
17 Congress to erect at the heart of our  
18 government a headless fourth branch insulated  
19 from political accountability and democratic  
20 control.

21 As Justice Thomas wrote in *Seila Law*,  
22 Humphrey's poses a direct threat to our  
23 constitutional structure and, as a result, the  
24 liberty of the American people. And, as *Seila*  
25 *Law* held, the modern expansion of the federal

1       bureaucracy sharpens the Court's duty to ensure  
2       that the executive branch is overseen by a  
3       President accountable to the people.

4                   I welcome the Court's questions.

5                   JUSTICE THOMAS: General Sauer, could  
6       you give me one example -- give us one example  
7       of a permissible restriction on the authority  
8       to remove a principal officer?

9                   GENERAL SAUER: We don't believe there  
10      are permissible restrictions on principal  
11      officers of the United States who exercise the  
12      executive power.

13                  Now there may be separate issues --

14                  JUSTICE THOMAS: Okay. Let's say a  
15      principal --

16                  GENERAL SAUER: -- relating to  
17      particular historical pedigrees.

18                  JUSTICE THOMAS: In this case, the --  
19      in a multi-body agency such as the FTC, is  
20      there any permissible restriction?

21                  GENERAL SAUER: No. This Court in  
22      Trump against United States held that the  
23      President's power to remove officers wielding  
24      the executive power is conclusive and  
25      preclusive.

1 JUSTICE THOMAS: How far do you go  
2 with that? Can it be arbitrary, completely  
3 arbitrary?

11 CHIEF JUSTICE ROBERTS: I think there  
12 are a lot of agencies in the federal government  
13 where it's hard to parse whether it's an  
14 executive function they're engaged in or a  
15 legislative function. We obviously have the  
16 Perlmutter case holding, where you do -- deal  
17 with the Library of Congress, which half of  
18 it's a library, half of it's things like the  
19 copyright. What are we supposed to do with  
20 that if you're correct?

21 GENERAL SAUER: Well, Mr. Chief  
22 Justice, in Free Enterprise Fund, this Court I  
23 think very aptly stated that the vast and  
24 varied nature of the federal government is a  
25 reason not to make general pronouncements on

1 issues that haven't been briefed and argued.  
2 There are certainly -- there are certainly  
3 situations where there are tough line-drawing  
4 problems. You raised the Perlmutter case as  
5 one that may raise arguments of that nature.

6                   But, by and large, the -- the sort of  
7 insight that goes from Morrison to FCC against  
8 Arlington and to Seila Law recognizes that  
9 these multi-member agencies that are exercising  
10 what this Court has repeatedly recognized as  
11 quintessential executive powers, like the  
12 FTC -- rulemaking, adjudication, investigation,  
13 seeking a civil enforcement power -- litigation  
14 seeking civil enforcement powers or civil  
15 enforcement remedies and so forth -- those are  
16 not close cases.

17                   CHIEF JUSTICE ROBERTS: Yeah, I -- I  
18 mean, I appreciate your point about not  
19 deciding cases that aren't before us, and I --  
20 I -- I -- I meant the Perlmutter case as an  
21 example, but I'm not sure you answered the  
22 question.

23                   Do -- is this a severance issue? Do  
24 we -- so the agency is okay so long as, you  
25 know, half of it -- half of it survives in one

1 branch and half in the other, and if so, who  
2 gets to decide that?

3                   GENERAL SAUER: For -- for the vast  
4 majority of these agencies, I think Seila Law  
5 pointed out there's maybe about two dozen  
6 executive agencies that are multi-member  
7 structure and have removal authority. I think  
8 the logic that this Court adopted for  
9 severability in Free Enterprise Fund and Seila  
10 Law and Collins indicates that in the vast  
11 majority of cases there would be an excision  
12 just of the removal authority.

13                   Now, if there are branch -- if there  
14 are agencies that kind of straddle the line  
15 between legislative and executive, that might  
16 present harder --

17                   JUSTICE SOTOMAYOR: Why is that --

18                   GENERAL SAUER: -- severability kinds  
19 of issues. Those haven't --

20                   JUSTICE SOTOMAYOR: -- why is that  
21 severability the issue? Meaning, if you think  
22 they're wielding power that is inappropriate,  
23 why don't we sever that power --

24                   GENERAL SAUER: I think those very  
25 arguments --

1 JUSTICE SOTOMAYOR: -- instead of the  
2 removal power?

9 JUSTICE SOTOMAYOR: But most of those  
10 powers were part of Humphrey's. This Court  
11 even in Seila Law and all of the cases you've  
12 mentioned since have said that Humphrey's is  
13 good -- is controlling law. You're asking us  
14 to overturn a case that has been around for  
15 over a hundred -- nearly a hundred years,  
16 correct?

17 GENERAL SAUER: Ninety years, I  
18 believe.

19 JUSTICE SOTOMAYOR: Ninety years.  
20 What other cases have we overturned that have  
21 had a pedigree of a hundred years?

22 GENERAL SAUER: Pennoyer against Neff  
23 was overruled by Shaffer against Heitner on its  
24 hundredth birthday by the --

25 JUSTICE SOTOMAYOR: That was an

1 economic case. What other case?

2 GENERAL SAUER: For example, Erie  
3 against -- Erie overruled Swift v. Tyson 96  
4 years later.

5 JUSTICE SOTOMAYOR: That -- that --  
6 that -- so too again --

7 GENERAL SAUER: Those are two  
8 examples. There's at least 13 or --

9 JUSTICE SOTOMAYOR: But which other  
10 case has fundamentally altered the structure of  
11 government? For over a hundred years,  
12 actually, since 1887, we've had multi-member  
13 boards, and that's the entire government  
14 structure.

15 GENERAL SAUER: The distortion of the  
16 structure of government, respectfully, that  
17 Humphrey's -- the philosophy that was --

18 JUSTICE SOTOMAYOR: Doesn't -- aren't  
19 we -- aren't you asking us to distort it a  
20 different way?

21 GENERAL SAUER: I think we're  
22 asking --

23 JUSTICE SOTOMAYOR: Neither the King  
24 nor parliament nor prime ministers, England at  
25 the time of the founding, ever had a

1       unqualified removal power. You're asking us to  
2       say that at a time, the founding, when the  
3       Constitution doesn't speak about this at all,  
4       where there was robust debate over this issue  
5       among legal scholars at the time, that we  
6       ourselves have said repeatedly in Humphrey's  
7       and other cases, Wiener, even in Myers, that  
8       our -- that those cases you mentioned did not  
9       establish this absolute power of the President.

10            You're asking us to destroy the  
11       structure of government and to take away from  
12       Congress its ability to protect its idea that  
13       a -- the government is better structured with  
14       some agencies that are independent.

15            GENERAL SAUER: I think we're asking  
16       the Court to return to the dominant line of  
17       authority that started in *Ex Parte Hennen* in  
18       1839 when this Court said that it's a settled  
19       and well-understood construction of the  
20       Constitution that the President alone can  
21       remove executive officials.

22            That was reaffirmed in *Parsons*, for  
23       example, where it described it as settled  
24       beyond the power of alteration, again, in  
25       *Shurtleff*, similar language, Myers says the

1 same thing, Free Enterprise Fund, Collins,  
2 Seila Law, Trump against United States, and  
3 even Humphrey's Executor itself paid lip  
4 service to this principle.

5 Humphrey's described this power as  
6 unrestricted and illimitable in order to get  
7 out of that rule which the -- the Court has  
8 recognized in those nine decisions is going  
9 back to 1789 --

10 JUSTICE SOTOMAYOR: You still haven't  
11 answered my question. Where else have we so  
12 fundamentally altered the structure of  
13 government?

14 GENERAL SAUER: I think what -- the  
15 fundamental alteration of the structure of the  
16 government was ushered in by Humphrey's, and  
17 then the Congress kind of took Humphrey's and  
18 ran with it in the building of the modern  
19 administrative state and the proliferation of  
20 independent agencies that are insulated from  
21 democratic control.

22 JUSTICE SOTOMAYOR: Independent  
23 agencies have been around since the founding.  
24 The Sinking Fund, the War Commission, we've had  
25 independent agencies throughout our history.

1       So this is not a modern contrivance.

2                   GENERAL SAUER: We disagree with that  
3       as -- as -- as, in our brief, we disagree with  
4       that characterization of those agencies. The  
5       Sinking Fund Commission, for example, was  
6       composed of three officers who are cabinet  
7       secretaries, clearly removable.

8                   JUSTICE SOTOMAYOR: And we have an  
9       amicus that shows us how the President's will  
10      could have been thwarted by that structure.

11                  GENERAL SAUER: And I --

12                  JUSTICE SOTOMAYOR: We have an amicus  
13      brief that shows us how that the President's  
14      will by that structure could have been  
15      thwarted.

16                  GENERAL SAUER: These kinds of  
17      historical examples, I think, have been  
18      considered in this Court's cases from Free  
19      Enterprise Fund and Seila Law and so forth.  
20      There's been a lively debate about that.

21                  JUSTICE SOTOMAYOR: So what do we do  
22      with Morrison?

23                  GENERAL SAUER: And the Court has  
24      come --

25                  JUSTICE SOTOMAYOR: What do we do with

1 Morrison and Wiener and Perkins?

2 GENERAL SAUER: Well, Morrison, for  
3 example, I think, is a really critical  
4 precedent here because what Morrison did is it  
5 repudiated the entire logic that supported the  
6 holding of Humphrey's Executor. It repudiated  
7 correctly the idea that there are these  
8 quasi-judicial and quasi-legislative powers  
9 that are outside the executive power and  
10 they're wandering around the executive branch  
11 and not in --

12 JUSTICE SOTOMAYOR: Yet you answered  
13 Justice -- the Chief Justice by saying that  
14 maybe we just need to look at each agency  
15 individually. So we can't leave that area.

16 By the way, your logic you're putting  
17 at risk by this. You're saying there's  
18 uncertainty. I think the uncertainty in the  
19 lower courts was not over Humphrey's Executor.  
20 It has been over the Court's most recent  
21 decisions, not because of Humphrey's Executor.

22 But you're putting at risk the  
23 independence of the Tax Court, of the Federal  
24 Claims Court, Article I courts. You're putting  
25 at risk the civil service. I don't see how

1       your logic could be limited.

2                   GENERAL SAUER: As to the non-Article  
3                   III courts, we haven't challenged the removal  
4                   restriction as to the non-Article III courts in  
5                   this case.

6                   JUSTICE SOTOMAYOR: Not yet. Not --  
7                   not yet. Not yet.

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

14                   JUSTICE SOTOMAYOR: Not yet.

15                   GENERAL SAUER: And the Court does --

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

18                   JUSTICE BARRETT: General Sauer --

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

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

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

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

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

1 brief -- there's one thing about philosophy and  
2 there's another thing about holdings.  
3 Certainly, the holdings of Humphrey's Executor  
4 doesn't necessarily support Wiener to its  
5 fullest extent.

6 GENERAL SAUER: We agree with that.

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

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

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

25 The Federal Reserve has been described

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

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

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

11 JUSTICE KAVANAUGH: Go ahead.

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

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

1       little bit hard to see how you stop.

2               And I think that that's one question.

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

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

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

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

1       officers that was in --

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

6                   Let's start with Article I courts.

7       How would you justify keeping those courts?

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

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

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

25                  JUSTICE KAGAN: Go ahead, please. No,

1 go ahead.

2 JUSTICE THOMAS: It's all right.

3 JUSTICE JACKSON: I'll go.

4 CHIEF JUSTICE ROBERTS: Well, I'll go.

5 (Laughter.)

6 CHIEF JUSTICE ROBERTS: Is it a  
7 possibility -- let's say you have an agency  
8 that is, I don't know, pick a number,  
9 85 percent is judicial, some of the judicial  
10 entities that have been talked about in -- in  
11 the briefs, and a smaller percentage is some  
12 executive function that they do, whether it's  
13 issuing rules or whatever.

14 Is there a principle that you would  
15 sever out the smaller little tail on the dog  
16 and -- and allow the judicial functions to  
17 go -- go on?

18 GENERAL SAUER: Quite possibly. That  
19 would be a sever -- I -- I think a unique  
20 severability question that would be distinct  
21 from the merits. So, if there was an agency  
22 that kind of straddles the line between two  
23 branches and -- that may raise a different  
24 severability question. But, for the mine run  
25 of these multi-member executive agencies,

1       they're clearly exercising executive power.

2       They're doing stuff that what, you know, the  
3       NLRB does, that the MSPB does --

4                   JUSTICE KAGAN: So how about those  
5       two?

6                   GENERAL SAUER: -- that, here, the FTC  
7       does.

8                   JUSTICE KAGAN: So you -- you --  
9       you're -- you are here saying the NLRB goes  
10      down, the MSPB goes down, notwithstanding that  
11      they do all their work or almost all their work  
12      in judicial-type proceedings.

13                  GENERAL SAUER: I wouldn't say goes  
14      down. I would say they are restored to  
15      democratic accountability --

16                  JUSTICE KAGAN: Yeah.

17                  GENERAL SAUER: -- the constitutional  
18      structure, but we have contended on the Court's  
19      emergency docket that those --

20                  JUSTICE KAGAN: The current versions  
21      of those agencies goes down.

22                  GENERAL SAUER: Yeah. We have  
23      challenged those in this Court, NLRB and S --  
24      MSPB and there -- there are others. This Court  
25      in Seila Law. I mean, there's various lists

1 out there where this --

2 JUSTICE JACKSON: General, you keep --

3 JUSTICE KAGAN: How about inferior  
4 officers?

5 GENERAL SAUER: We haven't challenged  
6 any restriction on inferior officers of the  
7 United States here.

8 JUSTICE KAGAN: Why wouldn't that also  
9 have to go?

10 GENERAL SAUER: That would --  
11 certainly, restrictions on inferior officers of  
12 the United States would be problematic because,  
13 of course, Myers involved an inferior officer.

14 JUSTICE KAGAN: Right.

15 GENERAL SAUER: The logic of Myers  
16 extends to inferior officers. We acknowledge,  
17 therefore, that --

18 JUSTICE KAGAN: And -- and, obviously,  
19 there are all kinds of inferior officers  
20 wielding executive power all over the place,  
21 yeah?

22 GENERAL SAUER: There are many.

23 JUSTICE KAGAN: Yeah. So -- so it  
24 seems as though executive officers.

25 How about employees?

1                   GENERAL SAUER: Again, we haven't  
2 challenged the restrictions on the employees,  
3 but --

4                   JUSTICE KAGAN: I know you haven't  
5 challenged it.

6                   GENERAL SAUER: Yeah.

7                   JUSTICE KAGAN: It's really -- the  
8 question is where does this lead, what does it  
9 take you to given what your primary rationale  
10 is.

11                  Employees are wielding executive power  
12 all over the place, and yet we've had civil  
13 service laws that give them substantial  
14 protection from removal for over a century.

15 How about those?

16                  GENERAL SAUER: Well, we do not  
17 challenge --

18                  JUSTICE KAGAN: I know what you don't  
19 challenge. You're missing the point.

20                  GENERAL SAUER: Well, then let me  
21 point the Court to -- if I could, to 7511(b),  
22 you know, of the civil service laws, the CSRA  
23 that we cite in our brief. That has a series  
24 of exceptions in it that provides no judicial  
25 relief at all to classes of employees they're

1       called. Now some of those employees are  
2       clearly officers, some aren't, but, for  
3       example, presidentially appointed officers,  
4       Senate-confirmed officials, those who exercise  
5       substantial policymaking or have confidential  
6       responsibilities, you know, members of the CIA  
7       for -- employees of the CIA and the Foreign  
8       Service. So there's already been a -- the  
9       political branches have in many ways already  
10      addressed issues with employees.

11           Now this Court obviously dealt with an  
12      employee issue in Lucia, and there was a  
13      dispute about that, various, you know, proposed  
14      lines between employee and inferior officer,  
15      all --

16           JUSTICE JACKSON: General --

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

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

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

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

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

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

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

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

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

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

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

1 power? That's a totally different set of  
2 questions. Those are hard questions.

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

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

19 So it seems to me that that greater  
20 power, we should at least think about whether  
21 it should include the power to determine the  
22 term of office, the extent to which people can  
23 be removed. And I appreciate that Article I  
24 has -- Article II has some language in it that  
25 you're pointing to, but, as Justice Sotomayor

1 pointed out, the Constitution does not speak  
2 specifically to removal.

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

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

15 JUSTICE JACKSON: Is that because --

16 GENERAL SAUER: For Congress to --

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

24 You -- you seem to -- to think that --  
25 that there's something about the President that

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

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

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

21            JUSTICE JACKSON: Why?

22            GENERAL SAUER: -- and confer on them  
23        broad --

24            JUSTICE JACKSON: Why? Why does it  
25        lack the -- the Constitution does not say that

1 Congress cannot create an independent agency,  
2 so what is it about your argument that requires  
3 us to reach that result?

4 GENERAL SAUER: We disagree with that.

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

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

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

24 GENERAL SAUER: May --

25 CHIEF JUSTICE ROBERTS: You can answer

1 the question, yes.

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

7 CHIEF JUSTICE ROBERTS: Thank you.

8 Justice Thomas?

9 Justice Alito?

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

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

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

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

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

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

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

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

1 the removal power.

2 JUSTICE ALITO: How about Myers?

3 GENERAL SAUER: Myers was also very

4 clear on that in 1926. And, in fact,

5 Humphrey's Executor itself paid lip service to

6 it even though its heart was far from it.

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

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

1 JUSTICE ALITO: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Sotomayor?

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

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

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

25 GENERAL SAUER: I'd say two things in

1 response to that. I think the Court was  
2 correct in the following decisions: Ex Parte  
3 Hennen, Parsons, Shurtleff, Myers --

4 JUSTICE SOTOMAYOR: Those all  
5 involved --

6 GENERAL SAUER: -- Seila Law.

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

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

22 Why are you so sure that Congress  
23 would have preferred to have the independence  
24 narrowed than not to have the agency at all?  
25 Some of my colleagues have suggested in prior

1 cases that we shouldn't be engaged in the  
2 severability actions at all. But, here, you  
3 are arguing that, no, we should be doing that.  
4 Why -- are you going to be consistent?

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

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

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

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

24 CHIEF JUSTICE ROBERTS: Justice Kagan?  
25 JUSTICE KAGAN: General, would you

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

10                   Easy enough to agree with, right?

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

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

19                   (Laughter.)

20                   GENERAL SAUER: Or -- or a codicil.

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

23                   (Laughter.)

24                   JUSTICE KAGAN: -- you know, because  
25 what I was saying was -- and maybe you knew

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

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

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

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

24 And -- and those are, although we've  
25 said that this is executive power in some

1 sense, but they're legislative functions.

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

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

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

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

25 JUSTICE KAGAN: Yeah.

1                   GENERAL SAUER: And -- and if the  
2 Court said --

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

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

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

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

1 them too.

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

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

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

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

6 So the separation --

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

24 GENERAL SAUER: You have control over  
25 the executive branch, which he must and does

1 have under our Constitution. And, again, if  
2 that's really legislating, then there's a  
3 separate constitutional problem that the  
4 legislative powers also have been taken away  
5 from Congress.

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

15 JUSTICE KAGAN: Thank you, General.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Gorsuch?

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

1 toothless with time.

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

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

9 JUSTICE GORSUCH: Is the water warm?

10 GENERAL SAUER: Is the water warm?

11 JUSTICE GORSUCH: Warm.

12 GENERAL SAUER: Suffice to say -- let  
13 me say one thing in response to that. The --  
14 the -- it is much easier to cure -- obviously,  
15 members of this Court have debated the scope of  
16 the non-delegation doctrine. The challenge of  
17 finding the right standard there is something  
18 we've discussed in the past.

19 Here, though, this wolf comes as a  
20 wolf, right? I mean, the restriction on  
21 executive power is right there in the statute.  
22 It's easy to remedy by excising the removal  
23 restriction in the past group of cases.

24 JUSTICE GORSUCH: There are a lot of  
25 wolves around here, General. The one thing our

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

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

25 JUSTICE GORSUCH: And let me ask you

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

7                   Thoughts?

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

18                   JUSTICE GORSUCH: They would be  
19 adjunct.

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

1 or executive power.

2 JUSTICE GORSUCH: The adjudication  
3 of --

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

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

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

12 JUSTICE GORSUCH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Kavanaugh?

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

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

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

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

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

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

1       Myers as -- and Marbury itself as teeing up  
2       some of those issues.

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

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

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

25                  However, our constitutional structure

1 dictates that the President cannot do so. He  
2 cannot bind the hands of his successors, or the  
3 encroached-upon branch cannot consent to the  
4 encroachment, you know, and -- and -- and,  
5 therefore, disrupt our constitutional  
6 structure.

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

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

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

22 GENERAL SAUER: That's exactly right.

23 JUSTICE KAVANAUGH: Okay. On stare  
24 decisis, you used the word "dangerous," I  
25 think, in your opening about the independent

1 agencies. One of the things we consider are  
2 the -- not only how wrong it was and reliance  
3 interests but the real-world impacts. And I --  
4 I think I'll just give you a little bit to  
5 explain why you used the word "dangerous" when  
6 talking about independent agencies, if I heard  
7 that correctly.

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

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

1 the agencies?

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

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

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

1 to independent agencies or to any agencies for  
2 that matter. You want to speak to the major  
3 questions doctrine and how that fits into your  
4 answer?

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

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

22 I have some real doubts about that  
23 argument. We don't need to reach it, of  
24 course, if we agree with you on the first  
25 question. I have some doubts about that

1 because that really would be an end run around  
2 the exceptions you had identified earlier for  
3 the Federal Reserve or for the article --  
4 non-Article III courts.

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

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

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

1 continuing to exercise their statutory  
2 authority.

3 JUSTICE KAVANAUGH: Don't you have a  
4 problem again here with Marbury on recognizing  
5 mandamus? I mean --

6 GENERAL SAUER: Mandamus has --

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

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

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

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

22 JUSTICE KAVANAUGH: Well, they're --

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

1 these issues.

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

10 JUSTICE KAVANAUGH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice  
12 Barrett?

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

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

1        might be an adjunct to the power of  
2        appointment, which would mean that inferior  
3        officers didn't come within it.

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

8                Is there any reason for us to be  
9        specific about it in this case?

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

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

1                   So I think the text of the  
2 Constitution supports what you've referred to  
3 as the strong theory, and that's, I think,  
4 repeated again and again in this Court's  
5 decisions where it started with the Vesting  
6 Clause, and, of course, it's the logic of  
7 Madison's statements on the floor of Congress  
8 in the Decision of 1789.

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

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

22                   And it seems to me that, and there's  
23 some dispute among this in the amicus briefs  
24 and the scholarship about which portion of  
25 Article II or if it's in the Appointments

1 Clause, would be the source of this authority.

2                   And is there any reason we have to  
3 decide that here given that it might be  
4 relevant to some of the harder questions about  
5 limiting principles?

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

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

18                   JUSTICE BARRETT: So we have to do  
19 Vesting Clause?

20                   GENERAL SAUER: We think the Vesting  
21 Clause is clearly -- provides at least the  
22 clearest textual basis for it. I mean, when  
23 Madison said, for example, the power of  
24 overseeing and controlling those who  
25 executive -- who execute the laws is the

1 quintessential executive power, that's the  
2 logic of it. Could the Court devise a  
3 holding that -- based solely on the  
4 Appointments Clause? That's possible, but --

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

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

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

24                   But I guess the question that I have,  
25    is that part of the bargain? Because

1 legislative vetoes were pretty ubiquitous  
2 throughout the Twentieth Century. And, of  
3 course, we held them unconstitutional in  
4 Chadha.

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

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

24 GENERAL SAUER: Two things. INS  
25 against Chadha correctly recognized that there

1 was legislative control.

2 JUSTICE BARRETT: I wasn't questioning  
3 Chadha.

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

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

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

25 Justice Kagan was pointing out they

1 now exercise a lot of rulemaking power.  
2 There's a lot of adjudicatory power. And I'm  
3 not saying -- I'm not questioning Chadha. I  
4 think Chadha rightly, as you said, made the  
5 separation-of-powers point that Congress can't  
6 retain this power for itself.

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

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

21 JUSTICE BARRETT: I understand that.

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

24 JUSTICE BARRETT: Let me ask you a  
25 question about stare decisis. How should we

1 think about reliance interests when it comes to  
2 reliance interests in government structure?

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

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

22 GENERAL SAUER: I think Justice  
23 Gorsuch's opinion for the plurality in Ramos  
24 addresses this when you -- when he -- when he  
25 talks about how you're weighing -- you know,

1 here, you're weighing an injury to the  
2 constitutional structure. That's not a valid  
3 reliance interest. The relevant reliance  
4 interest is the reliance of the American people  
5 in separation of powers in protect -- defending  
6 our liberties.

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

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

22 JUSTICE BARRETT: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Jackson?

25 JUSTICE JACKSON: So I guess I -- I

1 really don't understand why the agencies aren't  
2 answering to Congress. Congress established  
3 them and can eliminate them. Congress funds  
4 them and can stop.

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

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

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

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

1 or mechanisms of control.

2                   GENERAL SAUER: The Constitution  
3 requires clear lines of political  
4 accountability. So, if Congress is sort of  
5 informally actually controlling these -- these  
6 agencies through, like, oversight queries --

7                   JUSTICE JACKSON: Not informally. We  
8 have a statute. But let me ask you another  
9 question.

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

21                  So having a President come in and fire  
22 all the scientists and the doctors and the  
23 economists and the Ph.D.s and replacing them  
24 with loyalists and people who don't know  
25 anything is actually not in the best interest

1 of the citizens of the United States. This is  
2 what I think Congress's policy decision is when  
3 it says that these certain agencies we're not  
4 going to make directly accountable to the  
5 President.

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

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

22 JUSTICE JACKSON: No, we can have, but  
23 I'm asking you about Congress's choice,  
24 Congress's decision that in these particular  
25 areas we would like to have independence. We

1 don't want the President controlling. I guess  
2 what I don't understand from your overarching  
3 argument is why that determination of Congress,  
4 which makes perfect sense given its duty to  
5 protect the people of the United States, why  
6 that is subjugated to a concern about the  
7 President not being able to control everything.

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

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

23 JUSTICE JACKSON: And what I'm -- what  
24 I'm positing is that -- that Congress's  
25 decision here is not shaving away the

1 President's control. You cast it as that, and  
2 I appreciate that, but, instead, what Congress  
3 is doing is saying we'd like to have  
4 independent, nonpartisan experts working on  
5 certain issues for the good of the American  
6 people. And I understand that the President  
7 would rather control them, but it's not really  
8 his decision in the overall scheme of things, I  
9 say. Why am I wrong about that?

10 GENERAL SAUER: Under the  
11 constitutional design --

12 JUSTICE JACKSON: It is the  
13 President's decision as to --

14 GENERAL SAUER: It is.

15 JUSTICE JACKSON: -- how the  
16 government is structured and who should be  
17 doing what.

18 GENERAL SAUER: No, that is largely  
19 Congress's decision with certain exceptions.  
20 Congress cannot violate the separation of  
21 powers and threaten all of our liberties in the  
22 way that it structures the government and has  
23 done so here.

24 JUSTICE JACKSON: One last question.  
25 I -- I appreciate the effort to try to make

1 this not seem as big a deal as it might be by  
2 focusing only on the FTC and saying this is  
3 really just about what happens and we'll cross  
4 the bridge of the other agencies when we get to  
5 it. But can you just give us a sense because  
6 you -- I'm sure you must know this of what  
7 other agencies there are that have the kind of  
8 removal protections that are at issue here?  
9 There are some, what, two dozen?

10 GENERAL SAUER: That's what Seila Law  
11 said. That's probably a good accounting.  
12 And -- and, obviously, we -- we have challenged  
13 four of them in this Court, and we're  
14 challenging a handful of others in other courts  
15 as well.

16 JUSTICE JACKSON: But you could -- you  
17 could challenge the National Labor Relations  
18 Board, the Nuclear Regulatory Commission, the  
19 Commission on Civil Rights, potentially the  
20 Sentencing Commission, the Occupational Self --  
21 Safety and Health Review Commission, the  
22 Product -- Consumer Product Safety Commission.  
23 All of these have that kind of structure.

24 GENERAL SAUER: I don't know if all of  
25 those are on the list. Certainly, some of them

1 are. And some of them we're -- and many of  
2 these agencies we are litigating, including in  
3 this Court.

4 JUSTICE JACKSON: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 Mr. Agarwal.

8 ORAL ARGUMENT OF AMIT AGARWAL

9 ON BEHALF OF THE RESPONDENTS

10 MR. AGARWAL: Mr. Chief Justice, and  
11 may it please the Court:

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

24 On the merits, multi-member  
25 commissions with members enjoying some kind of

1 removal protection have been part of our story  
2 since 1790. So, if Petitioners are right, all  
3 three branches of government have been wrong  
4 from the start. Congress and prior Presidents  
5 have been wrong to jointly create early  
6 founding-era commissions and more than two  
7 dozen traditional independent agencies since  
8 1887. And this Court was wrong to repeatedly  
9 bless those laws and to unanimously uphold the  
10 exact same removal provision at issue here in  
11 Humphrey's Executor almost a century ago.

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

1 on the Federal Reserve and Article I courts.

2                   Finally, stare decisis militates  
3 against overruling a century of precedent at  
4 this late date. The political branches are  
5 more than up to the task of finding reasonable  
6 legislative solutions that strike an  
7 appropriate balance. That kind of legislative  
8 solution is far preferable than abandoning a  
9 foundational precedent on which so much of  
10 modern governance is based.

11                   I welcome the Court's questions.

12                   JUSTICE THOMAS: Was Humphrey's  
13 Executor an executive branch case?

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

22                   JUSTICE THOMAS: Did the Court in  
23 Humphrey's Executor distinguish it from  
24 Swift -- from its earlier precedent in Myers?

25                   MR. AGARWAL: The Court, yes,

1       absolutely distinguished --

2                   JUSTICE THOMAS: And didn't it --

3                   MR. AGARWAL: -- the FTC from its

4       earlier precedent in Myers.

5                   JUSTICE THOMAS: Wasn't that

6       distinction based on its function more as a

7       quasi-legislative, quasi-judicial agency as

8       opposed to an executive branch agency?

9                   MR. AGARWAL: It was based in part on

10       functions, Justice Thomas, but it was also

11       based on the placement of the agency and the

12       considered determination of Congress and the

13       President together that this was the kind of

14       agency that should be insulated from

15       presidential at-will removal.

16                   JUSTICE THOMAS: Now you rely on the

17       reliance interests in stare -- in -- the

18       reliance interests of Congress and reliance

19       interests, I guess, of others, of the agency

20       heads on the structure of this agency for so

21       many years. What is it, 70 years, you say?

22                   MR. AGARWAL: The -- the FTC is 111

23       years old.

24                   JUSTICE THOMAS: But from Humphrey's

25       Executor?

1 MR. AGARWAL: Ninety years.

2 JUSTICE THOMAS: How would you have  
3 applied that in the overruling of Swift v.  
4 Tyson, your reliance interests?

5 MR. AGARWAL: Yes. So Swift v. Tyson  
6 deals with a completely different kind of  
7 situation with respect to the Erie doctrine.  
8 It was not --

9 JUSTICE THOMAS: But -- so there was  
10 no reliance interests?

11 MR. AGARWAL: So reliance interests  
12 with respect to choice of law determinations?

13 JUSTICE THOMAS: Yeah, mm-hmm.

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

1 control, of just one person.

2 And that reliance interest would be  
3 completely destroyed by retroactively  
4 destroying the independence of traditional  
5 independent agencies.

6 JUSTICE THOMAS: So this is -- I don't  
7 know what a traditional executive --  
8 administrative agency is, but could Congress  
9 limit the removal authority of the President in  
10 a newly created executive branch agency?

11 Let's say, for example, a few years  
12 ago EPA became a -- an executive branch agency.  
13 It was more of an administrative agency, a  
14 sub-cabinet. Could it, in doing that, limit  
15 the removal authority of the President of the  
16 head of the EPA or Homeland Security?

17 MR. AGARWAL: I think it is within the  
18 realm of possibility, Justice Thomas. And I  
19 don't think that the Court *ex ante* should adopt  
20 any kind of categorical role precluding that --

21 JUSTICE THOMAS: No, I'm trying to --  
22 again, the SG was asked about the logic of his  
23 argument. What's the logic of yours? How far  
24 does it carry you? If this is an executive  
25 branch agency, in your distinction, as this is

1 a multi-member agency, why doesn't the logic  
2 take you to a single-head agency also?

3 MR. AGARWAL: So you're asking whether  
4 a single-headed agency could be converted into  
5 a --

6 JUSTICE THOMAS: No. Well, I -- I  
7 haven't gotten there yet, but that -- that  
8 would be the next step in order to make them  
9 removable, to make the -- the heads of the  
10 agency or the principals move -- removable.

11 MR. AGARWAL: Mm-hmm. So there --  
12 there are constraints. One of the constraints  
13 is that the creation of the agency and the  
14 insulation from presidential control cannot  
15 interfere with the President's conclusive and  
16 preclusive constitutional authorities.

17 JUSTICE THOMAS: But you still haven't  
18 told me why can't tomorrow morning Congress  
19 decide that the secretary of Congress should be  
20 removable in a -- should limit the President's  
21 authority to remove the Secretary of Commerce?

22 MR. AGARWAL: That would be squarely  
23 foreclosed by this Court's decision in Seila  
24 Law as we understand it. That is to say, this  
25 Court in Seila Law held that there is a

1 particular serious threat to individual liberty  
2 that is posed by single-headed agencies that  
3 wield significant executive power.

4 JUSTICE KAVANAUGH: Could -- could  
5 Congress convert all these --

6 JUSTICE THOMAS: The multi-member.

7 JUSTICE KAVANAUGH: -- departments  
8 into multi-member commissions, the Commerce,  
9 EPA, Department of Homeland Security,  
10 Department of State, convert them all into  
11 multi-member commissions and make them  
12 removable only for cause?

13 MR. AGARWAL: No. I think, Justice  
14 Kavanaugh, we're looking at three buckets here.  
15 In one bucket including the Department of  
16 State, you would have departments that under no  
17 conceivable circumstance could practicably be  
18 converted to a multi-member commission.

19 JUSTICE KAVANAUGH: Why?

20 MR. AGARWAL: Because they are  
21 wielding so many of the President's conclusive  
22 and preclusive constitutional authorities. But  
23 that is a relatively small bucket. Let's say  
24 Department of State --

25 JUSTICE KAVANAUGH: That's State,

1       Justice, and Defense?

2                    MR. AGARWAL: -- Justice, Defense,  
3       Homeland Security probably.

4                    JUSTICE GORSUCH: Are you -- are you  
5       saying, though, that -- that they're limited by  
6       practical concerns or constitutional concerns?

7                    MR. AGARWAL: Constitutional concerns.

8                    JUSTICE GORSUCH: What -- what --  
9       what --

10                  MR. AGARWAL: And then practical  
11       concerns will come up as well.

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

20                  MR. AGARWAL: Absolutely. And the  
21       constitutional problem in our view is that  
22       Congress cannot limit the President's authority  
23       over officers who are wielding the President's  
24       conclusive and preclusive constitutional  
25       powers. And that is a line that goes all the

1 way back to *Marbury v. Madison*. It's a through  
2 line through this Court's jurisprudence.

3 JUSTICE KAVANAUGH: Does it include --

4 JUSTICE BARRETT: But the FTC has  
5 the --

6 MR. AGARWAL: Justice Jackson's -- I'm  
7 sorry.

8 JUSTICE BARRETT: -- the FTC has the  
9 authority to enter foreign agreements, right?  
10 I mean, how do you -- how do you decide what's  
11 conclusive and preclusive?

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

20 JUSTICE KAVANAUGH: You talked --

21 CHIEF JUSTICE ROBERTS: So --

22 JUSTICE KAVANAUGH: -- about three --  
23 I'm sorry.

24 CHIEF JUSTICE ROBERTS: I just want to  
25 make sure I understand because it's fairly

1 basic.

2 I mean, there -- are there some  
3 cabinet departments that you say Congress could  
4 just take over? Department of Veterans  
5 Affairs, Department of Education, they think,  
6 well, we can do -- experts can do a better job  
7 of it and so we're going to say there is now an  
8 agency, the agency for education, and it will  
9 be run by -- whether it's a multi-member group  
10 or not, we think it's important for Congress to  
11 have greater control over education, so we're  
12 creating this new agency and its authorities  
13 will be everything that the current Department  
14 of Education has, except it will be run by a  
15 commission and they can only be removed for  
16 cause.

17 Is that all right?

18 MR. AGARWAL: Yeah, I think that it is  
19 probably within the realm of possibility for --  
20 for agencies, yes, Justice -- Chief Justice  
21 Roberts. And the constraint historically has  
22 been that these types of determinations have  
23 been made through a process of political  
24 accommodation between Congress and the  
25 President, and over the course of more than 200

1 years, we have not seen --

2 CHIEF JUSTICE ROBERTS: Yeah. Well,  
3 I'm sorry to interrupt, but sometimes that  
4 accommodation is greater than in other times.  
5 I mean, we have situations, let's say, where  
6 the Congress, both houses are controlled by one  
7 party and the President is of the -- the same  
8 party, and they may decide that the government  
9 would be structured better by -- by taking over  
10 these entities.

11 And so -- so which -- which  
12 departments could Congress impose a  
13 multi-member commission instead of a secretary?

14 MR. AGARWAL: So -- so, if you're  
15 asking about which ones could be converted  
16 today --

17 CHIEF JUSTICE ROBERTS: Yeah.

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

1 this Court annunciated in Trump --

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

4 MR. AGARWAL: Including under the --  
5 the analysis that this Court set out just last  
6 term in Trump v. United States, where, at pages  
7 620 to 621, the Court explained that the  
8 President does have a conclusive and preclusive  
9 authority with respect to certain criminal  
10 investigations and prosecutions, and that  
11 informed the Court's determination about  
12 whether the acting attorney general was subject  
13 to at-will presidential removal.

14 It turns out that the vast majority of  
15 these executive departments do have some kind  
16 of criminal investigative authority, including  
17 armed law enforcement agents authorized to make  
18 arrests. Now that is a -- that's a significant  
19 bucket. You probably have a very --

20 JUSTICE GORSUCH: Every agency in the  
21 government today has armed police officer --  
22 their own police force. Is that really the  
23 test of what's conclusive and preclusive?

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

25 JUSTICE GORSUCH: I mean, that -- it

1       rhymes, but I don't know what it means.

2                    MR. AGARWAL: I -- Justice Gorsuch, I  
3        think you're making a good point insofar as  
4        you're saying there's probable -- insofar as  
5        Your Honor's point is that there's a lot of  
6        what these agencies do that would not be deemed  
7        conclusive and preclusive, and we absolutely  
8        acknowledge that. And the --

9                    JUSTICE GORSUCH: So the answer to the  
10       Chief Justice's question is tomorrow we could  
11       have the labor commission, the education  
12       commission, the environmental commission,  
13       rather than departments of interior and so  
14       forth, right?

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

19                  JUSTICE GORSUCH: So it has -- what's  
20       the percentage then?

21                  MR. AGARWAL: Then -- so I -- I don't  
22       want to pretend, Justice Gorsuch, that I --  
23       that I have --

24                  JUSTICE GORSUCH: And what -- I want  
25       to know where the threshold of preclusive and

1 conclusive comes in.

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

4 JUSTICE GORSUCH: Is it a mere  
5 scintilla?

6 MR. AGARWAL: I -- I think that's  
7 what -- I think you would have a separation-of-  
8 powers problem if an agency, even if it's a  
9 vast agency wielding a broad panoply of powers,  
10 if one of those powers is the President's  
11 conclusive and preclusive authority and the  
12 officers who are exercising that power are  
13 insulated --

14 JUSTICE GORSUCH: So -- so -- so long  
15 as one person in the agency's exercising  
16 conclusive and preclusive, whatever that means,  
17 that's enough?

18 MR. AGARWAL: Yeah. So it's enough to  
19 have a separation of powers. And I wouldn't  
20 just say a person. I would say a principal  
21 officer. It's enough to generate a  
22 separation-of-powers problem. And what is the  
23 remedy for that problem, I think, is an  
24 analytically more difficult question.

25 JUSTICE GORSUCH: What is the

1       different --

2                   JUSTICE KAGAN: It -- it -- it strikes  
3       me, Mr. Agarwal, as I listen to this, you know,  
4       if you go back to let's say the Education  
5       Department, what the Chief Justice -- which the  
6       Chief Justice raised, that the more realistic  
7       danger here is that we'll have an Education  
8       Department as authorized by Congress, by law,  
9       that won't have any employees in it.

10                  MR. AGARWAL: I -- I think you're  
11       absolutely right, Justice Kagan, that there are  
12       competing dangers here, and it -- it makes a  
13       whole lot of sense to us to weigh the  
14       real-world dangers that we know are a virtual  
15       certainty that would result from adopting  
16       Petitioners' constitutional theory and to  
17       contrast those with purely hypothetical risks  
18       that have never materialized over the course of  
19       American history.

20                  And even in the unlikely event that  
21       Congress tomorrow was to try to start taking  
22       cabinet departments that have been around for a  
23       long time and to convert them wholesale into  
24       multi-member agencies, which they have never  
25       tried to do before, but even if they tried to

1 do that, of course, that would be subject to a  
2 presidential veto.

3 JUSTICE BARRETT: Well, I think  
4 that --

5 JUSTICE ALITO: How does your --

6 JUSTICE BARRETT: -- there's one thing  
7 history shows, is that we can't anticipate what  
8 might happen. And so we might be able to  
9 predict what is likely to happen in the very  
10 short term, but we don't know. I mean, if  
11 we -- if we decide this case in your favor now,  
12 we don't know what a Congress in 15 or 20 or 30  
13 years might do. We might be able to predict  
14 what's likely in -- in the short term. So, I  
15 mean, this is going to have longer-term  
16 implications.

17 MR. AGARWAL: So absolutely, but let  
18 me make two points on that. First, there is  
19 currently no constraint on -- there's currently  
20 no case that has ever held that Congress cannot  
21 give for-cause removal protections to principal  
22 officers serving on -- to a single layer of  
23 for-cause removal protection for single -- for  
24 principal officers serving on a multi-member  
25 commission, and nevertheless, notwithstanding

1 the absence of any such precedent throughout  
2 American history, we have not seen an epidemic  
3 of these problems. In fact, we haven't seen  
4 this problem materializing at all.

5 But let me make one other point about  
6 the real-world danger that is imminent right  
7 now that we know will happen, and that is that  
8 if Petitioners get their way, everything is on  
9 the chopping block. And we're not just talking  
10 about the FTC. Opposing counsel said we're not  
11 challenging right now the Federal Reserve.  
12 We're not challenging Article I courts. But  
13 there is absolutely no principled basis for  
14 carving those very important institutions out  
15 of their rule and --

16 JUSTICE ALITO: Well, you're right  
17 that the -- the Solicitor General was pressed  
18 quite legitimately about things like the Tax  
19 Court and the Claims Court, et cetera, et  
20 cetera. But I don't know that you can make the  
21 argument that his -- the logic of his argument  
22 is going to cause these allegedly revolutionary  
23 results without being prepared to explain more  
24 concretely than you have the limits of your own  
25 argument.

1                   I mean, I could go down the list with  
2 you of the cabinet officers and ask you whether  
3 you think they could be headed by a  
4 multi-member commission whose members are not  
5 subject to at-rule -- at-will removal by the  
6 President. Shall we do that? How about the --  
7 how about Veterans Affairs? How about  
8 Interior? Labor? EPA? Commerce? Education?  
9 What am I missing?

10                  JUSTICE GORSUCH: Agriculture.

11                  (Laughter.)

12                  JUSTICE ALITO: Agriculture.

13                  JUSTICE JACKSON: Mr. Agarwal, are you  
14 prepared --

15                  CHIEF JUSTICE ROBERTS: I'm sorry,  
16 there's a question before --

17                  JUSTICE ALITO: Well, there was a --  
18 there was a question there.

19                  MR. AGARWAL: Yes. So I don't want to  
20 pretend to greater certainty than I have about  
21 the full gamut of statutory authorities vested  
22 in all those other departments. I will say  
23 that based on a very quick preliminary  
24 analysis, it appeared to us that the vast  
25 majority of executive departments wield at

1 least some of the conclusive and preclusive  
2 authorities that this Court has recognized in  
3 the past, including criminal investigative and  
4 prosecutorial authorities and also authorities  
5 implicating national security and foreign  
6 relations.

7 Now that is not to say, Justice Alito,  
8 I think you're absolutely right to say for the  
9 vast -- for a lot of those, you could probably  
10 take those out, and at that point, there's  
11 going to be a fair question about whether --  
12 whether Congress and -- Congress and the  
13 President, acting together, could determine at  
14 some point that there is a need for a  
15 multi-member body of experts to preside over  
16 certain government functions.

17 And what I would say is I don't think  
18 that you should categorically rule out that  
19 possibility as a matter of constitutional law.  
20 And I don't -- I can't sit here today and tell  
21 you that there's a distinction of  
22 constitutional proportions, for example,  
23 between the Department of Labor and the  
24 National Labor Relations Board.

25 JUSTICE ALITO: Well, how about the --

1 the Post Office at the time of Myers? How does  
2 your exclusive and preclusive theory account  
3 for Myers? How can it be that the Postmaster  
4 at that time exercised exclusive Article II  
5 power, but a Federal Trade Commissioner does  
6 not?

7 MR. AGARWAL: So I would say three  
8 things about that. First, the conclusive and  
9 preclusive standard does not have to be the  
10 sole and exclusive limiting factor. Second,  
11 there is a provision that Justice Barrett  
12 referred to in the colloquy with opposing  
13 counsel about the Take Care Clause, and it is  
14 conceivable that at least in some circumstances  
15 the Take Care Clause might itself, not always  
16 but sometimes, impose a conclusive and  
17 preclusive stand -- standard, for example, with  
18 respect to officers like the Postmaster in  
19 Myers who are deemed to -- to -- to possess  
20 purely executive functions, as this Court  
21 unanimously in Humphrey's Executor and then  
22 again in Wiener, unanimously characterized the  
23 functions of the Postmaster in Myers as purely  
24 and obviously just executive.

25 So that's a second -- that's a second

1 constraint.

2 JUSTICE KAVANAUGH: When you answered  
3 Justice Alito about the agencies exercising  
4 investigative power and, thus, there would be a  
5 question whether they could be made independent  
6 multi-member commissions, don't a lot of the  
7 now independent agencies also exercise that  
8 kind of investigative power?

9 At least from my experience, it's very  
10 hard to get into the weeds of the particular  
11 powers exercised by the FTC and distinguish it  
12 from some of the powers exercised by some of  
13 the other cabinet agencies that we  
14 traditionally think of as executive or the FCC  
15 or the SEC. All of those seem to -- the FERC,  
16 NLRB -- when you get into them all. So what --  
17 what's your answer to that?

18 MR. AGARWAL: So my -- my answer is  
19 the criminal investigative authority is  
20 different. And, certainly, a lot of these  
21 agencies have civil investigative authority,  
22 including the FTC. As we understand it, this  
23 Court's precedent just from last term in Trump  
24 v. United States, criminal investigations and  
25 prosecutions are in a different category at

1 least as a general matter. And if the logical  
2 import of that analysis is that -- is that  
3 there are certain functions that cannot be  
4 wielded even by traditional independent  
5 agencies, then so be it.

6 JUSTICE GORSUCH: Counsel --

7 MR. AGARWAL: That's the law of the  
8 land.

9 JUSTICE GORSUCH: -- that's right --

10 JUSTICE KAVANAUGH: Can I --

11 JUSTICE GORSUCH: -- that's right --  
12 I'm sorry.

13 JUSTICE KAVANAUGH: Go ahead.

14 JUSTICE GORSUCH: Go ahead. Please go  
15 ahead.

16 JUSTICE KAVANAUGH: No, go ahead.

17 JUSTICE GORSUCH: All -- all right. I  
18 understand conclusive and preclusive entirely  
19 as we used it in -- when you're speaking about  
20 executive power, can -- can the President  
21 control what's done in his departments. I get  
22 that. And a criminal prosecution's a good  
23 example.

24 I do not understand it as you use it.  
25 Why isn't it just as conclusive and preclusive

1 to decide whether to bring charges under the  
2 FTCA Act --

3 MR. AGARWAL: Civil charges.

4 JUSTICE GORSUCH: -- against somebody,  
5 civil versus criminal. It's a conclusive and  
6 preclusive decision about enforcement decision  
7 of a power of the federal government against  
8 individuals across the country.

9 MR. AGARWAL: So there's a legal  
10 answer and there's a historical answer, and  
11 they might blend, Justice Gorsuch.

12 And the legal answer is that we don't  
13 have any controlling authority that has ever  
14 held that civil enforcement as a categorical  
15 matter is the kind of thing that can never be  
16 vested in a multi-member agency that enjoys a  
17 modicum of insulation from political pressure.

18 And we know that, for example, from  
19 this Court's unanimous decision in Humphrey's  
20 Executor, where you had that kind of civil  
21 enforcement taking place, and a unanimous  
22 court, including all four justices from Myers,  
23 said that's okay. And the kind of civil  
24 enforcement that was going on there, you had  
25 complaints being issued, you had

1 cease-and-desist orders --

2 JUSTICE GORSUCH: Cease-and-desist  
3 orders but -- but not lawsuits in court. They  
4 had to go to court. And -- and I'm just  
5 curious, though, are -- fine, I accept -- I  
6 accept your point, it's a good point about  
7 Humphrey's, but why isn't that conclusive and  
8 preclusive decision whether to use the federal  
9 government's full -- full power in prosecution  
10 where you can seek fines and -- and incur all  
11 the -- all the -- all of the penalties that are  
12 associated with violating the FTC Act?

13 MR. AGARWAL: So I think part of the  
14 answer is historical and part of the answer is  
15 functional. And on the historical part, we  
16 have had all kinds of civil enforcement of  
17 federal statutes taking place, including just  
18 private statutes that authorize private  
19 attorney generals, as this Court has -- has  
20 recognized in many, many cases. So you have a  
21 long, long history and tradition of private  
22 actors wielding, kind of enforcing civilly  
23 federal statutes.

24 Now I take -- I take the point --

25 JUSTICE GORSUCH: So --

1                   MR. AGARWAL: -- that civil  
2 enforcement on behalf of the government of the  
3 United States --

4                   JUSTICE GORSUCH: That's not the  
5 executive power, but criminal actions is the  
6 executive power?

7                   MR. AGARWAL: Yeah, I would not say  
8 that it --

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

11                  MR. AGARWAL: No, I would not -- I  
12 would not put it that way. I would not say  
13 it's not executive. And, in fact, in Seila --  
14 in Seila Law --

15                  JUSTICE GORSUCH: So it is executive?

16                  MR. AGARWAL: Yeah. In -- in Seila  
17 Law, this Court said it's not only executive,  
18 it's quintessentially executive. And that's  
19 okay because agencies like the FTC also engage  
20 in adjudicative activities, and that would be  
21 deemed quintessentially judicial and,  
22 nevertheless, they're not subject to plenary  
23 removal on the part of the judiciary. They  
24 engage in rulemaking that could be considered  
25 quintessentially legislative, and,

1 nevertheless, they're not subject to plenary  
2 control on the part of the legislature.

3 The issue is whether -- not whether  
4 it's executive in some sense. The issue is  
5 whether it's constitutionally committed to the  
6 President's sole and exclusive discretion. And  
7 as a matter of history and precedent, we  
8 haven't gotten there yet.

9 JUSTICE GORSUCH: So even some  
10 quintessentially executive functions in your  
11 view are not vested in the President of the  
12 United States?

13 MR. AGARWAL: I would not say that --  
14 I would not put it in this -- I would not say  
15 that that -- yes, I would -- I would say  
16 they're not --

17 JUSTICE GORSUCH: I think you have to  
18 say yes to that based on --

19 MR. AGARWAL: They're --

20 JUSTICE GORSUCH: -- what you've just  
21 given us.

22 MR. AGARWAL: They're not  
23 constitutionally committed to the person of the  
24 President and to his sole and exclusive  
25 discretion, yes.

1 JUSTICE JACKSON: Didn't we suggest as  
2 much in Humphrey's? I mean, didn't we -- we  
3 sort of -- we have some lines in Humphrey's  
4 that say, to the extent that it exercises any  
5 executive function as distinguished from  
6 executive power in the constitutional sense, it  
7 does so to discharge -- it does so in the  
8 discharge and effectuation of its  
9 quasi-legislative or quasi-judicial powers.

10 So I thought that in Humphrey's we  
11 recognized this idea that you could have an  
12 agency that's exercising legislative or  
13 judicial powers still engaging in some  
14 executive function, and that doesn't make it an  
15 executive agency.

16 MR. AGARWAL: That is exactly right.  
17 And on top of that, we have a lot of agencies  
18 over a long period of time engaging in all  
19 manner of civil enforcement of federal  
20 statutes.

21 And yet we do not have a single  
22 example of any case from this Court in more  
23 than two centuries that has ever held that a  
24 single layer of for-cause removal protection  
25 cannot apply to a principal officer of an

1 agency wielding that kind of civil enforcement  
2 function.

3 JUSTICE JACKSON: And so I think  
4 that's like your real point. In other words,  
5 you're not asking for some sort of conclusive  
6 or preclusive rule. That's not your burden in  
7 this situation.

8 You are just saying that the way the  
9 law has been interpreted by the Court here, the  
10 existence of Humphrey's and Congress's reliance  
11 on these kinds of multi-member agencies for  
12 something like 90 years plus, that's the  
13 background rule. And so now it's up to the  
14 government and the Solicitor General to come in  
15 to suggest that there's a constitutional  
16 problem with that.

17 MR. AGARWAL: That is absolutely  
18 right. We have a 111-year-old statute that was  
19 enacted by the people's elected  
20 representatives. It was signed into law by a  
21 President of the United States. It was  
22 unanimously affirmed by this Court. And it's  
23 been followed by every single President since  
24 1935 until the present.

25 We don't need an abstract theory to

1 tell us that the FTC Act is okay. It's the  
2 other side that needs to give you a really  
3 compelling theory to explain why, in our view,  
4 two -- 200-plus years of precedent and history  
5 need to be abandoned.

6                   But, in any event, even according to  
7 their own -- by their own acknowledgment, we're  
8 talking about the modern era of traditional  
9 independent agencies, which spans more than  
10 half the life of the Republic.

11                  JUSTICE KAVANAUGH: Can I ask you  
12 about some other limits of your argument? So  
13 most of the independent agencies by statute  
14 must include members of both major political  
15 parties.

16                  Is that a constitutional requirement?

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

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

21                  MR. AGARWAL: I do think, at some  
22 point, Justice Kavanaugh, that if there is not  
23 sufficient mechanisms of adequate presidential  
24 supervision, that you could have a problem.  
25 My -- my advice to the Court --

1 JUSTICE KAVANAUGH: Why? This is  
2 important.

3 MR. AGARWAL: Yeah.

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

6 MR. AGARWAL: Yeah, absolutely. So  
7 there is the Take Care Clause in Article II,  
8 Section 3. And we don't -- we don't dispute  
9 that the activities of these agencies are  
10 operating within the purview of the executive  
11 branch and they should be subject to  
12 constitutionally appropriate presidential  
13 supervision.

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

16 MR. AGARWAL: So, in the -- in the  
17 case of -- in -- in the case of the FTC, I  
18 don't want -- I don't think you want to --

19 JUSTICE KAVANAUGH: And if they don't  
20 have to turn over with each new President,  
21 what's the difference between seven years and  
22 20 years constitutionally speaking?

23 MR. AGARWAL: I think our -- our  
24 position is that the FTC, no matter what kind  
25 of rule that you articulate, would be okay

1 because we have the staggered terms and  
2 Presidents have the opportunity as a practical  
3 matter to influence the composition of the FTC.

4 You start to get into more difficult  
5 line-drawing problems if you imagine  
6 hypothetical scenarios where Presidents, you  
7 have longer terms and maybe fewer officers, and  
8 maybe Presidents in -- in that circumstance  
9 don't have --

10 JUSTICE KAVANAUGH: What about the  
11 chair? Usually, the chair has been removable  
12 at will as chair by Presidents. But that's  
13 been a matter of statute for most of these. Is  
14 that constitutionally required?

15 MR. AGARWAL: No. And we know that  
16 from Humphrey's Executor actually because, at  
17 the time of Humphrey's Executor, the chair of  
18 the FTC was not removable by the President.  
19 And now it was -- in the -- in the  
20 reorganization act that took place some 15  
21 years later, the President now has that  
22 designation authority.

23 JUSTICE KAVANAUGH: So I think putting  
24 those three together, you -- your position  
25 would allow Congress to create independent

1 agencies, maybe converting some of the existing  
2 executive agencies into independent agencies  
3 with no political balance requirement, with a  
4 long term, say, 10 or more years, and with the  
5 chairs not subject to removal as chair.

6                   So you can imagine a situation, and I  
7 just want to give you a chance to deal with the  
8 hard hypothetical, a -- when both houses of  
9 Congress and President are controlled by the  
10 same party, them creating a lot of these  
11 independent agencies with or extending some of  
12 the current independent agencies into these  
13 kinds of situations so as to thwart future  
14 Presidents of the opposite party, and to  
15 Justice Barrett's point, I don't think we can  
16 just say, oh, that hasn't happened, so it'll  
17 never happen.

18                   MR. AGARWAL: Absolutely. And I -- I  
19 don't think that you should articulate a rule  
20 that categorically rules out the possibility  
21 that some statute in the future might not  
22 provide for adequate tools of presidential  
23 supervision. This is not that --

24                   JUSTICE KAVANAUGH: But what would be  
25 the theory? I mean, that's what I'm getting

1 at. There's -- you know, just picking  
2 something out of thin air, what is the theory?

3 MR. AGARWAL: It would -- one textual  
4 basis in the Constitution for that would be the  
5 Take Care Clause of Article II, Section 3,  
6 which does require the President to take care  
7 that the laws be faithfully executed, and this  
8 Court could hold that in some -- that that  
9 requires that the President have  
10 constitutionally adequate means of supervision,  
11 such as those that are adverted to in part  
12 III.C.2 of Seila Law that discusses exactly the  
13 types of considerations to which Your Honor is  
14 referring, the designation of the chair, the  
15 staggered terms provision, and the opportunity  
16 to influence the composition of the Commission,  
17 budgetary tools.

18 I think all of those the FTC has, and  
19 so we're on the right side of the line wherever  
20 you draw that line. But I guess the -- the  
21 bigger point is that historically, this is a  
22 problem. This is a problem that has been  
23 resolved through a process of political  
24 accommodation.

25 And there's no reason to believe that

1 that process, which has been adequate for a  
2 very long time, will not be adequate in the  
3 future, but if it is, the Court can keep open  
4 the possibility that there will be time enough  
5 to decide on new constitutional rules.

6 JUSTICE KAVANAUGH: How do you answer  
7 the accountability theme, which I think is the  
8 theme of the other side, is that independent  
9 agencies are not accountable to the people?  
10 They're not elected as Congress and the  
11 President are and are exercising massive power  
12 over individual liberty and billion-dollar  
13 industries, whether it's the FCC or the FTC or  
14 whatever it might be.

15 MR. AGARWAL: May I answer?

16 CHIEF JUSTICE ROBERTS: Sure.

17 MR. AGARWAL: It is an entirely  
18 legitimate concern, but there are  
19 countervailing accountability and liberty  
20 concerns on the other side. And so, for  
21 example, you have an amicus brief that is  
22 submitted by the Reporters Committee For  
23 Freedom of the Press in this very case that  
24 talks about real dangers to freedom of the  
25 press, to individual liberty, to free speech

1       rights that would result from saying that  
2       agencies like the FCC are all of a sudden  
3       subject to at-will presidential removal.

4               And they discuss the history, just as  
5       one example, this precious First Amendment  
6       right that could in every meaningful sense be  
7       jeopardized if we abandon longstanding history  
8       and retroactively invalidate the independence  
9       of independent agencies.

10              The last thing I would say if I -- if  
11       I may, Justice Kavanaugh, in response to that  
12       point on political accountability is that I  
13       think it would be a really unfortunate way to  
14       vindicate the principle of democratic  
15       accountability for this Court to effectively  
16       invalidate, we're not talking about one or five  
17       or 10 or even 15, we're talking about more than  
18       two dozen traditional independent agencies that  
19       have been established by statutes, enacted by  
20       the people's elected representatives, and  
21       signed into law, all of them, by democratically  
22       elected Presidents.

23              If -- if it is really true that these  
24       kinds of for-cause removal protections, which,  
25       after all, authorize the President to fire

1 commissioners just for good cause, if they  
2 really pose this fundamental threat to the  
3 Republic, Petitioners could take their argument  
4 across the street and Congress could solve the  
5 problem tomorrow. They're not willing to do  
6 that.

7 CHIEF JUSTICE ROBERTS: Thank you.  
8 Thank you, counsel.

9 You mentioned Humphrey's Executor  
10 quite a bit and also Seila Law. And the one  
11 thing Seila Law made pretty clear, I think, is  
12 that Humphrey's Executor is just a dried husk  
13 of whatever people used to think it was  
14 because, in the opinion itself, it described  
15 the powers of the agency it was talking about,  
16 and they're vanishingly insignificant, have  
17 nothing to do with what the FTC looks like  
18 today. And yet it seems to be your primary  
19 authority.

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

1                   MR. AGARWAL: We have two other cases  
2        in which the Court has had occasion to assess  
3        the constitutionality of a single layer of  
4        for-cause removal protection applicable to a  
5        multi-member commission, and those two cases  
6        are Wiener v. United States and Free Enterprise  
7        Fund.

8                   In both of those cases, the Court  
9        unanimously concluded that a single layer of  
10       for-cause removal protection does not offend  
11       the separation of powers even with respect to  
12       agencies that were wielding what everybody  
13       today would consider significant executive  
14       authority.

15                  CHIEF JUSTICE ROBERTS: Well,  
16        certainly, Wiener is sort of a protege of  
17       Humphrey's and does exercise significant  
18       authority but of an adjudicative nature. And I  
19       don't know if that, again, should be considered  
20       in -- in a direct line from Humphrey's or an  
21       entirely different situation involving  
22       adjudicative authority that the Court did not  
23       say in deciding Humphrey's was at issue.

24                  MR. AGARWAL: A couple of responses to  
25       that, Mr. Chief Justice. First, Petitioners'

1 theory is based on the assumption that anytime  
2 you have an officer who is acting outside the  
3 auspices of Articles I and III, no matter what  
4 kind of function they are discharging, what  
5 they are doing "is and must be deemed an  
6 exercise of the executive power."

7 And if that is true, that sweeps in  
8 the commissioners of the War Claims Commission,  
9 it sweeps in the Federal Reserve, it sweeps in  
10 the Court of Appeals for the Armed Forces.  
11 Their constitutional theory cannot be  
12 distinguished on that basis.

13 CHIEF JUSTICE ROBERTS: Well, what  
14 about the -- regarding them, as I think Justice  
15 Gorsuch was discussing at one time, as adjuncts  
16 to the judicial authority, which would be  
17 something that would cover the Court, I think,  
18 would think, in -- in Wiener?

19 MR. AGARWAL: If -- if this is a  
20 viable distinction to say that there are  
21 certain functions that are being performed that  
22 are of an adjudicatory nature and that some  
23 kind of exception should be carved out for  
24 that, then why not for the FTC, which, after  
25 all, does exercise adjudicative powers?

1     Indeed, as this Court explained in Axon -- Axon  
2     Enterprise v. FTC, the -- the F -- the FTC --

3                   CHIEF JUSTICE ROBERTS: Well, sure --

4                   MR. AGARWAL: Yeah.

5                   CHIEF JUSTICE ROBERTS: Go ahead.

6                   MR. AGARWAL: The FTC stands in the  
7     shoes of the district court in such cases.

8     It's doing exactly the type of thing that  
9     district courts do. It's finding facts and  
10    reaching conclusions of law.

11                  CHIEF JUSTICE ROBERTS: Yeah, but it  
12    does a lot of stuff in addition to that that  
13    Wiener -- the -- the -- the Court in Wiener did  
14    not do, and many of these other entities that  
15    you've talk -- been talking about with --  
16    exercise judicial responsibilities might  
17    properly be considered adjuncts to the judicial  
18    power in Article III as opposed to purely  
19    executive power, which was not at issue in  
20    Humphrey's or --

21                  MR. AGARWAL: Sure.

22                  CHIEF JUSTICE ROBERTS: -- or Wiener.

23                  MR. AGARWAL: Two responses to that,  
24    Mr. Chief Justice.

25                  CHIEF JUSTICE ROBERTS: Sure.

1                   MR. AGARWAL: In Wiener, the claims  
2 commission members were making final and  
3 unreviewable determinations with respect to  
4 claims for compensation and they were getting  
5 no judicial review. That was final  
6 determination.

7                   But the more important point is that  
8 in Free Enterprise Fund, there was all manner  
9 of executive authority that was being wielded  
10 by the -- we're not talking about the 1935 FTC;  
11 we're talking about the 2010 Securities and  
12 Exchange Commission and the 2010 Public Company  
13 Accounting and Oversight Board. This Court  
14 characterized the Board's functions as  
15 involving enormous power to regulate an entire  
16 industry. Nobody would say that that was not  
17 executive. And, nevertheless, the Court  
18 unanimously concluded that a single layer of  
19 for-cause removal protection, exactly what we  
20 have here, is constitutionally permissible.

21                   On top of that, we don't, again, have  
22 a single case that has ever struck down the  
23 kind of removal protection that we have here in  
24 more than 200 years.

25                   CHIEF JUSTICE ROBERTS: Thank you.

## 1 Justice Thomas?

2 JUSTICE THOMAS: You used -- when I  
3 asked you or when a number of us asked you  
4 about making some of the -- currently, the  
5 executive branch cabinet-level agencies  
6 multi-member agencies, you resorted to the  
7 functionality of the current agencies, such as  
8 Commerce, as precluding that or at least as  
9 being a basis for not doing that.

10 Now, moving the other direction, could  
11 you -- you -- functionally, you say that as  
12 a -- from a functional standpoint, the FTC  
13 had -- is -- is not an executive branch agency,  
14 and you listed some of its functions.

15 Could that -- could Congress convert  
16 the FTC to a single-member head with the same  
17 protections because it engaged in the --  
18 discharging the exact same functions?

19 MR. AGARWAL: No under this Court's  
20 precedent in Seila Law.

21 JUSTICE THOMAS: No, could they under  
22 the logic of your argument?

23 MR. AGARWAL: No. We accept Seila Law  
24 as the -- as not only the law of the land but  
25 as being correct.

1 JUSTICE THOMAS: Why -- why --

2 MR. AGARWAL: And we -- we embrace its  
3 reasoning.

4 JUSTICE THOMAS: What's the  
5 limitation? You -- your argument was  
6 functionality before, not necessarily  
7 precedent. And I'm interested in why would the  
8 FTC functionally be any different as a  
9 single-member head than it is as a multi-member  
10 agency?

11 MR. AGARWAL: It is because Seila Law  
12 is correct, not just because it's precedent,  
13 but because it's correct to hold that there is  
14 a particular danger to individual liberty that  
15 is posed by the single-director highly  
16 anomalous circumstance that had no foothold in  
17 history and tradition and that vested a massive  
18 quantum of power in one person who is not  
19 directly accountable to the President.

20 JUSTICE THOMAS: I -- it's -- I don't  
21 understand why that's any different from a  
22 multi-member agency.

23 MR. AGARWAL: For all the reasons,  
24 Justice Thomas, that this Court explicated in  
25 Seila Law itself and, in particular, in parts

1 III.C.1 and III.C.2 of the decision, where the  
2 Court talked about basically two categories of  
3 considerations. One is the foothold in history  
4 and tradition, and the second is whether the  
5 configuration of the agency poses a problem for  
6 structural separation-of-powers principles.  
7 And in both of those, it -- the Court  
8 explained, and elsewhere throughout the  
9 opinion, the implications for individual  
10 liberty of taking massive amounts of  
11 governmental power and putting them in the  
12 hands of one person who's not accountable to  
13 the President as opposed to where you have the  
14 multi-member structure as a practical matter,  
15 there needs to be consensus, there needs to be  
16 deliberation, there's a safety valve in terms  
17 of dissenting opinions can be issued, and that  
18 can provide an alert to the public that  
19 something is going on.

20 So there's a whole variety of reasons  
21 why single-member agencies have been  
22 distinguished from multi-member commissions.  
23 And we -- we think that precedent is correct  
24 and should be adhered to. And I -- on that  
25 point, Justice Thomas, I guess I would say one

1 more thing, and that is I think it is a big  
2 difference between our position and the  
3 position of the Petitioners that we are asking  
4 the Court to adhere to all of its precedents  
5 and to give effect to the collective wisdom and  
6 experience of all three branches of government.

7 On the other hand, Petitioners are  
8 asking you to abandon precedent after precedent  
9 after precedent. A lot of precedents would go  
10 south if their constitutional theory is  
11 correct, and a whole lot of history and dozens  
12 of institutions that have been around for a  
13 long time, that have withstood the test of  
14 time, that embody a distillation of human  
15 wisdom and experience, all of those would go  
16 south.

17 CHIEF JUSTICE ROBERTS: Justice Alito?

18 JUSTICE ALITO: To follow up on  
19 Justice Thomas's question, suppose that the --  
20 suppose that the FTC did not have -- that  
21 the -- the members, the Commissioners, did not  
22 serve seven-year terms, staggered seven-year  
23 terms. Suppose there was not the requirement  
24 that there -- that no more than four be members  
25 of a single political party. Suppose that they

1 just -- they served very short terms.

2 What -- I mean, what is the -- why  
3 does it matter that it's a multi-member body as  
4 opposed to a single-member body in itself?

5 What is significant about that?

6 MR. AGARWAL: The significance is the  
7 distinction for purposes of individual liberty,  
8 the threat that is posed to individual liberty  
9 by single-headed agencies that are not  
10 accountable to the President. That -- that, as  
11 I understand it, Justice Alito, is the logic of  
12 this Court's decision in Seila Law. And we  
13 recognize that intelligent people of good  
14 will --

15 JUSTICE ALITO: Well, Seila -- Seila  
16 Law didn't --

17 MR. AGARWAL: -- can disagree about  
18 that.

19 JUSTICE ALITO: -- I mean, Seila Law  
20 didn't have to decide the question that's  
21 before us here. I mean, suppose that the --  
22 the F -- there were two FTC Commissioners and  
23 they served one-year terms. And you would say,  
24 well, that's okay, but there's a difference  
25 between that and -- and an agency that's headed

1 by a single -- a single member.

2 MR. AGARWAL: Making the terms  
3 shorter, in my view, would not raise  
4 constitutional concerns because that would only  
5 increase presidential opportunities to  
6 influence the composition of the agency.

7 Reducing the number of Commissioners might be a  
8 different type of situation. I'm not aware of  
9 any two-headed agency that has ever been  
10 created in the modern era or -- or throughout  
11 American history.

12 JUSTICE ALITO: Well, okay. What  
13 we're looking for are conceptual explanations  
14 for the distinctions you're drawing, but let me  
15 move on to something else.

16 Suppose the Department of Justice were  
17 split into two parts. One part has the  
18 authority to enforce the criminal laws, and the  
19 other part has the authority to enforce civil  
20 laws. Could the civil component -- could  
21 Congress put at the head of the civil component  
22 a multi-member commission with -- with removal  
23 protection?

24 MR. AGARWAL: Justice Alito, there is  
25 the -- the -- the logically antecedent question

1 with respect to any removal protection of  
2 whether Congress has constitutionally  
3 enumerated authority to enact the protection in  
4 the first place. And, as has been suggested in  
5 prior colloquies, the relevant source of  
6 constitutional authority would appear to be the  
7 Necessary and Proper Clause in terms of  
8 attaching removal restrictions to a federal  
9 office that is created by Congress.

10 I don't think it's obvious that you  
11 would -- you would comply with all the  
12 strictures of the Necessary and Proper Clause  
13 ex ante. And so it's not -- it's not obvious  
14 that Congress could do that. And what we know  
15 for sure is that Congress has never tried to do  
16 that.

17 JUSTICE ALITO: Well, I know.  
18 You're -- you keep answering it hasn't been  
19 done and it's not going to be done in the  
20 future, but I -- I want to understand the  
21 limits of the principle that you're asking us  
22 to accept. So you're not -- you -- you -- you  
23 cannot say no, that would not be permitted for  
24 this reason?

25 MR. AGARWAL: Well --

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

3 MR. AGARWAL: -- if you wanted --  
4 that -- that is one source of limiting  
5 principle for sure, but also, our argument is  
6 predicated in part on a long historical  
7 tradition pertaining to what I call --

8 JUSTICE ALITO: Okay. I understand  
9 the historical -- the historical argument.  
10 That wasn't what my question was getting at.

10 That wasn't what my question was getting at.

11 All of the civil enforcement laws, all  
12 of the civil laws that are now enforced by the  
13 Department of Justice were enacted by Congress  
14 under one of its enumerated powers. Let's  
15 assume that they were all constitutional. So  
16 the -- the question is whether it would be  
17 necessary and proper to the enforcement of  
18 those to -- to -- given the understanding of  
19 necessary and proper, to entrust that to a  
20 multi-member commission as opposed to a single  
21 officer like the attorney general? That would  
22 be the question?

23 MR. AGARWAL: I don't think so. And  
24 what I was trying to get at before is -- is not  
25 just that there's an historical tradition, it's

1 that the historical tradition we're invoking is  
2 for what are called traditional multi-member  
3 regulatory commissions, and those historically  
4 have never involved pure -- just purely  
5 executive civil enforcement. They involve a  
6 blend of law-making, adjudicatory, and  
7 enforcement actions where the enforcement  
8 authority is deemed to be reasonably ancillary  
9 to the other functions.

10 So the kind of -- the kind of  
11 hypothetical that you're positing, Justice  
12 Alito, I think it's an absolutely legitimate  
13 concern, but the historical tradition that we  
14 are drawing on for purposes of our  
15 constitutional liquidation argument would not  
16 require you to affirm the constitutionality of  
17 that kind of highly unusual structure that as  
18 far as I know has never been attempted before.

19 JUSTICE ALITO: On the question of  
20 giving the members of a multi-member commission  
21 longer terms of office, so, here, we have seven  
22 years. What if it were increased to 10 years?  
23 What if it were increased to 15 years and so  
24 forth? And the principle that you would have  
25 us apply is whether that longer term of office

1       preserved adequate presidential supervision?

2       Is that your answer to the question?

3            MR. AGARWAL: That is one potential  
4       limiting principle. I know that --

5            JUSTICE ALITO: We would have to -- in  
6       each -- each of those -- in every case in which  
7       that would be involved, we would have to  
8       make -- we would have to determine do I think  
9       this preserves adequate presidential  
10      supervision?

11           MR. AGARWAL: Our primary submission  
12       to you, Justice Alito, would be that it would  
13       not be the -- the -- the burden of the Court to  
14       develop ahead of time constitutional --  
15       heavy-handed constitutional rules that would  
16       try to make constitutional distinctions  
17       between, say, a seven-year term and a nine-year  
18       term or an 11-year term. Those don't appear to  
19       us to be distinctions of constitutional  
20       proportions.

21           Members of the Federal Reserve do have  
22       substantially longer terms than, say, FTC  
23       commissioners and, nevertheless, Petitioners  
24       don't have -- don't seem to have a problem with  
25       members of the Federal Reserve enjoying

1 statutory removal protections. But -- but our  
2 position is that the Court should recognize  
3 that these are really difficult line-drawing  
4 problems and the way that that has historically  
5 been resolved is through the political process,  
6 and the political process is up to the task of  
7 dealing with this problem.

8 JUSTICE ALITO: But you wouldn't say  
9 that we leave it completely -- would you say we  
10 leave it completely to the political process --

11 MR. AGARWAL: No.

12 JUSTICE ALITO: -- so that at no point  
13 in the extension of these terms would we say:  
14 Oh, there's a problem. I thought you were  
15 saying we -- there is a test and it is whether  
16 there's adequate presidential supervision.

17 And if that were challenged, we would  
18 have to decide. We would have to exercise our  
19 judgment about how much presidential  
20 supervision is necessary to satisfy  
21 constitutional requirements.

22 MR. AGARWAL: Absolutely. The Court  
23 should not relinquish its authority to  
24 establish judicially enforceable outer  
25 boundaries in this context. I just don't think

1       that you're going to have to do that anytime  
2       soon. And you might never have to do it. But  
3       you should absolutely not relinquish your  
4       authority to do it.

5               And there could be hypothetical  
6       scenarios in the future in which there's an  
7       arrangement that just palpably does not  
8       guarantee adequate presidential supervision,  
9       but that hypothetical risk, again, has to be  
10      measured against the real-world chaos and  
11      disruption that will be caused by taking --

12              JUSTICE ALITO: Okay. One -- one  
13      other question about where your argument would  
14      lead.

15              So, to go back to this issue of the  
16      various departments and whether it would be  
17      permissible for Congress to convert them into  
18      agencies headed by multi-member commissioners,  
19      by multi-member commissions with members  
20      protected from plenary presidential removal  
21      authority, the test would be whether some  
22      unspecified -- some limit on permissible -- I'm  
23      sorry -- a limit on exclusive and preclusive  
24      activities was exceeded?

25              MR. AGARWAL: Oh, our primary --

1 JUSTICE ALITO: Do they go to -- if --  
2 if they're exercising any power that is  
3 exclusively and conclusively the President's,  
4 do they -- are they exercising too much of  
5 that? That would be the test in going through  
6 these departments?

7 MR. AGARWAL: No. No.

8 JUSTICE ALITO: No?

18                           But I -- I think any conclusive and  
19 preclusive power that is vested in an agency  
20 that is not sufficiently accountable to the  
21 President is a problem and --

22 JUSTICE ALITO: Okay. I thought you  
23 had answered, in -- in answer to a prior  
24 question, you said a mere scintilla would not  
25 be enough. But now you say a mere scintilla

1       would be enough to cause a problem.

2                    MR. AGARWAL: I may have misspoken  
3 before, Justice Alito, and if I did, I  
4 apologize. But our position is that if a  
5 multi-member agency is vested with the  
6 President's conclusive and preclusive powers  
7 and it is insulated from at-will presidential  
8 approval -- supervision, that is a  
9 separation-of-powers problem.

10                  JUSTICE ALITO: Does -- it does 200  
11 things and one of the 200 things involves  
12 the -- the exercise of an exclusive and  
13 conclusive presidential power. That would be  
14 too much?

15                  MR. AGARWAL: That would be too much  
16 with respect to that power, but maybe the  
17 solution to that is to sever out that power and  
18 not to strike down the entire agency.

19                  JUSTICE ALITO: Thank you.

20                  CHIEF JUSTICE ROBERTS: Justice  
21 Sotomayor?

22                  JUSTICE SOTOMAYOR: Counsel, Seila Law  
23 involved the CFCP and it relied very heavily  
24 on -- focused very heavily on the novelty of  
25 the CFPB structure and the fact that it was a

1 historical anomaly, correct?

2 MR. AGARWAL: Absolutely. It was  
3 an -- it was an anomalous structure that was  
4 deemed to pose a significant threat to  
5 individual liberty.

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

9 The Chief asked a question about  
10 whether the additional powers the FTC has  
11 gathered create a different situation.

12 As I see it and as the judge in the  
13 district court outlined very clearly, most of  
14 the original powers of the FTC when Humphrey's  
15 Estate was decided exist -- are the same powers  
16 of today, correct?

17 MR. AGARWAL: That is correct.

18 JUSTICE SOTOMAYOR: And there is one  
19 power that I've identified that might be  
20 different and that the cease -- that the FTC's  
21 cease-and-desist orders have now binding effect  
22 immediately, correct?

23 MR. AGARWAL: I believe that's  
24 correct.

25 JUSTICE SOTOMAYOR: So I think your

1 point in response to Justice Alito is, if  
2 there's a power that the FTC is wielding now  
3 that trenches inappropriately, the answer is  
4 not to do away with the for-cause removal but  
5 to eliminate that power, that individual power,  
6 correct?

7 MR. AGARWAL: Correct. And an  
8 authority that is cited by Petitioners in their  
9 reply brief, Barr v. AAPC, supports that  
10 proposition.

11 JUSTICE SOTOMAYOR: And so that should  
12 be the answer if there's been a difference in  
13 the powers or an expansion of the powers  
14 inappropriately?

15 MR. AGARWAL: That is our position,  
16 yes. The parties have not briefed severability  
17 at the merits stage of this case. And in the  
18 event that the Court wants to reach that  
19 question, you might consider either  
20 supplemental briefing or remanding to the  
21 district court to decide that issue in the  
22 first instance.

23 JUSTICE SOTOMAYOR: Thank you,  
24 counsel.

25 CHIEF JUSTICE ROBERTS: Justice Kagan?

1 JUSTICE KAGAN: Mr. Agarwal, it seemed  
2 to me that when you were talking to Justice  
3 Alito, you had more to say about this question  
4 of comparative risks and how we should balance  
5 the two kinds of risks and what we should be  
6 thinking about now, so I wanted to give you a  
7 chance to say that.

8                           But -- and -- and within whatever you  
9                           want to say about that topic, I was wondering  
10                           if you could comment, a lot of these  
11                           hypotheticals have been about, you know, what  
12                           if -- what if Congress structured an  
13                           independent agency like this or like that.

14 I mean, most of these independent  
15 agencies, Justice Sotomayor is right that the  
16 CFPB was anomalous in this respect, but,  
17 basically, like, the vast majority of them all  
18 use the exact same structure or, if not exact,  
19 near exact same structure. There are little  
20 variations, but they're all set up with  
21 bipartisanship. They're all set up with a  
22 chair that -- that does have some greater  
23 control and that is more controllable by the  
24 President.

25 You know, they're all basically set up

1 the same way. So all of these hypotheticals  
2 about what if Congress did this, I'm wondering  
3 if you could comment in your discussion of  
4 comparative risks about how we actually just --  
5 why -- why it is that we actually have just  
6 never seen that?

7 MR. AGARWAL: I think it's because the  
8 political branches have learned from  
9 experience, and experience is the great  
10 teacher. There's a -- an insightful discussion  
11 of the history and tradition surrounding  
12 traditional independent agencies in the  
13 separate opinion in the PHH case that has been  
14 cited extensively by the parties and that  
15 explains that the structure that the political  
16 branches have come up with honors and gives  
17 effect to our constitutional values, as we  
18 explain on the very first page of our brief.

19 We think that the political branches  
20 have done a good job of learning from --

21 JUSTICE KAGAN: I mean, the political  
22 branch is Congress. Congress, which is made up  
23 of both Democrats and Republicans, who are  
24 aware that neither Democrats nor Republicans  
25 will control the government forever, and are

1 structuring these systems with that in mind.

2 MR. AGARWAL: That is -- I think that  
3 is exactly right, Justice Kagan, that there's  
4 an appreciation and an understanding that folks  
5 in power today may not be in power tomorrow and  
6 you want a structure that will be able to  
7 withstand the test of time.

8 The other kind of interesting thing  
9 about this is that it's not just Congress.  
10 It's Congress acting together with the  
11 President every single time. In the case of  
12 the FTC Act, the Act has been amended time and  
13 time and time again since this Court's decision  
14 in Humphrey's Executor. Presidents are signing  
15 all of those bills into law. They are  
16 supporting the FTC in a myriad of ways. They  
17 too have read the Vesting Clause of Article II,  
18 and they too believe in preserving executive  
19 power.

20 It is simply implausible to say that  
21 Presidents have been supporting these  
22 traditional independent agencies now for more  
23 than a century and a half, and even from the  
24 First Congress, George Washington signing into  
25 law the Sinking Fund Commission, the

1 Revolutionary War Debts Commission, the Mint  
2 Commission, it is absolutely implausible to say  
3 for the entirety of American history Presidents  
4 of the United States have been complicit in  
5 giving up a vital executive power that is,  
6 according to Petitioners, indispensable to  
7 their constitutional duty.

8                   The better -- the better answer by far  
9 is to say that Presidents have understood and  
10 appreciated that vital interests of the  
11 American people can be served by having  
12 constraints on the exercise of power. That is  
13 a really important part of our constitutional  
14 tradition, and that is what Petitioners are  
15 putting at risk.

16                   JUSTICE KAGAN: You mentioned some of  
17 the early history, and I think I want to give  
18 you a little bit of a chance to talk about that  
19 because we haven't. You know, when -- when I  
20 was a young lawyer and this unitary executive  
21 theory really got its start and got its legs,  
22 there was a pretty simple version of the  
23 history, and -- and that drove a lot of the  
24 early discussion of the unitary executive, what  
25 was wrong with Humphrey's Executor.

1                   What have the historians been telling  
2                   us more recently about that sort of early  
3                   understanding of the history? And -- and, you  
4                   know, like, bring us up to date here a little  
5                   bit about where the history is with respect to  
6                   these issues.

7                   MR. AGARWAL: There was an insightful  
8                   discussion of this in an essay authored by  
9                   Professor Nelson that we have cited in our  
10                  brief and that cites recent historical  
11                  scholarship. And there is also many amicus  
12                  briefs that have been submitted in this case,  
13                  which basically affirm that there is a rich  
14                  body of recent, including post-Seila Law  
15                  historical scholarship, that supports the  
16                  conclusion that the -- that the history  
17                  surrounding this issue is, at a minimum,  
18                  contestable and that there is a whole lot of  
19                  history, actually, that supports the  
20                  proposition that the -- the first President of  
21                  the United States and the first Congress did  
22                  not believe that the President always and  
23                  everywhere had to have an absolute illimitable,  
24                  indefeasible power to fire every single head of  
25                  any kind of commission exercising any

1 significant governmental authority.

2 We know that from the first Congress  
3 and the Sinking Fund Commission, the  
4 Revolutionary War Debt Commission, the Mint  
5 Commission, and I think there are some 10 other  
6 commissions, for example, that are discussed in  
7 Professor Nourse's amicus brief just by way of  
8 example.

9 I think that's another virtue of our  
10 position, that we're asking the Court to give  
11 effect not just to the Decision of 1789 but  
12 also to the Decision of 1790. The other side's  
13 not doing that. They want you to give a  
14 maximalist interpretation to, for example, the  
15 Decision of 1789, which we agree settled the  
16 question of whether the Senate should be able  
17 to interfere with presidential removals. But  
18 everything else, as Professor Nelson explains,  
19 as many other scholars have ably explained, is  
20 highly contestable at a minimum and there's  
21 actually a lot of historical evidence that goes  
22 the other way.

23 That is all the more reason for this  
24 Court to be cautious in developing heavy-handed  
25 constitutional rules that, one, don't have a

1 clear basis in constitutional text. We  
2 absolutely accept this Court's precedents that  
3 interpret the Vesting Clause of Article II to  
4 establish a general default presidential  
5 removal power, but it cannot be said the  
6 constitutional text clearly delineates the  
7 boundaries between the President's power and  
8 Congress's power with respect to removal.

9                   Then, when you add to that a growing  
10 body of historical scholarship indicating the  
11 original understanding from the time of the  
12 first Congress and the first President was that  
13 significant governmental authority absolutely  
14 could be vested in commissions that were not  
15 subject to plenary presidential control, that  
16 every single member was not subject to  
17 presidential control, and, in fact, in a lot of  
18 respects, as the scholars have explained, those  
19 early commissions were actually substantially  
20 more independent than modern-day administrative  
21 agencies.

22                   For some of them, the President  
23 couldn't even appoint -- he couldn't even  
24 decide who would be on the commission as, for  
25 example, with respect to the Sinking Fund

1 Commission, where you had the Chief Justice and  
2 the Vice President were by operation of law  
3 installed on those commissions. So those  
4 commissions were in a lot of respects much more  
5 independent than modern-day --

6 JUSTICE KAGAN: Thank you.

7 MR. AGARWAL: -- traditional  
8 independent agencies.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Gorsuch?

11 JUSTICE GORSUCH: I just want to  
12 explore just for a brief minute, I hope,  
13 your -- your scintilla of conclusive and  
14 preclusive power theory. You agree, I assume,  
15 the President is vested with all the executive  
16 power?

17 MR. AGARWAL: Yes.

18 JUSTICE GORSUCH: You agree that he  
19 has a duty to faithfully execute all the laws?

20 MR. AGARWAL: Yes.

21 JUSTICE GORSUCH: Civil and criminal?

22 MR. AGARWAL: We -- we agree that the  
23 Constitution imposes on -- on the President a  
24 duty to faithfully execute the laws,  
25 absolutely.

1 JUSTICE GORSUCH: All the laws?

2 MR. AGARWAL: Well --

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

6 MR. AGARWAL: The -- the Take -- the  
7 Take Care Clause is a duty, and it is also a  
8 power, but the text of the clause does not  
9 provide that the President must have at-will  
10 presidential --

11 JUSTICE GORSUCH: I didn't ask that.  
12 This is -- does he have a duty to faithfully  
13 execute all the laws?

14 MR. AGARWAL: We know from --

15 JUSTICE GORSUCH: Yes or no?

16 MR. AGARWAL: I -- I would say no in  
17 the sense -- in the sense --

18 JUSTICE GORSUCH: No?

19 MR. AGARWAL: -- in the -- in the  
20 sense that -- let -- let me -- there's two  
21 different questions, and I want to make sure  
22 that I'm answering the question.

23 JUSTICE GORSUCH: I'm -- the question  
24 is, does the President have a duty to  
25 faithfully execute all the laws? The answer is

1 no. Why?

2 MR. AGARWAL: So he can't break the  
3 law for sure. For sure. Does he have to be  
4 vested with statutory authority to actually  
5 enforce, directly enforce, or to exercise --

6 JUSTICE GORSUCH: I'm not asking  
7 whether he has to bring the indictment. I'm  
8 asking whether he has a duty to faithfully  
9 execute the laws.

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

12 JUSTICE GORSUCH: Okay.

13 MR. AGARWAL: -- have -- have to have  
14 plenary power of -- of supervision, but in the  
15 case of the FTC, he does have some power of  
16 supervision, including if there's a  
17 demonstrable, palpable violation of law, the  
18 President could absolutely fire a commissioner  
19 of the FTC --

20 JUSTICE GORSUCH: All right.

21 MR. AGARWAL: -- under the plain  
22 language of the statute.

23 JUSTICE GORSUCH: So the answer is no,  
24 I guess. But you say that he does have to --  
25 he has to have direct supervision and removal

1 authority for someone who has conclusive and  
2 exclusive authority to bring crime -- criminal  
3 prosecutions, right?

4 MR. AGARWAL: That is our  
5 understanding of this Court's decision in Trump  
6 v. United States --

7 JUSTICE GORSUCH: That's --

8 MR. AGARWAL: -- yes.

9 JUSTICE GORSUCH: That's your  
10 understanding?

11 MR. AGARWAL: Yes.

12 JUSTICE GORSUCH: But not civil?

13 MR. AGARWAL: That's -- that's right.  
14 And to go back to your earlier --

15 JUSTICE GORSUCH: Okay. And -- and  
16 just to be clear, so that means, if -- if the  
17 government wants to bring a misdemeanor, that  
18 person has to be reportable to the President,  
19 but if the government wants to bring ruinous  
20 fines and penalties and injunctions, that  
21 person doesn't?

22 MR. AGARWAL: I don't know the scope  
23 of this Court's holding in Trump v. United  
24 States --

25 JUSTICE GORSUCH: I'm asking --

1                   MR. AGARWAL: -- of how --  
2                   JUSTICE GORSUCH: -- you for your  
3                   theory because it's a very interesting theory.  
4                   You're building off of two words from Trump  
5                   versus United States and putting a gloss on it  
6                   that I -- I'm -- I'm not familiar with. I had  
7                   understood the executive power and he has  
8                   conclusive and preclusive authority to that,  
9                   but this line, I -- I don't know where it comes  
10                  from.

11                  MR. AGARWAL: Your -- Your Honor --  
12                  JUSTICE GORSUCH: And I'm wondering --  
13                  I'll be on -- I'll put my cards on the table --  
14                  maybe it's a recognition that Humphrey's  
15                  Executor was poorly reasoned and that there is  
16                  no such thing in our constitutional order as a  
17                  fourth branch of government that's  
18                  quasi-judicial and quasi-legislative. Maybe  
19                  you're trying to backfill it with a better new  
20                  theory that itself recognizes that we've got a  
21                  problem.

22                  MR. AGARWAL: The theory that we are  
23                  referring to, Justice Gorsuch, as we understand  
24                  it is not just based on this Court's recent  
25                  decision in Trump v. United States. It goes

1 all the way back to Marbury v. Madison. And  
2 Marbury does not use the term "conclusive and  
3 preclusive," but it absolutely says --

4 JUSTICE GORSUCH: And neither does  
5 Humphrey's. It uses "quasi" things.

6 MR. AGARWAL: It talks of -- it talks  
7 about the distinction between authorities that  
8 are vested in the President and the President's  
9 powers in the constitutional sense and  
10 executive power in the constitutional sense.  
11 And it actually cites Marbury v. Madison for  
12 that --

13 JUSTICE GORSUCH: Oh, sure. I would  
14 hope it would.

15 MR. AGARWAL: -- for that proposition.

16 JUSTICE GORSUCH: Yeah.

17 MR. AGARWAL: And Marbury itself  
18 distinguishes in the context of removability of  
19 federal offices --

20 JUSTICE GORSUCH: I guess I'm just  
21 wondering are we going to get -- if we take --  
22 if we -- if we take your -- your theory to  
23 backfill Humphrey's and go down this road, how  
24 are we supposed to decide which powers are  
25 exclusive and -- for your purposes, as you

1 understand it, not as I understand it, from --  
2 from Trump v. United States, but as you  
3 understand it, what powers are going to fall in  
4 and what are going to fall out? Are we going  
5 to have just as much litigation over that as  
6 anything else we might do in this case?

7 MR. AGARWAL: I don't think so. We've  
8 had these -- this modern era of traditional  
9 independent agencies for a long time. We  
10 haven't had any precedent ever striking them  
11 down. And this Court has not been, as far as I  
12 know, overwhelmed with difficult questions of  
13 line-drawing. In fact, from 1935 to 2025, we  
14 had pretty much unanimity among courts that  
15 traditional independent agencies are fine.

16 To go back to your earlier --

17 JUSTICE GORSUCH: We haven't had a lot  
18 of litigation over Humphrey's and its limits  
19 and its boundaries and -- I mean, Seila Law,  
20 you invoke it as a great decision.

21 MR. AGARWAL: We -- we do invoke --

22 JUSTICE GORSUCH: You know, we've had  
23 a lot of litigation.

24 MR. AGARWAL: -- we do invoke Seila  
25 Law as a great decision there.

1 JUSTICE GORSUCH: We're always going  
2 to have litigation over the separation of  
3 powers, aren't we?

4 MR. AGARWAL: Yeah. There will always  
5 be litigation --

6 JUSTICE GORSUCH: Yeah.

7 MR. AGARWAL: -- absolutely, but the  
8 point is that this Court's precedents affirming  
9 Congress's authority to work with Presidents to  
10 create traditional independent agencies has not  
11 generated any significant problems, still less  
12 insurmountable problems.

13 JUSTICE GORSUCH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Kavanaugh?

16 JUSTICE KAVANAUGH: I'll try to tick  
17 through a few questions here. On Justice  
18 Alito's questions, you said independent  
19 agencies do rulemaking, enforcement, and some  
20 adjudicatory powers as well, but so do the  
21 traditional cabinet agencies do all that too or  
22 at least most of them do. So I'm not sure that  
23 helps you distinguish the independent agencies  
24 from the traditional executive agencies on the  
25 earlier questions, but I'll just leave that.

1                   You said you agree with -- I think you  
2 said you agree with all the Court's precedents.

3                   MR. AGARWAL: Yes.

4                   JUSTICE KAVANAUGH: That includes --  
5 that includes everything in Myers.

6                   MR. AGARWAL: We agree with the  
7 holding of Myers.

8                   JUSTICE KAVANAUGH: Do you agree with  
9 the opinion in Myers?

10                  MR. AGARWAL: No. And the -- the -- a  
11 lot of the reasoning in Myers went too far, and  
12 that was part of what the Court decided in  
13 Humphrey's.

14                  JUSTICE KAVANAUGH: On the text of  
15 Article II, we haven't talked a lot about the  
16 theory by which you get to the other side's  
17 position from the text.

18                  The first 15 words, "The executive  
19 power shall be vested in a President of the  
20 United States of America. For the President to  
21 exercise that power, he needs subordinates for  
22 him to" -- and "he needs to be able to  
23 supervise and direct the subordinates and to  
24 supervise and direct, he must be able to remove  
25 those officers at will." This is the theory.

1                   Otherwise, and this is what I want to  
2 get your answer to, "otherwise, a subordinate  
3 could ignore the President's supervision and  
4 direction without fear and the President could  
5 do nothing about it."

6                   You agree that's the implication of  
7 your theory, correct?

8                   MR. AGARWAL: That the subordinate  
9 could disregard the President's instruction and  
10 that in some circumstances, the President could  
11 do nothing about it, yes. In some  
12 circumstances, but not under the FTC Act and  
13 the modern era of traditional independent  
14 agencies.

15                   If there was anything like  
16 malfeasance, if there was neglect of duty -- so  
17 that would be associated with law-breaking, as  
18 Professor Manners discusses in her amicus brief  
19 on the INM standard.

20                   JUSTICE KAVANAUGH: But, generally, if  
21 the President says: I wish you'd prefer a --  
22 pursue a more aggressive enforcement policy,  
23 and the head of the agency says: I'm not going  
24 to do that, there's nothing the President can  
25 do about that, right?

1                   MR. AGARWAL: If it's just a matter of  
2 enforcement priority, that's right. And that's  
3 for --

4                   JUSTICE KAVANAUGH: Or I -- I would  
5 want you to issue a new rule in a particular  
6 way that does a particular thing because I  
7 think as President it would be better for the  
8 American people and the agency head says: I  
9 disagree with that, I'm not going to do that.

10                  You agree that that's okay on your  
11 theory? That's --

12                  MR. AGARWAL: That is -- that is okay  
13 under our theory. That's the judgment of  
14 Congress and the President, and as -- as was  
15 pointed out in *In re Aiken* and as we've  
16 explained in our brief, this Court's precedents  
17 don't stand for the proposition, Justice  
18 Kavanaugh, that we have to have those  
19 arrangements. They just stand for the  
20 proposition that the people's elected  
21 representatives in Congress and their  
22 democratically elected President in appropriate  
23 circumstances can come together and decide that  
24 vital interests of the American people,  
25 including preservation of liberty, and I don't

1 think we should forget about that, including  
2 preservation --

3 JUSTICE KAVANAUGH: I agree.

4 MR. AGARWAL: -- that -- can be  
5 effectuated by having these multi-member  
6 commissions that --

7 JUSTICE KAVANAUGH: Two -- two  
8 real-world questions I want to -- you've  
9 mentioned many times you can just go to  
10 Congress to fix this.

11 Well, once the power's taken away from  
12 the President, it's very hard to get it back in  
13 the legislative process. Kind of the flip side  
14 of what we were talking about in the tariffs  
15 case because the -- the Congress, the real  
16 world of this is the independent agencies shift  
17 power from the presidency to the Congress.

18 Everyone recognizes that, that Congress has  
19 more control over the independent agencies than  
20 they do over the executive agencies. Congress  
21 doesn't want to give that up. It's hard for  
22 the President to get new legislation passed  
23 that would, for example, convert an independent  
24 agency to an executive agency.

25 Do you have an answer to that real --

1 I mean, I think just leave it to Congress  
2 ignores the reality of the legislative process  
3 and Congress's desire to keep that power that  
4 they have had that most people have recognized  
5 over the independent agencies.

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

8 MR. AGARWAL: Yeah. I have two  
9 responses to it. One is that I don't think  
10 it's an accurate characterization of what's  
11 going on to say that Congress is aggrandizing  
12 its own power at the expense of the executive.  
13 I think, in fact, exactly the opposite. And a  
14 lot of these agencies --

15 JUSTICE KAVANAUGH: That famous quote,  
16 "the independent agencies are ours," by a  
17 leading member of Congress, that was just --

18 MR. AGARWAL: I will give you an  
19 example from the FTC Act itself. The operative  
20 provision from the very first version of the  
21 Act provides that this act is all about  
22 defining unfair methods of competition in  
23 commerce, full stop.

24 How do you know what is an unfair  
25 method of competition in commerce? The statute

1 doesn't say. It delegates that Congressionally  
2 constitutionally enumerated authority to an  
3 agency that the President has all kinds of  
4 supervision and influence over.

5 And what is happening in the real --

6 JUSTICE KAVANAUGH: But much less than  
7 the executive agency. I -- I -- I understand  
8 your point there. I think I -- I got it.

9 Your brief refers to regulatory  
10 stability being a virtue served by the current  
11 overarching regime. I don't think a lot of the  
12 regulated parties really think stability has  
13 been a virtue of the regime because it goes  
14 back and forth when the agencies shift -- shift  
15 power.

16 And so I think, you know,  
17 "unaccountable instability" would be what they  
18 might say. So can you address why you think --  
19 and this is relevant to the stare decisis  
20 factors, I think -- why you think regulatory  
21 stability is actually occurring at a lot of  
22 these independent agencies?

23 MR. AGARWAL: Yeah, absolutely. So  
24 two things. One is that part of the logic of  
25 that comes from this Court's decision just last

1 term in the Chevron case where the Court said  
2 you can have a lot of regulatory instability if  
3 every single time a new administration comes  
4 into office, all of a sudden everything can  
5 change.

6 Now that is -- that is a problem on  
7 steroids if Petitioners get their view because  
8 you don't even have to wait for the  
9 administration to change, the President could  
10 just on a whim decide tomorrow that everything  
11 the agency has been doing is wrong.

12 Public reliance on stability  
13 presupposes that this is the whole point of the  
14 staggered terms requirement of -- that this  
15 Court explained in detail in Humphrey's  
16 Executor, that the whole point of this  
17 structure is to guarantee a modicum of  
18 stability that private regulated entities can  
19 depend upon. And that is jeopardized by  
20 at-will presidential removal.

21 JUSTICE KAVANAUGH: Two more quickly  
22 hopefully. You've used the phrase "chaos and  
23 disruption" if you lose and don't strike down  
24 the entire agency, I think you used that  
25 phrase.

1                   I don't think that's what would happen  
2 if you lost. And I think you would agree with  
3 what I'm about to say, which is, if you lose on  
4 the merits, the proper remedy is simply to  
5 sever the for-cause removal provision, not to  
6 get rid of the FTC.

7                   Do you agree with that?

8                   MR. AGARWAL: I agree with part of it  
9 but not all of it. The -- the remedy is not to  
10 get rid of the FTC, but I think there's an  
11 analytically difficult question about whether  
12 the proper remedy would be to sever the  
13 for-cause removal provision as opposed to,  
14 depending on the nature of the ruling, maybe  
15 one isolated power that is deemed to be  
16 quintessentially executive and that generates  
17 the separation-of-powers problem.

18                   JUSTICE KAVANAUGH: Okay. Last, sorry  
19 about the length of this, but this is  
20 important.

21                   Last, you said Congress has a  
22 tradition, they won't depart from it, but the  
23 last 10 years we've seen two examples of first  
24 a single-headed independent agency and  
25 separately a double for-cause removal

1 provision.

2 So I don't think the idea that  
3 Congress is just following the model that it's  
4 used before is really sustainable in the face  
5 of those two experiments that we've -- we've  
6 seen in the last 10 years. That's just a  
7 comment from your point about, oh, there's a  
8 model and they just follow the model.

9 MR. AGARWAL: It is not an absolute  
10 rule. And there may be times when the  
11 political branches depart from an established  
12 model. And when they do so in constitutionally  
13 problematic ways, what we know from recent  
14 history is that this Court will be there and  
15 there will be time enough to decide those  
16 questions.

17 JUSTICE KAVANAUGH: All right. Thank  
18 you for your answers.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Barrett?

21 JUSTICE BARRETT: I want to just ask a  
22 quick question about history. Justice Kagan  
23 was asking you about new scholarship that  
24 historians have identified, which you say shows  
25 that independent agencies has a longer pedigree

1 than maybe some thought originally.

2                   But do you concede that the first  
3 statutory -- anything that looks like a  
4 statutory removal restriction, like the  
5 inefficiency, neglect, malfeasance appeared in  
6 1887 with the ICC?

7                   MR. AGARWAL: I don't know if it's the  
8 first, to be honest with you, Justice Kagan --  
9 Justice Barrett, I'm sorry, but what I would  
10 say is that as to the early commissions, I  
11 think that factor actually cuts the other way  
12 because there was no -- there was no provision  
13 authorizing presidential removal for some  
14 commissioners. That's our point, that you had  
15 commissioners like the Chief Justice and the  
16 Vice President who were appointed by statute,  
17 and the President couldn't remove them under  
18 any circumstances.

19                   JUSTICE BARRETT: But they were two of  
20 five. And it could remove -- he had  
21 unchallenged authority to remove the other  
22 three who served on that commission. I mean,  
23 and -- and there's silence, I mean, they're  
24 not -- there's not the inclusion of statutory  
25 removal restrictions. You didn't really see

1 that until the ICC.

2 MR. AGARWAL: They were -- they were  
3 understood at the time to be for the officers  
4 like the Chief Justice and the Vice President  
5 on the Sinking Fund Commission, for example, to  
6 be completely insulated from presidential  
7 removal.

8 And it wouldn't make any sense for the  
9 President to be able to remove them from the  
10 Commission. That was not the understanding at  
11 the time. This has been ably set out by many  
12 historians.

13 But here's the bigger point, is that  
14 those commissions are in a lot of ways much  
15 more independent than modern-day independent  
16 agencies. And Petitioners' theory is based on  
17 the idea that anytime these commissions are  
18 exercising significant governmental authority,  
19 every single commission member must be subject  
20 to at-will presidential removal. And in that  
21 respect, their theory cannot be squared with  
22 founding-era --

23 JUSTICE BARRETT: Okay, but, counsel,  
24 the Sinking Fund had the Secretary of State,  
25 Treasury, and the AG, and there's no dispute

1 even under your theory that the President could  
2 fire those three. So, sure, the Chief Justice  
3 and the Vice President, but he could very  
4 easily take control over the fund. Also, we  
5 distinguished that in Collins.

6                   And, I mean, it seems to me that these  
7 early examples had very, very limited  
8 authority. I mean, the Mint, you know, or --  
9 or the Revolutionary War Debt Commission, there  
10 were no statutory removal restrictions, and all  
11 it did was settle accounts between the United  
12 States and individual states after the war. I  
13 mean, there's nothing that looks like the FTC  
14 at the time of Humphrey's or certainly not  
15 today. You have to concede at least that.

16                   MR. AGARWAL: Yes, and two  
17 responses -- but two -- two responses to that.  
18 I think it's a fair observation, but, first,  
19 for the Sinking Fund Commission, for example,  
20 maybe it didn't wield the broad panoply of  
21 authorities of the FTC. That's fair enough.  
22 But Alexander Hamilton thought that it was  
23 absolutely indispensable to the health of the  
24 national economy at -- that this was about  
25 managing the public debt, and he thought that

1       it would implicate the nation's stability going  
2       forward. That's why they thought this  
3       governmental function should be vested in this  
4       multi-member commission. So it was not  
5       something that was deemed to be insignificant  
6       by any stretch of the imagination.

7           But one more point on -- on the -- the  
8       difference between the three members and the  
9       two members. We have real-world evidence --  
10       this is not an abstract thing. We have  
11       real-world evidence of Chief Justice Jay I  
12       believe it was, who could make the dispositive  
13       vote difference in terms of the Sinking Fund  
14       Commission of when they make a decision that  
15       the President's cabinet supports, when they  
16       make a decision that they don't.

17           And so the fact that there are some  
18       members of the Commission who are not -- who  
19       were concededly not removable at will by the  
20       President, that just makes our point that the  
21       first President of the United States and the  
22       first Congress emphatically rejected the  
23       constitutional theory on which Petitioners'  
24       position is predicated.

25           JUSTICE BARRETT: Counsel, let me

1 say -- let -- let's say, just assume, that I  
2 disagree with you about the history. Let's  
3 assume that I think -- I'll -- I'll grant you  
4 for this purpose that the Decision of 1789, if  
5 you just took it in isolation, may be not as  
6 conclusive as Myers thought it was. I'll just  
7 grant that you for purposes of this question.

8           But let's say that I think the  
9 liquidation argument throughout the 19th  
10 century shows that by the time of the end of  
11 the 19th century up until we get to the ICC and  
12 the emergence of what starts to look like the  
13 more modern independent agency, that the  
14 government has the better of the argument.

15           But let's say that in 1887, after the  
16 ICC and then after the FTC and then after  
17 Humphrey's, when there was more the explosion  
18 of independent agencies, that -- let's just  
19 assume, again, for this purpose, that at that  
20 point, yes, you do have precedents like  
21 Humphrey's. Humphrey's clearly is -- is, you  
22 know, a good case for you. Do you still lose  
23 if I think as of 1887 it was liquidated, it was  
24 settled, but then we did have cases and  
25 congressional practices that veered from that

1 unbroken law?

2 MR. AGARWAL: No, we don't lose. We  
3 don't lose on the merits and we certainly don't  
4 lose on stare decisis.

5 So, on the merits, the doctrine of  
6 constitutional liquidation by historical  
7 practice absolutely can apply based on the last  
8 150 years of history.

9 JUSTICE BARRETT: But, counsel, if it  
10 had the first -- I mean, in -- in the -- the  
11 assumptions that I've asked you to make, it was  
12 liquidated as of 1887. So you think  
13 liquidation can kind of get a new restart, like  
14 kick-start in 1887?

15 MR. AGARWAL: That is not just my  
16 view. That is the view of this Court in cases  
17 like, I believe, NLRB v. Canning and Chiafalo,  
18 and I would also direct the Court's attention  
19 to United States versus Curtiss-Wright Export  
20 Corporation, where the Court said you have 150  
21 years of historical practice, that's enough.

22 JUSTICE BARRETT: Okay.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Jackson?

25 JUSTICE JACKSON: Really, really

1 quickly on your exchange with Justice Gorsuch,  
2 your hesitancy to respond to his Take Care  
3 question, I'm wondering whether that has to do  
4 with the fact that prosecutorial discretion  
5 exists and that the idea can't be, I think,  
6 that the executive has to always enforce all  
7 the laws, right?

8 MR. AGARWAL: I think that's right.

9 And the very authorities that Petitioners cite  
10 in their reply brief actually stand for that  
11 proposition. In cases like United States v.  
12 Texas and the Heckler v. Cheney case, the Court  
13 went out of its way to expressly and  
14 unambiguously affirm Congress's authority to  
15 regulate prosecutorial discretion by statute.

16 JUSTICE JACKSON: Let me ask you about  
17 Justice Kagan's invitation to expound upon  
18 comparative risks. I don't know if we got back  
19 to that, but, before you do that, let me just  
20 also focus in on Justice Kavanaugh's question  
21 about losing on the merits and the extent to  
22 which the answer would be just striking down  
23 the for-cause removal protections.

24 I mean, I -- I appreciate that, but  
25 doesn't that create pretty significant risks

1 with respect to the missions of the various  
2 agencies? I mean, it's not just we -- we don't  
3 have for-cause removal and the agency  
4 continues. That would then, I think, open the  
5 door for the President to come in, each new  
6 President, and clean house in terms of all of  
7 the individuals who are running that agency,  
8 notwithstanding their expertise and knowledge  
9 and experience and the things that they are  
10 doing to promote the mission of the agency,  
11 and, presumably, the President could install  
12 whoever he wanted in those positions, and that,  
13 I think, creates risks.

14 So why don't you talk about the  
15 comparative risks of your formulation or  
16 understanding of the different constitutional  
17 dynamics and what the government says should  
18 happen in this situation?

19 MR. AGARWAL: Sure. There are  
20 real-world risks that are palpable that we know  
21 will -- can materialize very quickly if  
22 Petitioners get their way. And think about it  
23 in terms of commissions like the Federal  
24 Elections Commission. Would anyone want those  
25 sensitive election-related determinations to be

1 under the plenary control of a political actor?  
2 Think about the Nuclear Regulatory Commission.  
3 Can't Congress and the President come together  
4 and say those types of technical determinations  
5 that could have massive implications for the  
6 public in all kinds of ways should be made by a  
7 multi-member body of experts?

8                   And if there's any kind of problem  
9 with the way those commissions are work -- are  
10 working, they can be changed by the political  
11 branches in a heartbeat. And Presidents, as  
12 far as we know, are not even trying to change  
13 them. It's not like they're coming to this  
14 Court and telling you we have a big problem,  
15 we've been lobbying Congress and Congress has  
16 just -- you know, to Justice Kavanaugh's  
17 earlier point, they're just not going along  
18 with it and they're not doing the right thing.  
19 Presidents are not even trying to go to  
20 Congress to get these for-cause removals.

21                   JUSTICE JACKSON: Because Presidents  
22 have accepted that there could be both an  
23 understanding of Congress and the presidency  
24 that it is in the best interest of the American  
25 people to have certain kinds of issues handled

1 by experts who -- and I think you were -- in  
2 your colloquy with Justice Kagan, you  
3 identified the fact that these boards are not  
4 only experts, but they're also nonpartisan. So  
5 the -- the seats are actually distributed in  
6 such a way that we are presumably eliminating  
7 political influence because we're trying to get  
8 to science and data and actual facts related to  
9 how these decisions are made.

10 And so the real risk, I think, of  
11 allowing non -- of allowing these kinds of  
12 decisions to be made by the President, of  
13 saying everybody can just be removed when I  
14 come in, is that we're going to get away from  
15 those very important policy considerations.

16 MR. AGARWAL: It will get away from  
17 those policy considerations and it will create  
18 opportunities for all kinds of problems that  
19 Congress and prior Presidents wanted to avoid,  
20 risks that flow inevitably, just given human  
21 nature, the realities of the world that we live  
22 in, risks associated with extreme  
23 concentrations of power in the hands of one  
24 person.

25 JUSTICE JACKSON: Can you talk about

1 the FTC? This is my final question. Why would  
2 Congress have thought it important to make this  
3 agency in particular independent?

4 MR. AGARWAL: I think in large part  
5 because Congress had tried, it had experimented  
6 with alternatives in the past. They didn't  
7 just do this on a whim. They tried to -- to  
8 do -- they tried to legislate on their own and  
9 they determined that it was not practicable for  
10 Congress to exercise its own constitutionally  
11 enumerated authority to regulate commerce by,  
12 for example, specifying ex ante all the  
13 different things that would constitute unfair  
14 methods of competition.

15 And so what they wanted was an expert  
16 agency that could take on that task and that  
17 would be insulated from political pressure not  
18 just emanating from the President but emanating  
19 from Congress too. Congress was giving away  
20 its own power to some extent.

21 JUSTICE JACKSON: So your point is  
22 that they were doing something important for  
23 the interests of the American people, not with  
24 an effort to try to strip the executive of any  
25 authority or anything like that but to fulfill

1 its own Article I obligations to legislate in  
2 the best interests of the American people?

3 MR. AGARWAL: Absolutely. And in a  
4 lot of ways, they're giving the President more  
5 power than he had before because the President  
6 wouldn't have the authority to determine what  
7 are unfair methods of competition all on his  
8 own. And that's what will be the practical  
9 result of accepting Petitioners' theory, that  
10 tomorrow you'll have a situation where the  
11 President can come in and unilaterally  
12 decide -- this is a quintessentially lawmaking  
13 function -- unilaterally decide what  
14 constitutes an unfair method of competition,  
15 what constitutes an unfair trade practice. If  
16 that was going to be the law, why wouldn't  
17 Congress just reserve that power to itself?

18 JUSTICE JACKSON: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Rebuttal, General Sauer?

22 REBUTTAL ARGUMENT OF GEN. D. JOHN SAUER  
23 ON BEHALF OF THE PETITIONERS

24 GENERAL SAUER: Thank you, Mr. Chief  
25 Justice. Two quick points.

1                   On the sort of parade of horribles  
2 arguments being made, I think it's very telling  
3 that Mr. Agarwal, one of the last things he  
4 said is that the FEC has to remain independent.  
5 But, of course, the FEC does not have statutory  
6 removal restrictions, and under Braidwood, the  
7 President already has the -- the power to  
8 remove the -- the commissioners of the FEC.  
9 Therefore, the notion that, like, this is the  
10 end of the world, it's going to change the  
11 structure of our government, the -- the -- the  
12 lead counterexample that's given is one that's  
13 already been decided by this Court's cases.

14                   Justice Barrett, regarding the  
15 question of historical liquidation, we think  
16 the case that you ought to look at is Powell  
17 against McCormack. It's very analogous to the  
18 sort of historical -- what happened in the  
19 history here. In that case, Congress, from the  
20 time of the Founding until the reconstruction  
21 of Congress after the Civil War, had  
22 interpreted the Constitution to not allow it to  
23 refuse to seat a member of Congress other than  
24 the reasons that are set forth explicitly in  
25 the Constitution in the Qualifications Clause.

1 The reconstruction of Congress changed that and  
2 decided not to seat a couple of former members  
3 who had too close ties to the Confederacy. And  
4 after that, for the next hundred years or so,  
5 Congress then started exercising that power,  
6 not -- not -- not often but intermittently  
7 exercising the power to refuse to seat other  
8 members.

9                   And this Court said in Powell against  
10 McCormack what is decisive there in that point  
11 of constitutional interpretation is the  
12 liquidation that occurred in the -- in the 19th  
13 century, not the subsequent, again, very  
14 lengthy tenure of practice of Congress refusing  
15 to do that, and, therefore, it -- it held that  
16 Congress lacked the power to refuse to seat the  
17 Congressman in that case. We think that's  
18 very, very compelling here.

19                   I think it's very telling that in this  
20 particular case early on, Mr. Agarwal said  
21 twice that it is within the realm of  
22 possibility that Congress could take -- I'm not  
23 sure how many -- but a significant number of  
24 cabinet-level agencies and convert them into  
25 multi-member agency commissions outside the

1 government's control.

2 How many of them it could do is really  
3 a creature of not -- not a question -- a  
4 constitutional question on his view. It's a  
5 question of statutory accident, is there  
6 conclusive and preclusive powers in the organic  
7 statute there? If there are, maybe they could  
8 be excised.

9 And, obviously, the devil's in the  
10 details here because, if those conclusive and  
11 preclusive powers are fairly broad, as the  
12 colloquy about civil enforcement powers  
13 illustrates, if they're fairly broad, then,  
14 basically, we would win this case and virtually  
15 every other case because almost all the  
16 agencies, cabinet-level or independent  
17 agencies, are going to have civil enforcement  
18 powers in most cases and so forth. But, if  
19 they are narrow, then we have a situation where  
20 Congress could erect virtual -- reconstruct  
21 virtually the entire executive branch outside  
22 the President's control, and that is not even a  
23 Republican form of government, but that is the  
24 logic of the position that's being advanced  
25 here. That is the parade of horribles the

1 Court ought to consider. And that contrasts  
2 dramatically with what, for example, Madison  
3 said when he talked about the great principle  
4 of unity and responsibility, the chain of  
5 dependence that runs from the lowest, to the  
6 middle grade, to the highest, to the President,  
7 and the President is accountable to the  
8 community, which is the voters.

9                   In short, Humphrey's Executor is a  
10 decaying husk with bold pretensions. It has a  
11 powerful hold on the minds of some people  
12 within our -- our -- our constitutional system.  
13 It certainly seems to have a powerful hold on  
14 the minds of lower court decisions. The Court  
15 should -- lower court -- the lower courts and  
16 their decisions. The Court should overrule  
17 Humphrey's Executor explicitly and restore the  
18 separation of powers to our government.

19                   CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21                   The case is submitted.

22                   (Whereupon, at 12:35 p.m., the case  
23 was submitted.)

24

25

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