

No. 25-332

IN THE
Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, *et al.*

Petitioners,

v.

REBECCA KELLY SLAUGHTER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF AMICUS CURIAE
REGARDING PRESUMPTION OF
ONLY PARTIAL INVALIDITY ON
BEHALF OF FORMER MEMBERS
OF THE EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
ON BEHALF OF RESPONDENTS**

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TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS.....	i
TABLE OF APPENDICES	iii
TABLE OF CITED AUTHORITIES	iv
INTEREST OF AMICI.....	1
SUMMARY OF ARGUMENT.....	1
INTRODUCTION.....	2
ARGUMENT.....	3
I. THE PRESUMPTION OF ONLY PARTIAL INVALIDITY APPLIES TO ARTICLE II VIOLATIONS.....	3
II. SECTION 41 IS INVALID, IF AT ALL, ONLY AS APPLIED TO MORE THAN TWO FTC COMMISSIONERS	6
A. AT-WILL REMOVABILITY OF THREE OF THE FTC COMMISSIONERS WOULD CURE ANY ARTICLE II VIOLATION	6
B. THE TWO NOT-AT-WILL FTC COMMISSIONERS WOULD NOT EXERCISE SIGNIFICANT EXECUTIVE AUTHORITY	15

Table of Contents

	<i>Page</i>
III. IF ARTICLE II REQUIRES THAT THREE FTC COMMISSIONERS BE SUBJECT TO AT-WILL REMOVAL, THAT HOLDING SHOULD BE APPLIED FIRST TO MEMBERS OF THE PRESIDENT'S POLITICAL PARTY	21
CONCLUSION	30

TABLE OF APPENDICES

	<i>Page</i>
APPENDIX A — SLAUGHTER BIP BOARDS	1a
APPENDIX B — SINKING FUND 1790	5a

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Cases	
<i>Ames v. Kansas</i> , 111 U.S. 449 (1994)	12
<i>Ayotte v. Planned Parenthood of Northern New England</i> , 546 U.S. 320 (2006)	1, 4, 6, 22
<i>Barr v. American Ass’n of Political Consultants, Inc.</i> , 140 S. Ct. 2335 (2020).	3
<i>Brockett v. Spokane Arcades, Inc.</i> , 472 U.S. 491 (1985).	1, 3
<i>Clinton v. Jones</i> , 520 U.S. 681 (1997).	11
<i>Collins v. Yellen</i> , 584 U.S. 220 (2021).	5, 12, 14, 19, 20
<i>Consumer Financial Protection Bureau v. Community Financial Services Association of America, Ltd.</i> , 601 U.S. 416 (2024).	12
<i>Dahnke-Walker Milling Co. v. Bondurant</i> , 257 U.S. 282 (1921).	6
<i>FCC v. Consumers’ Research</i> , 145 S. Ct. 2482 (2025)	11

Cited Authorities

	<i>Page</i>
<i>Free Enterprise Fund v. Public Company Accounting Oversight Board,</i> 561 U.S. 477 (2010)	3, 4, 8-12, 17, 22
<i>Kennedy v. Braidwood Management, Inc.,</i> 145 S. Ct. 2427 (2025)	18
<i>Lucia v. Securities and Exchange Commission,</i> 585 U.S. 237 (2018)	11, 20
<i>Mistretta v. United States,</i> 488 U.S. 361 (1989)	12
<i>PHH Corp. v. CFPB,</i> 881 F.3d 75 (D.C. Cir. 2018)	7, 9, 19, 23-26
<i>Regan v. Time, Inc.,</i> 468 U.S. 641 (1984)	22
<i>Seila Law LLC v. Consumer Financial Protection Bureau,</i> 591 U.S. 197 (2020)	3-5, 10, 12, 15, 16, 18-20, 22
<i>Slaughter v. Trump,</i> 202 WL 2551247 (D.C. Cir. Sept. 2, 2025)	17
<i>United States v. Arthrex, Inc.,</i> 594 U.S. 1 (2021)	10, 21
<i>United States v. National Treasury Emps. Union,</i> 513 U.S. 454 (1995)	5

Cited Authorities

	<i>Page</i>
<i>Wiener v. United States</i> , 357 U.S. 349 (1958).....	18
 Statutes and Regulations	
1 Stat. 186 (1790)	12, 13
1 Stat. 246 (1792)	14
1 Stat. 250 (1792)	14, 15
15 U.S.C. § 57.....	5
16 C.F.R. § 2.7(a)	17
U.S. Const., art. II.	1-6, 9-12, 14-21, 27, 29, 30
 Other Authorities	
Rachel E. Barkow, Insulating Agencies: Avoiding Capture Through Institutional Design, 89 Tex.L.Rev. 15 (2010)	25
Federal Trade Commission Act.....	5
Recent Legislation, Dodd-Frank Act Creates the Consumer Financial Protection Bureau, 124 Harv.L.Rev. 2123 (2011).....	26

Cited Authorities

	<i>Page</i>
Glen O. Robinson, On Reorganizing the Independent Regulatory Agencies, 57 Va.L.Rev. 947 (1971)	24
Webster's Third New International Dictionary (1981) ..	8

INTEREST OF AMICI¹

Amici are former members of the Equal Employment Opportunity Commission.² Their years of service on the EEOC demonstrated the important role that the bipartisan composition of a multimember commission plays in helping to ensure the soundness and the stability of such a commission's decisions and policies. They submit this brief to urge this Court, if it should conclude that section 41 violates Article II, to frame a remedy that will preserve in effect the FTC statutory requirement of bipartisan membership.

SUMMARY OF ARGUMENT

When a statute is held unconstitutional, the ‘normal rule [is] that partial, rather than facial, invalidation is the required course.’ *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985). The Court should hold that the removal provision in section 41 is constitutional. But if the Court concludes that section 41 violates Article II, it should “limit the solution to the problem.” *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328 (2006).

The gravamen of the government's constitutional argument is that the FTC exercises substantial executive authority, and that because of section 41—in contravention of Article II—the President cannot control the Commission's exercise of that authority because he cannot control (by

1. No portion of this brief was authored by counsel for a party, and no party made a monetary contribution intended to fund the preparation or submission of the brief.

2. Jocelyn Samuels, Charlotte Burrows, Chai Feldblum and Stuart Ishimaru.

direction, and if necessary by removal) the Commissioners who direct the FTC's actions. But to control the actions of the FTC, a President needs only the ability to control the actions of a majority of its five Commissioners. A remedy according the President the power to remove at will three Commissioners would be sufficient to cure any such Article II violation. Application of the section 41 removal limitation to the other two Commissioners would be constitutional.

The First and Second Congresses both created multi-member bodies which included minority members whom the President could not remove. That action is compelling evidence that the framers of the Constitution, many of whom were members of Congress in 1790 and 1792, did not regard such arrangements as inconsistent with Article II.

If the Court holds that section 41 violates Article II, the remedy should leave in effect the unchallenged portions of the statute. Section 41, like provisions of 50 other federal statutes, requires that the Commission be bipartisan, limiting to three the number of FTC Commissioners who may be members of the same political party. Such statutory requirements—which the government does not challenge—further a number of important purposes, including assuring a diversity of viewpoints among the members of these boards and commissions. To ensure the effectiveness of these statutory bipartisanship requirements, any remedy should provide that a President's at-will removal authority is ordinarily limited to members of his or her own political party.

INTRODUCTION

The government contends that the removal provision of section 41 violates Article II. We agree with respondent

that section 41 is constitutional, and reflects Congress’s considered judgment about the importance of ensuring independence and bipartisanship in federal agencies whose authorizing statutes contain similar provisions. This brief, however, addresses a distinct question: what remedy the Court should fashion if it concludes that there is an Article II violation.

ARGUMENT

I. THE PRESUMPTION OF ONLY PARTIAL INVALIDITY APPLIES TO ARTICLE II VIOLATIONS

When a statute is held unconstitutional, the ‘normal rule [is] that partial, rather than facial, invalidation is the required course.’ *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985). “The Court’s precedents reflect a decisive preference for surgical severance rather than wholesale destruction.” *Barr v. American Ass’n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2350-52 (2020) (plurality opinion). Those precedents recognize that ordinarily “Congress would prefer that [the Court] use a scalpel rather than a bulldozer in curing [a] constitutional defect ... ” *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197, 237 (2020).

When this Court has concluded that a federal statute unconstitutionally limits the President’s authority under Article II, it has separately and specifically determined the appropriate cure for that constitutional infirmity. *Seila Law*, 591 U.S. at 232-38; *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 508-09 (2010). *Seila Law* and *Free Enterprise Fund*

applied the general rule that statutes, where possible, will be held to be only partially invalid.

In this case, as in *Seila Law* and *Free Enterprise Fund*, the courts below—having concluded there was no Article II violation—had no occasion to address what the appropriate cure would be were such a violation to be found. In both *Seila Law* and *Free Enterprise*, this Court nonetheless proceeded to resolve that issue in the first instance, recognizing that the appropriate answer turned in part on a precise articulation, which only this Court could provide, of the manner and degree to which the statute violated Article II. In the instant case, if this Court concludes that the removal limitation in section 41 violates Article II, it should identify the narrowest approach that will correct that constitutional infirmity.

The government refers to the remedy issue only in passing, commenting that “the normal remedy for a removal defect is severing ‘the removal provision[.]’” Pet. Br. 36 (quoting *Seila Law*, 591 U.S. at 234). But any remedial issue in this case cannot be disposed of that simply. The presumption in favor of partial unconstitutionality does not, without more, countenance the summary invalidation of an entire provision or even an entire sentence in a particular provision. Even within a provision or sentence, that presumption requires consideration of whether invalidation can be limited to one or more specific applications. The Court “prefer[s] to enjoin only the unconstitutional applications of a statute while leaving other applications in force ...” *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328 (2006). “[T]his Court has on several occasion declared a statute invalid as to a particular application

without striking the entire provision that appears to encompass it.” *United States v. National Treasury Emps. Union*, 513 U.S. 454, 487 (1995) (O’Connor, J., concurring in the judgment in part and dissenting in part).

The Federal Trade Commission Act itself requires where possible an application-specific remedy. The severability clause applies not only to a particular provision of the Act, but also to “the application thereof.” 15 U.S.C. § 57.³

When, as in *Seila Law* and *Collins v. Yellen*, 584 U.S. 220 (2021), an agency is headed by a single individual, and that individual unilaterally exercises significant executive authority, a provision limiting removal has but a single application—to that official—so invalidating the provision itself may be the only effective cure for an Article II violation. But in this case the authority at issue—regardless of whether executive in nature—is exercised not by any single individual commissioner, but instead by a majority decision of the five Commissioners. The government repeatedly asserts that the FTC itself exercises executive authority, but (properly) never asserts that an individual Commissioner does so. The government assumes that if section 41 is invalid because it bars the President from removing at will *any* of the Commissioners, the only remedy that would satisfy Article II would be to accord the President the power to remove at will *all* of the Commissioners. But where, as here, the asserted

3. “If any provision of this subchapter, or the application thereof to any person, partnership, or corporation, or circumstance, is held invalid, the remainder of this subchapter, and the application of such provisions to any other person, partnership, corporation, or circumstance, shall not be affected thereby.”

executive authority can only be exercised by a majority of multiple officials, but not by any single individual, a more detailed analysis is required to ascertain how to apply the presumption in favor of only partial invalidity.

II. SECTION 41 IS INVALID, IF AT ALL, ONLY AS APPLIED TO MORE THAN TWO FTC COMMISSIONERS

A. AT-WILL REMOVABILITY OF THREE OF THE FTC COMMISSIONERS WOULD CURE ANY ARTICLE II VIOLATION

(1) Determination of the appropriate remedy requires the Court to delineate with specificity the nature and scope of the constitutional infirmity at stake. “[A] statute may be invalid as applied to one state of facts and yet valid as applied to another.” *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289 (1921). “Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem.” *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328 (2006).

The flaw in the government’s proposed approach is that the solution it suggests—enabling the President to fire at will *all* members of the FTC—is not limited to the problem which the government claims exists—that the FTC (not any individual member) is exercising substantial executive authority, and that the President needs to have the power, through the ability to terminate commissioners, to control the FTCs exercise of that executive authority.

That lack of connection pervades the government brief. Beginning on the very first page, and continuing

throughout the argument, that brief asserts only that the FTC—but not an individual commissioner—exercises executive authority. “The modern-day FTC ... exercises executive power—indeed, quite a bit of it.” Pet. Br. 5. “[T]he FTC has accumulated executive powers that *Humphrey’s Executor* never considered.” Pet. Br. 3. “The FTC has always exercised executive power, and it certainly exercises immense executive power now ... ” Pet. Br. 13. “[T]he FTC new powers ... are indisputably executive.” Pet. Br. 25. “The FTC regulates matters ranging from meat products, ... to contact lenses, ... to credit cards, ... to movie tickets, ... to horseracing ... and crab fishing.” Pet. Br. 19-20. “Since 1935, the FTC’s powers have swelled. Today the FTC may file civil suits ... The FTC may make substantive rules ... Its orders make take effect without judicial enforcement... The FTC may even negotiate agreements with foreign law-enforcement agencies ... ” Pet. Br. 7.

At no point does the government assert that a Commissioner by himself or herself exercises such executive authority. The absence from the government’s brief of any such assertion is not an oversight. An individual Commissioner cannot exercise any of the powers detailed in the government’s brief.

Then-Judge Kavanaugh correctly described the lack of significant executive authority on the part of individual commissioners or board members. “In a multi-member independent agency, no single commissioner or board member can *affirmatively* do much of anything. Before the agency can ... enforce[e] a law ... or ... issu[e] a rule ... – a majority of commissioners must agree.” *PHH Corp. v. CFPB*, 881 F.3d 75, 183-84 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) (emphasis in original).

The government’s brief at times refers to the five FTC Commissioners as the “heads” (plural) of the FTC. E.g., Pet. Br. 20 (“Upholding tenure protections for agency heads like FTC Commissioners would ... invert this Court’s removal jurisprudence ...”). That use of the plural form of “head” is semantically improper. As applied to whoever controls an institution, “head” is singular.⁴ That meaning of the term “head” derives from its origin as a description of a part of a living creatures, which (except in Greek mythology and some rare birth defects) have only a single head. If someone were to say “Congress has created an agency with five heads,” we would probably infer that the speaker did not understand the meaning of “head,” or at least that the speaker was using the term in some idiosyncratic manner.

A credulous reader of the government’s brief who took literally statements that all five Commissioners are “heads” of the FTC, and who was unfamiliar with the actual structure of the FTC, might conclude that each of the five FTC Commissioners actually has the power unilaterally to “bring civil enforcement suits ... , promulgate binding rules, [and] issue final orders in administrative adjudications ... ” Pet. Br. 10. But, of course, an individual FTC Commissioner cannot do any of those things.

The way the authority of the FTC is actually exercised is not by any individual Commissioner, but by the Commissioners “jointly.” *Free Enterprise Fund*, 561 U.S. at 511-12. That is, the Commissioners in some manner

4. Webster’s Third New International Dictionary, 1042 (“one in charge of a division or department in an office or institution”) (1981) (emphasis added).

reach majority agreement (e.g., by voting) on whether, for example, to bring a civil action, to adopt a regulation, or to hand down an administrative adjudication. The decision whether to do so is made by a majority of the Commissioners. A single Commissioner is not sufficient, and more than a majority of the five Commissioners—i.e., more than three—is not necessary.

The gravamen of the government’s constitutional argument is that the FTC exercises substantial executive authority, and that because of section 41—in contravention of Article II—the President cannot control the Commission’s exercise of that authority because he cannot control (by direction, and if necessary removal) the Commissioners who direct the FTC’s actions. But if that is indeed a constitutional “problem,” then the “solution” “limit[ed]” to the problem would be to hold that a majority (i.e., three) of the five Commissioners will be removable at will by the President. “[T]hough it may be criticized as ‘elementary arithmetical logic,’” control of three members⁵ of a five-member Commission is control of the Commission. *PHH*, 881 F.3d at 190 (Kavanaugh, J. dissenting) (quoting *Free Enterprise Fund*, 561 U.S. at 501). In the terms of the Question Presented, “the statutory removal protections for members of the Federal Trade Commission violate the separation of powers,” if at all, only if applied to more than two of its members. Pet. Br. i. If the President has the ability to control (through removal if necessary) the actions of three members of the FTC, that is sufficient to give him the ability to control the actions of the FTC itself, and thus satisfies Article II.

5. If, because of unfilled vacancies, there were only three FTC Commissioners, presidential control of two of them would be sufficient to control the Commission.

This situation is analogous to that presented in *Free Enterprise Fund* and *United States v. Arthrex, Inc.*, 594 U.S. 1 (2021), where the Article II violation was the result of the combined effect of two different provisions. *Free Enterprise Fund* held that Article II was violated because one statute limited the ability of the SEC to remove members of Public Company Accounting Oversight Board, while a different statute limited the ability of the President to remove members of the SEC itself. See *Free Enterprise Fund*, 561 U.S. at 509 (“a number of statutory provisions . . . , working together, produce a constitutional violation”). In *Arthrex* one statute limited the ability of the Secretary of Commerce to dismiss Administrative Patent Judges, and a second statute barred review by higher officials of certain decisions made by those Judges. In both cases the solution was to invalidate only one (but not both) of the provisions, because in the absence of the stricken provision the remaining provision did not by itself violate Article II. Here section 41 has five applications, one to each of the five Commissioners. If, as the government contends, that is constitutionally impermissible, it is because a limitation on removal of *all* of the five Commissioners (of a five-member Commission) means that the President cannot control (by removal if necessary) three Commissioners who could constitute a majority.⁶ But if (by analogy to *Free Enterprise Fund* and *Arthrex*) section 41 is invalidated as to three Commissioners, application of section 41 to the remaining two Commissioners would not violate Article II. If three members of the FTC “were removable at will by the President, [any] constitutional violation would disappear.” *Seila Law*, 591 U.S. at 234.

6. The number of members a President would need to control a commission or board would, of course, depend on the size of that body.

Consider, for example, what would happen if Congress were to create a five-member agency, three of whose members expressly served at the pleasure of the President, and two of whose members could only be removed by the President for cause. It is difficult to see how such an agency could be said to violate Article II. The President, exercising control over the three at-will members, could assure that the agency (which those three members would control) faithfully executes the laws, and advances his policies. The President could seek to direct those at-will members to act in a particular matter, or could order them to vote as a bloc, and could shape their conduct by threatening to dismiss them if their work was unsatisfactory. The President would be accountable for and “responsible for the actions” of the agency, because he could control those actions. *Free Enterprise Fund*, 561 U.S. at 497 (quoting *Clinton v. Jones*, 520 U.S. 681, 712-13 (1997) (Breyer, J., concurring in judgment)). Because the President would have that control, “the people [would know whom] to blame and hold responsible for a bad decision or policy ...” *FCC v. Consumers’ Research*, 145 S. Ct. 2482, 2517-18 (2025) (Kavanaugh, J. concurring). The inability of the President to remove at will the two minority members would not violate Article II, because under the terms of the statute itself those minority members would not be able to “exercise significant [executive] authority” unless the three at-will members (acting under the control of the President) decided to enable them to do so. See *Lucia v. Securities and Exchange Commission*, 585 U.S. 237, 245 (2018).

(2) Actions of the First and Second Congresses support the conclusion that no Article II violation would exist so long as the President could remove at will three

of the five FTC commissioners. This Court has long relied on actions of the early Congresses in ascertaining the contemporaneous understanding of the meaning of the Constitution with regard to a wide range of issues. *E.g.*, *Ames v. Kansas*, 111 U.S. 449, 463, 464 (1894); *Consumer Financial Protection Bureau v. Community Financial Services Association of America, Ltd.*, 601 U.S. 416, 432 (2024). Indeed, this Court has repeatedly looked to congressional action contemporaneous with the Constitution in determining the meaning of Article II. *Collins v. Yellin*, 594 U.S. at 253 n.20; *Seila Law*, 591 U.S. at 214; *Free Enterprise Fund*, 561 U.S. at 492. The government acknowledges the relevance to this case of “[f]ounding era practice ...” Pet. Br. 2.

The First Congress created the Sinking Fund Commission, a minority of whose members were not removable by the President. 1 Stat. 186-87 (1790).⁷ See Brief Appendix, 5a-7a. The Commission was authorized to expend revenues from a variety of sources to purchase the debt of the United States, and to issue regulations regarding the manner of such purchases. Under the government’s analysis in this case, the Sinking Fund Commission responsibilities would constitute executive action.

Under the terms of the statute, three of the five Commissioners were members of the cabinet: the Secretary of State, the Secretary of the Treasury, and the Attorney General. They served on the Commission at the pleasure of the President, who could remove them

7. This Court relied on the terms of the Sinking Fund Commission statute in resolving the constitutional question in *Mistretta v. United States*, 488 U.S. 361, 398-99 (1989).

from that post by dismissing them from their cabinet positions. But the two other Commission members, the Vice President and the Chief Justice, could not be removed from the Commission by the President. The statute itself designated them as members of the Commission, and the President could not fire the Vice President or the Chief Justice, as he could fire a cabinet member. As a result, President Washington had less control over those two commission members than a President today has over the members of the FTC. President Washington did not nominate or appoint those two individuals to the Commission, and he could not remove them from the Commission for any reason at all; they were removable only through impeachment by the Congress.

The three Commission members who served at the pleasure of the President could exercise effective control over the actions of the Commission, either on their own initiative or at the direction of the President. The statute expressly provided that the purchases of public debt, and the issuance of regulations, could be made by the five Commissioners “or any three of them.” 1 Stat. 186. So if the three at-will members of the Commission (acting on their own initiative or at the direction of the President) chose to take any action, or issue any regulation, the two non-removable members could not stop them.⁸ The not-

8. Actions by the Commission required the “approbation” of the President. But that presidential direct ability to disapprove Commission actions did not give the President the power to control the Commission, because the terms of the statute did not authorize the President to affirmatively direct the Commission to take any action. The President was able to do that only because three of the five commissioners served at his pleasure, and thus—effectively—subject to his direction.

at-will members might disagree with, criticize, and vote against the choices of the at-will majority, and within that limited scope of activity were not subject to presidential control, but the at-will majority, subject to the direction of (and removal from office by) the President controlled of the actions of the Commission itself.

The members of the First Congress, among them many former delegates to the Constitutional Convention, necessarily regarded the membership and structure of the Sinking Fund Commission as consistent with the recently adopted Constitution. Their conclusion is particularly significant because the members of the First Congress were especially sensitive to issues regarding the President's Article II powers, having only a year earlier taken part in the "decision of 1789" regarding removal of cabinet members by the President. See *Bowsher v. Synar*, 478 U.S. at 723-24. *Collins v. Yellen* concluded that the Sinking Fund Commission was consistent with Article II, and distinguishable from the statute at issue in that case, precisely because "three of the[] Commissioners were part of the President's cabinet and therefore removable at will." 594 U.S. at 253 n.20.

The Second Congress, acting only five years after the framing of the Constitution, created a second multimember executive branch entity whose membership was not limited to officials who served at the pleasure of the President. As part of the Coinage Act creating the federal mint, Congress authorized a group of five officials to jointly oversee the assaying of the coins being produced by the mint. 1 Stat 246, 250 (1792). Three of the officials were members of the cabinet and thus served at will: the Secretary of the Treasury, the Secretary of State, and the Attorney General. A fourth member, the Comptroller of the treasury, may at the time have served at the will of

the President. *Seila Law*, 591 U.S. at 197. But the fifth member—the Chief Justice—was designated a member of the body by act of Congress, not by the President, and could not be removed from that position by the President. The Coinage Act provided that the assaying of the coins would occur “under the inspection of any three of the[] [members of the group], in such manner as they or a majority of them shall direct.” 1 Stat. at 250. So the President, through the at-will members, had effective control over the activities of the body’s decisions (e.g., control of the manner in which the assaying would occur), but he could not remove one of its members.

That history makes clear that the members of the First and Second Congresses, many of whose members had been delegates to the Constitutional Convention, saw no constitutional problem if a minority of the members of a multi-member government body were not subject to removal by the President.

**B. THE TWO NOT-AT-WILL FTC
COMMISSIONERS WOULD NOT
EXERCISE SIGNIFICANT EXECUTIVE
AUTHORITY**

If the Court concludes that Article II entitles the President to remove at will three members of the FTC, and holds (as we urge, *infra* 21-30) that the three Commissioners who belong to the President’s party are the ones subject to such removal, application of section 41 to the two remaining other-party Commissioners would not violate Article II.

In its stay application, the government argued that if Commissioner Slaughter were restored to the FTC, she might be able to wield executive authority because “[t]he

FTC's three Republican members may disagree among themselves, and if they do, respondent's vote could be dispositive." Application for Stay of Judgment, 25. But if Court holds that three Republican members serve at the will of the President, the President could prevent that from happening. As the government repeatedly explains, the very purpose of according the President removal power is to assure that the President can compel an official to "obey" his directives. Pet. Br. 9, 14 (quoting *Seila Law*, 591 U.S. at 213-214). So the President would have the ability to assure that the three Republican members would never disagree among themselves, either by seeking to direct (under threat of removal) that the three at-will Republican Commissioners all vote in a given way on a particular issue, or by directing that they always vote as bloc. Either directive would assure that the votes of the not-at-will Commissioners would not be "dispositive." Of course if the President opted not to use his power that way, the vote of a not-at-will Commissioner might matter; but the failure of a President to utilize his Article II power regarding at-will officials does not create Article II power to remove other officials.

In its stay application, the government argued that "case-specific recusals are common, meaning that respondent could have the power to block agency action when recusals leave the agency with only two active Commissioners." Application for Stay of Judgment, 25. But the government noticeably did not represent that such recusals have frequently (or ever) resulted in 2-2 tie votes, a situation in which the vote of a not-at-will Commissioner might matter. And the government, in the courts below, chose not to make a record regarding the frequency of either recusals or ties. Having successfully invited this Court, in the absence of any such record evidence, to now decide the constitutionality of section 41, the government

cannot ask that section 41 be held invalid, or any remedy be framed, based on incomplete and undocumented assertions.

The government argues that in one circumstance a single Commissioner (including a not-at-will Commissioner) would have some authority to act unilaterally. “FTC members exercise some powers unilaterally. For example, ‘if the Commission passes a resolution authorizing the use of compulsory process, then individual commissioners are authorized to issue civil investigative demands and subpoenas.’” Application for Stay of Judgement, 25 (quoting *Slaughter v. Trump*, 202 WL 2551247, at *8 n.2 (D.C. Cir. Sept. 2, 2025)). But as is apparent on the face of this argument, a single Commissioner could only have such authority *if* the Commission itself—e.g., a majority controlled by at-will Commissioners—decided to adopt a resolution authorizing such unilateral action. And (as the rest of the cited footnote makes clear), the Commission’s ability to empower such unilateral actions itself depends on an FTC regulation, which an at-will FTC majority could repeal. 16 C.F.R. § 2.7(a). So any ability a single Commissioner might have to unilaterally act in this way depends on the willingness of the majority to accord such power. Whether an official exercises such significant executive authority that the President has an unfettered right under Article II to remove that official turns solely on what power the official enjoys *by statute*, not on what additional power the President (or those he controls) may choose to add. A President cannot acquire Article II power to dismiss an official at will by voluntarily giving significant non-statutory executive authority to that official, and then insisting that Article II entitles him to fire the official in order to prevent misuse of that very delegated authority. See *Free Enterprise Fund*, 561 U.S. at 497 (“The President can always choose to restrain himself in his dealings with

subordinates”); cf. *Kennedy v. Braidwood Management, Inc.*, 145 S. Ct. 2427, 2446-47 (2025) (Appointments Clause only requires that a department head have the authority to review actions of an inferior officer, not that the department head actually do so).

The government suggests that *Seila Law* held that to a general rule that the President can remove executive officers at will there is only a single exception,⁹ for certain inferior officers.

While recognizing a “general rule” of “unrestricted removal” for executive officers, this Court’s cases have carved out an “exceptio[n]” for certain inferior officers who are appointed by department heads or courts, perform “limited duties,” and have “no policymaking or administrative authority.” *Seila Law*, 591 U.S. at 215, 218. *That narrow exception* – which is dubious

9. Although in this instance acknowledging that there is at least one exception to a rule that the President has inherent power under Article II to remove executive officers, in five other passages the government asserts (without making any distinction between principal and inferior officers, and without acknowledging any limitations) that this Court has already held that executive officers are subject to removal at will. Pet. Br. 12 (“Article II vests the President with all executive power and the responsibility to supervise *all* executive officers who wield it—including through removal ...”) (emphasis added); see Pet.Br. 2, 10, 15, 28 And in two other passages the government asks the Court to announce such a rule without any exceptions at all. Pet. Br. 30 (“if *Humphrey’s Executor* is read to limit the President’s power to remove executive officers, it should be overruled”), 30 n.1 (“the Court should clarify that, to the extent *Wiener v. United States*, 357 U.S. 349 (1958)] suggests Congress may restrict removal of executive officers, it ... no longer remains good law.”).

but not directly at issue here - represents the “outermost constitutional limi[t] of permissible congressional restrictions” on the removal of inferior officers. *Id.* at 218.

Pet. Br. 20 (emphasis added). If that is what *Seila Law* had actually held, it would support an argument that Article II empowers a President to remove even the most powerless principal officer. But this quotation from *Seila Law* omits three key words from the second quoted sentence, and in doing so completely alters its meaning. This is what that *Seila Law* passage actually said.

These two exceptions—one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority—“represent what *up to now* have been the outermost constitutional limits of permissible congressional restrictions on the President’s removal power.” *PHH*, 881 F.3d at 196 (Kavanaugh, J., dissenting) (internal quotation marks omitted).

591 U.S. at 218 (emphasis added). The omitted words “up to now” make clear the Court was only describing which exceptions had been recognized by the Court so far, clearly and deliberately leaving open the possibility that more could be recognized in subsequent decisions

The government objects that *Collins* held that “the breadth of an agency’s authority is not dispositive.” Pet. Br. 34 (quoting 594 U.S. at 251). But *Collins* was addressing the issue of when an *agency’s* authority might

be so limited that Article II would not apply to that agency at all. The question at issue in this case concerns whether an individual *official* (e.g., a minority Commissioner) has such limited authority that Article II would not give the President unrestricted removal power. The Article II ramifications of an individual’s authority were addressed in *Seila Law*, not in *Collins*. *Seila Law* held that the amount of authority exercised by a particular official is central to whether Article II empowers the President to remove that official. 591 U.S. at 224 (“The CFPB’s single-Director structure contravenes this carefully calibrated system by vesting *significant* governmental power in the hands of a single individual accountable to no one”) (emphasis added), 238 (“While we have previously upheld limits on the President’s removal authority in certain contexts, we decline to do so when it comes to principal officers who, acting alone, wield *significant* executive power”) (emphasis added). So it matters whether the two not-at-will FTC Commissioners would remain able (by statute) to wield significant executive authority if the other three Commissioners served at will and thus under the direction of the President.¹⁰

The government earlier suggested that even when a President has plenary control over the actions of a board or commission agency, Article II still would be violated if the President could not also remove at will *all* its

10. Because the amount of power an official wields determines whether he or she is an executive officer at all, rather than an employee (whose removal Congress clearly could limit), *Lucia v. Securities and Exchange Commission*, 585 U.S. 237, 245-46 (2018), it would make little sense to hold that an executive officer can always be removed by the President regardless of how much or little power that official may exercise.

members. Reply in Support of Application for Stay, 11. That contention is inconsistent with this Court’s decision in *Arthrex*. The Article II violation in that case was the result of the combined effect of a statute that limited the removal of Administrative Patent Judges, and another that barred review of their panel decisions in certain cases. The remedy fashioned by the Court was to permit review of those decisions, but specifically to reject the government’s suggestion that it invalidate the tenure of the Judges themselves 594 U.S. at 24-26. That gave to a higher agency official the power to supervise the panel decisions, but while denying to agency officials the power to remove the Administrative Patent Judges themselves at will. 594 U.S. at 24-26. The Administrative Patent Judges, although in the wake of *Arthrex* no longer empowered to render a conclusive determination of the patent disputes at issue, continue to be protected by the statutory tenure provisions.

III IF ARTICLE II REQUIRES THAT THREE FTC COMMISSIONERS BE SUBJECT TO AT- WILL REMOVAL, THAT HOLDING SHOULD BE APPLIED FIRST TO MEMBERS OF THE PRESIDENT’S POLITICAL PARTY

If at-will removability of three FTC Commissioners is required by Article II, that requirement should be applied first to Commissioners who are members of the President’s own political party. A Commissioner who is not a member of the President’s party should not be subject to at-will removal, unless such removal is necessary to create a vacancy that would enable the President to control a majority of the Commission.

If the Court concludes that three of the FTC Commissioners must be subject to at-will removal, the Court must identify the two remaining Commissioners who would constitutionally remain covered by the removal limitations in section 41. In determining which particular remedy to select, this Court seeks first to ascertain the approach most consistent with the overall statutory scheme which Congress enacted. The key issue is what remedy Congress “would have preferred.” *Seila Law*, 591 U.S. at 236, 237; *Free Enterprise Fund*, 561 U.S. at 509. The remedy should to the extent possible assure that other aspects of a statute, not themselves unconstitutional, “remain fully operative” *Seila Law*, 591 U.S. at 235. “[W]e try to not nullify more of a legislature’s work than is necessary for we know that ‘[a] ruling of unconstitutionality frustrates the intent of the elected representative of the people.’” *Ayotte*, 546 U.S. at 967 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion)).

The key aspect of section 41, which the government does not challenge, and which this Court should assure remains fully in effect, is the requirement that the Commission be bipartisan. Section 41 directs that “[n]ot more than three of the Commissioners shall be members of the same political party.” The Commissioners thus must, as a practical matter, be “drawn from both sides of the aisle.” *Seila Law*, 591 U.S. at 218. In creating multi-member commissions and boards, Congress has repeatedly mandated that no more than a bare majority be members of the same political party, requiring as a practical matter, that the commissions and boards be bipartisan. There are, including the FTC, 50 such expressly bipartisan commissions and boards. See Brief Appendix, 1a-4a.

The repeated imposition of that statutory requirement reflects the importance that Congress attaches to such provisions. Once the maximum number of appointments for a given political party (invariably the President’s own party) has been reached, *not* being a member of that party is a statutorily imposed qualification for appointment.

This statutory requirement that a minimum number of members (in the case of the FTC, two) not be members of the President’s political party is important for several distinct reasons. First, it assures that there will be within a commission or board diverse viewpoints and perspectives; Congress reasonably concluded that membership in different political parties would have just that effect. Congress understood the mandated other-party members would typically be a minority of a commission or board, and that the authoritative action of the commission or board would still be controlled by the majority. But it recognized that the airing of diverse views could increase the majority’s understanding of the problems and possible pitfalls of a proposed course of action, could help the majority frame actions that would avoid unintended difficulties, and could enable the majority to anticipate objections that might arise to a specific course of action. “[E]ven when a majority of a commission agrees on a course of action, minority votes still play a constitutionally significant role.” Brief of the Chamber of Commerce of the United States of America as Amicus Curiae, *Seila Law LLC v. CFPB*, 19.

In *PHH*, citing to the statutory requirement that agencies such as the FTC “include members of both major political parties” (*PHH*, 881 F.3d at 184 n.12) (dissenting opinion), then-Judge Kavanaugh pointed out that

[m]ulti-member independent agencies benefit from diverse perspectives and different points of view among the commissioners and board members. The multiple voices and perspectives make it more likely that the costs and downsides of proposed decisions will be more fully ventilated.

881 F.3d at 184 (footnote omitted) (Kavanaugh, J., dissenting). “It is not bipartisanship as such that is important; it is rather the safeguard and balanced viewpoint that can be provided by plural membership. *Id.* (quoting Glen O. Robinson, On Reorganizing the Independent Regulatory Agencies, 57 Va.L.Rev. 947 963 (1971)). The statutory requirement regarding the FTC and other agencies that “no more than three commissioners may belong to the same political party ... ensure[s] that diverse political viewpoints will be highlighted when these independent agencies act.” Brief of Amicus Curiae Southeastern Legal Foundation, *Seila Law LLC v. CFPB*, 12. “A bipartisan, multi-member, Senate-confirmed commission ... ensure[s] that federal policy ... reflect[s] viewpoints and solutions from different perspectives ... ” Brief Amicus Curiae Consumer Bankers Association, *Seila Law LLC v. CFPB*, 14.

Second, dissenting opinions or statements of disagreement by minority commissioners or board members could alert the courts or Congress to problems in an agency’s actions which might warrant corrective action.

[A] multi-member independent agency (particularly when bipartisan) supplies “a built-in monitoring system for interests on both

sides because that type of body is more likely to produce a dissent if the agency goes too far in one direction.” A dissent, in turn, can serve “as a ‘fire alarm’ that alerts Congress and the public at large that the agency’s decision might merit closer scrutiny.”

PHH, 881 F.3d at 185 (Kavanaugh, J., dissenting) (quoting Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 *Tex.L.Rev.* 15, 41 (2010)). In a brief filed in *PHH*, then Missouri Solicitor Sauer argued that

the opportunity for dissent significantly checks a board’s ability to violate the principles of federalism. Agency dissents can raise federalism concerns that the majority has overlooked or underestimated [A]n agency dissent may identify federalism concerns that persuade a reviewing court to reverse the agency action altogether.

Brief for the State of Missouri, *PFF Corp. v. CFPB*, 12 (available at 2017 WL 947739). Agency dissents or disagreements can serve the same salutary function with regard to violations of the statutes that a commission or board is responsible for enforcing. See Brief of the Chamber of Commerce, *supra*, 19 (“dissent can provide an important external check, by prompting judicial or congressional action”).

Third, the presence of minority members with differing views accords the majority an opportunity to

fashion a consensus that will be supported by all members of the commission or board, and which thus will be likely to survive changes in the commission or board's membership. The majority members of a commission or board understand that at some point a President will be elected from the opposing party, and that control of the commission or board will as a consequence shift to members from that other party, often including members of the then-current minority. By reaching a consensus, the majority can help to ensure that the agency's action—although perhaps not everything it would have preferred—will be likely to remain in effect whatever the administration.

Consensus decisions provide the stability of agency policy and practice that is great importance to regulated organizations and individuals. “[M]ulti-member commission structure ‘reduce the variance of policy ... ’” *PHH*, 881 F.3d 184 (Kavanaugh, J., dissenting) (quoting Recent Legislation, Dodd-Frank Act Creates the Consumer Financial Protection Bureau, 124 Harv.L.Rev. 2123,2124 (2011)). Promoting such stability was a key purpose of Congress’s decision to give members of these commissions and boards staggered multi-year terms of office. To be sure, a majority—perhaps acting at the direction of the President—would be free to disregard the objections of the minority, and to select a course of action heedless of the likelihood it would be promptly reversed by the next administration. But the presence on a commission or agency of members of another party provides an opportunity that would not otherwise exist to fashion a consensus that will last beyond the next election.

The Solicitor General expresses concern that if a President cannot remove Commissioners at will,

individuals may remain on the Commission who do not agree with the President's policies. Pet. Br. 4. But the very purpose of requiring that the Commission include two individuals who are *not* members of the President's political party is to assure that there will be on the Commission members—albeit a minority—who are indeed likely to have views different than those of the President and of the Commissioners who are members of the President's party. The constitutional mandate that the President take care that the law be faithfully executed was not intended to empower to President to muzzle criticism when he fails to do so. The Solicitor's argument in favor of empowering the President to fire other-party Commissioners with whom he disagrees is at bottom an objection to those other-party Commissioners fulfilling the very function that led Congress to require their appointment in the first place. Indeed, among the multimember agency officials whom President Trump has recently dismissed, asserting authority to do so under Article II, several—including Commissioner Slaughter—are Democrats whom President Trump himself appointed during his first term, in compliance with the statutory requirement of bipartisan membership.

The statutory requirement of bipartisanship would be eviscerated were the Court to hold that, if Article II entitles the President to remove three Commissioners at will, the President could use that authority to fire all those who are not members of his own party. Empowered and emboldened by such a decision, a Republican President could purge every Democrat from all fifty of the bipartisan agencies, and seek to avoid ever filling the resulting vacancies (since the statute would bar filling those

vacancies with Republicans).¹¹ As a result of the recent controversial dismissals, there now are *only* Republicans on the FTC, the Merit Systems Protection Board, the Consumer Product Safety Commission, and the Privacy and Civil Liberties Oversight Board. Such partisan purges would replace the diversity of membership and viewpoint mandated by Congress with one-party agencies evocative of Politburos in certain foreign nations. Upon eventually regaining the White House, a Democratic President could dismiss all the Republican members (i.e., *all* the members) of those fifty agencies and opt to fill only the positions that the statute would permit be occupied by Democrats. The statutory requirement of bipartisanship would be wholly nullified. And Congress's intent that multi-year staggered terms result in an important and stable body of experience among the members of these agencies would be frustrated as well, because each change in the party in control of the White House would result in a completely new set of agency members, all likely with no agency experience whatever.

Even if a President were to leave in (or appoint to) office commissioners or board members of another party, if those appointees held office at the pleasure of the President, the statutory requirement of bipartisanship would be eviscerated. Such an at-will other-party commissioner or member would be deterred from doing or saying anything that might incur the disapproval of the President, of anyone on the White House staff, of a political supporter or influencer who had the President's ear, or of someone at a television network that the President

11. If a President did so, courts would have to determine the validity of actions taken by such a rump commission or board.

watched. Under constant threat of at-will removal, an other-party member could be effectively forced to provide only dutiful agreement or cowed silence, like the pro forma opposition members tolerated in the Russian Federation Duma.

If the Court concludes that Article II entitles a President to remove at will three members of the FTC, it should preserve the statutory requirement of bipartisanship by holding that those at-will removals must ordinarily be limited to Commissioners who are members of the President's political party. Such a limitation would have the salutary effect of reducing the likelihood that a President would fire members of the FTC at all, because officials from his own party are the Commissioners with whom a President is least likely to disagree.¹² That, in turn, would further Congress's intent that Commissioners remain in office long enough to acquire and use expertise in the wide range of issues the FTC addresses.

The only circumstance in which Article II could entitle the President to remove a Commissioner who is not a member of his party would be when such a removal is necessary to enable the President to appoint a majority of Commissioners who are from his own party, e.g. when three current commissioners of a five-member commission are members of the other party. To preserve the bipartisan makeup of a commission or board for as long as possible, an other-party commissioner or board member so removable must be the one with the shortest remaining tenure in office.

12. Unsurprisingly, all of the members of multimember commissions and boards whom President Trump has dismissed have been Democrats.

In the instant case, when in March 2025 the President dismissed respondent Slaughter, there were two Republican Commissioners and a vacant position. Dismissal of a Democratic Commissioner thus was not necessary to enable the President to appoint three Republican Commissioners and—if Article II limits the application of section 41 at all—to exercise at-will control over those three Commissioners. Thus, even if the Court concludes that section 41 violates Article II insofar as the statute limits removal of more than two Commissioners, the application of the section 41 removal limitation to respondent Slaughter would be constitutional.

CONCLUSION

For the above reasons, the Court should hold that section 41, as applied to respondent Slaughter, does not violate Article II.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

	<i>Page</i>
APPENDIX A — SLAUGHTER BIP BOARDS	1a
APPENDIX B — SINKING FUND 1790	5a

APPENDIX A — SLAUGHTER BIP BOARDS

**BIPARTISAN PRESIDENTIALLY-APPOINTED
BOARDS AND COMMISSIONS**

Advisory Board for Cuba Broadcasting, 22 U.S.C.
§ 1465c(a)

Advisory Board of the Great Lakes Seaway Development
Corporation, 33 U.S.C. § 982

African Development Foundation Board of Directors,
22 U.S.C. § 290h-5(a)(1)

Amtrak Board of Directors, 49 U.S.C. § 24302(a)(3)

Barry Goldwater Scholarship and Excellence in Education
Foundation Board of Trustees, 20 U.S.C. § 4703(b)(3)

Commodity Futures Trading Commission, 7 U.S.C. 2
§ (a)(2)(A)

Consumer Product Safety Commission 15 U.S.C. § 2053(a)

Corporation for National and Community Service Board
of Directors, 42 U.S.C. § 12651a(a)(1)(A)(ii)

Corporation for Public Broadcasting, 47 U.S.C. § 396(c)(1)

Defense Nuclear Facilities Safety Board, 42 U.S.C.
§ 2286(b)(i)

Election Assistance Commission, 52 U.S.C. § 20923(a)

Appendix A

Equal Employment Opportunity Commission, 42 U.S.C.
§ 2000e-4(a)

Farm Credit Administration Board, 12 U.S.C. § 2242(a)

Federal Agricultural Mortgage Corporation, 12 U.S.C.
§ 2279aa-2(a)(C)(iii)

Federal Communications Commission, 47 U.S.C. § 154(b)

Federal Election Commission, 52 U.S.C. § 30106(a)

Federal Energy Regulatory Commission, 42 U.S.C.
§ 7171(b)(1)

Federal Hospital Insurance Trust Fund Board of
Trustees, 42 U.S.C. § 1396i(b)

Federal Labor Relations Authority, 5 U.S.C. § 7104(1)

Federal Old-Age and Survivors Trust Fund, 42 U.S.C.
§ 401(c)

Federal Trade Commission, 15 U.S.C. § 41

Federal Supplementary Medical Insurance Trust Fund
Board of Trustees, 42 U.S.C. § 1395t(b)

Great Lakes St. Lawrence Seaway Development
Corporation Advisor Board, 33 U.S.C. § 982(b)

Appendix A

Harry S. Truman Scholarship Fund Board of Trustees,
20 U.S.C. § 2004(b)(1)(C)

Inter-American Foundation Board of Directors, 22 U.S.C.
§ 290f(g)

International Broadcasting Advisory Board, 22 U.S.C.
§ 6205(b)

James Madison Memorial Fellowship Foundation Board
of Trustees, 20 U.S.C. § 4502(b)(1)(D)

Legal Services Corporation Board of Directors, 42 U.S.C.
§ 2996c(a)

Merit Systems Protection Board, 5 U.S.C. § 1201

Metropolitan Washington Airport Authority Board of
Directors, 47 U.S.C. § 49106(c)(6)(A)

Morris K. Udall and Stewart L Udall Foundation Board
of Trustees, 20 U.S.C. § 6503(b)(3)

National Association of Registered Agents and Brokers,
Board of Directors, 15 U.S.C. § 6754(c)(2)(B)

National Commission on Social Security, 42 U.S.C.
§ 907a(a)(2)(B)

National Credit Union Administration, 12 U.S.C.
§ 1752a(b)

Appendix A

National Mediation Board, 42 U.S.C. § 154first

National Transportation Safety Board, 49 U.S.C. § 1111(b)

Nuclear Regulatory Commission, 42 U.S.C. § 5841(b)(2)

Peace Corps National Advisory Council, 22 U.S.C.
§ 2511(c)

Pension Benefit Guaranty Corporation Advisory
Committee, 29 U.S.C. § 1302(h)

Postal Regulatory Commission, 39 U.S.C. § 502(a)

Postal Service Board of Governors, 39 U.S.C. § 202(a)(1)

Privacy and Civil Liberties Oversight Board, 42 U.S.C.
§ 2000ee(h)(2)

Securities and Exchange Commission, 15 U.S.C. § 78d(a)

State Justice Institute Board of Directors, 42 U.S.C.
§ 10703(a)(1)

Surface Transportation Board, 49 U.S.C. § 1301(b)(1)

United States Institute of Peace Board of Directors, 22
U.S.C. § 4605(c)

United States International Trade Commission 19 U.S.C.
§ 1330(a)

United States Sentencing Commission, 28 U.S.C. § 991(a)

APPENDIX B — SINKING FUND 1790**1 STATUTES AT LARGE 186 (1790)**

An Act making Provision for the Reduction of the Public Debt. It being desirable by all just and proper means, to effect a reduction of the amount of the public debt, and as the application of such surplus of the revenue as may remain after satisfying the purposes for which appropriations shall have been made by law, will not only contribute to that desirable end, but will be beneficial to the creditors of the United States, by raising the price of their stock, and be productive of considerable saving to the United States:

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all such surplus of the product of the duties on goods, wares and merchandise imported, and on the tonnage of ships or vessels to the last day of December next, inclusively, as shall remain after satisfying the several purposes for which appropriations shall have been made by law to the end of the present session, shall be applied to the purchase of the debt of the United States, at its market price, if not exceeding the par or true value thereof.

Sec. 2. And be it further enacted, That the purchases to be made of the said debt, shall be made under the direction of the President of the Senate, the Chief Justice, the Secretary of State, the Secretary of the Treasury, and the Attorney General for the time being; and who, or any three of whom, with the approbation of the President of the United States, shall cause the said purchases to be

Appendix B

made in such manner, and under such regulations as shall appear to them best calculated to fulfill the intent of this act: Provided, That the same be made openly, and with due regard to the equal benefit of the several states: And provided further, That to avoid all risk or failure, or delay in the payment of interest stipulated to be paid for and during the year one thousand seven hundred and ninety-one, by the act, intituled “An act making provision for the debt of the United States,” such reservations shall be made of the said surplus as may be necessary to make good the said payments, as they shall respectively become due, in case of deficiency in the amount of the receipts into the treasury during the said year, on account of the duties on goods, wares and merchandise imported, and the tonnage of ships or vessels, after the last day of December next.

Sec. 3. And be it further enacted, That accounts of the application of the said monies shall be rendered for settlement as other public accounts, accompanied with returns of the amount of the said debt purchased therewith, at the end of every quarter of a year, to be computed from the time of commencing the purchases aforesaid: and that a full and exact report of the proceedings of the said five persons, or any three of them, including a statement of the disbursements and purchases made under their direction, specifying the times thereof, the prices at which, and the parties from whom the same may be made, shall be laid FIRST CONGRESS. Sess. II. Resolutions. 1790. before Congress, within the first fourteen days of each session which may ensue the present, during the execution of their said trust.

Appendix B

Sec. 4. And be it further enacted, That the President of the United States be, and he is hereby authorized to cause to be borrowed, on behalf of the United States, a sum or sums not exceeding in the whole two millions of dollars, at an interest not exceeding five per cent., and that the sum or sums so borrowed, be also applied to the purchase of the said debt of the United States, under the like direction, in the like manner, and subject to the like regulations and restrictions with the surplus afore said: Provided, That out of the interest arising on the debt to be purchased in manner aforesaid, there shall be appropriated and applied a sum not exceeding the rate of eight per centum per annum on account both of principal and interest towards the repayment of the two millions of dollars so to be borrowed. Approved, August 12, 1790.