No. 02-217

In the Supreme Court of the United States

VICTORIA WILSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
GREGORY G. KATSAS
Deputy Assistant Attorney General
DOUGLAS N. LETTER
JACOB M. LEWIS
ARA B. GERSHENGORN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner Victoria Wilson's term as a member of the United States Commission on Civil Rights expired on November 29, 2001.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 290 F.3d 347.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2002. The petition for a writ of certiorari was filed on August 7, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States Commission on Civil Rights is charged with investigating allegations that United States citizens have been deprived of the right to vote because of "color, race, religion, sex, age, disability, or

national origin," or "as a result of any pattern or practice of fraud." 42 U.S.C. 1975a(a)(1). The Commission has no power to enforce federal law. See generally *Hannah* v. *Larche*, 363 U.S. 420, 440 (1960).

When the Commission was first created in 1957, it was composed of six members appointed by the President with the advice and consent of the Senate. Civil Rights Act of 1957, Pub. L. No. 85-315, § 101(b), 71 Stat. 634. The statute that established the Commission provided that "[n]ot more than three of the members shall at any one time be of the same political party." *Ibid.* Under the 1957 Act, the Commission's members were appointed for open-ended terms and served "at the pleasure of the President." H.R. Rep. No. 197, 98th Cong., 1st Sess. 4 (1983).

In 1983, Congress reauthorized the Commission and made a number of changes to its structure. See United States Commission on Civil Rights Act of 1983, Pub. L. No. 98-183, 97 Stat. 1301. The 1983 Act expanded the Commission's membership from six to eight members, while maintaining the requirement of partisan balance by providing that no more than four members at any one time could be of the same political party. § 2(b)(1), 97 Stat. 1301. The Act also provided that four members of the Commission would be appointed by the President, two by the Senate President pro tempore, and two by the Speaker of the House. § 2(b)(1)(A)-(C), 97 Stat. 1301. The Act further specified that "[t]he President may remove a member of the Commission only for neglect of duty or malfeasance in office." § 2(d), 97 Stat. 1301.

The 1983 Act also created a system of fixed and regularly-staggered six-year terms. The Act stated as a general rule that the "term of office of each member of the Commission shall be six years." § 2(b)(2), 97 Stat.

1301. As an exception to that rule, however, the Act provided that half of the Commission's initial members would serve for three-year terms. See § 2(b)(2) and (3), 97 Stat. 1301. The Act further stated that "any member appointed to fill a vacancy shall serve for the remainder of the term for which his predecessor was appointed." § 2(b)(2), 97 Stat. 1301. The effect of those provisions, taken together, was that the terms of office of half of the members of the Commission would expire at every three-year interval.

In 1994, Congress again reauthorized the Commission. Civil Rights Commission Amendments Act of 1994, Pub. L. No. 103-419, 108 Stat. 4338.[1] The 1994 Act preserved the same division of appointment power among the President and congressional leaders, maintained the same requirements for partisan balance among the membership of the Commission, and preserved the protection afforded to Commission members against removal by the President except for cause. § 2, 108 Stat. 4338-4339 (codified at 42 U.S.C. 1975(b) and (e)). Like the 1983 Act, the 1994 Act provided that "[t]he term of office of each member of the Commission shall be 6 years." § 2, 108 Stat. 4338 (codified at 42 U.S.C. 1975(c)). But instead of the complex initial staggering provisions that had followed that sentence in the 1983 Act, the 1994 Act simply stated that "[t]he

[1] Although the 1994 Act stated that the Commission would terminate on September 30, 1996, see Pub. L. No. 103-419, § 2, 108 Stat. 4342 (codified at 42 U.S.C. 1975d), Congress has continued to appropriate funds for its operations. See Pub. L. No. 107-77, 115 Stat. 748 (2001); Pub. L. No. 106-553, 114 Stat. 2762 (2000); Pub. L. No. 106-113, 113 Stat. 1501 (1999); Pub. L. No. 105-277, 112 Stat. 2681 (1998); Pub. L. No. 105-119, 111 Stat. 2440 (1997); Pub. L. No. 104-134, 110 Stat. 1321 (1996); Pub. L. No. 104-208, 110 Stat. 3009 (1996).

term of each member of the Commission in the initial membership of the Commission shall expire on the date such term would have expired as of September 30, 1994." § 2, 108 Stat. 4338-4339 (codified at 42 U.S.C. 1975(c)).

2. On November 30, 1995, then-President Clinton appointed Judge A. Leon Higginbotham, Jr., to a six-year term as a member of the Commission. Pet. App. 5a. Judge Higginbotham's commission stated that his appointment was "for a term expiring November 29, 2001." *Ibid.* On December 14, 1998, Judge Higginbotham died in office. *Ibid.* On January 13, 2000, President Clinton appointed petitioner Victoria Wilson to the Commission to fill the vacancy created by Judge Higginbotham's death. *Ibid.* Petitioner Wilson's commission stated that her appointment was "for the remainder of the term expiring November 29, 2001." *Ibid.*

On December 6, 2001, President Bush appointed respondent Peter Kirsanow to succeed petitioner Wilson on the Commission. Pet. App. 5a. Respondent Kirsanow was sworn into office the same day, but the Chair of the Commission refused to recognize him as a member and refused to allow him to participate in Commission activities. *Ibid.* The Chair instead continued to recognize petitioner Wilson as a member and allowed her to participate as such. *Ibid.*

3. The United States and respondent Kirsanow filed suit against petitioner Wilson in the United States District Court for the District of Columbia, seeking a declaratory judgment that petitioner Wilson's term had expired and that respondent Kirsanow was therefore a member of the Commission. The other petitioners—*i.e.*, the Commission itself, Mary Frances Berry (the Chair of the Commission), and Cruz Reynoso (the

Vice-Chair of the Commission)—were granted leave to intervene by the district court. See Pet. App. 5a-6a. The district court issued an oral ruling granting summary judgment for petitioners. *Id.* at 29a-39a.

The district court concluded that, under the 1994 Act, each individual appointed to the Commission is entitled to serve for a six-year period, and that petitioner Wilson was therefore the proper occupant of the disputed seat. Pet. App. 31a-32a. The court acknowledged the "serious argument" that "deletion of the requirement of staggered terms would seriously undermine the clear Congressional intent to maintain the bipartisan nature of the Commission as well as its integrity and credibility." *Id.* at 35a. The court stated, however, that its ruling would not result in the "complete elimination of all staggering," *ibid.*, but would simply lead to "the absence of uniformly staggered terms," *id.* at 36a. The court found that result to be unproblematic, based in part on its view that "staggering was not considered one of the major protections being enacted for the Commission." *Ibid.*

4. A unanimous panel of the Court of Appeals for the District of Columbia Circuit reversed. Pet. App. 1a-28a. The court explained that there are "two kinds of official terms." *Id.* at 9a. "One kind of 'term,'" the court stated, refers to "a period of personal service," in which "the term is appurtenant to the person." *Ibid.* (emphasis omitted). The other kind of term refers to "a *fixed slot of time* to which individual appointees are assigned," in which "the person is appurtenant to the term." *Ibid.* "In other words," the court explained, "a 'term of office' can either run with the person or with the calendar." *Ibid.* The court of appeals found that the first sentence of 42 U.S.C. 1975(c), which states that "[t]he term of office of each member of the Commission

shall be 6 years," was reasonably susceptible of either reading. Pet. App. 9a.

The court of appeals next considered the broader context of Section 1975(c) and the structure of the 1994 Act as a whole, as well as the background against which Congress had legislated. The court observed that "every presidential appointee to the Commission since 1983 has been appointed to a term of office expiring six years from the date her predecessor's term expired," Pet. App. 16a, and that "the practice of appointing members to the Commission on Civil Rights is but an example of what has been the unbroken position of the Attorney General and the Justice Department on executive appointments," *id.* at 17a. The court of appeals stated that "[i]n appointing [petitioner] Wilson for the remainder of Judge Higginbotham's term of office, President Clinton was following an established Executive Branch practice which was known to Congress." *Id.* at 20a.

The court of appeals also observed, based on "the plain text and the historical events surrounding the 1983 reauthorization of the Commission," that "Congress went to great lengths to put various structural features in place to preserve the independence, autonomy, and non-partisan nature of the Commission. Clearly staggering was one of those features." Pet. App. 22a. The court found it

> evident that in staggering the membership (among other features), Congress was insulating the Commission from carte blanc replacement at any given time. To suggest that Congress abolished this practical structural feature without any indication that it intended to—evidenced by the fact that the Clinton and Bush Administrations continued to

> treat the Commission as a body with staggered membership—presents a highly improbable scenario. There is no evidence in or external to the 1994 Act that Congress meant to disrupt the system it had meticulously put into motion.

Id. at 22a-23a.

The court of appeals rejected petitioners' contention that Congress's intent to alter the Commission's structure could be inferred from the 1994 Act's elimination of the prior provision that "any member appointed to fill a vacancy shall serve for the remainder of the term for which his predecessor was appointed." Pet. App. 24a. The court observed that the 1994 Act involved "not a new agency, but a Commission that Congress had *already* established and was merely reauthorizing. In the process Congress removed provisions pertaining to the initial staggering of the Commission which also included the vacancy provision. What that leaves is not different words, * * * but rather silence." *Ibid.* Relying on the principle that "Congress is unlikely to intend any radical departures from past practice without making a point of saying so," *id.* at 25a (quoting *Jones* v. *United States*, 526 U.S. 227, 234 (1999)), the court concluded that "the 1994 Act maintained the structure of the Commission as reauthorized in 1983, and thus [petitioner] Wilson was appointed to fill an unexpired term, rather than to a new term of her own," *ibid.*

Finally, the court of appeals observed that its interpretation of the 1994 Act "avoids anomalous results." Pet. App. 26a. The court found "no apparent reason Congress would originally create fixed, staggered terms, as it did under the 1983 Act, only to have them become unpredictably de-staggered over time as

some members of the Commission resign, retire, are removed, or die." *Ibid.* The court also noted that under petitioners' construction of the Act, "de-staggering could arise from concerted resignations near the end of a President's term, allowing an outgoing President to appoint several members of the Commission at once, precluding his successor from appointing any members of the Commission." *Id.* at 26a-27a. The court reversed the judgment of the district court and remanded the case with instructions to grant summary judgment for respondents. *Id.* at 28a.[2]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The statutory provision at issue in this case states that "[t]he term of office of each member of the

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[2] Because petitioner Wilson's commission memorializes an appointment "for the remainder of the term expiring November 29, 2001" (Pet. App. 20a), the court of appeals observed, "it is clear that President Clinton intended to appoint Wilson to the *remainder of a term* and not to a full six-year term." *Id.* at 21a. The court noted that, if petitioner Wilson's interpretation of the 1994 Act were the correct one, the validity of her initial appointment could be called into question, since "[i]t could be seen as an attempt by the President to appoint Wilson to a position that did not exist." *Id.* at 21a-22a. The court also noted that, in light of petitioner Wilson's acceptance of the commission and her failure to challenge its terms before the commission expired, "she is arguably bound by those terms, and estopped from asserting an alleged violation of 42 U.S.C. § 1975(c)." *Id.* at 21a n.2. Because the court concluded that the terms of petitioner Wilson's commission reflected a correct understanding of the 1994 Act, it declined to resolve those issues. See *id.* at 21a n.2, 22a.

Commission shall be 6 years." 42 U.S.C. 1975(c). As the court of appeals correctly held (Pet. App. 9a), that language viewed in isolation is ambiguous. As the court explained, Section 1975(c) can be read to provide that "[e]ach individual member of the Commission, however appointed, whenever appointed, is entitled to serve a six-year period of time—*i.e.*, the term runs with the person." *Id.* at 8a-9a. The court recognized, however, that the pertinent language can also be read to "establish[] six-year terms of office, beginning and ending on fixed dates, irrespective of whether and when individuals are appointed to fill them. Under this reading, each member of the Commission must be assigned to a fixed, six-year 'slot' of time—*i.e.*, the term runs with the calendar." *Id.* at 9a.

For more than a century, the consistent understanding of the Executive Branch has been that, when a statute establishes *staggered terms* for a multi-member body, provisions like the one at issue here will be construed to provide for terms that are fixed slots of time. In 1882, Attorney General Brewster provided an opinion for the President addressing that situation. See 17 Op. Att'y Gen. 476 (1890). A mid-term vacancy arose in the office of one of the two civil Commissioners for the District of Columbia. The terms of the Commissioners were governed by the following provision: "The official term of said Commissioners appointed from civil life shall be three years and until their successors are appointed and qualified; but the first appointment shall be one Commissioner for one year and one for two years, and at the expiration of their respective terms their successors shall be appointed for three years." *Ibid.* The question for the Attorney General was whether the President was authorized to appoint a

successor for a new three-year period, or simply for the duration of the existing term.

The Attorney General began by explaining:

> There are two kinds of official terms, one or the other of which Congress doubtless had in mind in this enactment. In one the term is appurtenant to the person. Thus "collectors * * * shall be appointed for the term of four years" (Rev. Stat., sec. 2613), and in such cases, if the collector dies or resigns, the term which is *his* ends, and his successor begins a like term of four years.
>
> In the other, the term is a legal fixture as to beginning and duration, and the person is, so to speak, appurtenant. Thus certain Senatorial terms commence March 4, 1883, and continue six years. The incumbent on that day may or may not fill out the term. If one dies or resigns the term remains, and some other person or persons may be put in to hold the unexpired part, but not to begin a like term.

17 Op. Att'y Gen. at 476-477.

The Attorney General acknowledged that "[u]ndeniably the former kind is that which is usually prescribed, and when the latter kind is created some apt expression of the intent will be found." 17 Op. Att'y Gen. at 477. The Attorney General found, however, that an intent to create the "latter kind" of official term—*i.e.*, one in which a person appointed mid-term to fill a vacancy serves only for the remainder of the term—could be inferred from the system of staggered appointments that was evidently intended to preserve continuity of operations by preventing both seats on the D.C. Commission from becoming vacant at once. The Attorney General observed that such a

> scheme of arranging the several official terms in a fixed consecutive series has been long and successfully applied to official bodies in all departments of the Government.
>
> The vital essence of such a plan is that the term is fixed, and the officer, as it were, belongs to it.
>
> When Congress therefore so arranges the first appointment that the full terms shall begin consecutively at the end of one and of two years, does it not substantially follow the plan on which the Senate and like bodies are organized, and with the same intent.

Id. at 477-478.

As the court of appeals recognized (Pet. App. 17a), "the unbroken position of the Attorney General and the Justice Department" has been that, where the governing statute establishes staggered terms for a multi-member commission, an individual appointed to fill a mid-term vacancy serves only until the expiration date of his predecessor's term. *Id.* at 17a-18a. Because Congress is presumed to preserve, not abrogate, the background understandings against which it legislates, see, *e.g.*, *Bennett* v. *Spear*, 520 U.S. 154, 163 (1997); *Norfolk Redev. & Hous. Auth.* v. *Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983); *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979), that consistent Executive Branch practice provides considerable support for the court of appeals' construction of Section 1975(c).

The interpretive rule described above, moreover, "has been consistently applied to executive appointments to the Commission on Civil Rights both in its previous incarnation under the 1983 Act and as

constituted under the 1994 Act." Pet. App. 18a. And, as the court of appeals observed, "Congress has re-appropriated funds for the Commission, effectively re-authorizing it, each year since it was supposed to terminate in 1996, and yet it has not once suggested that the Executive Branch's implementation of the law was incorrect." *Id.* at 16a-17a. Although the court of appeals did not find prior Executive Branch practice to be dispositive of the interpretive question before it, see *id.* at 18a-19a ("It is of course possible that the consistent practice of Presidents Clinton and Bush in appointing members of the Commission has been consistently wrong."), it reasonably concluded that this practice supported a "fixed-slot" reading of the statute.[3]

2. The historical development of the statutory provisions governing the Commission's structure further supports the court of appeals' interpretation of Section

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[3] There is no merit to petitioners' contention (Pet. 20) that the court of appeals "improperly allowed the executive branch, through its recent appointment practices, effectively to rewrite the statute." The court stated that it was "not that the President's 'interpretation' of 42 U.S.C. § 1975(c) is due deference, * * * but rather that the Executive Branch's interpretation of the law through its implementation colors the background against which Congress was legislating." Pet. App. 17a. The court of appeals also did not "ignore[] the significance of *the Congress's* appointment practice." Pet. 22. Rather, the court examined prior congressional practice but found it to be uninstructive in construing the pertinent statutory language because "Congress has been inconsistent in its appointments under *both* the 1983 Act and the 1994 Act, generally failing to indicate termination dates for appointees, and on one occasion indicating the appointment was to run six years from the date of appointment." Pet. App. 18a n.1. The court of appeals also observed that the most recent congressional appointment to the Commission is consistent with the court's interpretation of the statute. *Ibid.*

1975(c). In 1983, Congress substantially amended the statute, going "to great lengths to put various structural features in place to preserve the independence, autonomy, and non-partisan nature of the Commission. Clearly staggering was one of those features." Pet. App. 22a. The legislative history of the 1994 Act does not suggest that Congress intended to effect a significant modification of these features. This Court has recognized that "Congress is unlikely to intend any radical departure from past practice without making a point of saying so." *Jones* v. *United States*, 526 U.S. 227, 234 (1999). As the court of appeals observed, "[t]o suggest that Congress abolished this practical structural feature without any indication that it intended to * * * presents a highly improbable scenario." Pet. App. 23a.

3. Petitioners contend (Pet. 18) that "Congress provided for and then removed a special rule for 'vacancy' appointments." They observe (*ibid.*) that the 1983 Act addressed in detail the manner in which the regular staggering should be implemented, and included language dealing specifically with the filling of mid-term vacancies. Petitioners argue (Pet. 18-19) that Congress's deletion of that language in 1994 implies an affirmative intent to adopt a different rule for the filling of such vacancies. The court of appeals correctly rejected that contention, explaining that "here we have not a new agency, but a Commission that Congress had *already* established and was merely reauthorizing. In the process Congress removed provisions pertaining to the initial staggering of the Commission which also included the vacancy provision. What that leaves is not different words, * * * but rather silence." Pet. App. 24a. The court further observed that "[h]ad Congress intended to change the established practice for appoint-

ing members of the Commission on Civil Rights, it could have affirmatively indicated its intent to do so. It did not." *Id.* at 25a. Congress's deletion of language specifically defining the length of time for which mid-term appointees will serve leaves that question to be resolved by reference to the established background presumption that, on a multi-member body whose members serve staggered terms, a mid-term appointee serves only until the expiration date of his predecessor's term.

Petitioners also attach significance (see Pet. 9-10) to the fact that the original version of the bill that became the 1994 Act provided that the "current staggering of terms shall continue in effect." H.R. 4999, 103d Cong., 2d Sess. § 2(c) (1994). That language was not included in the final version of the Act. As the court of appeals recognized, however, Congress may have "considered such language simply unnecessary in light of the addition of the provision that the terms of 'initial' members 'shall expire on the date such term would have expired as of September 30, 1994.'" Pet. App. 23a (quoting 42 U.S.C. 1975(c)). The fact that Congress might have expressed its intent even more clearly, by specifically defining the length of time for which a mid-term appointee would serve, does not detract from the force of the applicable interpretive presumption in construing the Act in its current form.

4. Contrary to petitioners' contention (Pet. 5), the ruling of the court of appeals will not "adversely affect[]" the autonomy and effectiveness of the Commission. Rather, as the court of appeals understood, it is petitioners' construction that "would invite the very sort of political manipulation"—including destaggering from "concerted resignations" at the end of an outgoing President's term—that led Congress to restructure the

Commission in 1983. Pet. App. 26a-27a. Regular fixed staggering also serves "to insulate the Commission from * * * carte blanc replacement at any given time." *Id.* at 27a. The court of appeals correctly determined that Congress "did not intend for the benefits of that provision to be destroyed as some future appointees, either because of random events or strategic behavior inevitably failed to serve out their terms." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
GREGORY G. KATSAS
Deputy Assistant Attorney General
DOUGLAS N. LETTER
JACOB M. LEWIS
ARA B. GERSHENGORN
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OCTOBER 2002