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The Right of Federal Officers to Remove Garnishment Proceedings Instituted to Support Child Support Decrees

Comments

THE RIGHT OF FEDERAL OFFICERS TO REMOVE GARNISHMENT PROCEEDINGS INSTITUTED TO SUPPORT CHILD SUPPORT DECREES

Since 1815 federal officers have had the right to remove suits against them from state court to federal court when the acts forming the basis of the cause of action were performed under color of federal office.[1] This grant of federal jurisdiction rests upon the federal interest in protecting the exercise of federal authority from state interference. It is designed to ensure the enforcement of federal law by protecting federal officers against attempts by state courts to impose liability or penalty upon the officers for performing their official duties.[2] The adjudication of a federal officer's defense of official immunity is obviously an important function of the federal court.[3] Despite the strong federal interests in removal, a state's interest in enforcing its laws has been recognized and accorded weight by some federal courts in their determination of the removability of a suit under the federal officer removal statute.[4]

Efforts by federal officers to invoke the present federal officer removal statute, 28 U.S.C. § 1442, in a unique context under the 1974 amendments to the Social Security Act[5] demonstrate the importance of carefully considering

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1. *See* note 15 and accompanying text *infra*. The right to remove a suit from state court to federal court is statutory. *See generally* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 148 (3d ed. 1976). Under the general removal statute, 28 U.S.C. § 1441 (1976), a defendant may remove only those civil actions over which the federal court has original jurisdiction. *See generally* 1A MOORE'S FEDERAL PRACTICE 0.156 to .163 (2d ed. 1974); C. WRIGHT, *supra* at 148–59 (3d ed. 1976). Where removal is sought by a federal officer, however, the applicable statute, 28 U.S.C. § 1442 (1976), does not require that the cause of action lie within the original jurisdiction of the federal court. Section 1442(a)(1) is set forth at note 14 *infra*. This Comment will discuss only § 1442(a)(1). For a discussion of the evolution of officer removal, see text accompanying notes 15 to 26 *infra*.

2. *E.g.*, text accompanying notes 35 & 39 to 42 *infra*.

3. *E.g.*, text accompanying notes 101 to 106 *infra*.

4. *See* text accompanying notes 72 to 74 & 90 *infra*.

5. Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2337 (codified at 42 U.S.C. §§ 601 to 660 (1976)).

In recent years the number of recipients of welfare assistance under the Aid to Families with Dependent Children program (AFDC) has dramatically increased. This increase has been caused largely by the nonsupport of families by absent parents. When unable to enforce support obligations against the defaulting spouse, the remaining spouse is often forced to seek welfare assistance. The Senate Committee on Finance, reporting on the 1974 Amendments to the Social Security Act, cited statistics indicating that 4 out of 5 recipients of AFDC monies are on the welfare rolls due to nonsupport by an absent parent. The Committee noted further that in a 6½-year period families with absent fathers contributed approximately 4.8 million additional recipients of AFDC benefits. *See* SENATE COMM. ON FINANCE, SOCIAL SERVICES AMENDMENTS OF 1974, S. REP. NO. 1356, 93d Cong., 2d Sess. 42, 42–44, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 8133, 8145–48. Recognizing the detrimental effects nonsupport of children has upon both the family and the national economy, Congress amended the Social Security Act to provide a comprehensive federal-state

whether the federal interests underlying federal officer removal are present in a proceeding sought to be removed. In section 459 of the amendments Congress waived the sovereign immunity of the United States to garnishment proceedings in which a spouse seeks to enforce support obligations by garnishing federal monies due the defaulting spouse.[6] Although this waiver of immunity made the United States amenable to suits in state court, Congress did not concurrently provide the right to remove the state court garnishment proceeding to federal court.[7] In most if not all section 459 proceedings, an officer of the United States will be the garnishee. Three federal district courts have been presented with the issue whether the federal

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child support program. For an analysis of the 1974 Social Services Amendments, see Note, *Federal Law and the Enforcement of Child Support Orders: A Critical Look at Subchapter 4 Part D of the Social Services Amendments of 1974,* 6 N.Y.U. REV. LAW & SOC. CHANGE 23 (1976). For a general discussion of the problems caused by the nonsupport of children by absent parents, see M. WINSTON & T. FORSCHER, NONSUPPORT OF LEGITIMATE CHILDREN BY AFFLUENT FATHERS AS A CAUSE OF POVERTY AND WELFARE DEPENDENCE (1971); Foster, *Dependent Children and the Law,* 18 U. PITT. L. REV. 579 (1957).

6. Social Services Amendments of 1974, Pub. L. No. 93-647, § 459, 88 Stat. 2337 (codified at 42 U.S.C. § 659 (1976)). 42 U.S.C. § 659 provides:

> Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States (including any agency or instrumentality thereof and any wholly owned Federal corporation) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

For a discussion of the legislative history of § 459, see notes 128 to 130 and text accompanying notes 128 to 132 *infra.*

Although § 459 does not expressly state that the United States is subject to garnishment, the courts that have been presented with a garnishment proceeding under § 459 have found that the words "legal process" in § 459 include a garnishment action. *See, e.g.,* Wilhelm v. United States Dep't of Air Force, 418 F. Supp. 162, 164 (S.D. Tex. 1976) (mem. and order); Popple v. United States, 416 F. Supp. 1227, 1228 (W.D.N.Y. 1976); Samples v. Samples, 414 F. Supp. 773, 773 (W.D. Okla. 1976) (mem.); Golightly v. Golightly, 410 F. Supp. 861, 862 (D. Neb. 1976) (mem. and order); Morrison v. Morrison, 408 F. Supp. 315, 317 (N.D. Tex. 1976) (order of dismissal); Bolling v. Howland, 398 F. Supp. 1313, 1313 (M.D. Tenn. 1975) (mem.).

The waiver of sovereign immunity effects another important change in existing law: Social Security benefits can be garnished. *See* SENATE COMM. ON FINANCE, SOCIAL SERVICES AMENDMENTS OF 1974, S. REP. NO. 1356, 93d Cong., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 8133, 8157.

7. A federal court may, however, assume original jurisdiction of a § 459 proceeding in the instance where the Secretary of Health, Education, and Welfare certifies that a state court is unable to enforce its support order. 42 U.S.C. § 660 (1976) provides:

> The district courts of the United States shall have jurisdiction, without regard to any amount in controversy, to hear and determine any civil action certified by the Secretary of Health, Education, and Welfare under section 652(a)(8) of this title. A civil action under this section may be brought in any

disbursement officer can remove the proceeding to federal court under section 1442(a)(1).[8] Two courts denied removal, finding that no federal interest was served by allowing a federal officer to remove a section 459

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judicial district in which the claim arose, the plaintiff resides, or the defendant resides.

Section 652 states in pertinent part:

> (a) The Secretary shall establish, within the Department of Health, Education, and Welfare a separate organizational unit, under the direction of a designee of the Secretary . . . who shall—
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> . . . .
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> (8) receive applications from States for permission to utilize the courts of the United States to enforce court orders for support against absent parents and, upon a finding that (A) another State has not undertaken to enforce the court order of the originating State against the absent parent within a reasonable time, and (B) that utilization of the Federal courts is the only reasonable method of enforcing such order, approve such applications. . . .

Cases in which § 660 has been discussed include Williams v. Williams, 427 F. Supp. 557, 564-65 (D. Md. 1976); Wilhelm v. United States Dep't of Air Force, 418 F. Supp. 162, 164 (S.D. Tex. 1976) (mem. and order granting remand motion); Golightly v. Golightly, 410 F. Supp. 861, 863 (D. Neb. 1976) (mem. and order); Morrison v. Morrison, 408 F. Supp. 315, 317 (N.D. Tex. 1976) (order of dismissal); Bolling v. Howland, 398 F. Supp. 1313, 1314-16 (M.D. Tenn. 1975) (mem.). *See also* note 131 *infra*.

8. 28 U.S.C. § 1442(a)(1) (1976). *Compare* Wilhelm v. United States Dep't of Air Force, 418 F. Supp. 162, 165-66 (S.D. Tex. 1976) (mem. and order of remand) (no federal interest present) *and* West v. West, 402 F. Supp. 1189, 1191 (N.D. Ga. 1975) (order of remand) (no personal liability of officer; no penalty for past official acts nor restraint of future acts) *with* Williams v. Williams, 427 F. Supp. 557, 567 (D. Md. 1976) (removal consistent with purposes of § 1442). For an analysis of these cases, see text accompanying notes 135 to 184 *infra*. This issue was also discussed in Golightly v. Golightly, 410 F. Supp. 861, 862 n.2 (D. Neb. 1976) (dictum) (mem. and order of remand) (not against federal officer for official acts; United States cannot remove).

Several courts have also considered whether a § 459 garnishment proceeding can be removed to federal court under the general removal statute, 28 U.S.C. § 1441 (1976). Section 1441 provides in pertinent part:

> (a) Except as otherwise expressly provided by an Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
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> (b) Any civil action of which the district courts have original jurisdiction founded upon a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

As indicated in note 1 *supra*, removal of a suit under § 1441 is proper only upon a finding by the federal court that it has original jurisdiction of the cause of action. In the cases in which the United States or its agency sought removal under § 1441, jurisdiction was claimed under that section in combination with either 28 U.S.C. § 1331(a) (1976) or 28 U.S.C. § 1346(a)(2) (1976). Section 1346(a)(2) provides: "(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of: . . . (2) Any other civil action or claim against the United States, not exceeding

proceeding.[9] Both of these courts concluded that the proceeding is not one that threatens a federal officer with liability or penalty;[10] one of them further observed that to allow removal of these garnishment proceedings would effect a profound alteration in the relationship between state and federal courts by bringing into the federal courts suits over which the state courts have traditionally exercised exclusive jurisdiction.[11] The third court allowed removal of a section 459 proceeding under section 1442(a)(1), apparently finding some federal interest warranting removal.[12]

This Comment considers whether any federal interest justifies allowing a federal officer to remove a section 459 proceeding under section 1442(a)(1), the current federal officer removal statute. First, it traces the legislative history of the right of removal. Next, it discusses the cases in which the Supreme Court of the United States has stated the purposes of the federal officer removal statutes and indicated the interests to be weighed in

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$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department . . . ." Section 1331(a) provides that "[t]he district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." The courts have held that a § 459 proceeding cannot be removed under § 1441 in combination with either § 1331(a) or § 1346(a)(2) because the cause of action does not arise under any federal law, within the meaning of § 1331(a), and is not founded upon the Constitution, or any act of Congress, or any regulation of the executive department, within the meaning of § 1346(a)(2). Because a § 459 action is not within the original subject matter jurisdiction of the federal courts, it cannot be removed under § 1441. The courts have explained that the waiver of sovereign immunity in § 459 merely removed the immunity of the United States to garnishment proceedings instituted to enforce support orders, and that it did not create a federal right of garnishment. Thus, the right of garnishment involved in a § 459 proceeding is created by state statute, and the cause of action neither arises under federal law nor is founded upon the Constitution, an act of Congress, or regulation of the executive department. Williams v. Williams, 427 F. Supp. 557, 558-60 (D. Md. 1976) (§§ 1331(a) and 1346(2)(a)); Wilhelm v. United States Dep't of Air Force, 418 F. Supp. 162, 164 (S.D. Tex. 1976) (mem. and order of remand) (§§ 1346(a)(2) and 1331(a)); Popple v. United States, 416 F. Supp. 1227, 1228 (W.D.N.Y. 1976) (by implication); Golightly v. Golightly, 410 F. Supp. 861, 862-63 (D. Neb. 1976) (mem. and order of remand) (§ 1346(a)(2)); Morrison v. Morrison, 408 F. Supp. 315, 317-18 (N.D. Tex. 1976) (§§ 1346(a)(2) and 1331(a)); West v. West, 402 F. Supp. 1189, 1191-92 (N.D. Ga. 1975) (order of remand) (§ 1346(a)(2)); Bolling v. Howland, 398 F. Supp. 1313, 1316 (M.D. Tenn. 1975) (§ 1346(a)(2)).

It is possible, however, that there is a split in the federal district courts on the removability of a § 459 proceeding under § 1441; two courts have allowed removal without stating the statutory basis of their decision. *See* Crane v. Crane, 417 F. Supp. 38, 39 & n.2 (E.D. Okla. 1976) (dictum) (order of dismissal) (only garnishment proceeding removable); Samples v. Samples, 414 F. Supp. 773, 773 (W.D. Okla. 1976) (mem.) (no discussion of removal).

9. Wilhelm v. United States Dep't of Air Force, 418 F. Supp. 162, 165-66 (S.D. Tex. 1976) (mem. and order of remand); West v. West, 402 F. Supp. 1189, 1191 (N.D. Ga. 1975) (order of remand).

10. *See* text accompanying notes 139 to 145 & 149 to 151 *infra*.

11. *See* note 139 and accompanying text *infra*.

12. Williams v. Williams, 427 F. Supp. 557, 567 (D. Md. 1976).

construing them. The legislative history of section 459 of the 1974 Social Security amendments is examined to determine the purpose of the waiver of the sovereign immunity of the United States[13] and whether removal of a section 459 proceeding by a federal officer was contemplated by Congress. Finally, it analyzes the two cases in which federal officer removal of a section 459 proceeding was denied and the one case in which it was granted, and concludes with the recommendation that removal under section 1442(a)(1) be denied federal officers, agencies, and the United States itself because there is no significant federal interest protected by federal officer removal of a section 459 proceeding.

THE HISTORICAL DEVELOPMENT OF FEDERAL OFFICER REMOVAL

The present federal officer removal statute, 28 U.S.C. § 1442, provides in pertinent part:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons 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:
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> (1) Any officer of the United States or any agency thereof, or person acting under him, for 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.[14]

Federal officers were first granted the right to remove suits against them in an 1815 customs statute which provided that federal officers engaged in its enforcement could remove to the federal courts any suit or prosecution based upon the officers' acting under color of the statute.[15] This removal provision was designed to protect federal officers enforcing a trade embargo against England from interference by the New England states, which had opposed the War of 1812.[16] This statute, by its own terms, expired at the end of the war.[17] A later provision, enacted in 1833, authorized the

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13. This Comment does not discuss a separate but related issue, whether by waiver of federal sovereign immunity, state garnishment law has been incorporated into federal law, thereby creating a federal common law of garnishment.

14. 28 U.S.C. § 1442(a)(1) (1976).

15. Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198. The Act provided in part:
> [I]f any suit or prosecution be commenced in any state court, against any collector, naval officer, surveyor, inspector, or any other officer, civil or military, or any other person aiding or assisting, agreeable to the provisions of this act, or under colour thereof, for anything done, or omitted to be done, as an officer of the customs, or for anything done by virtue of this act or under colour thereof, . . . the defendant shall . . . file a petition for the removal of the cause . . . at the next circuit court of the United States . . . .

16. *See* Willingham v. Morgan, 395 U.S. 402, 405 (1969).

17. The Act provided that: "This act shall continue in force during the continuance of the present war between the United States and Great Britain, and no

removal of state suits or prosecutions against federal officers arising from the officers' enforcement of customs laws.[18] Its purpose was to prevent states from penalizing federal officers for collecting duties under federal tariff laws.[19] A still later provision, enacted by Congress during the war between the states for the period of rebellion only, allowed the removal of suits against federal officers which arose from their efforts to suppress the rebellion of the southern states.[20] Subsequent enactments extended the right of removal to internal revenue officers,[21] officers of Congress,[22] officers of the federal courts,[23] members of the military services,[24] and those engaged in

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longer." Act of Feb. 4, 1815, ch. 31, § 13, 3 Stat. 195, 200. This act was the first removal provision but it never had effect; the War of 1812, unbeknown to Congress, had terminated before its passage. The Act of Mar. 3, 1815, ch. 94, §§ 6, 8, 3 Stat. 231, 233-35, contained the same language as the prior act and continued it for one year. It was extended for an additional year by the Act of Apr. 27, 1816, ch. 110, § 3, 3 Stat. 315. And the Act of Mar. 3, 1817, ch. 109 § 2, 3 Stat. 395, which expired in 1821, provided a similar removal right. *See generally* Strayhorn, *The Immunity of Federal Officers From State Prosecutions,* 6 N.C.L. REV. 123, 129-32 (1928) (citing Warren, *Federal Criminal Laws and the State Courts,* 38 HARV. L. REV. 545, 584-85 (1925).

18. Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 633. The act provided, *inter alia:*

> That in any case where suit or prosecution shall be commenced in a court of any state, against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under colour thereof, or for or on account of any right, authority, or title, set up or claimed by such officer, or other person under any such law of the United States, it shall be lawful for the defendant in such suit or prosecution . . . [to] petition to the circuit court of the United States . . . .

The act referred to revenue laws, but laws for the collection of internal revenue did not exist in 1833. The Supreme Court of the United States, in Assessors v. Osbornes, 76 U.S. (9 Wall.) 567, 573 (1869), treated the act as limited to cases involving import duties. *See* H. HART & H. WESCHLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1148 (1953).

19. *See* Willingham v. Morgan, 395 U.S. 402, 405-06 (1968); Maryland v. Soper (No. 1), 270 U.S. 9, 32 (1926); Tennessee v. Davis, 100 U.S. (10 Otto) 257, 268 (1879).

20. The Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755, authorized the removal of state prosecutions based upon acts of any government official who was carrying out the suppression of the rebellion of the southern states. The act was amended by the Act of May 11, 1866, ch. 80, 14 Stat. 46 and the Act of Feb. 5, 1867, ch. 27, 14 Stat. 385. The 1863 act was later extended to cases arising under the Civil Rights Law, by the Act of Apr. 9, 1866, ch. 31, § 3, 14 Stat. 27, and under the Freedman's Act, by the Act of Mar. 3, 1865, ch. 90, 13 Stat. 507. The Act of May 31, 1870, ch. 114, § 18, 16 Stat. 140, provided for the enforcement of the two preceding acts.

21. Act of Mar. 7, 1864, ch. 20, § 9, 13 Stat. 14, *as amended by* Act of June 30, 1864, ch. 173, § 50, 13 Stat. 223 (codified at 28 U.S.C. § 1442(a)(1) (1976)).

22. Act of Mar. 3, 1875, ch. 130, § 8, 18 Stat. 371, and Act of June 25, 1948, ch. 646, § 1, 62 Stat. 909 (codified at both 2 U.S.C. § 118 (1976) and 28 U.S.C. § 1442(a)(4) (1976)).

23. Act of Aug. 23, 1916, ch. 399, 39 Stat. 532 (codified at 28 U.S.C. § 1442(a)(3) (1976)).

24. Act of Aug. 29, 1916, ch. 418, § 3, Article of War 117, 39 Stat. 619. *See* Act of June 4, 1920, art. 117, Articles of War, ch. 227, subch. II, § 1, 41 Stat. 811, *as amended by* Act of June 24, 1948, ch. 625, tit. II, § 242, 62 Stat. 642 (codified at 28 U.S.C. § 1442(a) (1976)).

enforcing the National Prohibition Act.[25] Finally, in 1948, as part of the general revision of the judicial code, Congress gave all federal officers this right.[26]

The early removal statutes were enacted during periods of state hostility to federal policies. The legislative history of these statutes indicates that states frequently attempted to nullify federal laws by authorizing civil or criminal actions against federal officers for their execution of federal laws. Congress responded by providing for the removal of these suits to federal court.[27] It seems clear that the right of removal is designed to protect the federal government from attempts to interpose state policies where federal authority has been exercised and is paramount. Indeed, the Supreme Court has consistently characterized federal officer removal as an essential means of preserving the supremacy of the federal government.

In *Tennessee v. Davis*,[28] the defendant was a deputy collector of the internal revenue whose official duties included seizing illicit distilleries. While so doing he was assaulted and fired upon by several men. He returned fire, killing one of the men. Despite the fact that the officer had been enforcing a federal law at the time the death occurred, he was indicted under Tennessee law for murder.[29] The officer sought removal of the pending state murder prosecution to federal court,[30] claiming that he had acted by right of his office and in self-defense.[31] The case was removed to federal court,[32] and the state moved that the trial be remanded to state court. The federal circuit court judges disagreed as to whether this motion should be granted and certified three questions to the United States Supreme Court.[33]

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25. Act of Oct. 28, 1919, ch. 85, tit. II, § 28, 41 Stat. 305, *repealed by* Act of Aug. 27, 1935, ch. 740, tit. I, § 1, 49 Stat. 872 (codified at 27 U.S.C. § 45 (1976)).

26. Act of June 25, 1948, ch. 646, 62 Stat. 869 (codified at 28 U.S.C. § 1442 (1976)).

27. Willingham v. Morgan, 395 U.S. 402, 405-06 (1969); Tennessee v. Davis, 100 U.S. (10 Otto) 257, 268 (1879).

28. 100 U.S. (10 Otto) 257 (1879).

29. *Id.* at 260-61.

30. The officer claimed a right of removal under REV. STAT. 643 (1875).

31. 100 U.S. (10 Otto) at 260-61.

32. Nothing explicitly states that the case was in fact removed, but removal can be inferred from the fact that the circuit court was faced with a motion by the state to remand the case to state court. *See* 100 U.S. (10 Otto) at 259-60.

33. Three questions were certified:

> Whether an indictment of a revenue officer (of the United States) for murder, found in a State court, under the facts alleged in the petition for removal in this case, is removable to the Circuit Court of the United States, under sect. 643 of the Revised Statutes.
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> Whether, if removable from the State court, there is any mode and manner of procedure in the trial prescribed by the act of Congress.
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> Whether, if not, a trial of the guilt or innocence of the defendant can be had in the United States Circuit Court.

100 U.S. (10 Otto) at 260.

As discussed in the text accompanying notes 35 to 37 *infra*, the Court concluded that the prosecution was in fact removable. It did not explicitly answer the second question, stating that the general powers of a circuit court were adequate for it

The Supreme Court began its analysis by stating that the officer's allegations made out a case for removal if the removal statute upon which he relied encompassed criminal prosecutions and if such a removal statute was constitutional.[34] In construing the statute to cover the case the Court stated:

> The act of Congress authorizes the removal of any cause, when the acts of the defendant complained of were done, or claimed to have been done, in the discharge of his duty as a Federal officer. It makes such a claim a basis for the assumption of Federal jurisdiction of the case, and for retaining it, at least until the claim proves unfounded.[35]

Having stated this statutory purpose, Justice Strong found it "too plain to admit of denial" that the statute permitted removal of[36] criminal actions filed in state court against federal officers. He pointed out that the language of the statute encompassed state criminal prosecutions, and emphasized that to construe the statute so as to preclude removal of prosecutions under state law would render this language meaningless.[37]

Having found the removal statute applicable to the case before the Court, Justice Strong went on to examine the constitutionality of the statute. The issue was whether the Constitution conferred upon Congress the power to authorize the removal of a state prosecution of a federal revenue officer where it appeared that the case raised a federal question or a claim to a federal right.[38] Justice Strong identified the federal interest involved in removal as the preservation of the ability of the federal government to protect itself in the exercise of its constitutional powers, an ability he

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to meet any problems that could occur in the trying of the case. The Court answered the third question in the affirmative, indicating that its reasons had been adequately stated in its answer to the second question. *Id.* at 271-72.

The Court did not indicate the basis for the circuit court's certification of these questions or the reason the Supreme Court heard them. Apparently the procedure followed was that mandated by REV. STAT. §§ 651 & 697 (1875), whereby either party in a criminal proceeding in which the circuit judges were divided in opinion could request the judges to certify the questions upon which they were divided to the Supreme Court. REV. STAT. 651 (1875). The circuit judges were then required to certify such questions, *id.*, and the Supreme Court, in turn, was required to decide these issues, REV. STAT. 697 (1875).

The *Revised Statutes* indicate that this procedure was derived from the Act of Apr. 29, 1802, ch. 31, § 6, 2 Stat. 159, a certification procedure encompassing both civil and criminal cases.

34. 100 U.S. (10 Otto) at 261.

35. *Id.* at 261-62.

36. *Id.* at 262.

37. *Id.* The Court pointed out that state courts have no authority to try offenses against the United States. Thus, any attempt to construe the reference in the removal statute to criminal prosecutions as a reference to removal of criminal prosecutions for violations of federal law would render the reference to removal of criminal cases meaningless.

38. *Id.*

considered necessary for the survival of the national government.[39] Removal serves this function by protecting officers carrying out constitutionally authorized functions of the federal government:

> [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 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.[40]

The danger to federal authority in not allowing removal of such cases to federal court, according to the *Davis* Court, is that states could paralyze the federal government by enacting unfriendly legislation or by administering state or federal law in a manner contrary to federal interests.[41]

The Court ruled that the ability of the federal government to protect its operations from state interference is guaranteed by its supremacy in those areas in which it had been granted powers by the Constitution and concluded that no state can exclude the federal government from exercising authority conferred upon it by the Constitution, obstruct federal officers against the will of the federal government, or withhold from the federal government the cognizance of any subject committed to it by the Constitution.[42] The Court thus determined that removal is a constitutional mechanism for the protection of important federal interests, noting that article I, section 8 of the Constitution gives Congress the power to make all laws necessary and proper to carry into execution the powers vested in the federal government by the Constitution.[43] It found the judicial power, a power extending to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made under their authority, among the powers granted to the federal government.[44] Quoting *Osborn v. Bank of the United States,*[45] the *Davis* Court stated that Congress

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39. *Id.* at 262-63.
40. *Id.* at 263.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 264.
45. 22 U.S. (9 Wheat.) 738 (1824). In *Osborn,* the Court stated:

> The question, then, is, whether the constitution of the United States has provided a tribunal which can peacefully and rightfully protect those who are employed in carrying into execution the laws of the Union, from the attempts of a particular State to resist the execution of those laws.
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> . . . .
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> . . . It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It

can constitutionally grant federal courts jurisdiction over all cases in which a question in which the judicial power of the United States is an ingredient — whether the federal ingredient is stated expressly in terms of the Constitution or federal law, or implicit in these sources of the judicial power.[46] The Court then pointed out that the general practice of removal had been found constitutional, referring to the history of various removal provisions,[47] and rejected the argument that removal infringed upon state sovereignty, noting that in entering the union the states had relinquished their sovereignty in those areas where the authority of the federal government was supreme.[48]

Despite the *Davis* Court's emphasis on the interest of the federal government in protecting its officers, later cases implicitly, and then explicitly, construed officer removal statutes in a fashion that recognized and protected the state interest in trying cases under state law, at least where that interest was not in conflict with the federal interest protected by removal. In *Maryland v. Soper,*[49] for example, four prohibition agents and their chauffeur sought to remove state criminal charges brought against them, claiming that the charges related to the discharge of their duties as federal officers.[50] The men alleged that they were returning to their car after investigating and destroying an illegal distillery when they discovered a wounded man lying on the ground.[51] They claimed to have taken the wounded man to a doctor who pronounced him dead.[52] After leaving the body in a mortuary, the officers related their story to the local sheriff, including the fact that they were acting as federal agents when they found the body.[53] The sheriff was not impressed; he arrested and jailed the men.[54] Apparently, the state's attorney and grand jury were similarly unimpressed,

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> is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing, for an act of Congress to imply, without expressing, this very exemption from State control. . . . The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them, are protected while in the line of duty; and yet this protection is not expressed in any act of Congress. It is incidental to, and is implied in, the several acts by which these institutions are created, and is secured in the individuals employed in them, by the judicial power alone; that is, the judicial power is the instrument . . . [by which] . . . the government . . . administer[s] this security.

Id. at 849, 865. *See also* The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 253 (1867).

46. 100 U.S. (10 Otto) at 264.
47. *Id.* at 265-71.
48. *Id.* at 266-67.
49. (No. 1) 270 U.S. 9 (1926).
50. *Id.* at 22-26.
51. *Id.* at 23-24.
52. *Id.* at 24.
53. *Id.* at 24-25.
54. *Id.*

for the officers were indicted for murder and for conspiring to obstruct justice by lying at a subsequent inquest.[55]

Judge Soper allowed removal, denying the state's motion to quash the removal petition.[56] Rather than appeal this decision, the state applied to the United States Supreme Court for leave to file a petition for a writ of mandamus.[57] The Court granted leave and issued a ruling against Judge Soper to show why the writ should not issue.[58] Judge Soper responded that the defendants had a right to remove the case because their acts were performed under color of office in the course of enforcing the revenue and prohibition laws of the United States,[59] and the case was thus within the jurisdiction of the federal courts.[60]

The Supreme Court agreed with Judge Soper's finding that the agents were within the class protected by the removal statute,[61] but nevertheless refused to affirm Judge Soper's determination that the case was removable. The Court first discussed the propriety of issuing a writ of mandamus directing a district judge to remand a removed case to state court. Chief Justice Taft pointed out that mandamus was an extraordinary remedy analagous to the intervention of equity to secure justice in the absence of any other adequate remedy.[62] Despite the extraordinary nature of the writ, the Chief Justice found that wresting from a state court the authority to try offenses against its own state law, combined with the lack of any other adequate remedy, was sufficient to allow the writ to issue where a federal court has improperly granted removal of a state criminal proceeding.[63]

The use of mandamus to guard the state's interest in trying cases involving its own law provides the state with the opportunity to vindicate this interest where it does not conflict with the federal interest protected by removal. Although Chief Justice Taft never explicitly mentioned this state interest in *Soper,* his opinion restricted removal in a fashion consistent with a concern for state interests. He stated, for example, that although the officer need not admit the commission of the act with which he is charged, he must establish a causal connection between his actions and his official duties.[64] Indeed, the Court stated that the officer must exclude the possibility that his conduct was not within the scope of his official duty.[65] The officer's defense must be personal immunity — his act must be justified by his duty under federal law — and he must establish this defense fully and fairly by

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55. *Id.* at 25-26.
56. *Id.* at 26.
57. *Id.* at 27.
58. *Id.*
59. Judge Soper noted that the defendants need not admit having caused the man's death in order to be allowed to remove. *See id.* at 28.
60. *Id.* at 27-28.
61. *Id.* at 30-33.
62. *Id.* at 29.
63. *Id.* at 29-30.
64. *Id.* at 33.
65. *See id.* at 35.

the allegations in his petition before removal can be granted.[66] The Court ruled that the removal petition did not meet this requirement because it alleged merely that the officers were carrying out their official duties when they discovered the man.[67] Chief Justice Taft stated that the defendants had not been "candid, specific and positive in explaining . . . [their] relation to the transaction out of which . . . [they] . . . were indicted, and in showing that [their] relation to it was confined to [their] acts as . . . officer[s]."[68] Thus, the Court granted the writ but left open the possibility that the federal judge could allow the officers to amend their petition for removal with respect to the murder indictment.[69] The Court also held, however, that the obstruction of justice prosecution could not be removed, even if amended, for the officers' testimony at the coroner's inquest — although arguably relating to acts performed under color of federal office — was not itself given under color of office. Because neither federal nor state law compelled the officers to testify, their testimony was voluntary and therefore not even colorably in performance of their duty as officers of the United States.[70]

Detailed pleadings were required by the *Soper* opinion "so that the court may be fully advised and the state may take issue by a motion to remand."[71] This requirement suggests a concern for the state interest in trying its own criminal prosecutions in that it assures that the state will be provided with the information necessary to contest removal. The state interest is protected by requiring the defendant to declare his reasons for removal in such clear terms that the state can challenge its validity and the court evaluate its legitimacy. More than this, *Soper's* detailed pleadings requirement indicates that where the federal interest is sufficiently remote the state interest may preclude removal. The federal government arguably has an interest in protecting all officers indicted for acts committed during their government service because such an indictment at least raises the possibility of interference with the functions of the federal government. Despite this, the Court implicitly rejected such a broad interest as a justification for removal, describing the rejected petition as inadequate because it alleged only facts indicating that the act for which the officers were charged occurred when they were performing their official duties.[72] The limitation upon those federal interests that justify officer removal is further illustrated by the refusal of the Court to consider removing the obstruction of justice prosecution. Although the Court in *Soper* frankly acknowledged that the federal government would appear to have an interest in protecting its officers from state actions directed against behavior related to the

66. *Id.* at 34.
67. *Id.* at 35.
68. *Id.*
69. *Id.* at 35-36.
70. Maryland v. Soper (No. 2), 270 U.S. 36 (1926).
71. Maryland v. Soper (No. 1), 270 U.S. 9, 34 (1926).
72. *Id.* at 35.

performance of their offices,[73] it restricted removal to cases involving the actual performance of official duties,[74] thereby making the state interest in prosecutions dominant against more remote federal interests.

The import of state interests in construing federal officer removal statutes was more clearly stated in *Colorado v. Symes.*[75] In *Symes* a United States prohibition officer charged by the state with murder was allowed to remove the prosecution to federal court.[76] The agent had alleged in his petition to remove that, while investigating a restaurant for reported violations of the National Prohibition Act, he saw a man take a bottle of wine out of his pocket, place it on a counter, and look for a glass.[77] When the agent attempted to seize the bottle and arrest the man, he was resisted.[78] A fight ensued, requiring the officer to subdue the man by hitting him on the head with his (the officer's) gun.[79] The man was subsequently arrested and jailed.[80] Although he appeared to be in good health, he died the following day.[81] Alleging that the blow to the head had caused the death, the state charged the agent with murder.[82] The officer successfully petitioned for removal,[83] and Judge Symes denied the state's motion to remand the case to state court, finding that the officer had met the requirements for removal established by *Soper.*[84] As in *Soper,* the state petitioned for leave to file in the Supreme Court a motion for a rule requiring the judge to show cause why a writ of mandamus should not issue to compel him to remand the case.[85] Leave was granted, and the motion filed and granted.[86] Judge Symes responded to the show cause order, claiming that mandamus should not be granted,[87] but the Supreme Court was not persuaded.

Writing for the Court, Justice Butler began by restating the statutory purpose for officer removal, as developed in *Tennessee v. Davis,* as the protection of federal supremacy by safeguarding those acting under federal authority from state punishment for violating state laws or policies that are inconsistent with the federal laws or policies being vindicated by the federal agent.[88] The Court stressed the importance of this purpose, stating that

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73. Maryland v. Soper (No. 2), 270 U.S. 36, 43-44 (1926).

74. *Id.* The Court indicated that the statute could not be so construed and that if promoting this interest were considered desirable, Congress could do so by statute.

75. 286 U.S. 510 (1932).

76. *Id.* at 514.

77. *Id.* at 515-16.

78. *Id.* at 516.

79. *Id.*

80. *Id.*

81. *Id.* at 516-17.

82. *See id.* at 514.

83. *Id.*

84. *Id.* at 515.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 517-18.

measures designed to protect this federal interest should be "liberally construed to give full effect to the purposes for which they were enacted."[89]

After noting the importance of this policy the *Symes* Court went on to acknowledge the right of the states to make and enforce their own laws. Although the federal government has the right to exert exclusive and supreme power in the field constitutionally belonging to it, the Court emphasized that "[t]he removal statute is to be construed with highest regard" for the state's interest in making and enforcing its own laws:

> Federal officers and employees are not, merely because they are such, granted immunity from prosecution in state courts for crimes against state law. Congress is not to be deemed to have intended that jurisdiction to try persons accused of violating the laws of a state should be wrested from its courts in the absence of a full disclosure of the facts constituting the grounds on which they claim protection under section 33 [the removal statute].[90]

Having articulated the competing federal and state interests to be considered in construing the removal statute, Justice Butler quoted the removal requirements established in *Soper*.[91] Applying these requirements to the facts alleged in *Symes*, the Court ruled that the officer's petition did not meet the *Soper* standard[92] because, as in *Soper*, the officer's allegations did not provide the Court with specific information sufficient to determine the legitimacy of the officer's claim for removal.[93]

Except for its explicit recognition that both state and federal interests should be considered in construing the removal statute, the *Symes* decision added little to *Soper*. *Willingham v. Morgan*,[94] the most recent Supreme Court case addressing officer removal, appears to deviate from the *Symes-Soper* position, for it construed the "color of office" requirement of the current statute to require a far less detailed showing that the federal officer seeking removal had acted within the scope of his official duty.[95] In *Willingham*, the warden and chief medical officer of a federal penitentiary were sued in state court by a prisoner for allegedly having innoculated the prisoner with a foreign substance and for having beaten, tortured, and assaulted him.[96] The prison officers filed a petition for removal to the United States District Court for the District of Kansas, alleging that anything they may have done to the prisoner had been done in the course of their duties as federal officers and under color of their federal offices.[97] The district court

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89. *Id.*
90. *Id.* at 518.
91. *Id.* at 519–20.
92. *Id.* at 520.
93. *Id.* at 520–21.
94. 395 U.S. 402 (1969).
95. *Id.* at 408–09.
96. *Id.* at 403.
97. *Id.*

denied the prisoner's motion to remand the case to state court and proceeded to grant summary judgment in favor of the officers on the theory that recovery was barred by their official immunity.[98] The Court of Appeals for the Tenth Circuit reversed, finding the record in the case insufficient to support the district court's refusal to remand.[99] The Supreme Court reversed the court of appeals' decision and remanded the case to the appellate court for a determination of the propriety of the grant of summary judgment and any other questions remaining in the case.[100]

Writing for the Court, Justice Marshall rejected the conclusion of the court of appeals that the "color of office" test of section 1442(a)(1) provides a limited basis for removal, stating that the test for removal should be broader than the test for official immunity.[101] After tracing the history of officer removal statutes,[102] he quoted *Tennessee v. Davis* as stating the purpose of federal officer removal.[103] Unlike Justice Butler in *Symes,* Justice Marshall

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98. *Id.* at 404.

99. 383 F.2d 139, 142 (10th Cir. 1967).

100. 395 U.S. at 410.

101. *Id.* at 405. Although the Tenth Circuit found that the defendants fell within the class protected by § 1442(a)(1), it held that the record did not show that the acts complained of were committed under color of office. The court stated that § 1442 presents different standards for different classes of federal officers. 383 F.2d at 141, and that the color of office test of § 1442(a)(1) provides a limited basis for removal. The court cited several cases for the proposition that the color of office requirement is not satisfied by a showing that the officer had been acting within the scope of his employment (the standard for official immunity). Thus, although conceding that the officers' statement that their only contact with the prisoner had occurred in the prison might support a finding of immunity, the court found the statement insufficient to support a finding that the officers had acted under color of office. 383 F.2d at 141-42. The court concluded by expressing its regret that the standards for official immunity and color of office differ, but explained that the difference is due to the fact that the defense of official immunity is a common law doctrine that has been expanded by the courts, and the test for removal is based upon a statute by whose language the courts are bound. 383 F.2d at 142. The Tenth Circuit's narrow interpretation of § 1442(a)(1) could have resulted in the defense of official immunity being adjudicated by a state court, a result contrary to the purpose of federal officer removal.

102. 395 U.S. at 405-06. Justice Marshall initially noted that the first removal provision, included in an 1815 customs statute, was part of an attempt to enforce a trade embargo against Great Britain by protecting federal officers from interference by hostile state courts, particularly in New England, where the War of 1812 was unpopular. *Id.* at 405. Observing that "other periods of national stress spawned similar enactments," he singled out two periods: South Carolina's threat of nullification in 1833 and the Civil War. *Id.* Justice Marshall concluded by noting that the present federal officer removal statute covers all federal officers. *Id.* at 406.

103. *Id.* at 406. Justice Marshall quoted the section of the *Davis* opinion at which the Court explained that the operations of the national government could be halted if the national government could not protect federal officers — the only means of enforcing federal policy — from attempts by state courts to hold the officers civilly or criminally liable for performing their official duties. *See* text accompanying note 40 *supra.* Justice Marshall added that "[f]ederal jurisdiction rests on a 'federal interest in the matter,' the very basic interest in the enforcement of federal law through federal officials." *Id.* (quoting Poss v. Lieberman, 299 F.2d 358, 359 (2d Cir. 1962)).

did not refer to a state's interest in trying cases under its own laws as tempering the federal interest in removal. After enunciating the statutory purpose of section 1442(a), he construed the statute's "under color" of federal office requirement in light of that purpose, and found it at least "broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law."[104] The Supreme Court stated that, in contrast, the analysis of the Tenth Circuit would allow removal only when the federal officer had a clearly sustainable defense sufficient to cause the suit to be dismissed upon removal.[105] Because the Court felt that one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court, it concluded that a construction of the "under color of . . . office" language that would require the defense to be proved before removal would frustrate the purpose of the removal statute.[106]

Having defined color of office, the *Willingham* Court proceeded to determine whether the record in the case before it supported a finding that the officers' conduct from which the prisoner's suit arose was under color of office and therefore removable. In his motion to remand, the prisoner alleged that the officers had been acting " 'on a frolic of their own which had no relevancy to their official duties.' "[107] The officers' only response to this allegation was that their only contact with the prisoner had been inside the prison in the performance of their official duties.[108] Thus, the issue before the Court was whether allegations by the officers that their contact with the prisoner had occurred while they were executing their official duties in the penitentiary were sufficient to support removal under the statute.[109]

Justice Marshall initially noted the requirement of *Soper* and *Symes* that "the person seeking the benefit of [the removal provisions] should be candid, specific and positive in explaining his relation to the transaction which gave rise to the suit."[110] Instead of demanding the detailed allegations those two cases required, however, Justice Marshall stated that the requirements must be tailored to fit the peculiarities of each case.[111]

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104. 395 U.S. at 406-07.

105. *Id.* at 407.

106. *Id.* Justice Marshall stated that the strong congressional policy of protecting the exercise of all federal authority should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1). *Id.* A corollary of the Court's position is that satisfaction of the color of office requirement does not establish the defense of official immunity. *See, e.g.*, Green v. James, 473 F.2d 660 (9th Cir. 1973); North Carolina v. Carr, 386 F.2d 129, 137 (4th Cir. 1967) (dictum).

107. 395 U.S. at 407.

108. *Id.* The Court noted that although the officers' allegations were in their affidavits in support of their motion for summary judgment, whereas they should have been in the officers' petition for removal, it was proper to treat the removal petition as if it had been amended to include the information. *Id.* at n.3.

109. *Id.* at 408.

110. *Id.*

111. *Id.*

Examining the case at hand, he pointed out the dilemma of the federal officers: Because the suit against them charged numerous wrongs on numerous, unspecified dates, requiring the officers to be "candid, specific and positive" regarding the suit's allegations would place them under the impossible burden of describing every contact they or persons under their supervision had ever had with the prisoner.[112] By this analysis the Court found it sufficient that the officers had shown that their relationship to the prisoner had derived solely from their official duties.[113] Noting the additional requirement of "color of office" that a "causal connection" between the charged conduct and the asserted official authority exist, Justice Marshall quoted *Soper* for the proposition that the requirement is met if the basis of the state charge is the petitioners' acts or presence at a place in performance of their official duties.[114] He found this requirement satisfied by the fact that the officers were on duty at their place of federal employment at all times relevant to the suit.[115] The prisoner's allegation that the officers were acting on their own was regarded as relevant to the trial on the merits rather than to the appropriateness of removal. The allegations were thus sufficient, and removal therefore proper.[116]

Willingham appears to deemphasize the importance of a state's interest in adjudicating offenses against its own laws by failing to mention this interest as a factor to be considered in construing the removal statute. This deemphasis is implicit in the statement of the Court that "color of office" can be established by mere ability to raise a colorable defense arising from the officer's duty to enforce federal law, and by the relaxed requirements respecting the record that must be shown to support a finding that the officer's conduct from which the suit arose was under color of office and therefore removable.[117] A closer examination of the case, however, indicates that *Willingham* is not truly irreconcilable with *Soper* and *Symes,* and that the countervailing state interest against removal is still an important factor to be considered, not only in construing the removal statute, but in determining its application in a particular case.

The most obvious indication of the continuing importance of state interest is found in footnote four of *Willingham,* where the Court stated: "Were this a criminal case, a more detailed showing might be necessary because of the more compelling state interest in conducting criminal trials in the state courts."[118] Although the footnote deals with the distinction between criminal and civil cases, its reliance on the strong state interest in trying criminal cases in state courts indicates that the showing required for

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112. *Id.* at 408-09.
113. *Id.* at 409.
114. *Id.*
115. *Id.* at 409-10.
116. *Id.* at 407-08.
117. *Id.* at 408-09.
118. *Id.* at 409 n.4.

removal should be greater in any case where the state interest in trying the case is substantial in comparison to the federal interest in removal.[119]

The emphasis on the federal interest in *Willingham* becomes more understandable when the Court's decision in that case is compared with the Court's earlier decisions in *Soper* and *Symes*. In these earlier cases, the Court seemed to equate the burden of proof necessary to support removal with the burden which must be sustained to make out the defense of official immunity.[120] *Willingham*, in contrast, concluded that only a colorable defense arising from the officers' federal duty need be shown.[121] The placement of this lighter burden upon the federal officer might be interpreted as a failure to consider the state's interest in enforcing its own laws. The *Willingham* Court's analysis, however, indicates that consideration of the state interest with respect to an officer's burden of proof would be inappropriate in that it would thwart Congress' choice of removal as the vehicle for vindicating the federal interest in protecting federal officers in the performance of their official duties. If an officer were required to show much more than the possibility that he may be able to establish a defense arising from his federal duty, granting the removal petition would necessarily result in dismissal of the suit.[122] Conversely, if the officer were unable to establish his defense in his removal petition, the state court would retain jurisdiction in derogation of the principle that federal officers be permitted to present defenses of official immunity to a federal court.

Instead of emphasizing the detail necessary to establish that the officers were acting under color of office, Justice Marshall ruled that they need merely show that their relationship with the prisoner derived solely from their official duties.[123] His reason for allowing such a vague showing, however, distinguishes *Willingham* from *Soper* and *Symes*. In *Soper* and *Symes*, the Court not only concluded that the officers were capable of showing more detail, but apparently felt that a good faith petition for removal would necessarily have included more detail.[124] In *Willingham*, on the other hand, Justice Marshall concluded that the nature of the suit against the officers made it impossible for them to make more detailed allegations.[125] In *Soper* and *Symes* both the federal and state interests could be protected because, if the cases against the officers truly merited removal, the officers would be able to allege these interests in detail. In *Willingham* this capacity did not exist, and, unlike in *Soper* and *Symes*, the federal interest in removal would be completely defeated by requiring the detailed allegations necessary to protect the state interest in preventing removal. When, as in *Soper* and *Symes*, the federal interest would not be impaired, consideration of the state interest would still appear to be crucial.

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119. *Id.*
120. *See, e.g.*, Maryland v. Soper (No. 1), 270 U.S. 9, 35 (1926).
121. 395 U.S. at 406-07.
122. *Id.*
123. *Id.* at 408-09.
124. *See* text accompanying notes 64 to 68 & 91 to 92 *supra*.
125. 395 U.S. at 409.

Even if *Willingham* is interpreted as modifying *Soper* and *Symes*, the very existence of the color of office requirement limits the federal interest protected by removal and subordinates other federal interests to those of the state. It might be argued that the interest of the federal government in protecting its officers is unlimited and that any suit against an officer potentially interferes with the performance of his duties. By requiring a connection between an officer's performance of his duty and the facts upon which the suit is based, the Court has limited the subordination of the state interest in hearing cases based on its law in its own courts to cases where the federal interest is stronger and more direct.

Although the Supreme Court appears so far to have limited the federal interest only by way of construing the "under color of office" requirement, another provision of the removal statute would seem to occasion a similar consideration of the federal interest in removal of a suit. A federal court, in deciding whether a state suit against a federal officer can be removed, not only must carefully determine whether the officer acted under color of office, but must also consider whether the suit is against the officer; that is, does the action threaten the officer with personal liability or penalty? Yet, in the many cases in which section 1442 has been construed, the federal courts generally have not questioned whether the suit was in fact against the officer himself.[126] This is perhaps attributable to the fact that in the usual case the federal officer is the named party defendant and to the assumption that a lawsuit typically operates against the interests of the named defendant.

The purposes of federal officer removal suggest that in order to be "against" a federal officer, a suit must actually threaten him with personal liability or penalty. Congress granted section 1442's right of federal officer removal as a means of preventing states from subjecting federal officers to civil or criminal liability for the performance of official duties.[127] In a section 459 garnishment proceeding, the court should consider whether the suit sought to be removed truly operates "against" the disbursing officer named as a party. Section 459 makes the United States amenable to certain types of garnishment proceedings, but garnishment is unusual in that it does not normally impose liability or a penalty upon the disbursing officer as the named party defendant.

THE LEGISLATIVE HISTORY OF SECTION 459 OF THE 1974 SOCIAL SERVICES AMENDMENTS

Until recently, the sovereign immunity of the United States to a proceeding to which it had not consented precluded garnishing wages of federal employees.[128] Federal employees were often able to avoid paying

126. *E.g.*, New Jersey v. Moriarity, 268 F. Supp. 546 (D.N.J. 1967).

127. *See* notes 102 to 103 *supra*.

128. Willingham v. Morgan, 395 U.S. 402, 407 (1969); Maryland v. Soper (No. 1), 270 U.S. 9, 34 (1926); Tennessee v. Davis, 100 U.S. (10 Otto) 257, 262 (1879) (by implication).

their child support and alimony obligations because the United States — more specifically, the federal officer in charge of disbursing the defaulting spouse's wages — could not be garnished to satisfy a state court's support decree. Although at one time the pride and honor of government service may have kept default on support obligations at a minimum, this is no longer the case.[129] Responding to a dramatic increase in the number of welfare recipients, caused in part by the nonsupport of children by absent parents, Congress, in section 459 of the 1974 amendments to the Social Security Act, waived the sovereign immunity of the United States to garnishment proceedings instituted to enforce support obligations.[130] Section 459 does not

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The courts had held that garnishment of remuneration due federal employees would embarrass the national government, divert federal funds to extraneous purposes, and interrupt the administration of the national government. Garnishment of these monies was held to be against public policy. *See, e.g.*, Buchanan v. Alexander, 45 U.S. (4 How.) 19 (1846) (seamen's wages); McGrew v. McGrew, 38 F.2d 541, 544 (D.C. Cir. 1930); Allen v. Allen, 291 F. Supp. 312, 314 (S.D. Iowa 1968) (monies due doctor-husband from federal Medicare program); Applegate v. Applegate, 39 F. Supp. 887, 889-90 (E.D. Va. 1941) (naval officer's retirement benefits).

129. Senator Montoya, during debate on the Social Services Amendments of 1974, stated:

> This special privilege [immunity for federal employees] for one kind of worker is partly a result of tradition and partly because it has not been thought legally possible to sue the Federal Government as a "person" in order to arrange for the garnishment of wages. For many years, the pride and honor of Government service kept this kind of dishonorable behavior at a minimum. Today, however, there are an increased number of men and women in military and Government service — and a small percentage of "rotten apples" has resulted in a growing number of families who have been left to fend for themselves or to go on public welfare, with no recourse to the protection of the courts or the law.

120 CONG. REC. 40339 (1974).

Representative Waggoner also remarked: "[W]e are simply placing these people [federal employees] on a par to receive the same treatment and to assume the same responsibilities that those who are employed in the private sector now have to assume." 120 CONG. REC. 41810 (1974). *See also* S. REP. NO. 1356, 93d Cong., 2d Sess. 42, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 8133, 8146-47.

130. For the text of § 459, see note 6 *supra*.

Congress was primarily concerned with reducing federal and state welfare expenditures by ensuring adequate support collection mechanisms, one of which was the waiver of United States sovereign immunity to a garnishment proceeding. Others include a parent locator service, paternity establishment service, and access to the federal courts in certain circumstances. *See* note 5 *supra*. The Senate Committee on Finance in its report on the amendments noted that judicial enforcement of support obligations is a serious problem that is partly attributable to the inactivity of judges, prosecutors, and welfare officials, who either find such cases boring or are hostile to the concept of a father's responsibility. S. REP. NO. 1356, 93d Cong., 2d Sess. 43-44, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 8133, 8147. *See also* M. WINSTON & T. FORSCHER, NONSUPPORT OF LEGITIMATE CHILDREN BY AFFLUENT FATHERS AS A

expressly confer the right to remove such garnishment proceedings[131] and removal was referred to only briefly in that section's legislative history — in the course of the following colloquy between Congressmen Eckhardt and Ullman:

> Mr. ECKHARDT. In Texas, we do not have garnishment of wages, so this would be ingraining the Federal law on existing State law. Under circumstances like that I would think the case would be removable to the Federal court as a matter of right.
>
> Is that what the gentleman feels would result? Can these cases all be removed to Federal courts?
>
> Mr. ULLMAN. No. The garnishment provision places the U.S. Government in the same position as a private employer. Nonsupport cases can be certified to the Federal courts only by the Secretary of HEW who must find that use of the Federal courts is the only reasonable way to enforce a court order. In the situation the gentleman cites, there would be no court order on which to base such a finding.
>
> Mr. ECKHARDT. But ordinarily, of course, the State court retains jurisdiction of a divorce question. I just wonder what happens if we remove that case to Federal court on Federal court jurisdiction bases.
>
> Mr. Speaker, it seems to me we have a lot of very thorny conflict-in-law questions here.
>
> Mr. ULLMAN. Mr. Speaker, as a matter of Federal law, this in no way changes that situation at all. The existing law remains. They have the right now and they would continue to have the right.
>
> Mr. ECKHARDT. Then that would negate the provisions for removal in this act?
>
> Mr. ULLMAN. No, we do not affect that one way or the other.
>
> Mr. ECKHARDT. Then we would not remove a divorce case to Federal court with respect to this issue?
>
> Mr. ULLMAN. We do not affect existing law in that regard at all.
>
> Mr. ECKHARDT. Mr. Speaker, I really do not understand the answer.[132]

CAUSE OF POVERTY AND WELFARE DEPENDENCE (1971); Foster, *Dependent Children and the Law*, 18 U. PITT. L. REV. 579, 610 (1957). The Committee further stated that it hoped that implementation of the amendments would lower the welfare cost to the taxpayer, deter a parent from abandoning his family, and spare children the pain of family break-up. Its report added that the amendments are designed to help children enjoy their right to financial support by their fathers. S. REP. No. 1356, 93d Cong., 2d Sess. 42, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS at 8146.

131. Only original jurisdiction of the federal courts is provided, and even this is limited. *See* note 7 *supra*. *See also* 120 CONG. REC. 41809 (1974) where the enforcement of § 459 was discussed:

> Mr. KAZEN. Is the Federal Government going to be subject to State court orders? How is it going to be enforced? Or is that mother of the children going to have to go into Federal court?
>
> Mr. ULLMAN. It is based on the State court order for child support. We have provided that the Secretary can allow entry into the Federal courts in some instances only when it cannot be properly taken care of under the State court order.

132. 120 CONG. REC. 41810 (1974).

Although this discussion is vague and to some extent ambiguous, it suggests at least three conclusions with respect to the removability of section 459 proceddings. First, Congressman Ullman emphasized that section 459 puts the United States in the same position as a private employer: one of being amenable to garnishment and of not being able to remove under section 1442(a)(1). Second, he emphasized that the two classes of suits — garnishment and domestic relations disputes — traditionally have been within the exclusive jurisdiction of the state courts, and thought that section 459's waiver of sovereign immunity would not remove them from state control. Third, he believed that federal removal jurisdiction would only be available where a state court is unable to enforce its support decree. Thus although unclear, this interchange indicates that section 459 was perceived, at least by Congressman Ullman, as making the United States more amenable to suit in state courts, and that Congress perhaps envisioned the exercise of federal jurisdiction over these suits only when a state court could not enforce its orders.

THE FEDERAL COURTS' DIFFERING ASSESSMENTS OF THE RIGHT OF A FEDERAL OFFICER TO REMOVE A SECTION 459 PROCEEDING UNDER SECTION 1442(a)(1)

Only three federal district courts have addressed the question whether a section 459 garnishment proceeding can be removed by a federal officer. Two have held that a federal officer cannot remove the proceeding under section 1442(a)(1). In denying removal, one court stated that permitting removal would not only fail to fulfill the purposes of the statute but would radically alter the relationship between state and federal courts.[133] Another court concluded that allowing the removal of a section 459 proceeding would be inconsistent with the theory and purposes of section 1442(a)(1).[134]

In *Wilhelm v. United States Department of Air Force*,[135] a wife sought to satisfy her state court divorce decree, which awarded her one-half of her husband's retirement pay, by garnishing the United States Air Force, her husband's former employer.[136] The Air Force petitioned for removal of the proceeding to federal court, and the wife moved for its remand to state court.[137] In reaching its holding that the Air Force could not remove under section 1442(a)(1), the court first observed that it would appear that the Air Force was entitled to remove because it was the named defendant,[138] but proceeded to examine carefully the state and federal interests in the

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133. Wilhelm v. United States Dep't of Air Force, 418 F. Supp. 162, 165-66 (S.D. Tex. 1976) (mem. and order of remand).

134. West v. West, 402 F. Supp. 1189, 1191 (N.D. Ga. 1975) (mem. and order of remand).

135. 418 F. Supp. 162 (S.D. Tex. 1976) (mem. and order of remand).

136. *Id.* at 164.

137. *Id.*

138. *Id.* at 165.

garnishment proceeding. With respect to the state interest, the *Wilhelm* court noted that construing section 1442(a)(1) to permit removal of section 459 garnishment proceedings would bring into the federal courts ancillary domestic relations disputes, which had always been thought to lie within the exclusive jurisdiction of state courts.[139] Finally, after examining the discussion of Congressmen Eckhardt and Ullman,[140] the court concluded that Congress had not intended to broaden the jurisdiction of the federal courts, but in fact had envisioned state court implementation of section 459.[141] If this conclusion is correct, the state interest in retaining jurisdiction must be accorded greater weight than the federal interest in removal when determining the removability of a section 459 proceeding under section 1442(a)(1). It does not follow, however, that federal officer removal is precluded.

In *Wilhelm,* the court acknowledged that the purpose of federal officer removal is to protect federal officers and agencies[142] against state actions that threaten liability or penalty, and considered whether this federal interest is implicated in a section 459 garnishment proceeding. It found that the federal disbursing officer was merely a nominal defendant not subject to liability,[143] and, in concluding that no federal policy or interest would be furthered by removing section 459 proceedings to federal court under section 1442(a)(1),[144] expressed the fear that "[a] broader construction of this provision [section 1442(a)(1)] would effect a profound alteration in the relationship between state and federal courts."[145] The *Wilhelm* court thus balanced state and federal interests and concluded both that no federal interest demanded removal and that strong state interests supported the denial of removal.

In *West v. West,*[146] in which several wives garnished the United States and United States officers and agencies to enforce the support obligations of their husbands, the court also refused to allow the United State garnishees to remove the section 459 proceedings under section 1442(a)(1).[147] After noting that the purpose of federal officer removal is to protect federal

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139. *Id. See generally* 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 214 (1960).

140. 418 F. Supp. at 165. The court cited that part of Congressmen Eckhardt's and Ullman's discussion in which Texas's law of garnishment was raised. *See* text accompanying note 132 *supra.*

141. 418 F. Supp. at 165.

142. *Id.* The court here implied that an agency can remove under § 1442(a)(1) but did not discuss whether an agency does indeed come within the language of the statute. *See* note 181 *infra.*

143. 418 F. Supp. at 166. The court stated: "[T]here is no real collision of interests of substantial controversy between the plaintiff and this defendant." *Id.*

144. *Id.*

145. *Id.* The court then concluded by adding that state law will determine what can be garnished.

146. 402 F. Supp. 1189 (N.D. Ga. 1975) (mem. and order of remand).

147. *Id.* at 1191.

officers against actions that threaten personal liability or penalty,[148] the court concluded that removal of section 459 proceedings would not further this purpose,[149] basing its conclusion on two findings: First, that the action was not against a federal officer; and second, that it neither penalized an officer for past acts nor attempted to prevent the performance of his official duties.[150] The court held that the action was not against an officer because it did not threaten *him* with personal liability; its only purpose was to reach federal monies owed to the defaulting spouse.[151] Although the *West* court failed to explain its finding that the suit was neither an attempt to enjoin the enforcement of federal law nor based upon acts of an officer, it clearly stated that no federal interest was involved, holding that the proceeding could not be removed by a federal officer. Unlike the *Wilhelm* court, the court in *West* did not consider the state interest in section 459 garnishment proceedings; it simply analyzed section 459 proceedings and found them not within the intended scope of section 1442(a)(1).

Williams v. Williams,[152] the only case which has held appropriate the removal of section 459 proceedings under section 1442(a)(1),[153] also based its holding solely upon consideration of the nature and extent of the federal interest involved. In *Williams,* a wife sought to enforce her alimony award by naming the United States as garnishee in several writs of attachment filed in Maryland state court. She attempted, pursuant to section 459, to reach the pension of her husband, a retired United States warrant officer.[154] The United States successfully petitioned for removal of the proceeding to federal court, claiming jurisdiction under section 1442(a)(1).[155]

The *Williams* opinion began by noting that a garnishment proceeding is a civil act,[156] a prerequisite to removal under the statute. In determining

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148. *Id.* at 1190–91 (quoting New Jersey v. Moriarity, 268 F. Supp. 546, 555 (D. N.J. 1967)).

149. 402 F. Supp. at 1191.

150. *Id.*

151. *Id.*

152. 427 F. Supp. 557 (D. Md. 1976).

153. As discussed at note 8 *supra,* it is possible that two other courts would allow removal under § 1442(a)(1).

154. 427 F. Supp. at 558.

155. *Id.* at 567.

156. 427 F. Supp. at 560 n.8. Perhaps the court first noted this because there is a dispute among the federal courts concerning whether a garnishment proceeding is a civil action within the meaning of § 1441. Some courts have distinguished between garnishment which is found to be inseparably connected with the original judgment and garnishment which is an independent controversy. The former has been held not removable, while removal of the latter has been permitted. *See* C. WRIGHT, *supra* note 1, at 149–50 n.16 and cases cited therein.

Although the cases cited by the *Williams* court not only found that a garnishment proceeding is a civil action, they also held that it could be removed under § 1441; to conclude that an action is removable under that section is not to determine its removability under § 1442(a)(1). Cases discussing the removal of a garnishment proceeding under § 1441 include Moore v. Sentry Ins. Co., 399 F. Supp. 929 (S.D. Miss.

whether a section 459 proceeding is a civil action that falls within section 1442(a)(1), the court next reviewed *Wilhelm* and *West,* the cases denying removal.[157] The disagreement of the *Williams* court with the result reached in these two cases is obvious, but difficult to explain.[158] *Williams* apparently proceeded from a very broad view of the purposes of federal officer removal; certainly the manner in which *Williams* cited *North Carolina v. Carr*[159] and *Willingham*[160] supports this view.

In *Carr,* an FBI agent who, pursuant to an order of the United States Attorney General, refused to testify when called as a witness in a state court civil trial was cited for contempt by the state court.[161] Although the Fourth Circuit held the case moot,[162] it nevertheless approved removal under section 1442(a)(1), observing that:

> Insistence upon the right of removal has been declared essential to the integrity and preeminence of the Federal government within its realm of authority.
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> . . . .
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> . . . [T]he central and grave concern of the statute is that a Federal officer or agent shall not be forced to answer for conduct assertedly within his duties in any but a Federal forum. Thus the statute looks to the substance rather than the form of the state proceeding.[163]

1975); Swanson v. Sharp, 224 F. Supp. 850 (D. Alas. 1963); Larkin v. Worthley, 114 F. Supp. 877 (W.D. Mo. 1953); Robinson v. Fort, 112 F. Supp. 242 (E.D. Mo. 1953). *Contra,* American Auto Ins. Co. v. Freundt, 103 F.2d 613 (6th Cir. 1939); Buford v. Strother, 10 F. 406 (C.C. Iowa 1881).

A garnishment proceeding has, however, been held removable under a federal officer removal statute. *E.g.,* The Marion, 99 F. 448, 450 (C.C.D.N.J. 1900) (dictum); Fischer v. Daudisdal, 9 F. 145 (C.C.E.D. Pa. 1881) (no opinion) (by implication).

157. 427 F. Supp. at 560-61.

158. *Id.* at 561. The court cited the part of the *West* opinion that held that this garnishment proceeding does not come within the ambit of § 1442(a)(1). *See* text accompanying notes 148 to 151 *supra.* Because the court disagreed with the holding of *West* that this proceeding is neither against a federal officer, nor penalizes him for past acts, nor attempts to enjoin future acts, it can be inferred that the judge found that a § 459 proceeding is indeed against a federal officer. It can also be inferred that, in citing the section of the *Wilhelm* opinion discussed in the text accompanying notes 139 to 141 *supra,* the court concluded that permitting removal of this proceeding under § 1442(a)(1) would not affect the relationship between federal and state courts. Perhaps it can also be inferred that the court did not believe that a state's interest in the proceeding sought to be removed should enter into a federal court's determination of its removability under § 1442(a)(1). Once again, the opinion did not address the issue.

159. 386 F.2d 129 (4th Cir. 1967).

160. 395 U.S. 402 (1969).

161. 386 F. 2d at 130.

162. *Id.* at 131. The contempt case was held moot because the suit from which it arose had been settled.

163. *Id.* (dictum).

Carr was cited in *Williams* as a case allowing removal. The appropriateness of removing the contempt proceeding in *Carr* cannot be disputed. The FBI agent was threatened with personal liability and penalty for carrying out his official duties. Thus, the case is a clear example of an attempt by a state court to interfere with the enforcement of federal policy. The *Williams* court, however, did not measure the facts before it with the theoretical yardstick suggested by *Carr*. Instead, it chose merely to quote Justice Marshall's discussion in *Willingham* of the purpose and evolution of federal officer removal.

In *Willingham,* Justice Marshall had emphasized that the basis for federal jurisdiction of suits against federal officers is the federal interest in enforcement of federal law by federal officers without interference by the states.[164] He quoted *Tennessee v. Davis*[165] for the proposition that the purpose of federal officer removal is to protect federal officers — the only means through which the federal government can act within the states — from arrest and trial in state courts for acting within the scope of their federal authority.[166]

Williams quoted this *Willingham* analysis but interpreted the case very broadly, stating that "the purpose of section 1442(a)(1) is to enable the Government to answer in federal rather than in state court for any alleged failure of action or nonaction in the performance of duties by federal officers."[167] *Willingham* had required that the alleged failure of action both occur in the course of enforcement of federal law and give rise at least to a colorable defense arising from the duty to enforce federal law.[168] The *Willingham* Court had based its analysis of federal officer removal upon the premises that "[f]ederal jurisdiction rests on a 'federal interest in the matter,'"[169] and that "the very basic interest in the enforcement of federal laws through federal officials"[170] is sufficient to confer jurisdiction under section 1442(a)(1). In contrast, the *Williams* opinion failed to articulate the federal interest that supported removal of the garnishment proceeding before it, implying merely that uncertainty caused by ambiguities in the applicable state garnishment law adversely affected the ability of the federal officers who controlled the dispersal of the garnished monies to discharge their duties, and that this purported obstacle was sufficient to warrant the exercise of federal jurisdiction.[171] Although the court certified the ambiguous questions of Maryland law to the Maryland Court of

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164. *See* Willingham v. Morgan, 395 U.S. 402, 406-08 (1969); notes 102 & 103 *supra.*

165. 100 U.S. (10 Otto) 257, 263 (1879).

166. 395 U.S. at 406.

167. 427 F. Supp. at 563. The purpose, however, is to enable a federal officer (not the federal government) to account to a federal court for actions performed in discharge of official duties and upon which the state court suit is based.

168. Willingham v. Morgan, 395 U.S. 402, 406-07 (1969).

169. *Id.* at 406.

170. *Id.*

171. 427 F. Supp. at 567.

Appeals,[172] it stated that this certification had no bearing on the right of removal itself.[173] As the court implicitly recognized in its statement that the decision of the Maryland court would determine "what the United States as garnishee is or is not required to do,"[174] garnishment is an area of state concern.[175]

The *Williams* opinion closed with an examination of the legislative history of section 459, finding that Congress, in facilitating the garnishment of federal funds, had indicated no intention of limiting section 1442(a)(1).[176] The court concluded that the purpose of removal "is to permit federal officers, when called upon to perform their official duties in ways different than they are willing to perform . . . , to seek determinations in federal courts," and that this purpose does not conflict with the purposes of the 1974 Social Services Amendments.[177]

This view of the purpose of federal officer removal appears overly broad in several respects. Although the right of removal does protect federal officers against attempts by state courts to force them to perform their duties in a manner inconsistent with their federally authorized discretion, it does so, or should do so, only by way of protection from liability or penalty.[178] Moreover, *Williams* did not discuss one of the primary justifications for removal: to have the validity of the defense of official immunity tried in federal court.[179] Indeed, the garnishment proceeding sought to be removed arose precisely because the defense of official immunity had been waived in

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172. *Id.* at 563 n.12. For the resolution of these issues by the Maryland Court of Appeals, see United States v. Williams, 279 Md. 673, 370 A.2d 1134 (1977).

173. 427 F. Supp. at 564 n.12.

174. *Id.*

175. *Id.* The primacy of state law in resolving the garnishment issue is further illustrated by the government's argument that once the certified issues were settled, it would only rarely seek removal of such actions in the future. *Id.* at 563.

176. *Id.* at 567. Judge Kaufman also quoted at length an interchange between Congressmen Ullman and Kazen which took place during the course of a debate on the floor of the House of Representatives, *see* text accompanying note 132 *supra*, and concluded that the discussion, although ambiguous, is not inconsistent with the removability of a § 459 proceeding under § 1442(a)(1). *Id.* at 565-66.

177. 427 F. Supp. at 567.

178. In North Carolina v. Carr, 386 F.2d 129 (4th Cir. 1967), the Court of Appeals for the Fourth Circuit stated that:

> The purpose of the statute [1442(a)(1)] is to take from the State courts the indefeasible power to hold an officer or agent of the United States *criminally or civilly* liable for an act allegedly performed in the execution of any of the powers or responsibilities of the Federal sovereign.

Id. at 131 (emphasis added).

This language was quoted in the *Williams* opinion, 427 F. Supp. at 561, but the court nevertheless failed to discuss the liability element of the statute's purpose.

179. The Supreme Court has recently stated that "one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court." Willingham v. Morgan, 395 U.S. 402, 407 (1969). This language was also quoted by the *Williams* court, 427 F. Supp. at 563, but it failed to discuss the fact that no such defense was at issue in the case before it.

section 459. These elements of the removal doctrine embodied in section 1442(a)(1) are significant in that they qualify and define the availability of federal officer removal, but the *Williams* court apparently failed to take them into account in arriving at its broad formulation of the purposes of section 1442(a)(1).

In a section 459 garnishment proceeding, the garnishor-spouse merely seeks to have the United States, through a federal officer, divert federal monies to a person other than the one for whom they were appropriated; the officer himself is not subjected to liability. As the *Wilhelm* court observed, there is no real "collision of interests" between the garnishor-spouse and the garnishee-United States.[180] The real party in interest is the defaulting spouse, for it is his interest in the fund that is being litigated. Moreover, it can be argued that *Williams* is inconsistent with even the broadest possible formulation of the purposes of section 1442(a)(1) because the garnishment proceeding promotes, rather than inhibits, the federal officer's enforcement of federal policy. The apparent rationale of *Williams* is that, in naming the United States or an officer thereof[181] as garnishee in a state court section 459 proceeding, the garnishor-spouse is in effect enjoining the disbursing officer's performance of his federal duty to distribute the funds in issue to the defaulting spouse. This argument is superficially plausible but ignores the fact that in waiving the sovereign immunity of the United States, Congress clearly expressed its intention that state court support decrees be

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180. Wilhelm v. United States Dep't of Air Force, 418 F. Supp. 162, 166 (S.D. Tex. 1976) (mem. and order of remand).

181. An additional question of construction, not discussed by any of these courts, arises in the determination of the removability of a § 459 proceeding: does the statute limit removal to federal *officers*? Few courts have considered this issue. *Compare* Lance Int'l, Inc. v. Aetna Cas. & Sur. Co., 264 F. Supp. 349 (S.D.N.Y. 1967) (agency cannot remove); Harlem River Produce Co. v. Aetna Cas. & Sur. Co., 257 F. Supp. 160 (S.D.N.Y. 1965) (agency cannot remove) *with* James River Apartments, Inc. v. Federal Hous. Admin., 136 F. Supp. 24 (D. Md. 1955) (dictum) (agency can remove). Although one court has stated that an agency can remove, the majority view is that the plain meaning of the statute limits removal to officers. These courts have maintained that power to expand the scope of § 1442(a)(1) rests with Congress, not the judiciary. *E.g.*, Lance Int'l, Inc. v. Aetna Cas. & Sur. Co., 264 F. Supp. 349, 356 (S.D.N.Y. 1967).

Although the statute repeatedly refers to officers or persons acting under an officer, *see* text accompanying note 14 *supra*, there is a latent ambiguity. The controlling portion of § 1442(a)(1) arguably can be interpreted to read: (1) an officer of the United States or an officer of any agency of the United States; or (2) an officer of the United States or any agency of the United States. A liberal construction of the statute — resulting in federal agencies having the right of removal — might be justified in light of Congress' broad purpose of protecting the exercise of all federal authority. This author recommends, however, that a federal agency be denied the right of removal until Congress cures this ambiguity in the statute. It should be noted, however, that this problem can easily be resolved by an agency having its officer seek removal. *See* ALI GENERAL FEDERAL QUESTION JURISDICTION (Tent. Draft No. 4, 6-7, 5 Apr. 1966), in which the American Law Institute recommends that § 1442(a)(1) be amended to enable a federal agency, when sued in state court, to remove to federal court.

enforced by garnishing federal monies owed the defaulting spouse[182] but held and controlled by federal officers. It is clear that section 459 is itself an expression of a federal policy that the government pay to the spouses of federal employees, and spouses of others to whom federal monies are due, the amounts owed to such spouses by virtue of state court support decrees.[183]

In construing the reach of section 1442(a)(1), the *Williams* court did not consider the interests of the state in retaining jurisdiction of the garnishment proceeding. Although the Supreme Court has not explicitly balanced federal interests against those of the states in cases involving federal officer removal statutes, it has repeatedly emphasized in such cases that officer removal statutes are to be construed with a high regard for a state's interest in enforcing its own law. The state interests in section 459 proceedings are substantial: state law governs garnishment; the proceeding is ancillary to a state court decree; and the consequences of nonsupport burden state governments. Moreover, there appears to be no federal interest of the nature required for federal officer removal. The proceeding does not penalize a federal officer or the federal government for enforcing federal law, and no colorable defense, particularly no defense of official immunity, would seem to be available to federal officers involved in a section 459 garnishment proceeding. The only instance in which removal might be warranted is when the federal government or its officer is subsequently sued by the defaulting spouse for allegedly having improperly diverted the funds.

A weak argument for removal might be premised on a federal interest in protecting the United States against double liability arising out of garnishment proceedings. The critical issue in evaluating this argument is the probability of double payment. The possibility of double payment would seem to arise only when a state court's garnishment judgment is not recognized by another court. Such a denial of full faith and credit could occur only upon a finding by the second court both that the first court lacked personal jurisdiction over the primary debtor (the spouse to whom the United States owed the monies), and that the jurisdiction issue was neither litigated nor capable of being litigaged in the first forum. Until the Supreme Court's decision *Shaffer v. Heitner,*[184] a state court could exercise in rem or quasi in rem jurisdiction without first finding minimal contacts between the defendant, the cause of action, and the forum state. Prior to *Shaffer,* it was sufficient for purposes of exercising jurisdiction over a garnishment proceeding that the garnishee was present in the state. In addition, the garnishee was protected against double liability if he had notified the primary debtor of the suit.[185] In *Shaffer* the Supreme Court extended the requisites for personal jurisdiction to quasi in rem and, arguably, in rem

182. *See* notes 129 & 130 *supra.*
183. *See* note 129 *supra.*
184. 433 U.S. 186 (1977).
185. *See, e.g.,* Harris v. Balk, 198 U.S. 215, 227 (1905).

proceedings.[186] Thus, for a state court properly to exercise jurisdiction in a section 459 garnishment proceeding, it must find that the defaulting spouse had minimal contacts with the state. Double liability of the United States would arise only when a state court either refused to follow *Shaffer* and assumed jurisdiction of a section 459 proceeding without analyzing the relationship between the defendant-spouse and the state, or did not adjudicate the question of jurisdiction.

It must be noted, however, that *Williams* was decided prior to the Supreme Court's decision in *Shaffer*. The state court involved in *Williams* did not have to find that it had personal jurisdiction over the defaulting spouse; the consent of the United States to suit and the presence of the garnishee within the forum were sufficient for purposes of jurisdiction. Thus, although the possibility of double payment might justify federal officer removal after *Shaffer*, it could not have supported the *Williams* court's allowing removal because double payment was not even theoretically possible at that time. In any event, it appears that the possibility of double liability is too remote to justify the removal of section 459 proceedings to federal court. It is reasonable to assume that state courts will follow *Shaffer* and that denial of full faith and credit, with ensuing double liability for the United States, is therefore unlikely to occur. Moreover, the restriction of removal to cases which involve the actual liability of a federal officer or the federal government appears to be more consonant with the traditional purposes of federal officer removal.

CONCLUSION

Both the historical development of federal officer removal and the Supreme Court's interpretation of its purposes confirm that this right is designed to enable a federal officer to perform his official duties with the knowledge that if his acts are later claimed to violate state law, a federal forum will be available to entertain any colorable defense which arises from his duty to enforce federal law. A section 459 proceeding does not threaten a federal officer with personal liability, is not based upon his performance of his official duties, and does not enable the officer to present a defense based upon his enforcement of federal law to a federal court. Granting removal of section 459 proceedings neither protects a federal officer nor preserves the supremacy of federal law. It does, however, invade the traditionally exclusive jurisdiction of the state courts over garnishment proceedings. No federal interest warrants removal of these proceedings under section 1442(a)(1), and substantial state interests, in addition to the principle of comity in the federal system, suggest that section 459 garnishment proceedings should not be removable.

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186. 433 U.S. at 207. *See* R. LEFLAR, AMERICAN CONFLICTS LAW § 24, (3d ed. 1977); *The Supreme Court, 1976 Term,* 91 HARV. L. REV. 70, 155 (1977).