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1995]

SULLIVAN v. UNITED STATES: ARE FEDERAL PUBLIC DEFENDERS IN NEED OF A DEFENSE?

I. INTRODUCTION

Since the formation of this country's government, federal courts have recognized, to a certain extent, the doctrine of sovereign immunity.¹ This doctrine prevents individuals injured by an act or omission of the federal government from suing the government.² In the late nineteenth century, the doctrine of sovereign immunity expanded its reach by providing immunity for certain government employees who committed torts during the course of their employment.³ Thus, these higher-ranking employees who were granted immunity avoided liability by advancing the evolving doctrine of official immunity as a defense.⁴ Due to the develop-

1. See Edwin M. Borchard, *Governmental Responsibility in Tort*, VI, 36 YALE L.J. 1, 37-41 (1926) (explaining that United States courts regarded sovereign immunity "as a matter of simple logic"); Reginald Parker, *The King Does No Wrong — Liability for Misadministration*, 5 VAND. L. REV. 167, 167-69 (1952) (noting sovereign immunity's existence in United States); George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476, 480-81 (1953) (explaining that sovereign immunity exists in United States even though "the keystone of American political thought has been responsible government"). For further discussion of the doctrine of sovereign immunity, see *infra* notes 28-35 and accompanying text.

2. Parker, *supra* note 1, at 174. Countries such as Germany and France have abolished the doctrine. *Id.* at 167 & n.2. In the United States, prior to the enactment of the Federal Tort Claims Act, some states had already established legislation allowing law suits against the state for state-related tortious acts. H.R. REP. NO. 1287, 79th Cong., 1st Sess. 3-4 (1946).

A concept closely related to government liability is the principle of respondeat superior. Parker, *supra* note 1, at 168. The theory of respondeat superior prescribes that an employer is liable for the torts of an employee if such torts were committed during the course and scope of employment. Merton Ferson, *Bases for Master's Liability and for Principal's Liability to Third Persons*, 4 VAND. L. REV. 260, 263 & n.14 (1951). Nevertheless, respondeat superior has historically been held inapplicable to the government because if "the king would not be liable had he done the act himself . . . it follows that he is not responsible for acts of inferior organs." Parker, *supra* note 1, at 168.

3. See *Spalding v. Vilas*, 161 U.S. 483 (1896) (finding Postmaster General immune from suit while performing general duties of employment); *Dow v. Johnson*, 100 U.S. 158 (1879) (finding United States Army officer not liable "for injuries resulting from his military orders or acts"); *Lamar v. Browne*, 92 U.S. 187 (1875) (granting immunity to United States Treasury Agents acting within scope of employment).

4. PETER H. SCHUCK, *SUING GOVERNMENT, CITIZEN REMEDIES FOR OFFICIAL WRONGS* xvii (1983). Existing evidence demonstrates that most government officials who are sued are the lower, "rank-and-file" employees or the "street-level bureaucrats," such as police officers, schoolteachers and social workers. *Id.* at xvii-xviii. However, courts have generally held that higher-ranking employees are im-

ment of this doctrine of official immunity, victims of government-related torts were left with little available relief for tort claims.⁵

To remedy the inequity of this situation, Congress enacted the Federal Tort Claims Act (FTCA) in 1946, which waived a portion of the federal government's sovereign immunity.⁶ Under the FTCA, the federal government assumed exclusive responsibility, with some exceptions, for certain types of torts committed by federal employees acting within the scope of their employment.⁷ Therefore, the federal government became the sole defendant in any resulting liti-

ture from liability via the common-law doctrine of official immunity, leaving the "rank-and-file" employees with the protection of immunity. *Id.* at xviii.

5. *Id.* at 37-38. To handle a portion of the suits against the federal government and to provide a forum for the claims of government tort victims, the Court of Claims was established in 1863. *Id.* Its jurisdiction, however, extended only to claims against the government based on contract; "tort claims were explicitly barred." *Id.* Several decades later, patent infringement cases could be brought before the Court of Claims, and eventually, the Court of Claims was granted jurisdiction to hear suits involving government ships that committed admiralty and maritime torts. *Id.* at 39.

Alternatively, victims could attempt to get a private bill passed through the legislature, but this process was inefficient and unfair. H.R. REP. NO. 1287, 79th Cong., 1st Sess. 2 (1946); see Note, *Private Bills in Congress*, 79 HARV. L. REV. 1684, 1688-1703 (1966) (providing detailed description of private bill process). For further discussion of the history and relevant statistics regarding private bills in Congress, see *infra* notes 33-35 and accompanying text.

6. Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680 (1988). Congress had previously held numerous debates over enacting a bill that would abrogate a portion of the government's immunity. See WILLIAM B. WRIGHT, *THE FEDERAL TORT CLAIMS ACT* 5 (1957) (describing years of "Congressional consideration"). Congressional subcommittees proposed numerous legislative drafts that were rejected by Congress between 1916 and 1946. *Id.*; see also LESTER S. JAYSON, *1 HANDLING FEDERAL TORT CLAIMS* §§ 2.01-2.10 (1994) (providing in-depth examination of century of bills and other legislation considered or enacted relating to government torts); SCHUCK, *supra* note 4, at 38-39 (same).

For a general overview of the FTCA, see Herbert R. Baer, *Suing Uncle Sam in Tort: A Review of the Federal Tort Claims Act and Reported Decisions to Date*, 26 N.C. L. REV. 119 (1948); Irvin M. Gottlieb, *The Tort Claims Act Revisited*, 49 GEO. L.J. 539 (1961); Irvin M. Gottlieb, *The Federal Tort Claims Act — A Statutory Interpretation*, 35 GEO. L.J. 1 (1946) [hereinafter Gottlieb, *The Federal Tort Claims Act*].

7. 28 U.S.C. § 1346(b). Section 1346(b) specifically provides that:

Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States . . . for injury or loss . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his [or her] office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id. As the statute indicates, state standards determine the scope of employment; these standards depend on the state in which the tort was committed. *Johnson v. Carter*, 983 F.2d 1316, 1322 (4th Cir.) (citing *Williams v. United States*, 350 U.S. 857 (1955) (per curiam)), *cert. denied*, 114 S. Ct. 57 (1993).

gation.⁸ As originally enacted, the FTCA only applied to torts committed by employees in the executive branch of the government.⁹ Congress subsequently amended the FTCA by enacting the Federal Employees Liability and Reform Tort Compensation Act (the Westfall Act).¹⁰ The Westfall Act encompassed acts committed by employees of the judicial and legislative branches as well as those committed by executive branch employees.¹¹

In April of 1994, the United States Court of Appeals for the Seventh Circuit was confronted with the task of examining the boundaries of the Westfall Act in *Sullivan v. United States*.¹² Deciding an issue of first impression, the Seventh Circuit held that the Westfall Act applied to allegations of malpractice against federal public defenders — individuals who maintain an adversarial relationship with the government.¹³ Thus, the Seventh Circuit interpreted the FTCA to mean that the federal government remains the

8. 28 U.S.C. § 1346(b).

9. 28 U.S.C. § 2671 (prior to 1988 amendment).

10. Federal Employees Liability Reform and Tort Act (the Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified as amended at 28 U.S.C. §§ 1346(b), 2671-2680).

11. 28 U.S.C. § 2671. In 1988, responding to the decision of the United States Supreme Court in *Westfall v. Erwin*, 484 U.S. 292 (1987) (superseded by statute), Congress amended the FTCA by enacting the Westfall Act. § 2(a)(4), 102 Stat. at 4563. One section of the Westfall Act redefined the term “employee of the government” as used in the FTCA to encompass any employee of any federal agency, including those within the legislative and judicial branches. 28 U.S.C. § 2671.

The Westfall Act also provided for the substitution of the United States government as sole defendant in all applicable suits against a government employee. 28 U.S.C. § 2679(b)(1). Under the Westfall Act, no suit could be brought against the employee in a personal capacity either in state or federal court. *Id.* The current version of § 2679(b)(1) states:

The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury . . . arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his [or her] office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

Id.

12. 21 F.3d 198 (7th Cir.), *cert. denied*, 115 S. Ct 670 (1994).

13. *Id.* at 200. The court held “that a federal public defender . . . is an ‘employee of the government’ for purposes of 28 U.S.C. § 2671 and that the defender acts within the scope of that employment when representing his [or her] clients.” *Id.* Congress created the position of federal public defender in 1970. 116 CONG. REC. 34,809, 34,811 (1970). Some members of Congress adamantly contested this position in earlier versions of the Criminal Justice Act, and thus, the position did not appear in the Criminal Justice Act until after a detailed study was conducted

exclusive defendant in malpractice suits against federal public defenders.¹⁴

Significantly, the Seventh Circuit's holding in *Sullivan* arguably rejects the reasoning of two cases previously decided by the United States Supreme Court. First, *Sullivan* disregards the Supreme Court's holding in *Polk County v. Dodson*.¹⁵ In *Polk County*, the Court held that a public defender does not act under color of state law when representing an indigent client.¹⁶ The Court in *Polk County* was addressing an issue analogous to public defender liability under the FTCA: public defender liability under the Civil Rights Act of 1964 as codified in 42 U.S.C. § 1983 (§ 1983).¹⁷ In deciding the case, the Supreme Court focused on the antagonistic relationship between public defenders and the government as well as the similarities between public defenders and private attorneys.¹⁸ Second, the holding in *Sullivan* also ignores similar reasoning articulated in *Ferri v. Ackerman*,¹⁹ where the Supreme Court held that court-appointed attorneys representing criminal defendants do not have immunity from liability.²⁰

Regardless of Supreme Court precedent, if the Seventh Circuit's reasoning, but not its conclusion, is considered, federal public defenders would be immune from suit under the Westfall Act due to their status as judicial branch employees. However, similar immunity would not extend to private, court-appointed attorneys also accused of malpractice when representing an indigent defendant because technically, these court-appointed attorneys are not employees of the government.²¹ Finally, it is possible that allowing such immunity could be detrimental to the quality of representa-

under Congress' mandate in order to determine if the position was necessary. *Id.* at 34,813-14 (remarks of Rep. Kastenmeier).

14. See *Sullivan*, 21 F.3d at 206 (concluding that plaintiff's "exclusive remedy for the [public] defender's alleged malpractice is thus an action against the United States under the FTCA").

15. 454 U.S. 312 (1981).

16. *Id.* at 324-25. An employee is deemed to be acting under color of law when functioning for or on behalf of the government. *Id.* at 317-318 (citing *United States v. Classic*, 313 U.S. 299, 326 (1941)).

17. *Id.* at 314.

18. *Id.* at 318-25. For further discussion of the holding and factual context of *Polk County*, see *infra* notes 60-64 and accompanying text.

19. 444 U.S. 193 (1979).

20. *Id.* at 205. For further discussion of the facts and outcome of *Ferri*, see *infra* notes 46-54 and accompanying text.

21. See *Sullivan v. United States*, 21 F.3d 198, 201-03 (7th Cir.) (stressing plain-meaning interpretation of word "employee"), *cert. denied*, 115 S. Ct. 670 (1994).

tion provided to indigent defendants in the future.²²

This Casenote examines the propriety of substituting the United States as defendant in a legal malpractice suit against a federal public defender. Part II of this Casenote discusses the origin of the doctrines of sovereign immunity and official immunity in the United States and further examines how Congress has acted to diminish the effect of these doctrines.²³ Part III provides the factual background of *Sullivan* and discusses the Seventh Circuit's rationale in deciding *Sullivan*.²⁴ Part IV argues that the Seventh Circuit overlooked the reasons for granting immunity and failed to consider a possibly valid exception to the FTCA/Westfall Act: malpractice suits against federal public defenders who are "government employees" in name only, but certainly not in function, should retain the public defender as defendant.²⁵ This exception would hold federal public defenders individually liable for acts or omissions constituting malpractice that they committed while representing a criminal defendant. Finally, Part V considers the potential impact of the Seventh Circuit's ruling in *Sullivan* on future government-tort litigation as well as its possible effect on the occupations of both federal public defenders and private court-appointed defenders.²⁶ Part V also suggests a possible middle-ground approach that would ensure competent representation for indigent criminals but not deter individuals from pursuing positions as public defenders.²⁷

22. See Kenneth S. Schlesinger, Comment, *Polk County v. Dodson: Liability Under Section 1983 for a Public Defender's Failure to Provide Adequate Counsel*, 70 CAL. L. REV. 1291, 1303 (1982) (remarking that imposing liability on public defender may have beneficial effect on quality of counsel). Given the lay society's somewhat hostile reaction to the legal profession in general, extending immunity for public-defender malpractice would not help assuage any tainted conception of attorneys. Jeffrey H. Rutherford, Comment, *Dziubak v. Mott and the Need to Better Balance the Interests of the Indigent Accused and Public Defenders*, 78 MINN. L. REV. 977, 979 (1994).

23. For a chronological history of the FTCA, analogous legislation and relevant case law, see *infra* notes 36-80 and accompanying text.

24. For an examination of the factual context and the United States Court of Appeals for the Seventh Circuit's opinion in *Sullivan*, see *infra* notes 81-108 and accompanying text.

25. For a thorough critique of the Seventh Circuit's reasoning and ultimate conclusions of law, see *infra* notes 109-54 and accompanying text.

26. For a discussion of the impact of *Sullivan*, see *infra* notes 155-67 and accompanying text.

27. For a possible solution to the dilemma of federal public defender malpractice liability, see *infra* notes 155-67 and accompanying text.

II. FEDERAL EMPLOYEE/GOVERNMENT LIABILITY

A. Common Law

The belief that “the King c[ould] do no wrong” originated under English law.²⁸ The early American colonists carried this belief with them to the New World.²⁹ However, as the United States developed, this maxim frustrated thousands of victims of tortious acts committed by the United States government through the conduct of its employees.³⁰ This sense of futility increased significantly as the United States matured because, subsequently, a large majority of the “King’s” servants were also considered beyond the reach of litigation.³¹ As a result, numerous victims of government-related negligence were prevented from turning to the courts for relief.³² Furthermore, the unwieldy process of obtaining approval and passage of private legislation for relief increased victims’ frustration.³³ Congress also experienced aggravation because it seemed that for every tort victim, there was a corresponding bill for relief needing consideration.³⁴ Both the legislature and the people of the United

28. W. BLACKSTONE, 1 COMMENTARIES ON THE LAW OF ENGLAND, 241-42 (1765). This maxim generally has been held to mean that the government cannot be sued without its consent. SCHUCK, *supra* note 4, at 30-31. Early colonists brought with them the English legal concept of sovereign immunity. After the founding of the United States of America, the doctrine was initially addressed in 1793 when the Supreme Court decided *Chisholm v. Georgia*, 2 U.S. (4 Dall.) 419 (1793). WRIGHT, *supra* note 6, at 1. In *Chisholm*, the Supreme Court found that the state of Georgia was amenable to suit, stating that “all men ought to obtain justice, since in the estimation of justice, all men are equal, whether the prince complain of a peasant or the peasant complain of a prince.” *Id.* at 1 (quotation omitted). The Eleventh Amendment to the United States Constitution effectively reversed the *Chisholm* decision by establishing the supremacy of the sovereign. *Id.* at 1-2.

29. See JAYSON, *supra* note 6, § 2.01 (explaining that “[t]he doors of the courts were closed to [victims] . . . because of the long-established principle, inherited from the law of England and rigidly adhered to by judicial decisions in [the United States] . . . since its beginning, that no suit may be brought against the sovereign without his consent”).

30. See *id.* (providing example of frustration and shock of victims of 1946 military plane crash into Empire State Building when told government could not be held responsible).

31. See Parker, *supra* note 1, at 174-76 (explaining history and rationale behind concept of official immunity).

32. *Id.*

33. SCHUCK, *supra* note 4, at 37.

34. WRIGHT, *supra* note 6, at 2-3. In the years immediately preceding the enactment of the FTCA, Congress spent a large portion of time addressing these claims:

In the Sixty-eighth Congress about 2,200 private claim bills were introduced, of which 250 became law . . . in the Seventieth Congress 2,268 private bills were introduced . . . in each of the Seventy-fourth and Seventy-fifth Congresses over 2,300 private bills claims were introduced . . . In the Seventy-sixth Congress approximately 2,200 bills were introduced

States agreed that Congress needed to take steps to eliminate this situation.³⁵

B. *Legislation for the Victims*

1. *Congress Finally Responds: Enactment of the Federal Tort Claims Act*

To provide a method of obtaining compensation for the victims and to lighten the burden on the legislature, Congress passed the Federal Tort Claims Act (FTCA) in 1946.³⁶ Through the FTCA, Congress waived some of the federal government's immunity, admitting that perhaps the "King and his servants" did do wrong on occasion.³⁷ The FTCA established the exclusive liability of the federal government for common-law torts committed by government employees acting within the scope of their employment.³⁸ Thus, no government employee could be sued individually; the full responsibility of the tort fell on the federal government.³⁹

The FTCA, however, contained numerous exceptions. For instance, claims based on the performance of discretionary acts, claims alleging intentional torts and claims related to injuries sustained during wartime are examples of situations not covered by the FTCA, thereby leaving the victims without recourse.⁴⁰ Under

. . . in the Seventy-seventh Congress . . . 1,829 private claim bills [were] introduced In the Seventy-eighth Congress, 1,644 bills were introduced.

Id. at 3 n.7 (citing H.R. REP. NO. 1287, 79th Cong., 1st Sess., 2 (1946)). Two significant and complementary reasons for the volume of claim bills were the expanding scope of the federal government's activities and the ever-increasing size of the federal government's work force. *Id.* at 4.

35. See JAYSON, *supra* note 6, § 2.02 (1994) (describing "steady stream of grumbling, criticism, comment, and debate among the legislators and others concerned which was destined to continue until the enactment of the Federal Tort Claims Act in 1946").

36. 28 U.S.C. §§ 1346(b), 2671-2680 (prior to 1988 amendment).

37. Gottlieb, *The Federal Tort Claims Act*, *supra* note 6, at 2.

38. 28 U.S.C. § 1346(b). For the full text of § 1346(b), see *supra* note 7.

39. *Id.*

40. 28 U.S.C. § 2680(a), (h), (j). The exception generating the most controversy and a significant amount of claims is the discretionary-act exception. JAYSON, *supra* note 6, § 249.01. The discretionary-act exception provides, in relevant part, that:

The provisions of this chapter and section 1346(b) of this title shall not apply to -

(a) Any claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a).

Typically, the methods attorneys choose to defend their clients are very much

the FTCA's original form, the liability of the federal government only extended to employees of agencies within the executive branch.⁴¹ In fact, numerous courts held that the individuals employed in the judicial branch of the federal government were excluded from the FTCA; therefore, the federal government could not be sued for the negligence of judicial employees.⁴² Furthermore, based on the common-law doctrine of official immunity, judicial employees were also individually immune from suit because of the discretion involved in their positions.⁴³ Thus, under the com-

a product of professional judgment and, therefore, could be considered discretionary acts. See *Hodges v. Carter*, 80 S.E.2d 144, 146 (N.C. 1954) (explaining attorney's use of judgment when acting in best interests of client). Recently, the Supreme Court described the significant characteristic of a discretionary act: "[A] court must first consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). The standard of care applicable to attorneys in malpractice actions requires consideration of whether the attorneys exercised their best judgment and made the correct choice in the case. See *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 32, at 185-87 (5th ed. 1984) (explaining standard of care for physicians but noting similarity with that of attorneys). The judgment and choice made are then compared to the procedure typically followed by others in the profession. *Id.* Therefore, under the FTCA's discretionary-act exception, one could argue that the government should not be subject to liability for a public defender's improper choice of defense strategy. See 28 U.S.C. § 2680(a). Consequently, the victim would be left with no remedy. Congress, however, enacted the FTCA to allow victims to recover for injuries caused by government torts. Baer, *supra* note 6, at 119-25. Nevertheless, the Supreme Court has held that the ultimate prevention of suit against the government by the use of an exception to the FTCA does not prohibit granting immunity to an employee. *United States v. Smith*, 499 U.S. 160, 165 (1991).

However, the situation posed above is highly unlikely because the Court has been very clear in defining "discretionary acts." See *Berkovitz*, 486 U.S. at 537-39. Significantly, the exception only applies when individuals are making a public-policy decision that affects society as a whole. *Id.* In contrast, a public defender is only acting in the best interests of his or her client; he or she is not acting in the best interests of the public. *Polk County v. Dodson*, 454 U.S. 312, 318-19 (1981). Thus, the discretionary-act exception is not applicable to malpractice suits against federal public defenders. For a review of the purpose behind the FTCA, see *supra* notes 5-6 and accompanying text.

41. For a discussion of the limitations of the pre-1988 version of the FTCA, see *supra* text accompanying note 9.

42. *Sullivan v. United States*, 21 F.3d 198, 202-03 (7th Cir.) (citing *Cromelin v. United States*, 177 F.2d 275, 277 (5th Cir. 1949) (finding that FTCA does not apply to judge and trustee of court), *cert. denied*, 399 U.S. 944 (1950)), *cert. denied*, 115 S. Ct. 670 (1994); *Tomalewski v. United States*, 493 F. Supp. 673, 675 (W.D. Pa. 1980) (holding that court clerks and judges, as judicial branch employees, are not covered by FTCA); *Foster v. Bork*, 425 F. Supp. 1318, 1319-20 (D.D.C. 1977) (same). *But see* *United States v. LePatourel*, 571 F.2d 405, 408-10 (8th Cir. 1978) (holding that FTCA covered judicial branch employees), *cert. denied*, 115 S. Ct. 670 (1994). The Westfall Act effectively superseded the *Cromelin*, *Tomalewski* and *Foster* decisions.

43. See *Foster v. MacBride*, 521 F.2d 1304, 1305 (9th Cir. 1975) (holding that

mon law, the government and particular government employees retained absolute immunity for any tortious act.⁴⁴ However, it is important to recognize that the position of federal public defender did not exist until the mid-1900s; therefore, the doctrine of official immunity that developed through the common law for other government employees has never been available as a defense for the public defender in the absence of FTCA coverage.⁴⁵

In the late 1970s and 1980s, case law emerged that provides guidance on the relationship between the government and an attorney representing a criminal defendant. These cases demonstrate the Supreme Court's attitude towards granting immunity to defense counsel.

For example, in 1979, the Supreme Court addressed the issue of appointed defense counsel's liability for malpractice in *Ferri v. Ackerman*.⁴⁶ In *Ferri*, the Court held that, under federal law, a private, court-appointed attorney is not entitled to absolute immunity in a state malpractice suit even though the attorney received compensation from the federal government; therefore, the attorney was individually liable.⁴⁷ Interestingly, the Court never mentioned or considered whether the FTCA applied, most likely because the attorney involved was not a public defender, but rather a private,

judge was not covered under FTCA but immune nonetheless); *Dziubak v. Mott*, 503 N.W.2d 771, 774-75 (Minn. 1993) (explaining that independent discretion exercised by members of judiciary warrants protection).

44. See *Parker*, *supra* note 1, at 174 ("Not only is the liability of his [or her] superior, the Government, strictly limited on the ground of sovereign immunity, but also his [or her] own liability will be regularly disclaimed because of actual or imagined reasons of public policy.").

45. Francis P. McCune, *Recent Cases*, 51 U. CIN. L. REV. 724, 727 (1982) (explaining that because Supreme Court did not acknowledge indigent defendant's constitutional right to counsel until its decision in *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), common-law doctrine of sovereign immunity not applicable to newly-created position of public defender).

46. 444 U.S. 193 (1979). The plaintiff, an indigent, sued his former attorney in state court alleging that his attorney committed 67 different acts of malpractice during the indigent's previous federal trial. *Id.* at 195. A federal judge had appointed the attorney, *Ackerman*, to represent the indigent. *Id.* at 194.

47. *Id.* at 205. The Pennsylvania Supreme Court had determined that federal law should control whether the defender was granted immunity because the defender was a "participant in a federal proceeding." *Id.* at 196-97 & n.10 (citations omitted). The United States Supreme Court agreed that federal law should control that determination but ultimately reversed the Pennsylvania Supreme Court's finding that federal law provided immunity for a public defender. *Id.* at 205; see also *Westfall v. Erwin*, 484 U.S. 292, 295 (1988) (stating that "the scope of absolute official immunity afforded federal employees is a matter of federal law, 'to be formulated by the courts in the absence of legislative action by Congress'") (quoting *Howard v. Lyons*, 360 U.S. 593, 597 (1959)).

court-appointed attorney.⁴⁸ Instead, the Court focused on the differences between appointed counsel and other judicial employees.⁴⁹ In particular, the Court emphasized the differing loyalties involved in each occupation.⁵⁰ The Court found that while an appointed counsel owes the utmost loyalty to his or her client, other judicial-branch workers “represent the interest of society as a whole.”⁵¹ The Court also commented extensively on the similarities between lawyers appointed to represent indigent defendants and privately-retained attorneys.⁵² For example, both attorneys are required to “serve the undivided interests of [their] client[s].”⁵³ In addition, the *Ferri* Court noted that both attorneys must act independently of, and adversarial to, the government in a criminal proceeding.⁵⁴

2. Analogous § 1983 — Color of Law Issues

In addition to the enactment of the FTCA, Congress sought to provide other avenues of accountability for government tortfeasors who injure the people of the United States. By enacting § 1983,⁵⁵ Congress devised a means of compensating victims of injuries caused by government employees or private individuals acting on behalf of the government.⁵⁶ Specifically, Congress mandated that, under § 1983, a government employee can be held individually lia-

48. *Ferri*, 444 U.S. at 194.

49. *Id.* at 202-03. Other members of the judiciary, such as judges and prosecutors, require immunity to effectively and efficiently perform their duties. *Id.* at 202 (citing *Barr v. Mateo*, 360 U.S. 564, 571-72 (1958)). However, “[t]he primary rationale for granting immunity to judges, prosecutors, and other public officers does not apply to defense counsel sued for malpractice by his own client.” *Id.* at 204.

50. *See id.* at 202 & n.19 (citing to Court’s earlier decisions in *In re Griffiths*, 413 U.S. 717, 728-29 (1972), and *Cammer v. United States*, 350 U.S. 399, 405 (1956), in support of proposition that lawyer has different set of responsibilities than other government officers).

51. *Id.* at 203-04.

52. *Id.* at 204.

53. *Id.*

54. *Id.*

55. 42 U.S.C. § 1983 (1988).

56. MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, 1 SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES § 1.1, at 4 (2d ed. 1991). Federal prisoners like Sullivan often use § 1983 to file suits against government officials. *Id.* § 1.1, at 5. “During the 12-month period ending June 30, 1988, over 24,000 prisoner civil rights actions . . . were filed in federal court.” *Id.* (citation omitted). However, Sullivan’s complaint did not involve § 1983 because “claims of legal malpractice do not achieve constitutional status solely by virtue of a claimant’s status as a defendant in a criminal proceeding.” *Brown v. Schiff*, 614 F.2d 237, 239 (10th Cir.), *cert. denied*, 446 U.S. 94 (1980).

ble for violating the constitutional or statutory rights of the plaintiff.⁵⁷ However, this liability attaches only if the employee is acting under color of state law.⁵⁸ If the employee is found not to have acted under color of state law, the employee is then immune from suit in a § 1983 action.⁵⁹

In 1981, the Supreme Court considered a § 1983 cause of action involving a public defender in *Polk County v. Dodson*.⁶⁰ In *Polk County*, a criminal defendant sued a county public defender under § 1983 alleging that the public defender provided ineffective assistance of counsel in violation of the defendant's constitutional rights.⁶¹ The Court held that a public defender does not act under color of state law when representing a federal prisoner.⁶² There-

57. 42 U.S.C. § 1983. The statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

58. *Id.* For an analysis of potential plaintiffs, defendants and the procedural workings of § 1983 litigation, see SCHWARTZ & KIRKLIN, *supra* note 56.

59. See SCHWARTZ & KIRKLIN, *supra* note 56, § 5.4, at 253 ("A claim for relief under § 1983 may be asserted only against persons who acted under color of state . . . law."). Additionally, a plaintiff in a potential § 1983 action can seek alternative remedies such as state administrative remedies. *Id.* § 10.1., at 589-91. However, there is no requirement that the plaintiff exhaust these alternative administrative remedies before commencing a suit in federal court under § 1983. *Id.* Also, in a § 1983 action, the employee can be held personally liable. J. Devereux Weeks, *Personal Liability Under Federal Law: Major Developments Since Monell*, in SECTION 1983: SWORD AND SHIELD 295, 301-05 (Robert H. Freilich & Richard G. Carlisle eds., 1983).

In contrast, the FTCA is an exclusive remedy, and therefore, if the FTCA covers a particular employee, all threat of personal liability ends for that individual. 28 U.S.C. § 2679 (1988). Furthermore, the FTCA requires that, before instituting an action against the United States in federal court, the plaintiff must have presented his or her claim to the appropriate federal agency and been denied relief. 28 U.S.C. § 2675(a). Indeed, the court in *Sullivan v. United States* affirmed the district court's dismissal of the case for precisely this failure to exhaust administrative remedies. 21 F.3d 198, 206 (7th Cir.), *cert. denied*, 115 S. Ct. 670 (1994).

60. 454 U.S. 312 (1981).

61. *Id.* at 314. The county defender moved to withdraw herself as counsel based on her view that the indigent defendant's grounds for appeal were frivolous. *Id.* The defendant argued that this motion to withdraw had violated his Sixth Amendment right to counsel, his Eighth Amendment right to not be subjected to cruel and unusual punishment, and his Fourteenth Amendment right to due process. *Id.* at 315.

62. *Id.* at 317-18 (citing *United States v. Classic*, 313 U.S. 299, 326 (1941)).

fore, the Court dismissed the complaint against the public defender.⁶³ Once again, the Court focused on the function rather than the form of the office of public defender and determined that the relationship between a public defender and criminal defendant does not differ from the relationship between a private attorney and criminal defendant.⁶⁴

Following *Polk County*, the Supreme Court had an additional opportunity to analyze the importance of the relationship between an alleged tortfeasor and the government when it decided another § 1983 case, *West v. Atkins*.⁶⁵ In *West*, the defendant was a private physician who provided medical services to prisoners at a state prison.⁶⁶ Relying in part on the physician's contractual relationship with the state and the physician's cooperation with the government to achieve a common goal, the Supreme Court held that the physician was acting under color of state law.⁶⁷ The physician was, therefore, held personally responsible for any violation of the prisoner's constitutional rights.⁶⁸ The Court made this decision despite the fact that the physician was technically not an employee of the government.⁶⁹

C. The *Westfall v. Erwin* Decision

The impetus for Congress' decision to put a halt to the potential liability of rank-and-file government employees, employees in lower-level government positions, came in January of 1988 with the case of *Westfall v. Erwin*.⁷⁰ In *Westfall*, the plaintiff sued two civilian warehouse supervisors of an army depot for negligence.⁷¹ The de-

63. *Id.* at 325.

64. *Id.* at 318-24. The Court stated that "[t]his is essentially a private function, traditionally filled by retained counsel, for which state office and authority are not needed." *Id.* at 319; see also *West v. Atkins*, 487 U.S. 42, 56 & n.15 (1988) (discussing relevance of employee's function in determining whether employee is acting under color of state law); Jeffrey C. Gilbert, *In Defense of Public Defenders: Polk County v. Dodson*, 36 U. MIAMI. L. REV. 599 (1982) (explaining Court's development of "functions" test as applied in *Polk County*).

65. 487 U.S. 42 (1988). For further discussion of *West*, see *infra* notes 148-53 and accompanying text.

66. *Id.* at 44.

67. *Id.* at 56-57.

68. *Id.*

69. *Id.* at 44.

70. 484 U.S. 292 (1988) (superseded by statute).

71. *Id.* at 293. *Westfall* was injured by toxic soda ash which burned his eyes and throat upon inhalation. *Id.* at 294. He alleged that the ash was "improperly and negligently stored" and that the supervisors had taken no precautions to prevent worker injury. *Id.*

endants were considered employees of the executive branch.⁷² The Supreme Court held that the FTCA would apply and provide the supervisors with immunity from personal liability *only* if they were acting within the scope of their employment *and* performing a discretionary function related to that employment.⁷³ Accordingly, actions could be brought against the two employees in their personal capacities unless, upon further investigation, the actions taken were within the two employees' scope of duty and of a discretionary nature.⁷⁴

D. *Congressional Reaction to Westfall*

Alarmed by the possibility of massive litigation against the "rank-and-file" employees of the federal government as well as individual members of Congress due to the *Westfall* decision, Congress acted swiftly to amend certain provisions of the FTCA.⁷⁵ The result-

72. *Id.* at 293.

73. *Id.* at 300. "[A]bsolute immunity does not shield official functions from state-law tort liability unless the challenged conduct is within the outer perimeter of an official's duties and is discretionary in nature." *Id.*

74. *Id.* at 300. The Court held that the Court of Appeals correctly concluded that the granting of summary judgment was inappropriate because a genuine issue of material fact regarding the character of the two employees' conduct existed. *Id.*

75. Federal Employees Liability Reform and Tort Compensation Act (the *Westfall Act*), Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified as amended at 28 U.S.C. §§ 1346(b), 2671-2680). Section 2 of the *Westfall Act* details Congress' rationale in enacting the legislation. Section 2 provides:

(a) FINDINGS. — The Congress finds and declares the following:

(1) For more than 40 years the Federal Tort Claims Act has been the legal mechanism for compensating persons injured by negligent or wrongful acts of Federal employees committed within the scope of their employment.

(2) The United States, through the Federal Tort Claims Act, is responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment.

(3) Because Federal employees for many years have been protected from personal common law tort liability by a broad based immunity, the Federal Tort Claims Act has served as the sole means for compensating persons injured by the tortious conduct of Federal employees.

(4) Recent judicial decisions, and particularly the decision of the United States Supreme Court in *Westfall v. Erwin*, have seriously eroded the common law tort immunity previously available to Federal employees.

(5) This erosion of immunity of Federal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce.

(6) The prospect of such liability will seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts.

ing amendment was the Federal Employees Liability Reform and Tort Compensation Act (the Westfall Act).⁷⁶ Significantly, the Westfall Act provides that the government is *exclusively* liable for torts committed by government employees.⁷⁷ Therefore, individual employees are personally protected from suits brought against them by the injured party.⁷⁸ Furthermore, Congress included legislative and judicial personnel in its definition of "federal agency," thus protecting these workers from personal liability.⁷⁹ However, until 1991, no FTCA case had ever discussed whether the Westfall Act applied to federal public defenders.⁸⁰ Thus, the stage was set for the Seventh Circuit's decision in *Sullivan*.

III. Sullivan v. United States

A. Facts

In 1991, Joseph E.L. Sullivan sued two federal public defenders who had previously represented Sullivan in a parole hearing.⁸¹ Sullivan alleged that the public defenders had committed legal malpractice while handling his case.⁸² The federal public defenders

(7) In its opinion in *Westfall v. Erwin*, the Supreme Court indicated that the Congress is in the best position to determine the extent to which Federal employees should be personally liable for common law torts, and that legislative consideration of this matter would be useful.

(b) PURPOSE. — It is the purpose of this Act to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States.

Id. § 2, 102 Stat. at 4563-64.

76. The Westfall Act, 102 Stat. 4563.

77. 28 U.S.C. § 2679(b)(1) (1988). For the text of § 2679(b)(1), see *supra* note 11.

78. *Id.*

79. 28 U.S.C. § 2671 (1988) (definitional section of FTCA).

80. *Sullivan v. United States*, 21 F.3d 198, 201 (7th Cir.), *cert. denied*, 115 S. Ct. 670 (1994).

81. *Sullivan v. Freeman*, 944 F.2d 334, 335 (7th Cir. 1991).

82. *Id.* Sullivan's parole had been revoked. *Id.* Sullivan sued the two public defenders who represented him in the parole hearing alleging malpractice due to ineffective assistance of counsel under Illinois common law. *Id.* Sullivan named the federal public defenders, Freeman and Delworth, as defendants. *Id.* Sullivan sought "\$250,000 in general damages and \$250,000 in punitive damages." Brief for Appellee United States at 1, *Sullivan v. United States*, 21 F.3d 198 (7th Cir.) (No. 93-1364), *cert. denied*, 115 S. Ct. 670 (1994). On its initial hearing of the case, the Seventh Circuit stated that, under Illinois law, the defenders did not possess absolute immunity from a malpractice suit. *Freeman*, 944 F.2d at 335. However, the court mentioned the potential applicability of the Westfall Act, which would provide immunity for the defenders. *Id.* On remand, the Attorney General's office, in compliance with the FTCA, certified that Freeman and Delworth were federal employees, acting within the scope of their employment for purposes of the malpractice suit. *Sullivan*, 21 F.3d at 200. The district court reviewed this certification and

claimed immunity as employees of the government. Pursuant to the FTCA, the United States District Court for the Southern District of Illinois substituted the United States as defendant in the suit and subsequently dismissed the suit.⁸³ On appeal, the Seventh Circuit agreed that federal public defenders were employees of the government and, therefore, held that the public defenders were immune from personal liability due to the applicability of the Westfall Act.⁸⁴

B. *The Seventh Circuit's Rationale in Sullivan*

The first issue addressed by the Seventh Circuit was whether a federal public defender was an employee of the government as contemplated by Congress when enacting the FTCA.⁸⁵ To resolve this issue, the court focused on the definitions provided by the FTCA.⁸⁶ Section 2671 of the FTCA defines "employees of the government" to be any employee of a federal agency.⁸⁷ Moreover, "federal agency" is subsequently defined as including employees in the judicial, legislative and executive branches of the federal government.⁸⁸ The Seventh Circuit reasoned that, because the statute expressly indicates "any" employee, no restriction or exception could be read into what Congress had clearly and explicitly stated.⁸⁹

agreed with the Attorney General's determination of the public defenders' employment status. *Id.*

83. *Sullivan*, 21 F.3d at 201.

84. *Id.* at 201-04. The court stated that no further litigation could be brought against Freeman or Delworth. *Id.* at 200. The case was ultimately dismissed without prejudice because Sullivan failed to exhaust administrative remedies before filing suit as required by the FTCA. *Id.* at 206.

85. *Id.* at 201.

86. *Id.*

87. 28 U.S.C. § 2671 (1988). According to § 2671, "[e]mployee of the government' includes officers or employees of any federal agency, . . . and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." *Id.*

88. *Id.* "Federal agency' includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States." *Id.*

89. *Sullivan*, 21 F.3d at 203. The Seventh Circuit turned to the language of *Smith v. United States*, 499 U.S. 160 (1991), to support this contention. *Id.* "No language in § [2679(b)(1)] or elsewhere in the statute purports to restrict the phrases [sic] 'any employee of the Government' . . ." *Id.* (quoting *Smith v. United States*, 499 U.S. 160, 173 (1991)). However, the *Sullivan* court's plain-language-construction approach is seriously weakened by a recent Congressional bill, regarding the management of the Presidio Trust. Section 3(c)(1)(D) of the bill prescribes that the Board of Directors of the Presidio Trust contain 10 individuals who "are not employees of the Federal Government." H.R. 3433, 103d Cong., 2d Sess., 140 CONG. REC. H8634, H8650 (daily ed. Aug. 18, 1994). However, in

To bolster its opinion, the Seventh Circuit also relied on the Criminal Justice Act as codified in 18 U.S.C. § 3006A, which authorizes the United States district courts to establish the position of federal public defender.⁹⁰ The court held that the language used in the Criminal Justice Act suggests that a federal public defender holds typical employee status because the government controls various aspects of the federal public defender's office.⁹¹ The *Sullivan* court grudgingly conceded that the actions of a public defender were not normally attributable to the government given their adverse relationship.⁹² However, in the court's view, that did not matter because control only seemed to be an issue in the pre-Westfall Act days.⁹³ For the Seventh Circuit, once the Westfall Act extended immunity to the judicial branch, the importance of the concept of control disappeared.⁹⁴

The court distinguished the facts in *Sullivan* from those in *Ferri v. Ackerman*, wherein the Supreme Court held that an appointed

§ 3(e)(5), members of the Board of Directors are not considered federal employees solely because of their status as Board members "except for purposes of the Federal Tort Claims Act. . . ." *Id.* at H8651. Thus, Congress is indicating that actual "employment status" is not the sole factor determining whether the FTCA applies. For further discussion of whether a federal public defender functions as a typical employee, see *infra* notes 109-34 and accompanying text.

90. *Sullivan*, 21 F.3d at 202. The Criminal Justice Act mandates that a plan for representation of indigents be implemented in each United States district court. 18 U.S.C. § 3006A(a) (1988). Representation shall be provided by appointed, private attorneys for the majority of the cases, but attorneys can also come from a defender organization. *Id.* § 3006A(a)(3). Section 3006A(g)(2)(A) describes the characteristics and responsibilities of a Federal Public Defender Organization. *Id.* § 3006A(g)(2)(A).

91. *Sullivan*, 21 F.3d at 202 (citing 18 U.S.C. § 3006A(g)(2)(A) (1988)). Specifically, the court noted the control the judicial branch of the government has over appointing and removing federal public defenders. *Id.* The Criminal Justice Act gives the courts of appeals and the Director of the Administrative Office of the United States Courts (the Director) power to determine the size of the Defender staff. *Id.* Another aspect of control significant to the court was that federal public defenders' salaries are set by the courts of appeals to be commensurate with that paid to the United States attorney in a comparable jurisdiction. *Id.* Finally, the Seventh Circuit noted that the federal public defender's office is required to turn in periodic activity reports and a proposed budget. *Id.* The Director then approves the budget and assumes responsibility for making any necessary payments on behalf of the Federal Public Defender Organization. *Id.*

92. *Id.* The Seventh Circuit quoted the remarks it made in *Sullivan v. Freeman*: "It would be odd to make the federal government answerable for the legal malpractice of federal public defenders, when the acts constituting malpractice are beyond the federal government's power to control." *Id.* (quoting *Sullivan v. Freeman*, 944 F.2d 334, 336 (7th Cir. 1991)).

93. *Id.* at 203. "[T]he plain language of the [Westfall] Act must trump any 'control test' in the context of judicial branch employees." *Id.*

94. *Id.* For further discussion on the concept of control in any employee-employer relationship, see *infra* notes 111-19 and accompanying text.

attorney lacked absolute immunity under federal law in a state malpractice suit.⁹⁵ The Seventh Circuit placed a great deal of weight on the Supreme Court's comment in dicta that " 'federal law does not *now* provide immunity for court-appointed counsel in a state malpractice suit.' "⁹⁶ The Seventh Circuit reasoned that the *Ferri* Court was suggesting that Congress could provide immunity for court-appointed attorneys and in the Seventh Circuit's opinion, Congress did just that with the Westfall Act.⁹⁷

The Seventh Circuit also distinguished *Polk County v. Dodson*, wherein the Supreme Court held that a county public defender when representing an indigent did not act under color of state law due to the adversarial nature of the public defender's position with the government.⁹⁸ Therefore, the defender could not be held liable under § 1983.⁹⁹ For purposes of *Sullivan*, the court said that, in contrast to a § 1983 suit where a defendant must be acting under color of law to be liable, an FTCA suit does not require that the employee be acting under color of law.¹⁰⁰ Rather, for substitution to occur under the FTCA, the defendant must simply be "any employee of the government."¹⁰¹ With that reasoning, the Seventh Circuit focused on statements in *Polk County* and other Supreme Court cases where the Court stated that a public defender clearly was an employee of the government.¹⁰²

In his appeal, Sullivan presented a statutory argument postulating that, if the Westfall Act were to apply, it would effectively repeal a currently existing statute: specifically, it would repeal the section

95. *Id.* For a discussion of the *Ferri v. Ackerman* decision, see *supra* notes 46-54 and accompanying text.

96. *Sullivan*, 21 F.3d at 203 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 205 (1979)).

97. *See id.* at 203 n.9 (acknowledging Supreme Court's invitation to Congress to set immunity standards for federal employees in *Westfall v. Erwin*, 484 U.S. 292 (1988)).

98. 454 U.S. 312, 320 (1981). A criminal defendant sued the county public defender for inadequate representation in an appeal proceeding. *Id.*

99. *Id.* at 325.

100. *Sullivan*, 21 F.3d at 204. The Seventh Circuit did not focus on the arguments or rationale behind the § 1983 decisions but rather concentrated on the wording used by the courts in numerous cases, including *Polk County*, in which a public defender was called "an employee of the government." *Id.*

101. *Id.* "[A]ny employee" is the exact wording used in the FTCA. 28 U.S.C. § 1346(b) (1988). For the full text of § 1346(b), see *supra* note 7.

102. *Sullivan*, 21 F.3d at 204 (citing *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 626 (1991) (commenting on employment relationship between public defender and government); *Blum v. Yaretsky*, 457 U.S. 991, 1009 (1982) (describing public defender as state employee); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935-36 n.18 (1982) (same); *Polk County v. Dodson*, 454 U.S. 312, 322 n.12 (1981) (stating public defender is county employee)).

of the Criminal Justice Act that provides for the purchase of malpractice insurance or the indemnification of federal public defenders.¹⁰³ Sullivan argued that this would contravene the canon of construction disfavoring implied repeals of prior statutes.¹⁰⁴ The Seventh Circuit disposed of this argument by citing the Supreme Court's ruling in *United States v. Smith*.¹⁰⁵ In *Smith*, the Supreme Court rejected the argument that the Court was impliedly repealing a portion of the Gonzalez Act, which provided military physicians with malpractice insurance, or indemnification for negligence, or both, by finding a military physician immune from liability via the FTCA.¹⁰⁶ The *Smith* Court said that the Westfall Act did not repeal the Gonzalez Act but merely provided another layer of protection for military physicians.¹⁰⁷ Similarly, the Seventh Circuit believed that federal public defenders' immunity via the Westfall Act was supplemental to the provision for malpractice insurance found in the Criminal Justice Act.¹⁰⁸

103. *Sullivan*, 21 F.3d at 204. The statute allegedly being repealed was 18 U.S.C. § 3006A(g)(3). This section provides that:

The Director of the Administrative Office of the United States Courts shall . . . provide representation for and hold harmless, or provide liability insurance for, any person who is an officer or employee of a Federal Public Defender Organization established under this subsection . . . for money damages for injury, loss of liberty . . . arising from malpractice . . . of any such officer or employee in furnishing representational services under this section while acting within the scope of that person's office or employment.

18 U.S.C. § 3006A(g)(3) (1988); see also H.R. REP. NO. 417, 99th Cong., 1st Sess. 17 (1985), reprinted in 1986 U.S.C.C.A.N. 6165, 6178 (explaining that malpractice insurance provision was enacted due to concern regarding *Ferri v. Ackerman* decision).

104. *Sullivan*, 21 F.3d at 204. As the Supreme Court has previously held, " 'It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored.' " *Randall v. Loftsgaarden*, 478 U.S. 647, 661 (1986) (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (citations omitted)).

105. 499 U.S. 160 (1991).

106. *Sullivan*, 21 F.3d at 204-05 (citing *United States v. Smith*, 499 U.S. 160 (1991)). In *Smith*, the plaintiff was a sergeant whose baby was negligently delivered by a doctor on the medical staff of the United States Army while stationed in Italy. *Smith*, 499 U.S. at 162. The *Smith* Court focused on whether the Westfall Act "immunizes Government employees from suit even when an FTCA exception precludes recovery against the Government." *Id.* at 165. The Court held that the doctor was covered under the FTCA and because the injury occurred abroad, an exception to the government's liability, the plaintiff could not recover. *Id.* at 165-66. The exception referred to in *Smith* provides that the provisions of the FTCA shall not apply to "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k) (1988).

107. *Smith*, 499 U.S. at 172. ("[T]he . . . [Westfall] Act does not repeal anything enacted by the Gonzalez Act. . . . [Rather, it] adds to what Congress created in the Gonzalez Act").

108. *Sullivan*, 21 F.3d at 205. Using the reasoning of the Court in *Smith*, the Seventh Circuit in *Sullivan* noted that the Criminal Justice Act did not provide the

IV. A CRITICAL ANALYSIS

A. "Employee of the Government" as Intended by Congress

The FTCA states that the government will step in as the defendant in suits arising out of tortious acts committed by "any employee of the Government while acting within the scope . . . of employment."¹⁰⁹ Proponents of the proposition that a federal public defender is an "employee of the Government," as intended by Congress for purposes of FTCA immunity, point to various factors for support. For example, the occupation of public defender was set up by the federal government and the government provides compensation for public defenders.¹¹⁰ Also, to some extent, a public defender's workload is dictated by the government.¹¹¹ While representing an indigent client, the public defender is performing exactly the type of work the government anticipated.¹¹² Therefore, it is argued that a federal public defender should be immune from suit. However, even though the federal government decides what public defenders do and when the work is to be done, a federal public defender alone controls how to conduct the representation.¹¹³ The Seventh Circuit also focused on the fact that the Westfall Act extended coverage of the FTCA to the judicial

tort victim the right to sue a public defender for malpractice. *Id.* State common law provides for that cause of action. *Id.* The Westfall Act is limiting the victim's right to sue under state common law, not repealing any right supposedly granted by the Criminal Justice Act. *Id.*

109. 28 U.S.C. § 1346(b) (1988).

110. See Criminal Justice Act, 18 U.S.C. § 3006A(a)(3)-(d) (1988) (authorizing funds to be taken out of United States Treasury to finance Federal Public Defender Organization salaries). However, the Supreme Court has held that compensation provided via federal funds is not dispositive that Congress intended the recipient to have immunity from malpractice suits. *Ferri v. Ackerman*, 444 U.S. 193, 201 (1979). The courts of appeals also have the authority to remove any federal public defender, who may be serving within that particular court's jurisdiction, from office for cause. 18 U.S.C. § 3006A(g)(2)(A) (1988).

111. See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1863 (1994) (discussing government's control over funding and number of clients funnelled into public defender's office); Gilbert, *supra* note 64, at 605 (explaining United States Court of Appeals for the Eighth Circuit's determination regarding county public defender that "the county could decrease or increase directly the amount of time that a public defender devotes to a particular case").

112. See Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 393 (1993) (stating that public defender's work is "constitutionally mandated").

113. *But see* Bright, *supra* note 111, at 1863. Bright notes that [T]he notion of government innocence is simply not true in cases involving poor people accused of crimes. The poor person does not choose an attorney; one is assigned by a judge or some other government official. The government may well be responsible for attorney errors when it ap-

branch.¹¹⁴ It is not the position of this Casenote that all members of the federal judiciary should be precluded from immunity; this Casenote simply asserts that the FTCA should not cover federal public defenders due to their unique “employment” relationship with the government.¹¹⁵

An employee in the typical sense of the word means an individual who works under the direction of another.¹¹⁶ However, professional standards of attorneys and specifically those of public defenders, mandate that a public defender shall not be controlled or directed by the government any more than a private, “non-employee” attorney.¹¹⁷ Despite the expansion of the definition of “federal agency” to include the judicial branch, the concept of control is still relevant when considering the application of the FTCA to a federal public defender because of the use of the word “employee” in the language of the FTCA.¹¹⁸ Courts have traditionally held that control is the touchstone used for determining whether an employer-employee relationship exists.¹¹⁹ When deciding *Sulli-*

points a lawyer who lacks the experience and skill to handle the case, or when it denies the lawyer the time and resources necessary to do the job.

Id.

114. *Sullivan v. United States*, 21 F.3d 198, 201-02 (7th Cir.), *cert. denied*, 115 S. Ct 670 (1994).

115. *See Ferri v. Ackerman*, 444 U.S. 193, 202 n.19 (1979) (“[N]othing that was said . . . by this Court places attorneys in the same category as marshals, bailiffs, court clerks or judges.”).

116. BLACK’S LAW DICTIONARY 525 (6th ed. 1990). “Employee” is defined as “[a] person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed.” *Id.*; *see Ferson, supra* note 2, at 271-72 (discussing “right-to-control” test in determining whether master-servant relationship exists).

117. *See Polk County v. Dodson*, 454 U.S. 312, 327-28 (1981) (Burger, C.J., concurring) (“A lawyer shall not permit a person who recommends, employs, or pays him [or her] to render legal services for another to direct or regulate his [or her] professional judgment in rendering such legal services.”) (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(B) (1976)); ABA STANDARDS FOR CRIMINAL JUSTICE PROVIDING DEFENSE SERVICES Standard 5-1.3(a) — Professional Independence, 13 (3d ed. 1992) (“The [public defender] plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice.”).

118. For a review of the meaning of the word “employee,” *see supra* note 116.

119. *See Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 3-4 (1962) (discussing existence of control in employer-employee relationship); *Cape Shore Fish Co. v. United States*, 330 F.2d 961, 964 (Ct. Cl. 1964) (“The touchstone for determining the presence or absence of an employer-employee relationship is, of course, whether the person performing the services for another is subject to the other’s control or right to control.”); *Aviles v. Kunkle*, 765 F. Supp. 358, 363 (S.D. Tex. 1991) (listing control as factor to be considered when deciding whether individual is employee), *vacated on other grounds*, 978 F.2d 201 (5th Cir. 1992). *But see*

van, however, the Seventh Circuit evidently failed to recognize the appropriate scope of the word "employee."

In the case of a federal public defender, this requisite element of control by the government as "employer" does not exist or, if so, is not sufficient. "Employee is synonymous with the word servant."¹²⁰ Because an attorney maintains strict loyalty to the individual he or she is representing at a given time, a public defender cannot be a servant of the government.¹²¹

Also significant to the meaning of employee as used in the FTCA is the dichotomy caused by extending immunity to a federal public defender based on a broad interpretation of the word employee. According to the Seventh Circuit, a federal public defender will be immune from suit for malpractice.¹²² However, when applying the broad-interpretation approach to a private, court-appointed attorney performing exactly the same job, the private attorney would not be covered because that attorney is technically not an employee of the government.¹²³ Congress and the courts have taken great pains to ensure and insist that federal public defenders are, in fact, identical to private, court-appointed attorneys.¹²⁴

Congress' efforts can be revealed through an examination of the initial reasoning behind the grant of immunity to federal employees. Such an examination is helpful in determining the in-

Bartels v. Birmingham, 332 U.S. 126, 130 (1948) (explaining that, although control is characteristic of employer-employee relationship, "employees are those who as a matter of economic reality are dependent upon the business to which they render service").

120. BLACK'S LAW DICTIONARY 525 (6th ed. 1990) (citing *Tennessee Valley Appliances v. Rowden*, 146 S.W.2d 845, 848 (Tenn. Ct. App. 1940)).

121. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 626 (1990) ("[A] defense lawyer is not, and by the nature of his [or her] function cannot be, the servant of an administrative superior." (quoting *Polk County v. Dodson*, 454 U.S. 312, 321 (1981))).

122. *Sullivan v. United States*, 21 F.3d 198 (7th Cir.), *cert. denied*, 115 S. Ct 670 (1994).

123. *But see United States v. LePatourel*, 571 F.2d 405, 408 (8th Cir. 1978) (explaining that, because Congress "inclusively rather than exclusively" defined "employees of the government," broad interpretation should be given to FTCA); WRIGHT, *supra* note 6, at 7 (stating that "most of the Circuit courts and some of the District courts that have considered the question have held that the [FTCA] should receive a liberal construction in view of its benevolent purpose"); Gottlieb, *The Federal Tort Claims Act*, *supra* note 6, at 11 (characterizing definition of "employee of the government" as having broad scope).

124. *See Ferri v. Ackerman*, 444 U.S. 193, 199-200 n.16 (1979) (discussing concern of Congress that having federal public defenders would be tantamount to placing prisoner's constitutional rights solely in hands of attorneys appointed and compensated by federal government and, therefore, stressing need of public defenders to "share as much of retained counsel's characteristic independence" as possible (citing 110 CONG. REC. 18,558 (1964) (remarks of Rep. Moore))).

tended boundaries of the FTCA. The legislative history of both the original FTCA and the subsequent Westfall Act indicates that the immunity was granted so that federal employees would not fear performing routine or discretionary functions during the course of employment.¹²⁵ Specifically, Congress was concerned that the fear of liability would affect the "morale and well-being" of federal employees and have a detrimental effect on performance.¹²⁶ However, the Supreme Court has stated that this fear should not impinge on the performance of an attorney when representing a criminal defendant.¹²⁷ Although Congress, in effect, overruled *Westfall*, the examples that Congress provided of erring employees involved strictly lower-level employees, not employees like federal public defenders who are also subject to a professional code of ethics and standards.¹²⁸

The Seventh Circuit concluded that the Supreme Court in *Ferri v. Ackerman* was inviting Congress to change the FTCA to encompass federal public defenders.¹²⁹ The Seventh Circuit held that, by expanding the definition of "employee" to include those persons working in the judicial branch, Congress acted on the Supreme

125. 134 CONG. REC. H4718-03 (daily ed. June 27, 1988) (explaining that it is important "to restore a sense of security to hard working and dedicated people who work for this Federal Government") (remarks of Rep. Frank).

126. The Westfall Act, Pub. L. No. 100-694 102 Stat. 4563 (1988) (codified as amended at 28 U.S.C. §§ 2671, 2674, 2679(b), (d)). The Westfall Act was enacted in response to the *Westfall v. Erwin* decision. *Id.* Indeed, the *Westfall* Court's rationale for providing immunity to judges and prosecutors was not to "protect an erring official, but to insulate the decisionmaking process from the harassment of prospective litigation." *Westfall v. Erwin*, 484 U.S. 292, 295 (1988) (superseded by statute).

127. *Ferri*, 444 U.S. at 204. The Court in *Ferri* stated:

The fear that an unsuccessful defense of a criminal charge will lead to a malpractice claim does not conflict with performance of that function. If anything, it provides the same incentive for appointed and retained counsel to perform that function competently. The primary rationale for granting immunity to judges, prosecutors, and other public officers does not apply to defense counsel sued for malpractice by his [or her] own client.

Id. (footnote omitted).

128. See H.R. REP. NO. 700, 100th Cong., 2d Sess. 3 (1988), reprinted in 1988 U.S.C.C.A.N. 5945, 5946 (providing examples such as suits for clerical negligence, suits against maintenance personnel and suits against park rangers); see also William T. Cornell, Note, *An Evaluation of The Federal Employees Liability Reform and Tort Compensation Act: Congress' Response to Westfall v. Erwin*, 26 SAN DIEGO L. REV. 137, 138 (1989) (explaining that Westfall Act was response to exposure of "lower level employees to ruinous personal liability").

129. *Sullivan v. United States*, 21 F.3d 198, 203 (7th Cir.), cert. denied, 115 S. Ct. 670 (1994). The Seventh Circuit, in dicta, stated that "the [*Ferri*] Court suggested that Congress may be justified at some future point in providing immunity to court-appointed defense counsel." *Id.*

Court's invitation in *Ferri*.¹³⁰ However, the Supreme Court in *Ferri* specifically referred to court-appointed counsel, not federal public defenders.¹³¹ Furthermore, the Supreme Court was referring to the Criminal Justice Act of 1964, not the FTCA.¹³² In fact, the FTCA was not even addressed. Also, in *Ferri*, the Supreme Court adamantly stressed the differences between an attorney representing a criminal defendant and other officers of the court.¹³³ The position of federal public defender was established in the Criminal Justice Act; therefore, if Congress wanted to provide immunity for those individuals, Congress could have amended that Act.¹³⁴

B. *Federal Public Defender as Adversary,
Independent Contractor, or Both*

A consideration of the adversarial nature of the federal public defender's relationship with the government and the position's similarities to an independent contractor lends further support to the proposition that the FTCA should not provide immunity to federal public defenders. Typically, government employees work in conjunction with the federal government.¹³⁵ All of the examples provided by Congress in the legislative history of the Westfall Act relate to jobs where the employee's relationship with the government is one of cooperation.¹³⁶ In contrast, the Supreme Court has repeatedly emphasized that a public defender does not act for, or on be-

130. *Id.*

131. *Ferri*, 444 U.S. at 199.

132. *Id.*

133. *Id.* at 202.

134. *See id.* at 199-200 ("Congress' attempt to minimize the differences between retained counsel and appointed counsel is more consistent with the view that Congress intended all defense counsel to satisfy the same standards of professional responsibility and to be subject to the same controls."). The *Ferri* Court also noted that the legislative history of the Criminal Justice Act, as amended in 1970, did not indicate a Congressional preference for immunity of federal public defenders. *Id.* at 200 n.16. Furthermore, Congress has enacted immunity statutes expressly for Defense Department attorneys, but no comparable statute exists for federal public defenders. *See* 10 U.S.C. § 1054 (1988). *But see* *United States v. Smith*, 499 U.S. 160, 173 (1990) (explaining that Congress would have indicated if it only wanted FTCA to apply to employees who did not have existing statutory immunity). However, in the debates of the Westfall Act, proponents for the Act commented on the potential "devastating impact on individual civil servants' pocketbooks." 134 CONG. REC. S15,214 (daily ed. Oct. 7, 1988) (remarks of Sen. Grassley). A federal public defender's pocketbook would not necessarily be affected, as the Criminal Justice Act provides for malpractice insurance. *See* 18 U.S.C. § 3006A(g)(3) (1988).

135. *See* *West v. Atkins*, 487 U.S. 42, 50 (1987) (explaining that, due to public defender's adversarial role, defender "differs from the typical government employee").

136. *See* 134 CONG. REC. S15,214 (daily ed. Oct. 7, 1988) (providing examples

half of, the government because of the adversarial nature of their relationship.¹³⁷ Furthermore, as a lawyer with ethical responsibilities, the public defender is required to independently and fervently advocate the interests of his or her client, regardless of the government's interests.¹³⁸

In fact, one may view a federal public defender as being similar to an independent contractor of the government.¹³⁹ An independent contractor is an individual or company who performs an act for another while retaining control over his or her own actions.¹⁴⁰ The

of potential suits against police officers, postal workers, armed forces employees and secretaries) (remarks of Sen. Grassley).

137. *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 642 (1990) (O'Connor, J., dissenting). "When performing adversarial functions during trial, an attorney for a private litigant acts independently of the government . . ." *Id.* (O'Connor, J., dissenting); see *Georgia v. McCollum*, 112 S. Ct. 2348, 2361 (1991) (O'Connor, J., dissenting) ("[O]ur decisions specifically establish that criminal defendants and their lawyers are not government actors when they perform traditional trial functions."); *United States v. Robinson*, 553 F.2d 429, 430 (5th Cir. 1977) (rejecting plaintiff's contention that federal public defender system was unconstitutional due to government involvement by stating that "[public defenders] function independently of any agency of the Government and in a truly adversary action"), *cert. denied*, 434 U.S. 1016 (1978).

138. ABA STANDARDS FOR CRIMINAL JUSTICE PROVIDING DEFENSE SERVICES Standard 5-1.3 — Professional Independence, 16 (3d ed. 1992). The Standards stress that full-time public defenders be completely independent and use their best judgment in their representation of clients. *Id.*; see *Edmondson*, 500 U.S. at 641 (1990) (O'Connor, J., dissenting) ("[A] lawyer, when representing a private client, cannot at the same time represent the government."). *But see West*, 487 U.S. at 52 (emphasizing that, simply because individual has professional obligations and related code of ethics, individual is not precluded from acting under color of state law).

139. See RESTATEMENT (SECOND) OF AGENCY § 2 (1957). Section 2 of the Restatement provides:

An independent contractor is a person who contracts with another to do something for him [or her] but who is not controlled by the other nor subject to the other's right to control with respect to his [or her] physical conduct in the performance of the undertaking. He [or she] may or may not be an agent.

Id.

140. *Ferson*, *supra* note 2, at 272. The Second Restatement of Agency lists nine factors to consider when determining if an individual is a servant (employee) or an independent contractor:

- (a) the extent of control which . . . the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether . . . the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the work[er] supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment . . . ;

FTCA specifically excludes from coverage any contractor with the United States.¹⁴¹ Therefore, an independent contractor is personally liable for any tort committed during the course of employment.¹⁴² Given the role of the federal public defender, the characterization of such an individual as an independent contractor seems appropriate.¹⁴³

C. Section 1983 and Color of Law Analogy

As noted earlier, courts have often compared actions brought under the FTCA to § 1983 actions. The Supreme Court has held that a public defender does not act under color of state law when defending a client and, therefore, cannot be sued under § 1983.¹⁴⁴ This is due to the atypical, adversarial relationship the public defender holds with the government.¹⁴⁵ In a FTCA suit, because a public defender is an "employee of the government," the Seventh Circuit considered the defender individually immune from suit.¹⁴⁶

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant

RESTATEMENT (SECOND) OF AGENCY § 220(2) (1957).

141. 28 U.S.C. § 2671 (1988). The definition of "federal agency" as used in the FTCA "does not include any contractor with the United States." *Id.*

142. *Id.*

143. *Sullivan v. Freeman*, 944 F.2d 334, 336 (7th Cir. 1991). In *Freeman*, the Seventh Circuit in its initial review of this case acknowledged the similarities shared by a federal public defender and an independent contractor. *Id.* "[A] federal public defender is functionally an independent contractor rather than an employee" *Id.* Pennsylvania courts have also remarked on the similarities between the two. *See Reese v. Danforth*, 406 A.2d 735, 738 (Pa. 1979). For example, the Pennsylvania Supreme Court stated that "[t]he relationship between the [government] and the public defender is similar to that between an independent contractor and the party contracting for his [or her] services." *Id.* (noting same characterization found in RESTATEMENT (SECOND) OF AGENCY § 223 cmt. a). *See also Veneri v. Pappano*, 622 A.2d 977, 978 (Pa. Super. Ct. 1993) (stating that "once a public defender is assigned to assist a criminal defendant, his [or her] public functions cease"), *appeal denied*, 641 A.2d 589 (Pa. 1994).

144. *Polk County v. Dodson*, 454 U.S. 312, 316-17 (1981). Significantly, the *Polk County* ruling effectively overruled the Seventh Circuit's previous holding in *Robinson v. Bergstrom*, 579 F.2d 401, 408 (7th Cir. 1978), that a public defender does, in fact, act under color of state law. The Seventh Circuit had been the first court of appeals to so hold. *Id.*

145. *West v. Atkins*, 487 U.S. 42, 48 (1988). In fact, the Supreme Court alluded to the unique relationship between the public defender and the government when the Court described *Polk County* as "the only case in which this Court has determined that a person who is employed by the State and who is sued under § 1983 for abusing his [or her] position in the performance of his [or her] assigned tasks was not acting under color of state law." *Id.* at 50.

146. *Sullivan v. United States*, 21 F.3d 198 (7th Cir.), *cert. denied*, 115 S. Ct. 670 (1994).

It appears that Congress and the courts are providing federal public defenders with a win-win situation. Public defenders will not be held personally liable for constitutional rights violations under § 1983 because they do not act under color of law, nor will they be personally liable under the FTCA because they qualify as an "employee of the government."¹⁴⁷ In both FTCA and § 1983 cases, federal public defenders are performing identical functions, yet, for arguably contradictory reasons, will never be personally liable for negligent acts or omissions constituting malpractice.

Moreover, a review of the reasoning used by the Supreme Court when finding that certain individuals were acting under color of state law while finding others were not is also enlightening. In 1987, the Court in *West v. Atkins* held that a private doctor who contracted with a state prison hospital to provide medical services was acting under color of state law for § 1983 purposes.¹⁴⁸ In contrast, six years earlier, the Court in *Polk County* had determined that a private court-appointed attorney was not acting under color of state law.¹⁴⁹ Justifying its decision, the Court in *West* explained that, unlike a public defender, a private doctor was not acting in an adversarial role to the government and that the services provided by the physician could only be effectively rendered if the government administrators and the physician cooperated.¹⁵⁰ Once again, the Court stressed the importance of the adversarial aspect of employment and how that differentiates public defenders from typical government employees.¹⁵¹

The *West* Court also agreed with the lower court's dissent, finding that a private physician is functionally no different from a state physician who acts under color of state law.¹⁵² Presumably, func-

147. *Id.* at 202-04.

148. *West*, 487 U.S. at 43-44. Atkins was a private physician who, under contract with the state, provided orthopedic services for state prisoners on a regular basis. *Id.* at 44. Atkins was paid \$52,000 per year for providing these services. *Id.* Atkins also maintained a private practice. *Id.* at 44 n.1. Prisoner West alleged that Atkins had negligently treated injuries sustained by West while at the prison. *Id.*

149. For a review of the decision in *Polk County*, see *supra* notes 60-64 and accompanying text.

150. *West*, 487 U.S. at 51. "The provision of health care is a joint effort of correctional administrators and health care providers, and can be achieved only through mutual trust and cooperation." *Id.* (citation omitted). The Court also indicated that the official standards for health services in prisons required a combined effort of state officials and health care providers. *Id.*

151. *Id.*

152. *Id.* at 55-56. The *West* Court stated:

It is the physician's function within the state system, not the precise terms of his [or her] employment, that determines whether his [or her] actions can fairly be attributed to the State. Whether a physician is on the state

tion is more significant than form in any analysis regarding the employment relationship between an individual and the government. Therefore, a functional analysis should not be ignored in a FTCA case.¹⁵³ However, that is exactly what the Seventh Circuit chose to do in *Sullivan*.¹⁵⁴

V. A SOLUTION TO THE IMMUNITY OR NO IMMUNITY DILEMMA

Numerous arguments can be made for both sides regarding the issue of immunity for federal public defenders. Providing federal public defenders with immunity would be beneficial because it would encourage more individuals to pursue careers as federal public defenders.¹⁵⁵ Assuming that the immunity of county public defenders would parallel that of federal public defenders, highly-qualified individuals might be enticed to accept a county defender position, an occupation which currently suffers from a lack of highly-qualified attorneys due partly to poor compensation.¹⁵⁶

Conversely, ensuring competent behavior on the part of the public defender justifies the denial of immunity.¹⁵⁷ If public defenders are not personally liable for malpractice, the quality of

payroll or is paid by contract, the dispositive issue concerns the relationship among the State, the physician, and the prisoner.

Id.

153. *But see* Brief for Appellee United States at 14, *United States v. Sullivan*, 21 F.3d 198 (7th Cir.) (No. 93-1364), *cert. denied*, 115 S. Ct. 670 (1994) (recognizing Department of Justice belief that term "employee" should not be concerned with function of alleged employee).

154. *Sullivan v. United States*, 21 F.3d 198, 202-04 (7th Cir.), *cert. denied*, 115 S. Ct. 670 (1994).

155. *Cf. Ferri v. Ackerman*, 444 U.S. 193, 201 n.17 (1979) (recognizing that Court had seen no empirical evidence suggesting that risk of malpractice deterred private attorneys from agreeing to represent criminal defendants); Rutherford, *supra* note 22, at 1010 n.201 (noting that immunity is not always supported by public defenders and may be considered "philosophically repugnant").

Several state courts have granted immunity to public defenders. *See, e.g.,* Dziubak v. Mott, 503 N.W.2d 771, 774-777 (Minn. 1993); *Ramirez v. Harris*, 773 P.2d 343 (Nev. 1989); *Scott v. City of Niagara Falls*, 407 N.Y.S.2d 103 (Sup. Ct. 1978). *Contra Spring v. Constantino*, 362 A.2d 871 (Conn. 1975); *Reese v. Danforth*, 406 A.2d 735 (Pa. 1979).

156. *See Ferri*, 444 U.S. at 204-05 (commenting that, by providing immunity to avoid defending "groundless malpractice claims," more competent attorneys would be willing to represent criminal defendants); Nancy L. Schulze, *Recent Cases*, 50 U. CIN. L. REV. 212, 220 (1981) (explaining Eighth Circuit's finding that immunity is needed to attract qualified attorneys).

157. Richard Klein, *Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant*, 61 TEMP. L. REV. 1171, 1201 (1988). However, attorneys will always be subject to potential disbarment proceedings or other penalties administered by the bar association. McCune, *supra* note 45, at 729 (citing *Black v. Bayer*, 672 F.2d 309, 320 (3d Cir. 1982)). Unfortunately, disciplinary actions will not always compensate an injured victim. Rutherford, *supra* note 22, at 991.

assistance of counsel for indigent defendants in some instances will be grossly inadequate.¹⁵⁸ A compromise to these two extremes would be to grant limited liability to federal public defenders.¹⁵⁹ In this way, the public defender would be personally accountable for acts of malpractice or other professional negligence, but could escape liability for other torts committed in the more mundane and typical government employee aspects of the position. For example, a federal public defender is responsible for hiring and firing assistant federal public defenders as well as support staff.¹⁶⁰ Under the compromise position, any tort suit relating to this function would allow the substitution of the government as defendant.

The court in *Sullivan* stated that it believed that immunity under the FTCA would also be granted to appointed counsel.¹⁶¹ However, using the *Sullivan* court's plain-language approach to interpreting the FTCA, this extension of immunity does not seem possible given that the Westfall Act only grants immunity to employees and a court-appointed defender does not fit within the plain definition of "employee."¹⁶² Importantly, the Criminal Justice Act¹⁶³ and its legislative history¹⁶⁴ continuously stress the need to maintain the involvement of the private sector of the bar in the defense of indigents. When two attorneys perform identical functions, allowing one to be free from malpractice liability while the other remains liable is patently unfair. The compromise proposed

158. See Bright, *supra* note 111, at 1857-61 (describing atrocities that occur in defense representation, such as attorney drug dependency and unpreparedness).

159. Cf. *Delbridge v. Office of Pub. Defender*, 569 A.2d 854, 856 (N.J. Super. Ct. Law Div. 1989) (discussing New Jersey's comparable government-tort statute, N.J. STAT. ANN. §§ 59:1-1 to 59:10-4 (West 1995), and holding that government "attorneys have immunity from suit except for legal malpractice, conspiracy or other intentional misconduct"); Gilbert, *supra* note 64, at 613 (suggesting qualified immunity approach in § 1983 cases).

160. 18 U.S.C. § 3006A(g)(2)(A) (1988).

161. *Sullivan v. United States*, 21 F.3d 198, 203 (7th Cir.), *cert. denied*, 115 S. Ct. 670 (1994). Three years earlier, the Seventh Circuit had indicated that there was no reason for treating federal public defenders differently: "[T]he differences between court-appointed counsel, on the one hand, and retained counsel, on the other, are too slight to justify granting absolute immunity to the one while exposing the other to malpractice liability to his [or her] client with no immunity at all." *Sullivan v. Freeman*, 944 F.2d 334, 338 (1991).

162. *Sullivan*, 21 F.3d at 202-04.

163. 18 U.S.C. § 3006A(a)(3) (1988). "Private attorneys shall be appointed in a substantial portion of the cases." *Id.*

164. 116 CONG. REC. 34,809, 34,814 (1970) (remarks of Rep. Poff). "Research and study indicate that it is essential to maintain the interest and participation of the local attorneys and at the same time provide a full-time defender organization that would augment resources and efforts of the private assigned counsel systems in overburdened jurisdictions." *Id.*

herein might be one way to level the playing field for the two types of attorneys charged with defending indigents and, consequently, deflect any potential protest from the private sector.

A final concern is that, understandably, plaintiffs would probably rather sue the government than a private individual in the hopes of reaching into the "deep pocket" of the federal government for redress as opposed to the likely empty pocket of a federal public defender.¹⁶⁵ However, § 3006A(g)(3) of the Criminal Justice Act provides for the purchase of malpractice insurance covering federal public defenders.¹⁶⁶ Therefore, the federal public defender's pocket would not be totally empty if it were filled with malpractice insurance. Similarly, when a private, court-appointed attorney is sued by a client, the private attorney's malpractice insurance would theoretically cover any adverse judgment. A federal public defender could significantly mitigate his or her financial damage by purchasing additional malpractice insurance similar to the insurance obtained by a private attorney. Accordingly, the belief that federal public defenders should be treated as identical to private defenders in all aspects of their professional practice would be preserved.¹⁶⁷

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165. Cornell, *supra* note 128, at 151. The advantage of the exclusivity feature of the Westfall Act is that the government is able to pay any adverse judgment as opposed to a large majority of individuals who would not have that ability. *Id.* Given that indemnification exists for the federal public defender under the Criminal Justice Act, one commentator believes that "immunity is not only unnecessary but also undesired." Rutherford, *supra* note 22, at 1010 n.201.

166. 18 U.S.C. § 3006A(g)(3) (1988).

167. *Ferri v. Ackerman*, 444 U.S. 193, 199-200 (1979).

