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The Honorable Denny Rehberg
Chairman
Subcommittee on Labor, Health and Human Services,
Education, and Related Agencies
Committee on Appropriations
House of Representatives

The Honorable Cliff Stearns
Chairman
Subcommittee on Oversight and Investigations
Committee on Energy and Commerce
House of Representatives

The Honorable Joe Barton
House of Representatives

The Honorable Michael Burgess
House of Representatives

Subject: *Pay for Consultants and Scientists Appointed under Title 42*

This responds to your request for our views on whether there are statutory caps on pay for consultants and scientists appointed pursuant to 42 U.S.C. §§ 209(f) or (g), and specifically whether the pay cap under 5 U.S.C. § 5373 applies.¹ To answer this question, we address several issues. First, we consider the effect of an appropriation provision that restricts pay for individuals appointed on a limited-time basis pursuant to 42 U.S.C. §§ 209(f) and (g). Then, we examine two provisions in title 5 of the United States Code that also limit pay. The first is 5 U.S.C. § 3109,

¹ You also asked GAO to perform audit work on the extent to which the Department of Health and Human Services (HHS) and the Environmental Protection Agency (EPA) have used this authority and followed applicable guidance. See, GAO, *Human Capital: HHS and EPA Can Improve Practices under Special Hiring Authorities*, GAO-12-692 (Washington, D.C.: July 9, 2012).

which limits pay for consultants “procure[d]” on a temporary or intermittent basis. The second is 5 U.S.C. § 5373, which limits pay fixed by administrative action.

In brief, we find that the appropriations law provision enacted in 1993 established a permanent appropriation cap on the pay of individuals appointed on a limited-time basis under 42 U.S.C. §§ 209(f) and (g) at agencies funded through the Labor-HHS-Education Appropriations Act. With regard to the two title 5 limitations, we think these pay limitations do not apply to appointments made pursuant to 42 U.S.C. §§ 209(f) or (g).

At the outset, we note the extraordinary complexity of the federal pay systems and the difficulties we have encountered in attempting to resolve ambiguities arising from pay laws enacted at different times over nearly 70 years. Sections 209(f) and (g) of title 42 were enacted in 1944 and have not been amended since that time. There have, however, been many significant changes in related laws and regulations since 1944 that may be relevant to the interpretation of 42 U.S.C. §§ 209(f) and (g). One court, in deciding similar issues, has noted the inherent complexity of resolving ambiguities in this area of the law. In 1983, in *International Organization of Masters, Mates & Pilots v. Brown*, 698 F.2d 536, 539 (C.A.D.C. 1983), the court noted that there were six separate federal pay systems, plus “depending on the degree of disaggregation, over forty other, separate pay systems.” The statutory scheme has only become more complex since 1983. In formulating our views, we conducted extensive research of legislative history to aid in our understanding of congressional actions and the interplay of the laws addressed below, and examined regulations issued pursuant to these provisions over the last 65 years. We also solicited the views of the Department of Health and Human Services (HHS) and the Office of Personnel Management (OPM).²

BACKGROUND

The authority for special consultants and scientists appointed to fellowships within the Public Health Service contained in 42 U.S.C. §§ 209(f) and (g) was enacted as part of the Public Health Service Act, as amended,³ which reads as follows:

² Our practice when issuing decisions and opinions is to develop a factual record on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/resources.html. The record in this case consists of the request letter and the views of the Department of Health and Human Services and the Office of Personnel Management.

³ Pub. L. No. 410, sec. 208(c) and (d), 58 Stat. 682, 686 (July 1, 1944); amended by Pub. L. No. 425, sec. 5, 62 Stat. 38, 40 (Feb. 28, 1948), redesignated section 208 as section 207 and redesignated subsections (c) and (d) as subsections (e) and (f);
(continued...)

“(f) In accordance with regulations, *special consultants* may be employed to assist and advise in the operations of the Service. Such consultants may be appointed without regard to the civil-service laws and their compensation may be fixed without regard to the Classification Act of 1923, as amended.”

“(g) In accordance with regulations, individual scientists, other than commissioned officers of the Service, may be designated by the Surgeon General to *receive fellowships*, appointed for duty with the Service without regard to the civil-service laws and compensated without regard to the Classification Act of 1923, as amended, may hold their fellowships under conditions prescribed therein, and may be assigned for studies or investigations either in this country or abroad during the terms of their fellowships.”⁴

(Emphasis added). Subsection (f) applies to special consultants (“consultants”), while subsection (g) applies to scientists designated to receive fellowships (“scientists” or “fellows”). This authority was an expansion of authorities that had been given to the National Cancer Institute.⁵ These provisions of the Public Health

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Pub. L. No. 84-492, §3(b), 70 Stat. 116 (Apr. 27, 1956), redesignated subsections (e) and (f) as subsections (f) and (g).

⁴ Additionally, 42 U.S.C. § 210(f) provides that fellows appointed “shall have included in their fellowships such stipends or allowances . . . as the Surgeon General may deem necessary to procure qualified fellows.”

⁵ According to the accompanying report, the authority to hire special consultants was intended to broaden to all branches of the Public Health Service an authority that had been previously conferred to the National Cancer Institute. H.R. Rep. No. 78-1364, at 8 (1944). The National Cancer Institute Act, Pub. L. No. 244, §5(d), 50 Stat. 559, 561 (Aug. 5, 1937) authorizes the Surgeon General to secure “from time to time and for such periods as may be advisable, the assistance and advice of experts, scholars, and consultants from the United States or abroad who are learned and experienced in the problems” related to the research and treatment of cancer. The authority in the National Cancer Institute Act contains no mention of the application of civil service or classification laws. The accompanying report to the Public Health Service Act provides that the exemptions from the civil service and compensation laws were a confirmation of the existing situation. The report accompanying the Act states that the authority to appoint fellows to the Public Health Service was a similar expansion of an authority originally conferred on the National Institutes of Health and the National Cancer Institute. H.R. Rep. No. 78-1364, at 8 (1944).

Service Act, as included in the United States Code, omit as obsolete the references to “compensation . . . without regard to the Classification Act of 1923, as amended.” The United States Code serves as an editorial compilation of federal statutes and as *prima facie* evidence of the law for titles that have not been enacted as positive law.⁶ 1 U.S.C. § 204(a); *United States National Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993). Since Title 42 has not been enacted into positive law, the language of the Public Health Service Act as included in the Statutes at Large, rather than the United States Code, is controlling. Therefore, the language regarding compensation “without regard to the Classification Act of 1923” remains effective, and we include that language in our analysis.

The Public Health Service first issued regulations implementing section 209(f) for consultants on October 24, 1947, and regulations for section 209(g) for scientists on September 16, 1947.⁷ The regulations for consultants specified that “[n]o such consultant shall be employed for an aggregate of more than one-half of the number of working days of any fiscal year unless the Administrator, because of special circumstances, shall approve an extension thereof.” The regulations also placed limits on the duration of fellowships of periods not to exceed 16 months, which could be extended or renewed.⁸

In 1956, in its appropriations for the Public Health Service for fiscal year ending June 30, 1957, Congress included a pay cap, providing that “compensation to consultants or individual scientists appointed for limited periods of time pursuant to [42 U.S.C. §§ 209(f) and (g)] at rates established by the Surgeon General [shall] not . . . exceed \$15,000 per annum.”⁹ As discussed below, this “cap” authorized the Public Health Service to pay special consultants and fellows at a higher rate of pay than otherwise allowed at that time.

⁶ Positive law codification is the process of preparing and Congress enacting, one title at a time, a revision and restatement of the general laws of the United States. A title of the United States Code that has been enacted into positive law is itself legal evidence of the law. 1 U.S.C. § 204(a).

⁷ Regulations for special consultants were published at 12 Fed. Reg. 6,924 (Oct. 24, 1947). Regulations for fellows were published at 12 Fed. Reg. 6,199 (Sep. 16, 1947).

⁸ 42 C.F.R. § 61.12 (1949).

⁹ Pub. L. No. 84-635, 70 Stat. 423, 430 (June 29, 1956). The language of the provision refers to sections 207(f) and (g) of the Public Health Service Act, which are codified at 42 U.S.C. §§ 209(f) and (g). For ease of discussion, the references to the United States Code sections will be used throughout this opinion.

The appropriations for each fiscal year from 1957 through 1993 included a cap on pay for “consultants or individual scientists appointed for limited periods of time” pursuant to 42 U.S.C. §§ 209(f) or (g). The appropriations for fiscal year 1993 established a permanent cap on such compensation, providing that pay may be set at rates not to exceed “the per diem rate equivalent to the maximum rate payable for senior-level positions under 5 U.S.C. § 5376.”¹⁰

In 1966, all functions of the Public Health Service were transferred to the Secretary of Health, Education, and Welfare (HEW).¹¹ After the reorganization, HEW revised its regulations “to reflect current requirements” and removed the language limiting the number of days in a fiscal year that special consultants could be employed.¹² Current regulations do not contain such limits.¹³ HHS also issued regulations governing the appointment, duration, and compensation of fellows which include time limits on the appointment of fellows.¹⁴

Finally, in 2005, Congress extended to the Environmental Protection Agency (EPA) authority to hire a limited number of scientists pursuant to 42 U.S.C. § 209.

¹⁰ Pub. L. No. 102-394, §202, 106 Stat. 1792, 1810-1811 (Oct. 6, 1992).

¹¹ Reorg. Plan No. 3 of 1966, eff. June 25, 1966, 31 Fed. Reg. 8855 (June 25, 1966), 80 Stat. 1610. The Secretary of the Department of Health, Education and Welfare has since been redesignated as the Secretary of Health and Human Services.

¹² 31 Fed. Reg. 12,939 (Oct. 5, 1966).

¹³ These regulations, found at 42 C.F.R. § 22.3, read as follows:

(a) When the Public Health Service requires the services of consultants who cannot be obtained when needed through regular Civil Service appointment or under the compensation provisions of the Classification Act of 1949, special consultants to assist and advise in the operations of the Service may be appointed, subject to the provisions of the following paragraphs and in accordance with such instructions as may be issued from time to time by the Secretary of Health and Human Services.

(b) Appointments, pursuant to the provisions of this section, may be made by those officials of the Service to whom authority has been delegated by the Secretary or his designee.

(c) The per diem or other rates of compensation shall be fixed by the appointing officer in accordance with criteria established by the Surgeon General.

¹⁴ The regulations authorize a fellow to receive “such stipend as is authorized by the Secretary for each service fellowship or series of service fellowships,” and for each service fellowship to have an initial appointment of varying periods, not to exceed 5 years, and to be extended for varying periods not to exceed 5 years. 42 C.F.R. pt. 61, subpt. B.

DISCUSSION

The Appropriation Pay Cap

Under the U.S. Constitution, “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .” Art. 1, § 9, cl. 7. This power of the purse means that Congress, through its authority to appropriate funds, can determine the terms under which an appropriation may be used. See, e.g., *New York v. United States*, 505 U.S. 144, 167 (1992); *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937).

As discussed previously, since fiscal year 1957, pay for consultants and scientists appointed for a limited period of time pursuant to sections 209(f) and (g) has been capped by appropriations acts for most components of the Public Health Service. The first cap, in the appropriations bill for the fiscal year ending June 30, 1957, authorized pay “not to exceed \$15,000 per annum.”¹⁵ In response to our inquiry, HHS stated that the existence of a restriction in an appropriations act supports the analysis that the compensation authority is otherwise unrestricted.¹⁶ Our review of the legislative history of the first appropriation to contain the limit indicates that it was enacted due to other restrictions in law on compensation authority, and that the authorization for pay not to exceed \$15,000 per annum was an increase over then existing pay authority.

The provision appeared in the appropriation bill (H.R. 9720) originally passed by the House, but it was limited to appointments made to the National Institutes of Health (NIH). The report from the House Committee does not explain why this provision was added. H. Rep. No. 84-1845 (1956). However, in testimony before the House Subcommittee on the Departments of Labor, and Health, Welfare, and Education, and Related Agencies of the Committee of Appropriations, Dr. James A. Shannon, the Director of the National Institutes of Health, noted that NIH had “the ability to bring in non-Government scientists from laboratories and clinics for indefinite periods of time,” but a “practical problem exists in that we have to stay within salary levels of the civil service of a grade 15 job as far as compensation is concerned.”¹⁷

¹⁵ Pub. L. No. 84-635, 70 Stat. 423, 430 (June 29, 1956).

¹⁶ Letter from Acting General Counsel, Department of Health and Human Services, to Assistant General Counsel for Strategic Issues, GAO (Dec. 30, 2011) (HHS Letter), at 1.

¹⁷ *Labor-Health, Education, and Welfare Appropriations for 1957, Hearings before the Subcommittee of the Committee on Appropriations, United States House of*
(continued...)

According to Dr. Shannon's testimony, at that time the limitation was equal to \$12,600.

In hearings before the Senate, the following comment from the Public Health Service on the provision was placed on the record:

"The compensation of such scientists and consultants is limited by existing authority to the highest salary in grade 15 of the Classification Act. It is anticipated that the increase authorized by the House will make it easier for the National Institutes of Health to bring in non-Government scientists from laboratories and clinics for indefinite periods of time.

The language as written in the House bill is inequitable in that it does not apply to scientists and consultants who may be utilized in other parts of the Public Health Service Uniform authority could be provided to all parts of the Public Health Service if the language . . . were modified by deleting the words "by the National Institutes of Health."¹⁸

The Senate Committee recommended removing the limitation of the authority to personnel at the National Institutes of Health and extending it to the entirety of the Public Health Service. S. Rep. No. 84-2093, at 12 (1956). From the statements made in hearings referenced above, it is clear that this "cap" authorized the Public Health Service to pay consultants and scientists at a higher rate of pay than what the Public Health Service believed it could pay. The record does not indicate the specific basis on which HHS determined in 1956 that the compensation authorities under sections 209(f) and (g) were limited to the highest salary in grade 15.

Each appropriation for the Public Health Service from FY 1957 through FY 1993 contained a limitation on pay for consultants and scientists appointed for limited

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Representatives, 84th Cong. 530 (1956) (Statement of Dr. James A. Shannon, Director, National Institutes of Health).

¹⁸ *Labor-Health, Education, and Welfare Appropriations for 1957- Hearings on H.R. 9720 Before the Subcommittee of the Committee on Appropriations, United States Senate*, 84th Cong. 327-329 (1956) (Statement of Dr. Jack C. Haldeman, Chief, Division of General Health Services). Both Dr. Shannon and Dr. Haldeman use the phrase "indefinite periods of time" to describe the length of appointments pursuant to sections 209(f) and (g). As discussed above, the regulations at that time indicate that all such appointments were of limited duration. We do not know what the actual practice of Public Health Service was in 1956.

periods of time under sections 209(f) and (g) with identical language each year (except for amount).¹⁹ The limit became permanent in the FY 1993 Labor/HHS/Education Appropriation, which stated:

*“Appropriations in this or any other Act or subsequent Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Acts shall be available for...the payment of compensation to consultants or individual scientists appointed for limited periods of time pursuant to section 207(f) or section 207(g) of the Public Health Service Act, at rates established by the Assistant Secretary for Health, or the Secretary where such action is required by statute, not to exceed the per diem rate equivalent to the maximum rate payable for senior-level positions under 5 U.S.C. § 5376.”*²⁰

(Emphasis added). Generally, a provision in an annual appropriation act is effective only for that fiscal year, as appropriations acts are, by their nature, non-permanent legislation. B-319414, June 9, 2010. The presumption of non-permanence can be overcome, however, if the provision of law contains language indicating futurity. The provision in the 1993 Appropriations Act contains the phrase “in this or any other Act or subsequent Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Acts.” The words “this or any other Act,” standing alone, are not words of futurity. *Williams v. United States*, 240 F.3d 1019, 1063 (Fed. Cir. 2001); 65 Comp. Gen. 588 (1986); B-230110, April 11, 1988.

¹⁹ The first such provision limited pay to rates not to exceed \$15,000 annually. Pub. L. No. 85-67, 71 Stat. 210, 217 (June 29, 1957). The appropriation for the fiscal year ending June 30, 1960, increased the limit to rates not to exceed \$19,000 annually. Pub. L. No. 86-158, 73 Stat. 339, 347 (Aug. 14, 1959). The appropriation for the fiscal year ending June 30, 1965, increased the limit to rates not to exceed \$24,500. Pub. L. No. 88-605, 78 Stat. 959, 967 (Sep. 19, 1964). In 1970, the limit was changed again, this time to “not to exceed the per diem rate equivalent to the rate for GS-18.” Pub. L. No. 91-204, 84 Stat. 23, 44 (March 5, 1970). Each annual appropriation contained the provision limiting pay at that rate until 1991. On November 5, 1990, Congress passed the Federal Employees Pay Comparability Act of 1990 which, among other things, replaced references to GS-18 with references to 5 U.S.C. § 5376. Pub. L. No. 101-509, § 529, 104 Stat. 1389, 1433 (Nov. 5, 1990). The appropriation for fiscal year 1992, described the limit as “not to exceed the per diem rate equivalent to the maximum rate payable for senior-level positions under 5 U.S.C. § 5376.” Pub. L. No. 102-170, 105 Stat. 1107, 1140 (Nov. 26, 1991).

²⁰ Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-394, § 202, 106 Stat. 1792, 1810-1811 (Oct. 6, 1992).

However, when used in conjunction with other language, the result is different.²¹ In this case, the addition of the phrase “or *subsequent* Labor, Health and Human Services, Education Appropriations Acts” clearly indicates Congressional intent that the pay limitation become permanent law. These are words of futurity. HHS agrees that this language constitutes words of futurity and as such the pay limitation continues to be in effect.

The appropriation provision limits the rate of pay to no more than “the per diem rate equivalent to the maximum rate payable for senior-level positions under 5 U.S.C. § 5376.” The maximum rate of basic pay for senior level positions under section 5376 when the permanent appropriation cap was enacted was set at level IV of the Executive Schedule. Subsequently, in 2008, 5 U.S.C. § 5376 was amended to allow for a higher maximum compensation of up to Executive Level II for Senior Level and Scientific and Professional employees covered by a performance appraisal system certified by the Office of Personnel Management.²² However, since the appropriation cap was enacted prior to the 2008 amendment of section 5376, its reference to section 5376 is to be interpreted as referring to the lower pre-amendment level.²³ As such, the maximum rate payable under this provision is the rate of basic pay (excluding locality pay) payable for level IV of the Executive Schedule, which currently is \$155,500.²⁴

HHS asserts that the appropriation provision pay cap applies only to appointments made on a limited-time basis because of the language limiting its application to consultants and scientists employed “*for limited periods of time* pursuant to

²¹ See, B-230110, April 11, 1998, finding the addition of the phrase “with respect to any fiscal year” to constitute words of futurity; B-309704, Aug. 28, 2007, “with respect to any fiscal year”; B-316510, July 15, 2008, “beginning in fiscal year 2008 and thereafter.”

²² Senior Professional Performance Act of 2008, Pub. L. No. 110-372, 122 Stat. 4043 (Oct. 8, 2008).

²³ In its guidance to agencies, OPM directed that existing references to pay at the maximum rate payable under 5 U.S.C. § 5376 in statutes enacted prior to April 2, 2009, are to be interpreted as references to the previously authorized pay rates. See OPM guidance under Compensation Policy Memorandum 2009-06.

²⁴ The locality adjusted rate is capped at level III of the Executive Schedule, which is currently, \$165,300. The President’s pay agent is delegated the authority to provide locality pay for employees not otherwise eligible. 5 U.S.C. § 5304(h). The President’s pay agent has not authorized locality pay for employees appointed under 42 U.S.C. §§ 209(f) or (g).

[42 U.S.C. §§ 209(f) or (g)]” (emphasis added).²⁵ We considered the meaning of the phrase “for limited periods of time,” which has appeared in all of the relevant appropriations provisions from 1956 to 1993. In 1956, when this language was first included in the appropriations law, the Public Health Service’s regulations included time limitations on employment. It stated:

No such consultant shall be employed for an aggregate of more than one-half of the number of working days of any fiscal year unless the Administrator, because of special circumstances, shall approve an extension thereof.

42 C.F.R. § 22.3 (1949). Thus the time limit generally applied to all consultant appointments made under section 209(f) beginning in 1947, when the regulation containing the limit was first promulgated, unless “special circumstances” led the administrator to approve an extension. Further, the limit was in effect in 1956, when the first appropriations law provision referring to consultants appointed for “limited periods of time” was enacted.

However, as noted in the Background section, this time limitation was removed from the regulations in 1966. 31 Fed. Reg. 12,939 (Oct. 5, 1966). Thus under the regulations at that time, the appropriations pay cap applied to all section 209(f) consultants from 1956 until HHS changed the regulations in 1966 allowing for the hiring of consultants for indefinite periods. But, although the regulations implementing section 209(f) no longer included a time limitation on the employment of special consultants after 1966, the appropriations provisions for 1967 and subsequent years, using virtually identical language each year, imposed a cap only on pay of “consultants or individual scientists appointed for limited periods of time pursuant to [42 U.S.C. §§ 209(f) or (g)].” The appropriations restriction did not impose any cap on pay for those consultants whose appointments were not limited in time. The result is that, after the 1966 regulations were promulgated and continuing to the present, HHS has employed two categories of consultants: those appointed for limited periods of time, to whom the pay cap applies, and consultants appointed for indefinite periods, to whom the pay cap does not apply. At present, according to HHS, the consultants employed for term appointments under section 209(f) and all scientists employed pursuant to section 209(g) are considered by HHS to be employed for limited periods of time.

Importantly, the appropriations pay restriction is applicable only to payments made from Labor-HHS-Education Appropriations Acts. Three components of the Public Health Service (the Agency for Toxic Substances and Disease Registrations, the

²⁵ HHS Letter dated Dec. 30, 2011, at 1. Appointments of fellows pursuant to section 209(g) are all made on a limited-time basis and are therefore covered by the appropriation cap.

Food and Drug Administration, and the Indian Health Services)²⁶ are funded by appropriations acts other than the Labor-HHS-Education Appropriations Act, and are not covered by a restriction on funds appropriated under that Act. Therefore, this limitation on pay does not apply to the pay of consultants and scientists employed by these agencies.²⁷

In sum, we conclude that there is a cap of Executive Level IV on the pay of consultants and scientists employed for limited periods of time pursuant to 42 U.S.C. §§ 209(f) or (g) in all but three of the Public Health Service Agencies.

Statutory Pay Caps

The permanent appropriation restriction applies by its terms only to limited time appointments funded by Labor-HHS-Education Appropriations Acts. The specific language of sections 209(f) and (g) as enacted contains no cap on compensation for consultants or scientists, nor any limit on the length of consultants' employment.²⁸ Thus, we still need to examine the applicability of two pay caps found in title 5: section 3109, which limits pay for consultants "procure[d]" on a temporary or intermittent basis, and section 5373, which limits pay fixed by administrative action.

Pay Cap under 5 U.S.C. § 3109

We consider whether individuals appointed pursuant to sections 209(f) and (g) are covered by the provision governing length of service and amount of pay for "experts

²⁶ Funding for the National Institute of Environmental Health Sciences is shared between Interior-Environment and Labor-HHS-Education appropriations. Library of Congress, Congressional Research Service, Locate an Agency or Program Within Appropriation Bills, No. R40858 (Oct 20, 2009).

²⁷ According to HHS, the Public Health Service consists of the following components: the Office of the Assistant Secretary for Health, the Office of Global Affairs, the Office of the Assistant Secretary for Preparedness and Response, the Federal Occupational Health Service, the Agency for Healthcare Quality and Research, the Agency for Toxic Substances and Disease Registrations, the Centers for Disease Control and Prevention, the Food and Drug Administration, the Health Resources and Services Administration, the Indian Health Service, the National Institutes of Health, and the Substance Abuse and Mental Health Services Administration. HHS Letter dated Dec. 30, 2011, at 3-4.

²⁸ Section 209(g) refers to a "term" of employment for scientists who receive a fellowship. HHS agrees that all appointments of fellows under section 209(g) are limited-time appointments.

and consultants” currently codified at 5 U.S.C. § 3109. Originally enacted in 1946,²⁹ section 3109 has been amended several times and today provides in relevant part:

“When authorized by an appropriation or other statute, the head of an agency may procure by contract the temporary (not in excess of 1 year) or intermittent services of experts or consultants.... Services procured under this section are without regard to—

(1) the provisions of this title governing appointment in the competitive service; [and]

(2) chapter 51 and subchapter III of chapter 53 of this title;³⁰

However, an agency subject to chapter 51 and subchapter III of chapter 53 of this title may pay a rate for services under this section in excess of the daily equivalent of the highest rate payable under section 5332 of this title (GS-15) only when specifically authorized by the appropriation or other statute authorizing the procurement of the services.”

5 U.S.C. § 3109(b).

Whereas 42 U.S.C. §§ 209(f) and (g) are independent authorities authorizing the appointment of consultants and fellows, 5 U.S.C. § 3109 is not. Instead, it establishes specific legal parameters, including a pay cap and a limit on appointment duration, governing the employment of experts or consultants whose appointment must be authorized by an “appropriation or other statute.” That pay cap applies unless a different cap is authorized by the appropriation or another statute.

In 1992, Congress added subsection (d) to section 3109. It directs OPM to prescribe regulations necessary to administer section 3109. OPM subsequently issued regulations, which provide that they do not apply to the appointment of experts or consultants under other authorities. 5 C.F.R. § 304.101. OPM stated in its reply to our question that it “does not consider the cap under 5 U.S.C. § 3109 to apply to consultants under 42 U.S.C. § 209(f).” Letter from General Counsel, Office of Personnel Management, to Assistant General Counsel, GAO (Nov. 22, 2011) at 1.

²⁹ Pub. L. No. 600, § 15, 60 Stat. 806, 810 (Aug. 2, 1946). Sections 209(f) and (g) were enacted in 1944. See footnote 3.

³⁰ As discussed below, chapter 51 and subchapter III of chapter 53 of this title are references to the Classification Act of 1949.

GAO has only addressed the interaction of section 3109 and section 209(f) once. In 1947, shortly after the passage of section 3109, but well before Congress gave OPM authority to issue regulations under section 3109, GAO was asked by a certifying officer for the Public Health Service whether the pay of a consultant who had been appointed pursuant to section 209(f) was limited by the then recently enacted section 3109.³¹

Since section 3109 refers only to consultants whose services are procured “by contract,” the certifying officer inquired whether it applied to a consultant who had been “appointed” under section 209(f). GAO found nothing in the legislative history to indicate that section 3109 was intended to “distinguish between an employment agreement in the form of an appointment and an employment agreement in the form of a formal contract.” GAO then determined that section 3109 was intended to apply to all temporary or intermittent employment of experts or consultants, regardless of the type of employment agreement. At the time of the 1947 decision, all appointments made pursuant to section 209(f) were time-limited appointments, and section 3109 places a pay cap on temporary appointments, applying generally where there is no other specific cap. Since no other pay rate was specifically provided by 42 U.S.C. § 209(f) or in the appropriations act at that time, a special consultant hired pursuant to section 209(f) was not entitled to be compensated at a rate in excess of that authorized by section 3109.

However, subsequent to the 1947 decision, Congress, by its actions, signaled that section 3109 did not apply to section 209(f) appointments. Beginning in 1956 and continuing until 1993, Congress enacted provisions yearly in appropriations acts that set a cap (which may or may not have been higher than that found in section 3109 in any given year) for all those appointed pursuant to sections 209(f) and (g) for a limited period of time and funded out of the Labor-HHS-Education Appropriations Act. From fiscal year 1970 until the provisions became permanent in fiscal year 1993, the appropriations acts for HHS contained separate provisions placing identical compensation limits for experts and consultants subject to 5 U.S.C. § 3109, and for consultants and scientists appointed for limited periods of time pursuant to 42 U.S.C. §§ 209(f) or (g). One could argue that identical provisions would have been unnecessary if Congress believed that the limitations in 5 U.S.C. § 3109 would apply to 42 U.S.C. §§ 209(f) and (g) consultants or scientists.

³¹ The certifying officer also asked about a provision that was part of the Federal Employees Pay Act of 1945. This provision prohibited payment at a rate in excess of \$10,000, and applied only to pay provided pursuant to the Classification Act of 1923. Since section 209(f) authorized compensation “without regard to the Classification Act of 1923,” GAO concluded that the provision of the Federal Employees Pay Act of 1945 did not limit the consultant’s pay. 27 Comp. Gen. 46 (1947).

We must also consider that in 1992, Congress assigned OPM the responsibility for enforcing 5 U.S.C. § 3109 and issuing regulations necessary for administration of its provisions.³² OPM, in its regulations, explicitly states that the limitations under 5 U.S.C. § 3109 do not apply to consultants hired pursuant to other hiring authorities.³³ OPM's interpretation is entitled to considerable weight as the agency charged with administering it. In determining how much "deference" or weight should be accorded an agency interpretation, the Supreme Court in *Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), formulated its approach to deference in terms of two questions. The first question is "whether Congress has directly spoken to the precise question at issue." *Id.* at 42. In this case, we think it clear that Congress did not expressly address the interaction of the title 5 and title 42 hiring authorities. Then, under *Chevron*, we must determine whether OPM's determination is reasonable, or whether it is arbitrary and capricious. Generally, when the agency's interpretation is in the form of a regulation, the deference is at its highest.³⁴ As mentioned earlier, OPM has determined that section 3109 does not apply to consultants hired pursuant to other hiring authorities. In light of the discussion above, we find OPM's interpretation reasonable.

Therefore, we follow OPM and conclude that the provisions of section 3109 do not apply to consultants employed pursuant to 42 U.S.C. § 209(f).³⁵

Pay Cap under 5 U.S.C. § 5373

The other pay cap that we consider is found in section 5373 of title 5 of the United States Code, which places limits on pay fixed by administrative action. Pay fixed by administrative action refers to the various pay-setting authorities in which pay is determined by the agency instead of pursuant to pay rates under otherwise applicable statutory pay systems, such as the General Schedule.³⁶ Congress first

³² Technical and Miscellaneous Civil Service Amendments Act of 1992, Pub. L. No. 102-378, §2(8), 106 Stat. 1346, 1347(Oct. 2, 1992).

³³ 5 C.F.R. § 304.101.

³⁴ For an extensive list of Supreme Court cases giving *Chevron* deference to agency statutory interpretations found in rulemaking or formal adjudication, see *United States v. Mead Corp.*, 533 U.S. 218, 231 at n. 12 (2001). The Supreme Court has stated that when Congress leaves ambiguity in a statute, "it is for agencies, not courts, to fill statutory gaps." *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

³⁵ We also find that to the extent that the 1947 GAO decision conflicts with this conclusion, it is overruled.

³⁶ Examples of statutory pay systems include those pay rates established for the General Schedule (subchapter III of chapter 53 of title 5 of the United States Code),
(continued...)

enacted section 5373 as part of the Government Employees Salary Reform Act of 1964, 20 years after it passed sections 209(f) and (g). Section 5373 reads as follows:

a) Except as provided . . . by the Government Employees Salary Reform Act of 1964³⁷ and notwithstanding the provisions of other statutes, the head of an Executive agency . . . who is authorized to fix by administrative action the annual rate of basic pay for a position or employee may not fix the rate at more than the rate for level IV of the Executive Schedule. This section does not impair the authorities provided by—

(1) sections 248, 482, 1766, and 1819 of title 12, section 206 of the Bank Conservation Act, sections 2B(b) and 21A(e)(4) of the Federal Home Loan Bank Act, section 2A(i) of the Home Owners' Loan Act, and sections 5.11 and 5.58 of the Farm Credit Act of 1971;³⁸

(2) section 831b of title 16;³⁹

(...continued)

the Foreign Service (section 403 of the Foreign Service Act of 1980), the Executive Schedule (subchapter II of chapter 53 of title 5), and the Veterans Health Administration (chapter 74 of title 38 of the United States Code).

³⁷ The Government Employees Salary Reform Act of 1964 created both the administrative pay cap under section 5373 and the Executive Schedule. Pub. L. No. 88-426, 78 Stat. 400 (Aug. 14, 1964). “The Executive Schedule is a five-tier annual salary schedule for most of the federal government's highest officials, and the rates are adjusted on an annual basis.” B-309301, June 8, 2007. Among the purposes of the 1964 Act were “to establish a new, consistent, and rational salary structure for positions of the highest level in the Federal Government in the legislative, executive, and judicial branches,” which it did by creating the Executive Schedule, and “to provide a logical and appropriate relationship between career salaries paid under the four civilian statutory pay systems and compensation for top positions in the three branches.” S. Rep. No. 88-1121 at 1(1964). The 1964 Act removed authorities of agency heads to set rates of compensation for certain employees above GS-18. H.R. Rep. No. 88-1388 at 32 (1964).

³⁸ Relating to the pay for employees of the National Bank, the Federal Reserve, Office of the Comptroller of the Currency, National Credit Union Administration, Federal Deposit Insurance Corporation; Federal Housing Finance Agency; Farm Credit Administration; Farm Credit System Insurance Corporation.

³⁹ Relating to the Tennessee Valley Authority.

(3) sections 403a-403c, 403e-403h, and 403j of title 50;⁴⁰

(4) section 4802⁴¹

(5) section 2(a)(7) of the Commodity Exchange Act (7 U.S.C. 2(a)(7)).⁴²

The rate for level IV of the Executive Schedule is currently \$155,500 per year. When first enacted, section 5373 included provisions exempting employees found in subsections (1), (2), and (3) above. Provisions in subsections (4) and (5) exempting employees of the Securities and Exchange Commission and the Commodity Futures Trading Commission were added in 2002.⁴³

In addition to the authorities listed as excepted within the text of 5 U.S.C. § 5373, other statutory pay authorities contain explicit exemptions from section 5373.⁴⁴ However, sections 209(f) and (g) are not among the sections explicitly excluded from coverage under the section 5373 pay cap.

When previously faced with the question of the application of section 5373 to prevailing rate employees under a title 5 pay system, we determined that the pay of the crew of vessels required by statute to be fixed in accordance with prevailing industry rates was subject to the limitation in section 5373. The Court of Appeals, D.C. Circuit, concluded similarly, finding that the phrase “notwithstanding the provisions of other statutes” in section 5373 was evidence that “Congress wanted the pay cap to cut a wide swath.” *International Org. of Masters, Mates & Pilots v. Brown*, 698 F.2d 536, 542 (D.C. Cir. 1983). As we examine the title 42 authorities 35 years after we addressed section 5373 in the context of prevailing rate

⁴⁰ Relating to the Central Intelligence Agency.

⁴¹ Relating to the Securities and Exchange Commission.

⁴² Relating to the Commodity Futures Trading Commission.

⁴³ Investor and Capital Markets Fee Relief Act, Pub. L. No. 107-123, § 8(d)(1)(C), 115 Stat. 2390, 2399 (Jan. 16, 2002) and Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10702(c)(3), 116 Stat. 134, 517 (May 13, 2002).

⁴⁴ See, for example, 5 U.S.C. § 5376 (pay rates for senior-level (SL) and scientific or professional (ST) positions); 5 U.S.C. § 5382 (pay rates for SES positions); 10 U.S.C. § 1587 (DOD’s authority to pay senior executives of nonappropriated fund instrumentalities at levels equivalent to SES); 10 U.S.C. § 2113 (pay for faculty at the Uniformed Services University of Health Sciences); 42 U.S.C. § 2391-1 (pay for faculty at the U.S. Public Health Sciences Track) and 38 U.S.C. § 7281 (pay rates for Court of Veterans Appeals clerks and employees).

employees, we are struck by some of the differences between the two cases. The provisions governing the pay of prevailing rate employees are found in title 5, as is section 5373. Certainly there is a closer relationship with pay authorities that are both found in the same title. It is also more likely that Congress was aware of the prevailing rate statute when it included “notwithstanding the provisions of other statutes” in the language of section 5373.

HHS has determined that “the salary levels paid to individuals appointed under sections 209(f) and (g) are not subject to 5 U.S.C. § 5373 because . . . the plain language of [sections 209(f) and (g)] states that the civil service laws do not apply to these appointments.”⁴⁵ It has interpreted this language in sections 209(f) and (g) as giving the agency authority to set levels of pay under sections 209(f) and (g) above the section 5373 limit.

HHS’s interpretation of the language providing for an exemption from the civil service laws appears to be overly broad. Sections 209(f) and (g) contain two independent clauses addressing exemptions. The exemption from the civil service laws applies to the *appointment* of special consultants and fellows, whereas the exemption from the Classification Act of 1923, applies to *compensation* for these positions. HHS conflates the two clauses. The courts have not had much occasion to address the meaning of sections 209(f) and (g).

In an unreported district court decision, two scientists who had been appointed to fellowships pursuant to section 209(g) were terminated, and the district court confronted the question whether their positions were exempted from all provisions of the Civil Service Reform Act. The court noted that no other federal court appeared to have examined the language “appointed without regard to the civil-service laws” in section 209(g).⁴⁶ It concluded that the language meant that Congress intended to “provide federal agencies with the flexibility to hire Service Fellows without regard to the normal hiring formalities of the Civil Service,” but that Congress did not intend to disregard the civil service laws in their entirety with respect to section 209(g) fellows.⁴⁷ The district court decided that such fellows were in the excepted service under the Civil Service Reform Act, as the excepted service “consists of those civil service positions which are not in the competitive or Senior Executive Service,” and the Civil Service consists of “all appointive positions in the . . . Government of the United States, except positions in the uniformed services.”⁴⁸

⁴⁵ Letter from Acting General Counsel, Department of Health and Human Services, to Assistant General Counsel for Strategic Issues, GAO (Oct. 25, 2011), at 4.

⁴⁶ *Afshari v. Leavitt*, 2006 U.S. Dist. LEXIS 77107 (N.D. W. Va. Oct. 23, 2006).

⁴⁷ *Id.* at 77110.

⁴⁸ The court relied on a Merit Systems Protection Board decision, which concluded that positions under section 209(f) were in the excepted service and that authority for
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Of more direct applicability than the exemption from the civil service laws is the provision that appointees under sections 209(f) and (g) may be “compensated without regard to the Classification Act of 1923.” We therefore consider whether that language gives HHS the authority to compensate appointees in excess of the section 5373 limit. Case law is not helpful in determining the limit of the phrase “compensated without regard to the Classification Act of 1923.”⁴⁹ Certainly, in 1944, when sections 209(f) and (g) were enacted into law, the words “without regard to the Classification Act” eliminated any of the pay caps found in that Act. The more pertinent issue is whether, 20 years later, Congress intended to supersede the pay provisions of sections 209(f) and (g) with the enactment of section 5373 of title 5. A review of the evolution of law may prove helpful here.

In 1949, five years after sections 209(f) and (g) were enacted, Congress passed the Classification Act of 1949, which replaced the Classification Act of 1923 and provided that references in other laws to the 1923 Act should be held and considered to mean the 1949 Act.⁵⁰ As mentioned above, in 1964, Congress passed section 5373 as part of the Government Employees Salary Reform Act. When section 5373 was enacted, there is no indication in the legislative history or in the subsequent actions of the Public Health Service, OPM, or Congress that they believed it superseded the authority granted to the Public Health Service in sections 209(f) and (g). In 1966, the Classification Act of 1949 was enacted into positive law and codified in title 5 of the United States Code.⁵¹

Neither the Classification Act of 1949 nor the title 5 codification specifically addressed pay limits for appointments under sections 209(f) and (g). The Classification Act of 1949 and its predecessor Act of 1923 were codified in Chapter

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“appointment without regard to the civil-service laws” in section 209(f) was intended to provide the agency with flexible hiring authority. *Fishbein v. HHS*, 102 M.S.P.R. 4 (M.S.P.B. 2006). The court also cited a U.S. Court of Appeals for the Federal Circuit decision which found that similar language regarding TVA employees meant that such appointments are to the excepted service rather than the competitive service. *Dodd v. Tennessee Valley Authority*, 770 F.2d 1038, 1040 (Fed. Cir. 1985) (authority for appointment of TVA employees “without regard to the civil service laws” placed TVA employees in the excepted service, not the competitive service.)

⁴⁹ See, for example, *Abell v. United States*, 518 F.2d 1369 (Ct. Cl. 1975); *Afshari v. Leavitt*, 2006 U.S. Dist. LEXIS 77107 (N.D. W. Va. Oct. 23, 2006).

⁵⁰ Pub. L. No. 81-429, §1106(a), 63 Stat. 954, 972 (Oct. 28, 1949).

⁵¹ Pub. L. No. 89-554, 80 Stat. 378 (Sep. 6, 1966). See the Background section for a discussion of the meaning of codification and enactment into positive law.

51 (“Classification) and subchapter III (“General Schedule of Pay Rates”) of Chapter 53 of title 5.⁵² Section 5373 is codified in subchapter VII (“Miscellaneous Provisions”) of Chapter 53. Thus one possible reading of the codification is that the language in sections 209(f) and (g) that appointees may be “compensated without regard to the Classification Act of 1923” should not be interpreted as an exemption from the later enacted pay cap set forth in section 5373.

However, this construction would conflict with actions of Congress subsequent to the enactment of section 5373. Congress’s actions lead us to believe that it in fact did not intend that section 5373 would apply to these appointments. For example, even after section 5373 was enacted in 1964, Congress continued to impose a specific limit on pay for consultants and scientists appointed under sections 209(f) and (g). Every annual appropriation law enacted by Congress for 27 years after section 5373 was effective contained a separate pay cap, which suggests that Congress did not consider these positions to be under any existing pay cap. Finally, in 1993, Congress enacted a permanent and separate pay cap. It restricted compensation for limited-time appointments to the maximum rate payable under 5 U.S.C. § 5376, which, as discussed above, limits pay to Executive Level IV. A permanent provision limiting pay to Executive Level IV would have been unnecessary if Congress believed that the pay restriction in 5 U.S.C. § 5373, which also limits pay to Executive Level IV, was applicable. Thus it appears that Congress did not intend for the 5 U.S.C. § 5373 pay cap to apply to consultants and scientists hired pursuant to 42 U.S.C. §§ 209(f) and (g).

Additional evidence that the 5 U.S.C. § 5373 pay cap does not apply to 42 U.S.C. §§ 209(f) or (g) appointees is provided by Congress’ actions when it extended section 209 authority to certain Environmental Protection Agency (EPA) components. In 2005, Congress granted EPA authority to make a limited number of appointments “under the authority provided in 42 U.S.C. § 209” beginning in fiscal year 2006. That authority has twice been further granted and now extends through fiscal year 2015.⁵³ Our review of the legislative history of the appropriations

⁵² Chapter 51 of title 5 contains the classification provisions of the General Schedule, and subchapter III of Chapter 53 of title 5 contains the General Schedule pay rates. See S. Rep. No. 89-1380 (1966), pages 57, 102, 212-213.

⁵³ “For fiscal years 2006 through 2011, the Administrator may, after consultation with the Office of Personnel Management, make not to exceed five appointments in any fiscal year under the authority provided in 42 U.S.C. § 209 for the Office of Research and Development.” Department of the Interior, Environment, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-54, title II, 119 Stat. 499, 531 (Aug. 2, 2005). The authority was extended to allow EPA to employ up to 30 persons at any one time under 42 U.S.C. § 209 by the Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, title II, 123 Stat. 524, 729 (Mar. 11, 2009), and extended through fiscal year 2015 by the Department of Interior, Environment, and Related Agencies

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provisions giving EPA this authority indicates that Congress had specific knowledge that both EPA and HHS were interpreting sections 209(f) and (g) as exempt from 5 U.S.C. § 5373 limitations on pay.

The recommendation that EPA request this title 42 authority came from a report by the National Research Council (NRC),⁵⁴ which Congress had requested in the conference report accompanying the law containing EPA's appropriations for Fiscal Year 1995, Public Law 103-327.⁵⁵ In that report and in subsequent testimony by a member of the NRC before a congressional subcommittee,⁵⁶ NRC stated that "even greater measures" than the authority to appoint Senior Technical positions were "warranted and practicable to attract and retain outstanding research leaders." Senior Technical employees may be paid up to Executive Level III, currently \$165,300, or in certain circumstances up to Executive Level II, currently \$179,700.⁵⁷ 5 U.S.C. § 5376. Such levels of pay are above those set forth in section 5373, which sets a pay cap of Executive Level IV, currently \$155,500. The NRC therefore recommended that EPA seek authority to create and fill positions similar to the authority contained in 42 U.S.C. §§ 209(f) and (g).⁵⁸

Further, in hearings for Fiscal Year 2009 appropriations, before Congress extended the length of the authority, the Chairman of the House Subcommittee on Interior, Environment, and Related Agencies, asked EPA for information about its use of the title 42 authority and whether there were any statutory or regulatory caps on pay for

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Appropriations Act, 2010, Pub. L. No. 111-88, Division A, title II, 123 Stat. 2904, 2938 (Oct. 30, 2009).

⁵⁴ *Strengthening Science at the U.S. Environmental Protection Agency: Research-Management and Peer-Review Practices*, Committee on Research and Peer Review in EPA, Board on Environmental Studies in Toxicology, National Research Council (2000).

⁵⁵ H.R. Conf. Rep. No. 103-715 (1994).

⁵⁶ The testimony was given before the Environment, Technology and Standards Subcommittee, Committee on Science, U.S. House of Representatives.

⁵⁷ Salaries can be paid up to the Executive Level II when an agency has a performance appraisal system which, as designed and applied, is certified as making meaningful distinctions based on relative performance.

⁵⁸ *H.R. 64: A Proposal to Strengthen Science at the Environmental Protection Agency, Hearings before the Environment, Technology and Standards Subcommittee, Committee on Science, U.S. House of Representatives*, 107th Cong. (March 29, 2001) (Statement of Raymond C. Loehr, Ph.D.), available at <http://www7.nationalacademies.org/ocga/testimony/HR64.asp> (last visited July 5, 2012).

scientists employed under this authority. The record shows that EPA responded to the Subcommittee that there is no statutory or regulatory cap on what scientists hired pursuant to the authority can be paid, although EPA had established an internal policy capping pay at \$250,000.⁵⁹ This amount is clearly in excess of the maximum amount authorized under 5 U.S.C. § 5373 of \$155,500. Finally, as noted by both HHS and OPM in their letters to GAO, in the conference report for H.R. 2996, which was enacted as Public Law 111-88 (October 30, 2009), the conferees describe the title 42 authority granted to EPA as supporting the public's best interest by allowing EPA to employ elite scientists who are compensated at or near market rates.⁶⁰ After these hearings and receipt of these reports, Congress passed appropriations authorizing the program at EPA.

This evidence that Congress viewed the authority under 42 U.S.C. §§ 209(f) and (g) as providing pay in excess of the 5 U.S.C. § 5373 pay cap at HHS and EPA, and Congress's decision to extend section 209 authority to certain EPA appointees knowing that EPA planned to set compensation at a level higher than the 5 U.S.C. § 5373 pay cap, lends further support to the conclusion that Congress does not view the 5 U.S.C. § 5373 pay cap as applying to sections 209 (f) and (g) appointees.

Finally, we note that both HHS and OPM maintain that the section 5373 pay cap does not apply to appointments under 42 U.S.C. §§ 209(f) and (g). OPM defers to HHS with regard to the title 42 authorities. Given the evidence of how Congress viewed the authority and the complexity of the numerous pay authorities, we do not object to HHS's interpretation of its pay authority.

CONCLUSION

With respect to the first issue, the 1993 appropriations language unequivocally limits the pay of consultants and scientists appointed for limited periods of time pursuant to 42 U.S.C. §§ 209(f) or (g) at agencies that are funded by the Labor-HHS-Education Appropriations Acts. With regard to the two title 5 limitations, we think the pay limitations do not apply to appointments made pursuant to 42 U.S.C. §§ 209(f) or (g).

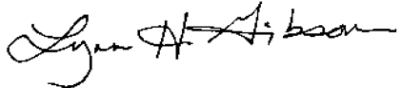
Some of the statutory pay provisions analyzed in this opinion, as mentioned earlier, were enacted nearly 70 years ago in different federal pay systems. As one court has observed, "although some pay systems are 'linked' to one another," they have

⁵⁹ Interior, Environment, and Related Agencies Appropriations for 2009: Hearings before the Subcomm. on Interior of the House Comm. on Appropriations, 110th Cong. 35 (2008). The appropriations for EPA for FY 2009 were subsequently passed as part of the Omnibus Appropriations for 2009, Pub. L. No. 111-8 (2009).

⁶⁰ H. Rep. No. 111-316, at 130 (2009).

not been “fastidiously integrated” to achieve uniform federal compensation policies.”⁶¹ In this case, the issues raised – in particular the applicability of the two title 5 limitations on the title 42 authority to hire special consultants and fellows – reflect the difficulty of applying distinct statutory schemes to determine whether specific pay limits apply. If Congress desires upper pay limits for appointments under sections 209(f) and (g), it may wish to consider amending these provisions to specifically establish such limits.

If you have any questions, please contact Robert J. Cramer, Managing Associate General Counsel, at (202)512-7227.

A handwritten signature in black ink, appearing to read "Lynn H. Gibson". The signature is fluid and cursive, with the first name "Lynn" being the most prominent.

Lynn H. Gibson
General Counsel

⁶¹ *International Organization of Masters, Mates & Pilots v. Brown*, 698 F.2d 536, 539 (C.A.D.C. 1983).