

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 07-5379

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRANK D. WUTERICH,

Plaintiff-Appellee,

v.

JOHN MURTHA, CONGRESSMAN, and
UNITED STATES OF AMERICA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

JEFFREY A. TAYLOR
United States Attorney

R. CRAIG LAWRENCE
DARRELL C. VALDEZ
Assistant United States Attorneys

CERTIFICATE OF COUNSEL
AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici:

Frank D. Wuterich was the plaintiff in the district court and is the appellee in this Court.

Congressman John Murtha was the named defendant in the District Court. The United States and Congressman Murtha moved to substitute the United States as the defendant, and on that basis to dismiss the case for lack of subject matter jurisdiction. The United States and Congressman Murtha are the appellants in this Court.

B. Ruling Under Review:

The ruling under review is the oral ruling issued on September 28, 2007, by United States District Court Judge Rosemary M. Collyer, in Wuterich v. Murtha (D.D.C.), Civ. No. 06-1366 (RMC). The ruling is unreported, and is reproduced in the Joint Appendix ("JA") at JA 4 (minute Order) and 308 (Hearing Transcripts).

C. Related Cases:

This case has not previously been before this Court or any other Court.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether a Congressman was acting within the scope of his employment in making public statements concerning the ongoing Iraq war and a Joint Resolution pending before Congress calling for the withdrawal of U.S. troops from Iraq.

2. Whether the denial of a federal employee's Westfall Act immunity pending discovery is immediately appealable under 28 U.S.C. § 1291.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5379

FRANK D. WUTERICH,

Plaintiff-Appellee,

v.

JOHN MURTHA, CONGRESSMAN, and
UNITED STATES OF AMERICA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

In this common-law defamation action filed against a sitting Congressman, Appellee invoked the district court's jurisdiction under 28 U.S.C. § 1332. See Complaint at ¶ 4 (JA 8). The government moved to substitute the United States as the defendant under the Westfall Act, 28 U.S.C. § 2679, and, on that basis, to dismiss the case for lack of subject matter jurisdiction. JA 30. In an oral ruling issued on September 28, 2007, the District

Court declined to grant the motion pending discovery, including specifically the Congressman's deposition. See Tr. 9/28/07 at 32-34 (JA 308). A timely notice of appeal was filed on November 16, 2007. JA 235. On April 14, 2008, this Court issued an order directing the parties to this appeal to address in their briefs the basis for this Court's appellate jurisdiction. See Order (Apr. 14, 2008). As we show below, this Court has appellate jurisdiction under 28 U.S.C. § 1291. See pp. 12-17, infra.

STATEMENT OF THE CASE

This is a common-law defamation action against Congressman John Murtha of Pennsylvania. Appellee is a U.S. Marine whose unit was involved in the killing of civilians in Haditha, Iraq. The complaint alleges that, in media interviews concerning the Iraq war, Congressman Murtha made disparaging remarks about Appellee's unit, thus injuring Appellee's reputation.

In the District Court, Congressman Murtha and the United States moved under the Westfall Act, 28 U.S.C. § 2679, to substitute the United States for Mr. Murtha as the defendant. The District Court denied the Congressman's immunity from suit pending discovery, holding that Appellee was entitled to depose Congressman Murtha prior to a judicial determination of whether Mr. Murtha was acting within the scope of his employment in

making the statements in question. Congressman Murtha and the United States appeal.

STATEMENT OF FACTS

Appellee, Frank Wuterich, is a Staff Sergeant in the U.S. Marine Corps. See Complaint at ¶ 1 (JA 8). He was part of a Marine squad that was involved in the deaths of a number of civilians in Haditha, Iraq, on November 19, 2005. Id. at ¶¶ 6-15 (JA 8-11). Appellee has been criminally charged by the United States with multiple counts of homicide in connection with those deaths. See Memorandum Of Law In Support Of Plaintiff's Opposition To Motion To Substitute Defendants And Dismiss For Lack Of Subject Matter Jurisdiction (June 8, 2007) ("Plaintiff's District Court Brief") at 6 (JA 145) ("Following the filing of his Complaint, Wuterich was charged with thirteen counts of unpremeditated murder for events arising from the November 19, 2005, incident in Haditha.").

Appellee filed this action in August 2006 against the Honorable John Murtha, a sitting member of Congress from Pennsylvania. Congressman Murtha represents the 12th Congressional District of Pennsylvania, is a member of the House Committee on Appropriations, and is the Chairman of the Appropriations Committee's Subcommittee on Defense. JA 50.

Prior to the commencement of the 110th Congress in January 2007, Congressman Murtha was the Ranking Member of the Subcommittee on Defense. JA 50. In November, 2005, Congressman Murtha introduced a Joint Resolution (HJ Res. 73) to Congress demanding the redeployment of U.S. troops from Iraq. JA 57. That resolution lapsed with the change of Congress, and Congressman Murtha re-introduced the resolution before the current Congress. (HJ Res. 18).

According to the Complaint, Congressman Murtha, in various media interviews, has made public statements alluding to the events in Haditha, and those statements have referred to the Marines who were involved in those events as, among other things, "cold-blooded killers." See, e.g., Complaint at ¶ 39 (JA 25-26). During these interviews, Congressman Murtha discussed the war in Iraq and the need to withdraw troops from the region, as evidenced by the "cold-blooded murder" of civilians by U.S. Marines at Haditha. The Complaint alleges that Congressman Murtha is liable in damages for libel, defamation, and false light invasion of privacy. Complaint at ¶¶ 22-43 (JA 13-28).

In response to the Complaint, the United States Attorney's Office certified that Congressman Murtha was acting within the scope of his employment as a member of Congress in connection

with the allegations in the complaint. See Certification (JA 138). On the basis of that certification, the United States Attorney, on behalf of Congressman Murtha and the United States, moved to substitute the United States under the Westfall Act, 28 U.S.C. § 2679(d), and to dismiss the case for lack of subject matter jurisdiction. JA 30. The motion argued that the United States should be substituted for Mr. Murtha as the defendant in this matter, and that the complaint would then have to be dismissed because the complaint's allegations do not fall within the waiver of sovereign immunity applicable to the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(h) (intentional tort exception). JA 32. Appellee subsequently conceded the latter proposition. See Plaintiff's District Court Brief at 10 (JA 149) ("Wuterich agrees that if the United States is properly substituted as the defendant in place of Mr. Murtha, his lawsuit stops there. The United States is unequivocally immune from his tort claims.").

On September 28, 2007, the District Court issued an oral ruling declining to grant the substitution request. JA 308. The Court explained that further factual inquiry was needed to determine whether Congressman Murtha was acting within the scope of his employment when he made the statements in question. See

Tr. 9/28/07 at 32-34 (JA 339-341); Minute Order (9/28/07) (JA 4). The Court stated that Appellee would be entitled to some discovery, including, specifically, the deposition of Congressman Murtha. JA 340. On the motion of Congressman Murtha and the United States, the Court stayed any discovery pending this appeal. See Order of December 17, 2007 (JA 302).

SUMMARY OF ARGUMENT

This is a common-law defamation action brought against Pennsylvania Congressman John Murtha based on statements made by the Congressman in media interviews concerning the Iraq war and his pending Joint Resolution. In the context of a motion for substitution under the Westfall Act, the District Court denied Congressman Murtha's assertion of absolute immunity from suit pending discovery, including, in particular, the Congressman's deposition. The District Court's ruling reflects legal error, and should be reversed. Appellee's complaint on its face compels the conclusion that Mr. Murtha was acting within the scope of his employment in making the statements in question, and the Westfall Act therefore entitles him to absolute immunity as a matter of law.

1. As an initial matter, the District Court's ruling denying immunity pending discovery is appealable under

established principles pursuant to 28 U.S.C. § 1291. In providing for substitution of the United States as defendant instead of the individual employee, the Westfall Act confers absolute immunity on federal employees sued for common-law torts based on actions undertaken in the scope of their employment. Like qualified immunity, Westfall Act immunity is an immunity from suit, not just an immunity from judgment, and it is settled that both absolute and qualified immunity encompass immunity from pretrial discovery as well as from trial itself. Requiring Congressman Murtha to be deposed before resolution of his legal right to immunity would destroy the very immunity to which he is entitled, and an immediate appeal under the collateral order doctrine is therefore recognized in this context to vindicate the vital interests that the immunity doctrine is intended to protect.

2. On the merits, it borders on self-evident that Congressman Murtha was acting within the scope of his employment in making statements to the media concerning the war in Iraq. Indeed, this Court's decision in Council On American Islamic Relations v. Ballenger, 444 F.3d 659 (D.C. Cir. 1996), is dispositive. There, this Court held that a Congressman was within the scope of his employment in speaking to a reporter

about the state of his marriage. If, as this Court concluded in Ballenger, a Congressman is within scope in addressing the media on a matter as ostensibly personal as his relationship with his spouse, it necessarily follows that Congressman Murtha was within scope in talking to the press about the ongoing Iraq war, one of the most pressing public policy issues of our time, and the need for pending legislation regarding the war. Indeed, as this Court and others have recognized, members of Congress in their role as the Nation's elected lawmakers routinely engage the media regarding matters of interest to their constituents, and such conduct forms an inherent and wholly legitimate part of a Congressman's job.

STANDARD OF REVIEW

This appeal raises issues of law reviewable de novo by this Court.

ARGUMENT

A. The Westfall Act Substitutes The United States And Confers Absolute Immunity On Federal Employees Acting Within The ScopeOf Their Employment.

In Westfall v. Ervin, 484 U.S. 292, 300 (1988), the Supreme Court held that federal employees are absolutely immune from state tort liability if (1) they were acting within the scope of

their employment, and (2) their actions were discretionary in nature. Congress shortly thereafter responded to "the Westfall decision by establishing legislated standards to govern the immunity of Federal employees who have allegedly committed state common law torts." H.R. Rep. No. 100-700, at 4 (1988), reprinted in 1988 U.S.C.C.A.N. 5945, 5947. The Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, eliminated the discretionary requirement, providing instead that immunity attaches as long as the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose...." 28 U.S.C. § 2679(d)(1).

Under the Westfall Act, when a federal employee is sued for a wrongful or negligent act under state tort law, the Attorney General or the applicable United States Attorney may certify that the employee was acting within the scope of his or her employment. 28 U.S.C. § 2679(d)(1); 28 C.F.R. § 15.4. "Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States District Court shall be deemed an action against the United

States under the provisions of this title, and the United States shall be substituted as the party defendant.” 28 U.S.C. § 2679(d)(1).¹

Where substitution is otherwise called for, it is mandated even where the United States, once substituted as the defendant, would be immune from suit. See 28 U.S.C. § 2679(d)(4); United States v. Smith, 499 U.S. 160, 166 (1991); Harbury v. Hayden, ___ F.3d ___, Slip op. 5-6 (D.C. Cir. Apr. 15, 2008). Here, as Appellee has acknowledged, the case would have to be dismissed upon substitution of the United States for Mr. Murtha because the FTCA’s waiver of sovereign immunity does not extend to claims “arising out of” “libel” or “slander.” See 28 U.S.C. § 2680(h); Plaintiff’s District Court Brief at 10 (JA 149) (“Wuterich agrees that if the United States is properly substituted as the defendant in place of Mr. Murtha, his lawsuit stops there. The

¹ There is no question that members of Congress fall within the applicable definition of federal employees. See 28 U.S.C. § 2671 (“‘Employee of the government’ includes officers or employees of any federal agency . . .”; “the term ‘Federal agency’ includes the executive departments, [and] the judicial and legislative branches”); see also Williams v. United States, 71 F.3d 502, 505 (5th Cir. 1995) (“A Member of Congress who holds an office in the U.S. House of Representatives is clearly an employee or officer of the legislative branch of the federal government.”); Operation Rescue National v. United States, 147 F.3d 68, 70-71 (1st Cir. 1998) (same).

United States is unequivocally immune from his tort claims.”).

The certification of the Attorney General or his designee that a federal employee was acting within scope “does not conclusively establish as correct the substitution of the United States as defendant in place of the employee.” Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 434 (1995). “But it does constitute *prima facie* evidence that the employee was acting within the scope of his employment.” Council On American Islamic Relations v. Ballenger, 444 F.3d 659, 662 (D.C. Cir. 1996).

A plaintiff challenging the government’s scope-of-employment certification “bears the burden of coming forward with specific facts rebutting the certification.” Stokes v. Cross, 327 F.3d 1210, 1214 (D.C. Cir. 2003). If necessary, “the district court may permit limited discovery and hold an evidentiary hearing to resolve a material factual dispute regarding the scope of a defendant’s employment.” Id. But “[n]ot every complaint will warrant further inquiry into the scope-of-employment issue.” Stokes, 327 F.3d at 1216. “[T]o obtain discovery and an evidentiary hearing,” a plaintiff must “allege[] sufficient facts that, taken as true, would establish that the defendant’s actions exceeded the scope of [his] employment.” Id. at 1215; see id. at 1216 (plaintiff “is required to plead sufficient facts that, if

true, would rebut the certification”).

“Scope of employment questions are governed by the law of the place where the employment relationship exists.” Rasul v. Myers, 512 F.3d 644, 655 (D.C. Cir. 2008) (quoting Majano v. United States, 469 F.3d 138, 141 (D.C. Cir. 2006)). The parties agreed below that District of Columbia scope-of-employment law governs here. See Plaintiff’s District Court Brief at 14 (“the Court would apply the law of the District of Columbia”).

District of Columbia law looks to the Restatement (Second) of Agency. Stokes, 327 F.3d at 1215. Under the Restatement, conduct is within the scope of employment if: “(a) it is of the kind [the employee] is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master.” Restatement (Second) of Agency, § 228(1).²

Here, as we now show, Mr. Murtha’s statements that form the basis for Appellee’s complaint were made, as a matter of law,

² Assuming Pennsylvania law were potentially germane on the basis that some of Mr. Murtha’s statements were made there, application of Pennsylvania law would be substantially similar since Pennsylvania scope-of-employment law incorporates the same Restatement standards. See Shuman Estate v. Weber, 419 A.2d 169, 173 (Pa. Super. 1980); accord Plaintiff’s District Court Brief at 15 n.8 (JA 154) (“the underlying factors are substantially the same”).

within the scope of his employment as a member of Congress. The District Court's ruling denying Mr. Murtha's absolute immunity pending discovery is likewise immediately appealable as a collateral order under 28 U.S.C. § 1291. The order of the District Court should therefore be reversed, with directions to substitute the United States as the defendant and dismiss the action for lack of subject matter jurisdiction.

B. The Denial Of Westfall Act Immunity Pending Discovery Is Immediately Appealable Under 28 U.S.C. § 1291.

Because the District Court's decision denies Congressman Murtha absolute immunity from suit, it is immediately appealable. 28 U.S.C. § 1291 provides that "[t]he courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts..." A decision to deny Westfall certification and substitution is a "final decision" because it "conclusively decide[s] a contested issue, the issue decided is important and separate from the merits of the action, and the District Court's disposition would be effectively unreviewable later in the litigation." Osborn v. Haley, 127 S.Ct. 881, 892 (2007).

In Osborn, the Supreme Court confirmed that "the Westfall Act accords federal employees **absolute immunity** from common-law tort claims arising out of acts they undertake in the course of

their official duties.” Id. at 887 (emphasis added). It necessarily follows that the denial of Westfall Act substitution effectively rejects a claim of absolute immunity and is therefore immediately appealable as a collateral order under 28 U.S.C. § 1291, at least insofar as it presents an issue of law. Indeed, the Supreme Court in Osborn expressly stated that “the Courts of Appeals are unanimous in holding that orders denying Westfall Act certification and substitution are amenable to review under Cohen [v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)],” and “[w]e confirm that the Courts of Appeals have ruled correctly on this matter.” Osborn, 127 S. Ct. at 893. See Kimbro v. Velten, 30 F.3d 1501, 1503 (D.C. Cir. 1994).

Here, the District Court did not issue an outright denial of the motion to substitute the United States as the defendant in lieu of Mr. Murtha. Instead, the District Court ruled that further factual inquiry was needed before it could pass upon the prerequisite scope-of-employment question, and the court thus permitted discovery to proceed, including in particular the deposition of Congressman Murtha. See Tr. 9/28/07 at 32-34 (JA 339-341).

For purposes of appealability and absolute immunity, the discrepancy between an outright denial of immunity and a denial

of immunity pending discovery is a distinction without a difference. As the Supreme Court and this Court have explained, the whole point of an individual's entitlement to qualified or absolute immunity is to shield the person from the burdens and distraction of the litigation itself, and not just from the possibility of an eventual adverse judgment. See Mitchell v. Forsyth, 472 U.S. 511, 526(1985) ("the denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action"); Kalka v. Hawk, 215 F.3d 90, 94 (D.C. Cir. 2000) (because "immunity is not simply from damages but from having to participate in the proceedings . . . [t]he Supreme Court has therefore instructed the lower courts that the validity of a qualified immunity defense should be determined as early as possible, preferably before discovery and trial") (citation omitted). Thus, "the doctrines of qualified immunity and absolute immunity do not just protect covered individuals from judgments; they also provide protection from 'the risks of trial - distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.'" Doe v. Exxon Mobil Corp., 473 F.3d 345,

350 (D.C. Cir. 2007) (*quoting Mitchell*, 472 U.S. at 526).

Indeed, in the specific context of the Westfall Act, the Supreme Court in Osborn made clear that the certification and substitution provision is “designed to immunize covered federal employees **not simply from liability, but from suit.**” Osborn, 127 S. Ct. at 892 (emphasis added).

Immunity from **discovery** is part and parcel of immunity from suit. In the qualified immunity context, the Supreme Court has repeatedly held that the immunity question must be decided at the earliest possible stage of the litigation, and that a defendant with a legal entitlement to immunity “is entitled to dismissal **before the commencement of discovery.**” Behrens v. Pelletier, 516 U.S. 299, 306 (1996) (*quoting Mitchell*, 472 U.S. at 526) (emphasis added). As the Court has explained, immunity “is meant to give government officials a right, not merely to avoid standing trial, **but also to avoid the burdens of such pretrial matters as discovery** . . ., as inquiries of this kind can be peculiarly disruptive of effective government.” Behrens, 516 U.S. at 308 (*quoting Mitchell*, 472 U.S. at 526) (emphasis added). For these reasons, it is well-settled that the denial of a motion to dismiss on qualified immunity grounds is immediately appealable under 28 U.S.C. § 1291. See Behrens, 516 U.S. at 307

("Mitchell clearly establishes that an order rejecting the defense of qualified immunity at either the dismissal stage or the summary judgment stage is a 'final' judgment subject to immediate appeal.").

These principles apply as well in the context of absolute immunity under the Westfall Act. As the Supreme Court reiterated in Osborn, "[t]he Westfall Act's core purpose . . . is to relieve covered employees from the cost and effort of defending the lawsuit, and to place those burdens on the Government's shoulders," and such "[i]mmunity-related issues, the Court has several times instructed, should be decided at the earliest opportunity." Osborn, 127 S. Ct. at 900-01 & n.18 (citing Hunter v. Bryant, 502 U.S. 224, 228 (1991); Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1987)). See also, e.g., Lyons v. Brown, 158 F.3d 605, 607 (1st Cir. 1998) ("qualified immunity in federal civil rights cases and Westfall Act immunity are treated in the same fashion").

Indeed, as this Court has recognized in the context of immunity under the Speech or Debate Clause, "the denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct

in a civil damages action.” Fields v. Office of Eddie Bernice Johnson, 459 F.3d 1, 23 (D.C. Cir. 2006) (quoting Mitchell, 472 U.S. at 525). Thus, “[a]n immediate appeal is permitted from a denial of absolute immunity because the doctrine is designed to protect legislators not only from ultimate liability, but also from the cost and inconvenience of the litigation.” Gross v. Winter, 876 F.2d 165, 166 n.1 (D.C. Cir. 1989); see also McSurely v. McClellan, 697 F.2d 309, 315-16 (D.C. Cir. 1982) (same).³

This case well illustrates these underlying concerns. As discussed immediately below, a central aspect of a Congressman’s role is to interact with the media regarding matters of public interest, including matters pending before Congress, and a member’s statements made in that context necessarily fall within the scope of his or her employment as an elected legislator. Members of Congress routinely make statements regarding a wide range of issues, and it is not unusual for a citizen to take offense at the content of a Congressman’s remarks. In the

³ We note that no issue of Speech or Debate Clause immunity was raised in the District Court proceedings in this case, and appellants raise no such issue in this appeal. The immunity question presented here is whether Congressman Murtha is absolutely immune from suit under the Westfall Act. As demonstrated infra, the answer to that question, as a matter of law, is yes.

context of an ensuing defamation action, it would vitiate a Congressman's absolute immunity from suit to require the Congressman to submit to potentially intrusive discovery in order to vindicate his right to be free from the burdens of the litigation in the first place.

We show in the next portion of this brief that Congressman Murtha is absolutely immune from this defamation suit as a matter of law. Requiring the Congressman to submit to a deposition to explain, among other things, precisely why he made his statements regarding Iraq and Haditha, would be extraordinarily invasive and serve no useful function, and would in and of itself destroy the very immunity to which Mr. Murtha is plainly entitled. An immediate appeal right at this threshold juncture is recognized under established principles, and is necessary to give meaning to the legal immunity entitlement at stake.

C. Congressman Murtha Was Within The Scope Of His Employment In Making Public Statements Regarding The Ongoing Iraq War.

1. As Ballenger Illustrates, Congressman Murtha Acted Within Scope In Addressing The Media On Matters Of Interest To His Constituents.

On the merits, this case is controlled by Council On American Islamic Relations v. Ballenger, 444 F.3d 659 (D.C. Cir.

1996). There, plaintiffs sued a Congressman for allegedly defamatory remarks he made in the context of discussing his marriage. This Court held that the Congressman was acting within the scope of his employment notwithstanding that the general subject matter of his comments, the state of his relationship with his wife, could be viewed as personal rather than official in nature. This Court on that basis affirmed the order of the district court granting the motion to substitute the United States as the defendant and dismissing the case for lack of subject matter jurisdiction. Id. at 661, 666.

This Court in Ballenger explained that, where, as here, the case concerns allegations of defamation in the context of a Congressman's discussions with reporters, "the appropriate question . . . is whether [the underlying interview] - not the allegedly defamatory sentence - was the kind of conduct [the defendant] was employed to perform." Ballenger, 444 F.3d at 664. The Court then concluded that "there was a clear nexus between the congressman's personal life and the congressman's ability to carry out his representative responsibilities effectively." Id. at 665-66.

The conclusion that Congressman Murtha was acting within scope in making public statements regarding the ongoing Iraq war

is compelled by Ballenger. In Ballenger, a Congressman's discussion of his marital status was deemed to be within scope because of the connection between an elected official's private life and his ability properly to serve his constituents. It necessarily follows that a Congressman's discussion of a matter of great public import must fall within scope as well, especially when the Congressman was a member of a House subcommittee that oversees the military and when the Congressman has pending legislation on the very matter discussed.

Indeed, Appellee's complaint on its face compels the conclusion that Congressman Murtha was within scope and that substitution is therefore required as a matter of law. The crux of the complaint is that Congressman Murtha, in his capacity as a member of Congress, gave media interviews in which he referred to the events of November 19, 2005 in Hadithah, Iraq, and characterized the Marines involved in those events as cold-blooded killers. See Complaint at ¶¶ 22-43 (JA 13-28). It is unclear in what meaningful way such activity could be deemed outside the scope, even assuming the Congressman's statements are considered offensive and potentially tortious.

From any objective standpoint, the war in Iraq is a major public policy issue. It is a matter of public record that

Congressman Murtha has been critical of the government's Iraq policies. See, e.g., Complaint at ¶ 26 (JA 14) ("[W]e ought to redeploy as quickly as we can and let the Iraqis handle this themselves."); id. at ¶ 36 (JA 25) (same). It was plainly within scope for Congressman Murtha to give press interviews about the situation in Iraq; to try to tie the events in Haditha, as he sees them, to the ongoing policy debate about Iraq; and to put forth his view that those events support his position that current policies are having an adverse effect on the role and function of the U.S. military. And, although a concrete link to specific attempts at legislation is not necessarily required, it is also a matter of public record that Congressman Murtha has been involved in efforts, to one extent or another still ongoing, to legislate a curtailment of U.S. military involvement in Iraq and/or a drawdown of American troops. JA 48, 52 and 62. See, also, H. J. Res. 73, 109th Cong., 1st Sess. (Nov. 17, 2005) (JA 4). The proposition that Congressman Murtha was acting outside the scope is thus particularly implausible given that the present matter involves statements indisputably involving issues of public concern.

Other cases beyond Ballenger confirm this conclusion. In Williams v. United States, 71 F.3d 502 (5th Cir. 1995), a common-

law tort suit was brought against a Congressman for allegedly defamatory remarks made during a television interview regarding the status of an appropriations bill. The district court granted the government's Westfall Act substitution motion on the ground that the Congressman was within the scope of his employment in talking to reporters, and the Fifth Circuit affirmed, noting that "the legislative duties of members of Congress are not confined to those directly mentioned by statute or the Constitution." Id. at 507. The court of appeals explained that, "[b]esides participating in debates and voting on the Congressional floor, a primary obligation of a Member of Congress in a representative democracy is to serve and respond to his or her constituents. Such service necessarily includes informing constituents and the public at large of issues being considered by Congress." Id.

Operation Rescue National v. United States, 975 F. Supp. 92 (D. Mass. 1997), aff'd, 147 F.3d 68 (1st Cir. 1998), is similar. There, the district court granted Westfall Act substitution in a defamation case brought against a United States Senator on the basis of comments the Senator made to the media following an event to raise funds for his upcoming re-election campaign. In substituting the United States as the defendant and then dismissing the case for lack of jurisdiction, the court reasoned

that, “[i]n making the remarks now claimed to be defamatory, [the Senator] was informing his constituents and the general public of his view on pending legislation,” 975 F. Supp. at 107, and “making such statements is one of a Senator’s official duties,” id. at 95.

All of these cases – Ballenger, Williams, and Operation Rescue – reflect the essential premise, recognized by the Supreme Court, that members of Congress “engage in a wide range of legitimate errands performed for constituents, including news releases and speeches delivered outside the Congress,” United States v. Brewster, 408 U.S. 501, 512 (1972), and that “speaking to the press is [thus] a critical part of the expected and authorized conduct of a United States Congressman.” Chapman v. Rahall, 399 F. Supp. 2d 711, 714 (W.D. Va. 2005) (also granting Westfall Act substitution in defamation suit against Congressman). Here, as a matter of law, Congressman Murtha was similarly acting within the scope of his employment in speaking to the media about a matter of interest to his constituents and the public at large, and he is thus absolutely immune from suit under the Westfall Act.

2. Appellee's Allegations, Taken As True, Present No Basis For Discovery On Scope Of Employment.

The District Court did not directly take issue with the above analysis. Instead, the Court held that it would not rule on the Congressman's entitlement to immunity until Appellee had the opportunity to depose the Congressman regarding his precise motivations for making the statements in question. See Tr. 9/28/07 at 32-34 (JA 339-341). In the District Court's view, further factual inquiry was needed before the dispositive scope-of-employment question could properly be resolved. Id.

The Court fundamentally erred. As noted, a plaintiff challenging the government's scope-of-employment certification under the Westfall Act "bears the burden of coming forward with specific facts rebutting the certification." Stokes v. Cross, 327 F.3d 1210, 1214 (D.C. Cir. 2003). In particular, "to obtain discovery and an evidentiary hearing," a plaintiff must "allege[] sufficient facts that, taken as true, would establish that the defendant's actions exceeded the scope of [his] employment." Id. at 1215; see Wilson v. Libby, 498 F. Supp. 2d 74, 99 (D.D.C. 2007) ("the Court finds that plaintiffs have not pled sufficient facts that, if true, would rebut the Westfall certification filed in this action. Hence, neither further discovery nor an

evidentiary hearing on the scope-of-employment issue is warranted, and the United States is substituted as the sole defendant."), appeal pending, No. 07-5257, argued May 9, 2008 (D.C. Cir.).

Here, the factual allegations in Appellee's complaint, taken as true, compel the conclusion that Congressman Murtha was at all times acting within the scope of his employment. Appellee was part of a Marine squad that was involved in the deaths of a number of civilians in Haditha, Iraq, on November 19, 2005. Complaint at ¶¶ 6-15 (JA 8-11). According to the complaint, Congressman Murtha, in various media interviews, has made public statements alluding to the events in Haditha, and those statements have referred to the implicated Marines as cold-blooded killers. See id. at ¶¶ 22-43 (JA 13-28). Under Ballenger, "the appropriate question . . . is whether [the underlying interview] - not the allegedly defamatory sentence - was the kind of conduct [the defendant] was employed to perform." Ballenger, 444 F.3d at 664. As we have shown, a Congressman's statements concerning an ongoing war in which U.S. troops continue to be involved necessarily fall within his core functions as an elected lawmaker.

In its oral ruling, the District Court stated that discovery

on scope of employment was nevertheless required because it was possible that Mr. Murtha made his statements in order "to embarrass the Secretary of Defense." Tr. 9/28/07 at 33-34 (JA 340-341). As the District Court recognized, however, Appellee's complaint pleads no such "embarrassment" theory. See id. at 33 (JA 340) (such an allegation is "not in the complaint"). The Court plainly erred in ordering discovery, thus defeating Congressman Murtha's absolute immunity from suit, on the basis of a theory nowhere advanced in the underlying pleadings.

At least as fundamentally, the proposition that Congressman Murtha might have made the statements in question "to embarrass the Secretary of Defense" is of no legal consequence. As noted, it is a matter of public record that Mr. Murtha has been a vocal critic of the current Administration's Iraq policy. See, e.g., Complaint at ¶ 26 (JA 11-12) ("[W]e ought to redeploy as quickly as we can and let the Iraqis handle this themselves."); id. at ¶ 36 (JA 24) (same). Seeking to "embarrass" the Secretary of Defense as part of Mr. Murtha's continuing disagreement with the Executive's handling of the war in Iraq is well within his role as a Congressman, and would thus not remove his statements from the scope of employment, even assuming, as the complaint nowhere alleges, that "embarrassing" the Defense Secretary formed a part

of the Congressman's motivation for making the statements.

It is also well-settled that, for conduct to be deemed outside the scope of employment, it must have been intended for purely personal reasons, wholly unconnected to the employee's official functions. See Ballenger, 444 F.3d at 665; Operation Rescue, 975 F. Supp. at 108-09; Restatement (Second) of Agency, § 228(1). At a minimum, even assuming that Mr. Murtha may have meant in some sense to "embarrass" the Secretary of Defense, Appellee's factual allegations, taken as true, support no conceivable inference that the Congressman's motivations here were purely private and entirely divorced from his role as a member of the House of Representatives. This conclusion becomes even more self-evident when one takes into account that Congressman Murtha sits on the House Appropriations Committee's Subcommittee on Defense (he was elevated to Subcommittee Chairman in 2007), a body with a special and particularized interest in national defense matters. JA 50. See <http://www.house.gov/murtha>.

In its written order staying discovery pending this appeal, the District Court suggested that discovery on scope of employment was also needed to explore such matters as "where the Congressman [was] speaking" and whether he was "advancing a

campaign for his own re-election" at the time he made the statements in question. Order of 12/17/07 at 2 (302). These additional rationales serve only to confirm the error in the Court's decision.

It is true that the complaint alleges that "[t]he tortious acts complained of herein were committed, in part, in the District of Columbia and elsewhere." Complaint at ¶ 27 (JA 18-19). It is entirely typical, however, for members of Congress to have offices both in Washington, D.C., and in their home states, and, as the courts have noted, "[i]t is [thus] customary and proper for [Congressmen] to address the merits of pending legislation, in the response to members of the media, while in their own states." Operation Rescue, 975 F. Supp. at 108. To the extent the court meant to suggest that Washington, D.C., was the only authorized venue for the performance of Congressman Murtha's duties, any such suggestion would be incorrect as a matter of law.

Nor would it matter for scope-of-employment purposes that Mr. Murtha was "advancing a campaign for his own re-election" (Order of 12/17/07 at 2 (JA 303)) at the time he made the statements at issue, even assuming that such an allegation, also nowhere reflected in the complaint, were taken as true. As the

courts have explained regarding members of Congress, "personal and public motives are often closely related. It is natural for public officials to believe that their own success, and that of their political parties, is inextricably linked with the public interest." Operation Rescue, 975 F. Supp. at 108. The fact that Mr. Murtha may have believed, in making his statements, that they would help his re-election prospects and enhance his position within his party's hierarchy, does not detract from the conclusion, compelled on the face of the complaint, that the statements were made within the scope of his employment as a member of Congress.

This Court observed in Ballenger that "service in the United States Congress is not a job like any other." Ballenger, 444 F.3d at 666 (*quoting* United States v. Rostenkowski, 59 F.3d 1291, 1312 (D.C. Cir. 1995)). A Congressman does not stop being a Congressman outside of Washington, D.C., nor are his work hours limited to a normal nine-to-five business day. Here, whether or not made in Washington, whether or not made during daytime, and whether or not made with his political future in mind, Congressman Murtha's statements concerned America's ongoing involvement in Iraq, one of the most significant public policy issues of our time, and were plainly made within the scope of his

employment as a member of the Nation's legislature. Mr. Murtha is legally entitled to absolute immunity from civil litigation brought against him based on those statements, and the District Court fundamentally erred in holding that the Congressman's deposition was required before his assertion of immunity could be upheld.

3. Rasul And Harbury Confirm That The District Court's Ruling Must Be Reversed.

We note, finally, that two recent decisions of this Court further underscore the correctness of Mr. Murtha's position. In Rasul v. Myers, 512 F.3d 644 (D.C. Cir. 2008), former Guantanamo detainees sued the Secretary of Defense and others, claiming that they had been tortured. This Court held that the defendants acted within the scope of their employment even though serious criminal misconduct was alleged, reasoning that "the detention and interrogation of suspected enemy combatants is a central part of the defendants' duties as military officers charged with winning the war on terror." Id. at 658.

In Harbury v. Hayden, ___ F.3d ___ (D.C. Cir. Apr. 15, 2008), the widow of a rebel fighter killed in Guatemala's civil war sued various Central Intelligence Agency officials on the ground that they were legally responsible for her husband's

physical abuse and death. See id., Slip op. 4, 7. Citing Rasul, this Court again held that the defendants acted within the scope of their employment, noting that their duties encompassed, among other things, the conduct of covert operations. See id., Slip op. 16. In both cases, this Court upheld the district court at the motion-to-dismiss stage, without any discovery on scope of employment. See Rasul, 512 F.3d at 662.

As noted, this Court's decision in Ballenger is most directly applicable because it specifically addresses the scope of employment of a Congressman in the context of his allegedly defamatory remarks. Rasul and Harbury reiterate in general, however, that high-level government officials' scope of employment is "very expansive[]" in nature, see Harbury, ___ F.3d at ___, Slip op. 16 n.4; that, under the Restatement, conduct falls within scope if it is intended even **in part** to serve the employer, see Rasul, 512 F.3d at 655; and that discovery on scope of employment is unavailable where, as here, "the plaintiff did not allege any facts . . . that, if true, would demonstrate that [the defendant] had been acting outside the scope of his employment." Id. at 662 (quoting Stokes, 327 F.3d at 1216).

CONCLUSION

For the foregoing reasons, the decision of the District

Court should be reversed, and the matter should be remanded with instructions that the motion to substitute the United States as the defendant should be granted and that the action should then be dismissed for lack of subject matter jurisdiction.

Respectfully submitted,

JEFFREY A. TAYLOR
United States Attorney

R. CRAIG LAWRENCE
Assistant United States Attorney

DARRELL C. VALDEZ
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with Rule 32(a)(7) of the Federal Rules of Appellate Procedure. The brief contains 6596 words, and was prepared in 12-point Courier font using Corel WordPerfect 12.0.

DARRELL C. VALDEZ
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2008, I served the foregoing "**BRIEF FOR THE APPELLANTS**" upon the United States Court of Appeals for the D.C. Circuit by hand-delivery, and upon counsel by causing two copies to be sent by hand-delivery to:

Mark S. Zaid
1250 Connecticut Ave., N.W.
Suite 200
Washington, DC 20036
Telephone: (202)454-2809

DARRELL C. VALDEZ
Assistant United States Attorney