

REMOVAL CLARIFICATION ACT OF 2011

FEBRUARY 28, 2011.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary,
submitted the following

R E P O R T

[To accompany H.R. 368]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 368) 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, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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PURPOSE AND SUMMARY

H.R. 368 amends a Federal officer removal statute (28 U.S.C. § 1442) and a related remand statute (28 U.S.C. § 1447) to ensure that any individual drawn into a State legal proceeding based on that individual’s status as a Federal officer has the right to remove the proceeding to a U.S. district court for adjudication. The purpose

of the removal statute, clarified by H.R. 368, is to ensure that State courts lack the authority to hold Federal officers criminally or civilly liable for acts performed in the execution of their duties. To suggest otherwise would potentially subject Federal officers to harassment, thereby compromising Federal Government operations. The bill responds to recent Federal court cases that reflect an inter- and intra-circuit split as to whether State “pre-suit discovery” laws qualify as civil actions or criminal prosecutions that are removable under § 1442.

BACKGROUND AND NEED FOR THE LEGISLATION

LEGISLATIVE HISTORY

The Judiciary Committee’s Subcommittee on Courts and Competition Policy conducted a hearing on H.R. 5281 (the predecessor bill to H.R. 368) on May 25, 2010. The witness roster was comprised of two law professors, a representative of the U.S. Department of Justice, and the House General Counsel. All agreed with the purpose of H.R. 5281, while the law professors provided suggestions for amendatory language.

The Subcommittee discharged H.R. 5281 on July 21, 2010, and six days later the full House passed the measure by voice vote under suspension of the Rules. A later attempt by the House and Senate to amend the bill with an unrelated immigration issue (the “DREAM Act”) scuttled further consideration of H.R. 5281. Representative Johnson of Georgia, sponsor of H.R. 5281, introduced a new version of the bill on December 21, 2010, incorporating clarifying amendments proffered by the Senate Judiciary Committee. The House passed the new bill, H.R. 6560, on December 22, 2010, by unanimous consent. The Senate adjourned shortly thereafter and did not act on the legislation. The text of H.R. 368 is identical to that of H.R. 6560.

THE RELEVANT STATUTE

Section 1442 of title 28 authorizes removal of civil actions or criminal cases brought in State courts against the following entities:

- The U.S. government, a U.S. agency, or a Federal officer sued for any act under color of their office or pursuant to a right derived from Congress to apprehend or punish criminals or to collect revenue;
- a property holder whose title derives from a Federal officer, where a civil cause of action or criminal prosecution affects the validity of a Federal law;
- Federal judicial officers acting under color of office or in the performance of their duties; and
- Members or Senators acting in the discharge of their official duties.

WHY THE STATUTE WAS WRITTEN AND HOW IT WORKS

Testimony provided at the Subcommittee hearing on the subject reveals that the origins of § 1442 may be traced back to 1815. The modern-day statute was written in the 1940s.

The purpose of the law is to take from State courts the indefeasible power to hold a Federal officer or agent criminally or civilly liable for an act allegedly performed in the execution of their Federal duties. This does not mean Federal officers can break the law; it just means that these cases are transferred to 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 within its realm of authority. Federal officers or agents, including Members of Congress, should not be forced to answer for conduct asserted within their Federal duties in a state forum that invites “local interests or prejudice” to color outcomes. In the absence of this constitutionally based statutory protection, Federal officers, including Members of Congress, could be subject to political harassment, and Federal operations generally would be needlessly hampered.

The statute and supporting case law require Federal officers to assert a Federal defense, such as absolute or qualified immunity, as part of a successful motion to remove. Federal officers must also show that the State suits are based on acts undertaken pursuant to color of office; in other words, they must demonstrate a causal connection between the charged conduct and asserted official authority. Removal is allowed only when the acts of Federal defendants are essentially ordered or demanded by Federal authority, which also gives rise to Federal defenses required by the statute.

THE PROBLEM ILLUSTRATED

House Rule II(8) authorizes the Office of the General Counsel, which provides legal assistance and representation to the House of Representatives and its Members. One of its counsel identified a recently-decided case involving a Texas State legal action taken against a Member of Congress (U.S. Representative Eddie Bernice Johnson of Texas) in which removal to Federal court was denied by a U.S. District Court and the U.S. Court of Appeals for the Fifth Circuit.

On February 17, 2009, in a State district court for Dallas County, a third party had filed a motion to depose Representative Johnson pursuant to Texas Rule 202. Under Rule 202, a plaintiff may request a *pre-suit* deposition to “perpetuate or obtain the person’s own testimony or that of any other person for use in an anticipated suit; or . . . to investigate a potential claim or suit.”

In response to this action, Representative Johnson removed the case to Federal court pursuant to 28 U.S.C. § 1442 and moved to dismiss the petition on four substantive grounds, including immunity under the Federal Tort Claims Act.

On April 7, 2009, while the motion to dismiss was still pending and without responding to it, the third party moved to remand the case to State court under 28 USC § 1447. The next day the Federal court granted the remand motion even though Representative Johnson had not filed her opposition. A motion to stay the remand order was rejected, and the case was appealed to the U.S. Court of Appeals for the Fifth Circuit.

The Fifth Circuit dismissed the appeal, ruling that a Texas Rule 202 proceeding is not a “civil cause of action” under 28 USC § 1442 because “it asserts no claim upon which relief can be granted and instead seeks an order for a deposition that may or may not result

in the filing of an actual suit.” And because the District Court lacked subject matter jurisdiction in the case (i.e., over a “civil action” or a “cause of action”), the Fifth Circuit reasoned they could not assert jurisdiction to review the corresponding remand order.

Representative Johnson has since appealed the case back to the Fifth Circuit under color of a *mandamus* petition.

The House General Counsel and the other Subcommittee witnesses noted that Federal courts have applied § 1442 inconsistently in recent years; the matter involving Rep. Johnson is just the most recent high-profile case that illustrates the problem. In fact, at the Subcommittee hearing on the subject, the General Counsel emphasized that case law interpreting the removal statute is not just split among the circuits but *within* them as well.

To summarize, the problem occurs when a plaintiff who contemplates suit against a Federal officer petitions for discovery without actually filing suit in State court. An increasing number of Federal courts maintain this conduct just anticipates a suit; it is not a “cause of action” as contemplated by the Federal removal statute, 28 USC § 1442.

The problem is compounded because the separate Federal remand statute, 28 USC § 1447, requires U.S. 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.” Remand orders under § 1447 are reviewable if the suit involves civil rights—it has no application to suits involving Federal officers and § 1442. This restriction means remanded cases brought against Federal officers under these conditions cannot find their way back to Federal court.

Given that 47 states have enacted pre-civil suit discovery statutes, the General Counsel’s Office recommends that the relevant portions of §§ 1442 and 1447 be amended to take into account the operation of these State pre-civil suit discovery statutes.

HEARINGS

The Committee on the Judiciary held no hearings on H.R. 368.

COMMITTEE CONSIDERATION

On January 26, 2011, the Committee met in open session and ordered the bill H.R. 368 favorably reported without amendment, by voice vote, a quorum being present.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee’s consideration of H.R. 368.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Rep-

representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 368, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 3, 2011.

Hon. LAMAR SMITH, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 368, the "Removal Clarification Act of 2011."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Martin von Gnechten, who can be reached at 226-2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 368—Removal Clarification Act of 2011.

H.R. 368 would clarify when Federal employees can transfer their case from a state court to a Federal district court. Under current law, Federal employees can transfer their cases to Federal court or seek clarification from a Federal court on the degree to which they must comply with a state-issued subpoena; however, courts have applied different procedures based on different interpretations of current law.

Based on information from the Administrative Office of the U.S. Courts, CBO estimates that implementing H.R. 368 would have no significant budgetary impact. Enacting H.R. 368 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 368 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of State, local, or tribal governments.

The CBO staff contact for this estimate is Martin von Gnechten. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 368 clarifies that the terms “civil action” and “criminal prosecution” include any proceeding, such as a subpoena for documents or testimony, under the Federal officer removal statute (28 U.S.C. § 1442). This allows any Federal officer subpoenaed pursuant to a State pre-suit discovery statute to remove the civil action or criminal prosecution to U.S. district court under 28 U.S.C. § 1442.

ADVISORY ON EARMARKS

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 368 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

SECTION-BY-SECTION ANALYSIS

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short title. Section 1 sets forth the short title of the bill as the “Removal Clarification Act of 2011.”

Sec. 2. Removal of Certain Litigation to Federal Courts. Section 2(a) of H.R. 368 amends 28 U.S.C. § 1442 by specifying that “civil action” and “criminal prosecution” include “any proceeding in which a judicial order, including a subpoena for testimony or documents, is sought or issued.” The bill clarifies that a civil action “commenced” in State court includes those brought “against” a Federal officer (which covers suits) as well as those “directed to” a Federal officer (which presumably covers discovery proceedings). Finally, Section 2(a) stipulates that if a case combines State subject matter with an ancillary Federal issue, only the Federal portion will be removable.

Section 2(b) rewrites § 1442 by permitting removal by Federal officers “in an official or individual capacity, for or relating to any act under color” of their office. This is intended to broaden the universe of acts that enable Federal officers to remove to Federal court.

In addition, a reference to Federal officers who are “sued” under the statute is also struck in the same subsection to deemphasize the current need for a suit to be brought in advance of a motion to remove.

Section 2 (c) preserves the institutional practice of how the Department of Justice (DoJ) responds to subpoenas. 28 USC § 1446 prescribes the procedures for Federal removal. Under the statute, the defendant in a civil action must request removal within 30 days following receipt of the complaint. In a criminal case, the request must come within 30 days of arraignment or at any time before trial, whichever is earlier. DoJ helped the Committee to draft Section 2(c) because it wants to maintain the ability to “retrigger” the 30-day period for removal cases that involve enforcement of subpoena requests. The great majority of requests only seek testimony or documents; these are typically frivolous, and are ignored. But DoJ cannot ignore a motion to enforce such a request. Section 2(c) therefore maintains the current and longstanding DoJ practice

of resetting the 30-day removal clock for cases that involve the enforcement of a subpoena.

Section 2(d) amends § 1447 by permitting judicial review of § 1442 cases that are remanded, just as they are with civil rights cases.

Sec. 3. PAYGO Compliance. Section 3 contains a PAYGO reference to a statement submitted by the House Budget Committee Chairman in 2010 regarding H.R. 5281, one of the legislative predecessors to H.R. 368 from the 111th Congress. The statement was included in the July 27, 2010, *Congressional Record*, which indicates the bill “would have no significant effect on direct spending by the Federal court system.”

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE

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PART IV—JURISDICTION AND VENUE

* * * * *

CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

* * * * *

§ 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution *that is* commenced in a State court *and that is* against or directed to 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]** *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.

* * * * *

(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.

* * * * *

(c) As used in subsection (a), the terms “civil action” and “criminal prosecution” include any proceeding (whether or not ancillary to another proceeding) to the extent that in such proceeding a judicial order, including a subpoena for testimony or documents, is sought or issued. If removal is sought for a proceeding described in the previous sentence, and there is no other basis for removal, only that proceeding may be removed to the district court.

* * * * *

§ 1446. Procedure for removal

(a) * * *

* * * * *

(g) Where the civil action or criminal prosecution that is removable under section 1442(a) is a proceeding in which a judicial order for testimony or documents is sought or issued or sought to be enforced, the 30-day requirement of subsections (b) and (c) is satisfied if the person or entity desiring to remove the proceeding files the notice of removal not later than 30 days after receiving, through service, notice of any such proceeding.

§ 1447. Procedure after removal generally

(a) * * *

* * * * *

(d) 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 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

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