

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

**No. 07-5379**

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FRANK D. WUTERICH

Plaintiff-Appellee

v.

JOHN MURTHA

Defendant-Appellant

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

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**BRIEF FOR THE APPELLEE**

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**ALTERNATE STATEMENT OF APPELLATE JURISDICTION**

This is a common-law defamation action filed by a private citizen, Appellee Frank D. Wuterich (“Wuterich), against Appellant John Murtha (“Murtha), who is currently a Congressman from the State of Pennsylvania. Wuterich invoked the District Court’s jurisdiction under 28 U.S.C. § 1332. See Joint Appendix at 8 (“JA”). The Government moved to substitute the United States as the defendant under the Westfall Act, 28 U.S.C. § 2679, and, on that basis, to dismiss the case for lack of subject matter jurisdiction.

JA 30.

In an oral ruling issued on September 28, 2007, and reduced thereafter to Minute Orders, the District Court took the pending Motions under advisement and authorized limited jurisdictional discovery including, specifically, Mr. Murtha's deposition. JA 4, 339-341. A timely Notice of Appeal was filed on November 16, 2007. Id. at 235. The District Court stayed discovery pending resolution of this appeal. Id. at 5, 302-305. It also noted that the "Court does not certify the question(s) for interlocutory review by the Court of Appeals. The Court was not asked to certify any question. The United States takes the position, which Plaintiff opposes, that it has an automatic right to seek review of the Order directing jurisdictional discovery." Id. at 304.

Mr. Murtha and the United States Government argues this Court has appellate jurisdiction under 28 U.S.C. § 1291. Brief for the Appellants at 2 (filed May 23, 2008)("Gov't Br."). As Wuterich demonstrates below, this Court does not possess jurisdiction over this appeal. See pp. 11 - 22, infra.

**ALTERNATE STATEMENT OF THE ISSUES**  
**PRESENTED FOR REVIEW**

1. Whether a District Court's decision that limited discovery is required before a judicial determination can be rendered as to whether a federal defendant acted within the scope his employment constitutes an immediate appealable order.

2. Whether a Congressman is, as a matter of law, always acting within the scope of his employment when he intentionally disseminates false information concerning a private citizen through public and/or private statements to members of the media or others.

3. Whether at least limited discovery is necessary to elicit factual information underlying a claim that a federal employee acted outside the scope of his employment before a judicial determination can be reached.

**ALTERNATE STATEMENT OF FACTS**

The tragic events arising from Haditha, Iraq on November 19, 2005, the true veracity of which are not relevant to this appeal, where civilians were unfortunately killed during U.S. military action of the 1st Squad, 3rd Platoon, Kilo Company, 3rd Battalion, 1st Marine Regiment, were detailed in Wuterich's Complaint. JA 7-13. Subsequent statements that were spread by Iraqis in the Haditha neighborhood were intentionally false or mistaken,

including accusations that the Marines had lined civilians up against the wall and executed them. These allegations led to the inquiries of a *Time Magazine* reporter who later published a distorted account of what occurred on the day in question.

In or about Spring 2006, Mr. Murtha was one of several congressional members in the House of Representatives and U.S. Senate who was apparently provided information by officials within the Department of Defense concerning the ongoing investigation. According to news reports Mr. Murtha was briefed by, among others, Marine Commandant General Michael Hagee. Mr. Murtha then made repeated false statements concerning the Marines involved in the tragic incident, including Wuterich. He inappropriately compared the tragic events of Haditha with the infamous war crimes and deliberate wide-spread massacre of civilians at My Lai in Vietnam. Department of Defense Officials denied providing Mr. Murtha any of the specific information that he publicly discussed. By no later than May 25, 2006, when ABC News reported on the existence of a military investigation into November 19, 2005, Wuterich was publicly identified as the leader for his squad and linked to the Haditha tragedy. *Id.* at 12.

Following the filing of his Complaint, on December 21, 2006, Wuterich was charged with thirteen counts of unpremeditated murder for events arising from the November 19, 2005, incident in Haditha.

<http://www.usmc.mil/lapa/Iraq/Haditha/Haditha-Preferred-Charges-061221.htm>.<sup>1</sup>

The charges alone, and the Marine Corps press conference that was held at the time of announcement, unequivocally refuted many of Mr. Murtha's outrageous statements such as that the killings were committed in "cold-blood" (premeditated) and that Wuterich and his Marines were not fired upon."<sup>2</sup> "Republican Iraq critic Murtha under fire on two fronts," *Philadelphia Inquirer*, Aug. 3, 2006; Official Marine Press Statement of Col. Stewart Navarre, Dec. 21, 2006 ("On the morning of 19 November 2005, a four vehicle convoy of Marines from Kilo Company, 3rd Battalion, 1st Marine Regiment, 1st Marine Division was moving through Haditha when it was ambushed by insurgents employing an improvised explosive device *and small arms fire.*")(emphasis added)(a copy can be

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<sup>1</sup> Additional court-martial proceedings have since modified the charges to lesser offenses. No trial has yet occurred.

<sup>2</sup> For example on May 19, 2006, CNN reported Mr. Murtha publicly and conclusively stated that the Marines "overreacted and killed a number of civilians without anybody firing at them. That's what you're going to find out." JA 14-15

found at <http://www.usmc.mil/lapa/Iraq/Haditha/Haditha-Press-Statement-061221.htm>). Thus, the United States Government itself – the very entity seeking to substitute itself for Mr. Murtha – has already proven some of the substantive claims underlying this lawsuit.<sup>3</sup> Subsequent proceedings within the military criminal justice system have only further served to disprove Mr. Murtha’s outlandish factual statements.

Wuterich offered Mr. Murtha an opportunity to resolve this dispute through a simple retraction. JA 169-170. An identical offer was conveyed to Congressman John Kline, who was subsequently identified as having allegedly disseminated defamatory remarks concerning the involved Marines. *Id.* at 171-172. Congressman Kline recognized that statements of that nature were premature and inappropriate and, immediately to his credit, issued a public apology. *Id.* at 173. Mr. Murtha never responded and this lawsuit was filed on August 2, 2006.

On May 7, 2007, Congressman Murtha filed a Motion to Dismiss that alleged he was entitled to absolute immunity based on his assertion he was acting within the scope of his employment. The District Court held oral

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<sup>3</sup> Additionally, individuals, such as General Hagee, who Mr. Murtha claimed to have provided him with the defamatory information that led to the filing of this lawsuit, publicly challenged his recollection of how he came to be in possession of the information.

arguments on September 28, 2007, at which time it indicated additional facts were necessary before it could render a substantive ruling. Id. at 4, 339-341.

Following the hearing the Court issued a Minute Order that stated:

Minute Entry for proceedings held before Judge Rosemary M. Collyer: Motion Hearing held on 9/28/2007 re [3], [4] Motion to Dismiss for Lack of Jurisdiction and to Substitute the United States as the Sole Defendant. Motion heard and taken under advisement. A Status Conference is set for 10/25/2007 AT 10:45 AM in Courtroom 2 before Judge Rosemary M. Collyer. (Court Reporter: Crystal Pilgrim) (cdw)

JA 4. A second Minute Order was issued shortly after stating:

MINUTE ENTRY ORDER. Pursuant to the Court's instructions during the hearing held in open court on September 28, 2007, Plaintiff may conduct discovery limited to the issue of whether Congressman Murtha was acting in the scope of his employment at the time he made the alleged defamatory statements. A further status conference is scheduled for October 25, 2007, at 10:45 a.m. Signed by Judge Rosemary M. Collyer on 9/28/2007. (lcrmc2)

Id. As a result, Wuterich served Mr. Murtha with Requests for Production of Documents on or about October 3, 2007, and issued a Notice of Deposition on or about October 23, 2007. The deposition was scheduled to take place on November 27, 2007.

On November 16, 2007, Congressman Murtha filed a Notice of Appeal with this Court. Id. at 235. The appeal was followed by a Motion to Stay Discovery that was filed with the District Court on November 20, 2007. Id.

at 236-245. On December 17, 2007, in light of the filing of the Government's Notice of Appeal, the District Court granted the Motion to Stay Discovery but noted it had not certified any of the issues now before this Court. Id. at 302-305.

### **ALTERNATE STATEMENT OF REVIEW**

Without citation Mr. Murtha claims "this appeal raises issues of law reviewable de novo by this Court." Gov't Br. at 8. To the degree this appeal pertains to review of a District Court's denial of absolute immunity, as Mr. Murtha claims, Wuterich agrees that a de novo standard applies. This appeal, however, does not pertain to any such ruling by the District Court.

This appeal actually pertains to a ruling of the District Court permitting limited jurisdictional discovery in advance of a substantive ruling on the merits of the issue of absolute immunity. "The district court has broad discretion in its handling of discovery, and its decision to allow or deny discovery is reviewable only for abuse of discretion." Rasul et al. v. Myers et al., 512 F.3d 644, 662 (D.C. Cir. 2008), quoting Islamic Am. Relief Agency v. Gonzales, 477 F.3d 728, 737 (D.C. Cir. 1997)(citation omitted).

## **SUMMARY OF ARGUMENT**

On November 19, 2005, a tragic incident that unfortunately is witnessed in every conflict throughout the history of warfare occurred in the city of Haditha, Iraq. A Marine squad that was following the rules of engagement prescribed by the U.S. Marine Corps, responded with force in the aftermath of an IED explosion and a perceived enemy insurgent coordinated attack. In the aftermath, sadly, civilians were mistakenly killed.

Wuterich, the squad leader of the Marines engaged in the Haditha battle, brought defamation and false light claims against Mr. Murtha for asserting that Wuterich, as part of an easily identifiable group of Marines, was a “cold-blooded” killer, among other disparaging and unproven comments. Rather than substantively – or even personally – respond to these claims, Mr. Murtha, a sitting member of the U.S. House of Representatives, seeks to hide behind a purported cloak of immunity and has brought the United States Government into this litigation to fight his battle for him.

Mr. Murtha has placed the cart before the horse and claims he is entitled to absolute immunity under any circumstances that he might have spoken to a member of the media (even though Wuterich’s defamation lawsuit was not restricted to media discussions) and, therefore, the United States Government is an appropriate intervening party to this action and requires

dismissal. Before any determination on the merits, however, can take place Wuterich is entitled to limited jurisdictional discovery – to include deposing Mr. Murtha – in order to challenge Mr. Murtha’s scope of employment claim and the Westfall Certification filed by the United States Attorney’s Office.

This case is not about the War in Iraq or Mr. Murtha’s opposition to it. The legitimate public debate regarding whether the United States should or should not have entered Iraq, or at what point in time our troops should or should not withdraw is an unrelated distraction, both as a matter of fact and law. Neither Wuterich nor this lawsuit takes a position or seeks to debate those questions, or Mr. Murtha’s personal views on the topic.

What this lawsuit addresses is the irresponsible and false statements spread by Mr. Murtha, who acted outside of the scope of his employment and without any substantive basis, against a group of young Marines – led by Wuterich – who were risking their lives in a dangerous situation that turned tragic.

### **ARGUMENT**

Mr. Murtha seeks to reverse an interlocutory ruling of the District Court to take under advisement the filing of his Motion to Dismiss for Lack of Jurisdiction and to Substitute the United States as the Sole Defendant pending the completion of limited jurisdictional discovery. Because this

Court does not possess jurisdiction over the District Court's ruling it should outright reject this appeal without reaching any determination on the substantive merits of the issues raised by Mr. Murtha.

Alternatively, should this Court determine jurisdiction does lie, Wuterich has demonstrated that he is entitled to first undertake limited jurisdictional discovery before the District Court can render a substantive determination as to whether Mr. Murtha was acting in the scope of his employment when he defamed Wuterich.

**I. THIS COURT LACKS JURISDICTION TO HEAR THIS APPEAL AND SHOULD DECLINE TO ADJUDICATE THE GOVERNMENT'S SUBSTANTIVE ARGUMENTS**

The question of whether this Court possessed jurisdiction over the District Court's Minute Order of September 28, 2007, was actually first raised in the proceedings below. In fact, the issue was tangentially litigated in response to Mr. Murtha's Motion to Stay Discovery. In agreeing to stay discovery, primarily as a result of the concern that were Mr. Murtha to submit to the deposition he would render his appeal moot, JA 304-305, the District Court noted the "Court does not certify the question(s) for interlocutory review by the Court of Appeals. The Court was not asked to certify any question. The United States takes the position, which Plaintiff opposes, that it has an automatic right to seek review of the Order directing

jurisdictional discovery.” Id. at 304.

On its own accord this Court ordered that the parties “address in their briefs the basis for the court’s appellate jurisdiction over the district court’s ruling of September 28, 2007. The district court docket reflects that defendant’s motion to substitute the United States and to dismiss the complaint was taken under advisement, rather than denied as appellants have stated in their notice of appeal and statement of issues.” Order at 1 (dated April 14, 2008).

Congressman Murtha claimed that requiring him to “be deposed before resolution of his legal rights to immunity would destroy the very immunity to which he is entitled, and an immediate appeal under the collateral order doctrine is therefore recognized in this context to vindicate the vital interests that the immunity doctrine is intended to protect.” Gov’t Br. at 7. These assertions, if accurate, would not only stand the entire process surrounding determinations of Westfall immunity on its head but are completely contrary to well-established D.C. Circuit precedent.

**A. Mr. Murtha Has Failed To Demonstrate That This Circuit Has Jurisdiction To Hear This Appeal Under 28 U.S.C. § 1291**

This Circuit has been clear in its view that it will strictly limit its jurisdiction to the review of “final district court decisions.” See Banks v. Office of the Senate Sergeant-At-Arms & Doorkeeper of the United States Senate, 471 F.3d 1341, 1344 (D.C. Cir. 2006), citing 28 U.S.C. § 1291. See also In Re Sealed Case (Medical Records), 381 F.3d 1205, 1209 (D.C. Cir. 2004)(“Ordinarily, a decision is not considered final under § 1291 unless it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”), quoting Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996)(internal quotation marks omitted).

It has similarly adhered to the Supreme Court’s “practical construction” of the finality requirement of 28 U.S.C. § 1291 by permitting immediate appellate review of only a “small class” of rulings that did not conclude the litigation but conclusively resolved “claims of right separable from, and collateral to, rights asserted in the action.” Banks, 417 F.3d at 1346, quoting Will v. Hallock, 546 U.S. 345, 349 (2006).

An “outright denial” of Westfall certification and substitution would arguably constitute a “final decision” for purposes of appellate jurisdiction under 28 U.S.C. § 1291. See Gov’t Br. at 13, quoting Osborn v. Haley,

127 S.Ct. 881, 892 (2007). While Mr. Murtha’s brief frequently mischaracterizes that a “denial” occurred below, ultimately he concedes that the District Court did not actually issue an “outright denial”. Instead the District Court refrained from issuing a substantive decision at all and simply authorized a limited and narrow factual inquiry into to the scope-of-employment question. JA 4. See also id. at 304 (“With limited jurisdictional discovery, the Court will be able to answer that question and, if it concludes that Representative Murtha was acting within the scope of his employment, it will also conclude that Representative Murtha is immune from any further discovery on the underlying defamation suit”). Thus, as will be explained further below, the Government has not satisfied the first condition – let alone all three conditions of the Collateral Order Doctrine – necessary to demonstrate that the interlocutory discovery order constituted a “final decision”.

Therefore, Mr. Murtha can not avail himself of the jurisdiction of this Court.

*1. There Is A Significant Legal Distinction Between An “Outright Denial” Of A Westfall Certification And An Interlocutory Order Permitting Limited Discovery On The Issue Of Scope Of Employment*

There is no dispute that the rationale behind affording public officials absolute immunity for actions that fall within the scope of their employment is to “shield the person from the burdens and distraction of the litigation itself, and not just from the possibility of an eventual adverse judgment.” See Gov’t Br. at 15, quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). See also Osborn, 127 S.Ct. at 892 (noting Westfall certification and substitution provision “designed to immunize covered federal employees not simply from liability, but from suit”); Doe v. Exxon Mobil Corp., 473 F.3d 345, 350 (D.C. Cir. 2007)(doctrine of absolute immunity protects covered individuals from “the risks of trial – distraction of officials from their governmental duties, inhibition of discretionary function, and deterrence of able people from public service”).

That understanding, however, does not correct the inherent flaws in Mr. Murtha’s overarching premise. As far as Mr. Murtha is concerned, there is no difference between an “outright denial” of Westfall certification and an interlocutory order permitting limited discovery on the underlying element of a Westfall certification, i.e., the scope-of-employment question. See Gov’t

Br. at 14-15. In effect, Mr. Murtha is arguing that an “outright denial” of absolute immunity, with prejudice, is the legal equivalent of an interlocutory order denying, *without prejudice*, absolute immunity pending the completion of limited discovery.<sup>4</sup> Mr. Murtha does not – and can not – produce a single binding citation that addresses and supports this particular assertion.

Moreover, this line of thinking lies contrary to the law of this Circuit. See Banks, 471 F.3d at 1346-1347 (“There is ample precedent in this Circuit for taking an appeal of a discovery order *after* entry of judgment.”)(emphasis added), citing Nat’l Ass’n of Crim. Def. Lawyers v. United States DOJ, 182 F.3d 981, 985 (D.C. Cir. 1999); Trout v. Garrett, 891 F.2d 332, 335 (D.C. Cir. 1989)(denying immediate review by appeal from interim attorney fee award).

Mr. Murtha’s attempt to fit a round “absolute immunity” peg into a square “qualified immunity” hole, see Gov’t Br. at 15-17, does nothing to fill in the gaps. The difference between the two forms of immunity is more

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<sup>4</sup> Unlike an “outright denial” with prejudice, an interlocutory determination that discovery is needed to assist the Court still obviously allows the Government to re-file a renewed Motion to Substitute Defendant and Dismiss for Lack of Subject Matter Jurisdiction at a later date, at which time the Court will then issue a substantive decision. See JA 304 (“The Court needs some facts from which such a determination could be made. Discovery is the answer to that dilemma”). This is exactly the circumstances seen in Majano v. U.S., 469 F.3d 138 (D.C. Cir. 2006).

than one of pure semantics.<sup>5</sup> Qualified, or “good faith”, immunity “shields government agents from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”. Behrens v. Pelletier, 516 U.S. 299, 305 (1996), quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)(internal notations omitted).<sup>6</sup> Absolute immunity, on the other hand, is derived from the Westfall Act, 28 U.S.C § 2679(d)(2), and accords

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<sup>5</sup> Mr. Murtha’s attempt to lump qualified and absolute immunity cases together as if there is no legal or factual distinction is considerably flawed. See Gov’t Br. at 15-17. Indeed, the distinction makes every difference as to whether a discovery order would be eligible for immediate appeal. In the case at bar – which involves absolute immunity – the District Court merely authorized limited discovery in order to place itself in a factual and legal position to determine whether Mr. Murtha’s actions fell within the scope of his employment. JA at 303-304. Nor should it go unnoticed that it is Mr. Murtha/Government who has created the current circumstances. Id. at (2)(“The United States is in this position because it chose to make a bald legal argument which the Court found too broad to accept but which could not be more finely tuned without some kind of fact record”).

<sup>6</sup> It was the special, substantial costs incurred by litigating the “subjective good faith of government officials” that the Supreme Court found to be “peculiarly disruptive of effective government” and which formed the basis for its objective “reasonable person” standard for determining the applicability of qualified immunity. Harlow, 457 U.S. at 815. This Circuit has followed that line of thought when considering the issue of discovery in qualified immunity cases. See Siegert v. Gilley, 895 F.2d 797, 804 (D.C. Cir. 1990), aff’d on other grounds, Siegert v. Gilley, 500 U.S. 226 (1991).

immunity to federal employees for claims arising out of acts they undertake in the course of their official duties. Osborn, 127 S.Ct. at 884. Absolute immunity determinations rest exclusively on whether the conduct falls within the employee's scope of employment. Stokes v. Cross, 327 F.3d 1210, 1214 (D.C. Cir. 2003).

In order to attempt to bolster his arguments Mr. Murtha eventually settles for simply regurgitating quotes pertaining to an undisputed issue, namely that an "outright denial" of absolute immunity is immediately appealable as a collateral order. See Gov't Memo at 17-18. Wuterich, however, is not contesting that an "outright denial" of absolute immunity would be immediately appealable, but rather is disputing Mr. Murtha's contention that the Interlocutory Order issued by the District Court somehow constitutes an "outright denial". Mr. Murtha's continued unwillingness to fathom the distinction, especially in light of the unequivocal clarification from the District Court in its Order of December 17, 2007, is telling.

*2. Mr. Murtha Has Not Demonstrated That The Interlocutory Order Satisfies The Three Conditions Necessary To Constitute An Appealable Collateral Order*

The Supreme Court has emphasized the modest scope of the exception to the final judgment rule, better known as the Collateral Order Doctrine. See Will, 546 U.S. at 350 ("[A]lthough the Court has been asked many times to

expand the small class of collaterally appealable orders, we have instead kept it narrow and selective in its membership”)(internal quotations omitted). See also Digital Equip. Corp. v. Desktop Direct, 511 U.S. 863, 868 (1994)(“But we have also repeatedly stressed that the ‘narrow’ exception should stay that way and never be allowed to swallow the general rule, that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated”)(quotations in original).

The requirements for the Collateral Order Doctrine consist of three conditions: that an order (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment. See Will, 546 U.S. at 349-50 (“The conditions are stringent, and unless they are kept so, the underlying doctrine will overpower the substantial finality interests § 1291 is meant to further: judicial efficiency, for example, and the sensible policy of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise.”)(internal quotations omitted”). See Banks, 471 F.3d at 1346 (noting failure to satisfy even one of three conditions is sufficient to deny appellate jurisdiction).

Since Mr. Murtha erroneously viewed the interlocutory Order as the legal equivalent of an “outright denial”, he merely states that the Supreme Court views an “outright denial” of Westfall certification as satisfying the three conditions and therefore constitutes a “final decision”. Gov’t Br. at 13, quoting Osborn, 127 S.Ct. at 892. Operating upon his flawed premise, it is no surprise that Mr. Murtha made no effort to otherwise demonstrate that the Interlocutory Order in question actually satisfies the three necessary conditions to qualify as an appealable collateral order. Needless to say, given that the two types of denials are not legal equivalents, and especially in light of the District Court’s Order of December 17, 2007, the Supreme Court’s rationale does not provide Mr. Murtha with the needed support to demonstrate this Court possesses proper jurisdiction over this appeal. In order for jurisdiction to lie with this Court, Mr. Murtha must satisfy the three conditions of the Collateral Order Doctrine. He has not.

Even had Mr. Murtha attempted to demonstrate that the interlocutory Order satisfies the first condition, namely that it conclusively determined the “disputed question”, he would fail. The notion that the Interlocutory Order determined anything lies at the heart of Mr. Murtha’s flawed interpretation of absolute immunity case law. From Mr. Murtha’s standpoint, when it comes to an invocation of absolute immunity, there is no “gray” area, and

any judicial decision that fails to accord the federal official's request for relief, i.e., to substitute the Government and dismiss the case from the outset, apparently constitutes a black or white "denial".

Reality, however, paints a far different picture.<sup>7</sup> The District Court's decision that Wuterich was entitled to limited discovery did not, in any shape or form, constitute a prejudicial denial of Congressman Murtha's absolute immunity. Indeed, the District Court did not conclusively determine one way or the other the "disputed question", namely whether Congressman Murtha's actions fell within the scope of his employment or that he was

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<sup>7</sup> Needless to say, Mr. Murtha's excessive reliance upon broad statements about the abstract threat that litigation allegedly poses by "inconveniencing" government officials and disrupting government business is hollow. The Supreme Court itself addressed this oft-held concern when it rejected President William J. Clinton's argument that he was immune from private suit while still in office. See Clinton v. Jones, 520 U.S. 681, 709 (1997) ("Although scheduling problems may arise, there is no reason to assume that the District Courts will be either unable to accommodate the President's needs or unfaithful to the tradition--especially in matters involving national security--of giving 'the utmost deference to Presidential responsibilities.' Several Presidents, including petitioner, have given testimony without jeopardizing the Nation's security."). If even the President of the United States, arguably our most indispensable government official, could sit for a deposition, there is no reason to believe that requiring Mr. Murtha to spend a few hours answering questions will somehow bring our democratic government crumbling to its knees and prevent him from serving his constituents. See also JA 303 ("The Court is not as shocked as counsel at the thought of the deposition of a sitting Member of Congress. Even Presidents can be required to interrupt their tremendous responsibilities when civil litigation requires it").

entitled to absolute immunity from suit in relation to those actions. That determination will come *after* limited discovery has been completed. All that the interlocutory Order concluded was that Wuterich had managed to raise, to the discretionary satisfaction of the District Court, a material dispute rebutting the Westfall certification and that he was therefore entitled to undertake some discovery.

To adopt Mr. Murtha's interpretation to the contrary would be to construe the rulings of the Supreme Court and this Circuit as permitting the government to immediately appeal under 28 U.S.C. § 1291 any decision by a district court that the plaintiff has alleged sufficient facts to raise a material dispute rebutting the Westfall certification. Needless to say, this argument would in effect consume the "final judgment rule" and render it null and void in relation to absolute immunity cases.

Therefore, the only rationale decision for this Court is to decide it lacks jurisdiction over this dispute.

**II. IF THIS COURT DETERMINES JURISDICTION LIES,  
WUTERICH IS ENTITLED TO LIMITED DISCOVERY BEFORE  
A JUDICIAL DETERMINATION IS RENDERED ON  
CONGRESSMAN MURTHA'S CLAIMS OF ABSOLUTE  
IMMUNITY**

Although as detailed above this Court should decline to hear Mr. Murtha's appeal without substantively addressing the merits of its

arguments, if jurisdiction were to lie than Wuterich has demonstrated he is entitled to undertake limited discovery as a matter of fact and law, and that is a determination within the discretion of the District Court.

There is little to no dispute as to how the Federal Tort Claims Act (“FTCA”) would operate were Mr. Murtha found to have acted within the scope of his employment and the U.S. Government substituted in his place.<sup>8</sup> Indeed, this is not an issue on appeal. Instead, Mr. Murtha has taken this appeal assuming facts that simply do not exist or have as yet to be judicially determined, i.e., whether he was acting within the scope of his employment.

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<sup>8</sup> When a federal employee is sued for a wrongful or negligent act, the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act) provides that:

[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679 (d)(1). Upon a *successful* invocation of the certification, the individual employee is dismissed from the case and the United States is substituted as defendant. The case would then proceed under the FTCA, which confers immunity to the Government for claims of libel and slander. See 28 U.S.C. § 2680(h). The Government, however, has not yet been substituted for Mr. Murtha as the defendant in this action. Indeed, the Government is entitled to be substituted *only* if Mr. Murtha was acting within the scope of his employment. If he was not, the Government has no role to play in this litigation, and Mr. Murtha must defend himself.

As the District Court noted, it had ordered jurisdictional discovery because it lacked “so much as an affidavit from Representative Murtha or clarity as to where he was, to whom he was speaking, and what he said on each of the allegedly offending occasions.” JA 303.<sup>9</sup>

**A. The Assistant United States Attorney’s Certification Alone Is Inadequate As A Matter Of Law And Fact To Justify Substitution At This Early Stage**

In order to support Mr. Murtha’s request for substitution, the Government submitted a May 7, 2007, certification from Rudolph Contreras, Assistant United States Attorney, Chief, Civil Division, Office of the United States Attorney for the District of Columbia.<sup>10</sup> JA 138. The mere fact that an Assistant United States Attorney has certified Mr. Murtha was acting in the scope of his employment is not enough to justify unfettered substitution.

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<sup>9</sup> Thus, at the heart of this appeal is a discovery ruling – plain and simple. “The district court has broad discretion in its handling of discovery, and its decision to allow or deny discovery is reviewable only for abuse of discretion.” Rasul, 512 F.3d at 662 (citations omitted).

<sup>10</sup> Under 28 C.F.R. § 15.4, the Attorney General has delegated to the United States Attorney the authority to provide § 2679(d) certification. Mr. Contreras notes that this authority was further delegated to him on March 20, 2006. While there is no evidence to support such claim, Wuterich presumes it is true for purposes of this response.

In Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995), the Supreme Court held that a certificate of scope of employment is conclusive for purposes of removal from state court only, not substitution. District courts are expected to substantively review the certification attempt. Without such review, the Court held, the scope of employment issue “however contestable in fact, would receive no judicial audience,” and federal courts would be reduced to “rubberstamp work.” Id. at 429.

Even before the Supreme Court issued its ruling in Gutierrez de Martinez, this Circuit had the foresight to opine that “regardless of the content of the certification ... the federal district court must at least conduct an evidentiary hearing on the scope issue.” Kimbro v. Velten, 30 F.3d 1501, 1508 (D.C. Cir. 1994). This procedure is “in keeping with the statutory scheme [,which] does not really treat the certification as having any particular evidentiary weight....” Id. This Court also considered the weight to which the Government’s certification is entitled and adopted the approach of the Third Circuit as expressed in Melo v. Hafer, 13 F.3d 736 (3d Cir. 1994). In Hafer, the Third Circuit treated the certification as entitled to “*prima facie* effect” but stated that:

if the Attorney General’s certification is based on a different understanding of the facts than is reflected in the complaint, the plaintiff should be permitted reasonable discovery and should

then be called upon to come forward, as if responding to a motion for summary judgment, with competent evidence supporting the facts upon which he would predicate liability, as well as any other facts necessary to support a conclusion that the defendant acted beyond the scope of his employment.

Following the Supreme Court's decision in Gutierrez de Martinez, this Circuit reiterated its position in Stokes v. Cross, 327 F.3d 1210 (D.C. Cir. 2003), stating that the certification

is *not* conclusive regarding substitution of the federal government. Instead, the federal court may determine independently whether the employee acted within the scope of employment and, therefore, whether to substitute the federal government as the proper defendant.

Id. at 1215 (emphasis original)(internal citations omitted).

In his May 7, 2007, certification, Mr. Contreras states as a simple matter of fact that Mr. Murtha was “acting within the scope of his employment as an employee of the United States at the time of the alleged incidents.” See JA 138. In reaching his position, Mr. Contreras relies upon his reading of the Complaint and “on the basis of information now available to me with respect to the incidents alleged therein.” Id. This Certification raises several

significant concerns that support a rejection of the substitution request at this time.<sup>11</sup>

First, merely citing to generic references to the “incidents alleged therein” is insufficient to satisfy the necessary standard to justify substitution. For one thing, what is the factual “basis of information” that was made available to Mr. Contreras?<sup>12</sup> The Government has failed to detail even one pertinent fact. Moreover, as multiple incidents make up the claims against Mr. Murtha, the scope of employment test must be applied specifically to each of the acts or incidents contained in the complaint that make up each claim, rather than broadly to the claims or complaint as a whole. See Lyons v. Brown, 158 F.3d 605, 608-09 (1st Cir. 1998).

Second, what was the other “available information” shared with Mr.

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<sup>11</sup> A nearly identical Westfall Certification seeking substitution was submitted by the U.S. Attorney’s Office for the District of Maryland in Elders v. Diaz, Case No. MJG-02-3892 (D.Md.). JA 174. It was rejected by the District Court and the plaintiff, who was represented by the undersigned counsel, was permitted to engage in limited discovery to include the defendant’s deposition. Id. at 175-181.

<sup>12</sup> 28 C.F.R. § 15.3 would appear to have required the U.S. House of Representatives to submit an agency report to the U.S. Attorney’s Office “fully addressing whether the employee was acting within the scope of his office or employment with the Federal Government at the time of the incident out of which the suit arose” There is no indication within the record that either this was done, or that if it was it was reviewed by Mr. Contreras.

Contreras that contradicts Wuterich's detailed assertions?<sup>13</sup> Not one fact was provided to the District Court by Mr. Contreras. Although the Government's certification may have initially satisfied its prima facie burden, it carries no evidentiary weight because it neither contains any "details" or "explains the bases for its conclusion." Maron v. United States, 126 F.3d 317, 323 (4th Cir. 1997). See also Wood v. United States, 995 F.2d 1122, 1123 (1st Cir. 1993)(Westfall Act certificate cannot simply deny the basic "incident" charged); McHugh v. University of Vermont, 966 F.2d 67 (2d Cir. 1992)(same).<sup>14</sup>

While it is true that courts, including this Circuit, routinely generically state that the plaintiff bears the burden of challenging the certification by "coming forward with specific facts rebutting the certification", Rasul et al.

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<sup>13</sup> According to the certification, Mr. Contreras reached his determination, at least in part, by reviewing Wuterich's Complaint despite the fact that the document was obviously drafted in a manner that would favorably support Wuterich's case, particularly in that a Motion for Substitution was anticipated.

<sup>14</sup> Given this position the Government's certification should have been vacated or stricken from the record, which would have required the denial, without prejudice, of Mr. Murtha's Motion. A Motion to Vacate or Strike, and for Discovery was filed by Wuterich but no decision was reached in light of the District Court's Minute Orders of September 28, 2007. JA 192.

v. Myers et al., 512 F.3d 644, 655 (D.C. Cir. 2008), quoting, Council on American Islamic Relations v. Ballenger, 444 F.3d 659, 662 (D.C. Cir. 2006)(citation omitted), it is unreasonable to believe this can be accomplished at the outset of this litigation given the sparse, conclusory statements within Mr. Contreras’s certification. At this early juncture, and particularly given the fact that the relief requested by Mr. Murtha/U.S. Government is outright dismissal of Wuterich’s lawsuit, a bare bones Westfall Certification is insufficient to support substitution. As a result, before such decision can be reached, limited jurisdictional discovery is warranted and the District Court was correct in its decision to order it.<sup>15</sup>

**B. Mr. Murtha Is Not Entitled To A Judicial Determination He Was Acting In The Scope Of His Employment Until Limited Discovery Occurs To Include Document Production And His Deposition**

Assuming the certification “constitute[s] *prima facie* evidence,” id. citing Kimbro, 30 F.3d at 1509, Wuterich then has the burden of proving the opposite “by alleging facts that, if true, would establish that the defendant[] [was] acting outside the scope of [his] employment.” Stokes, 327 F.3d at

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<sup>15</sup> “With limited jurisdictional discovery, the Court will be able to answer that question and, if it concludes Representative Murtha was acting within the scope of his employment, it will also conclude that Representative Murtha is immune from any further discovery on the underlying defamation suit.” JA 304.

1215. An effort to reach that burden is to be obviously pursued through the use of jurisdictional discovery.

There have been few reported cases involving defamation charges filed against Members of Congress in the history of the United States, and barely even a handful since the Westfall Act was enacted nearly twenty years ago. See e.g., Ballenger, 444 F.3d at 661; Williams v. United States of America, 71 F.3d 502 (5<sup>th</sup> Cir. 1995); Chapman v. Rahall, 99 F.Supp.2d 711 (W.D.Va. 2005); Operation Rescue National v. United States, 975 F.Supp. 92 (D.Mass. 1997), aff'd 147 F.3d 68 (1<sup>st</sup> Cir. 1998).

Mr. Murtha would have this Court conclude that based on its' decision in Ballenger, there is nothing left but to decide in favor of substitution. Gov't Br. at 7-8, 19. While it is true this Circuit noted 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'" id. 444 F.3d at 665, it was made quite clear that this statement was not to be accorded a broad preclusive effect to every single instance in which a congressman spoke to a member of the media (which is exactly and simply what the District Court concluded in noting that it was "unwilling to proclaim such a sweeping version of absolute immunity", JA 302. "This case, like every judicial decision, cannot be divorced from its facts. To be sure, it involves a

statement by a congressman to the press. But our *ratio decidendi* necessarily depends on the context in which the statement was made.” Ballenger, 444 F.3d at 666.<sup>16</sup> It is the context of Mr. Murtha’s numerous statements, to likely include individuals outside of the media, that jurisdictional discovery was intended to address.

Notwithstanding Mr. Murtha’s bald assertions to the contrary, it is

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<sup>16</sup> In fact, there are several factual distinctions that appear readily evident that should be taken into consideration when determining whether a Congressional representative is to be entitled to immunity as a result of speaking to the media. For one thing, it appears that in the other congressional cases the representative was *responding* to an unsolicited reporter’s inquiries about specific pre-existing personal or legislative matters rather than creating the very situation, as Mr. Murtha did, to generate the media inquiry. Chapman, 399 F.Supp.2d at 714-15; Operation Rescue National, 975 F.Supp. at 95. Yet another is that three of the media interviews given by Mr. Murtha, it is conceded, occurred in his “campaign office”. JA 37, 60-61. This fact is significant as the campaign office is politically separate from that of a congressman’s district or Washington, D.C. office. There is a very important line of distinction that exists between the two and it can be the difference between a grant of immunity or not. Mr. Murtha’s declarant specifically attempted to justify the use of his district location as distinct from that of his office in Washington, D.C. It is argued that this location was used “not because they were campaign related, but for the convenience of the broadcasters....” Id. Beyond the fact that this is a hearsay statement that may or may not be true (and which should be subject to challenge through discovery), it is this type of subtle distinction that can have a significant impact on a claim of immunity. For example, a lawyer has immunity for statements uttered during oral arguments within the courtroom, see Smolla, LAW OF DEFAMATION, §§ 8:8, 8:9 (2d Ed. 2005), but should he step just a few feet outside onto the courthouse steps, even if it were far more convenient for the filming cameras and note-pad reporters, and repeat the identical statement, that immunity evaporates and liability may attach.

common practice for district courts to first allow at least limited discovery in order to resolve factual disputes that bear on a scope-of-employment issue, including in cases alleging defamation. See e.g., Stokes, 327 F.3d at 1214; Ross v. Bryan, 309 F.3d 830 (4th Cir. 2002); Borneman v. United States, 213 F.3d 819 (4th Cir. 2000); Maron v. United States, 126 F.3d 317 (4th Cir. 1997); Aliota v. Graham, 984 F.2d 1350 (3d Cir. 1993), cert. denied, 126 L.Ed.2d 37 (1993); Schrob v. Catterson, 967 F.2d 929 (3d Cir. 1992); McHugh, 966 F.2d at 74; Brown v. Armstrong, 949 F.2d 1007 (8th Cir. 1991); Nasuti v. Scannell, 906 F.2d 802 (1<sup>st</sup> Cir. 1990). Even Mr. Murtha, as he must, concedes the discretion of the District Court to allow discovery. Gov't Br. at 11.

This is particularly so, as this Circuit has importantly recognized, and despite the fact that the certification “constitute[s] *prima facie* evidence,” Kimbro, 30 F.3d at 1509, “because the plaintiff cannot discharge this burden without some opportunity for discovery”. Stokes, 327 F.3d at 1214. In fact, this Court has gone even further and stated that “[i]f there is a material dispute as to the scope issue ... the district court must resolve it at an evidentiary hearing.” Kimbro, 30 F.3d at 1509 (emphasis added).

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Id. Wuterich submits it should be no different for a member of Congress.

Even Ballenger, the most recent case within this Circuit to have addressed the issue of congressional immunity under the Westfall Act, and which is heavily relied upon by Mr. Murtha to support his appeal, first permitted limited discovery prior to ruling on the issue of substitution. 444 F.3d at 663. Discovery occurred even in light of the filing of an affidavit by Congressman Ballenger, something Mr. Murtha declined to do.<sup>17</sup> See JA 303 (District Court noted Mr. Murtha failed to submit clarifying affidavit). Instead, Mr. Murtha saw fit to submit, through third-parties, factual evidence to support his claim of operating within the scope of employment.<sup>18</sup>

It is only fair, therefore, that Wuterich should be accorded an opportunity

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<sup>17</sup> Congressman Ballenger's affidavit, in fact, set forth specific reasons for why, and in what context, he made each and every alleged defamatory statement at issue in that case. Ballenger, 444 F.3d at 665. Mr. Murtha intentionally avoided doing so. Thus, this Court is respectfully obligated to favorably construe Wuterich's claims that Mr. Murtha's comments purely "intended to serve his own private purpose and interests." JA 13. As such, Mr. Murtha was acting outside of his scope of employment.

<sup>18</sup> For example, instead of making even a subtle attempt to defend his own statements, Mr. Murtha relied upon the declaration of Cynthia Abram ("Abram"), his former Communications Director, in order to demonstrate he acted within the scope of his employment. JA 60-61. Not surprisingly, Ms. Abram never specifically addressed the factual circumstances in dispute. Indeed, she did not even indicate that she was familiar with many of the relevant facts as they have been alleged to exist. Nor did she address each and every one of the statements made by Mr. Murtha or any of the third-party republications. Wuterich should be able to have the opportunity to challenge "evidence" placed before the District Court by Mr. Murtha.

to challenge those assertions and pursue answers to certain questions.<sup>19</sup> As the District Court noted, numerous questions about the answers to which would, or at least could, significantly impact a substantive judicial determination concerning scope of employment.

The questions are very important: what is the “scope of employment” for a Member of Congress? Can a Congressman allegedly defame a private citizen with absolute immunity, as long as there is pending legislation which is arguably, but not certainly, related? Does it matter where the Congressman is speaking or whether he is advancing legislation, advancing a campaign for his own re-election, advancing his name for a partisan leadership post, or speaking for some other reason? Does it matter whether the information is accurate? The answers to some of these questions seem obvious, others are

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<sup>19</sup> Mr. Murtha relies heavily on two recent decisions of this Circuit – Rasul and Harbury v. Hayden, 522 F.3d 413 (D.C. Cir. 2008) – that pertained to scope-of-employment and were decided without discovery. Gov’t Br. at 31-32. This reliance is misplaced. First, in Rasul it was held by the District Court that there were no facts that would have been adduced in discovery that would have changed the factual allegations set forth by the plaintiffs, particularly governing whether the federal employees had acted outside of the scope of their employment. 512 F.3d at 662. Thus, whether the federal defendants had in fact, for example, authorized or condoned torture they would still have acted in the scope of their employment. Id. The distinction between Rasul and Mr. Murtha’s cases should be obvious and is why the District Court ordered discovery as necessary. The facts that would be adduced through discovery could significantly impact a future scope of employment determination, i.e., to whom Mr. Murtha spoke, where he spoke and his motive for speaking. Nor does Harbury offer any value to Mr. Murtha as discovery in that case would not have impacted the scope of employment determination given that all the applicable tort claims occurred in a foreign country and fell within a FTCA’s exception thereby requiring dismissal. 522 F.3d at 417, 423. The taking of discovery could not change the location of the torts at issue.

more obscure. But it is inappropriate to ask a court to rule on such important questions in a vacuum; the distinctions to be drawn may, in the end, be more nice than obvious, but they need to be based on some facts.

JA 303.

If Mr. Murtha undertook to comment upon Wuterich for his own personal gain outside of his role as a representative for his constituents, it would remove the cloak of immunity. This is a question of fact that requires further development. See Ballenger, 444 F.3d at 665 (both District Court and Court of Appeals rendered factual determination regarding motivation underlying congressman's conduct).<sup>20</sup> There is no "clear nexus" absent the allowance of limited discovery that can yet tie Mr. Murtha's defamatory comments about

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<sup>20</sup> Mr. Murtha made it quite clear months before the Democrats regained power in the House of Representatives (and when victory was not at all ensured) following the November 2006 elections that he was using his Iraq War stance as a means by which to propel his own personal interests and assume the role of Majority Leader (a position for which his Democratic colleagues ultimately rejected him for). See "Murtha, foe of Iraq War, feels vindicated," *Miami Herald*, Aug. 20, 2006 ("Murtha said he was too old to consider running for president, but that he would try to become majority leader if Democrats gain the 15 seats they need to take charge of the House."). Notice was also provided to the District Court during oral arguments that evidence existed that Mr. Murtha, in making the relevant defamatory statements, was acting for his own personal gain and purpose to embarrass then Secretary of Defense Donald Rumsfeld. JA 331-332. Not surprisingly, Mr. Murtha minimizes the significance of this evidence. Gov't Br. at 28. This is a contested material fact and exactly why discovery is appropriate.

Wuterich to his ability to “carry out his representative responsibilities effectively.” *Id.* at 665-666. Some of the questions that require elaboration include what steps did Mr. Murtha take to initiate media interviews where he defamed Wuterich, and where and when did all of the interviews that defamed Wuterich take place?<sup>21</sup> Did he speak to members of the media and their staff off camera? At news studios or at social functions? Where else did Mr. Murtha appear to convey further falsehoods that the District Court has not been informed of thereby negating its ability to render a true *de novo* independent review?<sup>22</sup> It is not even known at this time whether Mr. Murtha

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<sup>21</sup> Before the District Court, Mr. Murtha conveniently only submitted into evidence his work schedules for May 19, 2006, and May 30, 2006, even though numerous other dates are at issue. JA 136-137. But he spoke to other members of the press on-air and probably off-air (and as well had comments foreseeably republished through third parties), and likely non-members of the media that Wuterich does not know about, which is exactly why limited jurisdictional discovery was deemed necessary and material by the District Court.

<sup>22</sup> The D.C. Circuit noted in Stokes that a plaintiff challenging the Government’s scope-of-employment certification “need only have alleged sufficient facts that, taken as true, would establish that the defendants’ actions exceeded the scope of their employment.” 327 F.3d at 1215. A plaintiff is not “required to allege the existence of evidence he might obtain through discovery....He was merely required to plead sufficient facts that, if true, would rebut the certification.” *Id.* (citation omitted). See also Koch v. United States, 209 F. Supp. 2d 89, 92 (D.D.C.)(2002)(“The question for  
(Continued...)

(...Continued)

resolution by this Court is whether plaintiff . . . would ever be able to produce competent evidence proving that [employee] was *not* acting within

disseminated his comments to individuals who are outside of the media – family, friends, donors, etc. – which would, of course, undercut Mr. Murtha’s entire case. But this cannot be determined without discovery. See Operation Rescue National, 975 F.Supp. at 98 (Senator ordered to provide plaintiffs with videotapes of fundraising event and subsequent press conference at which allegedly defamatory remarks were made; plaintiffs permitted to file further “evidentiary memorandum” in support of motion to vacate scope of employment certification).<sup>23</sup>

Additionally, nowhere within any of the submitted declarations or his supporting arguments to the District Court (or here on appeal) did Mr. Murtha discuss why he should not be held liable for third parties (particularly within the media and on the Internet) repeating his allegations. The District of Columbia has expressly recognized that individuals are

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the scope of his employment”).

<sup>23</sup> It should also be noted that the other Congressional defamation/FTCA cases can be distinguished as they invariably involved single incidents (a specific press conference or one conversation with a journalist), whereas this case encompasses multiple incidents over a period of weeks involving numerous people. This type of case requires limited jurisdictional discovery in order to properly ascertain Mr. Murtha’s scope of employment.

liable for the republication of defamatory information by third parties. Oparaugo v. Watts, 884 A.2d 63, 73 (D.C. 2003); Tavoulareas v. Piro, 759 F.2d 90, 136 (1985), cert. denied, 484 U.S. 870 (1987)(citations omitted). See also Blue Ridge Bank v. Veribanc, Inc., 866 F .2d 681, 689 (4th Cir.1989)(originator of defamation liable for republication or repetition by third persons, provided natural and probable consequence of act, or presumptively or actually authorized or directed republication); Hickey v. St. Martin's Press, Inc., 978 F. Supp. 230 (D.Md. 1997)(noting State of Maryland would recognize third-party republication liability); Smolla, LAW OF DEFAMATION, § 4:91 (“Liability for republication by another exists if it is ‘reasonably foreseeable’ or ‘a natural and probable consequence of the originator’s actions.’”).

Whether Mr. Murtha will ultimately prevail on his effort to have the Government stand in his shoes is not yet the issue. There are legitimate factual gaps that preclude the scope-of-employment determination at this time, and Wuterich should have a fair and reasonable opportunity to demonstrate that Mr. Murtha acted outside of his scope of employment when he not only accused him of being a mass murderer, but tried and convicted him in a public arena (and potentially tainted his still pending military court-martial proceedings).

Unlike in some of the other congressional immunity cases, there was no specific legislation pending that pertained to the Haditha events.<sup>24</sup> To be sure, issues surrounding the war in Iraq were and are repeatedly debated in Congress. Yet no other Member of Congress saw fit to tie Haditha, much less offer factual conclusions of guilt, to any legislative responsibilities. Notably, those representatives who were questioned by the media about the incident made it implicitly, if not explicitly, clear that it was inappropriate to do exactly what Mr. Murtha saw fit to do – prematurely condemn the Marines as guilty before a full investigation or trial had been completed – or, ostensibly, that it was outside of their scope of employment.

If there were problems in the chain of command, if there was a cover-up, if anything wasn't reported, let the chips fall where they may. But don't presume anything. Those reports aren't

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<sup>24</sup> Mr. Murtha has sought to tie H.J. Res. 73, which pertained to redeployment of U.S. troops from Iraq, to his defamatory statements concerning Wuterich. JA 57-58. H.J. Res. 73 was introduced not only seven months prior to his utterance of the defamatory statements in question but even before the incident in Haditha occurred. There is no relationship between the two. Even in his comments to the media Mr. Murtha does not attempt to link redeployment with Haditha. Instead, he proceeds on tangents wherein he unequivocally concludes Wuterich and his Marines are war criminals even before any official investigation had concluded anything of the sort. In fact, the only official Government investigation that had been concluded at the time Mr. Murtha was defaming Wuterich concluded “there are no indications that [Coalition Forces] intentionally targeted, engaged and killed non-combatants.” See JA 184.

finished yet. But the reports and the investigations are being pursued with great integrity.

CNN, May 19, 2006, The Situation Room (Statement of Congressman Duncan Hunter).

In the interim, frankly, the public opinion on this matter is being influenced by misinformation, leaks and undocumented and uncorroborated facts.

“Iraqi Accuses U.S. of ‘Daily’ Attacks Against Civilians”, *New York Times*, June 2, 2006 (statement of Senator John Warner).<sup>25</sup>

I can't say until we really know what happened. There are allegations, and I emphasize allegations, that there was a cover-up.

Id. (Statement of Senator John McCain). See also “Murtha jumps gun on Haditha”, *Grand Rapid Press*, June 2, 2006; “Murtha’s irresponsible remarks”, *Washington Times*, May 20, 2006; JA 173.

There were numerous ways in which Mr. Murtha could have referred to the Haditha incident without expressing a categorical conclusion that the Marines, including Wuterich, were guilty of atrocious war crimes that could

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<sup>25</sup> In commenting upon holding hearings on the topic of Haditha and the Defense Departments sharing of information, Senator Warner also stated: “Well, there have been discussions between myself and the secretary and the deputy secretary, but I find no reluctance on the part of the secretary to withhold from the Congress and the public facts. But I think the secretary is correct in waiting until the various investigations are completed. They're the

subject them to the death penalty. Because there is no blanket grant of immunity accorded congressional statements to the press, Mr. Murtha's comments can be determined to fall outside of his scope-of-employment.

*1. The Applicable State Law Justifies The Taking Of Discovery Before A Judicial Ruling Is Rendered*

In determining whether a federal employee was acting within the scope of his employment, there is no dispute the law of the District of Columbia, which is drawn from the Restatement (Second) of Agency, would apply to at least some of Mr. Murtha's statements. Haddon v. United States, 68 F.3d 1420, 1423 (D.C. Cir. 1995); accord Ballenger, 444 F.3d at 663. This Circuit has held that "scope of employment questions are generally viewed as questions of fact best resolved by a jury." Majano, 469 F.3d at 140. See also Jordan v. Medley, 711 F.2d 211, 215 (D.C. Cir. 1983)("Before examining the evidence on this point, we may note that the District of Columbia courts have considered it to be the general rule that scope of employment presents a jury question."); Lyon v. Carey, 533 F.2d 649, 655 (D.C. Cir. 1976)("It is, then, a question of fact for the trier of fact, rather than a question of law for the court, whether the assault stemmed from purely and solely personal sources or arose out of the conduct of the employer's business . . . .");

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ones that can best corroborate and put an official imprimatur on the facts." State News Service, June 13, 2006.

Boykin v. District of Columbia, 484 A.2d 560, 562 (D.C. 1984)(“As a general rule, whether an employee is acting ‘within the scope of employment’ is a question of fact for the jury.”); Penn Cent. Transp. Co. v. Reddick, 398 A.2d 27, 31 (D.C. 1979)(“Whether an assault which was the proximate cause of the injury was within the scope of [] employment . . . as a general rule, has been held to be a question of fact for the jury to determine.”)(internal quotation marks and citation omitted). At the very least it is entirely appropriate for the District Court to exercise its discretion and resolve what it perceives as material facts in dispute through an evidentiary hearing (which logically would follow the completion of limited jurisdictional discovery). Rasul, 512 F.3d at 660.

Pursuant to D.C. law, “an employee’s conduct falls within the scope of employment if: 1) it is of the kind of conduct he is employed to perform; 2) it occurs substantially within the authorized time and space limits; 3) it is actuated, at least in part, by a purpose to serve the master; and 4) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.” Majano, 469 F.3d at 141 (D.C. Cir. 2006), citing

Restatement (Second) of Agency § 228 (1957).<sup>26</sup> “The key inquiry is the employee’s intent at the moment the tort occurred.” Majano, 469 F.3d at 142.

Thus it was no surprise that the District Court noted it “needs some facts from which such a determination can be made. Discovery is the answer to that dilemma. The Court does not believe that jurisdictional discovery in this context is extraordinary or burdensome.” JA 304.

*2. Alternatively, The Case Should Be Remanded To The District Court To Permit Wuterich To Amend His Complaint Pursuant To Rule 15(a) To Overcome Any Deficiency*

Should this Court determine that Wuterich’s Complaint is deficient with respect to the allegations that he failed to assert sufficient information to indicate Mr. Murtha acted outside the scope of his employment, particularly in light of the fact that some of the evidence considered by the District Court was presented verbally, then this matter should be remanded back to

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<sup>26</sup> There is also no dispute that at least some of Mr. Murtha’s statements would be governed by the laws of the State of Pennsylvania. See Shuman Estate v. Weber, 419 A.2d 169, 173 (Pa. Super. 1980). Gov’t Br. at 12 fn. 2. As the underlying factors are substantially the same as those applied by the District of Columbia they will not be separately analyzed at this time. There may, depending upon what discovery reveals, be other jurisdictions whose law applies as well.

the District Court to allow Wuterich to amend his Complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure.

Of course, defamation cases, even when impacted by the FTCA, do not have a heightened pleading standard. Rule 8's liberal pleading standard requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), and courts are charged with construing the complaint "so ... as to do substantial justice," Fed. R. Civ. P. 8(f). The Rules "do not require a claimant to set out in detail the facts upon which he bases his claim." Conley, 355 U.S. at 47. Rather, the "simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002)(citations omitted). "The issue is not whether the plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Id. at 511, quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). "To that end, the complaint is construed liberally in the plaintiffs' favor, and we grant plaintiffs the benefit of all inferences that can be derived from the facts alleged." Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994)(citations omitted).

Of course, the end result would presumably still lead to the District Court granting jurisdictional discovery and the parties would improperly be before this Court yet again.

### **CONCLUSION**

Based on the foregoing, Wuterich respectfully requests that Mr. Murtha/U.S. Government's appeal be denied and this case remanded to the District Court for further proceedings.

Date: July 23, 2008

Respectfully submitted,

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