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Government
Officers
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§§40:1 to 40:888

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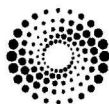
Lawyers Edition

Government Officers and Employees

A problem-solving textual analysis of
federal judicial and administrative
procedure

§§ 40:1 to 40:888

2016



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§ 40:785 Procedures for impeachment and trial; effect of judgment

Research References

West's Key Number Digest, Judges ⇨11(1) to 11(8); Public Employment ⇨159

The House of Representatives has the sole power of impeachment,¹ and the Senate has the sole power to try all impeachments.² The Senate has sole discretion to choose impeachment procedures, as the term "try" lacks sufficient precision to afford a judicially manageable standard of review,³ and such procedures may include appointment of a committee comprised of less than the full Senate to hear evidence in an impeachment proceeding and report such evidence to the full Senate.⁴ When sitting for the purpose of trying an impeachment, the Senate will be on oath or affirmation, and the Chief Justice will preside when the President of the United States is tried. No person may be convicted by the Senate without the concurrence of two-thirds of the Senate members present.⁵

Judgment in cases of impeachment will not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States, but the party convicted is nevertheless liable and subject to indictment, trial, judgment, and punishment according to law.⁶

◆ **Observation:** The constitutional provision stating that an impeached officer is subject to indictment, trial, judgment, and punishment according to law⁷ does not prevent an officer from being indicted and tried in a court of law prior to impeachment.⁸ Moreover, this constitutional provision does not imply immunity of the President from routine court process.⁹

IX. CIVIL LITIGATION AGAINST GOVERNMENT EMPLOYEES

A. JURISDICTION

Research References

West's Key Number Digest

Public Employment ⇨1029 to 1039; United States ⇨505 to 512, 965, 1230

A.L.R. Library

A.L.R. Index, Administrative Law; Bribery; Civil Service; Color of Right, Title,

[Section 40:785]

¹U.S. Const. Art. I, § 2, cl. 5.

²U.S. Const. Art. I, § 3, cl. 6.

³**U.S. Supreme Court**—Nixon v. U.S., 506 U.S. 224, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993).

⁴**D.C. Circuit**—Hastings v. U.S., 837 F. Supp. 3 (D.D.C. 1993).

⁵U.S. Const. Art. I, § 3, cl. 6.

⁶U.S. Const. Art. I, § 3, cl. 7.

⁷U.S. Const. Art. I, § 3, cl. 7.

⁸**Ninth Circuit**—U.S. v. Claiborne, 727 F.2d 842 (9th Cir. 1984).

⁹**D.C. Circuit**—Nixon v. Sirica, 487 F.2d 700, 19 A.L.R. Fed. 343 (D.C. Cir. 1973).

and Office; Conflicts of Interest; Congress; Jurisdiction; Public Officers and Employees; United States; Venue
 West's A.L.R. Digest, Public Employment ⇨1029 to 1039; United States ⇨505 to 512, 965, 1230

§ 40:786 Civil litigation against government employees, generally

Research References

West's Key Number Digest, Public Employment ⇨1033; United States ⇨505, 506, 965, 1230

Actions against government officials have been based on the federal question jurisdiction statute¹ or on the statute governing actions to compel an officer of the United States to perform his duty, which grants the district courts original jurisdiction over any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.² However, jurisdiction over an action brought against a federal officer sued in his official capacity cannot be based on the diversity statute.³

Jurisdiction over an action brought against a federal officer is limited by the doctrine of sovereign immunity, which protects not just the United States, but also government officials acting within the scope of their official duties.⁴ However, where an officer's powers are limited by statute, the officer's actions beyond those limitations are considered individual and not sovereign actions.⁵

B. VENUE

Research References

West's Key Number Digest

Public Employment ⇨1029 to 1039; Removal of Cases ⇨21; United States ⇨513, 1231

A.L.R. Library

A.L.R. Index, Administrative Law; Bribery; Civil Service; Color of Right, Title, and Office; Conflicts of Interest; Congress; Public Officers and Employees; Removal of Actions; United States; Venue

West's A.L.R. Digest, Public Employees ⇨1029 to 1039; Removal of Cases ⇨21; United States ⇨513, 1231

[Section 40:786]

¹28 U.S.C.A. § 1331.

²28 U.S.C.A. § 1361.

Mandamus jurisdiction over federal officers and employees is discussed generally in § 1:400.

³28 U.S.C.A. § 1332.

Diversity jurisdiction over federal officers and employees is discussed generally in § 1:171.

⁴**Fourth Circuit**—Uhrig v. Regan, 623 F. Supp. 968 (D. Md. 1985).

⁵§ 1:390.

1. In General

§ 40:787 Venue in civil actions against federal employees**Research References**

West's Key Number Digest, Public Employment ☞1029, 1033; United States ☞513, 965, 1231

Construction and application of 28 USC sec. 1391(e) providing for venue and process in civil actions against federal officers, employees, or agencies, 9 A.L.R. Fed. 719

A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may be brought in any judicial district in which—

- a defendant in the action resides.¹
- a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated.²
- the plaintiff resides, if no real property is involved in the action.³

The statute is merely a venue provision and does not itself confer subject matter jurisdiction on a district court.⁴

Venue is determined at the time of filing of the case, not later in the case after parties have been dismissed.⁵

The purpose of the venue statute is to permit an action which is essentially against the United States to be brought locally, and not just in the District of Columbia as would otherwise be required where Washington, D.C. is the official residence of the agency sued.⁶ However, venue of course may be proper in the District of Columbia for certain federal officers and employees, including the Secretary of Defense⁷ and the Secretary of the Navy,⁸ who meet the residence requirement for that judicial district.⁹

§ 40:788 Priority of other specific provisions concerning venue**Research References**

West's Key Number Digest, Public Employment ☞1029, 1033; United States

[Section 40:787]

¹28 U.S.C.A. § 1391(e)(1)(A).

²28 U.S.C.A. § 1391(e)(1)(B).

³28 U.S.C.A. § 1391(e)(1)(C).

⁴**U.S. Supreme Court**—Andrus v. Charlestone Stone Products Co., Inc., 436 U.S. 604, 98 S. Ct. 2002, 56 L. Ed. 2d 570 (1978).

⁵**Eleventh Circuit**—A.J. Taft Coal Co., Inc. v. Barnhart, 291 F. Supp. 2d 1290 (N.D. Ala. 2003).

⁶**Ninth Circuit**—Gilbert v. DaGrossa, 756 F.2d 1455 (9th Cir. 1985).

⁷**D.C. Circuit**—Bartman v. Cheney, 827 F. Supp. 1 (D.D.C. 1993).

⁸**D.C. Circuit**—Smith v. Dalton, 927 F. Supp. 1 (D.D.C. 1996).

⁹28 U.S.C.A. § 1391(e).

⊕513, 965, 1231

Construction and application of 28 USC sec. 1391(e) providing for venue and process in civil actions against federal officers, employees, or agencies, 9 A.L.R. Fed. 719

The courts have recognized that a plaintiff may not avail himself of the venue provisions of 28 U.S.C.A. § 1391(e) when specific venue provisions are established for a particular sort of action, such as patent infringement actions, where 28 U.S.C.A. § 1400 is the sole and exclusive provision controlling venue,¹ Title VII actions,² and actions brought under the Outer Continental Shelf Lands Act which similarly contains a special venue provision.³

In addition, venue of an action against a particular federal official may be specifically prescribed by statute, as in the case of judicial review of a final decision of the Commissioner of Social Security made after a hearing to which the plaintiff was a party.⁴

2. Judicial Districts

§ 40:789 Venue of civil action against federal official lies in any judicial district

Research References

West's Key Number Digest, Public Employment ⊕1029, 1033; United States ⊕505, 513, 965, 1231

Construction and application of 28 USC sec. 1391(e) providing for venue and process in civil actions against federal officers, employees, or agencies, 9 A.L.R. Fed. 719

The venue of a civil action against a federal official or agency lies in "any judicial district" in which any of the enumerated statutory conditions are met.¹ The judicial districts referred to include only those defined by statute,² specifically, enumerated districts within all 50 states, the District of Columbia, and Puerto Rico. The provisions of the venue statute do not apply to civil actions brought in the United States District Court for the District of the Canal Zone.³

[Section 40:788]

¹**Seventh Circuit**—Paley v. Wolk, 262 F. Supp. 640 (N.D. Ill. 1965), aff'd, 151 U.S.P.Q. 669, 1966 WL 7665 (7th Cir. 1966).

²**D.C. Circuit**—James v. Booz-Allen, 227 F. Supp. 2d 16 (D.D.C. 2002), referring to 42 U.S.C.A. § 2000e-5(f)(3).

³**Third Circuit**—Superior Oil Co. v. Andrus, 656 F.2d 33 (3d Cir. 1981), referring to 43 U.S.C.A. § 1349(b)(1).

⁴42 U.S.C.A. § 405(g), discussed in

§ 71:621.

[Section 40:789]

¹28 U.S.C.A. § 1391(e).

²28 U.S.C.A. § 451, referring to districts set forth in 28 U.S.C.A. §§ 81 to 131.

³**Fifth Circuit**—Doyle v. Fleming, 219 F. Supp. 277 (D. C.Z. 1963); Drummond v. Bunker, 560 F.2d 625 (5th Cir. 1977); Leber v. Canal Zone Cent. Labor Union and Metal Trades Council, AFL-CIO, 383 F.2d 110 (5th Cir. 1967).

§ 40:790 Venue of civil action against federal official lies where defendant resides

Research References

West's Key Number Digest, Public Employment ☞1029, 1033; United States ☞505, 513, 965, 1231

Construction and application of 28 USC sec. 1391(e) providing for venue and process in civil actions against federal officers, employees, or agencies, 9 A.L.R. Fed. 719

One choice of venue for a civil action in which a defendant is a federal officer or employee or federal agency acting in an official capacity or under color of legal authority is a judicial district in which a defendant in the action resides.¹ While this requirement of residence has been interpreted to mean the district where a defendant's office—the “official residence”—is maintained,² officers and agencies of the United States can have more than one residence and therefore, venue can properly lie in more than one jurisdiction.³ For instance, because the Social Security Administration has principal offices in both the District of Columbia and Baltimore, Maryland, venue is proper in either district.⁴

Only one defendant officer need reside in the district.⁵ Furthermore, the term “a defendant,” for purposes of the venue statute, refers only to a federal officer or agency defendant in the case, and not to “any” defendant, including a nonfederal one.⁶

§ 40:791 Venue of civil action against federal official lies where cause of action arose or real property is located

Research References

West's Key Number Digest, Public Employment ☞1029, 1033; United States ☞505, 513, 965, 1231

In a civil action in which a defendant is a federal officer or employee or federal agency acting in an official capacity or under color of legal

[Section 40:790]

¹28 U.S.C.A. § 1391(e)(1).

²**First Circuit**—Clegg v. U.S. Treasury Dept., 70 F.R.D. 486 (D. Mass. 1976).

Second Circuit—Hartke v. Federal Aviation Administration, 369 F. Supp. 741 (E.D. N.Y. 1973).

Seventh Circuit—Reuben H. Donnelley Corp. v. F.T.C., 580 F.2d 264 (7th Cir. 1978).

D.C. Circuit—Doe v. Casey, 601 F. Supp. 581 (D.D.C. 1985).

³**D.C. Circuit**—Bartman v. Cheney,

827 F. Supp. 1 (D.D.C. 1993); Doe v. Casey, 601 F. Supp. 581 (D.D.C. 1985).

⁴**Eleventh Circuit**—A.J. Taft Coal Co., Inc. v. Barnhart, 291 F. Supp. 2d 1290 (N.D. Ala. 2003).

⁵**D.C. Circuit**—Briggs v. Goodwin, 569 F.2d 1 (D.C. Cir. 1977), judgment rev'd on other grounds, 444 U.S. 527, 100 S. Ct. 774, 63 L. Ed. 2d 1 (1980).

⁶**Fifth Circuit**—National Ass'n of Life Underwriters v. Clarke, 761 F. Supp. 1285 (W.D. Tex. 1991).

Eleventh Circuit—Rogers v. Civil Air Patrol, 129 F. Supp. 2d 1334 (M.D. Ala. 2001).

authority, venue is proper in a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated.¹

◆ **Observation:** Under the former version of the statute, which provided that venue of an action against a federal officer was proper in a district where any real property involved in the action was situated, the action could be brought if it involved land titles or possession of property² in more than a peripheral manner.³ Accordingly, an action to compel the renewal of oil leases on particular tracts located in the district could be maintained in that district under 28 U.S.C.A. § 1391(e),⁴ but an action to compel the disclosure of documents involving a reseller's purchase and resale of crude oil for the purpose of determining the accuracy of royalty statements did not involve real property for the purposes of the venue statute and, accordingly, venue was proper where in the judicial district where the corporation resided.⁵

§ 40:792 Venue of civil action against federal official lies in any judicial district where plaintiffs reside

Research References

West's Key Number Digest, Public Employment ☞1029, 1033; United States ☞505, 513, 965, 1231

In a civil action in which a defendant is a federal officer or employee or federal agency acting in an official capacity or under color of legal authority, venue is proper in a judicial district in which the plaintiff resides if no real property is involved in the action.¹ This provision of the venue statute does not require that "all" plaintiffs reside in the forum district, rather, a suit may be brought in any judicial district in which a single plaintiff resides.²

The federal courts of appeals are split as to whether the district or

[Section 40:791]

¹28 U.S.C.A. § 1391(e)(2).

Where a cause of action arises against military officers in civilian courts for the purpose of 28 U.S.C.A. § 1391(e) is discussed in § 5:514.

²**Eighth Circuit**—Environmental Defense Fund, Inc. v. Corps of Engineers of U. S. Army, 325 F. Supp. 728 (E.D. Ark. 1971), supplemented, 325 F. Supp. 749 (E.D. Ark. 1971).

³**Seventh Circuit**—Ashley v. Andrus, 474 F. Supp. 495 (E.D. Wis. 1979).

⁴**Ninth Circuit**—Landis v. Watt, 510 F. Supp. 178 (D. Idaho 1981).

⁵**Third Circuit**—Shell Oil Co. v. Babbitt, 920 F. Supp. 559 (D. Del. 1996).

[Section 40:792]

¹28 U.S.C.A. § 1391(e)(1).

²**First Circuit**—Favereau v. U.S., 44 F. Supp. 2d 68 (D. Me. 1999).

Third Circuit—Exxon Corp. v. F.T.C., 588 F.2d 895 (3d Cir. 1978).

Sixth Circuit—Sidney Coal Co., Inc. v. Social Sec. Admin., 427 F.3d 336, 2005 FED App. 0418P (6th Cir. 2005).

Eighth Circuit—Minn-Dak Farmers Co-op. v. Espy, 851 F. Supp. 1423 (D.N.D. 1994).

Ninth Circuit—Railway Labor Executives' Ass'n v. I.C.C., 958 F.2d 252 (9th Cir. 1991).

Eleventh Circuit—A.J. Taft Coal Co., Inc. v. Barnhart, 291 F. Supp. 2d 1290

residence of a federal prisoner for the purpose of establishing venue is the district in which he resided prior to his incarceration, with several courts finding that it is, since a person's residence does not change by virtue of being incarcerated.³ However, others hold that a prisoner's residence for venue purposes is the place of his or her confinement.⁴

◆ **Observation:** Under the venue statute, residence for a corporate plaintiff, as opposed to a corporate defendant, is the corporation's place of incorporation,⁵ and proper venue does not include other states where it may do business or have its principal place of business.⁶ On the other hand, a corporate defendant is deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.⁷

§ 40:793 Venue of civil action against federal official lies in any judicial district where plaintiffs reside—Multiple plaintiffs

Research References

West's Key Number Digest, Public Employment ☞1029, 1033; United States ☞505, 513, 965, 1231

The venue of a civil action against a federal official, employee or agency is proper in a judicial district in which the plaintiff resides if no real property is involved in the action.¹ The residency requirement of the venue statute is satisfied if at least one of multiple plaintiffs resides in the judicial district in which an action is brought.² However, venue cannot be created by collusively joining plaintiffs or assigning a portion of the cause of action to another plaintiff for the purpose of creating venue in the district where that plaintiff resides.³

(N.D. Ala. 2003).

³**First Circuit**—*Abreu v. U.S.*, 796 F. Supp. 50 (D.R.I. 1992).

Third Circuit—*Flanagan v. Shively*, 783 F. Supp. 922 (M.D. Pa. 1992), judgment aff'd, 980 F.2d 722 (3d Cir. 1992).

Fourth Circuit—*Stone v. U.S. Bd. of Parole*, 360 F. Supp. 22 (D. Md. 1973).

Fifth Circuit—*Ellingburg v. Connett*, 457 F.2d 240 (5th Cir. 1972).

Eighth Circuit—*Brimer v. Levi*, 555 F.2d 656 (8th Cir. 1977).

D.C. Circuit—*In re Pope*, 580 F.2d 620 (D.C. Cir. 1978).

The relationship of 28 U.S.C.A. § 1391(e) to habeas corpus principles, including the issue of whether the petitioner is in custody within a particular

judicial district, is discussed in § 41:68.

⁵**Second Circuit**—*Caremark Therapeutic Services v. Leavitt*, 405 F. Supp. 2d 454 (S.D. N.Y. 2005).

⁶**Tenth Circuit**—*Johns-Manville Sales Corp. v. U.S.*, 796 F.2d 372 (10th Cir. 1986).

⁷28 U.S.C.A. § 1391(c)(2).

For a general discussion of 28 U.S.C.A. § 1391(c), see §§ 1:676 to 1:681.

[Section 40:793]

¹28 U.S.C.A. § 1391(e)(1).

²**Sixth Circuit**—*Sidney Coal Co., Inc. v. Social Sec. Admin.*, 427 F.3d 336, 2005 FED App. 0418P (6th Cir. 2005).

³**Third Circuit**—*National Distillers and Chemical Corp. v. Department of*

3. Government Officer or Employee Under Venue Statute

§ 40:794 Who is government officer or employee under venue statute

Research References

West's Key Number Digest, Public Employment ⇨1033; United States ⇨513, 515, 965, 1231

Construction and application of 28 USC sec. 1391(e) providing for venue and process in civil actions against federal officers, employees, or agencies, 9 A.L.R. Fed. 719

The venue statute¹ expressly applies to civil actions in which a defendant is an officer or employee of the United States or an agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States.² The words of the statute are generally considered descriptive of persons in the executive, as distinguished from the legislative, branch of the government, and it has been held that the legislative history of the statute indicates that Congress did not intend the provisions to apply to itself or to its employees as a basis for venue of a civil action, but rather only to those officers or employees of the executive branch of the government.³ The venue statute similarly does not apply to judicial officers.⁴

§ 40:795 Applicability of venue statute to former federal officers and employees

Research References

West's Key Number Digest, Public Employment ⇨1033; United States ⇨513, 515, 965, 1231

Applicability of 28 U.S.C.A. sec. 1391(e), providing for venue and process in civil suit against federal officer or employee for official conduct, to officer or employee no longer in government service or no longer serving government in capacity in which he acted, 48 A.L.R. Fed. 436

The provisions of the venue statute¹ apply to civil actions brought against a federal officer or employee or a federal agency acting in an official capacity or under color of legal authority, but are not applicable to an officer or employee who is no longer in government service or who is

Energy, 487 F. Supp. 34 (D. Del. 1980).

[Section 40:794]

¹28 U.S.C.A. § 1391(e).

²28 U.S.C.A. § 1391(e).

³**Second Circuit**—Liberation News Service v. Eastland, 426 F.2d 1379, 9 A.L.R. Fed. 710 (2d Cir. 1970).

Tenth Circuit—Shaffer v. Clinton, 54 F. Supp. 2d 1014 (D. Colo. 1999), aff'd on other grounds, 240 F.3d 878, 95 A.L.R.

5th 715 (10th Cir. 2001).

⁴**Fifth Circuit**—Duplantier v. U.S., 606 F.2d 654 (5th Cir. 1979).

Ninth Circuit—King v. Russell, 963 F.2d 1301, 22 Fed. R. Serv. 3d 1209 (9th Cir. 1992) (statute does not apply to bankruptcy court officers).

[Section 40:795]

¹28 U.S.C.A. § 1391(e).

no longer serving the government in the capacity in which he performed the act on which the civil action against him is based² as of the date the suit was filed or the particular person was joined to the action as a defendant.³

§ 40:796 Applicability of venue statute to federal officers or employees in their individual capacity

Research References

West's Key Number Digest, Public Employment ☞1033; United States ☞513, 515, 965, 1231

Construction and application of 28 USC sec. 1391(e) providing for venue and process in civil actions against federal officers, employees, or agencies, 9 A.L.R. Fed. 719

The provisions of the venue statute¹ do not apply in an action for damages against a federal officer or employee in his or her individual capacity,² and thus will not support a *Bivens* action for money damages.³ Instead, a damage action against a federal officer or employee sued in a private capacity must be brought in under 28 U.S.C.A. § 1391(b) in the district where the defendant resides or where the claim arose.⁴

4. Procedure

§ 40:797 Waiver of improper venue by federal government officer or employee

Research References

West's Key Number Digest, Public Employment ☞1033; United States ☞513, 965, 1231

In a civil action brought against a federal officer or employee or a federal agency acting in an official capacity or under color of legal authority,¹ the defense of improper venue is waived if it is not raised by the

²**U.S. Supreme Court**—*Stafford v. Briggs*, 444 U.S. 527, 100 S. Ct. 774, 63 L. Ed. 2d 1 (1980).

³**Ninth Circuit**—*Sutain v. Shapiro and Lieberman*, 678 F.2d 115 (9th Cir. 1982).

[Section 40:796]

¹28 U.S.C.A. § 1391(e).

²**U.S. Supreme Court**—*Stafford v. Briggs*, 444 U.S. 527, 100 S. Ct. 774, 63 L. Ed. 2d 1 (1980).

Ninth Circuit—*Gilbert v. DaGrossa*, 756 F.2d 1455 (9th Cir. 1985).

Tenth Circuit—*Overton v. U.S.*, 925 F.2d 1282 (10th Cir. 1991).

D.C. Circuit—*Cameron v. Thornburgh*, 983 F.2d 253 (D.C. Cir. 1993).

³**D.C. Circuit**—*Cameron v. Thornburgh*, 983 F.2d 253 (D.C. Cir. 1993).

⁴**U.S. Supreme Court**—*Stafford v. Briggs*, 444 U.S. 527, 100 S. Ct. 774, 63 L. Ed. 2d 1 (1980).

Venue under 28 U.S.C.A. § 1391(b) is discussed in §§ 1:670 to 1:703.

[Section 40:797]

¹28 U.S.C.A. § 1391(e).

defendant.² The Federal Rules of Civil Procedure provide that improper venue is waived when a defendant files a responsive pleading or timely motion failing to assert it,³ or when a district court raises the issue on its own motion and gives the parties an opportunity to present their views on the issue.⁴

◆ **Observation:** Where a venue objection is raised by the defendant, the plaintiff bears the burden of establishing the propriety of venue.⁵

§ 40:798 Change of venue in civil action involving federal government officer or employee

Research References

West's Key Number Digest, Public Employment ⇨1033; United States ⇨513, 515, 965, 1231

Construction and application of 28 USC sec. 1391(e) providing for venue and process in civil actions against federal officers, employees, or agencies, 9 A.L.R. Fed. 719

The venue provision¹ for civil actions brought against a federal officer or employee or a federal agency acting in an official capacity or under color of legal authority, has an important relationship to 28 U.S.C.A. § 1404(a) in expanding the number of judicial districts in which an action "might have been brought" for purposes of a change of venue, and in several cases, the courts have construed and applied the statutes together in granting a change of venue to another district.²

Thus although the District of Columbia may be a proper venue as the official residence of the sole defendant, the action may be transferred to a different district court where considerations of convenience and justice both militate in favor of a transfer.³ However, a court lacks authority to transfer an action to another district where venue is not proper in that forum.⁴

²**Eleventh Circuit**—A.J. Taft Coal Co., Inc. v. Barnhart, 291 F. Supp. 2d 1290 (N.D. Ala. 2003).

³Fed. R. Civ. P. 12(h)(1).

Objecting to venue is discussed in §§ 1:704 to 1:716.

⁴**Eleventh Circuit**—Lipofsky v. New York State Workers Compensation Bd., 861 F.2d 1257, 12 Fed. R. Serv. 3d 783 (11th Cir. 1988).

⁵**Eleventh Circuit**—Rogers v. Civil Air Patrol, 129 F. Supp. 2d 1334 (M.D. Ala. 2001).

[Section 40:798]

¹28 U.S.C.A. § 1391(e).

²**D.C. Circuit**—Nestor v. Hershey, 425 F.2d 504 (D.C. Cir. 1969); Young v. Director, U. S. Bureau of Prisons, 367 F.2d 331 (D.C. Cir. 1966).

The general principles of change of venue for the convenience of the parties is discussed in §§ 1:747 to 1:752.

³**D.C. Circuit**—Schreiber v. Kohn, 434 F. Supp. 2d 1 (D.D.C. 2006).

⁴**Third Circuit**—Phillips Petroleum Co. v. Federal Energy Administration, 435 F. Supp. 1234 (D. Del. 1977).

§ 40:799 Joinder of parties in civil action involving federal government officer or employee

Research References

West's Key Number Digest, Public Employment ☞1033; United States ☞513, 515, 965, 1231

Construction and application of 28 USC sec. 1391(e) providing for venue and process in civil actions against federal officers, employees, or agencies, 9 A.L.R. Fed. 719

In a civil action brought against a federal officer or employee or a federal agency acting in an official capacity or under color of legal authority, additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.¹ Thus, the question whether the United States or a superior or subordinate federal official must be joined in an action against a federal employee is governed by Fed. R. Civ. P. 19, and the venue provision of 28 U.S.C.A. § 1391(e) facilitates the joinder of government officers and employees in the district where the private defendant may be sued.²

Venue determinations for federal and nonfederal defendants joined in the same action must be made separately; for a federal official, the appropriate venue provision is 28 U.S.C.A. § 1391(e), but for a nonfederal defendant the court looks to the general venue provision for federal question cases, 28 U.S.C.A. § 1391(b), applies.³

◆ **Observation:** In a mandamus action against a government official, the United States is generally not a proper party.⁴

5. Service of Process

§ 40:800 Service of process in civil actions against federal employees

Research References

West's Key Number Digest, Public Employment ☞1036; United States ☞513
Construction and application of 28 USC sec. 1391(e) providing for venue and process in civil actions against federal officers, employees, or agencies, 9 A.L.R. Fed. 719

The summons and complaint in a civil action in which a defendant is an officer or employee of the United States or any agency thereof acting

[Section 40:799]

¹28 U.S.C.A. § 1391(e).

²**D.C. Circuit**—Lamont v. Haig, 590 F.2d 1124, 48 A.L.R. Fed. 418 (D.C. Cir. 1978); McKenna v. Udall, 418 F.2d 1171, 13 Fed. R. Serv. 2d 413 (D.C. Cir. 1969).

³**Eleventh Circuit**—Rogers v. Civil Air Patrol, 129 F. Supp. 2d 1334 (M.D. Ala. 2001).

⁴**Fourth Circuit**—McEachern v. U.S., 321 F.2d 31 (4th Cir. 1963).

in his official capacity or under color of legal authority, must be served as provided by the Federal Rules of Civil Procedure.¹ Service must therefore be made upon an officer or agency of the United States by serving the United States and by delivering a copy of the summons and complaint by registered or certified mail to the officer, agency, or corporation.² The venue statute additionally instructs that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.³

Service of process under the special service rules established by the venue statute is insufficient where federal officers and employees are sued in their individual capacities, for example in a *Bivens* action where the defendant must be served as an individual rather than as a federal officer in order for a court to exercise jurisdiction,⁴ and the Federal Rules of Civil Procedure provide separate rules of service for such an officer or employee sued in his individual capacity rather than in his official capacity.⁵

§ 40:801 Service of process in civil actions against federal employees—Former officers and employees

Research References

West's Key Number Digest, Public Employment ☞1036; United States ☞513
Applicability of 28 U.S.C.A. sec. 1391(e), providing for venue and process in civil suit against federal officer or employee for official conduct, to officer or employee no longer in government service or no longer serving government in capacity in which he acted, 48 A.L.R. Fed. 436

In a civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, the service of process provisions of the venue statute¹ are not applicable to an officer or employee who is no longer in government service or who is no longer serving the government in the capacity in which he performed the act on which the civil action

[Section 40:800]

¹28 U.S.C.A. § 1391(e).

²Fed. R. Civ. P. 4(i)(2).

³28 U.S.C.A. § 1391(e)(2).

⁴**Second Circuit**—*Armstrong v. Sears*, 33 F.3d 182, 30 Fed. R. Serv. 3d 174 (2d Cir. 1994).

Third Circuit—*Micklus v. Carlson*, 632 F.2d 227, 30 Fed. R. Serv. 2d 359 (3d Cir. 1980).

Seventh Circuit—*Robinson v. Turner*, 15 F.3d 82 (7th Cir. 1994).

Ninth Circuit—*Vaccaro v. Dobre*, 81 F.3d 854, 34 Fed. R. Serv. 3d 1003 (9th Cir. 1996).

Tenth Circuit—*Despain v. Salt Lake Area Metro Gang Unit*, 13 F.3d 1436, 28 Fed. R. Serv. 3d 236 (10th Cir. 1994).

D.C. Circuit—*Simpkins v. District of Columbia Government*, 108 F.3d 366, 37 Fed. R. Serv. 3d 8 (D.C. Cir. 1997).

⁵Fed. R. Civ. P. 4(i)(3).

[Section 40:801]

¹28 U.S.C.A. § 1391(e).

against him is based² as of the date the suit was filed or the particular person was joined to the action as a defendant.³

§ 40:802 Cure of defective service in civil actions against federal employees

Research References

West's Key Number Digest, Public Employment ☞1036; United States ☞513

In a civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, the court must allow a reasonable time to serve process for the purpose of curing the failure to serve all persons required to be served if the plaintiff has served either the United States attorney or the Attorney General of the United States.¹

The Federal Rules of Civil Procedure additionally provide for a reasonable amount of time to cure a failure to serve the United States in an action governed by Rule 4(i)(2)(B), if the plaintiff has served an officer or employee of the United States sued in an individual capacity.²

§ 40:803 Service in civil actions against federal employees as conferring personal jurisdiction

Research References

West's Key Number Digest, Public Employment ☞1036; United States ☞513

Although 28 U.S.C.A. § 1391(e) is, by its terms, a venue statute and not a personal jurisdiction statute,¹ service of process by certified mail upon an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority meets the due process requirements for establishing personal jurisdiction.² Thus, when service is properly made, it supplies both venue and jurisdiction over the persons of those so served.³

◆ **Caution:** Service that succeeds in providing a defendant with actual notice of a lawsuit, but fails to satisfy the technical requirements of the Federal Rules of Civil Procedure will not permit the court to render a personal judgment against the defendant absent a waiver

²U.S. Supreme Court—Stafford v. Briggs, 444 U.S. 527, 100 S. Ct. 774, 63 L. Ed. 2d 1 (1980).

³Ninth Circuit—Sutain v. Shapiro and Lieberman, 678 F.2d 115 (9th Cir. 1982).

[Section 40:802]

¹Fed. R. Civ. P. 4(i)(4)(A).

²Fed. R. Civ. P. 4(i)(4)(B).

[Section 40:803]

¹Tenth Circuit—Overton v. U.S., 925 F.2d 1282 (10th Cir. 1991).

²Fifth Circuit—Duplantier v. U.S., 606 F.2d 654 (5th Cir. 1979).

³Second Circuit—Liberation News Service v. Eastland, 426 F.2d 1379, 9 A.L.R. Fed. 710 (2d Cir. 1970).

of the defective service.⁴

C. REMOVAL OF STATE ACTION TO FEDERAL COURT; FEDERAL OFFICER REMOVAL ACT

Research References

West's Key Number Digest

Public Employment ☞1029 to 1039; Removal of Cases ☞21, 24, 100 to 110, 115, 120; United States ☞422, 427, 513, 965

A.L.R. Library

A.L.R. Index, Administrative Law; Bribery; Civil Service; Color of Right, Title, and Office; Conflicts of Interest; Congress; Jurisdiction; Public Officers and Employees; Removal of Actions; United States; Venue

West's A.L.R. Digest, Public Employees ☞1029 to 1039; Removal of Cases ☞21, 24, 100 to 110, 115, 120; United States ☞422, 427, 513, 965

1. In General

§ 40:804 Removal of state action against federal employees to federal court; Federal Officer Removal Act

Research References

West's Key Number Digest, Public Employment ☞1029 to 1039; Removal of Cases ☞21, 24, 100 to 110, 115, 120; United States ☞513, 965

Federal Procedural Forms § 58:31 (Allegations in notice—Fraudulent joinder of defendant to defeat removal)

A civil action or criminal prosecution that is commenced in a state court and that is directed to any of the following may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein the action or prosecution is pending—

- the United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.¹
- a property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.²
- any officer of the courts of the United States, for or relating to any

⁴**Tenth Circuit**—Williamson v. Sena, 229 F.R.D. 663, 62 Fed. R. Serv. 3d 54 (D.N.M. 2005).

²28 U.S.C.A. § 1442(a)(2).

[Section 40:804]

¹28 U.S.C.A. § 1442(a)(1).

act under color of office or in the performance of his duties.³

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

Generally, an action may be removed from state court to federal court only if a federal district court would have original jurisdiction over the claim in suit.⁵ However, under the federal officer removal statute, suits against federal officers may be removed despite the nonfederal cast of the complaint; the federal-question element is met if the defense depends on federal law.⁶ The removal statute reflects a congressional policy that federal officers, and indeed the Federal Government itself, require the protection of a federal forum.⁷

Removal to federal court requires three elements: (1) the removing defendant is or acted under the direction of a federal agency or officer; (2) he has a colorable federal defense; and (3) there is a causal connection between the conduct in question and the federal directive.⁸ The help or assistance necessary to bring a private person within the scope of federal officer removal statute does not include simply complying with the law.⁹

◆ **Illustration:** Chemical manufacturers that contracted to produce Agent Orange for the government during the Vietnam War were “acting under” a federal officer within meaning of the federal officer removal statute, in determining whether state actions based on alleged dioxin contamination were removable to federal court where the manufacturers contracted to provide a product that, in their absence, the government would have had to produce itself, and through the contracts, helped carry out the duties or tasks of officers at the Department of Defense.¹⁰

However, a private firm’s compliance (or noncompliance) with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase “acting under” a federal “official” as required to fall under the Federal Officer Removal Act. For example, a cigarette manufacturer did not fall within the terms of the federal officer removal statute in its testing and advertising of tar and nicotine levels in its cigarettes, and thus a claim brought by consumers was not removable to federal court, notwithstanding Federal Trade Commission’s

³28 U.S.C.A. § 1442(a)(3).

⁴28 U.S.C.A. § 1442(a)(4).

Removal of actions brought against congressional officers is discussed in § 40:812.

⁵**U.S. Supreme Court**—Jefferson County, Ala. v. Acker, 527 U.S. 423, 119 S. Ct. 2069, 144 L. Ed. 2d 408 (1999).

⁶**U.S. Supreme Court**—Jefferson County, Ala. v. Acker, 527 U.S. 423, 119 S. Ct. 2069, 144 L. Ed. 2d 408 (1999).

⁷**U.S. Supreme Court**—Kircher v. Putnam Funds Trust, 547 U.S. 633, 126 S. Ct. 2145, 165 L. Ed. 2d 92 (2006).

⁸**Second Circuit**—New York v. Grasso, 350 F. Supp. 2d 498 (S.D. N.Y. 2004).

⁹**U.S. Supreme Court**—Watson v. Philip Morris Companies, Inc., 551 U.S. 142, 127 S. Ct. 2301, 168 L. Ed. 2d 42 (2007).

¹⁰**Second Circuit**—Isaacson v. Dow Chemical Co., 517 F.3d 129 (2d Cir. 2008).

(FTC) detailed supervision of the cigarette testing process.¹¹

The provisions of the federal officer removal statute are liberally construed,¹² and a federal court cannot require the defendant to win his case before he can have it removed.¹³

◆ **Observation:** 28 U.S.C.A. § 1442(a) is a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases in which a federal officer is a defendant.¹⁴

§ 40:805 What are civil actions within Federal Officer Removal Act

Research References

West's Key Number Digest, Removal of Cases ⇐21, 24

Garnishment action against United States as removable from state court to Federal District Court under 28 U.S.C.A. sec. 1442(a)(1) allowing removal of action against "officer" or "agent" of United States for "acts under color of such office", 55 A.L.R. Fed. 473

Under the statute allowing a federal officer to remove a civil action commenced in a state court against her for any act under color of office to federal court,¹ a "civil action" must be a separate suit that is not ancillary, incidental, or auxiliary to another suit in state court.² The terms "civil action" and "criminal prosecution" in the removal statute include any proceeding (whether or not ancillary to another proceeding) to the extent that in such proceeding a judicial order, including a subpoena for testimony or documents, is sought or issued. If removal is sought for a proceeding described in the previous sentence, and there is no other basis for removal, only that proceeding may be removed to the district court.³

A civil action includes, but is not limited to, libel prosecutions,⁴ product liability actions,⁵ and civil contempt actions.⁶

There is a conflict of authority among the circuits regarding the re-

¹¹**U.S. Supreme Court**—*Watson v. Philip Morris Companies, Inc.*, 551 U.S. 142, 127 S. Ct. 2301, 168 L. Ed. 2d 42 (2007).

¹²**U.S. Supreme Court**—*Willingham v. Morgan*, 395 U.S. 402, 89 S. Ct. 1813, 23 L. Ed. 2d 396 (1969).

¹³**Eighth Circuit**—*Watson v. Philip Morris Companies, Inc., a Corporation*, 420 F.3d 852 (8th Cir. 2005), rev'd and remanded on other grounds, 551 U.S. 142, 127 S. Ct. 2301, 168 L. Ed. 2d 42 (2007).

¹⁴**U.S. Supreme Court**—*Mesa v. California*, 489 U.S. 121, 109 S. Ct. 959, 103 L. Ed. 2d 99 (1989).

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¹28 U.S.C.A. § 1442.

²**Sixth Circuit**—*Ohio v. Doe*, 433 F.3d 502 (6th Cir. 2006).

³28 U.S.C.A. § 1442(d)(1).

⁴**Second Circuit**—*Poss v. Lieberman*, 299 F.2d 358 (2d Cir. 1962).

Tenth Circuit—*O'Bryan v. Chandler*, 496 F.2d 403 (10th Cir. 1974).

⁵**Second Circuit**—*In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 399 F. Supp. 2d 356 (S.D. N.Y. 2005) (negligence/nuisance complaint was not removable until strict li-

removal of state court garnishment proceedings under 28 U.S.C.A. § 1442. Some circuits hold such proceedings are removable in certain circumstances,⁷ While other circuits have determined that state court garnishment proceedings are not removable.⁸

Removal of a motion to quash subpoenas issued in connection with a state-court tort action has been allowed even though proceedings regarding subpoenas are not full-fledged civil or criminal proceedings, but merely incidents thereof.⁹ However, the issuance of a subpoena by itself will not support removal where there has not been a commencement of a civil action against the federal officer because no "coercive power of the state court" had been exercised to enforce the subpoena.¹⁰

Removal to federal court under 28 U.S.C.A. § 1442 is not absolute. For instance, an action to contest the validity of a will is not removable where the federal agency has been joined in the action only because it was listed as a trust beneficiary, there was no allegation of any wrongdoing on the part of the agency, and no claim or defense arose from the performance of its federal responsibilities.¹¹ In addition, where an action is in rem rather than in personam against a federal officer, removal under the Federal Officer Removal statute is not available.¹²

There is authority that disciplinary proceedings against a federal prosecutor are not a removable civil action, but rather a special proceeding properly left in state hands.¹³ However, removal of a state disciplinary proceeding against a U.S. Attorney has been permitted on the ground that the removal statute is meant to ensure that a federal officer or agent is not forced to answer for acts performed under color of office in

ability claim was added).

Fifth Circuit—*Miller v. Diamond Shamrock Co.*, 275 F.3d 414 (5th Cir. 2001).

Eighth Circuit—*Charges of Unprofessional Conduct Against 99-37 v. Stuart*, 249 F.3d 821 (8th Cir. 2001).

Eighth Circuit—*Overman v. U.S.*, 563 F.2d 1287, 44 A.L.R. Fed. 485 (8th Cir. 1977).

Ninth Circuit—*Nationwide Investors v. Miller*, 793 F.2d 1044 (9th Cir. 1986).

Tenth Circuit—*Farm & City Ins. Co. v. Johnson*, 190 F. Supp. 2d 1232 (D. Kan. 2002).

Eleventh Circuit—*Loftin v. Rush*, 767 F.2d 800 (11th Cir. 1985).

Fifth Circuit—*Murray v. Murray*, 621 F.2d 103, 55 A.L.R. Fed. 464 (5th Cir. 1980).

Tenth Circuit—*Western Medical Properties Corp. v. Denver Opportunity,*

Inc., 482 F. Supp. 1205 (D. Colo. 1980).

Removal of garnishment proceedings to federal district court is discussed in § 42:682.

D.C. Circuit—*Maddox v. Williams*, 855 F. Supp. 406 (D.D.C. 1994), *aff'd*, 62 F.3d 408 (D.C. Cir. 1995).

Fourth Circuit—*U.S. v. Williams*, 170 F.3d 431 (4th Cir. 1999) (subject of subpoena was FBI officer providing investigative assistance to state officials).

Seventh Circuit—*Sheda v. U.S. Dept. of the Treasury Bureau of Public Debt*, 196 F. Supp. 2d 743 (N.D. Ill. 2002).

Third Circuit—*State of N.J. v. Moriarity*, 268 F. Supp. 546 (D.N.J. 1967).

Ninth Circuit—*Fountain Park Co-op., Inc. v. Bank of America Nat. Trust & Sav. Ass'n*, 289 F. Supp. 150 (C.D. Cal. 1968).

Tenth Circuit—*Matter of Doe*, 801 F. Supp. 478 (D.N.M. 1992).

anything but a federal forum.¹⁴

§ 40:806 What is action commenced in state court for purposes of Federal Officer Removal statute

Research References

West's Key Number Digest, Removal of Cases ⇨21

For purposes of the federal officer removal statute,¹ an action commenced in "state court" does not include actions in tribal courts.²

§ 40:807 Time for filing removal petition for purposes of Federal Officer Removal statute

Research References

West's Key Number Digest, Removal of Cases ⇨21

Petitions for removal under the Federal Officer Removal statute¹ must comply with the 30 day limit of the removal procedures of 28 U.S.C.A. § 1446.²

The Federal Officer Removal statute is strictly construed and provides that a notice of removal must be filed within 30 days of a defendant's receipt of the initial pleading³ or, if the case stated by the initial pleading is not removable, within 30 days after defendant's receipt of an amended pleading, motion, order or other paper from which it may be ascertained that the case is one which is or has become removable.⁴ The first 30-day window for removal is triggered when the four corners of the pleading informs the reader, to a substantial degree of specificity that all the elements of federal jurisdiction are present.⁵ The Third Circuit established that the analysis for determining whether the four corners of the pleading is sufficient is an objective one; the issue is not what the defendant knew, but what the relevant document said.⁶

A federal officer defendant's 30 days to remove commences when the

¹⁴**Fourth Circuit**—Kolibash v. Committee on Legal Ethics of West Virginia Bar, 872 F.2d 571 (4th Cir. 1989).

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¹28 U.S.C.A. § 1442.

²**Tenth Circuit**—Becenti v. Vigil, 902 F.2d 777 (10th Cir. 1990).

[Section 40:807]

¹28 U.S.C.A. § 1442.

²**Sixth Circuit**—Howes v. Childers, 426 F. Supp. 358 (E.D. Ky. 1977).

Procedural requirements under 28 U.S.C.A. § 1446 are discussed in §§ 69:59 to 69:105.

³**Second Circuit**—In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation, 399 F. Supp. 2d 356 (S.D. N.Y. 2005).

⁴**Third Circuit**—In re Asbestos Products Liability Litigation (No. VI), 770 F. Supp. 2d 736 (E.D. Pa. 2011).

⁵**U.S. Supreme Court**—Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 119 S. Ct. 1322, 143 L. Ed. 2d 448, 43 Fed. R. Serv. 3d 1 (1999).

Third Circuit—Foster v. Mutual Fire, Marine & Inland Ins. Co., 986 F.2d 48 (3d Cir. 1993).

⁶**U.S. Supreme Court**—Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.,

plaintiff discloses sufficient facts for Federal Officer Removal, even if the officer was previously aware of a different basis for removal; this interpretation of 28 U.S.C.A. § 1446(b) protects the government's right of removal and encourages plaintiffs to disclose the facts underlying their claims early on.⁷

§ 40:808 Joinder of defendants in removal petition under Federal Officer Removal statute

Research References

West's Key Number Digest, Removal of Cases ⇐21

The federal officer removal statute¹ represents an exception to the general removal rule² that all defendants must join in the removal petition,³ and thus the entire case can be removed under the provisions of 28 U.S.C.A. § 1442 by the timely petition of a single federal defendant, regardless of whether the other defendants, federal officers or not, join in that petition.⁴

§ 40:809 Separability of issues on removal petition under Federal Officer Removal statute

Research References

West's Key Number Digest, Removal of Cases ⇐21, 48

It is well settled that if one claim cognizable under the federal officer removal statute¹ is present, the entire action can be removed, regardless of the relationship between the 28 U.S.C.A. § 1442 claim and the

526 U.S. 344, 119 S. Ct. 1322, 143 L. Ed. 2d 448, 43 Fed. R. Serv. 3d 1 (1999).

³**Third Circuit**—Foster v. Mutual Fire, Marine & Inland Ins. Co., 986 F.2d 48 (3d Cir. 1993).

⁷**Ninth Circuit**—Durham v. Lockheed Martin Corp., 445 F.3d 1247 (9th Cir. 2006).

[Section 40:808]

¹28 U.S.C.A. § 1442.

²28 U.S.C.A. §§ 1441, 1446.

³**Ninth Circuit**—Ely Valley Mines, Inc. v. Hartford Acc. and Indem. Co., 644 F.2d 1310, 31 Fed. R. Serv. 2d 824 (9th Cir. 1981).

Parties entitled to remove a case to federal court are identified and discussed generally in §§ 69:62 to 69:67.

⁴**Second Circuit**—Bradford v. Harding, 284 F.2d 307 (2d Cir. 1960).

Fifth Circuit—Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 30 Fed. R. Serv. 2d 597 (5th Cir. 1980).

Sixth Circuit—Howes v. Childers, 426 F. Supp. 358 (E.D. Ky. 1977).

Seventh Circuit—Alsup v. 3-Day Blinds, Inc., 435 F. Supp. 2d 838 (S.D. Ill. 2006); Bottos v. Avakian, 477 F. Supp. 610 (N.D. Ind. 1979), judgment aff'd, 723 F.2d 913 (7th Cir. 1983).

Ninth Circuit—Durham v. Lockheed Martin Corp., 445 F.3d 1247 (9th Cir. 2006).

Tenth Circuit—Akin v. Ashland Chemical Co., 156 F.3d 1030 (10th Cir. 1998).

[Section 40:809]

¹28 U.S.C.A. § 1442.

nonremovable claims.² Upon removal under 28 U.S.C.A. § 1442, a federal court has the power to hear claims that would not be independently removable; this is true even after the basis for removal jurisdiction is dropped from the proceedings, as where the federal officers are dismissed as defendants.³

The district court's power to consider the nonfederal aspects of a case results from the ancillary jurisdiction created by the authority in 28 U.S.C.A. § 1442(a)(1) to remove the entire action, and through its creation of an ancillary jurisdiction, the statute confers discretion on the district court to decline to exercise continued jurisdiction over the plaintiff's claim once the federal officer or agency has dropped out of the case.⁴ Furthermore, at least one court has held that a discretionary remand of state-law claims that are properly within the federal removal jurisdiction is not a remand on a 28 U.S.C.A. § 1447(c) ground that is insulated from appellate review.⁵

§ 40:810 Removal under Federal Officer Removal statute as waiver or consent

Research References

West's Key Number Digest, Removal of Cases ☞10, 21; United States ☞422, 427

Removal under the federal officer removal statute¹ is neither a waiver of the right to question jurisdiction nor is it tantamount to governmental consent to be sued.²

²**Second Circuit**—Parker v. Della Rocco, 252 F.3d 663 (2d Cir. 2001).

Fifth Circuit—IMFC Professional Services of Florida, Inc. v. Latin American Home Health, Inc., 676 F.2d 152 (5th Cir. 1982).

Ninth Circuit—National Audubon Soc. v. Department of Water & Power of City of Los Angeles, 496 F. Supp. 499 (E.D. Cal. 1980).

Eleventh Circuit—Maseda v. Honda Motor Co., Ltd., 861 F.2d 1248 (11th Cir. 1988).

³**Ninth Circuit**—Murphy v. Kodz, 351 F.2d 163 (9th Cir. 1965).

⁴**Fifth Circuit**—IMFC Professional Services of Florida, Inc. v. Latin American Home Health, Inc., 676 F.2d 152 (5th Cir. 1982).

⁵**Fourth Circuit**—Jamison v. Wiley, 14 F.3d 222 (4th Cir. 1994).

Remand procedures are discussed in § 40:821.

[Section 40:810]

¹28 U.S.C.A. § 1442.

²**Second Circuit**—Special Prosecutor of State of N. Y. v. U.S. Attorney for Southern Dist. of New York, 375 F. Supp. 797 (S.D. N.Y. 1974).

Third Circuit—Stapleton v. Two Million Four Hundred Thirty-Eight Thousand, One Hundred and Ten Dollars (\$2,438,110), 454 F.2d 1210 (3d Cir. 1972).

Seventh Circuit—Crumpacker v. Andrus, 516 F. Supp. 286 (N.D. Ind. 1981).

Tenth Circuit—Hollingsworth v. City of Pueblo, 494 F. Supp. 1039 (D. Colo. 1980).

§ 40:811 Waiver of right to remove under Federal Officer Removal statute

Research References

West's Key Number Digest, Removal of Cases ☞17, 21; United States ☞422, 427

Actions which are primarily preliminary and not conclusive in character do not generally constitute a waiver of the right to remove from state to federal court under the federal officer removal statute, such as, filing an appearance, taking depositions, opposing a temporary restraining order, or stipulating that court action would take place on a specific date, inasmuch as the requisite intent to waive cannot be gleaned from preliminary actions brought about by the filing of a complaint.¹ Thus, the government will not waive its right of removal where a federal investigator consents to a deposition, and there is no basis for removal until the investigator is ordered by the state court to testify against his wishes.²

§ 40:812 Post-judgment removal under Federal Officer Removal statute

Research References

West's Key Number Digest, Removal of Cases ☞21

Generally, when all that remains in an action is the enforcement of a judgment, removal to federal court under the federal officer removal statute is not authorized.¹ However, there is authority to support the use of 28 U.S.C.A. § 1442 to remove a case after a judgment has been entered in state court; the federal court to which the action is removed then adopts the judgment of the state court as its own and may grant any applicable postjudgment relief that would be available had the case been initiated in federal court.²

2. Who May Remove Civil Action

§ 40:813 Government officers, agencies, and employees acting under color of office may remove civil action under Federal Officer Removal statute

Research References

West's Key Number Digest, Public Employment ☞1029 to 1039; Removal of

[Section 40:811]

¹**Seventh Circuit**—Swan v. Community Relations-Social Development Commission, 374 F. Supp. 9 (E.D. Wis. 1974).

²**Ninth Circuit**—Swett v. Schenk, 792 F.2d 1447 (9th Cir. 1986).

[Section 40:812]

¹**Sixth Circuit**—Ohio v. Doe, 433 F.3d 502 (6th Cir. 2006).

²**Fourth Circuit**—Holmes v. AC & S, Inc., 388 F. Supp. 2d 663 (E.D. Va. 2004).

Cases ⇐21

Who Is "Person Acting Under" Officer of United States or Any Agency Thereof for Purposes of Availability of Right to Remove State Action to Federal Court Under 28 U.S.C.A. s1442(a)(1), 166 A.L.R. Fed. 297

A civil action commenced in a state court against the United States, any federal agency or any federal officer, or any person acting under that officer, sued in an official or individual capacity for any act under color of such office¹ 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, may be removed by them to the district court of the United States for the district and division embracing the place wherein the action or prosecution is pending.²

◆ **Practice Tip:** Corporations are generally recognized as persons for purposes of the federal officer removal statute,³ and where a corporation is engaged in activities that implement a federal policy or directive, it has been held that "person" should be given a broad meaning to include companies that acted under federal direction or authority.⁴

Because the federal officer removal statute is premised on the protection of federal activity and an anachronistic mistrust of state courts' ability to protect and enforce federal interests and immunities from suit, private actors seeking to benefit from its provisions bear a special burden of establishing the official nature of their activities.⁵ Thus, whether a private defendant is "acting under" the direction of a federal officer depends on the detail and specificity of the federal direction of the defendant's activities and whether the government exercises control over the defendant; mere participation by the defendant in a regulated industry is generally insufficient to support removal.⁶

◆ **Illustration:** The removal of state court action against a Navy contractor, a manufacturer of marine steam turbines, arising from the plaintiff's exposure to asbestos while working at a shipyard during World War II, was warranted under federal officer removal statute as a colorable military contractor defense, broadly construed, existed by virtue of the Navy's control over all aspects of design; the contractor

[Section 40:813]

¹The "color of office" test is discussed in § 40:821.

²28 U.S.C.A. § 1442(a)(1).

³**First Circuit**—Camacho v. Autoridad de Telefonos de Puerto Rico, 868 F.2d 482 (1st Cir. 1989).

Seventh Circuit—Alsup v. 3-Day Blinds, Inc., 435 F. Supp. 2d 838 (S.D. Ill. 2006).

Ninth Circuit—Davidson v. Arch Chemicals Specialty Products, Inc., 347 F. Supp. 2d 938 (D. Or. 2004).

⁴**Fifth Circuit**—Winters v. Diamond Shamrock Chemical Co., 901 F. Supp. 1195 (E.D. Tex. 1995), judgment aff'd, 149 F.3d 387 (5th Cir. 1998).

⁵**Tenth Circuit**—Freiberg v. Swinerton & Walberg Property Services, Inc., 245 F. Supp. 2d 1144 (D. Colo. 2002).

⁶**Eighth Circuit**—Watson v. Philip Morris Companies, Inc., a Corporation, 420 F.3d 852 (8th Cir. 2005), rev'd and remanded on other grounds, 551 U.S. 142, 127 S. Ct. 2301, 168 L. Ed. 2d 42 (2007).

was acting under direct and detailed control regarding provision of warnings; and the plaintiff's lawsuit arose from alleged failure to warn, a state law duty interfered with by the federal actors' control.⁷

However, the manufacturer of an automatic implantable cardioverter defibrillator failed to demonstrate either that it acted under the direction of the Federal Food and Drug Administration (FDA) or that a causal connection existed between its alleged defects and deception and the FDA's regulatory authority, so that the federal court had jurisdiction over the claims of patients' survivors under the federal officer removal statute; even though the FDA had comprehensive regulatory authority over the production of class III medical devices, required manufacturer to submit information regarding the safety and efficacy of its products, and had authority to issue recall orders, the FDA did not exercise control over manufacturer's design, manufacture, or sale of defibrillators.⁸

Also, a cigarette manufacturer did not fall within the terms of the federal officer removal statute in its testing and advertising of tar and nicotine levels in its cigarettes, and thus a claim brought against it by consumers was not removable to federal court, notwithstanding the Federal Trade Commission's detailed supervision of the cigarette testing process.⁹

The right of a federal defendant to remove a case to federal court is not defeated by a mere assertion that suit is brought against them in their individual capacities if the actions complained of were performed by the defendants in their capacities as federal officers, and if they assert this as a defense.¹⁰ Moreover, the fact that a government officer or agency is a third-party defendant does not defeat the right of removal under 28 U.S.C.A. § 1442.¹¹

§ 40:814 Removal to federal court by property holder deriving title from federal officer of state court action

Research References

West's Key Number Digest, Removal of Cases ⇨19, 21

Federal Procedural Forms § 58:36 (Allegations in notice—By property holder deriving title from federal officer—For removal of civil action)

A property holder whose title is derived from a federal officer, may remove a state court action brought against him to federal court where such action or prosecution affects the validity of any law of the United

⁷**Second Circuit**—Nesbitt v. General Electric Co., 399 F. Supp. 2d 205 (S.D. N.Y. 2005). 142, 127 S. Ct. 2301, 168 L. Ed. 2d 42 (2007).

⁸**Eighth Circuit**—In re Guidant Corp. Implantable Defibrillators Products Liability Litigation, 428 F. Supp. 2d 1014 (D. Minn. 2006).

¹⁰**Ninth Circuit**—Saul v. Larsen, 847 F.2d 573 (9th Cir. 1988).

⁹**U.S. Supreme Court**—Watson v. Philip Morris Companies, Inc., 551 U.S.

¹¹**Fifth Circuit**—IMFC Professional Services of Florida, Inc. v. Latin American Home Health, Inc., 676 F.2d 152 (5th Cir. 1982).

States.¹ Analysis under 28 U.S.C.A. § 1442(a)(2) requires compliance with two prongs: (1) the property in controversy must derive from an officer of the United States, and (2) the controversy regarding the property must affect the validity of any law of the United States.²

◆ **Illustration:** The requirements for removal were satisfied in action in which the purported property owner claimed that she and her family held legal title over certain properties in Vieques that were transferred, via statute, by the United States to the Municipality of Vieques and government of Puerto Rico, inasmuch as the title of the properties at issue derived from the Deputy Assistant Secretary of the United States Navy, and the purported owner's claims challenged the validity of a federal law ordering the transfer of the properties.³

§ 40:815 Removal of state action against federal court officer to federal court

Research References

West's Key Number Digest, Removal of Cases ⇨21

An officer of the courts of the United States may remove to federal court state court civil actions against or directed to him for or relating to any act under color of office or in the performance of his duties.¹ Qualified officers include—

- federal judges.²
- federal marshals and deputy marshals.³
- federal court reporters.⁴
- receivers appointed by federal courts, where the plaintiff is challenging the receiver's personal dereliction in the execution of the court's orders or judgments, as opposed to the receiver's negligence in performing duties not entrusted to him or her by a court.⁵

On the other hand, a private process server is not a court officer

[Section 40:814]

¹28 U.S.C.A. § 1442(a)(2).

²**First Circuit**—Benitez-Bithorn v. Rossello-Gonzalez, 200 F. Supp. 2d 26 (D.P.R. 2002).

³**First Circuit**—Benitez-Bithorn v. Rossello-Gonzalez, 200 F. Supp. 2d 26 (D.P.R. 2002).

[Section 40:815]

¹28 U.S.C.A. § 1442(a)(3).

²**U.S. Supreme Court**—Jefferson County, Ala. v. Acker, 527 U.S. 423, 119 S. Ct. 2069, 144 L. Ed. 2d 408 (1999).

Seventh Circuit—Tinkoff v. Holly, 209 F.2d 527 (7th Cir. 1954).

Tenth Circuit—O'Bryan v. Chandler, 496 F.2d 403 (10th Cir. 1974).

³**Second Circuit**—Klein v. Robinson, 328 F. Supp. 417 (E.D. N.Y. 1971), judgment aff'd, 468 F.2d 619 (2d Cir. 1972).

⁴**First Circuit**—Conjugal Partnership Comprised by Joseph Jones and Verneta G. Jones v. Conjugal Partnership Comprised of Arthur Pineda and Toni Pineda, 22 F.3d 391, 28 Fed. R. Serv. 3d 1423 (1st Cir. 1994).

⁵**Ninth Circuit**—Ely Valley Mines, Inc. v. Hartford Acc. and Indem. Co., 644 F.2d 1310, 31 Fed. R. Serv. 2d 824 (9th Cir. 1981).

entitled to removal because a private process server is not a conventional court "officer" such as a marshal, bailiff, court clerk, or judge.⁶

§ 40:816 Removal of state action against federal court officer to federal court—Attorneys admitted to federal court

Research References

West's Key Number Digest, Removal of Cases ☞21

A lawyer admitted to practice before a federal court is not an officer for the purposes of the federal officer removal statute¹ and may not use the statute as a vehicle to remove disciplinary actions pending against him in a state court.²

However, it has been held that attorneys employed by organizations conducting federally funded legal assistance programs for indigents³ and attorneys in an OEO-funded (Office of Economic Opportunity) legal services program properly used 28 U.S.C.A. § 1442 to remove actions from state to federal court.⁴

§ 40:817 Removal of state civil action against congressional officers to federal court

Research References

West's Key Number Digest, Removal of Cases ☞21

Any officer of either House of Congress may remove a civil suit against or directed to him in a state court for or relating to any act in the discharge of his official duty under an order of such House.¹ Thus, civil rights claims against a Senator or Representative are properly removed where the claims arose from the defendant's service as a member of Congress.² The right to remove has been applied to members of Congress who were not defendants but subjects of subpoenas duces tecum, where their motion to quash rested on an assertion of privilege conferred by the Speech and Debate Clause of the U.S. Constitution.³

◆ **Observation:** In cases where removal jurisdiction is not appropri-

⁶**Fifth Circuit**—Herron v. Continental Airlines, Inc., 73 F.3d 57 (5th Cir. 1996).

[Section 40:816]

¹28 U.S.C.A. § 1442.

²**Eleventh Circuit**—State of Fla. v. Shimek, 356 F. Supp. 687 (N.D. Fla. 1973).

³**Eleventh Circuit**—Dixon v. Georgia Indigent Legal Services, Inc., 388 F. Supp. 1156 (S.D. Ga. 1974), aff'd, 532 F.2d 1373 (5th Cir. 1976).

⁴**Second Circuit**—Gurda Farms,

Inc. v. Monroe County Legal Assistance Corp., 358 F. Supp. 841 (S.D. N.Y. 1973).

[Section 40:817]

¹28 U.S.C.A. § 1442(a)(4).

²**Ninth Circuit**—Richards v. Harper, 864 F.2d 85 (9th Cir. 1988).

³**D.C. Circuit**—Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408 (D.C. Cir. 1995) (observing that power of state court in subpoena enforcement proceeding would be directed against federal officer, and there is no reason to suppose that Congress would have wished that

ate under 28 U.S.C.A. § 1442(a)(4) because a member of Congress was not acting "under an order of" a House of Congress, removal is proper under 28 U.S.C.A. § 1442(a)(1) as a congressman is an "officer of the United States" within the meaning of that subsection.⁴

3. Removal of Action Brought by Alien Plaintiff

§ 40:818 Removal of action brought against federal employee by alien plaintiff in state court

Research References

West's Key Number Digest, Removal of Cases ⇨21

A personal action commenced in a state court by an alien against a citizen of a state who is, or at the time of the accrual of the action was, a civil officer of the United States and is a nonresident of such state, wherein jurisdiction is obtained by the state court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.¹

4. Establishing Federal Jurisdiction

§ 40:819 Assertion of federal defense by defendant federal employee

Research References

West's Key Number Digest, Removal of Cases ⇨21, 25; United States ⇨505, 965

To establish a right to remove an action to federal court, a federal officer, employee, or agency must assert a colorable federal defense.¹ For these purposes, a colorable defense of immunity is sufficient,² as is compliance with governing federal regulations,³ and the preemption of state law claims by federal law.⁴

In a civil suit, the congressional determination that federal officers and the federal government itself require the protection of a federal

confrontation to be actually ignited before removal).

¹**Fifth Circuit**—Williams v. Brooks, 945 F.2d 1322 (5th Cir. 1991).

[Section 40:818]

¹28 U.S.C.A. § 1442(b).

[Section 40:819]

¹**U.S. Supreme Court**—Mesa v. California, 489 U.S. 121, 109 S. Ct. 959, 103 L. Ed. 2d 99 (1989).

²**U.S. Supreme Court**—Jefferson County, Ala. v. Acker, 527 U.S. 423, 119 S.

Ct. 2069, 144 L. Ed. 2d 408 (1999).

³**Eighth Circuit**—Hardge-Harris v. Pleban, 741 F. Supp. 764, 62 Ed. Law Rep. 137 (E.D. Mo. 1990), aff'd, 938 F.2d 185, 68 Ed. Law Rep. 981 (8th Cir. 1991).

³**Eighth Circuit**—Dent v. Packerland Packing Co., Inc., 144 F.R.D. 675 (D. Neb. 1992).

⁴**Ninth Circuit**—Goncalves ex rel. Goncalves v. Rady Children's Hosp. San Diego, 65 F. Supp. 3d 985 (S.D. Cal. 2014).

forum should not be frustrated by a narrow, grudging interpretation of the federal officer removal statute.⁵

◆ **Observation:** A federal defense need only be colorable, not airtight, to sustain a claim of federal officer jurisdiction, but by the same token, a court will not equate a federal defense that is merely colorable with one that is hopeless.⁶

§ 40:820 Jurisdictional facts necessary for removal of state action against federal officer

Research References

West's Key Number Digest, Removal of Cases ⇨21; United States ⇨505, 965

The jurisdictional facts necessary for the removal of a federal officer under 28 U.S.C.A. § 1442, unlike those necessary for removal under 28 U.S.C.A. § 1441,¹ need not appear on the surface of the complaint in the state action.² The removal petition may supply the jurisdictional basis for removal in the notice itself, if the complaint does not.³ In addition, if the removal notice is deficient in stating the grounds for removal under the federal officer removal statute, an amended removal notice may suffice.⁴

◆ **Caution:** If there are specific jurisdictional bars elsewhere that prevent the district court from asserting jurisdiction, 28 U.S.C.A. § 1442 cannot overcome the jurisdictional defect.⁵

§ 40:821 Satisfying “color of office” test for removal of state action against federal officer

Research References

West's Key Number Digest, Public Employment ⇨1033; Removal of Cases ⇨21, 25; United States ⇨505, 965

When is act “under color of such office” within meaning of 28 U.S.C.A. sec. 1442(a)(1), providing for removal from state court to federal court of civil action or criminal prosecution against officer of United States for any act under color of such office, 54 A.L.R. Fed. 442

⁵**U.S. Supreme Court**—Willingham v. Morgan, 395 U.S. 402, 89 S. Ct. 1813, 23 L. Ed. 2d 396 (1969).

⁶**Seventh Circuit**—Alsup v. 3-Day Blinds, Inc., 435 F. Supp. 2d 838 (S.D. Ill. 2006).

[Section 40:820]

¹Jurisdictional prerequisites and grounds necessary for removal under 28 U.S.C.A. § 1441 are discussed in §§ 69:1 to 69:11.

²**Second Circuit**—Poss v. Lieber-

man, 299 F.2d 358 (2d Cir. 1962).

³**Second Circuit**—In re Methyl Tertiary Butyl Ether (“MTBE”) Products Liability Litigation, 399 F. Supp. 2d 356 (S.D. N.Y. 2005).

⁴**Eighth Circuit**—Russell v. U.S. Dept. of Housing and Urban Development, 214 F. Supp. 2d 933 (W.D. Ark. 2002).

⁵**Ninth Circuit**—State Engineer of State of Nevada v. South Fork Band of Te-Moak Tribe of Western Shoshone Indians of Nevada, 339 F.3d 804 (9th Cir. 2003).

To qualify for removal of an action from state court under the federal officer removal statute,¹ a federal officer or agency must both raise a colorable federal defense² and establish that the suit is for an act taken under color of office, which requires the defendant to show a nexus between the charged conduct and the asserted official authority.³ The defendant must specifically show that he was acting under color of office when performing the act for which he is being sued or prosecuted.⁴ The "color of office" requirement should not be frustrated by a "narrow" construction; the rule has been interpreted broadly to achieve the protective purpose of the statute.⁵

A federal officer's acts must come within the scope of the necessary incidents of his duty as an officer of the United States to be under color of office for the purposes of removal.⁶ The test is not whether a government employee was acting in performance of his duties, but whether the act complained of was "under color of" such office, or of a right, title, or authority claimed under any act of Congress.⁷ It is enough that the federal defendants' acts in the performance of their official duties constitute the basis, though mistaken or false, of a state prosecution.⁸ A federal officer is acting under color of office so long as he does not depart from the course of his duty so that performance becomes a personal act.⁹ Unless the substantive defense by the federal officer is completely frivolous, he is entitled to have the merits of such defense decided in federal court.¹⁰

While removal under 28 U.S.C.A. § 1442 is broad, it does not automatically grant a federal official immunity from the state courts.¹¹ However, an official need not be blameless to be entitled to removal, and thus, a plaintiff's allegations that an officer acted maliciously and with intent to harm does not defeat federal jurisdiction.¹²

[Section 40:821]

¹28 U.S.C.A. § 1442.

²§ 40:813.

³**U.S. Supreme Court**—*Jefferson County, Ala. v. Acker*, 527 U.S. 423, 119 S. Ct. 2069, 144 L. Ed. 2d 408 (1999).

⁴**Second Circuit**—*Ryan v. Dow Chemical Co.*, 781 F. Supp. 934 (E.D. N.Y. 1992).

⁵**Second Circuit**—*In re "Agent Orange" Product Liability Litigation*, 304 F. Supp. 2d 442 (E.D. N.Y. 2004), *aff'd*, 517 F.3d 129 (2d Cir. 2008).

⁶**U.S. Supreme Court**—*Willingham v. Morgan*, 395 U.S. 402, 89 S. Ct. 1813, 23 L. Ed. 2d 396 (1969).

⁷**Eighth Circuit**—*Galbert v. Shively*, 186 F. Supp. 150 (W.D. Ark. 1960).

⁸**Tenth Circuit**—*State of Utah By and Through Jensen v. IWY Coordinating Committee of State of Utah*, 454 F. Supp. 518 (D. Utah 1978).

⁹**Fifth Circuit**—*Allman v. Hanley*, 302 F.2d 559 (5th Cir. 1962).

¹⁰**Second Circuit**—*Williams v. Brantley*, 492 F. Supp. 925 (W.D. N.Y. 1980), judgment *aff'd*, 738 F.2d 419 (2d Cir. 1984).

¹¹**Tenth Circuit**—*Preston v. Edmondson*, 263 F. Supp. 370 (N.D. Okla. 1967).

¹²**Second Circuit**—*Ove Gustavsson Contracting Co v. Floete*, 176 F. Supp. 841 (E.D. N.Y. 1959).

§ 40:822 Hearing on whether state action should be removed to federal court

Research References

West's Key Number Digest, Public Employment ☞1033; Removal of Cases ☞21; United States ☞505, 965

If a plaintiff contests by motion to remand¹ a federal defendant's assertion that his actions were under color of office, the district court must hold a hearing to determine the jurisdictional issues.² An evidentiary hearing is also required by statute where the action to be removed is a criminal prosecution and the United States district court does not order the summary remand of such prosecution.³

◆ **Observation:** District courts, when facing a motion for removal under 28 U.S.C.A. § 1442(a)(1), are urged to ensure that the state has an adequate opportunity to identify any disputed issues of fact relevant to removal, and to conduct an evidentiary hearing to resolve them, before acting on the motion.⁴

§ 40:823 Burden of proof on federal defendant to show removal is clearly appropriate

Research References

West's Key Number Digest, Public Employment ☞1033; Removal of Cases ☞21, 107; United States ☞505, 965

In federal officer removal cases under 28 U.S.C.A. § 1442, the federal defendant bears the burden of showing that removal is clearly appropriate.¹ While the federal officer removal statute should be interpreted broadly in favor of removal,² a defendant's bare assertion that removal is proper is insufficient to meet that burden.³

◆ **Practice Tip:** Affidavits filed in opposition to a motion to remand stating that the defendant's conduct which formed the basis of the complaint was mandated by the defendant's federal duties are conclusive.⁴

[Section 40:822]

¹As to motions to remand, generally, see §§ 69:126 to 69:146.

²**Tenth Circuit**—O'Bryan v. Chandler, 496 F.2d 403 (10th Cir. 1974).

³28 U.S.C.A. § 1446(c)(5).

⁴**Tenth Circuit**—Wyoming v. Livingston, 443 F.3d 1211, 53 A.L.R. Fed. 2d 643 (10th Cir. 2006).

[Section 40:823]

¹**Second Circuit**—Ryan v. Dow

Chemical Co., 781 F. Supp. 934 (E.D. N.Y. 1992).

²**Ninth Circuit**—Durham v. Lockheed Martin Corp., 445 F.3d 1247 (9th Cir. 2006).

³**Seventh Circuit**—Sheda v. U.S. Dept. of the Treasury Bureau of Public Debt, 196 F. Supp. 2d 743 (N.D. Ill. 2002).

⁴**Second Circuit**—People of State of N. Y. v. Keim, 308 F. Supp. 421 (S.D. N.Y. 1969).

5. Procedure After Removal

§ 40:824 Procedure after removal under Federal Officer Removal statute

Research References

West's Key Number Digest, Removal of Cases ⇨21, 115

In any case removed from a state to a federal court under the Federal Officer Removal statute, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the state court or otherwise.¹ The district court also may require the removing party to file with its clerk copies of all records and proceedings in such state court or may cause the same to be brought before it by writ of certiorari issued to such state court.² However, since a federal court's jurisdiction upon removal pursuant to the Federal Officer Removal statute is essentially derivative of the state court's jurisdiction, and where the state court lacks jurisdiction over the subject matter or the parties, the federal court acquires none upon removal, even though in a similar suit originally brought in federal court, the court would have had jurisdiction.³ Moreover, if the state court lacked jurisdiction to compel production of certain documents as contrary to valid regulations governing disclosure of confidential information, the federal court also cannot compel disclosure.⁴

◆ **Practice Tip:** A federal court exercising jurisdiction under the Federal Officer Removal statute serves as an alternative forum in a manner roughly analogous to its role in diversity cases, applying state law through the mechanism of its own procedural rules.⁵

§ 40:825 Remand of case removed to federal court under Federal Officer Removal statute

Research References

West's Key Number Digest, Removal of Cases ⇨21, 100 to 110

A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under the Federal Officer Removal statute.¹

[Section 40:824]

¹28 U.S.C.A. § 1447(a).

Procedures following removal of an action to federal court are discussed generally in §§ 69:100 to 69:116.

²28 U.S.C.A. § 1447(b), discussed in § 69:101.

³**Fourth Circuit**—Smith v. Cromer, 159 F.3d 875 (4th Cir. 1998).

⁴**Seventh Circuit**—Edwards v. U.S. Dept. of Justice, 43 F.3d 312 (7th Cir. 1994).

⁵**Fifth Circuit**—Wilkins v. Swift, 616 F. Supp. 123 (N.D. Miss. 1985).

[Section 40:825]

¹28 U.S.C.A. § 1447(c).

Motions to remand are discussed generally in §§ 69:126 to 69:137.

Generally, if at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case will be remanded to the state court.² However, the dismissal of the federal defendant whose presence allowed removal under 28 U.S.C.A. § 1442 does not deprive a district court of subject matter jurisdiction, notwithstanding the fact that, had the federal defendant not been named in the first place, there would have been no removal jurisdiction.³

A case is properly remanded to the local court where the federal party was eliminated on sovereign immunity grounds shortly after removal and the action against the remaining defendants implicates complex questions of local law.⁴ On the other hand, once an action has been removed properly under the federal officer removal statute, removal is not rendered improvident by a later determination that plaintiff lacked standing to sue, so that such a determination does not require remand of the action.⁵

◆ **Caution:** The court must resolve any ambiguities concerning the propriety of removal of case in favor of remand.⁶

§ 40:826 Award of attorney's fees incurred as result of removal to federal court upon remand to state court

Research References

West's Key Number Digest, Removal of Cases ◊21, 107(9), 120

An order remanding a case from district court to state court may require payment of just costs and any actual expenses, including attorney's fees, incurred as a result of the removal.¹

However, absent unusual circumstances, attorney's fees should not be awarded on remand to a plaintiff when the removing party has an objectively reasonable basis, under 28 U.S.C.A. § 1442, for removing the action to federal court.²

D. PARTICULAR TYPES OF ACTIONS

Research References

West's Key Number Digest

Public Employment ◊1029 to 1039; United States ◊491 to 494

²28 U.S.C.A. § 1447(c).

³**Second Circuit**—Parker v. Della Rocco, 252 F.3d 663 (2d Cir. 2001).

⁴**D.C. Circuit**—District of Columbia v. Merit Systems Protection Bd., 762 F.2d 129, 2 Fed. R. Serv. 3d 57 (D.C. Cir. 1985).

⁵**First Circuit**—Maine Ass'n of Interdependent Neighborhoods, Inc. v. Petit, 644 F. Supp. 81 (D. Me. 1986).

⁶**D.C. Circuit**—Cefarrati v. JBG Properties, Inc., 75 F. Supp. 3d 58 (D.D.C. 2014).

[Section 40:826]

¹28 U.S.C.A. § 1447(c).

²**Ninth Circuit**—Durham v. Lockheed Martin Corp., 445 F.3d 1247 (9th Cir. 2006).

A.L.R. Library

A.L.R. Index, Administrative Law; Bribery; Civil Service; Color of Right, Title, and Office; Conflicts of Interest; Congress; Jurisdiction; Public Officers and Employees; Removal of Actions; United States; Venue
 West's A.L.R. Digest, Public Employees ⇨1029 to 1039; United States ⇨491 to 494

§ 40:827 Actions against Congressional officers for official acts**Research References**

West's Key Number Digest, United States ⇨491 to 494

In any action brought against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty, in executing any order of such House, the United States attorney's for the district within which the action is brought, upon request by the officer sued, will enter an appearance in behalf of such officer.¹

Certain provisions relating to the removal of suits, the withholding of executions, and the paying of judgments against revenue or other officers of the United States are applicable to such actions, and the defense of such actions will be conducted under the supervision and direction of the Attorney General.²

◆ **Observation:** An action against members of the House of Representatives for official acts may raise issues the court will decline to rule upon in light of separation-of-powers concerns.³

§ 40:828 Suits against federal employees failing to pay over federal funds**Research References**

West's Key Number Digest, United States ⇨491 to 494

The Attorney General will bring a civil action to recover an amount due to the United States Government on settlement of the account of a person accountable for public money when the person neglects or refuses to pay the amount to the Treasury.¹ Any commission of that person and interest of 6% a year from the time the money is received by the person until repaid to the Treasury will be added to the amount due on the ac-

[Section 40:827]

¹2 U.S.C.A. § 5503.

²2 U.S.C.A. § 5503.

³**D.C. Circuit**—*Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1982) (action by Republican members of Congress against House Democratic leadership con-

tending that Democrats systematically discriminated against them by providing them with fewer seats on House committees and subcommittees than they were proportionally owed).

[Section 40:828]

¹31 U.S.C.A. § 3545.

count, and the commission is forfeited when judgment is obtained.²

§ 40:829 Suits for ethics violations by present and former officers and legislators; suit for civil penalty

Research References

West's Key Number Digest, United States ⇨491 to 494

The Attorney General may bring a civil action in the appropriate United States district court against any person who engages in conduct constituting an offense pertaining to bribery, graft, and conflicts of interest, and, upon proof of such conduct by a preponderance of the evidence, such person will be subject to a civil penalty of not more than \$50,000 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is greater.¹ As enumerated in the governing statute, the provisions of the U.S. Criminal Code which are enforceable in this manner are those pertaining to compensation to members of Congress, officers, and others in matters affecting the government;² practice in United States Court of Federal Claims or the United States Court of Appeals for the Federal Circuit by members of Congress and members of Congress Elect;³ activities of officers and employees in claims against and other matters affecting the government;⁴ restrictions on former officers, employees, and elected officials of the executive and legislative branches;⁵ acts affecting a personal financial interest;⁶ and payment of salary or other compensation to government officials and employees by other than the United States.⁷ The imposition of a civil penalty does not preclude any other criminal or civil statutory, common law, or administrative remedy, which is available by law to the United States or any other person.⁸

Under the Ethics in Government Act of 1978, the Attorney General may bring a civil action in any appropriate United States district court against any individual who violates the statutory provisions⁹ governing outside income and the limitation of outside employment for members of Congress or government officers.¹⁰ The court in which such action is brought may assess against the individual a civil penalty of not more than \$10,000 or the amount of compensation, if any, which the individual received for the prohibited conduct, whichever is greater.¹¹

◆ **Observation:** Written advisory opinions interpreting the Ethics in

²31 U.S.C.A. § 3545.

§ 730.103.

[Section 40:829]

¹18 U.S.C.A. § 216(b).

⁶18 U.S.C.A. § 208.

⁷18 U.S.C.A. § 209.

²18 U.S.C.A. § 203.

⁸18 U.S.C.A. § 216(b).

³18 U.S.C.A. § 204.

⁹5 U.S.C.A. App. 4 §§ 501, 502.

⁴18 U.S.C.A. § 205.

¹⁰5 U.S.C.A. App. 4 § 504(a).

⁵18 U.S.C.A. § 207; 5 C.F.R.

¹¹5 U.S.C.A. App. 4 § 504(a).

Government Act may be rendered by the Committee on Standards of Official Conduct of the House of Representatives, certain Senate Committees, the Office of Government Ethics, and the Judicial Conference of the United States (or such other agency as the Judicial Conference may designate).¹² Any individual to whom such an advisory opinion is rendered and any other individual covered by the Act who is involved in a fact situation which is indistinguishable in all material aspects, and who, after the issuance of such advisory opinion, acts in good faith in accordance with its provisions and findings will not, as a result of such actions, be subject to any civil penalty under the Act.¹³

§ 40:830 Suits for ethics violations by present and former officers and legislators; Petition for court order barring unethical conduct

Research References

West's Key Number Digest, United States ☞491 to 494

If the Attorney General has reason to believe that a person is engaging in conduct constituting an offense under certain provisions of the United States Criminal Code pertaining to bribery, graft, and conflicts of interest,¹ the Attorney General may petition an appropriate United States district court for an order prohibiting that person from engaging in such conduct.²

The court may issue an order prohibiting that person from engaging in such conduct if the court finds that the conduct constitutes such an offense, and the filing of the petition does not preclude any other remedy which is available by law to the United States or any other person.³

X. CRIMINAL PROSECUTIONS

A. PROSECUTIONS OF FEDERAL OFFICERS AND EMPLOYEES

Research References

West's Key Number Digest

Bribery ☞1; Conspiracy ☞28, 29; Criminal Law ☞106, 1570 to 1669; Embezzlement ☞21, 24; Extortion ☞24 to 24(6); Public Employment ☞1051, 1053, 1056, 1057, 1062, 1063, 1065 to 1072; Removal of Cases ☞22

A.L.R. Library

A.L.R. Index, Bribery; Conflict of Interest; Congress; Conspiracy; Criminal Law; Embezzlement; Extortion; Public Officers and Employees; Venue
West's A.L.R. Digest, Bribery ☞1; Conspiracy ☞28, 29; Criminal Law ☞106,

¹²5 U.S.C.A. App. 4 § 504(b).

208, 209.

¹³5 U.S.C.A. App. 4 § 504(b).

²18 U.S.C.A. § 216(c).

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³18 U.S.C.A. § 216(c).

¹18 U.S.C.A. §§ 203, 204, 205, 207,

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