REMOVAL CLARIFICATION ACT OF 2010

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS AND COMPETITION POLICY

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

ON

H.R. 5281

MAY 25, 2010

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MAY 25, 2010

REMOVAL CLARIFICATION ACT OF 2010

TUESDAY, MAY 25, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS AND
COMPETITION POLICY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:04 p.m., in room 2141, Rayburn House Office Building, the Honorable Henry C. "Hank" Johnson, Jr. (Chairman of the Subcommittee) presiding.

Present: Representatives Johnson, Boucher, Watt, Polis, Coble, Chaffetz, Goodlatte, Issa, and Harper.

Staff Present: (Majority) Eric Garduno, Counsel; Elisabeth Stein, Counsel; Rosalind Jackson, Professional Staff Member; (Minority) Blaine Merritt, Counsel; and Tim Cook, Staff Assistant.

Mr. JOHNSON. This hearing of this Committee on the Judiciary, Subcommittee on Courts and Competition policy will now come to order. Without objection, the Chair will be authorized to declare a recess of the hearing.

Before we begin, I will welcome Representative Polis when he gets here, if he arrives.

I will now recognize myself for a short statement. I am pleased to hold a hearing today on my bill, H.R. 5281, the "Removal Clarification Act of 2010."

This bill will ensure that Federal officers, including officials from all three branches of government are able to properly remove to Federal court when sued, based on actions undertaken in their official capacity.

This is a bipartisan bill and I was pleased that Chairman Conyers, the Ranking Member of the full Judiciary Committee, Representative Smith, and the Ranking Member of this Subcommittee, Representative Coble, all joined as original cosponsors.

The purpose of the Federal officer removal statute is to ensure that Federal officials can remove to a Federal forum so that the Federal Government will be free from interference with its operations. However, over 40 States have passed pre-suit discovery proceedings where individuals may be deposed and/or required to produce documents, despite the fact that a civil action has not yet commenced. These pre-suit discovery procedures have muddied the waters of the Federal removal statute as our Federal courts have split on whether the removal statute applies to such pre-suit discovery. Some courts apply the removal statute to pre-suit actions. Other courts don't and, instead, have held that pre-suit actions are

not covered by the removal statute because there is not yet a civil action under 1442.

Furthermore, some of these courts require a Federal official or agency to be held in contempt before the matter can be removed.

H.R. 5281 will make clear that section 1442 should apply anytime a legal demand is made on a Federal officer for any act done under their official capacity. It will also provide that there can be an appeal to the Federal circuit court if the Federal district court rejects a removal petition under 1442 and remands the matter back to the State court.

In short, H.R. 5281 will enable Federal officials to remove cases to Federal court in accordance with the spirit and the intent of the Federal officer removal statute.

I want to stress today that we are not changing the underlying removal law. Removal still must be predicated on the availability of a Federal defense. Further, only the part of the proceeding involving the Federal official will be removed. To the extent that there is any ambiguity in this legislation on those points or any other, I look forward to hearing the testimony of today's witnesses as to how to resolve such matters.

And at this point, I would like to take the opportunity to welcome Representative Jared Polis to the Subcommittee on Courts and Competition Policy. Representative Polis is not only a Member of Congress, but he is also a successful innovator and entrepreneur. He has founded several successful Internet companies, including proflowers.com and bluemountain.com.

In 2008 Representative Polis was elected to the 111th Congress, representing Colorado's Second Congressional District. He currently also serves on the House Education and Labor Committee and the Rules Committee. He is a charter member and vice chair of the Sustainable Energy and Environmental Coalition, the chair of the Immigration Task Force of the Progressive Caucus, and a member of the Democratic Steering and Policy Committee. I welcome Representative Polis to this Subcommittee.

[The bill, H.R. 5281, follows:]

I

111TH CONGRESS
2D SESSION

H. R. 5281

To amend title 28, United States Code, to clarify and improve certain provisions relating to the removal of litigation against Federal officers or agencies to Federal courts, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 12, 2010

Mr. JOHNSON of Georgia (for himself, Mr. CONYERS, Mr. SMITH of Texas, and Mr. COBLE) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 28, United States Code, to clarify and improve certain provisions relating to the removal of litigation against Federal officers or agencies to Federal courts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Removal Clarification Act of 2010".

SEC. 2. REMOVAL OF CERTAIN LITIGATION TO FEDERAL COURTS.

(a) CLARIFICATION OF INCLUSION OF CERTAIN TYPES OF PROCEEDINGS.—Section 1442 of title 28, United States Code, is amended by adding at the end the following:

"(c) As used in subsection (a)—

"(1) 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; and

"(2) the term 'against' when used with respect to such a proceeding includes directed to.".

(b) CONFORMING AMENDMENTS.—Section 1442(a) of title 28, United States Code, is amended—

(1) in paragraph (1)—

(A) by striking "capacity for" and inserting "capacity, for or relating to"; and

(B) by striking "sued"; and

(2) in each of paragraphs (3) and (4), by inserting "or relating to" after "for".

(c) REVIEWABILITY ON APPEAL.—Section 1447(d) of title 28, United States Code, is amended by inserting "1442 or" before "1443".

○

Mr. JOHNSON. I now recognize my colleague, Mr. Coble, the distinguished Ranking Member of this Subcommittee, for his opening remarks.

Mr. COBLE. Thank you, Mr. Chairman. I join you in welcoming Representative Polis as a Member of the Judiciary Committee. I appreciate, Mr. Chairman, your calling this legislative hearing. And I appreciate furthermore the outstanding panel who will testify before us.

The bill, H.R. 5281, addresses an obscure but important issue that touches on federalism and the balance relationship between the Federal Government and the individual States. The Removal Clarification Act of 2010 primarily amends section 1442 of title 28 of the U.S. Code. This is a statute that allows Federal officers under limited conditions to remove cases filed against them in State court to U.S. district courts for disposition.

The purpose of section 1442 is to deny State courts the power to hold a Federal officer criminally or civilly liable for an act allegedly performed in the execution of his or her Federal duties. This does not mean that Federal officers can break or violate the law; it just simply means that these cases are transferred to a U.S. district court for consideration.

Congress wrote the statute because it deems the right to remove under these conditions essential to the integrity and preeminence of the Federal Government under our Constitution. Federal officers or agents, including Congressmen, shouldn't be forced to answer in a State forum for conduct asserted in performance of Federal duties.

It is my understanding, Mr. Chairman, that U.S. district courts have inconsistently interpreted the statute. Most recently in March, the Fifth Circuit ruled that the Federal removal statute did not apply to a Texas State law involving pre-suit discovery. Since 46 other States have similar laws, the House General Counsel's Office is concerned that more Federal courts will adopt the Fifth Circuit's logic.

The problem occurs when a plaintiff who contemplates suit against a Federal officer petitions for discovery without actually filing suit in the State court. Technically, according to the Fifth Circuit, this conduct only anticipates a suit; it isn't a cause of action as contemplated by the Federal removal statute.

The problem is compounded, it seems to me, because a separate Federal statute, section 1447, requires U.S. district courts to remand any case back to State court if at any time before the final judgment it appears that the district court lacks matter of jurisdiction. Judicial review of a remand order under section 1447 is limited and has no application to suits involving Federal officers and section 1442. This means remanded cases brought against Federal officers under these conditions cannot find their way back to Federal court.

In conclusion, Mr. Chairman, the result is at odds with the history of the Federal removal and remand statutes that we will examine today. That is why I am an original cosponsor, as you pointed out, of H.R. 5281.

I look forward to interacting with the witnesses this afternoon, and I intend to vote for the bill when we proceed to markup at the conclusion of the hearing.

I yield back, Mr. Chairman.

Mr. JOHNSON. I thank the gentleman for his statement. Without objection, other Members' opening statements will be included in the record.

I am now pleased to introduce the witnesses for today's hearing. Our first witness will be Ms. Beth Brinkmann, Deputy Assistant Attorney General in the Civil Division for the Department of Justice. Ms. Brinkmann formerly practiced before the Supreme Court for approximately 15 years. During that time she was a partner at Morrison & Foerster and served as Assistant to the Solicitor General of the United States. And we welcome here today.

Our second witness will be Mr. Irvin Nathan. Since November of 2007, Mr. Nathan has been the general counsel for the U.S. House of Representatives. Prior to that, Mr. Nathan was a senior partner at Arnold & Porter. He is a Fellow of the American College of Trial Lawyers, a member of the American Law Institute, and a fellow of the American Bar Foundation. Welcome, Mr. Nathan.

We also have Professor Hellman, Arthur Hellman. Professor Hellman is a professor of law at the University of Pittsburgh where his specialties includes civil procedure, constitutional law and the Federal courts. Throughout his career, Professor Hellman has authored a number of publications in these fields, including two case books. Professor Hellman has testified before the House and Senate Judiciary Committees many times on issues related to the Federal courts, and we welcome him here today.

Our last witness will be Professor Lonny Hoffman. Professor Hoffman is the George Butler Research Professor of Law at the University of Houston Law Center where he is an expert on civil procedure. In 2009, he was elected to the American Law Institute and since 2005 he has served on the Supreme Court of Texas Rules Advisory committee. Professor Hoffman received his law degree from the University of Texas at Austin and a bachelor's from Columbia University. We welcome you, Professor Hoffman.

After each witness has presented his or her testimony, Subcommittee Members will be permitted to ask questions subject to the 5-minute limit.

Mr. NATHAN. Ms. Brinkmann, please proceed with your testimony.

TESTIMONY OF BETH BRINKMANN, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Ms. BRINKMANN. Good afternoon, Chairman Johnson, Ranking Member Coble and Members of the Subcommittee. I am pleased to appear before the Subcommittee today to present the views of the Department of Justice.

Mr. WATT. Would you pull your mike a little bit closer, please?

Mr. JOHNSON. Ma'am, would you pull your mike up a little bit? And it is on; is that correct?

Ms. BRINKMANN. As I was saying, I am pleased to appear before the Subcommittee today to present the views of the Department of

Justice on the Removal Clarification Act of 2010. The Department of Justice believes the proposed amendments to the removal statute would improve the Department's ability to represent Federal officers and agencies.

The Department represents executive branch's officers and agencies whose public duties and interests often become at issue in litigation in State court. The removal statute gives them, as well as officers of the judicial branch and Members of Congress, the important right to be heard in a Federal forum.

The amendment to 28 U.S.C. section 1442 would clarify one aspect of the statute concerning removal of a matter when a litigant seeks a subpoena in State court against a Federal official. A Federal official facing a State court subpoena has a right to have a Federal court determine the extent to which the Federal official must comply with the subpoena.

The proposed amendment would eliminate uncertainty in law. It would allow Federal officials to seek a Federal forum at an early stage of their involvement in such proceedings. It would protect the Federal official's ability to have a Federal court determine under Federal law whether compliance with the State court subpoena is required.

In order to effect the purpose of this amendment we believe that it would be important also to clarify the deadline by which removal must be sought, and we would be pleased to work with the Subcommittee on that issue.

The Department likewise believed that the proposed amendment to the section of the removal statute that deals with appeals 28 U.S.C. Section 1447 would improve the Department's representation of Federal officials. Under current law, if a Federal district court decides to send back to State court a case involving a Federal official, the Federal Government has no right to repeal the remand order and must instead participate in the State court litigation.

The proposed legislation would give Federal officials the right to appeal a district court judge's remand order and afford the court of appeals an opportunity to correct any legal error. That would allow cases that properly belong in Federal court to remain there, rather than being erroneously litigated in State court. Allowing Federal officials to repeal remand orders would be fully consistent with the existing exceptions to the no-appeal rule, where there is a similarly strong Federal interest in a Federal forum.

Although the appeal right is important, as a practical matter we expect the change in existing law to be limited in scope. That is because the number of cases that the Federal Government seeks to remove from State court each year is small. We expect the occasions on which the Department would need to appeal a remand order are likely to continue to be few.

In closing, we would be pleased to work with you as the legislation moves forward. And I would be pleased to address any questions that you may have.

Mr. JOHNSON. Thank you, Ms. Brinkmann.

[The prepared statement of Ms. Brinkmann follows:]

PREPARED STATEMENT OF BETH BRINKMANN

Department of Justice

STATEMENT OF

BETH BRINKMANN
DEPUTY ASSISTANT ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON COURTS AND COMPETITION POLICY
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 5281, THE "REMOVAL CLARIFICATION ACT OF 2010"

PRESENTED

MAY 25, 2010

Statement of
Beth Brinkmann
Deputy Assistant Attorney General
Department of Justice

Before the
Subcommittee on Courts and Competition Policy
Committee on the Judiciary
United States House of Representatives

Concerning
H.R. 5281, the "Removal Clarification Act of 2010"

Good afternoon, Chairman Johnson, Ranking Member Coble, and members of the Subcommittee. I am pleased to appear before the Subcommittee to present the Department of Justice's views on the Removal Clarification Act of 2010. The proposed amendments to the removal statute would clarify one aspect of current law that has sometimes been construed to delay Federal officers or agencies from vindicating their right to remove State court proceedings to a Federal forum. The law in its current form has been applied by some courts to deprive Federal officers or agencies of that right altogether. The Department believes the amendments would improve its ability to represent Federal officers and agencies. Specifically, the changes to the removal statutes would make an important difference to Federal officers or agencies who might wrongfully be shut out of Federal court under the removal statute as currently written.

The Department represents the Executive Branch officers and agencies whose public duties and interests often become at issue in litigation in the State courts. The removal statute gives the Executive Branch – as well as Judicial Branch officials and Members of Congress – the important right to be heard in a Federal forum. To vindicate this right, the Department ordinarily seeks removal to Federal court at the earliest possible opportunity.

The proposed amendments would clarify one aspect of the removal statutes that, in their current form, can impede access to a Federal forum. For cases involving subpoenas, the amendments would clarify *when* the United States can seek removal to Federal court and would provide for removal at an early stage of State court proceedings. The amendments also would add a new appeal right, the amendments would change one aspect of the removal statute that can allow the ruling of a single Federal district court judge to conclusively bar the Federal government's access to the Federal courts.

The proposed amendment to 28 U.S.C. § 1442 would resolve an uncertainty about the timing of removal that currently exists when a litigant seeks a subpoena in State court against a Federal officer or agency. This is not an uncommon issue for the Department. Federal officials such as FBI agents, DEA agents, and other Federal law enforcement officials may participate in

investigations that lead to State prosecutions, and these Federal officers or agencies may be subpoenaed in State criminal proceedings. In other cases, private individuals or corporations may seek the testimony of Federal officials performing investigatory functions for regulatory agencies. Officials from the Federal Aviation Administration, for example, could be subpoenaed in litigation among private parties over liability for an airline crash.

In any such situation, the Federal officer or agency facing a State court subpoena has a right to have a Federal court determine the extent to which the official must comply. In many instances, there will be no legal basis in either State or Federal court to require a Federal official or agency to comply with a State-issued subpoena. (In many circumstances, the limits of proper disclosure should ultimately be litigated not in the proceeding that gave rise to the subpoena, but in a separate action under the Administrative Procedure Act to determine whether a decision to withhold information was arbitrary or capricious). Federal agencies and departments also generally have regulations – called "*Touhy* regulations" after the Supreme Court case that upheld them as lawful – that set limits for agency employees' disclosure of official information and establish centralized procedures for processing requests for such information. If any basis exists for complying with the State court subpoena, a Federal court should decide what the agency's *Touhy* regulations require. Even in the absence of *Touhy* regulations, for example where a Member of Congress or an officer of the courts is subject to a subpoena issued by a State court, the Member or officer has a right to have a Federal court determine, as a matter of Federal law, whether compliance with the subpoena is required.

The proposed amendments would clarify an ambiguity in current law about *when* a subpoena matter can be removed to Federal court. Currently, some courts have held that removal is proper when a subpoena is issued, while others have concluded that a Federal officer or agency must wait until the court has taken some action to enforce the subpoena before he or she can seek removal. This legal uncertainty creates risks for Federal officers or agencies because removal proceedings must be instituted within thirty days of the matter's becoming removable. In jurisdictions where the timing rule is unclear, removal motions that would be timely in one court might be premature or late in others. The proposed amendment would provide a welcome clarification by establishing that Federal officers or agencies may seek removal when a subpoena is sought or issued in State court proceedings. It would also allow the Federal government to seek removal before becoming deeply embroiled in State proceedings. By removing the existing uncertainty in the law and allowing Federal officers or agencies to seek a Federal forum at an early stage of their involvement in judicial proceedings, this legislation would protect Federal officers' and agencies' ability to litigate in a Federal forum. We believe that clarification may also be useful regarding the timing for seeking removal and we would be pleased to work with the Subcommittee on this issue.

The Department likewise believes that the proposed amendment to the appeal provision, 28 U.S.C. § 1447, would improve its representation of its clients. Under current law, if a Federal district court decides, rightly or wrongly, to send a dispute involving a Federal officer or agency back to the State courts, the Federal government has no right to appeal that decision and will

have no choice but to participate in the State court litigation and to have the State court decide the questions of Federal law. The proposed legislation would give Federal officers and agencies a right to appeal the district judge's remand order and thus afford them an opportunity to correct any legal error in the judge's decision to remand. A successful appeal would allow the Federal officers and agencies to return to Federal court for resolution of the questions affecting their authority or obligations at issue in the State court proceedings.

The amendment granting appeal rights to Federal officers and agencies, officers of the courts, and Members of Congress would establish an important safeguard by allowing them to seek review of remand orders they believe to be erroneous to the appropriate United States Court of Appeals, instead of being forced to litigate in State courts even when they lack authority over the Federal government. It would thus offer an important procedural check that is absent from the current system, where the remand decisions of Federal district judges are conclusive even if they are grounded in a misunderstanding of Federal law.

As important as the appeal right would be for Federal officers or agencies, as a practical matter we expect the change in existing law to be limited in scope. While the amendment to Section 1447(d) would create a new category of orders subject to interlocutory appeal, the actual number of cases that the Federal government seeks to remove from State court each year is small, and we expect the occasions on which the Department would need to appeal a remand order are likely to be few.

Allowing Federal officers and agencies to appeal remand orders would be fully consistent with existing exceptions to the no-appeal rule where there is a similarly strong Federal interest in a Federal forum. Current law allows appeals from remand orders involving civil rights actions, actions involving the Federal Deposit Insurance Corporation, and actions for the foreclosure and sale of certain Indian lands. Extending the same appeal rights to the Executive Branch, Federal judicial officers, and Members of Congress would strengthen important protections for the United States when its interests are at stake in State court proceedings.

We would be happy to work with you as the legislation moves forward. I would be pleased to address any questions that you may have.

Mr. JOHNSON. Now we will hear from Mr. Nathan.

TESTIMONY OF IRVIN B. NATHAN, GENERAL COUNSEL, OFFICE OF THE GENERAL COUNSEL, U.S. HOUSE OF REPRESENTATIVES, WASHINGTON, DC

Mr. NATHAN. Thank you, Mr. Chairman, for inviting me to testify concerning H.R. 5281, the "Removal Clarification Act of 2010." As you know——

Mr. JOHNSON. Sir, would you please put that mike on also?

Mr. NATHAN. The green light is on.

Mr. JOHNSON. Green light? It should be a red light.

Mr. NATHAN. As you know, I have the privilege of serving as the General Counsel of the House. The function of our offices includes providing legal representation to Members, officers, and staff of the House when they are sued or when their testimony is sought to be compelled in connection with matters relating to their official responsibilities.

Our office has had considerable experience in matters in which private litigants have attempted to use the processes of State courts to compel the testimony of Members and their staffs. It is based on the experience of our office that I provide my testimony in support of this legislation. Like the Department of Justice, our office strongly supports the bill's enactment.

The statement of the Chairman accurately set forth the problem and our understanding of the effect of this legislation, as did Mr. Coble's statement, with one exception which makes the problem even greater than he described, because it was not the Fifth Circuit as a court of appeals that ruled that these pre-suit discovery is not a civil action. There were two conflicting courts in the district court in the Fifth Circuit that came to opposite conclusions. And the Fifth Circuit refused to hear an appeal on the subject to rule on the question, which underscores why we believe that there needs to be this clarifying legislation.

The bill would make certain that necessary clarifications concerning the Federal officer removal statute. That statute is a longstanding law. Its origins go back to 1815 concerning where matters are brought in State courts against Federal officers, based on their actions as Federal officials, and they are transferred to the Federal court for resolution of that question. As noted, the law applies to officials of all three branches of the Federal Government, and the clarification in the bill seeks to ensure uniform treatment throughout the country whenever the processes of State courts are invoked against Federal officers.

Our experience revealed that this bill is a needed clarification of the removal statute to ensure that removal to Federal court will be available to Federal officers where there is an issue of Federal law presented and their Federal duties are implicated, regardless of the procedures that are used in different State courts to obtain jurisdiction.

As detailed in my written testimony, there are unintended ambiguities in the current law that have led to disparate treatment by courts of virtually identical cases, even within the same Federal circuit.

In our view the bill, if enacted, would serve the public interest by making these clarifications in the law.

First, the bill amends 1442 to make clear that the statute, where its terms are satisfied, applies not just to State judicial proceedings in which the officer is a defendant or a party, but to all proceedings in which a legal demand is made in State court for the officer's testimony or documents.

Based on the disparate treatment that we have received in Federal courts, the current law is not sufficiently clear that ancillary proceedings against Federal officers, such as pre-suit discovery pe-

titions or subpoena enforcement actions, are civil actions for purposes of removal. As noted more than 40 states have procedures for pre-suit discovery and their standards vary. When a Federal official is subject to them, the official should have the matter decided by a Federal court.

The second amendment relates to the appeal and says that if a Federal court rejects a removal petition in the case of a Federal officer and remands to the state court there can be an appeal to the Federal court of appeals. As matters presently stand, appellate review of a district court remand to the State courts of an action against a Federal official is generally not available. That means that over 600 different Federal district judges have the final unreviewable say over these issues.

In light of the clarifying amendments that we seek to this statute, as in the bill, the provision regarding appeal will only apply in a very narrow set of cases, is unlikely to delay matters, and will tend to promote uniformed interpretation of the Federal officer removal statute.

The bill appropriately leaves in place the current law and practices governing Federal officer removal in nearly all respects. The bill does not alter the standard for general removal for Federal officer removal under 1442. And it won't change the widespread current practice in cases involving subpoenas, like a subpoena to a Federal official whereby only the ancillary proceedings involving the Federal officer is removed under section 1442, and the remainder of the case stays in State court.

I could cite a score of cases in virtually every circuit where the subpoena enforcement proceeding is removed and the remainder stays in State court. That issue has been raised by two of the academic witnesses, and I certainly want to say that it is our understanding that this bill does not change that policy, and that the underlying civil action in State court would remain in State court. It is only the ancillary proceeding that involved enforcement of a subpoena, or, in the case of a pre-suit discovery petition, that would go and would be removed. And we look forward to working with the Subcommittee to clarify that and to make sure that that is understood in the statute and in the legislative history.

Mr. JOHNSON. And if you will sum up, Mr. Nathan.

Mr. NATHAN. Yes. Just in short, e bill simply clarifies the existing statute, and, through the proposed amendments, will help ensure that Federal officials will not be treated differently depending on where or by what procedure they are hailed in to State court. Thank you, Mr. Chairman.

Mr. JOHNSON. Thank you, sir.

[The prepared statement of Mr. Nathan follows:]

House Committee on the Judiciary
Subcommittee on Courts and Competition Policy

Legislative Hearing on H.R. 5281,
The Removal Clarification Act of 2010

Testimony of Irvin B. Nathan
General Counsel
U.S. House of Representatives

May 25, 2010

Introduction and Overview

Thank you, Mr. Chairman, for inviting me to testify today in support of H.R. 5281, the Removal Clarification Act of 2010. The Office of General Counsel supports the bill's enactment because the bill would make certain necessary clarifications concerning the federal officer removal statute, 28 U.S.C. § 1442, a long-standing law that allows matters brought in state court against federal officers and agencies, based on their actions as federal officials or agencies, to be removed or transferred to federal court for resolution. The law applies to officials of all three branches of the federal government, and the clarification bill seeks to ensure uniform treatment throughout the country whenever the processes of state courts are invoked against federal officers in such circumstances.

I am honored to serve as the General Counsel of the United States House of Representatives. The functions of our office include providing legal representation to Members, officers, and staff of the House when they are sued or their testimony is sought to be compelled in connection with matters relating to their official responsibilities. Our office has had considerable experience in matters in which private litigants have attempted to use the processes of state courts to compel the appearance, testimony and/or production of documents of Members of Congress and their staffs. It is based on the experience of our office over the last three decades that I provide my testimony today in support of the bipartisan legislation that has been introduced by the Chairmen and ranking Members of the Judiciary Committee and this Subcommittee.

Our experience reveals that this bill is a needed clarification of the federal officer removal statute to ensure that removal to the federal courts will be available to officers in all three branches of the federal government where an issue of federal law is presented and their federal duties are implicated — regardless of the procedures that different state courts employ to obtain jurisdiction over individuals. As I will explain, unintended ambiguities in the current law have led to disparate treatment of virtually identical cases, even within the same federal Circuit. The federal officer removal statute — which has its roots in a statute first enacted in 1815 — reflects the longstanding recognition by Congress that it is important that federal officers be afforded a federal forum to present their federal defenses in litigation. Federal courts are generally more familiar than state courts with these defenses and immunities — such as sovereign immunity, executive privilege, and Speech or Debate Clause immunity — and state court litigation against federal officers can sometimes be used for improper political purposes or to harass and interfere with the federal government or its officers' performance of their official functions to the detriment of the American people. Litigation in this context encompasses not only lawsuits, but also ancillary legal proceedings, including (but not limited to) subpoenas for testimony or documents and pre-suit discovery requests such as demands for depositions or the production of documents.

The bill would serve the public interest by making needed clarifications in the law concerning federal officer removal, in two principal respects. First, the bill amends 28 U.S.C. § 1442 to make clear that the federal officer removal statute, where its terms are

satisfied, applies not just to state judicial proceedings in which a federal officer or agency is a party, but also to all proceedings in which a legal demand is made in a state court for a federal officer's testimony or documents whether or not the federal officer is a formal party to the proceeding. Based on disparate treatment by federal courts, the current law is not sufficiently clear that ancillary proceedings against federal officers, such as pre-suit discovery petitions or subpoena enforcement actions, are "civil actions" for removal purposes. The legislative history of the federal officer removal statute, described below, confirms that Congress intended all proceedings in state courts to be considered a "civil action" for removal purposes, and this bill reaffirms that direction from Congress. Further, this clarification responds to confusion that has developed in the caselaw about whether removal to federal court is contingent on the initiation of contempt proceedings in state court relating to the enforcement of subpoenas or other judicial orders, and makes clear that a federal officer is not required to be held in contempt of a state court in order to remove the proceeding in question to federal court.

Second, the bill amends 28 U.S.C. § 1447(d) to provide that if a federal district court rejects a Section 1442 removal and remands to the state court, there can be an appeal to the federal circuit court of the remand order. As matters presently stand, appellate review of a district court's remand to the state courts of an action or proceeding against a federal official is generally not available, and thus each of over 600 different federal district court judges have the final, unreviewable say over these issues. In light of the clarifying amendments to the federal officer removal statute, this provision regarding appeal will apply only in a quite narrow set of cases, is unlikely to unduly delay matters, and will tend to promote uniform interpretation of the federal officer removal statute.

The bill leaves in place the current law and practices governing federal officer removal in nearly all respects. The bill does not alter the standards for general removal under 28 U.S.C. § 1441 or for federal officer removal under 28 U.S.C. § 1442, and does not enlarge the scope of a civil action or criminal prosecution as those terms are used throughout the federal code. Nor will it change the current practice in cases involving proceedings — such as a subpoena to a non-party federal official — whereby only the ancillary proceeding involving the federal officer is removed under Section 1442(a)(1), and the rest of the case remains in state court.[1] The proposed legislation also will not alter the well-settled requirement, derived from Article III of the Constitution, that removal under Section 1442(a)(1) must be predicated on the availability to the federal officer of a federal defense.[2]

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[1] *See, e.g., State v. Rodarte*, No. 09-2912, 2010 WL 924099 at *1 (D. Colo. Mar. 9, 2010); *In re Subpoena In Collins*, 524 F.3d 249, 251 (D.C. Cir. 2008); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 414 (D.C. Cir. 1995); *Pollock v. Barbosa Group, Inc.*, 478 F. Supp. 2d 410, 413 (W.D.N.Y. 2007). In this regard, it may be advisable to explore any necessary amendments to the bill to make this point particularly clear.

[2] *See Mesa v. California*, 489 U.S. 121, 133-34 (1989) ("[A]n unbroken line of this Court's decisions extending back nearly a century and a quarter have understood . . . the federal officer removal statute to require the averment of a federal defense.").

Rather, under the terms of the bill if enacted, each of the currently existing requirements of the federal officer removal statute still must be met for removal to be permitted by the federal district judge. The bill simply clarifies the existing statute and will help ensure that federal officials will not be treated differently depending on where or by what procedure they are haled into state court.

I. 28 U.S.C. § 1442

The federal officer removal statute, 28 U.S.C. § 1442(a), permits "any officer (or person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office" to remove "a civil action or criminal prosecution ... commenced in a state court" to federal district court if the officer is able to raise a colorable federal defense.[3]

The manifest purpose of the federal officer removal statute is to provide federal officers — including executive branch officials, judges, and Members of Congress — with a federal forum where they may litigate before appointed judges possessing the independence associated with Article III lifetime tenure where either the claim asserted against them is based on federal law or the federal officer asserts a colorable defense based on federal law. In contrast to its approach to the general removal statute, 28 U.S.C. § 1441, which the Supreme Court has instructed should be construed narrowly, the Court has repeatedly mandated that Section 1442 be broadly and liberally construed to effectuate its purposes.[4] As the Court has repeatedly explained, removal for federal officers in matters related to their official conduct involving federal law provides them with a federal forum, free from local interests or prejudice, and protects the federal government from interference with its operations.[5] In addition, Section 1442 provides for such decisions to be made in the federal courts — which are equipped with accumulated expertise to deal with such matters — and promotes uniform application of federal law.

Section 1442 has its roots in several statutes enacted early in the nation's history

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[3] *See* 28 U.S.C. § 1442(a)(1)-(4); *see also Mesa*, 489 U.S. at 138-39; *Arizona v. Manypenny*, 451 U.S. 232, 242 (1981); *Willingham v. Morgan*, 395 U.S. 402, 406-07 (1969).

[4] *See, e.g., Jefferson County, Ala. v. Acker*, 527 U.S. 423, 431 (1999) (removal case involving federal judges); *Willingham*, 395 U.S. at 406-07; *Colorado v. Symes*, 286 U.S. 510, 517 (1932); *see also Louisiana v. Sparks*, 978 F.2d 226, 232 (5th Cir. 1992); *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1252 (9th Cir. 2006); *Nationwide Investors v. Miller*, 793 F.2d 1044, 1046 (9th Cir. 1986).

[5] *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 148 (2007) (canvassing the historical record and observing that "[t]his initial removal statute was obviously . . . an attempt to protect federal officers from interference by hostile state courts") (internal citation omitted and capitalization altered); *Manypenny*, 451 U.S. at 241-42; *Willingham*, 395 U.S. at 404-05; *see also Tennessee v. Davis*, 100 U.S. 257, 263 (1879) (interpreting Act of 1866).

that provided a right of removal for federal officers who were responsible for enforcement of customs and revenue laws, among other things.[6] In 1948, shortly after Congress adopted the Federal Rules of Civil Procedure, Congress amended Title 28, including the general removal and federal officer removal provisions.[7] The general removal statutory provisions then in Sections 71 and 114 were consolidated and recodified as 28 U.S.C. § 1441, which remains today the general removal statute.[8] The federal officer removal statutory provisions then in Sections 76 and 77 were consolidated and recodified as 28 U.S.C. § 1442 and, as rewritten, extended removal authority to all federal officers.[9] The term "civil action" was enacted by Congress into §§ 1442 and 1441 in 1948 and has remained in those provisions unchanged since then.

It is clear from the 1948 history that Congress intended by the term "civil action" to include both direct lawsuits and other ancillary legal proceedings such as subpoenas and discovery requests. In 1948, as now, Rule 2 of the Federal Rules of Civil Procedure provided that there is one form of action, the "civil action."[10] And, in 1948, as now, a "civil action" as used in Rule 2, included pre-suit discovery proceedings.[11] According to the contemporaneous House Report accompanying the 1948 legislation, in so revising the statute to conform with the then recently adopted Federal Rules of Civil Procedure, the words 'case,' 'cause,' 'suit,' and the like [that appeared in 28 U.S.C. §§ 71, 114 (1940)] were omitted and the words 'civil action' substituted [in § 1441] in harmony with Rules 2 and 81(c) of the Federal Rules of Civil Procedure."[12] Exactly the same thing is true of §§ 76, 77, the then-existing federal officer removal provisions. That is, words such as "civil suits," "suits," "suit . . . commenced in the State court by summons, subpoena, petition, or any other process," "personal action" and the like that appeared in 28 U.S.C. §§ 76, 77 (1940) were omitted in the 1948 recodification and the words "civil action" were substituted in § 1442 to encompass all types of proceedings in which process is initiated against federal officials and a judicial order is sought, including subpoenas for documents or testimony and petitions for pre-suit discovery, including depositions.

More recently, with the Federal Courts Improvement Act of 1996, Congress extended the § 1442 removal authority to federal agencies.[13] In so legislating, Congress

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[6] *See, e.g.*, *Watson*, 551 U.S. at 147-48; *Willingham*, 395 U.S. at 405-06 (citing Customs Act of February 4, 1815, ch. 31, § 8, 3 Stat. 198 (1815); Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 633 (1833); Act of July 13, 1866, ch. 184, § 67, 14 Stat. 171 (1866); Rev. Stat. § 643 (1874)).

[7] *See* Act of June 25, 1948, ch. 646, § 1442(a), 62 Stat. 938 (1948), 28 U.S.C. § 1442(a).

[8] *Id.*

[9] *See* H. Rep. No. 80-308, at A134 (1947).

[10] *See* Fed. R. Civ. P. 2 (1947).

[11] *See* Fed. R. Civ. P. 27 (1947).

[12] H. Rep. No. 80-308, at A133 (1947).

[13] *See* S. 1887, 104th Cong. (2d Sess. 1996)

reiterated its policy judgment that "[a] Federal forum in such cases is important since state court actions against Federal agencies and officers often involve complex Federal issues and Federal-State conflicts," and that, accordingly, the extension of removal authority "fulfills Congress' intent that questions concerning the exercise of Federal authority, the scope of Federal immunity and Federal-State conflicts be adjudicated in Federal court."[14]

II. 28 U.S.C. § 1447(d)

After a proceeding is removed, where a federal district court remands the proceeding to state court, 28 U.S.C. § 1447 generally governs whether an appeal to the regional federal circuit court of that remand order is available. The current form of Section 1447(d) provides that "an order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise." The Supreme Court has observed that the general intent of Section 1447(d) is to prevent "prolonged litigation of questions of jurisdiction of the district court to which the cause is removed."[15] If after removal, the federal district court finds that a matter was not properly removable and remands it back to the State court, under Section 1447(d) as it has been interpreted, the remand order is generally not appealable to the federal circuit courts, subject to several well-established exceptions, none of which this bill would alter.[16] The Section 1447(d) bar has been held to preclude appellate review of remand orders that followed removal under the federal officer statute, even in a case where the federal official had raised substantial defenses and had no opportunity to litigate the Section 1442 issue before the district court.[17]

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[14] S. Rep. No. 104-366, at 30-31 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 4202.

[15] *Osborn v. Haley*, 549 U.S. 225, 243 (2007) (*citing United States v. Rice*, 327 U.S. 742, 751 (1946)).

[16] There are at least two classes of recognized exceptions, neither of which the bill would alter in any way. First, there is an exception added by Congress in 1964 into the text of § 1447(d) to this bar on appellate review for "an order remanding a case to the State court from which it was removed pursuant to Section 1443," which is a provision concerning civil rights claims. Second, under the Supreme Court's interpretation of § 1447 in a line of cases beginning with *Thermtron v. Hermansdorfer*, 423 U.S. 336 (1976), *abrogated on other grounds*, *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 714-15 (1996), direct appellate review of a remand order is proper where the remand is based on a ground *other* than the two specified in 28 U.S.C. § 1447(c) — *i.e.*, lack of subject matter jurisdiction, or a defect in removal procedure. The Supreme Court has repeatedly held that 28 U.S.C. § 1447(d) must be read in *pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d). *See Carlsbad Tech., Inc. v. HIF BIO, Inc.*, 129 S. Ct. 1862, 1866-67 (2009); *Quackenbush*, 517 U.S. at 711-12; *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995); *Thermtron*, 423 U.S. at 345-46.

[17] *See Price v. Johnson*, 600 F.3d 460, 462 (5th Cir. 2010).

III. The Proposed Bill's Amendments to Sections 1442 and 1447

The bill as drafted makes three material clarifications to the federal officer removal statute, 28 U.S.C. § 1442(a)(1), and adds an additional exception to the Section 1447(d) statutory bar on appellate review of remand orders.

As to Section 1442, *first*, the bill clarifies that the terms "civil action" and "criminal prosecution" include, as the draft bill states, "any proceeding in which a judicial order, including a subpoena for testimony or documents, is sought or issued." *Second*, the bill clarifies that the term "against" a federal officer includes a proceeding in which a judicial order is "directed to" the federal officer in question, and that a civil action or criminal prosecution that is either "for" or "related to" a federal officer's conduct in his or her official capacity may qualify for removal under the statute. These language clarifications reaffirm that ancillary proceedings, such as subpoena enforcement matters and pre-suit discovery proceedings, fall within the scope of Section 1442. *Third*, the bill makes clear that a federal officer served with a state court subpoena that demands information about his federal activities can remove the subpoena proceeding to federal court without, as a number of courts have held, having first to stand in contempt of the state court.

As to Section 1447, the bill amends subsection (d) to permit a federal officer to appeal a district court's remand order if the federal officer removed under Section 1442 and the district court remanded the case — a scenario that should be exceedingly rare in the wake of the clarifying amendments to Section 1442.

Without these clarifications, Section 1442(a) leaves federal officers exposed to random, disparate treatment depending on where and how they are haled into state court, and Section 1447(d) may leave them with no right of appeal from erroneous remand orders. There are a number of recent cases, discussed below, that demonstrate why this legislation is warranted.

IV. Selected Relevant Judicial Decisions Illustrating the Need for the Bill

A. Subpoenas to Federal Officers

In the context of subpoenas issued to federal officers in state court proceedings, the Circuits have split on whether a state court must initiate contempt proceedings before a federal officer may remove to federal court. The proposed legislation would provide uniformity and reaffirm and codify the standard employed by the cases that have held that federal officers do not need to subject themselves to contempt before removing the subpoena proceedings under the federal officer removal statute. Under the bill's clarifying provisions, they would be able to remove the proceeding to federal court provided that they otherwise meet the requirements of the federal officer removal statute.

1. A Federal Officer May Remove a State Court Subpoena Prior to Contempt Proceedings.

In *Brown & Williamson Tobacco Corp. v. Williams*, the D.C. Circuit held that once a state court subpoena is directed to a federal officer, the federal officer may properly remove the subpoena matter to federal court under Section 1442(a).[18] Under this holding, it is not necessary that a federal officer stand in actual contempt of the state court in order for the subpoena proceeding to be removed to the appropriate federal district court. The D.C. Circuit stated:

> Once the subpoena is issued, a clash between state power and the federal official appears to be naturally inevitable. 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 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. We do not believe Congress used the terms "civil action," "against," or "act" in the limited fashion that appellant urges, but rather meant to refer to any proceeding in which state judicial civil power was invoked against a federal official.[19]

Courts in at least five other Circuits have likewise indicated that a federal officer may remove to federal court without waiting for contempt proceedings to be initiated.[20] Most recently, a federal official was subpoenaed to appear in a North Carolina state court divorce proceeding about actions he took in his official capacity.[21] The official removed

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[18] *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 412-15 (D.C. Cir. 1995).

[19] *Brown & Williamson*, 62 F.3d at 415.

[20] *See, e.g., Smith v. Cromer*, 159 F.3d 875, 883 (4th Cir. 1998) (affirming order on merits that followed removal pursuant to § 1442(a) where Department of Justice employees refused to testify in response to state court subpoena); *Edwards v. United States Dep't of Justice*, 43 F.3d 312, 317 (7th Cir. 1994) (affirming grant of motion to quash that followed removal pursuant to § 1442(a) where Department of Justice refused to produce FBI surveillance reports in response to state court subpoena); *Nationwide Investors v. Miller*, 793 F.2d 1044, 1045 (9th Cir. 1986) ("At least part of the purpose of Section 1442(a)(1) is to prevent state courts from unlimited exercise of their subpoena power against federal officers upon pain of contempt."); *Pollock v. Barbosa Group, Inc.*, 478 F. Supp. 2d 410, 412 (W.D.N.Y. 2007); *Ferrell v. Yarberry*, 848 F.Supp. 121, 122-23 (E.D. Ark. 1994).

[21] *In re Subpoena to Appear and Testify to U.S. Representative Patrick T. McHenry, in Lampe v. Lampe*, 08-CVD-1865, (Dist. Ct., Caldwell Cty., N.C., 2009).

to federal court under Section 1442(a)(1) and filed a motion to quash. The district court accepted the removal and resolved the motion to quash.[22]

2. Certain Federal Courts Require Contempt Proceedings Against Federal Officers Before They May Remove to Federal Court.

Other courts have taken an approach to Section 1442(a) very different from that of the D.C. Circuit and other courts applying the same approach, and have required that the state court initiate contempt proceedings or that the federal officer actually be held in contempt in order to allow removal under Section 1442.[23]

This view was articulated recently in the *Stallworth* case, an Alabama case involving a federal bank examiner who was the subject of a deposition subpoena seeking information about her official federal activities in a state court slander/libel case.[24] After the examiner was served with a deposition subpoena, she removed the matter to a federal district court. The district court rejected removal and remanded the matter back to the state court. The district court specifically considered and rejected the *Brown & Williamson* line of reasoning.[25] Rather, the court concluded that removal was premature, because "the appropriate time to invoke federal jurisdiction under § 1442(a)(1) is the point at which contempt proceedings are initiated against the federal employee by the state court."[26]

Confusing the issue even more is that where the Circuits follow the rule that a federal officer must stand in contempt of a state court before permitting removal, exceptions are still allowed based on the peculiarities of state law. For example, under Louisiana law, a state court may immediately cite a federal officer for contempt for refusing to comply with a subpoena without either notice or a show cause proceeding. Based on this State law, the Fifth Circuit, which usually requires a contempt proceeding in a subpoena matter before allowing removal, permitted removal by a federal officer without initiation of contempt proceedings, but did so in a manner that limited the

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[22] *In re Subpoena to Appear and Testify to U.S. Representative Patrick T. McHenry, in Lampe v. Lampe*, 08-CVD-1865, (Dist. Ct., Caldwell Cty., N.C., 2009), Misc. Case. No. 5:09-mc-5 (W.D.N.C. Dec. 3, 2009) (order granting motion to quash).

[23] *See, e.g., Florida v. Cohen*, 887 F.2d 1451, 1454 (11th Cir. 1989) ("Once the state court initiated contempt proceedings against the federal officials, removal of the contempt proceedings was appropriate."); *Wisconsin v. Schaffer*, 565 F.2d 961, 964 (7th Cir. 1977); *Boron Oil Co. v. Downie*, 873 F.2d 67, 68 (4th Cir. 1989) (citing *North Carolina v. Carr*, 386 F.2d 129, 130 (4th Cir. 1967)).

[24] *Stallworth v. Hollinger*, 489 F.Supp.2d 1305 (S.D. Ala. May 24, 2007).

[25] *Id.* at 1309.

[26] *Id.* at 1307.

holding to the facts of the case. Thus, the Court held, under these circumstances, the mere issuance of the subpoena triggered Section 1442.[27]

The proposed bill would bring needed clarity and uniformity by rejecting the *Stallworth* approach, and by codifying the *Brown & Williamson* approach ensuring that no contempt proceeding need be threatened or brought against a subpoenaed federal official in order for the official to remove the subpoena proceeding to federal court.

B. Pre-Suit Discovery

As shown in the Appendix attached to my testimony, nearly every State has some type of pre-suit discovery provision that allows individuals to be deposed and/or required to produce documents even though they have not yet been — and may never be — sued. The state statutes differ in their scope and application. Many, mirroring the text of Federal Rule of Civil Procedure 27, permit pre-suit discovery for the limited purpose of preserving testimony where there is an expectation that the witness will be unavailable when the action is commenced.[28] In other States, the rules are broader, allowing potential plaintiffs to use pre-suit discovery to investigate potential claims, confirm the identity of the putative defendant, identify unknown potential defendants, or verify factual allegations.[29] Texas is viewed by some as the State with the most expansive pre-suit discovery rule in the nation, allowing for the investigation of possible claims, and one commentator has noted that state courts in Texas provide very little supervision to ensure that there is no abuse of this pre-suit discovery device.[30]

Recent cases reveal that a federal official subject to pre-suit discovery in one state may receive very different treatment than a similarly situated federal officer served with a pre-suit discovery petition in another. As the case studies described below demonstrate, the outcomes, even within the same federal Circuit, are not consistent.

1. *Price v. Johnson*

In 2009, a county commissioner in Texas filed a petition in state court pursuant to Texas Rule of Civil Procedure 202 to take pre-suit deposition testimony from a Member of Congress.[31] The purported purpose of the petition was to investigate a potential defamation claim against the Member of Congress in connection with an interview she gave to a local newspaper that concerned transportation issues of importance to her constituents and the region. The fact that the interview was tape-recorded and available

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[27] *Louisiana v. Sparks*, 978 F.2d 226, 231-32 (5th Cir. 1992).

[28] *See* Appendix § B.

[29] *See* Appendix § A.

[30] Lonny Hoffman, *Access to Information, Access to Justice: The Key Role of Presuit Investigatory Discovery*, 40 U. Mich. J.L. Reform 217, 259 (2007).

[31] *Price v. Johnson*, 09-2362 (14th Judicial Dist., Dallas Cty. Feb. 27, 2009).

on the internet cast considerable doubt on whether there was any legitimate need for such pre-suit investigation. The Member removed the proceeding to federal court pursuant to Section 1442(a)(1) and promptly moved to dismiss on several substantive federal law grounds.[32] The commissioner, without responding to that motion, moved to remand. The district court immediately granted the remand motion, sending the matter back to state court without waiting to hear from the Member of Congress.[33] The only articulated ground for the remand was that a "[p]etition for authorization to take depositions before suit [under Texas Rule of Civil Procedure 202] is not a removable 'civil action' under 28 U.S.C. § 1442(a)(1)."[34]

The Member appealed the remand order to the Fifth Circuit, and the state court stayed all further proceedings in that court pending disposition of the Fifth Circuit appeal. The Fifth Circuit — like the district court — never considered the federal official's arguments that removal was proper and authorized. Instead, the Fifth Circuit held that Section 1447(d) barred it from considering Congresswoman Johnson's appeal of the remand.[35] The case is now back in Texas state court.

2. *In re Charlotte White*

In re Charlotte White, also filed quite recently in the same Circuit as the *Price* matter just described and involving materially identical facts, the district court reached the *opposite* result. Unlike *Price*, the result of the *White* case is consistent with the intent of Congress in passing the federal officer removal statute in 1948, and would be mandated by the clarification in the pending bill.

In *White*, an aide to a U.S. Senator from Louisiana was the subject of a petition for pre-suit deposition in a Louisiana state court.[36] That petition is, for all material purposes, identical to the *Price* petition. The aide, like the federal official in the *Price* case, removed the petition to federal district court and asserted a federal defense in a motion to dismiss.[37] The federal district court in Louisiana, however, in stark contrast to the district court in the *Price* case, accepted the removed action, thereby implicitly

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[32] *See* Motion to Dismiss, *Price v. Johnson*, No. 3:09-cv-476 (N.D. Tex. Mar. 13, 2009).

[33] *See Price v. Johnson*, 600 F.3d 460, 462 (5th Cir. 2010).

[34] *See* Order, *Price v. Johnson*, No. 3:09-cv-476 (N.D. Tex. Apr. 10, 2009).

[35] *See Price v. Johnson*, 600 F.3d 460, 462-63 (5th Cir. 2010); Order On Petition for Rehearing En Banc, *Price v. Johnson*, No. 09-10389 (5th Cir. Apr. 29, 2010) (denying the petition for *en banc* review).

[36] *See* Petition, *In re: Charlotte White*, No. 10-185 (E.D. La. Nov. 20, 2009).

[37] *See* Notice of Removal, *In re: Charlotte White*, No. 10-185 (E.D. La. Jan. 27, 2010); Motion to Dismiss, *In re: Charlotte White*, No. 10-185 (E.D. La. Feb. 5, 2010).

concluding that the petition was a "civil action" within the meaning of Section 1442(a), and, concluding that it had subject matter jurisdiction, dismissed the petition.[38]

Louisiana and Texas are both in the Fifth Circuit. When two district courts in the same Circuit, faced with materially identical facts, reach such different results, the perception of justice and the rule of law are undermined. Congress should exercise its authority to clarify the federal officer removal statute so that virtually identical cases will be treated identically. Under Section 1442 as amended by the bill's welcomed clarifying provisions, the removal of both cases to federal court would have been effective.

Conclusion

Without the needed clarifications set forth in the bill, the judicial interpretations by certain federal courts of Section 1442 have the potential to close the federal courthouse door to many federal officers – including executive branch officials, up to and including the President, as well as judges and Members of Congress and their staffs when they are subjected to subpoenas, pre-suit discovery petitions or other orders of state courts relating to their federal responsibilities. Without this legislation, each district court — without any judicial review — will under the current version of Section 1447(d) make its own determination of whether such a proceeding is an "action" that can be removed to federal court. There is no reason that identically situated federal officials should be treated differently depending on what State or in what judicial district they happen to be served with process. This is particularly true when many of these state processes, including pre-suit discovery and subpoenas, are subject to being abused for political or other reasons. The significance of this problem is magnified by additional considerations — including that in some States trial judges are elected, and that in some States their decisions on pre-suit discovery petitions are not appealable in the state courts.[39]

The bill responds to these problems by bringing needed clarity and uniformity to the application of the federal officer removal statute. The bill will promote uniformity and predictability across the country by making clear that removal is proper in subpoena enforcement, pre-suit discovery, and other ancillary proceedings where a federal official is haled into state court and has available a defense under federal law. Accordingly, on behalf of the Office of General Counsel of the House, I respectfully urge the Courts and Competition Policy Subcommittee of the House Committee on the Judiciary to give every favorable consideration to the Removal Clarification Act of 2010. Thank you.

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[38] *See* Order and Reasons, *In re: Charlotte White*, No. 10-185 (E.D. La. Mar. 10, 2010). For an example of a similar result outside the Fifth Circuit, *see Kelly v. Whitney*, 1998 WL 877625 at *1 (D. Ore. Oct. 27, 1998) (after several IRS employees were the subject of a pre-suit discovery petition filed in Oregon state court, the district court accepted removal under Section 1442(a)(1), declined to remand, and dismissed the action on the ground that the plaintiff's petition failed to satisfy the requirements of Federal Rule of Civil Procedure 27).

[39] *See, e.g., In re Jorden*, 249 S.W.3d 416, 419 n.8 (Tex. 2008).

Appendix to Testimony of Irvin B. Nathan, General Counsel, U.S. House of Representatives Before the Courts and Competition Policy Subcommittee of the House Committee on the Judiciary

Collection of State Rules Regarding Pre-Suit Discovery

This Appendix divides the States into three categories. First, the Appendix lists those state pre-suit discovery provisions that employ a standard broader than that of Federal Rule of Civil Procedure Rule 27. Second, it lists those States with pre-suit discovery provisions that use or mirror the language of Rule 27 of the Federal Rules of Civil Procedure. Third, it lists the handful of States that do not appear to have pre-suit discovery provisions.

A. States with Pre-Suit Discovery Provisions Broader Than Federal Rule of Civil Procedure Rule 27

1) Alabama: Ala. R. Civ. P. 27 (if justice so requires the court may order depositions, both oral or written, to be taken, or may compel discovery of specific "objects"); *Young v. Hyundai Motor Mfg. Alabama, LLC*, 575 F. Supp. 2d 1251, 1253 (M.D. Ala. 2008) (Rule 27 of the Alabama Rules of Civil Procedure "has been construed as being broader than its federal counterpart" because unlike the federal rule it "permits persons to seek pre-suit discovery for the purpose of investigating and evaluating a potential claim.")

2) California: Cal. Civ. Code 2035-010 (evidence reasonably calculated to lead to admissibility may be perpetuated by depositions, interrogatories, document inspection, requests for admission, and mental and physical examinations so long as the rule is not be used to determine if a cause of action exists or to identify who shall be made party to an action)

3) Iowa: Iowa R. Civ. P 1.722-29 (if the applicant is unable to bring the action, then the court shall determine whether written or oral interrogatories are appropriate and such depositions must be filed within 30 days after the date fixed by the court for taking the deposition and a guardian ad litem must be present at the deposition if a party has not yet been served with notice); *Stewart v. Foster Wheeler Energy Corp.*, 2008 WL 4189010 at *1 (Iowa Dist. Jan. 17, 2008) (The Iowa Rule is distinctive from its federal counterpart because "contains a specific rule of exclusion for depositions taken in contravention of the requirement for a guardian ad litem to be present at the deposition to represent parties not yet served with notice.")

4) Maryland: Md. R. P. Circ. Ct. 2-404 and 3-431 (with leave of court for good cause a party may obtain discovery of documentary evidence as well as physical or medical examinations); *Allen v. Allen*, 659 A.2d 411, 416 (Md. App. 1995) (Maryland Rule 2-404 provides in pertinent part that it "has taken a more expansive approach than its federal counterpart insofar as it provides for the perpetuation of documentary evidence and mental and physical examinations in addition to testimonial evidence.")

5) New York: N.Y. Civ. Prac. L. & R. § 3102(c) ("Before an action is commenced, disclosure [by depositions, interrogatories, demands for addresses, discovery and inspection of documents or property, physical and mental examinations of persons, and requests for admission] to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order."); *Dublin Worldwide Prods. (USA), Inc. v. Jam Theatricals, Ltd.*, 162 F. Supp. 2d 275, 277 (S.D.N.Y. 2001) (". . . Counsel . . . [sought] discovery pursuant to N.Y.C.P.L.R. 3102(c)—'to aid in bringing an action,' a provision offering broader pre-action discovery than comparable federal procedure.") (citing Fed. R. Civ. P. 27(a))

6) Pennsylvania: Pa. R. Civ. P. 4003.8 ("A plaintiff may obtain pre-complaint discovery where the information sought is material and necessary to the filing of the complaint and the discovery will not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party.")

7) Texas: Tex. R. Civ. P. 202.1 ("A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either: (a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or (b) to investigate a potential claim or suit."); *In re Am. State Bank to Obtain Testimony of Wade*, No. 07-03-0483, 2005 WL 1967262, at *1 (Tex. App. 2005) ("Rule 202 is 'a rewrite of former Rule 187 [whose language was identical to Fed. R. Civ. P. 27] that is broadened somewhat to expressly permit discovery depositions prior to suit and to investigate potential claims.'")

B. State Pre-Suit Discovery Provisions Using or Mirroring the Language of Federal Rule of Civil Procedure Rule 27

1) Alaska: Alaska R. Civ. Pro. 27

2) Arizona: Ariz. R. Civ. P. 27(a)

3) Arkansas: Ark. R. Civ. P. 27(a)

4) Colorado: Colo. R. Civ. Pro. 27

5) District of Columbia: D.C. Sup. Ct. R. Civ. P. 27(a)

6) Florida: Fla. R. Civ. P. 1.290

7) Georgia: Ga. Code Ann. § 9-11-27

8) Hawaii: Haw. R. Civ. P. 27(a)

9) Idaho: Idaho R. Civ. P. 27(a)

10) Illinois: Ill. Sup. Ct. R. Civ. P. Trial Ct. 217

11) Indiana: Ind. R. Civ. P. 27

12) Kentucky: Ky. R. Civ. Pro 27.01

13) Louisiana: La. Code Civ. P. § 1429-30

14) Massachusetts: Mass. R. Civ. P. 27

15) Maine: Me. R. Civ. P. 27(a)

16) Michigan: Mich. R. Civ. P. 2.303(a)

17) Minnesota: Minn. R. Civ. P. 27.01

18) Missouri: Mo. R. Civ. P. 57.02

19) Mississippi: Miss. R. Civ. P. 27(a)

20) Montana: Mont. R. Civ. P. 27(a)

21) Nevada: Nev. R. Civ. P. 27(a)

22) New Jersey: N.J. R. Ct. 4:11-1

23) New Mexico: N.M. R. Ann. 1-027

24) North Carolina: N.C. R. Civ. P. 27(a)

25) North Dakota: N.D. R. Civ. P. 27(a)

26) Ohio: Ohio R. Civ. P. 27(a)

27) Oklahoma: Okla. R. Civ. P. 27(a)

28) Rhode Island: R.I. R. Civ. P. 27(a)

29) South Carolina: S.C. R. Civ. P. 27(a)

30) South Dakota: S.D. R. Civ. P. § 15-6-27(a)

31) Tennessee: Tenn. R. Civ. P. 27(a)

32) Utah: Utah R. Civ. P. 27(a)

33) Vermont: Vt. R. Civ. P. 27(a)

34) Virginia: Va. R. Civ. P. 4:2(a)

35) Washington: Wash. R. Civ. P. 27(a)

36) West Virginia: W. Va. R. Civ. P. 27(a)

37) Wisconsin: Wis. St. Ann. § 804.02(1)(a)

38) Wyoming: Wyo. R. Civ. P. 27(a)

C. States That Do Not Appear to Have Pre-Suit Discovery Provisions

1) Connecticut

2) Delaware

3) Kansas

4) New Hampshire

5) Oregon

Mr. JOHNSON. Now we will hear from Professor Hoffman.

TESTIMONY OF LONNY HOFFMAN, GEORGE BUTLER RESEARCH PROFESSOR OF LAW, UNIVERSITY OF HOUSTON LAW CENTER, HOUSTON, TX

Mr. HOFFMAN. Mr. Chairman——

Mr. JOHNSON. If you would. That microphone down there, I think it is a virus going around.

Mr. HOFFMAN. Mr. Chairman and Members of the Committee, whatever its virtues, this bill could be significantly improved if more specific language were used to clarify its intended affects. There are a number of examples that can be cited, but in my brief time this afternoon I want to focus on one particular issue involving pre-suit discovery. This issue implicates a vital policy issue that is raised by the bill; and that is this: What would be the effect of allowing removal of a State pre-suit discovery request or order if there is no comparable right to such discovery under existing Federal law? The proposed legislation does not provide a clear answer to this question.

In my judgment, the bill should expressly clarify that after removal, a Federal judge has authority to decide whether to allow the sought-after pre-suit discovery.

To illustrate the problem plainly, consider this example. Someone who believes she was injured, but doesn't have enough information to bring a suit, files a request to take pre-suit discovery in a State court from a Federal officer. She says she believes the Federal officer has information that would lead her to determine whether she has a viable claim against someone; perhaps against a Federal officer or perhaps against some other entity, a separate third party entirely.

Now, assume that under State law she would be able to obtain the requested investigatory discovery; but under rule 27, the Federal pre-suit discovery rule, she could not. So what happens if the Federal officer removes this pursuant to 1442 to Federal court? Does it show up there dead on arrival, to be immediately dismissed? Or does the Federal judge somehow have the authority to decide whether to allow the pre-suit discovery to go forward? Again, the proposed legislation is silent on these vital questions.

A court faced with these choice of law problems could reasonably find that the law implicitly authorizes the Federal judge to decide whether to grant the pre-suit discovery or not. But the difficulty is with the adverb. To say that a law implicitly allows a Federal judge to do something, leaves a great deal of room for doubt and for many different opinions as to the right answer. Put another way, the proposed legislation could be read alternatively as immunizing the Federal officer or agency from ever having to provide discovery prior to suit.

That nicely frames the key problem: What reasonable policy justification would warrant granting blanket immunity in this context?

In the Brown and Williamson case out of the D.C. circuit, which appears to be a model on which this proposed legislation is based, at least in part, when a subpoena was issued to Federal officers in connection with a pending State case, the court allowed the pro-

ceedings to be removed and then proceeded, quite correctly, to decide whether a valid defense existed that would excuse the Federal officer's compliance with the State order in that case.

The same result should attend when the issue is pre-suit discovery. If a valid defense would trump, in whole or in part, the taking of such discovery, then that defense can and should be presented to the Federal judge to rule on.

Moreover, if a court were to read the ambiguous language now in the bill as precluding a Federal judge from ever allowing pre-suit discovery when it is not authorized by rule 27, then section 1442 would be unique. Congress has never before passed a law that, in allowing removal of a case to Federal court, had the simultaneous effect of terminating it.

If the proposed legislation is clarified—Mr. Chairman, shall I continue? I am almost finished.

Mr. JOHNSON. Yes.

Mr. HOFFMAN. Mr. Chairman, if the proposed legislation is clarified to make clear that its purpose is only to allow Federal officers and agencies to be able to get into Federal court, as Mr. Coble was saying in his opening remarks, and then to allow the Federal judge to rule upon whether a Federal defense trumps, then I believe 1442 will operate in the same manner as every other removal statute. It will change the forum, but not necessarily the final outcome of the case.

Thus, and in conclusion, I believe the proposed legislation should expressly clarify that after removal, a Federal judge has authority to decide whether to allow the pre-suit discovery to go forward, subject of course to whatever Federal defenses may apply. Thank you.

Mr. JOHNSON. Thank you Professor Hoffman.

[The prepared statement of Mr. Hoffman follows:]

PREPARED STATEMENT OF LONNY HOFFMAN

Prepared Statement of Lonny Hoffman

George Butler Research Professor of Law
University of Houston Law Center

Hearing on H.R. 5281, Removal Clarification Act of 2010

Before the Committee on the Judiciary

United States House of Representatives

May 20, 2010

Introduction

Mr. Chairman and members of the Committee: Thank you for inviting me to testify today on the proposed legislation that would amend the federal officer removal statute, 28 U.S.C. §1442. The legislation seeks to clarify the right of an officer or agency of the federal government to remove to federal court any proceeding in which a judicial order, including a subpoena for testimony or documents, is sought or issued. The legislation would reach not just familiar state court orders like testimonial or documentary subpoenas sought in connection with pending litigation, but also the less-well known procedures authorized in some states which permit a state judge to order that discovery be taken prior to the filing of a formal lawsuit.

One of my particular areas of academic specialty has concerned these presuit discovery procedures as they are authorized under state and federal law. More broadly, my scholarship and teaching interests are focused on civil procedural law, including jurisdictional and procedural issues as they arise in state and federal courts. One of my major goals as a professional academic has been to encourage legislators, courts and scholars alike toward greater clarity in thinking about what policy purposes ought to animate jurisdictional and procedural law, and how those objectives can best be accomplished. I am grateful for the opportunity to speak today about the subject of state court orders in the context of the federal officer removal statute.[1]

My main message to you is that because the proposed amendments to §1442 raise a host of complicated doctrinal and policy questions, the Committee may wish to consider using more specific language to clarify the purpose and effect of the legislative reforms. Doing so could go a long way toward minimizing uncertainty over statutory construction and, thereby, unnecessary litigation in the lower courts over the proposed legislation's meaning and application.

With regard to state presuit discovery there are several essential questions, which I discuss below, that can be anticipated to arise by the proposed amendment to §1442. Perhaps the most significant issue is what effect it will have to permit removal of a state presuit discovery request or order if no comparable discovery privilege exists under federal law. My own view of the answer, informed by considerations of policy and an evaluation of the relevant law, is that the proposed legislation can be read to implicitly authorize the district court to consider allowing the sought-after presuit discovery. If the proposed legislation is read to provide a federal forum for the officer or agency to raise whatever federal defense she or it may possess—in whole or in part—to the state presuit discovery petition, then §1442 will operate in the same manner as every other removal statute: it will change the forum, not necessarily the final outcome, of the case. Here, however, as in a number of other places, the proposed legislation would be improved by greater clarity as to its intended effects.

Beyond presuit discovery, it is significantly harder to predict what the consequences will be of expanding §1442 to reach those occasions in which a judicial order is sought or issued against a

[1] I appear before this Committee in my individual capacity. As university guidelines require, I attest that my testimony is not authorized by, and should not be construed as reflecting on, the position of the University of Houston.

federal officer or agency. The proposed language—which defines the terms "civil action" and "criminal prosecution" in §1442 to mean "any proceeding in which a judicial order, including a subpoena for testimony or documents, is sought or issued"—is potentially far-reaching. In numerous contexts, state judicial orders are sought and issued that are directed to federal officers and agencies. The proposed legislation, thus, may unintentionally sweep into §1442 all manner of judicial orders for which no sound policy reason justifies expanding the statute so broadly. A second, vital question with respect to subpoenas and other orders is whether the proposed legislation strikes the right balance between state and federal interests in permitting removal not only when judicial orders are issued but also when they merely have been sought. Most courts have disapproved removals under existing §1442 when the federal officer or agency has only received a subpoena directed to them but no state coercive judicial order has issued to enforce the officer or agency's compliance. In my judgment, it probably makes better sense not to follow the majority view and to allow removal, as the proposed legislation does, when a coercive judicial order to a federal officer or agency has been sought or issued.

Executive Summary

The first section of my statement examines the special qualities of §1442. Chief among them is that, unlike the general removal statute, which only permits removal of those civil actions over which the federal district court has "original jurisdiction," §1442 is both a removal statute and a grant of original jurisdiction to the district court. Current §1442 allows federal officers and agencies to remove to federal court when they raise a colorable federal defense to the claims asserted. This essential tethering to the assertion of a federal defense of both the jurisdictional grant and the privilege of removal carries important implications for the proposed amendments to §1442.

The second section examines current law regarding state presuit discovery. It looks initially at the existing sources of authority, and their limits, for obtaining discovery prior to suit. In the vast majority of jurisdictions, including the federal jurisdiction, presuit discovery typically may only be taken to preserve witness testimony when there is a credible risk shown the testimony may be lost if it is not recorded immediately. Discovery to confirm the existence of a claim or investigate a potential claim is only authorized in a minority of jurisdictions. In addition, in this portion of the statement I describe the predominant view under existing law that regards presuit discovery requests and orders not to be "civil actions" within the meaning of the removal statutes.

The third section discusses current law regarding subpoenas and other state court orders that are directed to federal officers or agencies. A minority of courts allow removal under §1442 whenever a federal officer or agency is the subject of a state court subpoena or other order, even when no coercive state court order has issued to enforce compliance by the federal officer or agency. Most courts, however, have rejected attempts by federal officers or agencies to gain the federal forum merely after receipt of a state court subpoena or other order, absent issuance (or at least notice) of a coercive order requiring compliance by the federal officer or agency.

The fourth section of this statement examines how H.R. 5281 would change current law.

The fifth section poses three main questions that are raised by H.R. 5281 concerning presuit discovery. First, what is the effect of removing to federal court a state presuit discovery request or order when no comparable authority may be found under existing federal law? Second, what are the implications of expanding §1442 to permit removal of state discovery petitions and orders but still requiring removal to be predicated on the assertion of a colorable federal defense? Finally, what should happen after the state presuit discovery either has been denied or, alternatively, discovery has been completed?

In the sixth section, three questions are raised relating to subpoenas and other judicial orders. First, if a case is pending in state court when the subpoena or other order is sought or issued, what happens to the rest of the pending case after removal? Second, how far does the proposed legislation reach in allowing removal of any proceeding in which a judicial order is directed at a federal officer or agency? Finally, I consider whether the proposed legislation strikes the right balance in allowing removal whenever a judicial order against a federal officer or agency is either *sought* or *issued*.

I. The Special Qualities of Current 28 U.S.C. §1442

Like its neighboring provision, the general removal statute in §1441, §1442 permits a defendant to remove "civil actions" to federal court.[2] The critical difference between the two sections is that the general provision only permits removal of those civil actions over which the federal district court has "original jurisdiction," which must attach under some other statute since §1441 is not, itself, a source of original jurisdiction. In stark contrast, §1442 is both a removal statute and a grant of original jurisdiction to the district court insofar as it authorizes removal by defendants of a certain status (federal officers and agencies) when sued for any act "under color of such office." Although this triggering language certainly could be read as allowing into federal court any suit that relates to the federal officer's or agency's work, §1442's critical phrase "under color of such office" has been read more narrowly. Under §1442, removal "must be predicated on the existence, as alleged by the defendant in the notice of removal, of a colorable federal defense," the Supreme Court wrote in *Mesa v. California*, 489 U.S. 121, 139 (1989), endorsing a view it discerned to date to "an unbroken line of this Court's decisions extending back nearly a century and a quarter," *id.* at 133, and from which it has not subsequently wavered.

This reading of the "under color of such office" language in §1442 is necessary because an officer's mere status as an employee of the federal government has been thought an insufficient

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[2] Section 1442(a) provides, in relevant part: "A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending: **(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 in an official or individual capacity for any act under color of such office. . ."

"ingredient" to qualify as a federal question for constitutional purposes under Article III, Section 2. *Id.* The assertion of a federal defense to the plaintiff's claims is what makes it constitutionally permissible, as the Court has seen it, for Congress to allow the case to be brought into the jurisdiction of the district court. That the federal issue arrives by way of a defense, rather than as part of the plaintiff's well-pleaded complaint, is of little consequence to Article III; it is, however, of enormous moment to the statute's construction since the general removal provision has always been read, in contradistinction, to incorporate the well-pleaded complaint doctrinal limit into the removal privilege.

As an express exception to the well-pleaded complaint rule, §1442 authorizes removal when the defendant federal officer or agency will offer a colorable federal defense to the claims asserted by the plaintiff in the state court suit. Nice problems can and do arise as a result of this essential tethering to the assertion of a federal defense of both the jurisdictional grant and the privilege of removal to the federal district court. As a practical matter, it has meant that the defendant's burden at removal is greater under §1442 than §1441: the federal officer or agency must specifically raise a colorable federal defense to the plaintiff's claims in the notice of removal. "Colorable" has not meant the federal officer bears the unreasonably high burden of showing he is likely to prevail on the defense, but the requirement inherently has meant that in assessing whether subject matter jurisdiction exists to adjudicate the case, the court may have to delve, to some degree, into the substantive merits of the defense itself. This overlapping of jurisdictional and merits inquiries is not the norm but appears to be unavoidable, at least to some extent, with regard to §1442.

The oft-repeated justification for §1442 has been to protect federal officers and agencies so they may carry out their legitimate governmental duties without undue interference by the state courts. *See, e.g., Colorado v. Symes*, 286 U.S. 510, 517 (1932) (federal officer removal statute serves purpose of "safeguarding officers and others acting under federal authority against peril of punishment for violation of state law or obstruction or embarrassment by reason of opposing policy on the part of those exerting or controlling state power"). This purpose has served as a guiding light for courts interpreting the section.

II. Current Law Regarding State Presuit Discovery Petitions

Authority for Obtaining Discovery Prior to Suit

In both state and federal practice, litigants have an array of discovery devices available to them after suit has been initiated. Nearly all jurisdictions—by rule, statute or common law—also allow prospective parties to petition the court to take discovery prior to the filing of a formal lawsuit but in most instances the right to use discovery devices before litigation is narrowly tailored. In most jurisdictions, presuit discovery typically may only be taken to preserve witness testimony when there is a credible risk shown the testimony may be lost if it is not recorded immediately. *See generally* Lonny Hoffman, *Access to Justice, Access to Information: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J. L. REF. 217, 235-36 (2007) (compiling list of state laws). Federal Rule of Civil Procedure 27, as it has been interpreted by nearly all courts

and commentators, typifies the narrow scope of authority given to private citizens to conduct presuit discovery.

The federal rule provides that "to perpetuate testimony regarding any matter that may be cognizable in any court of the United States" an oral or written deposition may be taken "to prevent a failure or delay of justice." While the text of the rule is not self-evidently clear—to *perpetuate* for what purpose?—the federal courts have long and nearly unanimously found that Rule 27 should be available to take the deposition of a witness prior to suit only when it has been demonstrated by the petitioner that the witness's testimony might otherwise be lost if it is not taken immediately. This might occur, for instance, when a witness is suffering from a terminal illness or may be about to leave the jurisdiction's subpoena reach.[3] According to the prevailing understanding, the rule is not meant for investigating the facts in advance of drafting a complaint. If the petitioner does not know the substance of the evidence she seeks to perpetuate, resort to the rule is unavailable. Most states have adopted the federal version of Rule 27 and given their state rule a similarly cramped interpretation. Even where textual variances exist in the state and federal rules, few courts have sanctioned any broader confirmatory or investigatory use of presuit discovery.

By contrast to the predominant rule in most jurisdictions, some states permit presuit discovery not only to preserve testimony but also to confirm the proper defendant to sue and/or the factual allegations that will be included in a suit. Some jurisdictions authorize a broader grant of presuit discovery for confirmatory purposes by rule, such as section 3102(c) of the New York Civil Practice Rule, which provides: "Before an action is commenced, disclosure to aid in bringing an action to preserve information or to aid in arbitration may be obtained, but only by court order." Other courts have exercised an equitable authority to allow bills of discovery to be used prior to suit. Florida courts, for instance, recognize a prospective party's right to bring an equitable bill of discovery.[4]

Finally, a few states have even broader grants of presuit discovery privileges, with the broadest of all, perhaps, coming from Texas. As promulgated by the Texas Supreme Court in 1999, Texas Rule of Civil Procedure 202 provides that a person "may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either: (a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or (b) to investigate a potential claim or suit."

Beyond these examples, it may also be helpful to add that there are a number of statutes that permit the use of formal process to compel the production of information prior to the filing of litigation in particular kinds of matters. One example is a provision in Delaware that permits

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[3] *See generally* 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER AND RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2071, at 651 (2d ed. 1994); PATRICK HIGGINBOTHAM, *Depositions or Other Discovery Before Action or Pending Appeal,* 6 MOORE'S FEDERAL PRACTICE § 27 (3d ed. 2006).

[4] *See* Florida Rule of Civil Procedure 1.290; *see also* First Nat'l Bank of Miami v. Dade-Broward Co., 171 So. 510, 510 -11 (Fla. 1937) (explaining that an equitable bill of discovery under Florida law "lies to obtain the disclosure of facts within the defendant's knowledge, or deeds or writings or other things in his custody, in aid of the prosecution or defense of an action pending or about to be commenced in some other court").

investors to use state inspection statutes in order to investigate cases of potential corporate fraud.[5] Other examples of specific rules or statutes may be found authorizing[6]—and in some cases mandating[7]—the use of process to compel the production of documents and information for investigatory purposes.

Presuit Discovery Petitions and Removal

As noted, for a proceeding to be removable to federal court under either the general removal provision of § 1441 or federal officer removal in § 1442, it must be a "civil action." Nearly every court forced to confront whether a state petition to take discovery prior to suit constitutes a "civil action" for removal purposes has held that it does not. *See Mayfield-George v. Texas Rehab. Comm'n.*, 197 F.R.D. 280, 283-84 (N.D. Tex. 2000); *McCrary v. Kansas City S.R.R.*, 121 F. Supp.2d 566, 569 (E.D. Texas. 2000); *Barrows v. American Airlines, Inc.*, 164 F. Supp.2d 179 (D. Mass. 2001); *Bryan v. America West Airlines*, 405 F. Supp.2d 218 (E.D.N.Y. 2005); *Sawyer v. E.I. du Pont de Nemours and Co.*, 2006 WL 1804614 (S.D. Tex., June 28, 2006); *Davidson v. Southern Farm Bureau Cas. Ins. Co.*, 2006 WL 1716075 (S.D. Tex., June 19, 2006); *Hasty v. Allstate Ins. Co.*, 2007 WL 1521126 (S.D. Miss., May 23 2007); *In re Enable Commerce, Inc.*, 2009 WL 604123 (N.D. Tex., Mar. 10, 2009); *Price v. Johnson*, 600 F.3d 460 (5th Cir. 2010); *but see In re Texas*, 110 F. Supp. 2d 514 (E.D. Tex. 2000), *rev'd on other grounds sub nom., Texas v. Real Parties in Interest*, 259 F.3d 387 (5th Cir. 2001).

The first district court to address the question succinctly explained why a state presuit discovery petition is not a "civil action" under § 1441:

> [T]he Petition is not a 'civil action' because it asserts no claim or cause of action upon which relief can be granted. It is merely a petition for an order authorizing the taking of a deposition for use in an anticipated suit, maybe with federal question jurisdiction, maybe not. Second, even if it can be argued that the Petition is a 'civil action' because it has all the indicia of a judicial proceeding, it surely is not removable under § 1441(b) because it is not a 'civil action of which federal district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States.' The petition simply seeks an order authorizing a deposition pursuant to the Texas Rules of Civil Procedure and contains no claim or right, much less one founded on the Constitution, treaties or laws of the United States. This Court concludes that federal subject matter jurisdiction does not exist.

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[5] DEL. CODE ANN. TIT 8, § 220 (1991); *see also* Guttman v. Jen-Hsun Huang, 823 A.2d 492 (Del. Ch. 2003) (approving use of the state inspection statute as an investigatory tool before litigation).

[6] *See, e.g.*, Fed. Bank. R. 2004 (authorizing any "party in interest" to petition the court to gather information before filing suit from "any entity" relating to "the acts, conduct, or property of the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge"); Fla. St. Ann. § 400.0233 (7) (LexisNexis 2005) (granting prospective claimants and defendants "informal discovery ... to obtain unsworn statements and the production of documents or things").

[7] *See, e.g.*, Fla. St. Ann. § 766.203 (mandating compliance with presuit investigation procedure in medical malpractice cases).

Mayfield-George 197 F.R.D. at 283 (internal citations omitted). The first rationale offered by the court for disallowing removal under §1441—that the state discovery petition is not a "civil action" because it asserts no claim or cause of action upon which relief can be granted—bears equivalent relevance for §1442 purposes. It is notable, however, that the *Mayfield-George* court's second rationale for removal would seem to have more direct relevance to §1441 than to federal officer removal under §1442 since the latter, as noted, is a jurisdictional statute. This is to say, if the "civil action" hurdle can be overcome, as the proposed legislation contemplates, then the state presuit discovery petition need not raise a federal question within the jurisdiction of the federal court. It is enough that the federal officer assert in the notice of removal that a colorable federal defense exists. Yet, as I discuss below, that still leaves open one important question: a federal defense to *what*? The answer to this question illuminates the reach—and inherent limits—of amending §1442 to permit removal of state presuit discovery requests and orders. *See infra* Section V, Question No.1.

The one district court case that found a presuit discovery request to constitute a "civil action" for removal purposes is instructive to consider. It is notable not only for being an outlier but, more significantly, because one of the primary reasons the court offered in support of its conclusion has since been squarely rejected by the Supreme Court in an unrelated case.

In re Texas, 110 F. Supp. 2d 514 (E.D. Tex. 2000) was a part of the intense litigation battle between the State of Texas and the tobacco companies. After private lawyers reached agreement with the State, through then-Attorney General Dan Morales, to represent Texas in litigation against the tobacco companies, the private lawyers filed suit on the State's behalf in federal court. *See In re Texas*, 110 F. Supp.2d at 515. A global settlement reached in late 1997 was subsequently blessed by the presiding judge, the Hon. David J. Folsom. Thereafter, when Morales was no longer Attorney General, the State of Texas took the position that the private lawyers were not entitled to the amount of attorneys' fees to which they claimed out of the federal tobacco litigation. *Id.* Much procedural and political wrangling followed, but the relevant point for present purposes is that one of those procedural steps involved the filing by the State of Texas of a presuit petition to take discovery. Presuit deposition testimony purportedly was sought in an effort to try to establish a possible civil claim against the private lawyers and, potentially, other persons. *Id.* at 517-18. Upon receipt of the presuit discovery petition, the private lawyers removed it to federal court citing as the primary authority for doing so the All Writs Act, contained in 28 U.S.C. §1651(a). *Id.* at 518. At the time, it was an open question whether the All Writs Act could serve as an independent source of original jurisdiction to support removal of a state court suit to federal court.

Convinced that the All Writs Act could provide such jurisdictional support, Judge Folsom held in *In re Texas* that the state petition to take presuit discovery was properly removed under §1651(a) because the removal was sought "to protect or effectuate" the prior judgment he had entered approving the global settlement in the tobacco case. More precisely, Judge Folsom reached two critical conclusions to support retaining jurisdiction: first, that the State's presuit discovery petition was a "civil action" within the meaning of §1441 and that, because it threatened to interfere with the prior federal judgment, (ii) he had jurisdiction over it by way of removal under

the All Writs Act. *Id.* On appeal, a panel of the Fifth Circuit reversed Judge Folsom's order denying remand on the ground that the All Writs Act did not provide an independent basis of original jurisdiction. It expressly did not reach whether the state petition to take presuit discovery should be classified as a "civil action" for removal purposes. *See Texas v. Real Parties in Interest*, 259 F.2d 387, 395 n.14 (5th Cir. 2001).

Two years later in an unrelated case, the Supreme Court of the United States unanimously concluded that the All Writs Act could not be used to justify the removal of a state suit to federal court in the absence of an independent basis of original jurisdiction. *Syngenta v.Henson*, 537 U.S. 28, 33-34 (2002); *see also* Lonny Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. PA. L. REV. 401 (1999), (*cited* in *Syngenta*, 537 U.S. at 35 n.1 (2003) (Stevens, J., concurring)). No presuit discovery petition was at issue in *Syngenta*, but the Court's holding underscores that for an action to be removable to the federal courts there must be an independent basis of original jurisdiction. As noted above, unlike §1441, §1442 internally provides that independent basis of jurisdiction but only for those matters that are "civil actions" within the meaning of the statute.

In sum, the primary take away regarding presuit discovery and federal removal is that nearly every court that has considered whether a state petition to take discovery prior to suit constitutes a "civil action" for removal purposes has held that it does not.

III. Current Law Regarding Subpoenas and Other State Court Orders Directed to Federal Officers or Agencies

A number of reported cases have found that when a federal officer or agency faces a direct and immediate threat of state court coercive power resulting from the officer or agency's failure to comply with a state court order, removal may be proper under §1442.[8] Some courts allow

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[8] State of Florida v. Cohen, 887 F.2d 1451, 1454 (11th Cir. 1989) ("Once the state court initiated contempt proceedings against the federal officials, removal of the contempt proceedings was appropriate"); Wisconsin v. Hamdia, 765 F.2d 612, 614-15 (7th Cir. 1985) (removal upheld under §1442 after state court judge ordered production of subpoenaed documents); Wisconsin v. Schaffer, 565 F.2d 961, 963 (7th Cir. 1977) (holding that removal of contempt action proper after state court ordered federal officer to produce grand jury materials or show cause why he should not be held in contempt); California v. Reyes, 816 F. Supp. 619, 622 (E.D. Ca. 1992) (removal upheld after state judge issued order denying federal officer's motion to quash subpoena); Bosaw v. National Treasury Employees' Union, 887 F. Supp. 1199, 1207 (S.D. Ind. 1995) (case properly removed under §1442 after state trial court issued order compelling production of records in officers' possession); State of Indiana v. Adams, 892 F. Supp. 1101, 1104 (S.D. Ind. 1995) ("It is clear that commencement in the state court of a contempt action intended to compel discovery which has not been approved by a federal agency would constitute an action "commenced" against a federal official"); Charges of Unprofessional Conduct Against 99-37 v. Stuart, 249 F.3d 821, 824 (8th Cir. 2001) (upholding removal under §1442 after motion filed in state court for an order holding federal official in contempt for failing to appear for deposition and to compel her to testify); Smith v. Cromer, 159 F.3d 875 (4th Cir. 1998) (removal proper under §1442 after state court judge issued order for government to produce documents); State of Florida v. Cohen, 887 F.2d 1451, 1454 (11th Cir. 1989) ("Once the state court initiated contempt proceedings against the federal officials [for not complying with the state subpoena], removal of the contempt proceedings was appropriate"); Boron Oil Co. v. Downie, 873 F.2d 67 (4th Cir. 1989) (removal proper after state court denied Environmental Protection Agency's motion to quash two trial subpoenas and directed agency employee to testify).

removal under §1442 whenever a federal officer or agency is the subject of a state court subpoena or other order, even before notice is received of a coercive order to enforce compliance by the federal officer or agency.[9] This, however, is a minority view. A majority of cases has rejected attempts by federal officers or agencies to gain the federal forum merely after receiving a state court subpoena or other order directed to them, absent notice of a hearing to enforce compliance or issuance of a compliance order.[10] The primary basis on which courts have disallowed removal in this context has been that subpoenas or other orders directed at federal officers or agencies are not "civil actions" within the meaning of the removal statute, absent a state judge's order to enforce non-compliance. Further, without a coercive order directing compliance from the federal officer or agency, most courts have concluded that nothing has been "commenced in a state court against" the federal official under §1442. Representative of the majority view that rejects the idea that removal can be predicted solely on issuance of a subpoena is *Stallworth v. Hollinger*, 489 F. Supp. 2d 1305 (S.D. Ala. 2007).

The decision in *Stallworth* was prompted by the filing a state lawsuit and the subsequent issuance of a notice of deposition and subpoena to a third-party federal official to be deposed in connection with the state case. Without attempting to quash the subpoena and before any civil contempt proceedings had been initiated, the federal officer filed a notice of removal to the federal district court. The district judge then ordered a remand on the ground that removal would be inconsistent with the statutory language of §1442. *Stallworth*, 489 F. Supp.2d 1305, 1310 ("the mere possibility of future conflict between a federal official and state judicial civil power [cannot] be fairly deemed to have 'commenced' a civil action against the official"). Additionally, the court concluded that it would not further statutory purposes to permit removal merely upon issuance of a state court subpoena to the federal officer or agency:

> 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

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[9] Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408 (D.C. Cir. 1995); Nationwide Investors v. Miller, 793 F.2d 1044 (9th Cir. 1986); Louisiana v. Sparks, 978 F.2d 226, 232 (5th Cir. 1992) (even though the federal employee had not yet been held in contempt by the state court for not testifying, removal was proper because to require the federal employee "to run the risk of a contempt citation ... simply because he complies with his federal duty would be imprudent and defeat the larger purpose of the federal officer protection removal statute"); Ferrell v. Yarberry, 848 F. Supp. 121 (E.D. Ark. 1994) (though not entirely clear from reported decision, court appears to uphold removal under §1442 only after subpoena issued to federal officials but before any accompanying state court coercive order, such as a contempt proceeding, initiated).

[10] State of Indiana v. Adams, 892 F. Supp. 1101 (S.D. Ind. 1995); State of Alabama v. Stephens, 976 F. Supp. 263 (M.D. Ala 1995); Dunne v. Hunt, 2006 WL 1371445 (N.D. Ill., May 16, 2006); Stallworth v. Hollinger, 489 F. Supp. 2d 1305 (S.D. Ala. 2007); Murray v. Murray, 621 F.2d 103 (5th Cir. 1980); Hexamer v. Foreness, 981 F.2d 821 (5th Cir. 1993); Swett v. Schenk, 792 F.2d 1447, 1451 (9th Cir. 1986); Colorado v. Nord, 377 F. Supp. 2d 945 (D. Colo. 2005); *cf.* State of Florida v. Cohen, 887 F.2d 1451, 1454 (11th Cir. 1989) ("Once the state court initiated contempt proceedings against the federal officials [for not complying with the state subpoena], removal of the contempt proceedings was appropriate"); People of California v. Reyes, 816 F. Supp. 619, 622 (E.D. Cal. 1992) (finding jurisdiction before federal official held in contempt of state order where intent to hold officer in contempt was clear and observing that "[t]here is no question that contempt proceedings initiated in state court against federal officers are removable pursuant to 28 U.S.C. 1442").

> be averted in any number of ways. . . . 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.

Id. at 1309. The *Stallworth* court, like most others, would permit removal only at the point at which contempt proceedings are initiated against the federal official for not complying with the state order. *Id.* at 1308-09.

Also representative of the majority view is *State of Indiana v. Adams*, 892 F. Supp. 1101 (S.D. Ind. 1995). In *Adams*, a defendant was prosecuted in state criminal court for three murders. Assisting in the crime investigation, the FBI collected DNA samples. Thereafter, the defendant sought subpoenas to depose the two FBI technicians who had collected the samples. The defendant sought to discover the procedures that they used and to learn whether their interpretation of the data varied from the testimony the state's experts were going to offer at the criminal trial. After the state judge granted the request to issue the subpoenas, the government moved to have them quashed, but the court refused to do so. Thereafter, the government removed to federal court "that portion of the state court action regarding the subpoenas" to the two FBI technicians. *Adams*, 892 F. Supp. 1101, 1103. The government argued that the FBI technicians could not be forced to comply with the subpoenas, under penalty of civil contempt for failing to do so, because under *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), "a subordinate official cannot be held in contempt for refusing to obey a subpoena when his or her compliance has been prohibited by a higher level official based upon valid federal regulations." *Adams*, 892 F. Supp. 1101, 1103 (*citing Touhy*, 340 U.S. 462, 466-68).

The *Adams* court discerned that the government was probably correct in its assertion that the state court judge could not compel the FBI technicians to be deposed unless supervising officials at the Justice Department granted their approval under the governing federal regulations. *Id.* (*citing* 28 C.F.R. §16.22(a), which provides, *inter alia*, that "[i]n any federal or state case or matter in which the United States is not a party, no employee . . . of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department . . . disclose any information or produce any material acquired as part of the performance of that person's official duties . . . without prior approval of the proper Department official"). Nevertheless, the court concluded that "until the state court takes some action intended to coerce [the FBI technicians] into complying with the subpoenas, the federal rights vindicated in *Touhy* have not been offended and no action has been commenced against [the FBI technicians] which may be removed to federal court" under §1442. *Id.* at 1106.

The leading exception to the majority view is the District of Columbia Court of Appeals' decision in *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995). In *Williams*, the court found that service of a subpoena on the Chairman of the House of Representatives' Subcommittee on Health and the Environment of the Committee on Energy and Commerce was sufficient to support a removal right under §1442. At the heart of its reasoning was an assumption that Congress would not have desired that a confrontation between the state

court and federal official "be actually ignited" in order to trigger the removal right. "Once a subpoena is issued," the court wrote, "a clash between state power and the federal official appears to be naturally inevitable." Thus, the terms "civil action," "against," and "act" in §1442 need not be read in a "limited fashion" but instead could be understood, as the D.C. Court of Appeals saw it, to "refer to any proceeding in which state judicial civil power was invoked against a federal official." *Id.* at 415. [11]

A third, middle position, reflected in cases like *Dunne v. Hunt*, 2006 WL 1371445 (N.D. Ill., May 16, 2006), reads §1442 as allowing removal when a party has sought judicial intervention to compel a federal officer or agency to comply with a state court subpoena, but not merely on service of the subpoena. *Id.* at *3 ("In our view, the critical factor is whether the subpoenaing party has sought judicial intervention to compel a federal officer to comply with a subpoena, not whether the state court has ruled on the request. . . . It makes sense that serving a subpoena on a federal official, without more, does not trigger the right of removal.").

IV. How H.R. 5281 Would Change Current Law

The most significant changes H.B. 5281 would make to existing law concern the textual amendments to §1442. The bill adds a new subsection (c) that specifically defines "civil action" (and "criminal prosecution") for §1442 removal purposes to include "any proceeding in which a judicial order, including a subpoena for testimony or documents, is sought or issued." This reform is meant to make clear the drafters' intent that state petitions to take discovery prior to the commencement of a formal lawsuit, as well as state court subpoenas, garnishments, and other orders directed at a federal officer or agency, would be removable to federal court under §1442 if the other requirements of the statute are satisfied. In terms of the latter, the bill departs from the majority view by allowing removal not just upon orders issued against the federal officer or agency but also when a judicial order is sought, even if no attempt has been made to hold the

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[11] One question that arises with regard to those cases that have allowed removals under §1442 when a subpoena or other order has been directed at a federal officer or agency is what, exactly, is removed to federal court? The entire state court proceeding or just the portion of the case concerning the judicial order being sought that would coerce the federal officer or agency to act. Although the courts are not always clear on this issue, many have concluded that the only "civil action" that is properly removed to federal court is the coercive order sought or issued against the federal officer or agency. *See, e.g.*, State of Indiana v. Adams, 892 F. Supp. 1101, 1103 (S.D. Ind. 1995) (government removed to federal court "that portion of the state court action regarding the subpoenas" to the two FBI technicians"); Dunne v. Hunt, 2006 WL 1371445 at *1 n.3 (N.D. Ill., May 16, 2006) (observing that "[b]ecause the motion to compel is the only action against a federal officer in the state court legal malpractice action, only that portion of the state court case is removable to federal court under §1442(a)"); Charges of Unprofessional Conduct Against 99-37 v. Stuart, 249 F.3d 821, 824 (8th Cir. 2001) (noting with approval that the civil action that was removed was the civil contempt action brought against the federal official for not appearing for deposition); Wisconsin v. Schaffer, 565 F.2d 961, 963 (7th Cir. 1977) (upholding removal of contempt action and distinguishing it from rest of underlying criminal proceeding against state criminal defendant). In Section VI, *infra*, I return to the question of what is the proper unit for removal purposes.

officer or agency in civil contempt or otherwise compel the officer or agency to act pursuant to the state court order.

Additionally, the bill addresses the textual hurdle against removal some courts have found in existing §1442's use of the term "against." It does so by clarifying that the term references not just civil lawsuits that assert claims seeking relief against a federal officer or agency but also any state court proceedings that are "directed to" a federal officer or agency. This should overcome any concern that the "against" terminology in §1442 precludes removal of a state court proceeding absent a possible claim or cause of action that seeks relief from (that is "against") the officer or agency. Other minor changes to existing §1442(a) would make it consistent with the new subsection.

The final reform H.R. 5281 effects would be to amend §1447(d) so that an order remanding a civil action to state court shall be reviewable by appeal or otherwise when the matter was removed pursuant to §1442 or §1443. This reform would allow appeals of *any* civil action or criminal prosecution removed under §1442, not just those removals triggered by a discovery request or order directed to a federal officer or agency.

V. Questions Raised by H.R. 5281 Concerning Presuit Discovery

In this section, I consider three essential questions raised by H.R. 5281 concerning presuit discovery. In this section, I identify various ways in which the proposed legislation would be improved by greater clarity regarding its intended effects and purposes. The first question I consider is the most significant: what is the effect of removing to federal court a state presuit discovery request or order when no comparable authority may be found under existing federal law. The second question focuses on the implications of expanding §1442 to permit removal of state discovery petitions and orders but still requiring removal to be predicated on the assertion of a colorable federal defense. Finally, I look at another question with regard to presuit discovery about which the proposed legislation is silent: what happens after the state presuit discovery has been denied or, alternatively, discovery has been completed?

1. What is the effect of removing into federal court a state presuit discovery request or order if no comparable authority may be found under existing federal law?

Probably the most important issue raised by the proposed amendments to §1442 concerns the effect of removing to federal court a state presuit discovery request or order when no comparable authority may be found under existing law. At this point, the Rules of Decision Act and Erie Doctrine come into play. Does the state court discovery petition show up dead-on-arrival, to be perfunctorily dismissed? Or should the amended statute be read as authorizing the presuit discovery to go forward and, if so, under what guidelines? The proposed legislation is silent on these vital questions. My own view of the answer, informed by considerations of policy and an application of the relevant law, is that the statute should be read as implicitly permitting the district court to consider whether to allow the sought-after presuit discovery. State law would provide the substantive content of the federal standard to be applied in federal court, and whether

to allow the presuit discovery would be subject, of course, to any federal defense that would trump a conflicting state rule.

Though one may advert to empirical evidence suggesting otherwise,[12] removal statutes at least have always been understood to serve only the purpose of changing the forum in which suit is to be tried. To be sure, congressional grants of subject matter jurisdiction to the federal courts and concomitant removal rights are often passed with assumptions made (by at least some proponents) that adjudication in the federal forum may produce a different outcome than what would have occurred in state court—the Class Action Fairness Act of 2005 is perhaps the most recent, important example. Nevertheless, a statute's actual language, not the future hopes and expectations of individual legislators, is what ultimately counts. *Cf. Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005) ("the authoritative statement is the statutory text, not the legislative history or any other extrinsic material"). The notion, then, that §1442, as amended, would have the direct but not expressly articulated effect of terminating the state court presuit discovery petition upon its arrival in federal court would not only likely be rejected as a matter of proper statutory construction. It also would be regarded as unprecedented: there are no other examples one can cite of a law Congress has ever passed that, allowing removal of a state court action to federal court, has the effect of simultaneously terminating it. The closest example that comes to mind, Section 502(a) of the Employee Retirement Income Security Act, is critically different.[13]

Faced with a statute that is silent about what to do with a state presuit discovery petition that has no equivalent under federal law, a court may begin by asking whether Federal Rule of Civil

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[12] Kevin Clermont & Theodore Eisenberg, Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction, 83 CORNELL L. REV. 581, 593-95 (1998).

[13] Section 502(a) of the Employee Retirement Income Security Act has been held to completely preempt any state law claim that could have been brought under the federal law if there is no other independent legal duty that is implicated by a defendant's actions. Aetna Health, Inc. v. Davila, 542 U.S. 200, 210 (2004) (*citing, inter alia,* Metropolitan Life Ins. Co v. Taylor, 481 U.S. 58, 66 (1987)). Because the complete preemption doctrine operates as an exception to the well-pleaded complaint rule, a state court action completely preempted by 502(a) may be removed under §1441. Beneficial Nat. Bank v. Anderson, 539 U.S. 1, 8 (2003) ("[W]hen a federal statute wholly displaces the state-law cause of action through complete pre-emption," the state claim can be removed"). Yet, in many instances, the substantive federal law provides no relief; thus, the effect of finding that the state law claims are completely preempted is to render the plaintiff's case stillborn. *Cf.* Di Felice v. Aetna U.S. Healthcare, 346 F.3d 442, 456 (3rd Cir. 2003) (Becker, J., concurring) (noting that the law provides "virtually impenetrable shields that insulate plan sponsors from any meaningful liability for negligent or malfeasant acts committed against plan beneficiaries in all too many cases"). Yet, although the ERISA removal issue appears similar to the problem implicated by §1442's amendment, the important distinction to keep in mind is that when an action is removed because ERISA completely preempts the field a dismissal of the action that follows results from application of the substantive federal law, not its procedural removal to federal court. Absent removal, the state court judge would be equally bound in these same circumstances to dismiss the suit if it is completely preempted by federal law. Quite the opposite dynamic is involved with removal and state presuit discovery petitions. If the discovery petition is not removable to federal court, then it will be governed by state law. Thus, to read the proposed legislation as requiring dismissal whenever existing federal law would not authorize the discovery allowed under state law would be *sui generis*: a removal statute that would have the direct and immediate effect of terminating the state court proceeding.

Procedure 27 answers the question in dispute. *Cf. Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, ___ U.S. ___, 130 S. Ct 1431, 1437 (2010) (in case that concerned class certification rule in Federal Rules of Civil Procedure and state law that precluded certain kinds of suits from proceeding as class actions, majority began with the observation that "[w]e must first determine whether Rule 23 answers the question in dispute"). If a court found Rule 27 to cover the same subject matter as the state presuit discovery law, then it could find that the federal rule must govern (thereby precluding the state petitioner from obtaining the investigatory discovery she sought), unless the federal rule exceeds statutory authorization or Congress's rulemaking power. *Id.* Following this approach, it could be observed that given the narrower grounds authorized for presuit discovery by Rule 27 (as noted above, Rule 27 has been consistently held not to permit discovery for confirmatory or investigatory purposes prior to suit), a court might conclude that the federal rule covers the same subject matter as the state rule and, thus, should be held to govern the field. Vertical choice of law problems are not easy to predict, but there is at least some support in the case law for this outcome.

Alternatively, a court might conclude that while the federal rule and state law generally cover the same subject matter, the texts are not in conflict. Rule 27 provides that testimony may be "perpetuate[d]" in order "to prevent a failure or delay of justice" but it does not say that testimony may *not* be gathered prior to suit for other purposes if another source of law would allow it. Arguably, the Supreme Court's decision in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980) supports this result. In *Walker*, the Court held that Rule 3 (which provides that a federal civil action is "'commenced'" by filing a complaint in federal court) did not displace a state law that seemed to cover the same subject matter. The state law provided, "'An action shall be deemed commenced, within the meaning of this article [the statute of limitations], as to each defendant, at the date of the summons which is served on him . . . .'" *Walker*, 446 U.S. 740, 743 n.4 (citing state statute) (alteration in original). The Court found no conflict because Rule 3 "governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations" or tolling rules, which it did not "purpor[t] to displace." *Id.* at 750-51. The majority opinion in the recent *Shady Grove* case similarly characterized the *Walker* case. *Shady Grove*, 130 S. Ct 1431, 1440 n.6 (Scalia, J.).

It may not be necessary, however, for a court to address whether there is a conflict between Rule 27 and the state law authorizing presuit discovery. The proposed legislation amending §1442, instead, could be read to trump Rule 27 by implicitly permitting the court to consider whether to allow the sought-after presuit discovery, using state law as the content of the federal law to be applied in federal court. As Justice Scalia noted in *Shady Grove*, "Congress . . . has ultimate authority over the Federal Rules of Civil Procedure; it can create exceptions to an individual rule as it sees fit—either by directly amending the rule or by enacting a separate statute overriding it in certain instances. *Shady Grove*, 130 S. Ct 1431, 1438 (*citing Henderson v. United States*, 517 U.S. 653, 668 (1996). This is precisely the argument that can be made with regard to the proposed legislation. By allowing removal to federal court of state presuit discovery petitions, the legislation can be understood to implicitly allow for the state law governing presuit discovery to be applied as the rule of decision in federal court. The alternative—to assume that the removal statute was meant to terminate the state court presuit discovery petition—is so much less appealing both as a matter of policy, and of statutory construction (one can readily anticipate a

court observing that if Congress had wanted to immunize federal officers from all state presuit discovery it could have done so expressly), as to give the view much to commend it that §1442 implicitly authorizes the federal court to consider allowing presuit discovery even though it would not be allowed under Rule 27.

The difficulty is the adverb: to say that §1442 *implicitly* authorizes federal courts to consider the request for presuit discovery leaves a great deal of room for litigation over the proper construction of the statute, and for differing opinions about the right answer. Consequently, I suggest that the better approach may be to expressly articulate the policy preference in §1442. And, as far as policy preferences go, my own view is that while Congress could choose to immunize federal officers and agencies from ever having to provide discovery prior to suit pursuant to state law, it is not the preferred course. If a federal officer or agency has a valid federal defense that would trump, in whole or in part, a state presuit discovery request or order, then that defense can be presented to a federal judge to rule on. Because the federal court is in a position to determine if presuit discovery in the specific case is precluded by some particular federal law, it would be unnecessary, to say nothing of excessive, to immunize federal officers and agencies, in every instance, from having to comply. Granting blanket immunity to federal officials from any state presuit discovery carries greater federalism implications than, I suspect, the drafters of this legislation intended. *Cf. Oklahoma v. Willingham*, 143 F. Supp. 445, 448 (E.D. Okla. 1956) (Section 1442 "should be construed liberally to effect its purpose of maintaining the supremacy of the federal law, but we think also that it should be construed with the highest regard for the right of the states to make and enforce their own laws in the field belonging to them under the Constitution"). If §1442, instead, is read to provide a federal forum for the officer or agency to raise whatever federal defense she or it may possess—in whole or in part—to the state court presuit discovery petition, then §1442 will operate in the same manner as every other removal statute: it will change the forum, not necessarily the final outcome, of the case.

In sum, faced with a statute that is silent about what to do with a state presuit discovery petition that has no equivalent under federal law, the best reading of the proposed legislation is that, aware that Congress "has ultimate authority over the Federal Rules of Civil Procedure," it provides a federal forum to the officer or agency to present all applicable federal defenses. In effect, the legislation creates an exception to Rule 27 to the extent the rule is considered in conflict with state law. Because vertical choice of law questions are not always easily predicted, however, the better approach would be for the proposed legislation to expressly address the effect of permitting removal to federal court of state presuit discovery petitions when no comparable presuit authority may be found under existing federal law.

2. What are the implications of expanding §1442 to permit removal of state discovery petitions and orders but still requiring removal to be predicated on the assertion of a colorable federal defense?

Above, I observed that §1442 is a special kind of removal statute in a number of respects. One of those respects, as noted, is that it operates differently from the general removal statute insofar as §1441 authorizes removal only when the basis for original jurisdiction appears as part of the

plaintiff's well-pleaded complaint. In contrast, if the federal officer or agency seeking to remove under §1442 raises a colorable federal defense to the plaintiff's claims in the notice of removal, then the statute confers jurisdiction on the federal district court; no other source of jurisdiction is needed. That essential tethering to the assertion of a federal defense of both the jurisdictional grant and the privilege of removal has, on occasion, raised difficult problems in applying existing §1442. The requirement inherently poses the risk that, in assessing whether subject matter jurisdiction exists to adjudicate the case, the district court may find itself having to delve into the substantive merits of the defense itself. As the Seventh Circuit once put it, §1442 "does not permit removal on the federal officer's say-so." *Venezia v. Robinson*, 16 F.3d 209, 211 (7th Cir. 1994) (Easterbrook, J.).

But whatever interesting problems are raised under the existing statute with regard to the intertwining of the jurisdiction inquiry and an assessment of whether the defense is meritorious, the proposed amendment raises even more difficult questions. If under §1442 "federal officer removal must be predicated on a colorable federal defense," *Mesa v. California*, 489 U.S. 121, 139 (1989), then what colorable federal defense is required to remove a state presuit petition that seeks only to discover information from the federal officer or agency and does not assert an affirmative claim for relief against anyone?

One way to think about this problem is to reflect on the more precise question, a federal defense to *what*? To a potential future claim for relief that may be asserted against the federal officer or agency? Or to the request to take discovery? In my view, the necessary answer is that the federal defense to be asserted in the notice of removal must be to the request to take discovery because the alternative raises potential constitutional problems. If the statute, as amended, were read to permit removal on the basis that a colorable federal defense may apply to a potential future claim for relief, serious concerns exist that the statute would exceed Article III's limits on federal jurisdiction. That potential future claim may not ever be asserted and, even if it is, it may not be brought against the federal officer or agency from whom the discovery is currently being sought. Further, the anticipated federal defense may or may not apply to the claim as it is actually constituted. To be sure, by design §1442 authorizes removal on the *anticipation* that the defendant federal officer or agency will offer a colorable federal defense, which distinguishes it from the general removal statute that, having had the well-pleaded complaint rule incorporated into it, need not worry about potential, anticipated federal questions. But to amend §1442 to permit removal on the basis that a colorable federal defense may apply to a potential future claim strikes me as going so far as to potentially run afoul of the "arising under" federal law head of jurisdiction in Article III.

One approach, then, would be to assume that the statute necessarily authorizes removal only when a colorable federal defense would apply to protect or immunize the federal officer or agency from the state court petitioner's request to take discovery. Even on this account, however, the question remains what to do when the state discovery petition is not adequately framed as to suggest a colorable federal defense. Of course, there will be instances when the discovery petition is plainly subject to a federal defense. For instance, the federal officer or agency may be able to assert in the notice of removal that he or it is not required to produce any of the information sought by the state discovery petition. This, indeed, was the defense offered

by Chairman Waxman and Representative Wyden in the *Brown & Williamson* case. One can imagine the circumstance, however, in which an injured person seeks to take discovery prior to the filing of a formal lawsuit to investigate a potential claim she may possess but does not have any idea whether her injury was the result of someone's negligence or merely bad luck for which no one is to blame. Nor might she have any idea what information, precisely, she will find or whether that information will reveal what cause of action she might possess against whom.

The answer to this difficult problem may be to say that when the state presuit discovery request is too generalized to permit the federal officer or agency to be able to plead a colorable federal defense, removal under §1442 will be unavailable. This limitation on the ability to invoke §1442 may be an unavoidable result of extending a general authority to remove state discovery petitions and orders. Simply put, in some instances the availability of a federal defense to the requested discovery may not be as apparent as it is with traditional lawsuits in which relief is affirmatively sought against the federal officer or agency.

3. What should happen after the state presuit discovery either has been denied or, alternatively, discovery has been completed?

There is one last issue concerning the effect of expanding §1442 to reach state presuit discovery petitions I want to address briefly. The proposed legislation is silent about what happens after the state presuit discovery has been denied or, alternatively, discovery has been completed. It might be suggested that if the discovery petitioner subsequently asserts claims for relief against the federal officer or agency in the proceeding that has been removed, the district court, by virtue of the proposed legislation, would have subject matter jurisdiction to adjudicate those claims. The better view, consistent with the traditional understanding that federal subject matter jurisdictional limits generally are to be narrowly construed, is that the district court would not have continuing jurisdiction to adjudicate any issues beyond those directly raised by the state court discovery petition and the federal defense(s) asserted by the officer or agency applicable to that discovery petition. However, because the statute is silent about what happens after the discovery petition has been removed, there is room for one inclined to argue in favor of continuing jurisdiction to do so. *Cf. Colorado v. Symes*, 286 U.S. 510, 517-18 (1932) ("It scarcely need be said that [the federal officer removal statute] are to be liberally construed to give full effect to the purposes for which they were enacted"); *Willingham v. Morgan*, 395 U.S. 402, 407 (1969) (cautioning against "a narrow, grudging interpretation of §1442(a)(1)"). The better approach, therefore, may be to expressly delineate in the text of the amendment that the district court has jurisdiction only to address the request for presuit discovery from the federal officer or agency and the applicability of any federal defenses to that request. Then, to the extent that the presuit investigation results in a claim filed in the state court against the federal official, that matter could be removable under the existing text of §1442.

VI. Questions Raised by H.R. 5281 Concerning Subpoenas and Other Judicial Orders, Sought or Issued

The last subject I wish to cover in this Statement, though certainly not the least significant, concerns the proposed change to §1442 that would have the statute reach "any proceeding in

which a judicial order . . . is sought or issued" against a federal officer or agent. I first consider the practical effect of amending §1442 in this manner: specifically, what happens to the rest of the pending case after removal? I then discuss the potential reach of the proposed legislation that would amend §1442 to cover any proceeding in which a judicial order is directed at a federal officer or agency. Finally, I consider the policy questions embedded in the proposed legislation's amendment of §1442 to apply both to judicial orders that are sought and to those that are issued.

1. If a case is pending in state court when the subpoena or other order is sought or issued, what happens to the rest of the pending case after removal?

The proposed legislation is not clear about what happens with the rest of a case commenced in state court, otherwise not within the subject matter jurisdiction of the federal courts, once the federal officer or agency invokes amended §1442. Imagine a state civil case that is pending between two private parties, both from the same state, concerning entirely state law questions. One of the parties seeks a subpoena from the state court directing a federal officer or agency to produce documents that may be relevant to the case between the two individual litigants. The proposed legislation allows the federal officer or agency to file a notice of removal at this point, but numerous questions then arise about which the proposed legislation is silent.

Does the entire civil action pending in state court between the two individuals get removed to federal court or only that part of it that relates to the judicial order sought against the officer or agency? The proposed legislation defines "civil action" under §1442 to mean "any *proceeding* in which a judicial order is sought or issued," suggesting perhaps that the entire civil action is to be removed. This could lead to some perverse tail-wagging-the-dog results, especially when the bulk of the underlying case has very little to do with the judicial order sought from the federal officer or agency. One particular problem might be that it could invite gamesmanship by private litigants seeking to gain the federal forum. One can imagine that a litigant might seek to obtain a judicial subpoena directed to a federal officer or agency, anticipating that the federal officer or agency will then remove the entire proceeding to federal court under §1442, as amended. Leaving to one side whether the statute, within the limits of Article III, could constitutionally permit removal of the entire underlying case, it is not clear why Congress would want private, non-diverse litigants asserting entirely state claims between them to be able to gain the federal forum in this manner. *Cf.* 28 U.S.C. §1367(b); H.R. Rep. No. 101-734, at 29 n.16 (1990) (noting that the purpose of §1367(b) is to implement the principal rationale of *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978)).

If the entire pending case does get removed by virtue of this proposed legislation, what happens next? Does it start all over in federal court? As a practical matter, what is the federal court to do if the case has already advanced in the state court system and is close to trial? May the court remand the portion of the case that does not concern the federal officer or agency and allow it to proceed in state court? On what authority? Perhaps a partial remand would be available on a model similar to that currently used in §1441(c), though the fit is not perfect. *But cf. Ferrell v. Yarberry*, 848 F. Supp. 121, 123 (E.D. Ark. 1994) (observing, after upholding removal under §1442, that "[o]nce the basis for the removal is dropped—here, to resolve the issue regarding the

effort to obtain testimony of the federal employees—it is within the discretion of the court to remand the rest of the case back to the state court from which it was removed" but citing no source of authority for granting a partial remand).

It would help answer many of these questions if the view is taken that the proposed legislation only means to authorize removal of the federal issue in the case relating to the subpoena or other order directed at the federal officer or agency, leaving the remainder of the underlying case unaffected in state court. As noted above, a number of the prior cases have adopted this view.[14] Restricting the unit removed to the federal issue in the case relating to the subpoena or other order directed at the federal officer or agency would then put the district court in a position to address whether the federal defenses asserted excuse the officer or agency's compliance, in whole or in part. Upon deciding that question, it would be reasonable to conclude that the matter that was removed under §1442 would terminate, either with the judge's order allowing the discovery to proceed under the subpoena or with a ruling that the discovery sought may be not had. Either way, it could be expected that in the normal course of affairs there would be no further superintendence of the matter by the district court.

All of this is speculation, of course, since the proposed legislation is silent on these important questions. This is why the better approach would be to more fully articulate what it means for §1442 to be expanded to reach "any *proceeding* in which a judicial order is sought or issued" against a federal officer or agent. The Committee may wish to clarify that the proposed legislation only means to authorize removal of the issues relating to whether the federal officer or agency must comply with the state court order sought or issued.

2. How far does the proposed legislation reach in amending §1442 to permit removal of any proceeding in which any judicial order is directed at a federal officer or agency?

As proposed, the legislation literally permits removal of "any proceeding in which a judicial order, including a subpoena for testimony or documents, is sought or issued." The dependent clause is not framed as an exhaustive list; facially, it would permit removal not just of subpoenas but of any other judicial order sought or issued against a federal officer or agency. In numerous contexts state judicial orders are sought and issued against federal officers and agencies. To illustrate, consider the facts in *Angello v. St. Augustine Center, Inc.*, 2006 WL 3827418 (W.D.N.Y., Dec. 27, 2006).

In *Angello*, a privately incorporated entity was placed into state court receivership. When the Internal Revenue Service received notice of the receivership, it filed for more than $850,000 based on tax liens it had issued, but it was not made a defendant and did not intervene formally into the case. When the state appointed receiver subsequently recommended a distribution to the IRS of less than $9,000 (in the motion it filed with the state court asking the court for an order approving his recommended distributions), the IRS removed the state court receivership action under §1442. It argued that "the actions contemplated in the Receiver's Motion—if granted—

[14] *See supra* note 11.

would be adverse to the IRS's tax liens and therefore the receivership action has become one 'against' the United States" within the meaning of 1442. *Angello*, 2006 WL 3827418 , at *1. Finding that "there is no state process or judicial power that has been invoked against the IRS" and that "the Receiver has merely provided notice of a proposed action—notice which is intended to allow the IRS and other claimants the opportunity to assert their rights if they so choose," the court granted remand. *Id.*, at *2. Yet, under the proposed legislation, when the receiver sought a judicial order approving his recommended distributions, the right to remove would appear to be triggered.

As the *Angello* case suggests, a wide variety of judicial orders may be sought and issued against federal officers and agencies. In this way, the proposed language as drafted is potentially far-reaching and may unintentionally sweep into §1442 all manner of judicial orders for which no sound policy reason may exist for expanding the statute so broadly.

3. Does the proposed legislation strike the right balance in allowing removal of any proceeding in which a judicial order is either sought or issued?

The last issue to consider concerns the language of the proposed legislation that would extend the statute's reach to any proceedings in which judicial orders are issued, as well as to those in which they are merely sought. As noted, most courts have disapproved removals under existing §1442 when the federal officer or agency has only received a state court subpoena directed to them but no state coercive judicial order has issued to enforce the officer or agency's compliance.

One important issue to highlight is that although the proposed legislation likely was meant to track the minority view reflected in cases like *Brown & Williamson*, it may unintentionally deprive federal officers or agencies of the removal right in jurisdictions in which state law allows a subpoena to issue on the authority of the attorney, without prior judicial approval. The proposed legislation applies §1442 to any proceeding in which a *judicial* order is sought or issued. Arguably, then, the statute, as amended, would not reach subpoenas that are issued on the authority of the requesting attorney without the necessity of prior judicial approval.

Among the courts that have disapproved removal under existing §1442 merely upon issuance of a subpoena, several policy arguments are typically made to support a textual reading of §1442 as not authorizing removal in this circumstance. One that is advanced is what might be referred to as the "practically premature" argument. That is, until a state coercive order is issued or notice is received that the court will hold a hearing to decide whether to grant a coercive order, it is premature to conclude that something will be demanded of the federal officer or agency for which federal law might justify his or its non-compliance. This is how one court put it:

> Perhaps the Defendant was merely bluffing that he would attempt these depositions. It is not at all unusual that a litigant may make a discovery request and never follow through on the request. Unfortunately, some discovery requests are used merely to delay pending litigation. There is no way to evaluate this request on that basis in the abstract. On the other hand, perhaps the Government

> will capitulate and permit the agents to testify-or perhaps not. Until this matter progresses further, there is no way to determine whether the provisions of section 1442 will be invoked by an action being "commenced" against [the federal officers].

Adams, 892 F. Supp. 1101, 1105. It is surely right that discovery disputes do not always come to a head, but the downside to allowing removal to federal court in this circumstance seems quite modest. If the discovery dispute does blossom into a direct confrontation between the state discovery demand and a federal officer or agency's insistence that federal law excuses them from having to comply, then in hindsight removal will have been warranted. If it does not, the federal court can always dismiss if the dispute has fizzled out. Ultimately, the practically premature argument may be less of a policy argument for not allowing removal than a practical explanation to help bolster a textual reading of existing §1442 as not authorizing removal of mere requests for information because they are not yet actions "commenced against" a federal officer or agency.

A second policy argument advanced by courts that have not allowed removal under §1442 on the mere issuance of a subpoena might be referred to as the "premature federalism conflict" argument. This view emphasizes the federalism interests that are at stake in applying §1442. When a request for discovery or other order merely has been sought, but no state order coercing the federal officer to act is involved, these courts have maintained that there is no harm in assuming that the state court will give adequate due to any federal law defenses that may excuse the federal officer's compliance with the requested discovery (or other order). On this view, disapproving removal

> comports with general notions of the competence of state courts to vindicate federal rights. As the Supreme Court has noted, "[u]nder [our] system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). This court has faith in the able and experienced state court judge's ability to interpret the relevant law and to refuse any attempts by Defendant to coerce compliance with the instant subpoenas, absent the requisite Justice Department approval.

Id.[15] The problem with this argument is that it fails to consider the possibility that federalism interests may be more severely impacted by delaying the right to remove until the point that the confrontation between the state court judge and federal officer or agency has reached (or nearly reached) a dramatic crescendo. Once a subpoena has been issued, the federal officer or agency is on a collision course with the state court that could result if the officer or agency ultimately refuses to comply. Insisting that the federal officer or agency disobey a court order requiring

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[15] *See also State of Alabama v. Stephens*, 876 F. Supp. 263, 265 (M.D. Ala 1995) ("[T]he relationship of federal courts and state courts [does not] involve mere technicalities. Concepts of federal judicial restraint in matters involving state court proceedings are too important to the principles of federalism which are so basic to our form of government to be ignored, even if enforcing them might seem to unnecessarily complicate procedural matters").

compliance may be understood to invite an even greater, more intense confrontation between the state court and federal officer or agency than if removal were permitted at an earlier point. To be sure, removal of a state case always has a certain quality of presumptiveness to it (it is, after all, called a *notice* of removal, not a *motion* to remove), but by allowing removal to be triggered not just when a judicial order issues but also when one is sought, the proposed legislation may have the salutary effect of reducing dramatic tension that may otherwise result from allowing the discovery dispute to go on too long. In this circumstance, respecting state's rights may actually mean allowing removal before the state court has ordered, or is on the precipice of ordering, the federal official to comply.

While recognizing that the question is a close one, my view is that the proposed legislation probably strikes the right balance between state and federal interests in authorizing removal when a party seeks judicial intervention to compel a federal officer or agency to comply with a state order. I do not come to this view easily. In my judgment, courts and commentators often overstate the necessity of federal superintendence over state adjudication. As I have written previously:

> It is abundantly clear from experience that pleas routinely recited to gain the federal forum may often reveal themselves as naked aggrandizements of federal power. ... [T]here are costs to not maintaining a high presumption of state court competence to adjudicate issues of federal law, at least in certain contexts.

Lonny Hoffman, *Intersections of State and Federal Power: State Judges, Federal Law and the "Reliance Principle,"* 81 TUL. L. REV. 283, 288 (2006). I have also recognized, however, that "we certainly should not assume that a [] presumption of state court competence fits every occasion." *Id.* With regard to state subpoenas and other orders directed at federal officers or agencies, it probably makes better sense—in the interests of federalism—to allow removal, as the proposed legislation does, when a coercive judicial order to a federal officer or agency has been sought.

Mr. JOHNSON. And last but not least, we will hear from Professor Hellman.

TESTIMONY OF ARTHUR D. HELLMAN, PROFESSOR OF LAW, UNIVERSITY OF PITTSBURGH SCHOOL OF LAW, PITTSBURGH, PA

Mr. HELLMAN. Thank you, Mr. Chairman. Is this microphone on?

Thank you, Mr. Chairman. As you have heard, H.R. 5281 deals with two aspects of the Federal officer removal statute: the kind of cases that can be reviewed and an appellate review of remand orders.

I will start with the latter. I agree with the other witness that appellate review should be available when a district court remands a case that has been removed under section 1442. H.R. 5281 accomplishes this with a simple and straightforward fix, and I support that aspect of the bill wholeheartedly.

Clarifying the kind of proceedings that can be removed is not such a simple task. And I will begin by outlining the reasons why this is so. 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 private citizens, state officials, and other parties who as litigants in a State court proceeding suddenly and unwillingly find themselves transported into Federal court.

Now, that is not all, because as you are aware, the Federal officers and agencies do not have to ask any court, State or Federal, 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 won't return to the State court unless and until the district court issues an order of remand.

That can impose substantial burdens on the other parties. And among other things, those parties are often represented by lawyers who are inexperienced in Federal practice and unfamiliar with the provisions of the judicial code that govern removal.

Against that background it is particularly important that the removal statutes be drafted with the greatest possible clarity and directness. They should also be drafted in a way that serves Federal interests, without interfering unnecessarily with the course of litigation in the State court.

I have some concerns about H.R. 5281 on both scores. The amended statute is not as clear and direct as it could be. In my written statement, I recalled attention to some particular concerns about how the amended statute would work. Professor Hoffman has raised some of those same concerns and others as well. I believe that those should be dealt with in the legislation itself and not left to be worked out by litigation in the future.

I also have a concern that H.R. 5281 in its present form does go somewhat further than it needs to in defining the kind of State court proceedings that can be removed. And in particular, the bill appears to allow removal of the entire civil action or criminal prosecution, even when the Federal officer is not a party and only one segment of the proceeding concerns any Federal interests.

Now, we may have some disagreement here about whether the bill ought to be read that way, but we do seem to agree that only the Federal aspect ought to be removable.

So how should that be dealt with? In my statement I suggest a couple of approaches. One would be to authorize a separate civil action in Federal court, an action for a protective order. The second is to write the removal statute in such a way as to distinguish be-

tween stand-alone proceedings and ancillary or embedded or collateral proceedings. There are a number of terms for that.

I have something of a preference for the separate proceeding in Federal court. I realize, though, that would be something of an innovation. And in my statement I have suggested some language for an approach that accomplishes the purpose within the removal framework. And basically, rather than trying to define civil action and criminal prosecution to include proceedings that do not fit easily into either of those categories, the legislation should directly define the proceedings, other than conventional civil actions and criminal prosecutions, that can be removed and it should distinguish between stand-alone proceedings like those in Price against Johnson, or embedded and ancillary proceedings like those in Stallworth.

I would welcome the opportunity to work with the Subcommittee and its staff to fine-tune this important legislation. Thank you.

Mr. JOHNSON. Thank you, Professor Hellman.

[The prepared statement of Mr. Hellman follows:]

PREPARED STATEMENT OF ARTHUR D. HELLMAN

Statement of

Arthur D. Hellman
Sally Ann Semenko Endowed Chair
University of Pittsburgh School of Law

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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May 21, 2010

Statement of
Arthur D. Hellman

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

[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.
>
> 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.]
>
> 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.
>
> 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.
>
> 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 "interneddle 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

[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

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[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

[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.

Mr. JOHNSON. We do have votes. We have got about 10 minutes left before the time for voting closes, but I think in the interest of being expeditious, I will go ahead and ask my questions now. And when we return, we will proceed with the Ranking Member's questions.

My first question is for the panel. There is a clear circuit split on whether any judicial action including pre-suit discovery request, constitutes a, quote, civil action, for purposes of the Federal officer removal statute. What evidence is there in the legislative history of section 1442 supporting either interpretation?

Mr. NATHAN. I will take that first, Your Honor—Mr. Chairman.

Mr. JOHNSON. Your Honor is fine.

Mr. NATHAN. I am expecting you will be going to the bench soon.

The legislative history of 1948 of the Federal removal statute as a whole makes clear that when the Congress decided to use the word "civil action," they were trying to condense all kinds of proceedings into a single word, single phrase, "civil action." And the legislative history makes clear they were incorporating many different kinds of petitions and cause-of-action suits and proceedings under the words "civil action."

So it is our view that that legislative history from 1948 makes clear that the original intent of Congress in consolidating the Federal officers removal statute meant it to include all kinds of proceedings, including pre-suit discovery and subpoenas. And I think that the evidence of that is that within the Federal rules itself, there is the concept, again, of civil action; and in Federal rule 27, there is a possibility of pre-suit discovery in very limited circumstances.

And so the contemplation was when they said civil action: They meant anything that starts the proceeding against a defendant for any kind of matter, whether it is for money, injunction, or even discovery.

So I think that the 1948 legislation is pretty clear history that this is a clarification of what was intended by Congress and not a change from that.

Mr. HOFFMAN. I am not sure I would read the history the same way. But maybe what I would say in direct answer to your question is that I think that the change to allow certain matters that are relating to Federal officers to come within the ambit of 1442 under this definition of "civil actions" or "criminal proceedings," that there is nothing inappropriate about that, and that what you are seeing with the courts, Mr. Johnson, is that they are struggling to try to say what is this animal. It isn't a lawsuit, it isn't what we normally think of as a civil action. And most of them have concluded that it is not. There actually are few that concluded that it is.

And so for that change to take effect, for the Congress to enact a law that would simply deem these to be within the orbit of 1442, strikes me as both eminently defensible and wise. But, again the devil is in some of these important details that we raised here today.

Mr. HELLMAN. I would just add that the pre-suit proceedings I think come very easily within a functional definition, and it is very striking that in Price against Johnson, the district court, although

rejecting the removal, said the petition in that case had all the indicia of a civil proceeding—a civil proceeding—it looked like a civil action. So I don't think this legislation is a radical change at all; it is just clarifying what the law ought to be.

Mr. JOHNSON. Thank you.

Ms. Brinkmann, I want to thank you for DOJ's support of the Removal Clarification Act. Can you tell us how pre-suit discovery has impacted Federal officials at the Department of Justice, and are there any suits against the Administration that are currently pending that passage of this bill will have an effect on?

Ms. BRINKMANN. Certainly, Your Honor. There are a wide range of examples of Federal officers served with subpoenas because of their involvement, whether it is law enforcement investigations or other matters, that then find their way to State court. For example, officials at the IRS, the National Safety Transportation Board, the four services, Veterans Affairs, also law enforcement, FBI, DEA agents; some of the reported cases, for example, an official attorney in a Federal judiciary also I would point out.

It is important here, in order to enforce the right that Congress intended to have the Federal courts decide these questions.

And I wanted to mention one thing Professor Hoffman brought up. We don't experience or envision having discovery relitigated in Federal court. Generally our experience is when there is a removal in a situation with a subpoena, the Federal court exercises derivative jurisdiction and looks to the question of sovereign immunity. Generally, in many instances, Federal officials and agencies would be immune from the subpoena because there hasn't been a waiver of sovereign immunity.

In addition to Federal court, then the next question would be—just as it would be in the State court—for the executive branch, there is often regulations that are called "touhy" regulations after the Supreme Court case that upheld the constitutionality of this type of provision. But there are regulations that set forth the scope and procedures to be followed when seeking information from an executive branch official. And the normal course would be the most common, when there are regulations like that. But the subpoena matter would be dismissed, and the appropriate action there is to bring a civil action, just reported in the Administrative Procedures Act. So I just wanted to clarify that aspect of our experience and how that normally plays out.

Mr. JOHNSON. Thank you, Ms. Brinkmann.

Mr. Nathan, the chief purpose of the removal statute is to prevent harassment of Federal officers. How broad would you define harassment in this context? And in your experience as General Counsel to the House of Representatives, are State court proceedings often used to harass Members of Congress?

Mr. NATHAN. I don't know about often, but it happens too many times to be justified. There are instances. The classic example of that is that a person comes into a Member's office, perhaps district office, or even the office in D.C., causes some disturbance and is then prosecuted for disturbing the peace. And the defendant seeks to subpoena the Member to ask the Member questions about the Member's policy positions which led to the protest in the first place.

It really has no bearing on the disturbance of the peace matter, and it is a way to either harass or at least to impose on the Member. And we have seen that on both sides of the aisle, on all kinds of issues, and in many State courts throughout the country.

And in the two pre-suit discovery matters that were brought in the Fifth Circuit with differing results, I would say in both cases those were abusive efforts that were not really looking for the merits for potential lawsuits.

In the one case, the potential of the claim was they wanted to see whether what the Congresswoman had said would justify a defamation action. In the first place, what the Congresswoman had said was already a matter of public record. It was on a recording that was available to the potential plaintiff.

And in the second place, if a defamation suit had been brought, it would have been brought and removed to Federal court. And since under the Federal Torts Claims Act, under the procedures there, the United States Government would have been substituted. Sovereign immunity has not been waived for defamation actions, and the suit would have been dismissed.

So there was really no real reason for the potential pre-suit discovery. This was done for some ulterior motive, maybe dealing with the particular Congresswoman or with a criminal investigation of the petitioner which was then underway.

And similarly, in the case involving Senator Landrieu's staff, the effort was made to circumvent an administrative proceeding which did not allow the discovery which was being sought.

So there are a number of instances in which these matters have been abused, and I think it is appropriate that the Federal courts decide these questions of the discovery that is either going to be during the proceeding or preceding the proceeding.

Mr. JOHNSON. Thank you, Mr. Nathan. We have four votes pending. It will take about 20 to 30 minutes for us to get back and during that time we will be in recess.

[Recess.]

Mr. JOHNSON. Thank you, ladies and gentlemen. We are back in session and we left off with me ending my questions, and so next we will hear from our Ranking Member, the distinguished Mr. Howard Coble.

Mr. COBLE. Thank you, Mr. Chairman. I apologize to the panel. I had to be called to testify at another Judiciary Subcommittee hearing, and I apologize to you for that. But we have examined your questions—testimony.

Mr. Nathan, how many section 1442 cases does your office deal with in an average year?

Mr. NATHAN. I don't really have a number at my fingertips, but I would say with respect—the majority of them are subpoena cases as opposed to recent discovery cases.

Mr. COBLE. Is your mike on, Mr. Nathan?

Mr. NATHAN. Ah, thank you. Sorry for that. I don't really have the numbers in answer to your question. We can obviously check that out and provide it for the record; but it is a substantial number of cases in State courts that we have to seek removal for, both for lawsuits against Members and also for subpoenas for testimony.

Mr. COBLE. Did you sense any hostility or resentment for State courts and State bars over Federal removal?

Mr. NATHAN. We have not seen any evidence of such hostility. In the first place, as I mentioned, we are only seeking removal. When a Member hasn't been sued, we are only seeking removal of that part of the proceeding that relates to the subpoena for testimony or documents of the Member or the staff.

And of course the Federal courts are greatly respected and fair to all the parties before them, so there is really no cause for the concern. And once the matter is over, the matters on the merits go back to the State court when the Member is not a party to the lawsuit.

Mr. COBLE. I thank you, Mr. Nathan.

Mr. Chairman, we received outstanding witness testimony for this hearing, and I am not averse to marking up the bill today, but I think we would do ourselves and the witnesses a disservice if we don't take their testimony into account at some point.

The witnesses, let me ask you, will you all be willing to work with our staffs on a possible manager's amendment that could be taken up at the full Committee? I really believe we really need to address some of the issues, particularly that Professors Hellman and Hoffman have raised.

Mr. NATHAN. Absolutely. We are willing to work, eager to work with the Committee, the Subcommittee, and the staff to improve this draft legislation.

Mr. COBLE. I thank each of the witnesses. Mr. Chairman I yield back.

Mr. JOHNSON. Thank you, Mr. Ranking Member. I concur precisely in your last question and the responses thereto. So I would like to thank you all for your testimony, and, without objection, Members will have 5 legislative days to submit any additional questions, which we will forward to the witnesses and ask that you answer as promptly as you can to be made a part of the record. Without objection, e record will remain open for 5 legislative days for the submission of any other additional materials.

I thank everyone for their time and patience. The markup of H.R. 5281 will follow this hearing. This hearing of the Subcommittee on Courts and Competition policy is adjourned.

[Whereupon, at 3:50 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE HOWARD COBLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA, AND RANKING MEMBER, SUBCOMMITTEE ON COURTS AND COMPETITION POLICY

Mr. Chairman, I appreciate your calling this legislative hearing today. The bill before us, H.R. 5281, addresses an obscure but important issue that touches on federalism and the balanced relationship between the national government and the individual states.

The "Removal Clarification Act of 2010" primarily amends Section 1442 of title 28 of the US Code. This is a statute that allows federal officers, under limited conditions, to remove cases filed against them in state court to US district court for disposition.

The purpose of Section 1442 is to deny state courts the power to hold a federal officer criminally or civilly liable for an act allegedly performed in the execution of their federal duties. This doesn't mean federal officers can break the law; it just means that these cases are transferred to US district court for consideration.

Congress wrote the statute because it deems the right to remove under these conditions essential to the integrity and preeminence of the federal government under our Constitution. Federal officers or agents, including congressmen, shouldn't be forced to answer in a state forum for conduct asserted in performance of federal duties.

It's my understanding that US district courts have inconsistently interpreted the statute. Most recently in March, the Fifth Circuit ruled that the federal removal statute does not apply to a Texas state law involving pre-suit discovery. Since 46 other states have similar laws, the House General Counsel's Office is concerned that more federal courts will adopt the Fifth Circuit's logic.

The problem occurs when a plaintiff who contemplates suit against a federal officer petitions for discovery without actually filing suit in state court. Technically, according to the Fifth Circuit, this conduct only anticipates a suit; it isn't a "cause of action" as contemplated by the federal removal statute.

The problem is compounded because a separate federal statute, Section 1447, requires US district courts to remand any case back to state court if "at any time before final judgment it appears that the district court lacks subject matter jurisdiction." Judicial review of remand orders under Section1447 is limited and has no application to suits involving federal officers and Section 1442. This means remanded cases brought against federal officers under these conditions cannot find their way back to federal court.

This result is at odds with the history of the federal removal and remand statutes that we will examine today. That's why I'm an original cosponsor of H.R. 5281. I look forward to interacting with the witnesses this afternoon, and I intend to vote for the bill when we proceed to markup at the conclusion of the hearing.