

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 22-CV-14102-MIDDLEBROOKS

DONALD J. TRUMP,

Plaintiff,

v.

HILLARY R. CLINTON, et al.,

Defendants.

ORDER SUBSTITUTING PARTIES

THIS CAUSE comes before the Court on the United States' Motion to Substitute and Dismiss, filed on July 14, 2022. (DE 224). For the reasons explained below, the Motion is granted insofar as the United States is substituted as defendant for James Comey, Andrew McCabe, Peter Strzok, Lisa Page, and Kevin Clinesmith. I will defer ruling on the United States' dismissal arguments until a later time.

In his sprawling Amended Complaint, Plaintiff brings tort claims against five former Federal Bureau of Investigation ("FBI") employees: James Comey, Andrew McCabe, Peter Strzok, Lisa Page, and Kevin Clinesmith. The allegations relate to these Defendants' purported involvement in an "investigation of the Plaintiff and his alleged collusion with Russia." (Am. Compl. ¶ 668). In the present Motion, the United States argues that it should be substituted for these Defendants under the Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act.

The Westfall Act "accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties." *Osborn v. Haley*, 549 U.S. 225, 229 (2007). The Westfall Act empowers the Attorney General (or his delegate) to

certify that the employee “was acting within the scope of his office or employment at the time of the incident out of which the claim arose.” 28 U.S.C. § 2679(d)(1). “Upon such certification, the United States is substituted as defendant in place of the employee, and the action is thereafter governed by the Federal Tort Claims Act.” *Osborn*, 549 U.S. at 225.

Upon certification, “the employee[s] [are] dismissed from the action and the United States is substituted in [their] stead.” *Omnipol, A.S. v. Multinational Def. Servs., LLC*, 32 F.4th 1298, 1305 (11th Cir. 2022). The United States remains the defendant “unless and until the district court determines that the federal officer originally named as defendant was acting outside the scope of his employment.” *Osborn*, 549 U.S. at 252; *see also Matsushita Elec. Co. v. Zeigler*, 158 F.3d 1167, 1169 (11th Cir. 1998) (“[U]nder § 2679(d)(1), the district court was required to substitute the United States as a defendant for Zeigler once the United States Attorney had certified that Zeigler’s actions occurred within the scope of his employment.”).

James G. Touhey, Jr., Director of the Torts Branch, Civil Division, United States Department of Justice, a delegate of the Attorney General, has certified that Defendants James Comey, Andrew McCabe, Peter Strzok, Lisa Page, and Kevin Clinesmith “were acting within the scope of their employment with the Federal Bureau of Investigation at the time of the alleged conduct at issue.” (DE 224-1). The United States is therefore due to be substituted as defendant in their stead under the Westfall Act. *See S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538, 1543 (11th Cir. 1990) (“Although, as discussed above, this scope certification is not dispositive for purposes of substitution, it indicates that the United States is *substituted as an automatic consequence* of the Attorney General’s certification.”) (emphasis added).

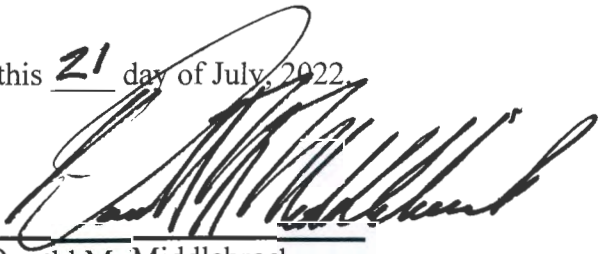
Of course, Plaintiff is entitled to “litigate the question of whether the employee[s] were acting within the scope of [their] employment when the challenged conduct occurred.” *See id.* If

he so chooses, he “has the burden of altering the status quo by proving that the employee acted outside the scope of employment,” and the certification constitutes *prima facie* evidence that the employees were acting within the scope of their employment. *See id.*; *see also Omnipol*, 32 F.4th at 1305.

Accordingly, it is **ORDERED AND ADJUDGED** that:

- (1) The United States’ Motion to Substitute and Dismiss (DE 224) is **GRANTED IN PART** and I will **DEFER RULING IN PART**. It is granted with respect to the United States’ substitution argument, and I will defer ruling on the United States’ dismissal argument.
- (2) The United States is **SUBSTITUTED** as defendant for James Comey, Andrew McCabe, Peter Strzok, Lisa Page, and Kevin Clinesmith.
- (3) Defendants James Comey, Andrew McCabe, Peter Strzok, Lisa Page, and Kevin Clinesmith are **DISMISSED** from this action

SIGNED in Chambers at West Palm Beach, Florida, this 21 day of July, 2022.



Donald M. Middlebrooks
United States District Judge

cc: Counsel of Record