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ADMINISTRATIVE LAW—DEFAMATION BY THE NATION: THE WESTFALL ACT AND SCOPE OF EMPLOYMENT FOR ELECTED OFFICIALS

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Are members of Congress or the President immune from defamation suits? Officially, the law provides for no such immunity. However, a line of cases interpreting the Federal Tort Claims Act and the Westfall Act threaten to create such an immunity for all elected officials. In such a world, powerless people can be defamed by the most powerful officials in the country without any recourse in the court system to preserve their reputations.

Journalist E. Jean Carroll discovered the potential for such an immunity when she brought a defamation suit against President Donald Trump after he denied her allegations of rape and accused her of lying to sell her new book. The Department of Justice intervened on the President's behalf, certifying that he was acting within the scope of employment when he denied Carroll's allegations.

In October 2020, Judge Lewis Kaplan denied the Attorney General's certification, allowing the case to proceed. As the Biden administration pursues an appeal, Judge Kaplan's decision looks less like a victory for defamed parties and more like an open question. Thus, although it highlights the potential injustices of the Westfall Act, Judge Kaplan's decision does little to fix the issue.

This Note proposes a solution in the form of a legislative amendment, which would create a list of exceptions where elected officials cannot use the Westfall Act, so that they would no longer be allowed to defame at will. The amendment would retain protections for lower-level

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employees while opening elected officials up to suit only in the most specific of cases.

INTRODUCTION

In June 2019, journalist E. Jean Carroll made waves when she accused sitting President Donald Trump of raping her in the mid-1990s.[1] According to Carroll, Trump forced himself on her and raped her in a Bergdorf Goodman dressing room after a short, initially playful, exchange.[2] When the allegations came out, President Trump responded with a series of statements to reporters in which he claimed that he had never met Carroll and that the allegations were false.[3] By 2019, the statute of limitations had run on any potential civil suit for rape.[4] If not for the statute of limitations running out, such a suit against the President would have been allowed to proceed under *Clinton v. Jones*.[5] Instead, Carroll filed suit for defamation, alleging that Trump's denials were false and that they damaged her reputation.[6] In a surprising move, the Department of Justice (DOJ) intervened in the suit, stating that President Trump was acting within the scope of employment when he denied the allegations, and was thus immune from suit in his personal capacity.[7] The DOJ had never intervened in a suit of this kind on behalf of a President—at least not under the authority of the Westfall Act.[8]

Under the government's theory, Carroll could pursue a rape claim against a sitting president, but she could not pursue a defamation claim

1. E. Jean Carroll, *Hideous Men: Donald Trump Assaulted Me in a Bergdorf Goodman Dressing Room 23 Years Ago. But He's Not Alone on the List of Awful Men in My Life.*, N.Y. MAG.: THE CUT (June 24, 2019), https://www.thecut.com/2019/06/donald-trump-assault-e-jean-carroll-other-hideous-men.html [https://perma.cc/NT2D-4HPZ].

2. *Id.*

3. Alexandra Svokos, *E. Jean Carroll Sues Trump for Defamation over Rape Accusation Denial*, ABC NEWS (Nov. 4, 2019, 3:16 PM), https://abcnews.go.com/Politics/jean-carroll-sues-trump-defamation-rape-accusation-denial/story?id=66740654 [https://perma.cc/KW98-7GRB].

4. Jessica Levinson, *E. Jean Carroll Sued Trump for Defamation as a Last Resort. Blame the Statute of Limitations.*, NBC NEWS: THINK (Nov. 7, 2019, 4:32 AM), https://www.nbcnews.com/think/opinion/e-jean-carroll-sued-trump-defamation-last-resort-blame-statute-ncna1077321 [https://perma.cc/GF83-PKTD].

5. *See* Clinton v. Jones, 520 U.S. 681, 710 (1997) (holding that the President of the United States can be sued in his or her personal capacity for acts that took place before that President took office).

6. Svokos, *supra* note 3.

7. Dan Berman, *Justice Department Wants to Defend Trump in E. Jean Carroll Defamation Lawsuit,* CNN POL. (Sept. 9, 2020, 6:40 AM), https://www.cnn.com/2020/09/08/politics/e-jean-carroll-trump-lawsuit/index.html [https://perma.cc/YQ78-DH6Z].

8. *See* Carroll v. Trump, 498 F. Supp. 3d 422, 433–34 (S.D.N.Y.) (noting that neither party cited any cases applying the Westfall Act to the President), *appeal filed*, No. 20-3978 (2d Cir. 2020).

arising out of the same rape accusations.[9] When the news broke that the DOJ was intervening on President Trump's behalf, the media seized upon the potentially unjust result and decried the action as evidence of corruption.[10] CNN's legal analyst referred to the intervention as "consistent with [Attorney General William] Barr's well-established pattern of distorting fact and law to protect Trump and his allies."[11] Other news outlets used the incident as another example of President Trump's willingness to break from political norms.[12]

The media frenzy the DOJ's move caused is consistent with the seeming incongruity of such a result. However, the DOJ's intervention was based on a long series of persuasive cases where courts have held that defamatory statements by elected officials are within the scope of employment, so long as the official was speaking to the press or posting on social media.[13] Under the Westfall Act of 1988, the Attorney General can certify that a federal employee facing a tort claim was acting within the scope of employment when the alleged wrongdoing occurred.[14] The court can then review the Attorney General's certification,[15] and the plaintiff—in this case Carroll—has the burden of proving that the employee was acting outside the scope of employment when the defamation occurred.[16]

Fortunately for Carroll, the court denied the motion, holding that the President was acting outside the scope of his employment when he denied Carroll's allegations.[17] For Carroll, the legal battle will continue in the Second Circuit. The Trump administration filed an appeal on the matter prior to leaving office, and President Biden's DOJ has filed an appellate

9. Memorandum of Points & Authorities in Support of Motion to Substitute the United States as Defendant at 4, Carroll v. Trump, 498 F. Supp. 3d 422 (S.D.N.Y. 2020) (No. 20-cv-7311).

10. *See, e.g.*, Leah Litman, *The Justice Department Says Defaming Women Is Part of Trump's Job. Literally.*, WASH. POST (Sept. 10, 2020, 2:57 PM), https://www.washingtonpost.com/outlook/2020/09/10/justice-carroll-defamation-trump/ [https://perma.cc/QCH6-K3LG]; Natasha Korecki & Anita Kumar, *'He's Getting a Bit Desperate': Trump Tramples Government Boundaries as Election Nears*, POLITICO (Oct. 15, 2020, 4:30 AM), https://www.politico.com/news/2020/10/15/trump-tramples-government-boundaries-as-election-nears-429487 [https://perma.cc/GTC5-RV59].

11. Berman, *supra* note 7.

12. *See* Korecki & Kumar, *supra* note 10.

13. *See, e.g.*, Council on Am. Islamic Rels. v. Ballenger, 444 F.3d 659 (D.C. Cir. 2006); Does 1-10 v. Haaland, 973 F.3d 591 (6th Cir. 2020).

14. 28 U.S.C. § 2679.

15. *Id.*

16. *See* DANIEL A. MORRIS, *Employees' Immunity from Personal Liability—Scope of Employment Certification*, FED. TORT CLAIMS § 7:6 (June 2020) [hereinafter *Employees' Immunity from Personal Liability*].

17. Carroll v. Trump, 498 F. Supp. 3d 422, 457 (S.D.N.Y.), *appeal filed*, No. 20-3978 (2d Cir. 2020).

brief in support of former President Trump's appeal.[18] The government takes substantially the same position as it did in the district court—with an added reference to Trump's speech as "crude and disrespectful"—and seeks a reversal of the district court's decision.[19] The Second Circuit will have the opportunity to side with the district court, thereby splitting with the D.C. Circuit, or to reverse the district court's decision and effectively end Carroll's lawsuit. Either way, the problem will remain unresolved until Congress takes action.

Under the Westfall Act and its application by the circuit courts, elected officials such as senators, representatives, and potentially the President enjoy a de facto absolute immunity from defamation suits.[20] Courts in the First, Fifth, Sixth, and D.C. Circuits have all held that elected officials are acting within the scope of their employment when speaking to reporters or posting on social media.[21] However, most communication from these elected officials comes in either of these two forms.[22] Thus, any defamatory statements would likely occur in either of these two mediums, and would therefore be considered within the scope of employment. Such a result would be especially unjust, as statements made on social media or on the news are likely to be widely reported and seen by a large swath of the public.[23] "In minutes or hours, a defamatory story may get millions of hits and generate thousands of comments and repetitions. A victim of defamation may watch in real time the destruction and havoc being rendered to the victim's reputation."[24]

Additionally, since the United States is immune from suit in defamation cases,[25] a court's acceptance of the Attorney General's certification and substitution of the United States as defendant would also

18. Reply Brief of Appellant United States, Carroll v. Trump, No. 20-3977 (2d Cir. June 7, 2021); *see also* Ryan Lucas, *Biden DOJ Plans to Continue to Defend Trump in E. Jean Carroll's Defamation Lawsuit*, NPR (June 8, 2021, 11:18 AM), https://www.npr.org/2021/06/08/1004340386/biden-doj-plans-to-continue-to-defend-trump-in-e-jean-carrolls-defamation-lawsui [https://perma.cc/K7VA-65TS].

19. *Id.*

20. *See infra* Section III.A.

21. *See, e.g.*, Operation Rescue Nat'l v. United States, 975 F. Supp. 92 (D. Mass. 1997); Williams v. United States, 71 F.3d 502 (5th Cir. 1995); Does 1-10 v. Haaland, 973 F.3d 591 (6th Cir. 2020); Council on Am. Islamic Rels. v. Ballenger, 444 F.3d 659 (D.C. Cir. 2006); Wuterich v. Murtha, 562 F.3d 375 (D.C. Cir. 2009).

22. *See Haaland*, 973 F.3d at 602 (noting that social media posts along with "news releases" and "speeches" constitute some of the duties of elected officials).

23. *See* 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 1:27.50, Westlaw LDEF (database updated Nov. 2020).

24. *Id.* (footnote omitted).

25. The United States has not waived sovereign immunity for the torts of libel and slander. *See infra* note 46 and surrounding text.

require dismissal of the case.[26] In a case like Carroll's, such a dismissal would have prevented discovery, meaning that Carroll's rape accusations would never be investigated.

Not only would such a result be fundamentally unjust, but it would also run counter to the purposes of the Federal Tort Claims Act (FTCA), which was passed in order to allow citizens to sue the federal government in a fair and efficient manner.[27] Even the Westfall Act, which was passed to protect federal employees from suit in their personal capacity, was intended mainly to protect low-level employees.[28] However, the language of the Westfall Act and its use of state scope-of-employment laws[29] have led to more protections than are necessary for elected officials. These Acts attempt to strike a balance between protecting federal employees and allowing for private citizens to seek relief from tortious actions. There is no such balance when elected officials can make defamatory statements about private citizens and those citizens are refused the opportunity to redress those wrongs.

In order to fully understand how the Westfall Act endangers these claims, it is important to understand the inherent dangers of defamation. The law of defamation protects a person's reputation by allowing that person to sue entities that publish or broadcast facts that are both false and damaging to that person's reputation.[30] The law of defamation is especially necessary in the modern era, where the internet and social media make the dissemination of these damaging statements easier and more common.[31] Any laws which make certain actors immune from suit for defamation are, essentially, licenses for those actors to lie and damage reputations. Thus, any laws allowing for defamation must be carefully considered and should serve a beneficial function, a threshold that the Westfall Act does not currently meet.[32]

This issue has become even more prevalent in the wake of the 2020 presidential election. In the aftermath of the election, news outlets and President Trump himself created a narrative of election fraud that eventually led to claims that voting machines were "'flipping' votes" from

26. *See* Berman, *supra* note 7 (noting that the Justice Department taking over "could mean the end of Carroll's lawsuit as the federal government can't be sued for defamation").

27. Paul F. Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TRIAL & INS. PRAC. L.J. 1105, 1106–07 (2009).

28. *See infra* Section I.B.

29. *See* Daniel A. Morris, *Federal Employees' Liability Since the Federal Employees Liability Reform & Tort Compensation Act of 1988 (The Westfall Act)*, 25 CREIGHTON L. REV. 73 (1991) [hereinafter *Federal Employees' Liability Since 1988*].

30. *See* SMOLLA, *supra* note 23, § 1:21.

31. *See id.* §§ 1:21, 1:27.50.

32. *See* Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (codified at 28 U.S.C. §§ 2671, 2674, 2679 (2006)).

Trump to his opponent Joe Biden.[33] As a result, the companies that produce these voting machines have filed lawsuits against media organizations like Fox News for *billions* of dollars, mainly in the form of reputation loss caused by these narratives.[34] As these companies prepare to potentially file similar suits against Trump himself,[35] it becomes exceedingly clear why this issue must be resolved in the near future.

This Note examines the line of cases interpreting the Westfall Act as it applies to legislators and executive officers in order to understand the broad immunity that the courts' interpretations of the Westfall Act have granted to elected officials.[36] The Note uses the legislative history and the context of the FTCA and the Westfall Act to argue that the immunity currently enjoyed by these officials is beyond what the Acts intended. Furthermore, the Note will analyze both the potential and actual injustices that result from such an immunity. Finally, the Note will propose an amendment that aligns with the purpose of the Westfall Act while eliminating the ability of elected officials to defame private citizens at will.

Part I will analyze the history of the FTCA and the Westfall Act, as well as the trend toward an expansive interpretation of scope of employment for elected officials. Part II will examine the line of cases that have adopted broad interpretations of the scope of employment for elected officials, as well as the *Carroll* case and its divergence from other circuits. Part III will argue that the Westfall Act currently allows for elected officials to have nearly absolute immunity in defamation cases when speaking to reporters or posting on social media, and that such an immunity runs counter to the purpose of the FTCA and the Westfall Act. Part IV will set forth a potential remedy to the issue in the form of an amendment to the Westfall Act that would define a set of circumstances in which elected officials would not be protected by the Westfall Act.

I. THE FEDERAL TORT CLAIMS ACT AND THE WESTFALL ACT

In order to understand the dangers presented by the cases interpreting the Westfall Act, it is important to first understand the Act itself, as well as the FTCA. The background of the FTCA[37] and the Westfall Act[38]

33. Grace Dean, *After Suing Fox News for $1.6 Billion, Dominion Says It Could File Lawsuits Against Other Media Outlets and Even Trump*, INSIDER (Mar. 30, 2021, 5:36 AM), https://www.businessinsider.com/dominion-voting-systems-machines-fox-news-lawsuit-defamation-trump-2021-3 [https://perma.cc/8USJ-TM5A].

34. *See id.*

35. *Id.*

36. *See* Does 1-10 v. Haaland, 973 F.3d 591 (6th Cir. 2020); Council on Am. Islamic Rels. v. Ballenger, 444 F.3d 659 (D.C. Cir. 2006).

37. 28 U.S.C. §§ 2671–80.

38. Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (codified at 28 U.S.C. §§ 2671, 2674, 2679 (2006)).

provide meaningful insight into the purposes of the respective Acts and how those purposes are no longer being properly served. The history of these Acts highlights the ways in which modern courts are distorting the Acts' purposes, as well as why legislative change is necessary.

A. *Congress Passed the FTCA to Allow Citizens to Sue the Government for Certain Tortious Acts*

Prior to the passage of the FTCA, Americans could not sue the federal government for damages arising from tortious injuries under the doctrine of sovereign immunity.[39] Over time, this immunity came to be considered unfit for a democratic society, as the government that was elected by its citizens could not be sued by those same citizens for damages.[40] This was especially true in light of the First Amendment, which requires that Congress make no law abridging the right to "petition the Government for a redress of grievances."[41] This incongruity left citizens without the ability to seek relief from the courts and instead required that injured citizens petition Congress to enact special legislation providing economic relief for injuries caused by the government.[42] The system proved to be unworkable and was criticized as a drain on congressional energy that could be focused elsewhere.[43]

Congress attempted to alleviate its burden with several remedies, most notably the Court of Claims Act of 1855,[44] but none of these remedies properly addressed tort claims.[45] The pressure grew until Congress finally passed the Federal Tort Claims Act in 1946.[46] The Act serves as a general waiver of the United States' sovereign immunity in tort, limited by a number of enumerated exceptions for which the government retained sovereign immunity, including the torts of libel and

39. Figley, *supra* note 27, at 1107. The doctrine of sovereign immunity "provides that [the United States] can be sued only to the extent that it has consented to be sued and that such consent can be given only by its legislative branch." *Id.*

40. *See* Comment, *The Federal Tort Claims Act*, 56 YALE L.J. 534, 534 (1947) ("The doctrine of immunity . . . has been frequently attacked as an anachronism unsuited to democratic society because of the unfairness to individuals with just claims against the Government.").

41. *See* U.S. CONST. amend. I; *see also* Figley, *supra* note 27, at 1107.

42. Figley, *supra* note 27, at 1107–08.

43. *See* Comment, *supra* note 40, at 534–35.

44. Court of Claims Act of 1855, ch. 122, 10 Stat. 612, *amended by* Pub. L. No. 83-158, 67 Stat. 226 (1953).

45. *See* Figley, *supra* note 27, at 1108–09 (noting that Congress passed various bills providing tort remedies only for specific classes like "horse owners, oyster growers, and persons injured by operations of the Post Office").

46. 28 U.S.C. §§ 2671–2680; Figley, *supra* note 27, at 1109 (citing the Legislative Reorganization Act, Pub. L. No. 79-601, 60 Stat. 812, 842 (1946)).

slander.[47] The Act allowed the government to retain sovereign immunity for these intentional torts, largely due to fears about the difficulty of defending such suits, as well as the probability of disproportionate damages, rather than any considerations of fairness or justice.[48] Although the breadth of the FTCA was expansive, the Act was passed largely to resolve "ordinary common-law torts" such as motor vehicle negligence.[49] Since its enactment, the FTCA has served its purpose by successfully providing for the efficient resolution of tort claims against the government and shifting the burden from Congress to the courts.[50]

B. *Congress Passed the Westfall Act to Protect Low-Level Employees from Suit in Their Personal Capacity*

In exchange for its waiver of sovereign immunity, Congress maintained control over the circumstances and conduct which would allow the government to be sued.[51] The Supreme Court temporarily turned this congressional control on its head in the case of *Westfall v. Erwin*.[52] The *Westfall* case involved a federal employee who came into contact with toxic material that was negligently stored.[53] The employee suffered chemical burns and brought suit against his supervisors under state law.[54] At the time, some states allowed for suits against government employees in their personal capacities.[55] The Court in *Westfall* held that federal employees were not absolutely immune from these state law suits unless their conduct was both within the scope of their employment and "discretionary in nature," which it defined as "the product of independent judgment."[56] This holding severely limited the immunity enjoyed by federal employees from state law tort liability, as these employees could now be sued personally for actions taken while simply following orders or completing routine tasks.

47. 28 U.S.C. § 2680; Comment, *supra* note 40, at 536. Libel is generally the "publication of defamatory matter by written or printed words," whereas slander is generally the "publication of defamatory matter by spoken words [or] transitory gestures." RESTATEMENT (SECOND) OF TORTS § 568 (AM. L. INST. 1977).

48. *See* Comment, *supra* note 40, at 546 (citing *Hearings before the Senate Committee on the Judiciary on S. 2690*, 76th Cong. 39 (1940)).

49. *S ee* Dalehite v. United States, 346 U.S. 15, 28

(1953). 50. Figley, *supra* note 27, at 1107.

51. *See* 28 U.S.C. § 2680 (listing the enumerated exceptions to which the FTCA does not apply).

52. Westfall v. Erwin, 484 U.S. 292 (1988), *superseded by statute*, Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (codified at 28 U.S.C. §§ 2671, 2674, 2679 (2006)).

53. *Id.* at 293–94.

54. *Id.*

55. *See* Carroll v. Trump, 498 F. Supp. 3d 422, 428 (S.D.N.Y.) (describing the history of the Westfall Act), *appeal filed*, No. 20-3978 (2d Cir. 2020).

56. *Westfall*, 484 U.S. at 296, 300.

In the *Westfall* opinion, Justice Marshall challenged Congress to weigh in on the matter, noting that "Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context."[57] Congress answered this call in short order, enacting the Federal Employees Liability Reform and Tort Compensation Act of 1988 before the end of the calendar year.[58] In light of the Supreme Court decision that it superseded, the statute became commonly known as the Westfall Act.[59] Under the Westfall Act, federal employees could not be sued under state law for conduct within the scope of employment.[60] Instead, the plaintiff would be able to seek relief from the United States under the FTCA.[61] This is true unless, as in cases of defamation, the United States has not waived sovereign immunity.[62] In such cases, the plaintiff is likely to face dismissal and be left without a remedy.[63]

Although the purpose of the Westfall Act was clearly to overturn the *Westfall* decision,[64] it is important to understand why Congress felt it necessary to take such action, especially with such haste. The House Judiciary Committee, in its report, noted that the *Westfall* decision would have its "most sovere [sic] impact on lower-level employees; that is, the 'rank and file' workers who are least likely to exercise discretion in carrying out their duties."[65] Senator Chuck Grassley, presenting the bill on the Senate floor, similarly stated that "the entire Federal work force . . . particularly rank-and-file civil servants" could now be sued in their personal capacity.[66] It is also noteworthy that the employees in the *Westfall* case were low-level supervisors, rather than high-level appointees or elected officials.[67]

Throughout the process, legislators evidenced an intent to protect lower-level federal employees, making protections for elected officials

57. *Id.* at 300.

58. Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (codified at 28 U.S.C. §§ 2671, 2674, 2679 (2006)); *see also Carroll*, 498 F. Supp. 3d at 429.

59. *See* H.R. REP. NO. 100-700, at 2 (1988).

60. *See* 28 U.S.C. § 2679(b)(1) (1988).

61. § 2674; *see also Carroll*, 498 F. Supp. 3d at 429–30.

62. 28 U.S.C. § 2680(h) (excepting libel and slander from the FTCA's waiver of sovereign immunity).

63. *See* Council on Am. Islamic Rels. v. Ballenger, 444 F.3d 659, 661 (D.C. Cir. 2006) (agreeing with a lower court that the defamation claim was barred by sovereign immunity and that dismissal was appropriate).

64. *See* H.R. REP. NO. 100-700, at 2–4.

65. *Id.* at 3.

66. 134 CONG. REC. 14265 (1988).

67. Westfall v. Erwin, 484 U.S. 292, 299–300 (1988), *superseded by statute*, Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (codified at 28 U.S.C. §§ 2671, 2674, 2679 (2006)).

and other high-level officials seem secondary as a result. Thus, even when the Court makes general statements about how the Act was intended to "relieve covered employees from the cost and effort of defending the lawsuit,"[68] it is clear that the cost and effort discussed is in reference to those low-income employees who would struggle to bear the cost.

The legislative history and context of the Westfall Act and the FTCA make it clear that the Acts were passed to allow private citizens to sue the federal government while also protecting low-level employees. However, the Westfall Act is currently being used to defend elected officials acting in their personal capacity, which is well beyond the scope of the Act and inconsistent with the Act's purpose.

II. THE CASES, FROM *WILLIAMS* TO *CARROLL*

The long line of cases preceding *Carroll* which interpret the Westfall Act also provide much-needed context.[69] Most of these cases reached a just result, but in the process managed to adopt an overbroad interpretation of the scope of employment for elected officials. These cases have created the potential for a dangerous immunity for elected officials. Although the *Carroll* court rejected the Department of Justice's attempt to further expand the scope of employment in declining to extend Westfall Act protections to President Trump,[70] this dangerous potential for injustice remains.

A. *The First and Fifth Circuits Opened the Door for Elected Officials to Use the Westfall Act as a Defense in Defamation Suits*

Despite the congressional record emphasizing the importance of protections for civil servants, congressional legislators across the country began using the Westfall Act as a defense against defamation cases.[71] The first major case which required the application of the Westfall Act to an elected official was that of *Williams v. United States*.[72] The Attorney

68. Osborn v. Haley, 549 U.S. 225, 252 (2007); *see also* H.R. REP. No. 100-700, at 3.

69. *See generally* Operation Rescue Nat'l v. United States, 975 F. Supp. 92 (D. Mass. 1997); Williams v. United States, 71 F.3d 502 (5th Cir. 1995); Does 1-10 v. Haaland, 973 F.3d 591 (6th Cir. 2020); Council on Am. Islamic Rels. v. Ballenger, 444 F.3d 659 (D.C. Cir. 2006); Wuterich v. Murtha, 562 F.3d 375 (D.C. Cir. 2009).

70. *See* Carroll v. Trump, 498 F. Supp. 3d 422, 457 (S.D.N.Y.) (describing the history of the Westfall Act), *appeal filed*, No. 20-3978 (2d Cir. 2020).

71. *See generally Operation Rescue Nat'l*, 975 F. Supp. 92; *Williams*, 71 F.3d 502; *Haaland*, 973 F.3d 591; *Ballenger*, 444 F.3d 659; *Wuterich*, 562 F.3d 375.

72. *Williams*, 71 F.3d at 504. In a series of prior cases, the Supreme Court held that the Attorney General's certification of the Westfall Act was reviewable by the courts. *See* Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 420 (1995) (holding that the Attorney General's scope-of-employment certification is subject to judicial review). *But see* Osborn v. Haley, 549 U.S. 225, 241 (2007) (holding that the courts have "no authority to return cases to state courts on the ground that the Attorney General's certification was unwarranted").

General had certified that a legislator, Congressman Jack Brooks, was acting within the scope of employment when he made comments regarding "Congress'[s] appropriation of money including [plaintiff's] lobbying fees for the restoration of the Battleship Texas."[73] Although the exact comments made by Brooks were not specified, the court found it noteworthy that Congressman Brooks was Chairman of the House Appropriations Committee at the time of the incident, especially considering the comments were related to congressional appropriations.[74]

Although the facts of the *Williams* case make it quite clear that the Congressman was acting within the scope of employment when he spoke about the material covered by his own Committee, the court's language set the precedent for a broad interpretation of a legislator's scope of employment:

> Members of Congress traditionally communicate to the public about issues of law, often expressing their concerns and opinions about the need to change the laws. Indeed, the legislative duties of Members of Congress are not confined to those directly mentioned by statute or the Constitution. Besides participating in debates and voting on the [c]ongressional 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.[75]

Most of this language is consistent with a common sense understanding of the scope of employment for a congressional legislator: to speak about the law. However, the court's interpretation here was only the first step in a line of cases that unnecessarily expanded the scope of employment for elected officials.[76] The court's unwillingness to confine legislative duties in such a cut-and-dry case set the precedent for later cases in other circuits that would stretch the scope-of-employment inquiry beyond reasonable bounds.[77]

In the First Circuit, a district court judge issued a similar ruling in a defamation case against Senator Edward Kennedy, *Operation Rescue National v. United States*.[78] Senator Kennedy, responding to a media question, stated that proposed legislation that would protect access to abortion clinics was necessary, because, according to him, "we have a national organization like Operation Rescue that has as a matter of

73. *Williams*, 71 F.3d at 507.

74. *Id.*

75. *Id.*

76. *See generally Operation Rescue Nat'l*, 975 F. Supp. 92; *Williams*, 71 F.3d 502; *Haaland*, 973 F.3d 591; *Ballenger*, 444 F.3d 659; *Wuterich*, 562 F.3d 375.

77. *See generally Haaland*, 973 F.3d 591; *Ballenger*, 444 F.3d 659.

78. *Operation Rescue Nat'l*, 975 F. Supp. at 94, 115.

national policy firebombing and even murder."[79] The court, relying heavily on *Williams*, noted that Kennedy was motivated, at least in part, by a desire to inform his constituents about the merits of the proposed legislation.[80] Although the statements in this case were slightly more incendiary and controversial, the fact remained that the legislator was speaking about proposed legislation, thus placing his conduct firmly within the scope of employment. Still, the court's reliance on the expansive interpretation of legislative duties in *Williams*[81] signaled a trend toward an overbroad interpretation of scope of employment for elected officials.

B. *The D.C. Circuit Expands the Scope of Employment for Elected Officials to Include Comments to the Press About Entirely Private Matters*

The next step for courts in the expansion of Westfall Act immunity was to hold that simply talking to the press immunized an elected official from suit for defamation, regardless of how distant the alleged false statement was from the official's responsibilities. The Court of Appeals for the D.C. Circuit took this step in 2006 in the case of *Council on American Islamic Relations v. Ballenger*, when Congressman Cass Ballenger was sued for defamation.[82] Ballenger, a representative from North Carolina, had recently separated from his wife at the time of the incident.[83] As a result, the media began asking questions about his marital status to his chief of staff, who confirmed the separation.[84] Ballenger elected, during normal work hours, to call the reporter who had asked and give a more detailed answer.[85] During the call, Ballenger explained that his wife had become uncomfortable living near the Council on American-Islamic Relations building, which he then referred to as the "fund-raising arm for Hezbollah."[86]

Although the inquiry in this case was the same as in *Williams* and *Operation Rescue National*, the facts were different in that the legislator

79. *Id.* at 94–95.

80. *Id.* at 107–09. Notably, the court cited the expansive language used by the court in *Williams*. *Id.* at 107 (citing Williams v. United States, 71 F.3d 502, 507 (5th Cir. 1995)). The court weighed this political motive against any personal motives Kennedy might have had, suggesting that conduct intended solely to enhance popularity or to garner reelection would be purely personal and outside the scope of his employment. *Id.* at 108.

81. *See Operation Rescue Nat'l*, 975 F. Supp. at 107; *Williams*, 71 F.3d at 507.

82. *See Ballenger*, 444 F.3d at 661.

83. *Id.* at 661–62.

84. *Id.* at 661.

85. *Id.* Ballenger noted that he reached out to the reporter to explain the separation because he felt that reports about his separation would be of concern in his "socially conservative district." *Id.*

86. *Id.* at 662. The court noted that Hezbollah had been designated a foreign terrorist organization by the United States Department of State. *Id.*

was not referring to any pending legislation or congressional business.[87] The court again referenced the language of *Williams* suggesting that a legislator's duty involves responding to constituents.[88] The court stretched this language, which originally referred to responses involving legislation, so that it protected Ballenger's comments about the purely private matter of his marital status.[89] In fact, the court went so far as to hold that "[s]peaking to the press during regular work hours in response to a reporter's inquiry falls within the scope of a congressman's authorized duties.'"[90] This holding gave no consideration to the content of the reporter's question or the legislator's answer, which would seem to create a de facto immunity under the Westfall Act for comments made at the right time to the right party.

Additionally, in an attempt to justify that such personal statements could be within the scope of employment, the court noted that there is a "clear nexus" between answering a personal question and the congressman's "ability to carry out his representative responsibilities effectively."[91] This is so because, in the court's view, "[a] Member's ability to do his job as a legislator effectively is tied, as in this case, to the Member's relationship with the public and in particular his constituents and colleagues in the Congress."[92]

The court's reasoning would seemingly allow for any defamatory statements to fall within the scope of employment, so long as the Congressman's intent was to increase his popularity with the public. The denial of sexual misconduct allegations, as in the case of President Trump, is no doubt an attempt to improve relationships with constituents. Such cases offer just a glimpse of the types of harmful statements that could be made with impunity under such a holding.

The *Ballenger* court took the dangerous potential of a broad interpretation of legislative duties and made it a reality, seemingly immunizing members of Congress from liability for defamation when speaking to reporters. Importantly, the court established such an immunity in the D.C. Circuit, the home to Capitol Hill and the legislative offices of most members of Congress. The *Ballenger* decision's effects were realized three years later, when a U.S. Marine brought a defamation suit against Congressman John Murtha in the case of *Wuterich v. Murtha*.[93] Congressman Murtha had made statements that created the impression that a group of Marines had "deliberately murdered innocent

87. *See id.* at 661–62.
88. *Id.* at 665.
89. *See id.*
90. *Id.* at 664.
91. *See id.* at 665–66.
92. *Id.* at 665.
93. Wuterich v. Murtha, 562 F.3d 375, 378 (D.C. Cir. 2009).

Iraqi civilians in a cold-blooded massacre."[94] At the time, Congressman Murtha was the Ranking Member of the Appropriations Committee's Subcommittee on Defense and had proposed legislation that would withdraw American troops from Iraq.[95]

Congressman Murtha's claims were at least tangentially related to his committee role and to a piece of proposed legislation, much like the comments made by Congressman Brooks in *Williams*.[96] Despite the fact that the statements were a far cry from the personal statements made by Representative Ballenger, the court noted that its analysis was controlled by its prior decision in *Ballenger*.[97] The court analyzed the importance of the connection between the Congressman's actual legislative duties as Ranking Member of a committee relating to defense and his comments on the activities of American troops.[98] The court even seemed to acknowledge the tenuous nature of its previous holding in *Ballenger*:

> Indeed, where comments made in the course of a conversation on as private a matter as marital status are within the scope of a congressman's official duties, it is hard to fathom how Congressman Murtha's discussion of grave public policy concerns relating to the war in Iraq could ever fall outside the scope of his employment.[99]

Although the court again reached the correct decision in protecting against liability for political and legislative statements, the case still highlighted the potential dangers of the *Ballenger* ruling on future defamation cases.

C. *The Sixth Circuit Extended Westfall Act Protections to Unsolicited Social Media Posts by Elected Officials*

The latest decision in the line of Westfall Act cases involving legislators came when a group of teens sued then-Congresswoman (and current Secretary of the Interior) Debra Haaland and Senator Elizabeth

94. *Id.*

95. *Id.* at 385.

96. *Id.*; *see also* Williams v. United States, 71 F.3d 502, 507 (5th Cir. 1995).

97. *See Wuterich*, 562 F.3d at 385 (citing Council on Am. Islamic Rels. v. Ballenger, 444 F.3d 659 (D.C. Cir. 2006)). This is especially noteworthy when, as the *Carroll* court later noted, the *Ballenger* court did not substantially apply the second prong of the scope of employment inquiry. Carroll v. Trump, 498 F. Supp. 3d 422, 451–52 (S.D.N.Y.), *appeal filed*, No. 20-3978 (2d Cir. 2020). Under D.C. law, the scope-of-employment inquiry requires a two-pronged analysis. *Id.* at 447. The first prong involves an analysis of whether a master-servant relationship existed. *Id.* The second prong turns on whether the employee's actions were undertaken to serve the employer: "Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or *too little actuated by a purpose to serve the master*." *Id.* at 447 n.104 (emphasis added).

98. *Wuterich*, 562 F.3d at 385.

99. *Id.*

Warren over allegedly defamatory social media posts.[100] In the posts, both legislators included a video of a group of Kentucky teens that had recently gone viral and accused the teens of showcasing hate and disrespect, which they argued was the fault of the Trump administration.[101] One of Haaland's statements read: "The students' display of blatant hate, disrespect, and intolerance is a signal of how common decency has decayed under this administration."[102] The court analogized the case to *Williams* and *Operation Rescue National*, reasoning that "each comment constituted a condemnation of a political adversary's public acts."[103]

Despite the official nature of the legislator's comments, the court still needed to broaden the legislative scope of employment because of the manner of communication.[104] Every prior case involved interviews or questions from the media, whereas the current case involved unsolicited social media posts.[105] In order to encompass the posts in question, the court held that "it is the act of communicating one's views to constituents and not the manner of communication that justifies application of the Westfall Act . . . . Defendants' statements are protected whether they are freestanding or made in response to a press inquiry."[106] Notably, the court distanced itself from *Ballenger* by holding that the statements must be expressing "views" to constituents, rather than private information.[107]

The court in *Haaland* attempted to narrowly define the scope of employment by emphasizing the political nature of the statements at issue.[108] However, the *Ballenger* court had previously extended scope-of-employment protection to nearly all statements made by legislators, so long as they are intended to improve relationships with constituents.[109] These two holdings highlight the dangerous possibilities of an overbroad interpretation of scope of employment for elected officials. Under a

100. Does 1-10 v. Haaland, 973 F.3d 591, 593 (6th Cir. 2020).

101. *Id.* at 594–95.

102. *Id.* at 594.

103. *Id.* at 601; *see also* Williams v. United States, 71 F.3d 502 (5th Cir. 1995); Operation Rescue Nat'l v. United States, 975 F. Supp. 92 (D. Mass. 1997).

104. *See Haaland*, 973 F.3d at 601 (reciting the plaintiffs' claim that previous cases hinged on the statements being "in response to press inquiries, and notably not made gratuitously' to serve personal political interests" (quoting *Operation Rescue Nat'l*, 975 F. Supp. at 108)).

105. *Id.*

106. *Id.* The court went on to equate tweets to newsletters, news releases, and speeches, each of which is considered a legitimate "errand." *Id.* at 602. Additionally, the court held that "[t]here is no meaningful difference between tweets and the other kinds of public communications between an elected official and their constituents that have been held to be within the scope-of-employment under the Westfall Act." *Id.*

107. *See id.* at 601; *see also* Council on Am. Islamic Rels. v. Ballenger, 444 F.3d 659 (D.C. Cir. 2006).

108. *See Haaland*, 973 F.3d at 601.

109. *Ballenger*, 444 F.3d at 664.

combination of the two, an elected official could send out unsolicited social media posts spreading lies about private citizens with impunity, so long as his or her goal was to curry favor with constituents.

D. *The Court in* Carroll v. Trump *Declined to Further Extend the Scope of Employment for Elected Officials to Include Denials of Prior Misconduct*

Unsurprisingly, the DOJ included the *Ballenger* and *Haaland* cases in its brief when it intervened in E. Jean Carroll's lawsuit.[110] The DOJ argued that "[n]umerous courts have recognized that elected officials act within the scope of their office or employment when speaking with the press, including with respect to personal matters."[111] Thus, at the time of the filing, it appeared more than plausible that the weight of the persuasive authority was in favor of the DOJ's position. At the very least, the certification appeared to stand on solid ground.

Unfortunately for President Trump, the court was not persuaded by the DOJ or by the line of cases in other circuits when it denied the government's motion.[112] Under the Westfall Act, the scope-of-employment inquiry is based on the law of the state or jurisdiction in which the tort occurred—in this case, Washington, D.C.[113] The scope-of-employment inquiry under D.C. law requires that a master-servant relationship exist between the employer and the employee.[114] Additionally, the employee must be acting within the scope of employment, which requires that the employee be acting to serve the master or employer rather than any personal interests.[115] The President, the court reasoned, has no "master" under D.C. law,[116] and even if he did, his statements were "too little actuated by a purpose to serve the master" to fall within the scope of employment.[117] The court engaged with the *Ballenger* court's holding, ultimately rejecting it as unpersuasive and

110. *See* Memorandum of Points and Authorities in Support of Motion to Substitute the United States as Defendant at 4, Carroll v. Trump, 498 F. Supp. 3d 422 (S.D.N.Y. 2020) (No. 20-cv-7311).

111. *Id.*

112. Carroll v. Trump, 498 F. Supp. 3d 422, 451–57 (S.D.N.Y.), *appeal filed*, No. 20-3978 (2d Cir. 2020).

113. *Id.* at 444.

114. *Id.* at 447.

115. *Id.*

116. The master-servant inquiry is especially complex for elected officials, as the only "master" they serve is the population of constituents that they represent. *Id.* at 447–50.

117. *Id.* at 447–53. The court also engaged in a less persuasive and less impactful analysis of whether the President is an "employee" for purposes of the Westfall Act, ultimately concluding that he is not. *See id.* at 433–43. Such a holding would be a potential workaround for extending protections to the President, but it fails to shore up the potential immunity for legislators under the expansive scope-of-employment inquiry.

overbroad.[118] The court noted the concerning implications of such a holding:

> The case stands for the proposition that, under D.C. law, virtually any remarks that Members of Congress make to the press are conduct within the scope of their employment. . . . [T]his means that Members of Congress, and perhaps all federal officials who speak to the press with any regularity, effectively are immune from defamation claims for comments made within the District of Columbia, no matter how personal or private in nature.[119]

The court went on to note that the *Williams* and *Wuterich* cases involved comments that were decidedly within the scope of employment as they involved legislation or other political topics.[120] Ultimately, the court was unpersuaded by the government's broad interpretation of the presidential scope of employment and denied the government's motion.[121] This ruling, despite being in line with the purpose of the Westfall Act, ultimately has little effect on the immunity that other courts have granted to elected officials in defamation suits.

The line of cases from *Williams* to *Wuterich* has created a broad immunity for elected officials in defamation cases.[122] These cases have gone so far as to hold that the Westfall Act applies when an official is speaking on entirely personal matters or posting on social media, making it unclear when an elected official could ever be open to suit for defamation.[123] Despite being a step in the right direction, the *Carroll* decision does little to remedy the broad immunity adopted by other circuits in Westfall Act cases.

III. ELECTED OFFICIALS ARE NEARLY IMMUNE FROM SUIT FOR DEFAMATION

Although the *Carroll* court rejected the DOJ's attempts to further expand the scope of employment for elected officials,[124] the problem is not so easily solved. In the D.C. Circuit, elected officials enjoy the same protections as they did prior to the *Carroll* decision. This overly broad protection allows elected officials to speak freely on personal matters, which can cause great harm to private citizens. The unjustness of such a

118. *Id.* at 451–53.

119. *Id.* at 452.

120. *Id.* at 455.

121. *Id.* at 457.

122. *See generally* Williams v. United States, 71 F.3d 502 (5th Cir. 1995); Operation Rescue Nat'l v. United States, 975 F. Supp. 92 (D. Mass. 1997); Does 1-10 v. Haaland, 973 F.3d 591 (6th Cir. 2020); Council on Am. Islamic Rels. v. Ballenger, 444 F.3d 659 (D.C. Cir. 2006); Wuterich v. Murtha, 562 F.3d 375 (D.C. Cir. 2009).

123. *See Ballenger*, 444 F.3d at 665; *Haaland*, 973 F.3d at 601.

124. *See Carroll*, 498 F. Supp. 3d at 457.

result is especially notable given that the protections enjoyed by these elected officials run counter to the purpose of the FTCA and the Westfall Act.

A. *Elected Officials Remain Fundamentally Immune from Suit for Defamation in the D.C. Circuit and Potentially Elsewhere*

The *Carroll* court resisted the government's attempts to further expand the scope of employment for elected officials.[125] However, one ruling from the Southern District of New York does not solve the problems of the Westfall Act and its application to elected officials. As the Biden administration pursues an appeal,[126] the Second Circuit could affirm the decision of the district court, effectively splitting from the D.C. Circuit and potentially attracting the attention of the Supreme Court. However, even a Second Circuit or Supreme Court decision in favor of Carroll would not entirely remedy the problem. There is also the added possibility that the Second Circuit could reverse the *Carroll* decision, which would allow elected officials to speak with near immunity in both the Second and D.C. Circuits.[127]

The *Carroll* case, at the very least, highlights the potential dangers of an expansive interpretation of scope of employment for elected officials.[128] Upon reaching its conclusion, the court states that "[t]o conclude otherwise would require the Court to adopt a view that virtually everything the president does is within the public interest by virtue of his office."[129] This is also true to a lesser extent for representatives and senators, who spend a large amount of time in the public eye. Thus, a rule which requires only an intent to improve relationships with constituents would allow such officials to defame others with immunity.[130]

Imagine what would have happened if E. Jean Carroll had brought her suit in the D.C. Circuit, where the court would be bound by *Ballenger*.[131] In *Ballenger*, the elected official was speaking to the press on an entirely private matter,[132] just as Trump was when he denied Carroll's allegations.[133] The *Wuterich* case, because it involved statements related to congressional duties, does not properly showcase the potential ramifications of the *Ballenger* holding.[134] However, if the

125. *See id.* at 457.

126. *See* Lucas, *supra* note 18.

127. *See Carroll*, 498 F. Supp. 3d at 457.

128. *Id.*

129. *Id.*

130. *See* Council on Am. Islamic Rels. v. Ballenger, 444 F.3d 659, 664 (D.C. Cir. 2006).

131. *See id.*

132. *Id.* at 661.

133. *Carroll*, 498 F. Supp. 3d at 426.

134. *See* Wuterich v. Murtha, 562 F.3d 375, 385 (D.C. Cir. 2009); *see also Ballenger*, 444 F.3d at 664.

Carroll case had been brought in the D.C. Circuit, the ruling would most likely have been very different.[135] Much of the *Carroll* court's decision rested on its fundamental disagreement with the *Ballenger* court's reasoning and holding.[136] Had the court been bound by such a holding, it is very likely that Carroll's lawsuit would have been dismissed. In such a scenario, the President would enjoy the same immunity conferred upon legislators, at least in the D.C. Circuit.

Even outside the D.C. Circuit, other courts could synthesize the *Ballenger* and *Haaland* holdings[137] to further expand the legislative scope of employment. Under such a synthesis, any public statement, speech, or social media post where the official's intent is to improve his or her relationship with constituents would be protected. Legislators could defame critics, journalists, or pundits who spoke ill of them in an attempt to save face with constituents. In a country where such a ruling is possible, private citizens can never be certain that the courts are an available option for relief if they are defamed by an elected official. In essence, when the majority of the persuasive authority suggests a broad interpretation of scope of employment,[138] elected officials enjoy a de facto immunity that runs counter to the American system of justice.

B. *Elected Officials Should Not Be Protected for Unofficial Speech*

Traditionally, the scope-of-employment inquiry is necessary to protect employers from liability for the personally motivated actions of their employees.[139] When employees commit wrongful acts while within the scope of their employment, respondeat superior laws provide an alternative party for the injured person to sue, traditionally one with deeper pockets.[140] The Westfall Act, however, bars suit against employees in their personal capacity once the certification has been made.[141] This is so because the Act, as opposed to traditional respondeat superior law, has the additional goal of protecting employees from

135. *See Carroll*, 498 F. Supp. 3d at 451–53.

136. *See id.*; *see also Ballenger*, 444 F.3d at 664.

137. *See Ballenger*, 444 F.3d at 664; Does 1-10 v. Haaland, 973 F.3d 591, 601 (6th Cir. 2020).

138. *See generally* Operation Rescue Nat'l v. United States, 975 F. Supp. 92 (D. Mass. 1997); Williams v. United States, 71 F.3d 502 (5th Cir. 1995); *Haaland*, 973 F.3d 591; *Ballenger*, 444 F.3d 659; *Wuterich*, 562 F.3d 375.

139. *See* Rochelle Rubin Weber, Note, *"Scope of Employment" Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by Their Employees*, 76 MINN. L. REV. 1513, 1523, n.37 (1992) (discussing the rationale for utilizing the employee's motivation in the scope-of-employment inquiry).

140. *See* Sands v. Union Cty., 455 F. Supp. 738, 742 (E.D. Tenn. 1978) (noting that one of the rationales for applying respondeat superior liability is the search for a "deep pocket").

141. 28 U.S.C. § 2679 ("Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.").

liability for official government conduct.[142] Such a result, when coupled with the United States' sovereign immunity for certain torts, provides for a number of circumstances where an injured party could be left without a remedy.[143] In those cases, it is more important than ever to ensure that the scope-of-employment inquiry is narrowly tailored to avoid circumstances where government employees are protected for purely personal conduct.

This is especially true for powerful elected officials, who have the potential to cause significantly more damage with defamatory statements than lower-level employees. It is not difficult to find potential examples of the damage that can be done by these officials. In the time since the *Carroll* decision, President Trump has issued several potentially defamatory statements about election officials committing voter fraud in the 2020 election, leading many to receive death threats.[144] However, since the voting system companies have filed suit against Fox News, the network has canceled one of its most prominent programs.[145] The host, Lou Dobbs, was named as a defendant in one of the suits and was one of the most prominent pundits questioning these voting machines, so the voting system companies have already received some retribution.[146] If these companies or election officials sought relief from Trump himself, the Westfall Act would most likely prevent those injured parties from receiving that same justice.

Such a result is especially unjust in the case of President Trump, whose campaign filed numerous lawsuits during the 2020 election.[147] The current state of the Westfall Act allows President Trump to protect his

142. *See Federal Employees' Liability Since 1988*, *supra* note 29, at 111 (arguing that the Westfall Act leaves federal employees "free to vigorously and effectively administer the policies of government without fear of personal liability").

143. *See id.* at 108 ("Courts have been faced with a 'troublesome aspect of the immunity conferred by section 2679' . . . . This troublesome aspect is the effect of the Westfall Act when employee immunity is combined with the various categories of common law torts for which sovereign immunity is retained by the government." (quoting Gogek v. Brown Univ., 729 F. Supp. 926, 931 (D.R.I. 1990))).

144. *See, e.g.*, Brendan Cole, *Election Official Says Death Threats His Family Got Should Be Considered in Trump Verdict*, NEWSWEEK (Feb. 13, 2021, 11:02 AM), https://www.newsweek.com/al-schmidt-donald-trump-philadelphia-impeachment-death-threats-1569107 [https://perma.cc/7BC7-HSAG]; Michael Wines, *Here Are the Threats Terrorizing Election Workers*, N.Y. TIMES (Dec. 3, 2020), https://www.nytimes.com/2020/12/03/us/election-officials-threats-trump.html [https://perma.cc/E34Z-WHP8].

145. Stephen Battaglio, *Fox News Cancels Lou Dobbs' Show; Pro-Trump Host Not Expected to Be Back on Air*, L.A. TIMES (Feb. 5, 2021, 3:10 PM), https://www.latimes.com/entertainment-arts/business/story/2021-02-05/fox-news-cancels-lou-dobbs-tonight [https://perma.cc/EC8V-6MEY].

146. *See id.*

147. Bruce D. Brown & Gabe Rottman, *Here's Merrick Garland's Orientation Memo for the Trump-Era Hangover on Press Freedom*, LAWFARE (Mar. 9, 2021, 10:36 AM), https://www.lawfareblog.com/heres-merrick-garlands-orientation-memo-trump-era-hangover-press-freedom [https://perma.cc/4K3W-GT9T].

own reputation from potentially false statements by news outlets while simultaneously preventing those he defames from seeking that same relief.[148] As one article noted, "[t]he U.S. cannot permit a president to sue for libel and then hide behind sovereign immunity when he himself is sued."[149] This result is untenable and runs counter to the purpose of the Westfall Act.

Additionally, elected officials are more likely to have the resources to defend against a lawsuit in the rare circumstances where their statements fall outside the scope of employment.[150] Thus, financial factors weigh less heavily in favor of broad protection.

The Westfall Act also defends officials against frivolous lawsuits, which would have the potential to distract legislators from their duties.[151] However, since the Westfall Act's passage in 1988, only two lawsuits have been brought in which the official's conduct could be considered outside the bounds of the scope of employment: *Carroll* and *Ballenger*.[152] It is unlikely that overly litigious actors would be able to find circumstances in which elected officials were making statements that were outside the scope of their employment with sufficient frequency to distract those officials from their duties. A carefully crafted amendment, such as the one proposed later in this Note, could both protect elected officials from frivolous lawsuits and protect defamed parties under the correct circumstances.[153]

C. *The Expansive Interpretation of Scope of Employment for Elected Officials Runs Counter to the Purposes of the FTCA and the Westfall Act*

Congress passed the FTCA to allow for the efficient resolution of tort claims against the government.[154] In doing so, Congress waived the

148. *See id.*

149. *Id.*

150. *See* Samuel Stebbins & John Harrington, *Here Are the Members of Congress with the Highest Estimated Net Worth*, USA TODAY (Oct. 25, 2019, 7:00 AM), https://www.usatoday.com/story/money/2019/10/25/richest-members-of-congress-by-net-worth/40290533/ [https://perma.cc/2MC8-VBNH] ("The typical congressional representative . . . has an estimated net worth of over $500,000, or roughly five times the median U.S. household net worth.").

151. *See* Nixon v. Fitzgerald, 457 U.S. 731, 753 (1982) (noting that even "[c]ognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve").

152. Carroll v. Trump, 498 F. Supp. 3d 422, 457 (S.D.N.Y.), *appeal filed*, No. 20-3978 (2d Cir. 2020); Council on Am. Islamic Rels. v. Ballenger, 444 F.3d 659, 661 (D.C. Cir. 2006).

153. *See* discussion *infra* Section IV.B.

154. *See* Figley, *supra* note 27, at 1106–07 (stating that the FTCA "creates an effective administrative procedure that efficiently resolves without litigation the vast majority of tort claims against the federal government").

government's sovereign immunity for various torts.[155] In exchange, Congress was able to define the circumstances under which the government could be sued.[156] The immunity currently afforded to elected officials does not match such a purpose, as it does not allow for any resolution of defamation claims.[157] Congress certainly had its reasons for electing not to waive sovereign immunity for libel and slander.[158] However, private citizens who are defamed by elected officials speaking about personal matters are currently in the same position as the general public prior to the enactment of the FTCA. The FTCA was meant to provide a remedy for injured citizens, and cases like *Ballenger* stand in the way of such a remedy for some.[159]

The current protections afforded to elected officials under *Ballenger*[160] are even further disconnected from the purposes of the Westfall Act. The Westfall Act was passed to overturn the Supreme Court's decision in *Westfall v. Erwin*, a case in which the unprotected employees were low-level supervisors.[161] In fact, the entire reason Congress superseded the *Westfall* decision was to override the requirement that conduct be discretionary in order for absolute immunity to attach.[162] The conduct of elected officials is almost entirely discretionary, as the actions of Congress and the President are rarely prescribed by statute.[163] Thus, the *Westfall* decision would have had little to no impact on the liability of elected officials.

Throughout the drafting process, Congress continuously noted that its intent was to protect lower-level federal employees.[164] The House Judiciary Committee noted that the impact of the *Westfall* decision would be more severe on lower-level employees, and the legislative history indicates that these lower-level employees were the focus of the Act.[165] In such a context, it would fit with the Westfall Act's purpose if lower-level federal employees were comprehensively protected. However, when the

155. *See id.* at 1109.

156. *See* 28 U.S.C. § 1346(b)(1).

157. *See supra* Section III.A.

158. *See* 28 U.S.C. § 2680(h).

159. *See generally* Council on Am. Islamic Rels. v. Ballenger, 444 F.3d 659 (D.C. Cir. 2006).

160. *Id.* at 664.

161. *See* Westfall v. Erwin, 484 U.S. 292, 293 (1988), *superseded by statute*, Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (codified at 28 U.S.C. §§ 2671, 2674, 2679 (2006)).

162. *See* H.R. REP. No. 100-700, at 2 (1988); *see also Westfall*, 484 U.S. at 300.

163. *See* Garcia v. U.S. Air Force, 533 F.3d 1170, 1176 (10th Cir. 2008) (defining discretionary conduct).

164. *See supra* Section I.B.

165. H.R. REP. No. 100-700, at 3; *see also* 134 CONG. REC. 14265 (1988) (statement of Sen. Grassley) (referring to the effect of the Court's decision "particularly [on] rank-and-file civil servants").

Act's stated purpose is to protect lower-level employees, immunity for elected officials would seem to be more of an unintended effect.

Additionally, the government should not protect elected officials for statements like those in *Carroll* and *Ballenger*.[166] Under the Westfall Act, employees are protected for conduct within the scope of their employment under the theory that it qualifies as government conduct.[167] Injured parties can seek relief from the U.S. government for this same reason.[168] This can lead to strange results when the Attorney General certifies that President Trump and Representative Ballenger were acting within the scope of their employment.[169] In those cases, the government is essentially accepting responsibility for calling E. Jean Carroll a liar and for calling the Council on American-Islamic Relations the "fund-raising arm for Hezbollah."[170] It is conceivable for the government to accept responsibility for the views of each of its elected officials on legislation and other official business. It does not make sense, though, for the government to deny sexual assault allegations, or to speak about an official's wife being uncomfortable living near a Muslim organization. The government cannot and should not accept responsibility for the statements of its elected officials when those statements lie far outside the bounds of the scope of their employment.

This is especially true given the nature of a defamation claim, which can rest only on a false statement of fact and not on any statements of opinion.[171] Thus, when the government takes responsibility for such speech, that false statement gains at least some indicia of government support. Additionally, the Attorney General's certification prevents any determination into whether the statement is in fact false.[172] In Carroll's case, the government is attempting to prevent discovery with its

166. *See generally* Carroll v. Trump, 498 F. Supp. 3d 422 (S.D.N.Y.), *appeal filed*, No. 20-3978 (2d Cir. 2020); Council on Am. Islamic Rels. v. Ballenger, 444 F.3d 659 (D.C. Cir. 2006).

167. *See Federal Employees' Liability Since 1988*, *supra* note 29, at 111 (stating that Congress's intent was "that the government accept sole responsibility for its employees' actions in the scope of employment").

168. *See id.*

169. *See Carroll*, 498 F. Supp. 3d at 426; *Ballenger*, 444 F.3d at 663.

170. *See Carroll*, 498 F. Supp. 3d at 426–27; *Ballenger*, 444 F.3d at 662. Notably, in the same opinion, the court referred to the Council on American-Islamic relations as "a nonprofit NGO whose stated goal is to promote a positive image of Islam in the United States and empower the American Muslim community." *Ballenger*, 444 F.3d at 662.

171. *See, e.g.*, Hammer v. Amazon.com, 392 F. Supp. 2d 423, 431 (E.D.N.Y. 2005) ("It is well established that '[a] statement of pure opinion is not actionable' in a defamation action." (quoting Belly Basics, Inc. v. Mothers Work, Inc., 95 F. Supp. 2d 144, 145 (S.D.N.Y. 2000)); *see also* SMOLLA, *supra* note 23, § 1:34 (noting that the elements of a defamation claim include "a statement of fact . . . that is false").

172. *See* Berman, *supra* note 7 (noting that the Justice Department taking over "could mean the end of Carroll's lawsuit as the federal government can't be sued for defamation").

certification on President Trump's behalf.[173] However, the facts of *Ballenger* are quite clear in that the Council on American Islamic Relations is not a "fund-raising arm for Hezbollah."[174] Yet, when the government certified that Ballenger was acting within the scope of his employment,[175] that statement became the government's lie, most likely increasing the damaging effect on the plaintiff, a nonprofit organization.[176]

IV. CONGRESS SHOULD AMEND THE WESTFALL ACT

Legislative change is needed, and the most appropriate way to solve this problem is to create a narrow exception from the Westfall Act's protections for the unofficial speech of elected officials.[177] The Supreme Court cannot properly decide this issue for the entire nation, as the Westfall Act requires the application of each state's respondeat superior laws.[178] Thus, legislative change is an appropriate and necessary next step to protect private citizens from defamation by elected officials. The proposed amendment would protect private citizens from defamation by elected officials while also protecting those officials from frivolous lawsuits and allowing them to speak freely on official matters.

A. *The Supreme Court Cannot Effectively Solve this Problem; A Legislative Response is Necessary and Appropriate*

Even with the *Carroll* case set to be heard by the Second Circuit, the Second Circuit and even the Supreme Court are unable to completely solve the problem. The FTCA provides that state law governs any claims brought under it, so the respondeat superior laws of the various states are applied in Westfall Act cases.[179] Thus, if a case were to reach the Supreme Court, the Court would be interpreting the respondeat superior laws of one of the fifty states or—as in *Carroll*—the District of Columbia.[180] Even if the Court adopted a narrow interpretation of scope of employment for elected officials, the result would impact only those states which had the exact same respondeat superior laws. A legislative resolution would not

173. *See id.*

174. *Ballenger*, 444 F.3d at 662.

175. *Id.*

176. *See id.*

177. *See* Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (codified at 28 U.S.C. §§ 2671, 2674, 2679 (2006)).

178. *See Carroll*, 498 F. Supp. 3d at 443.

179. *See* 28 U.S.C. § 1346(b)(1); *see also* Hamm v. United States, 483 F.3d 135, 137–38 (2d Cir. 2007); Stokes v. Cross, 327 F.3d 1210, 1214 (D.C. Cir. 2003); Henson v. Nat'l Aeronautics & Space Admin., 14 F.3d 1143, 1147 (6th Cir.), *opinion corrected on reh'g*, 23 F.3d 990 (6th Cir. 1994).

180. *See*, *e.g.*, *Carroll*, 498 F. Supp. 3d at 447 (interpreting the respondeat superior laws of D.C.).

suffer the same drawbacks because it could establish a federal standard for scope of employment for elected officials. This would be appropriate for those federal officials whose defamatory statements can have national consequences.

In fact, the non-uniformity in scope-of-employment standards across the country is also a factor weighing in favor of a change in the law. In the *Carroll* case, the application of state respondeat superior laws led to a conflict over which state's laws should apply—the state where the statements were made or where the reputational injury occurred.[181] Thus, the result of a defamation case under the Westfall Act could reach entirely different conclusions depending on where the comments were made, where the lawsuit is filed, and where the reputational injury occurred.[182] Although those provisions might protect lower-level employees by allowing them the protections of their home state, the same provisions lead to incongruous and potentially unjust results when applied to elected officials. A change in the law which clarifies the scope-of-employment inquiry for elected officials would also allow for uniformity across jurisdictions.

In 1988, Congress acted with haste to protect the federal employees exposed to suit under the *Westfall* decision.[183] Now, it would be appropriate for Congress to take similar action to protect those potentially injured by federal elected officials. Previously, when injured parties needed an outlet to pursue claims against the government, Congress took over one hundred and fifty years to waive its sovereign immunity in tort.[184] However, courts have moved quickly in expanding interpretations of the scope of employment for elected officials.[185] The *Carroll* decision was a small victory for one defamed person,[186] but legislative action is needed to ensure that the court in the next case does not reach an unjust decision.

B. *The Westfall Act Should Be Carefully Amended to Define Scope of Employment for Elected Officials and Protect Official Speech*

In order to protect those injured by the defamatory statements of elected officials, Congress should amend the Westfall Act to include the language:

181. *Id.* at 443–46.

182. *Compare id.* (applying D.C. law and finding that personal statements were not within the scope of employment), *with* Council on Am. Islamic Rels. v. Ballenger, 444 F.3d 659 (D.C. Cir. 2006) (applying D.C. law and coming to the opposite conclusion).

183. *See* H.R. REP. NO. 100-700, at 2 (1988); *see also Federal Employees' Liability Since 1988*, *supra* note 29, at 73.

184. *See* Figley, *supra* note 27, at 1107–09.

185. *See* discussion *supra* Part II.

186. *See* Carroll v. Trump, 498 F. Supp. 3d 422 (S.D.N.Y.), *appeal filed*, No. 20-3978 (2d Cir. 2020).

> "Acting within the scope of his office or employment, in the case of an elected official or other executive officer, shall not be construed to include public statements, speeches, social media posts, or responses to press inquiries regarding:
>
> (a) personal matters such as family, marital status, or other personal relationships;
>
> (b) denials of allegations of misconduct in an unofficial capacity;
>
> (c) any other matter where the official's intent is solely to improve relationships with constituents or to achieve re-election."[187]

The proposed amendment is narrow in scope and comports with the purposes of the FTCA and the Westfall Act.[188] The amendment is carefully written to sufficiently protect elected officials as well as those defamed while officials are speaking outside the scope of employment.

One possible danger in amending the Westfall Act is the potential to expose elected officials to frivolous lawsuits in their personal capacity. Such a result would distract the resources and attention of elected officials from more important matters.[189] For this reason, the proposed amendment still provides immunity to elected officials under the Westfall Act, except in very specific cases. This is especially necessary in the modern political world, where discourse has become especially strained and politicians frequently refer to each other as communists or fascists.[190] However, although the amendment still protects elected officials for their speech as it relates to legislation or other official duties, the amendment might have the incidental effect of requiring politicians to be more careful with their speech—a not entirely unwelcome result.

While sections (a) and (b) broadly address the specific cases discussed above, section (c) of the amendment serves as a reminder to elected officials that although their duties involve informing and aiding constituents, the act of seeking re-election is an act undertaken entirely as a private citizen and cannot fall within the scope of employment. Since

187. The wording and format of the proposed language is based on the current wording of 28 U.S.C. § 2671. The proposed language would be an addition to the current text of § 2671.

188. *See* discussions *supra* Part I and Section III.C.

189. *See* Nixon v. Fitzgerald, 457 U.S. 731, 753 (1982) (noting that even "[c]ognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve").

190. *See, e.g.*, Devan Cole, *Graham Declines to Condemn Racist Trump Tweets and Calls Democratic Congresswomen A Bunch of Communists*,*'* CNN POL. (July 15, 2019, 11:19 PM), https://www.cnn.com/2019/07/15/politics/lindsey-graham-communists-democratic-congresswomen/index.html [https://perma.cc/LL5R-AZ4B]; Justin Wise, *Ocasio-Cortez Says U.S. is Headed to 'Fascism' Under Trump*, HILL (July 3, 2019, 3:42 PM), https://thehill.com/homenews/house/451601-ocasio-cortez-says-us-is-headed-to-fascism-under-trump [https://perma.cc/DWJ7-Y999].

his defeat at the polls in November of 2020, Donald Trump has created the narrative that the election was wrought with fraud and that voting machines were involved in rigging the election for Joe Biden.[191] Since then, the companies that produce these voting machines have allegedly incurred billions of dollars in damages.[192] This proposed amendment would allow these companies to sue Trump for his defamatory statements, as his words were purely to contest the results of the election and not related to any legislative or executive matters.

Under the proposed amendment, the courts in *Williams*, *Operation Rescue National*, *Murtha*, and *Haaland* would reach the exact same result.[193] The speech in each of those cases was related either to pending legislation or to issues of political and legislative significance.[194] The amendment applies only to speech which is purely private in nature, and would therefore preclude comments like those in *Ballenger* and *Carroll*[195] from being protected. Such a provision protects elected officials while they perform official duties relating to legislation or executive actions.

In fact, the amendment is written to exclude certain actions, rather than to define a set of legislative duties, because any attempt to create an exhaustive list would most likely be underinclusive. An underinclusive list then exposes elected officials to suit for acts that are clearly official in nature. A list of exclusions, on the other hand, creates only a narrow set of circumstances in which an elected official could be sued in his or her personal capacity.

The amendment is intended to protect private citizens from the reputational harm that is almost guaranteed when elected officials of great power make false, harmful statements. The amendment would protect the Council on American Islamic Relations, a nonprofit, from being linked with terrorist organizations.[196] Additionally, the amendment would allow citizens like E. Jean Carroll, who accuse elected officials of pre-election misconduct, the ability to use courts to determine the validity of their claims and provide relief.[197]

191. *See* Dean, *supra* note 33.

192. *Id.*

193. *See* Williams v. United States, 71 F.3d 502 (5th Cir. 1995); Operation Rescue Nat'l v. United States, 975 F. Supp. 92 (D. Mass. 1997); Wuterich v. Murtha, 562 F.3d 375 (D.C. Cir. 2009); Does 1-10 v. Haaland, 973 F.3d 591 (6th Cir. 2020).

194. *See Williams*, 71 F.3d 502; *Operation Rescue Nat'l*, 975 F. Supp. 92; *Wuterich*, 562 F.3d 375; *Haaland*, 973 F.3d 591.

195. *See* Council on Am. Islamic Rels. v. Ballenger, 444 F.3d 659, 661 (D.C. Cir. 2006); Carroll v. Trump, 498 F. Supp. 3d 422, 426 (S.D.N.Y.), *appeal filed*, No. 20-3978 (2d Cir. 2020).

196. *See supra* note 86 and accompanying text.

197. *See supra* note 26 and accompanying text.

CONCLUSION

In today's political climate, personal attacks, sexual assault allegations, and marital issues are just as often the focus of political discourse as actual legislative and policy issues.[198] The media's focus on such issues, however, does not go so far as to make those topics a part of the President or a legislator's official duties. When elected officials speak on personal matters or deny allegations of sexual misconduct, they are acting within their personal capacity. Thus, when officials defame private citizens in that context, they should also be liable in their personal capacity.

Under the Westfall Act and the line of cases interpreting it, this is not the case.[199] Elected officials currently benefit from a de facto immunity for statements that are personal in nature. As long as the official's intent is to improve relationships with constituents, the weight of authority is on his or her side.[200] Such a result is fundamentally unfair to private citizens who suffer reputational harm from the false statements of the President or members of Congress. Such an immunity cannot be allowed to continue, nor should courts be allowed to expand this immunity even further.

E. Jean Carroll was fortunate in that the district court allowed her case to proceed, and that President Trump failed in his re-election bid.[201] However, the Biden administration's appeal makes it unclear whether her legal battle will be allowed to continue. This is especially troublesome as voting system companies prepare to potentially file suit against Trump for the damages caused by his false statements about election fraud.[202] In order to fix the Westfall Act's application to elected officials, the Act must

198. *See, e.g.*, Audrey Conklin, *Trump Claims Biden's 'Dementia' Is 'Rapidly Getting Worse' After Campaign Trail Gaffes*, FOX NEWS (Oct. 13, 2020), https://www.foxnews.com/politics/trump-biden-dementia-getting-worse-campaign-gaffes [https://perma.cc/BQU4-PN9V]; Lisa Lerer & Sydney Ember, *Examining Tara Reade's Sexual Assault Allegation Against Joe Biden*, N.Y. TIMES (Apr. 12, 2020), https://www.nytimes.com/2020/04/12/us/politics/joe-biden-tara-reade-sexual-assault-complaint.html [https://perma.cc/J63B-N5YY]; Mary Jordan & Jada Yuan, *Vegas May Be Betting on a Post-Presidential Divorce, But Melania Trump Seems All In for Her Husband*, WASH. POST (Nov. 17, 2020, 8:00 AM), https://www.washingtonpost.com/lifestyle/style/melania-trump-donald-trump-marriage/2020/11/17/fba269fa-250e-11eb-a688-5298ad5d580a_story.html [https://perma.cc/6B77-67UQ].

199. *See* Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (codified at 28 U.S.C. §§ 2671, 2674, 2679 (2006)); *see also* Council on Am. Islamic Rels. v. Ballenger, 444 F.3d 659 (D.C. Cir. 2006); Does 1-10 v. Haaland, 973 F.3d 591 (6th Cir. 2020).

200. *See Ballenger*, 444 F.3d at 664–66.

201. *See* Carroll v. Trump, 498 F. Supp. 3d 422, 457 (S.D.N.Y.), *appeal filed*, No. 20-3978 (2d Cir. 2020); Scott Detrow & Asma Khalid, *Biden Wins Presidency, According to AP, Edging Trump in Turbulent Race*, NPR (Nov. 7, 2020, 11:26 AM), https://www.npr.org/2020/11/07/928803493/biden-wins-presidency-according-to-ap-edging-trump-in-turbulent-race [https://perma.cc/T9SE-3DVR].

202. *See* Dean, *supra* note 33.

be amended to include a list of potential circumstances in which the Act would not apply to elected officials. The amendment should be narrow in scope to maintain protections for elected officials when it is proper. In 1988, Congress took fast and decisive action to protect federal employees.[203] Today, Congress should act with the same speed to protect private citizens from elected officials in our increasingly personal and polarized political climate.

203. *See* H.R. REP. No. 100-700, at 2 (1988).