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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 Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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OSBORN *v.* HALEY ET AL.

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

No. 05–593. Argued October 30, 2006—Decided January 22, 2007

The federal statute commonly known as the Westfall Act accords federal employees absolute immunity from tort claims arising out of acts undertaken in the course of their official duties, 28 U. S. C. §2679(b)(1), and empowers the Attorney General to certify that a federal employee sued for wrongful or negligent conduct "was acting within the scope of his office or employment at the time of the incident out of which the claim arose," §2679(d)(1), (2). Upon such certification, the United States is substituted as defendant in place of the employee, and the action is thereafter governed by the Federal Tort Claims Act. If the action commenced in state court, the Westfall Act calls for its removal to a federal district court, and renders the Attorney General's certification "conclusiv[e] . . . for purposes of removal." §2679(d)(2).

Plaintiff-petitioner Pat Osborn sued federal employee Barry Haley in state court. Osborn alleged that Haley tortiously interfered with her employment with a private contractor, that he conspired to cause her wrongful discharge, and that his efforts to bring about her discharge were outside the scope of his employment. The United States Attorney, serving as the Attorney General's delegate, certified that Haley was acting within the scope of his employment at the time of the conduct alleged in Osborn's complaint. She thereupon removed the case to a federal district court, where she asserted that the alleged wrongdoing never occurred. The District Court, relying in Osborn's allegations, entered an order that rejected the Westfall Act certification, denied the Government's motion to substitute the United States as defendant in Haley's place, and remanded the case to the state court. The Sixth Circuit vacated the District Court's order, holding that a Westfall Act certification is not improper simply

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because the United States denies the occurrence of the incident on which the plaintiff centrally relies. Based on §2679(d)(2)'s direction that certification is "conclusiv[e] . . . for purposes of removal," the Court of Appeals instructed the District Court to retain jurisdiction over the case.

Held:

1. The Attorney General's certification is conclusive for purposes of removal, *i.e.*, once certification and removal are effected, exclusive competence to adjudicate the case resides in the federal court, and that court may not remand the suit to the state court. Pp. 9–17.

(a) The Sixth Circuit had jurisdiction to review the order rejecting the Attorney General's certification and denying substitution of the United States as defendant. Under the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, the District Court's ruling, which effectively denied Haley Westfall Act protection, qualifies as a reviewable final decision under 28 U. S. C. §1291. Meeting *Cohen*'s three criteria, the District Court's denial of certification and substitution conclusively decided 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. 337 U. S., at 546. Pp. 9–11.

(b) The Sixth Circuit also had jurisdiction to review the District Court's remand order. Pp. 11–17.

(1) The Sixth Circuit had jurisdiction to review the District Court's remand order, notwithstanding 28 U. S. C. §1447(d), which states that "[a]n order remanding a case to the State court . . . is not reviewable on appeal or otherwise . . . ." This Court held, in *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336, that §1447(c) confines §1447(d)'s scope. Section §1447(c) provides that a case must be remanded "if . . . it appears that the district court lacks subject matter jurisdiction." Under *Thermtron*, "only remand orders issued under §1447(c) and invoking the [mandatory ground] specified therein . . . are immune from review" under §1447(d). *Id.*, at 346. To determine whether *Thermtron*'s reasoning controls here, the Westfall Act's design, particularly its prescriptions regarding the removal and remand of actions filed in state court, must be examined.

When the Attorney General certifies that a federal employee named defendant in a state-court tort action was acting within the scope of his or her employment at the time in question, the action "shall be removed" to federal court and the United States must be substituted as the defendant. §2679(d)(2). Of prime importance here, §2679(d)(2) concludes with the command that the "certification of the Attorney General shall *conclusively establish scope of office or employment for purposes of removal*." (Emphasis added.) This direc-

tive markedly differs from Congress' instruction for cases in which the Attorney General "refuse[s] to certify scope of office or employment." §2679(d)(3). In that event, the defendant-employee may petition the court in which the action is instituted to make the scope-of-employment certification. If the employee so petitions in an action filed in state court, the Attorney General may, at his discretion, remove the action to federal court. If removal has occurred, and thereafter "the district court determines that the employee was not acting within the scope of his office or employment, the action . . . *shall be remanded to the State court*." *Ibid*. (emphasis added).

The Act's distinction between removed cases in which the Attorney General issues a scope-of-employment certification and those in which he does not leads to the conclusion that Congress gave district courts no authority to return cases to state courts on the ground that the Attorney General's certification was unwarranted. Section 2679(d)(2) does not preclude a district court from resubstituting the federal official as defendant for purposes of trial if the court determines, postremoval, that the Attorney General's scope-of-employment certification was incorrect. For purposes of establishing a forum for adjudication, however, §2679(d)(2) renders the Attorney General's certification dispositive. Were it open to a district court to remand a removed action on the ground that the Attorney General's certification was erroneous, §2679(d)(2)'s final instruction would be weightless. Congress adopted the "conclusiv[e] . . . for the purposes of removal" language to "foreclose needless shuttling of a case from one court to another," *Gutierrez de Martinez* v. *Lamagno*, 515 U. S. 417, 433, n. 10. The provision assures 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." *Id*., at 440 (SOUTER, J., dissenting).

Thermtron held that §1447(d) must be read together with §1447(c). There is stronger cause to hold that §1447(c) and (d) must be read together with the later enacted §2679(d)(2). Both §1447(d) and §2679(d)(2) are antishuttling provisions that aim to prevent "prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." *United States* v. *Rice*, 327 U. S. 742, 751. Once the Attorney General certifies scope of employment, triggering removal of the case to a federal forum, §2679(d)(2) renders the federal court exclusively competent and categorically precludes a remand to the state court. By declaring certification conclusive as to the federal forum's jurisdiction, Congress has barred a district court from passing the case back to state court based on the court's disagreement with the Attorney General's scope-of-employment determination. Of the two antishuttling commands, §1447(d) and

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§2679(d)(2), only one can prevail and the Court holds that the latter controls. Tailor-made for Westfall Act cases, §2679(d)(2) "conclusively" determines that the action shall be adjudicated in the federal forum, and may not be returned to the state system. Pp. 11–16.

(2) The Westfall Act's command that a district court retain jurisdiction over a case removed pursuant to §2679(d)(2) does not run afoul of Article III. An Article III question could arise in this case only if, after full consideration, the District Court determined that Haley engaged in tortious conduct outside the scope of his employment. Because, at that point, little would be left to adjudicate as to his liability, and because a significant federal question (whether he has Westfall Act immunity) would have been raised at the outset, the case would "aris[e] under" federal law as that term is used in Article III. Even if only state-law claims remained after resolution of the federal question, the District Court would have authority, consistent with Article III, to retain jurisdiction. Pp. 16–17.

2. Westfall Act certification is proper when a federal officer charged with misconduct asserts, and the Attorney General concludes, that the incident or episode in suit never occurred. Pp. 17–24.

(a) Because the Westfall Act's purpose is to shield covered employees not only from liability but from suit, it is appropriate to afford protection to an employee on duty at the time and place of an "incident" alleged in a complaint who denies that the incident occurred. Just as the Government's certification that an employee "was acting within the scope of his employment" is subject to threshold judicial review, *Lamagno*, 515 U. S., at 434, so a complaint's charge of conduct outside the scope of employment, when contested, warrants immediate judicial investigation. Otherwise, a federal employee would be stripped of suit immunity not by what the court finds, but by what the complaint alleges. This position is supported by *Willingham* v. *Morgan*, 395 U. S. 402, which concerned 28 U. S. C. §1442, the federal officer removal statute. Section 1442 allows a federal officer to remove a civil action from state court if the officer is "sued in an official or individual capacity for any act under color of such office." The Court held in *Willingham* that the language of §1442 is "broad enough to cover all cases where federal officers can raise a colorable defense arising out of the duty to enforce federal law." 395 U. S., at 406–407. There is no reason to conclude that the Attorney General's ability to remove a suit to federal court under §2679(d)(2), unlike a federal officer's ability to remove under §1442, should be controlled by the plaintiff's allegations. Pp. 19–21.

(b) Tugging against this reading is a "who decides" concern. If the Westfall Act certification must be respected unless and until the District Court determines that Haley, in fact, engaged in conduct be-

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yond the scope of his employment, then Osborn may be denied a jury trial. Upon the Attorney General's certification, however, the action is "deemed to be . . . brought against the United States," §2679(d)(2), and the Seventh Amendment, which preserves the right to a jury trial in common-law suits, does not apply to proceedings against the sovereign. Thus, at the time the district court reviews the Attorney General's certification, the plaintiff has no right to a jury trial. The Westfall Act's core purpose—to relieve covered employees from the cost and effort of defending the lawsuit and to place those burdens on the Government—also bears on the appropriate trier of any facts essential to certification. Immunity-related issues should be decided at the earliest opportunity. See, *e.g., Hunter* v. *Bryant*, 502 U. S. 224, 228 *(per curiam)*. Pp. 22–24.

422 F. 3d 359, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, and ALITO, JJ., joined, in which SOUTER, J., joined except for Parts II–B and II–C, and in which BREYER, J., joined as to Parts I and II. SOUTER, J., and BREYER, J., filed opinions concurring in part and dissenting in part. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined.