

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

SEILA LAW LLC,)
)
) Petitioner,)
)
) v.) No. 19-7
)
) CONSUMER FINANCIAL PROTECTION)
)
) BUREAU,)
)
) Respondent.)

Pages: 1 through 80
Place: Washington, D.C.
Date: March 3, 2020

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IN THE SUPREME COURT OF THE UNITED STATES

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SEILA LAW LLC,)

Petitioner,)

v.) No. 19-7

CONSUMER FINANCIAL PROTECTION)

BUREAU,)

Respondent.)

- - - - -

Washington, D.C.

Tuesday, March 3, 2020

The above-entitled matter came on
for oral argument before the Supreme Court of the
United States at 10:09 a.m.

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7 PAUL D. CLEMENT, ESQ., Washington, D.C.;
8 Court-appointed amicus curiae in support
9 of the judgment below on Q1.
10 DOUGLAS N. LETTER, ESQ., Washington, D.C.;
11 for the U.S. House of Representatives,
12 as amicus curiae.

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P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 19-7, Seila Law versus the Consumer Financial Protection Bureau.

Mr. Shanmugam.

ORAL ARGUMENT OF KANNON K. SHANMUGAM

ON BEHALF OF THE PETITIONER

MR. SHANMUGAM: Thank you, Mr. Chief Justice, and may it please the Court:

The structure of the CFPB is unprecedented and unconstitutional. Never before in American history has Congress given so much executive power to a single individual who does not answer to the President. By significantly limiting the President's ability to remove the CFPB's director, Congress violated the core presidential prerogatives to exercise the executive power and to take care that the laws be faithfully executed.

This Court has recognized and reaffirmed the principle that the Constitution empowers the President to keep principal officers accountable by removing them at will.

1 While the Court created a narrow exception in
2 Humphrey's Executor in the context of a
3 multi-member commission, it has since distanced
4 itself from the reasoning of that decision. And
5 there's no valid basis for extending it to the
6 CFPB.

7 The Court should also reject amicus's
8 proposed test, seemingly based on Morrison
9 versus Olson, which would extend Morrison to
10 principal officers and permit significant
11 limitations on the President's ability to remove
12 even his closest advisors.

13 Now, as to the question of remedy, the
14 Solicitor General contends that the Court should
15 rewrite the Dodd-Frank Act to give the President
16 the power to remove the director. But the
17 constitutional question in this case arises in
18 the context of a defense to an enforcement
19 proceeding and not a facial challenge.

20 The Court can provide complete relief
21 by invalidating the Civil Investigative Demand
22 and reversing the judgment below.

23 In any event, the text and context of
24 the Dodd-Frank Act make clear that Congress
25 wanted to create an agency that was independent

1 to the fullest extent possible and not to vest
2 vast power in an agency that was subject to
3 presidential control without any congressional
4 control over its funding.

5 The government's proposed remedy would
6 have the perverse effect of making the CFPB less
7 independent than agencies it was replacing.

8 The Court should leave to Congress the
9 quintessentially legislative task of deciding
10 how to fix the CFPB's defective structure.

11 JUSTICE GINSBURG: Mr. Shanmugam, this
12 case has kind of an academic quality to it. The
13 demand in question was ratified by an acting
14 head who was subject to the President's removal
15 power, without qualification.

16 I don't see how the composition of the
17 Bureau affects your client since your client was
18 -- the adverse action is now attributable to
19 someone who the President could remove at will.
20 And I don't see how differently you would be
21 affected if the same thing occurred with the
22 President having the power to remove at will.

23 So whatever might have been with the
24 Board head that was responsible for this demand,
25 the acting head is fully removable by the

1 President.

2 MR. SHANMUGAM: Justice Ginsburg,
3 there is a live dispute between us and the
4 government because we want the Civil
5 Investigative Demand to be invalidated and the
6 government seeks to enforce it.

7 On this question of ratification, we
8 don't believe that there is a live issue on
9 ratification, not least because, when the
10 government raised this issue below, it presented
11 no evidence, no factual evidence, that the
12 acting director, in fact, ratified the Civil
13 Investigative Demand.

14 But where we agree with the government
15 is that, at most, that would be an issue that
16 would be live on remand. And the issue of
17 ratification was raised at the certiorari stage,
18 and both we and the government agree that that
19 is not a live issue before the Court. Where we
20 disagree is that the government is trying to
21 resuscitate that as a potential argument that it
22 could make on remand.

23 But, in terms of this Court's
24 traditional jurisdictional doctrines, there is a
25 live dispute, and, therefore, there is no

1 mootness here. And we plainly have standing,
2 including standing to appeal, because our injury
3 is the fact that my client is subject today to a
4 Civil Investigative Demand that even today the
5 government is seeking still to enforce.

6 JUSTICE GINSBURG: But you would be --

7 JUSTICE SOTOMAYOR: May I ask --

8 JUSTICE GINSBURG: -- you would be
9 harmed in the very same way if the President had
10 the full removal power.

11 MR. SHANMUGAM: If the President had
12 the full removal power and then a properly
13 appointed and removable director sought to
14 enforce a Civil Investigative Demand against us,
15 then, sure, we would no longer have the argument
16 that we are making now. But this Court time and
17 again has said that where an action has been
18 taken by an unaccountable executive official,
19 that creates a here-and-now injury and an injury
20 that a private individual can vindicate. Where
21 the separation of powers has been violated, a
22 private individual, no less than an aggrieved
23 removed official, has the ability to raise that
24 issue.

25 JUSTICE SOTOMAYOR: My problem is more

1 -- somewhat like Justice Ginsburg's, but you
2 started by saying an unprecedented agency.
3 Well, there is at least two others, the Office
4 of Special Counsel and the Social Security
5 Administration, which have single heads subject
6 to some limitations on removal.

7 And I see the Social Security
8 Administration being as powerful, if not more
9 powerful, than this agency, because the Social
10 Security Administration affects virtually every
11 American. This agency is limited to the
12 financial market.

13 And with respect to the amount of
14 money that it distributes or can seek
15 restitution on, it's comparable to the Social
16 Security Administration. So I don't think this
17 is so unprecedented as you claim.

18 MR. SHANMUGAM: I would differ with
19 you, Justice Sotomayor, only in that I do think
20 that the level of executive power wielded by the
21 CFPB is unprecedented precisely because it takes
22 enforcement action.

23 The Social Security Administration
24 unquestionably affects millions of Americans,
25 but one thing it doesn't do is to take

1 enforcement action. There -- it poses no threat
2 to individual liberty.

3 And as you are aware, the Social
4 Security Administration was turned into a
5 single-director agency with only for-cause
6 removal relatively recently. Indeed,
7 independent agencies with for-cause removal
8 restrictions more generally are of comparatively
9 recent vintage, but these sorts of
10 single-director agencies are even more recent.

11 JUSTICE SOTOMAYOR: Given that your
12 client is not the President, it seems to me that
13 the person who should be complaining is the
14 President, not your client.

15 Shouldn't we address the severability
16 question and leave for another day the issue
17 that would cause harm, i.e., shouldn't we
18 address severability first? If we find this
19 severable, then it's academic whether the person
20 -- President has power. And shouldn't we do
21 what we've done for over 200 years of this
22 country and wait until there's an actual dispute
23 between the President and a director that he or
24 she -- that he or she wants to fire?

25 MR. SHANMUGAM: This Court, in the

1 modern era, has not required there to be a
2 contested removal. There was no such contested
3 removal in Morrison or Bowsher or Free
4 Enterprise Fund, and that is because, as this
5 Court stated in Bond, the separation of powers
6 creates an injury that a private party can
7 vindicate because an action --

8 JUSTICE SOTOMAYOR: That's not my
9 point. My point is, isn't it mooted here if we
10 find this severable?

11 MR. SHANMUGAM: No. And I want to
12 address that directly because that is a
13 suggestion that is made in the amicus brief
14 filed by Professor Harrison, and the fundamental
15 problem with the suggestion that the Court can
16 somehow resolve the question by addressing
17 severability first is that in -- that would in
18 no way validate the Civil Investigative Demand
19 in this case.

20 Even if there is severability, there
21 is still a Civil Investigative Demand that was
22 issued by a director who at the time was
23 unaccountable. And this Court's cases, Bowsher,
24 Lucia, and others, make clear that when you have
25 an action taken by an unaccountable official or

1 an official who is, you know, either improperly
2 appointed or is subject to an improper removal
3 restriction, that action is void full stop.

4 And that is why we submit that on the
5 question of remedy, the appropriate remedy here
6 is simply to invalidate the Civil Investigative
7 Demand and to stop. That is the more modest
8 remedy here than proceeding to the question of
9 severability.

10 JUSTICE GINSBURG: Well, speaking
11 about modesty, this is a very modest restraint,
12 inefficiency, malfeasance. It -- it stops the
13 President from at whim removing someone,
14 replacing someone with someone who is loyal to
15 the President rather than to the consumers that
16 the Bureau is set up to serve.

17 You talked about liberty. Now whose
18 liberty are we speaking of? What about the
19 consumers? I mean, Congress passed this law so
20 that the consumers would be better protected
21 against financial fraud. And you're talking
22 about, I suppose, the liberty of your client.
23 But what about the people that Congress was
24 concerned about, that is, the consumers who were
25 not well protected by the array of agencies that

1 were handling these problems?

2 MR. SHANMUGAM: So two points in
3 response to that, Justice Ginsburg. The first
4 is that the for-cause removal restriction here,
5 the inefficiency, neglect of duty, and
6 malfeasance standard, has never been understood
7 to be a modest standard and certainly cannot be
8 read to permit what we think the Constitution
9 requires; namely, that the President be able to
10 remove a subordinate not just because of policy
11 disagreements but because the President has lost
12 faith in the official's judgment or because the
13 President wants someone of his or her own
14 choosing.

15 But I think, second, to the extent
16 that we're talking about Congress's goal here,
17 there is abundant evidence that what Congress
18 was trying to do was to create an agency that
19 precisely, because of its desire to protect
20 consumers, was insulated from political control
21 to the fullest extent possible.

22 As Elizabeth Warren, who was really
23 the progenitor of the CFPB, said at the time, if
24 Congress did not create an agency with
25 functional independence, "my second choice is no

1 agency at all and plenty of blood and teeth left
2 on the floor."

3 And so, if this Court is considering
4 what the hypothetical Congress -- what Congress
5 would have hypothetically wanted at the time of
6 the Dodd-Frank Act, I don't think that what
7 Congress would have wanted was the creation of
8 an agency that was fully subject to the
9 President's control.

10 CHIEF JUSTICE ROBERTS: I -- I think
11 Justice Ginsburg's point included what the
12 standard would be like, the inefficiency,
13 malfeasance, whatever, and I don't think we've
14 done this in prior cases, but wouldn't the
15 normal principles of constitutional avoidance
16 suggest that we might want to scrutinize a
17 little bit how rigorous a limitation that is
18 before we get to the point of striking down the
19 statute?

20 I mean, just take inefficiency. I
21 mean, the President might determine that a
22 particular approach of the agency to consumer
23 protection was not as efficient as another
24 approach. And I don't know why you couldn't say
25 that that's a ground of efficiency that -- that

1 he could act upon.

2 And, theoretically, I don't know that
3 the courts would be terribly suited to
4 second-guess that judgment.

5 MR. SHANMUGAM: Mr. Chief Justice, I
6 don't think that that term has ever been
7 understood that broadly, and, of course, this
8 Court has a long history of dealing with the
9 inefficiency, neglect, and malfeasance standard
10 dating back to Humphrey's Executor.

11 And I would refer the Court to Judge
12 Wilkinson's concurring opinion in the D.C.
13 Circuit in PHH, which I think walks through each
14 of the terms and explains why what those terms
15 really require is something closer to outright
16 incompetence. And not surprisingly, Presidents
17 have only very rarely invoked their authority at
18 all to remove officers under that standard.

19 But -- but, if this Court were to
20 somehow convert that standard into what we think
21 it constitutionally would need to be, which is
22 effectively an at-will standard, then, sure,
23 that would have essentially the same effect as
24 overruling Humphrey's Executor because it would
25 permit Presidents, where they disagree with the

1 policy priorities of these officials, to remove
2 them.

3 JUSTICE KAVANAUGH: On severability --

4 JUSTICE ALITO: So, for instance --

5 MR. SHANMUGAM: And so, if we --

6 JUSTICE ALITO: No, go ahead.

7 JUSTICE KAVANAUGH: On severability,
8 what do you do with the text of the severability
9 clause? You -- you mentioned we would be
10 rewriting the Dodd-Frank Act.

11 But wouldn't we be rewriting it by
12 ignoring the text of the severability clause?

13 MR. SHANMUGAM: I -- I -- I don't
14 think so, Justice Kavanaugh. And mindful of
15 your opinion when you were on the D.C. Circuit
16 on this issue, I would say two things.

17 The first is that I think that the
18 text of the boilerplate severability clause in
19 the Dodd-Frank Act can be read to say, in
20 essence, only that if you strike an invalid
21 constitutional provision, the entirety of the
22 remainder of the Act shall not fall.

23 And part of the reason why you may
24 want to give the boilerplate provision that
25 interpretation is because of the more specific

1 severability provision in Title V, which I think
2 by the government's own concession would be
3 rendered superfluous if you don't adopt our
4 proposed meaning.

5 But, if you disagree with me on that,
6 I do have a second point, which is that this
7 Court has consistently made clear the
8 severability clauses create only a presumption.
9 After all, they are, as this Court has
10 indicated, an aid in determining the intent of a
11 hypothetical Congress.

12 And, here, I would respectfully submit
13 that the presumption is a weak one because, on
14 the one hand, you have a boilerplate
15 severability clause which covers the entirety of
16 the Dodd-Frank Act, and on the other hand, you
17 have very specific indicia in Title X itself,
18 the very --

19 JUSTICE KAVANAUGH: But the Court said
20 that back in an era when we didn't pay as much
21 attention to the text of the statute, and the
22 text of the statute here has a severability
23 clause?

24 MR. SHANMUGAM: This Court has never
25 treated severability clauses as dispositive, and

1 I think that that is because of the nature of
2 the severability inquiry, which is a
3 hypothetical inquiry. It's not quite like
4 ordinary statutory interpretation.

5 And, here, I am not just relying on
6 statements in the legislative history. I'm
7 relying on the text of Title X itself. And in
8 the very provision creating the CFPB, Congress
9 describes it as an independent Bureau. There
10 are the other provisions of the CFPB with --
11 which very unusually insulate the CFPB from the
12 appropriations process.

13 And so, to the extent that this is an
14 inquiry into congressional intent, this Court
15 should have serious pause about going so far as
16 to render this agency subject to complete
17 Presidential control when we know that that's
18 not what the sponsors --

19 JUSTICE KAGAN: Mr. Shanmugam --

20 MR. SHANMUGAM: -- of the Dodd-Frank
21 Act wanted.

22 JUSTICE KAGAN: -- your argument rests
23 mostly on this distinction between multi-member
24 and single-member agencies.

25 And I think most people who have been

1 in these agencies or have studied these
2 agencies, have observed these agencies, might
3 say that that distinction is that it's -- it's
4 kind of simplistic, that it all depends, that
5 there are so many contingencies involved as to
6 which kind of agency a President might have more
7 effective influence over that one simply can't
8 make a general statement of that kind.

9 You know, there are voting rules.
10 There are rules about whether there's a weak
11 chair or a strong chair. There are rules about
12 holdover commissioners. There are a thousand
13 things that go into whether a President has
14 influence over any particular agency, of which
15 the question is it one or multiple members is
16 not so important.

17 CHIEF JUSTICE ROBERTS: Yeah, please,
18 spend a couple of sentences.

19 MR. SHANMUGAM: Great. Thank you.
20 I'm happy to turn to the merits for a minute.
21 On Humphrey's Executor, which is really the
22 primary case on which amicus relies, I think
23 we're all here trying to make sense of
24 Humphrey's Executor, knowing that, in Morrison,
25 this Court essentially disemboweled the

1 reasoning of that case.

2 And I think that it is at least
3 implicit in Humphrey's Executor that the Court
4 was focused on the fact that the FTC was a
5 multi-member commission and, as we explain, ex
6 ante, recognizing that there are variations in
7 how multi-member commissions are structured.

8 We believe that multi-member
9 commissions pose a much lower threat to
10 individual liberty and give Presidents a
11 somewhat greater degree of control.

12 And so our fundamental submission on
13 the constitutional merits here is that the Court
14 can plausibly limit Humphrey's Executor to that
15 context. If the Court does not accept that
16 distinction, then I think it is squarely
17 presented with the question of whether to
18 overrule Humphrey's Executor.

19 CHIEF JUSTICE ROBERTS: Thank --

20 MR. SHANMUGAM: But we don't believe
21 that the Court needs to reach that question.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 General Francisco.

25

1 ORAL ARGUMENT OF GEN. NOEL J.
2 FRANCISCO ON BEHALF OF THE RESPONDENT,
3 SUPPORTING VACATUR
4 GENERAL FRANCISCO: Mr. Chief Justice,
5 and may it please the Court:

6 As a general rule, the President has
7 the unrestricted authority to remove principal
8 officers. Humphrey's Executor recognizes an
9 exception for multi-member commissions, but that
10 shouldn't be extended to single-headed agencies
11 for two reasons.

12 First, there would be no coherent
13 limiting principle. The only difference between
14 the FTC and most cabinet agencies is the
15 multi-member structure. If that's irrelevant,
16 then Congress could presumably impose for-cause
17 removal restrictions on almost the entire
18 cabinet, from Treasury to the EPA.

19 Second, that, in turn, would sever
20 executive power from political accountability.
21 The President stands for election. The director
22 of the CFPB does not. So, if the director is
23 insulated from presidential oversight, then her
24 exercises of executive power are insulated from
25 democratic control. And that's not the

1 structure that our Constitution creates and
2 requires.

3 Mr. Chief Justice, I'd like to
4 initially address the meaning of the for-cause
5 removal standard --

6 JUSTICE GINSBURG: Before --

7 GENERAL FRANCISCO: -- because you --

8 JUSTICE GINSBURG: -- before you do
9 that, may I ask, isn't it uncommon for the
10 Department of Justice not to defend a statute
11 passed by Congress? How often has the SG
12 declined to defend legislation adopted by
13 Congress?

14 GENERAL FRANCISCO: Your Honor, I
15 don't have the precise number, but the general
16 rule is that we defend the acts of Congress
17 unless it infringes upon the President's own
18 executive power. And, here, we believe that we
19 have a statute that infringes upon the
20 President's own executive power.

21 JUSTICE GINSBURG: Has that been the
22 position of the Department of Justice, or is
23 this a new position?

24 GENERAL FRANCISCO: I believe that
25 that is the long-standing position of the

1 Department of Justice, that the general
2 presumption that we will defend acts of Congress
3 has an exception built in when the act of
4 Congress infringes upon the President's own
5 executive power. And that's what we have here.

6 JUSTICE GINSBURG: I mean in this
7 particular context, in the -- in the context of
8 a restriction on the President's removal power.

9 GENERAL FRANCISCO: Your Honor, I -- I
10 don't know the exact answer to that question. I
11 believe, although I'd want to double-check on
12 this, that in Bowsher, the executive branch did
13 not defend the removal restriction that was at
14 issue. I believe in Free Enterprise Fund, they
15 did defend the removal restriction at issue.

16 I cannot recall what their position
17 was in Humphrey's Executor. In Myers, I don't
18 believe they defended the removal restriction
19 that Congress had enacted. But --

20 JUSTICE ALITO: General, isn't it true
21 that the Department of Justice has refused to
22 defend the constitutionality of other federal
23 statutes even when the President's removal power
24 is not at issue?

25 GENERAL FRANCISCO: Yes, Your Honor.

1 I am simply --

2 JUSTICE ALITO: For example, the
3 Defense of Marriage Act?

4 GENERAL FRANCISCO: All I'm simply
5 saying is that our general rule is that there is
6 a presumption that we will defend acts of
7 Congress when arguments can reasonably be made
8 in their -- in their defense. And there's
9 obviously room to -- in the joints there, but
10 there is an exception to even that presumption
11 when the President's own powers are at stake.

12 And, Mr. Chief Justice, as to the
13 scope of the for-cause removal restriction, we
14 think that the one thing that it cannot be
15 interpreted to allow is the President to remove
16 a principal officer simply because he has lost
17 faith in their judgment or simply because, even
18 though the current principal officer is
19 perfectly good, he thinks he can do better.

20 And we think that's critical because
21 the President cannot personally exercise all
22 executive power. So the way that he does it is
23 he puts in place people who have his implicit
24 trust, and then he is fully accountable for
25 their decisions precisely because he can remove

1 them for any reason.

2 And the problem with these for-cause
3 removal restrictions is that they vest executive
4 power in an individual who is not ultimately --

5 JUSTICE BREYER: The -- what I've
6 always thought -- and I don't -- I would like a
7 -- what I've always thought, and these cases are
8 hard to put in boxes, but, look, the reason Taft
9 could -- could remove the postmaster is because,
10 at that time, a postmaster was a political plum
11 and the President is a politician and,
12 therefore, there is no good reason to stop him
13 from controlling political plums.

14 The reason they couldn't in Humphrey's
15 Executor is because this is meant to be an
16 independent board. And Frankfurter explains it
17 well in Myers. He says, if you have an agency
18 that has something of an adjudicative function,
19 you need to keep him insulated.

20 Now, once we depart from that kind of
21 thing, trying to figure out what works -- a
22 workable government, says the Constitution,
23 certainly by implication -- it's impossible.
24 What about the Fed? What about the FCC?

25 The only thing you can say about those

1 is there are very strong reasons for giving them
2 some independence in terms of the workability of
3 their function. Now that notion, case by case,
4 look at it. I haven't been able to find
5 another.

6 You want another standard. You
7 obviously think there's another standard.

8 GENERAL FRANCISCO: Well, I -- I'd
9 offer you two responses to that, Your Honor.
10 First of all, I think you can leave Humphrey's
11 Executor exactly where it is, applying to
12 multi-member commissions, and you don't call
13 into question any of the current multi-member
14 commissions. But the second and more critical
15 point is, once you make that leap away from
16 multi-member commissions, there's no real clear
17 limiting principle since there's no --

18 JUSTICE GINSBURG: But why -- why is
19 it -- why should it make a difference? It seems
20 the President is hemmed in even more if, for
21 every one of those people, he can't remove them
22 at whim. I --- I don't understand why it
23 doesn't go the other way.

24 So there's one head, but, with the
25 multi-member, that each time every one of them,

1 the President can't do what he wants.

2 GENERAL FRANCISCO: Right, and for --
3 for two reasons, Your Honor. The first is the
4 point that I was just making to Justice Breyer.
5 Once you make that leap to single-headed
6 agencies, then Congress could impose a for-cause
7 removal restriction just like the one in
8 Humphrey's Executor on most of the cabinet, and
9 that would be a wholesale revolution in
10 separation-of-powers principles.

11 JUSTICE GINSBURG: Well, maybe cabinet
12 officials are different from the -- from an
13 agency that Congress tries to make independent
14 both of itself and of the President to some
15 extent.

16 I mean, cabinet members are loyal to
17 the President. They carry out the President's
18 policy in areas where the President has the
19 authority. It's -- cabinet officials are not
20 like what Congress tried to create here, some --
21 an agency that is independent of both --

22 GENERAL FRANCISCO: Uh-huh.

23 JUSTICE GINSBURG: -- branches of
24 government.

25 GENERAL FRANCISCO: And, Your Honor,

1 that goes to my second point. This Court has
2 made clear that separation-of-powers principles
3 requires high walls and clear distinctions
4 precisely because low walls and vague distinct
5 -- distinctions aren't judicially enforceable.

6 JUSTICE BREYER: Well, I mean, I don't
7 know that you can say anything additionally, but
8 it's a very basic question. You have a
9 document, and the document has to work. And
10 different judges in this Court have taken
11 somewhat different approaches.

12 GENERAL FRANCISCO: Uh-huh.

13 JUSTICE BREYER: But the approach of
14 -- of workability in terms of what Congress
15 wanted and the other provisions does not lead
16 you to a clear standard.

17 You are offering a clear standard, but
18 my problem is, why that one? I mean --

19 GENERAL FRANCISCO: Sure.

20 JUSTICE BREYER: -- how long will that
21 last? And -- and -- and it's -- I don't know if
22 there's anything you can add, but you see -- you
23 see where I'm coming from?

24 GENERAL FRANCISCO: Well, I would like
25 to add something, Your Honor --

1 JUSTICE BREYER: Yeah.

2 GENERAL FRANCISCO: -- because I do
3 think that we're offering a very clear standard,
4 and at the same time, I would like to finish
5 responding to Justice Ginsburg's point, because
6 the cabinet is nowhere defined. The cabinet is
7 simply a matter of tradition.

8 The reason why particular agencies are
9 in the cabinet is typically because they're
10 removable at will. But, once you say that you
11 can impose at will -- for-cause removal
12 restrictions on agencies that are functionally
13 no different than the -- the FTC, other than in
14 their multi-member structure, you really no
15 longer have defined a limit on when Congress can
16 impose a similar restriction.

17 And if you go down that road, Your
18 Honor, you can effectively saddle every new
19 President with his predecessor's cabinet, much
20 like this administration was saddled --

21 JUSTICE KAGAN: I -- I'm not sure --

22 GENERAL FRANCISCO: -- with his
23 predecessor's head of the CFPB.

24 JUSTICE KAGAN: I'm not sure, General,
25 that you responded to the part of Justice

1 Ginsburg's question which, again, focused on --
2 on this principal argument that you're making,
3 which is the multi-member versus the
4 single-member.

5 And I think she was saying that even
6 if you could make a generalization, which I
7 think that there are problems with, but even if
8 you can make a generalization, it cuts the other
9 way, that a multi-member commission, just
10 because it diffuses power, is much dif -- much
11 more difficult to influence. You know --

12 GENERAL FRANCISCO: Right.

13 JUSTICE KAGAN: -- if a President can
14 get one person on the phone, that's a lot easier
15 than if he has to worry about seven people who
16 are all doing their own thing. And -- and so in
17 just the -- the -- the basic understandings of
18 one person, easy to influence, more accountable,
19 even if you can't influence him, you can point
20 at him, why isn't a single-member agency better?

21 GENERAL FRANCISCO: Sure. So my first
22 answer to that is, even if I assumed, for the
23 sake of argument, that what you were saying was
24 right, and I don't agree with it, I don't think
25 it would matter, because the rationale of

1 Humphrey's Executor is that the for-cause
2 removal restriction was allowed because the
3 agency was quasi-legislative or quasi-judicial.
4 And by that, I think what the Court meant was
5 that it was a multi-member body that acted
6 through deliberation and consensus. And that
7 rationale simply doesn't apply to single-headed
8 agencies, even if you thought it was the same
9 diminution of power.

10 If I could give you an example to help
11 illustrate the point based on Morrison against
12 Olson. I doubt -- I very much doubt this Court
13 would uphold an independent counsel statute that
14 was trained in on the investigation of private
15 individuals, even if it were a very small number
16 of private individuals and even if this Court
17 thought it resulted in less of a diminution of
18 executive power than the independent counsel
19 statute at issue in Morrison, precisely because
20 the rationale for Morrison wouldn't apply.

21 There wouldn't be the need to prevent
22 the perceived conflict of interest when the
23 Executive Branch investigates itself. So even
24 if you thought it was a lesser diminution of
25 executive power because the rationale of

1 Humphrey's Executor doesn't apply, it wouldn't
2 justify the extension of Humphrey's.

3 But now I'd like to address also why I
4 disagree with your fundamental point.

5 The first is the no limiting principle
6 point, and I'm not going to go further into that
7 because I've already said it.

8 The second is multi-member commissions
9 actually in my view represent less of a threat
10 to liberty precisely because they are
11 multi-member bodies that act through
12 deliberation and consensus. And that restrains
13 the exercise of their power.

14 For a single-headed agency, often the
15 only restraint on the exercise of power is a
16 political or democratic accountability
17 restraint. And once you remove that, you've now
18 vested enormous executive power in somebody who
19 is not subject to the procedural constraint that
20 multi-member commissions have and are not
21 subject to the political constraint that
22 everyone else has.

23 JUSTICE KAGAN: So what strikes me
24 about a lot of these arguments in the brief and
25 here, you're saying, you know, this is the

1 better way to promote liberty, to protect
2 liberty.

3 I mean, traditionally, there's been a
4 long history of saying that it's actually the
5 political branch's decision as to which is the
6 best way to promote liberty, that there -- this
7 is a constitution that does not say anything
8 about removal. It does not say anything about
9 for cause or at will or anything else.

10 Indeed, it doesn't say anything very
11 much about the structure or organization of the
12 government in general. It essentially allows it
13 to Congress with the President, the President
14 has to sign these laws, to decide which
15 institutions of governance and which modes of
16 governance are best to promote liberty and to
17 serve the public interest.

18 And I don't know how to make these
19 decisions. They're contested. They're
20 contestable as to what independence and what
21 form of accountability and what form of
22 Presidential control is appropriate.

23 Why don't we just leave it to the
24 political branches, who actually know about
25 these things?

1 GENERAL FRANCISCO: For a couple of
2 reasons, Your Honor. And the first thing I'd
3 say is I -- I do think the Constitution
4 specifically addresses this question, though not
5 in so many words.

6 And what I'd point you to is exactly
7 what this Court said in the Free Enterprise Fund
8 case. The view that prevailed, talking about
9 the decision of 1789, as most consonant to the
10 text of the Constitution, was that the executive
11 power included a power to oversee executive
12 officers through removal.

13 Now, as to your liberty point, the
14 reason why I don't think that the courts leave
15 this just to the executive branches is because
16 the purpose of separation of powers is not to
17 protect the President from Congress or to
18 protect Congress from the President but to
19 protect the liberty of the people by enforcing
20 the structural constraints of our Constitution.

21 And the key structural constraint at
22 issue here is the one set forth in Article II,
23 that the executive power shall be vested in a
24 President and that he shall take care that the
25 laws be faithfully executed.

1 The only way he can do that is if he's
2 fully accountable for the decisions of his
3 principal officers. And the problem with these
4 for-cause removal restrictions is that they vest
5 executive power in individuals who are not
6 ultimately accountable to the people through
7 their duly elected President.

8 CHIEF JUSTICE ROBERTS: Is your
9 argument stronger or weaker when you look at the
10 budgetary constraints? I mean, does the
11 independence of the agency from the budgetary
12 process further weaken the democratic
13 accountability through the President, or does it
14 give him at least some say in the agency's
15 functioning?

16 GENERAL FRANCISCO: Well, Your Honor,
17 respectfully, I think that that gives the
18 President less control, but that's not the focus
19 of our argument.

20 Ultimately, it's the President's duty
21 to oversee the Executive Branch through the
22 removal power, not Congress's duty to oversee
23 the Executive Branch through the appropriations
24 power. So I think it marginally -- that -- that
25 additional insulation marginally helps us, but I

1 wouldn't rely --

2 JUSTICE KAVANAUGH: How much --

3 GENERAL FRANCISCO: -- on that here.

4 JUSTICE KAVANAUGH: -- how much does
5 it matter that the tenure of the single director
6 continues into the next President's term?
7 Because I think that's when the problem really
8 reveals itself, that the next President is going
9 to have to deal for his or her whole term,
10 potentially, with a CFPB director appointed by
11 this President and will not be able to supervise
12 or direct that person, even if that President
13 has a wildly different conception of consumer
14 financial protection?

15 GENERAL FRANCISCO: Right. I think
16 that helps illustrate the fundamental nature of
17 the problem in that. And it -- and it doesn't
18 just have to do with timing. If you've got a
19 President and a Senate of the same political
20 party, they could also game the system by just
21 putting in place a new CFPB director at the very
22 end of the President's term. So I think that --

23 JUSTICE KAVANAUGH: The current --

24 GENERAL FRANCISCO: -- exacerbates the
25 problem.

1 JUSTICE KAVANAUGH: -- the current
2 director will go to the end of 2023, correct?

3 GENERAL FRANCISCO: Right.

4 JUSTICE KAVANAUGH: So the first three
5 years of the next term.

6 GENERAL FRANCISCO: I think that
7 illustrates the nature of the problem, Your
8 Honor. Even if you didn't have that, I still
9 think this for-cause removal restriction --

10 JUSTICE KAGAN: But, I mean, Justice
11 --

12 GENERAL FRANCISCO: -- would be
13 unconstitutional.

14 JUSTICE KAGAN: -- Kavanaugh raises a
15 -- a really interesting point here because the
16 Court has been so focused, all our cases, on
17 removal. But removal is really not the thing
18 that -- if you wanted to pick one thing, you
19 would pick appointments as -- as -- as
20 reflective of whether a President will have
21 control or not control over a particular person.

22 So, you know, it's appointments. It's
23 length of term. There are so many things that
24 go into the question of Presidential control.
25 Removal has historically been very difficult for

1 Presidents to exercise as a way of controlling
2 people, because the people you want to remove
3 the most, there are all kinds of political
4 constraints about why you shouldn't remove them.

5 So removal is like a nuclear bomb.
6 There are all kinds of things that actually
7 figure in how much control a President has over
8 an individual that have nothing to do with
9 removal. Why is it that we've picked this one
10 thing as the sine qua non of Article II?

11 GENERAL FRANCISCO: Because,
12 respectfully, Your Honor, I would very much
13 disagree with the entire premise of your point.
14 And I point you to this Court's decision in
15 Bowsher where the Court wrote that once an
16 officer is appointed, it is only the authority
17 that can remove him and not the authority that
18 appointed him that he must fear and in the
19 performance of his duties obey.

20 And as this Court made clear in the
21 Free Enterprise Fund case, the removal power is
22 the principal power that the President uses not
23 only to supervise the Executive Branch but to
24 ultimately be held accountable to the people,
25 which is, after all, the whole point.

1 I would like to address the
2 severability issue, which is very important to
3 the government. If the Court doesn't address
4 the severability clause, as my friend has
5 suggested, then there really is a cloud hanging
6 over everything that the CFPB does.

7 If, as we contend, the removal
8 restriction is unconstitutional and if it is
9 inseverable from the remainder of the statute,
10 then everything that the CFPB does is invalid
11 and they don't even have the authority to ratify
12 the CID here.

13 So we think it's critical that the
14 Court address that question. And I would also
15 respectfully submit that it is a very easy
16 question in this case in view of the clear and
17 unambiguous severability clause.

18 There's no need to engage in this
19 navel-gazing, what would Congress have done had
20 it considered the issue, because Congress has
21 answered that question.

22 JUSTICE KAVANAUGH: Well, Mr.
23 Shanmugam said to look at all the provisions of
24 the statute, and those reveal an intent that is
25 distinct from the severability clause.

1 So can you respond to his point on
2 that?

3 GENERAL FRANCISCO: Yes. Two
4 responses, a specific one and a general one.

5 On the specific one, he points to a
6 provision that simply refers to the CFPB as an
7 independent Bureau. All that really means is
8 that while it's housed under the umbrella of the
9 Federal Reserve, it is independent of the
10 Federal Reserve Board.

11 It is a separate and independent
12 agency just like, you know, the Department of
13 Education is a separate and independent agency.

14 But, in any event, there is nothing
15 that they point to that can overcome the clear
16 and unambiguous text of a severability clause
17 that says, if any provision is found
18 unconstitutional, then the remainder of the
19 statute shall remain intact.

20 JUSTICE ALITO: Well, I -- I take your
21 point about the severability clause, but if what
22 you say is true, then what would be the
23 justification for this Court's statements in
24 other cases that a severability clause like this
25 is not necessarily dispositive?

1 GENERAL FRANCISCO: Well, Your Honor,
2 first of all, I point to what Justice Kavanaugh
3 was alluding to. That was -- those cases are
4 often from an earlier era. But I will put that
5 wholly to the side because at the very least it
6 is a strong presumption.

7 And it's a presumption that can be
8 overcome only if there is an internal statutory
9 conflict, if, for example, severing a provision
10 would render the statutory scheme incoherent.

11 Here, one of Congress's principal
12 purposes was to take a consumer protection
13 function that was spread out across multiple
14 agencies and concentrate it into a single agency
15 because they thought that would lead to better
16 and more effective enforcement.

17 May I have one more sentence?

18 CHIEF JUSTICE ROBERTS: One more.

19 GENERAL FRANCISCO: And by severing
20 the for-cause removal restriction, you leave
21 fully intact that concentrated enforcement
22 mechanism.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 General.

25 Mr. Clement.

1 ORAL ARGUMENT OF PAUL D. CLEMENT
2 COURT-APPOINTED AMICUS CURIAE
3 IN SUPPORT OF THE JUDGMENT BELOW ON Q1

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

6 Text, first principles, and precedent
7 all support the validity of the removal
8 provision at issue here. Nonetheless, the
9 parties are in violent agreement that the
10 provision is unconstitutional.

11 Moreover, they are eager, indeed
12 hungry, to borrow a phrase from Justice Scalia's
13 Windsor opinion, to have this Court decide the
14 constitutional issue on which they agree.

15 But if they agree, it's reasonable to
16 ask why doesn't the government give Petitioner
17 what it wants and drop the CID? Ah, but there's
18 the rub.

19 The President and the executive branch
20 acting through the President does not want the
21 CID dropped, which is why the acting director,
22 when he was removable at will, ratified the
23 investigatory demand here and told the Ninth
24 Circuit that that ratification was an
25 independent, non-constitutional basis to resolve

1 the entire case.

2 The Solicitor General, at page 22 of
3 his reply brief, continues to argue that the
4 ratification precludes any relief for the
5 Petitioner. Yet, he insists that this Court
6 should decide the constitutional question
7 because the parties somehow agreed at the cert
8 stage that ratification would be saved for the
9 Ninth Circuit.

10 Thus, this is a case, unlike Windsor,
11 for example, where the lack of adverseness
12 between the parties is fundamentally distorting
13 this Court's ability to do its job and its
14 general preference to decide cases on
15 non-constitutional grounds, rather -- rather
16 than wading into difficult constitutional
17 questions.

18 There is a phrase that aptly describes
19 what the Solicitor General wants from this
20 Court, and it's an advisory opinion. And this
21 Court lacks jurisdiction to issue it.

22 But if this Court were to reach the
23 merits, it should affirm the decision below and
24 the constitutionality of a removal provision
25 that uses the same familiar phrase that this

1 Court has approved on other occasions and leaves
2 the removal power with the President, which
3 avoids the principal defect in this Court's
4 cases.

5 My friends want to describe this
6 Court's precedents as providing a general rule
7 of illimitable presidential removal power
8 subject only to a narrow exception for
9 multi-member commissions. With all due respect,
10 that is wishful thinking.

11 The general rule that describes all of
12 this Court's cases is that the Congress cannot
13 assign the President's removal authority
14 elsewhere --

15 JUSTICE GORSUCH: Mr. Clement --

16 MR. CLEMENT: Whether to Congress --

17 JUSTICE GORSUCH: I -- I -- I
18 understand your point about ratification. I --
19 I think if -- if the other side were to have an
20 opportunity to respond, they might say something
21 like this: That we don't normally decide
22 questions in the first instance that haven't yet
23 been adjudicated below. We're a court of
24 review, not first view, I think is the phrase I
25 often hear.

1 What -- what would you say to that?

2 MR. CLEMENT: I would say, Justice
3 Gorsuch, that might be a reason to dismiss this
4 case as improvidently --

5 JUSTICE GORSUCH: So you're arguing --
6 you're really arguing that we should DIG the
7 case?

8 MR. CLEMENT: I -- I -- I'd say, if
9 the choices are DIG the case --

10 JUSTICE GORSUCH: That's your first
11 argument?

12 MR. CLEMENT: -- or decide -- well,
13 it's -- it's not strictly a DIG argument. The
14 way I would think about it is this Court in
15 Windsor, over a strong dissent by at least three
16 justices, said that it could decide that case
17 jurisdictionally even though there was a lack of
18 adverseness between the parties. But even the
19 majority was concerned with that lack of
20 adverseness between the parties, and it
21 suggested there was a prudential test and you
22 look for whether there was a prudential reason
23 to decide the case or not to decide the case.

24 Here, I think there is, with respect,
25 the mother of all prudential reasons not to

1 decide this case, which is --

2 JUSTICE GORSUCH: So I think the
3 answer to the question is yes, right? You'd DIG
4 the case?

5 MR. CLEMENT: No. I -- I would --

6 JUSTICE GORSUCH: That's your first
7 choice, the prudential -- mother of all
8 prudential reasons not to decide it, I would
9 take that to mean we should DIG it, no?

10 MR. CLEMENT: No, Mr. Justice Gorsuch,
11 I think you should write a fine opinion that
12 vindicates much of the reasoning of the
13 dissenters in Windsor but -- but reconciles it
14 with the majority, and it's not a DIG. It's a
15 jurisdictional opinion, and it says adverseness
16 is vitally important to Article III, and it's
17 vitally important especially when the lack of
18 adverseness could cause this Court to
19 unnecessarily decide a constitutional question.

20 JUSTICE GORSUCH: Boy -- boy, that
21 sounds a lot like a DIG, but, okay, fine.

22 (Laughter.)

23 JUSTICE GORSUCH: Let -- on -- on the
24 merits, what do we do with the fact -- and I'm
25 sure you've given this great thought -- that if

1 we were to approve single-member agencies
2 without any presidential removal power -- let's
3 just suppose that -- we would run into questions
4 about the cabinet, for example, which are just
5 agencies, right?

6 So what -- how would you have the
7 Court write an opinion to distinguish this case
8 from that?

9 MR. CLEMENT: So I -- I -- I want to
10 be responsive, but I want to point out that I
11 don't think --

12 JUSTICE GORSUCH: Great.

13 MR. CLEMENT: But -- but just to point
14 out for starters, you don't avoid drawing a line
15 by adopting the Solicitor General's position.

16 JUSTICE GORSUCH: I understand that.

17 MR. CLEMENT: Okay. Because I don't
18 think --

19 JUSTICE GORSUCH: Now if you could
20 answer my question.

21 MR. CLEMENT: Sure. So I would draw
22 it the same place I think he would draw it. So
23 I don't think he said -- would say that you can
24 eliminate the State Department by creating a
25 multi-member commission on foreign affairs.

1 JUSTICE GORSUCH: That's not my
2 question, Mr. Clement. If you could answer my
3 question, I'd be grateful.

4 MR. CLEMENT: I -- I would -- with all
5 due --

6 JUSTICE GORSUCH: My question is what
7 if Congress tomorrow revived the Tenure of
8 Office Act, all right --

9 MR. CLEMENT: Well --

10 JUSTICE GORSUCH: -- and said
11 presidents can't remove without a whole bunch of
12 conditions, not Senate approval, okay, but
13 something else that looks a lot like that.

14 Wouldn't that be a problem with the
15 Constitution?

16 MR. CLEMENT: Absolutely.

17 JUSTICE GORSUCH: Okay. Then -- then
18 how do we distinguish this case from that one?

19 MR. CLEMENT: So I think there's two
20 -- I offer you two limiting principles, which I
21 think is two more than the Solicitor General's
22 offered you. But here's the first: The first
23 is --

24 JUSTICE GORSUCH: If we could avoid
25 disparaging our colleagues and just answer my

1 question, I would be grateful.

2 MR. CLEMENT: First, there is a
3 structural limitation. So they can't put
4 somebody essentially in the cabinet or in the
5 White House staff and then have that person
6 subject to for-cause removal.

7 Second, there's a constitutional
8 backstop, an absolute constitutional backstop,
9 which is those authorities that the Constitution
10 assigns directly to the President -- so the
11 State Department, the Defense Department, pardon
12 power; there's a few others -- those cannot be
13 subject under any circumstances to anything
14 other than at-will removal.

15 JUSTICE ALITO: How about the --

16 MR. CLEMENT: And I didn't mean to
17 disparage my colleague. I was just saying the
18 same limiting principle ultimately has to be in
19 place for multi-member commissions.

20 JUSTICE ALITO: How about the EPA or
21 Homeland Security?

22 MR. CLEMENT: So I -- I think EPA is
23 something that they probably could make subject
24 to for-cause removal. I think Homeland
25 Security, in its current form, they couldn't,

1 because some of the powers that were given to
2 the Homeland Security Secretary by Congress were
3 powers that were borrowed from the Defense
4 Department.

5 And I think, if any of the authorities
6 that are being exercised by a cabinet secretary
7 are authorities that the Constitution assigns
8 directly to the President, you probably can't
9 make that subject to --

10 JUSTICE ALITO: Well, what is your
11 definition of a cabinet secretary?

12 MR. CLEMENT: I would take the
13 definition, for these purposes, directly from 5
14 U.S.C. 101. That's where Congress defines the
15 15 executive departments. They are the 15
16 executive departments that are in the line of
17 succession. I -- that's -- that would be my
18 place. And I --

19 JUSTICE GORSUCH: Those -- those
20 change from time to time, right?

21 MR. CLEMENT: Relatively rarely. I
22 mean, the last time we had one added was the
23 Department of Homeland Security.

24 JUSTICE GORSUCH: Right.

25 MR. CLEMENT: And -- and -- and my

1 point is a structural one that works with a
2 constitutional backstop. The point is Congress
3 can't sort of try to have it both ways and say
4 we don't really want this person to be
5 independent; we just want to sort of hamstringing
6 the President.

7 But, ultimately, there is a
8 constitutional backstop, and I think it's the
9 same backstop that you would have to eventually
10 put in place for multi-member commissions. And
11 based on --

12 CHIEF JUSTICE ROBERTS: I -- I --
13 that's when you -- you began by saying that was
14 a narrow exception that the Solicitor General
15 adopts. Why is that? I mean, most of these
16 agencies are multi-member commissions, and they
17 seem -- most of the more significant ones are
18 multi-member commissions -- agencies or
19 commissions.

20 I would have thought that's a fairly
21 significant exception?

22 MR. CLEMENT: Well, Mr. Chief Justice,
23 the Solicitor General described it as a narrow
24 exception. It's -- it's however broad it is. I
25 don't think, though, it's a coherent place to

1 draw the line.

2 And that's because, if you think of
3 what the agencies are doing as exercising
4 executive power -- and I don't think there's any
5 other way to think about them -- and this is how
6 Chief Justice Rehnquist thought about them in
7 Morrison. If they are exercising executive
8 power, then this Court has held for nearly a
9 century that you can have principal officers
10 exercising executive power subject to
11 inefficiency, neglect of duty, and malfeasance
12 removal provisions. So there isn't some
13 absolute sort of prohibition on that.

14 Then the question is, is there
15 something sacrosanct about a multi-member
16 commission? And the answer, I would think for
17 purposes of this argument, is absolutely not.
18 And, actually, if the constitutional problem is
19 that somebody is exercising the executive power
20 with a for-cause removal restriction, I think
21 it's more problematic if they're subject not
22 just to for-cause removal but a multi-member
23 requirement and a partisan balance requirement.

24 JUSTICE KAVANAUGH: But -- but
25 Congress has always established these as

1 multi-member commissions or agencies, and as the
2 Free Enterprise Fund decision said, and as Noel
3 Canning said in a different context, recess
4 appointments, Justice Breyer's opinion, that
5 historical practice at some point becomes an
6 important aspect of how we define or draw the
7 line. So what do we do with that historical
8 practice here?

9 MR. CLEMENT: Well, I -- I think what
10 you do is you take the historical practice as a
11 given, so you don't overrule Humphrey's
12 Executor, despite the invitation to do so, but
13 then you think: Okay, now we confront something
14 that's different, not completely unprecedented,
15 we've had four of them spanning about 30 years,
16 but you confront something new. And then you
17 say, is this different in kind?

18 JUSTICE KAVANAUGH: And here's -- on
19 the different in kind, just how this will play
20 out if you were to win, it's really the next
21 President who's going to face the issue, because
22 the head of this agency will go at least three
23 or four years into the next President's term,
24 and the next President might have a completely
25 different conception of consumer financial

1 regulatory issues yet will be able to do nothing
2 about it.

3 And this director -- and that's
4 different from the FCC and the FTC and the NLRB
5 and you name the rest, because the chair is
6 redesignated by the new President when the
7 President comes in. That happens with all the
8 -- or almost all the multi-member agencies.

9 So -- so how do we deal with that real
10 world consequence that seems different and
11 troubling?

12 MR. CLEMENT: So two points, Justice
13 Kavanaugh. First, I don't know that's different
14 with respect to many of the important agencies
15 and I point, for example, to the fed.

16 I don't think the President has the
17 ability to just change who's the chair of the
18 fed as soon as they walk into office. And they
19 may not even be able to make an appointment to
20 the fed for a couple of years.

21 And so I think, as Justice Kagan
22 alluded to, there is a number of different forms
23 of multi-member agency. But, second, I think
24 that gets to the question that the Chief Justice
25 asked earlier in the argument, which is it

1 depends a little bit about what inefficient --
2 what inefficiency, neglect of duty, and
3 malfeasance mean.

4 I mean, if that's something that
5 basically means that you have to have a very
6 high standard before you can remove somebody,
7 then maybe there is more of a constraint in that
8 situation. If it means something slightly less,
9 there may be less of a constraint and you're not
10 drawing on a blank slate in that regard.

11 My friends on the --

12 JUSTICE KAVANAUGH: What if we --

13 MR. CLEMENT: -- other side act as if
14 this --

15 JUSTICE KAVANAUGH: I'm sorry to
16 interrupt, but if we -- if we watered down the
17 standard, as you're suggesting, of what it takes
18 to remove an independent agency head, that would
19 apply across the board and actually would be a
20 broad hold -- holding that would make the FCC,
21 the FTC, NLRB less independent.

22 MR. CLEMENT: I -- I -- I think it
23 depends. I mean, if you're interpreting those
24 terms to avoid a constitutional problem and the
25 particular constitutional problem you just

1 articulated, then I don't think it necessarily
2 follows that those same terms would be watered
3 down in the context of a multi --

4 JUSTICE KAVANAUGH: Well --

5 CHIEF JUSTICE ROBERTS: What about --

6 JUSTICE KAGAN: What about the --

7 (Laughter.)

8 CHIEF JUSTICE ROBERTS: What about the
9 -- what about the budgetary consequences? I
10 mean, your -- your friend on the other side
11 refers to this individual, the head, as sort of
12 like a, you know, the effective President over
13 the significant swath of the economy. But with
14 the budgetary things, it's actually more
15 powerful than that.

16 I mean, they don't even have to go to
17 Congress to get -- to get their money. Isn't
18 that something that we should factor into the
19 substantive question on his removability?

20 MR. CLEMENT: Well, Mr. Chief Justice,
21 I think that actually cuts in our favor because
22 that means that the officer is less responsive
23 to Congress and, therefore, however responsive
24 they would otherwise be to the President, they
25 don't have to dilute that by trying to worry

1 about what they're going to say to the
2 appropriators when they go up and talk to the
3 appropriators.

4 And I think that the Solicitor General
5 referred to the Bowsher opinion. I think the
6 Bowsher opinion is helpful for us for two
7 reasons: First, it interprets inefficiency,
8 neglect of duty, and malfeasance in a way that I
9 think, if applied to this statute, would make it
10 constitutional.

11 But, second, it also points out that
12 the critical principle is that an officer is
13 drawn kind of in a magnetic way to the
14 individual that has the ability to remove them.

15 And here, unlike Bowsher, unlike
16 Myers, and even unlike Free Enterprise, the
17 person that gets to remove the director is the
18 President. So the director has to be to some
19 degree, even when there's a change of
20 administration, responsive to the President.

21 JUSTICE KAVANAUGH: On your -- on your
22 definition of how we should apply the standard
23 or water it down, is what I said, would it be
24 enough for the President to say: I don't feel
25 that your mind and my mind go along together on

1 the policies or administering of the agency?

2 MR. CLEMENT: I -- I don't know that
3 that would be enough, Your Honor, but I do think
4 if a President said, look, I think it's an
5 important priority for consumer finance
6 protection that we deal with, let's just say,
7 pay day lenders or some problem that's out
8 there, and the director said absolutely not, I
9 think you could, especially if you're --

10 JUSTICE KAVANAUGH: That's what --
11 that's what President Roosevelt said to
12 Humphrey.

13 MR. CLEMENT: No, no, what -- what you
14 said is what --

15 JUSTICE KAVANAUGH: Yeah, I know --

16 MR. CLEMENT: -- he said to Humphrey.

17 JUSTICE KAVANAUGH: -- but what you're
18 saying is --

19 MR. CLEMENT: No --

20 JUSTICE KAVANAUGH: -- really the same
21 thing.

22 MR. CLEMENT: I -- I -- I don't think
23 it is what he said. And, I mean, keep in mind
24 in Humphrey you had those terms, but you upheld
25 the constitutionality of the statute.

1 JUSTICE GORSUCH: Yes. But what's the
2 difference if we water it down to something
3 approaching at will? What's the difference
4 between that and overruling Humphrey and being
5 honest about what we're doing, Mr. Clement?

6 MR. CLEMENT: Well, two things, Your
7 Honor: I mean, first, in every other context
8 I'm aware of, if you have one path that says we
9 interpret the Constitution -- the statute to
10 avoid the constitutional problem, or we can
11 strike it down, you favor the non-constitutional
12 ruling.

13 JUSTICE GORSUCH: Yes. But what
14 you're doing is equating the two. If it winds
15 up being at will, then that is Humphrey.

16 MR. CLEMENT: With due -- all -- all
17 due respect, I think that -- it's still a
18 difference, whatever the standard is. Maybe it
19 -- maybe it allows something like sort of a
20 broad-standing policy disagreement but not
21 disagreeing with individual cases.

22 JUSTICE GORSUCH: A broad-standing --

23 CHIEF JUSTICE ROBERTS: But that's --

24 JUSTICE GORSUCH: -- policy
25 disagreement versus a policy disagreement in a

1 particular case? I'm sorry, Chief. I'm not
2 sure what the difference would be.

3 MR. CLEMENT: Well, one is I want you
4 to go after pay day lending. The other is I
5 don't like what you did in that particular
6 adjudication. I do think --

7 CHIEF JUSTICE ROBERTS: Well, but
8 that's worse than -- that's worse than Humphrey
9 because what's going to happen is that there
10 will be litigation over whether or not the
11 standard has been met or not met.

12 I mean, we begin with the idea of a
13 serious conflict between the President and the
14 agency director. And if then we're saying,
15 well, the standard is more flexible, it sounds
16 to me like that's a dispute that's going to be
17 presented to the courts, which would be the
18 worst of all possible worlds.

19 MR. CLEMENT: Well, I -- I -- I -- no,
20 I think it would -- first of all, I don't think
21 it would be the worst of all possible worlds
22 because it would be a concrete live dispute.
23 And, of course, as you suggested, you could
24 provide a degree of deference.

25 But I do think it's important there

1 would still be a big difference between a
2 restriction that applied however you interpret
3 it and at will, because at will --

4 JUSTICE ALITO: Well, let me ask this
5 in concrete terms. So let's say that the -- the
6 director is appointed by a prior President and
7 the new President says: I want to remove you
8 because I think you are too pro-consumer and
9 you're hurting the economy, or you are not
10 sufficiently protecting consumer interests.

11 Would that be permissible?

12 MR. CLEMENT: I -- I -- I don't know
13 for sure because I don't have a concrete
14 controversy here, and that's maybe just yet
15 another reason to not decide this case in its
16 current artificial posture. But I guess if you
17 told me --

18 JUSTICE ALITO: Well, that's exactly
19 -- that's all we -- that's all we know about it.
20 There's just a policy disagreement about the way
21 interests are balanced.

22 Would that be sufficient to just -- to
23 remove that person?

24 MR. CLEMENT: If the only alternative
25 is to strike the statute down, I would say

1 that's sufficient.

2 Now I will confess I don't think
3 that's what Congress had in mind when it put
4 those words in this particular statute. And I
5 think, as written, it's still perfectly
6 constitutional.

7 I'm just saying -- said in every other
8 context, the rule this Court applies is we
9 interpret the statute to make it more
10 constitutional, not less constitutional --

11 JUSTICE SOTOMAYOR: Mister --

12 MR. CLEMENT: -- just so we can strike
13 it down.

14 JUSTICE SOTOMAYOR: -- Mr. Clement,
15 can you say or explain what your counter is to
16 the buck stops here argument? There seems to be
17 an overriding assumption that somehow the
18 President needs unfettered discretion to execute
19 the laws. Why is that -- answer that argument
20 head on.

21 MR. CLEMENT: So I don't think that
22 that's true as a constitutional matter with
23 respect to every power the President exercises.
24 I think Congress has the power to say there are
25 certain things where we want the President to

1 have a role, but we also want it somewhat
2 insulated from politics.

3 So take the Fed, for example. We
4 don't want the President to juice up interest
5 rates right before a presidential election, so
6 we're going to give that to somebody who is
7 insulated. How insulated depends on what's
8 constitutionally permissible. But not every
9 statutory responsibility needs to be conducted
10 by the President himself.

11 In the current situation, you see
12 people are trying to make a political football
13 out of dealing with a pandemic disease. So
14 maybe Congress decides: You know what makes
15 sense, let's have the head of CDC be protected
16 by for-cause removal because that'll make sure
17 people get good advice and it doesn't become
18 political. That is the kind of sensible
19 decision that Congress has been making for over
20 100 years.

21 Now it gave that responsibility, that
22 important responsibility to the Fed, protected
23 by for-cause removal 100 years ago.

24 Now it happened to be a multi-member
25 Board of Governors, but I don't think anything

1 turned on that. As the House makes clear in
2 their amicus brief, at no point did Congress
3 ever put multi-member restrictions in there or
4 for -- or -- or bipartisan requirements in there
5 to give the President greater control.

6 Although the reality is diverse, as a
7 general matter, if you add multi-member
8 requirements and partisan balance requirements
9 to for-cause removal requirements, you make the
10 officers more insulated, not less insulated.

11 CHIEF JUSTICE ROBERTS: But the buck
12 stops --

13 JUSTICE KAGAN: So more insulated --

14 CHIEF JUSTICE ROBERTS: -- the buck
15 stops here quote was quoted in our recent
16 decision in Free Enterprise. Do you think that
17 that should -- that recent precedent should have
18 a binding -- binding effect on how the Court
19 addresses this case?

20 MR. CLEMENT: May I answer?

21 (Laughter.)

22 CHIEF JUSTICE ROBERTS: No. Yes, you
23 may.

24 (Laughter.)

25 MR. CLEMENT: Mr. Chief Justice, we

1 think Free Enterprise Fund helps us in two ways.
2 One, it made crystal-clear that the defect there
3 is that the removal power was taken away from
4 the President. And what you found to be
5 sufficient to give the President control there
6 was the ability to remove the SEC commissioners
7 for cause.

8 The second thing you said later in the
9 opinion is that the SEC itself, the whole
10 multi-member commission, could actually function
11 as a head of the Department.

12 So that's -- in an Appointments Clause
13 context, it's a way of saying the difference
14 between a single member and a multi-member
15 doesn't make a constitutional difference.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 JUSTICE GINSBURG: May I -- may I just
19 ask one question? Mr. Shanmugam said there was
20 no proof of ratification.

21 MR. CLEMENT: Well, I -- I don't know
22 what he means by that. The -- the acting -- in
23 a brief that said that it was essentially
24 endorsed by the acting director at a time when
25 the acting director was in charge and at-will

1 removable by the President, told the Ninth
2 Circuit that the acting director had ratified
3 the decision to issue the CID in that context, I
4 would take that, as in any other context, as all
5 the evidence you need.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Mr. Letter.

9 ORAL ARGUMENT OF DOUGLAS N. LETTER
10 FOR THE U.S. HOUSE OF REPRESENTATIVES,
11 AS AMICUS CURIAE

12 MR. LETTER: Mr. Chief Justice, and
13 may it please the Court:

14 Let me begin just by saying the
15 Speaker of the House thanks the Court for its
16 courtesy in agreeing to let the House be heard
17 here today.

18 I'd like to start out, if I could, by
19 responding to Justice Gorsuch's question to my
20 friend, Mr. Clement, about do we want the Court
21 to DIG the case. No. We think that the Court
22 should affirm on alternative grounds because, as
23 we have pointed out, there are -- there are two
24 reasons why this Court's venerable doctrine with
25 which the House completely agrees, about

1 avoidance of constitutional issues, one is the
2 ratification point that we've been discussing,
3 and two is the severability point, which this
4 Court, in cases like Matthews and Chadha, has
5 indicated you -- you can look at first,
6 initially.

7 And, here, the severability point, we
8 think, is absolutely clear because of the
9 severability -- severability clause, but, in
10 addition, there's -- there's another point that
11 I wanted to -- to make that hasn't yet been
12 said.

13 If this -- if there is no severability
14 here, I want to make sure that you all
15 understand this is not a simple -- you know, a
16 situation of, well, we'll just have these
17 functions go back to the other agencies that --
18 where they came from. They came from seven
19 different agencies.

20 The Office of Thrift Supervision no
21 longer exists. The other agencies don't have
22 either slots or appropriations to enforce what
23 the -- the CFPB does. So, if you say this is
24 non-severable, we strike down the whole statute,
25 in this instance, that would be a very, very

1 major action.

2 CHIEF JUSTICE ROBERTS: Mr. -- Mr.
3 Letter, are you quite concerned about the agency
4 taking away your client's authority over the
5 budget with respect to this very significant
6 part of the economy?

7 MR. LETTER: We are not, Your Honor,
8 because this is something that Congress has done
9 with several agencies in the financial
10 regulatory sectors, for example, the -- the Fed,
11 in particular, the National Credit Union
12 Administration.

13 So this is a -- a function that -- oh,
14 I'm sorry, the FDIC. This is a -- this is
15 something that Congress has done and -- and the
16 President. So the political branches have done
17 in -- in different -- in different agencies
18 within this financial regulatory sector.

19 As far as one of the things I'd like
20 to pick up on also is Justice Kagan's point or
21 question about is it really so -- so simple
22 about agencies with multi-members or
23 individual -- an individual? And -- and I note,
24 Justice -- as Judge Kavanaugh, you wrote
25 extensively on the influence, but I'm going to

1 try to press hard and convince you otherwise.

2 The -- the situation here is, if the
3 President were to try to, by removals, influence
4 the kinds of functions that the CFPB did, does,
5 he'd have to make removals possibly from seven
6 different agencies, any number of individuals.

7 And then the -- the point that was
8 made about, well, there haven't been many
9 removals, it's a big deal: It is a big deal,
10 and that's why there have been almost no
11 removals.

12 In fact, what we know from history is
13 presidents have all sorts of ways that they
14 influence agencies, and they influence agency
15 commissioners or heads, just as, for example,
16 sometimes you might have a situation where a
17 President convinces a Supreme Court justice to
18 leave that post and --

19 JUSTICE BREYER: Well, what do you
20 have -- do you want to add anything on what I
21 think is quite basic, and people disagree? On
22 the one hand, you have people -- good walls make
23 good neighbors, let's look for a line, multi
24 versus single or some other line.

25 The other is the approach there's

1 something about me that doesn't like a wall, and
2 before I want to have a wall, I want to know
3 what I'm walling in and walling out. And that
4 looks to function. What did Congress have in
5 mind? How does it wall in the President? What
6 is it exactly the agency is doing?

7 The difficulty of that, of course, is
8 there is no strict line. And the courts have to
9 approach it without knowing too much about it
10 case by case.

11 Do you have anything you want to say
12 on what I'd call that basic difference of
13 approach in these cases?

14 MR. LETTER: Yes, Your Honor, and --
15 and you're absolutely right, this is a basic
16 difference here.

17 The -- the point is that we -- we do
18 not agree -- I do not agree with Mr. Clement's
19 argument that we should water down the standard.
20 But we definitely agree, the House believes --
21 and notice the House has not tried to have
22 cabinet members be anything other than at will.

23 And I think my friend, Mr. Clement,
24 hit on a very key provision. One is the
25 succession, that cabinet members who are in the

1 succession, not all cabinet members are --
2 succession to the President -- but, two, the
3 basic independent powers that the President has
4 because of the Constitution.

5 So it's not just the Defense
6 Department, as -- as my --

7 JUSTICE GORSUCH: So where --

8 MR. LETTER: I'm sorry.

9 JUSTICE GORSUCH: -- would you draw
10 the line, Mr. Letter, then? If -- I guess I
11 have two questions for you. First, if -- if the
12 standard isn't watered down, what does that
13 standard mean for removal in your mind? And,
14 number two, what would be the stopping point for
15 Congress's ability to place high levels, serious
16 impediments to presidential removal powers of --
17 of members of the cabinet and other
18 executives -- what we think of traditionally as
19 executive agencies?

20 MR. LETTER: Your Honor, I'm going to
21 start with the second one. I don't know the
22 answer of how far Congress could -- could go,
23 Congress and the President together could go.

24 JUSTICE GORSUCH: Isn't that a pretty
25 vital question for us to be able to answer to

1 decide this case?

2 MR. LETTER: I don't think so, Your
3 Honor, because you have decided in Humphrey's
4 Executor, Wiener, Buckley, Free Enterprise,
5 Morrison versus Olson, you've decided all of
6 those cases and you've said that removal
7 protections are constitutional without answering
8 that question.

9 I -- I searched in vain. In none of
10 those decisions have you --

11 JUSTICE GORSUCH: No, fair enough.
12 But you're at the podium, so take a shot at it.

13 (Laughter.)

14 MR. LETTER: They -- I'm going to pick
15 up on a word that -- that I believe this Court
16 has used, which is they should be modest. I
17 think the test is, Your Honor, what -- again,
18 this Court has said, I believe it's in Morrison,
19 but you've said it in various situations, is it
20 -- does it so interfere with the executive's
21 ability to carry out his constitutional
22 responsibilities?

23 I think that's the test that this
24 Court has -- has said in a variety of
25 separation-of-powers cases. I know that's --

1 that's vague, but I can't do better than what --
2 what you have said.

3 JUSTICE KAVANAUGH: What -- what do
4 you do about --

5 JUSTICE GORSUCH: Well -- I -- I --
6 I'm sorry.

7 JUSTICE KAVANAUGH: Go ahead. Go
8 ahead.

9 JUSTICE GORSUCH: I'm sorry. I hope
10 you'll get to my first question at some point,
11 but I --

12 JUSTICE KAVANAUGH: No, go ahead. Go
13 ahead first.

14 MR. LETTER: Justice Gorsuch, would
15 you mind repeating your first question? I
16 apologize.

17 JUSTICE GORSUCH: Sure. What does
18 that removal standard mean to you? If -- if we
19 shouldn't water it down, what does it mean?

20 MR. LETTER: Your Honor -- and, again,
21 I'm going to agree with Mr. Clement insofar as
22 this. A lot of times, this is going to depend
23 on context.

24 So, for example, and -- and, again,
25 this Court hasn't defined what it means, so I

1 don't have a great answer yet from you all. You
2 tell us what the Constitution --

3 JUSTICE GORSUCH: Your client wrote
4 it. So I'm -- I'm just wondering what your
5 client's view is. And you say you disagreed
6 with Mr. Clement on this, and now you say you
7 agree. So I'm really quite confused.

8 MR. LETTER: I -- I disagree with Mr.
9 Clement about watering it down. We don't think
10 that it should be made basically at will.

11 But the -- I -- I will agree --

12 JUSTICE KAGAN: I don't think Mr.
13 Clement said that either.

14 MR. LETTER: Oh, I -- I apologize. I
15 thought he was saying a watered-down version.

16 But, Justice Kagan, I will very
17 strongly agree with Mr. Clement. It does depend
18 on the -- the circumstances.

19 For example, if a President says I'm
20 -- I'm firing you because you are investigating
21 one of my big political donors, and I don't like
22 that, so you're gone, I don't think that anybody
23 would feel that that fits within the IMN
24 standard.

25 JUSTICE ALITO: So what if the

1 President just says we don't agree on policy?

2 Would that be permitted?

3 MR. LETTER: I don't believe -- I
4 think in Free Enterprise, I believe you said no.
5 So -- so I think you've already answered that.

6 If --

7 JUSTICE KAVANAUGH: So -- so we don't
8 always think about the future implications of
9 these things, but that's one of the things I've
10 tried to think about.

11 MR. LETTER: Yes.

12 JUSTICE KAVANAUGH: The next President
13 in 2021 or 2025, or whenever, will have to deal
14 with a CFPB director appointed by the prior
15 President potentially for his or her whole term
16 without being able -- given your answer to
17 Justice Alito -- being able to do anything about
18 that difference in policy.

19 Are you comfortable with that result?
20 Does that give you any concern? Should we be
21 concerned about that?

22 MR. LETTER: It does give me concerns
23 but -- and I'm -- I'm very glad you brought that
24 up because you've asked that and it's a very key
25 question, Your Honor.

1 What I would say, though, is let's
2 compare it to, for example -- may I finish my --

3 CHIEF JUSTICE ROBERTS: Sure.

4 MR. LETTER: If you compare it to, for
5 instance, the Fed, that has seven members who
6 serve 14-year terms.

7 A President who serves a four-year
8 term is, therefore, very likely to have almost
9 no influence over the Fed. They won't -- I've
10 not -- I'm not a good mathematician, but I don't
11 think that means that they get to come anywhere
12 close to appointing a majority of the Fed
13 members.

14 So this is a problem that you have
15 already decided to -- to recognize.

16 CHIEF JUSTICE ROBERTS: Mr. Letter, I
17 think Justice Gorsuch's first question is still
18 on the table.

19 MR. LETTER: As I said what we --

20 JUSTICE GORSUCH: Thank you.

21 MR. LETTER: -- what we think it means
22 will be fact-dependent. It will depend -- as I
23 say, if it is -- it can't just be we have a
24 policy difference. You've already -- you've
25 told me that.

1 You've already told me that it can't
2 simply be I don't like you. We -- we know that.

3 But, for example, if it's a situation
4 where the -- the -- the President says you are
5 doing something that undermines national
6 security, one of my core functions, or
7 undermines foreign relations and I want -- and I
8 direct you to stop, an agency that says, no, I
9 believe that that would be, Your Honor, cause
10 for -- that would meet the standard.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 MR. LETTER: Thank you, Your Honor.

14 CHIEF JUSTICE ROBERTS: Two -- two
15 minutes, Mr. Shanmugam.

16 REBUTTAL ARGUMENT OF KANNON K.

17 SHANMUGAM ON BEHALF OF THE PETITIONER

18 MR. SHANMUGAM: Thank you, Mr. Chief
19 Justice. Just three points on jurisdiction, the
20 merits and the remedy, respectively.

21 On jurisdiction, Amicus, who is
22 appointed to defend the judgment below, now
23 seems primarily to be arguing that this Court
24 made a mistake in granting certiorari because of
25 the existence of the ratification question.

1 As a preliminary matter, that was
2 flagged by both sides at the cert stage and this
3 Court, nevertheless, granted review, and I would
4 respectfully submit for good reason.

5 Ratification goes at most to the
6 remedy for the constitutional violation here.
7 And that issue is obviously not briefed before
8 this Court. It was raised by the government in
9 the Ninth Circuit.

10 But notably, unlike in the other cases
11 involving challenges to the CFPB's
12 constitutionality, the government provided no
13 factual support, no declaration, nothing in
14 support of ratification.

15 I think the ratification is deeply
16 legally problematic here, too, and I would refer
17 the Court to the amicus brief of RD Legal
18 Funding if the Court has questions about that,
19 and ratification wouldn't solve the
20 constitutional problem because, even if the CID
21 itself had been ratified, the continued
22 prosecution of this enforcement action would
23 still present exactly the same constitutional
24 concern.

25 Now, on the merits, Amicus disparages

1 the notion that the removal power is
2 illimitable. Ironically, the Court used exactly
3 that adjective in *Humphrey's Executor*, at least
4 where agencies are performing executive
5 functions.

6 No one defends the rationale of
7 *Humphrey's Executor* distinguishing between
8 executive functions and quasi-legislative or
9 quasi-judicial functions.

10 And our approach gives meaning to
11 *Humphrey's Executor* and allows the Court to
12 leave it in place by limiting it to the
13 multi-member context.

14 Amicus's proposed approach by contrast
15 would really create an exception without limit.
16 And the exception cannot be limited to cabinet
17 officers because for those cabinet officers who
18 exercise enumerated constitutional
19 responsibilities, that's only two, the Secretary
20 of State and the Secretary of Defense.

21 All 13 of the other cabinet officers
22 as the cabinet is currently constituted would be
23 removable. The judgment of the court of appeals
24 should be reversed.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Mr. Clement, this Court appointed you
3 to brief and argue this case as an amicus curiae
4 in support of the judgment below. You have ably
5 discharged that responsibility, for which we are
6 grateful.

7 The case is submitted.

8 (Whereupon, at 11:24 a.m., the case
9 was submitted.)

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