OFFICE OF SPECIAL MASTERS

No. 99-946V

(Filed: February 8, 2001)

SHON S. BURCH, for herself and on behalf of her daughter, SABIAN E. BURCH, and JONATHAN BURCH, on his own behalf and on behalf of his daughter, SABIAN E. BURCH,	**TO BE PUBLISHED**
Petitioners,	
v.	
SECRETARY OF HEALTH AND HUMAN SERVICES,	
Respondent.	

Clifford Shoemaker, Vienna, Virginia, appeared for petitioner

Lisa Willett, Department of Justice, Washington, D.C., appeared for respondent.

RULING ON LEGAL ISSUE

HASTINGS, ***Special Master***

This is an action seeking an award under the National Vaccine Injury Compensation Program (hereafter "the Program")[1]. The parties have sought my ruling on a legal issue pertinent to petitioners' primary theory of entitlement to a Program award. For the reasons set forth below, I hereby conclude that petitioners' stated legal theory is untenable, and could not support entitlement to a Program award under current law.

[1]The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq*. (1994 ed.). Hereinafter, all "§" references will be to 42 U.S.C. (1994 ed.).

I

FACTUAL AND PROCEDURAL BACKGROUND

A. Facts

The following facts appear to be undisputed. Shon S. Burch and Jonathan Burch are the mother and father, respectively, of Sabian E. Burch, who was born on November 21, 1996. While Shon Burch was pregnant with Sabian, she received an "MMR" (measles, mumps, rubella) vaccination on March 25, 1996. After Sabian was born, the infant was determined to be suffering from a serious neurologic abnormality known as Aicardi's Syndrome. Sabian has suffered from a seizure disorder, brain malformation, and significant developmental delay.

B. Procedural history

The instant petition, filed on November 19, 1999, alleged that Sabian's severe neurologic abnormality was a result of the MMR vaccination that her mother received on March 25, 1996, while pregnant with Sabian. On April 18, 2000, respondent filed "Respondent's Report," taking the position that, as a matter of fact, the evidence does not support a conclusion that Sabian's neurologic abnormality was caused by the MMR vaccination in question. An unrecorded status conference was held on May 17, 2000. At that conference, the parties agreed that as to this claim of petitioners, a crucial legal issue is whether Sabian, while *in utero*, "received" the MMR vaccine from the MMR vaccination administered to her mother on March 25, 1996, as the term "received" is used at § 300aa-11(c)(1)(A). They agreed to brief the issue. Respondent's "Motion to Dismiss" and accompanying brief was filed on July 13, 2000. Petitioners' brief was filed on September 6, 2000.

II

DISCUSSION

The legal question now at issue is whether, *assuming* that petitioners could prove as a factual matter that their daughter Sabian's neurologic abnormality resulted from the MMR vaccine that was administered to her mother on March 25, 1996, they would be eligible for a Program award on her behalf. For the reasons set forth below, I conclude, as a matter of law, that they would not.

A. The relevant statutory provision

Under the Program, compensation is available, under certain circumstances, to a person who has suffered an injury after having "received" a vaccine of the type set forth in the statute. The relevant statutory provision reads, in pertinent part, as follows:

> A petition for compensation under the Program for a vaccine-related injury or death shall contain–

> (1) * * * an affidavit, and supporting documentation, demonstrating that the person who suffered such injury or who died–
>
> > (A) received a vaccine set forth in the Vaccine Injury Table or, if such person did not receive such a vaccine, contracted polio, directly or indirectly, from another person who received an oral polio vaccine * * *.

§ 300aa-11(c)(1)(A). Thus, the person whose injury is the subject of the Program petition must have "received" a vaccine set forth in the Vaccine Injury Table (except if that person contracted polio from another person, an exception which is not relevant to this case).

B. Statutory construction principles

Before I move to my analysis of the particular statutory provision here in question, I note that respondent has argued that in reaching an interpretation of that statutory provision, I am bound by the "sovereign immunity" principles of statutory construction, which would mean that I should "strictly" and "narrowly" construe the statute. On the other hand, there also exists a principle of statutory construction that states that a "remedial" statute is generally to be construed in a "liberal" fashion so as to give broad effect to the "remedial" purpose behind the statute. Accordingly, in the following subsections of this Ruling, I will examine each of these principles of statutory construction.

1. The doctrine of "sovereign immunity"

The starting point of the doctrine of "sovereign immunity," a judge-made doctrine which dates from the early days of our country, is that the federal government, as this nation's "sovereign," may not be sued without its consent. *See*, *e.g.*, *United States v. Horn*, 29 F. 3d 754, 761 (1st Cir. 1994); *M.A. Markenson Co. v. United States*, 996 F. 2d 1177, 1180 (Fed. Cir. 1993). From that initial principle, the federal courts have derived certain principles of *statutory construction* that have been applied in interpreting legislation which is said to have *waived* that immunity with respect to a particular type of suit against the United States. One principle is that a statutory waiver of sovereign immunity must be "definitely and unequivocally expressed." See, *e.g.*, *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992); *Horn, supra*, 29 F. 3d at 762. The second is that the statutory language setting forth such a waiver is to be "construed strictly" or "construed narrowly" in favor of the government. *Nordic Village, supra*, 503 U.S. at 34; *Ardestani v. I.N.S.*, 502 U.S. 135, 137 (1991); *Horn, supra*, 29 F. 3d at 762.

In this case, of course, as the respondent does not dispute, the overall statute establishing the Program, to which I will sometimes refer as the "Vaccine Act" (see 42 U.S.C. § 300aa-1 through 34), unquestionably *does* waive the government's immunity from suit, in order to permit monetary awards to persons whose circumstances fall within that Act's requirements. The sovereign immunity principles of statutory construction set forth above, however, are still of great significance here,

because in this case I am required to determine the meaning of *one particular provision* of the Vaccine Act. Respondent argues that because this particular provision is *part* of the Vaccine Act, which *as a whole* constitutes a waiver of sovereign immunity, in reaching an interpretation I must "narrowly and strictly" construe the statutory language. (Resp. Br. filed 7-13-00, p. 3.)

After reviewing a great number of the cases that have discussed these principles of statutory construction, to which I will sometimes refer collectively as the "sovereign immunity doctrine," I note that over the years the federal courts, including the Supreme Court, appear to have waxed and waned in their level of devotion to the doctrine. In fact, there have been opinions, especially in the middle of the last century, in which the courts have indicated that the doctrine was falling into "disfavor." *See, e.g.*, Wright, Miller, and Cooper, *Federal Practice and Procedure*, Vol. 14 (West 1998), § 3654, pp. 317-18, and cases cited therein; *National City Bank of New York v. Republic of China*, 348 U.S. 356, 359-60 (1955); *Kiefer and Kiefer v. Reconstruction Finance Corp*, 306 U.S. 381, 390-91 (1939). Several Supreme Court opinions, indeed, suggested that waivers of sovereign immunity in some circumstances could be construed "liberally" rather than "strictly." *See, e.g., United States v. Shaw*, 309 U.S. 495, 501 (1940); *United States v. Yellow Cab Co.*, 340 U.S. 543, 555 (1951); *F.H.A. v. Burr*, 309 U.S. 242, 245 (1940). In other cases, that same Court stated that "[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." *United States v. Aetna Surety Co.*, 338 U.S. 366, 383 (1949); *Block v. Neal*, 460 U.S. 289, 298 (1983); *Yellow Cab, supra*, 340 U.S. at 554. That Court has also indicated that in construing a statute that waives sovereign immunity, a court must be careful not to "assume the authority to narrow the waiver that Congress intended." *United States v. Kubrick*, 444 U.S. 111, 118 (1979); *Bowen v. City of New York*, 476 U.S. 476, 479 (1986). It has added that, in such statutory construction situations, a federal court should not "as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955).[2]

More recently, however, the Supreme Court has vigorously *reaffirmed and reemphasized* the principles of requiring "unequivocal" expression of an immunity waiver and of "strictly and narrowly construing" such waivers. *See, e.g.*, Wright, Miller, and Cooper, *supra*, § 3654, pp. 318-19, 327, 333-38; Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 Wis. L. Rev. 771, 780. Specifically, the Supreme Court decisions of the 1990's have resoundingly endorsed these principles. *Nordic Village, supra*, 503 U.S. at 33; *Ardestani, supra*, 502 U.S. at 137;

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[2]The lower courts have also at times suggested something other than "strict construction" of statutes waiving sovereign immunity. *See, e.g., May Dept. Stores Co. v. Smith*, 572 F. 2d 1275, 1276-77 (8th Cir. 1978) ("courts have been liberal in finding that [sovereign] immunity has been waived"); *Bank of Hemet v. United States*, 643 F. 2d 661, 665 (9th Cir. 1981) ("[t]he time is long past when the bar of sovereign immunity should be preserved through strained and hypertechnical interpretations of relevant acts of Congress"); *In re Town & Country Home Nursing Services, Inc.*, 963 F. 2d 1146, 1151 (9th Cir. 1991) ("[i]t is well established that when the federal government waives its immunity, the scope of the waiver is construed to achieve its remedial purpose").

United States v. Idaho, 508 U.S. 1, 6-9 (1993); *Lane v. Pena*, 518 U.S. 187, 192 (1996); *U.S. Dept. of Energy v. Ohio*, 503 U.S. 607, 615, 619, 626 n.16, 627 (1992); *United States v. Williams*, 514 U.S. 527, 531 (1995). As to the statements regarding "liberal" construction and the like set forth in the cases cited in the previous paragraph, the recent Supreme Court opinions have cautioned that those statements were confined to two particular types of cases and should *not* be applied beyond those cases. That is, the Court explained that in the context of the "sweeping language" of the Federal Tort Claims Act allowing suits against the United States, as well as those statutes which allow certain federally-created agencies to "sue or be sued" as if they were non-governmental entities, the Court had elected to narrowly construe *exceptions* to those broad waivers of sovereign immunity, and, thus, in effect, to broadly construe the waivers themselves. *Nordic Village*, *supra*, 503 U.S. at 34. But the Court emphasized that these specific exceptions do *not* mean that waivers of sovereign immunity in *other* types of statutes are to be "liberally construed;" instead, the "traditional principle" that statutes "must be construed strictly in favor of the sovereign" remains the general rule. *Id.*

Moreover, the 1990's Supreme Court decisions cited above have done more than to merely reaffirm the sovereign immunity doctrine in the face of prior indications that the doctrine might have been falling into "disfavor;" those decisions seem clearly to have actually *strengthened and reinforced* the doctrine, making it more rigorous than ever before. As one commentator has put it, those recent decisions have given the sovereign immunity doctrine "some extra teeth." Nagle, *supra*, 1995 Wis. L. Rev. at 796. For example, those decisions have specified that the fact and extent of the waiver must be unequivocally indicated in the language of the *statutory text itself. Nordic Village*, 503 U.S. at 37; *United States v. Idaho*, 508 U.S. at 6; *Lane v. Pena*, 518 U.S. at 192. In other words, if the waiver is not apparent in the statutory text itself, the Court will *not utilize the legislative history* to interpret the text. *Nordic Village*, 503 U.S. at 37; *Lane v. Pena*, 518 U.S. at 192. Further, in one case where the text itself did not contain an unequivocal waiver, the Court declined to find a waiver even though such an interpretation admittedly would have fostered the general purpose behind the statute. *Ardestani*, 502 U.S. at 138. The commentators, as well as at least one Supreme Court justice, have referred to these pronouncements as creating a "clear statement rule" with regard to sovereign immunity waivers. *United States v. Williams*, 514 U.S. 527, 541 (1995) (J. Scalia, concurring); Wright, Miller, and Cooper, *supra*, § 3654, p. 333; Nagle, *supra*, 1995 Wis. L. Rev. at 774. Some commentators have even dubbed it a "super strong clear statement rule." See W. Eskridge and P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992). At the least, these recent decisions firmly entrench the rule that statutory waivers of sovereign immunity must be unequivocally expressed, and that the statutory language of such waivers must be strictly and narrowly construed in favor of the government.

2. The "sovereign immunity" statutory construction principles apply to the interpretation of the statutory section at issue here.

In light of the above discussion, the question then becomes whether the sovereign immunity statutory construction principles, set forth above, apply to the interpretation of the *particular* statutory subsection at issue here. I conclude that they do. Indeed, because the Vaccine Act

authorizes suits and monetary awards against an agency of the United States, it is obvious that the sovereign immunity doctrine must be generally applicable to that Act. Moreover, the United States Court of Appeals for the Federal Circuit, whose legal holdings are binding upon this court, has in fact on two occasions cited the sovereign immunity doctrine as applicable to its interpretation of Vaccine Act provisions. See *Martin v. Secretary of HHS*, 62 F. 3d 1403, 1405 (Fed. Cir. 1995); *Schumacher v. Secretary of HHS*, 2 F. 3d 1128, 1135 fn.12 (Fed. Cir. 1993). In addition, both the judges and the special masters of the Court of Federal Claims have also applied the sovereign immunity doctrine to Vaccine Act cases on numerous occasions. See, *e.g.*, *Stevens v. Secretary of HHS*, 31 Fed. Cl. 12 (1994); *Massard v. Secretary of HHS*, 25 Cl. Ct. 421 (1992); *Lombardo v. Secretary of HHS*, 34 Fed. Cl. 21 (1995); *Brown v. Secretary of HHS*, 34 Fed. Cl. 663 (1995); *Mass on Behalf of Mass v. Secretary of HHS*, 31 Fed. Cl. 523 (1994); *Carlson v. Secretary of HHS*, 23 Cl. Ct. 788 (1991); *Ashe-Cline v. Secretary of HHS*, 30 Fed. Cl. 40 (1993); *Munn v. Secretary of HHS*, 28 Fed. Cl. 490 (1993); *Patton v. Secretary of HHS*, 28 Fed. Cl. 532 (1993), *aff'd* 25 F. 3d 1021 (Fed. Cir. 1993); *Jessup v. Secretary of HHS*, 26 Cl. Ct. 350 (1992); *Grice v. Secretary of HHS*, 36 Fed. Cl. 114, 120 (1996); *Staples v. Secretary of HHS*, 30 Fed. Cl. 348 (1994); *Mikulich v. Secretary of HHS*, 18 Cl. Ct. 253 (1989); *Brown v. Secretary of HHS*, 18 Cl. Ct. 834 (1989), *rev'd*, 920 F. 2d 918 (Fed. Cir. 1990); *Edgar v. Secretary of HHS*, 29 Fed. Cl. 339 (1993); *Hulsey v. Secretary of HHS*, 19 Cl. Ct. 331 (1990); *Sheehan v. Secretary of HHS*, 19 Cl. Ct. 320 (1990); *Andrews v. Secretary of HHS*, No. 90-2126V, 1995 WL 262264 (Fed. Cl. Spec. Mstr. April 20, 1995); *Van Houter v. Secretary of HHS*, No. 90-1444V, 1991 WL 239056 (Cl. Ct. Spec. Mstr. Oct. 30, 1991); *Brice v. Secretary of HHS*, No. 95-835V, 1996 WL 718287 (Fed. Cl. Spec. Mstr., Nov. 26, 1996); *Spohn v. Secretary of HHS*, No. 95-460V, 1996 WL 532610 (Fed. Cl. Spec. Mstr. Sept. 5, 1996); *Pertnoy v. Secretary of HHS*, No. 95-218V, 1995 WL 579827 (Fed. Cl. Spec. Mstr. Sept. 8, 1995); *Weddel v. Secretary of HHS*, No. 94-524V, 1995 WL 413925 (Fed. Cl. Spec. Mstr. June 29, 1995); *Scott v. Secretary of HHS*, No. 95-129V, 1995 WL 413930 (Fed. Cl. Spec. Mstr. June 29, 1995); *Gribble v. Secretary of HHS*, No. 91-460V, 1991 WL 211919 (Cl. Ct. Spec. Mstr. Sept. 26, 1991); *Mains v. Secretary of HHS*, No. 90-992V, 1993 WL 69724 (Fed. Cl. Spec. Mstr. Feb. 26, 1993); *Wodicker v. Secretary of HHS*, No. 92-64V, 1993 WL 64280 (Fed. Cl. Spec. Mstr. Feb. 23, 1993); *Polanco v. Secretary of HHS*, No. 91-195V, 1997 WL 618256 (Fed. Cl. Spec. Mstr. Sept. 11, 1997); *Edinburg v. Secretary of HHS*, No. 90-1572V, 1997 WL 74703 (Fed. Cl. Spec. Mstr. Jan. 31, 1997); *Dominick v. Secretary of HHS*, No. 90-2665V (Fed. Cl. Spec. Mstr. Nov. 14, 1995); *Karras v. Secretary of HHS*, No. 90-1701V, 1995 WL 650681 (Fed. Cl. Spec. Mstr. October 24, 1995); *Taylor v. Secretary of HHS*, No. 90-1036, 1995 WL 729519 (Fed. Cl. Spec. Mstr. March 27, 1995); *Hoffman v. Secretary of HHS*, No. 90-3451V, 1995 WL 103334 (Fed. Cl. Spec. Mstr. Feb. 21, 1995); *Salceda v. Secretary of HHS*, No. 90-1304V, 1994 WL 139375 (Fed. Cl. Spec. Mstr. Apr. 6, 1994); *Goodwin v. Secretary of HHS*, No. 90-3696V, 1992 WL 170690 (Cl. Ct. Spec. Mstr. July 2, 1992).

Accordingly, it is clear that the doctrine of sovereign immunity applies to the interpretation of this provision of the Vaccine Act.

3. The principle of "liberal" construction of "remedial" legislation

Another principle of statutory construction, however, must also be considered. That is, a number of federal courts have stated that "remedial" or "welfare" legislation should be given a "broad construction" or a "liberal interpretation" in order to further the "remedial," "beneficent," or "humanitarian" purposes behind the statute. *See, e.g., Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557, 562 (1987); *Urie v. Thompson*, 337 U.S. 163, 180 (1949); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *Cosmopolitan Shipping Co. v. McCallister*, 337 U.S. 783, 788 (1949); *United States v. Zacks*, 375 U.S. 59, 67 (1963); *Jefferson County Pharmaceutical Ass'n. v. Abbott Laboratories*, 460 U.S. 150, 159 (1983); *Connecticut Light & Power Co. v. Secretary of the U.S. Dept. of Labor*, 85 F.3d 89, 94 (2d Cir. 1996); *Bechtel Construction Co. v. Sec. of Labor*, 50 F. 3d 926, 932 (11th Cir. 1995); *Caro-Galvan v. Curtis Richardson*, 993 F.2d 1500, 1505 (11th Cir. 1993). Thus, the question arises whether the Vaccine Act should be viewed as legislation that is "remedial" in nature, and therefore should be "liberally" construed so as to give a wider application to the remedial purposes behind the statute.[3] The cases that I have identified mentioning this "remedial legislation" rule do not provide any precise definition of what legislation should be considered to be "remedial" in nature. However, the cases all seem to refer to statutes that are designed to benefit or protect classes of persons who have been harmed or disadvantaged in some fashion. In that light, it seems reasonable to conclude that the Vaccine Act, which is designed to benefit persons injured by vaccinations, does constitute a "remedial" statute. *See, e.g., McGowan v. Secretary of HHS*, 31 Fed. Cl. 734, 740 (1994). Does it follow, therefore, that the provisions of that Act are to be "liberally" or "broadly" interpreted? I conclude that it does not. Rather, my analysis of the case law is that with respect to statutes which are *both* "remedial" in nature *and* also waive the federal government's immunity from suit, it is the sovereign immunity doctrine which "trumps" the competing principle of statutory construction, so that *strict and narrow construction* remains the controlling principle with respect to such statutes.

The most straightforward reason for this conclusion, with respect to the Vaccine Act, is simply that binding precedent mandates it. That is, as noted above, the Federal Circuit has clearly stated that the doctrine of sovereign immunity *does* apply in interpreting Vaccine Act provisions. *Martin v. Secretary of HHS, supra*, 62 F. 3d at 1405; *Schumacher v. Secretary of HHS, supra*, 2 F. 3d at 1135, fn. 12. That court, whose pronouncements concerning legal issues are binding upon this court, has *not* indicated that the operation of the sovereign immunity doctrine is negated or mitigated because the Vaccine Act is remedial in nature. Accordingly, the precedent of *Martin* and *Schumacher* would seem to leave me no choice but to apply the sovereign immunity principle of strict and narrow construction to the Vaccine Act provision here in question, without regard to the fact that the Act may be "remedial" in nature.

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[3]The petitioners in this case have not cited these cases, nor have they cited this principle of liberal construction of remedial statutes. Nevertheless, I have found it appropriate to consider on my own this potentially-applicable theory of statutory construction.

In addition, I note that the same result flows from an analysis of the non-Program case law, especially the recent Supreme Court precedent. First, I note that in all of the cases cited above at p. 7 concerning "remedial legislation," as in all of the Supreme Court opinions and nearly all of the other federal cases that I have found that also describe the same rule of "liberal construction," the statute that was being interpreted pertained to relief against *private entities*, rather than against the federal government.[4] So those cases provide no authority for the proposition that it is correct to use the "remedial legislation" principle to construe liberally a statute that authorizes relief against the *United States*. More importantly, the recent Supreme Court precedent seems to point strongly to the conclusion that the "remedial legislation" principle has *no* application to statutes affording relief against the *government*. For example, in *Lane v. Pena*, that court was interpreting the Rehabilitation Act of 1973, an act protecting the handicapped which certainly does seem to be an example of "remedial legislation." 518 U.S. at 188. Yet the Court applied the sovereign immunity "strict construction" rule, and mentioned nothing about the remedial nature of the statute being a reason to mitigate the application of that rule. *Id.* at 192. Another example is *Library of Congress v. Shaw*, *supra*, in which the Supreme Court was interpreting a provision of the Civil Rights Act of 1964, which allows victims of racial discrimination to obtain redress, and, thus, also seems to fit the description of "remedial legislation." 478 U.S. at 311. Again, the Court applied the "strict construction" principle as part of the sovereign immunity doctrine. *Id.* at 317.[5] Thus, the Supreme Court, at least in its recent decisions, seems clearly to have taken the view that when a statute waives the federal government's immunity from suit, such a statute, *even when "remedial" in nature*, must be strictly construed in the government's favor.

To be sure, I have identified two appellate court decisions in which it is asserted that a "remedial" statute affording relief against the United States should be interpreted "liberally." See *Thurston v. United States*, 179 F. 2d 514, 515 (9th Cir. 1950); *In re Town and Country Home Nursing Services, Inc.*, 963 F. 2d 1146, 1151 (9th Cir. 1991). In addition, the court in *McMahon v. United States*, 186 F. 2d 227, 229 (3rd Cir. 1950), *aff'd* 342 U.S. 25 (1951), suggested that in the case of a statute that is *both* "remedial" *and* constitutes a waiver of sovereign immunity, the two competing statutory construction principles would in effect cancel each other out, so that the court would construe the statutory language "without throwing any weights on either side of the scale."

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[4]It may be noted that in some of "remedial legislation" cases cited above, the United States or an agency thereof is listed as a party. However, in none of those cases was the "remedial legislation" doctrine utilized in interpreting a statute that afforded relief *against the government*. For example, in *United States v. Zacks*, it was found that the statute in question was *not* "remedial" in nature. 375 U.S. at 68. And in the cases in which the Secretary of Labor was a party to the litigation, that Secretary participated only in the posture of assisting a worker in obtaining relief *against a private employer*.

[5]See also *United States v. Horn*, *supra*, in which the court explained that where the sovereign immunity doctrine conflicted with the doctrine of the "supervisory powers" of federal courts, the sovereign immunity doctrine, being a "mandatory and absolute" doctrine, would take precedence. 29 F. 3d at 764-767.

186 F. 2d at 229.[6] I conclude, however, that these three appellate court decisions were simply overruled by the recent Supreme Court decisions in *Lane v. Pena* and *Library of Congress v. Shaw*, cited above, which establish a contrary rule.

In short, the recent Supreme Court precedent seems to indicate the same rule apparently imposed by the Federal Circuit in the cases of *Martin* and *Schumacher, supra*. That is, even though the Vaccine Act may be remedial in nature, its provisions still must be "strictly construed" in keeping with the doctrine of sovereign immunity.[7]

4. Summary of statutory construction principles to be applied here

For the reasons set forth above, I have concluded that the sovereign immunity statutory construction principles *are* properly applicable to the statutory interpretation question at issue here. This means that I must "constru[e] ambiguities in favor of immunity." *Lane v. Pena*, 518 U.S. at 192; *United States v. Williams*, 514 U.S. at 531; see also *Robb v. United States*, 80 F. 3d 884, 887 (4th Cir. 1996) ("all ambiguities are resolved in the favor of the sovereign"); *Levernier Construction*, 947 F. 2d at 503 (the statutory provision is to be given the "most restrictive" interpretation). It means that if there exist more than one "plausible" reading of the statutory provision at issue (*Nordic Village*, 503 U.S. at 36-37), or two possible interpretations of "equal likelihood" (*Department of Energy v. Ohio*, 503 U.S. at 626 fn.16), then I must choose the interpretation that produces the more limited award.

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[6]Note that the Supreme Court in *McMahon*, while affirming the appellate court's *result*, merely interpreted the statutory language in the government's favor, without explaining whether it approved of the court of appeals' comment as to the *statutory construction rules*. 342 U.S. at 26.

[7]Finally, I note that I have considered one Vaccine Act opinion that could be considered as inconsistent with my conclusion here. That is, in *McGowan v. Secretary of HHS, supra*, the court applied the doctrine of sovereign immunity in interpreting one of those portions of the Vaccine Act that determine whether a petitioner is *initially qualified* to seek an award, suggesting that the provision in question constituted a "jurisdictional requirement." 31 Fed. Cl. at 740. But, noting that the Vaccine Act is "remedial" in nature, the court added language that might conceivably be interpreted as implying that once it is determined that a claimant meets the statute's "jurisdictional requirements," there is no need for strict construction of those *additional* statutory provisions that are *non-jurisdictional*. *Id.* In my view, that would be a misinterpretation of *McGowan*. The important teaching of *McGowan* is that the court *did* apply rule of strict construction to the Vaccine Act provision there at issue; if there is any suggestion in the opinion that such a rule might not apply to *other* provisions of the Vaccine Act--and it is certainly *not* clear that the *McGowan* court made any such suggestion-- that suggestion would clearly constitute *dicta*. Further, I would respectfully conclude that any such suggestion would be erroneous, in light of the precedent discussed at pp. 5-6 above.

C. Analysis of provision relevant here

The question of whether an unborn child *in utero* "receives" a vaccine that is administered to his mother, under the meaning of the word "received" as used in § 300aa-11(c)(1)(A), presents a difficult issue of statutory interpretation. Petitioners argue that Sabian "received" the MMR vaccine administered to her mother while Sabian was *in utero*, contending as a matter of fact that the vaccine injected into the mother's body would automatically pass into the unborn child's system, "just as that fetus receives the nutrients that the mother ingests." (See petitioners' "Opposition" filed on September 6, 2000, p. 2.) Petitioners argue that since the vaccine passes into the unborn child's system, that child has "received" the vaccine. Respondent argues, on the other hand, that the term "received" applies only to situations in which a person was *directly administered* the vaccine by the vaccine administrator--*i.e.*, was injected with a vaccine or ingested it (took it orally). Respondent argues that Sabian did not "receive" the vaccine within the statutory meaning; only her mother did.

The parties have cited, and I have found, only two cases involving published opinions dealing directly with the issue of whether an unborn child can be said to have "received a vaccine" when his mother received a vaccination while the child was *in utero*. In *DiRoma v. Secretary of HHS*, No. 90-3277, 1993 WL 496981 (Fed. Cl. Spec. Mstr. Nov. 18, 1993), a special master of this court opined that the unborn child had *not* "received" the vaccine within the statutory meaning of that word, concluding that the statutory requirement that the injured person have "received" the vaccine "eliminates any possibility * * * of a claim for compensation for an *in utero* injury." 1993 WL 496981 at *2. In *Rooks v. Secretary of HHS*, No. 93-689V, 1995 WL 522769 (Fed. Cl. Spec. Mstr. Aug. 22, 1995), another special master of this court also ruled that an unborn child had not "received the vaccine" within the statutory meaning, because the vaccination was not "directly administered" to the fetus. 1995 WL 522769 at *1. In the latter case, however, a judge of this court reversed the special master's decision, ruling that the *in utero* child had, as a matter of law, "received" the vaccine, because the vaccine passed through the mother's system into that of the fetus. *Rooks v. Secretary of HHS*, 35 Fed. Cl. 1 (1996).

I find this statutory interpretation question to be a difficult one, with reasonable arguments on both sides. However, I ultimately must conclude that the sovereign immunity doctrine dictates the outcome of this issue. I conclude that the statutory language of § 300aa-11(c)(1)(A) is ambiguous in its application to this situation, and that both competing interpretations are at least "plausible." Therefore, as explained above, I must choose the interpretation that produces the most narrow and restricted waiver of sovereign immunity. *Nordic Village*, 503 U.S. at 36-37; *Department of Energy v. Ohio*, 503 U.S. at 626 n.16; *Levernier Construction*, 947 F. 2d at 503. In other words, I must adopt respondent's interpretation, since that produces the more narrow waiver.

In reaching this conclusion, I acknowledge that I find much that is persuasive in petitioners' arguments and, especially, in the judge's opinion in *Rooks, supra*. First, I find considerable merit in the argument, adopted by the judge in *Rooks*, that an unborn child can be said to have "received" a vaccine under the ordinary meaning and usage of the term "received." (35 Fed. Cl. at 9-10.) That is, assuming that it is true as a factual matter that the MMR vaccine would have naturally flowed

through the mother's system into Sabian's system at that stage of the pregnancy,[8] then it does seem logical to conclude that Sabian "received" the vaccine. Although Sabian did not receive it *directly* from the vaccine administrator, it is reasonable to say that she did "receive" it through her mother's system. As the judge in *Rooks* pointed out, there seems to be no particular reason to restrict the word "received" in the statute to receipt by *injection* or *ingestion*, as respondent argues. Certainly, under the ordinary usage of the word "receive," a person can "receive" things by means other than injection or ingestion. I see no inherent reason why a person could not be said to "receive" a vaccine in this third fashion--that is, by transfer from a pregnant woman's system into the system of the unborn child.

Second, I agree with the judge in *Rooks* that petitioners' interpretation of the term "received" would be more in keeping with the general spirit and the remedial nature of the Program, which was intended to "generously" assist injured persons whose injuries may have been vaccine-caused. (*Id*. at 6-8.)

However, on the other hand, I can also see merit in respondent's argument. Although a person can "receive" other things by means other than injection or ingestion, it is true that when one thinks of "receiving" *a vaccine*, one would normally think of having the vaccine administered by injection or ingestion. So, there is some appeal to respondent's argument that when Congress used the phrase "received a vaccine" in § 300aa-11(c)(1)(A), Congress likely had in mind only receipt by injection or ingestion.[9]

Accordingly, after full consideration of this issue, I must respectfully disagree with the ultimate legal conclusion of the *Rooks* court. My view is that the *Rooks* decision failed to give full effect to the rigorous application of the sovereign immunity doctrine that has been directed by the 1990's decisions of the Supreme Court highlighted above.[10] Specifically, I note the following discussion in the judge's opinion in *Rooks*:

> Within the context of the Act's purpose, the language of clause (c)(1)(A) does not itself clearly settle the issue. *The term "received" is ambiguous* because it could

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[8]For purposes of this legal ruling, I am *assuming* that factual scenario to be accurate. That seems to be the factual scenario assumed in the *Rooks* opinion as well. However, I note that petitioner in this case has never provided evidence showing that scenario to be accurate. It may be factually possible, on the other hand, that at some stages of a pregnancy, the MMR vaccine might *not* automatically pass through the mother's system into the unborn child's system.

[9]I note that I have not found any legislative history that relates specifically to the statutory provision at issue here. Further, as explained above, the recent Supreme Court "sovereign immunity" rulings indicate that a court should *not* look to the legislative history to interpret a statutory provision subject to the sovereign immunity doctrine.

[10]I note that one of those Supreme Court decisions, *Lane v. Pena*, was issued after the judge's ruling in *Rooks*.

> refer to receipt of the actual vaccine or receipt of the injection or pill to be swallowed. *Each is plausible.* * * *. Based on the underlying policy and object of the Act, the court believes that the term "received" should be given broader scope. The court finds that the potential to "receive" a vaccine while in utero exists because such an interpretation would fulfill the purpose behind the statute.

(35 Fed. Cl. at 6, emphasis added.)

Thus, in this passage, the judge in *Rooks* clearly acknowledges that the statutory provision in question is "ambiguous," and that each of two proposed interpretations thereof is "plausible." (*Id*.) The judge further indicates that he chose the petitioner's "broader" interpretation over the respondent's interpretation, "[b]ased on the underlying policy and object of the [Vaccine] Act," as determined from the legislative history. (*Id*.) But while this method of statutory interpretation would seem quite persuasive to me outside the context of the sovereign immunity doctrine, in my view it is contrary to the Supreme Court sovereign immunity decisions of the 1990's, discussed above. That is, the judge's reliance upon the legislative history and statutory purpose seems to be erroneous in light of the direction of those Supreme Court rulings that if the waiver is not unambiguously apparent in the statutory text itself, a court *must not utilize the legislative history* to interpret the text. *Nordic Village*, 503 U.S. at 37; *Lane v. Pena*, 518 U.S. at 192. (See also *Ardestani*, 502 U.S. at 138, in a case in which, because the statutory text itself did not contain an unequivocal waiver, the Supreme Court declined to find a waiver even though such an interpretation admittedly would have fostered the general purpose behind the statute.) Moreover, it seems to me to have been incorrect, under the recent Supreme Court decisions, for the *Rooks* court to find the statutory provision to be "ambiguous" and the respondent's narrower interpretation to be "plausible," but to nevertheless choose the petitioner's "broader" interpretation. Rather, the recent cases have specified that a court must "constru[e] ambiguities in favor of immunity." *Lane v. Pena*, 518 U.S. at 192; *United States v. Williams*, 514 U.S. at 531; see also *Robb v. United States*, 80 F. 3d 884, 887 (4th Cir. 1996) ("all ambiguities are resolved in the favor of the sovereign"); *Levernier Construction*, 947 F. 2d at 503 (the statutory provision is to be given the "most restrictive" interpretation). Those decisions have also mandated that if there exist more than one "plausible" reading of the statutory provision at issue (*Nordic Village*, 503 U.S. at 36-37), or two possible interpretations of "equal likelihood" (*Department of Energy v. Ohio*, 503 U.S. at 626 fn.16), then a court must choose the interpretation that produces the *narrower* waiver of immunity.

In short, on this issue of statutory interpretation, I agree with the judge in *Rooks* that the statutory language is "ambiguous" as to its application here, and that both statutory interpretations advanced in this case are "plausible." Therefore, as dictated by the recent Supreme Court sovereign immunity decisions cited above, I am bound to choose the interpretation that produces the more narrow waiver of immunity. Here, that is the respondent's interpretation of the statute.[11]

[11]I note that the respondent never had the opportunity to appeal the judge's legal ruling in *Rooks*, because when the judge remanded the case to the special master to resolve the case factually in light of the judge's legal ruling, the special master concluded as a factual matter that the

This result finds at least some additional support, I believe, in several other Program decisions. In addition to *DiRoma* and *Rooks*, one other published decision interprets the word "received" as used in § 300aa-11(c)(1)(A). In *Brausewetter v. Secretary of HHS*, No. 99-278V, 1999 WL 562700 (Fed. Cl. Spec. Mstr. July 16, 1999), the petitioner was not directly administered one of the vaccinations listed on the Vaccine Injury Table, but had received an injection derived from the blood of persons who had received tetanus toxoid vaccinations. Brausewetter argued that, therefore, he had indirectly "received" the tetanus vaccine, resulting in injury. The special master, however, while expressing sympathy to the petitioner's plight, concluded that he had *not* "received" the tetanus vaccine. The special master concluded that it would be legally incorrect to "expand the language of the [Vaccine] Act" by concluding that Brausewetter had "received" the tetanus vaccine, when instead he had been administered a somewhat different product. 1999 WL 562700 at *3. Thus, the special master's reasoning in *Brausewetter*, while not directly invoking the sovereign immunity doctrine, seems to support my conclusion here, that it would be legally incorrect to interpret the ambiguous term "received" in an expansive fashion.

Another Program case of at least some relevance here is *Staples v. Secretary of HHS*, No. 90-1205V, 1993 WL 330948 (Fed. Cl. Spec. Mstr. Aug. 16, 1993), *aff'd*, 30 Fed. Cl. 348 (1994). That case did not specifically interpret the term "received" in § 300aa-11(c)(1)(A), but the issue decided there is still somewhat analogous to the issue here. Jean Staples did not receive a vaccination herself, but contracted polio as a result of a defective dose of *injected* polio vaccine received by her infant child. The relevant statutory subsection, § 300aa-11(c)(1)(A), the same provision at issue here, provides that the injured claimant must have either received a vaccine listed in the statute *or* have "contracted polio, directly or indirectly, from another person who received an *oral* polio vaccine" (emphasis added). Staples apparently did not specifically argue that she "received" a vaccine within the statutory meaning, but did argue that that statutory provision should be interpreted expansively to cover her situation. Both the special master and the judge of this court, however, ruled that it would be legally incorrect to liberally interpret the statute to include Staples, who received an *injected* polio vaccine, not an *oral* vaccine as specified by the statute; the judge cited the sovereign immunity doctrine in reaching that conclusion. *Staples*, thus, adds at least some weight to my conclusion here that it would be legally inappropriate for me to interpret the statute in the expansive fashion suggested by the petitioners in this case.[12]

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vaccination did *not* cause an injury to the unborn child. See *Rooks v. Secretary of HHS*, No. 93-689V, 2000 WL 816825 (Fed. Cl. Spec. Mstr. June 5, 2000).

[12]Respondent also cites one other published opinion as potentially relevant here--*Van Houter v. Secretary of HHS*, No. 90-1444V, 1991 WL 239056 (Cl. Ct. Spec. Mstr. Oct. 30, 1991). That case, however, did *not* involve a vaccination administered to the mother while the injured child was *in utero*. Instead, the *Van Houter* petitioner, a child born in 1983 alleged that he suffered injury during his *in utero* period as an *indirect* result of a deficiency in a vaccination that his mother had received in *1969*. In these circumstances, the special master concluded, for obvious reasons, that the child born in 1983 did not "receive" the vaccine administered to his mother in 1969. Therefore, I do not find the *Van Houter* ruling to be of any substantial relevance here.

As a final point, I note that I reach my decision on this case even though I am well aware of the statement in the legislative history indicating that Vaccine Act awards are to be made with "generosity." H.R. Rept. No. 99-908, 99th Cong., 2d Sess. at 3 (reprinted at 1986 U.S.C.C.A.N. at 6344). Also, as the judge pointed out in *Rooks*, it seems clear that the *general spirit* behind enactment of the Act was one of generosity to persons who have suffered very unfortunate injuries. Therefore, I candidly acknowledge that my own initial intuitive inclination was to resist the idea that the sovereign immunity doctrine should apply to questions of statutory interpretation in Vaccine Act cases, requiring use of the most narrow interpretation as to close questions. It seems counter-intuitive to apply this doctrine to a statute with such a generous, remedial purpose. Moreover, I personally find some of the dissenting opinions in the 1990's Supreme Court cases cited above to be persuasive in arguing against the recent trend to rigorously apply the sovereign immunity doctrine. However, those dissenting opinions are, of course, *dissents*; I am bound to follow, instead, the *majority* opinions in those cases, which mandate strict enforcement of the doctrine, even in cases where the statutory scheme involves a remedial program.

Accordingly, as I read the precedent, I am bound to apply the sovereign immunity doctrine, and interpret the statutory provision here at issue in the narrow fashion urged by the respondent.[13]

III

CONCLUSION

Sabian Burch clearly suffers from a tragic condition, and she and her parents are clearly deserving of great sympathy. However, I have concluded as a legal matter, for the reasons set forth above, that petitioners are barred under current law from receiving Program compensation for Sabian's neurologic condition, because Sabian did not "receive" the vaccine in question as that term is used at § 300aa-11(c)(1)(A).

A status conference with be scheduled shortly to discuss whether this petition should be dismissed at this time as a result of this legal ruling.

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George L. Hastings, Jr.
Special Master

[13]But for the sovereign immunity doctrine, I would likely have interpreted the statutory provision in petitioners' favor, for the reasons articulated by the judge in *Rooks*.