No. 25A312

IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*

Applicant,

v.

LISA D. COOK

BRIEF OF *AMICUS CURIAE* JED SHUGERMAN IN OPPOSITION TO THE APPLICATION TO STAY THE PRELIMINARY INJUNCTION

Ayesha N. Khan
Counsel of Record
Andrew L. Bookbinder
Democracy Forward Foundation
P.O. Box 34553
Washington, DC 20043
(240) 938-4234
akhan@democracyforward.org

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IDENTITY AND INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Curiae Jed H. Shugerman is a Professor of Law at Boston University. He has a JD and a PhD in History from Yale University. He is of the view that the Constitution should be interpreted as originally intended (*i.e.*, originalism), and much of his scholarship focuses on the Constitution's original public meaning. This brief offers historical evidence demonstrating that termed officers protected by a "cause" requirement – such as a Governor of the Federal Reserve Board – are to receive fair notice and a meaningful opportunity to respond before their removal may take effect.

INTRODUCTION

The Federal Reserve Act states that "each member shall hold office for a term of fourteen years from the expiration of the term of his predecessor, unless sooner removed for cause by the President." 12 U.S.C. § 242. Based on the historical record, when Congress creates an office *with a fixed term of years and protects against removal without "cause,"* Congress has both granted "a constitutionally protected property interest," *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985), under the Fifth Amendment (that cannot be taken away without "due process"), U.S. Const. amend. V., *and* extended a *statutory* entitlement to receive fair notice and a meaningful opportunity to respond before any removal may take effect.

Constitutional Protection. Under English law through the eighteenth century, termed executive offices – even cabinet-level offices – were considered

[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

"freehold" property, subject to protections from removal akin to those applicable to real property. This conception – of termed offices as "property" – would have been well known to the Founders and was reflected in Founding-era documents and commentary. The Constitution was drafted with this understanding.

Statutory Protection. Independent of the Fifth Amendment, the "cause" requirement has a long-established common law meaning of requiring notice and an opportunity to be heard before removal. This understanding hails from pre-Founding English common law, and is likewise reflected in American precedents soon before Congress drafted the Federal Reserve Act of 1913. *See Shurtleff v. United States*, 189 U.S. 311, 314 (1903); *Reagan v. United States*, 182 U.S. 419, 425 (1901). The Act's text of "cause" should be read in this context.

"Faithful Execution." Article II of the Constitution requires the President to undertake a "faithful execution" of the laws. From a historical perspective, there is nothing inconsistent with that obligation and recognizing procedural protections for employees who can be terminated only for cause.

I. THE HISTORICAL RECORD DEMONSTRATES THAT TERMED POSITIONS FROM WHICH ONE CANNOT BE REMOVED ABSENT "CAUSE" ARE "PROPERTY" SUBJECT TO PROTECTION UNDER THE FIFTH AMENDMENT

The Constitution was drafted against a backdrop of English jurisprudence making termed offices subject to for-cause removal a species of property that could not be withdrawn without process. This understanding persisted through the Founding era, and it is the original public meaning of offices that were protected from removal. Governor Cook's employment merits protection under the Fifth

Amendment because of this original public meaning that such offices had procedural guarantees.

A. Under Eighteenth-Century English Law, Offices Held for a Term of Years Were Considered Property

The English historical record shows that many high offices, and even "great offices," department heads, and cabinet-level offices were considered protected freehold property. The tenures of these offices included legal protections from being fired or displaced by an executive, including protections of "tenure during good behaviour" that we now associate with Article III judges. *See* Jed H. Shugerman, *Venality: A Strangely Practical History of Unremovable Offices and Limited Executive Power*, 100 Notre Dame L. Rev. 213, 252–65 (2024).

In 1740, Matthew Bacon provided a list of office types, most of which were forms of protected property patterned after categories of real property: "Offices, in respect to their Duration and Continuance, are distinguished in those which are of Inheritance, or in Fee, or Fee-tail, those of Freehold or for Life, those for Years or a limited Time, and those which are at Will only . . . ." 3 Matthew Bacon, *A New Abridgment of The Law* 732 (1740); *see also* 1 Sir William Searle Holdsworth, *A History of English Law* 247–50 (3d ed. 1922) (listing offices held "in fee, in tail or for life" as forms of traditional property which "came very naturally to the mediæval common law," *id.* at 249, 248); Jane Manners and Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 Colum. L. Rev. 1, 19–20 (2021).

Soon thereafter Blackstone confirmed Bacon's account by recognizing four categories of offices: three categories of offices protected as property (inheritable offices, offices for a life term, and offices for a term of years), and one of unprotected tenure to which one was entitled to serve "during pleasure only." *See* Bacon and Blackstone, *infra*. As with the many inheritable offices and life-tenure offices, offices with tenure for a "term of years" was freehold property that stood in contrast to offices held at pleasure. 2 William Blackstone, *Commentaries on the Laws of England* *36 (1st ed. 1765); Jed H. Shugerman, *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 Yale L.J. 128, 158–60 (2022). Blackstone specified only a small number of offices with "during pleasure" tenure. 2 Blackstone, *Commentaries* *36–37; Manners and Menand, *The Three Permissions*, 121 Colum. L. Rev. at 19–20; Shugerman, *Removal of Context*, 33 Yale L.J. at 158-159; Shugerman, *Venality*, 100 Notre Dame L. Rev. at 221.

Montesquieu defended the legal protections of offices as property and went so far as to describe regimes that allowed removal at will as "despotic." 1 Baron de Montesquieu, *The Spirit of Laws* 100 (Nourse & Vaillant eds., 1750); *see also* Shugerman, *Venality*, 100 Notre Dame L. Rev. at 237. Blackstone, Burke, and Bentham all defended this property system and its tenure protections as a practical system that protected increasingly modern values of expertise, efficiency, and decisional independence, and allowed officers to perform their tasks in the public interest protected from local backlash, special interests, the centralized "court"

party's corruption, and even the Crown itself. Shugerman, *Venality*, 100 Notre Dame L. Rev. at 265.

Under this offices-as-protected-property system, the Crown had to use the writ of *scire facias* ("to make known") – "a rough equivalent to the modern day 'order to show cause'" – or the writ of *quo warranto* ("by what authority") – which likewise entailed notice and a hearing – to allege misbehavior and remove officers. Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. Pa. L. Rev. 753, 849 n.552 (2023) (quoting Mark Lemley, *Why Do Juries Decide If Patents Are Valid?*, 99 Va. L. Rev. 1673, 1683 & n.83 (2013)).

The king was required to use *scire facias* as a plaintiff to remove officers holding positions obtained by patent[2] from the King. Raoul Berger, *Impeachment: The Constitutional Problems* 128–29 (1973) (citing two instances in which, though the king ordered a judge to be removed from office, the judge successfully asserted that removal required a "scire facias proceeding"); Saikrishna Prakash and Steven D. Smith, *How To Remove a Federal Judge*, 116 Yale L.J. 72, 77 n.13 (2006) (discussing the Crown's use of the writ of *scire facias*); *see also* Shugerman, *The Indecisions of 1789*, 171 U. Pa. L. Rev. at 849.

[2] "Letters patent" were official legal instruments issued by the king to grant public offices (and other things) to corporations or individuals. The patent would outline the powers, duties, jurisdiction, and sometimes the duration of the office. They stood in contrast to "letters close," which were private letters meant only for the recipient. Governor Cook's appointment is much like an appointment by patent. 1 Timothy Cunningham, *A New and Complete Law-Dictionary* (3d ed. 1783); "Chancery," 4 *Encyclopaedia Britannica* 329 (3d ed. 1797).

After the American Revolution, some English department heads, cabinet members, and significant offices running Treasury continued to hold their offices as freeholds for life. Shugerman, *Venality*, 100 Notre Dame L. Rev. §§ III.A, IV.A (on the heads of household departments as members of the cabinet until 1782, after American independence); 10 Holdsworth, *A History of English Law* 499–501 (1938).

B. The Offices-as-Property Tradition Carried Into the Era of the United States Constitution's Adoption

The First Congress reflected the continuation of this property-in-office tradition. For example, during the famous removal debates, one congressman recited a similar menu of legislative options including "hold[ing] for three years" (as property protected from removal by English law); "good behaviour" (similar); by legislative declarations of "unfitness and incapacity"; or a statutory list of "causes of removal." *The Congressional Register* (May 19, 1789) (Rep. Laurance), *reprinted in* 10 *The Documentary History of the First Federal Congress of the United States of America*, *4 March 1789–3 March 1791* 733 (Charlene Bangs Bickford, Kenneth R. Bowling & Helen E. Veit eds., 1992).

The First Congress's debates also referred frequently to the English writ tradition that protected offices as property and required notice and hearings before removal. *See* Shugerman, *The Indecisions of 1789*, 171 U. Pa. L. Rev. at 848–50 (discussing *scire facias*, mandamus, and *quo warranto*). The All Writs Act, a section of the Judiciary Act of 1789, enacted the writ of *scire facias*, mandamus, and "all other writs not specially provided for by [s]tatute." *Id.* at 849.

In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Chief Justice John Marshall directly describes Marbury's office as a property interest, while repeatedly describing his office – held for a term of five years with no mention of any conditions for removal – as unremovable. Here are Chief Justice Marshall's words:

> In order to determine whether he is entitled to this commission, it becomes necessary to inquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, *became his property*.
>
> . . .
>
> [W]hen the officer is not removable at the will of the executive, *the appointment is not revocable*, and cannot be annulled. It has conferred legal rights which cannot be resumed.
>
> The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where, by law, the officer is *not removable* by him.
>
> . . .
>
> "[I]t is a general and indisputable rule that *where there is a legal right, there is also a legal remedy* by suit or action at law whenever that right is invaded."
>
> . . .
>
> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.

Id. at 155, 162–63 (quoting Blackstone, *Commentaries*).

Then Marshall refers again to the "rights of property," *id.* at 165, and equates the legal right in an office to a legal right in land ownership:

> By the act passed in 1796, authorizing the sale of the lands above the mouth of Kentucky river, the purchaser, on paying his purchase money, becomes completely entitled to the property purchased, and, on producing to the Secretary of State the receipt of the treasurer upon a certificate required by the law, the President of the United States is authorized to grant him a patent. It is further enacted that all patents shall be countersigned by the Secretary of State, and recorded in his office. If the Secretary of State should choose to withhold this patent, or, the patent being lost, should refuse a copy of it, can it be imagined that the law furnishes to the injured person no remedy?
>
> It is not believed that any person whatever would attempt to maintain such a proposition.

Id. at 165; *see also* 1 James Kent, *Commentaries on American Law* 311 n.1 (O.W. Holmes, Jr. and John M. Gould eds., 14th ed. 1896) (citing *Marbury*, 5 U.S. (1 Cranch) at 167, 168, 172); Manners and Menand, *The Three Permissions*, 121 Colum. L. Rev. at 25 (discussing holding that Marbury's tenure was unremovable property); Jed H. Shugerman, *Presidential Removal: The Marbury Problem and the Madison Solutions*, 89 Fordham L. Rev. 2085 (2021) (same); Shugerman, *Venality*, 100 Notre Dame L. Rev. at 281–82 (same).[3]

Contemporaneous legal commentators and judges confirmed that Congress could use limited duration to foreclose removal short of impeachment, stating "[A]ll others [besides judges] must hold their offices during pleasure, unless congress shall have given some other duration to their office." 3 Joseph Story, *Commentaries on The Constitution of The United States* 388 (1833); *see generally id.* at 388-90.

[3] For a parallel example, *see* Jed H. Shugerman, *Marbury and Judicial Deference: The Shadow of Whittington v. Polk and the Maryland Judiciary Battle*, 5 U. Pa. J. Const. L. 58 (2002) (discussing a similar dispute in which the Maryland Supreme Court acknowledged a property interest in office).

Eventually, "permissions" were extended, which provided grounds or "cause" – such as neglect of duty, inefficiency, or malfeasance – to remove officers who would otherwise hold office for a term of years. *See* Manners and Menand, *Three Permissions*, 121 Colum. L. Rev. at 18–25, 27. These offices remained imbued with property protections up through the modern precedents of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538–39 (1985); *Esparraguera v. Department of the Army*, 101 F.4th 28, 33 (D.C. Cir. 2024) (collecting cases).

Over time, through the nineteenth century, Americans increasingly eliminated offices subject to property protections, and offices held at pleasure became routine in the executive branch, thereby stripping most executive offices of their protected-property status. Jerry Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829-1861*, 117 Yale L.J. 1568, 1616 (2008).

However, offices held for a limited term of years remained an exception, as demonstrated by Marbury's office with a five-year tenure and no other reference to removal rules in the statute. A narrow category of offices remained protected as a property interest, as under English law: Offices held for a term of years and offices protected with "cause" requirements were considered property interests that could not be taken away without the procedural protections of notice and hearing. This historical background explains why modern precedents continue to protect this exceptional category as property.

II. COMMON LAW DATING TO THE FOUNDING ERA AND THE TIME OF THE FEDERAL RESERVE ACT'S PASSAGE DEMONSTRATES THAT A STATUTORY REFERENCE TO REMOVAL FOR "CAUSE" SIGNIFIED ENTITLEMENT TO PROCEDURAL PROTECTIONS BEFORE REMOVAL

As recounted below, the common law rule from the pre-Founding era dating until the Federal Reserve Act's passage was that statutes prohibiting removal other than for "cause" encompassed procedural protections. This background provides context for why the Supreme Court interpreted the statutory language of "cause" protections as requiring notice and hearings in *Shurtleff*, 189 U.S. 311, and *Reagan*, 182 U.S. 419. It also informs the interpretation of the Federal Reserve Act of 1913, which was drafted soon after these Supreme Court cases were decided.

English common law cases – the background for the Supreme Court precedents interpreting "cause" to require notice and hearings – clarified that the threshold for "cause" is high: not just minor violations, but only for offenses "so infamous a nature, as to render the offender unfit to execute any public franchise"; breaches while in office, related to the office; or a crime so serious and so clearly established that it would be considered a common-law crime in England. *Rex v. Richardson*, 97 Eng. Rep. 426, 438 (1758).

Thus, independently of whether the Fifth Amendment applies to an office held for a term of years or subject to a for-cause-removal requirement, the Federal Reserve Act of 1913 should be interpreted by reference to the long-standing common law background from England, through the Founding, until the era of the Federal Reserve Act's enactment.

A. The Pre-Founding Default Common Law Rule Was That Public Officers Could Not Be Terminated Without "Good Cause" and Procedural Protections

In England, corporate charters were specially granted by the state with a concrete public purpose, giving such charters a more public orientation than we expect of incorporated entities today. "General incorporation" did not arise until later, so many of the canonical cases about municipal charters bear on what we would consider today the common law of public offices.

In England and America at the time, the process of ejecting corporate officers was called "amotion," and sometimes "amoval." Early cases and treatises mention "neglect of duty" as a common standard for "amotion," so long as the allegations were specific, while a criminal indictment was not grounds for amotion until there was a conviction. Sir John Comyns, *A Digest of the Laws of England* 21–26, 131–41(Stewart Kyd ed., 4th ed. 1793). Courts held that personal bankruptcy or recurring unexcused absences were not grounds for amotion. 2 Bacon, *A New Abridgment* 23–25 (Henry Gwillim ed., 6th ed. 1807). These distinctions are spelled out clearly in eighteenth and early nineteenth-century treatises. *Id.*; Joseph K. Angell and Samuel Ames, *Treatise on the Law of Private Corporations Aggregate* 424 (8th ed. 1866) (Section 408).

Both amotion and amoval required a process of notice and hearings. *See generally* Manners and Menand, *The Three Permissions*. Accordingly, corporate forms of removal were legally regulated substantively and procedurally, unlike "at pleasure" or "at will" public and private employment.

A canonical triad cited in treatises throughout this era makes this removal baseline clear. The triad begins in 1615, with *Rex v. Plymouth* (James Bagg's Case), which ruled that "amotion," which simply required a showing of neglect of duty, was not an inherent power of a corporation. 77 Eng. Rep. 1271, 1271–72 (1615). Instead, Lord Coke set a demanding standard for disfranchisement, concluding that the municipal corporation could take away an office only after a conviction in a court of law of either an "infamous" crime – "attainted of perjury, forgery, conspiracy" – making the officeholder unfit for any public office or of an offense "against the said… duty and trust of his freedom." *Id.* at 1278–79.

To clarify the procedural protections due before removal, Coke cited the Magna Carta:

> No Free-man shall be taken, or imprisoned, or dispossessed, of his free tenement, or liberties, or free customs, or be outlawed, or exiled, or in anyway destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land.—To none will we sell, to none will we deny, to none will we delay right or justice.

Id. at 1279 (quoting Magna Carta, cls. 39, 40 (1215)).[4]

In *Lord Bruce's Case* in 1728, the King's Bench swung in the other direction, abandoning the rule in *Plymouth* (Bagg's Case) and recognizing a more permissive power to remove officers. 93 Eng. Rep. 870, 870 (1729) ("[I]f it is an actual forfeiture, he is out, and you may chuse another . . . if not, it is but a misdemeanour, and a quo warranto will not lie.").

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[4] *Reprinted and translated in The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law* App'x (Ellis Sandoz ed., 2008).

That precedent was moderated, however, thirty years later. In *Richardson*, a number of Ipswich officers had missed some of the town's occasional "great courts," and the town corporation sought to remove them from office. Lord Mansfield explained that at the time of *Plymouth* (Bagg's Case), "[t]he law of corporations was not so well understood, and settled, at the time of *Bagg's Case*, as it has been since." *Richardson*, 97 Eng. Rep. at 438. He explained that the amotion power was "incident to every corporation," and that the amoval power was "necessary to the good order and government of corporate bodies." *Id.* These removal powers, however, were not unfettered.

Mansfield set forth "infamy" and "unfitness" for any public office or a "breach" of duty as the three types of offenses that could justify removal from office, stating as follows:

> 1st. Such as have no immediate relation to his office; but are in themselves of so infamous a nature, as to render the offender unfit to execute any public franchise.
>
> 2d. Such as are only against his oath, and the duty of his office as a corporator; and amount to breaches of the tacit condition annexed to his franchise or office.
>
> 3d. The third sort of offence for which an officer or corporator may be displaced, is of a mixed nature; as being an offence not only against the duty of his office, but also a matter indictable at common law."

Id. at 438. Mansfield ruled that the evidence in the case was insufficient to make this showing. *Id.* at 439–40.

Emphasis on the rule resulting from these three cases continued throughout the eighteenth century and into at least the mid to late nineteenth century. In his seminal *Commentaries*, Blackstone cited *Plymouth* (Bagg's Case) for the proposition

that disfranchisement was available when an office-holder was "acting contrary to the laws of the society, or the laws of the land." 1 Blackstone, *Commentaries* *472 (citing Bagg's Case for the proposition that corporations could disenfranchise their employees only for a violation of the law); Manners & Menand, *The Three Permissions*, 121 Colum. L. Rev. at 30–33 (discussing Bagg's Case, *Lord Bruce's Case*, and *Richardson*).

Blackstone did not directly address removal or "amotion." But James Wilson, in his Law Lectures in 1791, just a few years after he helped draft the Constitution in Philadelphia, cited *Richardson* for the rule that the power of removal "for just cause" is "a power incident to a corporation. To the order and good government of corporate bodies, it is adjudged necessary that there should be such a power." James Wilson, *Lectures on Law*, Part 2: Chapter X, *reprinted in* James Wilson, *The Works of the Honourable James Wilson, L.L.D.* 427 (Bird Wilson ed., 1804) (citing *Richardson*, 97 Eng. Rep. at 438).

Nineteenth-century American legal commentators drew from *Rex v. Plymouth* (James Bagg's Case), *Lord Bruce's Case*, *Rex v. Richardson*, and other decisions from the pre-1787 era, illustrating that these rules and practices endured through and beyond the Founding period. For example, James Kent summarized that "amotion" is "a power necessarily incident to every corporation," and requires "reasonable cause." 2 Kent, *Commentaries* 297 (O.W. Holmes ed., 12th ed. 1873). George Sharswood, in his commentaries on Blackstone, wrote: "generally an officer cannot be removed without good cause, though the charter says *generally* he may be

removed." William Blackstone, *Commentaries on the Laws of England*, Book 1, Ch. 18, at 481 (George Sharswood ed., 1893) ("Sharswood, *Commentary on Blackstone*"). This reflected the default rule that a showing of good cause was required for removal, and that this encompassed procedural protections, including that the summons should show "the particular charge alleged against the party to be amoved." *Id.* And *Sharswood* concluded on the question of redressability and justiciability: If an officer "be improperly amoved, a mandamus lies." *Id.*

B. The Long History of Deference to the Common Law Default Rules Continues Through the Modern Era, and Should Be Applied in Interpreting the Statute Before this Court

This common-law history carried into this country's jurisprudence, as state courts interpreted removal-for-cause restrictions to require the same tradition of notice and hearings. *See Dullam v. Willson*, 19 N.W. 112, 116 (1884); *Page v. Hardin*, 47 Ky. (8 B. Mon.) 648, 668, 672 (1848); *Willard's Appeal*, 4 R.I. 597 (1857); *Commonwealth v. Slifer*, 25 Pa. 23, 28 (1855); *State v. Hawkins*, 5 N.E. 228, 235 (1886); *Biggs v. McBride*, 21 P. 878, 881 (1889); *Ham v. Boston*, 7 N.E. 540 (1886). These conclusions were independent of the Due Process Clause, which at that time, had not been incorporated and deemed applicable to the states.

Congress adopted the pertinent "cause" language in the statute at issue here in 1913. Around that time, this Court twice held, as a matter of statutory interpretation, that limitations on removal expressed within a statute, as well as appointments for a term, encompass a right to notice and a hearing before termination.

In *Reagan*, the Court considered the removal of a Commissioner of the United States under a statute that allowed removal for a "cause prescribed by law." 182 U.S. at 424. As Chief Justice Fuller explained:

> The inquiry is therefore whether there were any causes of removal prescribed by law March 1, 1895, or at the time of the removal. If there were, then the rule would apply that, where causes of removal are specified by Constitution or statute, as also where the term of office is for a fixed period, notice and hearing are essential. If there were not, the appointing power could remove at pleasure or for such cause as it deemed sufficient.

Id. at 425.

Two years later, the Court decided *Shurtleff*, which involved a federal appraiser who had been appointed under a statute that allowed removal for "inefficiency, neglect of duty, or malfeasance in office." 189 U.S. at 313. The Court explained that "we are of the opinion that if the removal is sought to be made for those causes, or either of them, the officer is entitled to notice and a hearing." *Id.* at 314.[5]

[5] The Court rejected Shurtleff's claim, even though he had not been removed for any of the three statutorily specified grounds, because the Court interpreted the statute to authorize the President to terminate appraisers at will for reasons beyond those specified in the statute (*see* 189 U.S. at 315–19), without provision of process (*id.* at 318). The Court reached this conclusion because the statute did not specify a term, so absent the recognition of the President's general removal power, the statute would have extended a "right to hold that office during his life," and the Court was of the view that Congress could not have meant to create such an unusual judge-like tenure. *Id.* at 316. Such a construction would be inappropriate here because there is an operative statutory limitation on termination – "cause" – and the Federal Reserve Act specifies a term for Governors' appointments. Indeed, even without the reference to "cause," the statute's specification of a term squarely places this case within the holding of *Reagan* that "where the term of office is for a fixed period, notice and hearing are essential." *Reagan*, 182 U.S. at 425.

Thus, both *Reagan* and *Shurtleff* stand for the proposition that, when Congress specifies a statutory limitation on removal, or sets a term limit on an office, a termination of the office prior to the term's expiration must be subject to notice and a hearing. This squarely applies to the Federal Reserve Act, which both specifies "cause" as a basis for removal and sets a seventeen-year term for Governors' tenure. Indeed, a contrary rule – one that would allow the President to remove a termed employee at will – would render the term provision a nullity.

In sum, when Congress drafted the Federal Reserve Act in 1913, it added the term "cause" in the context of *Shurtleff* and *Reagan*, decided only a few years earlier, and in the context of longstanding common law – dating to the pre-Founding era, the Founding era, up to the time of the Federal Reserve Act's passage. That context was clear: for-cause-removal statutes, as well as termed appointments, are to be interpreted as extending procedural protections against removal.

As context of the statute's textual reference to "cause," the common law precedents had clarified this legal term and set a high bar for what constituted "cause": "so infamous" to be disqualifying for any public office; a breach while in office so clear that it was implied from the oath of office; or a crime so serious and clear that it would be recognized as a traditional English common-law crime. *Richardson*, 97 Eng. Rep. at 438.

III. ENCOMPASSING PROCEDURAL PROTECTIONS WITHIN A CAUSE-BASED REMOVAL REGIME IS CONSISTENT WITH THE PRESIDENT'S DUTY TO FAITHFULLY EXECUTE THE LAWS

Finally, a good-cause removal standard encompassing procedural protections is consistent with Article II, Section 3 of the Constitution, which obligates the President to "take Care that the Laws be faithfully executed."

In *Morrison v. Olson*, three government officials challenged an independent counsel's subpoenas to compel their testimony before a grand jury, claiming that the independent counsel provision of the Ethics in Government Act of 1978 interfered with the President's authority under Article II to faithfully execute the laws. 487 U.S. 654, 668 (1988). This Court, with Chief Justice William Rehnquist writing for a 7-1 majority, rejected that argument, holding that "the power to remove the counsel for 'good cause,' . . . provides the Executive with substantial ability to ensure that the laws are 'faithfully executed' by an independent counsel." *Id*. at 696. Thus, a good-cause-termination regime is not inconsistent with the President's faithful-execution duty. Chief Justice Rehnquist correctly interpreted the meaning of "faithful execution," as subsequent historical research has confirmed. *See generally* Andrew Kent, Ethan J. Leib, and Jed H. Shugerman, *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111 (2019).

Indeed, dating back to the colonial period, "faithful execution" was itself enforced through notice, hearings, and judicial process. Colonial leaders relied on civil proceedings to show cause to remove an officer who was alleged to be "unfaithfully" discharging his office. *See id*. at 2171.

Here, the President's oath and duty to take care that the laws be faithfully executed obligates compliance with the Federal Reserve Act's for-cause requirement. Requiring the provision of meaningful process to show cause is consistent with that duty.

CONCLUSION

From both a constitutional and statutory-interpretation perspective, and through the lens of the President's faithful-execution obligation, the historical record demonstrates that termed offices subject to for-cause removal cannot be terminated without the procedural protections of fair notice and meaningful process.

Respectfully submitted.

Ayesha N.Khan
Counsel of Record
Andrew L. Bookbinder
Democracy Forward Foundation
P.O. Box 34553
Washington, DC 20043
(240) 938-4234
akhan@democracyforward.org

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