04-6265-cv

To be Argued By:
SANDRA S. GLOVER

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-6265-cv

KEVIN MURPHY, Administrator of the Estate of Lawrence Martin Payne, BARBARA GOREN, and

(for continuation of Caption, See Inside Cover)

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

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BRIEF FOR THE UNITED STATES OF AMERICA, DEPARTMENT OF THE AIR FORCE, AND COLONEL CHARLES H. WILCOX, II

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Plaintiffs-Appellants,

-vs-

UNITED STATES OF AMERICA, DEPARTMENT OF THE AIR FORCE, and COLONEL CHARLES H. WILCOX, II,

Defendants-Appellees.

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STATEMENT OF JURISDICTION

Plaintiffs invoked the subject matter jurisdiction of the district court under 28 U.S.C. § 1331 (general federal question jurisdiction) alleging that a federal question is presented. As explained below, the district court lacked subject matter jurisdiction over Plaintiffs' suit because the Military Claims Act precludes judicial review of settlements under that Act. *See* 10 U.S.C. § 2735.

The district court (Mark R. Kravitz, J.) entered a final judgment dismissing all of Plaintiffs' claims for lack of subject matter jurisdiction on September 27, 2004. Special Appendix (SPA) 1. Plaintiffs filed a timely notice of appeal on November 22, 2004. Joint Appendix (JA) 319. *See* Fed. R. App. Pr. 4(a)(1)(B). This Court has jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291.

ISSUE PRESENTED

The Military Claims Act authorizes the Secretary of the Air Force to settle claims under the Act and provides that any such resolution "is final and conclusive," "[n]otwithstanding any other provision of law." The Secretary denied Plaintiffs' claims under the Act, and they sought review of those decisions in federal court. Did the district court properly dismiss Plaintiffs' claims for lack of subject matter jurisdiction?

United States Court of Appeals

FOR THE SECOND CIRCUIT

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Preliminary Statement

This case arises out of Plaintiffs' dissatisfaction with the resolution of their claims for damages under the Military Claims Act (the MCA or the Act). Plaintiffs filed claims for damages under the Act for losses arising from the deaths of three federal employees in a 1996 plane crash in Croatia. The Air Force, which operated the plane, denied their damages claims, citing its policy of denying MCA relief for claims, such as those involving Plaintiffs' decedents, that were eligible for benefits under the Federal Employees Compensation Act (FECA). Plaintiffs exhausted their appeals through the Air Force's administrative appeals process.

Still dissatisfied, Plaintiffs filed suit in the United States District Court for the District of Connecticut to challenge the Secretary of the Air Force's denial of their claims. The district court (Mark R. Kravitz, J.) dismissed their complaint for lack of subject matter jurisdiction after finding -- consistent with the eight federal appellate courts that have considered the question -- that the MCA bars Plaintiffs' requested judicial review of decisions paying or denying claims under the Act.

The district court properly concluded that it lacked jurisdiction to consider Plaintiffs' challenges to the Secretary's decisions denying their claims under the MCA. As the almost unanimous weight of the authority has held, the MCA precludes judicial review of decisions denying or paying claims under that Act. Furthermore, even if this Court were to agree with the district court that the Act allows limited judicial review of constitutional questions

or alleged violations of the statutory mandate, it would be of no help to Plaintiffs. Plaintiffs allege no colorable constitutional claims, and although they claim the Air Force violated FECA, they allege no colorable violations of the statute in question, the MCA. In any event, Plaintiffs' suggestion that the Secretary's decisions violate FECA is without merit; the FECA exclusivity provision precludes the payment of Plaintiffs' claims.

Statement of the Case

Plaintiffs filed suit in the United States District Court for the District of Connecticut on March 20, 2003.

Defendants filed a motion to dismiss for lack of subject matter jurisdiction, and the district court (Mark R. Kravitz, J.) granted that motion in a Memorandum of Decision dated September 24, 2004. *See* SPA 2. The district court's decision is reported at *Murphy ex rel. Estate of Payne v. United States*, 340 F. Supp. 2d 160 (D. Conn. 2004).

The district court entered final judgment for Defendants on September 27, 2004. *See* SPA 1. Plaintiffs filed a timely notice of appeal on November 22, 2004. *See* JA 319.

STATEMENT OF FACTS

A. Facts

On April 3, 1996, an Air Force CT-43A crashed near Dubrovnik, Croatia, killing everyone on board. Among

the passengers was a delegation from the United States Department of Commerce, personally led by the Secretary of Commerce, the Honorable Ronald H. Brown. *See* Complaint ¶¶ 9-10, JA 8-9. Secretary Brown and his delegation, which included federal civil employees Lawrence Martin Payne, Adam Noel Darling, and Gail Dobert, were in the midst of a "good will" mission to Bosnia. *Id.* ¶ 9, JA 8. The Air Force investigated the crash and determined that it was caused by multiple factors, including failure of command, aircrew error, and utilization of a faulty instrument approach procedure. *Id.* ¶ 11, JA 9.

Plaintiffs are family members of Payne, Darling, and Dobert and/or representatives of their estates. *Id.* ¶¶ 2-7, JA 7-8. They filed claims for recovery of damages for death and loss of consortium under the MCA. *Id.* ¶ 12, JA 9. The Air Force denied their claims, and Plaintiffs appealed those denials through the administrative appeals process. *Id.* ¶ 13, JA 9.

In substantively identical decisions dated August 18, 1998, the Secretary of the Air Force, through his designate, upheld the denial of Plaintiffs' claims under the MCA. *Id.* ¶ 14, JA 9. *See* JA 57-60; 61-63; 64-67. As relevant here, the Secretary denied the claims because the regulations governing MCA claims prohibit payment of MCA claims for the death of government employees, such as Plaintiffs' decedents, for whom benefits are provided by

FECA. *See*, *e.g.*, JA 57 (citing 32 C.F.R. § 842.50(r) and Air Force Instruction 51-501, ¶ 3.6.9).[1]

The Secretary noted that the policy of denying MCA claims for individuals covered by FECA was based on language in FECA and a long-standing policy of recognizing the MCA as a "payment authority of last resort." *Id.* First, as explained by the Secretary, FECA contains an exclusivity provision that precludes recovery by way of an administrative proceeding under a federal tort liability statute where FECA covers an injury. The MCA is a tort liability statute -- it "allocates losses arising out of human activities" -- and thus FECA's exclusivity clause precludes the payment of MCA claims when recovery could be had under FECA. JA 58.

Second, the denial of MCA claims for claims covered by FECA serves the Air Force's long-standing policy of "utiliz[ing] the MCA as a payment authority of last resort, to cover those situations where no other provision of law provides for payment by the Government." *Id.* This policy ensures a uniformity of benefits for all government civilian employees (*i.e.*, recovery under FECA). Thus, a payment under the MCA in this case would "permit a double recovery from the Government not otherwise generally provided to other civil service employees and their families facing similar losses." *Id.*

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[1] The reference to ¶ 3.6.9 of Air Force Instruction 51-501 is presumably a typographical error. The relevant paragraph from the Instruction is ¶ 3.7.9.

B. District Court Proceedings

On March 20, 2003, still dissatisfied with the resolution of their MCA claims before the Air Force, Plaintiffs filed suit in federal district court to challenge the Secretary's decisions. *See* Complaint, JA 6-12. The Complaint named the United States, the Department of the Air Force, and Colonel Charles H. Wilcox, II, as Defendants, and claimed that Defendants' actions were arbitrary, capricious, and otherwise contrary to law. It asked the district court, *inter alia*, to declare the Secretary's decisions denying their claims invalid and to direct the Air Force to consider their MCA claims without regard to its policy of denying MCA claims for individuals eligible for recovery under FECA. *Id.* 11.

Defendants moved to dismiss for lack of subject matter jurisdiction, noting that the MCA expressly precludes judicial review of settlements (including settlements that deny claims) under that statute. After receiving extensive briefing and argument on the issue, the district court issued its decision granting Defendants' motion to dismiss. *See Murphy*, 340 F. Supp. 2d 160.

The district court first noted that, with the exception of one early district court case, the unanimous conclusion of the courts to have considered the issue was that the MCA precludes judicial review of claims settled under that statute. *Id.* at 166-67. After reviewing the MCA's language, structure, and legislative history, the court concluded that "the MCA precludes all judicial review except for constitutional claims and claims involving violations of a clear statutory mandate contained in the

MCA itself." *Id.* at 175. The court found, however, that Plaintiffs had failed to allege any meritorious constitutional claims, and had failed to allege that the Air Force violated any mandates of the MCA in its decisions. *Id.* at 178-82. Accordingly, the court granted Defendants' motion to dismiss, *id.* at 184, and this appeal followed.

SUMMARY OF ARGUMENT

Section 2735 of the Military Claims Act precludes judicial review of settlements under that Act. As all eight courts of appeals to consider the question have concluded, the text, history, and structure of the Act reveal an unmistakable congressional intent to preclude judicial review of MCA settlements. The text speaks with clarity about the finality of MCA settlements and resolves any ambiguity about the potential for judicial review by stating that such settlements are final and conclusive "[n]otwithstanding any other provision of law." And the history of the MCA confirms this understanding. When Congress enacted the current version of the preclusion statute, it was well aware that the Supreme Court had interpreted a prior version of that same statute to preclude judicial review. Finally, the structure of the MCA reinforces this conclusion because that statute grants virtually unfettered discretion to the military to settle MCA claims. Judicial review would interfere with this discretion and insert the courts into matters Congress wanted left to the military.

Despite this evidence of congressional intent to preclude judicial review, the district court allowed review of (1) constitutional claims, and (2) claims that the agency

exceeded a statutory mandate in the MCA. Even if this Court were to adopt these limited exceptions to the preclusion-of-review statute, they would not help Plaintiffs. As the district court concluded, Plaintiffs allege no colorable constitutional claims and no colorable claim that the Secretary violated a statutory mandate of the MCA.

Finally, Plaintiffs argue that apart from the district court's limited forms of judicial review, this Court may generally review legal questions and may review the Secretary's decisions under the Administrative Procedure Act (APA). Plaintiffs cite no compelling authority for the review of legal questions in the face of a statute that precludes judicial review, and the APA is expressly inapplicable in the face of such a statute. Plaintiffs' arguments are beside the point in any event. The only alleged error by the Air Force -- denying MCA benefits for FECA-eligible claimants -- is not an error. FECA's exclusivity provision precludes the payment of claims under the MCA for FECA-eligible claimants.

ARGUMENT

I. THE MILITARY CLAIMS ACT BARS JUDICIAL REVIEW OF PLAINTIFFS' CLAIMS

A. Governing Law and Standard of Review

1. The Military Claims Act

Plaintiffs' claims are brought under the MCA. As relevant to this case, that Act authorizes the Secretary of

the Air Force to settle claims against the United States for damage to real or personal property, or for personal injury or death, "either caused by a civilian officer or employee of [the Air Force] . . . or a member of the . . . Air Force . . . acting within the scope of his employment, or otherwise incident to noncombat activities of that department." 10 U.S.C. § 2733(a). The Act specifically defines "settle" to include the denial of a claim under the Act. *See* 10 U.S.C. § 2731 ("In this chapter, 'settle' means consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or by disallowance.").

The Act places virtually no restrictions on the Secretary's discretion to settle a claim under the Act. Indeed, the Act does not even require the Secretary to pay claims; it merely *authorizes* him to pay claims. 10 U.S.C. § 2733(a) (the Secretary "may settle"). *Collins v. United States*, 67 F.3d 284, 286 (Fed. Cir. 1995) ("We note that section 2733(a) is permissive and not mandatory. It provides that the Secretary 'may' settle and pay claims. Action by him in settling and paying claims is entirely discretionary and not mandatory."). Aside from establishing a statute of limitations for claims, prohibiting payments for services furnished at the expense of the United States, and establishing a handful of other like limitations, *see generally* 10 U.S.C. § 2733, the Act's only limitation on the Secretary's discretion to settle claims is that any settlements must be "[u]nder such regulations as the Secretary concerned may prescribe," *id.*

Consistent with this mandate, the Secretary of the Air Force has promulgated regulations to govern MCA claims. As relevant to this case, one regulation precludes the

approval of MCA claims when the claimant is otherwise eligible for the recovery of benefits under FECA. *See* 32 C.F.R. § 842.50(r) ("A claim is not payable under this subpart if it [i]s for the personal injury or death of a government employee for whom benefits are provided by the FECA."). This exclusion is consistent with identical regulatory exclusions promulgated by the other branches of the military to govern MCA claims processed by those branches. *See* 32 C.F.R. § 536.24(k) (citing § 536.50(j)(2)) (Army); 32 C.F.R. § 750.44(d)(6) (Navy); 33 C.F.R. § 25.205(c) (Coast Guard).

Finally, the Act contains a preclusion-of-review provision: "Notwithstanding any other provision of law, the settlement of a claim under section 2733 . . . of this title is final and conclusive." 10 U.S.C. § 2735.

2. Preclusion of Judicial Review

Federal courts are courts of limited jurisdiction, empowered to exercise only the jurisdiction granted to them by Congress. *Carlyle Towers Condominium Ass'n, Inc. v. FDIC*, 170 F.3d 301, 306 (2d Cir. 1999). And thus the Supreme Court has long held that Congress has the power to deprive federal courts of jurisdiction to hear specific types of cases. *See, e.g.*, *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) ("The Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'") (quoting *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845)); *see also*

Carlyle Towers, 170 F.3d at 306. Thus, while courts generally presume that Congress intends judicial review of agency actions, *see, e.g.*, *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986); *Carlyle Towers*, 170 F.3d at 306, this presumption is rebuttable with evidence that Congress intended to preclude judicial review, *Bowen*, 476 U.S. at 673.

The Supreme Court has taken an expansive view of the types of evidence that demonstrate a congressional intent to preclude judicial review. Evidence that Congress intended to preclude judicial review may be found in the statutory language, in the legislative history, or as an inference "'fairly discernible' in the detail of the legislative scheme." *Bowen*, 476 U.S. at 673 (quoting *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349 (1984)). In addition, congressional intent to preclude judicial review

> may also be inferred from contemporaneous judicial construction barring review and the congressional acquiescence in it, . . . or from the collective import of legislative and judicial history behind a particular statute . . . . More important for purposes of this case, the presumption favoring judicial review of administrative action may be overcome by inferences of intent drawn from the statutory scheme as a whole.

Block v. Community Nutrition Inst., 467 U.S. 340, 349 (1984) (citations omitted). *See also id.* at 345 ("Whether and to what extent a particular statute precludes judicial review is determined not only from its express language,

but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved."). Finally, evidence that judicial review would frustrate the purposes of the statute would support a finding that Congress intended to preclude judicial review. *See Traynor v. Turnage*, 485 U.S. 535, 542-44 (1988).

Although the cases state that evidence of congressional intent to preclude judicial review must be "clear and convincing," *see, e.g.*, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967), the Supreme Court has emphasized that this standard should operate not as "a rigid evidentiary test but [rather as] a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling," *Block*, 467 U.S. at 351. *See also Carlyle Towers*, 170 F.3d at 306. The presumption does not control, however, where the evidence demonstrates Congress intended to preclude judicial review. *Block*, 467 U.S. at 351.

3. Standard of Review

This Court reviews *de novo* a district court's dismissal of a complaint for lack of subject matter jurisdiction. *Firstland Int'l, Inc. v. United States INS*, 377 F.3d 127, 130 (2d Cir. 2004); *Dew v. United States*, 192 F.3d 366, 371 (2d Cir. 1999).

B. Discussion

As all eight courts of appeals to consider the question have concluded, substantial evidence demonstrates that Congress intended to preclude judicial review of claims settled under the MCA. *See Minns v. United States*, 155 F.3d 445, 453 (4th Cir. 1998); *Collins*, 67 F.3d at 287-88; *Schneider v. United States*, 27 F.3d 1327, 1331-33 (8th Cir. 1994); *Hata v. United States*, 23 F.3d 230, 233 (9th Cir. 1994); *Rodrigue v. United States*, 968 F.2d 1430, 1432-34 (1st Cir. 1992); *Broadnax v. United States Army*, 710 F.2d 865, 867 (D.C. Cir. 1983) (per curiam); *LaBash v. United States Dep't of the Army*, 668 F.2d 1153, 1155-56 (10th Cir. 1982); *Towry v. United States*, 620 F.2d 568 (5th Cir. 1980) (adopting district court opinion). *But see Welch v. United States*, 446 F. Supp. 75, 77-78 (D. Conn. 1978).

These decisions are supported by an analysis of the text, history, and statutory scheme of the MCA.

1. Section 2735 Precludes Judicial Review of Settlements Under the MCA

The text of the MCA demonstrates congressional intent to preclude judicial review of settlements under that Act. Section 2731 defines "settle" broadly to include the partial or complete payment or denial of a claim, 10 U.S.C. § 2731, and then protects those settlements from *any* further review or consideration, whether administrative or judicial. Specifically, § 2735 provides that "[n]otwithstanding any other provision of law, the settlement of a claim under section 2733 . . . of this title is

final and conclusive." 10 U.S.C. § 2735. That Congress deemed settlements "final and conclusive" demonstrates that those settlements are not subject to any review or revision. *See LaBash*, 668 F.2d at 1156 n.5 (holding that "§ 2735 provides 'clear and convincing' evidence of Congress' intent" to preclude judicial review); *Hata*, 23 F.3d at 233 (same); *Poindexter v. United States*, 777 F.2d 231, 233 (5th Cir. 1985) (holding that §§ 2731 and 2735 "preclude[] all judicial review of the encompassed administrative rulings"); *Schneider*, 27 F.3d at 1331 ("We conclude that the language of section 2735 clearly expresses Congress's intent to preclude judicial review and presents no ambiguity that would give rise to a presumption in favor of judicial review."); *Minns*, 155 F.3d at 453 ("We believe that when Congress provided that the decisions of the Judge Advocate General are 'final and conclusive,' it placed final discretion over military claims with the military and not with the courts.").

The conclusion that § 2735 precludes judicial review is buttressed by the history of that section. An early version of § 2735 contained language providing that settlements were to be final and conclusive "for all purposes," but this latter clause was omitted as surplusage. *See* 10 U.S.C. § 2735 (explanatory note). *See also Rodrigue*, 968 F.2d at 1433; *Schneider*, 27 F.3d at 1331. Thus, to allow judicial review of MCA settlements would directly contradict the intent of Congress that such settlements be "final and conclusive" for all purposes.

Despite the overwhelming evidence -- and authority -- to the contrary, Plaintiffs contend that § 2735 does not preclude judicial review but rather merely precludes

further *administrative* proceedings. In support of this assertion, Plaintiffs point to *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955), and some scattered language in the legislative history, Appellants' Br. at 15-19, but neither source helps them.

In *Shaughnessy*, the Supreme Court held that a section of the 1952 Immigration and Nationality Act providing that deportation orders shall be "final" only referred to the finality of administrative proceedings and did not preclude judicial review of those orders. 349 U.S. at 51-52. But unlike the statute at issue in *Shaughnessy*, the MCA does not merely provide that administrative decisions are "final." It goes further to state that they are "final *and conclusive*," "*[n]otwithstanding any other provision of law*." 10 U.S.C. § 2735 (emphasis added). To interpret § 2735 to allow judicial review, exactly as the statute in *Shaughnessy*, would render this emphatic language in § 2735 meaningless in derogation of the Supreme Court's command to "disfavor interpretations of statutes that render language superfluous." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). *See also Schneider*, 27 F.3d at 1331 ("To interpret the section as precluding only further administrative review would be to render meaningless the phrase 'notwithstanding any other provision of law.'"). In any event, the Supreme Court has emphasized that "[e]ach statute in question must be examined individually," *Heikkila v. Barber*, 345 U.S. 229, 233 (1953), and an examination of *this* statute, along with its history and structure, support the conclusion that Congress intended to preclude judicial review.

The legislative history is similarly unhelpful to Plaintiffs. Indeed, Plaintiffs concede that one part of the legislative history supports the conclusion that § 2735 precludes judicial review. Appellants' Br. at 18-19. Specifically, the Senate Report accompanying a 1964 revision to that Section includes a letter from the Assistant Secretary of the Interior recommending passage of the bill and noting that "[n]o provision is made for appeal to the courts. On the contrary, the bill provides that the administrative settlement of a claim is final and conclusive." S. Rep. 1423, at 3414-15, SPA 93. Plaintiffs argue that this letter should be given little weight and that greater weight should be given instead to other snippets from the legislative history suggesting that Congress was concerned primarily with precluding additional administrative proceedings, not with precluding judicial review. *See also Welch*, 446 F. Supp. at 78 (relying on legislative history to conclude that § 2735 only precludes further administrative proceedings). The language relied on by Plaintiffs is subject to different interpretations, however. For example, Plaintiffs rely on the language at pages 17-18 of their brief to support their conclusion that § 2735 merely precludes further administrative review, but one court identified this precise language as supporting the conclusion that § 2735 precludes *judicial* review. *Towry v. United States*, 459 F. Supp. 101, 107 (E.D. La. 1978) (decision adopted by Court of Appeals).

Thus, the *most* that can be said about these competing tea leaves of legislative history is that the legislative history provides no conclusive evidence of congressional intent one way or the other. *See Rodrigue*, 968 F.2d at 1434 ("[W]e do not pause to detail the small bits of

legislative comment cited to us as contradictory, except to say that our examination reveals inconsistency and nothing persuasive."); *Hata*, 23 F.3d at 233 n.3 ("The legislative history of the MCA, however, is inconclusive on the issue of congressional intent."). The absence of evidence from the legislative history is inconsequential, however, because "the language of the MCA is sufficiently clear that analysis of the legislative history is unnecessary to discern congressional intent." *Hata*, 23 F.3d at 233 n.3.

Plaintiffs also suggest that the MCA does not bar judicial review because Congress has used language in other statutes that appears (to Plaintiffs) to more clearly preclude judicial review. *See* Appellants' Br. at 14-15. The issue is not, however, whether Congress could have been clearer, or whether Congress used specific "magic words" in the MCA. The only question is whether the MCA demonstrates a congressional intent to preclude judicial review. And on that question, the Supreme Court has never required Congress to incant a magic formula. *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 778-79 (1985) ("Of course, the 'clear and convincing evidence' standard has never turned on a talismanic test."). Thus, even if Congress *could* have been clearer in the abstract, that is irrelevant to the question at hand. A review of the language, history, and structure of the statute demonstrates that Congress intended to preclude judicial review of settlements under the MCA.

2. The History of the MCA Demonstrates Congressional Intent to Preclude Judicial Review

In addition to the textual language, the "collective import of legislative and judicial history" of the MCA demonstrates that Congress intended to preclude judicial review of MCA settlements. *Block*, 467 U.S. at 349. *See also Heikkila*, 345 U.S. at 233-35 (finding that statute barred review based on review of history of the preclusion section as understood by courts and Congress).

An early precursor to the MCA provided that "any claim which shall be presented and acted on under authority of this act shall be held as finally determined, and shall never thereafter be reopened or considered." *United States v. Babcock*, 250 U.S. 328, 331 (1919) (quoting Act of March 3, 1885, 23 Stat. 350). In 1919, in a unanimous opinion, the Supreme Court interpreted this language to bar judicial review of administrative decisions under the act. *Id.* at 330-31. As the Court explained, when the government "creates rights in individuals against itself, [it] is under no obligation to provide a remedy through the courts." *Id.* at 331. Here, the "finality" language "express[es] clearly the intention to confer upon the Treasury Department exclusive jurisdiction and to make its decision final." *Id.*

Thus, when Congress enacted the current version of the MCA, it acted against the backdrop of this language, as definitively interpreted to preclude judicial review by the Supreme Court. Congress is presumed to be aware of

judicial interpretations of statutes when it acts, *Lindahl*, 470 U.S. at 782 n.15, and there is nothing in the text or history to suggest that Congress intended to deviate from this history. *See Rodrigue*, 968 F.2d at 1433-34 (noting that Congress enacted MCA against backdrop of *Babcock* decision interpreting a "substantive precursor" to the MCA).

Indeed, as described above, in decisions going back over a quarter of a century, the overwhelming weight of judicial authority continues to interpret the MCA to preclude judicial review of MCA settlements. *See supra* at 13.

3. The MCA's Statutory Scheme -- Including the Grant of Virtually Unfettered Discretion to the Secretary -- is Inconsistent with Judicial Review

The MCA's grant of virtually unfettered discretion to the Secretary demonstrates that Congress intended to preclude judicial review. *Block*, 476 U.S. at 345 (evidence that statute precludes review may be evident from "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved"). As described above, the MCA places virtually no limits on the Secretary's discretion to resolve claims under the statute. *See supra* at Part I.A.1. Although it requires the Secretary to establish regulations for processing claims, and establishes a few general standards for such claims (*e.g.*, a statute of limitations, and a prohibition on payments for services rendered by the United States), the overall structure of the Act is designed

to give virtually full authority to the military to resolve claims against it. Indeed, the Act is phrased as a permissive statute, not a mandatory one, authorizing, but not requiring, the military to settle claims against it. 10 U.S.C. § 2733(a) (providing that the Secretary "may" settle claims). Further, the Act authorizes the Secretary to "settle" claims, which is broadly defined to include full or partial approval or denial of claims. *Id.* § 2731.

The preclusion-of-review provision is an integral component of this structure, ensuring that "final discretion over military claims" is "with the military and not with the courts." *Minns*, 155 F.3d at 453. *See Collins*, 67 F.3d at 287 ("We are convinced that when Congress included the finality provision in the Military Claims Act it intended that army claims would be considered and disposed of by the army and not by the courts."). The administrative claims procedure thus reflects an "appropriate balance between individual rights and Congress' desire to avoid the disruptive effect that judicial review may have on the 'prompt and authoritative administrative settlement of claims' against the military." *Hata*, 23 F.3d at 234 (quoting *Heller v. United States*, 776 F.2d 92, 98 (3d Cir. 1985)); *Schneider*, 27 F.3d at 1332; *Towry*, 459 F. Supp. at 108 (opinion adopted by Court of Appeals). Judicial review would disrupt this balance and thrust courts into matters Congress wanted left to military discretion. As the district court below explained, "[j]udicial review of a Secretary's decision to pay or not pay some or all of a claim would seem inconsistent with the broad discretion that Congress sought to confer on the Secretaries of the Armed Forces in the MCA." *Murphy*, 340 F. Supp. 2d at 171.

In addition, judicial review would be inconsistent with the historic deference courts have accorded to Congress and the Executive in matters relating to the military. As the Supreme Court has explained, "judges are not given the task of running the [military.] . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate [military] matters as the [military] must be scrupulous not to intervene in judicial matters." *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953). *See also Able v. United States*, 155 F.3d 628, 633 (2d Cir. 1998) ("Deference by the courts to military-related judgments by Congress and the Executive is deeply recurrent in Supreme Court caselaw and repeatedly has been the basis for rejections to a variety of challenges to Congressional and Executive decisions in the military domain.").

This case presents a prime example. Although Plaintiffs suggest that review in their case would not be disruptive to the military because they do not seek review of any factual determinations, Appellants' Br. at 8, their suit seeks review of Air Force policies. Specifically, they ask the courts to overturn the Secretary's policy decision at the core of the administrative decisions in this case, namely, that MCA claims should be disallowed when the claimant is eligible for benefits under FECA. As the Air Force explained, this policy choice reflected both its understanding of the FECA exclusivity provision, and its long-standing policy of treating the MCA as a payment authority of last resort. *See* JA 57-58. Accordingly, to overturn the Secretary's decisions in this case would

require the invalidation of a regulation *and* the second-guessing of a military policy, the exact sort of interference Congress sought to avoid when it enacted § 2735.

II. EVEN UNDER THE LIMITED JUDICIAL REVIEW ALLOWED BY SOME COURTS, PLAINTIFFS' CLAIMS STILL FAIL

Despite the abundant evidence of congressional intent to bar judicial review of MCA settlements, the district court allowed consideration of a limited class of claims challenging MCA settlements. Specifically, the district court allowed consideration of constitutional claims and claims that the Secretary's decisions violated a statutory mandate of the MCA. *Murphy*, 340 F. Supp. 2d at 175-78. Even if this Court were to approve the limited form of review allowed by the district court, it should affirm the district court's decision finding that Plaintiffs were entitled to no relief.

A. The Secretary's Decisions are Fully Consistent with the Constitution

Most courts that have interpreted § 2735 have held that even though that section precludes judicial review of MCA settlements, it does not bar judicial review of claimed constitutional violations. *See, e.g.*, *Minns*, 155 F.3d at 453; *Collins*, 67 F.3d at 287-88; *Schneider*, 27 F.3d at 1332; *Hata*, 23 F.3d at 233; *Rodrigue*, 968 F.2d at 1434; *Poindexter*, 777 F.2d at 234 (expressing doubt about propriety of review for constitutional claims, but noting that even if such review were allowed, plaintiffs had raised

no "colorable constitutional concerns"); *LaBash*, 668 F.2d at 1155.

This interpretation "avoids the 'serious constitutional question' that would arise" if the statute were construed to deny judicial review of constitutional claims. *Bowen*, 476 U.S. at 681 n.12. *See also Webster v. Doe*, 486 U.S. 592, 603 (1988) (requiring "heightened showing" of congressional intent to preclude constitutional claims to "avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim").

Even if this Court considered constitutional claims, however, this would not help Plaintiffs because they allege no colorable constitutional violation. Plaintiffs' only constitutional argument is that the Secretary's decisions violated separation of powers principles. Appellants' Br. at 36-37. According to Plaintiffs, the Secretary's interpretation of FECA's exclusivity provision to prohibit MCA payments for FECA-eligible claims "narrow[ed] the scope of the MCA and frustrate[d] its purpose, namely, to pay meritorious claims." *Id.* at 37.

Plaintiffs' argument is meritless because the Secretary's policy decision to deny MCA claims for FECA-eligible claimants does not violate the MCA or "narrow" its scope. The MCA places no restrictions on the Secretary's discretion to deny FECA-eligible claims and certainly does not require the Secretary to pay such claims. Indeed, the MCA does not *require* the Secretary to pay *any* claims; it merely *authorizes* the Secretary to

pay claims under such regulations that he prescribes. *See Collins*, 67 F.3d at 286.

Even if the Secretary's decision on this topic rested solely on his interpretation of FECA (which it does not) and even if that interpretation were incorrect (which it is not, *see infra* at Part III.B.), this error would not violate the Constitution. As the First Circuit explained, "an incorrect application of the law . . . by an agency does not violate the Constitution." *Rodrigue*, 968 F.2d at 1435.

The cases cited by Plaintiffs are not to the contrary. Both *Legal Assistance for Vietnamese Asylum Seekers v. Department of State*, 45 F.3d 469 (D.C. Cir. 1995),[2] and *Sullivan v. Zebley*, 493 U.S. 521 (1990), stand for the unremarkable proposition that an agency regulation may not violate a federal statute. In neither case did the court hold that an unlawful regulation violated the separation of powers doctrine.

And while the district court in *Wolke v. Dreadnought Marine, Inc.*, 954 F. Supp. 1133 (E.D. Va. 1997), did find

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[2] The decision in this case was eventually vacated by the Supreme Court. After the Circuit Court's decision, the government petitioned for rehearing, arguing that the case had become moot. The D.C. Circuit eventually rejected this argument, *see* 74 F.3d 1308 (D.C. Cir. 1996), and the government petitioned for a writ of certiorari on the merits. The United States Supreme Court vacated the judgment and remanded for reconsideration in light of an intervening change in the law. 519 U.S. 1 (1996). *See* 104 F.3d 1349 (D.C. Cir. 1997) (finding administrative claims unreviewable in light of unfettered discretion entrusted to agency).

a constitutional violation, that case is inapposite. In *Wolke*, the court ruled that a regulation "might" not apply to the case because the plaintiff had not alleged facts that would have invoked the regulation. *Id.* at 1135. In dicta, the court noted that even if the plaintiff had alleged such facts, it would not help the plaintiff because the regulation was "manifestly contrary to the statute." *Id.* at 1137 n.6. As an additional reason for invalidating the regulation, the district court stated that it violated the separation of powers because it exceeded the congressional mandate *and* directed the judiciary to apply a doctrine "traditionally applied solely in the discretion of the courts." *Id.* at 1137. Here, by contrast, the regulation at issue does not violate the MCA or FECA, and it certainly is not "manifestly contrary to the statute." In addition, even if it were contrary to the statute, there is no suggestion here that the regulation imposes any particular rule of decision on the judiciary. In sum, *Wolke* does not support Plaintiffs' claim that the Secretary's decisions violate the separation of powers doctrine.

B. The Secretary's Decisions Fully Complied with the MCA

Although most of the appellate courts interpreting § 2735 have found that it allows review of constitutional claims, only one court out of the eight has even suggested that it might allow review of claims beyond that limited exception. *Minns*, 155 F.3d at 453 (§ 2735 precludes judicial review except for constitutional claims); *Collins*, 67 F.3d at 287-88 (same); *Schneider*, 27 F.3d at 1331-33 (same); *Hata*, 23 F.3d at 233 (same); *Rodrigue*, 968 F.2d at 1432-34 (same); *LaBash*, 668 F.2d at 1155-56 (same);

see also Towry, 459 F. Supp. at 107-108 (§ 2735 precludes all judicial review); *but see Broadnax*, 710 F.2d at 867 (§ 2735 "may" permit review for additional claims but stating that "such review is not implicated under the circumstances of this case").

These decisions, adopting a narrow scope of review, reserve appropriate discretion for the military and give effect to Congress's considered judgment that decisions affecting the military should be made by the military and not the courts. *See Minns*, 155 F.3d at 453 (through § 2735, Congress "placed final discretion over military claims with the military and not with the courts"). They further give appropriate weight to the statutory language and the historical understanding of the MCA. *See supra* at Part 1.B. *See also Heikkila*, 345 U.S. at 233 ("Each statute in question must be examined individually; its purpose and history as well as its text are to be considered in deciding whether the courts were intended to provide relief for those aggrieved by administrative action.").

Nevertheless, relying on decisions such as *Leedom v. Kyne*, 358 U.S. 184 (1958), and on judicial interpretations of FECA's preclusion-of-review provision, the district court found that it had jurisdiction to review a claim that the Secretary's decisions violated a clear statutory mandate of the MCA. *Murphy*, 340 F. Supp. 2d at 175-78. *Kyne* allowed review of a National Labor Relations Board decision that was alleged to be "taken in excess of delegated powers," 358 U.S. at 190, even though the Board had argued that the decision was unreviewable. The Supreme Court has since interpreted *Kyne* narrowly, however, to "stand[] for the familiar proposition that only

upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." *Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.*, 502 U.S. 32, 44 (1991) (internal citations omitted). *See also Association of Civilian Technicians, Inc. v. Federal Labor Relations Authority*, 283 F.3d 339, 344 (D.C. Cir. 2002) ("The invocation of *Leedom [v. Kyne]* jurisdiction . . . is extraordinary; to justify such jurisdiction, there must be a specific provision of the Act which, although it is clear and mandatory, was nevertheless violated by the agency. . . . [An] error of fact or law is insufficient; the agency must have acted without statutory authority.") (internal quotations and citations omitted); *Goethe House New York v. National Labor Relations Board*, 869 F.2d 75, 77-78 (2d Cir. 1989) (describing *Kyne* as "an extremely narrow exception" that only applies "where the Board has clearly violated an express provision of the statute," and holding that *Kyne* only permits review when an order is alleged to violate the National Labor Relations Act and not any other statute) (internal citations omitted).

Even if this Court were to review for a clear violation of a statutory mandate, Plaintiffs have not identified any such violation. In the district court, Plaintiffs "ma[d]e no claim that the Air Force violated any provision of the MCA," *Murphy*, 340 F. Supp. 2d at 182, and for good reason. The MCA authorizes the Secretary to issue regulations on the payment of claims under the statute and then to pay claims in conformity with those regulations, but places virtually no restrictions on the Secretary's decisions on those claims. There is no suggestion here that the Secretary's decisions were in any way

procedurally improper, or that the MCA *requires* the Secretary to pay claims when the claimants are eligible for recovery under FECA. In short, the Secretary's decisions did not violate any statutory "mandate" in the MCA.

For the first time on appeal, however, Plaintiffs raise the novel argument that the Secretary's denials of their claims violated the MCA's requirement that the Air Force "consider" their claims. Appellants' Br. at 30-34. As a preliminary matter, because Plaintiffs failed to present this issue to the district court below, this Court may decline to consider it. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *Vintero Corp. v. Corporacion Venezolana de Fomento*, 675 F.2d 513, 515 (2d Cir. 1982) ("A party who has not raised an issue below is precluded from raising it for the first time on appeal.") (internal quotation marks omitted).

If this Court elects to consider Plaintiffs' new issue, it should reject it as meritless. Plaintiffs claim that the definition of "settle" in § 2731 requires the Secretary to engage in a "two-prong determination," first "consider[ing], ascertain[ing], adjust[ing] and determin[ing] a claim," and *then* "dispos[ing] of" the claim by full or partial allowance or disallowance. Appellants' Br. at 32. This argument finds no support in the statutory language. The statute defines the term "settle" to encompass numerous activities -- considering, ascertaining, adjusting, determining, and disposing -- but in no way suggests that these activities are to be conducted in a two-stage process. Rather, the statute suggests that

"settlement" of a claim is a unitary process involving all of the listed activities and resulting in the ultimate disposition of the claims.

In any event, the Air Force *did* consider Plaintiffs' claims. Plaintiffs filed their claims with the Air Force and those claims were denied. Complaint ¶¶ 12-13, JA 9. Plaintiffs appealed those denials, and the Air Force denied those appeals. Complaint ¶¶ 13-14, JA 9. Acting for the Secretary, Col. Charles H. Wilcox II wrote lengthy letters for each claim explaining the reasons for the denial. *See* JA 57-67. In those letters, he expressly responded to their arguments challenging the Air Force's policy to deny claims for FECA-eligible claimants, and fully explained the rationale for this policy. The fact that the Air Force ultimately rejected their arguments and denied their claims does not mean that the Air Force did not "consider" their claims. Thus, while Plaintiffs may not be happy with the result of that consideration, it can hardly be said that the Air Force failed to "consider" their claims. And *a fortiori*, it cannot be said that the Air Force acted without statutory authority, *Association of Civilian Technicians, Inc.*, 283 F.3d at 344, or clearly violated an express provision of the MCA, *Goethe House New York*, 869 F.2d at 77-78.

Because the Air Force has already considered Plaintiffs' claims, there is no basis for a court order directing it to take that action. To the extent Plaintiffs ask this Court to order the Air Force to "consider" their claims without regard to its policy on FECA-eligible claims, Plaintiffs ask this Court to direct the Air Force to exercise its discretion to allow their claims. But as even Plaintiffs acknowledge, *see* Appellants' Br. at 33, "while [a court]

can compel [the government] to exercise [its] discretion, it cannot dictate how that discretion is to be exercised." *Marathon Oil Co. v. Lujan*, 937 F.2d 498, 501 (10th Cir. 1991).

Wilbur v. United States, 280 U.S. 306 (1930), is not to the contrary. In that case, the Supreme Court approved a writ of mandamus directing the Secretary of the Interior to dispose of a patent application without regard to an erroneous statutory interpretation. *Id.* at 319. There, however, the erroneous statutory interpretation was the sole basis for the Secretary's refusal to perform the ministerial act of issuing the patent. Here, by contrast, the Air Force's decision on Plaintiffs' claims was not a ministerial act, but rather was an exercise of statutorily delegated discretion. As such, it is not appropriate for mandamus relief. Moreover, even if it could be assumed *arguendo* that the Air Force's interpretation of the FECA exclusivity provision was incorrect -- and it is not -- that was not the sole basis for the Secretary's decision. As explained above, the Secretary based his policy on the denial of FECA-eligible claimants on the FECA exclusivity provision *and* on the long-standing Air Force policy to utilize the MCA as a payment authority of last resort. In short, even if the Court were to order the Air Force to "consider" Plaintiffs' claims without regard to its interpretation of the FECA exclusivity provision, that decision would still stand on the basis of long-standing Air Force policy.

III. PLAINTIFFS' ARGUMENTS FOR A BROADER FORM OF REVIEW ARE MERITLESS AND IRRELEVANT IN ANY EVENT BECAUSE THE SECRETARY'S DECISION IS FULLY CONSISTENT WITH THE LAW

Although Plaintiffs themselves do not explicitly argue for the two types of review allowed by the district court, they argue that this Court should engage in a broader form of review than that used by the district court. Appellants' Br. at 19. Plaintiffs cite no persuasive authority for their arguments, but their arguments are all beside the point in any event. The only alleged error identified by Plaintiffs is the Secretary's alleged misinterpretation of FECA's exclusivity provision to deny MCA benefits for FECA-eligible claimants. There is no error here, however, because putting aside the policy considerations underlying the Secretary's decision to deny MCA benefits for FECA-eligible claimants, that decision is fully consistent with FECA.

A. Plaintiffs Cite No Persuasive Authority for Any Broader Form of Judicial Review

Plaintiffs advance three main arguments in support of broad judicial review of the Secretary's decisions. *First*, Plaintiffs argue that this Court has the authority to correct agency mistakes of law under the so-called "*Scroggins* standard," named after *Scroggins v. United States*, 397 F.2d 295 (Ct. Cl. 1968). In *Scroggins*, the Court of Claims interpreted 5 U.S.C. § 8347, a statute involving the finality of disability retirement decisions made by the Office of

Personnel Management, as allowing the review of those decisions "to determine whether there had been 'a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination.'" *Lindahl*, 470 U.S. at 780-81 (quoting *Scroggins*, 397 F.2d at 297). When Congress later amended § 8347 without repealing the established *Scroggins* doctrine, the Court held in *Lindahl* that Congress intended to embody that doctrine in the newly amended statute, a holding confirmed by the legislative history of the statute. *Lindahl*, 470 U.S. at 781-83.

There is no reason, much less a compelling one, to apply this specialized form of review -- developed as an interpretation of a disability retirement statute -- to review under the MCA, a different statute using different language. Only one court has even suggested that *Scroggins* review might be available for claims under the MCA, but that court did so only in dicta. *See Broadnax*, 710 F.2d at 867 ("Although § 2735 may well permit some limited review, for example, where there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination, such review is not implicated under the circumstances of this case.") (internal citations and quotations omitted). Here, there is no suggestion, whether from the text or the legislative history, as there was in *Lindahl*, that Congress intended to adopt the *Scroggins* review standard when it passed § 2735. And indeed it would be surprising to find that Congress had such an intent since § 2735 was enacted long before courts began

applying the *Scroggins* standard. And as noted above, if anything, Congress can be presumed to have adopted the Supreme Court's authoritative construction of the MCA's predecessor statute as precluding all judicial review. *See Babcock*, 250 U.S. at 330-31.

Plaintiffs do not address this specialized history of the *Scroggins* standard, but argue meekly that "as to mistakes of law review is readily available." Appellants' Br. at 20. "The Supreme Court, however, has generally rejected 'the principle that if the agency gives a reviewable reason for otherwise unreviewable action, the action becomes reviewable.'" *Association of Civilian Technicians, Inc.*, 283 F.2d at 343 (quoting *Interstate Commerce Comm'n v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987)). Thus, the mere fact that Plaintiffs disagree with a legal issue incorporated in the Secretary's decisions does not make those decisions subject to review.

The cases cited by Plaintiffs do not disturb this basic principle. In *Shaughnessy* and *Harmon v. Brucker*, 355 U.S. 579 (1958) (per curiam), for example, the Supreme Court allowed judicial review of administrative decisions, but the statutes at issue in those cases did not present the same quantum of evidence of congressional intent to preclude judicial review as is evident in this case. *See Shaughnessy*, 349 U.S. at 51 (statute provided that immigration decisions shall be "final"); *Harmon*, 355 U.S. at 581 (statute provided that army decisions were "final subject only to review by the Secretary" of the Army). In *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309 (1958), the Supreme Court repeated a statement from *Harmon* about the general availability of judicial review to

review legal questions, but then held that in that case review was unavailable. According to the *Panama Canal Co.* Court, in that case, the issue had been squarely committed to the discretion of the agency and was therefore inappropriate for judicial relief. *Id.* at 317-19. Here, as in that case, the issue has been squarely committed to agency discretion and is thus inappropriate for judicial relief.

Similarly, in *Hammond v. Lentfest*, 398 F.2d 705 (2d Cir. 1968), this Court allowed judicial review of a decision denying a discharge to a naval reservist. The central argument for precluding such review, however, was based on a Department of Defense regulation that purported to make such decisions final. As this Court noted, "it would be strange doctrine to permit an executive department to oust a court of jurisdiction merely by stating in its regulation that a court cannot review agency rulings." *Id.* at 715. Here, by contrast, the preclusion principle is not in the Air Force regulations, but rather is in the statutory command of Congress. *Hammond* is thus inapposite.

Second, in an argument related to the first, Plaintiffs contend that "an invalid regulation cannot be enforced." Appellants' Br. at 29. According to Plaintiffs, the Air Force regulation precluding MCA benefits for FECA-eligible claimants is an interpretive (as opposed to legislative) regulation and thus only entitled to the lesser form of deference announced in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Because, according to Plaintiffs, the regulation is not entitled to *any* deference under that standard, it is "not valid and cannot be enforced." Appellants' Br. at 30. But as described above, even if the

Air Force committed a legal error, this would not entitle Plaintiffs to judicial review.

Third and finally, Plaintiffs contend that this Court may review the Secretary's decisions under the APA provision authorizing courts to set aside agency actions that are arbitrary and capricious or not in accordance with law. *See* Appellants' Br. at 22-24, 34-35; 5 U.S.C. § 706(2)(A). The APA generally provides a cause of action for persons "aggrieved" by final agency actions, 5 U.S.C. § 702, but it does not authorize review where another statute precludes review. 5 U.S.C. § 701(a)(1) ("This chapter applies . . . except to the extent that statutes preclude judicial review."). *See Block*, 467 U.S. at 345. Here, because the MCA precludes judicial review, they may not seek review under the APA. *See Schneider*, 27 F.3d at 1331-32 (holding that MCA precludes review and thus blocks action under APA); *LaBash*, 668 F.2d at 1156 (same).

B. Plaintiffs' Arguments for Broader Judicial Review are Irrelevant Because the FECA Exclusivity Provision Precludes Payment of MCA Claims When a Claimant is Eligible for Benefits Under FECA

Plaintiffs argue for judicial review of the settlements in this case, but they only identify one alleged error in the Secretary's decisions, namely the Secretary's allegedly erroneous interpretation of the FECA exclusivity provision as a basis for denying MCA benefits to FECA-eligible claimants. As a preliminary matter, the Secretary's denial

of MCA benefits for FECA-eligible claimants rests not only on his interpretation of the FECA exclusivity provision but also on his policy judgment about the appropriate utilization of the MCA as a payment authority. *See* JA 57-58. This policy judgment fully supports the Secretary's decisions, is independent of his interpretation of FECA, and is fully consistent with the wide discretion granted him in the MCA. Thus, even if this Court were to conclude that the Secretary misinterpreted FECA, the Secretary's decisions in this case should still stand. In any event, a careful review of FECA demonstrates the exclusivity provision precludes payments under the MCA for FECA-eligible claimants.

Under FECA, the United States pays compensation for federal employee deaths or disabilities arising out of the performance of civil service duties. 5 U.S.C. § 8102(a). FECA also provides that its remedy is exclusive:

> The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality . . . in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. . . .

5 U.S.C. § 8116(c). Section 8116(c) was enacted in its present form in 1949 "to establish that, as between the Government on the one hand and its employees and their representatives or dependents on the other, the statutory

remedy was to be exclusive." *Weyerhaeuser Steamship Co. v. United States*, 372 U.S. 597, 601 (1963).

The legislative history confirms that the exclusivity section was designed to prevent an employee who was dissatisfied with his FECA entitlement from seeking additional relief from the government under general statutes which allow for the recovery of damages. According to the Senate Report advocating the addition of the exclusivity provision:

> The purpose of the [exclusivity provision] is to make it clear that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities of the kind *which can be enforced by original proceeding whether administrative or judicial*, in a civil action or in admiralty or by any proceeding under any other workmen's compensation law or under any Federal tort liability statute. Thus, an important gap in the present law would be filled and at the same time needless and expensive litigation will be replaced with measured justice. The savings to the United States, both in damages recovered and in the expense of handling the lawsuits, should be very substantial and the employees will benefit accordingly under the Compensation Act as liberalized by this bill.

Id. at 601 n.5 (quoting S.Rep. No. 836, 81st Cong., 1st Sess. 23; U.S. Code Cong. Service 1949, p. 2135) (emphasis added). Because the FECA was intended to "afford employees and their dependents a planned and

substantial protection, to permit other remedies by civil action or suits would not only be unnecessary, but would in general be uneconomical, from the standpoint of both the beneficiaries involved and the government." *Id.*

With this understanding of the purpose behind FECA's exclusivity provision, the Secretary properly applied that provision to preclude payments under the MCA for FECA-eligible claimants. *See also* 32 C.F.R. § 536.24(k) (citing § 536.50(j)(2)) (Army) (excluding coverage under MCA for FECA-eligible claimants); 32 C.F.R. § 750.44(d)(6) (Navy) (same); 33 C.F.R. § 25.205(c) (Coast Guard) (same). An examination of the MCA's statutory scheme reveals that it shares important qualities with traditional tort liability schemes.

First, tort principles pervade the MCA and its pertinent regulations. A tort is "[a] civil wrong, other than breach of contract, for which a remedy may be obtained, usu. in the form of damages; a breach of a duty that the law imposes on persons who stand in a particular relation to one another." Black's Law Dictionary (8th ed. 2004). In conformity with these principles, and like the Federal Tort Claims Act (FTCA), the MCA provides that a remedy may be obtained in the form of damages for a civil wrong caused by a civilian officer or employee of the armed services. Specifically, the MCA covers:

> (1) damage to or loss of real property, including damage or loss incident to use and occupancy;
> (2) damage to or loss of personal property . . .
> (3) personal injury or death;

> either caused by a civilian officer or employee of that department, or the Coast Guard, or a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be, acting within the scope of his employment, or otherwise incident to noncombat activities of that department, or the Coast Guard.

See 10 U.S.C. § 2733(a). *Compare* the FTCA, 28 U.S.C. § 1346(b)(1) ("[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment . . . .").

The MCA contains other provisions similar to the FTCA. For example, the MCA, like the FTCA, contains a two-year statute of limitations for the presentation of claims. *See* 10 U.S.C. § 2733(b)(1) and 28 U.S.C. § 2401(b). And like the FTCA, recovery under the MCA is allowed "only to the extent that the law of the place where the act or omission complained of occurred would permit recovery from a private individual under like circumstances." 10 U.S.C. § 2733(b)(4). *Compare* 28 U.S.C. § 1346(b)(1) (contemplating an injury which occurs "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred"); and 28 U.S.C. § 2674 ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same

extent as a private individual under like circumstances. . . .").

In addition, the MCA regulations also focus on tort-related issues, including guidance for choice of law, 32 C.F.R. § 842.51(a), damages calculations, 32 C.F.R. § 842.51(b)(1), and contributory negligence, 32 C.F.R. § 842.51(b)(2), all of which reference the principles of American tort law. In sum, the statutory framework of the MCA has all the trademarks of a traditional tort statute.

Plaintiffs argue, nonetheless, that the MCA is not a tort liability statute covered by FECA's exclusivity provision because the MCA does not waive sovereign immunity. Appellants' Br. at 24-25. In support of this proposition, they cite *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983). But *Lockheed Aircraft* does not support such a narrow proposition. While the Court in that case made the general statement that FECA was "designed to protect the Government from suits under statutes, such as the Federal Tort Claims Act, that had been enacted to waive the Government's sovereign immunity," *id.* at 194, it did not engage in a textual analysis of § 8116(c) to hold that that section *only* supplants those statutory schemes that waived sovereign immunity. More significantly, the Court had no occasion to examine the MCA or to consider whether it was an alternate scheme precluded by FECA.

Given that the MCA is, as Plaintiffs concede, a substitute for tort recovery, *see* Appellants' Br. at 26, it is precisely the kind of alternate tort liability scheme which the FECA was designed to supplant. *See United States v. Demko*, 385 U.S. 149, 151 (1966) ("Thus [workmen's]

compensation laws are practically always thought of as substitutes for, not supplements to, common-law tort actions."). *See also Ryan v. General Electric Co.*, 256 N.E.2d 188, 191 (N.Y. 1970) (MCA "serves as a substitute for a tort recovery").

The fact that the MCA is not specifically mentioned in § 8116(c) does not militate against this conclusion. For example, in *Vogrin v. Bureau of Alcohol, Tobacco and Firearms*, No. CIVA598CV117, 2001 WL 777427, *8 (N.D.W.Va., March 30, 2001), *aff'd*, 15 Fed.Appx. 72, 2001 WL 744857 (4th Cir. 2001), the district court held that a plaintiff could not seek remedies under both FECA and the FOIA and the federal Privacy Act, two statutes also not mentioned in § 8116(c). The court noted that the plaintiff's injuries were covered by FECA and that he had been awarded benefits for psychological and psychiatric disabilities. Further, the medical issues raised in the FECA claim were the same matters raised in the Privacy Act civil action, and the injuries were work-related. The court held that "[t]he exclusivity provision contained in 5 U.S.C. § 8116(c) precludes a suit under the Privacy Act even if FECA does not provide benefits for all of the injuries that plaintiff Vogrin claims." *Vogrin*, 2001 WL 777427, at *7. The court reasoned:

> While the Federal Tort Claims Act and the Privacy Act are obviously not identical in their provisions, there are certain similarities to their remedies, particularly the remedies sought by plaintiff Vogrin in this action. Indeed, it appears to this Court that plaintiff Vogrin has attempted to use the Privacy Act as a tort liability statute. The FECA is intended

> to serve as a substitute rather than a supplement for a tort action. *See White v. United States*, 143 F.3d 232, 234 (5th Cir.1998). . . .This Court finds that, based upon the facts in this case, the fact that plaintiff Vogrin has sought and received benefits under the FECA precludes his filing suit and pursuing a cause of action under the FOIA and the Privacy Act, because of the exclusivity provision contained in the FECA, 5 U.S.C. § 8116(c).

Vogrin, 2001 WL 777427, at *8. In this case, as in *Vogrin*, Plaintiffs attempted to use the MCA as a tort liability statute because of their dissatisfaction with their FECA benefits. This is precisely the kind of scenario the FECA exclusivity provision was designed to address.

Based on the foregoing, the MCA and its regulations create a tort liability scheme subject to FECA exclusivity. Plaintiffs' arguments to the contrary are without merit.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: May 20, 2005

Respectfully submitted,

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 10,551 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

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ADDENDUM OF STATUTES/RULES

10 U.S.C. § 2731. Definition

In this chapter, "settle" means consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or by disallowance.

10 U.S.C. § 2733. Property loss; personal injury or death; incident to noncombat activities of Department of Army, Navy, or Air Force

(a) Under such regulations as the Secretary concerned may prescribe, he, or, subject to appeal to him, the Judge Advocate General of an armed force under his jurisdiction, or the Chief Counsel of the Coast Guard, as appropriate, if designated by him, may settle, and pay in the amount not more than $100,000, a claim against the United States for --

(1) damage to or loss of real property, including damage or loss incident to use and occupancy;

(2) damage to or loss of personal property, including property bailed to the United States and including registered or insured mail damaged, lost, or destroyed by a criminal act while in the possession of the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be; or

(3) personal injury or death;

either caused by a civilian officer or employee of that department, or the Coast Guard, or a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the

case may be, acting within the scope of his employment, or otherwise incident to noncombat activities of that department, or the Coast Guard.

10 U.S.C. § 2735. Settlement: final and conclusive

Notwithstanding any other provision of law, the settlement of a claim under section 2733, 2734, 2734a, 2734b, or 2737 of this title is final and conclusive.

32 C.F.R. 842.50 Claims not payable

Exclusions listed in § 842.50 (a) through (l) of this part, are based on the wording of 28 U.S.C. 2680. The remainder are based either on statute or court decisions. The interpretation of these exclusions is a Federal question decided under Federal law. Where State law differs with Federal law, Federal law prevails. A claim is not payable under this subpart if it:

. . .

(r) Is for the personal injury or death of a government employee for whom benefits are provided by the FECA.

Air Force Instruction 51-501

3.7. MCA Exclusions. Settlement authorities cannot pay claims described in paragraph 3.6. under the MCA if the claim:

. . .

3.7.9. Is for the personal injury or death of any person for whom benefits are available under the Federal Employees' Compensation Act, 5 U.S.C. 8101, and following.