

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

DAVID BRYON BABCOCK,)
)
 Petitioner,)
)
 v.) No. 20-480
)
 KILOLO KIJAKAZI, ACTING)
)
 COMMISSIONER OF SOCIAL SECURITY,)
)
 Respondent.)

Pages: 1 through 61
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DAVID BRYON BABCOCK,)

Petitioner,)

v.) No. 20-480

KILOLO KIJAKAZI, ACTING)

COMMISSIONER OF SOCIAL SECURITY,)

Respondent.)

- - - - -

Washington, D.C.

Wednesday, October 13, 2021

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:36 a.m.

APPEARANCES:

NEAL K. KATYAL, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

NICOLE REAVES, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	NEAL K. KATYAL, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	NICOLE REAVES, ESQ.	
7	On behalf of the Respondent	35
8	REBUTTAL ARGUMENT OF:	
9	NEAL K. KATYAL, ESQ.	
10	On behalf of the Petitioner	55
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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P R O C E E D I N G S

(11:36 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 20-480, Babcock versus Kijakazi.

Mr. Katyal.

ORAL ARGUMENT OF NEAL K. KATYAL

ON BEHALF OF THE PETITIONER

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

I'd like to begin with the statutory text. Section 415(a)(7)(A) is found at petition appendix page 69a, and it excludes from the windfall elimination provision "a payment based wholly on service as a member of a uniformed service as defined in section 410(m)."

David Babcock, who served as a dual-status technician in the National Guard for 33 years, qualifies. Indeed, 32 U.S.C. 709 requires technicians like him to literally "wear the uniform of the armed services, be a member of the National Guard, and hold the military grade specified by the Secretary."

And Babcock did. He wore the U.S. Army uniform day in, day out, teaching people

1 how to fly Black Hawk helicopters and the like.
2 Babcock engaged in service. He was a
3 dual-status tech. He's undoubtedly a member of
4 a uniformed service. Indeed, the Section 410(m)
5 expressly says National Guard folks qualify.

6 The government says Babcock was a
7 civilian. Even if this were true, it would be
8 irrelevant. The key statute, 415, doesn't use a
9 civil-versus-military dividing line. It simply
10 asks was the service uniformed.

11 The government attempts to say that
12 Babcock's service was not as wholly a member of
13 the uniformed service. But the best reading of
14 the statute, even before one gets to the
15 veterans canon, rejects that.

16 There is no status language in 415.
17 The government would convert the word "as" into
18 a status test trying to discern what hat someone
19 was wearing at a given point in time. Congress
20 certainly could have made such a choice, and,
21 indeed, it has in many other statutes, but it
22 did nothing like that here.

23 So we have three basic arguments.
24 One, the statute doesn't look to civilian
25 status. It looks to uniformed service. Second,

1 even if civilian status mattered, this would
2 meet it. Dual-status tech service is
3 irreducibly military. And, third, if there's
4 any ambiguity, the veterans canon would suggest
5 reading it in favor of Mr. Babcock.

6 JUSTICE THOMAS: Counsel, if -- just a
7 simple factual question. If he -- if Petitioner
8 was receiving his -- was exclusively uniformed
9 service, then why is he receiving a civilian
10 pension and a military pension?

11 MR. KATYAL: Yeah, that's just the way
12 the statute works. And I -- Justice Thomas,
13 it's very much like something that's common
14 ground between both the government and us, which
15 is that inactive service members who didn't pay
16 into the system would receive both, that that's
17 what Congress certainly had in mind in the
18 uniformed service exception.

19 JUSTICE THOMAS: That's not exactly --
20 part of it's civilian and part of it is
21 military. If your argument is right, it would
22 seem that it would be all military. That makes
23 sense if you're talking about NOAA or you're
24 talking about the Coast Guard. It's all -- it
25 -- it -- it's -- it's consistent with what

1 you're saying, that the service was uniformed
2 service, as opposed to part civilian, since he's
3 wearing more than one hat. It's dual -- it is a
4 dual position, so part civilian, part military.

5 And I don't understand how you can
6 have that and now argue that it's all military.

7 MR. KATYAL: Well, we're -- we're
8 saying, Your Honor, that it is -- it's all
9 uniformed service. That's the language of
10 410(m). And so it does certainly have some
11 civilian overtones. Civilian versus uniformed
12 service are not mutually exclusive categories.

13 JUSTICE THOMAS: Is -- is there any
14 other -- is there any other service where that's
15 the case?

16 MR. KATYAL: Well, we do think --

17 JUSTICE THOMAS: Other than this?

18 MR. KATYAL: Well, NOAA and the Public
19 Health Service are both civil --

20 JUSTICE THOMAS: But they're
21 designated by statute, though --

22 MR. KATYAL: Correct.

23 JUSTICE THOMAS: -- right?

24 MR. KATYAL: Correct. And just --

25 JUSTICE THOMAS: And -- and your --

1 and -- and -- and Petitioner is not?

2 MR. KATYAL: No, Justice Thomas, it is
3 designated by statute just as much. So the
4 National Guard is enumerated in -- Congress
5 specified in the uniformed service exception
6 certain services that were defined as uniformed,
7 and that's 410(m).

8 And when you look at 410(m) and the
9 cross-reference, it says that NOAA and Public
10 Health Services are certainly included, but so
11 too is the National Guard of the United States.

12 Now, Justice Thomas, you're absolutely
13 right, there is no other category besides
14 dual-status technicians that fall within our
15 argument about 410(m).

16 JUSTICE THOMAS: But Petitioner is not
17 acting as a National Guard -- as a member of the
18 National Guard of the United States all the
19 time.

20 MR. KATYAL: So our argument is that
21 he is all the time and that -- and that Congress
22 in 410(m) didn't draw any distinction.

23 Now, absolutely, Justice Thomas, my
24 friend on the other side has made that argument
25 before this Court for the first time, that

1 there's some distinction between the National
2 Guard of the United States and the National
3 Guard in general. And as I was saying to you in
4 my -- my first answer to you, the problem with
5 that is that it would ultimately -- first of
6 all, that's not the way the government
7 administers the statute. At page 24 of their
8 brief, they admit that it covers inactive duty
9 folks.

10 And if this is the National Guard of
11 the United States and that's the only thing
12 swept up in the uniformed service exception, the
13 problem with that is then Congress didn't reach
14 the one category that was common ground that we
15 both agree was covered by the uniformed service
16 exception. That's why I think this
17 late-breaking theory by the Solicitor General 27
18 years after the statute has passed I don't think
19 really works.

20 It also doesn't work because the
21 statutes say that once you're a member of the
22 National Guard, you're automatically
23 concurrently enlisted in the National Guard of
24 the United States. And, here, that's really
25 true. As I was saying, Babcock is required, as

1 with all dual-status technicians, to wear the
2 uniform, a United States uniform. So he wears
3 the United States Army -- it's emblazoned on his
4 uniform --

5 CHIEF JUSTICE ROBERTS: Well, counsel,
6 I don't think --

7 MR. KATYAL: -- when he goes to work
8 every day.

9 CHIEF JUSTICE ROBERTS: -- I don't
10 think the fact that -- I don't think, when they
11 say "the uniformed service," they -- they mean
12 does he wear a uniform or not. I mean --

13 MR. KATYAL: Correct.

14 CHIEF JUSTICE ROBERTS: -- I
15 appreciate he -- he wears the uniform because of
16 his National Guard service.

17 But he gets two checks, right, two
18 checks a month or however often? One is for his
19 National Guard service, the -- I don't know
20 whether it's a weekend a month or however much
21 it is, and then another check for his 9-to-5
22 civilian job. The former is based wholly on his
23 uniformed service, working in -- in the
24 uniformed service. But the other is based
25 wholly on his civilian job.

1 Now the one is subject -- subject to
2 the exemption from the windfall exception if
3 that's -- if that's right. But the other isn't
4 because it's certainly not based wholly on his
5 service in the National Guard. It's based on
6 his civilian service.

7 MR. KATYAL: So, Mr. Chief Justice, we
8 do think that the other is one that falls
9 squarely within the uniformed service exception;
10 that is, you're absolutely right, the statute
11 doesn't ask are you literally wearing a uniform
12 at any time. It asks, are you a member of a
13 service that is a uniformed service?

14 And then the statute tells us exactly
15 what is a uniformed service in Title 42, and it
16 includes the National Guard, in contrast to, as
17 Justice Thomas was asking about, Title 5, which,
18 for purposes of other things, like bookkeeping,
19 calls them civilian.

20 So I don't think the fact that they
21 are civilian answers the fundamental question,
22 which is, is Babcock serving as a member of a
23 uniformed service at the time?

24 Now my friend on the other side says,
25 well, that's a different hat because that is the

1 hat National Guard, the state National Guard.
2 But, as I say, if that's the test, then it would
3 mean inactive duty folks who stand very much
4 like Mr. Babcock don't get the -- they wouldn't
5 be able to be eligible for the uniformed service
6 exception either because they are the same --
7 they fall in the same exact category. They're
8 people who didn't pay into the system before
9 1988. Congress undoubtedly said for those
10 folks, absolutely, they should get it.

11 And the reason for this, and it sounds
12 a little arcane, but I think the reason why this
13 all exists is people like Babcock or others
14 joined the -- joined federal employment with a
15 certain set of expectations, and one of those
16 expectations was they would get a windfall if
17 they fell within this.

18 Congress later changed that in 1983
19 and adopted a broad windfall elimination
20 provision, one that sweeps very large, 1.9
21 million people are encompassed by that. But, in
22 1994, they said: Well, if you're serving in
23 uniform, if your service is wholly there, then
24 you should get an exemption, the uniformed
25 service exemption.

1 And so that's what it's about. And so
2 it's certainly about inactive service folks who
3 didn't pay into the system but see their
4 paycheck slashed decades after they started
5 their employment. They don't really remember
6 whether they paid into the system or not.
7 Congress said we want to get rid of that.

8 And as our reply brief at page 14
9 says, once Congress decided to get into that
10 question, then it stands to reason that folks
11 like dual-status technicians like Mr. Babcock
12 are just like those inactive service folks.
13 They're people who didn't pay into the system
14 but see their paycheck slashed decades later,
15 and these are people who are truly, through and
16 through, military to the extent that that was
17 even the test in terms of the way they performed
18 their --

19 CHIEF JUSTICE ROBERTS: Well, I -- I
20 don't see how you can say through and through
21 military when their job title is dual-status.

22 MR. KATYAL: Well --

23 CHIEF JUSTICE ROBERTS: I mean, what
24 are the two statuses --

25 MR. KATYAL: Well --

1 CHIEF JUSTICE ROBERTS: -- stati?

2 MR. KATYAL: -- it's -- it's military
3 and civilian to be sure.

4 CHIEF JUSTICE ROBERTS: Yeah, sure.

5 MR. KATYAL: But --

6 CHIEF JUSTICE ROBERTS: So the --
7 their pension payments are not based wholly on
8 the military service. They get a pension based
9 on their military service, and that works the
10 way you want the whole thing to work in terms of
11 accepting the application of the windfall
12 exception. But I don't see -- or I think you --
13 well, how -- how does the other part of it --
14 not the -- not the whole thing. I understand
15 you want to look at the whole thing and say the
16 whole thing is based on --

17 MR. KATYAL: So --

18 CHIEF JUSTICE ROBERTS: -- military
19 service.

20 MR. KATYAL: -- so two things.

21 CHIEF JUSTICE ROBERTS: It seems to me
22 the whole system separates out the two to the
23 extent that they call it a position dual.

24 MR. KATYAL: So two things, Mr. Chief
25 Justice. First, the title is not just

1 dual-status tech. It's -- it's -- and you can
2 see it at U.S. -- at 32 U.S.C. 709(b), which is
3 petition appendix page 64a, and it's military
4 technician dual-status.

5 And then, at 10 U.S.C. 10216, it calls
6 them military technicians and military 24
7 whopping times. So I think Congress has said,
8 to the extent that you even looked at this
9 military/civil line, I think they're calling
10 them more military if anything.

11 Now the second point is we don't think
12 that the words of the statute have some sort of
13 purity test that you've got to be all military
14 all the time. You know, the --

15 CHIEF JUSTICE ROBERTS: Well, you
16 don't have to be all military all the time, but
17 maybe you do when they say the payment has to be
18 based wholly on service as a member of a
19 uniformed service.

20 MR. KATYAL: I agree that's one way to
21 read it. I just don't think it's the best way.
22 And so, you know, let me walk you through the
23 way that we understand "wholly," which is it's a
24 very severe test, as our reply brief at page 10
25 says. What it says is that if there's even a

1 drop of money that comes -- that not from
2 uniformed service, then you don't get the
3 exception the way -- the uniformed service
4 exception.

5 So Congress in 1983 passed a broad
6 provision, the windfall elimination provision,
7 which says "if any part or whole of the money
8 comes from non-covered service, then you're in
9 the windfall elimination provision." That's
10 what they said. That's a sweeping broad
11 provision that affects 1.9 million Americans
12 each year.

13 And then Congress said, we're going to
14 enact a narrow exception only for those who are
15 wholly in uniformed service, people who have
16 basically spent their career doing that.

17 And so the word "wholly" has a lot of
18 meaning. It's integral to our -- to our reading
19 of the statute because, without it, it means
20 that you can have just a little bit of money
21 from uniformed service and then you're entirely
22 out of this broad windfall elimination
23 provision.

24 So it's not the case that we're not
25 giving "wholly" work. We're giving it a lot of

1 work. Indeed, it's integral to the way we read
2 the statute.

3 To my friend's reading and, Mr. Chief
4 Justice, I think your reading, suggests that
5 "wholly" would modify the word "service," not
6 "payment." And I think that's not what Congress
7 had in mind. Congress certainly has in other
8 statutes focused on the status or something like
9 that, but it hasn't here.

10 And that's why our brief
11 linguistically walks you through that at page
12 29, saying "wholly" would have to be two words
13 down in the statute in order for this to apply.
14 And so we think it's a -- not to -- we do think
15 it's the best reading of the statute to really
16 -- to understand this. I think the government
17 itself at page 22 of their brief admits that
18 "wholly" modifies the word "payment," not
19 "service."

20 And so, when you read the statute, you
21 simply ask whether or not the service is as a
22 member of a uniformed service. And, here, when
23 someone like Mr. Babcock or dual-status
24 technicians are performing their duties, they're
25 literally having to wear the uniform, having to

1 be a military rank, having to comply with all
2 sorts of fitness requirements that --

3 JUSTICE BARRETT: Mr. Katyal --

4 MR. KATYAL: -- us civilians don't --

5 JUSTICE BARRETT: -- what if a private
6 employer said, I'm very patriotic, I really like
7 employing members of the National Guard and all
8 of these same requirements that you're
9 articulating, said I want you to wear your
10 uniform to work, I want you to maintain a
11 certain rank, I want you to maintain a certain
12 fitness level, but Mr. Babcock is doing the same
13 job that he's doing, you know, teaching pilot
14 flight school, but he's doing it for a private
15 employer.

16 MR. KATYAL: Yeah.

17 JUSTICE BARRETT: Would that be
18 service as a member --

19 MR. KATYAL: It wouldn't.

20 JUSTICE BARRETT: -- of the National
21 Guard?

22 MR. KATYAL: So -- so two things,
23 Justice Barrett. First is, of course, if a
24 private employer did anything at this point in
25 time, it's all covered employment. So --

1 JUSTICE BARRETT: Well --

2 MR. KATYAL: -- this case really --

3 JUSTICE BARRETT: -- imagine not.

4 MR. KATYAL: Right. I just want to
5 make sure that, you know, focus on it's
6 impossible for these kinds of hypotheticals to
7 arise. And then, second, we definitely don't
8 think that a private employer can somehow
9 supplement and define what is a National Guard
10 duty. Those are enumerated by statute in 709
11 and 10216.

12 JUSTICE BARRETT: But why would that
13 matter? You know, why does it matter if they're
14 two employers rather than one? Is it just the
15 fact that he works for the government?

16 MR. KATYAL: It's -- it's not two
17 employers rather than one. We're just asking --
18 when you ask what is service as a member of a
19 uniformed service, I think that can only be done
20 by someone who is a member of a uniformed
21 service.

22 Now, if the hypothetical is the
23 employer makes those people become, say,
24 National Guard members or something like that,
25 our point --

1 JUSTICE BARRETT: That is the
2 hypothetical.

3 MR. KATYAL: Yeah. Then our point
4 would be, in that circumstance, they -- they'd
5 still have -- that they'd have to be performing
6 the duties that National Guard folks do
7 enumerated by statute, not other duties. If
8 they're doing other things, they're just not --
9 they're not service -- their role -- they're
10 not -- their service is not as a member of a
11 uniformed service.

12 JUSTICE SOTOMAYOR: How about if
13 they're delivering food to the National Guard?
14 It's a private company with all of the
15 prerequisites that Justice Breyer had said and
16 they're delivering mess, food.

17 MR. KATYAL: I think you'd look to the
18 way Congress has characterized the duty, if
19 there's any clue, like, here, there is the --
20 you know, to the extent you want to focus on
21 military, something like that. And the reason
22 for that, Justice Sotomayor, is what is civilian
23 and what looks military is actually really hard.
24 Take your example of food. A culinary
25 specialist is a chief petty officer in the U.S.

1 Army. It is thoroughly a military position.

2 But it's cooking food.

3 And so I do think that the way to --
4 to deal with this -- and this only affects,
5 obviously, a narrow set of people -- is to ask,
6 what did Congress have in mind in the roles that
7 it was enumerating? Here, Congress had roles in
8 mind like the one that Mr. Babcock does,
9 teaching people how to fly military helicopters.

10 JUSTICE SOTOMAYOR: Where do you get
11 all of that from the language?

12 MR. KATYAL: We get it --

13 JUSTICE SOTOMAYOR: Tell me where you
14 -- you --

15 MR. KATYAL: We -- we get it from --

16 JUSTICE SOTOMAYOR: -- where the
17 language gives us those two requirements --

18 MR. KATYAL: It --

19 JUSTICE SOTOMAYOR: -- first, that --
20 that your job has to require you to be a -- be a
21 member, and, secondly, that it be one of these
22 specified jobs?

23 MR. KATYAL: Yeah. So I think the --
24 the language --

25 JUSTICE SOTOMAYOR: Just read the

1 language to me and tell me where.

2 MR. KATYAL: Right. So the language
3 of the statute is "service as a member of a
4 uniformed service." So we think that has three
5 components to it. One, you got to be a member,
6 you know, and, here, of course, membership in
7 the National Guard is required. Second, that
8 you got to perform the statutory duties that are
9 enumerated by the -- by the statute, as opposed
10 to Justice Barrett's hypothetical, like, adding
11 some other duties --

12 JUSTICE SOTOMAYOR: So a cook is --

13 MR. KATYAL: -- that a private
14 employer does.

15 JUSTICE SOTOMAYOR: -- a cook is -- is
16 listed. So what else?

17 MR. KATYAL: Yeah. And then -- and
18 then, lastly, you know, whether it's for a
19 uniformed service or not, and that's defined by
20 the statute, as I was saying to the Chief
21 Justice, in 410(f).

22 JUSTICE SOTOMAYOR: So how do you
23 exclude the -- the chef, that he's in the Army,
24 he's a officer --

25 MR. KATYAL: So I do think --

1 JUSTICE SOTOMAYOR: -- a petty
2 officer?

3 MR. KATYAL: Right. I do think, if
4 the Congress -- if Congress has defined that as
5 a kind -- as -- as -- as an enumerated duty of
6 the National Guard, then that person would
7 qualify.

8 Here, there are enumerated duties of
9 the National Guard found in 709 and 10216, and
10 as our brief explains, dual-status technicians
11 are integral to the performance of those duties.

12 You know, that's been said time and
13 again by different people, members of the
14 military, you know, civilian officers, even the
15 government's own briefs to this Court in an
16 admittedly different context, the Ferris
17 context, calls them irreducibly military.

18 JUSTICE BARRETT: Well, Mr. Katyal, is
19 training pilots to fly Black Hawk helicopters
20 one of those enumerated duties?

21 MR. KATYAL: We do think it falls
22 directly within -- within the enumerations of
23 709, which is organizing, administering,
24 instructing, or training the National Guard and
25 -- or armed services and the like. So, yes, we

1 think it does fall that way.

2 We don't think you have to get into
3 any of that here because Congress did use a
4 pretty simple test, simple language that affects
5 relatively few people. To the extent there's
6 any doubt about this, we would suggest you apply
7 the veterans canon. As Justice Alito's
8 unanimous opinion for the Court in Shinseki said
9 back in 2011, if there's any ambiguity, read it
10 in favor of veterans. And so we think that that
11 would answer it.

12 And then I think, you know, my friend
13 on the other side suggests that there's somehow
14 some sort of civilian bar in the statute, and I
15 think this is implicit in the Chief Justice's
16 question to me as well. But the relevant
17 statutory language doesn't say that. It just
18 says uniformed service.

19 JUSTICE KAGAN: Well, the way the
20 Chief Justice read the language, I think, and
21 this is the way I read the language too, is that
22 we can sort of make this simpler by saying a
23 payment based wholly on military service.

24 Do you think that that's right? Is
25 there a difference? If I say a payment based

1 wholly on military service, is that the same as
2 or different than this statutory language?

3 MR. KATYAL: I -- I think it may be
4 the same. It'll obviously depend on how you
5 read "wholly." We don't think you should read
6 "wholly" the way that they read it to
7 essentially say that there's -- "wholly" will
8 modify "service," which I think could be done in
9 a --

10 JUSTICE KAGAN: Well, "a payment based
11 wholly on military service" means that the
12 payment has to be for entirely military service.

13 MR. KATYAL: Exactly. So, if -- if --
14 if that's the way you read it, Justice Kagan, we
15 don't disagree. So people like Babcock, who
16 have spent their whole career in the dual-status
17 technician role and get a payment for that,
18 that's a circumstance in which they fall within
19 the exception.

20 If we contrast that to a modified Mr.
21 Babcock, someone who spent half of his time,
22 say, working at the Department of Transportation
23 in non-covered employment and half of his time
24 working as a dual-status tech, that person would
25 not be eligible for the uniformed service

1 exception.

2 JUSTICE KAGAN: So, if I understand --

3 MR. KATYAL: He falls without it.

4 JUSTICE KAGAN: -- what you're saying

5 in terms of the way you read this stat --

6 statute, the only thing at issue is, when he

7 receives his paycheck, is it entirely for

8 military service, or might it be for other

9 things as well?

10 MR. KATYAL: Is it entirely for

11 uniformed service. That's the -- that's the one

12 --

13 JUSTICE KAGAN: Oh. Now you're

14 changing it, because I asked you is it the same

15 as for military service.

16 MR. KATYAL: Oh, I'm so sorry, I meant

17 -- I didn't hear the last part then. So, yeah,

18 so we do think there's a difference between

19 uniformed service and military service. And

20 Congress gave you an express textual indication

21 of that by enumerating the Public Health Service

22 and NOAA as two examples. Those are people who

23 are not military. The government, you know,

24 dances around this in their brief, but they

25 certainly don't call them military because that

1 would be preposterous.

2 Instead, what people like NOAA and
3 Public Health Services folks are are uniformed
4 service, and that's why Congress used that
5 specific phrase. They could have used -- picked
6 up any other military test, as our brief says.
7 There are all sorts of military pay stub tests
8 throughout, including about the National Guard,
9 like 709(b) and so on, but not this one.

10 And so, here, Congress just simply
11 asked: Is the service as a member of a
12 uniformed service? And to answer that question,
13 you look to what is a uniformed service --

14 JUSTICE KAGAN: So are you saying,
15 well, we -- we concede that the payment is not
16 entirely for military service, but it's all for
17 uniformed service?

18 MR. KATYAL: We -- we don't concede
19 it. We do think, if you went there, this is
20 irreducibly military at the end of the day, but
21 -- but we don't think you have to get there.
22 That is not the language of the statute. We
23 think we meet the government's test, but we
24 don't think the government's test is right.

25 We think it's a simpler test affecting

1 a very small number of people but, obviously,
2 people to whom this amount of money is really
3 important.

4 JUSTICE BREYER: But isn't it that --
5 I mean, is there anything wrong with my reading
6 the legislative history? Is there anything
7 wrong where the statute's ambiguous?

8 MR. KATYAL: So --

9 JUSTICE BREYER: If I turn to a House
10 report, which was so common and still is, where
11 someone who works on the staff explains what
12 they mean, and that explanation is run by all
13 the senators, and either they or their staff
14 sign off on it, and, here, no one objected.

15 And what they seem to say, when I read
16 House Report 103-506, whatever it is, at 67, I
17 read it, and it seems to say that these smaller
18 group of people who are actually in military
19 reserve between 1956 or whatever the years were,
20 they're the ones we're trying to help, not
21 anybody else.

22 MR. KATYAL: So -- so, Justice Breyer,
23 we certainly don't have any problem with you
24 looking at legislative history. Some of your
25 colleagues might, but we certainly don't.

1 And -- and we think, if you look at
2 it, you draw exactly the opposite conclusion
3 because Congress did say -- you're absolutely
4 right, Congress said military pensions focused
5 on inactive service members and the like in
6 the -- excuse me -- the legislative history says
7 that, but Congress didn't use those words. They
8 used far broader words, service --

9 JUSTICE BREYER: So you're saying the
10 person who wrote the legislative history got it
11 wrong?

12 MR. KATYAL: I --

13 JUSTICE BREYER: That the person who
14 wrote that report didn't actually read the
15 statute and didn't really know what the statute
16 said?

17 MR. KATYAL: Justice Breyer, there's
18 nothing in there that excludes dual-status
19 technicians --

20 JUSTICE BREYER: It says for a small
21 --

22 MR. KATYAL: -- from the legislative
23 history.

24 JUSTICE BREYER: -- closed group of
25 people who receive military pay --

1 MR. KATYAL: Correct.

2 JUSTICE BREYER: -- based on your
3 reading.

4 MR. KATYAL: -- and we agree it is a
5 small group of people either way, whether
6 dual-status techs --

7 JUSTICE BREYER: Based at least in
8 part on non-covered military reserve duty after
9 1956 and before 1988 --

10 MR. KATYAL: Correct.

11 JUSTICE BREYER: -- which I admit I
12 don't understand --

13 MR. KATYAL: Correct.

14 JUSTICE BREYER: -- but I'll try.
15 Right.

16 MR. KATYAL: That is -- we agree that
17 that is the heart of what the statute is about.
18 Our only point is the language Congress
19 ultimately settled on doesn't have any of those
20 terms in it. And once you start reading it the
21 government's way, you're then into the problem
22 of, wait, Congress then didn't do anything. It
23 didn't cover even inactive duty folks, which is,
24 as you were saying, the paradigmatic case of
25 what they wanted to cover.

1 Questions?

2 CHIEF JUSTICE ROBERTS: Mr. Katyal,
3 when -- when Mr. Babcock was working, did he get
4 one paycheck or two?

5 MR. KATYAL: So he got -- when he was
6 working in --

7 CHIEF JUSTICE ROBERTS: Just regular
8 --

9 MR. KATYAL: -- as an -- as an active
10 --

11 CHIEF JUSTICE ROBERTS: I assume he's
12 retired now.

13 MR. KATYAL: Yeah, so he got one
14 paycheck for his National Guard service. When
15 he went into active duty for his --

16 CHIEF JUSTICE ROBERTS: No, no, no.
17 One paycheck for his National Guard service.
18 Did he get one paycheck for his 9-to-5 job and
19 one paycheck for the National Guard job?

20 MR. KATYAL: I -- I will let you -- I
21 just want to make sure of what the record says.
22 I'll get that for you on rebuttal.

23 CHIEF JUSTICE ROBERTS: But he does
24 get two separate checks for pension, right?

25 MR. KATYAL: Correct.

1 CHIEF JUSTICE ROBERTS: One for his
2 9-to-5 job and one for his National Guard job?

3 MR. KATYAL: Correct. And the way
4 that the statute works, it goes payment system
5 by payment system. So it asks whether the CSRS
6 payments are all wholly as a member of a
7 uniformed service or not. And then, if he has,
8 for example, state and local pension, that's a
9 whole separate system and a separate calculation
10 under the windfall elimination provision. You
11 don't aggregate them together.

12 CHIEF JUSTICE ROBERTS: Just to be
13 clear, I'm asking when he's working, does -- at
14 the end of the month, does he have -- this is my
15 National Guard check for the time I spent
16 working as a National Guardsman, military
17 status, right? But he had this separate -- you
18 will fight the "separate" maybe -- but he also
19 had the 9-to-5 job --

20 MR. KATYAL: Oh.

21 CHIEF JUSTICE ROBERTS: -- because
22 that's what made him dual-status.

23 MR. KATYAL: Oh, yeah. No, I don't
24 think he gets a separate paycheck for that. I
25 think that's all one paycheck. It's just -- I

1 think that his military service, to the extent
2 he's on active duty or something like that, the
3 -- that is a separate paycheck. So I think
4 those are the two paychecks. I will confirm
5 this in the record --

6 CHIEF JUSTICE ROBERTS: Well, I --

7 MR. KATYAL: -- and get back to you.

8 CHIEF JUSTICE ROBERTS: -- you say to
9 the extent he's on active duty. Is it to the
10 extent he's not -- the National Guard has not
11 been called up, but he's in the National Guard
12 for specific periods, right?

13 MR. KATYAL: Correct.

14 CHIEF JUSTICE ROBERTS: Okay. So
15 you're going to let me know if he gets a -- got
16 a separate paycheck for his 9-to-5 job and a
17 separate paycheck for the time he was doing
18 National Guard work?

19 MR. KATYAL: Yeah, I -- I'm pretty
20 sure it's all the same thing because, you know,
21 literally, every time he's going to work, he's
22 wearing the uniform and performing his National
23 Guard dual-status technician duties. I don't
24 think there is any separate paycheck, but I just
25 want to double-check what's in the record.

1 CHIEF JUSTICE ROBERTS: Okay. Thank
2 you.

3 Justice Thomas?

4 JUSTICE THOMAS: Yes, counsel, just an
5 -- a question as an aside. What would have been
6 the difference in the treatment of Petitioner if
7 he had exercised the option in the 1980s to
8 switch from CSRS to FERS?

9 MR. KATYAL: Yeah. So, one, if he --
10 if he elected to be in FERS, then he would be in
11 covered employment, and then he'd be outside of
12 the windfall elimination provision because it
13 doesn't encompass at least for those
14 going-forward years non-covered employment. It
15 only applies to non-covered employment.

16 So, once you're in the language of
17 FERS in covered employment, you're outside of
18 the windfall elimination provision.

19 JUSTICE THOMAS: So he exercised an
20 option that put him in the current position that
21 he's in?

22 MR. KATYAL: Correct, and he -- you
23 know, as he says at -- this is petition appendix
24 page 44a -- when he joined the service, he
25 thought he was entitled to a certain stream of

1 benefits. They then changed it on him, and,
2 yes, he had the option to convert, but
3 conversion had all sorts of problems inherent to
4 it.

5 JUSTICE THOMAS: Yeah, but that was
6 true in the '80s for every federal employee.

7 MR. KATYAL: Correct. And what
8 Congress in 1994, Justice Thomas, said was
9 uniformed service folks are going to get a
10 benefit that other federal employees don't get.
11 We want to benefit them in a certain way because
12 they're seeing their paychecks slashed, as are,
13 of course, civilian employees, but they wanted
14 to do something -- you know, they wanted to do
15 something for uniformed service folks that was
16 different and special.

17 JUSTICE THOMAS: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Breyer?

20 JUSTICE BREYER: No, thank you.

21 CHIEF JUSTICE ROBERTS: Justice Alito?
22 No?

23 Justice Sotomayor, anything further?

24 JUSTICE SOTOMAYOR: I -- I -- on this
25 two -- two checks, he got a check for his 9-to-5

1 job for the State National Guard, and he got a
2 separate check for his inactive duty military
3 service? When he got called up for his two
4 weeks or weekend duty for the Army National
5 Guard, he got a separate check, correct?

6 MR. KATYAL: Correct. I'm pretty
7 sure.

8 JUSTICE SOTOMAYOR: And so he's being
9 paid two pensions now, one by his 9-to-5 job and
10 he does get a military pension as well?

11 MR. KATYAL: That is correct. That is
12 what the uniformed --

13 JUSTICE SOTOMAYOR: So that's the
14 answer to Justice -- the Chief's question.

15 MR. KATYAL: I'm pretty sure it is. I
16 just want to see what's in the record,
17 absolutely, yes.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?
19 Justice Barrett? No?

20 Thank you, counsel.

21 Ms. Reaves.

22 ORAL ARGUMENT OF NICOLE REAVES

23 ON BEHALF OF THE RESPONDENT

24 MS. REAVES: Mr. Chief Justice, and
25 may it please the Court:

1 When a dual-status technician retires,
2 he receives two separate streams of payments,
3 and the application of the uniformed services
4 exception depends on the basis for each set of
5 payments that he receives.

6 First, he receives Civil Service
7 Retirement System payments from the Office of
8 Personnel Management for the work that he
9 performs in his full-time civilian role as a
10 technician. Those payments do not trigger the
11 uniformed services exception because they are
12 based on his civilian employment.

13 A technician also receives a second
14 stream of payments which are military retirement
15 payments from the Defense Finance and Accounting
16 Service for his part-time military service, that
17 is, his inactive duty training and drills and
18 his active duty service in the National Guard.

19 Those military retirement payments do
20 trigger the uniformed service exception because
21 they are based wholly on service in a qualifying
22 National Guard capacity. And Petitioner and
23 other dual-status technicians like him, when
24 they were in the role, received two separate
25 paychecks with two separate leave and earnings

1 statements. One was a paycheck for their 9-to-5
2 technician work, and the other was the paycheck
3 for all their inactive and active duty service.

4 Congress also repeatedly categorized
5 technician service as outside -- as civilian
6 service, not uniformed service.

7 First, Congress did not include
8 dual-status technicians within the definition of
9 a member of a uniformed service that is
10 cross-referenced in the uniformed services
11 exception.

12 Second, in Section 10216 of Title 10,
13 one of the two primary provisions that governs
14 dual-status technicians, Congress describes
15 technicians as civilian four separate times.

16 And, third, in Title 5, Congress
17 defined technician employment as falling within
18 the civilian service of the government and
19 ensured that technicians would receive civilian
20 retirement payments for their civilian
21 employment.

22 I think I'd start then by discussing a
23 couple of points that my friend on the other
24 side made, and the first is whether an
25 individual knows what type of status they're in

1 at any given point in time.

2 And it's actually quite clear what
3 status a technician is at any point. During his
4 9-to-5 job, a technician is doing work in the
5 technician role, and in that role, he has a
6 variety of benefits that he doesn't have while
7 he's working in his National Guard role, and
8 that includes the fact that he can join a union.
9 He can file complaints with the EEOC and MSPB.
10 He can receive compensatory time off and
11 worker's compensation. And he's compensated
12 under the federal GS system.

13 That's different from his National
14 Guard service which he performs on weekends or
15 if he's called up to active duty.

16 Now my friend on the other side has
17 suggested that if you are -- were to accept the
18 government's position in this case, inactive
19 duty service, such as training and drills,
20 wouldn't trigger the uniformed services
21 exception. And that's wrong because of a
22 specific provision that deems such service as
23 federal for the purpose of federal funding.

24 And that provision is 10 U.S.C.
25 12602(a), which provides that for the purposes

1 of laws providing benefits for members of the
2 Army National Guard of the United States,
3 military training, duty, or other service
4 performed by a member of the Army National Guard
5 of the United States in his status as a member
6 of the Army National Guard, for which he's
7 entitled to pay from the United States, shall be
8 considered military training, duty, or other
9 service in the federal service.

10 So let me unpack that a little bit.
11 What that means is that when an individual is in
12 his state status, which usually happens when
13 he's doing inactive training and drills, because
14 of this provision, he's paid by the federal
15 government as a general matter, and that does,
16 in fact, trigger the uniformed services
17 exception because that payment is payment for
18 qualifying service.

19 Now dual-status technician service is
20 different because Congress has categorized that
21 service as outside the uniformed service and the
22 payments for that service as civilian in nature.

23 JUSTICE GORSUCH: Counsel, as -- as I
24 understand your -- your colleague on the other
25 side, and I may not, but, as I understand it as

1 best I can in this area, we -- we all understand
2 that National Guardsmen serve in at least two
3 capacities, and one of them is denominated by
4 the government for purposes of its own HR
5 administration as civilian.

6 And -- and so, fine, he served as a
7 civilian when he was working as a technician.
8 That was -- that's how you classified it.

9 But just looking at the language of
10 the statute -- and I think this is the argument
11 in its simplest terms as I understand it -- was
12 -- were the payments based -- were they made
13 wholly on service in the capacity of -- as -- as
14 a member of the uniformed service, and the
15 answer he would give is yes because, while you
16 denominate it civilian for certain purposes, you
17 also said it could only be performed by someone
18 who is a member of a uniformed service.

19 So the work may be civilian for a
20 bunch of other purposes, but it can only be
21 performed by someone who is serving in the
22 capacity of a National Guardsman.

23 What's wrong with that argument?

24 MS. REAVES: I think there are a few
25 things that are wrong with that argument. One

1 is that a precondition to hold a given role
2 doesn't render service in that role and payments
3 for service in that role wholly for service in
4 the capacity of the prerequisite.

5 JUSTICE GORSUCH: Well, why -- now let
6 me stop you there. Why not? Because, if the
7 work, civilian work, whatever you -- whatever
8 words you want to put around it, can only be
9 performed, has to be wholly performed by someone
10 who is a member of the National Guard, why
11 doesn't that take care of the word "wholly" for
12 you?

13 MS. REAVES: So I think it writes out
14 the word "as" and the fact that we're in
15 agreement, I think, that "as" means in the
16 capacity of.

17 JUSTICE GORSUCH: Mm-hmm.

18 MS. REAVES: And the fact that
19 Congress --

20 JUSTICE GORSUCH: Okay. All right.
21 So, if we're moving from "wholly" now, we're
22 putting that aside, okay, so we're not arguing
23 on "wholly," we're going to "as," all right, and
24 "as" is a very important word in this case. I
25 got that.

1 "In the capacity of" is, I think, how
2 that -- you would argue it is.

3 MS. REAVES: Yes.

4 JUSTICE GORSUCH: Why isn't the
5 civilian work being performed in the capacity
6 of, by someone who has to be a National
7 Guardsman?

8 MS. REAVES: So I think "in the
9 capacity of" and "by someone that has to be" are
10 two different terms. And I -- I guess maybe an
11 analogy would be helpful here.

12 JUSTICE GORSUCH: But the work is
13 civilian work being performed as, okay, wholly
14 as a National Guardsman. Why -- why can't both
15 be true, in other words? I know it's -- it's --
16 it's a lot to hold in one's head at the same
17 time that one can be both civilian and
18 performing work as a National Guardsman, but
19 what's -- what's wrong with that?

20 MS. REAVES: So they -- they can't be
21 because Congress has said they can't be.
22 Congress has said that an individual -- that
23 there's something called National Guard service,
24 and we pay individuals military pay and give
25 them military pensions as a result of that.

1 JUSTICE GORSUCH: That's all over in
2 Title 10, though. Here we are in Title 42. And
3 what do you do just on -- in Title 42 itself?

4 MS. REAVES: So I think, in Title 42
5 itself, we looked at what is uniformed service
6 and we see that a member of a uniformed service
7 is not a technician. And we know that when
8 Congress wanted to include an individual who
9 doesn't really look normal to us who don't have
10 expertise in this area, like a member of the PHS
11 Corps or the NOAA Corps, it explicitly included
12 them within that definition of uniformed
13 service, and it didn't do that with technicians.

14 JUSTICE GORSUCH: So are we blowing
15 past "as" now and now we're on to "uniformed
16 service"?

17 MS. REAVES: We're not blowing past
18 anything. I think the best reading of the
19 statute is looking at the entire phrase and
20 giving meaning to the definition of "member of a
21 uniformed service" which doesn't include
22 technician service, giving meaning to "as" and
23 the fact that service needs to be performed in
24 that capacity, and giving meaning to "wholly"
25 and the fact that payments themselves have to be

1 entirely or completely based on qualifying
2 service. And we know that --

3 JUSTICE GORSUCH: All right. Let me
4 -- let me try it one more time and then I -- and
5 I'll promise I'll stop because I'm beating a
6 horse that's pretty dead, I think.

7 Payments based wholly on service,
8 okay, civilian service, based wholly on civilian
9 service performed in the capacity of a National
10 Guardsman. I think that's the reading, okay? I
11 -- I think that's it as best I got it, and I may
12 be completely off base, Mr. Katyal will tell me,
13 but what's -- what's -- what's wrong with that?
14 Why can't we hold these two things in our head
15 at the same time?

16 MS. REAVES: I think because of the
17 definition of "uniformed service," and I don't
18 think we can just look at the Title 42
19 definition because Title 10 is one of the two
20 provisions that creates dual-status technicians
21 and it refers to their service as civilian four
22 separate times.

23 Now my friend on the other side has
24 noted that they're referred to as military
25 technicians multiple times, but that just refers

1 to whom they -- for whom they work. It doesn't
2 refer to the nature of their service. So I
3 think that we can't just read this in a bubble.

4 And when Congress enacted that --
5 this, it was enacting it against a backdrop of
6 the fact that National Guard members do have
7 different types of service and that National
8 Guard members for the most part are part-time
9 service members.

10 And I think it's helpful to compare
11 the service that a dual-status technician
12 renders with two other types of service that the
13 National Guard has. One is active guard
14 reserve, and those are individuals who hold a
15 full-time military role, and all of their pay
16 for their 9-to-5 job receives the benefits of
17 the uniformed services exception.

18 And the National Guard also employs
19 civilian employees who aren't members of the
20 National Guard, and all of these individuals may
21 perform service that seems to us to be very
22 important to the National Guard and integral to
23 its functioning, but what matters for the
24 purposes of the uniformed services exception is
25 how Congress chose to define the service.

1 And Congress chose to --

2 JUSTICE BARRETT: Well --

3 MS. REAVES: -- define this --

4 JUSTICE BARRETT: -- Ms. Reaves --

5 JUSTICE ALITO: What is the --

6 JUSTICE BARRETT: -- what about Mr.

7 Katyal's point that there is a statutory list of
8 duties performed by people like Mr. Babcock and
9 that that list can be read to include Mr.
10 Babcock's training, you know, of pilots?

11 MS. REAVES: So it's -- it's certain
12 -- so the -- the description he was referring to
13 is in 32 U.S.C. 709, which describes what
14 dual-status technicians do on a day-to-day
15 basis, and that includes organizing,
16 administering, and instructing the National
17 Guard.

18 And that is certainly what he did
19 during his 9-to-5 technician job. We aren't
20 debating that in any way. But that -- even
21 though that's important to the National Guard,
22 integral to its functioning, that was his 9-to-5
23 civilian service, and that's separate from his
24 weekend training and guard -- training and
25 reserve service.

1 So I don't think the fact that
2 Congress decided to list off their roles here
3 tells us anything about whether that service is
4 in the capacity of a member of a National Guard.

5 It's also important to note that
6 Congress also has wholly civilian employees of
7 the National Guard who aren't members of the
8 National Guard and don't have that prerequisite.
9 They can also be trainers, like Mr. Babcock was.

10 JUSTICE ALITO: What is the purpose of
11 this dual-status setup? Why -- why would it not
12 have been sufficient for these employees to be
13 simply civilian federal employees? If they want
14 to be on -- in the National Guard on the side,
15 fine, they can be in the National Guard?

16 MS. REAVES: So I can't answer that
17 question as to any individual technician because
18 there are tens of thousands of them and they do
19 have very different roles. It might be a
20 different answer for Mr. Babcock. The
21 individual who was the plaintiff in Martin, the
22 Eleventh Circuit case on this issue, was a
23 personnel clerk, so he did paperwork but still
24 had to be a National Guard member. But I can
25 tell you why we got here and maybe some of the

1 benefits of it.

2 As to the why, this is really a
3 holdover of how states had structured the system
4 before. So, in 1916, Congress authorized states
5 to hire military caretakers, who were the
6 predecessors of dual-status technicians, and
7 states developed a practice where most of these
8 individuals had to be members of the National
9 Guard.

10 JUSTICE ALITO: Well, is it -- is this
11 just a historical accident, or is there some
12 benefit to the federal government or to the
13 National Guard from having these people in a
14 dual status as opposed to a -- an overlapping
15 status as opposed to completely discrete
16 statuses?

17 MS. REAVES: So I think the benefits
18 are that it definitely helps the National Guard
19 with enrollment because these civilian jobs are
20 very attractive with all the benefits that they
21 have. And it also does help the National Guard
22 from the perspective of cohesion and unit
23 readiness. These individuals, you know, do get
24 called up with their National Guard units and do
25 inactive training and drills with them.

1 I don't think any of that really tells
2 us anything about how to answer the question
3 presented here just because, as I previously
4 discussed, what we have to look at is the status
5 itself as Congress has defined it and the
6 payment, type of payments that Congress has
7 provided for that, not whether it looks military
8 or looks essential to us.

9 I think my friend -- let's talk for a
10 moment about "wholly" and what kind of work that
11 term is doing here. We read "wholly" as an
12 adverb that modifies the adjectival phrase that
13 begins with "based on" and that phrase in turn
14 modifies "payment." I think we're all in
15 agreement on that reading, and what that means
16 is that we have to look at the nature of this
17 particular payment here.

18 And I think even if the Court were to
19 accept my friend on the other side's functional
20 approach, which says that this looks like
21 National Guard service, so we should treat these
22 payments as it for being payments that trigger
23 the uniformed services exception, that doesn't
24 work because "wholly" indicates that even if
25 you're taking that functional approach, which we

1 don't think you should, the payments are not
2 wholly based on that.

3 An individual member of the National
4 Guard who's not a technician cannot receive the
5 CSRS pay -- Civil Service Retirement System
6 payments that Petitioner received. He can't
7 hold that technician role. And I think, because
8 of that, "wholly" does do work under our
9 reading.

10 And the problem with my friend on the
11 other side's reading of "wholly" is it actually
12 is reading "wholly" as "in whole or in part."
13 Petitioner suggests that if -- if there was a
14 CSRS payment that was partially based on
15 military service and partially based on
16 non-military service, that could somehow be
17 apportioned out and only the part based on
18 military service would trigger the uniformed
19 services exception.

20 But that's actually completely against
21 the text of the uniformed services exception.
22 And if this Court were to find that dual-status
23 technician payments trigger the uniformed
24 services exception, it would be the only
25 situation in which a CSRS payment could be

1 entirely based on military service and would be
2 subject to the uniformed services exception.

3 If the Court has no further questions?

4 CHIEF JUSTICE ROBERTS: Further
5 questions? Justice Thomas?

6 JUSTICE THOMAS: I have one. I have
7 just a minor question. The -- how -- how -- how
8 big a problem is this now that CSRS no longer
9 exists?

10 MS. REAVES: I can give you a partial
11 answer as to the number of individuals that this
12 will impact. So this will only impact
13 individuals who are in the dual-status
14 technician role before 1984 and are still
15 receiving CSRS payments or are eligible to
16 receive them and are not yet receiving them.

17 And because of data-keeping
18 limitations, I only have the number of
19 dual-status technicians who retired after 2004
20 or are eligible to retire, and that's about
21 53,000 National Guard dual-status technicians.

22 This case will also impact a smaller
23 number of Air Force and Navy -- Air Force and
24 Army technicians. Those forces have dual-status
25 technicians like these. It's a much smaller

1 number because the force authorizations for
2 those have been smaller.

3 So that -- that's unfortunately all
4 that I can provide for you, but it -- it's a
5 fairly small group of individuals that this case
6 will possibly impact.

7 JUSTICE THOMAS: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Breyer?

10 Justice Alito, anything for you?

11 Justice Sotomayor?

12 Justice Kagan?

13 JUSTICE GORSUCH: One quick question.

14 So we agree this only impacts folks who are
15 still receiving CSRS benefits that they would
16 have been eligible for before 1984?

17 MS. REAVES: Based on service before
18 1984 --

19 JUSTICE GORSUCH: 1984, yeah.

20 MS. REAVES: -- or service that began
21 before 1984 --

22 JUSTICE GORSUCH: Right. Yeah.

23 MS. REAVES: -- and continued.

24 JUSTICE GORSUCH: All right. And
25 then, secondly, if -- if -- if no man alive can

1 figure this out, does the veterans canon have
2 any role to play here?

3 MS. REAVES: So, obviously, I disagree
4 with your premise there. I think that there are
5 a lot of textual clues in the statute and in
6 related statutes that indicate that our reading
7 is the better one, but I don't think the
8 veterans canon has any play here for a couple of
9 reasons.

10 The first is that the group of
11 individuals that this would benefit Congress has
12 defined as not being veterans, and that's
13 because technician service itself doesn't create
14 any sort of veterans preference.

15 It doesn't give someone veterans
16 benefits. It's only the National Guard service
17 that someone renders that can possibly give
18 technicians veterans preference, so I don't
19 think this would be a -- that would be an
20 appropriate place to apply the veterans canon
21 because the veterans canon is usually applied to
22 statutory schemes that themselves are intended
23 to benefit veterans.

24 JUSTICE GORSUCH: Military, not
25 uniformed service, we're back to that?

1 MS. REAVES: I don't think it's back
2 to that because I -- because I would dis- -- I
3 disagree that technician service is uniformed
4 service. Technician service isn't within the
5 definition of "uniformed service."

6 JUSTICE GORSUCH: Sorry, I didn't mean
7 to go back there. Thank you. Thank you,
8 counsel.

9 CHIEF JUSTICE ROBERTS: Justice
10 Kavanaugh?

11 JUSTICE KAVANAUGH: You -- you -- you
12 agree, however, that there is a veterans canon
13 that would apply when statutes are ambiguous
14 generally. You'd say it doesn't apply here both
15 because it's not ambiguous and because it's not
16 really veterans as we normally think about it?

17 MS. REAVES: Yes, we are not
18 contesting the availability of the veterans
19 canon to resolve grievous ambiguity.

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett?

22 Thank you, counsel.

23 Rebuttal, Mr. Katyal?

24

25

1 REBUTTAL ARGUMENT OF NEAL K. KATYAL

2 ON BEHALF OF THE PETITIONER

3 MR. KATYAL: Thank you, Mr. Chief
4 Justice. Three points.

5 First, as Justice Gorsuch was
6 indicating, we do think that the plain text
7 controls here. There are two key features of
8 our argument. First, Section 415 looks to
9 service, not status, and, in particular,
10 uniformed status -- service.

11 And, second, Congress has specifically
12 defined National Guard service as uniformed
13 service and dual-status technician service in
14 particular as part of that and has labeled it
15 military.

16 Second, Mr. Chief Justice, he got one
17 paycheck for his DST service, his dual-status
18 service. That was -- that's petition appendix
19 page 42a. That is, to be sure, a civilian
20 paycheck under Title 5.

21 Our point is civilian pay -- where
22 your paycheck comes from doesn't matter for
23 purposes of 415. 415 doesn't ask that. And,
24 indeed, as Justice Gorsuch was saying, it's not
25 mutually exclusive. You can have a civilian

1 paycheck but still be serving -- your service
2 may still be performed as a member of a
3 uniformed service.

4 There is no pay stub test. Congress
5 has used pay stub tests even with respect to the
6 National Guard, as our reply brief points out.
7 Here, they didn't do anything like that. They
8 used the words "service as a member of a
9 uniformed service." They didn't try and embrace
10 a paycheck test or anything like that.

11 CHIEF JUSTICE ROBERTS: Mr. Katyal,
12 I'm sorry to interrupt your rebuttal, but I'm
13 not -- I want to make sure I've got this right.

14 He -- did he receive one paycheck for
15 his civilian status duty and one for his
16 National Guard duty?

17 MR. KATYAL: No, one paycheck for it
18 all; that is, his job is all part of one thing.
19 So, as he shows up to work as a dual-status
20 technician, he falls within all the requirements
21 of 709, wearing the uniform, all that stuff. He
22 doesn't have some separate hat he's wearing for
23 purposes of 415. He's just -- he's getting one
24 paycheck --

25 CHIEF JUSTICE ROBERTS: Is it --

1 MR. KATYAL: -- and it is civilian.

2 CHIEF JUSTICE ROBERTS: -- is it
3 allocated separately?

4 MR. KATYAL: Only to the extent, as I
5 was saying before, he is in active duty or
6 something like that. But, otherwise, he's
7 getting one paycheck. It is a civilian
8 paycheck, but that's not the way -- that's not
9 what the test is.

10 JUSTICE BARRETT: What about weekend
11 service when he goes for training and drills?

12 MR. KATYAL: And the weekend stuff
13 also comes in the military DFAS payments as
14 well.

15 JUSTICE BARRETT: So that's the
16 separate -- like, we could say it's two separate
17 paychecks insofar as you're talking about his
18 weekend National Guard service that you might do
19 even if you were in private employment?

20 MR. KATYAL: To the --

21 JUSTICE BARRETT: And then the 9-to-5?

22 MR. KATYAL: Yeah, to the extent he
23 was doing any of that, any -- any weekends or
24 something like that, that's military and
25 separate.

1 Now my friend on the --

2 CHIEF JUSTICE ROBERTS: Wait, wait.

3 But that's military and separate. Does he get
4 paid for that?

5 MR. KATYAL: He does get paid for
6 that, just -- absolutely.

7 CHIEF JUSTICE ROBERTS: Is that
8 different than the pay he gets for his 9-to-5
9 job?

10 MR. KATYAL: It is because that's
11 Title 5 --

12 CHIEF JUSTICE ROBERTS: Are there two
13 checks?

14 MR. KATYAL: He does get two paychecks
15 for --

16 CHIEF JUSTICE ROBERTS: Okay.

17 MR. KATYAL: Not -- not for his
18 dual-status service but anything else.

19 So then my friend on the other side
20 said that there's a statute that she's just
21 pointed out, 12602, which says that -- that --
22 she says it fills the gap and allows him to
23 cover National Guard of the United States.
24 That's not an argument they've made before in 27
25 years, but I don't think that that statute

1 actually works.

2 Indeed, it's inconsistent with their
3 own view of the word "wholly" because their own
4 view of "wholly" is that Title -- because they
5 say Title 5 is responsible for these civilian
6 payments.

7 JUSTICE BREYER: Is this a -- let me
8 get back to this thing. He -- Person A, Monday,
9 Tuesday, Wednesday, works as a technician,
10 nothing really -- at the Army base but does
11 nothing that a civilian doesn't do there. Then,
12 on Thursday, he does a special National Guard
13 duty, and on Friday, they're nationalized, so he
14 has a federal thing. He gets one paycheck for
15 that week, is that right?

16 MR. KATYAL: He gets -- if he's
17 nationalized, he would get a separate military
18 pay stub in a separate military paycheck.

19 JUSTICE BREYER: Okay. So, for
20 Monday, Tuesday, Wednesday, Thursday, he gets
21 one paycheck?

22 MR. KATYAL: Correct.

23 JUSTICE BREYER: And now -- okay. How
24 do they deduct the Social Security for that? Do
25 they -- do they -- and it goes to two systems,

1 doesn't it?

2 MR. KATYAL: It does go to two
3 systems, Your Honor.

4 JUSTICE BREYER: All right. So do
5 they -- do they -- how do they do it? They
6 deduct two amounts, one for the one day of
7 Thursday and another for the --

8 MR. KATYAL: No. It's system by
9 system. And that's the way the windfall
10 elimination provision works. So you only look
11 to -- and I was saying this in my opening -- you
12 only look to, for example, the CSRS payments
13 here. There's only one stream of CSRS payments.
14 They're all wholly -- wholly uniformed services.
15 So that's why we think he falls within it.

16 Now, if there's any ambiguity in this,
17 we would suggest that the veterans canon does
18 apply. And the government doesn't argue,
19 Justice Kavanaugh, that they are not -- that
20 Mr. Babcock and other dual-status technicians
21 aren't veterans. Pointedly, the last paragraph
22 of their brief says the reverse, that they are
23 veterans. And so, if there is any ambiguity, we
24 would suggest that you read it that way.

25 And I think it would be a very

1 dangerous thing to fall on the 12602 argument
2 that my friend has just raised because it's
3 inconsistent with what they say "wholly" means.
4 And also, indeed, it very well may boomerang on
5 them because it says you're -- if you're
6 "entitled to pay" from the federal government,
7 then that counts as federal service.

8 Well, undoubtedly, Babcock is entitled
9 to pay for his federal service, for his
10 dual-status technician service Monday through
11 Wednesday. That makes him part of the uniformed
12 service exception.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel. The case is submitted.

15 (Whereupon, at 12:30 p.m., the case
16 was submitted.)

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<p>1</p> <p>1.9 [2] 11:20 15:11 10 [6] 14:5,24 37:12 38:24 43:2 44:19 10216 [4] 14:5 18:11 22:9 37:12 103-506 [1] 27:16 11:36 [2] 1:16 3:2 12:30 [1] 61:15 12602 [2] 58:21 61:1 12602(a) [1] 38:25 13 [1] 1:12 14 [1] 12:8 1916 [1] 48:4 1956 [2] 27:19 29:9 1980s [1] 33:7 1983 [2] 11:18 15:5 1984 [5] 51:14 52:16,18,19,21 1988 [2] 11:9 29:9 1994 [2] 11:22 34:8</p>	<p>16 34:25 35:9 37:1 38:4 45:16 46:19,22 57:21 58:8</p> <p>A</p> <p>a.m [2] 1:16 3:2 able [1] 11:5 above-entitled [1] 1:14 absolutely [7] 7:12,23 10:10 11:10 28:3 35:17 58:6 accept [2] 38:17 49:19 accepting [1] 13:11 accident [1] 48:11 Accounting [1] 36:15 ACTING [2] 1:6 7:17 active [9] 30:9,15 32:2,9 36:18 37:3 38:15 45:13 57:5 actually [7] 19:23 27:18 28:14 38:2 50:11,20 59:1 adding [1] 21:10 adjectival [1] 49:12 administering [2] 22:23 46:16 administrators [1] 8:7 administration [1] 40:5 admit [2] 8:8 29:11 admits [1] 16:17 admittedly [1] 22:16 adopted [1] 11:19 adverb [1] 49:12 affecting [1] 26:25 affects [3] 15:11 20:4 23:4 aggregate [1] 31:11 agree [6] 8:15 14:20 29:4,16 52:14 54:12 agreement [2] 41:15 49:15 Air [2] 51:23,23 Alito [5] 34:21 46:5 47:10 48:10 52:10 Alito's [1] 23:7 alive [1] 52:25 allocated [1] 57:3 allows [1] 58:22 ambiguity [5] 5:4 23:9 54:19 60:16,23 ambiguous [3] 27:7 54:13,15 Americans [1] 15:11 amount [1] 27:2 amounts [1] 60:6 analogy [1] 42:11 another [2] 9:21 60:7 answer [9] 8:4 23:11 26:12 35:14 40:15 47:16,20 49:2 51:11 answers [1] 10:21 anybody [1] 27:21 APPEARANCES [1] 1:18 appendix [4] 3:13 14:3 33:23 55:18 application [2] 13:11 36:3 applied [1] 53:21 applies [1] 33:15 apply [6] 16:13 23:6 53:20 54:13,14 60:18 apportioned [1] 50:17 appreciate [1] 9:15 approach [2] 49:20,25</p>	<p>appropriate [1] 53:20 arcane [1] 11:12 area [2] 40:1 43:10 aren't [4] 45:19 46:19 47:7 60:21 argue [3] 6:6 42:2 60:18 arguing [1] 41:22 argument [18] 1:15 2:2,5,8 3:4,7 5:21 7:15,20,24 35:22 40:10,23,25 55:1,8 58:24 61:1 arguments [1] 4:23 arise [1] 18:7 armed [2] 3:21 22:25 Army [10] 3:25 9:3 20:1 21:23 35:4 39:2,4,6 51:24 59:10 around [2] 25:24 41:8 articulating [1] 17:9 aside [2] 33:5 41:22 asks [3] 4:10 10:12 31:5 Assistant [1] 1:21 assume [1] 30:11 attempts [1] 4:11 attractive [1] 48:20 authorizations [1] 52:1 authorized [1] 48:4 automatically [1] 8:22 availability [1] 54:18</p>	<p>between [4] 5:14 8:1 25:18 27:19 big [1] 51:8 bit [2] 15:20 39:10 Black [2] 4:1 22:19 blowing [2] 43:14,17 bookkeeping [1] 10:18 boomerang [1] 61:4 both [7] 5:14,16 6:19 8:15 42:14,17 54:14 Breyer [20] 19:15 27:4,9,22 28:9,13,17,20,24 29:2,7,11,14 34:19,20 52:9 59:7,19,23 60:4 brief [10] 8:8 12:8 14:24 16:10,17 22:10 25:24 26:6 56:6 60:22 briefs [1] 22:15 broad [4] 11:19 15:5,10,22 broader [1] 28:8 BRYON [1] 1:3 bubble [1] 45:3 bunch [1] 40:20</p>
<p>2</p> <p>20-480 [1] 3:4 2004 [1] 51:19 2011 [1] 23:9 2021 [1] 1:12 22 [1] 16:17 24 [2] 8:7 14:6 27 [2] 8:17 58:24 29 [1] 16:12</p>		<p>B</p> <p>BABCOCK [23] 1:3 3:4,17,24 4:2,6 5:5 8:25 10:22 11:4,13 12:11 16:23 17:12 20:8 24:15,21 30:3 46:8 47:9,20 60:20 61:8 Babcock's [2] 4:12 46:10 back [6] 23:9 32:7 53:25 54:1,7 59:8 backdrop [1] 45:5 bar [1] 23:14 BARRETT [18] 17:3,5,17,20,23 18:1,3,12 19:1 22:18 35:19 46:2,4,6 54:21 57:10,15,21 Barrett's [1] 21:10 base [2] 44:12 59:10 based [27] 3:14 9:22,24 10:4,5 13:7,8,16 14:18 23:23,25 24:10 29:2,7 36:12,21 40:12 44:1,7,8 49:13 50:2,14,15,17 51:1 52:17 basic [1] 4:23 basically [1] 15:16 basis [2] 36:4 46:15 beating [1] 44:5 become [1] 18:23 began [1] 52:20 begin [1] 3:11 begins [1] 49:13 behalf [8] 1:19,22 2:4,7,10 3:8 35:23 55:2 benefit [5] 34:10,11 48:12 53:11,23 benefits [9] 34:1 38:6 39:1 45:16 48:1,17,20 52:15 53:16 besides [1] 7:13 best [6] 4:13 14:21 16:15 40:1 43:18 44:11 better [1] 53:7</p>	<p>C</p> <p>calculation [1] 31:9 call [2] 13:23 25:25 called [5] 32:11 35:3 38:15 42:23 48:24 calling [1] 14:9 calls [3] 10:19 14:5 22:17 came [1] 1:14 cannot [1] 50:4 canon [10] 4:15 5:4 23:7 53:1,8,20,21 54:12,19 60:17 capacities [1] 40:3 capacity [11] 36:22 40:13,22 41:4,16 42:1,5,9 43:24 44:9 47:4 care [1] 41:11 career [2] 15:16 24:16 caretakers [1] 48:5 Case [12] 3:4 6:15 15:24 18:2 29:24 38:18 41:24 47:22 51:22 52:5 61:14,15 categories [1] 6:12 categorized [2] 37:4 39:20 category [3] 7:13 8:14 11:7 certain [8] 7:6 11:15 17:11,11 33:25 34:11 40:16 46:11 certainly [11] 4:20 5:17 6:10 7:10 10:4 12:2 16:7 25:25 27:23,25 46:18 changed [2] 11:18 34:1 changing [1] 25:14 characterized [1] 19:18 check [5] 9:21 31:15 34:25 35:2,5 checks [5] 9:17,18 30:24 34:25 58:13 chef [1] 21:23 CHIEF [50] 3:3,9 9:5,9,14 10:7 12:19,23 13:1,4,6,18,21,24 14:15 16:3 19:25 21:20 23:15,20 30:2,7,11,16,23 31:1,12,21 32:6,8,14 33:1 34:18,21 35:18,24 51:4 52:8 54:9,20 55:3,16 56:11,25 57:2 58:2,7,12,16 61:13 Chief's [1] 35:14</p>
<p>3</p> <p>3 [1] 2:4 32 [3] 3:19 14:2 46:13 33 [1] 3:19 35 [1] 2:7</p>			
<p>4</p> <p>410(f) [1] 21:21 410(m) [7] 3:16 4:4 6:10 7:7,8,15,22 415 [6] 4:8,16 55:8,23,23 56:23 415(a)(7)(A) [1] 3:12 42 [5] 10:15 43:2,3,4 44:18 42a [1] 55:19 44a [1] 33:24</p>			
<p>5</p> <p>5 [5] 10:17 37:16 55:20 58:11 59:5 53,000 [1] 51:21 55 [1] 2:10</p>			
<p>6</p> <p>64a [1] 14:3 67 [1] 27:16 69a [1] 3:13</p>			
<p>7</p> <p>709 [6] 3:19 18:10 22:9,23 46:13 56:21 709(b) [2] 14:2 26:9</p>			
<p>8</p> <p>80s [1] 34:6</p>			
<p>9</p> <p>9-to-5 [14] 9:21 30:18 31:2,19 32:</p>			

Official - Subject to Final Review

<p>choice ^[1] 4:20 chose ^[2] 45:25 46:1 Circuit ^[1] 47:22 circumstance ^[2] 19:4 24:18 civil ^[3] 6:19 36:6 50:5 civil-versus-military ^[1] 4:9 civilian ^[5] 4:7,24 5:1,9,20 6:2,4, 11,11 9:22,25 10:6,19,21 13:3 19: 22 22:14 23:14 34:13 36:9,12 37: 5,15,18,19,20 39:22 40:5,7,16,19 41:7 42:5,13,17 44:8,8,21 45:19 46:23 47:6,13 48:19 55:19,21,25 56:15 57:1,7 59:5,11 civilians ^[1] 17:4 classified ^[1] 40:8 clear ^[2] 31:13 38:2 clerk ^[1] 47:23 closed ^[1] 28:24 clue ^[1] 19:19 clues ^[1] 53:5 Coast ^[1] 5:24 cohesion ^[1] 48:22 colleague ^[1] 39:24 colleagues ^[1] 27:25 comes ^[4] 15:1,8 55:22 57:13 COMMISSIONER ^[1] 1:7 common ^[3] 5:13 8:14 27:10 company ^[1] 19:14 compare ^[1] 45:10 compensated ^[1] 38:11 compensation ^[1] 38:11 compensatory ^[1] 38:10 complaints ^[1] 38:9 completely ^[4] 44:1,12 48:15 50: 20 comply ^[1] 17:1 components ^[1] 21:5 concede ^[2] 26:15,18 conclusion ^[1] 28:2 concurrently ^[1] 8:23 confirm ^[1] 32:4 Congress ^[49] 4:19 5:17 7:4,21 8: 13 11:9,18 12:7,9 14:7 15:5,13 16: 6,7 19:18 20:6,7 22:4,4 23:3 25: 20 26:4,10 28:3,4,7 29:18,22 34:8 37:4,7,14,16 39:20 41:19 42:21, 22 43:8 45:4,25 46:1 47:2,6 48:4 49:5,6 53:11 55:11 56:4 considered ^[1] 39:8 consistent ^[1] 5:25 contesting ^[1] 54:18 context ^[2] 22:16,17 continued ^[1] 52:23 contrast ^[2] 10:16 24:20 controls ^[1] 55:7 conversion ^[1] 34:3 convert ^[2] 4:17 34:2 cook ^[2] 21:12,15 cooking ^[1] 20:2 Corps ^[2] 43:11,11 Correct ^[15] 6:22,24 9:13 29:1,10, 13 30:25 31:3 32:13 33:22 34:7 35:5,6,11 59:22 Counsel ^[8] 5:6 9:5 33:4 35:20 39:</p>	<p>23 54:8,22 61:14 counts ^[1] 61:7 couple ^[2] 37:23 53:8 course ^[3] 17:23 21:6 34:13 COURT ^[10] 1:1,15 3:10 7:25 22: 15 23:8 35:25 49:18 50:22 51:3 cover ^[3] 29:23,25 58:23 covered ^[4] 8:15 17:25 33:11,17 covers ^[1] 8:8 create ^[1] 53:13 creates ^[1] 44:20 cross-reference ^[1] 7:9 cross-referenced ^[1] 37:10 CSRS ^[10] 31:5 33:8 50:5,14,25 51: 8,15 52:15 60:12,13 culinary ^[1] 19:24 current ^[1] 33:20</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C. ^[3] 1:11,19,22 dances ^[1] 25:24 dangerous ^[1] 61:1 data-keeping ^[1] 51:17 DAVID ^[2] 1:3 3:17 day ^[5] 3:25,25 9:8 26:20 60:6 day-to-day ^[1] 46:14 dead ^[1] 44:6 deal ^[1] 20:4 debating ^[1] 46:20 decades ^[2] 12:4,14 decided ^[2] 12:9 47:2 deduct ^[2] 59:24 60:6 deems ^[1] 38:22 Defense ^[1] 36:15 define ^[3] 18:9 45:25 46:3 defined ^[8] 3:16 7:6 21:19 22:4 37: 17 49:5 53:12 55:12 definitely ^[2] 18:7 48:18 definition ^[6] 37:8 43:12,20 44:17, 19 54:5 delivering ^[2] 19:13,16 denominate ^[1] 40:16 denominated ^[1] 40:3 Department ^[2] 1:22 24:22 depend ^[1] 24:4 depends ^[1] 36:4 describes ^[2] 37:14 46:13 description ^[1] 46:12 designated ^[2] 6:21 7:3 developed ^[1] 48:7 DFAS ^[1] 57:13 difference ^[3] 23:25 25:18 33:6 different ^[12] 10:25 22:13,16 24:2 34:16 38:13 39:20 42:10 45:7 47: 19,20 58:8 directly ^[1] 22:22 dis ^[1] 54:2 disagree ^[3] 24:15 53:3 54:3 discern ^[1] 4:18 discrete ^[1] 48:15 discussed ^[1] 49:4 discussing ^[1] 37:22 distinction ^[2] 7:22 8:1 dividing ^[1] 4:9</p>	<p>doing ^[10] 15:16 17:12,13,14 19:8 32:17 38:4 39:13 49:11 57:23 done ^[2] 18:19 24:8 double-check ^[1] 32:25 doubt ^[1] 23:6 down ^[1] 16:13 draw ^[2] 7:22 28:2 drills ^[5] 36:17 38:19 39:13 48:25 57:11 drop ^[1] 15:1 DST ^[1] 55:17 dual ^[4] 6:3,4 13:23 48:14 dual-status ^[38] 3:18 4:3 5:2 7:14 9:1 12:11,21 14:1,4 16:23 22:10 24:16,24 28:18 29:6 31:22 32:23 36:1,23 37:8,14 39:19 44:20 45: 11 46:14 47:11 48:6 50:22 51:13, 19,21,24 55:13,17 56:19 58:18 60: 20 61:10 During ^[2] 38:3 46:19 duties ^[10] 16:24 19:6,7 21:8,11 22:8,11,20 32:23 46:8 duty ^[23] 8:8 11:3 18:10 19:18 22:5 29:8,23 30:15 32:2,9 35:2,4 36:17, 18 37:3 38:15,19 39:3,8 56:15,16 57:5 59:13</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each ^[2] 15:12 36:4 earnings ^[1] 36:25 EEOC ^[1] 38:9 either ^[3] 11:6 27:13 29:5 elected ^[1] 33:10 Eleventh ^[1] 47:22 eligible ^[5] 11:5 24:25 51:15,20 52: 16 elimination ^[9] 3:14 11:19 15:6,9, 22 31:10 33:12,18 60:10 emblazoned ^[1] 9:3 embrace ^[1] 56:9 employee ^[1] 34:6 employees ^[6] 34:10,13 45:19 47: 6,12,13 employer ^[6] 17:6,15,24 18:8,23 21:14 employers ^[2] 18:14,17 employing ^[1] 17:7 employment ^[12] 11:14 12:5 17: 25 24:23 33:11,14,15,17 36:12 37: 17,21 57:19 employs ^[1] 45:18 enact ^[1] 15:14 enacted ^[1] 45:4 enacting ^[1] 45:5 encompass ^[1] 33:13 encompassed ^[1] 11:21 end ^[2] 26:20 31:14 engaged ^[1] 4:2 enlisted ^[1] 8:23 enrollment ^[1] 48:19 ensured ^[1] 37:19 entire ^[1] 43:19 entirely ^[7] 15:21 24:12 25:7,10 26: 16 44:1 51:1</p>	<p>entitled ^[4] 33:25 39:7 61:6,8 enumerated ^[7] 7:4 18:10 19:7 21: 9 22:5,8,20 enumerating ^[2] 20:7 25:21 enumerations ^[1] 22:22 ESQ ^[3] 2:3,6,9 ESQUIRE ^[1] 1:19 essential ^[1] 49:8 essentially ^[1] 24:7 Even ^[13] 4:7,14 5:1 12:17 14:8,25 22:14 29:23 46:20 49:18,24 56:5 57:19 exact ^[1] 11:7 exactly ^[4] 5:19 10:14 24:13 28:2 example ^[3] 19:24 31:8 60:12 examples ^[1] 25:22 exception ^[27] 5:18 7:5 8:12,16 10:2,9 11:6 13:12 15:3,4,14 24:19 25:1 36:4,11,20 37:11 38:21 39: 17 45:17,24 49:23 50:19,21,24 51: 2 61:12 exclude ^[1] 21:23 excludes ^[2] 3:13 28:18 exclusive ^[2] 6:12 55:25 exclusively ^[1] 5:8 excuse ^[1] 28:6 exemption ^[3] 10:2 11:24,25 exercised ^[2] 33:7,19 exists ^[2] 11:13 51:9 expectations ^[2] 11:15,16 expertise ^[1] 43:10 explains ^[2] 22:10 27:11 explanation ^[1] 27:12 explicitly ^[1] 43:11 express ^[1] 25:20 expressly ^[1] 4:5 extent ^[10] 12:16 13:23 14:8 19:20 23:5 32:1,9,10 57:4,22</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>fact ^[11] 9:10 10:20 18:15 38:8 39: 16 41:14,18 43:23,25 45:6 47:1 factual ^[1] 5:7 fairly ^[1] 52:5 fall ^[5] 7:14 11:7 23:1 24:18 61:1 falling ^[1] 37:17 falls ^[5] 10:8 22:21 25:3 56:20 60: 15 far ^[1] 28:8 favor ^[2] 5:5 23:10 features ^[1] 55:7 federal ^[14] 11:14 34:6,10 38:12, 23,23 39:9,14 47:13 48:12 59:14 61:6,7,9 fell ^[1] 11:17 Ferris ^[1] 22:16 FERS ^[3] 33:8,10,17 few ^[2] 23:5 40:24 fight ^[1] 31:18 figure ^[1] 53:1 file ^[1] 38:9 fills ^[1] 58:22 Finance ^[1] 36:15 find ^[1] 50:22</p>
---	--	---	---

Official - Subject to Final Review

<p>fine [2] 40:6 47:15 first [12] 7:25 8:4,5 13:25 17:23 20:19 36:6 37:7,24 53:10 55:5,8 fitness [2] 17:2,12 flight [1] 17:14 fly [3] 4:1 20:9 22:19 focus [2] 18:5 19:20 focused [2] 16:8 28:4 folks [13] 4:5 8:9 11:3,10 12:2,10,12 19:6 26:3 29:23 34:9,15 52:14 food [4] 19:13,16,24 20:2 Force [3] 51:23,23 52:1 forces [1] 51:24 former [1] 9:22 found [2] 3:12 22:9 four [2] 37:15 44:21 Friday [1] 59:13 friend [12] 7:24 10:24 23:12 37:23 38:16 44:23 49:9,19 50:10 58:1,19 61:2 friend's [1] 16:3 full-time [2] 36:9 45:15 functional [2] 49:19,25 functioning [2] 45:23 46:22 fundamental [1] 10:21 funding [1] 38:23 further [3] 34:23 51:3,4</p> <hr/> <p style="text-align: center;">G</p> <p>gap [1] 58:22 gave [1] 25:20 General [4] 1:21 8:3,17 39:15 generally [1] 54:14 gets [8] 4:14 9:17 31:24 32:15 58:8 59:14,16,20 getting [2] 56:23 57:7 give [5] 40:15 42:24 51:10 53:15,17 given [3] 4:19 38:1 41:1 gives [1] 20:17 giving [5] 15:25,25 43:20,22,24 going-forward [1] 33:14 GORSUCH [17] 39:23 41:5,17,20 42:4,12 43:1,14 44:3 52:13,19,22,24 53:24 54:6 55:5,24 got [16] 14:13 21:5,8 28:10 30:5,13 32:15 34:25 35:1,3,5 41:25 44:11 47:25 55:16 56:13 government [14] 4:6,11,17 5:14 8:6 16:16 18:15 25:23 37:18 39:15 40:4 48:12 60:18 61:6 government's [5] 22:15 26:23,24 29:21 38:18 governs [1] 37:13 grade [1] 3:23 grievous [1] 54:19 ground [2] 5:14 8:14 group [5] 27:18 28:24 29:5 52:5 53:10 GS [1] 38:12 Guard [8] 3:18,22 4:5 5:24 7:4,11,17,18 8:2,3,10,22,23 9:16,19 10:5,16 11:1,1 17:7,21 18:9,24 19:6,13 21:7 22:6,9,24 26:8 30:14,17,19</p>	<p>31:2,15 32:10,11,18,23 35:1,5 36:18,22 38:7,14 39:2,4,6 41:10 42:23 45:6,8,13,13,18,20,22 46:17,21,24 47:4,7,8,14,15,24 48:9,13,18,21,24 49:21 50:4 51:21 53:16 55:12 56:6,16 57:18 58:23 59:12 Guardsmen [6] 31:16 40:22 42:7,14,18 44:10 Guardsmen [1] 40:2 guess [1] 42:10</p> <hr/> <p style="text-align: center;">H</p> <p>half [2] 24:21,23 happens [1] 39:12 hard [1] 19:23 hat [5] 4:18 6:3 10:25 11:1 56:22 Hawk [2] 4:1 22:19 head [2] 42:16 44:14 Health [4] 6:19 7:10 25:21 26:3 hear [2] 3:3 25:17 heart [1] 29:17 helicopters [3] 4:1 20:9 22:19 help [2] 27:20 48:21 helpful [2] 42:11 45:10 helps [1] 48:18 hire [1] 48:5 historical [1] 48:11 history [5] 27:6,24 28:6,10,23 hold [6] 3:22 41:1 42:16 44:14 45:14 50:7 holdover [1] 48:3 Honor [2] 6:8 60:3 horse [1] 44:6 House [2] 27:9,16 however [3] 9:18,20 54:12 HR [1] 40:4 hypothetical [3] 18:22 19:2 21:10 hypotheticals [1] 18:6</p> <hr/> <p style="text-align: center;">I</p> <p>imagine [1] 18:3 impact [4] 51:12,12,22 52:6 impacts [1] 52:14 implicit [1] 23:15 important [5] 27:3 41:24 45:22 46:21 47:5 impossible [1] 18:6 inactive [13] 5:15 8:8 11:3 12:2,12 28:5 29:23 35:2 36:17 37:3 38:18 39:13 48:25 include [4] 37:7 43:8,21 46:9 included [2] 7:10 43:11 includes [3] 10:16 38:8 46:15 including [1] 26:8 inconsistent [2] 59:2 61:3 Indeed [7] 3:19 4:4,21 16:1 55:24 59:2 61:4 indicate [1] 53:6 indicates [1] 49:24 indicating [1] 55:6 indication [1] 25:20 individual [7] 37:25 39:11 42:22 43:8 47:17,21 50:3 individuals [9] 42:24 45:14,20 48:</p>	<p>8,23 51:11,13 52:5 53:11 inherent [1] 34:3 insofar [1] 57:17 Instead [1] 26:2 instructing [2] 22:24 46:16 integral [5] 15:18 16:1 22:11 45:22 46:22 intended [1] 53:22 interrupt [1] 56:12 irreducibly [3] 5:3 22:17 26:20 irrelevant [1] 4:8 isn't [4] 10:3 27:4 42:4 54:4 issue [2] 25:6 47:22 It'll [1] 24:4 itself [5] 16:17 43:3,5 49:5 53:13</p> <hr/> <p style="text-align: center;">J</p> <p>job [18] 9:22,25 12:21 17:13 20:20 30:18,19 31:2,2,19 32:16 35:1,9 38:4 45:16 46:19 56:18 58:9 jobs [2] 20:22 48:19 join [1] 38:8 joined [3] 11:14,14 33:24 Justice [162] 1:22 3:3,10 5:6,12,19 6:13,17,20,23,25 7:2,12,16,23 9:5,9,14 10:7,17 12:19,23 13:1,4,6,18,21,25 14:15 16:4 17:3,5,17,20,23 18:1,3,12 19:1,12,15,22 20:10,13,16,19,25 21:10,12,15,21,22 22:1,18 23:7,19,20 24:10,14 25:2,4,13 26:14 27:4,9,22 28:9,13,17,20,24 29:2,7,11,14 30:2,7,11,16,23 31:1,12,21 32:6,8,14 33:1,3,4,19 34:5,8,17,18,18,20,21,21,23,24 35:8,13,14,18,18,19,24 39:23 41:5,17,20 42:4,12 43:1,14 44:3 46:2,4,5,6 47:10 48:10 51:4,5,6 52:7,8,8,10,11,12,13,19,22,24 53:24 54:6,9,9,11,20,20 55:4,5,16,24 56:11,25 57:2,10,15,21 58:2,7,12,16 59:7,19,23 60:4,19 61:13 Justice's [1] 23:15</p> <hr/> <p style="text-align: center;">K</p> <p>KAGAN [9] 23:19 24:10,14 25:2,4,13 26:14 35:18 52:12 KATYAL [99] 1:19 2:3,9 3:6,7,9 5:11 6:7,16,18,22,24 7:2,20 9:7,13 10:7 12:22,25 13:2,5,17,20,24 14:20 17:3,4,16,19,22 18:2,4,16 19:3,17 20:12,15,18,23 21:2,13,17,25 22:3,18,21 24:3,13 25:3,10,16 26:18 27:8,22 28:12,17,22 29:1,4,10,13,16 30:2,5,9,13,20,25 31:3,20,23 32:7,13,19 33:9,22 34:7 35:6,11,15 44:12 54:23 55:1,3 56:11,17 57:1,4,12,20,22 58:5,10,14,17 59:16,22 60:2,8 Katyal's [1] 46:7 Kavanaugh [3] 54:10,11 60:19 key [2] 4:8 55:7 KIJAKAZI [2] 1:6 3:5 KILOLO [1] 1:6 kind [2] 22:5 49:10</p>	<p>kinds [1] 18:6 knows [1] 37:25</p> <hr/> <p style="text-align: center;">L</p> <p>labeled [1] 55:14 language [16] 4:16 6:9 20:11,17,24 21:1,2 23:4,17,20,21 24:2 26:22 29:18 33:16 40:9 large [1] 11:20 last [2] 25:17 60:21 lastly [1] 21:18 late-breaking [1] 8:17 later [2] 11:18 12:14 laws [1] 39:1 least [3] 29:7 33:13 40:2 leave [1] 36:25 legislative [5] 27:6,24 28:6,10,22 level [1] 17:12 limitations [1] 51:18 line [2] 4:9 14:9 linguistically [1] 16:11 list [3] 46:7,9 47:2 listed [1] 21:16 literally [4] 3:20 10:11 16:25 32:21 little [3] 11:12 15:20 39:10 local [1] 31:8 longer [1] 51:8 look [12] 4:24 7:8 13:15 19:17 26:13 28:1 43:9 44:18 49:4,16 60:10,12 looked [2] 14:8 43:5 looking [3] 27:24 40:9 43:19 looks [6] 4:25 19:23 49:7,8,20 55:8 lot [4] 15:17,25 42:16 53:5</p> <hr/> <p style="text-align: center;">M</p> <p>made [6] 4:20 7:24 31:22 37:24 40:12 58:24 maintain [2] 17:10,11 man [1] 52:25 Management [1] 36:8 many [1] 4:21 Martin [1] 47:21 matter [5] 1:14 18:13,13 39:15 55:22 mattered [1] 5:1 matters [1] 45:23 mean [7] 9:11,12 11:3 12:23 27:5,12 54:6 meaning [4] 15:18 43:20,22,24 means [6] 15:19 24:11 39:11 41:15 49:15 61:3 meant [1] 25:16 meet [2] 5:2 26:23 member [33] 3:15,21 4:3,12 7:17 8:21 10:12,22 14:18 16:22 17:18 18:18,20 19:10 20:21 21:3,5 26:11 31:6 37:9 39:4,5 40:14,18 41:10 43:6,10,20 47:4,24 50:3 56:2,8 members [12] 5:15 17:7 18:24 22:13 28:5 39:1 45:6,8,9,19 47:7 48:8 membership [1] 21:6</p>
---	--	---	---

Official - Subject to Final Review

<p>mess ^[1] 19:16</p> <p>might ^[4] 25:8 27:25 47:19 57:18</p> <p>military ^[68] 3:22 5:3,10,21,22 6:4, 6 12:16,21 13:2,8,9,18 14:3,6,6,10, 13,16 17:1 19:21,23 20:1,9 22:14, 17 23:23 24:1,11,12 25:8,15,19,23, 25 26:6,7,16,20 27:18 28:4,25 29: 8 31:16 32:1 35:2,10 36:14,16,19 39:3,8 42:24,25 44:24 45:15 48:5 49:7 50:15,18 51:1 53:24 55:15 57:13,24 58:3 59:17,18</p> <p>military/civil ^[1] 14:9</p> <p>million ^[2] 11:21 15:11</p> <p>mind ^[4] 5:17 16:7 20:6,8</p> <p>minor ^[1] 51:7</p> <p>Mm-hmm ^[1] 41:17</p> <p>modified ^[1] 24:20</p> <p>modifies ^[3] 16:18 49:12,14</p> <p>modify ^[2] 16:5 24:8</p> <p>moment ^[1] 49:10</p> <p>Monday ^[3] 59:8,20 61:10</p> <p>money ^[4] 15:1,7,20 27:2</p> <p>month ^[3] 9:18,20 31:14</p> <p>most ^[2] 45:8 48:7</p> <p>moving ^[1] 41:21</p> <p>Ms ^[23] 35:21,24 40:24 41:13,18 42: 3,8,20 43:4,17 44:16 46:3,4,11 47: 16 48:17 51:10 52:17,20,23 53:3 54:1,17</p> <p>MSPB ^[1] 38:9</p> <p>much ^[5] 5:13 7:3 9:20 11:3 51:25</p> <p>multiple ^[1] 44:25</p> <p>mutually ^[2] 6:12 55:25</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>narrow ^[2] 15:14 20:5</p> <p>National ^[85] 3:18,22 4:5 7:4,11, 17,18 8:1,2,10,22,23 9:16,19 10:5, 16 11:1,1 17:2,20 18:9,24 19:6,13 21:7 22:6,9,24 26:8 30:14,17,19 31:2,15,16 32:10,11,18,22 35:1,4 36:18,22 38:7,13 39:2,4,6 40:2,22 41:10 42:6,14,18,23 44:9 45:6,7, 13,18,20,22 46:16,21 47:4,7,8,14, 15,24 48:8,13,18,21,24 49:21 50:3 51:21 53:16 55:12 56:6,16 57:18 58:23 59:12</p> <p>nationalized ^[2] 59:13,17</p> <p>nature ^[3] 39:22 45:2 49:16</p> <p>Navy ^[1] 51:23</p> <p>NEAL ^[5] 1:19 2:3,9 3:7 55:1</p> <p>needs ^[1] 43:23</p> <p>next ^[1] 3:4</p> <p>NICOLE ^[3] 1:21 2:6 35:22</p> <p>NOAA ^[6] 5:23 6:18 7:9 25:22 26:2 43:11</p> <p>non-covered ^[5] 15:8 24:23 29:8 33:14,15</p> <p>non-military ^[1] 50:16</p> <p>normal ^[1] 43:9</p> <p>normally ^[1] 54:16</p> <p>note ^[1] 47:5</p> <p>noted ^[1] 44:24</p> <p>nothing ^[4] 4:22 28:18 59:10,11</p>	<p>number ^[5] 27:1 51:11,18,23 52:1</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>objected ^[1] 27:14</p> <p>obviously ^[4] 20:5 24:4 27:1 53:3</p> <p>October ^[1] 1:12</p> <p>Office ^[1] 36:7</p> <p>officer ^[3] 19:25 21:24 22:2</p> <p>officers ^[1] 22:14</p> <p>often ^[1] 9:18</p> <p>Okay ^[10] 32:14 33:1 41:20,22 42: 13 44:8,10 58:16 59:19,23</p> <p>once ^[4] 8:21 12:9 29:20 33:16</p> <p>one ^[52] 4:14,24 6:3 8:14 9:18 10:1, 8 11:15,20 14:20 18:14,17 20:8, 21 21:5 22:20 25:11 26:9 27:14 30:4,13,17,18,19 31:1,2,25 33:9 35:9 37:1,13 40:3,25 42:17 44:4, 19 45:13 51:6 52:13 53:7 55:16 56:14,15,17,18,23 57:7 59:14,21 60:6,6,13</p> <p>one's ^[1] 42:16</p> <p>ones ^[1] 27:20</p> <p>only ^[20] 8:11 15:14 18:19 20:4 25: 6 29:18 33:15 40:17,20 41:8 50: 17,24 51:12,18 52:14 53:16 57:4 60:10,12,13</p> <p>opening ^[1] 60:11</p> <p>opinion ^[1] 23:8</p> <p>opposed ^[4] 6:2 21:9 48:14,15</p> <p>opposite ^[1] 28:2</p> <p>option ^[3] 33:7,20 34:2</p> <p>oral ^[5] 1:15 2:2,5 3:7 35:22</p> <p>order ^[1] 16:13</p> <p>organizing ^[2] 22:23 46:15</p> <p>other ^[35] 4:21 6:14,14,17 7:13,24 9:24 10:3,8,18,24 13:13 16:7 19:7, 8 21:11 23:13 25:8 26:6 34:10 36: 23 37:2,23 38:16 39:3,8,24 40:20 42:15 44:23 45:12 49:19 50:11 58: 19 60:20</p> <p>others ^[1] 11:13</p> <p>otherwise ^[1] 57:6</p> <p>out ^[8] 3:25 13:22 15:22 41:13 50: 17 53:1 56:6 58:21</p> <p>outside ^[4] 33:11,17 37:5 39:21</p> <p>over ^[1] 43:1</p> <p>overlapping ^[1] 48:14</p> <p>overtones ^[1] 6:11</p> <p>own ^[4] 22:15 40:4 59:3,3</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>p.m ^[1] 61:15</p> <p>PAGE ^[10] 2:2 3:13 8:7 12:8 14:3, 24 16:11,17 33:24 55:19</p> <p>paid ^[5] 12:6 35:9 39:14 58:4,5</p> <p>paperwork ^[1] 47:23</p> <p>paradigmatic ^[1] 29:24</p> <p>paragraph ^[1] 60:21</p> <p>part ^[15] 5:20,20 6:2,4,4 13:13 15:7 25:17 29:8 45:8 50:12,17 55:14 56:18 61:11</p> <p>part-time ^[2] 36:16 45:8</p> <p>partial ^[1] 51:10</p>	<p>partially ^[2] 50:14,15</p> <p>particular ^[3] 49:17 55:9,14</p> <p>passed ^[2] 8:18 15:5</p> <p>past ^[2] 43:15,17</p> <p>patriotic ^[1] 17:6</p> <p>pay ^[18] 5:15 11:8 12:3,13 26:7 28: 25 39:7 42:24,24 45:15 50:5 55: 21 56:4,5 58:8 59:18 61:6,9</p> <p>paycheck ^[29] 12:4,14 25:7 30:4, 14,17,18,19 31:24,25 32:3,16,17, 24 37:1,2 55:17,20,22 56:1,10,14, 17,24 57:7,8 59:14,18,21</p> <p>paychecks ^[5] 32:4 34:12 36:25 57:17 58:14</p> <p>payment ^[19] 3:14 14:17 16:6,18 23:23,25 24:10,12,17 26:15 31:4, 5 39:17,17 49:6,14,17 50:14,25</p> <p>payments ^[26] 13:7 31:6 36:2,5,7, 10,14,15,19 37:20 39:22 40:12 41: 2 43:25 44:7 49:6,22,22 50:1,6,23 51:15 57:13 59:6 60:12,13</p> <p>pension ^[7] 5:10,10 13:7,8 30:24 31:8 35:10</p> <p>pensions ^[3] 28:4 35:9 42:25</p> <p>people ^[22] 3:25 11:8,13,21 12:13, 15 15:15 18:23 20:5,9 22:13 23:5 24:15 25:22 26:2 27:1,2,18 28:25 29:5 46:8 48:13</p> <p>perform ^[2] 21:8 45:21</p> <p>performance ^[1] 22:11</p> <p>performed ^[12] 12:17 39:4 40:17, 21 41:9,9 42:5,13 43:23 44:9 46:8 56:2</p> <p>performing ^[4] 16:24 19:5 32:22 42:18</p> <p>performs ^[2] 36:9 38:14</p> <p>periods ^[1] 32:12</p> <p>person ^[5] 22:6 24:24 28:10,13 59: 8</p> <p>Personnel ^[2] 36:8 47:23</p> <p>perspective ^[1] 48:22</p> <p>petition ^[4] 3:12 14:3 33:23 55:18</p> <p>Petitioner ^[13] 1:4,20 2:4,10 3:8 5: 7 7:1,16 33:6 36:22 50:6,13 55:2</p> <p>petty ^[2] 19:25 22:1</p> <p>phrase ^[4] 26:5 43:19 49:12,13</p> <p>PHS ^[1] 43:10</p> <p>picked ^[1] 26:5</p> <p>pilot ^[1] 17:13</p> <p>pilots ^[2] 22:19 46:10</p> <p>place ^[1] 53:20</p> <p>plain ^[1] 55:6</p> <p>plaintiff ^[1] 47:21</p> <p>play ^[2] 53:2,8</p> <p>please ^[2] 3:10 35:25</p> <p>point ^[10] 4:19 14:11 17:24 18:25 19:3 29:18 38:1,3 46:7 55:21</p> <p>pointed ^[1] 58:21</p> <p>Pointedly ^[1] 60:21</p> <p>points ^[3] 37:23 55:4 56:6</p> <p>position ^[5] 6:4 13:23 20:1 33:20 38:18</p> <p>possibly ^[2] 52:6 53:17</p> <p>practice ^[1] 48:7</p>	<p>precondition ^[1] 41:1</p> <p>predecessors ^[1] 48:6</p> <p>preference ^[2] 53:14,18</p> <p>premise ^[1] 53:4</p> <p>preposterous ^[1] 26:1</p> <p>prerequisite ^[2] 41:4 47:8</p> <p>prerequisites ^[1] 19:15</p> <p>presented ^[1] 49:3</p> <p>pretty ^[5] 23:4 32:19 35:6,15 44:6</p> <p>previously ^[1] 49:3</p> <p>primary ^[1] 37:13</p> <p>private ^[7] 17:5,14,24 18:8 19:14 21:13 57:19</p> <p>problem ^[6] 8:4,13 27:23 29:21 50: 10 51:8</p> <p>problems ^[1] 34:3</p> <p>promise ^[1] 44:5</p> <p>provide ^[1] 52:4</p> <p>provided ^[1] 49:7</p> <p>provides ^[1] 38:25</p> <p>providing ^[1] 39:1</p> <p>provision ^[14] 3:14 11:20 15:6,6,9, 11,23 31:10 33:12,18 38:22,24 39: 14 60:10</p> <p>provisions ^[2] 37:13 44:20</p> <p>Public ^[4] 6:18 7:9 25:21 26:3</p> <p>purity ^[1] 14:13</p> <p>purpose ^[2] 38:23 47:10</p> <p>purposes ^[8] 10:18 38:25 40:4,16, 20 45:24 55:23 56:23</p> <p>put ^[2] 33:20 41:8</p> <p>putting ^[1] 41:22</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualifies ^[1] 3:19</p> <p>qualify ^[2] 4:5 22:7</p> <p>qualifying ^[3] 36:21 39:18 44:1</p> <p>question ^[11] 5:7 10:21 12:10 23: 16 26:12 33:5 35:14 47:17 49:2 51:7 52:13</p> <p>Questions ^[3] 30:1 51:3,5</p> <p>quick ^[1] 52:13</p> <p>quite ^[1] 38:2</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>raised ^[1] 61:2</p> <p>rank ^[2] 17:1,11</p> <p>rather ^[2] 18:14,17</p> <p>reach ^[1] 8:13</p> <p>read ^[19] 14:21 16:1,20 20:25 23:9, 20,21 24:5,5,6,14 25:5 27:15,17 28:14 45:3 46:9 49:11 60:24</p> <p>readiness ^[1] 48:23</p> <p>reading ^[16] 4:13 5:5 15:18 16:3,4, 15 27:5 29:3,20 43:18 44:10 49: 15 50:9,11,12 53:6</p> <p>really ^[14] 8:19,24 12:5 16:15 17:6 18:2 19:23 27:2 28:15 43:9 48:2 49:1 54:16 59:10</p> <p>reason ^[4] 11:11,12 12:10 19:21</p> <p>reasons ^[1] 53:9</p> <p>REAVES ^[26] 1:21 2:6 35:21,22,24 40:24 41:13,18 42:3,8,20 43:4,17 44:16 46:3,4,11 47:16 48:17 51:</p>
--	--	---	---

Official - Subject to Final Review

<p>10 52:17,20,23 53:3 54:1,17 REBUTTAL [5] 2:8 30:22 54:23 55:1 56:12 receive [7] 5:16 28:25 37:19 38:10 50:4 51:16 56:14 received [2] 36:24 50:6 receives [6] 25:7 36:2,5,6,13 45:16 receiving [5] 5:8,9 51:15,16 52:15 record [4] 30:21 32:5,25 35:16 refer [1] 45:2 referred [1] 44:24 referring [1] 46:12 refers [2] 44:21,25 regular [1] 30:7 rejects [1] 4:15 related [1] 53:6 relatively [1] 23:5 relevant [1] 23:16 remember [1] 12:5 render [1] 41:2 renders [2] 45:12 53:17 repeatedly [1] 37:4 reply [3] 12:8 14:24 56:6 report [3] 27:10,16 28:14 require [1] 20:20 required [2] 8:25 21:7 requirements [4] 17:2,8 20:17 56:20 requires [1] 3:20 reserve [4] 27:19 29:8 45:14 46:25 resolve [1] 54:19 respect [1] 56:5 Respondent [4] 1:8,23 2:7 35:23 responsible [1] 59:5 result [1] 42:25 retire [1] 51:20 retired [2] 30:12 51:19 Retirement [5] 36:7,14,19 37:20 50:5 retires [1] 36:1 reverse [1] 60:22 rid [1] 12:7 ROBERTS [39] 3:3 9:5,9,14 12:19,23 13:1,4,6,18,21 14:15 30:2,7,11,16,23 31:1,12,21 32:6,8,14 33:1 34:18,21 35:18 51:4 52:8 54:9,20 56:11,25 57:2 58:2,7,12,16 61:13 role [14] 19:9 24:17 36:9,24 38:5,5,7 41:1,2,3 45:15 50:7 51:14 53:2 roles [4] 20:6,7 47:2,19 run [1] 27:12</p> <hr/> <p style="text-align: center;">S</p> <p>same [10] 11:6,7 17:8,12 24:1,4 25:14 32:20 42:16 44:15 saying [14] 6:1,8 8:3,25 16:12 21:20 23:22 25:4 26:14 28:9 29:24 55:24 57:5 60:11 says [19] 4:5,6 7:9 10:24 12:9 14:25,25 15:7 23:18 26:6 28:6,20 30:21 33:23 49:20 58:21,22 60:22 61:5</p>	<p>schemes [1] 53:22 school [1] 17:14 Second [8] 4:25 14:11 18:7 21:7 36:13 37:12 55:11,16 secondly [2] 20:21 52:25 Secretary [1] 3:23 Section [5] 3:12,16 4:4 37:12 55:8 SECURITY [2] 1:7 59:24 see [7] 12:3,14,20 13:12 14:2 35:16 43:6 seeing [1] 34:12 seem [2] 5:22 27:15 seems [3] 13:21 27:17 45:21 senators [1] 27:13 sense [1] 5:23 separate [25] 30:24 31:9,9,17,18,24 32:3,16,17,24 35:2,5 36:2,24,25 37:15 44:22 46:23 56:22 57:16,16,25 58:3 59:17,18 separately [1] 57:3 separates [1] 13:22 serve [1] 40:2 served [2] 3:17 40:6 service [177] 3:15,16 4:2,4,10,12,13,25 5:2,9,15,18 6:1,2,9,12,14,19 7:5 8:12,15 9:11,16,19,23,24 10:5,6,9,13,13,15,23 11:5,23,25 12:2,12 13:8,9,19 14:18,19 15:2,3,8,15,21 16:5,19,21,22 17:18 18:18,19,21 19:9,10,11 21:3,4,19 23:18,23 24:1,8,11,12,25 25:8,11,15,19,19,21 26:4,11,12,13,16,17 28:5,8 30:14,17 31:7 32:1 33:24 34:9,15 35:3 36:6,16,16,18,20,21 37:3,5,6,6,9,18 38:14,19,22 39:3,9,9,18,19,21,21,22 40:13,14,18 41:2,3,3 42:23 43:5,6,13,16,21,22,23 44:2,7,8,9,17,21 45:2,7,9,11,12,21,25 46:23,25 47:3 49:21 50:5,15,16,18 51:1 52:17,20 53:13,16,25 54:3,4,4,5 55:9,10,12,13,13,17,18 56:1,3,8,9 57:11,18 58:18 61:7,9,10,12 services [18] 3:21 7:6,10 22:25 26:3 36:3,11 37:10 38:20 39:16 45:17,24 49:23 50:19,21,24 51:2 60:14 serving [4] 10:22 11:22 40:21 56:1 set [3] 11:15 20:5 36:4 settled [1] 29:19 setup [1] 47:11 severe [1] 14:24 shall [1] 39:7 she's [1] 58:20 Shinseki [1] 23:8 shows [1] 56:19 side [9] 7:24 10:24 23:13 37:24 38:16 39:25 44:23 47:14 58:19 side's [2] 49:19 50:11 sign [1] 27:14 simple [3] 5:7 23:4,4 simpler [2] 23:22 26:25 simplest [1] 40:11 simply [4] 4:9 16:21 26:10 47:13</p>	<p>since [1] 6:2 situation [1] 50:25 slashed [3] 12:4,14 34:12 small [4] 27:1 28:20 29:5 52:5 smaller [4] 27:17 51:22,25 52:2 SOCIAL [2] 1:7 59:24 Solicitor [2] 1:21 8:17 somehow [3] 18:8 23:13 50:16 someone [12] 4:18 16:23 18:20 24:21 27:11 40:17,21 41:9 42:6,9 53:15,17 sorry [3] 25:16 54:6 56:12 sort [4] 14:12 23:14,22 53:14 sorts [3] 17:2 26:7 34:3 SOTOMAYOR [16] 19:12,22 20:10,13,16,19,25 21:12,15,22 22:1 34:23,24 35:8,13 52:11 sounds [1] 11:11 special [2] 34:16 59:12 specialist [1] 19:25 specific [3] 26:5 32:12 38:22 specifically [1] 55:11 specified [3] 3:23 7:5 20:22 spent [4] 15:16 24:16,21 31:15 squarely [1] 10:9 staff [2] 27:11,13 stand [1] 11:3 stands [1] 12:10 start [2] 29:20 37:22 started [1] 12:4 stat [1] 25:5 state [4] 11:1 31:8 35:1 39:12 statements [1] 37:1 STATES [16] 1:1,16 7:11,18 8:2,11,24 9:2,3 39:2,5,7 48:3,4,7 58:23 stati [1] 13:1 status [16] 4:16,18,25 5:1 16:8 31:17 37:25 38:3 39:5,12 48:14,15 49:4 55:9,10 56:15 statuses [2] 12:24 48:16 statute [33] 4:8,14,24 5:12 6:21 7:3 8:7,18 10:10,14 14:12 15:19 16:2,13,15,20 18:10 19:7 21:3,9,20 23:14 25:6 26:22 28:15,15 29:17 31:4 40:10 43:19 53:5 58:20,25 statute's [1] 27:7 statutes [5] 4:21 8:21 16:8 53:6 54:13 statutory [6] 3:11 21:8 23:17 24:2 46:7 53:22 still [7] 19:5 27:10 47:23 51:14 52:15 56:1,2 stop [2] 41:6 44:5 stream [3] 33:25 36:14 60:13 streams [1] 36:2 structured [1] 48:3 stub [4] 26:7 56:4,5 59:18 stuff [2] 56:21 57:12 subject [3] 10:1,1 51:5 submitted [2] 61:14,16 sufficient [1] 47:12 suggest [4] 5:4 23:6 60:17,24 suggested [1] 38:17 suggests [3] 16:4 23:13 50:13</p>	<p>supplement [1] 18:9 SUPREME [2] 1:1,15 sweeping [1] 15:10 sweeps [1] 11:20 swept [1] 8:12 switch [1] 33:8 system [15] 5:16 11:8 12:3,6,13 13:22 31:4,5,9 36:7 38:12 48:3 50:5 60:8,9 systems [2] 59:25 60:3</p> <hr/> <p style="text-align: center;">T</p> <p>teaching [3] 3:25 17:13 20:9 tech [4] 4:3 5:2 14:1 24:24 technician [31] 3:18 14:4 24:17 32:23 36:1,10,13 37:2,5,17 38:3,4,5 39:19 40:7 43:7,22 45:11 46:19 47:17 50:4,7,23 51:14 53:13 54:3,4 55:13 56:20 59:9 61:10 technicians [24] 3:20 7:14 9:1 12:11 14:6 16:24 22:10 28:19 36:23 37:8,14,15,19 43:13 44:20,25 46:14 48:6 51:19,21,24,25 53:18 60:20 techs [1] 29:6 tells [3] 10:14 47:3 49:1 tens [1] 47:18 term [1] 49:11 terms [6] 12:17 13:10 25:5 29:20 40:11 42:10 test [13] 4:18 11:2 12:17 14:13,24 23:4 26:6,23,24,25 56:4,10 57:9 tests [2] 26:7 56:5 text [3] 3:12 50:21 55:6 textual [2] 25:20 53:5 themselves [2] 43:25 53:22 theory [1] 8:17 there's [14] 5:3 8:1 14:25 19:19 23:5,9,13 24:7 25:18 28:17 42:23 58:20 60:13,16 they've [1] 58:24 third [2] 5:3 37:16 THOMAS [22] 5:6,12,19 6:13,17,20,23,25 7:2,12,16,23 10:17 33:3,4,19 34:5,8,17 51:5,6 52:7 thoroughly [1] 20:1 though [3] 6:21 43:2 46:21 thousands [1] 47:18 three [3] 4:23 21:4 55:4 throughout [1] 26:8 Thursday [3] 59:12,20 60:7 Title [16] 10:15,17 12:21 13:25 37:12,16 43:2,2,3,4 44:18,19 55:20 58:11 59:4,5 together [1] 31:11 trainers [1] 47:9 training [12] 22:19,24 36:17 38:19 39:3,8,13 46:10,24,24 48:25 57:11 Transportation [1] 24:22 treat [1] 49:21 treatment [1] 33:6 trigger [7] 36:10,20 38:20 39:16 49:22 50:18,23</p>
---	--	---	--

Official - Subject to Final Review

true ^[4] 4:7 8:25 34:6 42:15	1,19,21 24:6,14 25:5 29:5,21 31:3
truly ^[1] 12:15	34:11 46:20 57:8 60:9,24
try ^[3] 29:14 44:4 56:9	wear ^[5] 3:20 9:1,12 16:25 17:9
trying ^[2] 4:18 27:20	wearing ^[6] 4:19 6:3 10:11 32:22
Tuesday ^[2] 59:9,20	56:21,22
turn ^[2] 27:9 49:13	wears ^[2] 9:2,15
two ^[35] 9:17,17 12:24 13:20,22,24	Wednesday ^[4] 1:12 59:9,20 61:
16:12 17:22 18:14,16 20:17 25:22	11
30:4,24 32:4 34:25,25 35:3,9 36:2,	week ^[1] 59:15
24,25 37:13 40:2 42:10 44:14,19	weekend ^[6] 9:20 35:4 46:24 57:
45:12 55:7 57:16 58:12,14 59:25	10,12,18
60:2,6	weekends ^[2] 38:14 57:23
type ^[2] 37:25 49:6	weeks ^[1] 35:4
types ^[2] 45:7,12	whatever ^[4] 27:16,19 41:7,7
U	Whereupon ^[1] 61:15
U.S ^[3] 3:24 14:2 19:25	whether ^[9] 9:20 12:6 16:21 21:18
U.S.C ^[5] 3:19 14:2,5 38:24 46:13	29:5 31:5 37:24 47:3 49:7
ultimately ^[2] 8:5 29:19	who's ^[1] 50:4
unanimous ^[1] 23:8	whole ^[9] 13:10,14,15,16,22 15:7
under ^[4] 31:10 38:12 50:8 55:20	24:16 31:9 50:12
understand ^[10] 6:5 13:14 14:23	wholly ^[46] 3:15 4:12 9:22,25 10:4
16:16 25:2 29:12 39:24,25 40:1,	11:23 13:7 14:18,23 15:15,17,25
11	16:5,12,18 23:23 24:1,5,6,7,11 31:
undoubtedly ^[3] 4:3 11:9 61:8	6 36:21 40:13 41:3,9,11,21,23 42:
unfortunately ^[1] 52:3	13 43:24 44:7,8 47:6 49:10,11,24
uniform ^[13] 3:21,25 9:2,2,4,12,15	50:2,8,11,12 59:3,4 60:14,14 61:3
10:11 11:23 16:25 17:10 32:22 56:	whom ^[3] 27:2 45:1,1
21	whopping ^[1] 14:7
uniformed ^[79] 3:15 4:4,10,13,25	will ^[9] 24:7 30:20 31:18 32:4 44:
5:8,18 6:1,9,11 7:5,6 8:12,15 9:11,	12 51:12,12,22 52:6
23,24 10:9,13,15,23 11:5,24 14:19	windfall ^[12] 3:14 10:2 11:16,19
15:2,3,15,21 16:22 18:19,20 19:	13:11 15:6,9,22 31:10 33:12,18
11 21:4,19 23:18 24:25 25:11,19	60:9
26:3,12,13,17 31:7 34:9,15 35:12	within ^[12] 7:14 10:9 11:17 22:22,
36:3,11,20 37:6,9,10 38:20 39:16,	22 24:18 37:8,17 43:12 54:4 56:
21 40:14,18 43:5,6,12,15,21 44:17	20 60:15
45:17,24 49:23 50:18,21,23 51:2	without ^[2] 15:19 25:3
53:25 54:3,5 55:10,12 56:3,9 60:	word ^[8] 4:17 15:17 16:5,18 41:11,
14 61:11	14,24 59:3
union ^[1] 38:8	words ^[7] 14:12 16:12 28:7,8 41:8
unit ^[1] 48:22	42:15 56:8
UNITED ^[13] 1:1,16 7:11,18 8:2,11,	wore ^[1] 3:24
24 9:2,3 39:2,5,7 58:23	work ^[23] 8:20 9:7 13:10 15:25 16:
units ^[1] 48:24	1 17:10 32:18,21 36:8 37:2 38:4
unpack ^[1] 39:10	40:19 41:7,7 42:5,12,13,18 45:1
up ^[7] 8:12 26:6 32:11 35:3 38:15	49:10,24 50:8 56:19
48:24 56:19	worker's ^[1] 38:11
V	working ^[9] 9:23 24:22,24 30:3,6
variety ^[1] 38:6	31:13,16 38:7 40:7
versus ^[2] 3:4 6:11	works ^[9] 5:12 8:19 13:9 18:15 27:
veterans ^[19] 4:15 5:4 23:7,10 53:	11 31:4 59:1,9 60:10
1,8,12,14,15,18,20,21,23 54:12,16,	writes ^[1] 41:13
18 60:17,21,23	wrote ^[2] 28:10,14
view ^[2] 59:3,4	Y
W	year ^[1] 15:12
wait ^[3] 29:22 58:2,2	years ^[5] 3:19 8:18 27:19 33:14 58:
walk ^[1] 14:22	25
walks ^[1] 16:11	
wanted ^[4] 29:25 34:13,14 43:8	
Washington ^[3] 1:11,19,22	
way ^[25] 5:11 8:6 12:17 13:10 14:	
20,21,23 15:3 16:1 19:18 20:3 23:	