OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-5954

TITLE WAYNE LINDAHL, Petitioner v. OFFICE OF PERSONNEL MANAGEMENT

PLACE Washington, D. C.

DATE December 3, 1984

PAGES 1 thru 43

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IN THE SUPREME COURT OF THE UNITED STATES

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WAYNE LINDAHL, :

Petitioner :

v. : No. 83-5954

OFFICE OF PERSONNEL :

MANAGEMENT :

- -x

Washington, D.C.

Monday, December 3, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:55 o'clock p.m.

APPEARANCES:

JOHN MURCKO, ESQ., Oakland, Calif.
(appointed by this Court);
on behalf of Petitioner

EDWIN S. KNEEDLER, ESQ., Washington, D.C.;
on behalf of Respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Murcko, I think you may proceed when you're ready.

ORAL ARGUMENT OF JOHN MURCKO, ESQ.

ON BEHALF OF THE PETITIONER

MR. MURCKO: Mr. Chief Justice, and may it please the Court:

The case here concerns the issue of whether or not the Federal Circuit Court of Appeals had jurisdiction to rule on the determinations of disability retirement. There is an anomaly in this case, that the majority of judges below decided that the Federal Circuit does have jurisdiction; however, the ruling was that in this particular case there is not jurisdiction.

We think that resolution of this issue is very straightforward. Simply, this Court is called upon to determine whether under 5 U.S.C. 8347c) the Federal Circuit has jurisdiction to rule on physical disability determinations that are denied by the OPM or whether it is precluded only from -- the Federal Circuit is only precluded from reviewing decisions on factual determinations.

And we think the canons of judicial interpretation by this Court in the past provide a very straightforward answer here, and we think essentially

that the Congressional intent here was only to limit determinations of disability retirement on factual issues and not on legal, procedural or constitutional issues. And we think the court below erred when it ruled the way it did.

And we think the first cannon of judicial interpretation is that there is no clear and convincing evidence of Congressional intent to bar all judicial review under 8347(c).

QUESTION: Well now, Mr. Murcko, I guess you have to persuade us, first of all, that the Court of Appeals for the Federal Circuit has jurisdiction by virtue of Section 7703, do you, before we even reach the 8347(c) question?

MR. MURCKO: No --

QUESTION: Don't you have a preliminary step?

MR. MURCKO: No, I don't believe that we do have to reach that issue, because I think in the retirement cases, the disability retirement cases, the jurisdiction exists under 8347(c), and that that is the basis of jurisdiction.

QUESTION: Well, what if Section 7703 deals only with employees or applicants for employment and there was no jurisdiction conferred at all?

MR. MURCKO: Well, we think that under 7703

that, first, that issue is not related here, that is not related to this case. However, when Congress passed the Civil Service Reform Act in '77 -- in 1978, it gave a broad grant of jurisdiction under 7703 and it specifically stated that it covered all cases coming from the Merit System Protection Board. It covered all cases coming from the Merit System Protection Board, and there was no exclusion of any cases except for Section 2 cases, which cover discrimination.

So we think that there is a broad grant of review there under 7703, as we cover in our brief, stating that we believe that --

QUESTION: You think it covers retired employees?

MR. MURCKO: Yes, I think that it does.

QUESTION: And survivors?

MR. MURCKO: No, I think it just covers employees or retired employees. In fact, the Federal Circuit below in Bronger specifically stated that it includes employees and the retired employees. And if you look under 8337, the retirement section, it says that an employee is entitled to retirement if he puts in five years and he's too disabled to work.

And if you don't -- if you adopt the interpretation by the U.S. Government, that would mean

that an individual could never apply for retirement if he's terminated from his job. And there's a one-year statute of limitations after a person is terminated, so that would mean a person, once he is no longer working, can no longer apply for retirement.

And second, it would mean that any person who is terminated --

QUESTION: Mr. Murcko, it would be helpful if you would raise your voice and stay near the center of the lectern.

MR. MURCKO: I'm sorry, yes. Okay.

And it means that any person who -- any employee who is terminated can never go to the Federal Circuit, because he's no longer an employee.

We think, returning to the interpretation of 8347(c), we think that the plain language itself indicates that there is a bar of review of only the facts and not of legal, procedural, or constitutional questions. The wording there provides that the OPM shall determine questions of disability and that those determinations are final. The language there does not state that it should be a final determination of questions of procedure and law and constitutional rights.

In addition, we think that the second sentence

of that statute specifically states that the OPM can hold hearings to determine the facts of medical disability, and we think that's further language supporting our position that it's limited only to review of facts.

In addition, the pre-codification of 1948, the first finality provision, also states that decisions with respect to questions of disability, and we think that that language is even clearer that on its face it only limits factual determinations.

But further, we believe that Congress knows how to preclude the courts from reviewing statutes, and when it passed 211 of the Veterans Act and also 8128 of the Federal Employees Compensation Act, it said that no courts of the U.S. shall have power to review such action. Now, if Congress meant to eliminate all review it could definitely have put that language in there.

But we think that, even more important, if we go behind the legislative words here of 8347 and look at the legislative history, we think that it's even clearer. First, we feel that the basis for historical review under U.S. versus Erika teaches us that we should look behind a statute to determine what the Congressional intent was, and we think that at a minimum it can be argued there is ambiguity here because there

has been legal interpretations by five circuit court of appeals in one way and five circuit court of appeals another way.

So we think that the legislative history first shows that when Congress first passed this in 1948 it was in the period when it also passed the Administrative Procedure Act, and the Administrative Procedure Act specifically stated that the courts shall have power to judicially review all administrative determinations. And this limitation was passed in '48 and it's in the context of permitting judicial review, and so it left -- Congress intended to leave the expertise or the factual determination to the agency.

In addition, there was the court interpretation between 1956, the codification language, and 1980, the Court of Claims. And every decision decided on disability retirement stated that there is a limited right of review under the Scroggins formula, to allow review for procedural errors, for constructions of legislation, and for errors going to the heart of the administrative procedure.

So we think that Congress, when it amended this statute in 1978, specifically adopted those judicial interpretations under Scroggins to make that clear that it became part of the law, and the Scroggins

rules were adopted into the language of 1978.

In addition, the 1980 amendment shows that there were no changes, no changes whatsoever in the review authority for non-mental cases. First, Congress knew at the time when it was passing this legislation in 1980 that there was all this judicial review allowing them to review for procedural errors.

Next, the major focus of Congress, as shown by those hearings, was that there was an overnarrowness of review for terminations, involuntary terminations because of mental disability. In addition, no one ever testified --

QUESTION: Those were terminations, Mr. Murcko, that had been initiated by the person himself, the ones for mental disability?

MR. MURCKO: Well, no. Those were ones which were initiated by the agency.

QUESTION: By the agency.

MR. MURCKO: Right, the agency. Involuntary terminations, Your Honor.

And no one ever testified at these hearings, by the Congressional Record, either at the committee, the Senate Committee on Government Affairs or the House Committee on Post Office and Civil Affairs, that they wanted to eliminate judicial review of procedural, legal

and constitutional errors.

In fact, the anomaly here is that the Office of Personnel Management Director, Mr. Campbell, and his assistant testified or sent letters to the heads of these departments saying that, we want to expand review for involuntary mental terminations and we want to keep the review the same. Well, it's quite an anomaly that now the Government is saying just the opposite: We didn't mean that, but instead we now mean that we want to cut off all review for non-mental involuntary determinations.

QUESTION: Well, Congress did at least change the language.

MR. MURCKO: Congress did make an amendment adding that section to it, that is correct. It did add that section saying that now for involuntary mental terminations there is full review under 7703, which includes review not only of legal, procedural and constitutional errors, but there's now going to be review for factual errors, too. Because there was so much abuse in terminating politically active employees, and there was a large history of that action by agencies in terminating people.

In addition, in the committee reports or discussions there is no evidence that the Scroggins test

was to be eliminated in the non-mental area. There was no actual substantive change in the language of the finality clause itself. So we think that the intent here of Congress was to expand the limited review and give the full scope of review to involuntary mental disability determinations and to maintain it in the other area, and we think that there is no clear and convincing evidence to allow the conclusion that there should be no review for the federal employees' rights.

In addition, we think that the second error that the court committed below was that it failed to give deference to the administrative construction of 8347. The Merit System Protection Board, which decides these cases on an administrative level, has taken the position in its rulings that judicial review is available by the Federal Circuit. In addition, it took that position in the Federal Circuit below as an amicus; and it notifies employees who are adversely -- who get adverse decisions that they have a right to appeal to the Federal Circuit.

In addition, the OPM has consistently taken that position, as I mentioned before, in decisions before the Congress at the time this legislation was passed in 1980. So we think that the court below failed to give deference to that administrative rulings,

administrative determination, when it ruled that it has no jurisdiction.

In addition, we think that the Federal Circuit below committed a third error when it stated that -- in its construction of 8347, it raised substantial constitutional questions. And we think that the canon of construction here is that if there is an interpretation of a statute which will avoid the constitutional issue, then the Court should adopt that construction. And we think that by adopting the construction that we say 8347 -- the construction that was given by the court in Parodi versus OPM by the Ninth Circuit, that essentially is an expansion of judicial review to the non-mental area and retention, does not raise that constitutional error of preclusion of judicial review.

QUESTION: Mr. Murckc, it's Section 8347(c) that the Government relies on to say that the decision in your client's case case wasn't reviewable by the Federal Circuit?

MR. MURCKC: Yes, that's correct, Your Honor.

QUESTION: Now, was the language in 8347(c), was that existent, did that exist verbatim before the 1980 amendments?

MR. MURCKC: Yes, it existed verbatim except

it said -- the amendment said except to the extent as provided in Section (d). That was added by the 1980 amendment.

QUESTION: And the rest of the language remained the same?

MR. MURCKO: That's correct, Your Honor, that's correct.

And so we think that, in addition, moving on, that there is also a question of possible property rights here of Mr. Lindahl as it affects his disability retirement. And so the court below could have avoided those constitutional issues if it essentially interpreted 8347, as it had in the past, that it precluded only review of the factual determinations.

So in conclusion, we think essentially that we are dealing here with an issue of preclusion of judicial review. We believe that this preclusion is favored by the courts. We think that it would also be unusual for federal employees not to have the right to have review in the federal courts, and we believe that, most important, the Congressional intent here was to allow review for procedural, constitutional and legal errors.

Thank you.

CHIEF JUSTICE BURGER: Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.

ON BEHALF OF RESPONDENT

MR. KNEEDLER: Thank you, Mr. Chief Justice, and may it please the Court:

The judgment of the Court of Appeals dismissing Petitioner's appeal from the decision of the Merit System Protection Board was correct on either of two alternative grounds. The Court of Appeals decided only one of those grounds. It held that judicial review is barred by 8347(c) in this case because Petitioner seeks review of the administrative determination that he was not disabled.

The Court of Appeals did not reach the Government's threshold submission below, however, that an individual does not have a right of direct appeal to the Federal Circuit under the civil service retirement program pursuant to Section 1295(a)(9) of Title 28. Section 1295(a)(9) insofar as it's relevant here simply refers back to Section 7703(b)(1), which provides for the filing of petitions for review in the Federal Circuits by individuals.

I would -- because it is a threshold question, though, I would like to address it at the outset. Before doing so, I'd like to respond briefly to the suggestion by Petitioner and several of the amici in this case that this issue is not before the Court or

that it was somehow inappropriate for us to raise it.

First of all, it is an alternative ground for affirmance of the judgment below and it's a ground that was raised below, and for that reason alone we as Respondent are entitled to raise it.

But beyond that, if the Federal Circuit did not have jurisdiction under 1295(a)(9) the case was not properly in the Court of Appeals and therefore this Court does not have certiorari jurisdiction to reach other issues in the case. So far from it being inappropriate to raise it, we felt obligated to do so.

The question whether the Federal Circuit has direct appellate jurisdiction in appeals by an individual affects not just the disability retirement cases, but all retirement cases. The direct appeal mechanism was added in the Civil Service Reform Act in 1978 and its language, its structure, and its legislative history indicate that it was intended to address adverse actions and other personnel type matters that were addressed by the Civil Service Reform Act. It was not intended to apply to the civil service retirement program, which is governed by separate statutory procedures and was not substantively amended by the Civil Service Reform Act.

Now, I should also stress at the outset that

we're not arguing that all judicial review of retirement claims are barred. This Court in 1936 in the Dismuke decision said that a person whose application for civil service retirement is denied can bring a suit under the Tucker Act for a money judgment. That established avenue of judicial review is not disturbed by the Civil Service Reform Act, nor by the Federal Courts Improvement Act of 1982, and it remains available to persons seeking retirement benefits except where review is precluded, as in cases involving disability.

But a suit under the Tucker Act has to be brought in the first instance in the Claims Court or in the district court for the subsequent appeal to the Federal Circuit, not in the Federal Circuit in the first instance. But our submission does not cut off review in such cases by the Federal Circuit, since all appeals in Tucker Act suits go to that court. That therefore is faithful to the central purpose of both Acts in centralizing review in the Federal Circuit.

QUESTION: If you're right on the first point, the Federal Circuit would have had no jurisdiction to review this claim. But had the claim been brought in the Claims Court or in the district court, the Federal Circuit then would have had -- would have been authorized to review. And to what extent would 8307

have precluded a review?

MR. KNEEDLER: 8347(c) would preclude review on the question of disability in any court, by the Federal Circuit or by the district or Claims Court under the Tucker Act.

QUESTION: So 8347 applies across the board regardless of which court you're in?

MR. KNEEDLER: Yes. I'm sorry, I guess I didn't make that clear. That's correct. We're just talking about the, I guess what you could call subject matter jurisdiction, whether the Federal Circuit could entertain the case in the first instance.

If it has jurisdiction, then the question of whether review on this disability question is precluded then is a second question that the Court could decide.

QUESTION: Am I right, Mr. Kneedler, that what would happen if we accepted your first submission is that we'd dismiss the appeal, he'd refile in the district court or the Court of Claims, go right back to the Federal Circuit, and lose there again, presumably, because they've already decided this question? And then it would have to come back if we're ever to reach --

MR. KNEEDLER: Well, that -- I don't think it would be necessary to dismiss the appeal in this case. We suggested in our brief that an appropriate

disposition would be for this Court to remand to the Federal Circuit with directions to transfer the case to the Claims Court, since under Section 1631 of Title 28 a court can --

QUESTION: But wouldn't that court be bound by the opinion that's on the books now of the Federal Circuit?

MR. KNEEDLER: Well, I think as a legal matter perhaps technically not, because I presume the judgment --

QUESTION: But as a practical matter?

MR. KNEEDLER: -- would be vacated in this case. As a practical matter, I suspect a Claims Court judge might well perceive himself to be bound as a practical matter.

QUESTION: Well, how could we remand a case which we had no jurisdiction to hear?

MR. KNEEDLER: Well, I think it might be in aid of the Court's -- the Court certainly has jurisdiction to decide the jurisdictional question, and in that event I think it could reasonably be in aid of the Court's decision on that jurisdictional question.

QUESTION: We would dismiss the appeal and then remand the case?

MR. KNEEDLER: Dismiss the petition. I think

the Court could do that, and perhaps 1631 itself would apply to this Court in terms of the transfer. I think a liberal construction of that statute might embrace this situation.

QUESTION: And there'd be a transfer, if that may be done, Mr. Kneedler, without entering a new judgment below?

MR. KNEEDLER: I don't think it would be necessary to enter a judgment.

Our submission that the Federal Circuit did not have jurisdiction in this case starts with the separation of the retirement and the personnel sections of the civil service laws prior to the Civil Service Reform Act of 1978. With respect to adverse actions and similar personnel matters, those were things that were initiated by the employing agency against the employee, although there was a subsequent right of appeal to the Civil Service Commission in certain cases governed by Section 7701 of Title 5, and there was a right to an administrative hearing on such an adverse action.

The retirement program, on the other hand, was governed by separate provisions in subchapter 83. The retirement program was centrally administered by the Civil Service Commission, not by the employing agencies, and the process was ordinarily initiated by the employee

filing an application, not the agency taking action against the employee.

And although there was a right of administrative appeal within the Civil Service Commission on denial of a retirement claim, that was not subject to Section 7701, which required a hearing, but was instead subject to whatever procedures were prescribed by the Civil Service Commission itself.

QUESTION: Mr. Kneedler, can I ask you this question. I understand your argument to be that there's basically a difference between retirement disability on the one hand and adverse actions on the other, rather than a difference between employees on the one hand and annuitants or retirees.

But what do you do with temporary disability cases in subsection (c) of 8337, which clearly involve employees, and then which clearly come within the language of 7703, "any employee or applicant"? It seems to me that you've got to bump square into some pretty plain statutory language to maintain your position.

MR. KNEEDLER: I'm not sure I understand the question.

QUESTION: Well, is it not correct that there is in 8337(c) a provision for temporary disability for employees, who retain their status as employees, and

therefore their right to review would be governed by 7703?

MR. KNEEDLER: I don't think so.

QUESTION: There's no temporary disability provision?

MR. KNEEDLER: No, as I read Section 8337(c) it refers to an annuitant receiving disability retirement. As I understand the way the retirement program operates, when someone is found eligible for a retirement annuity he is separated from the federal service.

QUESTION: But you would say that even temporary disability claims are --

MR. KNEEDLER: Yes. The question you're referring to, I suppose the language "unless his disability is permanent in character"?

QUESTION: Right.

MR. KNEEDLER: That I think just refers back to the periodic review of someone who is -- it refers to an annuitant under 8337(c), not an employee. So it's referring to a situation where someone has been found to be disabled, therefore would have been separated from his employment.

But in order to make sure that someone who recovers doesn't continue to get benefits, this

provision simply requires that he be reviewed periodically unless a decision was made at the outset that his disability is permanent, in which case it would be futile or unnecessary to re-examine him periodically. A similar sort of judgment was made in the Social Security Disability Reform Act, where persons receiving social security disability benefits are not reviewed periodically if it was a permanent disability.

You are correct, Justice Stevens, though, that our submission is not based on a distinction between employees on the one hand and survivors on the other. The fact that Congress used the word "employees" in Section 7701 and Section 7703 in our view indicates that it didn't have the retirement program in mind in furnishing a right of direct review.

This is so because there are numerous people covered by the retirement program who are not employees and often never were. By far the largest category are those -- are survivors. And I'm informed by the Office of Personnel Management that there are almost half a million persons receiving civil service retirement benefits as survivors. So this is not some incidental group of persons who would be outside the scope of the direct review mechanism.

QUESTION: Is it not possible -- and again, I

don't have a feel for the whole thing -- that there would be claims where both types of claim would be asserted arising out of the same employment, a personnel action that somebody --

MR. KNEEDLER: An adverse action and a --

QUESTION: Yes. And under your view they would have to proceed through separate --

MR. KNEEDLER: Yes, and in fact OPM recently revised its procedures to try to separate the two to the degree possible. The controversy about agency-filed mental disability cases, for example, arose when the agency would file a retirement application when in fact what it was trying to do was remove someone, or this was the theory.

Well, OPM revised its regulations now to require the removal action to go forward first and for the agency to decide to remove someone and actually issue an order of removal, and only then, after that's completed, will OPM consider the retirement application.

And OPM -- then there are separate avenues for review of those two decisions, the standard approach or avenue of review for adverse actions on the one hand through 7703 and the retirement claim on the other. And there's no anomaly in that because, even to the extent a

removal could be based on a person's physical characteristics, perhaps an inability to do the job, it's well settled that a finding of disability under the retirement program is not controlled by whether someone was terminated from his employment because of an inability to do the job.

We cite in our brief, although not for this proposition, the Polas case and the Piccone case and the Fancher case of the Court of Claims, all of which stand for that proposition. So the fact that there are separate avenues of review simply means there are separate questions, even in a case involving disability, that would be decided in the two circumstances.

QUESTION: Why would Congress want the two different procedures for two rather similar types of cases?

MR. KNEEDIER: Well, in one respect they aren't that similar. The petitions for review and adverse actions in personnel matters really concern things arising out of the ongoing employment relationship: reductions in force, in-grade increases, adverse actions, suspensions, the whole panoply of issues involving the Senior Executive Service.

And the retirement program is something of an insurance program, which is somewhat different and apart

from that. And as I mentioned, it concerns many applications or issues by people who are not in federal employment and often never were.

And it was historically administered by a Bureau of Retirement and Civil Service Commission, separate from the involvement with adverse actions. And as I also mentioned, the retirement program has always been directly administered by the Civil Service Commission. The personnel matters are primarily the responsibility of the respective agencies, the employing agencies.

So there are a lot of reasons why, to explain why Congress would have --

QUESTION: But it is your view that there would be an extra layer of review in the retirement situation, but not in the other? You go to the district court and then up to the federal --

MR. KNEEDLER: Yes, that is true.

QUESTION: Just the sort of thing you criticized in the Florida Power & Light case.

MR. KNEEDLER: Well, the judgment is not -- I'm not here suggesting what would be the best policy judgment. Our submission is that that was the arrangement prior to the Civil Service Reform Act, and that Congress simply didn't change it. It may be fair

to say that Congress didn't specifically focus on it, but no one has pointed to anything in the legislative history in which Congress said it intended civil service retirement cases to be now channeled through this individual right of review in the Federal Circuit.

So our submission is that Congress simply didn't disturb the prior arrangement. And the employee language is important in our view, because it doesn't seem to make -- the Federal Circuit has held that a survivor does have to bring a suit under the Tucker Act, rather than directly in the Federal Circuit. But that seems also to us to make no sense, because two different types of cases would go to two different courts under the same program.

We think that the indication, rather, by the focusing on the word "employee" is that Congress wasn't considering retirement at all.

Secondly, 7703 refers to applicants for employment. Well, it refers to one kind of applicant, but not to the type of applicant that's involved in this case, an applicant for retirement benefits. So the fact that Congress focused on one type of applicant, but not this one, again supports the inference.

7701 and 7703 both refer to the agency involved. Well, the agency would typically be the

employing agency, and it doesn't seem to fit the Civil Service Commission and then OPM, which administer the retirement program.

And then finally, Section 7701, which is part of this comprehensive standard of review involving 7701 and 7703, states that the agency's decision on a matter will be sustained if it's supported by a preponderance of the evidence. Well, that may make sense when it's the agency that has taken the action against the employee, but it doesn't make any sense at all in the retirement program, where the employee is submitting an application for a benefit.

It would make no sense to put the burden on OPM to disapprove the person's entitlement to benefits, and in fact prior to the Civil Service Reform Act it was uniformly held by the courts and by the Civil Service Commission that the applicant had the burden of proof. There's no suggestion that Congress changed that, and in fact the courts since the Civil Service Reform Act of '78 have unanimously held, as has the Merit System Protection Board, that the applicant bears the burden of proof.

But 7701, which is part of this review mechanism for an employee to go to the Court of Appeals, puts the burden of proof the other way. That's another

indication that the special statutory scheme Congress was focusing on then did not apply to retirement cases.

There is one other indication of that, actually two others: One in the '78 Act, where Congress wanted -- provided for a direct appeal in the Act itself to the Merits System Protection Board. It ordinarily provided for that to be taken pursuant to Section 7701, again within the special statutory review procedure. But under the retirement program, Congress -- the only amendments Congress made to the retirement program were to divide the former responsibilities of the Civil Service Commission into two. It gave OPM the administrative part of it and the Merit System Protection Board the authority to hear appeals.

So it amended the appellate provision, 8347(d), to give a right of administrative appeals to the Merit Systems Protection Board, but, significantly, it did not say that such an appeal would be pursuant to 7701, unlike every other case in the Act where it had done so. So again, this suggests that Congress focused on the question of appeals in retirement cases and decided not to make them subject to the statutory review procedure.

And finally, in 1980 Congress enacted the amendments that have been discussed before, which

provide for -- explicitly provide for a right of administrative appeal to the MSPB under 7701 and judicial review under 7703 in cases involving agency-filed applications. This express grant of authority under 7703 would have been unnecessary of those appeals were already taken pursuant to 7703, as Petitioner submits.

Moreover, there was every reason why Congress would have treated those sorts of appeals differently. What has to be remembered there is that the application in that category of cases was filed by the agency, not the employee, and it's a situation where the MSPB or OPM would have actually found that the person is disabled.

And when the person seeks review of that by the MSPB or in court, he is not seeking an annuity, he's not seeking a retirement annuity under the retirement program. What he is really doing is challenging the finding that he was disabled and had to be separated from his job.

QUESTION: These are the actions that are initiated originally by the agency?

MR. KNEEDLER: By the agency, that's correct. So it's something that Congress viewed as more in the nature of an adverse action. In fact, the legislative history shows that, that it had a stigmatizing effect on

employees and therefore Congress decided to assimilate it into the adverse action procedures by providing a special 7301 statutory right to a hearing and the right to judicial review under 7703.

It seems to us that the obvious inference from that is that Congress did not intend for -- or believed and continued to believe that retirement cases brought by an individual seeking review were not brought under 7703. And we cite in the legislative history of the Civil Service Reform Act that Congress recognized that 7701 and 7703 did not grant an individual a statutory right of review under those procedures, and that it was enacting new procedures.

So given all of that, it seems to us the various indicia add up to, we think, an inescapable conclusion that Congress did not bring retirement appeals by individuals under the 7703 procedure.

If the Court should disagree with our submission on that point, the judgment of the Court of Appeals dismissing Petitioner's direct appeal nevertheless was correct because judicial review in this case is barred by 8347(c) of Title 5. Now, I should also point out in saying this that this does not leave an employee in a disability case without any substantial protection against an arbitrary or erroneous denial of

an application for disability benefits.

OPM's decision, if it stands by that on reconsideration, is subject to review by the Merit Systems Protection Board, which is the very agency Congress established in 1978 as independent and quasi-judicial to review and protect the rights of employees. So that the denial of disability benefits is protected by that, and there is a right to a hearing by the MSPB in connection with that.

So the question that we're concerned with here is whether there is another layer of review, whether the statute requires another layer of review by an Article 3 court. And we think the answer to that question is that it does not.

I'd like to begin with the language of 8347(c), which is of course where we must begin. That section provides that OPM "shall determine questions of disability arising under the retirement subchapter of the civil service laws, except to the extent" -- and, except to the extent provided under subsection (d), the decisions of OPM concerning these matters are final and conclusive and are not subject to review."

8347(d) then in turn provides for an administrative review by the MSPB, and this limited judicial review for agency-filed mental disability cases

which doesn't apply here. The net effect is that -- and Petitioner doesn't dispute this -- that 8347(c) applies to judicial review and bars judicial review. The only disagreement between us is what the scope of that bar is.

QUESTION: But Mr. Kneedler, if you are correct on your first point, then we don't reach this question?

MR. KNEEDLER: That's correct.

QUESTION: Mr. Kneedler -- did you finish your answer?

MR. KNEEDLER: Yes.

QUESTION: In your earlier point you discussed the difference between actions by the Office of Personnel Management on the one hand and actions of the employing agency on the other hand. Is there any history of this section that suggests that possibly one of the purposes of this section was to make it clear that these decisions were to be made by OPM rather than by the employing agency?

MR. KNEEDLER: Which --

QUESTION: The language that they're not subject to review. I mean particularly that it's a matter of deciding who gets what turf.

MR. KNEEDLER: No, I think not, because

historically the retirement program was always centrally administered, not handled by the employing agencies. So the application would have been submitted to the Civil Service Commission, and before that I think it was the Veterans Administration.

QUESTION: Right.

MR. KNEEDLER: So I don't think it carries that connotation.

QUESTION: That would have been understood even if this language were not in?

MR. KNEEDLER: Yes, yes.

In the Court of Appeals Petitioner argued that the decision of the MSPB denying his application for disability benefits was not supported by substantial evidencee. In this Court, however, he seems to concede that, whatever else 8347(c) may mean, it does not permit a court to review an MSPB decision on the basis of substantial evidence. And in fact, the courts are unanimous on the question that 8347(c) bars any inquiry into the factual or evidentiary issues underlying a decision with respect to disability.

Petitioner also argues, however, that 8347(c) does not bar review on questions of law or procedure that may underlie a decision of no disability. In this particular case, he argues that the particular error was

that in his view MSPB erred in placing the burden of proof on him, rather than on the agency, on OPM, on the question of disability.

Now, as we've pointed out, as I pointed out before and as we point out in our brief, that position is wholly insubstantial. It was never the law before the Civil Service Reform Act and it is not the law now. Putting the merits to one side, Petitioner's submission that 8347(c) is limited to factual questions, not questions of law or procedure, is in our view inconsistent with the plain language and purpose of 8347(c), with the parallel preclusions of review under the other statutes that grant benefits to federal officials who are disabled, that being the Federal Employment Compensation Act and the veterans statutes, and also inconsistent with the 1980 amendments.

The pertinent language under 8347(c) refers to "decisions" of OPM. Well, the term "decision" connotes a judgment or a decision resolving all procedural, factual and legal questions, not just factual questions. And ordinarily where Congress intends to include only factual questions, it uses the term "findings of fact," not "decisions."

That's true in 28 U.S.C. 1291, governing appeals to the Courts of Appeals. It's true with

respect to Section 405(g) of the Social Security Act. And particularly it's true under the very provisions that Petitioner invokes in this case, 7703(b)(1) and 1295(a)(9). Both provide for review of final orders and decisions of the Merit System Protection Board, which obviously in that context includes questions of law and procedure as well as fact. And in fact, 7703(c) says so.

QUESTION: Mr. Kneedler, I just want to be sure you address one thing before you sit down. In the House report they talk about expanded judicial review as a new concept for the cases covered by the amendments, suggesting there are two kinds of judicial review, one broader than the other. What do you do with that?

MR. KNEEDLER: Well, in fact what the committee report is referring to is back to the Director of OPM's letter, that the Director would not oppose that. What the Director in his letter referred to is what's called the Scroggins formula, and he was simply reciting what the Court of Appeals in fact had held. He wasn't, I think, endorsing that as a matter of statutory construction. In fact, we point out in our brief that at the same time the Government was arguing that 8347(c) is a complete bar.

But the fact of the matter is that Congress

itself nowhere in the legislative history endorsed the Scroggins formula. The Administration -- the OPM representative told Congress about the Scroggins formula, but Congress had no occasion to focus on it, because all of the cases, Scroggins and the other cases that the court was referring to in terms of expanded review, all arose in this agency-filed mental disability case.

Congress expanded the pre-existing right of review as to that category of cases. But the issue here is not that category of cases, but whether the Federal Circuit was wrong in not using the Scroggins formula in other cases where Congress had chosen not to provide a special statutory right of judicial review.

QUESTION: Well, the House report says that "it is reasonable and proper to restrict expanded judicial review to one category of cases." It rather clearly suggests there are two kinds. You say that is just wrong?

MR. KNEEDLER: Well, I understood that to be referring back to the Director. That is what the Director said. He said that the voluntary right, voluntary -- what we call voluntary appeals, filed by the employee, rather than the agency-filed ones, should not be subject to this new procedure.

But whatever -- whatever the Director said or whatever Congress might have thought, the fact of the matter is, as Justice Rehnquist's question pointed out, Congress did not amend that language. Whatever it's belief might have been, it didn't enact it into law.

Nor is this a case like Merrill Lynch, where Congress engaged in a comprehensive examination and revision of the statutory scheme, so that what it left untouched it could be said to have approved. That's not this case at all.

The 1980 amendments never focused on retirement cases outside of the context of these involuntary mental disability cases, so an inference can't be drawn, we think, that Congress intended to endorse a standard of review in other cases that weren't even addressed by that subject matter, or by Scroggins and the other cases that Congress explicitly focused on.

And in fact there are repeated references in the legislative history other -- you mentioned the one in terms of expanded review, but there are repeated references in the legislative history to what Congress was doing was creating an exception to the bar to judicial review that existed. Congresswoman Spellman, for example, the sponsor of the legislation, said on the

floor of the House that these persons are denied access to the courts.

And as we also point out in our brief, there are other inconsistencies in the legislative history of the 1980 Act, even narrowly limited to agency-filed mental disability cases. We think that that's a wholly insubstantial basis on which to undermine what the Federal Circuit concluded was required by the plain language of the Act and its similarity to the other federal employment benefit schemes.

It's also important to point out that in Scroggins and the other cases the court was focusing on, the Court of Appeals never granted relief. And the Congress -- the committee was dissatisfied by the fact, again somebody who was found disabled and was trying to get his job back -- he was not trying to get an annuity -- could be arbitrarily treated, and was trying to give him a right of review. And there's no indication it was focusing on the question of somebody who was trying to get disability benefits and to affirm the right of review in those cases.

Thank you.

CHIEF JUSTICE BURGER: Mr. Murcko, do you have anything further?

REBUTTAL ARGUMENT OF JOHN MURCKO, ESQ.,

ON BEHALF OF PETITIONER

MR. MURCKO: Yes, I have a few points if I have some further time.

First, we think we'd like to discuss the point that was raised about jurisdiction under the Tucker Act and the requirement that we go to the Court of Appeals. We think that is completely contrary to the Congressional intent here.

Congress, when it passed the Federal Uniform Act in 1982 -- Federal Court Improvement Act, excuse me -- specifically had an intention here that there was to be uniformity of the decisions and that there was to be one court, the Federal Circuit, which was to decide all cases of federal employment, concerning adverse actions and retirements.

But if we take the position in the U.S. Government that there should be a two-tiered review, we're going back in time. We're going back to what the Congress intended to eliminate by the Federal Court Improvement Act, all these diverse decisions in the district courts, in the Court of Claims. That isn't what Congress intended.

In addition, Congress intended to eliminate the two-tier review system which existed before, from 1978 to 1982, where you go first to the Civil Service

Commission, then you go upstairs to the district court, and then you go to the Court of Appeals. Well, that Congress felt was a waste of money. That was a waste of money, a waste of judicial time and resources.

So we think that by sending this case back to the Court of Claims it would be completely contrary to the intent of Congress. But even further, we think that it would also be an Act which would be incorrect because essentially we would wind up in the same position we are here today, that it would go to the Court of Claims, who would say that they're bound under 1295, subsection (9), by the decision of the Court of Appeals. So it would be a fruitless act.

Second, this whole question about employees we think is an issue that is not before this Court. That was the issue that was raised in the Bronger case, and the Solicitor General's Office is attempting to backdoor it into this Court through this case. If they want a decision on Bronger, they should file a petition for a writ of certiorari on that particular case.

But the Court of Appeals for the Federal Circuit has decided that case, and in that decision they said that the arguments raised by the OPM there are frivolous, frivolous at their best.

So we think that the Court should not address

that issue, because that has not been briefed by Bronger's attorney and he should be allowed to have an opportunity to come to court and argue his position.

In addition, the position of the Government that there are two separate procedures here, one for adverse actions, one for disability retirement, is contrary to the history of the Civil Service Reform Act, contrary to prior procedures. When Congress passed 7701, it embodied all of the civil service regulations on retirement and also on adverse actions, and it codified those regulations in 7701 and provided for full review by the Merit System Protection Board of adverse actions and retirement claims.

There's no basis for any distinction in an administrative hearing, and Congress intended to have administrative review by the Merit System Protection Board of retirement claims, like adverse actions by the Merit System Protection Board, and also by the Federal Circuit. That was the specific Congressional intent when it passed the Civil Service Reform Act.

In addition, part of the civil service -- when Congress was considering the Civil Service Reform Act, they also read the Reorganization Act, Section 202, which was the executive's position. And the Executive Branch stated that retirement cases fall under this

provision, they're entitled to a hearing, and they should have the same right to review as adverse actions. And the Congress considered that.

Further, the Merit System Protection Board has essentially taken the same position that we have in this particular case, that there is review. We think that the intention of Congress here was to expand judicial review in the area of mental cases, mental involuntary retirement determinations, and to maintain. And we think the Congress originally, when it was considering this legislation, wanted to have de novo review of the entire area, complete de novo review for mental and physical retirement cases.

However, the OPM came in and argued against that, saying they just wanted expanded review for the mental cases. In addition, we think that, relying on the OPM decision, it modified this legislation to just provide expanded review for the area of involuntary mental retirement cases.

In addition, if the Congressional hearings are read very closely, we see that Representative Spellman and Senator Pryor both state that this limitation on judicial review, this limitation on judicial review must be eliminated so that these improper practices are done away with.

In addition, we think that the construction of this Court that when Congress passes an amendment it intends to adopt the judicial interpretation of that statute is required by the Illinois Brick case and the Canning versus University of Chicago case. And we think that Congress, when it passed both the '78 and '80 amendments, attempted to -- or was assumed to adopt the Scroggins decision, decisions or line of cases.

So we feel that the Court here should rule that the Federal Circuit below had jurisdiction to determine the issue, that the intent of Congress was to allow limited jurisdiction review in this area, and we think that all of the questions of procedural or substantive errors should be sent back to that court for their ultimate determination.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:49 p.m., argument in the above-entitled case was submitted.)

* * *

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BY Paul A. Richardson

(REPORTER)