

**FEDERAL EMPLOYEES' LIABILITY SINCE THE  
FEDERAL EMPLOYEES LIABILITY REFORM  
& TORT COMPENSATION ACT OF 1988  
(THE WESTFALL ACT)**

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INTRODUCTION

The Federal Tort Claims Act<sup>1</sup> was amended by the Federal Employees Liability Reform & Tort Compensation Act of 1988<sup>2</sup> in response to the United States Supreme Court case of *Westfall v. Erwin*.<sup>3</sup> In *Westfall*, the Supreme Court significantly altered the balance between the public interest in granting federal government employees immunity from personal suits<sup>4</sup> and the right to sue those employees,<sup>5</sup> personally, for damages arising from their tortious acts.

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1. 28 U.S.C. §§ 1346(b), 2671-80 (1981). The Federal Tort Claims Act (hereinafter referred to as the FTCA) authorizes suit in federal court against the United States of America

for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

*Id.* at § 1346(b).

2. Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified as amended in scattered sections of 28 U.S.C.). See *infra* Appendix for the full text of these sections.

3. 484 U.S. 292 (1988). See *infra* notes 64-69 and accompanying text.

4. See *Gogek v. Brown University*, 729 F. Supp. 926, 929-30 (D.R.I. 1990).

5. "Federal government employees" will be referred to simply as "employees" throughout this article. In accordance with case law, this article uses "employees" and "officials" interchangeably. See Note, *An Evaluation of the Federal Employees Liability Reform and Tort Compensation Act: Congress' Response to Westfall v. Erwin*, 26 SAN DIEGO L. REV. 137, 142 n.47 (1989).

For a definition of employee, see *infra* Appendix; 28 U.S.C. § 2671 (1988).

To determine whether an individual causing injury is an employee of the United States, see generally 35 AM. JUR. 2d *Federal Tort Claims Act* §§ 55-58 (1967) (describing those who are to be considered government employees); Annotation, *Who are "employees" of the United States within the Federal Tort Claims Act*, 57 A.L.R.2d 1448 (1958) (collecting federal case law interpreting the meaning of employee); Annotation, *Who is an "Employee of the Government" for Whose Conduct the United States May be Held Liable Under the Federal Tort Claims Act—Federal Cases*, 14 L. Ed. 2d 892, §§ 1, 3 (1965) (analyzing and collecting federal cases to determine whether an identified person is a federal employee); 20 AM. JUR. PROOF OF FACTS *Employee Status—Federal Tort Claims Act* 375 (1968) (providing attorneys with sample proof of legal and

In the 1988 *Westfall* decision, the Supreme Court addressed the rights of William Erwin, a civilian employee of the federal government, to bring a tort action against federal employees.<sup>6</sup> Erwin was employed as a civilian warehouseman when he inhaled toxic soda-ash dust that he alleged was negligently and improperly stored.<sup>7</sup> Consequently, Erwin suffered from chemical burns to the eyes and throat, and filed a complaint in state court against his supervisors.<sup>8</sup> The complaint charged the supervisors with negligence "in proximately causing, permitting, or allowing [him] to inhale . . . soda ash."<sup>9</sup>

Upon removal to the United States District Court for the Northern District of Alabama, the supervisors were held to be absolutely immune from suit for torts committed while acting within the scope of their employment.<sup>10</sup> The district court granted summary judgment in favor of the supervisors, and Erwin appealed to the United States Court of Appeals for the Eleventh Circuit.<sup>11</sup> The Eleventh Circuit reversed the district court decision reasoning that federal employee immunity is only available if the alleged misconduct "is a discretionary act *and* is within the outer perimeter of the actor's line of duty."<sup>12</sup> Because the District Court had erred in failing to address the discretionary element of the supervisor's conduct, the Eleventh Circuit held summary judgment to be inappropriate and remanded the case back to the lower court.<sup>13</sup>

The Supreme Court granted certiorari<sup>14</sup> to resolve the circuit court dispute over the discretionary element of federal employment immunity.<sup>15</sup> The Supreme Court affirmed the Eleventh Circuit and held

[A]bsolute immunity does not shield official functions from state-law tort liability unless the challenged conduct is within the outer perimeter of an official's duties and is discretionary in nature. Moreover, absolute immunity does not attach simply because the precise conduct of the federal offi-

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factual issues determining federal employee status); 8 AM. JUR. TRIALS *Federal Tort Claims Act Proceedings* § 7 at 646, § 31 at 685 (1965) (discussing the procedural aspects of determining whether a person is a federal employee).

6. *Westfall*, 484 U.S. at 293.

7. *Id.* at 293-94.

8. *Id.* at 294.

9. *Id.* (quoting 1 Record, Complaint ¶ 6). Erwin asserted that the bags of soda ash were not to have been routed to the warehouse in which he was working. *Id.*

10. *Id.*

11. *Erwin v. Westfall*, 785 F.2d 1551, 1552 (11th Cir. 1986).

12. *Id.* at 1552 (*Johns v. Pettibone Corp.*, 769 F.2d 724, 728 (11th Cir. 1985)).

13. *Id.* at 1552-53.

14. *Westfall v. Erwin*, 480 U.S. 905 (1987).

15. *Westfall*, 484 U.S. at 295.

cial is not prescribed by law.<sup>16</sup>

In surveying the post-*Westfall* impact of the Federal Employees Reform & Tort Compensation Act of 1988 on actions brought against federal employees personally, this Article will first address the case history and statutory predecessors concerning federal employee immunity.<sup>17</sup> This Article will then summarize the legislative response to the *Westfall* decision, including a discussion of the statutory provisions and the constitutionality of those provisions.<sup>18</sup> Next, this Article will examine the Attorney General's Scope of Employment Certification procedure, the use of which may result in the United States being substituted for a government employee as a defendant.<sup>19</sup> This examination will include a review of the following areas: an employee's petition to the court for a determination that the employee was acting within the scope of employment when the Attorney General declines to issue a scope of employment certificate,<sup>20</sup> conclusiveness or reviewability of the Attorney General's Certification,<sup>21</sup> completeness of information in the certificate,<sup>22</sup> factors considered in scope determinations,<sup>23</sup> and treatment of appellate review of remand to state courts.<sup>24</sup> This Article then reviews the effect of sovereign immunity after substitution of the United States as the solely permissible defendant.<sup>25</sup> This Article concludes with the author's impression of the future course of federal employee immunity.<sup>26</sup>

## BACKGROUND

Prior to *Westfall v. Erwin*,<sup>27</sup> Congress appeared content to let the balance between the right to sue federal employees and the public interest in granting those employees immunity be struck primarily by the courts.<sup>28</sup> The Federal Torts Claims Act ("FTCA") generally was not the exclusive remedy for misconduct giving rise to an FTCA claim and therefore suits were not statutorily prohibited against the employees personally.<sup>29</sup> However, the courts generally

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16. *Id.* at 300.

17. See *infra* notes 27-69 and accompanying text.

18. See *infra* notes 70-131 and accompanying text.

19. See *infra* notes 132-39 and accompanying text.

20. See *infra* notes 140-42 and accompanying text.

21. See *infra* notes 143-98 and accompanying text.

22. See *infra* notes 199-226 and accompanying text.

23. See *infra* notes 227-40 and accompanying text.

24. See *infra* notes 241-82 and accompanying text.

25. See *infra* notes 283-303 and accompanying text.

26. See *infra* notes 304-06 and accompanying text.

27. 484 U.S. 292 (1988).

28. See *Gogek v. Brown University*, 729 F. Supp. 926, 929 (D.R.I. 1990).

29. Prior to the new legislation, only actions against federal employees whose driving of an automobile caused injury were exclusively against the United States.

granted the employees immunity, thereby insuring that they would not be deterred from executing their duties for fear of lawsuits subjecting them to personal liability.<sup>30</sup> Congressional action to make the FTCA exclusive apparently was not deemed necessary.

In determining whether immunity should be conferred on a particular employee, courts initially focused on "whether the act in question was within the scope of the employee's official powers or the outer perimeter of the employee's line of duty."<sup>31</sup> If so, the employee was immune from personal suit.<sup>32</sup> A federal employee's entitlement to immunity for his or her conduct in the course of duty was determined by reference to federal law.<sup>33</sup>

After the United States Supreme Court decision in *Barr v. Matteo*,<sup>34</sup> some courts indicated that absolute immunity attached only when the conduct was discretionary, that is, immunity did not exist when an employee's actions were required by law or by the direction of a superior.<sup>35</sup> When the *Westfall* decision made it clear that the Supreme Court intended absolute immunity to exist only when the employee was exercising discretion, Congress acted quickly to pass new legislation.

Before discussing the specifics of the new legislation, which officially was given the "short title" of the "Federal Employees Liability Reform and Tort Compensation Act of 1988," it would be useful to establish a truly short title for reference. The courts have not been consistent in this regard. Although some courts have used the whole name when referring to the legislation,<sup>36</sup> other courts have shortened

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Federal employees were required to defend all other actions on the basis of official immunity. See Act of Sept. 21, 1961, Pub. L. No. 87-258, 75 Stat. 539 (1961) (previously codified as 28 U.S.C. § 2679(b)-(e)). See *infra* notes 48-63 and accompanying text.

30. See *Gogek*, 729 F. Supp. at 929 (referring to *Barr v. Matteo*, 360 U.S. 564, 571-72 (1959)).

31. See *id.* (referring historically to *Barr*, 360 at 575). See generally Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1069-78 (1946); Willig, *The Breadth of the Tort Perspective: Judicial Review for Tortious Conduct of Governmental Agencies and Agents*, 45 MO. L. REV. 621, 625-35 (1980); Comment, *Tort Immunity of Federal Executive Officials: The Mutable Scope of Absolute Immunity*, 37 OKLA. L. REV. 285, 286-97 (1984); and Note, *An Evaluation of the Federal Employees Liability Reform and Tort Compensation Act: Congress' Response to Westfall v. Erwin*, 26 SAN DIEGO L. REV. 137, 142-47 (1989).

32. See *Gogek*, 729 F. Supp. at 929 (citing authoritatively *Barr*, 360 U.S. at 575).

33. See *Howard v. Lyons*, 360 U.S. 593, 597 (1959); *Williams v. Morgan*, 723 F. Supp. 1532, 1533 n.3 (D.D.C. 1989).

34. 360 U.S. 564 (1959).

35. See *infra* note 66 and accompanying text. See also Rabago, *Absolute Immunity for State-Law Torts Under Westfall v. Erwin: How Much Discretion is Enough?*, THE ARMY LAWYER (Nov. 1988).

36. E.g., *Underwood v. United States Postal Serv.*, 742 F. Supp. 968, 970 (M.D. Tenn. 1990); *North Jersey Secretarial School, Inc. v. McKiernan*, 713 F. Supp. 577, 586 (S.D.N.Y. 1989).

it to the "Liability Reform Act,"<sup>37</sup> the "Reform Act,"<sup>38</sup> "the Act," "the 1988 Act"<sup>39</sup> or the abbreviation "FELRTCA."<sup>40</sup> Because the legislation amended the FTCA, some courts have referred to it as "the Amendments" or "the 1988 Amendments."<sup>41</sup> The United States Supreme Court more recently utilized the short title "Liability Reform Act."<sup>42</sup> However, the "Westfall Act" is the shorthand title preferred by several circuits<sup>43</sup> and is the term now commonly used by the United States Department of Justice, which handles the defense of all Federal Tort Claims Act actions. Therefore, the name "Westfall Act" will be used throughout this article.

#### ABSOLUTE IMMUNITY BEFORE THE WESTFALL DECISION

Congress observed in the legislative history of the Westfall Act that before the *Westfall* decision, "nearly all actions against Federal employees in their personal capacity were unsuccessful because those employees were acting in the course and scope of employment and therefore were immune from personal liability."<sup>44</sup> Before *Westfall*, courts resolved most claims brought against federal employees in their personal capacity by granting summary judgment or early dismissal.<sup>45</sup> After *Westfall*, employees could be held personally liable if they were not exercising governmental discretion, and governmental discretion was always a question of fact.<sup>46</sup> Therefore, summary judgments and dismissals would not be readily available. This resulted in substantially increased litigation costs and time consumption neces-

37. *E.g.*, *Matlack, Inc. v. Treadway*, 729 F. Supp. 1574, 1576 (S.D.W. Va. 1990).

38. *E.g.*, *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538, 1538 (11th Cir. 1990), *reh'g denied*, 925 F.2d 1477 (11th Cir. 1991).

39. *E.g.*, *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989), *reh'g denied*, 893 F.2d 1341 (11th Cir. 1989); *Jordan v. Hudson*, 879 F.2d 98, 99 (4th Cir. 1989); *O'Neill v. United States*, 732 F. Supp. 1254, 1255 (E.D.N.Y. 1990); *Egan v. United States*, 732 F. Supp. 1248, 1250 (E.D.N.Y. 1990); *Martin v. Merriday*, 706 F. Supp. 42, 43 (N.D. Ga. 1989).

40. *E.g.*, *Melo v. Hafer*, 912 F.2d 628, 639 (3d Cir. 1990), *cert. granted* 111 S. Ct. 1070 (1991); *Springer v. Bryant*, 897 F.2d 1085, 1086 (11th Cir. 1990); *Smith v. Marshall*, 885 F.2d 650, 651 (9th Cir. 1989), *rev'd sub nom. United States v. Smith*, 111 S. Ct. 1180 (1991); *Connell v. United States*, 737 F. Supp. 61, 62 (S.D. Iowa 1990); *Nadler v. Mann*, 731 F. Supp. 493, 495 (S.D. Fla. 1990); *Williams*, 723 F. Supp. at 1533.

41. *E.g.*, *Bradley v. United States*, 875 F.2d 65, 66 (3d Cir. 1989); *Gogek*, 729 F. Supp. at 929; *Simpson v. McCarthy*, 741 F. Supp. 95, 97 n.1 (W.D. Pa. 1990); *Kelly v. United States*, 737 F. Supp. 711, 714 (D. Mass. 1990), *aff'd*, 924 F.2d 355 (1st Cir. 1991).

42. *United States v. Smith*, 111 S. Ct. 1180, 1183 (1991).

43. *See, e.g.*, *Nasuti v. Scannell*, 906 F.2d 802, 803 (1st Cir. 1990); *Arbour v. Jenkins*, 903 F.2d 416, 419 (6th Cir. 1990); *Mitchell v. Carlson*, 896 F.2d 128, 130 (5th Cir. 1990).

44. H.R. REP. NO. 700, 100th Cong., 2d Sess. 2-4, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 5945, 5946.

45. *See Gogek*, 729 F. Supp. at 930-31.

46. *Id.* at 931.

sary in resolving the discretion issue, in addition to the uncertainty for federal employees who were sued.<sup>47</sup>

#### DRIVER'S ACT IMMUNITY

The Federal Driver's Act,<sup>48</sup> the predecessor of the Westfall Act, only provided "employees with immunity for injuries resulting from the operation of a motor vehicle."<sup>49</sup> Judicially created immunity principles continued to govern an employee's liability for other acts.<sup>50</sup>

Under the Driver's Act provisions, when a federal employee drove a vehicle in the scope of his employment, a claimant could not sue the employee-driver individually.<sup>51</sup> Instead, the FTCA mandated that the claimant's exclusive remedy be against the Government.<sup>52</sup> Therefore, the employee could only be held personally liable when he committed a motor vehicle tort outside the scope of his employment.<sup>53</sup>

The Driver's Act authorized the Attorney General to certify that a federal employee was acting within the scope of his or her employment as a federal driver when the motor vehicle tort was committed.<sup>54</sup> A case could then be removed from the state court to a federal district court.<sup>55</sup> The United States, as defendant, could then take advantage of the limitations of the FTCA, including the defense of sovereign immunity.<sup>56</sup> This occasionally resulted in a plaintiff being left without a remedy against either the United States or the individual employee.<sup>57</sup>

Under the Driver's Act and later under the Westfall Act, the seemingly harsh prospect of dismissal once the United States was

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47. See H.R. NO. 700, 100th Cong., 2d Sess. 2-4 reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 5945, 5946. See also *Gogek*, 729 F. Supp. at 931.

48. 28 U.S.C. § 2679(b)-(e) (1966). Prior to enactment of the Westfall Act, 28 U.S.C. § 2679(b) stated:

The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by an employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

*Id.*

49. *Gogek*, 729 F. Supp. at 929.

50. See *id.* (addressing a common law tort action brought against a federal employee).

51. See *id.*

52. See *id.*

53. See *id.*

54. See *Nasuti*, 906 F.2d at 805.

55. See, e.g., *id.*

56. See, e.g., *Gogek*, 729 F. Supp. at 931.

57. See, e.g., *id.*

substituted as defendant led claimants to contend that a federal employee should not be granted immunity from personal liability unless the claimant could recover from the United States.<sup>58</sup> Claimants relied on a Driver's Act provision which stated that:

[s]hould a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the state court.<sup>59</sup>

However, four circuit courts rejected this contention.<sup>60</sup> Unanimously, these courts held that the FTCA remedy under the Driver's Act was unavailable only when the federal employee-driver was not acting within the scope of his employment.<sup>61</sup> Reasoning that the remand provision was inapplicable when a FTCA remedy was unavailable, these courts noted that the basic purpose of the exclusivity provision of 28 U.S.C. § 2679(b) was to immunize federal drivers from the potentially burdensome personal liabilities which accompany the operation of motor vehicles.<sup>62</sup> As summarized by the United States Court of Appeals for the Third Circuit, "a contrary interpretation of the 'not available' language in the removal section 'would revitalize the common law action. [T]his result would directly contradict the Act's immunizing purpose."<sup>63</sup>

#### WESTFALL V. ERWIN

The legislative history of the Westfall Act and later case law show that the United States Supreme Court decision of *Westfall v. Erwin*<sup>64</sup> prompted the passage of the Westfall Act.<sup>65</sup> The Supreme Court granted certiorari in *Westfall* to resolve a conflict among the

58. *See id.*

59. *Id.* (quoting 28 U.S.C. § 2679(d) (1966)).

60. *See Thomason v. Sanchez*, 539 F.2d 955, 958 (3d Cir. 1976); *Carr v. United States*, 422 F.2d 1007, 1011 (4th Cir. 1970); *VanHouten v. Ralls*, 411 F.2d 940, 942 (9th Cir.), *cert. denied*, 396 U.S. 962 (1969); and *Vantrease v. United States*, 400 F.2d 853, 855 (6th Cir. 1968).

61. *See Thomason*, 539 F.2d at 958; *Carr*, 422 F.2d at 1011; *VanHouten*, 411 F.2d at 942; and *Vantrease*, 400 F.2d at 855.

62. *See Thomason*, 539 F.2d at 958; *Carr*, 422 F.2d at 1011; *VanHouten*, 411 F.2d at 942-43; and *Vantrease*, 400 F.2d at 856.

63. *Thompson*, 539 F.2d at 958 (citing *Carr*, 422 F.2d at 1011).

64. 484 U.S. 292 (1988).

65. *See* H.R. REP. NO. 700, 100th Cong., 2d Sess. 2-4, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 5945, 5945-5948 (hereinafter "The House Report"); *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538, 1540 (11th Cir. 1990); *Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990) (stating "The Westfall Act is Congress's response to the Supreme Court's decision in *Westfall* . . . which limited a federal official's absolute immunity from tort claims to situations where the official's actions were 'within the

circuit courts regarding the proper standard to apply in determining whether a federal employee has absolute immunity under state-law tort liability.<sup>66</sup> In *Westfall*, the Supreme Court "held that absolute immunity does not shield official functions from state-law tort liability unless the challenged conduct is within the outer perimeter of an official's duties and is discretionary in nature."<sup>67</sup> The Supreme Court reasoned that:

The central purpose of official immunity, promoting effective government, would not be furthered by shielding an official from state-law tort liability without regard to whether the alleged tortious conduct is discretionary in nature. When an official's conduct is not the product of independent judgment, the threat of liability cannot detrimentally inhibit that conduct. It is only when officials exercise decisionmaking discretion that potential liability may shackle "the fearless, vigorous, and effective administration of policies of government. . . . Because it would not further effective governance, absolute immunity for nondiscretionary functions finds no support in the traditional justification for official immunity."<sup>68</sup>

In so holding, the Supreme Court severely restricted the protection from common law tort liability afforded to federal employees, especially those rank-and-file workers whose conduct is generally not discretionary.<sup>69</sup>

## WESTFALL ACT

### LEGISLATIVE RESPONSE TO THE WESTFALL CASE

In *Westfall v. Erwin*,<sup>70</sup> the United States Supreme Court noted that Congress was "in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity [for federal employees] is warranted in a particular context" and invited congressional consideration of the issue.<sup>71</sup> Within the year, Congress accepted this invitation by enacting the Westfall

outer perimeter of the official's duties . . . and discretionary in nature.'"); *Springer v. Bryant*, 897 F.2d 1085, 1086 (11th Cir. 1990); and *Gogek*, 729 F. Supp. at 930.

66. *Westfall*, 484 U.S. at 295. For a review of the circuit court conflict see Note, 26 SAN DIEGO L. REV. at 145, 145 n.69 (noting that "[s]ome circuits required the discretionary function prong of *Barr*, while others required only the outer perimeter prong"); *Rabago*, THE ARMY LAWYER at 5, 5 n.1.

67. *Westfall*, 484 U.S. at 300.

68. *Id.* at 296-97 (quoting *Barr v. Matteo*, 360 U.S. at 571).

69. See 134 CONG. REC. S7668 (daily ed. June 13, 1988) (statement of Sen. Grassley). See also The House Report, *supra* note 65, at 5946; Note, 26 SAN DIEGO L. REV., at 141.

70. 484 U.S. 292 (1988).

71. *Id.* at 300.

Act.<sup>72</sup> Enacted on November 18, 1988, the amendments to the Federal Tort Claims Act made by the Westfall Act became applicable "to all claims, civil actions, and proceedings pending on, or filed on or after, the date of Enactment."<sup>73</sup> Therefore, common law tort actions against federal employees now must be considered in light of the Westfall Act.<sup>74</sup> Congress did not intend the Westfall Act to create new remedies or causes of action but intended it to shore "up the erosion of the common law tort immunity formerly available to federal employees,"<sup>75</sup> and to overrule the distinction the *Westfall* decision drew between "discretionary" and "operational" capacities.<sup>76</sup> To accomplish this, Congress broadened the class of activities to which immunity was given under section 2679(b) of the FTCA from the operation of motor vehicles, under the Driver's Act,<sup>77</sup> to any wrongful or negligent act that an employee committed while acting within the scope of his or her office or employment.<sup>78</sup>

In findings set out at the beginning of the Westfall Act, Congress described the *Westfall* decision as an erosion of the common law tort immunity formerly available to federal employees and stated that the decision "created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce."<sup>79</sup> "Congress feared that this potential threat could undermine federal employee morale, could alter the effectiveness of the agencies that employed them,<sup>80</sup> and could substantially diminish the vigor of federal law enforcement and implementation."<sup>81</sup>

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72. See *Nasuti v. Scannell*, 906 F.2d 802, 804 (1st Cir. 1990); *Nadler v. Mann*, 731 F. Supp. 493, 495 (S.D. Fla. 1990); and *Gogek v. Brown University*, 729 F. Supp. 926, 930 (D.R.I. 1990).

73. *Lunsford v. Price*, 885 F.2d 236, 240 (5th Cir. 1989) (quoting Section 8(b) of the Westfall Act). See *Egan v. United States*, 732 F. Supp. 1248, 1250 (E.D.N.Y. 1990) (recognizing that section 8(d) of the Westfall Act makes provisions for claims that accrue before its enactment. The court then stated that "[s]uch a claim shall be deemed to be timely presented under section 2679(d)(5) if presented within the period in which 'the claim could have been timely filed under applicable State law' but such period shall not exceed two years from the date of enactment [of the Westfall Act]."); and *O'Neill v. United States*, 732 F. Supp. 1254, 1256 (E.D.N.Y. 1990).

74. The Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, 4564 (1988) (enacted on November 18, 1988).

75. *Underwood v. United States Postal Serv.*, 742 F. Supp. 968, 970 (M.D. Tenn. 1990).

76. See *Springer v. Bryant*, 897 F.2d 1085, 1087 n.2 (11th Cir. 1990); *Lunsford*, 885 F.2d at 237 n.5 (5th Cir. 1989).

77. See *supra* notes 48-63 and accompanying text.

78. 28 U.S.C. § 2679(b)(1) (1988). See also *Gogek*, 729 F. Supp. at 930.

79. Federal Employees Liability Reform & Tort Compensation Act of 1988, Pub. L. No. 100-694, § 2(a)(4)-(5), 102 Stat. 4563, 4563 (1988).

80. *Id.* at § 2(a)(6), 102 Stat. at 4563. See *Springer*, 897 F.2d at 1086-87.

81. The House Report, *supra* note 65. See *Egan*, 732 F. Supp. at 1249; S.J. & W.

Congress stated that the purpose of the Westfall Act was "to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States."<sup>82</sup> The Westfall Act accomplished this purpose by legislatively overruling the *Westfall* decision and granting employees absolute immunity from common law tort liability committed within the scope of their employment.<sup>83</sup> In passing the Westfall Act, Congress

recognized that plaintiffs could also benefit from the new legislation in that they would have an administrative claim against the government which could be resolved without costly litigation; and perhaps most importantly, the government would be able to pay any judgment whereas an individual federal employee might be judgment proof.<sup>84</sup>

#### PROVISIONS OF THE WESTFALL ACT

The Westfall Act amended sections 2671, 2674, and 2679(b) and (d) of the Federal Tort Claims Act<sup>85</sup> and created "a statutory mechanism through which tort actions against federal employees would be transformed into actions against the federal government to be channelled through the Federal Tort Claims Act."<sup>86</sup> To accomplish this, the Attorney General or the courts are authorized to certify that an employee's alleged misconduct occurred while the employee was acting within the scope of employment.<sup>87</sup> Once the scope-of-employment element is established, the United States is substituted as the party defendant in place of the employee and the suit proceeds as if an FTCA claim had originally been brought against the federal government.<sup>88</sup> When an employee is certified to be acting within the scope of employment, the exclusive statutory remedy for tort claims that arise from employee omissions or actions is against the United

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Ranch, Inc. v. Lehtinen, 717 F. Supp. 824, 827 (S.D. Fla. 1989) *rev'd*, 913 F.2d 1538 (11th Cir. 1990).

82. Pub. L. No. 100-694, § 2(b), 102 Stat. 4563, 4564 (1988).

83. See *Nasuti*, 906 F.2d at 804; *Nadler*, 731 F. Supp. at 495 (citing *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989)); *North Jersey Secretarial School, Inc. v. McKiernan*, 713 F. Supp. 577, 586 (S.D.N.Y. 1989); *Martin v. Merriday*, 706 F. Supp. 42, 44 (N.D. Ga. 1989) (stating that "[t]he [Westfall] Act thus broadens common law tort immunity enjoyed by federal employees").

84. See *Sowell*, 888 F.2d at 805.

85. All sections referenced in this article are within title 28, U.S.C., unless otherwise indicated. See *infra* Appendix for the text of each of these sections.

86. *Springer*, 897 F.2d at 1087.

87. See *infra* notes 132-42 and accompanying text.

88. See *Springer*, 897 F.2d at 1087 (citing section 6 of the Westfall Act).

States.<sup>89</sup>

As stated by the United States Court of Appeals for the First Circuit “[t]he heart of the scheme created by the Westfall Act lies in sections 5 and 6, which amend the Federal Tort Claims Act.”<sup>90</sup> Each of these sections will be discussed separately.

#### *Exclusivity—Section 5*

Section 5 of the Westfall Act made the remedy against the United States under the FTCA for negligent injury by a federal employee acting within the scope of his or her office or employment “exclusive” of any other civil action for damages against the employee “by reason of the same subject matter.”<sup>91</sup> Any other civil action for “damages arising out of or relating to the same subject matter against the employee or employee’s estate is precluded,”<sup>92</sup> except actions alleging constitutional torts or federal statutory torts otherwise authorized.<sup>93</sup>

The House Report on the Westfall Act states “the availability of suit under the FTCA precludes any other civil action or proceeding of any kind from being brought against an individual federal employee or his estate if such action or proceeding would sound in common law tort.”<sup>94</sup> The status held by federal employees prior to the Supreme Court’s decision in *Westfall* was returned by Congress when federal employees were granted immunity from personal liability while acting within the scope of their employment.<sup>95</sup>

In *Sellers v. United States*,<sup>96</sup> the United States Court of Appeals for the Seventh Circuit addressed an appeal brought by a federal prisoner involving property lost during a lockdown.<sup>97</sup> The district court had dismissed the prisoner’s constitutional claims against a warden and three guards and entered a judgment in favor of the inmate solely against the United States pursuant to the FTCA.<sup>98</sup> The United States argued that the dismissal of the individual federal government employees could be affirmed because the FTCA furnishes

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89. See *id.* (citing sections 5 and 8 of the Westfall Act).

90. *Nasuti*, 906 F.2d 802, 804.

91. 28 U.S.C. § 2679(b)(1) (1988). See *infra* Appendix.

92. *Id.*

93. 28 U.S.C. § 2679(b)(2) (1988). See *infra* Appendix. See, e.g., *Simpson v. McCarthy*, 741 F. Supp. 95, 97 n.1 (W.D. Pa. 1990) (clarifying that “[t]he 1988 amendment to the exclusivity of remedy provision . . . makes it clear that Congress has not declared the FTCA the exclusive remedy for a constitutional tort.”).

94. The House Report, *supra* note 65, at 5949.

95. See *id.* at 5947.

96. 902 F.2d 598 (7th Cir. 1990).

97. *Id.* at 600.

98. *Id.* at 600-01.

an adequate remedy, and a direct action against the jailers is not authorized by the Due Process Clause of the Fifth Amendment.<sup>99</sup>

The Seventh Circuit noted that the reasoning of the United States paralleled two United States Supreme Court decisions.<sup>100</sup> The United States acknowledged that the Supreme Court had previously rejected an argument that the FTCA ousted all private actions for damages against federal officials who violate the constitution.<sup>101</sup> The United States urged the Court to hold that the prior Supreme Court decision in *Carlson v. Green*<sup>102</sup> was inapplicable when the FTCA provided an effective and complete remedy for negligent property loss.<sup>103</sup> The United States argued that subsequent case law had overtaken *Carlson* and pointed out that subsequent case law had demonstrated a "greater willingness to infer from the provision of statutory remedies that direct constitutional actions are unnecessary or have been precluded."<sup>104</sup> The Seventh Circuit declined to rule on this argument.<sup>105</sup>

The District Court for the Western District of Pennsylvania addressed a constitutional claim brought by a federal prisoner who alleged that a federal employee had maliciously harassed him.<sup>106</sup> Agreeing with case law subsequent to *Carlson*, the district court declined to create a *Bivens* action based on the plaintiff's allegations.<sup>107</sup> The district court stated that the "Federal Tort Claims Act, 28 U.S.C. § 2680(h), provides for an action against the United States for offenses akin to those [constitutional torts] alleged by the plaintiff."<sup>108</sup>

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99. *Id.* at 603.

100. *Id.* (citing *Parrat v. Taylor*, 451 U.S. 527, 535-44 (1981) (overruled in part by *Daniels v. Williams*, 474 U.S. 327 (1986)) which concerned the state of mind required for a finding of individual liability, and *Hudson v. Palmer*, 468 U.S. 517, 530-36 (1984)).

101. *Id.* (acknowledging *Carlson v. Green*, 446 U.S. 14 (1980) and referring to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)). Actions for money damages brought by private individuals against federal officials who violate the Constitution are commonly referred to as *Bivens* suits.

102. 446 U.S. 14 (1980).

103. *Sellers*, 902 F.2d at 603.

104. *Id.* (referring to *Parrat*, 451 U.S. at 527; *Hudson*, 468 U.S. at 517; *Schweiker v. Chilicky*, 487 U.S. 412 (1988); *Bush v. Lucas*, 462 U.S. 367 (1983); and *Chappell v. Wallace*, 462 U.S. 296 (1983)).

105. *Sellers*, 902 F.2d at 603.

106. *Simpson*, 741 F. Supp. at 96-97.

107. *Id.* at 96-97 (agreeing with *Schweiker*, 487 U.S. 412; *United States v. Stanley*, 483 U.S. 669 (1987); *Bush*, 462 U.S. at 367; *Gaj v. United States Postal Serv.*, 800 F.2d 64 (3d Cir. 1986); *Baird v. Haith*, 724 F. Supp. 367 (D. Md. 1988); and *Neiman v. Secretary of HHS*, 722 F. Supp. 950 (E.D.N.Y. 1988).

108. *Simpson*, 741 F. Supp. at 97.

*Substitution—Section 6*

Section 6 of the Westfall Act amended section 2679(d).<sup>109</sup> This section now “authorizes the Attorney General to issue what has come to be called a ‘scope certification’ — a certification that ‘the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose.’”<sup>110</sup>

If the Attorney General certifies that the employee acted within the scope of employment, an action brought in United States district court “shall be deemed” an action against the United States, which shall be substituted as party defendant.<sup>111</sup> By this same certification procedure, an “action brought in a state court is removed to the federal district court, where it ‘shall be deemed to be an action or proceeding brought against the United States.’”<sup>112</sup> For removal purposes, this certification “conclusively” establishes the scope of office or employment.<sup>113</sup> Upon such certification and removal, the case proceeds in the same fashion as any action filed against the United States pursuant to 28 U.S.C. § 1346(b) of the Federal Tort Claims Act “and shall be subject to the limitations and exceptions applicable to those actions.”<sup>114</sup>

Although the Attorney General’s certification conclusively establishes scope of office or employment “for purposes of removal,”<sup>115</sup> there is some question as to whether the certification is conclusive for purposes of substitution.<sup>116</sup>

*Tennessee Valley Authority*

Because the Westfall Act originally was drafted only to amend the FTCA, the statutory protections provided for federal employees

109. See *infra* Appendix.

110. See *Nasuti*, 906 F.2d at 804 (quoting 28 U.S.C. § 2679(d)(1)-(2) (1988)).

111. Federal Employees Liability Reform & Tort Compensation Act of 1988, § 6, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (amending 28 U.S.C. § 2679(d)(1)). See also, *Arbour v. Jenkins*, 903 F.2d 416, 419-20 (6th Cir. 1990) (citing *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989)); *O’Neill v. United States*, 732 F. Supp. 1254, 1257 (E.D.N.Y. 1990) (stating that “[u]pon certification by the Attorney General’s designee, the action against [the federal employee] was transmogrified into an action ‘deemed an action against the United States.’”) (quoting 28 U.S.C. § 2679(d)(1) (1988)); and *Egan*, 732 F. Supp. at 1251 (holding that upon the Attorney General’s certification, “the action is ‘transmogrified’ into one against the United States.”).

112. *Nasuti*, 906 F.2d at 804 (quoting 28 U.S.C. § 2679(d)(2)).

113. 28 U.S.C. § 2679(d)(2) (1988).

114. 28 U.S.C. § 2679(d)(4) (1988). See *infra* notes 283-303 and accompanying text.

115. *Nasuti*, 906 F.2d at 804 (quoting 28 U.S.C. § 2679(d)(2)). See *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538, 1541 (11th Cir. 1990) (stating that “[t]he legislative history of the certification provision of the Reform Act coupled with the language of the statute itself persuades us that the Attorney General’s scope certification is pertinent and dispositive only for removal purposes.”).

116. See *infra* notes 143-98 and accompanying text.

would not have included employees of the Tennessee Valley Authority ("TVA").<sup>117</sup> Congress later recognized that TVA employees also required immunity from tort liability under state law and revised the Westfall Act to include TVA employees. This amendment, which was adopted and integrated as Section 9 of the Westfall Act, mirrors the protections of the Westfall Act for federal employees.<sup>118</sup> Section 9 of the Westfall Act, now provides that, under the same conditions imposed on other government employees, "the TVA is to be substituted for the employee as the party defendant."<sup>119</sup>

#### CONSTITUTIONALITY OF WESTFALL ACT

In an attempt to retain a case against an individual federal government employee, rather than being forced to face an action against the United States, some claimants have challenged the constitutionality of the Westfall Act. However, the constitutionality of the Westfall Act should no longer be in question. The United States Court of Appeals for the Eleventh Circuit, in *Sowell v. American Cyanamid*,<sup>120</sup> described unsuccessful constitutional challenges to other statutes authorizing substitution of the United States as sole defendant.<sup>121</sup> As in the Westfall Act, those statutes deny "the right of recovery against the individual defendants . . . [and] plac[e] the responsibility for their actions upon their employer, the government."<sup>122</sup>

Although the Westfall Act is retroactive, this does not make it unconstitutional, "as a legal claim affords no definite or enforceable property right until reduced to final judgment."<sup>123</sup> The United States Court of Appeals for the Sixth Circuit noted that the Westfall Act

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117. See *Springer*, 897 F.2d at 1087 (citing 28 U.S.C. § 2680(1) (excluding the TVA from the range of the FTCA's coverage); *Painter v. Tennessee Valley Auth.*, 476 F.2d 943, 945 n.3 (5th Cir. 1973) (per curiam)).

118. *Springer*, 897 F.2d at 1087, 1087-88 n.5 (citing 134 CONG. REC. S15599 (daily ed. Oct. 12, 1988) Westfall Act §§ 9(b)(1) and 9(b)(3), authorizing a TVA employee to petition the court any time prior to trial "to find and certify that the employee was acting within the scope of his office or employment."). *Id.* at 1088, n.5.

119. *Id.*

120. 888 F.2d 802 (11th Cir. 1989).

121. *Id.* at 805.

122. *Id.* (citing *In Re Consol. United States Atmospheric Testing Litig.*, 820 F.2d 982 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988) (discussing the Nuclear Energy Authorization Act of 1985); *Ducharme v. Merrill-National Laboratories*, 574 F.2d 1307 (5th Cir.), *cert. denied*, 439 U.S. 1002 (1978) (discussing the Swine Flu Act); and *Carr v. United States*, 422 F.2d 1007 (4th Cir. 1970) (discussing the Federal Driver's Act)).

123. *Sowell*, 888 F.2d at 805 (citing *In Re Consol. United States Atmospheric Testing Litig.*, 820 F.2d at 982). *Accord*, *Arbour*, 903 F.2d at 420; *Nadler v. Mann*, 731 F. Supp. 493, 495 n.7 (S.D. Fla. 1990) (citing *Sowell*, 888 F.2d at 805, *Lunsford v. Price*, 885 F.2d 236 (5th Cir. 1989) (rejecting plaintiff's argument that application of the Westfall Act to pending cases would be "manifestly unjust")).

said it "shall apply to all claims, civil actions, and proceedings pending on or filed on or after, the date of the enactment of this Act [November 18, 1988.]"<sup>124</sup> It is therefore apparent "that Congress specifically provided that the Westfall Act was to apply to suits pending at the time of its enactment."<sup>125</sup>

When a plaintiff alleged that the Westfall Act was a violation of due process, the United States District Court for the Southern District of Florida stated that the plaintiff, to prove such a violation, "must show that the challenged legislation is wholly arbitrary and irrational in purpose and effect."<sup>126</sup> The district court observed that "the Constitution does not forbid the creation of new rights or the abolition of old ones recognized by the common law to obtain a permissible legislative object."<sup>127</sup> The district court stated that Congress specifically struck a balance which favored individual federal employees when competition exists between the employee's protection from personal liability and a plaintiff's remedy.<sup>128</sup> The court found that the substitution by Congress of the United States as the sole defendant in a pending tort action "is reasonably related to the goal of enhancing the vigor of Federal law enforcement" and that the Westfall Act thus meets the requirements of substantive due process.<sup>129</sup>

The United States District Court for the Eastern District of New York stated that although the Westfall Act took away a plaintiff's state law claim brought against an individual federal government employee, the Westfall Act did grant plaintiffs a remedy against the United States, "a defendant presumably more financially responsible" than individual employees.<sup>130</sup> The district court noted that although a plaintiff is not granted a jury trial against the United States as is available against individual defendants, and although a plaintiff may not obtain punitive damages, a plaintiff's right of due process is not deprived by the FTCA.<sup>131</sup>

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124. *Arbour*, 903 F.2d at 420 (quoting Section 8(b) of the Westfall Act).

125. *Id.* (citing *Lunsford*, 885 F.2d at 240; and *Yalkut v. Gemignani*, 873 F.2d 31, 34 (2d Cir. 1989)).

126. *S. J. & W. Ranch, Inc. v. Lehtinen*, 717 F. Supp. 824, 827 (S.D. Fla. 1989), *rev'd*, 913 F.2d 1538 (11th Cir. 1990) (citing *Pensions Benefit Guar. Corp. v. R.A. Fray & Co.*, 467 U.S. 717, 728-34 (1984); *Vance v. Bradley*, 440 U.S. 93, 97-98 (1979); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978); and *In Re Consol. United States Atmospheric Testing Litig.*, 820 F.2d 982 (9th Cir. 1987)).

127. *S. J. & W. Ranch, Inc.*, 717 F. Supp. at 827 (quoting *Silver v. Silver*, 280 U.S. 117, 122 (1929)).

128. *Id.* at 828.

129. *Id.*

130. *Egan*, 732 F. Supp. at 1253.

131. *Id.* at 1253 (citing 28 U.S.C. §§ 2402, 2674 (1988) and *Hammond v. United States*, 786 F.2d 8, 11-16 (1st Cir. 1986)).

## SCOPE OF EMPLOYMENT CERTIFICATION

## ATTORNEY GENERAL'S SCOPE CERTIFICATE

When Congress passed the Westfall Act, it broadened the class of activities for which federal employees were granted immunity from torts arising from the operation of motor vehicles<sup>132</sup> to any "negligent or wrongful act" committed "while acting within the scope of [the employee's] office or employment," and "made the claimant's remedy against the United States exclusive."<sup>133</sup> In Section 6 of the Westfall Act, Congress amended section 2679(d), requiring any such suits brought against a federal employee be deemed an action brought against the United States pursuant to the provisions of the FTCA and substituting the United States as the party defendant.<sup>134</sup> Substitution and removal of a state court action is accomplished by a certification by the Attorney General or his designee "that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose."<sup>135</sup>

The Attorney General has delegated the certification decision to the United States Attorneys, who "make scope certification determinations in consultation with the Department of Justice."<sup>136</sup> In some instances, the authority to certify that an employee was acting within the scope of his or her employment has been delegated from the Attorney General to the United States Attorney and further delegated to an Assistant United States Attorney.<sup>137</sup>

The Attorney General also has delegated to the Assistant Attorney General in charge of the Civil Division of the United States De-

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132. See *supra* notes 48-63 and accompanying text.

133. *Gogek v. Brown University*, 729 F. Supp. 926, 930 (D.R.I. 1990) (quoting 28 U.S.C. § 2679(d)(1) (1988)).

134. *Id.*

135. 28 U.S.C. § 2679(d)(1), (d)(2) (1988). See *Arbour v. Jenkins*, 903 F.2d 416, 421 (6th Cir. 1990); *Gogek*, 729 F. Supp. at 930.

136. 28 U.S.C. § 510 (1988) (Attorney General's delegation authority); 28 C.F.R. § 15.3(b)(4) (1991). See *S.J. & W. Ranch, Inc.*, 913 F.2d at 1542, 1542 n.5 (noting that in an action against a United States Attorney, scope of employment certifications are subject to judicial review, and stating "[o]ur concern with the impartiality of the scope determination is especially acute in a situation like the one in this case where the authority to make scope certifications has been delegated to the federal employee defendant or his colleagues"); *Melo v. Hafer*, 912 F.2d 628, 639 (3d Cir. 1990), *cert. granted* 111 S. Ct. 1070 (1991); *Nasuti v. Scannell*, 906 F.2d 802, 804 n.1 (1st Cir. 1990) (citing 28 C.F.R. § 15.3 (1989)); and *Arbour v. Jenkins*, 903 F.2d 416, 421 (6th Cir. 1990) (stating that "[t]he Attorney General has delegated this authority to United States Attorneys who make the scope certification determinations in consultation with the Department of Justice.").

137. See, e.g., *Richardson v. United States Dept. of Interior*, 740 F. Supp. 15, 20 n.10 (D.D.C. 1990) (noting certification by the Chief of the Civil Division of the United States Attorneys Office); *O'Neill v. United States*, 732 F. Supp. 1254, 1255 (E.D.N.Y. 1990) (noting certification by an Assistant United States Attorney).

partment of Justice the authority to make certifications as provided under section 2679(d) and has authorized further delegation to subordinate division officials.<sup>138</sup> The Assistant Attorney General has redelegated scope certification authority to any Director of the Torts Branch.<sup>139</sup>

#### EMPLOYEE'S PETITION TO COURT FOR CERTIFICATION

If the Attorney General refuses certification, the employee may "petition the court to find and certify that the employee was acting within the scope of his office or employment."<sup>140</sup> If an employee's petition has been filed in a state court, the petition "may be removed by the Attorney General for determination by the district court which must remand the action if it denies the petition."<sup>141</sup> Upon certification by the court, the action shall be deemed one against the United States, which shall be the substituted party defendant.<sup>142</sup>

#### CONCLUSIVENESS OR REVIEWABILITY OF ATTORNEY GENERAL'S SCOPE CERTIFICATION

A difference of opinion exists "in the federal courts as to whether the determination and certification by the Attorney General that an individual was working within the scope of his or her employment is judicially reviewable."<sup>143</sup>

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138. 28 C.F.R. § 15.3(b)(1), (b)(4) (1991).

139. See, e.g., *S.J. & W. Ranch, Inc.*, 913 F.2d at 1542 n.5; *Melo*, 912 F.2d at 632 (3d Cir. 1990); *Martin v. Merriday*, 706 F. Supp. 42, 44 n.1 (N.D. Ga. 1989) (citing 28 C.F.R. § 15.3 (Directive No. 90-77)).

140. 28 U.S.C. § 2679(d)(3) (1988).

141. *Gogek*, 729 F. Supp. at 930 n.3 (citing 28 U.S.C. § 2679(d)(3)). See *Nadler v. Mann*, 731 F. Supp. 493, 497 (S.D. Fla. 1990).

142. 28 U.S.C. § 2679(d)(3) (1988). See *Nadler*, 731 F. Supp. at 497 n.13; *Gogek*, 729 F. Supp. at 930.

143. *Springer v. Bryant*, 897 F.2d 1085, 1087 n.3 (11th Cir. 1990) (stating that "[b]ecause this issue is not presently before us, we express no opinion as to what effect, if any, a federal court faced with a motion to substitute the United States as a party defendant for an individual defendant should give the Attorney General's certification that the employee was working within the scope of his or her employment").

For cases holding that Attorney General certification is conclusive, see *Arbour v. Jenkins*, 903 F.2d 416, 419 (6th Cir. 1990); *Mitchell v. Carlson*, 896 F.2d 128, 136 (5th Cir. 1990) (suggesting that judicial review of the Attorney General's certification is precluded); *Aviles v. Lutz*, 887 F.2d 1046, 1049 (10th Cir. 1989) (holding that upon certification by the Attorney General that an employee was working within the scope of his or her employment, the district court possesses no independent authority of review and must substitute the United States as party defendant); *Moreno v. Small Business Admin.*, 877 F.2d 715, 717 (8th Cir. 1989); *Nadler*, 731 F. Supp. at 496; *Williams v. Morgan*, 723 F. Supp. 1532, (D.D.C. 1989) (stating that scope of employment is "apparently to be determined *de novo* by a 'finding' of the court, since the Attorney General's decision is not subject to judicial review"); *Assaad-Faltas v. Griffin*, 715 F. Supp. 247, 248 (1989).

For cases holding that Attorney General certification is judicially reviewable, see

Sound arguments can be made for either position, as shown by the fact that the United States Department of Justice has advocated both views, conclusiveness and reviewability, since the Westfall Act was adopted. As explained below, the government now argues that the certification is reviewable. This position is consistent with the position taken by the courts when an employee or plaintiff contested the scope certification under the Driver's Act, the predecessor of the Westfall Act.<sup>144</sup> The prevailing view under the Driver's Act was that scope of employment was an issue for the courts to decide, and that "the Attorney General's certification was conclusive only for purposes of initial removal."<sup>145</sup>

### *Conclusive*

If the Attorney General or an authorized designee certifies that a federal employee acted within the scope of employment, "the Westfall Act mandates that the suit 'shall be deemed an action against the United States' under the FTCA and 'the United States shall be substituted as the party defendant.'"<sup>146</sup>

The Westfall Act "makes no mention of a redetermination by the court of the Attorney General's finding that the employee was acting within the scope of his employment. Nor does the Act make provision for a remand in the event of such a redetermination."<sup>147</sup> In contrast, prior to the Westfall Act, section 2679 provided exclusivity of a suit against the United States only when a federal employee was operating a motor vehicle within the scope of his employment.<sup>148</sup> In such a case, under the provision then referred to as the Driver's Act,<sup>149</sup> the Attorney General's certification that an employee was acting within the scope of employment "caused removal to the federal court and the action was to be deemed against the United States."<sup>150</sup> However, that certification was not binding upon the court because the Driver's Act specifically authorized the court to consider a mo-

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*S.J. & W. Ranch, Inc.*, 913 F.2d at 1540-41; *Gogek*, 729 F. Supp. at 933 (stating that the determination of whether an employee was working within the scope of some federal employment for substitution purposes is "one for the Court to make in accordance with the traditional guarantees of due process"); *Petrousky v. United States*, 728 F. Supp. 890, 897 (N.D.N.Y. 1990); *Baggio v. Lombardi*, 726 F. Supp. 922, 924-25, 924 n.1 (E.D.N.Y. 1989) (noting that the United States had conceded the issue and ordered an evidentiary hearing to determine the scope of employment issue in a defamation action); and *Martin*, 706 F. Supp. at 44-45.

144. See *supra* notes 48-63 and accompanying text.

145. *Gogek*, 729 F. Supp. at 932-33 (citing *Nasuti*, 792 F.2d at 266 n.3).

146. *Arbour*, 903 F.2d at 421 (quoting 28 U.S.C. § 2679(d)(1), (d)(2)).

147. *Egan v. United States*, 732 F. Supp. 1248, 1251 (E.D.N.Y. 1990).

148. See *id.*

149. See *supra* notes 48-63 and accompanying text.

150. *Egan*, 732 F. Supp. at 1251.

tion to remand to determine if the case was one in which the remedy was unavailable against the United States.<sup>151</sup> The action was then remanded if the court determined that the employee was not acting within the scope of employment.<sup>152</sup> In contrast, the Westfall Act does not contain a comparable provision, but provides that the "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal."<sup>153</sup> As observed by the United States District for the District of New York:

[The Westfall Act] did not limit the purposes of certification to removal. It made clear the repeal of the previous provision authorizing the court to redetermine the scope of employment. Where statutory language has repealed a provision authorizing judicial review of the Attorney General's finding in some cases, it would not be intellectually honest to read that language as implying permission for such review in all cases.<sup>154</sup>

An early district court decision, *S.J. & W. Ranch v. Lehtinen*,<sup>155</sup> which was later reversed on appeal, followed this reasoning and stated that the wording of the Westfall Act "is mandatory in that it requires the United States to be substituted as a defendant upon the Attorney General's certification," and that "the statute does not provide for judicial review of the Attorney General's grant of a 'scope' certification."<sup>156</sup> In *Matlock, Inc. v. Treadway*,<sup>157</sup> the United States District Court for the District of Rhode Island held that when Congress stated that an action *shall* be "deemed an action against the United States," Congress "expressed its intent that the substitution of the United States be the automatic result of certification by the Attorney General."<sup>158</sup>

In *Gogek v. Brown University*,<sup>159</sup> the United States District Court for the District of Rhode Island stated that the Westfall Act had made several changes which could be "construed as evincing a congressional intent to make the Attorney General's certification

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151. *See id.*

152. *See id.*

153. *Id.* (quoting 28 U.S.C. § 2679(d)(2)).

154. *Id.*

155. 717 F. Supp. 824 (S.D. Fla. 1989), *rev'd*, 913 F.2d 1538 (11th Cir. 1990).

156. *Id.* at 826 (stating that "Congress provided . . . judicial review of a scope certification but only when the federal employee . . . who has been denied the scope certification requests judicial review.").

157. 729 F. Supp. 1574 (S.D.W. Va. 1990).

158. *Matlock*, 729 F. Supp. at 1576-77. The court stated further that "[i]ndeed[,] the Act makes no provision for judicial review of the Attorney General's determination that an employee was acting within the scope of his employment." *Id.* at 1577. (quoting *Mitchell*, 709 F. Supp. at 768).

159. 729 F. Supp. 926 (D.R.I. 1990).

conclusive for all purposes."<sup>160</sup> The district court further observed that "language was added to what is now section 2679(d)(2) providing that, with respect to actions commenced in a state court, the Attorney General's certification 'shall conclusively establish scope of office or employment for purposes of removal.'<sup>161</sup> The district court said that the insertion of subsections (d)(1) and (d)(2) "of language that, upon certification by the Attorney General the claim 'shall be deemed an action against the United States . . . and the United States shall be substituted as the party defendant, arguably suggests an intent to make such certification conclusive for those purposes also."<sup>162</sup>

### *Reviewability*

Some of the difference of opinion on the issue of reviewability of the Attorney General's scope certificate might be traced to the change in position of the United States Department of Justice, which initially argued for conclusiveness but now concedes that certification is subject to judicial review.<sup>163</sup> For example, in *Nadler v. Mann*,<sup>164</sup> the plaintiff challenged the Attorney General's scope certification. The district court dealt with the "threshold issue" of reviewability and noted that the defendant, an Assistant United States Attorney, sued individually but represented by the United States Attorney, had receded from his initial position that judicial review is unavailable.<sup>165</sup> The district court noted that this "concession is based on the legislative history of a similar bill which suggests that Congress believed that judicial review of the certification decision would be available."<sup>166</sup>

160. *Id.* at 933.

161. *Id.* (quoting 28 U.S.C. § 2679(d)(2) (1988)).

162. *Id.* (emphasis added) (stating that, on the other hand,

[t]he failure to specifically extend such deference to the substitution provisions of subsection (d)(2) or to include a similar provision in subsection (d)(1) which deals with actions commenced in federal court, suggests that Congress did not intend that certification be conclusive for those purposes. Rather, it indicates that the purpose was merely to ensure the government's right to have the scope of employment issue determined in federal court rather than state court.)

163. See *S. J. & W. Ranch, Inc.*, 913 F.2d at 1538 (observing that the lower court adopted the Justice Department's initial argument that the certificate was conclusive for removal and substitution). However, "[o]n appeal both the plaintiff and the United States contend that the district court erred in holding that the [Westfall Act] precludes judicial review of the scope of employment certification with respect to the substitution of defendants. . . . [The federal employee named as a defendant in the case, the United States Attorney] persists in defending the district court's construction of the statute." *Id.* at 1539. See also *Melo*, 912 F.2d at 640; *Arbour*, 903 F.2d at 421.

164. 731 F. Supp. 493 (S.D. Fla. 1990).

165. *Id.* at 496.

166. *Id.* (citing *Legislation to Amend the Federal Tort Claims Act, Hearing Before the Subcommittee on Administrative Law and Governmental Relations*, 100th Cong.,

In adopting the Justice Department's current position, the United States Court of Appeals for the Sixth Circuit held that "where a statute is clear on its face, its plain meaning should be given effect without reference to legislative history," but that the Westfall Act "is ambiguous regarding the reviewability of the Attorney General's scope certification."<sup>167</sup> The court therefore looked to the legislative history of the Westfall Act for guidance on this issue.<sup>168</sup> The court stated that at a legislative hearing on the Westfall Act

Representative Frank of Massachusetts, the sponsor of the Westfall Act, noted that a plaintiff would still have the right to contest the certification under the Westfall Act if he or she thought that the Attorney General was certifying without justification. In response, a representative of the Department of Justice agreed that a plaintiff may challenge a certification, adding that the certification would be reviewable by a court.<sup>169</sup>

The court concluded that "a plaintiff who is dissatisfied with a scope certification may challenge the certification judicially," but stated that the "scope certification 'shall conclusively establish scope of office or employment for purposes of removal.'"<sup>170</sup>

In *Martin v. Merriday*,<sup>171</sup> the United States District Court for the Northern District of Georgia was one of the first district courts to note that the Justice Department's initial interpretation that Congress had delegated to the Attorney General the absolute and final authority to determine whether an employee's conduct was within the scope of his or her employment raised "serious constitutional questions because the [Westfall] Act's lack of standards by which the Attorney General is to determine 'scope of employment' threaten[ed] to run afoul of the nondelegation doctrine."<sup>172</sup> The district court further noted that:

The court recognizes that Congress has the ability to delegate its legislative powers under broad standards. Con-

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2d Sess. 128, 133, 197 (April 14, 1988) (Remarks of Representative Frank, with Department of Justice approval) (stating "the plaintiff would still have the right to contest the certification without justification.")).

167. *Arbour*, 903 F.2d at 421.

168. *Id. Accord, S.J. & W. Ranch, Inc.*, 913 F.2d at 1540-41, 1540 n.4 (containing perhaps the most complete description of the legislative history on this issue to date); *Melo*, 912 F.2d at 641.

169. *Arbour*, 903 F.2d at 421 (citing *Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary*, 100th Cong., 2d Sess. 128 (April 14, 1988) (statements of Representative Frank, at 128, and statements of Deputy Assistant Attorney General Robert L. Willmore, at 133)). See also, *Nadler*, 731 F. Supp. at 496.

170. *Arbour*, 903 F.2d at 421, 421 n.3 (citing 28 U.S.C. § 2679(d)(2) (1988)).

171. 706 F. Supp. 42 (N.D. Ga. 1989).

172. *Id.* at 44.

gress is only required to provide the Attorney General with "an intelligible principle" to which he is to conform in determining whether or not an employee was acting within the scope of his employment. Regardless of the constitutionality of the delegation, the attempt to make the Attorney General's determination "conclusive" clearly violates the long-standing principle that when a controversy arises regarding an administrator's execution of delegated authority the courts can always ascertain whether the will of Congress has been observed and can require adherence to statutory standards.<sup>173</sup>

The district court stated that the Westfall Act limits the purpose of certification to removal, and therefore does not restrict a federal court from addressing the issue of scope of employment.<sup>174</sup> Rather, the district court held that the Westfall Act "ensures that federal, rather than state, courts will be reviewing the Attorney General's determination when a question arises and will be applying federal common law."<sup>175</sup>

In discussing the ambiguity regarding reviewability, the United States District Court for the District of Rhode Island in *Gogek* stated that it would be "guided by the principle that whenever possible a statute should be construed in a manner that preserves its constitutionality."<sup>176</sup> The court then noted that if the Westfall Act prescribes no criteria for reviewing or making the Attorney General's scope determination, then the Act would violate the "requirements of procedural due process and [the] aspect of the separation of powers doctrine that forbids delegation of legislative functions without adequate standards."<sup>177</sup>

The United States District Court for the Southern District of California in *Nadler* began "with the principle that 'Congress will be presumed to have intended judicial review of agency action unless there is persuasive reason to believe otherwise,'"<sup>178</sup> and agreed with other district courts that "construing the [Westfall] Act to preclude judicial review would open the door to constitutional attack."<sup>179</sup> The court also stated that the legislative history did not resolve the issue of whether the Attorney General's scope of employment certification

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173. *Id.*

174. *Id.* at 45.

175. *Id.*

176. *Gogek*, 729 F. Supp. at 933.

177. *Id.*

178. *Nadler*, 731 F. Supp. at 496 (quoting *United States v. Fausto*, 484 U.S. 439, 452 (1988) and *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984)).

179. *Id.* at 496, 496 n.10 (citing *Martin v. Merriday*, 706 F. Supp. 42 (N.D. Ga. 1989) (construing the Westfall Act to allow judicial review to avoid a constitutional challenge)).

is subject to judicial review<sup>180</sup> and concluded that "Congress intended to preclude *state* courts from reviewing the Attorney General's decision to grant certification" but did not intend "to prevent federal courts from reviewing that decision upon removal."<sup>181</sup> Furthermore, the court reasoned that it was "highly doubtful that Congress intended to deny judicial review of the decision that vests subject matter jurisdiction in federal court."<sup>182</sup>

In *Kelly v. United States*,<sup>183</sup> the United States District Court for the District of Massachusetts stated that "[a] careful analysis of section 2679(d) does not suggest that an Attorney General's certification as to scope of employment should preclude all judicial review of decisions to substitute the United States as a defendant for individual government employees."<sup>184</sup> Applying reasoning similar to that used by the district court in the decision of *S.J. and W. Ranch, Inc. v. Lehtinen*,<sup>185</sup> but reaching an opposite result, the *Kelly* court noted that "the plain language of section 2679(d)(1) mandates the substitution of the United States as a defendant upon certification by the Attorney General" but that "the overall construction of section 2679(d) clearly allows for some judicial review of the Attorney General's scope of employment certifications."<sup>186</sup> The court indicated that because "[s]ection 2679(d)(3) expressly provides that a government employee may challenge the Attorney General's refusal to certify scope of employment and may petition a United States district court for judicial review," the court would be "hard pressed" to read 28 U.S.C. § 2679(d)(1) to implicitly bar potential plaintiffs from obtaining judicial review of certifications.<sup>187</sup>

The United States Court of Appeals for the First Circuit, in *Nasuti v. Scannell*,<sup>188</sup> stated that the Attorney General's scope of employment certification may possibly give way to a subsequent, contrary, judicial finding on the scope question. The court observed that [i]f contested issues arise over whether or not the employee was acting within the scope of his employment, the district court possesses power under Article III of the Constitution to resolve the dispute; the issue, after all, goes to the court's

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180. *Id.* at 496, 496 n.11 (observing that "[t]he House report merely presents the standard for determining scope of employment, without discussing the propriety of judicial review. PL. 100-694, 102 Stat. 4563, H.R. Rep. No. 100-700, U.S. Code Cong. & Admin. News 1988, p. 5945, 134 Cong. Rec. 5945, 5949 (1988).").

181. *Id.* at 497.

182. *Id.*

183. 737 F. Supp. 711 (D. Mass. 1990).

184. *Id.* at 715.

185. 717 F. Supp. 824 (S.D. Fla. 1989). See *supra* note 154 and accompanying text.

186. *Kelly*, 737 F. Supp. at 715.

187. *Id.*

188. 906 F.2d 802 (1st Cir. 1990).

own subject-matter jurisdiction. Absent, however, a contrary federal judicial determination of the scope question, the Attorney General's certification is binding on all, including the court itself.<sup>189</sup>

Citing *Arbour v. Jenkins*,<sup>190</sup> which reached a similar conclusion based upon legislative history,<sup>191</sup> the First Circuit, in *Nasuti*, stated that even without this history, it did not believe that Congress would allow the Attorney General to have the final word on whether a court has jurisdiction by allowing the Attorney General's scope of employment certificate to be final.<sup>192</sup> This would "prevent[] the plaintiff, by executive fiat, from pursuing a possibly legitimate claim in state court."<sup>193</sup> The court noted that it was unlikely that the scope of employment determination should be considered unreviewable because of the Attorney General's "interested relationship" to the case.<sup>194</sup> The responsibility of the Attorney General is to "represent and protect the interests of the United States and of the defendant employee."<sup>195</sup>

The First Circuit also determined the Attorney General's certification to be reviewable because there is no suggestion in the Westfall Act "that the Attorney General is to conduct a neutral proceeding, open to all parties, before taking a final position on the scope question," and that this is "the least one would expect had Congress intended the Attorney General to substitute for the federal courts as the final arbiter of the controversy affecting both the parties' rights and liabilities and the court's jurisdiction."<sup>196</sup>

Finally, the First Circuit found "nothing inconsistent between judicial determination of a scope dispute and Congress's grant of conclusive weight to the Attorney General's scope certification."<sup>197</sup> The

189. *Id.* at 810.

190. 903 F.2d 416 (6th Cir. 1990).

191. *Nasuti*, 906 F.2d at 812 (citing *Arbour v. Jenkins*, 903 F.2d 416 (6th Cir. 1990)).

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* 28 U.S.C. § 2679(c) (1988) (providing federal employees with guidelines to initiate representation by the Attorney General). *Accord*, *S.J. & W. Ranch, Inc.*, 913 F.2d at 1542.

196. *Nasuti*, 906 F.2d at 812-13.

197. *Id.* at 813 (reasoning that

[t]he granting of conclusive weight to the certification enables the Attorney General quickly to remove cases from state courts, and to maintain them in the federal courts where all questions affecting the rights and liabilities of federal employees while acting within the scope of employment will be resolved. Only in relatively rare circumstances such as the present, where the facts underlying the scope issue are disputed, need the matter be independently resolved by the court—and at all such times the government and the sued employee will have the benefit of a federal forum pursuant to the scope certification.)

Circuit Court stated that a separation of powers question as well as a fundamental fairness question might exist if the Westfall Act "were read to leave the Attorney General as the sole judge of an issue determinative of the jurisdiction of the federal court."<sup>198</sup>

#### COMPLETENESS OF INFORMATION IN SCOPE CERTIFICATION

The completeness of the information provided in the scope certification in certain cases may have influenced some courts' determinations of whether the Attorney General's scope certificate should be considered conclusive. For example, in *Gogek*, the district court ruled that a scope certification is not conclusive for purposes of determining whether an employee was within the scope of his employment.<sup>199</sup> The court stated that:

[T]he problems inherent in such an interpretation are compounded by the fact that the certification, on its face is far from definitive. . . . [I]t states only that certification is based on "information now available." There is no indication as to the nature, source, reliability, or completeness of that information. According conclusive effect to such a tentative conclusion would be patently irrational. The Court will not impute such an intent to Congress. Therefore the Court concludes that the determination regarding whether [the federal employees] were acting within the scope of some federal employment is one for the Court to make in accordance with the traditional guarantees of due process.<sup>200</sup>

Additional evidence that an employee was acting within the scope of his or her employment may be necessary. For example, in *Matlack, Inc. v. Treadway*,<sup>201</sup> the United States Attorney certified, pursuant to 28 U.S.C. § 2679(d)(1), "that the defendant was acting within the scope of his employment and line of duty as an employee of the United States at the time of the incident."<sup>202</sup> The court stated that "[a] notarized affidavit executed by [the Chief of Staff of the West Virginia Army National Guard] states the same and, in addition, that no administrative claim has been filed, according to his knowledge and the records of the Guard."<sup>203</sup> The plaintiff requested that a motion to substitute the United States be denied or, in the alternative, that the court grant an extension of time for discovery and factual development before requiring a substantive response to the

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198. *Id. Accord, S.J. & W. Ranch, Inc.*, 913 F.2d at 1541.

199. *Gogek*, 729 F. Supp. at 933.

200. *Id.*

201. 729 F. Supp. 1574 (S.D.W. Va. 1990).

202. *Id.* at 1575.

203. *Id.*

motion to substitute.<sup>204</sup> In its motion for an extension of time, the plaintiff argued that the court need not accept the United States certification or the supporting affidavit as dispositive or conclusive of the issues and that the plaintiff should be given the opportunity to explore the nature of the defendant's activities giving rise to the law suit.<sup>205</sup> The court acknowledged, however, that the Westfall Act makes no provision for judicial review of the Attorney General's determination that an employee was acting within the scope of his employment, and therefore granted the government motion for substitution, apparently without allowing additional discovery.<sup>206</sup>

Once the Attorney General has submitted a scope certification, the burden of proof may be on the plaintiff to show that the certification is incorrect. For example, in *Nadler v. Mann*,<sup>207</sup> the United States District Court for the Southern District of Florida addressed a defamation action brought against a former Assistant United States Attorney.<sup>208</sup> The defendant, a candidate for state judge, had initiated a criminal investigation for suspicion of bribery against the plaintiff-incumbent, and had then leaked the story to the press.<sup>209</sup> The plaintiff did not argue that the federal employee's activity was outside the Assistant United States Attorney's scope of employment.<sup>210</sup> Instead, the plaintiff argued that the federal employee was motivated by his desire to displace the plaintiff from his state bench position.<sup>211</sup> However, the court held that "allegations that an employee was 'motivated by malice or some other unworthy purpose' or that he acted 'maliciously or corruptly,' cannot defeat a finding that the employee was otherwise acting within the scope of employment."<sup>212</sup> Because the plaintiff offered no valid grounds to set aside the Attorney General's certification decision that the employee was acting within the scope of his employment, the court concluded that the Attorney General's scope certification was appropriate, was within his discretion, and therefore denied plaintiff's challenge to the certification.<sup>213</sup>

However, in *Gogek*, the district court put the burden on the government to prove that the certified employee was acting within the

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204. *Id.*

205. *Id.*

206. *Id.* at 1577-78.

207. 731 F. Supp. 493 (S.D. Fla. 1990).

208. *Id.* at 494.

209. *Id.*

210. *Id.* at 497.

211. *Id.*

212. *Id.* at 497 (citing *Rochon v. FBI*, 691 F. Supp. 1548, 1562 (D.D.C. 1988) and *Jordan v. Hudson*, 690 F. Supp. 502 (E.D. Va. 1988)).

213. *Id.*

scope of employment.<sup>214</sup> The district court said that, under state law, "the doctrine of *respondeat superior* may render an employer liable for even the intentional torts of an employee if it was committed while performing a duty in the course of [the employee's] employment and by express or implied authority from the employer."<sup>215</sup> However, the court held that it was not possible to apply this principle because the factual record was insufficient to allow for a reasoned determination of whether the federal employee acted within the scope of federal employment.<sup>216</sup> The court noted that counsel had filed pleadings and memoranda that contained conflicting allegations as to the capacity in which defendants acted and that disagreed on fundamental points, but that neither party had presented any facts to support their assertions.<sup>217</sup>

In response to the government's motion to substitute the United States as the defendant and its motion to remand, the court in *Gogek* observed that "normally the failure to present supporting facts would lead the Court to resolve both motions against the government."<sup>218</sup> Furthermore, the court found that:

The motion to substitute would be denied because the government, as the proponent of the motion, has the responsibility of establishing a sufficient basis for granting it. Similarly, as the removing party, the government also bears the burden of proving the allegations contained in its removal petition when those allegations are controverted.<sup>219</sup>

The court said that the government had proceeded on the understandable but erroneous assumption that a certification alone by the United States Attorney was sufficient to meet its burden and said that "under these circumstances it would be unjust to deprive either party of an opportunity to present any facts supporting their respective allegations."<sup>220</sup> Both parties were therefore given sixty days to submit affidavits or sworn statements of fact relating to whether the claims against the federal employees arose from acts performed within the scope of federal employment.<sup>221</sup> The court further ruled

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214. *Gogek*, 729 F. Supp. at 934.

215. *Id.* at 934 (applying Rhode Island law). See Note, 26 SAN DIEGO L. REV. at 148 (indicating that the amendment to § 2674 was attacked by a legislator during legislative debate "as possibly violating the doctrine of *respondeat superior*" and footnoting that "[t]he majority rule at common law in the private employment context is that an employer, sued for the tortious acts of its employee, may not invoke the employee's remedies under the doctrine of *respondeat superior*").

216. *Gogek*, 729 F. Supp. at 934.

217. *Id.*

218. *Id.*

219. *Id.* (citing *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921)).

220. *Gogek*, 729 F. Supp. at 935.

221. *Id.*

that if the submissions should "reveal the existence of a genuine dispute regarding facts material to that issue," an evidentiary hearing on that issue would be conducted by the court.<sup>222</sup> Meanwhile, the court deferred ruling on either motion.<sup>223</sup>

In *S.J. & W. Ranch, Inc. v. Lehtinen*,<sup>224</sup> a later decision by the United States Court of Appeals for the Eleventh Circuit, the court ruled that judicial deference to the Attorney General's certification is not warranted.<sup>225</sup> The court was persuaded "that the plaintiff has the burden of proving that the employee's conduct was not encompassed by the scope of his employment, . . . [but] agree[d] with the majority of federal courts that the district court determines scope de novo."<sup>226</sup>

#### FACTORS CONSIDERED IN SCOPE DETERMINATIONS

Whether an employee's actions are within the scope of his or her employment for purposes of the Westfall Act is governed by the law of the state in which the negligent or wrongful conduct occurred.<sup>227</sup> In making a scope determination, the *Gogek* court stated that the dual purpose of section 2679 is to provide redress against the United States for torts of its employees and to protect federal employees from the specter of personal liability that might otherwise inhibit them from vigorously discharging their duties.<sup>228</sup> Accordingly, the court noted that it had to determine "whether the employee's action was so related to the discharge of his or her official duties that the prospect of personal liability for that action would inhibit the proper performance of those duties."<sup>229</sup>

The language of the Westfall Act speaks of "negligent or wrongful acts," and therefore is not intended to be confined to negligence claims alone.<sup>230</sup> The fact that conduct may constitute an intentional

222. *Id.*

223. *Id.*

224. 913 F.2d 1538 (11th Cir. 1990).

225. *Id.* at 1543.

226. *Id.* The Eleventh Circuit remanded the case to the district court, requiring a de novo evidentiary hearing on whether the federal employee, a United States Attorney, made allegedly defamatory statements in the scope of employment, and permitting the plaintiff full discovery. *Id.* at 1544.

227. See *S.J. & W. Ranch, Inc.*, 913 F.2d at 1542; *Nasuti*, 906 F.2d at 805 n.3; *Arbour*, 903 F.2d at 421-22; *Nelson v. United States*, 838 F.2d 1280, 1282 (D.C. Cir. 1988); *Cronin v. Hertz Corp.*, 818 F.2d 1064, 1065 (2d Cir. 1987); *White v. Hardy*, 678 F.2d 485, 487 (4th Cir. 1982); and *Kelly v. United States*, 737 F. Supp. 711, 715 (D. Mass. 1990).

228. *Gogek*, 729 F. Supp. at 934.

229. *Id.* at 934. See Note, 26 SAN DIEGO L. REV. at 149-50 (listing factors said to be considered by the courts in determining whether an employee was acting within the scope of his or her employment).

230. See *Nadler*, 731 F. Supp. at 495 n.6 (observing that "if Congress intended to confine the [Westfall] Act to negligence claims, it would have written the Act in those

tort for which the United States has not waived sovereign immunity under 28 U.S.C. section 2680(h) "does not necessarily negate the possibility that the employee was acting 'within the scope of his office or employment.'"<sup>231</sup> In addition, in making a determination as to whether an employee was acting within the scope of his or her employment, a district court need not be bound by allegations of malice alone or by other labels describing allegedly tortious conduct as intentional rather than negligent.<sup>232</sup>

The First Circuit, in *Nasuti*, stated that the legislative history of the Westfall Act indicates that "federal employees can still be held personally liable for egregious misconduct."<sup>233</sup> The court noted that:

[The Westfall Act] provides that the United States will incur vicarious liability only for the common law torts of its employees which are committed within the "scope of their employment." If an employee is accused of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted as the defendant, and the individual employee remains liable.<sup>234</sup>

A United States District Court for the District of Columbia discussed this legislative history in *Williams v. Morgan*<sup>235</sup> but reached a different conclusion. The Attorney General had refused a defendant employee's request for certification that he was acting within the scope of his employment when, as a result of "horseplay," he struck a fellow employee.<sup>236</sup> The employee argued that the Westfall Act was enacted to protect federal employees from personal liability in cases where "ill-advised, even foolish, behavior at work results in an 'incidental' or 'casual' injury, whether the employee's conduct could be simply characterized as careless . . . or must be classified as an intentional tort for legal purposes."<sup>237</sup> Quoting the legislative history of the Westfall Act, the employee contended that the behavior at issue did not rise to the level of "egregiousness" that the employee argued

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terms. Moreover, while the legislative history quoted by Plaintiff emphasizes claims for negligence, the sponsor of the bill specifically referred to defamation as one of the torts covered by the Act. 134 CONG. REC. S15214-01, October 7, 1988").

231. See *Gogek*, 729 F. Supp. at 934.

232. See *id.* at 933-34.

233. *Nasuti*, 906 F.2d at 807. See H.R. REP. NO. 700, 100th Cong., 2d Sess. 5 (1988), reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 5945, 5949 (stating that "[i]f an employee is accused of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted as the defendant," and the employee remains personally liable). See also Note, 26 SAN DIEGO L. REV. at 149 (re-stating that "[t]he United States will not be substituted as the sole defendant if an employee is accused of egregious misconduct and the Attorney General so certifies").

234. *Nasuti*, 906 F.2d at 807 n.10.

235. 723 F. Supp. 1532 (D.D.C. 1989).

236. *Id.* at 1532-34.

237. *Id.* at 1534.

was the standard for determining scope of employment.<sup>238</sup>

Notwithstanding the legislative history, the *Williams* court said that the Westfall Act, by its terms, "declares that the protection it affords federal employees against civil liability for their official activities depends entirely upon whether they were acting 'within the scope of [their] office or employment' when they caused injury."<sup>239</sup> The court observed that "No other conditions or qualifications [are] imposed, whether relating to the innocence of the employee's purpose, the gravity of the offense, or the severity of the resulting injury" and that "the exclusive liability of the United States under . . . [the Westfall Act] is simply a function of the requirements of [the federal employee's] job."<sup>240</sup>

#### APPELLATE REVIEW OF REMAND TO STATE COURT

When suit is brought against a federal government employee in state court, the Westfall Act "permits the Attorney General to remove it by simply filing the appropriate certification."<sup>241</sup> Upon certification and removal of the action from state court to a federal district court, the action is to be deemed an action against the United States and the United States substituted as the party defendant.<sup>242</sup> Certification of the Attorney General conclusively establishes scope of office or employment for purposes of removal.<sup>243</sup> If scope certification is withheld, the employee may petition for certification in state court but "the Attorney General may remove that petition to the federal court for determination subject to a possible remand if the federal court determines that the employee was not acting within the scope of his employment."<sup>244</sup>

Remand after a federal district court determines that the Attorney General improperly certified an employee as acting within the scope of his or her employment is not specifically covered in the Westfall Act. Likewise, appellate jurisdiction for review of remands was left to the courts to determine. When district courts have found

238. *Id.* (quoting H.R. REP. NO. 700, 100th Cong., 2d Sess. at 5, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 5945, 5949.).

239. *Id.* at 1535 (citing 28 U.S.C. § 2679(b)(1) (1988)).

240. *Williams*, 723 F. Supp. at 1535.

241. *See Gogek*, 729 F. Supp. at 933 n.4 (citing 28 U.S.C. § 2679(d)(2) (1988)).

242. *See Nadler*, 731 F. Supp. at 497 (citing Section 6 of the Westfall Act, amending § 2679(d)(2)).

243. *Id.*

244. *Gogek*, 729 F. Supp. at 933 n.4 (citing Section 6 of the Westfall Act, amending § 2679(d)(3)); and *Nadler*, 731 F. Supp. at 497 n.13. The amended section, 28 U.S.C. § 2679(d)(3) (1988), reads, "if in considering the [employee's] petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the state court.").

authority to review the Attorney General's scope certification,<sup>245</sup> and have remanded the action to state court after overruling the scope certification, there is a split in the circuits over whether circuit courts have either appellate or mandamus jurisdiction to review the remand.

### *Appellate Review Denied*

After a district court's order remanding an action against a federal employee to a state court due to the district court's opinion that it lacked jurisdiction over the action, the United States Court of Appeals for the Fifth Circuit, in *Mitchell v. Carlson*,<sup>246</sup> faced the issue of whether it had jurisdiction to review the remand order.<sup>247</sup> Although the United States argued that Westfall Act claims were not subject to the limitation stated in 28 U.S.C. § 1447(d),<sup>248</sup> the Fifth Circuit found otherwise, holding that § 1447(d) "applies to review by mandamus as well as appeal" and therefore precluded review.<sup>249</sup> The Fifth Circuit ruled that "section 1447(d) applies to all remands for lack of jurisdiction pursuant to section 1447(c). The Westfall Act contains no provision expressly or by implication excepting it from the operations of sections 1447(c) or (d)."<sup>250</sup>

The Government argued that the Westfall Act had effectively repealed the portion of the pre-Westfall Act § 2679(d)<sup>251</sup> that authorized "a district court to remand a case to state court if it found that the employee acted outside the scope of employment," asserting that the repealed provision should be viewed as "persuasive evidence that Congress intended to deny district courts the power to remand a

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245. Not all courts have found this authority. See, e.g., *Egan v. United States*, 732 F. Supp. 1248, 1252 (E.D.N.Y. 1990). The *Egan* court read the Westfall Act to prohibit it "both from reviewing the finding of the Attorney General or his designee [that a federal employee was acting within the scope of his or her employment] and from remanding to the State court." *Id.*

246. 896 F.2d 128 (5th Cir. 1990).

247. *Id.* at 128, 131 (citing 28 U.S.C. § 1447(d) (1988)); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976); and *Richards v. Federated Dept. Stores, Inc.*, 812 F.2d 211 (5th Cir. 1987)).

248. See 28 U.S.C. § 1447(d) (1988). The limitation provided by 28 U.S.C. § 1447(d) (1988) states that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." *Id.*

249. *Mitchell*, 896 F.2d at 131 (citing *Gravitt v. Southwestern Bell Tele. Co.*, 430 U.S. 723 (1977)).

250. *Id.*

251. Prior to the Westfall Act, this section of the Driver's Act, see *supra* notes 48-63 and accompanying text, said "[s]hould a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court." 28 U.S.C. § 2679(d) (1966).

Westfall Act case, regardless of the reason, once the Attorney General has issued certification."<sup>252</sup> The court found this argument unpersuasive, stating that:

Congress repealed the provision in order to give the new certification procedure conclusive effect on the issue of whether the employee acted within the scope of employment. There is no evidence, however, that the act of repeal implicated or affected the authority of the district court to order remand for reasons wholly unrelated to the scope certification.<sup>253</sup>

Because the district court had remanded the case for reasons other than the scope certification, the Fifth Circuit concluded that it was barred by Section 1447(d) from reviewing the district court's order of remand, even though it noted that the district court's determination concerning its supposed lack of jurisdiction was incorrect.<sup>254</sup> Because the district court had stated that the case was remanded "because it originally was removed 'improvidently and without jurisdiction'" and that "orders which recite [these] magic words . . . are 'not subject to challenge in the court of appeals by appeal, by mandamus or otherwise,'" the Fifth Circuit determined that it had no appellate jurisdiction.<sup>255</sup>

#### *Appellate Review Granted; Collateral Order Doctrine*

Although the Fifth Circuit determined in *Mitchell* that it lacked appellate jurisdiction to review the remand order,<sup>256</sup> it found that it had appellate jurisdiction to review the portion of the district court's decision and order, separable from the remand issue, in which the district court had vacated its previous order substituting the United States for the individual federal government employee, thereby resubstituting the federal employee as the defendant.<sup>257</sup> The court held that it could separate the resubstitution issue from the remand order and therefore resubstitution was reviewable on appeal because the district court had dismissed the United States as the party defendant and had resubstituted the federal employee while the district court "still had control of the cause. Only then did the [district court] remand the case to state court."<sup>258</sup>

The appellate court noted that had the district court not resubsti-

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252. *Mitchell*, 896 F.2d at 131 (citing 28 U.S.C. § 2679(d) (1988)).

253. *Mitchell*, 896 F.2d at 131. The district court had remanded, holding that an action against the United States was barred by sovereign immunity under the facts alleged and that the plaintiff should not be left without a remedy. *Id.* at 134.

254. *Id.* at 131, 131-32 n.3.

255. *Id.*

256. See *supra* notes 246-55 and accompanying text.

257. *Mitchell*, 896 F.2d at 132.

258. *Id.* at 132-33.

tuted the individual federal employee, "but had only dismissed the case against the United States, there would have been no case left to remand to state court. Thus, the resubstitution order being prior to and separable from the remand order, section 1447(d) does not bar us from review of the resubstitution order."<sup>259</sup>

The Fifth Circuit concluded, in *Mitchell*, that it had jurisdiction to review the district court's resubstitution order pursuant to 28 U.S.C. section 1291,<sup>260</sup> which vests appellate courts with jurisdiction over final district court decisions, and the "collateral order doctrine."<sup>261</sup> The court held that this doctrine "embraces that small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in an action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."<sup>262</sup> Furthermore, the court noted that this "doctrine extends to government employees the right of immediate appeal under [section] 2679 from orders denying them absolute or qualified immunity."<sup>263</sup> Because entitlement to immunity is intended to be "an immunity from suit rather than a mere defense to liability," the court held that it had jurisdiction to consider the resubstitution order which denied immunity granted to federal employees under the Westfall Act.<sup>264</sup> The court then reversed the district court's order of resubstitution.<sup>265</sup>

### *Mandamus Review Granted*

An open question exists as to whether remand to state court is permitted if the federal district court determines that an employee was acting outside the scope of his or her employment. In *Nasuti v. Scannell*,<sup>266</sup> the First Circuit said that it differs "in this regard from the view seemingly taken by the Fifth and Tenth Circuits."<sup>267</sup> In

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259. *Id.* at 133 (citing for comparison, *Hirsch v. Bruchhausen*, 284 F.2d 783 (2d Cir. 1960)).

260. 28 U.S.C. 1291 (1988). This section reads, in part: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court." *Id.*

261. *Mitchell*, 896 F.2d at 133.

262. *Id.* (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)).

263. *Mitchell*, 896 F.2d at 133 (citing *Mitchell v. Forsyth*, 472 U.S. 511 (1985)).

264. *Mitchell*, 896 F.2d at 133.

265. *Id.* at 136.

266. 906 F.2d 802 (1st Cir. 1990).

267. *Id.* at 813 n.16 (noting that "[w]e differ in this regard from the view seemingly taken by the Fifth and Tenth Circuits. *Mitchell v. Carlson*, 896 F.2d 128 (5th Cir.

*Nasuti*, the First Circuit discussed the issue of its jurisdiction to review a remand order in the context of a remand to state court of a claim against a federal government employee for assault and battery.<sup>268</sup> The court concluded that it had jurisdiction to review the remand by way of mandamus.<sup>269</sup>

The United States argued in *Nasuti* that the remand order of the district court was an appealable final order as it effectively dismissed the United States as the party defendant in violation of section 2679(d)(2), which, the government contended, at that time made the Attorney General's scope certification conclusive.<sup>270</sup> Under these circumstances, the government argued that restriction of section 1447(d) on appellate review of remand orders did not apply.<sup>271</sup> The United States also argued that if an action is removed to the federal court under section 2679(d)(2),<sup>272</sup> then the action could "not be remanded back to state court so long as the Attorney General's valid scope certification remains outstanding."<sup>273</sup> The United States reasoned that once the Attorney General had certified that the employee was acting in the scope of office or employment for purposes of removal, "the Attorney General's scope certificate conferred jurisdiction upon the district court which the court could not override, at least without a finding of its own that [the defendant] had acted beyond the scope of his employment."<sup>274</sup>

In response to these arguments, the First Circuit reviewed the legislative history and Congress's stated purpose in adopting the Westfall Act and held that mandamus review was appropriate in this case "because issuance of a remand order at this point in the proceedings was entirely outside the district court's statutory authority."<sup>275</sup>

In reaching this conclusion, the *Nasuti* Court noted that the Fifth Circuit, in *Mitchell v. Carlson*,<sup>276</sup> had "recently ruled that questions similar to those here should be reviewed upon appeal rather than by mandamus" and had "held that by resubstituting [a] federal

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1990); *Aviles v. Lutz*, 887 F.2d 1046 (10th Cir. 1989). While we entirely concur in their view that scope certification must be given conclusive effect for purposes of removal, that conclusive effect lasts only until the court speaks on the specific scope issue.").

268. *Nasuti*, 906 F.2d at 807.

269. *Id.* at 803.

270. *Id.* at 807. See *supra* notes 143-98 and accompanying text.

271. *Nasuti*, 906 F.2d at 807.

272. 28 U.S.C. § 2679(d)(2) (1988). This provision now reads: "Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, . . . [the suit] shall be removed . . . [to federal court] . . . at any time before trial." *Id.*

273. *Nasuti*, 906 F.2d at 807.

274. *Id.*

275. *Id.* at 808.

276. 896 F.2d 128 (5th Cir. 1990). See *supra* notes 256-65 and accompanying text.

employee . . . the district court created a reviewable issue as to immunity."<sup>277</sup> The First Circuit, in *Nasuti*, stated, however, that in instances in which "remand was [addressed] on grounds inextricably mixed with the scope of employment issue, and was plainly barred by the scope certification, . . . mandamus is appropriate."<sup>278</sup> Stating that "extreme circumstances" existed here, the First Circuit in *Nasuti* held that the doctrine of non-reviewability of remand orders as stated by the Supreme Court<sup>279</sup>

gives way to the exception later carved out in *Thermtron Products, Inc. v. Hermansdorfer*. This is not a situation where allowing mandamus review of the remand order threatens the "policy of avoiding further interruption of the litigation of removed causes, properly begun in state courts." Whatever its policy in most other contexts, the aim of Congress in the Westfall Act was to establish and protect a federal employee's immunity by assuring removal to and retention by, a federal court of all actions commenced against the employee where scope of employment has been certified. Congress has stated that, for removal purposes, the scope certification is conclusive.

. . .

While *Thermtron's* facts were different, "the underlying concept—reviewability by mandamus of a remand lacking any basis in the governing statute—applies. We believe that the district court's remand order was a departure so lacking in statutory basis, and so clearly contrary to congressional policy as expressed in the Westfall Act, as to require our review by mandamus."<sup>280</sup>

The First Circuit stated that if, upon review, the district court should find that the federal government employee was acting outside the scope of his employment, the district court should then remand the case back to state court.<sup>281</sup> The court said "[w]e imply power to enter a remand order (should scope not be found) from the analogous authorization in section 2679(d)(3), [authorizing remand if the district court finds the employee acted outside the scope of employment after review of a petition by a government employee whom the Attorney General declined to certify] and from the fact that a remand is both more logical and efficient than a dismissal of the federal action."<sup>282</sup>

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277. *Nasuti*, 906 F.2d at 811-12, n.15 (citing *Mitchell v. Carlson*, 896 F.2d 128 (1990)). See *supra* notes 256-65 and accompanying text.

278. *Nasuti*, 906 F.2d at 811-12 n.15.

279. *Id.* at 811 (citing *United States v. Rice*, 327 U.S. 742 (1946)).

280. *Id.* (citing *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976)).

281. *Nasuti*, 906 F.2d at 814.

282. *Id.* at 814 n.17.

EFFECT OF SOVEREIGN IMMUNITY AFTER SUBSTITUTION  
FTCA EXCEPTIONS

Courts have been faced with a "troublesome aspect of the immunity conferred by section 2679" as amended by the Westfall Act.<sup>283</sup> This troublesome aspect is the effect of the Westfall Act when employee immunity is combined with the various categories of common law torts for which sovereign immunity is retained by the government under the Federal Tort Claims Act.<sup>284</sup>

This issue was discussed by the district court in *Gogek v. Brown University*,<sup>285</sup> in which the court stated that "it is Congress' prerogative to establish reasonable limitations on a federal employee's personal liability for acts performed within the scope of employment just as it is Congress' prerogative to choose the circumstances under which the United States will or will not waive its sovereign immunity."<sup>286</sup> Some plaintiffs have questioned Congress's ability or intent to exercise that "prerogative by immunizing employees for alleged common law torts committed in the course of performing their official duties even if the aggrieved party has no remedy against the United States."<sup>287</sup> However, the district court in *Gogek* stated that any doubt as to Congress's intent should be dispelled by review of the legislative history of the Westfall Act which states:

The "exclusive remedy" provision of [section 2679(d)(4)] is intended to substitute the United States as the solely permissible defendant in all common law tort actions against Federal employees who acted in the scope of employment. Therefore, suits against Federal employees are precluded even where the United States has a defense which prevents an actual recovery. Thus, any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28, U.S.C. also is precluded against an employee in [sic] his or her estate.<sup>288</sup>

The United States District Court for the Southern District of

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283. *Gogek v. Brown University*, 729 F. Supp. 926, 931 (D.R.I. 1990) (citing 28 U.S.C. § 2679(d)(4) (1988) which, as a result of the Westfall Act, now says that upon certification that an employee was acting within the scope of his or her employment, "any action or proceeding subject to [the certification provisions] shall proceed in the same manner as any action against the United States filed pursuant to [the Federal Tort Claim Act] and shall be subject to the limitations and exceptions applicable to those actions.") (emphasis added).

284. *Gogek*, 729 F. Supp. at 931.

285. 729 F. Supp. 926 (D.R.I. 1990).

286. *Id.* at 932.

287. *Id.*

288. *Id.* (quoting H.R. REP. NO. 700, 100th Cong., 2d Sess. 6, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 5950).

Florida observed that “[e]very circuit considering the issue has held, expressly or implicitly, that substitution under [the Westfall Act] is required even if the United States must ultimately be dismissed based on immunity,”<sup>289</sup> that most district courts have recognized this principle,<sup>290</sup> but that some district courts “have gone astray.”<sup>291</sup>

The *Gogek* court stated that “[o]bviously, Congress concluded that exposing government employees to suit for acts performed in the course of discharging their official duties, simply because the law affords the claimant no remedy against the government, would strip those employees of the very protection that Congress intended to confer by enacting section 2679.”<sup>292</sup>

Other courts have not found this to be so obvious. For example, a Ninth Circuit decision, later reversed by the United States Supreme Court, stated that when Congress enacted the Westfall Act, it did not amend 28 U.S.C. section 2680(k), the provision which states that claims arising in a foreign country are not covered under the FTCA.<sup>293</sup> Therefore, a claim could not be brought against the United States for any claim that arose in a foreign country, and a plaintiff

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289. *Sowell v. American Cyanamid, Co.*, 888 F.2d 802 (11th Cir. 1989) (finding that the Federal Employees' Compensation Act, 5 U.S.C. § 8101 *et seq.* (1988), precluded recovery against United States); *Lunsford v. Price*, 885 F.2d 236 (5th Cir. 1989) (finding the same result as to the Tennessee Valley Authority); *Smith v. United States*, 877 F.2d 40 (11th Cir. 1989) (finding immunity under the *Feres* Doctrine); *Jordan v. Hudson*, 879 F.2d 98 (4th Cir. 1989) (stating that the United States was immune under the discretionary function exception to the FTCA); and *Nadler v. Mann*, 731 F. Supp. 493, 498 (S.D. Fla. 1990) (citing *Aviles v. Lutz*, 887 F.2d 1046 (10th Cir. 1989) (holding that the United States was immune from libel claims under the FTCA). *Cf. Newman v. Soballe*, 871 F.2d 969 (11th Cir. 1989) and *Smith v. Marshall*, 885 F.2d 650 (9th Cir. 1989), *rev'd sub nom. United States v. Smith*, 111 S. Ct. 1180 (1991).

290. *Nadler*, 731 F. Supp. at 498 (stating that “the lack of a remedy against the United States is not a bar to substitution. Indeed, that argument was expressly rejected by Congress in the House report accompanying [the Westfall Act].” Noting that no Senate report was submitted with the Westfall Act and citing *Saratoga Sav. & Loan Assn. v. Federal Home Loan Bank*, 724 F. Supp. 683 (N.D. Cal. 1989) (involving a tortious interference with contractual relations); *S.J. & W. Ranch, Inc. v. Lehtinen*, 717 F. Supp. 824, 828 (S.D. Fla. 1989), *rev'd*, 913 F.2d 1538 (11th Cir. 1990) (addressing a libel, slander and invasion of privacy action); *Kassel v. United States Veterans' Admin.*, 709 F. Supp. 1194 (D.N.H. 1989) (addressing a claim of negligently violating federal statute); and *Robinson v. Egnor*, 699 F. Supp. 1207, 1215 n.14 (E.D. Va. 1988) (involving a defamation claim). *See Egan v. United States*, 732 F. Supp. 1248, 1252 (E.D.N.Y. 1990) (discussing claims arising out of assault, battery, false imprisonment, liable, slander, or deceit).

291. *Nadler*, 731 F. Supp. at 498 (citing *Mitchell v. United States*, 709 F. Supp. 767 (W.D. Tex. 1989) (remanding for a suit against a federal employee in his individual capacity because the United States was immune from the assault and battery claim); *Smith v. DiCara*, 329 F. Supp. 439 (E.D.N.Y. 1971) (discussing a pre-Westfall Act case which remanded suit against a federal physician because the United States was immune from a defamation claim)).

292. *Gogek*, 729 F. Supp. at 932.

293. *Smith v. Marshall*, 885 F.2d 650 (9th Cir. 1989), *rev'd sub nom. United States v. Smith*, 111 S. Ct. 1180 (1991).

would have no remedy against the United States. The court said that "[h]ad Congress intended to extend [Westfall Act] immunity to individual government employees for tort claims arising in foreign countries it could have done so quite easily. Indeed, this is just what Congress did with regard to claims against Tennessee Valley Authority employees."<sup>294</sup> The court could not reconcile the promise found in the legislative history, that the rights of individual claimants would not be diminished, with the assertion that "any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28 U.S.C. also is precluded against an employee in [sic] his or her estate."<sup>295</sup> The *Smith* circuit court concluded "that the report is internally inconsistent. But the statutory language is not. And we join the Eleventh Circuit in holding that [the Westfall Act] does not bar medical malpractice claims brought against military personnel serving abroad."<sup>296</sup> The Supreme Court disagreed, however, and concluded that the "any claim" statement in the legislative history, which precludes an action against an employee if the action is barred against the United States, "obviously would include claims barred by the exception for causes of action arising abroad."<sup>297</sup>

#### TIMELY PRESENTATION OF ADMINISTRATIVE CLAIM

In addition to the defenses stated in 28 U.S.C. section 2680 (1988), upon substitution of the United States as defendant for a federal employee, the United States may raise any other defenses it may have. For example, if a plaintiff has not presented an administrative claim to the appropriate federal agency as required by 28 U.S.C. section 2675(a),<sup>298</sup> the United States may argue that the court lacks subject matter jurisdiction over the action and that the action therefore

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294. *Id.* at 655. See *supra* notes 117-19 and accompanying text.

295. *Smith*, 885 F.2d at 656 (observing that "The House Committee emphasized that under [the Westfall Act] 'no one who previously had the right to initiate a lawsuit will lose that right.'" H.R. REP. NO. 100-700, 100th Cong., 2d Sess. 6-7, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 5945, 5950-51; see also 134 CONG. REC. H4719 (daily ed. June 27, 1988) (remarks of Representative Wolf) (stating "[i]n no way does this measure infringe or diminish any legal rights of the individual.")).

296. *Smith*, 885 F.2d at 656 (citing *Newman v. Soballe*, 871 F.2d 969, 971 (11th Cir. 1989)).

297. *United States v. Smith*, 111 S. Ct. 1180, 1189-90 (1991).

298. 28 U.S.C. § 2675(a) (1988). This section provides in part:

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

*Id.*

should be dismissed.<sup>299</sup>

Even if the government is successful in arguing for dismissal, however, the plaintiff may be able to revive his or her action. Section 2679(d)(5),<sup>300</sup> as amended by the Westfall Act, provides that when the United States has been substituted and an action "dismissed for failure first to present a claim pursuant to section 2675(a), . . . a claim shall be deemed to be timely presented under section 2401(b)<sup>301</sup> . . . if [it] would have been timely had it been filed on the date the underlying civil action was commenced"<sup>302</sup> and if within sixty days after dismissal, the claim is presented to the appropriate agency.<sup>303</sup>

## CONCLUSION

Congress passed the Federal Employees Liability Reform & Tort Compensation Act of 1988,<sup>304</sup> the Westfall Act, in response to the Supreme Court's decision in *Westfall v. Erwin*,<sup>305</sup> which effectively denied most rank-and-file federal employees immunity from lawsuits against them personally for their common-law torts committed in the scope of employment.

Since passage of the Westfall Act, which amended the Federal Tort Claims Act, several actions brought against federal employees personally have been transformed into actions exclusively against the United States of America. Many of those actions discussed the history and specifics of the Westfall Act. However, as new cases are filed against federal government employees, courts will begin to view the new exclusivity and substitution provisions of the Westfall Act only as additional parts of the overall scheme of the FTCA, without specific reference to the Westfall Act or the Supreme Court case which brought it about.<sup>306</sup> By applying the provisions of FTCA as amended by the Westfall Act, the courts will carry out Congress's intent that the government accept sole responsibility for its employees' actions in the scope of employment, leaving the employees free to vigorously and effectively administer the policies of government without fear of personal liability.

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299. See, e.g., *Matlack, Inc. v. Treadway*, 729 F. Supp. 1574, 1578 (S.D.W. Va. 1990).

300. See *infra* Appendix.

301. See *infra* Appendix.

302. See 28 U.S.C. § 2679(d)(5)(A) (1988). See *infra* Appendix.

303. See 28 U.S.C. § 2679(d)(5)(B) (1988). See *infra* Appendix. See also *Egan*, 732 F. Supp. at 1250.

304. Pub. L. No. 100-694, 102 Stat. 4563 (1988).

305. 484 U.S. 292 (1988).

306. See, e.g., *Richardson v. United States Dept. of Interior*, 740 F. Supp. 15, 20 n.10 (D.D.C. 1990) (applying § 2679, as amended, without mention of the Westfall Act).

## APPENDIX

## 28 U.S.C. SECTION 2401(B) (1988)

This section reads as follows:

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

## 28 U.S.C. SECTION 2671 (1988)

Section 3 of the Westfall Act states:

Section 2671 of title 28, United States Code, is amended in the first full paragraph by inserting after "executive departments," the following: "the judicial and legislative branches,"<sup>307</sup>

Section 2671 now reads:

As used in this chapter [28 U.S.C. §§ 2671 et seq.] and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

## 28 U.S.C. SECTION 2674 (1988)

Section 4 of the Westfall Act states:

Section 2674 of title 28, United States Code, is amended by adding at the end of the section the following new paragraph:

With respect to any claim under this chapter, the United States

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307. Pub. L. No. 100-694, 102 Stat. 4563 (1988).

shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.<sup>308</sup>

28 U.S.C. SECTION 2679 (1988)

This section states:

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b) [As amended by Westfall Act *Section 5*]

(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government —

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers

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308. *Id.*

and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) [As amended by Westfall Act *Section 6*]

(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if —

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) the Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

