

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: KATIA GUTIERREZ DE MARTINEZ, EDUARDO
MARTINEZ PUCCINI AND HENRY MARTINEZ DE
PAPAIANI, Petitioners v. DIRK A. LAMAGNO, ET AL.
CASE NO: 94-167
PLACE: Washington, D.C.
DATE: Wednesday, March 22, 1995
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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 KATIA GUTIERREZ DE MARTINEZ, :

4 EDUARDO MARTINEZ PUCCINI AND :

5 HENRY MARTINEZ DE PAPAIANI, :

6 Petitioners : No. 94-167

7 v. :

8 DIRK A. LAMAGNO, ET AL. :

9 - - - - -X

10 Washington, D.C.

11 Wednesday, March 22, 1995

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 10:05 a.m.

15 APPEARANCES:

16 ISIDORO RODRIGUEZ, ESQ., Barranquilla, Colombia, S.A.; on
17 behalf of Petitioners.

18 MALCOLM L. STEWART, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; Federal
20 Respondent in support of Petitioners.

21 ANDREW J. MALONEY, III, ESQ., New York, New York; on
22 behalf of Respondent Lamagno.

23 MICHAEL K. KELLOGG, ESQ., Washington, D.C.; by invitation
24 of the Court, as amicus curiae, in support of the judgment
25 below.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in number 94-167, Katia Gutierrez de
5 Martinez v. Dirk Lamagno.

6 Mr. Rodriguez.

7 ORAL ARGUMENT OF ISIDORO RODRIGUEZ

8 ON BEHALF OF THE PETITIONERS

9 MR. RODRIGUEZ: Thank you, Mr. Chief Justice.
10 May it please the Court:

11 The question for the Court today is to resolve
12 the dispute between the Circuits. That is, whether or not
13 the Attorney General's scope of employment certification
14 issued under the Westfall Act is subject to de novo
15 judicial review by the district court.

16 This action involves a simple automobile
17 accident in Barranquilla, Colombia, where an employee of
18 the Federal Government, driving at night, injured
19 Petitioners. An administrative claim was filed in '91.
20 Subsequently, after two years of filing additional data to
21 the administrative body, told the statute of limitations
22 of the action was filed in '93. Three months subsequent
23 to that, the attorney -- the U.S. Attorney for the Eastern
24 District of Virginia issued a one-line paragraph saying
25 that Mr. Lamagno was in fact acting within the scope of

1 his employment.

2 We opposed that motion in the district court,
3 however, based on the Fourth Circuit's ruling in Johnson
4 v. Carter, that held that there was no discretion on the
5 part of the district court but to dismiss the action and
6 substitute the United States.

7 As a result of being -- having the United States
8 substitute, the action was dismissed as a result of the
9 Foreign Claims Exemption to the Federal Torts Claims Act.
10 And this action was then filed -- a petition before this
11 Court.

12 We hold that -- we believe that the Fourth
13 Circuit's decision is in error in two essential ways.
14 First, there is nothing within the Westfall Act to
15 indicate that the -- that the presumption of judicial
16 review under the Federal Drivers Act, which was the
17 underpinning of the Westfall Act, was amended. That at
18 all times judicial review was maintained --

19 QUESTION: Well, they did change the statutory
20 language, didn't they?

21 MR. RODRIGUEZ: Yes. Under (d)(1), Mr. Chief
22 Justice, they changed the statutory language to expand
23 what was under the Federal Drivers Act -- that is immunity
24 from suit if a Federal driver was acting within the scope
25 of employment at the time of the car accident -- to

1 encompass all Federal employees as long as they were
2 acting within the scope of their employment.

3 QUESTION: And what did the Federal Drivers Act
4 say about judicial review?

5 MR. RODRIGUEZ: It said nothing, with the
6 exception on the issue of removal from the State court to
7 the Federal court, which permitted a challenge by the
8 individual. With regard to a -- an action that was filed
9 in divers, in the Federal court. It was moot. There was
10 -- there was a presumption of judicial review, and the
11 courts followed that presumption.

12 And that --

13 QUESTION: Well, now, now, wait a minute. There
14 -- was the presumption of judicial review contained in the
15 language of the Act?

16 MR. RODRIGUEZ: I -- I -- in reviewing the
17 decision --

18 QUESTION: No; you can answer that question yes
19 or no, surely.

20 MR. RODRIGUEZ: Specifically, no -- within the
21 Drivers --

22 QUESTION: Yes.

23 MR. RODRIGUEZ: The Federal Drivers Act. It was
24 not specifically black-letter law within the statute.

25 QUESTION: Well, was it any other kind of letter

1 law within the statute?

2 MR. RODRIGUEZ: No, Your Honor.

3 Subsequently, the Westfall Act expanded the --
4 the ability of immunity from suit on an individual basis
5 if the Federal employee was acting within the scope of
6 employment.

7 The reason why the -- the need for judicial
8 review is threefold. First, without judicial review,
9 there is a question about due process. Here we have
10 individuals who have a right of action as a result of a
11 tort action, having property damage and injuries, having
12 no opportunity to be heard as a result of a -- a -- a
13 certification -- scope of employment by an administrative
14 body, who is acting both as a factfinder and, at the same
15 time, as defense of the Federal employee.

16 QUESTION: And what is the argument that that
17 would deny due process -- this accident took place in
18 Colombia, right?

19 MR. RODRIGUEZ: Correct.

20 QUESTION: And you're perfectly free to sue in
21 the courts of Colombia, I take it?

22 MR. RODRIGUEZ: No, Your Honor. As a result of
23 sovereign immunity, Mr. Lamagno was detailed to the United
24 States Embassy, and so there is sovereign immunity from
25 suit in Colombia.

1 QUESTION: As against him as an individual? I
2 guess the United States I can understand that argument,
3 but suing him as an individual -- you can't sue the United
4 States --

5 MR. RODRIGUEZ: Correct.

6 QUESTION: In the United States either.

7 MR. RODRIGUEZ: Well, you could not under
8 Colombian civil law sue him as an individual as a result
9 of his being in the service of a foreign embassy.

10 QUESTION: With diplomatic immunity?

11 MR. RODRIGUEZ: Correct.

12 So he has -- in that capacity, there is not,
13 within civil law -- the Civil Code of Colombia, a scope of
14 employment exception to this diplomatic immunity. And so,
15 we're -- we're essentially without recourse under the laws
16 of Colombia.

17 QUESTION: This -- this accident occurred after
18 the Westfall Act was passed?

19 MR. RODRIGUEZ: Correct.

20 QUESTION: Not before?

21 MR. RODRIGUEZ: It occurred in -- in January of
22 '91.

23 QUESTION: It's not as though the right to sue
24 existed and then the Act took it away. The Act said, when
25 the accident occurred, that this might happen. That --

1 that the Attorney General might, in -- in effect, say you
2 can't sue this individual?

3 MR. RODRIGUEZ: Correct.

4 QUESTION: So why is that a denial of due
5 process?

6 MR. RODRIGUEZ: Well, because essentially, even
7 under the Federal Drivers Act you had a right to challenge
8 the issue of the scope of employment to determine whether
9 in fact at the time --

10 QUESTION: Yes, but they changed that before
11 this accident --

12 MR. RODRIGUEZ: That is -- that is the issue
13 before this Court -- whether in fact it was changed.

14 QUESTION: Suppose -- suppose the Federal
15 Government says, ex ante, before -- before an accident
16 occurs, they -- they say you cannot sue personally any
17 Federal employee?

18 MR. RODRIGUEZ: Before the accident occurs?

19 QUESTION: Yes. They just say, you know, we --
20 we have made the determination that suits against Federal
21 employees are so much trouble, they are so distracting to
22 -- to their execution of their duties that one of the
23 perquisites of Federal employment is you are to be immune
24 from civil tort suits, period?

25 MR. RODRIGUEZ: Based on that hypothetical --

1 QUESTION: Is that a denial of -- of equal -- of
2 due process?

3 MR. RODRIGUEZ: Well, it -- no, based on that
4 hypothetical. However, that -- those facts

5 QUESTION: Well, this is just one step short of
6 that. It says not all of them will be, but only those
7 that the Attorney General says shall be, shall be.

8 MR. RODRIGUEZ: I think -- I think there's a
9 large distinction between the hypothetical you presented
10 and the facts with regard to the Westfall Act and the
11 antecedent Federal Drivers Act. The Westfall Act was
12 never designed and never attempted to remove the issue of
13 judicial review.

14 This -- there is cursory legislative language in
15 the history of it. But with regard to the specific --

16 QUESTION: No, wait. I -- I'm -- I was not
17 speaking to the point of whether the Act removed judicial
18 review. I was speaking to your argument that if it did re
19 -- remove judicial review, it would be a denial of due
20 process of law.

21 MR. RODRIGUEZ: If it did --

22 QUESTION: And that's all I'm speaking -- yes --

23 MR. RODRIGUEZ: On your hypothetical --

24 QUESTION: You said -- you said it would be a
25 denial of due process.

1 MR. RODRIGUEZ: No. Based on your hypothetical,
2 I said that that would be acceptable, because there would
3 be a clear, emphatic statement on the part of Congress,
4 saying that -- that for these specific findings and these
5 specific fact situations, we will deny and we will
6 underwrite all Federal employees.

7 QUESTION: Right.

8 MR. RODRIGUEZ: Now, whether or not that was
9 challenged subsequent --

10 QUESTION: Leaving it to the Attorney General is
11 what -- is what causes it to be a denial of due process?

12 MR. RODRIGUEZ: Leaving both issues -- both the
13 factfinding and the defending of the -- of the -- of the
14 employee. And then, the third issue, removing all
15 recourses for the injured parties.

16 QUESTION: Well, before the Federal Tort Claims
17 Act, you couldn't sue the Government for -- for any injury
18 inflicted by a -- an employee acting in the course of --
19 of his employment.

20 MR. RODRIGUEZ: But that is the issue. Our
21 challenge is whether or not Mr. Lamagno was in fact acting
22 within the scope of his employment. And what we requested
23 both at the administrative level -- where we raised the
24 challenge initially -- was some sort of impartial
25 factfinding that -- to assure that in fact he was acting

1 within the scope of employment to provide that type of
2 immunity.

3 Neither at the administratively level nor at the
4 judicial level do we have that type of impartial
5 factfinding.

6 QUESTION: But you have nothing at all before
7 the Federal Tort Claims Act?

8 MR. RODRIGUEZ: We had this lawsuit against the
9 individual. That -- that is -- that is a common law tort
10 that occurred in -- in Colombia, which we have sued
11 Mr. Lamagno in his individual capacity.

12 QUESTION: And you say the diplomatic immunity
13 is so total that even acting outside the scope of
14 employment, it would -- there is no remedy in -- in
15 Colombia?

16 MR. RODRIGUEZ: There would be no way of getting
17 into the court because of the diplomatic immunity.

18 QUESTION: Well, how can you lay venue against
19 him back here in the United States?

20 MR. RODRIGUEZ: Because -- because he is a
21 resident of Virginia. He is a -- he works out of the --
22 the Agency that is stationed in Virginia. All indices
23 indicates that this is where his connection was, was in
24 Virginia. Hence, that's why the lawsuit -- why otherwise
25 --

1 QUESTION: And was -- was he served with process
2 in the action?

3 MR. RODRIGUEZ: We served process both on -- on
4 the Agency head and also on -- on the Agency in his name,
5 which was accepted.

6 QUESTION: Well, was it -- yes, but I -- this is
7 collateral, but I -- I doubt that they could accept
8 service for him personally, could they?

9 MR. RODRIGUEZ: Well, they -- we never received
10 it back to our process server, Your Honor.

11 QUESTION: You -- you sued him personally based
12 on all-purpose jurisdiction, you sued him where he
13 resided, his all-purpose forum where he resided?

14 MR. RODRIGUEZ: Yes.

15 QUESTION: You said you would be left without a
16 remedy, but isn't there some kind of administrative
17 proceeding ongoing before the DEA?

18 MR. RODRIGUEZ: Theoretically there is an
19 administrative process. But if the -- if Lamagno's
20 grandchildren get to a certain age, I'm certain that they
21 will be able to deal with that, because here we are four
22 years down the road, a simple car accident, and DEA has
23 the -- has not responded in any fashion other than -- I
24 should say -- DEA -- the Torts Division of the Justice
25 Department, because it was transferred from DEA to the

1 Torts Division.

2 Although they have requested mountains of
3 documentation, both medical reports and other -- other
4 information, they never have responded during this
5 four-year course as to what the status of this action
6 would be.

7 QUESTION: Could you tell me a little bit more
8 about your due process argument? What's -- what line of
9 authority -- what precedents from this Court do you cite
10 in support of the proposition that there is a denial of
11 due process when the certification by the Government
12 deprives your client of a cause of action?

13 MR. RODRIGUEZ: Well, the -- the -- the line of
14 reason from this Court starts out that there is a property
15 right in a common law action. That's been supported in
16 *Petrousky v. United States* in the Second Circuit, and
17 reaffirmed there. And that, once you have that property
18 right, in order to deprive them of the property right, you
19 have to have due process.

20 QUESTION: And what's your -- your closest case
21 in point from this Court?

22 MR. RODRIGUEZ: Okay, one moment, Your Honor.

23 According to *Petrousky*, they cite *Paul v. Davis*,
24 424 U.S. 693.

25 QUESTION: Well, of course, you're making an

1 argument of a property right. It's a fine argument when
2 the statute is passed after the cause of action arises.
3 But this statute was passed before the cause of action
4 arises. So the -- so the point can be made that the --
5 that the cause of action, when it sprung up, was
6 automatically limited by -- by the statute.

7 MR. RODRIGUEZ: But --

8 QUESTION: There was no cause of action expected
9 or anticipated, except one that was subject to this
10 Attorney General's specification.

11 MR. RODRIGUEZ: But that's only if you abide by
12 the analysis that when the Westfall Act was passed, it was
13 designed to remove judicial review. There is nothing to
14 support that -- that assertion.

15 QUESTION: Let -- let me ask one -- one more
16 variation about the due process question. Would you have
17 the same due process objection if the statute did not say
18 that the Attorney General would certify that the
19 individual was acting within the course of his employment,
20 but simply said, if the Attorney General says, no cause of
21 action, there shall be no cause of action?

22 MR. RODRIGUEZ: I believe that -- that you'd
23 have the same sort of -- of problem of having the
24 factfinder --

25 QUESTION: Well, he's not finding any facts.

1 He's just saying I don't want this guy sued. He's not
2 finding any facts at all. So there are no facts for
3 courts to review.

4 MR. RODRIGUEZ: Yes. Yes, I -- I would find the
5 same problem --

6 QUESTION: The same problem.

7 MR. RODRIGUEZ: The issue of bias by the
8 factfinder is one of the key ingredients of -- of -- of
9 this particular case. Because here you have the person
10 who is the supervisor of the employee, if you will, making
11 the decision that when he makes the decision that in fact
12 scope of employment exists, it ends all litigation.

13 QUESTION: Are your clients American citizens?

14 MR. RODRIGUEZ: No, they are Colombian citizens.

15 QUESTION: And the accident occurred in
16 Colombia?

17 MR. RODRIGUEZ: In Barranquilla, Colombia.

18 QUESTION: And they're protected by the due
19 process clause?

20 MR. RODRIGUEZ: They're -- they're --

21 QUESTION: Is the whole world protected by the
22 due process clause of the American Constitution?

23 MR. RODRIGUEZ: It's sad to say, no. But in
24 this instance, when they have an action against an
25 employee who lives in -- in the United States, and they're

1 filing under State law right of -- a tort action under the
2 State law of Virginia, and then if there is affirmative
3 Government action to deprive them of the right to
4 litigate, due process does kick in.

5 They have a right to litigate in Virginia. But
6 for the fact that he was a Federal employee, they would
7 have had this issue resolved three or four years ago.

8 QUESTION: The whole -- the whole world has a
9 right protected by the United States Constitution to
10 litigate in Virginia?

11 MR. RODRIGUEZ: No. If -- if -- if I, as a
12 tourist, am in France and I crash into someone's car, and
13 I go back and -- and the people in France come over to
14 Virginia --

15 QUESTION: Right. The Frenchman is protected by
16 the United States Constitution?

17 MR. RODRIGUEZ: To ensure that he has due
18 process within the judicial system to have his case
19 litigated.

20 QUESTION: That's new to me.

21 QUESTION: Why -- why on Earth does the due
22 process clause extend to a citizen of France, who is
23 injured in -- who is injured in France?

24 MR. RODRIGUEZ: We're not -- we're not extending
25 the due process clause to France. What we're saying is

1 that once the person comes in and seeks access to the --
2 the U.S. courts, he has the same rights as any U.S.
3 citizen to those -- to the --

4 QUESTION: What's -- what's your authority from
5 this Court for that proposition?

6 MR. RODRIGUEZ: I -- I have none, Your Honor.

7 QUESTION: Mr. Rodriguez, did you make this
8 constitutional argument in your brief?

9 MR. RODRIGUEZ: Not in my brief. But I --

10 QUESTION: I'm surprised you spent all the time
11 on a constitutional argument. I thought this was a
12 statutory case.

13 MR. RODRIGUEZ: It is a statutory case, Your
14 Honor. I backed into that somewhat unwanting here.

15 QUESTION: It was suggested in your brief. I
16 think the argument --

17 MR. RODRIGUEZ: It was suggested --

18 QUESTION: It's the point in your brief that
19 most troubles me, as a matter of fact.

20 MR. RODRIGUEZ: It was suggested in my brief in
21 the sense that it follows the Petrousky argument in the --
22 that -- that the Westfall Act assured that there would be
23 judicial review and that --

24 QUESTION: Your point isn't that it's
25 unconstitutional; your point is that it would be -- since

1 it would be unconstitutional if it were interpreted the --
2 the way you don't want it interpreted, we shouldn't
3 interpret it that way. We should avoid the constitutional
4 difficulty. That's your argument; right?

5 MR. RODRIGUEZ: Correct, Your Honor.

6 If there's no more questions, I'll reserve time.
7 Thank you.

8 QUESTION: Very well, Mr. Rodriguez.

9 Mr. Stewart.

10 ORAL ARGUMENT OF MR. MALCOLM L. STEWART

11 FEDERAL RESPONDENT IN SUPPORT OF PETITIONERS

12 MR. STEWART: Mr. Chief Justice, and may it
13 please the Court:

14 The position of the United States is that under
15 the Westfall Act, the Attorney General's scope
16 certification is subject to review by a court at the
17 behest of a tort plaintiff. The large majority of courts
18 of appeals to have addressed the question have also
19 concluded that the scope certification is subject to
20 judicial review. That view is consistent with the text of
21 the Westfall Act and with the strong presumption that
22 administrative action is judicially reviewable.

23 Moreover, to permit judicial review of the
24 Attorney General's scope certification does not render the
25 Act susceptible to a challenge based on Article III.

1 First, the text of the Act does not definitively
2 resolve the interpretive question that this case presents.
3 Respondent, in his amicus, placed principal reliance on
4 the statute's use of the word "shall." And in Johnson v.
5 Carter, the predecessor Fourth Circuit case to this one,
6 the Fourth Circuit also concluded that the word "shall"
7 reflected an unambiguous congressional intent to preclude
8 review of the certification.

9 QUESTION: And whereabouts in the statute does
10 the word "shall" that you're referring to --

11 MR. STEWART: The word "shall," in section 2679
12 (d)(1) says, "Upon certification by the Attorney General
13 that the defendant employee was acting within the scope of
14 his office or employment" --

15 QUESTION: Oh, you're going a little fast.

16 MR. STEWART: Oh, I'm sorry.

17 QUESTION: Would you repeat?

18 MR. STEWART: "Upon certification by the
19 Attorney General that the defendant employee was acting
20 within the scope of his office or employment at the time
21 of the incident out of which the claim arose, any civil
22 action or proceeding commenced upon such claim in the
23 United States District Court shall be deemed an action
24 against the United States under the provisions of this
25 Title and all references thereto, and the United States

1 shall be substituted as the party defendant."

2 And 2679 (d)(2) contains similar language with
3 respect to actions that are commenced in State court.

4 QUESTION: No, it contains more than similar
5 language, it goes on to say, "This" -- in (2) -- which
6 relates to removal -- it says, "This certification of the
7 Attorney General shall conclusively establish scope of
8 office or employment for purposes of removal."

9 MR. STEWART: Right.

10 QUESTION: Now, what is the position of the
11 United States when -- when something is removed? You have
12 to accept the -- I mean it's clear from (2) that -- that
13 you must accept the -- the scope of employment
14 determination for purposes of removal, right?

15 MR. STEWART: That's correct, Your Honor. And
16 our position is that if the Attorney General certifies in
17 a case that arises in State court, and the case is removed
18 to Federal District Court, and the district court reviews
19 the certification and determines that the defendant
20 employee was not acting within the scope of employment,
21 the case, nevertheless, remains in Federal court because
22 of the -- the conclusive "for purposes of removal"
23 language of (d)(2).

24 QUESTION: Well, that's very strange, isn't it?

25 MR. STEWART: Well, it's certainly the normal

1 rule in --

2 QUESTION: What is the basis for jurisdiction
3 then?

4 MR. STEWART: The -- the normal rule of Federal
5 jurisdiction, obviously, is that a Federal defense, by
6 itself, won't confer jurisdiction. And that's the
7 well-pleaded complaint rule.

8 But as a constitutional matter, it's certainly
9 clear that Congress may provide a Federal forum when the
10 cause of action arises under State law, but if a viable or
11 colorable Federal defense is asserted -- as this Court
12 said in Mesa v. California.

13 And essentially, we read 2679 (d)(2) to reflect
14 a congressional determination that where the Attorney
15 General has certified, the Federal defense at least
16 remains colorable.

17 QUESTION: Yes, but even -- even assuming that
18 it's constitutional to do that -- and I think there is
19 some question about it -- it is certainly weird to do
20 that. To say it must remain in Federal court, but allow
21 the Federal court to decide -- and require the Federal
22 court to decide that in fact this is not a scope of
23 Federal employment case.

24 MR. STEWART: Well --

25 QUESTION: And not allow the Federal court, once

1 having decided that, to send it back to the State court.
2 That's very, very strange.

3 MR. STEWART: Well, I think, as Mr. Kellogg has
4 pointed out in his brief, there is a divergence of opinion
5 among the Circuits as to the factors to be taken into
6 account in certifying and the factors to be taken into
7 account in judicial review. And, in particular, the
8 dispute pertains to the question of whether the
9 plaintiffs' allegations should be taken as true in making
10 the initial certification and in conducting judicial
11 review thereof.

12 And at least on some occasions, the Attorney
13 General will base her -- or her designee -- will base the
14 scope determination on the view that the acts, as alleged
15 in the complaint, are within the scope.

16 The district court may disagree with that
17 determination -- may determine that if the facts, as
18 alleged, were proved to a tee, the defendant employee
19 would be acting with the -- outside of his scope of
20 employment. But the possibility still remains that the
21 facts, as proved at trial, would establish tortious
22 conduct, but conduct within the scope of employment. And
23 that --

24 QUESTION: But could -- it could well be that
25 the scheme makes a lot more sense if we just say that it's

1 not reviewable at all, whether it's for removal or
2 anything else -- once that certification is filed?

3 MR. STEWART: Well --

4 QUESTION: And of course I assume that the
5 United States administratively could nevertheless allow
6 the claim in this case even though the United States
7 itself wouldn't be liable.

8 MR. STEWART: It certainly --

9 QUESTION: Couldn't it?

10 MR. STEWART: In this case there is, 21 U.S.C.
11 904, the administrative claim procedure to which
12 Mr. Rodriguez referred -- doesn't apply across the board.
13 It says that, notwithstanding the foreign tort exception,
14 the Department of Justice may settle administratively a
15 claim based on the actions of one of its employees abroad.

16 QUESTION: Yes. And presumably the Government
17 is still considering this claim? Is it?

18 MR. STEWART: That's correct.

19 QUESTION: Yes.

20 QUESTION: Mr. Stewart, do you have -- I'm sorry
21 -- before you get off this point -- or the Government
22 could review the Attorney General's determination. Set up
23 some board to review it. I mean it's very strange the
24 Government is coming in and asking us to protect
25 defendants from you.

1 MR. STEWART: It's --

2 QUESTION: Why don't you protect defendants from
3 you?

4 MR. STEWART: There is certainly something
5 unusual about the Department of Justice affirmatively
6 asserting the position that one of its acts is judicially
7 reviewable. And I think there are two reasons that we are
8 here today.

9 The first is that the Court has often stressed
10 that there is a strong presumption in favor of judicial
11 review of executive action; that that presumption is
12 overcome only in very unusual circumstances; and,
13 consequently, we feel an obligation not to assert a
14 non-reviewability argument unless there are compelling
15 reasons for it.

16 The second is that during congressional
17 consideration of the bill that became the Westfall Act, we
18 represented to Congress our view that under the Act, the
19 scope certification would be judicially reviewable.
20 That's not binding us on it, but I think the Department is
21 --

22 QUESTION: Well, it's also true, isn't it, that
23 the statute does provide that the defendant can get
24 protected from you by appealing an adverse -- a refusal to
25 certify?

1 MR. STEWART: That's correct. The statute says
2 specifically that if the Attorney General declines to
3 certify scope, the defendant employee may seek a
4 determination from the -- the district court.

5 QUESTION: I should have said it's the
6 plaintiffs that -- that have to be protected from you,
7 right, not the defendants. I misspoke. The defendant can
8 come to court, but the plaintiff can't?

9 MR. STEWART: That's correct. And to respond to
10 your question, Justice O'Connor, I think to hold that the
11 -- the certification is not judicially reviewable
12 obviously would take the courts out of resolving a lot of
13 questions that the -- the courts have found difficult and
14 -- and troubling. I don't --

15 QUESTION: Well, let -- let me ask you this.
16 Does the Attorney General sometimes come in and say yes
17 this per -- this employee was acting within the scope of
18 his employment, but the accident didn't occur or the
19 events didn't occur?

20 MR. STEWART: That -- that has sometimes been
21 the base -- basis of the scope certification; that a tort
22 was alleged to have occurred. The Attorney General or her
23 designee investigates the circumstances and concludes
24 that, at the time the wrongful conduct was alleged to have
25 happened, the defendant employee in fact engaged in no

1 tort, but was simply going about his or her --

2 QUESTION: So, what kind of a certification is
3 entered then? Do you say, I certify the employee was
4 acting within the employment, but it didn't happen, or
5 what do you do?

6 MR. STEWART: Well, typically, the certification
7 itself would be a fairly sparse document. A certification
8 would simply say something to the effect of this on; that
9 I've investigated the circumstances of -- of the
10 allegations and have concluded that the defendant employee
11 was acting within the scope of employment at the time of
12 -- of the alleged incident.

13 Typically, there would be supporting papers,
14 either a memorandum in support of the notion of notice of
15 substitution or an affidavit that would flesh out the
16 basis for the conclusion.

17 I think here we had something of a truncated
18 proceeding because the scope certification was undertaken
19 immediately after the Fourth Circuit's decision in Johnson
20 v. Carter. And I think it's likely that because the
21 Fourth Circuit had very squarely held there would be no
22 judicial review, there was probably less of a -- a sense
23 of a need to make a record, and certain --

24 QUESTION: But isn't it correct that in Justice
25 O'Connor's hypothetical you would have the case removed,

1 and then you would file an answer denying your liability?
2 I mean you -- you defend on the merits that -- that the
3 United States would then be the defendant -- in her
4 hypothetical she gave, where you said he was in the scope
5 of his employment, but there was no accident. You'd get
6 removal and substitution, and then you'd defend on the
7 merits, wouldn't you?

8 MR. STEWART: That's correct. Although if the
9 plaintiff wanted to seek judicial -- again, under the view
10 of most Circuits, and under the view that we believe is
11 the correct one, of the Westfall Act --

12 QUESTION: Oh, I understand.

13 MR. STEWART: The plaintiff could seek a
14 judicial review of that -- that process.

15 I think the proper construction --

16 QUESTION: Why would the plaintiff seek judicial
17 review? I mean ordinarily it's more desirable to have the
18 United States than the employee as the defendant, so the
19 -- when -- but when there's an exception, as there is
20 here. Otherwise, the certification is more likely than
21 not to please the plaintiff, is it not?

22 MR. STEWART: That's correct. I think the class
23 of cases in which the certification is challenged tends to
24 be an unrepresentative sample of tort suits against
25 Federal employees. Because the -- the challenge is

1 generally made when there appears likely to be an
2 exception, barring suit against the Government under the
3 FTCA.

4 QUESTION: Well, I -- I take --

5 QUESTION: Do we know -- I mean I suppose one of
6 the considerations to bear in mind in -- in trying to
7 infer what Congress had in mind was the risk that it might
8 have been guarding against -- and do we know -- do you
9 know either in gross figures or in percentage terms how
10 frequently the certification in fact results in a
11 situation like this in which the United States ends up
12 claiming an immunity so that there can be no recovery
13 against anybody?

14 MR. STEWART: I -- I don't know the answer to
15 that either in gross terms or -- or percentage terms. And
16 to some degree it would depend on the perspicuity of
17 plaintiff's lawyer. That is, if all plaintiff's lawyers
18 were fully aware of the ram -- of all the ramifications of
19 what they did, presumably they would not name the
20 individual defendant -- a employee -- as the defendant to
21 begin with unless they suspected there was some bar to
22 suit against the -- the United States under the FTCA.

23 So that might affect the calculus.

24 QUESTION: Mr. Steward, I -- I must -- I'm
25 really impressed with the generosity of the Government's

1 position in this case. You have a statute that says
2 "shall" categorically. And -- and -- and you argue to us
3 that that does not mean "shall." I can think of a lot of
4 other areas where there is much less clear language about
5 judicial review -- in immigration, in -- in review of --
6 of administrative determinations concerning Federal
7 employment matters.

8 Can we take it to be the consistent position of
9 the United States that there should always be judicial
10 review? Is -- is that a new -- a new approach that the
11 Government is going to take?

12 MR. STEWART: I -- I guess I'd have -- I guess
13 I'd have three responses to that. First, the -- the kind
14 of situations in which we would most want to assert a
15 non-reviewability argument would be those in which the
16 administrative decis -- determination rested on the
17 exercise of discretion or involved a substantive area that
18 courts were ill-equipped to consider -- such as the
19 national security area.

20 Here, as to the question of whether a particular
21 individual was acting within the scope of employment at a
22 particular time, this is the kind of thing that courts
23 resolve all the time.

24 QUESTION: I can see the Attorney General coming
25 in and saying, DEA agents, you don't know, Your Honor,

1 what the DEA agent is like. I mean the argument here is
2 that he is always on duty. He is always on duty. Always
3 dressed to look like a -- like a drug dealer, and even
4 when he walks down the street he's on duty. Your Honor,
5 you can't possibly know what it's like. I, the Attorney
6 General, know that.

7 This is not an expertise area?

8 MR. STEWART: Well, clearly there are some --
9 some cases at the margins in which normal scope of
10 employment principles will be more difficult to apply to a
11 particular Government employee. But I think the vast bulk
12 of cases will involve Federal employees who were
13 performing fairly traditional tasks. They will call --
14 judicial review will call upon the courts to perform
15 fairly traditional functions.

16 QUESTION: Well, you don't think the language is
17 somehow inadequate, do you, when it says "shall be
18 substituted"?

19 MR. STEWART: Well, the -- I think the proper --

20 QUESTION: Do they have to say "and we really
21 mean it" or what?

22 (Laughter.)

23 MR. STEWART: Well, I -- two questions. I think
24 the proper understanding of the word "shall" here may --
25 may be assisted by comparing this case to United States v.

1 Smith, which this Court decided about four terms ago. And
2 in Smith, the -- it involved a medical doctor accused of
3 malpractice. The Attorney General certified that that
4 doctor had been acting within the scope of employment.
5 And the plaintiff said, we don't challenge the scope
6 determination, but we nevertheless contend that
7 substitution is improper because an FTCA exemption would
8 bar a suit against the United States.

9 And this Court held, no, when the defendant
10 employee was acting within the scope, that employee is off
11 the hook even if there is no recovery under the FTCA. And
12 I think that's the gist of the word "shall." That if the
13 certification is made and is determined to be valid, a
14 court cannot say for some other reason, we will
15 nevertheless resubstitute the individual defendant for the
16 United States.

17 QUESTION: Why require the determination to be
18 made at all then? I mean why not just leave it to the --
19 I thought the purpose of the determination was to get this
20 thing done right away, so the employee doesn't have to
21 litigate this matter in court. You know, a quick
22 determination. But you're saying it's going to have to be
23 litigated anyway, even if there is the determination.

24 MR. STEWART: Well, as Justice Ginsburg quest --
25 Ginsburg's question points out, without knowing the -- the

1 percentages, there will certainly be a large number of
2 cases in which the certification will not be challenged,
3 because it's not in the plaintiff's interest to challenge
4 it -- in the plaintiff's interest to sue the United
5 States.

6 So, at least in a large class of cases, the
7 certification will help everybody out -- will be of
8 service to the plaintiff --

9 QUESTION: Well, aren't there instances in which
10 in State courts there is a pleading of malice or assault
11 and battery, and there's an attempt to get a jury trial in
12 the State court?

13 MR. STEWART: That's correct. And courts -- the
14 Attorney General and reviewing courts have devised various
15 means of dealing with these situations. And one of them
16 is that traditionally the Attorney General's designee has
17 investigated the circumstances of -- of the alleged in --
18 I'm sorry --

19 QUESTION: Do -- do you, in any event, share the
20 Petitioners' view that there are some constitutional
21 concerns if, say, a State cause of action in -- before a
22 jury trial, was foreclosed by reason of the certification
23 that's non-reviewable?

24 MR. STEWART: No, we don't.

25 QUESTION: Thank you, Mr. Stewart.

1 Mr. Maloney, we'll hear from you.

2 ORAL ARGUMENT OF ANDREW J. MALONEY, III

3 ON BEHALF OF RESPONDENT LAMAGNO

4 MR. MALONEY: Thank you, Mr. Chief Justice, and
5 may it please the Court:

6 With all respect to Petitioners' representation
7 that the Federal -- the old Federal Drivers Act did not
8 contain language with respect to judicial review, I'd like
9 to quote subsection (d) from the old Federal Drivers Act,
10 which is 2679, codified in 1982.

11 QUESTION: And where are you reading from, so
12 that we might follow you?

13 MR. MALONEY: Well, on page 9 of Respondent's
14 brief.

15 QUESTION: Thank you.

16 MR. MALONEY: "Should a United States district
17 court determine on a hearing on a motion to remand held
18 before a trial on the merits that the case so removed is
19 one in which a remedy by suit within the meaning of
20 subsection (b) of this section is not available against
21 the United States, the case shall be remanded to State
22 court."

23 That's pretty clear language, I believe, that
24 empowers the courts, as that statute was written, to
25 review scope of the employment issues, to review the

1 Attorney General's certification. That empowered -- that
2 gave the courts that power.

3 The new Westfall Act passed in 1980 -- 88 --
4 took that power away.

5 QUESTION: But now 2679 (d) just talks about on
6 a motion to remand, doesn't it?

7 MR. MALONEY: That's correct, Your Honor. But
8 it clearly articulates that the United States District
9 Court is making a determination on a hearing.

10 QUESTION: Yes. But on a motion to remand. And
11 at least the Westfall Act seems to set out several
12 different sections. And it seems to treat a little bit
13 differently a motion to remand and the simple
14 determination of whether a suit shall proceed.

15 MR. MALONEY: That's correct, Mr. Chief Justice.

16 But the stat -- the subsection here goes on to
17 say, when there's not an available remedy against the
18 United States, which implies that what they're talking
19 about is where the district court found that the
20 certification for some reason was invalid, or that a
21 district court found that the employee was not acting in
22 the scope of his employment, and therefore had the ability
23 to remand that case to the State court.

24 The reading that the Government and the Third
25 Circuit give on the (d) (2) clause in the current Westfall

1 Act, with respect to the language of "conclusive for
2 purposes of removal," is a strange reading.

3 QUESTION: May I go back to the provision you
4 quote earlier? I had thought that provision would cover a
5 case where it was even perfectly clear that the defendant
6 was acting in the scope of his employment, but
7 nevertheless, the United States would have a defense under
8 the Federal Tort Claims Act that the individual would not
9 have -- such as willful, more compounded, and things like
10 that.

11 Because even -- even if he's in the scope of his
12 employment, there would be cases that would be subject to
13 remand under this provision, I think.

14 MR. MALONEY: Well, that's -- that's correct,
15 Your Honor. But the design was if he was acting in the
16 scope of his employment, the indi -- individual employee
17 would not be sued. It would be the United States that
18 would be -- would be held accountable for the employee.

19 QUESTION: Yes, but when the United States
20 cannot be held accountable, then the individual remains
21 accountable, even though he was acting in the scope of his
22 employment.

23 MR. MALONEY: Well, I don't believe that's
24 correct, Justice Stevens. Under the Federal Tort Claims
25 Act, they have a provision that says there's only one suit

1 that can be brought. And that is against the United
2 States Government if this employee was acting in the scope
3 of his employment.

4 So if he was acting in the scope of his
5 employment, they can only bring one lawsuit, and that's
6 against the Government.

7 So if it's barred because of a Federal Tort
8 Claims exception --

9 QUESTION: You -- you mean you can't name the
10 employee as a -- as a second party?

11 MR. MALONEY: Well, you can name him --

12 QUESTION: Suppose the allegation is the
13 employee acted -- it was an assault and battery or acted
14 with malice, I assume that's beyond recovery under the
15 Federal Tort Claims Act? You can only bring one suit
16 against the Government? That's not right.

17 MR. MALONEY: Justice Kennedy, if the employee
18 is held to be with -- within -- acting within the scope of
19 his employment -- and albeit there are some intentional
20 torts where the Government would say that employee was not
21 acting in the scope of his employment -- but let's assume
22 for a second that he's found to be acting within the scope
23 of his employment. He is then protected under the Act,
24 and he can't be sued personally. It's the United States
25 that has to be sued.

1 QUESTION: In other words, even if he assaulted
2 -- if the U.S. employee assaulted the plaintiff, if the
3 United States certified that this was within the scope of
4 employment, your argument is thus unreviewable, and that's
5 an exception to the Tort Claims Act because it's
6 intentional conduct -- intentional tort -- there is no
7 remedy against anybody? I think that's -- that's your --

8 MR. MALONEY: That -- that's correct, Justice
9 Ginsburg. That is --

10 QUESTION: Yes. And it isn't either/or --
11 either the United States is liable -- if so, it's
12 exclusively liable, and the exceptions apply; or if the
13 United States -- if it's outside the scope of the
14 employment, then the employee may be liable, but it can't
15 be both?

16 MR. MALONEY: That's correct. They're mutually
17 exclusive, Justice Ginsburg, in our opinion.

18 The Government pointed out that under the
19 current Westfall Act they give a interpretation for
20 conclusive -- for purposes of removal under the (d)(2)
21 subsection that if a court reviewed the scope of
22 employment issue, found the employee not to be acting in
23 the scope of the employment, that they could somehow keep
24 the case in Federal court.

25 Well, the -- there is nothing in the legislative

1 history that suggests that Congress intended to create
2 this additional jurisdiction. In fact, subsection (d)(3)
3 under the Act specifically says -- and -- and I should
4 draw -- step back for a second -- (d)(3) is the section
5 that provides -- the only section under the Westfall Act
6 that provides for judicial review, and that is when an
7 employee is denied certification. He's entitled to
8 petition the court for review.

9 If, upon review, the court finds that he was not
10 acting in the scope of his employment, the statute
11 mandates -- it says that the -- the court shall remand
12 this case back to the State court. Which is a clear
13 indication that Congress meant to have State cases tried
14 in State court. The only reason they wanted it in Federal
15 court is because they assume that the United States is a
16 party after they have certified.

17 QUESTION: Well, let me ask you this. Suppose a
18 case gets to the Federal court on the basis that the
19 employee was a Federal employee. And under your theory,
20 if the certification is filed by the Attorney General that
21 the employee was acting within the scope of employment,
22 that ends the matter. And the court then cannot ever
23 inquire into the basis of its jurisdiction?

24 MR. MALONEY: That's correct. I believe that's
25 what Congress intended in the legislation.

1 QUESTION: Which is kind of curious, isn't it?

2 MR. MALONEY: Well, it's -- it's -- it's not for
3 me to speculate. I believe that's -- that Congress was
4 pretty clear on that, Justice O'Connor, in making a
5 balancing test between the rights of plaintiffs and the
6 rights of Federal employees.

7 And as this Court noted in the Smith case that
8 was cited by my adversary, Congress gave less solicitude
9 for plaintiffs' rights in passing this Act.

10 QUESTION: Well, there's no doubt that Congress
11 did just that with respect to removal at least. Because
12 with respect to removal, Congress did say, "and we really
13 mean it," right, with -- with that spec -- separate
14 provision that says -- and the only question is whether
15 they did a similar thing with respect to -- to liability
16 at all?

17 MR. MALONEY: Well, Justice Scalia, the -- the
18 language in (d)(2) -- "and we really mean it" -- although
19 not found in (d)(1), does not undermine the clear and
20 plain language in the (d)(1) clause, which says that upon
21 certification by the Attorney General, this shall be
22 deemed an action against the United States, "and the
23 United States shall be substituted." That's pretty clear.

24 QUESTION: So once the United States is
25 substituted, even if it's determined that it comes within

1 an exception to the Tort Claims Act, why isn't it just
2 like you have an ordinary diversity suit, and the
3 defendant, two days after the complaint is filed, moves to
4 the same State as plaintiff, so you have no more
5 diversity? It doesn't -- doesn't wreck Federal
6 jurisdiction, does it?

7 MR. MALONEY: No. If the plaintiff moves after
8 a complaint has been filed, it will not wreck --

9 QUESTION: So then you -- then you have Federal
10 courts trying a case between two people of the same
11 citizenship. Why is that any different from the United
12 States having been the real party, and then the United
13 States dropping out because the -- the exception applies,
14 but the court finds in -- was -- was outside the scope of
15 the employment, so the employee gets substituted? Why is
16 -- why should that be different?

17 MR. MALONEY: Well, that wouldn't be different.
18 If I understand your -- your question, Justice Ginsburg,
19 if the case is in Federal court by virtue of diversity,
20 then it can stay in Federal court. There is a Federal
21 question. There is a Federal subject matter jurisdiction
22 over the diversity action.

23 QUESTION: But the diversity has in fact ended.
24 Here there's a Federal -- there's the suit against the
25 United States -- certainly a secure basis for Federal

1 jurisdiction, a suit against the United States.

2 MR. MALONEY: That's correct. And that was the
3 presumption that Congress was making -- if the United
4 States was a party, that they would have Federal
5 jurisdiction -- even if there wasn't diversity. And
6 that's what they -- that's what they meant by the language
7 --

8 QUESTION: But that once existed, just as
9 diversity once existed in my other case, so once Federal
10 jurisdiction having latched on, the court can continue to
11 hear the case, even if the basis for Federal jurisdiction
12 terminates after the proceeding begins?

13 MR. MALONEY: Well, that's correct, under
14 appendant jurisdiction, a district judge --

15 QUESTION: You wouldn't acknowledge that it once
16 existed? I mean, surely a proper analog, as I understand
17 your brief, would be a situation in which it was thought
18 that one of the parties was from another State, and then
19 it is discovered in the Federal court that he was never
20 from another State. That's the proper analog. Here it
21 was thought the person was -- was within the scope of
22 employment, and it turns out that he wasn't within the
23 scope of employment.

24 So that ex ante, when the suit was filed, the --
25 the predicate of jurisdiction did not exist in this case;

1 isn't -- isn't that the proper analog?

2 MR. MALONEY: That -- that is absolutely
3 correct, Justice Scalia.

4 I see that my time is up. I thank the Court for
5 its time.

6 QUESTION: Thank you, Mr. Maloney.

7 Mr. Kellogg, we'll hear from you.

8 ORAL ARGUMENT OF MICHAEL K. KELLOGG

9 BY INVITATION OF THE COURT, AS AMICUS CURIAE,

10 IN SUPPORT OF THE JUDGMENT BELOW

11 MR. KELLOGG: Thank you, Mr. Chief Justice, and
12 may it please the Court:

13 The only part of the language or structure of
14 the Westfall Act that the Government is able to rely on at
15 all to try to undermine the mandatory language of the
16 statute is subsection (d)(2), which says that
17 certification shall be conclusive for purposes of removal.
18 The United States tries to argue that the implication of
19 that provision is that it's not conclusive for purposes of
20 substitution.

21 There are several reasons why that implication
22 doesn't hold. First of all, as Mr. Maloney pointed out,
23 it does not change the mandatory language used in the rest
24 of the statute that says the United States shall be
25 substituted, period.

1 The only condition precedent for substitution
2 listed in the statute is certification. It's the only
3 event that the district court is charged with determining.

4 The second reason the implication doesn't hold
5 is that it's counterbalanced by subsection (d)(3), which
6 says that if the Attorney General does not certify, then
7 the plaintiff can seek a certification from the court that
8 he was in fact acting within the scope of the employment.

9 QUESTION: You mean the defendant?

10 MR. KELLOGG: No, the plaintiff. I mean the
11 defendant -- you're right. I apologize.

12 The defendant can seek a ruling from the court
13 --

14 QUESTION: Is it not correct that in that case
15 he can get the -- a State judge to review the United
16 States Attorney General's refusal to certify?

17 MR. KELLOGG: No. Because the statute in,
18 (d)(3), allows the United States to remove it to Federal
19 court.

20 QUESTION: No, I'm thinking in cases in which
21 the United States refused to certify -- the (d)(3)
22 situation.

23 MR. KELLOGG: That's correct. Then the
24 defendant petitions for certification. The United States
25 then removes the case to Federal court under (d)(3). And

1 a Federal court judge will make that determination.

2 And then, if he rules against the defendant --
3 says he was acting outside the scope of employment -- the
4 case is remanded to State court.

5 But by providing a specific provision that says
6 certification is reviewable at the behest of the
7 defendant, with no corresponding provision saying it's
8 reviewable at the behest of the plaintiff, the implication
9 there cancels out the implication that the Government
10 tries to draw from (d)(3) -- that it's only conclusive for
11 purposes of removal.

12 A third reason --

13 QUESTION: Or you'd say you don't really get
14 down to the -- to the implications when you have a
15 "shall"?

16 MR. KELLOGG: Exactly. That's our first
17 argument. The statute repeats "shall" several times.

18 QUESTION: Or that each side has an expressio
19 unius argument going for it, so it cancels out?

20 MR. KELLOGG: They cancel out, and we're left
21 with the plain language that says "shall," and mandates
22 this result by the district court.

23 If you want an explanation --

24 QUESTION: But I don't quite understand why that
25 plain language carries you that far. Because it does

1 carry it -- there shall be removal -- but does that
2 preclude necessarily the judicial review of the
3 determination?

4 MR. KELLOGG: It says there shall be
5 substitution, period.

6 QUESTION: All right, that there's substitution.

7 MR. KELLOGG: Now, I don't think you can go on
8 and say, well, okay, but the district court could
9 resubstitute.

10 QUESTION: Why can't you? I mean it doesn't
11 foreclose it. It just says there shall be substitution
12 and removal. But having been removed, why does that
13 foreclose treating the defendant just like you treat the
14 plaintiff? Because on one hand it says it is subject to
15 review.

16 MR. KELLOGG: Well, if you look at an analogous
17 statute -- let's say 24(a) of the Federal --

18 QUESTION: Yes, but if you have to get outside
19 this statute, then it isn't quite as plain as you were
20 representing it to --

21 MR. KELLOGG: No, I think -- I think it is quite
22 plain. But if -- I think the analogy will help reveal
23 just why it's so plain.

24 Under 24(a), which is intervention as a right,
25 it says if certain circumstances are met, certain criteria

1 are met, the -- the person shall be allowed to intervene.

2 Now, the district court has no discretion there.

3 If those criteria are met, he cannot say, okay, you can
4 intervene, you've met the criteria.

5 QUESTION: Correct.

6 MR. KELLOGG: Now get out.

7 QUESTION: But that is always subject to review
8 by the court of appeals and said, well, we took a second
9 look at it and say they weren't -- those criteria --

10 MR. KELLOGG: But those criteria were not met.

11 QUESTION: Right.

12 MR. KELLOGG: But the criteria in the statute
13 are the only criteria that the court is charged with
14 determining.

15 QUESTION: Right.

16 MR. KELLOGG: That's why they call it
17 intervention as a right.

18 QUESTION: The same thing here. The criteria
19 are whether he's in the scope of employment.

20 MR. KELLOGG: No, that is not what the statute
21 says. The only criteria listed in the statute is
22 certification.

23 QUESTION: Well, certainly the Attorney General
24 doesn't have the authority to certify if the man was not
25 in the scope of his employment?

1 MR. KELLOGG: The Attorney General is charged
2 with determining whether he's within the scope of
3 employment.

4 QUESTION: Right.

5 MR. KELLOGG: That is correct.

6 QUESTION: And it's -- and it is reviewable in
7 some situations, you admit?

8 MR. KELLOGG: At the behest of the defendant.

9 QUESTION: Right.

10 MR. KELLOGG: And the reason for that is that --

11 QUESTION: By statute?

12 MR. KELLOGG: By statute.

13 QUESTION: Right.

14 MR. KELLOGG: In the ordinary course of events,
15 of course, the admission of the Attorney General that the
16 employee acted within the scope of the employment is going
17 to be contrary to the interest of the United States.

18 QUESTION: But --

19 MR. KELLOGG: And there was needed to be some
20 mechanism which the defendant employee could challenge
21 that certification.

22 QUESTION: Yes, but can you go back for a
23 minute, which I -- I thank you very much for your brief,
24 by the way, which was very helpful. And the one thing I
25 found missing in this -- because I do think it's ambiguous

1 and I'd like you to address -- is what I'd call a page of
2 history. I mean if you go back to Gregoire and Biddle and
3 Learned Hand, people -- plaintiffs could sue Government
4 employees, but they couldn't recover if it was within the
5 scope of their employment; right?

6 Then this Court, in Westfall, limited that;
7 right?

8 MR. KELLOGG: That's correct.

9 QUESTION: And said, well, sometimes you can.
10 But what they were limiting was a plaintiff's right to
11 recover if it wasn't in the scope of employment, as
12 decided by a judge and a jury. That was the original
13 right.

14 So why in heaven's name would we read this
15 statute not simply to restore scope of employment, but
16 also to say the plaintiff no longer has a right to that
17 decision by a judge and a jury? So that if, to take a
18 case out of the First Circuit, there is an allegation that
19 an employee raped a woman on the job -- that wasn't quite
20 the case, but it was a sexual assault -- whether or not
21 that occurred will be decided not by a judge or a jury,
22 but by the Attorney General.

23 Why would one read an ambiguous statute to reach
24 a result like that, that is so contrary to the history of
25 this area of the law?

1 MR. KELLOGG: There is two reasons. First of
2 all, the statute is not ambiguous. It directs the
3 district court to substitute the United States upon
4 certification.

5 The second reason you read that is because of
6 the policy purposes of having immunity --

7 QUESTION: The policy purposes of having the
8 Attorney General decide whether an assault and battery
9 took place, the policy and purposes for having the
10 Attorney General decide the facts of the case, to decide
11 -- the Attorney General should decide if the action is
12 taken away from the plaintiff rather than a judge and a
13 jury -- or at least a judge?

14 MR. KELLOGG: The policy purpose is to allow the
15 Attorney General to articulate the circumstances under
16 which the United States is prepared to take responsibility
17 for the action of its employee as taken within the scope
18 of employment. Immunity always erects a barrier which
19 could lead to allegations of --

20 QUESTION: Immunity always is decided after an
21 initial determination, say, by an agency or someone, by
22 the judge or the jury or both.

23 MR. KELLOGG: Immunity --

24 QUESTION: Is there something in the legislative
25 history that says that Congress wanted not only to restore

1 scope of immunity -- scope of employment immunity, but
2 also to take the plaintiff's right to have review of that
3 question by a judge and hand it to one of the parties in
4 the case?

5 MR. KELLOGG: It's -- it's not handing it to one
6 of the parties. What it is is allowing the Attorney
7 General to make a determination based upon Federal law as
8 to --

9 QUESTION: But in this case, to be the judge of
10 her own case. That's what it comes down to ultimately,
11 does -- doesn't it?

12 MR. KELLOGG: No, it's --

13 QUESTION: Here if there is a certification,
14 everybody is off the hook. The employee is off the hook
15 and the United States is off the hook. So you're letting
16 an executive official make the determination that no one
17 is liable to this private party who is allegedly injured
18 as a result of the conduct of a Government agent.

19 MR. KELLOGG: That is correct.

20 QUESTION: It is the Attorney General being
21 judge in her cause, in that sense, is it not?

22 MR. KELLOGG: Not -- not in her own cause of
23 action, but in the cause of action of her employee. In
24 the vast bulk of cases --

25 QUESTION: And -- and of the Government?

1 MR. KELLOGG: In the vast bulk of cases, as you
2 yourself pointed out, the admission of the Attorney
3 General that the employee was acting within the scope of
4 employment will be essentially against interest. It will
5 be something that the plaintiff will want.

6 It's only in the small number of cases where the
7 United States has retained an immunity, so that it is
8 itself not subject to suit, that the Attorney General's
9 certification --

10 QUESTION: I'm not sure that's correct to say
11 that it's against the Government's interest. Because a
12 government typically protect their employees, even when
13 they're -- when they're sued for things that might be
14 outside the scope of the employment. Because there is an
15 interest in the morale of the work force to give them
16 protection of this kind. It's not necessarily entirely
17 against the Government's interest.

18 MR. KELLOGG: No, that's the whole point of
19 immunity, of course. Congress made a judgement that
20 Federal employees were particularly vulnerable to suit,
21 and that they needed this sort of protection.

22 Now, if you breach that barrier --

23 QUESTION: Or they're willing to have the
24 Federal Government pick up the tab on the liability -- is
25 what they're --

1 MR. KELLOGG: That's correct, they -- they are.
2 If you breach that barrier --

3 QUESTION: If that's in the overall best
4 interest of the work force and the United States.

5 MR. KELLOGG: That's correct.

6 QUESTION: Mr. Kellogg, could you say something
7 about the -- the due process argument? I mean the
8 arguments made that we should interpret "shall" to mean
9 something other than "shall" because of the constitutional
10 problems that arise otherwise. Is there a constitutional
11 due process problem about taking away a cause of action?

12 MR. KELLOGG: No, I don't think so. I think
13 your answer, quite frankly, was -- was perfectly correct
14 on that point.

15 QUESTION: Is there --

16 MR. KELLOGG: The statute was passed before the
17 acts in question occurred. Congress could have passed a
18 broader statute, cutting off any suits whatsoever against
19 Federal employees. Therefore, it can do the lesser of
20 allowing the Attorney General to --

21 QUESTION: Well, the greater doesn't always
22 include the lesser. Here -- here they -- they said we're
23 going to leave it up to a single Federal official to
24 decide whether you have a cause of action or not. Is it
25 -- is that in accord with due process of law? Can you

1 give --

2 MR. KELLOGG: I -- I see no problem with that.

3 QUESTION: What about a --

4 MR. KELLOGG: And I certainly have not seen any
5 cases cited by the Petitioner in this case that would
6 indicate that that was a problem.

7 QUESTION: May I ask one question about the word
8 "shall" -- great emphasis on it? Is it not true that you
9 can leave the statute with all the "shalls" that are in it
10 as it is now and then add a sentence at the end providing,
11 however, the determine shall be subject to judicial
12 review? They don't need the "shalls" -- just because
13 you've got them -- to get the case moving.

14 MR. KELLOGG: No, I don't believe that's
15 correct. I mean you could have added a sentence on there,
16 and it would have negated the natural --

17 QUESTION: So the point is that the "shalls"
18 don't resolve the question of judicial review. They just
19 resolve the question of initially move -- movability and
20 initial substitution.

21 QUESTION: But it wouldn't be "however" to be
22 provided, however, that if the court finds that -- that
23 the certification was incorrect, the United States shall
24 not be substituted?

25 MR. KELLOGG: That's correct.

1 QUESTION: I mean you --

2 QUESTION: I wondered about a different
3 constitutional problem. Now, I don't know if this really
4 exists or not. And that's why I'd appreciate your view.
5 But there's a line of cases in this Court that talk about
6 a constitutional separation of powers problem that arises
7 when you take a common variety -- common, garden variety
8 tort action and you say that common, garden variety tort
9 action is no longer going to be decided by a court; it's
10 going to be decided by an administrator.

11 They go back to Crowell & Benson, Shore,
12 Marathon.

13 Now, here -- here, in fact, even in Crowell &
14 Benson, you could take a common variety tort action and
15 give it to an administrator because there was judicial
16 review of that administrator's decision.

17 Now, here, I take it, you would be taking a
18 common, garden variety tort action, handing it not to --
19 really, over to the Attorney General to decide, and there
20 would be no judicial review of that Attorney General's
21 decision on that common, garden variety tort action.

22 Now, what I wonder is, doesn't that raise some
23 kind of constitutional problem under Shore, Crowell &
24 Benson, Marathon, and all those cases that worry about
25 taking tort actions away from judges and juries and giving

1 them to Federal or State administrators?

2 MR. KELLOGG: I don't believe so, Justice --
3 Justice Breyer. I think the key point here is that the
4 determination by the Attorney General as to scope of
5 employment is itself under the common law generally
6 regarded as an admission or a ratification of the acts of
7 that employee.

8 I know of no separation of powers or due process
9 problem in allowing an employer to ratify or acknowledge
10 scope of employment on behalf of its employee.

11 Now, ordinarily, of course, under the common
12 law, the plaintiff could then proceed against both the
13 defendant employee and the employer who admits
14 responsibility --

15 QUESTION: The reason being that the admission
16 was adverse to the dec -- declarant's interest.

17 MR. KELLOGG: That's correct.

18 QUESTION: But here -- but here, the -- the
19 admission is taken as defeating a cause of action, say, in
20 a State court with a jury trial for a malicious act.

21 MR. KELLOGG: That is precisely what this Court,
22 in United States v. Smith acknowledged was the result of
23 the Westfall Act, and the intent of Congress. That even
24 when it cuts off a ordinary, common law tort action
25 against the employee and against the United States, it is

1 still precluded by the Act.

2 QUESTION: Well, that's -- but there was a
3 judicial determination there of the fact of immunity. And
4 that isn't so here.

5 MR. KELLOGG: No, there was no judicial
6 determination --

7 QUESTION: The judicial -- the determination
8 here is a unilateral determination by the -- by the
9 executive.

10 MR. KELLOGG: There was no determination in
11 Smith. There was merely the certification of the Attorney
12 General. And in Smith this Court indicated that that
13 certification was sufficient to require substitution. The
14 precise issue here --

15 QUESTION: But there was no -- there was no
16 issue about the certification. No question was raised
17 about it?

18 MR. KELLOGG: That's correct. The precise issue
19 here was not raised there. But the Court's discussion --

20 QUESTION: Nobody said that he acted outside the
21 scope of his employment, as I understand it?

22 MR. KELLOGG: That's correct.

23 But the Court's discussion certainly indicates
24 an assumption as to how the statutory scheme worked. That
25 upon certification, the United States was required to be

1 substituted.

2 QUESTION: Do you think a certification is
3 reviewable somehow under the Administrative Procedure Act,
4 the final Agency action?

5 MR. KELLOGG: I -- I don't think so, Justice
6 Scalia, because this statute really sort of occupies the
7 field, and sets up its own standards for how the
8 determination is made. Besides which, I -- I view this
9 decision in the light of a discretionary determination by
10 the Attorney General.

11 QUESTION: What are the standards -- you said --
12 you just used the words, set up standards for how the
13 determination is made. As I understand it, the U.S.
14 Attorneys all over make these certifications or not. Are
15 there guidelines for them?

16 MR. KELLOGG: I was unable to find any. I
17 looked in the U.S. Attorneys manuals and could not find
18 any.

19 QUESTION: So we don't even know if there's any
20 uniformity in the way these certifications are being
21 handed out, do we?

22 MR. KELLOGG: That's correct. But we do know
23 that under the United States' view, scope of employment in
24 this case would be determined under the law of Colombia,
25 which would lead to all sorts of problems as to whether a

1 Federal agent is acting within the scope of his Federal
2 employment.

3 It would make considerably more sense to have
4 that determination made by the Attorney General or
5 delegated to a U.S. Attorney, to try to determine some
6 sort of uniform Federal standards, rather than have the
7 agent subject to the vagaries of whatever law of whatever
8 country he happens to be in.

9 QUESTION: Is it not conceivable that apart from
10 this procedure, apart from challenging it when -- when the
11 -- when the certification is made to -- to the court that
12 has the tort action, might there not be an action against
13 the -- let's suppose an Attorney General who is -- or a
14 U.S. Attorney who is making these certifications just
15 randomly, just in order to help both the employee at no
16 expense to the Government, without any investigation
17 whatever -- is there a possibility of a separate action
18 under the Administrative Procedure Act to get that -- to
19 get that decision overturned?

20 MR. KELLOGG: Well, I think --

21 QUESTION: You'd have a different standard to
22 review. The court wouldn't determine it de nova. It
23 would simply determine whether -- whether the -- the U.S.
24 Attorney's action was arbitrary or capricious.

25 MR. KELLOGG: I think --

1 QUESTION: Which would be quite different from
2 what -- what -- what is -- what is asked for here.

3 MR. KELLOGG: True. I think as -- as an initial
4 matter, there would be potentially Rule 11 sanctions in
5 the court, where the Attorney General or the U.S. Attorney
6 makes this certification.

7 I mean it is not something that the Attorney
8 General or the U.S. Attorney is likely to take lightly.
9 Because they do have to go into court. They do have to
10 say, we've looked into these circumstances. We are
11 certifying this. It's a representation to the court that
12 puts the credibility of the United States on the line, and
13 subjects them to potential Rule 11 sanctions.

14 Now, whether there also be some potential --

15 QUESTION: If it's not -- if it's not reviewable
16 by the court, how does the court get into it at all for
17 purposes of Rule 11 sanctions?

18 MR. KELLOGG: Well, in -- in many instances,
19 you'll find where a particular side wins the argument, but
20 still could be subject to Rule 11 sanctions for
21 misrepresenting some aspect. The court, for purposes of
22 substitution, cannot look behind it. But if the court had
23 reason to believe that in fact no investigation had been
24 -- had been conducted or that it was done randomly or
25 arbitrarily, it is a representation to the court, subject

1 to Rule 11.

2 I'd like to raise a final point about the
3 Article III problems in this case. Because I think they
4 are quite substantial, if one takes the United States'
5 view of the statute.

6 I agree absolutely with Justice Scalia's point
7 that when this case reaches Federal court, it is not
8 necessarily a case against the United States. The
9 question of the proper defendant is precisely the question
10 that the United States says the district court is going to
11 resolve. And until that question is resolved, the
12 identity of the defendant is not determined.

13 QUESTION: I thought the United States "shall be
14 substituted" -- so why isn't it a case against the United
15 States?

16 MR. KELLOGG: It does say, "shall be
17 substituted," but if it's subject to review by the
18 district court, then --

19 QUESTION: I didn't understand you either. You
20 mean on the basis of the other side's case --

21 MR. KELLOGG: Right.

22 QUESTION: You don't know it's the United States
23 when you get to court?

24 MR. KELLOGG: Right.

25 QUESTION: But on the basis of your case, you do

1 know?

2 MR. KELLOGG: You do know. It is a suit against
3 the United States, and therefore there is no
4 jurisdictional problem, because it's a suit against the
5 United States that's clearly covered by Article III. But
6 on the Solicitor General's view, if the defendant is
7 properly identified as the employee because he was acting
8 outside of the scope of employment, then there is no
9 Federal question --

10 QUESTION: Why is it any different from pendant
11 jurisdiction?

12 MR. KELLOGG: Pendant jurisdiction involves two
13 claims generally. One --

14 QUESTION: Yes, but here they came into Federal
15 court on a good basis. There's a suit. It's determined
16 that, hey, this is a simple assault and battery. The
17 attorney -- it's not in the scope of employment at all.
18 The Federal forum remains. It came in on a good basis.
19 Why can't it remain pendant, just like a State pendant
20 claim?

21 MR. KELLOGG: Because I don't think it makes
22 sense to say it came in on a good basis if it's the
23 district court that makes the determination, not the
24 Attorney General.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

1 Kellogg. The case is submitted.

2 (Whereupon, at 11:05 a.m., the case in the
3 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

KATIA GUTIERREZ DE MARTINEZ, EDUARDO MARTINEZ PUCCINI AND HENRY MARTINEZ DE PAPAANI, Petitioners v. DIRK A. LAMAGNO, ET AL.

CASE NO.: 94-167

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)