Statement of

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House Committee on the Judiciary
Subcommittee on Courts and Competition Policy

Hearing on H.R. 5281

"Removal Clarification Act of 2010"

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Chairman Johnson, Ranking Member Coble, and Members of the Subcommittee:

Thank you for inviting me to express my views at this hearing on H.R. 5281, the Removal Clarification Act of 2010.

The purpose of H.R. 5281 is to clarify the provisions of Title 28 relating to the removal of litigation against federal officers and agencies. In my view, there is a clear need for such legislation. Two points in particular require attention. First, there are conflicting decisions on the kinds of proceedings that can be removed under 28 U.S.C. § 1442(a). Some courts have given a narrow interpretation to the terms "civil action" and "criminal prosecution" – holding, for example, that an action for pre-suit discovery directed at a Member of Congress could not be removed. Although some of these narrow decisions may be defensible on their facts, as a general matter I agree with the view suggested by the Ninth Circuit: removal should be available to a federal officer whenever the officer "is threatened with the state's coercive power" in a judicial proceeding and the officer relies on the assertion of a federal privilege in resisting the exercise of state power. However, countervailing considerations come into play when a state court issues a subpoena or other judicial order to a federal officer in a proceeding to which the officer is not a party. The statute should be drafted in a way that balances the competing interests in that situation.

There is also a need to clarify the availability of appellate review when a district court remands a proceeding to state court on the ground that the proceeding is not a "civil action" or "criminal prosecution" within the meaning of § 1442. A recent Fifth Circuit decision held that review of such an order is barred

by 28 U.S.C. § 1447(d). This decision is contrary to sound policy and should be overturned by legislation.

I. Background

Starting with the Judiciary Act of 1789, Congress has provided for the removal of cases from state to federal court. Since the late nineteenth century, Congress has tied removal under the general removal statute – now 28 U.S.C. § 1441(a) – to the requirements of original jurisdiction. This means that a defendant seeking removal must ordinarily establish that the case as presented by the plaintiff is one that might have been filed in federal court in the first place. Typically, either the case must meet the requirements for diversity jurisdiction or the plaintiff must assert a federal question as part of a "well-pleaded complaint."

Congress has also enacted a number of statutes that allow removal of cases involving particular subject-matter or defendants even though the requirements for original jurisdiction might *not* be met. One of the most important of these is the federal officer removal statute, codified at 28 U.S.C. § 1442(a).

Section 1442(a) has a lengthy and interesting history, but there is no need to go into that history here.[1] For present purposes, two points are established. First, the statute is constitutional. In one of the landmark decisions, the Supreme Court explained:

> [The Federal Government] can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection, – if their protection must be left to the action of the State court, – the operations of the general government may at any time be arrested at the will of one of its members. …

[1] For a very brief account, see Willingham v. Morgan, 395 U.S. 402, 405-06 (1969).

> We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it.[2]

Second, section 1442(a) permits removal only when the federal officer asserts a federal defense. The Supreme Court emphatically reaffirmed this rule two decades ago in *Mesa v. California*.[3] After an extensive review of its precedents, the Court concluded: "In sum, an unbroken line of this Court's decisions extending back nearly a century and a quarter have understood all the various incarnations of the federal officer removal statute to require the averment of a federal defense."[4] The Court expressed concern that if the statute were construed to eliminate the federal defense requirement, this would raise "serious doubt" about the statute's constitutionality. The Court explained:

> Section 1442(a) … cannot independently support Art. III "arising under" jurisdiction. Rather, it is the raising of a federal question in the officer's removal petition that constitutes the federal law under which the action against the federal officer arises for Art. III purposes. The removal statute itself merely serves to overcome the "well-pleaded complaint" rule which would otherwise preclude removal even if a federal defense were alleged. . . . Adopting the Government's view would eliminate the substantive Art. III foundation of § 1442(a)(1) and unnecessarily present grave constitutional problems.[5]

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[2] Tennessee v. Davis, 100 U.S. 257, 263 (1880)

[3] 489 U.S. 121 (1989).

[4] Id. at 133-34.

[5] Id. at 136-37.

As I understand it, nothing in H.R. 5281 is intended to alter this aspect of the federal officer removal statute. After enactment as before, removal would require the assertion of a federal defense.

What *is* at issue today is the kinds of state-court proceedings that can be removed under § 1442(a)(1). To that subject I now turn.

II. Proceedings Subject to Removal: The Conflicting Decisions

Section 1442(a) authorizes the removal of a "[a] civil action or criminal prosecution commenced in a state court against" any of the individuals or entities specified in four numbered paragraphs. For convenience, I will refer to all of these individual officers and entities as "federal officers." There is no question but that the statute applies when a federal officer is named as a defendant in an action for damages or injunctive relief or in a criminal prosecution. But there is extensive controversy over whether the statute applies when a state court issues a summons, subpoena, or other judicial order to a federal officer in a stand-alone proceeding or in litigation to which the officer is not a party.

Two views have emerged in the lower courts. The first is what I will call the narrow or restrictive view. Under this view, § 1442(a) permits the removal in only two categories of cases: (a) "those actions commenced in state court that expose a federal official to potential *civil liability or criminal penalty* for an act performed in the past under color of office"; and (b) "civil actions that seek to *enjoin* a federal officer from performing such acts in the future."[6] This rule (including the quoted language) was endorsed by the Fifth Circuit in 1980 in the leading case of *Murray v. Murray*.[7] Three years ago, in *Stallworth v. Hollinger*,[8] the District

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[6] Murray v. Murray, 621 F.2d 103, 107 (5th Cir. 1980) (emphasis added).

[7] Id.

Court for the Southern District of Alabama followed *Murray* in holding that the service of a subpoena and notice of deposition on a federal officer was not a proceeding that could be removed under § 1442(a).

More recently, in *Price v. Johnson*,[9] the District Court for the Northern District of Texas took an even narrower approach to § 1442(a). The case involved a pre-suit discovery action filed in state court pursuant to Texas Rule of Civil Procedure 202. The petitioner sought an order to take an investigatory deposition of Rep. Eddie Bernice Johnson. Rep. Johnson removed the proceeding under § 1442(a), asserting that the pre-suit discovery concerned actions taken by her under color of her office as a Member of the House. The district court ordered remand, holding that the Rule 202 petition could not be removed to federal court because it was not a "civil action" within the meaning of § 1442(a). The court acknowledged that a Rule 202 petition "has all the indicia of a judicial proceeding," but it ruled that "the petition is not a 'civil action' because it asserts no claim or cause of action upon which relief can be granted."[10] The court made no mention of *Murray*.

On the other side are cases that endorse a "broad" reading of § 1442(a). Two such decisions are particularly noteworthy for the guidance they offer in delineating the circumstances under which a state-court proceeding may be removed. The first is the 1986 Ninth Circuit decision in *Nationwide Investors v. Miller*.[11] The Ninth Circuit explicitly disagreed with the rationale of cases like *Murray*. The court appeared to say that a case fits under the "broad category" of

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[8] 489 F.Supp.2d 1305 (S.D. Ala. 2007).

[9] Case No. 3:09-cv-476-M (N.D. Tex. Apr. 10, 2009).

[10] Id. at *2. The court was quoting from a case seeking removal under 1441.

[11] 793 F.2d 1044 (9th Cir. 1986).

actions " 'brought against' a federal officer" as long as the officer "*is threatened with the state's coercive power*."[12] The court upheld the removal of a state proceeding based on the issuance of an order compelling a federal employee to appear for examination in connection with plaintiff's efforts to garnish the wages of another federal employee.

In 1995, the District of Columbia Circuit also endorsed a broad reading of § 1442(a), but it articulated a somewhat different standard. In *Brown & Williamson Tobacco Corp. v. Williams*,[13] a Kentucky state court issued an order for the issuance of subpoenas *duces tecum* to two Members of Congress, Rep. Henry Waxman and Rep. Ronald Wyden. The subpoenas sought production of certain documents which the Members had received for legislative use. The Kentucky court's orders were presented to the Superior Court for the District of Columbia, which issued the subpoenas. The two Members removed the case to the District Court.[14] The District Court granted a motion to quash the subpoenas.

On appeal, the threshold question was whether the District Court properly exercised removal jurisdiction under 28 U.S.C. § 1442(a). The party who sought the subpoenas argued that the statute "allows federal officers to transfer proceedings to a federal district court only when they are themselves *defendants* in the state court action." The D.C. Circuit acknowledged that the language of § 1442(a) "ostensibly supports [this] argument," but the court nevertheless upheld

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[12] Id. at 1046 (emphasis added).

[13] 62 F.3d 408 (D.C. Cir. 1995).

[14] The D.C. Circuit opinion states that "Representatives Waxman and Wyden filed a *petition* for removal with the United States District Court." Id. at 412 (emphasis added). Under 28 U.S.C. § 1446, a case is removed by filing a *notice* of removal. (The document was referred to as a "petition" for removal until 1988. Even after 1988, some courts continued to use the superseded language.)

the jurisdiction. The Court took the position that by using the term "civil action," Congress meant in § 1442 to allow removal of "any proceeding in which state judicial civil power [is] invoked against a federal official."[15]

III. Proceedings Subject to Removal: The Policy Arguments

In all of the cases discussed above, the courts were endeavoring to interpret the language adopted by Congress in the statute as it now stands. To that extent, the decisions are not relevant to today's hearing. However, some of the decisions on both sides of the conflict also addressed policy concerns – the reasons why Congress would or would not *want* to allow removal beyond the situations delineated by the Fifth Circuit in *Murray*. Those policy discussions can inform this Subcommittee's review of the proposed amendments to § 1442 contained in H.R. 5281. The Subcommittee should also consider a policy matter that is not adequately treated in the various judicial opinions: the distinction between cases like *Brown & Williamson*, where the federal officer is a party to the action that is removed, and cases like *Stallworth*, where the officer is not a party.

A good starting-point on the policy issues is the opinion of the D.C. Circuit in *Brown & Williamson*. Writing for the court, Judge Silberman said:

> [I]n a subpoena enforcement proceeding the power of the state court is certainly directed "against" the target official. Although the federal officer might be thought to have not yet been called to account for his "action" – refusing to comply with the subpoena – prior to a contempt proceeding, that interpretation seems quite artificial. Once the subpoena is issued, a clash between state power and the federal official appears to be naturally inevitable.
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> Certainly in any case in which the officer (typically represented by the federal government or Congress) seeks removal, we can assume the officer would be prepared to force the matter to a contempt proceeding – at which point

[15] Id. at 415. The court also relied on the Congress's use of the terms "against" and "act" in § 1442(a).

> removal is clearly available. Appellant has not suggested any reason why Congress would have wished that confrontation to be actually ignited before removal. We think, therefore, that the officer's "act," declining to comply with the subpoena, can be presumed to occur simultaneously with the removal petition.[16]

Based on this rationale, the court held that the service of a subpoena upon a federal officer is sufficient to support removal under § 1442(a) as long as the officer relies on an assertion of a federal privilege in resisting the subpoena.

In *Stallworth*, Judge William H. Steele of the District Court for the Southern District of Alabama criticized the *Brown & Williamson* decision and declined to follow it. In part, Judge Steele rested his decision on the restrictive approach taken by the Fifth Circuit in *Murray v. Murray*, which was binding authority.[17] But he also rejected the reasoning of *Brown & Williamson*. As he pointed out, the D.C. Circuit panel (in the passage quoted above) rested its decision on its belief that "Once the subpoena is issued, a clash between state power and the federal official appears to be naturally inevitable." Judge Steele believed that this premise was incorrect:

> As several district courts have pointed out …, issuance of a subpoena to a federal official is not a guarantee of confrontation between state power and that official. To the contrary, the threat of conflict may be averted in any number of ways. [Judge Steele described several scenarios in which the conflict would be averted.]
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> Even if the Government refused to allow [the officer] to testify and even if [the plaintiff] pushed forward with subpoena enforcement proceedings in state court, the Monroe County Circuit Court could certainly decide to quash the subpoena or could find that it is not appropriate to consider sanctions against [the officer] for obeying lawful instructions of her employer (the National Credit Union Administration, a federal agency) based on valid regulations in refusing to comply with the subpoena. Under the circumstances, the institution of contempt proceedings against [the officer] by the state court appears unlikely,

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[16] 62 F.3d 415 (paragraphing added).

[17] Murray was decided by the Fifth Circuit before the creation of the Eleventh Circuit.

> even if the Government refuses to allow her to testify and even if [the plaintiff] refuses to back down or revise her approach.
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> Only if all of these highly uncertain contingencies came to pass could such a clash between state power and federal official come to fruition, the federal official reasonably require protection from the potentially hostile state court, and the underlying purposes of § 1442(a) favor removal.
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> Hence, the *Brown & Williamson* approach endorses removal under § 1442(a) at the point where the state/federal conflict that is the *raison d'etre* of the statute is nothing more than a remote, speculative possibility. The result of that approach is that federal courts would intermeddle in state court actions to protect interests and prevent conflicts that have not materialized and may never form, effectively trampling the delicate balance between federal and state jurisdiction in which notions of federalism are firmly rooted.

In a footnote, Judge Steele criticized the Government position even more forcefully:

> The Government's "nipping the bud" approach would be vastly overinclusive, resulting in the removal of – and federal court interference in – numerous state court actions in which only the mere possibility of conflict existed. It is far more prudent, and far more respectful of the state courts' authority, to refrain from intruding on state court proceedings under the guise of § 1442(a)(1) until and unless a development occurs in state court that requires the protection of a federal forum to safeguard the interest of national supremacy from the interference of hostile state courts.

Judge Steele is on sound ground in calling attention to the value of federalism and the importance of preserving "the delicate balance between federal and state jurisdiction." But is he persuasive in rebutting the D.C. Circuit's position in *Brown & Williamson*? I do not think so. The flaw in Judge Steele's reasoning is that in at least some circumstances his approach would require the federal government officer to expose himself or herself to contempt proceedings in state court as a means of vindicating the underlying federal interest. Federal government employees should not be put in that position. The contempt citation would likely become part of the employee's record. Even if it is crystal clear that the citation was a formality to bring the controversy to a head, the employee

would be put in the position of having to explain it. The federal-state balance does not require such a sacrifice.

More generally, the answer to the narrow approach endorsed by *Stallworth* is found in the Ninth Circuit's decision in *Nationwide Investors*. Although the court was referring to garnishment proceedings, its arguments apply also to the situation where a state court has issued a subpoena to a federal officer. The Ninth Circuit said:

> The Fifth Circuit's ban on removal at the initial stage is worse than an empty gesture, because it encourages the government to disobey state court process so that the government can obtain a federal forum. … At least part of the purpose of § 1442(a)(1) is to prevent state courts from unlimited exercise of their subpoena power against federal officers upon pain of contempt. The form of the action is not controlling; it is the state's power to subject federal officers to the state's process that § 1442(a)(1) curbs.[18]

I believe that the D.C. Circuit and the Ninth Circuit have the better of the argument, and that the conflict should be resolved by amending 42 U.S.C. § 1442 to endorse their position. At the same time, it is desirable to take account of a variable that receives little attention in the opinions: whether or not the federal officer is a party to the action that is sought to be removed.

Stallworth is illustrative. In *Stallworth*, the subpoena was issued to a federal officer as part of state-court lawsuit by one private party against another.[19] But the federal officer (represented by the U.S. Attorney's Office) removed the entire case to the federal district court. If Judge Steele had allowed the removal to proceed, he would have had to decide what to do with the rest of the case after

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[18] Nationwide Investors, 793 F.2d at 1047.

[19] Initially the plaintiff sued the federal officer as well as a private defendant, but by the time the subpoena was served, all claims against the federal defendant had been dismissed, and the federal defendant was no longer a party to the proceedings.

ruling on the Government's motion to quash. Very likely he would have remanded the case to the state court. But in considering legislation to modify § 1442, it is important to determine whether cases like *Stallworth* should be subject to removal and, if so, how the underlying case should be handled.

IV. The Proposed Amendments to Section 1442

H.R. 5281 endorses the broad view of federal officer removal by adding a new paragraph to 28 U.S.C. § 1442. The new language specifies that as used in § 1442(a), the terms "civil action" and "criminal prosecution" include "any proceeding in which a judicial order, including a subpoena for testimony or documents, is sought or issued." This would overrule the line of cases in the Fifth Circuit that allow removal only if the action exposes a federal official to potential civil liability or criminal penalty or seeks to enjoin a federal officer. It would also overrule the district court decision in *Price v. Johnson*.

To nail down this result, H.R. 5281 also provides that the term "against," when used with respect to a proceeding in which a judicial order is sought or issued, includes "directed to."

Because the amended § 1442 would now include proceedings that do not seek to impose civil liability or a criminal penalty on the federal officer, H.R. 5281 allows removal not only in proceedings "for" acts under color of the federal office but also in proceedings "relating to" such acts.

A. Defining the proceedings subject to removal

As explained above, H.R. 5281 seeks to accomplish its purpose largely by adding two new definitional sections to § 1442 and, to a lesser degree, by modifying the language of § 1442(a)(1). This results in a rather cumbersome statute, with new language that does not fit easily into the existing language of §

1442(a). Some additional editing is needed to integrate new and old, to produce something like the following:

> A civil action or criminal prosecution commenced in a State court against any of the following [and] any civil action or criminal prosecution [in which] a judicial order, including a subpoena for testimony or documents, is sought or issued, [when such order is] directed to any of the following, may be removed … [etc. as in current law].

This awkwardness is sufficient reason for considering whether the purpose can be accomplished more straightforwardly. But beyond that, the proposed amendments also raise some questions about the scope and application of the provision. One question in particular deserves attention: the availability of removal when a state court issues an order to a federal officer in litigation to which the officer is not a party.

B. H.R. 5281 and the *Stallworth* model

H.R. 5281 defines "civil action" and "criminal proceeding" to include "any proceeding in which a judicial order, including a subpoena for testimony or documents, is sought or issued" against a federal officer. It is easy enough to see how this language would apply in *Price v. Johnson* and in *Brown & Williamson*. *Price* was a stand-alone proceeding for pre-suit discovery. In *Brown & Williamson* the plaintiff brought a separate action to enforce the subpoenas in a different court from that of the underlying litigation. The enforcement proceeding would fall easily within the amended statute.

But what about cases like *Stallworth*? As noted earlier, in *Stallworth* the subpoena was issued as part of a state court lawsuit which, at the time of removal, involved only claims against a private party.[20] A similar scenario might have been

[20] See supra note 19.

presented in *Brown & Williamson* if the party seeking production of the documents had asked the Kentucky court to enforce the subpoenas directly. (Presumably the Kentucky court would have lacked personal jurisdiction over Reps. Waxman and Wyden.) Would H.R. 5281 apply to cases like these, in which the "judicial order" is directed to a federal officer who is not a party? Should it?

To answer the first question, it is necessary to again examine how the language of page 2 lines 8-11 of H.R. 5281 would be integrated into the existing language of 28 U.S.C. § 1442(a). The new language does not add a third category of removable proceedings; it defines "civil action" and "criminal prosecution" to include "*any* proceeding" that fits the description on lines 8-11. But under the amended statute it would still be the "civil action" or the "criminal prosecution" that could be removed.

It seems to me, therefore, that in cases like *Stallworth* (or the hypothetical variation on *Brown & Williamson*), H.R. 5281 would allow removal of the entire action, not just the proceedings involving the subpoena.[21] This is a troubling result. It would "intermeddle in state court actions" in a rather drastic way. It would also raise all sorts of questions about what the federal court would do with the case once the federal issues relating to the officer's defense have been resolved. I suggest that the Subcommittee consider whether H.R. 5281 can be modified in a way that will protect the federal interests at stake without interfering unnecessarily with proceedings that are otherwise entirely grounded in state law.

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[21] H.R. 5281 uses the words "includes" and "any." The Supreme Court today generally takes a literalist approach to statutory interpretation. Recently the Court emphasized the "expansive meaning" of "any." Ali v. Federal Bureau of Prisons, 552 U.S. 214, 219 (2008).

C. An outline of possible solutions

One approach would be to revise the legislation to make clear that when removal is based on an "order" in a proceeding that does not otherwise implicate federal interests, only the part of the proceeding relating to the order would be removable. As far as I am aware, the only existing provision for removal of part of a case is 28 U.S.C. § 1452, which allows removal of a "claim or cause of action" that falls within the bankruptcy jurisdiction.[22] That provision does not seem to be used much. However, particularly where subpoenas are involved, it may be possible to draft a statute that would allow removal only of the part of the proceeding that involves the federal officer. A suggestion along these lines is outlined below.

Another approach would be to allow removal of the entire case but also add a provision that would require the district court to resolve the federal issues expeditiously and then to remand the case to the state court.

Yet another possibility would be to limit the amendment of the removal statute to stand-alone proceedings and simultaneously authorize a separate proceeding in federal court to deal with other situations in which state judicial power is invoked against a federal officer. The federal forum would be available for the separate proceeding whenever a state court issues an order directed to a federal officer, based on acts under color of his office, in a suit to which the officer is not a party. One model for this approach is sketched below.

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[22] See In re Northwood Flavors, Inc., 202 B.R. 63 (Bkrtcy. W.D. Pa. 1996). The court explained: "According to this provision, a party may remove *any* claim or cause of action. This indicates that removal under this provision is not an all-or-nothing proposition. Section 1452 permits a party to remove only *some* of the claims or causes of action and to leave the remainder for litigation in the other forum. It alternatively permits a party to remove *all* of the claims or causes of action, thereby depriving the other forum of any jurisdiction over them unless and until they are remanded."

Finally, the Subcommittee may conclude that cases like *Stallworth* arise infrequently enough that the statute need not address them. If the core purpose of the legislation is to overrule *Price v. Johnson* and endorse *Brown & Williamson*, this could be done by modifying the language of H.R. 5281 in the way described below.

D. Clarifying the proposed legislation

The threshold question is whether this Subcommittee thinks it sufficient to allow removal in stand-alone proceedings like *Price v. Johnson* without also allowing removal in cases like *Stallworth*. If so, I think the purpose could be accomplished in a less confusing way by amending § 1442 to read as follows (deleted language struck through; new language underlined):

> **(a)** A civil action or criminal prosecution commenced in a State court ~~against any of the following~~ may be removed by any person or entity listed in subsection (b) to the district court of the United States for the district and division embracing the place wherein it is pending if -
>
> (1) the civil action or criminal prosecution is brought against that person or entity; or
>
> (2) the civil action or criminal prosecution is a proceeding whose object is to secure the issuance of a judicial order, such as a subpoena for testimony or documents, to that person or entity.
>
> (b) A civil action or criminal prosecution may be removed under subsection (a) by -
>
> **(1)** The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, ~~sued~~ whether in an official or individual capacity for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.
>
> **(2)** A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.
>
> **(3)** Any officer of the courts of the United States, for or relating to any act under color of office or in the performance of his duties;

> **(4)** Any officer of either House of Congress, for or relating to any act in the discharge of his official duty under an order of such House.

Subsection (b) in the current statute would become (c).

If the Subcommittee does not wish to leave the law as it is for cases like *Stallworth*, there are three possible approaches to consider. The first would be to add a third basis for removal to the draft revision of §1442 above, as follows:

> (3) the civil action or criminal prosecution is one in which a judicial order, such as a subpoena for testimony or documents, [is sought from or] has been issued to that person or entity.

The difficulty with this approach is that (like H.R. 5281 as introduced) it would authorize removal of the entire case and thus require additional provisions to tell district courts how to deal with the underlying state-law claims after the federal issues have been resolved. I think that a better approach would be to authorize a separate proceeding in federal court to deal with the federal issues.

There are several possibilities. One would be a declaratory judgment action.[23] Another would be a kind of reverse-Rule 27 proceeding. In preference to either of those, I suggest that Congress might establish a procedure that would enable the federal officer to obtain a protective order from a federal court that would determine the validity of any orders issued by the state court and, if they are invalid under federal law, quash them. Specifically, I suggest that the Subcommittee consider adding a new section to Title 28, either in Chapter 85 (dealing with district court jurisdiction) or as a new section in Part VI, along these lines:

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[23] This approach might draw on the courts' experience in using the declaratory judgment remedy in insurance cases. The scenario is this: a dispute arises over insurance coverage of a claim that is being litigated in a state tort suit. The insurance company brings a declaratory judgment action in federal district court to resolve the coverage issues, while the liability issues are resolved in the state court proceeding.

> **§ … Civil action for protective order**
>
> (a) If a State court issues a judicial order (including a subpoena for testimony or documents) to a federal officer or entity in a proceeding to which that officer or entity is not a party, the officer or entity may bring a civil action for a protective order in the district court of the United States for the district and division embracing the place wherein the State-court proceeding is pending. The district court may hear and determine any issues relating to the validity of the state-court order under the Constitution, laws and treaties of the United States.
>
> (b) A civil action may be initiated under section (a) by any person or entity authorized to remove a civil action or criminal prosecution under section 1442 of this title.
>
> (c) Notwithstanding section 2283 of this title or any other provision of law, the district court may enter any orders necessary to effectuate the jurisdiction conferred by subsection (a).

Admittedly, a proceeding of this kind would interfere with a state's operation of its judicial system. But it would be less of an intrusion than removal of the underlying case.

Finally, the statute could explicitly allow removal only of the part of a state-court proceeding that involves the federal officer.[24] This could be done by adding a definitional section to the suggested revision of § 1442 set forth above. It would be a paragraph along these lines:

> (c) When a State court issues a judicial order (including a subpoena for testimony or documents) to any person or entity listed in subsection (b) in a civil action or criminal prosecution to which that person or entity is not a party, the proceeding involving the order shall be deemed to be a proceeding included within paragraph (a)(2).

While this would accomplish the purpose, I think that the protective order approach is preferable. The nature and scope of the proceeding would be defined

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[24] Some courts have followed this course without explicit statutory authorization. See, e.g., Bosaw v. National Treasury Employees' Union, 887 F. Supp. 1199, 1209 (S.D. Ind. 1995).

by federal rather than state law, so there would be less room for uncertainty or disputation over what issues are properly before the federal court.

E. Other questions

Questions may also arise about the applicability of the amended statute to particular proceedings. I have already mentioned garnishment proceedings. These may pose particular problems because garnishment may occur pre-judgment as well as post-judgment. Other types of proceedings may warrant attention as well.

The Subcommittee may also wish to consider whether similar amendments should be made to 28 U.S.C. § 1442a, which allows removal by members of the armed forces sued or prosecuted in state court for acts done under color of their office or status. At least at first blush, it would seem that members of the armed forces should be treated in the same way as other federal officers in this context.

There are also issues of choice of law. In *Price v. Johnson*, the state-court petitioner argued that if the proceeding was removed to federal court, the federal court would be required to dismiss it because federal law – specifically, Rule 27 of the Federal Rules of Civil Procedure – authorizes a pre-suit petition to perpetuate testimony, but nothing in the Federal Rules allows a pre-suit petition to investigate a potential claim or suit. The latter was the purpose of the petition in *Price*.

Whether or not this assumption was correct at the time of the district court ruling in *Price*, it is almost certainly correct today. A few weeks ago, the Supreme Court held that any Enabling Act rule that regulates procedure will override contrary state law.[25] Thus, unless Congress enacts a law that provides otherwise, removal in a case like *Price* would result not only in a change of forum but in the loss of a procedure available under state law. Perhaps this outcome is desirable in

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[25] Shady Grove Orthopedic Associates v. Allstate Ins. Co., 130 S. Ct. 1431 2010).

cases like *Price*, but the Subcommittee should consider whether it is necessary to go that far to protect federal interests.

V. Appellate Review of Remand Orders

A. Remand orders in cases removed under §1442

In *Price v. Johnson*, when the District Court for the Northern District of Texas remanded the discovery proceeding to the state court, Rep. Johnson appealed the order to the Fifth Circuit Court of Appeals. The Fifth Circuit dismissed the appeal for lack of jurisdiction, holding that appellate review was barred by 42 U.S.C. § 1447(d).[26] That section provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise …" The Fifth Circuit acknowledged case law that allows the review of remand orders in some instances notwithstanding the seemingly absolute language of § 1447(d). But the court found that the remand order before it did not fall within that body of precedents.

Congresswoman Johnson, represented by the Office of the General Counsel of the House of Representatives, filed a petition for rehearing en banc arguing that the panel decision conflicted with Supreme Court precedent – in particular, the 1976 decision in *Thermtron Products, Inc. v. Hermansdorfer*.[27] Whether this argument is well taken need not concern this Subcommittee. The body of law interpreting § 1447(d) in light of *Thermtron* and other precedents is enormous and hopelessly confused. But whether or not the panel decision is correct under current law, it is unsound as a matter of policy. Congress can overrule it, and it should do so.

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[26] Price v. Johnson, 600 F.3d 460 (5th Cir. 2010).

[27] 423 U.S. 336 (1976).

Congress has already determined that some categories of remand orders should be subject to appellate review. Appellate review is available when cases are removed under the civil rights removal statute, 28 U.S.C. § 1443. Appellate review is available when cases are removed under the Class Action Fairness Act of 2005. The removal jurisdiction conferred by § 1442 is no less important to federal interests and should be given the same kind of protection.

There is no need to belabor the point, but the reasons can be found in the House Counsel's petition for rehearing en banc in the *Price* case. Almost from the beginning of the Republic, Congress has been concerned about the possibility that federal officers will have to defend their acts under color of federal law in "potentially hostile local and state courts." There is a particular danger that state procedures will be "abused for political [or] other reasons" irrespective of the merits. Thus, an erroneous decision by a federal district court to remand a case removed under § 1442(a) exacts a high cost from the perspective of Congress's reasons for allowing removal under the circumstances specified in that provision. Appellate review should be available to correct such errors.

H.R. 5281 accomplishes this goal simply and effectively. It amends § 1447d) to establish an exception to the prohibition on appellate review for remand orders in cases "removed pursuant to section 1442" of Title 28.

B. Remand orders under § 1441 and other statutes

The Fifth Circuit decision in *Price v. Johnson*, which H.R. 5281 would overturn, exemplifies a much wider problem in the federal judicial system: confusion and conflict over the availability of appellate review of remand orders in removed cases. This might seem surprising. After all, the language of § 1447(d), already quoted, appears unequivocal: "[a]n order remanding a case to the State

court from which it was removed is not reviewable on appeal or otherwise …" But the Supreme Court, in the aforementioned *Thermtron* case, held that § 1447(d) applies only when the remand is on one of the grounds set forth in § 1447(c). *Thermtron* and its progeny have given rise to an enormous and complex body of decisional law. This in turn generates additional confusion and additional litigation. A leading treatise on Federal Practice includes a section entitled "Appealability of orders relating to removal." That section prints out to 142 dense pages of analysis and case summaries.[28]

I suggest that Congress (and this Subcommittee in the first instance) should consider using the federal judicial rulemaking process to create an orderly system for limited appellate review of remand orders in removed cases. While this is not the occasion to elaborate on this suggestion in detail, I will briefly note three reasons why the suggestion warrants consideration.

First, much is at stake. If the district court erroneously remands a case to the state court, it has denied the defendant the federal forum that it is entitled to under Article III and an Act of Congress. That is a serious consequence – perhaps not as serious in § 1441 cases as in the § 1442 removals that are the subject of today's hearing, but serious.

Second, remand motions often raise questions that are difficult and close. It is very easy for the district court to "get it wrong."

Finally, many of the questions are recurring ones. This is significant, because decisions of district courts are not binding on other districts; they are not even binding on other judges in the same district. In a large circuit like the Fifth or

[28] 14C WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3740 (updated 2010). Five years ago, the section of the treatise printed out to 60 pages.

Ninth, the same issue can be litigated again and again before different judges. This is not a good use of litigant resources or of judicial resources.

For all of these reasons, I believe it would be desirable for Congress to institute a carefully designed system of appellate review of remand orders. The best way to do this is through the rulemaking process. Congress has already authorized the use of rulemaking to "define when a ruling of a district court is final for the purposes of appeal under section 1291," so this is little more than an application of a policy judgment that Congress has already reached.[29] I hope that the subject can be explored at a future hearing of this Subcommittee.

VI. Conclusion

When considering revisions to the federal officer removal statute, it is only natural to look at the law from the perspective of the federal officers and agencies who will be invoking it. But there is another perspective that is equally important: that of the private citizens, state officials, and other parties who, as litigants in a state-court proceeding, suddenly and unwillingly find themselves transported into federal court.

Keep in mind, too, that the federal officers and agencies do not have to ask the court for permission to remove. The moment that the removing party files a copy of the notice of removal with the state court, *the case is removed*, and it will not return to the state court unless and until the district court issues an order of remand. This can impose substantial burdens on the other parties, whose lawyers

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[29] See 28 USC § 2072(c). Indeed, it can be argued that this section already authorizes rulemaking of the kind I am suggesting. Section 2072(b) provides: "All laws in conflict with [rules prescribed by the Supreme Court] shall be of no further force or effect after such rules have taken effect." The implication of §§ (b) and (c) taken together is that the rulemaking process could be used to override the command of § 1447(d). However, I do not believe that this step should be taken without explicit authorization from Congress.

may be inexperienced in federal court practice and unfamiliar with the provisions of the Judicial Code that govern removal.

In this light, it is particularly important that the removal statutes be drafted with the greatest possible clarity and directness. They should be drafted in a way that serves federal interests without interfering unnecessarily with the course of litigation in the state court. I hope that the suggestions in this statement will help the Subcommittee in pursuing these goals as it considers the amendments contained in H.R. 5281.