NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GUTIERREZ DE MARTINEZ ET AL. *v.* LAMAGNO ET AL.

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

No. 94–167. Argued March 22, 1995—Decided June 14, 1995

Invoking the federal court's jurisdiction based on diversity of citizenship, petitioners alleged in their complaint that they had suffered physical injuries and property damage as a result of an accident in Colombia caused by the negligence of respondent Lamagno, a federal employee. The United States Attorney, acting pursuant to the statute commonly known as the Westfall Act, 28 U. S. C. §2679(d)(1), certified on behalf of the Attorney General that Lamagno was acting within the scope of his employment at the time of the episode. Ordinarily, upon such certification, the employee is dismissed from the action, the United States is substituted as defendant, and the case proceeds under the Federal Tort Claims Act (FTCA). But in this case, substitution would cause the action's demise: petitioners' claims arose abroad, and thus fell within an exception to the FTCA's waiver of the United States' sovereign immunity. And the United States' immunity would afford petitioners no legal ground to bring Lamagno back into the action. See *United States* v. *Smith*, 499 U. S. 160. Endeavoring to redeem their lawsuit, petitioners sought court review of the Attorney General's scope-of-employment certification, for if Lamagno was acting outside the scope of his employment, the action could proceed against him. However, the District Court held the certification unreviewable, substituted the United States for Lamagno, and dismissed the suit. The Fourth Circuit affirmed.

Held: The judgment is reversed, and the case is remanded.

23 F. 3d 402, reversed and remanded.

JUSTICE GINSBURG delivered the opinion of the Court with respect to Parts I, II, and III, concluding that the Attorney General's scope-of-employment certification is reviewable in court. Pp. 5–17.

(a) As shown by the division in the lower courts and in this

case, the Westfall Act is open to divergent interpretation on the question at issue. Two considerations weigh heavily in the Court's analysis. First, the Attorney General herself urges review, mindful that in cases of the kind petitioners present, the incentive of her delegate to certify is marked. Second, when a Government official's determination of a fact or circumstance—for example, ``scope of employment''—is dispositive of a court controversy, federal judges traditionally proceed from the strong presumption that Congress intends judicial review. Review will not be cut off absent persuasive reason to believe that Congress so intended. No such reason is discernible here. Pp. 5–6.

(b) Congress, when it composed the Westfall Act, legislated against a backdrop of judicial review: courts routinely reviewed the local U. S. Attorney's scope-of-employment certification under the Act's statutory predecessor. The plain purpose of the Westfall Act was to override *Westfall* v. *Erwin,* 484 U. S. 292, which had added a ``discretionary function'' requirement, discrete from the scope-of-employment test, as a criterion for a federal officer's personal immunity. Although Congress thus wanted the employee's personal immunity to turn solely on the critical scope-of-employment inquiry, nothing tied to the Act's purpose shows an intent to commit that inquiry to the unreviewable judgment of the Attorney General or her delegate. Pp. 6–8.

(c) Construction of the Westfall Act as Lamagno urges—to deny to federal courts authority to review the Attorney General's scope-of-employment certification—would oblige this Court to attribute to Congress two highly anomalous commands. First, the Court would have to accept that, whenever the case falls within an exception to the FTCA, Congress has authorized the Attorney General to sit as an unreviewable judge in her own cause—able to block petitioners' way to a tort action in court, at no cost to the federal treasury, while avoiding litigation in which the United States has no incentive to engage, and incidentally enhancing the morale—or at least sparing the purse—of federal employees. This conspicuously self-serving interpretation runs counter to the fundamental principle that no one should be a judge in his own cause, and has been disavowed by the United States. Pp. 8–11.

(d) Second, and at least equally perplexing, Lamagno's proposed reading would cast Article III judges in the role of petty functionaries, persons required to rubber-stamp the decision of a scarcely disinterested executive officer, but stripped of capacity to evaluate independently whether that decision is correct. This strange course becomes all the more surreal when one adds to the scene the absence of any obligation on the part of the Attorney General's delegate to conduct proceedings, to give the plaintiff an opportunity to speak to the scope-of-employment question, to give notice that

she is considering the question, or to give any explanation for her action. This Court resists ascribing to Congress an intention to place courts in the untenable position of having automatically to enter judgments pursuant to decisions they have no authority to evaluate. Pp. 11–12.

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(e) The Westfall Act's language is far from clear. Section 2679(d)(2) provides for removal of the case from state to federal court and for substitution of the United States as defendant upon the Attorney General's certification. Section 2679(d)(2) states explicitly that ``certification of the Attorney General shall conclusively establish scope of office or employment *for purposes of removal.*'' (Emphasis added.) Notably, §2679(d)(2) contains no such statement with regard to substitution. The §2679(d)(2) prescription thus tends in favor of judicial review. Counselling against review, however, is the commanding force of the word ``shall'': ``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.'' §2679(d)(1) (emphasis added). As the statutory language is reasonably susceptible to divergent interpretations, the Court adopts the reading that accords with the presumption favoring judicial review and the tradition of court review of scope certifications, while avoiding the anomalies that attend foreclosure of review. Pp. 12–17.

GINSBURG, J., delivered the opinion of the Court with respect to Parts I, II, and III, in which STEVENS, O'CONNOR, KENNEDY, and BREYER, JJ., joined, and an opinion with respect to Part IV, in which STEVENS, KENNEDY, and BREYER, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment. SOUTER, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined.