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Transcription of Audio File

20-3977, 20-3978.mp3

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1 (Beginning of Audio Recording)

2 JUDGE NARDINI: Docket numbers 20-3977  
3 and 3978, Eugene Carroll Versus Donald J.  
4 Trump and United States of America. I would  
5 invite counsel to come forward. Come settle  
6 at counsel table.

7 Now, I understand that the sequence in  
8 which the parties would like to proceed with  
9 oral argument would be Mr. Freeman first  
10 followed by Ms. Habba, and then, of course,  
11 for the Appellee, Mr. Matz. Is that correct,  
12 the sequence?

13 MR. FREEMAN: Yes, Your Honor.

14 JUDGE NARDINI: Okay. And I  
15 understand, Mr. Freeman, you have asked to  
16 reserve two minutes for rebuttal.

17 MR. FREEMAN: Yes, Your Honor, if that  
18 pleases the Court.

19 JUDGE NARDINI: Thank you very much,  
20 and if you're ready, please proceed.

21 JUDGE CALEBRESI: Mr. Freeman, you're  
22 representing President Trump?

23 MR. FREEMAN: I represent the  
24 Department of -- I'm from the Department of  
25 Justice. I represent the United States of

1 America. That was the first thing I was  
2 going to say.

3 May it please the Court. I'm Mark  
4 Freeman from the Department of Justice on  
5 behalf of the United States of America. The  
6 former president made crude and offensive  
7 comments in response to the very serious  
8 accusations of sexual assault made by Ms.  
9 Carroll. I'm not here to defend or justify  
10 those comments. I'm here because any  
11 president facing a public accusation of this  
12 kind, which the media is very interested  
13 would feel obliged to answer questions from  
14 the public, answer questions from the media.  
15 And as citizens. --

16 JUDGE CALEBRESI: Well, can a -- can a  
17 president or a Congress person on the steps  
18 of the Capital or White House say anything  
19 they want and be protected, as long as  
20 there's a reporter there listening? Is that  
21 the government's position?

22 MR. FREEMAN: It's not the  
23 government's position, Your Honor, and we are  
24 not asking the Court to adopt any categorical  
25 rule here. What happened was, and what

1 should have happened is that we questioned  
2 whether the president was acting within the  
3 scope of his federal office should be  
4 assessed under DC law (inaudible) secondary  
5 statement.

6 JUDGE CALEBRESI: Counsel, counsel,  
7 counsel.

8 MR. FREEMAN: Yes.

9 JUDGE CALEBRESI: This is all very  
10 well. You're telling us this. I want to  
11 know what law decides whether it was in the  
12 scope of employment or not. And if, as I  
13 think probably is likely but not that certain  
14 I'll have more to say about that, it's the  
15 law of DC. It isn't the law of the District  
16 of Columbia Circuit. It's the law of the  
17 District of Columbia itself.

18 MR. FREEMAN: Agreed.

19 JUDGE CALEBRESI: And I'd like to know  
20 because I didn't see in any of these briefs  
21 that I've gone bac and read all the law of  
22 the District of Columbia, what the District  
23 of Columbia has to say about this issue.

24 MR. FREEMAN: Yes, let me address  
25 that. So you're right under the Federal Tort

1 Claims Act, the applicable law is the law of  
2 the place where the act or omission occurred.  
3 The Supreme Court decided in the Richards  
4 case in the 1960s that that is the whole law  
5 including the choice of law rules of that  
6 jurisdiction. So we apply here the choice of  
7 law rules of the District of Columbia. The  
8 District of Columbia analyzes choice of law  
9 on an issue by issue basis including scope of  
10 employment, and the District of Columbia  
11 analyzes scope of employment by looking to  
12 the law of the jurisdiction where the  
13 employment relationship exists That's here  
14 in our view the District of Columbia.

15 JUDGE CALEBRESI: Yeah. This is why  
16 you are saying it is District of Columbia  
17 law, but one can argue with that. My own  
18 feeling is it's probably correct.

19 MR. FREEMAN: Yes.

20 JUDGE CALEBRESI: I'm not so sure  
21 about the initial starting point rather than  
22 the law of the forum deciding that despite  
23 Richards, but that's something that the  
24 parties agree to so I'm not going to get into  
25 it. I don't need to. So it is the District

1 of Columbia deciding which law it is --

2 MR. FREEMAN: Yes.

3 JUDGE CALEBRESI: And I think it's  
4 plausible on an issue-by-issue basis that it  
5 is therefore the law of the district. So  
6 what's the law of the district on this?

7 MR. FREEMAN: So the law of the  
8 District, Your Honor, is -- and we have in  
9 our briefs emphasized the DC Circuit cases  
10 that apply the district law.

11 JUDGE CALEBRESI: That's nonsense.  
12 That's nonsense. The District of Columbia  
13 Circuit, as DC has said, knows no more about  
14 the law of that than we necessarily know the  
15 law of New York.

16 MR. FREEMAN: Of course.

17 JUDGE CALEBRESI: And they have said  
18 that, so Bellinger (phonetic), which is your  
19 main case.

20 MR. FREEMAN: Yes.

21 JUDGE CALEBRESI: Is a lovely case,  
22 but it is no more relevant, really, than  
23 Judge Tattle's (phonetic) opinion that comes  
24 out the other way before because they are  
25 federal courts guessing as to the law of the

1 state.

2 MR. FREEMAN: I agree, and so I would  
3 point the Court in that event to the District  
4 of Columbia -- DC Court of Appeals decision,  
5 called District of Columbia versus Jones,  
6 2007. It's cited in our brief. That was a  
7 case about a defamation action against the  
8 mayor of DC, and in that case, that was a  
9 case to be totally candid where the Court was  
10 applying the absolute immunity rules of the  
11 District of Columbia, not squarely the scope  
12 of employment rules.

13 JUDGE CALEBRESI: That's right.

14 MR. FREEMAN: But in that case, as the  
15 Court, I assume, knows, the Court cited to  
16 Ballinger as evidence of the correct  
17 application of DC law so --

18 JUDGE CALEBRESI: They have also said  
19 in Penn Central case, they came out with a  
20 quite different way. So let me just be very  
21 blunt.

22 MR. FREEMAN: Yes.

23 JUDGE CALEBRESI: Why shouldn't we  
24 simply do what we do in these cases, certify  
25 the question to a District of Columbia?

1           MR. FREEMAN: So I don't think that's  
2 necessary. I agree it's within the Court's  
3 power. If you'll let me explain why I don't  
4 think it's necessary, I think every court  
5 that has addressed the understanding of the  
6 District of Columbia local law of agency, its  
7 application of the re-statement to public  
8 officials has come to the same conclusion.  
9 And Plaintiffs don't point to anything that  
10 goes the other way, that is that it's part of  
11 the responsibility of a public official to  
12 address matters of great interest to the  
13 public and the electorate.

14           JUDGE CALEBRESI: The problem with  
15 this is that while the parties both sort of  
16 say the law of New York and the law of the  
17 district are the same, the law of New York  
18 and the law of the district are actually  
19 quite different because the whole question of  
20 whether it is necessary -- whether the whole  
21 point is internalization, as one set of cases  
22 do, or whether the point instead is is it in  
23 the interest of the employer when the  
24 Defendant is doing that. It goes back to the  
25 essence of tort law, the difference between

1 an action on the case and the action in  
2 trespass, and the restatement in DC are deft  
3 in that from New York. On the other hand, DC  
4 has cited Harper and James, which is all  
5 internalization, all internalization, and I  
6 know because Harper and James took from me.  
7 So, you know, I'm there.

8 MR. FREEMAN: Yes, sir.

9 JUDGE CALEBRESI: In that situation,  
10 do we have any idea of whether either New  
11 York or DC would do in a case we are saying  
12 that is within the scope of employment has to  
13 be effective externalizing because of a  
14 totally separate fact that the Federal Torts  
15 Claims Act doesn't guarantee immunity. They  
16 might say this is fine, but we don't have any  
17 cases that tell us.

18 MR. FREEMAN: If I understand Your  
19 Honor's question correctly, and I may not so  
20 let me see if I understand it. If I  
21 understand Your Honor's question correctly,  
22 it's does the jurisdiction analyze scope of  
23 employment differently because the  
24 consequence of finding within scope would be  
25 under the cases like Smith and so on the

1 application of an FTCA exception, which would  
2 mean the Plaintiff loses.

3 If I'm understanding the question  
4 correctly, I think the answer is that that --  
5 is that we can't look to the downstream  
6 consequences under federal law in analyzing  
7 the question Congress directed us to ask  
8 under local law. Congress pointed to --

9 JUDGE CALEBRESI: Congress, but it is  
10 up to local law to decide --

11 MR. FREEMAN: But local --

12 JUDGE CALEBRESI: -- so that if local  
13 law wants to make a broad notion of scope of  
14 employment because that internalizes cost,  
15 the local court may well not want to do that  
16 where it doesn't. And the fact that that's  
17 a perfectly good thing from the standpoint of  
18 federal law doesn't bind them.

19 MR. FREEMAN: Well, I have a couple  
20 reactions to that. First, I think that as a  
21 matter of federal law the Supreme Court, and  
22 I see that I'm over my time.

23 JUDGE NARDINI: You know what, we're  
24 going to be very likely keeping all the  
25 parties up here beyond your -- your red dot,

1 so we'll tell you when to sit down. Since  
2 there's a question pending, if any of you  
3 have a question pending, please go ahead and  
4 answer it.

5 MR. FREEMAN: Thank you, Your Honor.  
6 I have a couple of things, if I may, say in  
7 response to that -- that concern. The first  
8 is the consequence recognized by the Supreme  
9 Court in Smith, and that was as a textual  
10 analysis of the FTCA, it says that when the  
11 Westfall Act applies, the exceptions and  
12 exemptions apply, has led already to other  
13 federal consequences and interpretation of  
14 the FTCA to avoid the outside, the negative  
15 consequences to Plaintiffs. The most  
16 important of those, as you know, is the  
17 Gutierrez (phonetic) v. Martinez case, which  
18 holds that you can have an appeal like this  
19 one, that the attorney general certification  
20 is judicially revealable, and part of what  
21 the Supreme Court said in coming to that  
22 conclusion was you've got cases like Smith  
23 where the certification is the whole  
24 ballgame. That's why we ought to allow  
25 judicial review of that question.

1           So on the one hand, I think the  
2           consideration you identify has already been  
3           accounted for on the federal side

4           JUDGE CALEBRESI: But that says  
5           because the issue, ultimately, given this  
6           federal effect is a state issue, and that's  
7           why it is appealable. If they wanted it to  
8           be only a federal issue, they would have  
9           decided those cases differently, but they  
10          said the issue is what in these circumstances  
11          does the State want to do, and, you know,  
12          nobody doubts that it's a matter of state  
13          law. Whether it's DC or New York maybe in  
14          doubt, but nobody doubts it's an issue of  
15          state law.

16          MR. FREEMAN: Respectfully, Your  
17          Honor, what the Act directs us to decide is  
18          whether the United States if a private person  
19          would be liable under state law. So it is --  
20          I think the Act specifically instructs us not  
21          to ask what the consequences for the United  
22          States as an entity would be.

23          JUDGE CALEBRESI: The question that is  
24          a question of state law is how does the state  
25          read scope in all of the -- in all of the

1 circumstances that are before it, which  
2 involves somebody that is doing something.

3 Now, the matter would be easy if this  
4 were negligence because negligent acts have  
5 from the beginning in all of these states  
6 been read in terms of scope enormously  
7 broadly.

8 MR. FREEMAN: Right.

9 JUDGE CALEBRESI: And that would be  
10 so, even if it were a negligent act which  
11 would not be -- give rise to federal  
12 governmental liability for whatever peculiar  
13 reason, but that isn't so with intentional  
14 torts, which is completely uncertain.

15 MR. FREEMAN: But the District of  
16 Columbia, if I may on that point applies very  
17 generous scope of employment law,  
18 specifically as to intentional torts. The  
19 Ballinger case and the Woodard (phonetic)  
20 case both cite District of Columbia  
21 decisions, which, for example --

22 JUDGE CHIN: What about the Mohano  
23 (phonetic) case, you know, involved an  
24 employee, two employees, where they were  
25 entering the building at the Smithsonian, and

1 one employee assaults the other because she's  
2 offended that she was asked to show her ID.

3 MR. FREEMAN: Right.

4 JUDGE CHIN: And there the Court held  
5 that there were issues of fact that you  
6 should be looking at what the intent was, the  
7 -- the moment the agent turns aside from the  
8 business of the principal and commits an  
9 independent trespass then that might be not  
10 within the scope.

11 MR. FREEMAN: Yes.

12 JUDGE CHIN: How do you -- how do you  
13 apply that case here?

14 MR. FREEMAN: So, if I may, I think --

15 JUDGE CHIN: And earlier you said that  
16 you're not -- the government doesn't suggest  
17 there's a categorical approach.

18 MR. FREEMAN: WE do not.

19 JUDGE CHIN: I mean shouldn't we be  
20 parsing the individual comments and looking  
21 at whether they are serving the country or  
22 they're purely for personal purposes. Aren't  
23 there issues of fact here?

24 MR. FREEMAN: I don't think there are  
25 issues of fact, but let me take the questions

1 in reverse order, if I may.

2 MALE VOICE 2; All right

3 MR. FREEMAN: So, yes, we're not  
4 asking for a categorial rule. What we're  
5 asking is the correct application of DC law.  
6 DC law it's common among the parties that DC  
7 law applies the re-statement. It's a multi-  
8 factor test. In the Mohano (phonetic) case,  
9 as you mentioned, there was a violent attack.  
10 Under the restatement, the fourth prong of  
11 the restatement involves whether the use of  
12 violence, if it is a violent intentional  
13 tort, as opposed to, for example defamation,  
14 whether the use of violence was predictable  
15 to the -- foreseeable to the employer in the  
16 circumstances.

17 Now, the Court, even then DC law is  
18 quite encompassing on intentional torts.  
19 There's the laundromat case.

20 JUDGE CHIN: The case is different  
21 because it involves violence?

22 MR. FREEMAN: A case can well be  
23 different. This is the context by context,  
24 case-by-case analysis.

25 JUDGE CALEBRESI: Exactly. It is

1 context by context, and that's why I keep  
2 being troubled. You know, I'm not interested  
3 whether this is President -- former President  
4 Trump or this is -- I'm very interested in  
5 tort law.

6 MR. FREEMAN: I'm aware of that, Your  
7 Honor.

8 JUDGE CALEBRESI: And because I'm very  
9 interested in tort law, I would like to know  
10 how the District of Columbia, which is the  
11 one that is deciding this context in context  
12 would decide this particularly very  
13 interesting and difficult issue, which may  
14 get the District of Columbia into asking how  
15 outrageous or not, how much it is the sort of  
16 thing that is in employment, all sorts of  
17 things, which if they were to -- if we  
18 certified, and they were to deny  
19 certification, I would have to face. But  
20 that isn't really up to me to face. It's up  
21 to them to decide how relevant it is in the  
22 whole context perhaps including in that  
23 context the fact that saying that it is  
24 within the scope externalizes cost while the  
25 whole theme, increasingly of the District of

1 Columbia is to internalize cost.

2 So, again, you know, I'm just --

3 MR. FREEMAN: I have a couple of  
4 things, if I may, on that. As I've already  
5 said, and I'm happy to go into this, but I  
6 don't think that a state court can  
7 permissibly take into account the federal  
8 consequences in a particular case because I  
9 think federal law speaks to that question,  
10 and Congress directed us what to happen if  
11 the United States were a private person.

12 JUDGE NARDINI: Just to be clear so I  
13 understand the point you're making.

14 MR. FREEMAN: Yes.

15 JUDGE NARDINI: Because I think we're  
16 talking about the FTCA carve out for slander  
17 defamation, right?

18 MR. FREEMAN: Yes, that's the  
19 downstream exception, but I'm --

20 JUDGE NARDINI: That's what I mean  
21 when you're referencing the downstream effect  
22 that's what we're talking about, right?

23 MR. FREEMAN: Yes, 26A.

24 JUDGE NARDINI: So I take it that your  
25 theory would be or your argument is if for

1 some reason Congress were to pass a law  
2 saying, well, we're changing that, we're  
3 abolishing that carveout for torts that  
4 happened after a certain date, that there's  
5 no way in which the scope of employment  
6 analysis of the DC courts could permissibly -  
7 - would be different for --

8 MR. FREEMAN: Right.

9 JUDGE NARDINI: For -- for slanders  
10 before that date and after that date, and  
11 say, well, they're covered by the scope of  
12 employment when slanders are something you  
13 can't bring against the United States, but  
14 we're going to have a different scope of  
15 employment theory after that's abolished.

16 MR. FREEMAN: Exactly, Your Honor.

17 JUDGE CALEBRESI: What do you cite  
18 from --

19 MR. FREEMAN: I'm not aware of any  
20 case.

21 JUDGE CALEBRESI: Yeah, what do you  
22 cite me for that very interesting  
23 proposition?

24 MR. FREEMAN: I'm citing the statute.  
25 I don't have a case.

1           JUDGE CALEBRESI: No, there is -- the  
2 statute doesn't speak to that. The statute  
3 says the government is liable when a private  
4 party is -- the statute says or the  
5 interpretation of the statute says the  
6 federal government has not waived immunity in  
7 that. None of that says what a state might  
8 take into account. Let me give you -- let me  
9 give you a hypothetical.

10           MR. FREEMAN: Yes.

11           JUDGE CALEBRESI: There is a state,  
12 we'll call it Calabresia (phonetic) or  
13 postnaria (phonetic) --

14           MR. FREEMAN: Yes.

15           JUDGE CALEBRESI: Which says we define  
16 scope of employment entirely in terms of  
17 putting costs on this context internalized,  
18 and, therefore, for us it makes all the  
19 difference whether this results in the loss  
20 being on the victim, as against on the  
21 injured, and that has nothing to do with  
22 whether there is immunity or whatever. We  
23 want cost internalized, and that's what is  
24 the essence of our scope of employment. Now,  
25 I'm not saying that that is the essence of

1 DC's, I don't know.

2 MR. FREEMAN: I understand. I  
3 understand.

4 JUDGE CALEBRESI: But where in federal  
5 law do you cite to me anything that said  
6 Posnaria (phonetic) and Calabria (phonetic)  
7 couldn't do that?

8 MR. FREEMAN: Your Honor, this is a  
9 question that to my knowledge has not come up  
10 in any case.

11 JUDGE CALEBRESI: No.

12 MR. FREEMAN: So I -- I -- I don't  
13 have a case to cite to you for that. What I  
14 can tell you, I think, is a couple of things.  
15 If you look at Smith or Richards or --

16 JUDGE CALEBRESI: Smith -- Smith --  
17 Smith said that as far as federal law, as far  
18 as the Westlaw Act is concerned, we aren't --  
19 we don't take into account the fact of --  
20 whether there is immunity or not. And that's  
21 a perfectly sensible thing that something  
22 should be asked and was answered, but it's a  
23 different question.

24 MR. FREEMAN: But I think one would  
25 search the U.S. reports and the F 3rd and now

1 F 4th in vain to find any Federal Tort Claims  
2 Act case, in which a court has backed the  
3 federal consequences of Westfall Act  
4 certification into the scope of employment

5 JUDGE CALEBRESI: I don't believe -- I  
6 don't believe the question was asked perhaps  
7 because neither lawyer nor Court knew enough  
8 about tort law, but unfortunately for you you  
9 have somebody who has spent 62 years teaching  
10 the subject.

11 JUDGE NARDINI: So, counsel, why don't  
12 we do this. We've kept you considerably past  
13 your time. You have reserved two minutes in  
14 rebuttal. We'll let you keep those.

15 MR. FREEMAN: Okay.

16 JUDGE NARDINI: Why don't we move  
17 along then to Ms. Habba. You have ten  
18 minutes, and you have reserved two minutes to  
19 rebuttal. Why don't we move along, and again  
20 if we have additional questions for anybody,  
21 we're going to see you again in rebuttal.

22 MS. HABBA: Thank you, Your Honor.  
23 May it please the Court. My name is Alina  
24 Habba, and I represent the Defendant,  
25 Appellant Donald John Trump in this matter.

1 I find it critical to address my client's  
2 position here, which is that he's not hiding  
3 behind the shield of the Westfall Act.

4 This case, you know, in his opinion  
5 and my opinion is meritless. What is of  
6 monumental importance right now is that this  
7 is not a political matter. This is not about  
8 being a Democrat or a Republican. It is  
9 solely to protect the presidency as an  
10 institution, and that is why I think this  
11 case is important.

12 If affirmed, future president will be  
13 needlessly hindered by frivolous lawsuits.  
14 Americans need to feel secure --

15 JUDGE NARDINI: Counsel --

16 MS. HABBA: Yes.

17 JUDGE NARDINI: -- can I ask you when  
18 you say that about the institutional  
19 interests of the president, I think we all  
20 understand that whatever decision we make  
21 today would apply equally to all former, all  
22 future presidents, so I think we understand  
23 that.

24 There are two questions, really, we  
25 focused our initial set of questions on the

1 scope of employment question, which as I  
2 think the discussion showed, involved certain  
3 choice of law questions. Right? So the  
4 answer to the scope of employment question  
5 could vary in future cases depending on where  
6 the alleged tort may -- may occur. Right?  
7 Or depending on what employee we have, if  
8 it's the president whether it's always in DC  
9 or it's somewhere else, we don't know. We  
10 would have to decide a choice of law question  
11 somewhere. You would agree with that, right?

12 MS. HABBA: I would.

13 JUDGE NARDINI: Future cases could  
14 hypothetically involve, I don't know, the law  
15 of Minnesota or wherever, right?

16 MS. HABBA: Well, Your Honor --

17 JUDGE CALEBRESI: The president is  
18 golfing in Minnesota with the prime minister  
19 of France and negligently hits a ball that  
20 hits somebody, it's then the law of Minnesota  
21 that decides scope of employment on that,  
22 right?

23 MS. HABBA: I don't know that I agree  
24 with that, Your Honor, all due respect. I  
25 think that the president is the leader of the

1 country when he is sitting as the president.  
2 He is always in that position. So the  
3 protections that he's afforded whether he's  
4 in Minnesota, or whether he's in New York, or  
5 whether he's making a comment in the oval  
6 office as in this case.

7 JUDGE CHIN: You are taking a  
8 categorical approach then, whatever he does,  
9 whatever he says, it's an act of the United  
10 States. Is that the position?

11 MS. HABBA: That is my position to  
12 some extent, and, frankly, it has never been  
13 questioned until this point --

14 JUDGE NARDINI: You're suggesting,  
15 again, to put it more technically, the second  
16 prong of our analysis, which is what law  
17 governs the scope of employment if we get to  
18 step two would always be the DC law. Is that  
19 your suggestions, which is, of course, not  
20 federal law, but just because that would be  
21 the place where the employment contract  
22 exists?

23 MS. HABBA: Yes, because the president  
24 works in DC

25 JUDGE NARDINI: And, obviously, that

1 would be a question for future courts,  
2 whether that was correct or not in other  
3 circumstances.

4 JUDGE CALEBRESI: If we decided with  
5 you that this case was DC, then we don't need  
6 to worry about --

7 JUDGE NARDINI: Right, so I guess my  
8 point is because that seems to be a question  
9 which could be of great importance in this  
10 case in terms of whether DC law applies, and  
11 then what DC means, right, not federal law,  
12 could I direct your attention to the first  
13 question, which is also the subject of a lot  
14 of briefing and strikes me as perhaps the  
15 one that is guaranteed to have a greater  
16 overall effect on, you know, would always of  
17 necessity apply to a president's involvement  
18 in such a case, which would be is the  
19 president or a person who is then serving as  
20 president at the time of the alleged tort  
21 covered by the Westfall Act to begin with?

22 MS. HABBA: Yes, that's a resounding  
23 yes, Your Honor.

24 JUDGE NARDINI: So could you maybe  
25 address that for a minute?

1 MS. HABBA: Of course. The first  
2 prong of the Westfall Act is to address  
3 whether the president is, in fact, a  
4 government employee that was meant to be  
5 protected along with any other federal  
6 employees that were meant to be protected in  
7 this case. The answer is a resounding yes,  
8 absolutely. In Levin versus United States,  
9 the courts held that the Westfall Act applies  
10 to all federal employees, Gutierrez,  
11 Martinez, you know, they said the expansive  
12 definition in the Westfall Act is intended  
13 for the entire federal workplace.

14 JUDGE CHIN: It doesn't mean every  
15 single employee who receives a federal  
16 paycheck, right? There are inclusions, there  
17 are exclusions, so it isn't literally every  
18 employee who receives a paycheck.

19 MS. HABBA: No, Your Honor, but if you  
20 look at the Hatch Act, for instance, where it  
21 specifically excluded the president and vice  
22 president, that's a good example of why the  
23 definition section here in the Westfall Act  
24 was done intentionally. Any -- any federal  
25 employee was interpreted to mean all federal

1 employees, when it comes to the Westfall Act.  
2 it was applied to --

3 JUDGE CALEBRESI: To do this, you have  
4 to say that the word "include" is an  
5 expansive word not a limiting word. The  
6 court below said it was a limiting word.

7 MS. HABBA: Right.

8 JUDGE CALEBRESI: You could argue that  
9 either way. It does seem to me that at least  
10 it is ambiguous, and if you look at the  
11 legislative history, which you are allowed  
12 still to do despite thing -- the Westfall Act  
13 sounds as though this is broadly inclusive so  
14 that you can -- it can expand, so that  
15 looking at legislative history including the  
16 use of the word "executive branch," when they  
17 add expressly legislative branch and judicial  
18 branch, sounds in your favor.

19 MS. HABBA: Yes, Your Honor. Actually  
20 the legislative history demonstrated that  
21 Congress intended to include the president,  
22 when it stated that the United States would  
23 also be able to continue to assert other  
24 functional immunities such as presidential  
25 immunity.

1           JUDGE CALEBRESI: But there is a  
2 question of whether the Westfall Act did  
3 amend the Federal Tort Claim Act, which is  
4 the one that defines employee, or whether it  
5 was an appropriate way of -- of suggesting  
6 what it meant. And my problem actually this  
7 will be with opposing side is on the one hand  
8 they say that the fact that the Westfall Act  
9 added some specific ones suggests that the  
10 original word was limiting, but that is  
11 immediately saying that the Westfall Act can  
12 be read to interpret the earlier one and when  
13 you do that it cuts your favor.

14           MS. HABBA: Right. Well, to add to  
15 your point, Your Honor, which I think what  
16 you're discussing is the executive department  
17 versus the executive branch and that whole  
18 line of case law and legislative history on  
19 that. Wilson versus Libby (phonetic) the DC  
20 Circuit Court of Appeals upheld that the  
21 Westfall Act, certification for the VP and  
22 three senior executive officials. Also, one  
23 was the White House chief of staff. That is  
24 the executive branch. That is directly with  
25 the president Mississippi versus Johnson,

1 they said the president is the executive  
2 branch. He entirely holds that department  
3 branch, you know, McNamara (phonetic) versus  
4 United States, FTCA held that it applied to  
5 all three branches.

6 So even if you look at the FTCA and  
7 the original meaning, this was just an  
8 extension. This was not, you know, it's  
9 semantics in my opinion. I do believe it  
10 included all three branches, and the  
11 president is part of the executive branch is  
12 the head of.

13 JUDGE CALEBRESI: Yeah. The principal  
14 argument the opposite way, I mean if we  
15 assume that it is ambiguous, the principal  
16 argument in favor is actually a case like the  
17 president golfing with the prime minister of  
18 France on official business, which in a  
19 negligence case is very broadly scoped, hits  
20 a ball negligently, hits somebody, it makes  
21 every sense in the world to say that the U.S.  
22 should pay for that rather than the president  
23 of the United States when he does that.

24 That's the principal argument in favor.

25 The principal argument the other way

1 is the president is not somebody who is  
2 subject to anybody, and the idea of the  
3 Westfall Act is the government pays and then  
4 the government disciplines. And there's  
5 nobody to discipline the president.

6 MS. HABBA: Yeah.

7 JUDGE CALEBRESI: On the other hand --

8 MS. HABBA: I disagree.

9 JUDGE CALEBRESI: -- the Westfall Act  
10 adds judges and legislators, and there's  
11 nobody to discipline us either.

12 MS. HABBA: Right.

13 JUDGE CALEBRESI: And those are the  
14 two --

15 MS. HABBA: Your Honor, all due  
16 respect, I think the president can be  
17 disciplined. The president, you know, if you  
18 look at President Trump's history, he tends  
19 to be disciplined quite often. This is truly  
20 -- the president can be fired. He gets a  
21 paycheck. He is a government employee. The  
22 reports to things. There is checks and  
23 balances, that's how our history is.

24 And to be clear on the facts, and I  
25 don't know how much time I'm allotted --

1 JUDGE NARDINI: Go ahead and respond,  
2 please.

3 MS. HABBA: Thank you. But I do think  
4 there is one distinction that I would like to  
5 make that is critical in this case, this is a  
6 negligence action. Ms. Carroll, she went to  
7 the press, she was a public figure, she went  
8 and put out an excerpt to the New York  
9 magazine, then she published a book. She  
10 made it public. She was on the aggressor  
11 side. At the time President --

12 JUDGE NARDINI: I'm sorry, how is this  
13 -- did you just say this is a negligence  
14 action?

15 MS. HABBA: No. No, I said --

16 JUDGE CHIN: You said -- that's what  
17 you said.

18 JUDGE NARDINI: That's what --

19 MS. HABBA: Oh, I did? Excuse me.

20 JUDGE NARDINI: I think you may have  
21 misspoken. I'm sorry.

22 MS. HABBA: Defamation. I said this  
23 is a defamation --

24 JUDGE NARDINI: Defamation, I'm sorry.

25 MS. HABBA: -- is what I meant. Thank

1 you for correcting, Your Honor, but this is  
2 defamation. This is not about the underlying  
3 alleged assault, which my client did not do.

4 JUDGE CHIN: Even if that is all the  
5 case, I mean who is he serving when he says  
6 something like she's not my type? Is that --  
7 is he serving the United States of America  
8 when he makes that statement?

9 MS. HABBA: Absolutely because he has  
10 to address the fact that this could not and  
11 would not have happened. He did not do it.

12 JUDGE CHIN: It's not -- it would have  
13 been one thing if he said I didn't do it, but  
14 he goes way beyond that. You don't think so?

15 MS. HABBA: I think that -- at the end  
16 of the day if he says she's not my type --

17 JUDGE CHIN: In the context of an  
18 alleged sexual assault, she's not my type.

19 MS. HABBA: Quite honestly, Your  
20 Honor, it's content -- it's content that  
21 you're discussing, not context. Was he  
22 sitting as the president when he made the  
23 comment that this didn't happen? Did he need  
24 to say it didn't happen? Absolutely. if  
25 somebody --

1 JUDGE CHIN: Did he need to say she's  
2 not my type?

3 MS. HABBA: That is not really the  
4 critical question here.

5 JUDGE CALEBRESI: Again, my problem is  
6 that you're discussing this with Judge Chin,  
7 and you could be discussing it with me. I  
8 don't know whether DC would say she's not my  
9 type is part of the job of president or  
10 whether DC would say she's not my type is  
11 not.

12 I mean you don't see any DC case --  
13 leave aside the broader question that I  
14 raised, which got you as the attorney all in  
15 a swivvet, but leave that aside, it's -- it's  
16 up to DC.

17 JUDGE NARDINI: Let me just -- to  
18 follow on to Judge Calabresi's question,  
19 could you tell us your view if you think it's  
20 settled under DC law whether the precise  
21 content, for example, as Judge Chin is  
22 saying, the particulars of what were said  
23 matter in this context for determining scope  
24 of employment or it's rather just simply the  
25 context in which comments of some sort are

1 made, regardless of whether they are  
2 defamatory or not, sort of along the lines of  
3 you have the employees who, you know, you  
4 have the -- what is it the mattress delivery  
5 man who goes out, and he's supposed to be  
6 delivering a mattress, and he winds up  
7 engaging in all sorts of horrible intentional  
8 torts like rape, is your notion that even if  
9 someone engages in squarely personal  
10 defamatory statements, which lets hypothesize  
11 that these are squarely defamatory, if given  
12 by a private citizen, is your theory that  
13 even if that is true, it doesn't matter  
14 because the context in which they were given  
15 is anything the president is saying is --

16 MS. HABBA: Yes, and I don' t--

17 JUDGE NARDINI: -- covered by within  
18 the scope of his employment, and then I guess  
19 I'd like to know what is your limiting  
20 principle, or is there no limiting principle.  
21 Is your theory that everything the president  
22 says, and I don't know, I guess I'll assume  
23 from the moment the president is sworn in  
24 until the moment the term of office expires,  
25 is your theory that anything the president

1 says in any context within the scope of  
2 employment?

3 JUDGE CALABRESI: For purposes of DC  
4 law in terms of DC cases.

5 JUDGE NARDINI: Yeah.

6 MS. HABBA: This is not -- I think  
7 what you are addressing is Plaintiff's idea  
8 that this is a slippery slope.

9 JUDGE NARDINI: Right. And what is  
10 the limiting principle in your view.

11 MS. HABBA: No, this is -- yes.

12 JUDGE NARDINI: -- of what kinds of  
13 statements. Is it -- well, let's just take  
14 this in baby steps. Is it your view that  
15 everything a president says during their term  
16 of office is within the scope of employment  
17 as president?

18 MS. HABBA: No.

19 JUDGE NARDINI: Okay. So what is the  
20 limiting principle you would propose under DC  
21 law that you think is recognized by DC law?

22 MS. HABBA: What is recognized by DC  
23 law in this exact specific -- is Bellinger,  
24 is Libby, is the fact that --

25 JUDGE CALABRESI: Bellinger is not DC

1 law. Bellinger is the DC Circuit  
2 pontificating on DC law.

3 MS. HABBA: My limit to you, Your  
4 Honor, in plain English would be an  
5 unprovoked attack on a citizen. That is not  
6 what happened here. She put a statement in  
7 the press.

8 JUDGE NARDINI: So you think the  
9 provocation -- the test would be provocation?

10 MS. HABBA: I think it is very  
11 important in this case to remember that Ms.  
12 Carroll --

13 JUDGE CALABRESI: What DC case do you  
14 cite me for saying that provocation is even  
15 relevant.

16 MS. HABBA: No I -- I think he asked  
17 me what my opinion is. I don't have a DC  
18 case (inaudible).

19 JUDGE NARDINI: Well, no, as a legal  
20 matter. I'm not asking you sort of what you  
21 feel.

22 MS. HABBA: Right.

23 JUDGE NARDINI: When I say I'm asking  
24 you for your view as a litigant --

25 MS. HABBA: Right.

1           JUDGE NARDINI: What would you propose  
2 that we articulate is the limit that DC law -  
3 - we would ascertain from DC law is the limit  
4 on what statements fall within and without  
5 the scope of employment, and I don't  
6 understand the provocation point, where that  
7 comes from.

8           MS. HABBA: Whether it goes to the  
9 fitness of the president who is sitting  
10 running the country, and I think in this case  
11 it did. He had to address it. When the  
12 press, which is part of his job, asks him a  
13 question about a story, which would go to his  
14 fitness to sit, whether it's true or untrue,  
15 he needs to respond. Would you expect -- let  
16 me put it this way --

17           JUDGE CALABRESI: That's an  
18 interesting argument that DC might buy. You  
19 know, it's a possible argument. It's an  
20 argument that if I were arguing before DC, I  
21 would certainly make. I would say the reason  
22 that you say it is DC choice of law is  
23 because scope of employment, employment even  
24 if a tort occurred someplace else, employment  
25 is the issue and therefore it is DC law, and

1 with respect to the president anything that  
2 speaks to him is that. And that's an  
3 interesting argument, and maybe DC would buy  
4 it, and maybe they wouldn't.

5 MS. HABBA: Well, quite honestly  
6 nobody has had to answer this question  
7 because it was applied five times prior and  
8 it was without question. Obama used it three  
9 times. Hillary Rodham Clinton used it to  
10 keep her private servers private. The fact  
11 that we're even here addressing this question  
12 in itself shows how established this is. And  
13 I appreciate trying to carve out and make new  
14 law, but this is done for a reason so that  
15 the president can address concerns of the  
16 public. That is his job, to make this  
17 country feel secure, and when somebody says  
18 he did a heinous crime 20 year ago, he needs  
19 to address it.

20 JUDGE CALABRESI: Look, look to the  
21 extent that that is an appropriate federal  
22 question, then that should be addressed  
23 appropriately by a federal statute, but when  
24 the federal statute says for whatever reason  
25 correctly or incorrectly, we leave that up to

1 the state, you can't make me an argument,  
2 which says Congress should have said that  
3 this is not a state question, but they  
4 didn't, so --

5 JUDGE NARDINI: Maybe I -- we've kept  
6 you well beyond your time. If there's  
7 anything you'd like to say wrapping up, we  
8 know you've reserved two minutes, but then  
9 we'll turn to your -- so if you have any last  
10 concluding remark.

11 MS. HABBA: I think that the real  
12 reason we're here, and I appreciate your  
13 torts perspective on this is that in my  
14 opinion the lower court, the district court,  
15 erred when they applied the Westfall Act, and  
16 it is -- it should definitely be overturned.  
17 thank you.

18 JUDGE NARDINI: Thank you. You've  
19 reserved two minutes for rebuttal. We  
20 appreciate that, and Mr. Matz, we'll hear  
21 from you now.

22 MR. MATZ: Thank you, Your Honor. Can  
23 you hear me?

24 JUDGE CALABRESI: Yeah, but stand in  
25 between the microphones, and that would be

1 better.

2 MR. MATZ: May it please the Court.

3 My name is Joshua Matz. I represent  
4 Plaintiff Appellee E. Jean Carroll. For the  
5 reasons given in our brief, which I'd be  
6 happy to elaborate on, we do not believe Mr.  
7 Trump is covered by the FTCA. But I want to  
8 start by turning to the court's questions  
9 concerning scope of employment since that is  
10 the narrowest and clearest basis on which the  
11 decision below should be affirmed. Our  
12 argument here rests on three premises, which  
13 with the Court's permission, I will very  
14 simply state. The first premise really goes  
15 to your questions, Judge Calabresi and Judge  
16 Nardini, and the third premise really goes, I  
17 think, directly to Judge Chin's questions.

18 The first premise is that under DC  
19 law, which we're happy to accept for purposes  
20 of this appeal is the governing law, a person  
21 acts outside the scope of their employment if  
22 their conduct is too little actuated by a  
23 job-related purpose, in other words, if they  
24 act in furtherance of private motives like  
25 revenge or retaliation.

1           Second, in applying that standard, the  
2 Court accepts all of the allegations in the  
3 complaint as true and bends all inferences in  
4 favor of Ms. Carroll.

5           JUDGE NARDINI: Wasn't that abrogated  
6 by Osborne?

7           MR. MATZ: Respectfully, Your Honor,  
8 it wasn't. Osborne clarifies that there must  
9 be an ultimate factual determination, and  
10 that it's our burden to bear, but under cases  
11 like Stokes versus Cross and Jacobs, as well  
12 as this court's Bellow (phonetic) decision,  
13 when the Defendant and the United States make  
14 a decision not to introduce any evidence, and  
15 there is nothing in front of the court other  
16 than the complaint, the allegations in the  
17 complaint are taken as true for purposes of  
18 the threshold determination. It's not really  
19 clear what else the court could look to.  
20 There's nothing in front of it.

21           JUDGE CALABRESI: But the allegations  
22 in a complaint cannot simply say we allege  
23 that the president acted entirely out of  
24 personal --

25           MR. MATZ: We agree. That would be

1     conclusory, but that --

2             JUDGE CALABRESI: That's right.

3     That's right.

4             MR. MATZ: -- leads to my third  
5     premise, Your Honor. I'm sorry.

6             JUDGE CALABRESI: But if the DC  
7     Circuit accepts the restatement, which says  
8     that some personal may be okay, in fact, if  
9     this is in part to benefit the activity then  
10    I don't see how you can say that what is  
11    alleged here gets us out of the situation  
12    where DC might say it is more one way than  
13    the other. That's why, you know, my problem  
14    is, again, now then you have to ask, and this  
15    is where I get into the real trouble, that  
16    you have to ask why are they asking about  
17    whether it benefits the activity or not, and  
18    then if this has to do with internalization,  
19    then I get into real trouble, but --

20            MR. MATZ: Yes, Your Honor, if I may I  
21    think what I'm going to try to establish is a  
22    legal point about DC Scope of Employment law,  
23    and then going to Judge Chin's questions and  
24    this was going to be the third premise I  
25    wanted to emphasize that the factual

1 allegations here do support a conclusion  
2 under DC law that Mr. Trump acted for reasons  
3 that place him outside the scope of  
4 employment. And I do want to make sure that  
5 I emphasize those factual considerations, but  
6 first I'll start with the legal point.

7         The position advanced by the President  
8 and the Department of Justice is a  
9 categorical position. They deny that it is,  
10 but they come up with basically no examples  
11 except this made-up provocation test that was  
12 not seen in the briefing or in any precedent.  
13 The position that they would have this Court  
14 adopt, and this is from the Justice  
15 Department's reply brief at page 18 is that  
16 the only question here is whether the general  
17 type of conduct is within the scope of the  
18 President's office.

19         In the reply brief, DOJ principally  
20 cites Smith versus Clinton for that, which is  
21 a really good case for them, because there  
22 was no allegation of an improper purpose in  
23 that case, and therefore the Court didn't  
24 consider the purpose standard.

25         There is a wall of authority, however,

1 holding that if a person is too little  
2 actuated by a purpose to serve the master,  
3 that brings them outside the scope of the  
4 employment, and we know that the Justice  
5 Department knows this because even as they're  
6 here telling you that's not the case, they're  
7 in DC telling the federal judge it is the  
8 case, in the case of Squalvo (phonetic)  
9 versus Trump where they have argued that a  
10 member of Congress, Representative Mo Brooks,  
11 acted outside the scope of his employment on  
12 January 6th, specifically because he was not  
13 actuated by an appropriate purpose.

14 And then there are additional cases, I  
15 would highlight DC versus Pamadil (phonetic)  
16 which is a DC case, not a DC Circuit case,  
17 which says at least where intentional torts  
18 are concerned, it is not enough that an  
19 employer's -- an employee's tortious activity  
20 occurs while he is on duty or even that those  
21 duties bear some causal relationship to the  
22 tort.

23 So with respect to the question of  
24 whether acting with an improper purpose can  
25 remove you from the scope of employment,

1 Ballinger says that, Wilson versus Libby says  
2 that, Woodrook (phonetic) says it, in other  
3 courts the Justice Department says it. We  
4 think that is clearly settled under DC law,  
5 and that their categoric position can't be  
6 maintained.

7           And let me explain why as a matter of  
8 first principles it can't be right. If -- if  
9 -- the restatement is clear that an improper  
10 purpose removes you from the scope of  
11 employment. I am unaware -- it would be a  
12 startling innovation in the law to hold that  
13 as a categorical matter every official who  
14 engages in certain conduct necessarily acts  
15 with a specific individual subjective  
16 motivation. That is a classic fact  
17 determination that is traditionally entrusted  
18 to juries and to district courts.

19           JUDGE CALABRESI: So are you saying  
20 that in every one of these cases, DC would  
21 require that there be an examination of the  
22 person's mind in order to determine whether  
23 it was within the scope of employment?

24 That's a mighty broad statement. I hear --

25           MR. MATZ: It is a mighty broad

1 statement.

2 JUDGE CALABRESI: -- what you say that  
3 it is relevant, but the statement that that  
4 is enough so that in every case the District  
5 of Columbia would say we must essentially  
6 send to a jury what was within this person's  
7 mind to say that it was within the scope.

8 JUDGE NARDINI: And if you do that,  
9 how do you -- I'm sorry.

10 JUDGE CHIN: I was going to say that's  
11 in the restatement, right, which DC -- the DC  
12 cases rely on that you look at the intent of  
13 what the purpose is, isn't that right?

14 MR. MATZ: It is. Let me offer two  
15 very quick points in response to Judge  
16 Calabresi's question, the first is just a  
17 quote from Jacobs versus Roble (phonetic).  
18 Quote, "the focus of our analysis is on the  
19 state of Ms. Erbin's (phonetic) mind."  
20 Armstrong versus Thompson, the key inquiry is  
21 the employee's intent at the moment the  
22 allegedly tortious conduct occurred. There  
23 are many cases that cite that proposition,  
24 and it's not the case that you always go to  
25 the jury. Courts are very familiar and have

1 no shortage of tools to conclude that conduct  
2 was motivated by a purpose that is within the  
3 scope of employment. Wooltrip (phonetic)  
4 versus Murtha (phonetic) and Wilson versus  
5 Libby (phonetic) I think are good examples  
6 that are very different than this case. In  
7 both of those cases, the Plaintiffs have  
8 alleged that high-level government officials  
9 acted with the intent of embarrassing another  
10 high-level government official.

11 JUDGE CALABRESI: Let me tell you, and  
12 I'm afraid that this gets me into tort things  
13 again, which is problem, the whole notion of  
14 benefitting the employer as against your own  
15 aim comes from a tragic mistake done in 1900  
16 when courts didn't know the origin between an  
17 action on the case and an action in trespass.  
18 The world split into two sets of case laws,  
19 New York, which is essentially does this --  
20 is this part of the business, and a majority  
21 including the restatement in DC, which says  
22 it must benefit the person. And that's where  
23 intent comes in.

24 The problem is with virtually all of  
25 these intent cases, states while they are

1 saying that have moved more and more and more  
2 in the direction of saying, but what really  
3 matters to us is whether this is part of this  
4 job.

5           And you can just see that, and you can  
6 see it in DC citing Harper and James that  
7 they are moving in that direction. They are  
8 moving that way. How far that goes, I don't  
9 know. But I'm a little troubled just picking  
10 one language about intent and (inaudible) and  
11 saying that that is what governs DC today.

12           JUDGE NARDINI: And along those lines,  
13 don't you have the trouble, when you have  
14 cases that are DC, I think, not DC Circuit of  
15 the guy who works at the laundromat who  
16 shoots somebody. I mean you're not going to  
17 say that the laundromat owner actually  
18 derived a tangible benefit from having  
19 somebody shot, so doesn't that illustrate, I  
20 think, Judge Calabresi's point that the  
21 benefit of the employer or being actuated by  
22 the benefit of the employer is not quite as  
23 narrow as it might sound. You know, you've  
24 got other court, admittedly not DC, but DC  
25 circuit, also the example of the mattress

1 delivery man, right? There's no way in which  
2 that sort of an intentional tort was good or  
3 that he was thinking -- again, if you're  
4 trying to get subjectively into the mind of  
5 the tortfeasor, hey, this will be great for  
6 my boss. Right? I mean nobody pretends that  
7 that's what the test means, and doesn't it  
8 mean what Judge Calabresi is suggesting, it's  
9 drifted considerably or maybe it never was  
10 what it was.

11 JUDGE CALABRESI: The classic, the  
12 beginning cases, which went on one side of  
13 the line and the other were bill collector  
14 cases where the bill collector beat up the  
15 debtor and those were within the scope of  
16 employment or intentional and rape cases,  
17 which people like me thought were terribly  
18 decided in 1900 where these were in  
19 department stores. Women were being raped by  
20 foremen, and the court's usual care of women  
21 at the time said not covered. That has  
22 changed so in any number of cases even  
23 involving things rather like rape, things,  
24 cases, they start doing dirty dancing  
25 analysis it may be the benefit, all in order

1 to internalize the cost. And, you know,  
2 realistically that's what is going on, and  
3 that is how you have to read what these cases  
4 in DC are doing, and what that does to us  
5 today then in a case where the fact of saying  
6 it's within the scope of employment means  
7 that it is externalized. I have no idea.

8 MR. MATZ: I think that raises, if I  
9 may, two quick points, and I want to -- the  
10 second point I want to forecast is about the  
11 internalization point, but I'll make the  
12 first point first, which is it's true that in  
13 some of those cases, Your Honor is thinking  
14 of Winebrook (phonetic) versus Johnson  
15 (phonetic) I believe, the mattress case in  
16 DC, it doesn't matter, the --

17 JUDGE NARDINI: Yeah.

18 MR. MATZ: -- the way that the courts  
19 reasoned about it is there the altercation  
20 arose from an effort to sort of do the  
21 store's job and so there was a sense that it  
22 was within the scope of employment, and I  
23 agree it's a broad view of what it means to  
24 be within the scope of employment.

25 JUDGE NARDINI: But then if you accept

1 that, why couldn't you equally accept the  
2 rather expansive view but it's a view put  
3 forth by the other side that when you're the  
4 president, one thing you are constantly doing  
5 is fielding questions about your capability  
6 of fulfilling the office, and just as one  
7 might argue that someone might go  
8 dramatically beyond the bounds of say  
9 propriety in doing that, it's still  
10 functionally within the world of responding  
11 to claims you can't do your job, again, given  
12 the expansive nature of someone at a  
13 laundromat presumably not supposed to be  
14 shooting people, but that's as you're saying  
15 was viewed by DC as somehow being within the  
16 scope of employment.

17 MR. MATZ: So if I may I'll address  
18 the internalization point quickly and then  
19 come to your question because I think they  
20 follow naturally on each other. Judge  
21 Calabresi, you had asked before, DC law is  
22 about internalization in many ways, and the  
23 question you asked is how would the DC courts  
24 deal with the circumstance where the broad  
25 scope of employment denies the remedy. And

1 the colloquy that the court had with --

2 JUDGE CALABRESI: The opposite of all  
3 the cases they have dealt with.

4 MR. MATZ: Exactly, and the colloquy  
5 the court had with opposing counsel was  
6 whether there was some issue with the absence  
7 of a federal remedy being uniquely  
8 problematic as a reason to treat state law  
9 differently, but what we don't actually know  
10 is how the DC Circuit would -- sorry, the DC  
11 courts would deal with a case where even as a  
12 matter of local law there was no remedy. The  
13 DC courts have not articulated a respondeat  
14 superior doctrine for a circumstance where  
15 under either anybody (inaudible) no remedy.

16 JUDGE CALABRESI: Exactly. Exactly.

17 MR. MATZ: So a certification could be  
18 appropriate for that reason, and I would  
19 highlight that point.

20 JUDGE CALABRESI: There may be, for  
21 instance, it may even be something as simple  
22 as a situation of whether they look at scope  
23 of employment differently when the employer  
24 is bankrupt and the employee is rich.

25 MR. MATZ: Exactly. So the government

1 would say that Smith --

2 JUDGE CALABRESI: And both cases  
3 occurred in a negligence context in  
4 Connecticut when the New Haven Railroad was  
5 constantly bankrupt and the engineers who  
6 were driving the trains were very rich which  
7 is why the railroad was bankrupt, you know.  
8 Do you -- does the local court look at that?

9 MR. MATZ: And we respect that would  
10 be an appropriate determination for the court  
11 in this circumstance to certify it to the DC  
12 court for that determination, but if the  
13 Court doesn't do that, what I would emphasize  
14 is that it's true that in a number of cases,  
15 and this goes to Judge Nardini's question,  
16 and I think I want to try to get back to  
17 Judge Chin's questions about the facts as  
18 well. It's true that DC courts have taken a  
19 broader view of what it means for a person to  
20 be pursuing a job-related purpose, but it's  
21 also true that those same courts, and here  
22 I'm looking at cases like Lare (phonetic) and  
23 Bamidell (phonetic) and the whole line of  
24 cases that have been cited in the briefs,  
25 have emphasized that there are limits where a

1 person seems to be acting in furtherance of  
2 personal animus, or revenge or motivation  
3 even if there is some connection to the tort,  
4 sorry to the job where the job provides the  
5 opportunity for commission of the tort, but  
6 the conduct is personal.

7 JUDGE CALABRESI: Suppose the  
8 president is giving medals to people who were  
9 awarded medals somewhere, he puts a medal on,  
10 puts a medal on, sees somebody who insulted  
11 him and as he puts the medal on, he chokes  
12 him, he chokes him and maybe kills him or  
13 not. Is that within the scope of employment  
14 or not?

15 MR. MATZ: Your Honor, we would submit  
16 that if there were good reasons to believe  
17 that he had choked that person out of  
18 personal spite and malice, then, yes, that  
19 would potentially bring the president outside  
20 the scope of employment, and this is where I  
21 think the facts matter in a case like this  
22 because at this stage in the proceedings, the  
23 allegations in the complaint have to be taken  
24 as true, and here is what that means, the  
25 Court must accept as true and by the way it

1 is true, that Mr. Trump raped my client, that  
2 he knew who she was when he did it, that he  
3 knew she was telling the truth when she came  
4 forward, and that he responded with his long-  
5 standing private modus operandi for  
6 destroying people who come forward to reveal  
7 his misconduct, and that his actions went way  
8 beyond a mere denial.

9 JUDGE CALABRESI: Isn't it equally as  
10 possible to view this, assuming all of those  
11 things to be true, as saying, my god, if  
12 people think that the president did something  
13 like that, that makes the president incapable  
14 of doing his job and so I have to lie and  
15 attack in order to protect the presidency.  
16 You know, the fact is that the president  
17 often has done things, which go beyond the  
18 law, for purposes of the presidency. Almost  
19 every president has done it, and indeed what  
20 is impeachable is when somebody like Mr.  
21 Nixon did something not for the presidency,  
22 but for his own benefit. But that's a mighty  
23 difficult thing.

24 MR. MATZ: Your Honor, we agree it's  
25 not the -- it's a line that will be violated

1 in extreme circumstances.

2 JUDGE CHIN: You don't have a problem  
3 -- I assume you wouldn't have a problem if he  
4 had simply said that's a false accusation, I  
5 didn't do it.

6 MR. MATZ: We would not have a problem  
7 with that, Your Honor. And the reason --

8 JUDGE CHIN: So how do we figure out  
9 where there is a problem, particularly if --  
10 if -- if he's making a series of statements  
11 one after the other? I mean do you really go  
12 through and say this line is within the  
13 scope, the next line is not within the scope?  
14 Is that what a jury is expected to do?

15 MR. MATZ: Your Honor, yes, and the  
16 inquiry and to be clear we're not asking for  
17 some innovation. It's really my friends on  
18 the other side who are. This is classic  
19 respondeat superior doctrine. You look at  
20 the acts one at a time. The acts together  
21 may provide context and illuminate the  
22 meaning of each other.

23 JUDGE CALABRESI: May I ask you what  
24 your view would be on certifying this  
25 question of scope of employment to the

1 District of Columbia?

2 MR. MATZ: Your Honor, we would  
3 support the Court making that judgment. We  
4 think it is ultimately a state law matter for  
5 determination, but in the event that the  
6 Court doesn't do that, what we would  
7 highlight is just be --

8 JUDGE CALABRESI: We can -- we must  
9 also -- always assume that the District of  
10 Columbia may wisely say thank you, we don't  
11 want to take it, you decide, and then we have  
12 to decide.

13 MR. MATZ: That is a possibility, but  
14 I --

15 JUDGE NARDINI: Counsel, can we just  
16 go back to Judge Chin's question. I think a  
17 little -- I would be interested in a little  
18 bit more follow up there. I don't quite  
19 understand your position with respect to the  
20 hypothetical that Judge Chin posed, which is  
21 let's suggest it was a more, it was a  
22 slightly different response, and the  
23 statement had been that event never happened,  
24 or that accusation is false. How is that not  
25 equally defamatory?

1           MR. MATZ: Your Honor, it may be  
2 equally defamatory.

3           JUDGE NARDINI: So you're just saying  
4 that it just because it's said in a calmer  
5 tone, it's somehow going to be viewed as not  
6 actuated by personal interest or not by an  
7 interest that diverges from that of the  
8 employer?

9           MR. MATZ: Your Honor, no, that is not  
10 our submission.

11          JUDGE NARDINI: So how is this  
12 relevant? Explain to me why there is a  
13 distinction legally between those two  
14 scenarios.

15          MR. MATZ: Yes. Because the question  
16 here is whether Mr. Trump acted in  
17 furtherance of private motives, and courts  
18 have identified many indicia of when a person  
19 appears to be acting in pursuit of private  
20 (inaudible).

21          JUDGE NARDINI: So the tone, or the  
22 colorful nature of the language, but the  
23 substance is identical? The substance is  
24 identical.

25          MR. MATZ: Your Honor, a mere denial

1 is not the same as saying I didn't rape her  
2 and she's too unattractive for me to have  
3 done it, and by the way she lied about other  
4 people doing it.

5 JUDGE NARDINI: Take -- take the first  
6 part. Take the first part. Why is that not  
7 a mere denial? I don't understand the  
8 difference.

9 MR. MATZ: Because it's our submission  
10 that a mere denial would not necessarily,  
11 would not standing alone be sufficient to  
12 cause a fact finder to conclude reasonably  
13 that the president was necessarily acting  
14 with (inaudible) motives.

15 JUDGE CALABRESI: Are you saying that  
16 the president or anybody in such a situation  
17 because this isn't only a president must do  
18 the minimal amount that is sufficient to  
19 preserve the office and that anything beyond  
20 that is not covered or --

21 MR. MATZ: No.

22 JUDGE CALABRESI: You're not saying  
23 that because that's such a difficult line to  
24 draw.

25 JUDGE NARDINI: Because it seems like

1 then you're -- then you're suggesting the  
2 president of the United States is always  
3 going to be measuring their language every  
4 time they talk to wonder whether if -- if  
5 they articulate their thinking just a little  
6 bit more or if they lose their cool or  
7 whatever it is, somehow that's the line  
8 between personal liability and not personal  
9 liability?

10 MR. MATZ: With respect, Your Honor, I  
11 have two responses to that. The first is  
12 that there's nothing strange in our legal  
13 tradition about the idea that a person who  
14 says intemperate things that reveal an  
15 inappropriate motive could be held liable in  
16 circumstances where they wouldn't be if they  
17 hadn't revealed an improper motive, and the  
18 second point is that in this circumstance,  
19 the fact -- I mean in anticipation of the  
20 argument today I was thinking to myself, what  
21 would be the hypothetical I could use to  
22 describe a slippery slope?

23 JUDGE NARDINI: What's the improper  
24 motive? I'm trying to think. If the  
25 improper motive is defamation, that's

1 achieved. That's achieved by a simple  
2 denial. So I'm trying to think what is the  
3 improper motivation, a non-work-related  
4 motivation? Is that the improper motivation?

5 MR. MATZ: Yes. To be clear, we  
6 understand that the mere engaging in an  
7 intentional tort in this case defamation is  
8 not itself sufficient to conclude that a  
9 person acted with private (inaudible).

10 JUDGE NARDINI: Right. Because we  
11 know shooting somebody the DC courts have  
12 told us is not necessarily enough.

13 MR. MATZ: Yes.

14 JUDGE NARDINI: So -- so what is the  
15 line? I'm -- I'm -- I'm sorry I'm just not  
16 following what you mean when you say improper  
17 purpose.

18 MR. MATZ: Yes, Your Honor, and with  
19 respect I would resist Your Honor's  
20 suggestion that because the DC courts have  
21 said shooting (inaudible) is not enough then  
22 anything -- then sort of the door is off the  
23 hinges and anyone can do anything without a  
24 private motive. What I would say is that the  
25 courts have directed our attention to whether

1 a person has acted with a private motive.

2 JUDGE NARDINI: So it's a private  
3 motive, not an improper purpose?

4 MR. MATZ: Yes, but what I was -- the  
5 point I was making earlier in response, Your  
6 Honor -- I took Your Honor and I apologize if  
7 I was mistaken, I took Your Honor to be  
8 asking the question how will we know isn't it  
9 weird to ask whether the president's purpose  
10 was one that potentially creates liability or  
11 not. And what I was suggesting is that's  
12 actually not weird. We do that in the law  
13 all the time. We look to circumstantial  
14 evidence in the conduct of a person to  
15 identify when they may have been acting with  
16 motives that potentially give rise to  
17 liability.

18 JUDGE NARDINI: And I guess that's  
19 what I'm asking you is what is the line in  
20 your view between proper and improper  
21 motives? That's what -- I'm sorry, I'm just  
22 not understanding which line you're trying to  
23 draw, maybe you could just explain that.

24 MR. MATZ: Your Honor, I'm happy to  
25 try, but the line is -- the way that the DC

1 courts have described it is that when a  
2 person acts in furtherance of personal  
3 retaliation or in vengeance or animus, that  
4 those are the kinds of motives, and I should  
5 say that very often that occurs in cases  
6 involving sexual impropriety.

7 JUDGE CALABRESI: I think part of the  
8 problem is that DC has clearly gone both  
9 ways, that there are cases in DC that suggest  
10 that somehow this is beyond the pale, and  
11 there are cases in DC that say this is not,  
12 and you're trying to give us a rationale for  
13 that that is in some way appealing, but which  
14 presents some problem for Judge Nardini. My  
15 problem is that I can give any number of  
16 rationales. I am at a loss as to what is the  
17 actual, today because these things have been  
18 changing, what the DC court would say.

19 MR. MATZ: Yes. And that would be, as  
20 we submit, a reason to certify, but in the --  
21 on the assumption that the Court may not  
22 choose that path, you know, I agree that this  
23 is not always the clearest test, that  
24 questions about private motivation can  
25 present challenges, but the fact that there

1 may be hard cases doesn't mean that when  
2 there is an easier case the Court shouldn't  
3 apply the law as its stated. And that we  
4 submit that when Mr. Trump responded to Ms.  
5 Carroll's revelation of his sexual misconduct  
6 by going out in public and repeatedly over  
7 the course of several days and quite  
8 vindictively saying essentially she's not my  
9 type, she's too unattractive for me to have  
10 raped her, you know.

11 JUDGE CALABRESI: So you are saying  
12 whatever that line is a statement that she is  
13 not my type, she ain't pretty enough or  
14 something like that is not something that  
15 benefits the government, the premise, the  
16 presidency, and, therefore, is out wherever  
17 the line is. That's your -- that's  
18 essentially your narrow argument has to be  
19 that we have to look at this, and there is  
20 something said that is so clearly beyond that  
21 it doesn't fit. Well, if I agree with you, I  
22 agree with you, but I'm not sure I do.

23 JUDGE NARDINI: Can I -- we've kept  
24 you up past your time, and I appreciate that  
25 you've been answering our questions. Can I

1 ask you stick around a little bit more, would  
2 you just address what I would call question  
3 one, which you might think of as a threshold  
4 question, but I suppose it depends on which  
5 order one thinks one ought to address these  
6 questions, which is about whether in your  
7 view or explain why the president isn't  
8 covered by the Westfall Act to begin with? I  
9 think it would be useful for us to just hear  
10 your views on that.

11 MR. MATZ: I appreciate that, Your  
12 Honor. You know, with respect to whether the  
13 FTCA applies to the president, and I should  
14 highlight this, we're talking -- we believe  
15 we're talking about the FTCA not the Westfall  
16 Act because the relevant definitional  
17 provisions were all written in 1946, and then  
18 some of them were amended in 1988, but back  
19 in 1946, looking at the statutory text, the  
20 first line is the text makes no reference to  
21 the president, and as Judge Kaplan (phonetic)  
22 pointed out, you know, Congress doesn't  
23 ordinarily cover the president by the  
24 indirect implication of generic definitional  
25 terms, and if it were correct that that

1 language covered the president by virtue of  
2 applying to anyone who draws a federal  
3 salary, then significant swaths of the  
4 original FTCA and pretty much all of the  
5 amendments since then would be rendered  
6 superfluous and so it's our submission that  
7 when you look at that definition it's using  
8 the word "includes" in a fairly irregular  
9 sense that is definitional rather than  
10 illustrative, and we would submit that is  
11 actually consistent with the original purpose  
12 and structure of the 1946 law.

13           When the FTCA was enacted in 1946, it  
14 was not enacted as a benefit for federal  
15 officials, and my friends on the other side  
16 say, why would you deny the president the  
17 benefit of a statutory scheme. It became a  
18 benefit in 1988, but in 1946, it was a  
19 benefit for victims of torts. It was just  
20 another way that you could sue to try to  
21 obtain redress if you were injured at the  
22 hands of a federal employee. You were still  
23 free at the time to bring a private suit  
24 against them.

25           JUDGE CALABRESI: But wouldn't you

1 want in the case, thinking about what  
2 Congress was thinking in 1946, wouldn't you  
3 want to say that if a president was golfing  
4 on official business with the prime minister  
5 of France and negligently hit a ball that hit  
6 somebody that this would be better placed as  
7 a suit against the government instead of  
8 against the president?

9 MR. MATZ: Your Honor, that may --

10 JUDGE CALABRESI: In 1946, thinking  
11 about what they were trying to do to give  
12 relatively easy recovery to victims who were  
13 injured by the negligence of -- a suit  
14 against a president would be a terribly messy  
15 business and probably would have to be  
16 delayed four or five years until after he no  
17 longer, she no longer was president. A suit  
18 against the government would be the simplest  
19 thing in the world, so if that was the aim of  
20 the Federal Torts Claim Act and we can read  
21 (inaudible) one way or the other, isn't that  
22 a sensible way to read this?

23 MR. MATZ: Your Honor, as a policy  
24 matter with reference to my own policy  
25 preferences, that would be a reasonable way

1 for Congress to have written the law.

2 JUDGE CALABRESI: But we can't do it  
3 if it is clear that include is a narrow word,  
4 but if include is not or can be read more  
5 broadly and if what happens in 1988 can be  
6 taken as at least some judgment as to what  
7 was meant in 1946, then we can do it. Judge  
8 Kaplan said, no, that's what the word means  
9 and if that's what the word means (inaudible)  
10 but I'm not so sure it means it that clearly.

11 JUDGE CHIN: If -- I'm not sure there  
12 would be any spectators on the golf course  
13 anyway if the president were hitting the  
14 balls, but if --

15 JUDGE NARDINI: A secret service agent  
16 maybe.

17 JUDGE CHIN: Secret service, well,  
18 they would be covered by worker's comp or  
19 some version thereof, I suppose, but if the  
20 FTCA does not cover the president, would  
21 there be any remedy or is it just too bad and  
22 there -- sovereign immunity would bar any  
23 claim.

24 MR. MATZ: To your question, and then,  
25 of course, I would also answer Judge

1 Calabresi's question, so in the circumstance  
2 where the FTCA doesn't apply to the  
3 president, the president would have the  
4 defense of absolute immunity from suit in  
5 that circumstance, and there probably  
6 wouldn't be a remedy to the Plaintiff in the  
7 event that the absolute immunity (inaudible).

8 JUDGE CHIN: And it's unlikely to  
9 happen very often anyway, so --

10 MR. MATZ: Yeah.

11 JUDGE CHIN: -- that's something that  
12 we as a societal matter we give up in return  
13 for the benefits of immunity I suppose.

14 MR. MATZ: Well, you know, and in 1946  
15 when Congress passed the law, they weren't  
16 thinking as we are today about presidents on  
17 golf courses. They were thinking about U.S.  
18 Postal Service workers in cars --

19 JUDGE CHIN: Yeah.

20 MR. MATZ: -- hitting people, and to  
21 go back to Judge Calabresi's question about  
22 that, you know, I took, you know, Your Honor  
23 to be asking, well, if we could read it in  
24 either way, doesn't it make more sense to  
25 read it as applying to the president? And

1 let me just offer one reason to think it may  
2 not make that much more sense, one of which  
3 is the president already has ample immunities  
4 although we realize that under Smith that's  
5 not conclusive, but the other reason is that  
6 if the FTCA as enacted in 1946 applied to the  
7 president, what it would mean is that  
8 Congress had passed a law that created a new  
9 circumstance in which federal judges could  
10 sit in judgment and review of the conduct of  
11 the president in making that scope of  
12 employment determination whereas they  
13 couldn't before. And we usually expect a  
14 clear statement.

15 JUDGE CALABRESI: (inaudible) by golf  
16 course, the president is driving in his  
17 official car, there's a chauffeur and is  
18 going to official meetings, (inaudible) and  
19 the president is in a hurry and says speed,  
20 go faster, and somebody gets injured for  
21 that. Do we want the fact that did in 1946  
22 given what they were trying to do about  
23 having -- making victims whole, do we want to  
24 say that because the president himself might  
25 be immune there might not be a suit against

1 the federal government in that very much like  
2 a postman driving, which is the classic FTCA  
3 case.

4 MR. MATZ: Your Honor, I completely  
5 hear you as a policy matter, and I agree that  
6 providing redress is a good thing, but what I  
7 would note is that numerous courts  
8 interpreted the FTCA as not providing exactly  
9 that protection, for example if Your Honor if  
10 a judge or if a member of Congress or if a  
11 great many other persons that drew federal  
12 salaries engaged in such conduct.

13 JUDGE CALABRESI: That's right, and  
14 then in 1948 -- in 1988, the Westfall Act it  
15 says brings us in using language, which they  
16 also suggest applies to the president when  
17 they say legislative branch, judicial branch,  
18 executive.

19 MR. MATZ: Your Honor, that's actually  
20 an important difference of opinion, I think,  
21 it doesn't say executive branch. Under the  
22 definition of federal agency, the 1988 law  
23 added the judicial and legislative branches.

24 JUDGE CALABRESI: No, no, it's in the  
25 house report.

1 MR. MATZ: Yes, Your Honor, and, yes,  
2 I mean we can read the house report for what  
3 it's worth but, you know, at the same time I  
4 would just highlight I think that looking at  
5 the text, when the law refers to two branches  
6 of government and that it only refers to  
7 subsidiary components of the executive it's -  
8 - and reading it as applying to the president  
9 would at least give rise to an additional new  
10 circumstance where courts could review the  
11 conduct of the president in office, you would  
12 expect something a bit clearer, and I think  
13 that was the basis of Judge Kaplan's  
14 reasoning, and that would be the basis on  
15 which if the court were inclined to affirm on  
16 that grounds it could.

17 JUDGE NARDINI: So we've kept you up  
18 here. Unless there are any further questions  
19 from the bench, maybe if you would like to  
20 wrap it up with some final comments, and then  
21 we'll go to the rebuttal.

22 MR. MATZ: I appreciate that, Your  
23 Honor, I just have a quick final comment.

24 JUDGE NARDINI: Please.

25 MR. MATZ: Which is that with respect

1 just focusing on the scope of employment  
2 issue, we appreciate that DC law has read the  
3 scope of employment tests broadly, but the DC  
4 courts have also made it clear that when a  
5 person acts with private motives, they are  
6 outside the scope of their employment, and if  
7 an elected official deliberately harms  
8 somebody and does so for reasons that are  
9 private personal reasons as confirmed by the  
10 evidence in front of the court denying a  
11 remedy in the name of the nation's sovereign  
12 immunity is at odds with the maxim that  
13 nobody is above the law. And we would simply  
14 submit that a White House job is not a  
15 promise of an unlimited prerogative to  
16 brutalize victims of prior wrongdoing through  
17 personally motivated attacks. That isn't the  
18 law. No court has ever said it's the law,  
19 and we would ask this court not to make it  
20 the law.

21 JUDGE NARDINI: Thank you very much.  
22 Moving in order now, I think we'll hear from  
23 Mr. Freeman next for two minutes of rebuttal.  
24 And I think for rebuttal because we've heard  
25 excellent arguments on both sides, we're

1 going to keep the rebuttals to just about two  
2 minutes, please.

3 MR. FREEMAN: Thank you, Your Honor.  
4 I'll get right to it. I'd like to start on  
5 the question where we ended about the first  
6 question, the textual issue about I think the  
7 argument comes down to whether including is a  
8 limiting question or an exclusive one. I'll  
9 just point you to a textual evidence on this.

10 JUDGE CHIN: Before you get to the  
11 textual argument, the big picture argument,  
12 indeed the FTCA was passed to waive sovereign  
13 immunity so that victims could sue, and it is  
14 contemplating things like postal truck  
15 accidents and malpractice at a VA hospital.  
16 Did Congress really contemplate that it would  
17 apply to the president of the United States?

18 MR. FREEMAN: You're right that it was  
19 the postal truck drivers that was the animus  
20 for the whole thing, but it says any employee  
21 of the government. We know that if a supreme  
22 court justice gets in a car accident on the  
23 way to work, that can be covered, and there's  
24 no reason to think that if the president of  
25 the United States got into a similar car

1 accident Congress wanted to relegate the  
2 president --

3 JUDGE CHIN: The president is never  
4 going to be driving. Even the speeding  
5 example, the streets are all clear.

6 MR. FREEMAN: Well, but to take a real  
7 example --

8 JUDGE CHIN: it's just not going to  
9 be, you're not going to have situations where  
10 the president is committing torts, maybe but  
11 then the discretionary function exemption  
12 fits in or you know it just doesn't seem  
13 likely that -- it doesn't make sense.

14 MR. FREEMAN: Well, Congress said any  
15 -- any employee of the government, and in the  
16 Westfall Act the Supreme Court has described  
17 that as comprehensive. The word is  
18 inclusive, and if I can make a contextual  
19 point before I'm out of time, the  
20 definitional; section 2671 says includes in  
21 two places, but there's a third definition,  
22 acting within the scope of employment for a  
23 military person, and that uses the word  
24 means, that's a limiting word and in  
25 juxtaposition includes is an open word. I'll

1 also note that Plaintiff's point to section  
2 451 of Title 28 for the definition of  
3 executive department. That is the word  
4 "means," so in the Westfall Act, Congress was  
5 deliberately expansive and embracive and it  
6 wanted to get every federal employee in all  
7 of the branches.

8 And the last question, I know I'm just  
9 at my buzzer --

10 JUDGE CALABRESI: Are you -- excuse  
11 me, are you saying by that that the Westfall  
12 Act Amended the Federal Tort Claims Act to  
13 include the president?

14 MR. FREEMAN: No, Your Honor, what I'm  
15 saying is I'm making the point you -- the  
16 observation you made before, which is that  
17 the Westfall Act tells us what Congress meant  
18 by the phrase any employee in the government.

19 JUDGE CALABRESI: That's always, you  
20 know, that's a complicated argument about  
21 saying the (inaudible). Okay, I just was  
22 wondering.

23 MR. FREEMAN: And then I just on the  
24 scope point, I think I heard my friend say  
25 that if the president of the United States

1 had falsely denied, the former president just  
2 falsely denied the accusation of rape, that  
3 that would have been within scope, but here  
4 he went farther, and I think that gets us  
5 into very dangerous territory, and I think  
6 that's the merits of the defamation claim. I  
7 think once you agree that the president  
8 answering questions from on this subject was  
9 within scope, he's within scope and the  
10 defamation, the merits of the defamation  
11 claim are what they are, but the scope of the  
12 employment question (inaudible).

13 JUDGE CALABRESI: Unless the  
14 outrageousness in DC defines the scope.

15 MR. FREEMAN: And if I may I know  
16 Judge Calabresi you've raised a couple  
17 questions about DC. I understand your point  
18 that we don't know how DC would decide this  
19 exact case, but if I could take ten seconds  
20 to give you an argument about why they would  
21 decide it the way that we think they would.

22 JUDGE NARDINI: Ten seconds.

23 MR. FREEMAN: DC law applies to ask  
24 whether the general, and this is a  
25 restatement, whether the general conduct is

1 authorized and whether it was in the time and  
2 the place. Here the president is answering  
3 questions through White House press  
4 statements, sit-down interviews in the oval  
5 office and answering questions from reporters  
6 within the south lawn. Whatever else is  
7 within scope for the president, that's within  
8 scope.

9 JUDGE NARDINI: Okay. Thank you very  
10 much. Ms. Habba, you have two minutes, which  
11 we could also stretch by 10 seconds.

12 MS. HABBA: I appreciate it, Your  
13 Honor. First, I want to correct one  
14 misstatement made by counsel for Ms. Carroll  
15 that rape is not the underlying allegations  
16 in this case. That is not what this is.  
17 This is a defamation case. I just have to  
18 put that back on the record. Rape is what  
19 she alleged in her book. This is not a  
20 personal retaliation, and I do want to go to  
21 your point, which is that if we are to say  
22 that just because we don't like the way the  
23 president responds, what is the court going  
24 to do if Kyle Rittenhouse goes after  
25 President Biden for calling him a white

1    supremacist?  In that case, where there has  
2    been numerous press about defamation, is he  
3    to say that because he shouldn't have used  
4    those words, that then the Westfall Act  
5    doesn't apply to President Biden?  No,  
6    because they need to focus on their job.  We  
7    are all imperfect people, but that is not  
8    what we are looking for from the president.

9            He was, as my colleague said from the  
10   United States Department of Justice, he was -  
11   - it was a deputy white house press secretary  
12   comment, and what he said was not just she's  
13   not my type, which I think is very clearly  
14   him saying I wouldn't have done this, this  
15   isn't me, I didn't do this, but also he said  
16   he didn't want to diminish the severity of  
17   real assaults.  Nobody is talking about that  
18   part of his statement.  It was published in  
19   the federal register.  The other statement  
20   was on the way to Marine 1 on the south lawn  
21   where the press was asking him a wide range  
22   of questions about Iran targeting a U.S.  
23   drone and immigration issues and then the  
24   press asked him about Ms. Carroll.  Why?  
25   Because she made it a matter of public

1 concern, he did not. The third part, he was  
2 responding to questions from a reporter  
3 during a 45-minute interview. They discussed  
4 the federal reserve, supreme court, Justice  
5 Kavanaugh, taxes and trade, election,  
6 president's authority to take military action  
7 against Iran and then the reporter asked him  
8 about Ms. Carroll. I think that when we  
9 realize that he was on the defensive here,  
10 and that goes to where we say where is the  
11 limit, this is not a slippery slope.

12 She made it public, and then when he  
13 addressed it and said she's not my type, I  
14 wouldn't have done this, and don't say that,  
15 Ms. Carroll because there are victims that  
16 have actually been assaulted and it's not  
17 right, that's what he said. I don't see that  
18 as outside the scope.

19 JUDGE CALABRESI: Aren't you arguing  
20 the merits of the issue rather -- which, you  
21 know, may be very appealing, rather than the  
22 question of whether DC would say that this is  
23 in the scope of employment or potentially  
24 outside it?

25 MS. HABBA: I don't think so, Your

1 Honor, I think I'm directly on point with the  
2 fact that this is within the scope of his  
3 employment. He's talking to the press about  
4 numerous things, and this was put in the  
5 press's purview by Ms. Carroll. So then he  
6 responds and says I didn't do it, and she  
7 says, oh, I'm suing you for defamation.

8 JUDGE CALABRESI: So you are saying  
9 that in effect DC courts would make the  
10 merits issue be the issue as to scope of  
11 employment in -- in a great particular --

12 MS. HABBA: I don't -- I don't --

13 JUDGE CALABRESI: -- that may be, but  
14 I'd like to see a case.

15 JUDGE NARDINI: All right. I think we  
16 have everyone's argument. We want to thank  
17 everyone for very helpful arguments today.

18 MS. HABBA: Thank you, Your Honor.

19 JUDGE CALABRESI: Excellent, excellent  
20 arguments on all sides. Thank you.

21 JUDGE NARDINI: And as with all of the  
22 cases today, we're taking them under  
23 advisement. We also have a couple of motions  
24 on the calendar. We reserve decision on  
25 those as well, and with that I would ask the

1 courtroom deputy to please adjourn.

2 THE DEPUTY: Court stands adjourned.

3 (End of Audio Recording)

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I, Trisha Ruckart, do hereby certify that I was authorized to and transcribed the foregoing recorded proceedings and that the transcript is a true record, to the best of my ability.

DATED this 3rd day of December, 2021.



TRISHA RUCKART, CVR-CM