

1 UNITED STATES COURT OF APPEALS

2  
3 FOR THE SECOND CIRCUIT

4  
5 August Term, 2005

6  
7 (Argued: December 21, 2005 Decided: May 1, 2006)

8  
9 Docket No. 05-2404-cv

10  
11 - - - - -x

12  
13 JOHN SCOTT BECHTEL,\*

14  
15 Plaintiff-Appellee,

16  
17 UNITED STATES DEPARTMENT OF LABOR,

18  
19 Intervenor-Plaintiff-Appellee,

20  
21 - v.-

22  
23 COMPETITIVE TECHNOLOGIES, INC.,

24  
25 Defendant-Appellant.

26  
27 - - - - -x

28  
29 Before: JACOBS, LEVAL, STRAUB, Circuit Judges. Judge  
30 Leval concurs in the judgment in a separate opinion. Judge  
31 Straub dissents in a separate opinion.

32  
33 Preliminary injunction entered by the United States  
34 District Court for the District of Connecticut, enforcing a  
35 preliminary administrative order reinstating a putative  
36 whistleblower, is vacated.

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\*The Clerk is requested to modify the official caption to reflect that Willie Jacques, Jr. is no longer a party to this appeal.

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21 Plaintiff-Appellee.  
22

23 DENNIS JACOBS, Circuit Judge:

24 Competitive Technologies, Inc. ("CTI") appeals from a  
25 judgment of the United States District Court for the  
26 District of Connecticut (Covello, J.) granting the  
27 applications of John Scott Bechtel and Willie Jacques, Jr.<sup>1</sup>  
28 for a preliminary injunction ordering CTI to reinstate them  
29 as CTI vice presidents. Bechtel sues to enforce the  
30 preliminary order of reinstatement issued by the Secretary  
31 of Labor ("Secretary") upon a finding that Bechtel's firing  
32 violated 18 U.S.C. § 1514A, which is § 806 of the Sarbanes-

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<sup>1</sup>CTI has settled its dispute with Jacques, and he is no longer a party to this appeal.

1 Oxley Act of 2002. We vacate the injunction, and direct the  
2 district court to dismiss this action.

3 Bechtel filed a complaint with the Secretary pursuant  
4 to 18 U.S.C. § 1514A(b)(1)(A), alleging that the reason CTI  
5 discharged him on June 30, 2003 was that he had raised  
6 concerns with management about CTI's financial reporting.

7 On February 2, 2005, the Secretary issued a preliminary  
8 order finding that Bechtel's expression of concern is  
9 activity protected by § 1514A and ordering reinstatement.

10 CTI duly objected to the order, and requested a hearing  
11 before an administrative law judge ("ALJ"). See 49 U.S.C. §  
12 42121(b)(2)(A); 29 C.F.R. § 1980.107. As of the date of  
13 this opinion, the Secretary has not issued a final order.

14 CTI's objection to the Secretary's preliminary order  
15 does not stay the reinstatement remedy, see 49 U.S.C. §  
16 42121(b)(2)(A); 29 C.F.R. § 1980.106; nevertheless, CTI has  
17 refused to take Bechtel back.

18 On April 18, 2005, Bechtel filed a complaint in the  
19 district court seeking a preliminary injunction requiring  
20 CTI to comply with the reinstatement remedy in the  
21 preliminary order; the district court issued the requested

1 injunction on May 13, 2005.<sup>2</sup> CTI appeals from the district  
2 court judgment, asserting that (i) the district court lacked  
3 jurisdiction to enforce the preliminary order and (ii) in  
4 the event that the district court had such jurisdiction, the  
5 Secretary's investigation of Bechtel's complaint violated  
6 CTI's constitutional right to due process.

7  
8 **I**  
9

10 CTI argues that 18 U.S.C. § 1514A does not confer power  
11 on district courts to enforce preliminary orders. "When  
12 reviewing a district court's determination of its subject  
13 matter jurisdiction, we review . . . legal conclusions de  
14 novo." McCarthy v. Navistar Fin. Corp. (In re Vogel Van &  
15 Storage), 59 F.3d 9, 11 (2d Cir. 1995).

16 The power of the inferior federal courts is "limited to  
17 those subjects encompassed within a statutory grant of  
18 jurisdiction." Ins. Corp. of Ir., Ltd. v. Compagnie des  
19 Bauxites de Guinee, 456 U.S. 694, 701 (1982). Even when the  
20 exercise of "[federal] judicial power is desirable or

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<sup>2</sup>The facts of this case are set forth more fully in the district court opinion, reported at Bechtel v. Competitive Technologies, 369 F. Supp. 2d 233 (D. Conn. 2005).

1 expedient," jurisdiction does not lie absent statutory  
2 authorization. United States v. N. Hempstead, 610 F.2d  
3 1025, 1029 (2d Cir. 1979).

4 "Statutory construction begins with the plain text and,  
5 if that text is unambiguous, it usually ends there as well."  
6 United States v. Gayle, 342 F.3d 89, 92 (2d Cir. 2003); see  
7 also Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207,  
8 236 (1986). At the same time, "we must 'interpret [a]  
9 specific provision in a way that renders it consistent with  
10 the tenor and structure of the whole act or statutory scheme  
11 of which it is a part.'" United States v. Pacheco, 225 F.3d  
12 148, 154 (2d Cir. 2000) (quoting United States v. Bonanno  
13 Organized Crime Family of La Cosa Nostra, 879 F.2d 20, 24  
14 (2d Cir. 1989)). We "give effect, if possible, to every  
15 clause and word of a statute." Williams v. Taylor, 529 U.S.  
16 362, 404 (2000) (internal quotation marks omitted).

17 There are three provisions of § 1514A that provide for  
18 federal power to enforce actions related to complaints under  
19 the statute. None of them authorizes enforcement of  
20 preliminary orders.

21 Of the three, two incorporate provisions of the Wendell  
22 H. Ford Aviation Investment and Reform Act for the 21st

1 Century ("AIR21"), 49 U.S.C. § 42121(b) (see 18 U.S.C. §  
2 1514A(b)(2)(A), incorporating by reference provisions of 49  
3 U.S.C. § 42121(b)): AIR21 paragraph (b)(5) and subparagraph  
4 (b)(6)(A) authorize district court jurisdiction over actions  
5 brought by the Secretary and private parties, respectively,  
6 to grant all appropriate relief, including injunctive  
7 relief, when there has been a failure of compliance with an  
8 order "issued under paragraph (b)(3)" (text in margin<sup>3</sup>).  
9 The reference is to AIR21 paragraph (b)(3), entitled "Final

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<sup>3</sup>49 U.S.C. § 42121(b)(5) and (b)(6)(A) read in pertinent part:

(5) Enforcement of order by Secretary of Labor. Whenever any person has failed to comply with an order issued under paragraph [b](3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.

(6) Enforcement of order by parties.

(A) Commencement of action. A person on whose behalf an order was issued under paragraph [b](3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

1 Order."<sup>4</sup> Subparagraph (b) (3) (A) specifies when the  
2 Secretary must "issue a final order providing the relief  
3 prescribed by this paragraph or denying the complaint";  
4 subparagraph (b) (3) (B) authorizes specific remedies for  
5 inclusion in final orders upon a finding of a violation; and  
6 subsection (b) (3) (C) specifies procedures for dealing with  
7 frivolous complaints.

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<sup>4</sup>49 U.S.C. § 42121(b) (3) reads in pertinent part:

(3) Final order.

(A) Deadline for issuance; settlement agreements. Not later than 120 days after the date of conclusion of a hearing under paragraph (2), the Secretary of Labor shall issue a final order providing the relief prescribed by this paragraph or denying the complaint. . . .

(B) Remedy. If, in response to a complaint filed under paragraph (1), the Secretary of Labor determines that a violation of subsection (a) has occurred, the Secretary of Labor shall order the person who committed such violation to--

(i) take affirmative action to abate the violation;

(ii) reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and

(iii) provide compensatory damages to the complainant.

\* \* \* \*

(C) Frivolous complaints. . . .

1           If the Secretary has not issued a final decision within  
2   180 days of the filing of the administrative complaint, the  
3   third provision of 18 U.S.C. § 1514A, subparagraph  
4   (b) (1) (B), authorizes jurisdiction in district court over an  
5   action for de novo review seeking remedial relief.<sup>5</sup>

6           None of the provisions of 18 U.S.C. § 1514A authorizing  
7   judicial enforcement reference AIR21 subparagraph (b) (2) (A),  
8   under which the Secretary issues preliminary orders.<sup>6</sup> Nor,  
9   in the absence of such a specific reference, can any of the

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<sup>5</sup>18 U.S.C. § 1514A(b) (1) provides in pertinent part:

(1) In general. A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by--

. . . .

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, [bringing] an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

<sup>6</sup>49 U.S.C. § 42121(b) (2) (A) reads in pertinent part:

If the Secretary of Labor concludes that there is a reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph [b] (3) (B).



1 potentially relevant statutory text be read reasonably as  
2 conferring federal judicial power to enforce orders that are  
3 preliminary. I therefore conclude that the district court  
4 lacked power to enforce the preliminary order reinstating  
5 Bechtel.

## 6 7 **II**

8  
9 The district court ruled that AIR21 paragraph (b) (5)  
10 and subparagraph (b) (6) (A) confer jurisdiction on district  
11 courts to enforce preliminary orders. As the court  
12 observed, AIR21 subparagraph (b) (2) (A) provides that  
13 preliminary orders should contain the relief prescribed by  
14 subparagraph (b) (3) (B) for final orders. The court reasoned  
15 that it therefore had authorization to enforce a preliminary  
16 reinstatement order as if the order were final.

17 I disagree. The plain text of subparagraph (b) (2) (A)  
18 incorporates the types of relief specified in subparagraph  
19 (b) (3) (B); it nowhere suggests that the two subparagraphs  
20 are to be treated identically for federal jurisdictional  
21 purposes. See United States v. Wong Kim Bo, 472 F.2d 720,  
22 722 (5th Cir. 1972) (per curiam) ("In construing statutes,

1 words are to be given their natural, plain, ordinary and  
2 commonly understood meaning unless it is clear that some  
3 other meaning was intended."); see also United States v.  
4 Peterson, 394 F.3d 98, 107 (2005) ("[W]hen Congress uses  
5 particular language in one section of a statute and  
6 different language in another, we presume its word choice  
7 was intentional."). It seems improbable that Congress would  
8 have chosen to confer federal judicial enforcement power  
9 over preliminary orders by indirection and opacity when it  
10 easily could have modified the jurisdictional provisions of  
11 AIR21--paragraph (b)(5) and subparagraph (b)(6)(A)--to  
12 encompass subparagraph (b)(2)(A). I therefore conclude that  
13 the plain text of the provisions granting enforcement power  
14 cannot support a reading that confers on federal courts the  
15 power to enforce orders that are preliminary.

16 In construing the relevant provisions conferring  
17 judicial enforcement power, the district court concluded  
18 that an interpretation that barred enforcement of  
19 preliminary reinstatement orders in district court is  
20 inconsistent with the statutory scheme created by 18 U.S.C.  
21 § 1514A. This argument gains traction from AIR21  
22 subparagraph (b)(2)(A), which provides that the filing of

1 objections to a preliminary order does "not operate to stay  
2 any reinstatement remedy contained in the preliminary  
3 order": Why provide that the remedy is unstayed unless  
4 there is provision for enforcement without delay?

5 As I have already demonstrated, the statutory language  
6 here is clear. But even when the statutory language (and  
7 legislative history) are unclear, courts do not  
8 automatically assume that judicial power is necessary to  
9 enforce statutory rights; the need for enforcement is  
10 ascertained in light of other considerations. See Chicago &  
11 N. W. R. Co. v. United Transp. Union, 402 U.S. 570, 578  
12 (1971) ("[T]he propriety of judicial enforcement turns on  
13 the importance of the duty in the [statutory] scheme . .  
14 .[, ] the capacity of the courts to enforce it effectively,  
15 and the necessity for judicial enforcement if the right of  
16 the aggrieved party is not to prove illusory."); cf.  
17 Alexander v. Sandoval, 532 U.S. 275, 290 (2001) ("[S]ome  
18 remedial schemes foreclose a private cause of action to  
19 enforce even those statutes that admittedly create  
20 substantive private rights."). Congress does its own  
21 weighing when drafting statutes, and is free to put--by  
22 design or as an outcome of the legislative process--

1 companies under a legal obligation to reinstate workers  
2 without authorizing instantaneous judicial enforcement.

3 The likelihood that Congress intended such an  
4 unenforceable preliminary order here is buttressed by three  
5 considerations:

6 First, 18 U.S.C. § 1514A(b)(1)(B) provides for de novo  
7 review in the district court if the Secretary has not issued  
8 a final decision within 180 days of the filing of the  
9 complaint. This remedy reduces any need for a judicial  
10 order.

11 Second, a preliminary order is based on no more than  
12 "reasonable cause to believe that the complaint has  
13 merit[.]" 49 U.S.C. § 42121(b)(2)(A). That is a tentative  
14 and inchoate basis for present enforcement.

15 Third, a preliminary order remains subject to being  
16 overturned by the Secretary's final order or by the district  
17 court on appeal from that final order. Given these  
18 successive levels of review, the absence of federal judicial  
19 power to enforce preliminary orders reasonably could serve  
20 to ensure that appeals work their way through the  
21 administrative system before the federal courts become  
22 involved. Moreover, if the result changes from one level of

1 review to the next, immediate enforcement at each level  
2 could cause a rapid sequence of reinstatement and discharge,  
3 and a generally ridiculous state of affairs.

4 Not to the contrary is Martin v. Yellow Freight Sys.,  
5 Inc., in which we held that the Secretary could enforce in  
6 district court an interim order of reinstatement issued by  
7 an ALJ (after a full hearing) pursuant to the Surface  
8 Transportation Assistance Act ("STAA"), 49 U.S.C. § 31105.  
9 983 F.2d 1201, 1203 (2d Cir. 1993). The STAA explicitly  
10 conferred jurisdiction on federal district courts over  
11 actions brought by the Secretary to enforce both preliminary  
12 and final orders. See 49 U.S.C. § 31105(d) (conferring  
13 district court jurisdiction over actions brought to enforce  
14 orders issued under subsection (b), which authorized  
15 Secretary to issue both preliminary and final orders).<sup>7</sup>  
16 However, the STAA nowhere explicitly authorized actions to  
17 enforce interim orders. Nevertheless, Yellow Freight held  
18 that such orders were enforceable, specifically referencing  
19 the need to avoid undermining the statutory purpose of  
20 protecting whistleblowers.

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<sup>7</sup>In explicitly authorizing district court jurisdiction over actions brought to enforce preliminary orders, the STAA thus demonstrates that Congress knew how to provide expressly for such jurisdiction when it thought desirable.

1           The reasoning of Yellow Freight is inapposite here.  
2   Yellow Freight relied on statutory wording that expressly  
3   conferred power to enforce preliminary orders, construing  
4   that wording to encompass interim orders as well. As Yellow  
5   Freight recognized, it makes sense that a scheme providing  
6   for the enforcement of preliminary and final orders would  
7   likewise enforce interim orders, given that the power to  
8   enforce preliminary orders signifies an intent to involve  
9   the federal court system in the enforcement process at an  
10   early stage, before the employer has received the procedural  
11   protections afforded by a full hearing before an ALJ. 983  
12   F.2d at 1203 ("'[W]e do not feel that it is unreasonable or  
13   unanticipated that an ALJ, vested with the authority of the  
14   Secretary of Labor, would issue an order of reinstatement  
15   after a full hearing on the merits of the dispute in light  
16   of the Secretary's ability to issue a reinstatement order  
17   after merely a preliminary investigation.'") (quoting Martin  
18   v. Yellow Freight System, Inc., 793 F. Supp. 461, 469  
19   (S.D.N.Y. 1992)). No such inference is available in this  
20   present case.

21           Because I conclude that § 1514A confers no judicial  
22   enforcement power over preliminary orders of reinstatement,

1 I do not reach the question whether the Secretary's  
2 investigation violated CTI's constitutional right to due  
3 process. My colleague Judge Leval takes the opposite tack  
4 and assumes that § 1514A confers such judicial enforcement  
5 power--thus exercising "hypothetical jurisdiction,"  
6 Concurring Op. at [11-12 n.1]--in order to decide that the  
7 Secretary's investigation did violate CTI's right to due  
8 process. I think this analysis proceeds backwards. Judge  
9 Leval evaluates the procedures afforded CTI by the standards  
10 established in Brock v. Roadway Express, Inc., 481 U.S. 252  
11 (1987), in which the Supreme Court determined that, due to  
12 inadequate procedures, an employee's reinstatement pursuant  
13 to a preliminary order under § 405 of the STAA constituted a  
14 violation of the employer's right to due process. But Brock  
15 furnishes no basis for an exercise of "hypothetical  
16 jurisdiction" here: Even assuming that an unenforceable  
17 preliminary order of reinstatement constitutes a deprivation  
18 of property, the question whether the Secretary's  
19 investigation violated CTI's right to due process depends  
20 for its answer on whether the resulting preliminary order is  
21 judicially enforceable.<sup>8</sup>

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<sup>8</sup>The procedures required under Brock are derived from application of the Mathews v. Eldridge balancing test in the

1        "A fundamental and long-standing principle of judicial  
2        restraint requires that courts avoid reaching constitutional  
3        questions in advance of the necessity of deciding them."  
4        Lyng v. N.W. Indian Cemetery Protective Ass'n, 485 U.S. 439,  
5        445 (1988); see also Ashwander v. Tenn. Valley Auth., 297  
6        U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a  
7        case can be decided on either of two grounds, one involving  
8        a constitutional question, the other a question of statutory  
9        construction or general law, the Court will decide only the  
10        latter.") (citing Siler v. Louisville & N. R. Co., 213 U.S.  
11        175, 191 (1909) & Light v. United States, 220 U.S. 523, 538  
12        (1911)). Here, the non-constitutional basis for decision  
13        (the question of statutory judicial enforcement power),  
14        while complex and difficult, has the potential to fairly  
15        dispose of the case. Nor is this a situation in which the

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context of a statute that did authorize judicial enforcement  
of preliminary reinstatement orders, 424 U.S. 319 (1976);  
see Brock, 481 U.S. at 261-68. Brock does not control where  
there is no such enforcement, since the private interests at  
stake, see Mathews, 424 U.S. at 339-43, will presumably  
differ depending on whether the preliminary order of  
reinstatement is enforceable. Indeed, Judge Leval's  
contention that the order has essentially no legal effect in  
the absence of judicial enforcement, see Concurring Op. at  
[5], suggests that the private interest at stake in the  
absence of judicial enforcement is quite minimal.



1 constitutional issue "cannot be avoided."<sup>9</sup> Fry v. UAL  
2 Corp., 84 F.3d 936, 939 (7th Cir. 1996) (Posner, C.J.).

3 I therefore decline to assume statutory judicial  
4 enforcement power in order to determine whether a close,  
5 avoidable constitutional claim is meritorious, when that  
6 determination is likely controlled by whether there is  
7 enforcement power.

8 Since Judge Leval and I nevertheless concur in the  
9 decree, the preliminary injunction is vacated, and the case  
10 is remanded for entry of an order of dismissal.

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<sup>9</sup>Two of the Second Circuit cases cited by Judge Leval, see Concurring Op. at [12 n.1], involve the assertion of hypothetical jurisdiction to decide constitutional questions. See Guaylupo-Moya v. Gonzales, 423 F.3d 121, 132 (2d Cir. 2005); Fama v. Comm'r of Corr. Servs., 235 F.3d 804, 817 (2d Cir. 2000). In both cases, however, the question of statutory jurisdiction did not bear upon the ultimate conclusion that the constitutional claim was "plainly without merit." Marquez-Almanzar v. INS, 418 F.3d 210, 216 (2d Cir. 2005).

1 LEVAL, Circuit Judge, concurring in the judgment:

2  
3 This case presents a very difficult question: Whether  
4 § 806 of Sarbanes-Oxley, 18 U.S.C. §1514A, confers authority  
5 on a district court to enforce a preliminary order of  
6 reinstatement. I find it unnecessary to answer this  
7 question. Even if § 806 authorizes a district court to  
8 enforce a preliminary order of reinstatement issued in  
9 compliance with the obligations of due process, the  
10 preliminary order in this case is not enforceable, in my  
11 view, because the Secretary's disclosures to CTI during its  
12 investigation of Bechtel's allegations did not satisfy the  
13 due process requirements of *Brock v. Roadway Express, Inc.*,  
14 481 U.S. 252 (1987).

15  
16 I.  
17

18 Complaints filed with the Secretary of Labor concerning  
19 violations of the whistleblower-protection provisions of §  
20 806 are governed by provisions of AIR21(b), 49 U.S.C. §  
21 42121(b). 18 U.S.C. § 1514A(b)(2)(A). Under paragraph (5)  
22 and subparagraph (6)(A) of AIR21(b), a district court is  
23 authorized to enforce an order of the Secretary of Labor  
24 "issued under paragraph (3)." Paragraph (3), entitled

1 "Final order," provides in relevant part that if the  
2 Secretary of Labor makes a final determination that a  
3 violation has occurred, the Secretary "shall order the  
4 person who committed such violation to . . . reinstate the  
5 complainant to his or her former position together with the  
6 compensation (including back pay) and restore the terms,  
7 conditions, and privileges associated with his or her  
8 employment." 49 U.S.C. § 42121(b)(3)(B). Thus, a district  
9 court is clearly authorized to enforce a final reinstatement  
10 order issued under paragraph (3).

11 In this case, however, we are asked to decide whether  
12 a district court has authority to enforce a preliminary  
13 reinstatement order. Under paragraph (2) of AIR21(b),  
14 entitled "Investigation; preliminary order," if the  
15 Secretary determines that "there is reasonable cause to  
16 believe that the complaint has merit," then the Secretary  
17 must make written findings and accompany those findings with  
18 "a preliminary order providing the relief prescribed by  
19 paragraph (3)(B)." 49 U.S.C. § 42121(b)(2)(A). Within  
20 thirty days, either party "may file objections to the  
21 findings or preliminary order, or both, and request a  
22 hearing on the record." *Id.* The statute provides that "the

1 filing of such objections shall not operate to stay any  
2 reinstatement remedy contained in the preliminary order."  
3 *Id.*

4 The plaintiff and the Secretary contend that such a  
5 preliminary order of reinstatement qualifies as an  
6 enforceable order "issued under paragraph (3)" because it  
7 provides the relief prescribed by paragraph (3)(B). The  
8 defendant contends that such a preliminary order is issued  
9 under paragraph (2), even though it provides for the kind of  
10 relief prescribed by paragraph (3).

11 The statute, no matter how it is read, does not make  
12 complete sense. As I read the opposing arguments of my  
13 colleagues, certain provisions of the statute favor each of  
14 their arguments, while other provisions disfavor them.

15 As Judge Jacobs argues, the fact that a preliminary  
16 order authorized by paragraph (2) "provid[es] the relief  
17 prescribed by paragraph (3)(B)" does not mean that the  
18 preliminary order is an order "issued under paragraph (3)."  
19 The source of the authority for a preliminary order of  
20 reinstatement is paragraph (2), not paragraph (3). Such an  
21 order therefore appears to be "issued under" paragraph (2).  
22 The references in paragraph (5) and subparagraph (6)(A) to

1 the enforcement of an order issued under paragraph (3) do  
2 not seem to apply to such an order. See *Carnero v. Boston*  
3 *Scientific Corp.*, 433 F.3d 1, 16 n.16, 17 (1st Cir. 2006)  
4 (stating in dictum that paragraph (5) and subparagraph  
5 (6)(A) authorize district court enforcement of the  
6 Secretary's "final order"). Moreover, paragraph (5)  
7 provides that the civil action of the Secretary seeking  
8 enforcement of the order "issued under paragraph (3)" may be  
9 filed "in the United States district court for the district  
10 in which the violation *was found to occur*." (emphasis  
11 added). A violation, however, has not been "found to occur"  
12 until the Secretary issues a final order; the preliminary  
13 order is based only on reasonable cause, not on a finding  
14 that the violation has occurred.

15 Further support for this reading of the statute is  
16 found in subparagraph (4)(A), which states that "[a]ny  
17 person adversely affected or aggrieved by an order issued  
18 under paragraph (3) may obtain review of the order in the  
19 United States Court of Appeals." In *Bell v. New Jersey*, 461  
20 U.S. 773, 778 (1983), the Supreme Court stated that "[t]he  
21 strong presumption is that judicial review [of agency  
22 decisions] will become available only when agency action

1 becomes final.” That presumption supports the proposition  
2 that “an order issued under paragraph (3),” which is subject  
3 to immediate review in the court of appeals, does not  
4 include a preliminary order of reinstatement. See *Carnero*,  
5 433 F.3d at 16 n.16 (stating in dictum that AIR21 provides  
6 for “appellate court review of the Secretary’s final  
7 order”); *Stone v. Duke Energy Corp.*, 432 F.3d 320 (4th Cir.  
8 2005) (assuming that only a final order is appealable under  
9 paragraph (4)).

10 On the other hand, as Judge Straub observes, AIR21  
11 states that a preliminary order of reinstatement is not  
12 stayed pending the final order of the Secretary. The  
13 absence of a stay presumably makes some difference in the  
14 regulatory scheme. Yet if the preliminary order is not  
15 enforceable, an employer, as in this case, is free to refuse  
16 to reinstate the employee. It is as if the preliminary  
17 order of reinstatement were stayed pending a final order.  
18 Judge Jacobs’ reading of the statute, which follows from the  
19 plain meaning of paragraph (5) and subparagraph (6)(A) and  
20 the presumption against review of non-final agency orders,  
21 is not easily reconciled with the provision that there is no  
22 stay of a preliminary order of reinstatement. Judge

1     Straub's reading of the statute, which makes better sense of  
2     the statute's express denial of a stay of a preliminary  
3     order of reinstatement, is difficult to reconcile with the  
4     stated scope of enforcement under AIR21 and is counter to  
5     the presumption against review of non-final agency orders.

6             Judge Jacobs offers several explanations as to why the  
7     absence of enforcement of the preliminary order makes sense  
8     in light of various features of the statutory scheme—the  
9     complainant may bring an action in the district court if the  
10    Secretary has not issued a final order after 180 days, the  
11    preliminary order is based on a reasonable cause  
12    determination, and it is subject to being overturned at  
13    multiple stages of review. I believe Judge Straub  
14    demonstrates that these arguments are overstated. See  
15    Dissenting Op. at [10-12]. And even if Judge Jacobs is  
16    correct that there are good reasons why a preliminary order  
17    should not be enforced, these considerations do not explain  
18    why Congress would provide that a preliminary order is not  
19    stayed if despite the statute's denial of a stay, the  
20    employer without adverse consequence may effectively stay  
21    the order simply by declining to obey it.

22            Judge Straub argues that his reading of the statute is

1 supported by the legislative history of Sarbanes-Oxley.  
2 Dissenting Op. at [6-7]. The legislative history  
3 undoubtedly shows an intent to protect whistleblowers. But  
4 Judge Straub points to no language in the legislative  
5 history which addresses in any way the enforceability of a  
6 preliminary order of reinstatement.

7 Judge Straub rests his argument in part on a regulation  
8 promulgated by the Secretary, 29 C.F.R. § 1980.113, which  
9 states:

10 Whenever any person has failed to comply with  
11 a preliminary order of reinstatement or a  
12 final order or the terms of a settlement  
13 agreement, the Secretary or a person on whose  
14 behalf the order was issued may file a civil  
15 action seeking enforcement of the order in the  
16 United States district court for the district  
17 in which the violation was found to have  
18 occurred.  
19

20 In this regulation, the Secretary interprets paragraph (5)  
21 and subparagraph (6)(A) to provide for enforcement of a  
22 preliminary order. However, because the statutory  
23 interpretation at issue concerns the scope of federal court  
24 jurisdiction, it is not a proper subject of deference under  
25 *Chevron U.S.A., Inc. v. Natural Resources Defense Council,*  
26 *Inc.*, 467 U.S. 837 (1984). See *Verizon Maryland, Inc. v.*  
27 *Global Naps, Inc.*, 377 F.3d 355, 383 (4th Cir. 2004)



1 ("Chevron deference is not required when the ultimate  
2 question is about federal jurisdiction. Analogous to our  
3 obligation to inquire *sua sponte* whenever federal  
4 jurisdiction is in doubt, a federal court must interpret  
5 statutory grants of jurisdiction for itself." (citation  
6 omitted)); *Murphy Exploration & Prod. Co. v. U.S. Dep't of*  
7 *the Interior*, 252 F.3d 473, 478 (D.C. Cir. 2001) ("Chevron  
8 does not apply to statutes that . . . confer jurisdiction on  
9 the federal courts. It is well established that  
10 [i]nterpreting statutes granting jurisdiction to Article III  
11 courts is exclusively the province of the courts." (internal  
12 quotation marks omitted)); *Lopez-Elias v. Reno*, 209 F.3d  
13 788, 791 (5th Cir. 2000) ("[T]he fact that courts defer to  
14 the INS's construction of its statutory powers of  
15 deportation does not mean that similar deference is  
16 warranted with respect to the enforcement of this court's  
17 jurisdictional limitations. The former may trigger  
18 deference, but the determination of our jurisdiction is  
19 exclusively for the court to decide."); see generally *Adams*  
20 *Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990).

21 Judge Straub argues that the Secretary's interpretation  
22 is entitled to "some minimal deference" under *United States*

1     *v. Mead*, 533 U.S. 218, 234-35 (2001). Dissenting Op. at  
2     [9]. The *Mead* Court, citing *Skidmore v. Swift & Co.*, 323  
3     U.S. 134 (1944), held that even when an administrative  
4     agency's statutory interpretation is not entitled to *Chevron*  
5     deference because there is "no indication that Congress  
6     intended such a ruling to carry the force of law," that  
7     statutory interpretation "is eligible to claim respect  
8     according to its persuasiveness." *Mead*, 533 U.S. at 221;  
9     see *Skidmore*, 323 U.S. at 140 ("The weight of such a  
10    judgment in a particular case will depend upon the  
11    thoroughness evident in its consideration, the validity of  
12    its reasoning, its consistency with earlier and later  
13    pronouncements, and all those factors which give it power to  
14    persuade, if lacking power to control."). I do not find the  
15    Secretary's interpretation to have persuasive force. The  
16    regulations implementing § 806 of Sarbanes-Oxley result in  
17    an inconsistent reading of the words "order issued under  
18    paragraph (3)" in AIR21. Section 1980.112 of the  
19    regulations, entitled "Judicial review," provides in  
20    paragraph (a) that

21             [w]ithin 60 days after the issuance of a final  
22             order by the Board (Secretary) under §  
23             1980.110, any person adversely affected or  
24             aggrieved by the order may file a petition for

1 review of the order in the United States Court  
2 of Appeals for the circuit in which the  
3 violation allegedly occurred or the circuit in  
4 which the complainant resided on the date of  
5 the violation. A final order of the Board is  
6 not subject to judicial review in any criminal  
7 or other civil proceeding.  
8

9 29 C.F.R. § 1980.112(a). The regulation seems to interpret  
10 paragraph (4) of AIR21(b), which provides for review of "an  
11 order issued under paragraph (3)," to apply only to review  
12 of a final agency order; the regulations contain no  
13 provision for immediate review of a preliminary order in the  
14 Court of Appeals. Thus, according to the Secretary's  
15 reading of AIR21, a preliminary order of reinstatement is an  
16 order issued under paragraph (3) for purposes of judicial  
17 enforcement but is not an order issued under paragraph (3)  
18 for purposes of judicial review. I do not find so  
19 inconsistent an interpretation of AIR21 to be persuasive.  
20

## 21 II.

22 I find it unnecessary *in this case* to resolve the very  
23 difficult question of enforceability under a statute which  
24 contains apparently inconsistent provisions. This is  
25 because, in my view, the Secretary's disclosures to CTI  
26 prior to the issuance of the preliminary order did not meet

1 the due process requirements of *Brock v. Roadway Express,*  
2 *Inc.*, 481 U.S. 252 (1987). Regardless of whether a  
3 preliminary order of reinstatement under § 806 is generally  
4 enforceable by a federal court, *this* preliminary order is  
5 not enforceable. Even if I agreed with Judge Straub that  
6 AIR21 authorizes judicial enforcement of a preliminary order  
7 of reinstatement (and that therefore § 806 does the same),  
8 this conclusion would, in my view, have no effect on the  
9 outcome of this case. Rather than unnecessarily reaching a  
10 thorny question of statutory interpretation, I leave the  
11 resolution of this problem to a future case in which the  
12 outcome depends on the resolution of that problem.<sup>1</sup>

---

<sup>1</sup>In order to secure judicial enforcement of the Secretary's preliminary order of reinstatement, Bechtel must satisfy several elements, which include that Congress has provided statutory authority for judicial enforcement of such an order and that the order was issued in compliance with law. Because I find the Secretary's order was not issued in compliance with the requirements prescribed in *Brock*, I conclude Bechtel has failed to show entitlement to enforcement regardless of whether Congress authorized such judicial enforcement. Such a ruling is sometimes called an exercise of "hypothetical jurisdiction." As our ruling does not purport to adjudicate ultimate rights as between the parties, but only the enforceability of an interim order, it is not so clear that the concept of assertion of hypothetical jurisdiction is apt. In any event, while *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998), severely restricts our ability to exercise hypothetical *Article III* jurisdiction over a dispute that does not come within the scope of constitutional "Cases" or

1           In *Brock*, the Supreme Court considered whether Roadway  
2 Express, an interstate trucking company, was denied due  
3 process when a terminated employee was reinstated pursuant  
4 to a preliminary reinstatement order under § 405 of the  
5 Surface Transportation Assistance Act of 1982 ("STAA"). The  
6 employee alleged that he had been improperly terminated for

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"Controversies," that precedent does not restrict our authority to dismiss on the merits cases that come within our constitutional jurisdiction, notwithstanding doubts as to whether we have statutory jurisdiction. This court has repeatedly exercised such hypothetical *statutory* jurisdiction. See, e.g., *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 132 n.10 (2d Cir. 2005); *Marquez-Almanzar v. INS*, 418 F.3d 210, 216 n.7 (2d Cir. 2005); *United States v. Miller*, 263 F.3d 1, 4 n.2 (2d Cir. 2001); *Fama v. Comm'r of Corr. Srvs.*, 235 F.3d 804, 817 n.11 (2d Cir. 2000). In this case, the district court certainly had Article III jurisdiction, and therefore hypothetical jurisdiction is not precluded by *Steel Co.* I would also observe that the phrase "hypothetical jurisdiction" is something of a misnomer. Courts regularly decide cases on the basis of certain dispositive issues, while leaving other issues unresolved. When a court decides a case by going immediately to a merits question, the unanswered question whether the claims arises at the time or is of the type consigned by the governing statute for adjudication is like any other merits issue that need not be resolved in that case. See *Fry v. UAL Corp.*, 84 F.3d 936, 939 (7th Cir. 1996) (Posner, C.J.) ("It is true that when Congress makes clear that a statute is not intended to confer rights on a particular class of persons, a suit under the statute by a member of that class does not engage the jurisdiction of the federal courts . . . . But if the scope of the statute is unclear, the question whether a particular class is protected by it becomes just another issue concerning the merits of the suit and therefore one that the court need not decide if . . . another issue is truly dispositive.").

1 complaining of safety violations. The STAA provided that if  
2 the Secretary of Labor found that the employee's claim was  
3 supported by reasonable cause, the Secretary was to issue a  
4 preliminary order reinstating him. Prior to the preliminary  
5 reinstatement order, Roadway was informed of the allegations  
6 in the employee's complaint, given the opportunity to meet  
7 with an investigator from the Occupational Safety and Health  
8 Administration ("OSHA"), and submitted a written statement  
9 explaining that the employee had not been discharged for  
10 whistleblowing activities. Roadway was not provided with  
11 the names of witnesses supporting the employee's claim or  
12 the substance of their statements. *Id.* at 255-56. Roadway  
13 sought an injunction against enforcement of the preliminary  
14 order of reinstatement, arguing that due process required  
15 that the Secretary conduct an evidentiary hearing before  
16 granting a preliminary order of reinstatement.

17 In *Brock*, a majority of the Justices held that due  
18 process did not require an evidentiary hearing prior to the  
19 preliminary reinstatement order. However, a different  
20 majority held that Roadway's due process rights had been  
21 violated because it was not informed, prior to the  
22 preliminary reinstatement order, what evidence had been

1 submitted to the Secretary in support of the employee's  
2 allegations. Justice Marshall, joined by three other  
3 justices, wrote that "minimum due process for the employer  
4 in this context requires notice of the employee's  
5 allegations, *notice of the substance of the relevant*  
6 *supporting evidence*, an opportunity to submit a written  
7 response, and an opportunity to meet with the investigator  
8 and present statements from rebuttal witnesses." *Id.* at 264  
9 (emphasis added). Justice Brennan, concurring in part and  
10 dissenting in part, agreed that due process required the  
11 Secretary of Labor to inform the employer of the "substance  
12 of the evidence" supporting the employee's allegations. *Id.*  
13 at 269 (Brennan, J., concurring in part and dissenting in  
14 part).

15 The record in this case demonstrates that the Secretary  
16 gave CTI a copy of Bechtel's initial complaint, a  
17 description of the allegations, and opportunities to submit  
18 written responses to those allegations and to present  
19 statements from rebuttal witnesses. An OSHA investigator  
20 also met with CTI's counsel on at least two occasions.  
21 However, based on the record before us, CTI was not given  
22 reasonable notice of the evidence against it. CTI

1 repeatedly asked OSHA to provide it with copies of  
2 statements by Bechtel or witness statements that supported  
3 Bechtel's allegations. On July 2, 2004, CTI was provided  
4 with a two-page purported summary of witness statements.  
5 The document, however, does not name any of the witnesses  
6 against CTI. Nor does it mention the undisclosed oral  
7 revenue-sharing agreements or whistleblowing regarding those  
8 agreements—the very grounds for the preliminary order of  
9 reinstatement. Most important, the "summary" is not a  
10 summary at all, but a mishmash of disconnected sentences  
11 that does not provide a coherent or comprehensible picture  
12 of the evidence against CTI.<sup>2</sup> Furthermore, Bechtel

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<sup>2</sup>Below is the entirety of the "summary" as it relates to Bechtel (references to Willie Jacques, who also brought a complaint against CTI and was a plaintiff in this case before settling with CTI, have been omitted):

**Job Performance**

- Mr. Bechtel closed one or two agreements with small returns.
- Mr. Bechtel brought in [no] significant revenues.

**Relationship with CEO John Nano**

- CEO Nano pushed . . . Mr. Bechtel to get the job done and bring in revenues.
- Beginning in March 2003 the relationship between CEO Nano . . . and Mr. Bechtel became unprofessional and unproductive.

**Disclosure Committee**

- Mr. Bechtel [was] not [an] official member[] of the



1 subsequently submitted additional statements to the  
2 Secretary in August and December of 2004. No summary of  
3 these statements was ever provided to CTI in any form.

4 Determining whether an employer has been provided with  
5 notice of the substance of the relevant supporting evidence

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Disclosure Committee but [was] required to sign off on the SEC reports.

- Committee had to answer 59 questions on each quarterly report and review all agreements.
- Any questions that could not be answered at the meeting were assigned to a member for follow-up. The results of the follow-up were reported to the Audit Committee not to the person who raised the question.
- The sign-off letter was circulated for signatures following the meeting.
- An exception page could be attached to the sign-off letter if there were still reservations about signing off.
- Mr. Bechtel did not sign off on the procedure page.
- Mr. Bechtel initially did not sign off on the March, 2003 report.

#### **Reasons for Termination**

- Mr. Bechtel [was] let go for performance and financial reasons.
- Mr. Bechtel [was] terminated due to restructuring.
- Mr. Bechtel [was] terminated because [he was] coerced into signing something [he did not] want[] to sign.

#### **Contractors**

- CEO Nano hired contractors in summer of 2002 to produce revenue through sales.
- Contractors are easier to terminate than employees.
- No significant revenues have been brought in by contractors.
- 5 contractors have been hired as employees even though there has been no change in the Respondent's financial picture.

1 is necessarily a fact-specific inquiry, and I do not suggest  
2 that there is some precise quantum of information that must  
3 be provided to an employer in every case. But in this case,  
4 I think it is clear that CTI was not afforded reasonable  
5 notice of the evidence against it. I conclude that its due  
6 process rights were violated.<sup>3</sup>

7 In her brief to this Court, the Secretary claims that  
8 OSHA's June 24, 2004 letter to CTI provided it with the  
9 "substance of the evidence that it had collected." Although  
10 the letter states that it provides "notice of the substance  
11 of the relevant evidence" against CTI, in fact it provides

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<sup>3</sup>Judge Jacobs contends that under the doctrine of constitutional avoidance it is inappropriate for me to rule on a constitutional question when the dispute might be resolved by answering a non-constitutional question. *Ante* at [16-17]. Without doubt the doctrine of constitutional avoidance is important in our jurisprudence. Nonetheless, there is a difference between undertaking to establish a new constitutional standard and determining whether a set of facts satisfies a constitutional standard that has already been established by the Supreme Court. In this case, the relevant constitutional standard was established by the Court in *Brock*. My reasoning, which is that the Secretary failed to give CTI "notice of the substance of the relevant supporting evidence" against it, *Brock*, 481 U.S. at 264, simply applies that standard. Where the choice is between resolving a statutory conundrum for which Congress has failed to provide any clear answer, and the application of a pre-existing constitutional standard to the facts of this case, I believe that the doctrine of constitutional avoidance plays a smaller role.

1 notice of the *allegations* against CTI, not the evidence  
2 supporting these allegations. As *Brock* clearly states,  
3 notice of the allegations is not enough to satisfy due  
4 process; notice of the substance of the relevant supporting  
5 evidence must be provided to the employer as well. It is  
6 only with an awareness of the evidence against it that the  
7 employer can respond and attempt to rebut that evidence.  
8 Moreover, even if the June 24, 2004 letter had provided  
9 notice of the evidence against CTI gathered until that  
10 point, the Secretary would still have been obligated to  
11 provide CTI with notice of the substance of the additional  
12 statements provided by Bechtel in August and December 2004.  
13 The Secretary does not even claim to have provided CTI with  
14 such notice. Thus, the June 24 letter and the July 2  
15 "summary" were insufficient to satisfy the Secretary's  
16 obligation under *Brock*.<sup>4</sup>

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<sup>4</sup>Judge Straub asserts that the June 24 letter describes evidence which tends to rebut CTI's claim that Bechtel was fired for economic reasons. See Dissenting Op. at [17]. I take no position as to whether in this letter the Secretary provided CTI with adequate notice of evidence on this particular point. Even if Judge Straub's assertion is correct, neither in this letter nor elsewhere did the Secretary provide CTI with notice, as *Brock* requires, of the evidence supporting Bechtel's allegation that he was terminated for engaging in whistleblowing activities.

1           This conclusion does not call into question the  
2   procedures generally followed by the Secretary when  
3   investigating whistleblower allegations under Sarbanes-  
4   Oxley. In fact, in this case the Secretary violated  
5   Department of Labor regulations. Under 29 C.F.R. §  
6   1980.104(e) the Secretary was required, "[p]rior to the  
7   issuance of findings and a preliminary order," to provide  
8   CTI with

9           notice of the substance of the relevant  
10   evidence supporting the complainant's  
11   allegations as developed during the course of  
12   the investigation. This evidence includes any  
13   witness statements, which will be redacted to  
14   protect the identity of confidential  
15   informants where statements were given in  
16   confidence; if the statements cannot be  
17   redacted without revealing the identity of  
18   confidential informants, summaries of their  
19   contents will be provided.  
20

21   For whatever reason, the Secretary did not provide CTI with  
22   any witness statements, redacted or otherwise.<sup>5</sup> It may  
23   be—though I express no view on this question—that summaries  
24   of witness statements, redacted to maintain the  
25   confidentiality of witnesses' identities, are consistent  
26   with *Brock's* requirements. But even assuming this to be the

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<sup>5</sup>An OSHA supervisor ordered the investigator in the case to provide CTI with "complete statements from complainants." The investigator did not do so.

1 case, the summaries must be sufficient to provide an  
2 employer with reasonable notice of the evidence against it—a  
3 standard that was not satisfied here. Moreover,  
4 confidentiality interests cannot explain the Secretary's  
5 failure to provide CTI with copies, or even coherent  
6 summaries, of Bechtel's own statements, as his identity as a  
7 source of complaints about his employer was known.

8 While I agree with Judge Straub that violation of  
9 agency regulations does not, in and of itself, suffice to  
10 establish a due process violation, in this case the  
11 Secretary's failure to follow its own regulations resulted  
12 in a process that did not meet the requirements of *Brock*.<sup>6</sup>

---

<sup>6</sup>Bechtel argues that there cannot have been a due process violation because CTI has not been deprived of any property interest. A property interest under the Fifth Amendment is "created . . . by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Such a property interest can be created, pursuant to state law, through an implied contract. *Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972). However, just because a property right exists under state law does not mean that a denial of that right constitutes a due process violation. Rather, "federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause." *Ezekwo v. New York City Health & Hospitals Corp.*, 940 F.2d 775, 782 (2d Cir. 1991) (internal quotation marks omitted).

In *Brock*, Roadway asserted a property interest deriving from the collective bargaining agreement with its employees' union, and a more general property interest in the "right to

1     Accordingly, I join Judge Jacobs, although for different  
2     reasons, in voting to vacate the preliminary injunction and  
3     remand to the district court for an order of dismissal.

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discharge an employee for cause." *Brock*, 481 U.S. at 260. There the Secretary conceded "that the contractual right to discharge an employee for cause constitutes a property interest protected by the Fifth Amendment" and the Court "accept[ed] the Secretary's concession." *Id.* at 261 & n.2. In *United States v. International Brotherhood of Teamsters*, 3 F.3d 634, 637 (2d Cir. 1993), this court, relying on *Brock*, held that the right to discharge an employee for cause is a property interest protected by the Due Process Clause.

CTI argues that under Connecticut law it had the right, derived from an implied contract of employment, to discharge Bechtel with or without cause, and that this constitutes a property interest for purposes of the Fifth Amendment. I agree. The Connecticut Supreme Court has explained that "all employer-employee relationships not governed by express contracts involve some type of implied 'contract' of employment" and when that employment relationship is for an indefinite term "an implied contract of employment does not limit the terminability of an employee's employment but merely includes terms specifying wages, working hours, job responsibilities and the like." *Torosyan v. Boehringer Ingelheim Pharm., Inc.*, 234 Conn. 1, 13-14 (1995). Just as the right to discharge an employee for cause is a property interest protected under the Due Process Clause, the right to discharge an employee with or without cause is a protected property interest.

1 STRAUB, Circuit Judge, dissenting from the result:

2  
3 The questions before us are (1) whether, under the  
4 whistleblower provisions of the Sarbanes-Oxley Act of 2002,  
5 when the Department of Labor ("Department") finds sufficient  
6 cause to order that an employee be reinstated but the  
7 employer flouts this order, we have jurisdiction to enforce  
8 the order; and, if so, (2) whether, in this case, the  
9 procedure followed by the Department in finding sufficient  
10 cause and ordering reinstatement constituted due process.  
11 The District Court answered both questions in the  
12 affirmative, and ordered Competitive Technologies, Inc.  
13 ("CTI") to reinstate Bechtel pursuant to the Department's  
14 order.

15 My colleagues, for different reasons, conclude that the  
16 case should instead be dismissed. Judge Jacobs finds that  
17 we do not have jurisdiction to enforce preliminary orders,  
18 whereas Judge Leval finds that the Department failed to  
19 provide CTI with due process. Because I find that the  
20 statute-though internally inconsistent-is best read to  
21 provide jurisdiction, and that the Department's procedure  
22 did not violate CTI's due process rights, I would affirm the

1 District Court's injunction. I note that, because of the  
2 form our disposition of the case has taken, there is no  
3 majority rule of law from which I need dissent.  
4

## 5 **I. Jurisdiction**

6 Congress enacted the Sarbanes-Oxley Act of 2002 ("Act")  
7 in response to an acute crisis: Revelations of mass  
8 corporate fraud, most vividly in connection with the Enron  
9 Corporation, threatened to destroy investors' faith in the  
10 American financial markets and, in so doing, to jeopardize  
11 those markets and the American economy. Congress recognized  
12 that the problem was an intractable one, and that a number  
13 of strong enforcement tools would be necessary—from new  
14 regulations and reporting requirements, to expanded  
15 oversight, to new criminal provisions. Congress also  
16 recognized that for any of these tools to work, the law had  
17 to protect whistleblowers from retaliation, because "often,  
18 in complex fraud prosecutions, . . . insiders are the only  
19 firsthand witnesses to the fraud." S. Rep. No. 107-146, at  
20 10 (2002). Congress therefore made whistleblower protection  
21 central to the Act, creating a procedure whereby wrongfully  
22 discharged employees can seek redress, including *immediate*



1 preliminary reinstatement, first through the Department of  
2 Labor and then through the courts.

3       The text of the Sarbanes-Oxley Act, when read as a  
4 whole and in light of this urgent statutory purpose, firmly  
5 supports our exercise of jurisdiction to enforce the  
6 Secretary of Labor's ("Secretary") preliminary reinstatement  
7 order. Paragraph 42121(b)(2) of Title 49 of the United  
8 States Code provides that, if an individual files a  
9 whistleblower complaint and the Secretary, after  
10 investigating, finds reasonable cause to believe that a  
11 violation has occurred, "the Secretary *shall* accompany the  
12 Secretary's findings with a preliminary order providing the  
13 relief prescribed by paragraph (3)(B)" (emphasis added).  
14 Subparagraph (3)(B), in turn, *requires* the Secretary to  
15 provide certain relief if she finds, after a full  
16 investigation, that a violation occurred; among other  
17 relief, the Secretary *must* order the employee's  
18 reinstatement. Finally, subparagraph (5) authorizes the  
19 Secretary to bring an action in district court to enforce  
20 "an order issued under paragraph (3)" against a non-  
21 compliant employer, and subparagraph (6)(A) authorizes a  
22 similar action by the employee. Although an order is not

1 necessarily "issued under" a provision simply because it  
2 provides "the relief prescribed by" that provision, I  
3 conclude that Congress intended to equate the two for  
4 purposes of mapping out judicial enforcement procedures.

5       Such a reading of paragraph (2) is necessary to make  
6 sense of the overall statutory scheme. The text of the  
7 statute makes clear that immediate reinstatement is  
8 paramount, which cuts against any interpretation that would  
9 allow an employer to ignore a reinstatement order with  
10 impunity.<sup>1</sup> To begin with, the statute requires the  
11 Secretary to respond promptly to a complaint, deciding  
12 within 60 days whether reasonable cause exists. 49 U.S.C.  
13 § 42121(b)(2). If the Secretary does find reasonable cause,  
14 she must issue a preliminary reinstatement order, and this  
15 order has immediate effect notwithstanding any subsequent  
16 objections and requests for an administrative hearing by the  
17 employer. *Id.* ("The filing of . . . objections shall not  
18 operate to stay any reinstatement remedy contained in [a]  
19 preliminary order.") Paragraph (b)(2) then provides for

---

<sup>1</sup>At oral argument, none of the parties was aware of any alternative mechanisms available to the Secretary to immediately enforce her orders.

1 "expeditious[]" hearings upon the filing of any objections,  
2 presumably in large part to minimize the burdens on the  
3 employer of preliminary reinstatement before the merits are  
4 fully determined.

5 These provisions, taken together, reflect Congress's  
6 sense that timely reinstatement is essential to prevent the  
7 chilling effects of employer retaliation. Congress's firm  
8 language would be rendered entirely ineffective if we  
9 interpreted the Act in such a way that courts have no power  
10 to enforce administrative orders of reinstatement. See  
11 *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("[A] statute  
12 ought, upon the whole, to be so construed that, if it can be  
13 prevented, no clause, sentence, or word shall be  
14 superfluous, void, or insignificant" (citations omitted)).<sup>2</sup>

---

<sup>2</sup>Admittedly, my reading of the Act is in some tension with other language in section 42121—namely, paragraph 42121(b)(3)'s heading ("Final order") and paragraph 42121(b)(4)'s provision that "[a]ny person adversely affected or aggrieved by an order issued under paragraph (3) may obtain review of the order [in a Court of Appeals]." These tensions suggest that Congress may not have specifically considered the possibility that employers would flout or judicially challenge preliminary reinstatement orders. As set forth above, however, there is no possible reading that will make perfect sense of every aspect of the statute, and I have chosen the one that, in my view, leaves the statutory text and purpose most intact.

1           The importance of *effective* preliminary reinstatement  
2   is plain not simply from the statute's mandatory language  
3   and strict deadlines but also from the purpose of the  
4   statute as a whole. *See Connecticut ex rel. Blumenthal v.*  
5   *U.S. Dep't of Interior*, 228 F.3d 82, 89 (2d Cir. 2000)  
6   (where text of statute is ambiguous, we must construct an  
7   interpretation consistent with the primary purpose of the  
8   statute as a whole), *cert. denied*, 532 U.S. 1007 (2001).  
9   Congress made clear, in enacting the Sarbanes-Oxley Act,  
10   that it viewed corporate whistleblowers not simply as good  
11   guys who deserve reward but also as useful-indeed  
12   essential-combatants against corporate malfeasance.

13           The Senate Judiciary Committee's report on the Act, for  
14   example, listed whistleblower protection as one of three  
15   main purposes of the Act (alongside criminal liability for  
16   wrongdoers and bars to bankruptcy discharge). S. Rep. No.  
17   107-146, at 2 (2002) ("Senate Report"). In the "Background  
18   and Need for Legislation" section of the Senate Report,  
19   which narrated the epic demise of Enron, the Committee  
20   explained that the cover-up efforts of Enron's management  
21   included "discourag[ing] at nearly every turn" attempts by  
22   "employees at both Enron and [its auditor] Andersen . . . to

1 report or 'blow the whistle' on fraud," The Senate Report  
2 concluded that a "culture, supported by law," existed at  
3 Enron and related companies:

4 that discourage[s] employees from reporting  
5 fraudulent behavior not only to the proper  
6 authorities, such as the FBI and the SEC, but  
7 even internally. This 'corporate code of  
8 silence' not only hampers investigations, but  
9 also creates a climate where ongoing  
10 wrongdoing can occur with virtual impunity.  
11 The consequences of this corporate code of  
12 silence for investors in publicly traded  
13 companies, in particular, and for the stock  
14 market, in general, are serious and adverse,  
15 and they must be remedied.  
16

17 *Id.* at 5. The Committee also recognized the importance of  
18 these employees to any attempt to enforce new safeguards:  
19 "often, in complex fraud prosecutions, these insiders are  
20 the only firsthand witnesses to the fraud. They are the only  
21 people who can testify as to 'who knew what, and when,'  
22 crucial questions not only in the Enron matter but in all  
23 complex securities fraud investigations." *Id.* at 10.

24 The language and history of the Act, then, evince a  
25 strong Congressional preference for reinstatement as a means  
26 of encouraging whistleblowing.<sup>3</sup> Congress's preference,

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<sup>3</sup>While I agree with Judge Leval that nothing in the legislative history speaks *specifically* to the

1    moreover, makes eminent sense. The Act's provision for  
2    *immediate* orders of preliminary reinstatement encourages  
3    whistleblowing, by assuring potential whistleblowers that  
4    they will remain employed, integrated in the workplace,  
5    professionally engaged, and well-situated in the job market;  
6    such orders also facilitate whistleblowing, by enabling  
7    whistleblowers to continue on as observers and potential  
8    witnesses to corruption. Moreover, when a whistleblower is  
9    immediately reinstated, this assures his co-workers that  
10   they are protected and thereby encourages them to come  
11   forward as well. The alternative is likely to discourage  
12   initial whistleblowing and, where a whistleblower has been  
13   removed pending the administrative and judicial processes,  
14   to send a chilling signal to co-workers who notice the  
15   whistleblower's sudden (and to all appearances permanent)  
16   disappearance. As the Supreme Court explained in  
17   considering an analogous whistleblower provision in the

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enforceability of preliminary orders, the history does make plain Congress's preference for immediate reinstatement whenever probable cause exists, which ought to inform our attempt to reconcile apparently conflicting statutory language in determining whether, in cases where an employer chooses to flout a preliminary order, we have jurisdiction to enforce that order to preserve the status quo.

1 Surface Transportation Assistance Act of 1982:

2 Congress . . . recognized that the employee's  
3 protection against having to choose between  
4 operating an unsafe vehicle and losing his job  
5 would lack *practical effectiveness* if the  
6 employee could not be reinstated pending  
7 complete review. The longer a discharged  
8 employee remains *unemployed*, the more  
9 devastating are the consequences to his  
10 personal financial condition *and prospects for*  
11 *reemployment*. Ensuring the eventual recovery  
12 of backpay may not alone provide sufficient  
13 protection to encourage reports of safety  
14 violations.

15  
16 *Brock v. Roadway Exp., Inc.*, 481 U.S. 252, 258-59 (1987)

17 (emphasis added).

18 Based on these same statutory and policy  
19 considerations, the Secretary has promulgated 29 C.F.R.  
20 1980.113, which provides that:

21 [w]henver any person has failed to comply  
22 with a preliminary order of reinstatement or a  
23 final order or the terms of a settlement  
24 agreement, the Secretary or a person on whose  
25 behalf the order was issued may file a civil  
26 action seeking enforcement of the order in the  
27 United States district court for the district  
28 in which the violation was found to have  
29 occurred.

30  
31 This agency rule, while by no means authoritative over this  
32 Court, is entitled to some minimal deference based on the  
33 Secretary's experience enforcing the Act and on the need for  
34 national uniformity. *United States v. Mead Corp.*, 533 U.S.

1 218, 234-35 (2001).

2       Notwithstanding these considerations, my esteemed  
3 colleague, Judge Jacobs, makes three policy arguments  
4 against jurisdiction. I address them in turn. First, Judge  
5 Jacobs argues that any hardship resulting from an employer's  
6 refusal to reinstate a complainant is mitigated by the  
7 prospect of judicial review if the Secretary fails to issue  
8 a final decision within 180 days. However, when compared  
9 with the statute's clear scheme of immediate reinstatement  
10 (in the ordinary case where the employer complies with the  
11 Secretary's order), the remote prospect of reinstatement *180*  
12 *days plus one legal action later* hardly seems like a robust  
13 incentive to report wrongdoing. Moreover, Judge Jacobs's  
14 interpretation would leave whistleblowers under AIR21, which  
15 contains identical review language *except* for the 180-day  
16 provision, remediless.

17       Judge Jacobs's second and third arguments are similarly  
18 unavailing. As for the argument that preliminary orders  
19 should not be enforced because they rest on a "tentative and  
20 inchoate" basis, *see ante*, at [12], preliminary relief is  
21 often based on a finding of "reasonable cause" or a "prima  
22 facie case." More importantly, Congress is entitled to make



1 the policy decision, as it has here, that, where an employee  
2 has made out a substantial claim, a balance of harms  
3 analysis favors forced reinstatement. *Brock*, 481 U.S. at  
4 259 (upholding an analogous preliminary reinstatement  
5 provision, coupled with reasonable cause requirement and  
6 efficient post-reinstatement procedures, as a "legislative  
7 determination" reflecting a sufficient "balancing of the  
8 relative interests of the Government, employee, and  
9 employer"). At any rate, the harm to the *employer* feared by  
10 Judge Jacobs is minimal because, even where an employee  
11 makes out a prima facie case, the Secretary must halt her  
12 investigation "if the employer demonstrates, by clear and  
13 convincing evidence, that the employer would have taken the  
14 same unfavorable personnel action in the absence of  
15 [whistleblowing] behavior." 49 U.S.C. § 42121(b)(2)(B)(ii).

16 Judge Jacobs's final argument is that deferred  
17 jurisdiction helps to "ensure that appeals work their way  
18 through the administrative system before the federal courts  
19 become involved" and helps to avoid the potential chaos of  
20 multiple actions being filed at multiple stages in the  
21 administrative process. *Ante*, at [12-13]. However,  
22 Congress has made clear that it wants employees reinstated

1     *while*, not after, the administrative process goes forward.  
2     Nor does any chaos ensue from immediate enforcement because,  
3     as explained below, our task at this stage is not to assess  
4     the merits of the Secretary's determination but merely,  
5     after assuring ourselves that due process has been afforded,  
6     to give it effect. Indeed, preliminary or interim  
7     reinstatement orders issued under other whistleblower  
8     statutes have been enforced by this Court, with no dire  
9     effects. See *Martin v. Yellow Freight Sys., Inc.*, 793 F.  
10    Supp. 461 (S.D.N.Y. 1992) (enforcing *interim* reinstatement  
11    order issued under the Surface Transportation Assistance Act  
12    of 1982), *aff'd*, 983 F.2d 1201 (2d Cir. 1993).<sup>4</sup>

13         As set forth above, jurisdiction is appropriate and  
14     expedient; the alternative would undermine a key element of  
15     the Sarbanes-Oxley Act.

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<sup>4</sup>Additionally, Judge Jacobs suggests that immediate enforcement might result in a "rapid sequence of reinstatement and discharge and a generally ridiculous state of affairs." *Ante*, at [13]. There is no dispute, however, that Congress provided for immediate reinstatement regardless of whether the employee ultimately prevailed. At any rate, the scenario Judge Jacobs presents is hardly more "ridiculous" than a statutorily-mandated preliminary order that is utterly unenforceable.

## II. Due Process

My other esteemed colleague, Judge Leval, votes to dismiss the case even *if* we have jurisdiction because he concludes that the Department's preliminary reinstatement order rested on a flawed procedure that violated CTI's right to due process. With respect, I disagree.

The lead-and practically the only-case on this issue is *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987).

*Brock* held that:

minimum due process for the employer in this context requires notice of the employee's allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet with the investigator and present statements from rebuttal witnesses. The presentation of the employer's witnesses need not be formal, and cross-examination of the employee's witnesses need not be afforded at this stage of the proceedings.

*Id.* at 264. Because in *Brock* the Secretary had given the defendant employer *no* information about the evidence against it or the basis for its preliminary finding against the employer, the Supreme Court did not have occasion to elaborate on the above standard before concluding that the Department had not complied with due process requirements. Conversely, in what may be the only other case to analyze

1 the due process requirements for preliminary whistleblower  
2 reinstatement orders, *Martin v. Yellow Freight Sys., Inc.*,  
3 793 F. Supp. 461 (S.D.N.Y. 1992) (enforcing *interim*  
4 reinstatement order issued under the Surface Transportation  
5 Assistance Act of 1982), *aff'd*, 983 F.2d 1201 (2d Cir.  
6 1993), the district court found due process *easily* satisfied  
7 because the employer had received a full hearing on the  
8 merits. Neither case, therefore, suggests a clear-cut  
9 answer to the question before us.

10 *Brock*, however, does offer some guidance. To begin  
11 with, the *Brock* Court explained that, in determining how  
12 much process is due, courts must weigh three sets of  
13 "substantial" interests: 1) the government's interest in  
14 encouraging whistleblowing, 481 U.S. at 262; 2) the  
15 employer's interest in controlling the makeup of its staff,  
16 *id.* at 263; and 3) the employee's interest in his livelihood  
17 (which depends not merely on receiving backpay but also on  
18 being able to find another job), *id.* Although an employer's  
19 interests must be protected by a pre-reinstatement  
20 investigative procedure that ensures a minimum degree of  
21 reliability, after a certain point the value of additional  
22 reliability is outweighed by the cost of "extending

1 inordinately the period in which the employee must suffer  
2 unemployment." *Id.* at 266. Ultimately, in the context of  
3 whistleblower actions, the inquiry boils down to whether  
4 "the prereinstatement procedures establish a reliable  
5 initial check against mistaken decisions, and complete and  
6 expeditious review is available." *Id.* at 263 (quotation  
7 omitted).

8 Judge Leval finds that the Department's investigation  
9 fails the *Brock* test because "CTI was not given reasonable  
10 notice of the evidence"-as opposed to the  
11 allegations-"against it." Concurring Op. at [14-15]. My  
12 conclusion to the contrary is based largely on the  
13 Department's initial letter to CTI ("Notice"), dated June  
14 24, 2004, which (in four pages of small, single-spaced  
15 print) provided CTI with a highly detailed summary and  
16 analysis of the allegations and evidence against it. In  
17 addition, the Department gave CTI "a copy of Bechtel's  
18 initial complaint, a description of his allegations, and  
19 opportunities to submit written responses to those  
20 allegations[,] to present statements from rebuttal  
21 witnesses," and to meet with investigators. Concurring Op.  
22 at [14].

1           The Notice, first, set out exactly what Bechtel's  
2   alleged whistleblowing activities were and when they  
3   occurred. In brief, Bechtel, a Vice President at CTI,  
4   raised concerns about CTI's alteration, to avoid SEC  
5   disclosure, of its employee "incentive compensation plan,"  
6   under which employees received a share of incoming revenue.  
7   Bechtel also stated his opinion that CTI was illegally  
8   concealing various oral agreements to compensate inventors,  
9   salespersons and attorneys with a percentage of the  
10   revenue-anywhere from 10 % to 70 %-from specific projects  
11   they helped realize, even though these agreements would  
12   materially affect CTI's net profits and losses. The Notice  
13   detailed Bechtel's allegation that, on March 14, 2003, he  
14   (and Wil Jacques, a colleague and co-complainant who has  
15   since settled with CTI) met privately with CTI's Chief  
16   Executive Officer, John Nano, and agreed to sign off on a  
17   SEC report, albeit with a written reservation from Jacques,  
18   in return for a performance review for Bechtel and a  
19   promised raise for Jacques.

20           The Notice set forth specific alleged acts of  
21   retaliation by Nano against Bechtel and Jacques, culminating  
22   in their termination on June 30, 2003, ostensibly for poor

1 performance. The Notice discussed CTI's admitted lack of  
2 documentary evidence that Bechtel or Jacques performed  
3 poorly, as well as the evidence to the contrary (in the form  
4 of annual bonuses, positive performance reviews, and an  
5 enthusiastic memorandum from Nano to Jacques). The Notice  
6 then discussed CTI's assertion that it had economic reasons  
7 for firing Bechtel and Jacques. The Notice cited to  
8 evidence to the contrary, *i.e.*, the fact that CTI had  
9 replaced Bechtel and Jacques with "consultants" who held  
10 titles of Vice President, derived their entire income from  
11 CTI, functioned like regular employees, and at the time of  
12 the Notice had not produced significant revenues.

13 Notwithstanding the specificity of this letter, Judge  
14 Leval finds that the Department provided CTI only with  
15 allegations, not "evidence" (as that term was used in  
16 *Brock*). In so finding, Judge Leval focuses on what he calls  
17 the "mishmash" of a witness summary provided to CTI in lieu  
18 of full or redacted witness statements. Concurring Op. at  
19 [15 & n.2] (quoting the summary in full). While I agree  
20 that this summary is not a masterwork of drafting, it does  
21 provide a straightforward summary of what witnesses said  
22 about the main contested issue in the case: *i.e.*, whether

1 Nano fired Bechtel for legitimate business reasons. It is  
2 true that, under Department regulations, prior to issuing a  
3 preliminary order, the Secretary:

4 will . . . contact the named [respondent] to  
5 give notice of the substance of the relevant  
6 evidence . . . . includ[ing] any witness  
7 statements, which will be redacted to protect  
8 the identity of confidential informants where  
9 statements were given in confidence; if the  
10 statements cannot be redacted without  
11 revealing the identity of confidential  
12 informants, summaries of their contents will  
13 be provided.

14  
15 29 C.F.R. § 1980.104(e). However, it may well be that the  
16 Secretary was justified in providing only witness summaries;  
17 given that CTI only had approximately seventeen employees,  
18 any disclosure of witness statements (even in a reasonably  
19 redacted form) might have revealed the witnesses'  
20 identities. Even if the Secretary should have provided  
21 statements under § 1980.104(e), this fact alone could not  
22 constitute a due process violation. *Torres-Rosado v.*  
23 *Rotger-Sabat*, 335 F.3d 1, 10 (1st Cir. 2003) ("An agency's  
24 failure to follow its own rules may be significant in  
25 administrative law, but the federal Due Process Clause does  
26 not incorporate the particular procedural structures enacted  
27 by state or local governments.").



1           From other documents in the record, we know that CTI  
2   responded to the Notice on July 14, 2004; that the  
3   Department responded in turn on November 3, 2004; and that  
4   CTI submitted further information on November 15,  
5   2004-information which the Secretary later characterized as  
6   "lengthy but largely non-responsive." Only as of February  
7   2, 2005, after numerous communications between the Secretary  
8   and CTI and after investigators met twice with CTI's General  
9   Counsel and outside counsel, did the Secretary issue her  
10   findings of reasonable cause and her preliminary  
11   reinstatement order.

12           The Secretary's February 5, 2005, letter engaged  
13   substantively with CTI's defenses. The letter explained  
14   that CTI's defense, which had focused on Bechtel's failure  
15   to bring in new revenue, was contradicted by its own SEC  
16   filings, which reveal a "business model" under which  
17   Bechtel's job was not to generate short-term income but  
18   rather "to close transactions that would create future,  
19   recurring income streams-that is, to obtain licenses." In  
20   this respect, the Department noted "that Bechtel and Jacques  
21   obtained at least three licenses during their employment," a  
22   record that the Department found, based on its

1 investigation, "[could not] be characterized as [a] poor  
2 performance." The Department also restated its earlier  
3 observation that CTI did not appear to have profited  
4 financially in any way from its replacement of Bechtel and  
5 Jacques with full-time Vice President "consultants."

6 In my view, this record reflects a methodical  
7 investigation and ample notice to CTI of the evidence, as  
8 well as the allegations, against it. Whether or not the  
9 Department, in an ideal world, should have provided any  
10 further information to CTI, its investigation constituted "a  
11 reliable initial check against mistaken decisions," *Brock*  
12 *v. Roadway Exp., Inc.*, 481 U.S. 252, 263 (1987) (quotation  
13 omitted), and therefore merits enforcement.

#### 14 15 **CONCLUSION**

16 As set forth above, I would exercise jurisdiction and  
17 affirm the District Court's injunction that CTI reinstate  
18 Bechtel pending the completion of the Department's  
19 investigation. Accordingly, I respectfully dissent from the  
20 result reached today.