

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   PAT OSBORN,                               :

4                     Petitioner,                               :

5                     v.   :   No. 05-593

6   BARRY HALEY, ET AL.                       :

7   - - - - - x

8                                     Washington, D.C.

9                                     Monday, October 30, 2006

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11           The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United  
13   States at 10:03 a.m.

14   APPEARANCES:

15   ERIC GRANT, ESQ., Sacramento, Cal.; on behalf of  
16   the Petitioner.

17   DOUGLAS HALLWARD-DRIEMEIER, ESQ., Assistant to the  
18   Solicitor General, Department of Justice,  
19   Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Osborn v. Haley.

Mr. Grant.

ORAL ARGUMENT OF ERIC GRANT

ON BEHALF OF PETITIONER

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

The court of appeals misinterpreted the Westfall Act in a way that unfairly deprives tort plaintiffs of the most basic procedural protections routinely afforded in both Federal and State courts. That misinterpretation cannot be reconciled with the text and history of the statute, the nature and operation of official immunity or the jurisdictional limitations of article III. Accordingly, the judgment of the court of appeals should be reversed and this State law case should be remanded to the State courts where it rightfully belongs. In the alternative, the court of appeals judgment should be vacated for lack of appellate jurisdiction.

Prior to the Westfall Act, courts considered whether, assuming the alleged acts occurred, the Federal employee was acting within the scope of his employment.

1 In Westfall v. Erwin, this Court added the additional  
2 requirement that the acts be undertaken with a  
3 discretionary function, but invited Congress to address  
4 the issue. In responding with the Westfall Act,  
5 Congress did not change the basic rule that scope of  
6 employment sets the line for immunity. Indeed, Congress  
7 confirmed that rule. In particular, Congress gave no  
8 hint that it was radically rewriting the rules to direct  
9 Federal district courts to determine the merits of  
10 wholly State law claims in some sort of unprecedented  
11 summary proceeding.

12 JUSTICE GINSBURG: Why is it a wholly State  
13 law claim if the principal matter is whether this  
14 Federal employee is immune from suit? That's the  
15 threshold question that has to be answered. It's  
16 determined wholly by Federal law, so you must get  
17 through that Federal law gateway before you can go any  
18 place else in the suit.

19 MR. GRANT: Your Honor, that is true in  
20 perhaps a majority of Westfall Act cases, but in cases  
21 like this and a significant and recurring subset of  
22 cases there is no Federal law question because scope of  
23 employment simply is not at issue. What the Government  
24 does in those subset of cases is merely to assert the  
25 defense of he didn't do it or it never happened.

1 JUSTICE GINSBURG: But that -- it's not it  
2 never happened as though the Federal employee was off in  
3 Hong Kong. He was there on the premises. He is  
4 claiming that whatever he did was within the scope of  
5 his authority. It seems like it's a question of  
6 phraseology that you're dealing with.

7 MR. GRANT: With respect, Your Honor, that  
8 is not the case, certainly in this case and in others.  
9 The Government has conceded that if Respondent Barry  
10 Haley acted as alleged in the complaint he was acting  
11 outside the course and scope of his Federal employment.

12 JUSTICE KENNEDY: But I think Justice  
13 Ginsburg's point, and it concerns me as well, is that  
14 the Government is entitled to say that during the time  
15 the event occurred, i.e., the firing, he was on duty and  
16 he refrained from committing any unlawful act.

17 MR. GRANT: Your Honor, there may be cases  
18 where even if the acts occurred, they were within the  
19 course and scope of the Federal employment. But in the  
20 case like this, as in Wood versus United States, as in  
21 Melo v. Hafer in the Third Circuit, the Government  
22 concedes, because the law and the facts require the  
23 Government and the employee to concede, that if the  
24 alleged acts took place they were necessarily outside  
25 the scope of employment.

1                   CHIEF JUSTICE ROBERTS:  But the actual  
2  statutory language refers to acting within the scope of  
3  employment at the time of the incident, and so a  
4  certification based on the view that at the time of the  
5  alleged incident, he was acting entirely within his  
6  scope would seem to be within the language of the  
7  statute.

8                   MR. GRANT:  Your Honor, on its face the  
9  certification in this case, as in others, tracks the  
10 statutory language.  But when the Government's position  
11 was examined in the district court, it became apparent  
12 that the Government's essential defense, in fact  
13 supported by two declarations, including the declaration  
14 of Respondent Haley, was that he simply did not do the  
15 acts alleged.

16                   JUSTICE KENNEDY:  Well, but the question is  
17 what the district court should examine, and the statute  
18 talks about the incident out of which the claim arose.  
19 So that necessarily requires the Government to look at  
20 the complaint, see the incident out of which this claim  
21 arises, whether or not the claim is true, and to certify  
22 it.

23                   MR. GRANT:  Your Honor --

24                   JUSTICE KENNEDY:  "Out of which the claim  
25 arose" it seems to me is of some importance.  But the

1 dissenting judges in the First Circuit case, Wood,  
2 didn't think it was important. I'm not sure they were  
3 right about that.

4 MR. GRANT: Your Honor, this Court has  
5 consistently made a distinction between immunity and the  
6 merits. Starting in cases like Mitchell versus Forsyth  
7 in 1985 and continuing through cases like Richardson  
8 versus McKnight in 1997, the Court has consistently  
9 recognized that immunity is different from a defense on  
10 the merits. It's different from a defense of he didn't  
11 do it or it never happened. And I would say that,  
12 although the time of the incident is important, that is  
13 only one of several factors certainly under Kentucky law  
14 in determining whether something happened within the  
15 course and scope of employment.

16 CHIEF JUSTICE ROBERTS: Well how is it -- I  
17 mean, that line is awfully difficult to draw. You assert  
18 he didn't do it versus something else. But it's easy,  
19 let's say it's an assault case and the person says, you  
20 hit me, and the person says, well, it was entirely an  
21 accident; I was gesticulating with my hand so it wasn't,  
22 wouldn't have met the requirements for the tort. Now,  
23 are they denying the incident in that case?

24 MR. GRANT: Your Honor, the Court in Wood v.  
25 United States took account of the possibilities of

1 artful pleading and would allow the Government to  
2 challenge the characterization of the incident.

3 CHIEF JUSTICE ROBERTS: But it's not just a  
4 characterization. If it's something that has, for  
5 example, a mental element, the plaintiff can assert, you  
6 did that with malice aforethought and the defendant can  
7 say, no, I didn't. Now, is that a characterization or  
8 is that a denial of the incident?

9 MR. GRANT: I believe that's a  
10 characterization, Your Honor.

11 JUSTICE SOUTER: Why isn't it the denial of  
12 an element of the claim? There's no recovery for  
13 assault if the mental element is what the Chief Justice  
14 just described in his hypo, and if in fact that is an  
15 element of the claim how do you draw a distinction  
16 between that and the existence or nonexistence of any  
17 act at all.

18 MR. GRANT: There are, Your Honor, certain  
19 cases in which --

20 JUSTICE SOUTER: Well, I'm not asking about  
21 certain cases. I just want to know analytically how you  
22 do it or how you think we're supposed to do it.

23 MR. GRANT: There are cases in which the  
24 merits and the immunity defense overlap and in those  
25 cases the district courts are fully empowered to make



1 factual findings.

2 JUSTICE SOUTER: Well, in this case the  
3 immunity defense is, number one, as you said, the  
4 Government forthrightly said at the beginning right in  
5 terms of the statute that he was acting within the scope  
6 of his employment. Secondly, as you said, the  
7 Government in effect elaborated on that and said the  
8 reason he was not acting outside the scope of his  
9 employment is that these acts which would have been  
10 outside scope didn't happen. Why is that any  
11 different from the claim in the Chief Justice's hypo  
12 that there was no intent to harm?

13 MR. GRANT: Your Honor, because a claim of,  
14 that the alleged act did not occur, that he didn't do  
15 it, is not a claim of immunity. Again, this --

16 JUSTICE SOUTER: It's a claim upon which the  
17 immunity depends. The immunity is claimed -- the  
18 immunity claimed here is that at the time in question he  
19 was not acting outside the scope of his employment. The  
20 reason he was not acting outside the scope was that he  
21 didn't do what they say he did.

22 MR. GRANT: Your Honor, I'm sorry if I have  
23 the same answer to the question, but again, this Court's  
24 jurisprudence has consistently distinguished between  
25 defenses, so to speak, on the merits, a claim that the

1 alleged act did not occur, that one of the elements of  
2 the State law claim is not met.

3 JUSTICE ALITO: In this case, if Mr. Haley  
4 had said, I had some conversations with the private  
5 employer and the plaintiff's name was mentioned during  
6 the conversations, but I never told them to discharge  
7 her, would this, would that be something -- would your  
8 argument apply there?

9 MR. GRANT: It would apply, Your Honor, if,  
10 if that factual determination were relevant to scope of  
11 employment under the applicable law, namely the agency  
12 law of Kentucky.

13 JUSTICE GINSBURG: Well, is it? I mean,  
14 that's -- the problem that I have with your argument,  
15 Mr. Grant, is that in life things are often not, it  
16 happened or it didn't happen. There is a middle  
17 ground, which is this officer is saying, I was there at  
18 the relevant time or place and when I was there  
19 everything that I did was within the scope of my  
20 employment, I didn't do anything that was outside the  
21 scope of my employment.

22 MR. GRANT: There are cases in which there  
23 is a middle ground, Your Honor. But this case is not  
24 one of them, and there is certainly a distinct and  
25 recurring subset of cases, like Wood and Melo and

1 Kimbro, where it is conceded on the facts and the law  
2 that if the actions occurred, they occurred outside the  
3 scope of employment.

4 JUSTICE SCALIA: I don't understand why  
5 anyone would want to come out the way you urge us to  
6 come out. Why would it make any sense to give a Federal  
7 employee the benefit of trial in Federal court when he  
8 committed the act, and then you debate about whether it  
9 was, whether there was liability or not, and yet deprive  
10 him of the benefit of a Federal court when he denies  
11 that he did anything at all? Why would you want one set  
12 of cases to remain in the State court and the other set  
13 of cases to go to Federal court?

14 MR. GRANT: Your Honor, it's Congress that  
15 set the line at scope of employment.

16 JUSTICE SCALIA: Well, I mean, that's what  
17 we're debating, whether the line is there or not, and as  
18 you've seen from the discussion, there is at least some  
19 ambiguity in it. There being ambiguity, why should we  
20 find a line that doesn't make any sense?

21 MR. GRANT: Well, Your Honor, I believe that  
22 line does make sense because if the Government's view is  
23 adopted and the view of the majority of the court of  
24 appeals, the merits of the wholly State law claim will  
25 be resolved in Federal court and resolved in a

1 procedural context that denies a tort plaintiff the  
2 right to discovery, that denies the tort plaintiff a  
3 right to the normal evidentiary presumptions on a motion  
4 to dismiss or motion for summary judgment, and denies  
5 that tort plaintiff the right to a jury trial.

6 JUSTICE SCALIA: But that can happen when in  
7 fact the certification of the Attorney General turns out  
8 to be wrong and there isn't any immunity. Still, the  
9 whole thing is going to be tried in Federal court.

10 MR. GRANT: Your Honor, in that situation,  
11 the merits will at least be tried under the normal  
12 provisions for discovery and evidentiary presumptions,  
13 even if it does ultimately proceed against the United  
14 States.

15 JUSTICE STEVENS: But Mr. Grant, I'm a  
16 little puzzled. Why is the discovery in the Federal  
17 system any less valuable in the State system?

18 MR. GRANT: Because what the Government  
19 advocates here, as I think most starkly illustrated by  
20 the Third Circuit's decision in *Melo v. Hafer* is some  
21 sort of summary proceeding that takes place before the  
22 normal processes of Federal litigation. After all, it's  
23 the Government's position that this employee is immune.

24 JUSTICE STEVENS: Isn't that only summary  
25 for the purpose of deciding whether the removal was

1 proper?

2 MR. GRANT: It's for the purpose of deciding  
3 scope of employment, but the Government's interpretation  
4 of that phrase encompasses essentially the merits of the  
5 case.

6 CHIEF JUSTICE ROBERTS: It's not for  
7 deciding whether removal -- I thought the statute says  
8 that the Attorney General's certification is conclusive  
9 with respect to removal.

10 MR. GRANT: It is conclusive, Your Honor, in  
11 those cases that truly do implicate scope of employment.  
12 In this case, by contrast, the certification was  
13 essentially to raise the he didn't do it or it never  
14 happened defense.

15 CHIEF JUSTICE ROBERTS: Well, what does it  
16 mean to say that the certification is conclusive with  
17 respect to scope of employment for purposes of removal  
18 if it doesn't mean that it's conclusive, if you're going  
19 to have judicial review that is going to address the  
20 question of removal as opposed to the validity of the  
21 certification on the merits?

22 MR. GRANT: Your Honor, it's conclusive  
23 where it satisfies the definition in the statute. What  
24 is conclusive in the final sentence of paragraph (d)(2)  
25 of section 2679 is this certification, and this

1 certification of course is the one referred to earlier  
2 in that paragraph.

3 CHIEF JUSTICE ROBERTS: So you're saying  
4 it's only conclusive if it's right?

5 MR. GRANT: No, Your Honor. It's only, it  
6 can be conclusive right or wrong, but it's only  
7 conclusive if it satisfies the statutory definition,  
8 being about scope of employment, not about the merits.  
9 In this case, for example, there never will be, never  
10 could be a true scope of employment determination, the  
11 Government having conceded it.

12 JUSTICE GINSBURG: Suppose, Mr. Grant, that  
13 the district court had said, I'm going to deny the  
14 substitution of the United States as the defendant, but  
15 I realize that this is a debatable question, so I'm not  
16 going to order a remand until the defendant and the United  
17 States have had a chance to challenge my initial ruling  
18 that I deny the substitution of the United States.  
19 Suppose that it had happened that way? Would you have any  
20 right to get back in the State court? Wouldn't that  
21 properly go to a court of appeals?

22 MR. GRANT: Your Honor, that, that could  
23 certainly go to the court of appeals under the  
24 discretionary appeal procedure in section 1292(b), or  
25 perhaps by mandamus.

1 JUSTICE GINSBURG: Well, suppose that  
2 happened, and then the court of appeals said the United  
3 States should have been substituted?

4 MR. GRANT: That would -- that would on its  
5 merits restrict the district court from remanding, but  
6 of course in this case, the district court did enter an  
7 order of remand based on its interpretation of section  
8 2679.

9 JUSTICE ALITO: But your position is that  
10 the Attorney General's certification is conclusive --  
11 is not conclusive in those situations in which the  
12 Attorney General doesn't draw the line properly between  
13 an event denying answer and an event characterizing  
14 answer? Whenever the Attorney General is wrong on that  
15 very nuanced decision in some instances, then the  
16 Attorney General's certification is not conclusive?

17 MR. GRANT: The short answer is yes, Your  
18 Honor. The Attorney General's certification is not  
19 conclusive where it does not satisfy the statutory  
20 definition, where it is not a certification that truly  
21 implicates scope of employment. We have tried to draw  
22 the distinction between an unauthorized or improper  
23 certification, one that doesn't meet the statutory  
24 definition, and a certification as, as the Court in  
25 *Aliota versus Graham* said was wrong or erroneous on its

1 merits, so to speak, on the facts, on the law, of State  
2 agency law.

3 JUSTICE SCALIA: Mr. Grant, these items  
4 we've been discussing are perhaps the more important  
5 features of the case. But your argument in your brief  
6 didn't begin with those. It began with the assertion  
7 that there is no jurisdiction to review the district  
8 court's remand order at all. I take it you're not  
9 abandoning that, are you?

10 MR. GRANT: Absolutely not, Your Honor.

11 JUSTICE SCALIA: Then why was it first in  
12 your brief and not first in your argument?

13 MR. GRANT: It was first in my brief because  
14 this Court ordered me to brief and address it, and I was  
15 happy to do so. The court of appeals in fact did lack  
16 jurisdiction in this case. This Court has made clear as  
17 recently as the Kircher opinion last term that section  
18 1447(d) means what it says. And in this case, the  
19 district court entered an order remanding the case to  
20 the State court from which it was removed, and 1447(d),  
21 of course, bars review of that order by appeal or  
22 otherwise.

23 CHIEF JUSTICE ROBERTS: There is at least  
24 considerable tension with 1447(d), though, and  
25 2679(d)(2), in that that specifically says that for



1 purposes of removal, the Attorney General's certification  
2 is conclusive. And it doesn't, if you look at 2679, it  
3 suggests, you'd think that case would proceed in Federal  
4 court rather than be immediately remanded without the  
5 availability of review.

6 MR. GRANT: Your Honor, on the merits of the  
7 interpretation of 2679(d)(2), we tried to explain why  
8 conclusive does not operate in a case like this, but I  
9 think the important point for jurisdiction is that this  
10 Court has consistently said that even if a district  
11 court misinterprets a jurisdictional statute, that  
12 review is nonetheless barred by section 1447(d).

13 CHIEF JUSTICE ROBERTS: This is a different  
14 type of jurisdictional statute in that there is concern  
15 on Congress's part here to provide a Federal forum for  
16 the adjudication of whether something is within the  
17 scope of a Federal employee's duty. It's not  
18 inconceivable, but it would seem illogical to  
19 specifically provide for review of that determination  
20 but then have that review take place in State court  
21 rather than Federal court.

22 MR. GRANT: Well, Your Honor, Congress  
23 obviously knows how to make exceptions to section  
24 1447(d). I believe it was footnote eight of this  
25 Court's opinion in Kircher that cited a number of

1 examples. The Government in its brief relied on 12  
2 U.S.C. section 1441(a), and that statute which involved  
3 the Resolution Trust Corporation specifically refers to  
4 appeal and remand. And so what this Court has said is,  
5 the bar of section 1447(d), which has been around for  
6 more than a century, is not to be ignored unless there  
7 is a clear statutory command that makes an exception.

8 JUSTICE ALITO: But here not only, not only  
9 does it say that the Attorney General's certification is  
10 conclusive for purposes of removal, but there is no  
11 mention about remand in relation to a case that is  
12 removed after the Attorney General's certification.  
13 Whereas by contrast, where the Attorney General doesn't  
14 certify and the case is removed, the statute does  
15 address the issue of remand. So if you put those two  
16 things together, isn't it perfectly clear that Congress  
17 did not want these cases that are removed on the  
18 Attorney General's certification to be remanded?

19 MR. GRANT: No, Your Honor. The authority  
20 to remand in this case proceeds from subsection C of  
21 section 1447. As this Court has said in various cases,  
22 including the International Primate Protection League  
23 case in 1991, when a Federal district court lacks  
24 subject matter jurisdiction because a case, a party  
25 attempting to remove has done so without authority to do

1 so, section 1447(c) obliges a remand.

2 JUSTICE SCALIA: I would have thought your  
3 answer would have been even if, even if the remand was  
4 improper, even if it is the case that, what is it,  
5 (d)(2) envisions that the suit remain in the Federal  
6 court. Nonetheless, if there is an erroneous remand, it  
7 is still a remand that is covered by the prohibition of  
8 review. I mean, we said in other cases that even when  
9 the remand is wrong, the remand is not reviewable.

10 MR. GRANT: That is my answer, Your Honor.  
11 Section (d)(2) goes, gives direction to district courts,  
12 but section 1447(d) gives direction to appellate courts.

13 JUSTICE BREYER: If that's your answer, can  
14 I go back to the other main issue for a second? I would  
15 have thought that your case, unfortunately for you in my  
16 mind, is the classic case where there should be  
17 jurisdiction because the AG is supposed to say look, I  
18 don't think anything happened, okay? So he was doing  
19 his job all day. But if something did happen, I'll tell  
20 you what, it was within the scope of his employment.  
21 And apparently, that's just what they did say here. And  
22 then it got mixed up in the courts below. In other  
23 words, if he made some phone calls and even if he  
24 mentioned the employee, even if he said something  
25 improper, it was within the scope of his employment,

1 which is just what they said. So because of that, it  
2 seems to me this makes a lot of complexity out of  
3 nothing. Now you explain what your answer is.

4 MR. GRANT: Your Honor, with respect, I  
5 believe the Attorney General said just the opposite,  
6 that --

7 JUSTICE BREYER: In the district court he  
8 didn't say, if something happened here, it was in the  
9 scope of his employment? I thought he had. Maybe he  
10 hadn't. I thought he had, but I'll ask him that.

11 MR. GRANT: Your Honor --

12 JUSTICE BREYER: In the district court I  
13 thought he said that.

14 MR. GRANT: The Attorney General's  
15 submission, the Government's submission in the district  
16 court was that nothing happened.

17 JUSTICE BREYER: Well, it was there first,  
18 but you can argue in the defense alternative, I think  
19 nothing happened. But if the plaintiff can convince a  
20 jury otherwise, fine, but then what they can convince  
21 him of is within the scope of his employment. Now did  
22 that happen in the district court, that they said  
23 something like that or not?

24 MR. GRANT: Your Honor, the Government did  
25 make what it called an alternative argument.

1 JUSTICE BREYER: Well, why can't they do  
2 that, which is just what Wood says they can do, if  
3 anybody, you know, thinks that's valid? But the --  
4 what's the problem then? Because I would have thought  
5 that the reason this case appears difficult is because  
6 yours is a case where the AG should be able to come in  
7 and remove it.

8 MR. GRANT: The district court, the very  
9 same district court that the Government so, so  
10 desperately wants to review the facts of this case, said  
11 that given Mr. Haley's declaration under penalty of  
12 perjury, it would not accept that alternative.

13 JUSTICE BREYER: But it's wrong in that,  
14 isn't it?

15 MR. GRANT: Well, the Government did not  
16 appeal that point in the court of appeals, and in fact --

17 JUSTICE BREYER: I mean, the Wood issue was  
18 the issue of where if anything happened, of course it's  
19 outside the scope. It's like one employee shoots  
20 another, you know. There is nothing to do with scope of  
21 employment there, it's plainly outside. And of course,  
22 this act, in my view then, then, was that this is not an  
23 act that allows the AG to defend that kind of thing.  
24 But if it's arguable at least that something happened,  
25 if it happened at all it was within the scope of

1 employment, the AG can defend it.

2 MR. GRANT: Your Honor, the Government --

3 JUSTICE BREYER: What's the problem with --  
4 there should be a problem with what I say from your  
5 point of view, so --

6 MR. GRANT: I think the problem is in the  
7 record, Your Honor, and the Government's brief at the,  
8 at the petition stage on page 14 in note five quotes its  
9 own appellate brief in the court of appeals, and that  
10 brief says the memorandum of understanding between the  
11 Forest Service and the private respondent showed that if  
12 Haley did cause the contractor to fire Osborn, he acted  
13 outside the scope of his employment. And the court of  
14 appeals quite logically took that --

15 JUSTICE BREYER: So you're saying they have  
16 abandoned the argument?

17 MR. GRANT: They have Your Honor and the  
18 court of appeals recognized that on page 3a of the  
19 petition appendix. If the Court has no further  
20 questions I'd like to reserve the balance of my time.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 Mr. Grant. Mr. Hallward-Driemeier.

23 ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER,  
24 ON BEHALF OF THE RESPONDENTS

25 MR. HALLWARD-DRIEMEIER: Mr. Chief Justice

1 and may it please the Court:

2 In the Westfall Act Congress provided an  
3 absolute immunity for Federal employees for acts  
4 taken within the scope of their employment and it  
5 went further and provided that when the Attorney  
6 General certifies that the employee was acting  
7 within the scope of his employment at the time of  
8 the incident out of which the claim arose, that that  
9 issue of Federal immunity is to be decided by the  
10 Federal court. It is the Attorney General's assertion  
11 of this Federal defense of immunity that satisfies  
12 article III just as the employee's own assertion of  
13 immunity satisfies article III under the Federal Officer  
14 Removal statute and just as a, in other circumstances a  
15 plaintiff's assertion of a claim under Federal law  
16 satisfies article III.

17 CHIEF JUSTICE ROBERTS: So what if the  
18 Attorney General certifies and removes a case in a  
19 criminal case, a case clearly not within the statute?  
20 What happens then?

21 MR. HALLWARD-DRIEMEIER: Well, I think that  
22 the, the -- that would probably be a defect in removal  
23 procedure rather than a jurisdictional defect but even  
24 if it is --

25 CHIEF JUSTICE ROBERTS: No, no, on the

1 procedure, he follows the procedure meticulously; it's  
2 just wrong. It's a criminal case. The statute says he  
3 can do it in a civil case. On the other hand the statute  
4 also says that his certification is conclusive.

5 MR. HALLWARD-DRIEMEIER: Well, Your Honor  
6 even if that is a case that would be removed without  
7 jurisdiction, that case is quite different from this  
8 case because this case --

9 CHIEF JUSTICE ROBERTS: Yes, this one is a  
10 civil one and that's a criminal, but I'm just  
11 trying to understand how broad your argument that this  
12 is not subject to further review goes.

13 MR. HALLWARD-DRIEMEIER: Well, the issue  
14 that is not subject to further review for purposes of  
15 jurisdiction is the Attorney General's certification  
16 that the employee was acting within scope. The  
17 statute doesn't provide that the Attorney General's  
18 certification that it is a civil action is conclusive  
19 but only the Attorney General's certification that the  
20 employee was acting within scope is conclusive for  
21 purposes of removal. That's the essential element of  
22 the Federal defense and that's what satisfies article  
23 III jurisdiction. And in fact, this Court in the  
24 Willingham case recognized that an employee could assert  
25 a claim of Federal immunity even though he was also at



1 the same time denying that he caused any harm to the  
2 plaintiff.

3 CHIEF JUSTICE ROBERTS: Well I thought your  
4 analogy to Willingham was a strong one until you go back  
5 and read the statute. Willingham is a very different  
6 statutory predicate. It's acting under color of law.  
7 This is much more specific. At the time of the  
8 incident, he was acting within his scope, so I'm not  
9 sure the analogy holds up.

10 MR. HALLWARD-DRIEMEIER: Well if anything  
11 the language of the Westfall Act is broader because as  
12 Your Honor emphasized earlier, the statute, the Westfall  
13 act provides that the Attorney General is to certify  
14 that at the time of the incident out of which the claim  
15 arose the employee was acting within the scope. So  
16 arguably the necessary question is what was the employee  
17 doing at the time. The Federal Officer Removal statute  
18 is somewhat narrower because it requires that the claim  
19 arise out of the, the acts taken under color of office.

20 CHIEF JUSTICE ROBERTS: But yet that would  
21 be a good argument if the statute said the Attorney  
22 General can certify that the employee did not do  
23 anything outside the scope of his employment, but it's  
24 phrased in the affirmative. He has to certify that he  
25 was acting within the scope of his employment.

1                   MR. HALLWARD-DRIEMEIER: That's right. And  
2 that's what the Attorney General did here, certified  
3 that Mr. Haley was acting within the scope of his  
4 employment at the time of the incident out of which the  
5 claim arose. And as several --

6                   JUSTICE BREYER: So that's the issue then.  
7 And what I -- is my, my question for you is this, let's  
8 imagine not this case, which as I said I think is too  
9 complicated and probably is one that the Government  
10 should be able to defend, but suppose it's an assault  
11 like Wood's, a sexual assault and there is absolutely no  
12 doubt that if it happened it was outside the scope of  
13 employment, everybody concedes it but Government. And  
14 the Government's position is, nothing happened. All  
15 right? Nothing happened. You say Government, would you  
16 like to argue that if something happened, and they may  
17 be able to prove something, something like a movement?  
18 No, we agree there was nothing like that, we agree  
19 nothing like that happened; we are not going to defend  
20 on any scope of employment ground. All we are arguing  
21 is that ordinary work went on and that was within the  
22 scope of employment. Now, does this act cover it or  
23 not? Your view is yes and you read, you know I thought  
24 it was a close question but you read what I thought the  
25 other way in Wood, though it was obviously a close

1 question. So what is your basic response to that?

2 MR. HALLWARD-DRIEMEIER: You are correct  
3 that our view is that yes, the Attorney General can  
4 certify in that case. The issue is really one along a  
5 continuum as I think Your Honor has recognized. Of on,  
6 on the one extreme, one might say that the Attorney  
7 General must accept all of the plaintiff's allegations  
8 as true. And, and I don't think that anybody here is  
9 arguing that.

10 JUSTICE GINSBURG: That was the position of  
11 the district court, though, wasn't it?

12 MR. HALLWARD-DRIEMEIER: That was the  
13 position of the district court, although I don't think  
14 the Petitioner is now advocating that view. And that  
15 view would certainly be inconsistent; it would create  
16 the anomaly that the Attorney General's authority to  
17 certify scope and to assert the immunity on behalf of  
18 the employee would be narrower than the employee's own  
19 authority to assert the immunity, because again going back  
20 to the Willingham case, the Court never asked whether it  
21 would be within the scope of employment for the prison  
22 officials to have maliciously tortured the prisoner;  
23 rather the defense was we didn't harm the prisoner but  
24 anything that happened between us and the prisoner  
25 happened within the scope of our employment. And so the

1 Attorney General's authority to certify has to be at  
2 least as broad as that in our view.

3 JUSTICE BREYER: The basic point I think in  
4 Wood is this. I'm the district judge. And the  
5 Government, you come in and argue in the alternative.  
6 Nothing happened, but if it did happen it was within the  
7 scope of employment and they say there is no  
8 possibility. You'd say, plaintiff, I want to know here  
9 if there is a reasonable chance, maybe any chance, that  
10 a jury could find that something went on here that was  
11 within the scope of employment that shouldn't have. And  
12 if the answer to that question is no, the defendant wins  
13 either because of summary judgment or because -- no,  
14 sorry. I've gotten lost in what I said. Do you follow  
15 it?

16 MR. HALLWARD-DRIEMEIER: The -- I think I do.  
17 In our view --

18 JUSTICE BREYER: All right. Good, I'm glad  
19 that someone did.

20 [Laughter.]

21 MR. HALLWARD-DRIEMEIER: In our view, it  
22 would be anomalous that the, that the more innocent  
23 employee would be deprived of the benefits of the  
24 Westfall Act, and if I could use a more simple --

25 JUSTICE BREYER: I was talking really about

1 practicality of it. I don't think you can give me a  
2 case that is going to be hard for me as a district judge  
3 to decide because I'm going to ask you, the Government,  
4 to tell me if anything went on here that might have been  
5 within the scope of employment. And I look at what  
6 you're saying; if you say no, if you say no you can't  
7 defend it. If you say yes, you can defend it and that's  
8 going to be the end of it as long as your view is based  
9 on a reasonable reading of the record.

10 MR. HALLWARD-DRIEMEIER: Well, I don't think  
11 that that could be the end of it. As Justice Ginsburg  
12 pointed out, reality is much murkier than the black or  
13 white and even in the hypothetical that Your Honor  
14 poses, it is quite possible that as the case progresses,  
15 the plaintiff is going to attempt to introduce evidence  
16 that is much more ambiguous as to whether the employee  
17 was acting within the scope or not.

18 If I could use a simple example of assault.  
19 If the, if a supervisor is dressing down her employee  
20 for, for inadequate work, the employee then sues the  
21 supervisor alleging that she assaulted her, shaking her  
22 fist right under her nose, threatening harm to her.  
23 Even if that would be outside the scope of employment,  
24 the employee might say -- the supervisor rather might  
25 say, I never raised my hand at all. I raised my voice

1 certainly but I never raised my hand. A third party  
2 witness may say well I saw the supervisor wag her finger  
3 at the employee but not in a threatening fashion. Now --

4 JUSTICE BREYER: And as long as a jury could  
5 find that there is a view of the record such that the  
6 plaintiff might prove something wrong that it was within  
7 the scope of employment, such as finger wagging that  
8 hits her forehead, for example, you can defend it.  
9 What's the problem?

10 MR. HALLWARD-DRIEMEIER: Well, if the  
11 employee --

12 JUSTICE BREYER: The only problem is if you  
13 admit that you can't prove anything like that.

14 MR. HALLWARD-DRIEMEIER: If the employee was  
15 acting within the scope of the employment when she  
16 wagged a finger, then a fortiori she was acting within  
17 the scope of her employment when she didn't raise her  
18 hand at all.

19 JUSTICE BREYER: No, not a fortiori, for the  
20 reason that Congress wrote this statute not to give the  
21 defendant the right to call in the Government to defend  
22 him no matter what he did. The reason that Congress  
23 wrote the statute was to repeal the Westfall case, which  
24 was a question of the scope of immunity, which was the  
25 question of the scope of Government responsibility to

1 take away that limited determination in Westfall. That  
2 was the only point. Congress could have written a  
3 statute the way. What's your response to that?

4 MR. HALLWARD-DRIEMEIER: But Congress made,  
5 established an absolute immunity where the employee was  
6 acting within the scope of employment, and Petitioner  
7 agrees that scope of employment is the essential  
8 question for immunity. So if in my hypothetical the  
9 supervisor was acting within the scope of her employment  
10 when she dressed down, raising her voice but not raising  
11 her fist, her, her subordinate, then she is protected by  
12 the Westfall Act from a claim arising out of the context  
13 of that employment.

14 CHIEF JUSTICE ROBERTS: But what happens in a  
15 case where the certification is clearly wrong? I mean,  
16 you get into a fight with your neighbor. It's got  
17 nothing to do with your employment at all but the  
18 Attorney General certifies that it does. You know:  
19 "They are always thinking about your cases. You must  
20 have been thinking about it at the time." That  
21 certification goes into the district court. The  
22 district court looks at it and says this is ridiculous,  
23 throws it out, then that State law assault case proceeds  
24 in Federal court?

25 MR. HALLWARD-DRIEMEIER: Your Honor, the

1 Congress enacted the Westfall Act against the  
2 presumption of regularity of Federal officials and that  
3 is of course what this Court has often said as well, and  
4 so I don't think we should construe the statute on the  
5 presumption that the Attorney General would, would  
6 certify ridiculous cases.

7 JUSTICE GINSBURG: Well what about the,  
8 Lamagno, where the question was, was the employee  
9 working within the scope of his employment or was he off  
10 on a frolic of his own? I think that's the kind of  
11 question that the Chief Justice put to you. The  
12 certification, if it were wrong, the Attorney General  
13 said what he was doing was within the scope of  
14 employment and turned out he was on a drunken binge with  
15 his friends and they got in his car and killed someone.  
16 If that certification within the scope was wrong and  
17 instead he is on a frolic of his own, then the United  
18 States isn't substituted.

19 MR. HALLWARD-DRIEMEIER: That's right. That  
20 would mean that the district court did not on the merits  
21 ultimately uphold the defense of immunity, but as the  
22 Court said in Mesa, the merits of the immunity defense  
23 have nothing whatsoever to do with the question of  
24 jurisdiction.

25 JUSTICE GINSBURG: I thought that that case



1 was about, was the certification reviewable?

2 MR. HALLWARD-DRIEMEIER: That's right.  
3 Lamagno was about whether the certification was  
4 reviewable. Your Honor is also correct about the facts  
5 of that case. One of the points of dispute between the  
6 Government and the plaintiffs there was whether  
7 Mr. Lamagno was drunk at the time of the accident, and,  
8 and the Attorney General certified on his understanding  
9 that Mr. Lamagno was not drunk. And that was upheld by  
10 the district court on remand after some discovery and  
11 summary judgment type litigation.

12 JUSTICE GINSBURG: But the Court said that  
13 that could be reviewed.

14 MR. HALLWARD-DRIEMEIER: That's right. It  
15 can be reviewed and the Attorney General's certification  
16 is not conclusive for purposes of the substitution.

17 JUSTICE GINSBURG: Right.

18 MR. HALLWARD-DRIEMEIER: It is conclusive  
19 for purposes of the court's removal jurisdiction.

20 JUSTICE SCALIA: What does that mean? Does  
21 that mean that if the district court finds that in fact  
22 the defendant was not acting within the scope of his  
23 employment, the United States is eliminated as the  
24 defendant and the individual employee is resubstituted?

25 MR. HALLWARD-DRIEMEIER: Yes, Your Honor.

1 That's what happened. But, and in that --

2 JUSTICE SCALIA: Where, where does that come  
3 from?

4 MR. HALLWARD-DRIEMEIER: Well, the procedure  
5 for what happens upon the district court's review is not  
6 spelled out in the Westfall Act, neither is the review  
7 itself in particular. But the, the employee --

8 JUSTICE SCALIA: Maybe the United States  
9 should remain the party defendant and the United States  
10 should pay which would be the, you know, the price of  
11 the Attorney General's certification. He should be  
12 careful what he certifies.

13 MR. HALLWARD-DRIEMEIER: Well, the uniform  
14 view of the lower courts is that when the certification is  
15 overturned, the effect is to resubstitute the employee  
16 as the defendant and it proceeds in Federal court as a  
17 pendent claim. The Attorney General's assertion of the  
18 defense of immunity which we presume to be colorable  
19 because we presume regularity by the Attorney General,  
20 confers article III jurisdiction on the courts, even  
21 though it may ultimately on the merits be rejected.  
22 This Court held in the Carnegie-Mellon case that the  
23 district courts have discretion whether to exercise  
24 jurisdiction over pendent claims once the Federal  
25 question has been resolved. If the courts have

1 discretion to exercise that pendent jurisdiction, then  
2 certainly Congress can instruct them to exercise that --

3 CHIEF JUSTICE ROBERTS: Well, they wouldn't  
4 have discretion in that case, though, because the  
5 statute says the Attorney General's certification is  
6 conclusive for purposes of removal.

7 MR. HALLWARD-DRIEMEIER: That's right.  
8 Congress has removed the discretion in this class of  
9 cases and says that the courts must retain jurisdiction.

10 CHIEF JUSTICE ROBERTS: I thought maybe your  
11 answer, one alternative answer, would have been that you  
12 can't remand the case but you can still dismiss it.

13 MR. HALLWARD-DRIEMEIER: Well, the, perhaps,  
14 perhaps that's so. Certainly Carnegie-Mellon --

15 CHIEF JUSTICE ROBERTS: It would still be  
16 conclusive for purposes of removal, but it doesn't mean  
17 it's conclusive for purposes of subject matter  
18 jurisdiction.

19 MR. HALLWARD-DRIEMEIER: By its text, the  
20 statute speaks to removal and that the Attorney  
21 General's certification is conclusive for purposes of  
22 removal. But I think --

23 JUSTICE SOUTER: Couldn't it be conclusive  
24 for purposes of removal jurisdiction, but still leave  
25 the district court with discretion to remand on the

1 grounds that, although it had removal jurisdiction, in  
2 fact the premise of that removal jurisdiction was wrong,  
3 and it would therefore remand, in effect, because the  
4 only claim it had before it was the equivalent of a  
5 pendent claim.

6 MR. HALLWARD-DRIEMEIER: But the -- as the  
7 Court held in Carnegie-Mellon, a remand of pendent claims  
8 after the Federal issue has been resolved is not a  
9 remand for lack of subject matter jurisdiction within  
10 the meaning of 1447(c). Rather, it is a discretionary  
11 remand under the doctrine of pendent jurisdiction, and  
12 so --

13 JUSTICE SOUTER: In that case it would be  
14 reviewable.

15 MR. HALLWARD-DRIEMEIER: And it would be  
16 reviewable. That's why -- that's one of the reasons why  
17 the district court's order here is reviewable, because  
18 it is not an order of remand authorized by 1447(c)  
19 because, first of all, Congress has instructed the  
20 courts that they are not to remand.

21 JUSTICE SCALIA: That's, that's what the  
22 district court said it was, though, isn't it? Didn't it  
23 -- wasn't the district court remanding for lack of  
24 jurisdiction?

25 MR. HALLWARD-DRIEMEIER: It is certainly

1 true that the district court --

2 JUSTICE SCALIA: So you want us to review  
3 the, the assertion of the district court that it was  
4 remanding for, I mean that would mean every case would,  
5 would be reviewable.

6 MR. HALLWARD-DRIEMEIER: No, Your Honor,  
7 because here the Court need not go beyond the face of  
8 the district court's order to understand what it was  
9 doing. The court exercised jurisdiction over the  
10 Federal question that was properly brought before it by  
11 the Attorney General's certification and this Court's  
12 decision in Lamagno. After resolving that, the district  
13 court said, having concluded that the United States is  
14 not a proper party to this case, the court must now  
15 determine whether or not it has jurisdiction, and it  
16 also said that the absence of the U.S. as a party to the  
17 case destroys the court's jurisdiction. So it's evident  
18 that the court understood that it had jurisdiction and  
19 that it was a subsequent event that deprived it.

20 JUSTICE STEVENS: Let me go back to the  
21 Chief Justice's hypo a little earlier. Could the  
22 district judge at that point dismiss the case without  
23 prejudice to refile in the State court?

24 MR. HALLWARD-DRIEMEIER: I don't think that  
25 that would be consistent with Congress's intent. The --

1 in all of the Government --

2 JUSTICE STEVENS: It would be consistent  
3 with the court having jurisdiction to dispose of the  
4 case.

5 MR. HALLWARD-DRIEMEIER: That is true. But  
6 I think that the intent of Congress was the same as this  
7 Court, all the members of this Court, recognized in  
8 Lamagno. In Lamagno, even the dissenters, the  
9 plurality, all acknowledged what Congress intended by  
10 the "conclusive for purposes of removal" language was to  
11 prevent the shuttling back and forth of the case. Once  
12 it was removed, it was to stay in Federal court. That  
13 was what Congress intended. And one reason --

14 JUSTICE GINSBURG: Then it's more than  
15 pendent jurisdiction, because pendent jurisdiction  
16 leaves it up to the Federal court to either retain the  
17 State claim or send it back. So this is -- what you're  
18 suggesting is something other than pendent jurisdiction.

19 MR. HALLWARD-DRIEMEIER: That's right. By  
20 pendent jurisdiction what, what I meant to convey was  
21 that it is within the Court's article III jurisdiction  
22 to exercise jurisdiction over the State law claims that  
23 were pendent to a Federal claim. Under this Court's  
24 judicially developed doctrine of pendent jurisdiction,  
25 that is discretionary with the court. But if it is

1 discretionary with the court, then certainly Congress  
2 can mandate that the court exercise that jurisdiction  
3 and that it would be consistent with article III.

4 But another reason why Congress would have  
5 wanted the case to remain in Federal court even if the  
6 certification is overturned is, as we've alluded to  
7 before, the development of the case subsequent to the  
8 certification substitution decision may, may illustrate  
9 that the plaintiff's claim does indeed assert facts that  
10 were within the scope of employment. The court would at  
11 the very --

12 CHIEF JUSTICE ROBERTS: Well, the  
13 jurisdiction wouldn't depend on that. Justice Ginsburg's  
14 point that there's more than pendent jurisdiction here I  
15 take it is because these are not separate State claims  
16 appended to what you thought was a Federal claim. This  
17 is the same claim that you initially thought was a  
18 Federal claim and then it turned into a purely State law  
19 claim, and that may be analyzed quite differently for  
20 purposes of jurisdiction.

21 MR. HALLWARD-DRIEMEIER: No. The case is I  
22 think not distinguishable from removals under the  
23 Federal Officer Removal statute, where Congress has  
24 indicated that it is the Federal defense that confers  
25 jurisdiction rather than the Federal claim. Then, the

1 ultimate merits of the Federal defense are irrelevant to  
2 the jurisdictional issue. And the Court --

3 JUSTICE SOUTER: So you're saying there are  
4 two claims, one claim is raised by the defense, and if  
5 you look at that claim which is by definition Federal,  
6 then it's fair to look at the original State claim by  
7 analogy as a pendent claim?

8 MR. HALLWARD-DRIEMEIER: Yes.

9 JUSTICE SOUTER: Is that fair?

10 MR. HALLWARD-DRIEMEIER: Yes, Your Honor.

11 JUSTICE KENNEDY: What happens if the  
12 Attorney General doesn't certify and it goes to State  
13 court? I take it one of the concerns we have here is  
14 that there will be a deprivation of jury trial if the  
15 certification is wrong and if it's in Federal court.  
16 Suppose that there is a denial of certification. Then  
17 under (d)(3) --

18 MR. HALLWARD-DRIEMEIER: (D)(3).

19 JUSTICE KENNEDY: -- the employee can ask  
20 for a certification decision. I take it that's a  
21 Federal law defense that the, or a Federal law  
22 point, that the State court must hear and so now we're  
23 back in State court?

24 MR. HALLWARD-DRIEMEIER: Yes.

25 JUSTICE KENNEDY: And we still don't have a



1 jury trial and if that's so I'm not sure if that helps  
2 you or helps the Petitioner.

3 MR. HALLWARD-DRIEMEIER: Well, I think that  
4 Your Honor's point illustrates that this issue of Federal  
5 law is one that Congress has mandated be resolved at the  
6 outset by the judge, and if the employee petitions for  
7 certification over the Attorney General's objection the  
8 statute allows the Attorney General to remove the  
9 petition to Federal court and the statute states that  
10 the district court shall find and certify whether the  
11 employee was acting within the scope.

12 JUSTICE KENNEDY: But in my case I guess I  
13 don't think it ever gets to district court because  
14 there's no certification, but then the employee can ask  
15 the State court to have a bench trial on the scope of  
16 employment. Am I right about that?

17 MR. HALLWARD-DRIEMEIER: He can, you are  
18 correct. It is at the option of the Attorney General  
19 under (d)(3) to remove the case at that point so that  
20 the review of his noncertification happens in Federal  
21 court. (D)(3), in stark contrast to (d)(2), provides  
22 that if the district court holds that the Attorney  
23 General was correct that the employee was not acting  
24 within the scope the case is to be remanded to State  
25 court. So the presence of the remand --

1 JUSTICE KENNEDY: But my point is I suppose  
2 the Government can just say, we're not going to make the  
3 certification and we're not going to remove.

4 MR. HALLWARD-DRIEMEIER: Yes.

5 JUSTICE KENNEDY: So then the State court  
6 still has to have the bench trial on the scope of  
7 employment.

8 MR. HALLWARD-DRIEMEIER: That's right.

9 JUSTICE KENNEDY: I'm not sure if that helps.  
10 It seems to me that might be an argument for limiting  
11 the inquiry just so that we can avoid having bench  
12 trials in almost every case.

13 MR. HALLWARD-DRIEMEIER: The -- I think what  
14 that illustrates is that Congress wanted the issue of  
15 immunity resolved at the outset of the case by the  
16 court. And one reason that that is so essential under  
17 the Westfall Act FTCA scheme is that if the immunity --  
18 if the scope of employment issue is resolved in favor of  
19 the employee, that has many, many consequences,  
20 including that the United States is the proper  
21 defendant, exclusive jurisdiction lies in the Federal  
22 court, the case must be dismissed until an  
23 administrative claim is filed and that avenue is  
24 exhausted.

25 All of these procedural and substantive

1 defenses come into play depending on how the scope of  
2 employment issue is resolved.

3 JUSTICE BREYER: Right, but that's the  
4 strongest argument I thought the other way initially,  
5 that suppose the issue is whether he is on a frolic of  
6 his own. That you resolve in a bench trial. If the  
7 answer he was, okay, it stays in the Federal court  
8 anyway. I understand that.

9 But if you're going to take your position  
10 whether, say, it's a sexual assault as it was in Wood  
11 and the question is well, was there a sexual assault or  
12 not, and if there was it's clearly outside of the scope  
13 of employment, well, then you're going to have all these  
14 things resolved in a bench trial and actually it's  
15 supposed to normally be before a jury, for example.

16 JUSTICE GINSBURG: Is that so? If the  
17 employee is resubstituted, it's going on now, the United  
18 States is not a party, just the Federal employee, but  
19 it's staying in Federal court under this pendent  
20 jurisdiction-like theory, wouldn't either party be  
21 entitled to a jury trial?

22 MR. HALLWARD-DRIEMEIER: Yes. Yes, Your  
23 Honor. I think Justice Breyer's question, though, had  
24 to do with the procedure at the certification review  
25 stage. That is to be done by the district court sitting

1 without jury and that's because under the statute the  
2 Attorney General's certification has the legal effect of  
3 making the United States the defendant. The United  
4 States -- the action shall be deemed an action against  
5 the United States and the United States shall be  
6 substituted, and that is true unless and until the  
7 certification is overturned. And there is of course no  
8 Seventh Amendment right to jury trial against the United  
9 States.

10 JUSTICE SCALIA: Mr. Grant, could I come  
11 back for -- I'm sorry. I have the wrong counsel. Mr.  
12 Hallward-Driemeier --

13 MR. HALLWARD-DRIEMEIER: I'll respond to  
14 anything, Your Honor.

15 JUSTICE SCALIA: What is your response to  
16 the application of 1447(d)? You say that it does not  
17 apply where it's apparent on the face that the remand is  
18 improper?

19 MR. HALLWARD-DRIEMEIER: That the remand was  
20 not one of the remands authorized by 1447(c) --

21 JUSTICE SCALIA: Right, right.

22 MR. HALLWARD-DRIEMEIER: Not just that it  
23 was erroneous.

24 JUSTICE SCALIA: Wouldn't somebody always be  
25 able to bring an appeal asserting that to be the case --

1 MR. HALLWARD-DRIEMEIER: No, Your Honor.

2 JUSTICE SCALIA: And wouldn't that destroy  
3 the whole purpose of 1447(d), which is to stop this  
4 ping-pong?

5 MR. HALLWARD-DRIEMEIER: No, Your Honor, I  
6 think not. And we have two arguments that both the  
7 issues, substitution and remand, are appealable. One is  
8 a very specific one and that is that Congress has  
9 categorically taken this kind of remand outside the  
10 court's authority under 1447(c) by specifically  
11 prohibiting remand at all in 2679(d)(2), and that  
12 argument of course would not have relevance, I don't  
13 think, much beyond this case. And this Court has  
14 recognized that Congress can exempt a certain class of  
15 orders from the scope of 47(c) and (d) without  
16 cross-referencing those provisions. In the Rice case,  
17 the Court said that that specific removal provision did  
18 not purport to impair or restrict the application of the  
19 then equivalents of 747(c) and (d). But clearly  
20 2679(d)(2) does purport to impair the authority to  
21 remand by making the certification conclusive for  
22 purposes of removal. So with that as our narrowest  
23 argument --

24 JUSTICE SCALIA: But the response to that is  
25 that our opinions show that even an erroneous remand is

1 nonetheless governed by 1447(d). There are a lot of  
2 erroneous remands and this would just be, just be  
3 another one.

4 MR. HALLWARD-DRIEMEIER: But when Congress  
5 specifically prohibited the courts from remanding a case  
6 under 2679(d)(2) it certainly did not mean to protect a  
7 court that ignored that mandate from review.

8 JUSTICE SOUTER: Isn't the problem, and  
9 maybe I'm missing, and I may be missing something here,  
10 but isn't the problem with your argument is that the  
11 statute didn't come out and say you can't remand. The  
12 statute said, for purposes of removal, the certification  
13 is conclusive, and that allows for the kind of dichotomy  
14 that you and I were talking with before. A court can  
15 say look, I know that I have article III jurisdiction  
16 here, but in point of fact I am, I am remanding because  
17 what you and I are calling here the pendent claim does  
18 not support any of the Government's theory. If that's  
19 the case, then under 1447(d), there could be a review of  
20 it because it was not a jurisdictional ruling. But if  
21 on the contrary, the judge said, as I think the judge  
22 said here, I am remanding because based on this  
23 analysis, I do not have jurisdiction, i.e., the judge  
24 went against the statute saying that jurisdiction is  
25 conclusive. That is an erroneous jurisdictional ruling,

1 and as Justice Scalia said, we have said over and over  
2 again, however erroneous it may be, it is not  
3 reviewable.

4 MR. HALLWARD-DRIEMEIER: If I may, Your  
5 Honor? I think, two things: One, that there is a  
6 difference between Congress categorically prohibiting a  
7 certain kind of remand, and saying that a remand was  
8 simply erroneous. And secondly, that that argument  
9 would not go to our argument that under Waco, at the  
10 very least, the order on substitution is appealable,  
11 because it is separate and independent from remand.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
13 Mr. Grant, you have four minutes remaining.

14 REBUTTAL ARGUMENT OF ERIC GRANT  
15 ON BEHALF OF THE PETITIONER

16 MR. GRANT: Thank you. As to jurisdiction,  
17 Congress knows how to make an exception to section  
18 1447(d). All of the examples cited by the Court in  
19 Kircher, and by the Government in its brief,  
20 specifically referred, used the terms appeal and remand.  
21 The statute here contains neither of those terms.

22 CHIEF JUSTICE ROBERTS: Well, there was  
23 nothing expressed about Thermtron, and yet we recognized  
24 an exception there.

25 MR. GRANT: Your Honor, Thermtron was a case

1 where the district court did not even purport to be  
2 relying on one of the grounds enumerated in section  
3 1447(c), namely lack of subject matter jurisdiction. In  
4 this case, of course, the district court explicitly  
5 cited both that statute and used the term subject matter  
6 jurisdiction, and the Government itself is, is not  
7 willing to go behind that. On the merits, the  
8 Government has argued this morning that the Westfall Act  
9 provides a Federal forum to assert a Federal defense of  
10 immunity. The Government has analogized this statute  
11 to section 1442(a), which allows the assertion of a  
12 colorable Federal defense, but the defense of, he didn't  
13 do it, it never happened, is not a Federal defense. It  
14 is not a defense of immunity.

15 JUSTICE GINSBURG: How about the defense of,  
16 I was on the job and everything I did on the job was  
17 within the scope of my employment?

18 MR. GRANT: In certain cases, Your Honor,  
19 that could be a defense of immunity, but in a class of  
20 cases identified by Justice Breyer, there will be an  
21 admission. There has to be an admission under the facts  
22 and the law, that even if the alleged acts occurred, it  
23 was outside the scope of employment. In that case, the  
24 defense is purely a merits defense. And I think for  
25 this Court to say otherwise in this case would require



1 overruling, or being contradictory to over 20 years of  
2 official immunity jurisprudence, where the Court has  
3 consistently distinguished between immunity defenses and  
4 defenses on the merits, where certainly the lower courts  
5 have taken that conceptual distinction and said a  
6 defense that the alleged acts did not occur do not raise  
7 an immunity defense. And so, the assertion of a defense  
8 in that case on the merits is not the assertion of a  
9 Federal defense. It is not sufficient to confer Federal  
10 jurisdiction under article III. It does not meet the  
11 definition of a statute, of the statute, which uses the  
12 phrase "scope of employment" no fewer than seven times.  
13 There is no indication that Congress in the Westfall Act  
14 intended to change the normal rules that purely State  
15 law defenses such as he didn't do it were to be decided  
16 in a Federal forum.

17 JUSTICE GINSBURG: But then you're left with  
18 this question Justice Scalia raised. If it's ambiguous,  
19 an employee says I did everything within the scope of my  
20 employment, I did nothing improper. They allege I did  
21 something improper. I didn't. I was a faithful  
22 servant. The negligent employee will be allowed the  
23 Federal forum, but the one who was a loyal, careful  
24 employee has to be in the State court. Does that make  
25 any sense?

1           MR. GRANT: Your Honor, I think that's, with  
2 respect, a misunderstanding of how the statute works.  
3 The employee who acts within the scope of his  
4 employment, whether or not he did the acts alleged, gets  
5 immunity. The employee who acts outside of the scope of  
6 employment --

7           JUSTICE GINSBURG: This is an employee who  
8 said I never did one thing that was inconsistent with my  
9 Federal employment.

10           MR. GRANT: That's an employee who should  
11 win on the merits and will win on the merits. As  
12 Justice Kennedy recognized, there are certain  
13 applications that allow the State court to resolve even  
14 a Federal defense. We should trust that State courts  
15 will resolve State law defenses in a manner fair to  
16 their own citizens as well.

17           CHIEF JUSTICE ROBERTS: Thank you,  
18 Mr. Grant. The case is submitted.

19           (Whereupon, at 11:04 a.m., the case in the  
20 above-entitled matter was submitted.)

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22  
23  
24  
25

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