SUPREME COURT OF THE UNITED STATES

No. 94–167

KATIA GUTIERREZ DE MARTINEZ, EDUARDO MARTINEZ PUCCINI AND HENNY MARTINEZ DE PAPAIANI, PETITIONERS *v.* DIRK A. LAMAGNO ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June 14, 1995]

JUSTICE SOUTER, with whom THE CHIEF JUSTICE, JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

One does not instinctively except to a statutory construction that opens the door of judicial review to an individual who complains of a decision of the Attorney General, when the Attorney General herself is ready to open the door. But however much the Court and the Attorney General may claim their reading of the Westfall Act to be within the bounds of reasonable policy, the great weight of interpretive evidence shows that they misread Congress's policy. And so I respectfully dissent.

The two principal textual statements under examination today are perfectly straightforward. "Upon certification by the Attorney General . . . any civil action or proceeding . . . shall be deemed an action against the United States . . ., and the United States shall be substituted as the party defendant." 28 U. S. C. §2679(d)(1); see also §2679(d)(4) ("[u]pon certification, any action or proceeding . . . shall proceed in the same manner as any action against the United States filed pursuant to [the FTCA]. . . ."). Notwithstanding the Court's observation that some contexts can leave the word "shall" a bit slippery, *ante*, at 15, n. 9, we have repeatedly recognized the normally uncompromising directive that it carries. See *United States* v. *Monsanto*, 491 U. S. 600, 607 (1989); *Anderson* v. *Yungkau*, 329 U. S. 482, 485 (1947); see also *Griggs* v. *Provident Consumer*

Discount Co., 459 U. S. 56, 61 (1982) (*per curiam*); *Association of Civilian Technicians* v. *FLRA*, 22 F. 3d 1150, 1153 (CADC 1994) ("The word `shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive"); Black's Law Dictionary 1375 (6th ed. 1990) ("As used in statutes . . . this word is generally imperative or mandatory"). There is no hint of wobbling in the quoted language,[1] and the normal meaning of its plain provisions that substitution is mandatory on certification is the best evidence of the congressional intent that the Court finds elusive (*ante*, at 6, 8). That normal meaning and manifest intent is confirmed by additional textual evidence and by its consonance with normal jurisdictional assumptions.

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[1]The Court provides two examples from the Federal Rules in which the circumstances under which action "shall" be taken are limited by use of the word "only." *Ante*, at 15, n. 9. There is, of course, no similar language of limitation in §2679(d)(1). The only prerequisite for substitution under the Westfall Act is certification.

We would not, of course, read "shall" as so uncompromising if the Act also included some express provision for review at the behest of the tort plaintiff when the Attorney General certifies that the acts charged were inside the scope of a defendant employee's official duties. But the Westfall Act has no provision to that effect, and the very fact that its predecessor, the Federal Drivers Act, Pub. L. 87–258, 75 Stat. 539 (1961), combined "shall" with just such authorization for review at the will of a disappointed tort plaintiff, *ibid.* (previously codified at 28 U. S. C. §2679(d) (1982 ed.)),[2] makes the absence of a like provision from the Westfall Act especially good evidence that Congress meant to drop this feature from the system, leaving "shall" to carry its usual unconditional message. See *Brewster* v. *Gage*, 280 U. S. 327, 337 (1930) ("The deliberate selection of language so differing from that used in . . . earlier Acts indicates that a change of law was intended"); 2A N. Singer, Sutherland on Statutory Construction §51.02, p. 454 (4th ed. 1984). That conclusion gains further force from the presence in the Westfall Act of an express provision for judicial review at the behest of a defending employee, when the Attorney General refuses to certify that the acts fell within the scope of government employment. See 28 U. S. C. §2679(d)(3) ("[i]n the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment"). Providing authority in one circumstance but not another implies an absence of authority in the statute's silence. See *Russello* v.

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[2]The Drivers Act provided for certification only in cases originating in state court, and judicial review was perforce limited to those cases. See 75 Stat. 539 (previously codified at 28 U. S. C. §2679(d)).

United States, 464 U. S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"); see also *United States* v. *Naftalin*, 441 U. S. 768, 773–774 (1979).

Even if these textually grounded implications were not enough to confirm a plain reading of the text and decide the case, an anomalous jurisdictional consequence of the Court's position should be enough to warn us away from treating the Attorney General's certification as reviewable. The Court recognizes that there is nothing equivocal about the Act's provision that once a state tort action has been removed to a federal court after a certification by the Attorney General, it may never be remanded to the state system: "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal," 28 U. S. C. §2679(d)(2). As the Court concedes, then, *ante*, at 17, its reading supposes that Congress intended federal courts to retain jurisdiction over state-law tort claims between nondiverse parties even after determining that the Attorney General's certification (and thus the United States's presence as the defendant) was improper. But there is a serious problem, on the Court's reasoning, in requiring a federal district court, after rejecting the Attorney General's certification, to retain jurisdiction over a claim that does not implicate federal law in any way. Although we have declined recent invitations to define the outermost limit of federal court jurisdiction authorized by the "Arising Under" Clause of Article III of the Constitution,[3] see *Mesa* v. *California*, 489 U. S.

[3]"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made,

121, 136–137 (1989); *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480 (1983), on the Court's reading this statute must at the very least approach the limit, if it does not cross the line. This, then, is just the case for adhering to the Court's practice of declining to construe a statute as testing this limit when presented with a sound alternative. *Mesa* v. *California*, *supra*, at 137, citing *Califano* v. *Yamasaki*, 442 U. S. 682, 693 (1979).

The Court departs from this practice, however. Instead, it looks for jurisdictional solace in the theory that once the Attorney General has issued a scope-of-employment certification, the United States's (temporary) appearance as the sole defendant suffices forever to support jurisdiction in federal court, even if the district court later rejects the Attorney General's certification and resubstitutes as defendant the federal employee first sued in state court. *Ante*, at 17–18. Whether the employee was within the scope of his federal employment, the Court reasons, is itself a sufficient federal question to bring the case into federal court, and "`considerations of judicial economy, convenience and fairness to litigants,'" *ante*, at 18, quoting *Mine Workers* v. *Gibbs*, 383 U. S. 715, 726 (1966), are sufficient to keep it there even after a judicial determination that the United States is not the proper defendant.

But the fallacy of this conclusion appears as soon as one recalls the fact that substitution of the United States as defendant (which establishes federal-question jurisdiction) is exclusively dependant on the scope-of-employment certification. The challenge to the certification is thus the equivalent of a challenge to the essential jurisdictional fact that the United States is a party, and the federal court's jurisdiction to review scope of employment (on the Court's theory) is merely an example of any court's

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under their Authority . . . ." U. S. Const., Art. III, §2, cl. 1.

necessary authority to rule on a challenge to its own jurisdiction to try a particular action. To argue, as the Court does, that authority to determine scope of employment justifies retention of jurisdiction whenever evidence bearing on jurisdiction and liability overlaps, is therefore tantamount to saying the authority to determine whether a Court has jurisdiction over the cause of action supplies the very jurisdiction that is subject to challenge. It simply obliterates the distinction between the authority to determine jurisdiction and the jurisdiction that is the subject of the challenge, and the party whose jurisdictional claim was challenged will never lose: litigating the question whether an employee's allegedly tortious acts fall within the scope of employment will, of course, always require some evidence to show what the acts were. Accordingly, there will always be overlap between evidence going to the scope-of-employment determination and evidence bearing on the underlying liability claimed by the plaintiff, and for this reason federal-question jurisdiction in these cases becomes inevitable on the Court's view. The right to challenge it therefore becomes meaningless, as does the very notion of jurisdictional limitation. The Court's cure for the jurisdictional disease is thus to kill the concept of federal question jurisdiction as a limit on what federal courts may entertain.

It would never be sound to attribute such an aberrant concept of federal question jurisdiction to Congress; it is impossible to do so when we realize that Congress expressly provided that when a federal court considers a challenge to the Attorney General's refusal to certify (raised by an employee-defendant) and finds the act outside the scope of employment, a case that originated in a state court must be remanded back to the state court. See 28 U. S. C. §2679(d)(3). In such a case, there will have been just as much overlap of jurisdictional evidence and

liability evidence as there will be when the jurisdictional issue is litigated at the behest of a plaintiff (as here) who contests a scope-of-employment certification. If Congress thought the federal court should retain jurisdiction when it is revealed that none exists in this latter case, it should have thought so in the former. But it did not, and the reason it did not is obvious beyond any doubt. It assumed a federal court would never be in the position to retain jurisdiction over an action for which a tort plaintiff has shown there is no federal-question basis, and Congress was entitled to assume this, because it had provided that a certification was conclusive.

In sum, the congressional decision to make the Attorney General's certification conclusive was couched in plain terms, whose plain meaning is confirmed by contrasting the absence of any provision for review with just such a provision in the predecessor statute, and with an express provision for review of a refusal to certify, contained in the Westfall Act itself. The Court's contrary view implies a jurisdictional tenacity that Congress expressly declined to assert elsewhere in the Act, and invites a difficult and wholly unnecessary constitutional adjudication about the limits of Article III jurisdiction. These are powerful reasons to recognize the unreviewability of certification, and the Court's contrary arguments fail to measure up to them.

The Court raises three counterpoints to a straightforward reading of the Act. First, it suggests that language in §2679(d)(2) negatively implies that Congress intended to authorize judicial review of scope-of-employment certifications, and that, in fact, the straightforward reading of the statute results in a drafting redundancy. Second, the Court claims that the straightforward reading creates an oddity by limiting the role of federal courts in certain cases. Finally, the Court invokes the presumption against judging one's self.

The redundancy argument, it must be said, is facially plausible. It begins with the sound general rule that Congress is deemed to avoid redundant drafting, *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 837 (1988); see *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U. S. 189, 196–197 (1985), from which it follows that a statutory interpretation that would render an express provision redundant was probably unintended and should be rejected. Applying that rule here, the argument is that if certification by the Attorney General conclusively establishes scope of employment for substitution purposes, then there is no need for the final sentence in §2679(d)(2), that certification "shall conclusively establish scope of office or employment for purposes of removal" in cases brought against federal employees in state court. If certification is conclusive as to substitution it will be equally conclusive as to removal, since the federal defendant will necessarily be entitled to claim jurisdiction of a federal court under 28 U. S. C. §1346(b). See *ante*, at 14, n. 8. Accordingly, the Court suggests the provision making certification conclusive for purposes of removal must have greater meaning; it must carry the negative implication that certification is not conclusive for purposes of substitution. *Ante*, at 14.

Sometimes, however, there is an explanation for redundancy, rendering any asserted inference from it too shaky to be trusted. Cf. *United States Nat. Bank of Ore.* v. *Independent Ins. Agents of America, Inc.*, 508 U. S. ___, ___ (1993) (slip op., at 19–20). That is the case with the provision that certification is conclusive on the issue of removal from state to federal court. The explanation takes us back to the Westfall Act's predecessor, the Federal Drivers Act, 75 Stat. 539, which was superseded upon passage of the current statute, Pub. L. 100–694, 102 Stat. 4563–45-67. The Drivers Act made the FTCA the exclusive source of remedies for injuries resulting from the

operation of any motor vehicle by a federal employee acting within the scope of his employment. 28 U. S. C. §2679(b) (1982 ed.). Like the Westfall Act, the Drivers Act authorized the Attorney General to certify that a federal employee sued in state court was acting within the scope of employment during the incident allegedly giving rise to the claim, and it provided in that event for removal to the federal system, as well as for substitution of the United States as the defendant. 28 U. S. C. §2679(d) (1982 ed.). Unlike the Westfall Act, however, the Drivers Act explicitly directed district courts to review, "on a motion to remand held before a trial on the merits," whether any such case was "one in which a remedy by suit . . . is not available against the United States." *Ibid.* The district courts and the courts of appeals routinely read this language to permit district courts to hear motions to remand challenging the Attorney General's scope-of-employment determination. See *McGowan* v. *Williams*, 623 F. 2d 1239, 1242 (CA7 1980); *Van Houten* v. *Ralls*, 411 F. 2d 940, 942 (CA9), cert. denied, 396 U. S. 962 (1969); *Daugherty* v. *United States*, 427 F. Supp. 222, 223–224 (WD Pa. 1977); accord, *Seiden* v. *United States*, 537 F. 2d 867, 869 (CA6 1976); *Levin* v. *Taylor*, 464 F. 2d 770, 771 (CADC 1972). Given the express permissibility of a motion to remand in order to raise a post-removal challenge to certification under the Drivers Act, when the old Act was superseded, and challenges to certification were eliminated, Congress could sensibly have seen some practical value in the redundancy of making it clear beyond question that the old practice of considering scope of employment on motions to remand was over.[4]

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[4]The Court concludes that the provision for review of certification was omitted because it was joined with the provision for remand in the Drivers Act. *Ante*, at 15, n. 10. On a matter of this substance, the explanation does

How then does one assess the force of the redundancy? On my plain reading of the statute, one may take it as an understandable inelegance of drafting. One could, in the alternative, take it as some confirmation for the Court's view, even though the Court's view brings with it both a jurisdictional anomaly and the consequent certainty of a serious constitutional question. Is it not more likely that Congress would have indulged in a little redundancy, than have meant to foist such a pointless need for constitutional litigation onto the federal courts? Given the choice, inelegance may be forgiven.

The Court's second counterpoint is that we should be reluctant to read the Westfall Act in a way that leaves a district court without any real work to do. The Court suggests that my reading does just that in cases like this one, because the district court's sole function after the Attorney General has issued a scope-of-employment certification is to enter an order of dismissal. *Ante*, at 11–12. Of course, in the bulk of cases with an Attorney General's certification, the sequence envisioned by the Court will never materialize. Even though a district court may not review the scope-of-employment determination, it will still have plenty of work to do in the likely event that either liability or amount of damages is disputed, or the United States's claim to immunity under 28

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not give Congress credit for much intellectual discrimination. The same footnote also sells this dissent a bit short: we have no need to argue that omission of any provision to review scope of employment, in isolation, would conclusively have foreclosed review, and we have made the very point that a failure to provide for conclusiveness of removal would not have left that issue in doubt; on each point, the various items of interpretive evidence supplied by the text and by textual comparison with the Drivers Act are to be read together in pointing to whatever judgment they support.

U. S. C. §2680 turns on disputed facts. Only in those rare cases presenting a claim to federal immunity too air-tight for the plaintiff to challenge will the circumstance identified by the Court even occur. It is hard to find any significance in the fact that now and then a certification will relieve a federal court of further work, given the straightforward and amply confirmed provision for conclusiveness.

The Court's final counterpoint to plain reading relies heavily on "the strong presumption that Congress intends judicial review of administrative action," citing a line of cases involving judicial challenges to regulations claimed to be outside the statutory authority of the administrative agencies that promulgated them. See *ante*, at 5–6, citing *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 670–673 (1986); *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967). It is, however, a fair question whether this presumption, usually applied to permit review of agency regulations carrying the force and effect of law, should apply with equal force to a Westfall Act certification. The very narrow factual determination committed to the Attorney General's discretion is related only tangentially, if at all, to her primary executive duties; she determines only whether a federal employee, who will probably not even be affiliated with the Justice Department, acted within the scope of his employment on a particular occasion. This function is far removed from the agency action that gave rise to the presumption of reviewability in *Bowen*, *supra*, at 668–669, in which the Court considered whether Congress provided the Secretary of Health and Human Services with non-reviewable authority to promulgate certain Medicare distribution regulations, and in *Abbott Laboratories*, *supra*, at 138–139, in which the Court considered whether Congress provided the Secretary of Health, Education and Welfare with non-reviewable authority to promulgate certain prescription drug labeling

regulations.

The Court's answer that the presumption of reviewability should control this case rests on the invocation of a different, but powerful principle, that no person may be a judge in his own cause. *Ante*, at 8–11. But this principle is not apt here. The Attorney General (who has delegated her Westfall Act responsibilities to the United States Attorneys, 28 CFR §15.3(a) (1994)) is authorized to determine when any one of nearly three million federal employees was acting within the scope of authority at an allegedly tortious moment. She will characteristically have no perceptible interest in the effect of her certification decision, except in the work it may visit on her employees or the liability it may ultimately place on the National Government (each of which considerations could only influence her to deny certification subject to the employee's right to challenge her). And even where she certifies under circumstances of the Government's immunity, as here, she does not save her employer, the United States, from any liability it would face in the absence of certification; if she refused to certify, the Government would remain as free of exposure as if she issued a certification. The most that can be claimed is that when the Government would enjoy immunity it would be easy to do a favor for a federal employee by issuing a certification. But at this point the possibility of institutional self interest has simply become *de minimis*,[5] and the likelihood of improper

[5]The Court tries to convert this minimal influence into a "conflict of interest," *ante*, at 19, derived from an "impetus to certify [that is] overwhelming," *ante*, at 9, said to arise from a United States Attorney's fear that a Government employee would contest a refusal to certify and force the U. S. Attorney to litigate the issue. This suggestion will appear plausible or not depending on one's view of the frailty of United States Attorneys. We have to doubt that the Attorney General sees her district

influence has become too attenuated to analogize to the case in which the interested party would protect himself by judging his own cause or otherwise take the law into his own hands in disregard of established legal process. Although the Court quotes at length from the traditional condemnations of self-interested judgments, *ante*, at 10–11, its citations would be on point here only if the employee were issuing the certification. But of course, the employee is not the one who does it, and the Attorney General plainly lacks the kind of self-interest that "`would certainly bias [her] judgment, and, not improbably, corrupt [her] integrity. . . .'" *Ante*, at 10, quoting The Federalist No. 10, p. 79 (C. Rossiter ed. 1961) (J. Madison).

In any event, even when this presumption is applicable, it is still no more than a presumption, to be given controlling effect only if reference to "specific language or specific legislative history" and "inferences of intent drawn from the statutory scheme as a whole," *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 349 (1984), leave the Court with "substantial doubt" as to Congress's design, *id.*, at 351. There is no substantial doubt here. The presumption has no work to do.

I would affirm.

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attorneys as quite so complaisant, and if Congress had thought that the Government's lawyers would certify irresponsibly just to avoid preparing for a hearing it would surely have retained the Drivers Act's provision for review of certification.