LEGISLATIVE REFORM

THE WESTFALL ACT AND SCOPE OF EMPLOYMENT: THE ROLE OF THE ATTORNEY GENERAL

I. INTRODUCTION

A. The Statute

In response to the Supreme Court's decision in *Westfall v. Erwin*,[1] which changed the effect of civil litigation against federal employees, Congress enacted the Westfall Act.[2] Before *Westfall*, the common law general rule[3] applicable to federal employees stated "that they were absolutely immune from personal liability in state common law tort actions for harm that resulted from activities within the scope of their employment."[4] *Westfall* modified the general rule, allowing "absolute immunity from state-law tort actions . . . only when . . . the conduct is discretionary in nature."[5] In *Westfall*, plaintiff William Erwin, a federal employee, received chemical burns after exposure to toxic soda ash at an Army Depot. Claiming that the ash was stored improperly, Erwin and his wife sued the Depot supervisors in state court alleging negligence. The suit was removed to the United States District Court. The Court dismissed the claim holding that the defendants, federal employees, were absolutely immune from state torts while acting within the scope of their employment. The Court of Appeals reversed and held that immunity applies only to the discretionary acts of the defendants. The Supreme Court upheld the Court of Appeals' reversal, concurring with the Circuit Court's modified "scope of employment" rule.

The *Westfall* modification to the general rule, which added the discretionary requirement, increased federal employees' potential for being held civilly liable for their tortious behavior on the job. Congress responded to the court-created increase in federal employees' liability by enacting the Westfall Act.[6] This Act modified the Federal Tort Claims Act (FTCA) "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

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1. Westfall v. Erwin, 484 U.S. 292 (1988).

2. Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2679 (1994).

3. *See* General Electric Co. v. United States, 813 F.2d 1273 (4th Cir. 1987); Poolman v. Nelson, 802 F.2d 304 (8th Cir. 1986).

4. H.R. Rep. No. 700, 100th Cong., 2d Sess. 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5946.

5. 484 U.S. at 297-98.

6. In fact, the Supreme Court requested Congressional guidance, openly requesting "[l]egislated standards governing the immunity of federal employees involved in state-law tort actions . . . ." *Id.* at 300.

remedy against the United States."[7]

The Westfall Act contains ambiguities that the federal circuits have interpreted inconsistently. The Act provides that when a cause of action is brought against a federal employee in state court, the Attorney General or her designee may certify that the employee was acting within the scope of her/his office or employment.[8] After the employee has been certified as acting in the scope of employment, the Westfall Act requires substituting the United States as defendant[9] and removing the suit to the U.S. District Court.[10]

The circuits disagree whether the Attorney General's certification may be reviewed by the District Court, particularly concerning the substitution requirement. The sections which require substitution and removal contain compulsory language which indicate that certification may not be reviewed. The substitution sections state that "[u]pon certification by the Attorney General . . . such claim . . . shall be deemed an action against the United States . . . and the United States shall be substituted as the party defendant."[11] The removal clause is even more explicit: "This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal."[12] In applying these provisions, the Circuit Courts debate whether a United States District Court can review the Attorney General's certification of a federal employee's scope of employment with respect to substitution of the United States as defendant.

B. Real Lives

The issue in question is more easily illustrated by example, and the following scenario is rendered to aid in understanding the effects of the split. While the scenario is hypothetical, it mirrors the facts in *Garcia v. United States*,[13] a case specifically addressing the issue of the circuit split. Imagine Mrs. Everymom driving down Main Street, U.S.A. in her minivan with her children carefully strapped into their seats behind her. She approaches an intersection with the appropriate caution and notices out of the corner of her eye a white van swerving out of control. Immediately following the crunch of metal as the other vehicle crashes into the minivan, Mrs. Everymom loses consciousness, leaving the blue letters on the van's door etched indelibly into her brain: "U.S. NAVY." The police investigation reveals that the other driver, Seaman Shmuccatelli, was not on duty, but had taken the official duty van for a joy-ride with a blood alcohol content of .20, twice the amount needed to be legally intoxicated in that state.

As is her right, Mrs. Everymom brings a lawsuit against Shmuccatelli in state court for negligence, the wrongful deaths of her children, and other relavent torts. However, the local U.S. attorney certifies that Shmuccatelli was acting in the scope of his employment, and, because Mrs. Everymom failed to exhaust all administrative remedies, the suit must be dismissed. What happens from here? If Mrs. Everymom

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7. Pub. L. No. 100-694 § 2(b).
8. 28 U.S.C. § 2679 (1994).
9. 28 U.S.C. § 2679(d) (1994).
10. 28 U.S.C. § 2679(d)(2) (1994).
11. 28 U.S.C. § 2679(d)(1)-(2) (1994).
12. 28 U.S.C. § 2679(d)(2) (1994).
13. 22 F.3d 609 (5th Cir. 1994).

brings suit in the Fourth, Fifth or Tenth Circuits,[14] the certification is conclusive and she will probably not be able to pursue her legal claims in court. If, however, Mrs. Everymom files suit in any of the remaining numbered circuits or the District of Columbia, the District Court may review the certification.[15] Mrs. Everymom may yet have legal recourse. Mrs. Everymom's fortunes depend largely on a random determination of geography and not on an even-handed systemic dispensation of justice. The split among the various circuits over the Westfall Act causes this inequity.

II. THE SPLIT

Since the passage of the Westfall Act, all of the circuits have addressed whether the Attorney General's scope-of-employment certification is reviewable. Three circuits, the Fourth, Fifth and Tenth, have held that the Attorney General's certification is conclusive and unreviewable with respect to substitution. The remaining eight circuits have held that, once the case is removed to federal court after certification, the District Court may review certification with respect to substitution, and may remand. The Supreme Court has not addressed this issue,[16] and the results of the federal incongruity are readily witnessed. For plaintiffs seeking redress for the tortious conduct of federal employees in the circuits refusing judicial review of the Attorney General's certification, their cause of action is limited by the federal law. Federal law prohibits punitive damages, only permitting actual or compensatory damages.[17] Federal law also bars recovery under "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights [with exceptions]."[18] Federal law requires the plaintiff to exhaust administrative remedies before resorting to legal action[19] and

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14. Johnson v. Carter, 983 F.2d 1316 (4th Cir. 1993) (dismissing a defamation suit brought by Naval base police officer against Navy Admiral because certification was conclusive); Garcia v. United States, 22 F.3d 609 (5th Cir. 1994) (dismissing an action because a federal employee was certified as acting within the scope of his employment while driving intoxicated); Aviles v. Lutz, 887 F.2d 1046 (10th Cir. 1989) (dismissing defamation claim against federal employees because the employees were certified as acting within the scope of their employment while deciding promotional status of plaintiff).

15. Nasuti v. Scannell, 906 F.2d 802 (1st Cir. 1990) (holding that the scope of employment question was judiciable in a negligence suit against a National Park Service driver); McHugh v. University of Vermont, 966 F.2d 67 (2d Cir. 1992) (holding that certification should be reviewed de novo in a sexual and religious harassment suit against an Army Major); Melo v. Hafer, 912 F.2d 628 (3d Cir. 1990) (holding that the scope of employment is subject to judicial review in suits against the Pennsylvania Auditor General for violation of due process); Arbour v. Jenkins, 903 F.2d 416 (6th Cir. 1990) (allowing the plaintiff to judicially challenge certification in a wrongful death action against postal employees); Hamrick v. Franklin, 931 F.2d 1209 (7th Cir. 1991) (holding that certification is subject to judicial review in a defamation suit against Veterans Administration hospital employees); Brown v. Armstrong, 949 F.2d 1007 (8th Cir. 1991) (giving certification prima facie weight in farmers' tort claims against Farmers Home Administration employees); Meridian Int'l Logistics, Inc. v. United States, 939 F.2d 740 (9th Cir. 1991) (giving courts de novo review of certification in a slander suit against FBI agent); Ranch v. Lehtinen, 913 F.2d 1538 (11th Cir. 1990) (allowing the plaintiff to challenge certification in a libel and slander action against a U.S. Attorney); Kimbro v. Velten, 30 F.3d 1501 (D.C. Cir. 1994) (holding Attorney General's certification was prima facie evidence in a Veterans Administration employee's assault and battery claim against colleague).

16. Johnson v. Carter, 114 S. Ct. 57 (1993) (denying certiorari); Hafer v. Melo, 502 U.S. 1118 (1991) (affirming on other grounds); Hamrick v. Franklin, 112 S. Ct. 200 (1991) (denying certiorari); Lehtinen v. S.J. and W. Ranch, Inc., 502 U.S. 813 (1991) (denying certiorari). The Supreme Court has granted certiorari in Martinez v. Lamagno, 63 USLW 20 d126 (1994), to address this issue.

17. 28 U.S.C. § 2674 (1994).

18. 28 U.S.C. § 2780 (1994).

19. 28 U.S.C. § 2674 (1994).

has a two-year statute of limitations.[20] The plaintiffs in the remaining circuits would not be hampered by federal limitations and have a greater opportunity to have their day in court, depending on state law. While in certain instances state law may be more restrictive than federal law, the immediate problem reveals a need for uniformity in applying federal laws. Therefore, the application of the federal statute results in widely varying outcomes depending on the circuit in which the cause is brought.

A. Favoring Judicial Review

The circuits favoring judicial review of the Attorney General's decision employ a variety of arguments which can be arranged in four general categories: textual, constitutional, historical, and political.

Under the textual arguments, the statute answers the debate. The first textual argument looks to the provisions of the Westfall Act which addresses situations when the Attorney General refuses to certify a federal employee as acting in the scope of office or employment. In such cases the defendant may petition the court to certify him/her.[21] Some circuits have used this section to justify judicial review of the certification.[22] The second textual argument analyzes the conclusivity statement concerning removal; "This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal."[23] Comparing this section to the substitution section,[24] the conclusive language indicates the lack of intention on Congress' part to give conclusivity to the substitution portion. "Had Congress intended to render the certification conclusive for purposes other than removal, it knew how to do so."[25]

The constitutional arguments assert that the U.S. Constitution conflicts with any construction of the statute which gives conclusivity to the Attorney General's certification. The first constitutional argument addresses due process. The Attorney General cannot make an unbiased decision because she acts as both the certifier and the counsel for the defendant United States. The dual roles of the Attorney General would deny plaintiffs fair and impartial resolutions to legitimate state claims, denying them due process.[26] The second constitutional argument concerns the "separation of powers . . . ."[27] If the Attorney General were given unreviewable power to certify an employee, she would be performing a judicial function. This assignment of judicial power to an executive actor contradicts the Constitution, which vests the judicial power "in one Supreme Court . . . ."[28]

The historical arguments look to legislative or judicial history. The first historical argument looks at a previous version of the statute and case law. The earlier form of 28 U.S.C. § 2679 established that a U.S. District Court could determine if the employ-

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20. 28 U.S.C. § 2401(b) (1994).
21. 28 U.S.C. § 2679(d)(3) (1994).
22. *Nasuti*, 906 F.2d at 813; *Melo*, 912 F.2d at 641.
23. 28 U.S.C. § 2679(d)(2) (1994).
24. *See supra* note 9 and accompanying text.
25. *McHugh*, 966 F.2d at 72. *See also Meridian International*, 939 F.2d at 744; *Ranch*, 913 F.2d at 1540; *Melo*, 912 F.2d at 641.
26. *See Brown*, 949 F.2d at 1011; *Meridian International*, 939 F.2d at 744; *Ranch*, 913 F.2d at 1541-1542; *Nasuti*, 906 F.2d, at 812-813.
27. *Nasuti*, 906 F.2d at 813. *See also Meridian International*, 939 F.2d at 744; *Ranch*, 913 F.2d at 1541.
28. U.S. CONST. art. III § 1.

ee was acting within the scope of employment. This statute, coupled with previous case law, establishes precedent favoring judicial review.[29] The second historical argument asserts that the Westfall Act is ambiguous when read as a whole. Therefore, legislative history must be examined to discern the intent of Congress. The legislative history states that "the plaintiff would still have the right to contest if they thought the Attorney General were certifying without justification."[30] This statement supports judicial review.[31]

Another argument relies primarily on policy. The Justice Department agrees that certification is not conclusive with respect to substitution of the United States as defendant.[32] Therefore, because the Justice Department stands to gain the most power from the conclusive construction of the statute, yet reads the statute to permit judicial review of the Attorney General's certification, the statute must favor judicial review.

B. Favoring Conclusivity

The circuits which give certification conclusive weight follow two lines of logic, the first of which contends that the statute lacks ambiguity. The language of the statute is facially clear: "[u]pon certification by the Attorney General [the action] *shall* be deemed an action against the United States . . . and the United States *shall* be substituted as the party defendant (emphasis added)."[33] Circuits following this rationale assert that the language of the statute unambiguously demands conclusive effect of the Attorney General's decision.[34] Therefore, District Courts cannot review scope of employment certification with respect to substitution.[35]

The other generally followed basis for giving certification conclusive effect focuses on the actual modifications to the FTCA. The Westfall Act omitted the portion of the original act which allowed District Courts to remand to state court if they found that the employee was not acting in the scope of his employment. This omission in the Westfall Act gives "'the new certification procedure conclusive effect on the issue of whether the employee acted within the scope of employment.'"[36]

III. RESOLUTION

The Westfall Act was developed as a Congressional balancing act, attempting to return greater immunity to federal employees while still giving redress to victims of federal employees' tortious conduct. Unfortunately, Congressional efforts to alleviate one inequity created another. The Westfall Act has been interpreted differently among the federal circuits, resulting in disparate treatment of suits depending on geography. This circuit split should be addressed by Congress to eliminate uneven application of

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29. *McHugh*, 966 F.2d at 72-73.

30. *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 (1988) (statement by Representative Frank).

31. *Meridian International*, 939 F.2d at 744; *Hamrick*, 931 F.2d at 1211; *Ranch*, 913 F.2d at 1541 n.4; *Melo*, 912 F.2d at 642; *Arbour*, 903 F.2d at 419. *See also Nasuti*, 906 F.2d at 812.

32. *Brown*, 949 F.2d at 1011; *Hamrick*, 931 F.2d at 1211; *Melo*, 912 F.2d at 640 n.17; *Nasuti*, 906 F.2d at 812; *Arbour*, 903 F.2d at 421.

33. 28 U.S.C. § 2679(d)(1)-(2) (1994).

34. *See supra* note 15.

35. *Johnson*, 983 F.2d at 1319; Mitchell v. Carlson, 896 F.2d 128, 134-135 (5th Cir. 1990); *Aviles*, 887 F.2d at 1048.

36. *Garcia*, 22 F.3d at 611 (quoting Mitchell v. Carlson, 896 F.2d 128, 131 (5th Cir. 1990)).

the law.

In eliminating the split, the text of the statute must guide the conclusion. Unfortunately, interpretation of the text is the source of the split; three circuits read conclusiveness in the text, whereas the remaining eight do not. Therefore, attention must be directed to the Congressional intent. While debating the bill in committee, Congress addressed the question of judicial review of the Attorney General's certification. During hearings before the House Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, the question of judicial review was expressly discussed. The Subcommittee Chair and co-sponsor of the bill, Congressman Frank, was asked if the plaintiff could contest the certification. Congressman Frank answered in the affirmative.[37] The Department of Justice agrees with this reading of the Westfall Act. Deputy Assistant Attorney General Robert Willmore stated that "a plaintiff can challenge [the Attorney General's] certification."[38] Therefore, the subcommittee assumed that certification by the Attorney General was not conclusive with respect to substitution of the United States as defendant.

The constitutional arguments are also persuasive. Vesting in the Attorney General both the responsibility to litigate as lead counsel for the defendant United States and the conclusive power of certification with its effects of substitution and removal forces her to fill mutually exclusive roles of advocate and impartial judge. This incongruity "is out of accord with our usual notions of fairness and separations of powers."[39]

In the light of the constitutional argument, the legislative history, and the policy reason stated above,[40] the Attorney General should not be given the power to conclusively limit a cause of action. Furthermore, the unfair effect of giving conclusive effect to her certification would fail to allow the proper administration of justice in many states. Therefore, Congress should amend the Westfall Act to allow District Courts review of the scope of employment certification.

Any amendment granting judicial review should also define the applicable scope of review. In common law the scope of review depends considerably on the distinction between questions of law and questions of fact.[41] "In determining the facts, an agency is operating within its area of expertise."[42] The courts therefore are generally deferential to the agency regarding questions of fact.[43] The scope of employment issue, however, is a question of law "defined by the applicable state law of respondeat superior."[44] Therefore, as a trier of law, the district judge is best suited for ascertaining issues of law and the scope of employment certification should be reviewed de novo by the District Court.[45]

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37. *Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcomm. on Administrative Law and Governmental Relations to the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 128, 197 (1988).

38. *Ranch*, 913 F.2d at 1541.

39. International Union, United Mine Workers v. Bagwell, — U.S. ——, 114 S. Ct. 2552, 2563 (1994) (Scalia, J., concurring) (addressing the concepts of fairness and separation of powers in a case with a similar set of facts).

40. *See supra* text accompanying note 37.

41. BERNARD SCHWARTZ, ADMINISTRATIVE LAW, 3d. ed. (1991). *See also* ALFRED C. AMAN, JR. AND WILLIAM T. MAYTON, ADMINISTRATIVE LAW § 13.3 (1993).

42. SCHWARTZ, *supra*, note 41, § 10.5.

43. *Id.*

44. Lutz v. Secretary of the Air Force, 944 F.2d 1477, 1488 (9th Cir. 1991).

45. SCHWARTZ, *supra* note 41.

In light of the arguments in favor of judicial review, 28 U.S.C. 2679(d) should be amended to read:

> (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. *This certification of the Attorney General is reviewable de novo by the United States District Court.*
> (2) . . . This certification shall conclusively establish scope of office or employment for purposes of removal, *but is reviewable de novo by United States District Court for purposes of substitution.*

This modification will alleviate any ambiguities currently present in the statute and resolve the split in the Circuit Courts. The amendment will allow plaintiffs to seek redress and ensure that federal employees are held accountable for tortious conduct committed outside the scope of their office or employment.

*Juan R. Balboa**

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* B.S., Mathematics, United States Naval Academy, 1988; J.D., Candidate, Notre Dame Law School, 1996.