

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.

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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 Blackhawk 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. The government
11 attempts to say that Babcock's service was not
12 as wholly a member of the uniformed service.

13 But the best reading of the statute,
14 even before one gets to the veterans canon,
15 rejects that. There is no status language in
16 415. The government would convert the word "as"
17 into a status test trying to discern what hat
18 someone was wearing at a given point in time.
19 Congress certainly could have made such a
20 choice, and, indeed, it has in many other
21 statutes, but it did nothing like that here.

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

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

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

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

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

1 service, as opposed to part civilian, since he's
2 wearing more than one hat. It's dual -- it is a
3 dual position, so part civilian, part military.

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

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

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

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

16 JUSTICE THOMAS: Other than this?

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

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

21 MR. KATYAL: Correct.

22 JUSTICE THOMAS: -- right?

23 MR. KATYAL: Correct. And just --

24 JUSTICE THOMAS: And -- and your --
25 and -- and -- and Petitioner is not?

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

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

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

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

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

22 Now, absolutely, Justice Thomas, my
23 friend on the other side has made that argument
24 before this Court for the first time, that
25 there's some distinction between the National

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

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

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

1 uniform, a United States uniform. So he wears
2 the United States Army -- it's emblazoned on his
3 uniform --

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

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

8 CHIEF JUSTICE ROBERTS: -- I don't
9 think the fact that -- I don't think, when they
10 say "the uniformed service," they -- they mean
11 does he wear a uniform or not. I mean, I
12 appreciate he -- he wears the uniform because of
13 his National Guard service.

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

23 Now the one is subject -- subject to
24 the exemption from the windfall exception if
25 that's -- if that's right. But the other isn't

1 because it's certainly not based wholly on his
2 service in the National Guard. It's based on
3 his civilian service.

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

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

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

21 Now my friend on the other side says,
22 well, that's a different hat because that is the
23 hat National Guard, the state National Guard.
24 But, as I say, if that's the test, then it would
25 mean inactive duty folks who stand very much

1 like Mr. Babcock don't get the -- they wouldn't
2 be able to be eligible for the uniformed service
3 exception either because they are the same --
4 they fall in the same exact category. They're
5 people who didn't pay into the system before
6 1988. Congress undoubtedly said for those
7 folks, absolutely, they should get it.

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

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

23 And so that's what it's about. And so
24 it's certainly about inactive service folks who
25 didn't pay into the system but see their

1 paycheck slashed decades after they started
2 their employment. They don't really remember
3 whether they paid into the system or not.
4 Congress said we want to get rid of that.

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

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

19 MR. KATYAL: Well --

20 CHIEF JUSTICE ROBERTS: I mean, what
21 are the two statuses --

22 MR. KATYAL: Well --

23 CHIEF JUSTICE ROBERTS: -- stati?

24 MR. KATYAL: -- it's -- it's military
25 and civilian to be sure.

1 CHIEF JUSTICE ROBERTS: Yeah, sure.

2 MR. KATYAL: But --

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

14 MR. KATYAL: So --

15 CHIEF JUSTICE ROBERTS: -- military
16 service.

17 MR. KATYAL: -- so two things.

18 CHIEF JUSTICE ROBERTS: It seems to me
19 the whole system separates out the two to the
20 extent that they call it a position dual.

21 MR. KATYAL: So two things, Mr. Chief
22 Justice. First, the title is not just
23 dual-status tech. It's -- it's -- and you can
24 see it at U.S. -- at 32 U.S.C. 709(b), which is
25 petition appendix page 64a, and it's military

1 technician dual-status.

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

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

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

17 MR. KATYAL: I agree that's one way to
18 read it. I just don't think it's the best way.
19 And so, you know, let me walk you through the
20 way that we understand "wholly," which is it's a
21 very severe test, as our reply brief at page 10
22 says. What it says is that if there's even a
23 drop of money that comes -- that not from
24 uniformed service, then you don't get the
25 exception the way -- the uniformed service

1 exception.

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

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

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

21 So it's not the case that we're not
22 giving "wholly" work. We're giving it a lot of
23 work. Indeed, it's integral to the way we read
24 the statute.

25 To my friend's reading and, Mr. Chief

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

7 And that's why our brief
8 linguistically walks you through that at page
9 29, saying "wholly" would have to be two words
10 down in the statute in order for this to apply.
11 And so we think it's a -- not to -- we do think
12 it's the best reading of the statute to really
13 -- to understand this. I think the government
14 itself at page 22 of their brief admits that
15 "wholly" modifies the word "payment," not
16 "service."

17 And so, when you read the statute, you
18 simply ask whether or not the service is as a
19 member of a uniformed service. And, here, when
20 someone like Mr. Babcock or dual-status
21 technicians are performing their duties, they're
22 literally having to wear the uniform, having to
23 be a military rank, having to comply with all
24 sorts of fitness requirements that --

25 JUSTICE BARRETT: Mr. Katyal --

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

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

13 MR. KATYAL: Yeah.

14 JUSTICE BARRETT: Would that be
15 service as a member --

16 MR. KATYAL: It wouldn't.

17 JUSTICE BARRETT: -- of the National
18 Guard?

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

23 JUSTICE BARRETT: Well --

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

25 JUSTICE BARRETT: -- imagine not.

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

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

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

19 Now, if the hypothetical is the
20 employer makes those people become, say,
21 National Guard members or something like that,
22 our point --

23 JUSTICE BARRETT: That is the
24 hypothetical.

25 MR. KATYAL: Yeah. Then our point

1 would be, in that circumstance, they -- they'd
2 still have -- that they'd have to be performing
3 the duties that National Guard folks do
4 enumerated by statute, not other duties. If
5 they're doing other things, they're just not --
6 they're not service -- their role -- they're
7 not -- their service is not as a member of a
8 uniformed service.

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

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

25 And so I do think that the way to --

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

7 JUSTICE SOTOMAYOR: Where do you get
8 all of that from the language?

9 MR. KATYAL: We get it --

10 JUSTICE SOTOMAYOR: Tell me where you
11 -- you --

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

13 JUSTICE SOTOMAYOR: -- where the
14 language gives us those two requirements --

15 MR. KATYAL: It --

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

20 MR. KATYAL: Yeah. So I think the
21 language --

22 JUSTICE SOTOMAYOR: Just read the
23 language to me and tell me where.

24 MR. KATYAL: Right. So the language
25 of the statute is "service as a member of a

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

9 JUSTICE SOTOMAYOR: So a cook is --

10 MR. KATYAL: -- that a private
11 employer does.

12 JUSTICE SOTOMAYOR: -- a cook is -- is
13 listed. So what else?

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

19 JUSTICE SOTOMAYOR: So how do you
20 exclude the -- the chef, that he's in the Army,
21 he's a officer --

22 MR. KATYAL: So I do think --

23 JUSTICE SOTOMAYOR: -- a petty
24 officer?

25 MR. KATYAL: Right. I do think, if

1 the Congress -- if Congress has defined that as
2 a kind -- as -- as -- as an enumerated duty of
3 the National Guard, then that person would
4 qualify.

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

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

15 JUSTICE BARRETT: Well, Mr. Katyal, is
16 training pilots to fly Black Hawk helicopters
17 one of those enumerated duties?

18 MR. KATYAL: We do think it falls
19 directly within -- within the enumerations of
20 709, which is organizing, administering,
21 instructing, or training the National Guard and
22 -- or armed services and the like. So, yes, we
23 think it does fall that way.

24 We don't think you have to get into
25 any of that here because Congress did use a

1 pretty simple test, simple language that affects
2 relatively few people. To the extent there's
3 any doubt about this, we would suggest you apply
4 the veterans canon. As Justice Alito's
5 unanimous opinion for the Court in Shinseki said
6 back in 2011, if there's any ambiguity, read it
7 in favor of veterans. And so we think that that
8 would answer it.

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

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

21 Do you think that that's right? Is
22 there a difference? If I say a payment based
23 wholly on military service, is that the same as
24 or different than this statutory language?

25 MR. KATYAL: I -- I think it may be

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

7 JUSTICE KAGAN: Well, a payment based
8 wholly on military service means that the
9 payment has to be for entirely military service.

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

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

24 JUSTICE KAGAN: So, if I understand --

25 MR. KATYAL: He falls without it.

1 JUSTICE KAGAN: -- what you're saying
2 in terms of the way you read this stat --
3 statute, the only thing at issue is, when he
4 receives his paycheck, is it entirely for
5 military service, or might it be for other
6 things as well?

7 MR. KATYAL: Is it entirely for
8 uniformed service. That's the -- that's the one
9 --

10 JUSTICE KAGAN: Oh. Now you're
11 changing it, because I asked you is it the same
12 as for military service.

13 MR. KATYAL: Oh, I'm so sorry, I meant
14 -- I didn't hear the last part then. So, yeah,
15 so we do think there's a difference between
16 uniformed service and military service. And
17 Congress gave you an express textual indication
18 of that by enumerating the Public Health Service
19 and NOAA as two examples. Those are people who
20 are not military. The government, you know,
21 dances around this in their brief, but they
22 certainly don't call them military because that
23 would be preposterous.

24 Instead, what people like NOAA and
25 Public Health Services folks are are uniformed

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

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

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

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

22 We think it's a simpler test affecting
23 a very small number of people but, obviously,
24 people to whom this amount of money is really
25 important.

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

5 MR. KATYAL: So --

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

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

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

23 And -- and we think, if you look at
24 it, you draw exactly the opposite conclusion
25 because Congress did say -- you're absolutely

1 right, Congress said military pensions focused
2 on inactive service members and the like in
3 the -- excuse me -- the legislative history says
4 that, but Congress didn't use those words. They
5 used far broader words, service --

6 JUSTICE BREYER: So you're saying the
7 person who wrote the legislative history got it
8 wrong?

9 MR. KATYAL: I --

10 JUSTICE BREYER: That the person who
11 wrote that report didn't actually read the
12 statute and didn't really know what the statute
13 said?

14 MR. KATYAL: Justice Breyer, there's
15 nothing in there that excludes dual-status
16 technicians --

17 JUSTICE BREYER: It says for a small
18 --

19 MR. KATYAL: -- from the legislative
20 history.

21 JUSTICE BREYER: -- closed group of
22 people who receive military pay --

23 MR. KATYAL: Correct.

24 JUSTICE BREYER: -- based on --

25 MR. KATYAL: -- and we agree it is a

1 small group of people either way, whether
2 dual-status techs --

3 JUSTICE BREYER: Based at least in
4 part on non-covered military reserve duty after
5 1956 and before 1988 --

6 MR. KATYAL: Correct.

7 JUSTICE BREYER: -- which I admit I
8 don't understand --

9 MR. KATYAL: Correct.

10 JUSTICE BREYER: -- but I'll try.
11 Right.

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

22 Questions?

23 CHIEF JUSTICE ROBERTS: Mr. Katyal,
24 when -- when Mr. Babcock was working, did he get
25 one paycheck or two?

1 MR. KATYAL: So he got -- when he was
2 working in -- as an -- as an active --

3 CHIEF JUSTICE ROBERTS: I assume he's
4 retired now.

5 MR. KATYAL: Yeah, so he got one
6 paycheck for his National Guard service. When
7 he went into active duty for his --

8 CHIEF JUSTICE ROBERTS: No, no, no.
9 One paycheck for National Guard service. Did he
10 get one paycheck for his 9-to-5 job and one
11 paycheck for the National Guard job?

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

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

17 MR. KATYAL: Correct.

18 CHIEF JUSTICE ROBERTS: One for his
19 9-to-5 job and one for his National Guard job?

20 MR. KATYAL: Correct. And the way
21 that the statute works, it goes payment system
22 by payment system. So it asks whether the CSRS
23 payments are all wholly as a member of a
24 uniformed service or not. And then, if he has,
25 for example, state and local pension, that's a

1 whole separate system and a separate calculation
2 under the windfall elimination provision. You
3 don't aggregate them together.

4 CHIEF JUSTICE ROBERTS: Just to be
5 clear, I'm asking when he's working, does -- at
6 the end of the month, does he have -- this is my
7 National Guard check for the time I spent
8 working as a National Guardsman, military
9 status, right? But he had this separate -- you
10 will fight the "separate" maybe, but he also had
11 the 9-to-5 job --

12 MR. KATYAL: Oh.

13 CHIEF JUSTICE ROBERTS: -- because
14 that's what made him dual-status.

15 MR. KATYAL: Oh, yeah. No, I don't
16 think he gets a separate paycheck for that. I
17 think that's all one paycheck. It's just -- I
18 think that his military service, to the extent
19 he's on active duty or something like that, the
20 -- that is a separate paycheck. So I think
21 those are the two paychecks. I will confirm
22 this in the record and get back to you.

23 CHIEF JUSTICE ROBERTS: Well, I -- you
24 say to the extent he's on active duty. Is it to
25 the extent he's not -- the National Guard has

1 not been called up, but he's in the National
2 Guard for specific periods, right?

3 MR. KATYAL: Correct.

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

9 MR. KATYAL: Yeah, I -- I'm pretty
10 sure it's all the same thing because, you know,
11 literally, every time he's going to work, he's
12 wearing the uniform and performing his National
13 Guard dual-status technician duties. I don't
14 think there is any separate paycheck. But I
15 just want to double-check what's in the record.

16 CHIEF JUSTICE ROBERTS: Okay. Thank
17 you.

18 Justice Thomas?

19 JUSTICE THOMAS: Yes, counsel, just an
20 -- a question as an aside. What would have been
21 the difference in the treatment of Petitioner if
22 he had exercised the option in the 1980s to
23 switch from CSRS to FRS?

24 MR. KATYAL: Yeah. So, one, if he --
25 if he elected to be in FRS, then he would be in

1 covered employment, and then he'd be outside of
2 the windfall elimination provision because it
3 doesn't encompass at least for those
4 going-forward years non-covered employment. It
5 only applies to non-covered employment.

6 So, once you're in the language of FRS
7 in covered employment, you're outside of the
8 windfall elimination provision.

9 JUSTICE THOMAS: So he exercised an
10 option that put him in the current position that
11 he's in?

12 MR. KATYAL: Correct, and he -- you
13 know, as he says at -- this is petition appendix
14 page 44a -- when he joined the service, he
15 thought he was entitled to a certain stream of
16 benefits. They then changed it on him, and,
17 yes, he had the option to convert, but
18 conversion had all sorts of problems inherent to
19 it.

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

22 MR. KATYAL: Correct. And what
23 Congress in 1994, Justice Thomas, said was
24 uniformed service folks are going to get a
25 benefit that other federal employees don't get.

1 We want to benefit them in a certain way because
2 they're seeing their paychecks slashed, as are,
3 of course, civilian employees, but they wanted
4 to do something -- you know, they wanted to do
5 something for uniformed service folks that was
6 different and special.

7 JUSTICE THOMAS: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Breyer?

10 JUSTICE BREYER: No, thank you.

11 CHIEF JUSTICE ROBERTS: Justice Alito?
12 No?

13 Justice Sotomayor, anything further?

14 JUSTICE SOTOMAYOR: I -- I -- on this
15 two -- two checks, he got a check for his 9-to-5
16 job for the State National Guard, and he got a
17 separate check for his inactive duty military
18 service when he got called up for his two weeks
19 or weekend duty for the Army National Guard, he
20 got a separate check, correct?

21 MR. KATYAL: Correct. I'm pretty
22 sure.

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

1 MR. KATYAL: That is correct. That is
2 what the uniformed --

3 JUSTICE SOTOMAYOR: So that's the
4 answer to Justice -- the Chief's question.

5 MR. KATYAL: I'm pretty sure it is. I
6 just want to see what's in the record,
7 absolutely, yes.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?
9 Justice Barrett? No?
10 Thank you, counsel.
11 Ms. Reaves.

12 ORAL ARGUMENT OF NICOLE REAVES
13 ON BEHALF OF THE RESPONDENT

14 MS. REAVES: Mr. Chief Justice, and
15 may it please the Court:

16 When a dual-status technician retires,
17 he receives two separate streams of payments,
18 and the application of the uniformed services
19 exception depends on the basis for each set of
20 payments that he receives.

21 First, he receives Civil Service
22 Retirement System payments from the Office of
23 Personnel Management for the work that he
24 performs in his full-time civilian role as a
25 technician. Those payments do not trigger the

1 uniformed services exception because they are
2 based on his civilian employment.

3 A technician also receives a second
4 stream of payments which are military retirement
5 payments from the Defense Finance and Accounting
6 Service for his part-time military service, that
7 is, his inactive duty training and drills and
8 his active duty service in the National Guard.

9 Those military retirement payments do
10 trigger the uniformed service exception because
11 they are based wholly on service in a qualifying
12 National Guard capacity. And Petitioner and
13 other dual-status technicians like him, when
14 they were in the role, received two separate
15 paychecks with two separate leave and earnings
16 statements. One was a paycheck for their 9-to-5
17 technician work and the other was the paycheck
18 for all their inactive and active duty service.

19 Congress also repeatedly categorized
20 technician service as outside -- as civilian
21 service, not uniformed service.

22 First, Congress did not include
23 dual-status technicians within the definition of
24 a member of a uniformed service that is
25 cross-referenced in the uniformed services

1 exception.

2 Second, in Section 10216 of Title 10,
3 one of the two primary provisions that governs
4 dual-status technicians, Congress describes
5 technicians as civilian four separate times.

6 And, third, in Title 5, Congress
7 defined technician employment as falling within
8 the civilian service of the government and
9 ensured that technicians would receive civilian
10 retirement payments for their civilian
11 employment.

12 I think I'd start then by discussing a
13 couple of points that my friend on the other
14 side made, and the first is whether an
15 individual knows what type of status they're in
16 at any given point in time.

17 And it's actually quite clear what
18 status a technician is at any point. During his
19 9-to-5 job, a technician is doing work in the
20 technician role, and in that role, he has a
21 variety of benefits that he doesn't have while
22 he's working in his National Guard role, and
23 that includes the fact that he can join a union.
24 He can file complaints with the EEOC and MSPB.
25 He can receive compensatory time off and

1 worker's compensation. And he's compensated
2 under the federal GS system.

3 That's different from his National
4 Guard service which he performs on weekends or
5 if he's called up to active duty.

6 Now my friend on the other side has
7 suggested that if you are -- were to accept the
8 government's position in this case, inactive
9 duty service, such as training and drills,
10 wouldn't trigger the uniformed services
11 exception. And that's wrong because of a
12 specific provision that deems such service as
13 federal for the purpose of federal funding.

14 And that provision is 10 U.S.C.
15 12602(a), which provides that for the purposes
16 of laws providing benefits for members of the
17 Army National Guard of the United States,
18 military training, duty, or other service
19 performed by a member of the Army National Guard
20 of the United States in his status as a member
21 of the Army National Guard, for which he's
22 entitled to pay from the United States, shall be
23 considered military training, duty, or other
24 service in the federal service.

25 So let me unpack that a little bit.

1 What that means is that when an individual is in
2 his state status, which usually happens when
3 he's doing inactive training and drills, because
4 of this provision, he's paid by the federal
5 government as a general matter, and that does,
6 in fact, trigger the uniformed services
7 exception because that payment is payment for
8 qualifying service.

9 Now dual-status technician service is
10 different because Congress has categorized that
11 service as outside the uniformed service and the
12 payments for that service as civilian in nature.

13 JUSTICE GORSUCH: Counsel, as -- as I
14 understand your -- your colleague on the other
15 side, and I may not, but, as I understand it, as
16 best I can in this area, we -- we all understand
17 that National Guardsmen serve in at least two
18 capacities, and one of them is denominated by
19 the government for purposes of its own HR
20 administration as civilian.

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

24 But just looking at the language of
25 the statute -- and I think this is the argument

1 in its simplest terms, as I understand it -- was
2 -- were the payments based, were they made
3 wholly on service in the capacity of -- as -- as
4 a member of the uniformed service, and the
5 answer he would give is yes because, while you
6 denominate it civilian for certain purposes, you
7 also said it could only be performed by someone
8 who is a member of a uniformed service.

9 So the work may be civilian for a
10 bunch of other purposes, but it can only be
11 performed by someone who is serving in the
12 capacity of a National Guardsman.

13 What's wrong with that argument?

14 MS. REAVES: I think there are a few
15 things that are wrong with that argument. One
16 is that a precondition to hold a given role
17 doesn't render service in that role and payments
18 for service in that role wholly for service in
19 the capacity of the prerequisite.

20 JUSTICE GORSUCH: Well, why -- well,
21 let me stop you there. Why not? Because, if
22 the work, civilian work, whatever you --
23 whatever words you want to put around it, can
24 only be performed, has to be wholly performed by
25 someone who is a member of the National Guard,

1 why doesn't that take care of the word "wholly"
2 for you?

3 MS. REAVES: So I think it writes out
4 the word "as" and the fact that we're in
5 agreement, I think, that "as" means in the
6 capacity of.

7 JUSTICE GORSUCH: Mm-hmm.

8 MS. REAVES: And the fact that
9 Congress --

10 JUSTICE GORSUCH: Okay. All right.
11 So, if we're moving from "wholly" now, we're
12 putting that aside, okay, so we're not arguing
13 on "wholly," we're going to "as," all right, and
14 "as" is a very important word in this case. I
15 got that.

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

18 MS. REAVES: Yes.

19 JUSTICE GORSUCH: Why isn't the
20 civilian work being performed in the capacity
21 of, by someone who has to be a National
22 Guardsman?

23 MS. REAVES: So I think "in the
24 capacity of" and "by someone that has to be" are
25 two different terms. And I guess maybe an

1 analogy would be helpful here.

2 JUSTICE GORSUCH: But the work is
3 civilian work being performed as, okay, wholly
4 as a National Guardsman. Why -- why can't both
5 be true, in other words? I know it's -- it's --
6 it's a lot to hold in one's head at the same
7 time that one can be both civilian and
8 performing work as a National Guardsman, but
9 what's -- what's wrong with that?

10 MS. REAVES: So they -- they can't be
11 because Congress has said they can't be.
12 Congress has said that an individual -- that
13 there's something called National Guard service,
14 and we pay individuals military pay and give
15 them military pensions as a result of that.

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

19 MS. REAVES: So I think, in Title 42
20 itself, we looked at what is uniformed service
21 and we see that a member of a uniformed service
22 is not a technician. And we know that when
23 Congress wanted to include an individual who
24 doesn't really look normal to us who don't have
25 expertise in this area, like a member of the PHS

1 Corps or the NOAA Corps, it explicitly included
2 them within that definition of uniformed
3 service, and it didn't do that with technicians.

4 JUSTICE GORSUCH: So are we blowing
5 past "as" now and now we're on to "uniformed
6 service"?

7 MS. REAVES: We're not blowing past
8 anything. I think the best reading of the
9 statute is looking at the entire phrase and
10 giving meaning to the definition of "member of a
11 uniformed service" which doesn't include
12 technician service, giving meaning to "as" and
13 the fact that service needs to be performed in
14 that capacity, and giving meaning to "wholly"
15 and the fact that payments themselves have to be
16 entirely or completely based on qualifying
17 service. And we know that --

18 JUSTICE GORSUCH: All right. Let me
19 try one more time and then I -- and I'll promise
20 I'll stop because I'm beating a horse that's
21 pretty dead, I think.

22 Payments based wholly on service,
23 okay, civilian service, based wholly on civilian
24 service performed in the capacity of a National
25 Guardsman. I think that's the reading, okay? I

1 -- I think that's it as best I got it. And I
2 may be completely off base, Mr. Katyal will tell
3 me, but what's -- what's -- what's wrong with
4 that? Why can't we hold these two things in our
5 head at the same time?

6 MS. REAVES: I think because of the
7 definition of uniformed service, and I don't
8 think we can just look at the Title 42
9 definition because Title 10 is one of the two
10 provisions that creates dual-status technicians
11 and it refers to their service as civilian four
12 separate times.

13 Now, my friend on the other side noted
14 that they're referred to as military technicians
15 multiple times, but that just refers to whom
16 they -- for whom they work. It doesn't refer to
17 the nature of their service. So I think that we
18 can't just read this in a bubble.

19 And when Congress enacted that --
20 this, it was enacting it against a backdrop of
21 the fact that National Guard members do have
22 different types of service and that National
23 Guard members for the most part are part-time
24 service members.

25 And I think it's helpful to compare

1 the service that a dual-status technician
2 renders with two other types of service that the
3 National Guard has. One is active guard
4 reserve. And those are individuals who hold a
5 full-time military role.

6 And all of their pay for their 9-to-5
7 job receives the benefits of the uniformed
8 service exception and the National Guard also
9 employs civilian employees who aren't members of
10 the National Guard. And all of these
11 individuals may perform service that seems to us
12 to be very important to the National Guard and
13 integral to its functioning, but what matters
14 for the purposes of the uniformed service
15 exception is how Congress chose to define the
16 service.

17 And Congress chose to --

18 JUSTICE BARRETT: Well --

19 MS. REAVES: -- define this --

20 JUSTICE BARRETT: -- Ms. Reaves, what
21 about Mr. Katyal's point that there is a
22 statutory list of duties performed by people
23 like Mr. Babcock and that that list can be read
24 to include Mr. Babcock's training, you know, of
25 pilots?

1 MS. REAVES: So it's -- it's certain
2 -- so -- so the description he was referring to
3 is in 32 U.S.C. 709, which describes what
4 dual-status technicians do on a day-to-day
5 basis. And that includes organizing
6 administering and instructing the National
7 Guard.

8 And that is certainly what he did
9 during his 9-to-5 technician job. We aren't
10 debating that in any way. But that -- even
11 though that's important to the National Guard,
12 integral to its functioning, that was his 9-to-5
13 civilian service and that's separate from his
14 weekend training and -- training and reserve
15 service.

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

20 It's also important to note that
21 Congress also has wholly civilian employees of
22 the National Guard who aren't members of the
23 National Guard and don't have that prerequisite.
24 They can also be trainers, like Mr. Babcock was.

25 JUSTICE ALITO: What is the purpose of

1 this dual-status setup? Why -- why would it not
2 have been sufficient for these employees to be
3 simply civilian and federal employees if they
4 want to be on -- in the National Guard on the
5 side, fine, they can be in the National Guard?

6 MS. REAVES: So I can't answer that
7 question as to any individual technician because
8 there are tens of thousands of them and they do
9 have very different roles. It might be a
10 different answer for Mr. Babcock. The
11 individual who was the plaintiff in Martin, the
12 Eleventh Circuit case on this issue, was a
13 personnel clerk so he did paperwork but still
14 had to be a National Guard member, but I can
15 tell you why we got here and maybe some of the
16 benefits of it.

17 As to the why, this is really a
18 holdover of how states had structured the system
19 before. So in 1916, Congress authorized states
20 to hire military caretakers who were the
21 predecessors of dual-status technicians, and
22 states developed a practice where most of these
23 individuals had to be members of the National
24 Guard.

25 JUSTICE ALITO: Well, is it -- is this

1 just the historical accident or is there some
2 benefit to the federal government or to the
3 National Guard from having these people in a
4 dual-status as opposed to a -- an overlapping
5 status as opposed to completely discrete
6 statuses?

7 MS. REAVES: So I think the benefits
8 are that it definitely helps the National Guard
9 with enrollment because these civilian jobs are
10 very attractive with all the benefits that they
11 have. And it also does help the National Guard
12 from the perspective of cohesion and unit
13 readiness. These individuals, you know, do get
14 called up with their National Guard units and do
15 inactive training and drills with them.

16 I don't think any of that really tells
17 us anything about how to answer the question
18 presented here, just because, as I previously
19 discussed, what we have to look at is the status
20 itself as Congress has defined it, and the
21 payment, type of payments that Congress has
22 provided for that, not whether it looks military
23 or looks essential to us.

24 I think my friend -- let's talk for a
25 moment about wholly and what kind of work that

1 term is doing here. We read wholly as an adverb
2 that modifies the adjectival phrase that begins
3 with based on and that phrase in turn modifies
4 payment. I think we're all in agreement on that
5 reading. And what that means is that we have to
6 look at the nature of this particular payment
7 here.

8 And I think even if the Court were to
9 accept my friend on the other side's functional
10 approach, which says that this looks like
11 National Guard service so we should treat these
12 payments as if for being payments that trigger
13 the uniformed services exception, that doesn't
14 work because wholly indicates that even if
15 you're taking that functional approach, which we
16 don't think you should, the payments are not
17 wholly based on that.

18 An individual member of the National
19 Guard who's not a technician cannot receive the
20 CRS pay -- civil service retirement system
21 payments that Petitioner received. He can't
22 hold that technician role.

23 And I think because of that, wholly
24 does do work under our reading. And the problem
25 with my friend on the other side's reading of

1 "wholly" is it actually is reading wholly as in
2 whole or in part.

3 Petitioner suggests that if -- if
4 there was a CSRS payment that was partially
5 based on military service and partially based on
6 non-military service, that could somehow be
7 apportioned out and only the part based on
8 military service would trigger the uniformed
9 services exception.

10 But that's actually completely against
11 the text of the uniformed services exception.
12 And if this Court were to find that dual-status
13 technician payments trigger the uniformed
14 services exception, it would be the only
15 situation in which a CSRS payment could be
16 entirely based on military service and would be
17 subject to the uniformed services exception.

18 If the Court has no further questions.

19 CHIEF JUSTICE ROBERTS: Further
20 questions? Justice Thomas?

21 JUSTICE THOMAS: I have one. I have
22 just a minor question. The -- how -- how -- how
23 big a problem is this now that CSRS no longer
24 exists?

25 MS. REAVES: I can give you a partial

1 answer as to the number of individuals that this
2 will impact. So this will only impact
3 individuals who are in the dual-status
4 technician role before 1984 and are still
5 receiving CSRS payments or are eligible to
6 receive them and are not yet receiving them.

7 And because of data-keeping
8 limitations, I only have the number of
9 dual-status technicians who retired after 2004
10 or are eligible to retire and that's about
11 53,000 National Guard dual-status technicians.

12 This case will also impact a smaller
13 number of Air Force and Navy -- Air Force and
14 Army technicians. Those forces have dual-status
15 technicians like these. It's a much smaller
16 number because the force authorizations for
17 those have been smaller.

18 So that -- that's unfortunately all
19 that I can provide for you but it -- it's a
20 fairly small group of individuals that this case
21 will possibly impact.

22 JUSTICE THOMAS: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Breyer?

25 Justice Alito? Anything for you?

1 Justice Sotomayor?

2 Justice Kagan?

3 JUSTICE GORSUCH: So we agree this
4 only impacts folks who are still receiving CSRS
5 benefits, that they would have been eligible for
6 before 1984?

7 MS. REAVES: Based on service before
8 1984 --

9 JUSTICE GORSUCH: Right.

10 MS. REAVES: Or service that before
11 1984 --

12 JUSTICE GORSUCH: Right. All right.

13 MS. REAVES: -- and continued.

14 JUSTICE GORSUCH: And then secondly,
15 if -- if -- if no man alive can figure this out,
16 does the veterans canon have any role to play
17 here?

18 MS. REAVES: So obviously I disagree
19 with your premise there. I think there are a
20 lot of textual clues in the statute and related
21 statutes that indicate that our reading is the
22 better one but I don't think the veterans canon
23 has any play here for a couple of reasons.

24 The first is that the group of
25 individuals that this would benefit, Congress

1 has defined as not being veterans. And that's
2 because technician service itself doesn't create
3 any sort of veterans preference.

4 It doesn't give someone veterans
5 benefits. It's only the National Guard service
6 that someone renders that can possibly give
7 technicians veterans preference, so I don't
8 think this would be -- that would be an
9 appropriate place to apply the veterans canon
10 because the veterans canon is usually applied to
11 statutory schemes that themselves are intended
12 to benefit veterans.

13 JUSTICE GORSUCH: Military not
14 uniformed service, we're back to that?

15 MS. REAVES: I don't think it's back
16 to that because I -- because I disagree
17 technician service is uniformed service.
18 Technician service isn't within the definition
19 of uniformed service.

20 JUSTICE GORSUCH: Sorry, I didn't mean
21 to go back there. Thank you. Thank you,
22 counsel.

23 JUSTICE KAVANAUGH: You -- you -- you
24 agree, however, that there is a veterans canon
25 that would apply when statutes are ambiguous

1 generally. You'd say it doesn't apply here
2 because it's not ambiguous and because it's not
3 really veterans as we normally think about it?

4 MS. REAVES: Yes, we are not
5 contesting the availability of the veterans
6 canon to resolve grievous ambiguity.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 Thank you, counsel.

10 Rebuttal, Mr. Katyal?

11 REBUTTAL ARGUMENT OF NEAL K. KATYAL

12 ON BEHALF OF THE PETITIONER

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15 MR. KATYAL: Thank you, Mr. Chief
16 Justice. Three points.

17 First, as Justice Gorsuch was
18 indicating, we do think that the plain text
19 controls here. There are two key features of
20 our argument. First, Section 415 looks to
21 service, not status and, in particular,
22 uniformed service status service.

23 And, second, Congress has specifically
24 defined National Guard service as uniformed
25 service and dual-status technician service, in

1 particular, as part of that and has labeled it
2 military.

3 Second, Mr. Chief Justice, he got one
4 paycheck for his DST service, his dual-status
5 service. That was -- that's Petition Appendix
6 page 42a. That is to be sure a civilian
7 paycheck under Title 5.

8 Our point is civilian -- where your
9 paycheck comes from doesn't matter for purposes
10 of 415. 415 doesn't ask that. And, indeed, as
11 Justice Gorsuch was saying, it's not mutually
12 exclusive. You can have a civilian paycheck but
13 still be serving -- your service may still be
14 performed as a member of a uniformed service.

15 There is no pay stub test. Congress
16 has used pay stub tests even with respect to the
17 National Guard, as our reply brief points out.
18 Here they didn't do anything like that. They
19 used the words "service as a member of a
20 uniformed service." They didn't try and embrace
21 a paycheck test or anything like that.

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

25 He -- did he receive one paycheck for

1 his civilian status duty and one for his
2 National Guard duty?

3 MR. KATYAL: No, one paycheck for it
4 all; that is, his job is all part of one thing.
5 So as he was -- shows up to work as a
6 dual-status technician, he falls within all the
7 requirements of 709, wearing the uniform, all
8 that stuff. He doesn't have some separate hat
9 he's wearing for purposes of 415. He's just --
10 he's getting one paycheck --

11 CHIEF JUSTICE ROBERTS: Is it --

12 MR. KATYAL: -- it is civilian.

13 CHIEF JUSTICE ROBERTS: Is it
14 allocated separately?

15 MR. KATYAL: Only to the extent, as I
16 was saying before, he is in active duty or
17 something like that. But, otherwise, he's
18 getting one paycheck. It is a civilian
19 paycheck, but that's not the way -- that's not
20 what the test is.

21 JUSTICE BARRETT: What about weekend
22 service when he goes for training and drills?

23 MR. KATYAL: And the weekend stuff
24 also comes in the military DFAS payments as
25 well.

1 JUSTICE BARRETT: So that's the
2 separate -- like we could say it's two separate
3 paychecks insofar you're talking about his
4 weekend National Guard service that you might do
5 even if you were in private employment?

6 MR. KATYAL: To the --

7 JUSTICE BARRETT: And then that --

8 MR. KATYAL: Yeah, to the extent he
9 was doing any of that, any -- any weekends or
10 something like that, that's military and
11 separate. Now, my friend's --

12 CHIEF JUSTICE ROBERTS: Wait, wait.
13 But that's military and separate. Does he get
14 paid for that?

15 MR. KATYAL: He does get paid for
16 that, just -- absolutely.

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

20 MR. KATYAL: It is, because that's
21 Title 5 --

22 CHIEF JUSTICE ROBERTS: Are there two
23 checks?

24 MR. KATYAL: He does get two paychecks
25 for --

1 CHIEF JUSTICE ROBERTS: Okay.

2 MR. KATYAL: Not -- not for his
3 dual-status service but anything else.

4 So then my friend on the other side
5 said that there's statute that she's just
6 pointed out, 12602, which says that -- that --
7 she says it fills the gap and allows him to
8 cover National Guard of the United States.
9 That's not an argument they've made before in 27
10 years, but I don't think that that statute
11 actually works.

12 Indeed, it's inconsistent with their
13 own view of the word "wholly," because their own
14 view of "wholly" is that Title -- because they
15 say Title 5 is responsible for these civilian
16 payments.

17 JUSTICE BREYER: Is this -- let me get
18 back to this thing. Person A, Monday, Tuesday,
19 Wednesday, works as a technician, nothing
20 really -- at the Army base but does nothing that
21 a civilian doesn't do there. Then on Thursday,
22 he does a special National Guard duty, and on
23 Friday, they're nationalized, so he has a
24 federal thing. He gets one paycheck for that
25 week; is that right?

1 MR. KATYAL: He gets -- if he's
2 nationalized, he would get a separate military
3 pay stub in a separate military --

4 JUSTICE BREYER: Okay. So for Monday,
5 Tuesday, Wednesday, Thursday, he gets one
6 paycheck?

7 MR. KATYAL: Correct.

8 JUSTICE BREYER: And now -- okay. How
9 do they deduct the Social Security for that? Do
10 they -- do they -- and it goes to two systems,
11 doesn't it?

12 MR. KATYAL: It does go to two
13 systems, Your Honor.

14 JUSTICE BREYER: All right. So do
15 they -- do they -- how do they do it? They
16 deduct two amounts, one for the one day of
17 Thursday and another for the --

18 MR. KATYAL: No. It's system by
19 system. And that's the way the windfall
20 elimination provision works. So you only look
21 to -- and I was saying this in my opening -- you
22 only look to, for example, the CSRS payments
23 here. There's only one stream of CSRS payments.
24 They're all wholly -- wholly uniformed services.
25 So that's why we think he falls within it.

1 Now, if there's any ambiguity in this,
2 we would suggest that the veterans canon does
3 apply. And the government doesn't argue,
4 Justice Kavanaugh, that they are not -- that
5 Mr. Babcock and other dual-status technicians
6 aren't veterans. Pointedly, the last paragraph
7 of their brief says the reverse, that they are
8 veterans. And so if there is any ambiguity, we
9 would suggest that you read it that way.

10 And I think it'd be dangerous thing to
11 fall on the 12602 argument that my friend has
12 just raised, because it's inconsistent with what
13 they say "wholly" means. And also, indeed, it
14 very well may boomerang on them because it says
15 you're -- if you're "entitled to pay" from the
16 federal government, then that counts as federal
17 service.

18 Well, undoubtedly Babcock is entitled
19 to pay for his federal service, for his
20 dual-status technician service Monday through
21 Wednesday. That makes him part of the uniformed
22 service exception.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 The case is submitted.

1 (Whereupon, at 12:30 p.m., the case
2 was submitted.)
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