

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

Nos. 06-5113, 06-5135

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, et al.,

Plaintiffs-Appellees/Cross-Appellants

v.

DONALD H. RUMSFELD,
SECRETARY, UNITED STATES DEPARTMENT OF DEFENSE, et al.,

Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICUS CURIAE NATIONAL TREASURY EMPLOYEES UNION IN
SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

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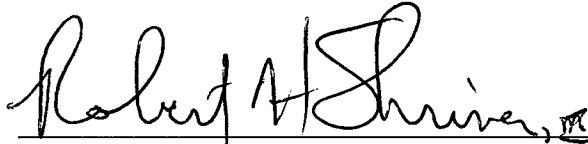
CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1, the undersigned counsel hereby certifies as follows:

1. The National Treasury Employees Union (NTEU) is an unincorporated, non-profit professional organization serving as the exclusive collective bargaining representative of approximately 150,000 employees of the federal government pursuant to 5 U.S.C. §§ 7101-7135.

2. NTEU has no parent companies.

3. No publicly held company has any ownership interest in NTEU.



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GLOSSARY

<i>DHS</i>	U.S. Department of Homeland Security
<i>DoD</i>	U.S. Department of Defense
<i>FLRA</i>	Federal Labor Relations Authority
<i>FLRC</i>	Federal Labor Relations Council
<i>FSLMRS</i>	Federal Service Labor-Management Relations Statute
<i>HSA</i>	Homeland Security Act
<i>HSLRB</i>	Homeland Security Labor Relations Board
<i>NDAA</i>	National Defense Authorization Act for Fiscal Year 2004
<i>NLRB</i>	National Labor Relations Board
<i>NSLRB</i>	National Security Labor Relations Board
<i>NSPS</i>	National Security Personnel System
<i>NTEU</i>	National Treasury Employees Union
<i>OPM</i>	U.S. Office of Personnel Management

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INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT¹

The National Treasury Employees Union (NTEU) is a federal sector labor union representing approximately 150,000 federal employees in 30 agencies and departments, including approximately 14,000 employees of the Department of Homeland Security (DHS). DHS, along with the Office of Personnel Management (OPM), promulgated regulations pursuant to statutory authority similar to that at issue in this case to establish a

¹ The Court granted NTEU's motion to participate as an amicus curiae on September 19, 2006.

new human resources management system for DHS. See 70 Fed. Reg. 5272-5347 (Feb. 1, 2005). In NTEU v. Chertoff, 452 F.3d 839 (D.C. Cir. 2006), this Court ruled that the labor relations portion of those regulations failed to ensure employees' right to bargain collectively, as required by the Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2230 (2002) (HSA).

The jointly issued Department of Defense (DoD) and OPM regulations establishing the National Security Personnel System (NSPS) (70 Fed. Reg. 66116-66220 (Nov. 1, 2005)), were patterned largely after the illegal DHS program (called "MaxHR"). See AFGE v. Rumsfeld, 422 F. Supp. 2d 16, 40 (D.D.C. 2006) (noting the "striking similarities" in the DHS and DoD regulations). They were promulgated pursuant to the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1621 (NDAA), which, like the HSA, required that the regulations ensure that employees may bargain collectively. See 5 U.S.C. § 9902(b)(4). As did the DHS regulations, these regulations violate that mandate.

In this amicus brief, NTEU focuses on the legal defects of the regulations concerning the National Security Labor Relations Board (NSLRB). The NSLRB is identical in all material respects to the Homeland Security Labor Relations Board (HSLRB), which DHS and OPM created to adjudicate labor disputes under the DHS scheme. This Court deferred addressing the unions' challenge to

the lawfulness of the HSLRB in Chertoff because it agreed that other important features of the review scheme there (including the regulations conscripting the Federal Labor Relations Authority (FLRA) to review HSLRB decisions) were illegal. Should DHS and OPM issue new regulations in the wake of Chertoff, it is crucial to NTEU and the employees it represents that those regulations guarantee employees and unions a neutral and independent forum to adjudicate labor relations disputes and enforce collective bargaining rights.

As we show below, contrary to the NDAA, the NSLRB, like the HSLRB, is not an "independent third party," and bears no resemblance to the kinds of adjudicatory bodies that Congress has charged with overseeing systems of "collective bargaining" in other statutes. Therefore, under the reasoning of Chertoff, the use of the NSLRB violates the NDAA's statutory command to "ensure" employees' rights to bargain collectively.

ARGUMENT

I. THE NSLRB IS NOT AN INDEPENDENT THIRD PARTY AND, CONSEQUENTLY, FAILS TO ENSURE EMPLOYEES' RIGHT TO BARGAIN COLLECTIVELY

The NDAA gives DoD and OPM the authority, during a five-year experimentation period, to devise a new labor relations system governing DoD employees. See 5 U.S.C. § 9902(m)(1). Like the HSA, it requires, among other things, that any such system "ensure that employees may . . . bargain collectively." Id. at § 9902(b)(4). It also specifically mandates that "the labor relations system . . . shall provide for independent third party review of decisions. . . ." Id. at § 9902(m)(6).

As we show below, the use of the NSLRB to decide collective bargaining disputes under the NSPS regulations violates both of these inter-related statutory commands. Accordingly, this Court should affirm the decision of the district court and rule the regulations concerning the NSLRB unlawful.

A. The Use of a Management-Controlled Board To Decide Labor Disputes Is Inconsistent with the Statutory Requirement To "Ensure" Employees' Right To Bargain Collectively

The district court held that the regulations establishing and assigning powers and duties to the NSLRB violate the statutory requirement that an "independent third party" resolve labor relations disputes. See Rumsfeld, 422 F. Supp. 2d at 45-47 (citing 5 U.S.C. § 9902(m)(6)). On appeal, the government

contends that "the district court erred in substituting its own judgment for the agencies' in deciding what precise protections" [the term 'independent third party'] may encompass." Gov't Br. at 44. It argues that the term "independent" is a "flexible one" whose meaning "varies with context." Id. at 43. It further argues that various features of the regulations provide adequate safeguards to ensure the "independence" of the NSLRB. Id. at 41-43. The government's arguments are without merit.

The government's contention that the agencies were entitled to deference in determining the characteristics of the NSLRB collides with the statutory requirement of the NDAA to ensure DoD employees' right to bargain collectively, as well as this Court's holding in Chertoff. As this Court recognized in Chertoff, "[c]ollective bargaining' is a term of art in the federal sector that has been defined by Congress in the FSLM[R]S." Chertoff, 452 F.3d at 857 (citing 5 U.S.C. § 7103(a)(12)). As in the case of the DHS regulations, collective bargaining under the NSPS should "gain[] meaning from the application of that same term under [the FSLMRS]" and should "be consistently construed" under both the FSLMRS and the NDAA. Id. at 858.

DoD's use of the management-controlled NSLRB to resolve disputes under its labor relations scheme is a dramatic departure from the federal sector collective bargaining model

and therefore violates the central holding of Chertoff. The FLRA, which is responsible for adjudicating collective bargaining disputes under the FSLMRS, consists of individuals who are appointed by the President with the advice and consent of the Senate.² This model mirrors private sector collective bargaining regimes.³

The NSLRB, by contrast, consists of three members appointed in the sole and unreviewable discretion of the Secretary of Defense. See 5 C.F.R. § 9901.907(b)(1). The Secretary has exclusive and unreviewable discretion to remove members for "inefficiency, neglect of duty, or malfeasance in office." See id. at § 9901.907(b)(2). He also has sole and unreviewable discretion to re-appoint members, and to pack the Board with additional members over and above the initial three, so long as the Board continues to consist of an odd number of members. See id. at § 9901.907(b)(1). There is no analog to this skewed

² Indeed, because it adjudicates labor disputes in the public sector, the FLRA has an added safeguard against bias in that no more than two members may be from the same political party. See 5 U.S.C. § 7104(a).

³ Thus, the National Labor Relations Board is an independent agency constituted of members appointed by the President with Senate confirmation. See 29 U.S.C. §§ 153, 154(a). The National Railroad Adjustment Board, which resolves disputes concerning grievances or the application of agreements concerning rates of pay, rules, or working conditions under the Railway Labor Act, consists of an equal number of members appointed by labor and management. See 45 U.S.C. § 153(i).

dispute resolution scheme in any statutory collective bargaining system.

Further, unlike the members of the FLRA (or of the NLRB for that matter) the NSLRB is charged with both investigating and adjudicating labor disputes arising at DoD. See 5 C.F.R. § 9901.908. An independent investigative entity, however, is a fundamental component of dispute resolution in any regime of collective bargaining. Congress has previously repudiated as "failed" and "discredited" the Taft-Hartley Act approach to dispute resolution, adopted in the DoD regulations, under which one body was to act as "investigator, prosecutor, jury, and judge all rolled into one," as the NSLRB is. See NTEU v. Chertoff, 385 F. Supp. 2d 1, 20 (D.D.C. 2005), aff'd in part and rev'd in part, 452 F.3d 839 (D.C. Cir. 2006) (citing legislative history of Labor-Management Relations Act). Thus, it amended the National Labor Relations Act to create the position of General Counsel as prosecutor and NLRB members as neutral adjudicators. Id. The General Counsel, just as NLRB members, has specific statutory duties and is nominated by the President and approved by the Senate. See 29 U.S.C. § 153(d).

The federal sector model follows this approach. As with the NLRB, it is the FLRA's General Counsel who investigates and enforces the Act, while the FLRA's members adjudicate disputes. See 5 U.S.C. § 7104. The General Counsel is appointed

separately by the President, confirmed separately by the Senate, and has separate statutory responsibilities. Id. at § 7104(f). The DoD regulations' merger of the investigatory and adjudicatory functions into one body--the NSLRB--cannot be squared with the command of the Chertoff Court that "collective bargaining" be construed consistently with the FSLMRS.

Indeed, as the district court recognized, the NSLRB "shares few attributes with other 'independent' bodies in the Executive branch." Rumsfeld, 422 F. Supp. 2d at 46. The NSLRB actually bears a far greater resemblance to the system for dispute resolution that Congress repudiated when it first extended statutory collective bargaining rights to federal employees in the FSLMRS. Thus, under the executive order regime that preceded the FSLMRS, labor disputes were resolved by a management-controlled board called the Federal Labor Relations Council (FLRC). When Congress extended statutory collective bargaining rights to federal employees, it deliberately jettisoned the FLRC and substituted the FLRA, an independent agency that, as mentioned above (at 6) was modeled upon the NLRB. It did so precisely in order to "assure impartial adjudication of labor-management cases."⁴ See S. Rep. No. 95-

⁴ The members of the NSLRB are actually even less neutral than were the members of the FLRC. The FLRC consisted of the head of the Civil Service Commission, the Secretary of Labor, and an official of the Executive Office of the President (the Director

969, at 7-8, 99 (1978), reprinted in 2 Legislative History of the Civil Service Reform Act of 1978, Comm. Print 96-2, 1461, 1471-72, 1563 (Mar. 27, 1979) (hereafter "CSRA Legis. Hist."); H.R. Rep. No. 95-1403, at 41-42, reprinted in 1 CSRA Legis. Hist., 636, 678-79.

As in the case of the DHS regulations at issue in Chertoff, collective bargaining under the NSPS should "gain[] meaning from the application of that same term under [the FSLMRS]" and should "be consistently construed" under both the FSLMRS and the NDAA. 452 F.3d at 858. Assigning a management controlled board such as the NSLRB to investigate, prosecute, and resolve labor disputes is a "flagrant departure from the norms of collective bargaining underlying the FSLMRS." Id. at 862. Accordingly, the regulations violate the statutory command to ensure employees' right to bargain collectively, and the district court properly invalidated them.

of the Office of Management and Budget). See E.O. 11491 (Oct. 29, 1969). Those positions were all subject to Senate confirmation. Further, the FLRC's decisions involved disputes that arose government-wide, so the Council's members were more often than not resolving disputes at agencies other than their own (and the Council thus constituted a "third party"). By contrast, the members of the NSLRB are accountable to no one but the Secretary and are assigned to adjudicate disputes arising solely within the very department he heads.

B. The Regulations Establishing the NSLRB Are Also Unlawful Because the Board Is Not an "Independent Third Party"

In addition to violating the statutory command to ensure employees' right to bargain collectively, the adjudicatory scheme established by the DoD regulations also violates the explicit statutory requirement that an "independent third party" be employed to resolve labor relations disputes. See Rumsfeld, 422 F. Supp. 2d at 45-47 (citing 5 U.S.C. § 9902(m)(6)). The NSLRB is not "independent" because its members are appointed by, and beholden to, the Secretary of Defense. Further, the NSLRB is not a "third party" because the Board is an entity within DoD and its members are DoD employees.

1. The NSLRB is not "independent"

First, the NSLRB is not an "independent" body. As the district court recognized, while the regulations provide that the Secretary may only remove NSLRB members for inefficiency, neglect of duty, or misconduct, this "one procedural safeguard" (see Rumsfeld, 422 F. Supp. 2d at 47) is theoretical only and, in any event, does not transform the NSLRB into an independent adjudicatory body. In fact, the Secretary decides, in his sole and unreviewable discretion, who will be appointed to the Board, whether members will be removed during their term, and whether they will be reappointed after their term expires. See 5 C.F.R. § 9901.907. The Secretary appraises the members' performance,

just as other DoD employees' performance is appraised. See Rumsfeld, 422 F. Supp. 2d at 46 (citing 5 C.F.R. §§ 9901.907(b)-(d), 9901.908). Unlike career DoD employees, though, the NSLRB members enjoy no civil service protections, including the right to a hearing before an independent third party to challenge their removal. See id.

Further, as noted above (at 6-7), unlike the FLRA members, who are appointed by the President with Senate confirmation, members of the NSLRB are appointed by the Secretary in his sole discretion. The combination of exclusive appointment and removal authority undermines any claim that the NSLRB is an "independent" body. See Morrison v. Olson, 487 U.S. 654, 692-693 (1988) (Congress concluded that, to ensure its independence, it was "essential" to vest the power to appoint the Independent Counsel outside the Executive Branch); see also Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, 501 U.S. 252, 268 (1991) (Board of Review is agent of legislative branch where Congress effectively controls appointment of members as well as their removal).

The other safeguards of "independence" identified in the government's brief (at 41-43) are equally unpersuasive. For example, the requirement in 5 C.F.R. § 9901.907(b)(2) that NSLRB members be "independent, distinguished citizens of the United States who are well known for their integrity, impartiality, and

expertise' in labor relations, DoD's mission, and/or national security matters" is essentially meaningless because the Secretary alone decides whether the requirement is met. Similarly, the fact that the Secretary must "consider[]" nominees submitted by labor organizations for all positions on the NSLRB, except the chair (see id. at § 9901.907(d)(1)), is of no import because he is not required to select such nominees nor even to give them any greater consideration than a nominee submitted by any other individual or group.

Nor do the regulations authorizing the NSLRB "to establish its own rules and internal operating procedures" provide adequate assurances of independence. See id. at §§ 9901.907(g)(1), 9901.908(b); see Gov't Br. at 42 (citing 70 Fed. Reg. at 66130, 66179). Rules for pursuing cases before the NSLRB and the operating procedures it will adopt do not alter the fundamentally subservient role that the Board's members possess in relation to the Secretary. An arm of management that can establish its own rules and procedures nonetheless remains an arm of management if its members are functionally employees of the Secretary.

2. The NSLRB is not a "third party"

In any event, the NSLRB is not a "third party." The government's brief completely ignores this separate, albeit related, requirement. It is "axiomatic", however, that "all

words and provisions of a statute are presumed to have meaning and are to be given effect." See Greyhound Corp. v. Interstate Commerce Comm'n, 668 F.2d 1354, 1362 (D.C. Cir. 1981). The requirement that the Board be a third party, therefore, cannot be dismissed as mere surplusage, but instead must be read as a further limit on the agencies' discretion to structure the dispute resolution system.

A "third party" is "[o]ne who is not a party to a lawsuit, agreement, or other transaction but who is somehow involved in the transaction; someone other than the principal parties." Black's Law Dictionary 1489 (7th ed. 1999). See Gentry v. Flint Eng'g & Constr. Co., 76 F.3d 95, 96 (5th Cir. 1996) (per curiam) ("In a statute which describes the legal duties owed between employers and employees, 'third-party' clearly must exclude these first and second parties"); cf. Niklos Drilling Co. v. Cowart, 927 F.2d 828, 829 n.1 (5th Cir. 1991) (en banc), aff'd, 505 U.S. 469 (1992) (Longshore and Harbor Workers Compensation Act defines third party as "some person other than the employer or a person or persons in his employ"). In federal sector labor relations, the "third parties" are entities or individuals who cannot be characterized as either agents or employees of either of the principals to the collective bargaining relationship. Instead, they consist of arbitrators who are chosen jointly by the parties; the FLRA's General Counsel, who is appointed by the

President, confirmed by the Senate, and removable by the President (see 5 U.S.C. § 7104(f)(1)); administrative law judges who are employed by the FLRA, an independent agency not controlled by any of the employer-agencies that appear before it; and the FLRA, consisting of three members appointed by the President, confirmed by the Senate, and removable by the President (see 5 U.S.C. § 7104(b)-(c)).⁵

In contrast to these independent adjudicatory bodies, the NSLRB is not a "third party"—i.e., an entity "other than the employer or a person or persons in his employ." It is, instead, an entity within DoD, whose members, as we showed above (at 6-7, 10-12), are nothing more than DoD employees without civil service protections. Accordingly, the use of the NSLRB to resolve labor disputes violates the explicit statutory requirement of the NDAA that a "third party" make such decisions.

II. THE REGULATIONS PROVIDING FOR FLRA REVIEW OF NSLRB DECISIONS DO NOT CURE THE NSLRB'S LEGAL DEFECTS

In defending the use of the NSLRB to adjudicate disputes under the regulations, the government relies upon the fact that the regulations purport to provide for FLRA review of NSLRB decisions. See id. at § 9901.909(a)(4). As Chertoff

⁵ Bargaining impasses in the federal sector are referred to the Federal Service Impasses Panel, which is a part of the FLRA. See 5 U.S.C. § 7119.

establishes, however, the Secretary lacks the authority to conscript the FLRA to play this role in DoD's labor relations regime. 452 F.3d at 865-66. Moreover, and in any event, the regulations providing for FLRA review of NSLRB decisions under a highly deferential standard do not transform the NSLRB into an independent third party.

A. The Agencies Lack the Authority To Conscript the FLRA To Adjudicate Cases Under the DoD Regulations

In Chertoff, the unions challenged the validity of regulations in which DHS and OPM purported to assign new jurisdiction to the FLRA and dictate the procedures and standards it was to apply in adjudicating cases arising under the new jurisdiction. This Court agreed with the unions, declaring the regulations invalid. See Chertoff, 452 F.3d at 865-66.

While a similar claim concerning the role of the FLRA in the NSPS has not been raised in this litigation, DoD and OPM are still limited to exercising the statutory authority that Congress granted them, and they may not exceed it. There is no distinction between the language of the HSA and of the NDAA that would authorize DoD and OPM to conscript an independent agency--the FLRA--into its scheme and dictate the way it is to consider cases.

The NDAA does not amend the FSLMRS, does not authorize DoD and OPM to amend the FSLMRS, and indeed, does not even mention the FLRA. Nothing in the NDAA delegates to DoD the power "to regulate the work of the Authority or alter its statutory jurisdiction." Chertoff, 452 F.3d at 865. While Congress did authorize DoD and OPM to "defin[e] what decisions are reviewable by the third party, what third party would conduct the review, and the standard or standards for that review" (5 U.S.C. § 9902(m)(6)), that merely establishes DoD's "freedom to design its own internal human resources scheme." Chertoff, 452 F.3d at 866. It does not "serve as a license" for DoD to amend 5 U.S.C. § 7105, the statute establishing the FLRA's jurisdiction, and thereby "draft an independent agency to do its bidding pursuant to terms prescribed by the Department." Id. Thus, like the HSA, the NDAA provides no statutory authority for DoD and OPM to encroach upon the FLRA's independent status.

It follows that the principles announced in Chertoff invalidating regulations assigning a role to the FLRA to review decisions of an internal board set up to resolve labor disputes at DHS apply equally to the corresponding scheme devised for DoD. The invalid FLRA-review scheme adopted by the regulations therefore does not cure the NSLRB's lack of independence.⁶

⁶ As the government notes, because the unions' complaint in this case does not separately challenge the regulations assigning the

B. In Any Case, Given the Narrow Standard of Review the FLRA Would Apply, Its Involvement Would Not Remedy the NSLRB's Lack of Independence

In any event, even if FLRA review, with judicial review under 5 U.S.C. § 7123, were available, the NSLRB would still not be an independent board. The standard of review that the FLRA would apply to NSLRB decisions is the kind of deferential review standard applied to FLRA decisions. See 5 C.F.R. § 9901.909(c)(1); cf. 5 U.S.C. § 706. Courts defer to FLRA decisions because the FLRA is an independent agency with expertise in federal sector labor relations. See Ass'n of Civilian Technicians, Mont. Air Chapt. No. 29 v. FLRA, 22 F.3d 1150, 1153 (D.C. Cir. 1994). Those same policy considerations, however, do not apply to an arm of management serving as prosecutor, judge, and jury. Affording the NSLRB independent agency-level deference simply insulates management decisions from outside review.

In addition, the courts have "not . . . embraced the general proposition that a wrong may be done if it can be undone." Bonner v. Coughlin, 545 F.2d 565, 577 (7th Cir. 1976),


FLRA a role under the NSPS "the prematurity analysis" of Chertoff is inapplicable. See Gov't Br. at 42-43 n.4. Nonetheless, this Court should consider the Chertoff court's ruling that the FLRA may not be conscripted to serve as an adjudicator under the parallel DHS scheme, because the government in this case is relying upon the availability of FLRA review to defend the lawfulness of the NSLRB's composition and functions.

cert. denied, 435 U.S. 932 (1978), cited in Rumsfeld, 422 F. Supp. 2d at 48. "Principles of fairness are not satisfied if an employee must expend all of his or her time and resources navigating an unfair appeals process simply because at some later stage the DoD's decision can be reviewed under the still deferential arbitrary and capricious standard." Rumsfeld, 422 F. Supp. 2d at 48. The government's argument that DoD has provided for independent review because the decisions of its management-controlled NSLRB could theoretically be reversed under a deferential standard of review is totally unpersuasive.


CONCLUSION

For the reasons stated herein, as well as those stated in the DoD unions' brief, the amicus curiae NTEU respectfully requests that the Court affirm the injunction issued by the lower court for the independent reason that the NSLRB is not an "independent third party" and, therefore, fails to ensure employees' right to bargain collectively.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN FEDERATION OF GOVERNMENT)
EMPLOYEES, et al.,)
)
Plaintiffs-Appellees/Cross-Appellants)
)
v.) Nos. 06-5113,
) 06-5135
DONALD H. RUMSFELD,)
SECRETARY, UNITED STATES DEPARTMENT OF)
DEFENSE, et al.,)
)
Defendants-Appellants/Cross-Appellees.)
_____)

CERTIFICATE OF SERVICE

I hereby certify that today I caused the foregoing
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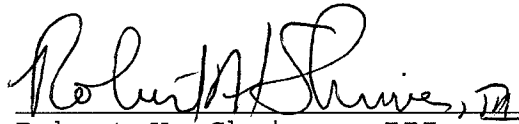
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