WRONGFUL REMOVALS

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The law of removal is almost as old as the country itself. Although the Constitution is silent on the subject, in the First Judiciary Act of 1789 Congress gave defendants the right to remove to federal court certain types of civil cases that plaintiffs file in state court.[1] That first legislative grant of removal authority was limited, applicable primarily to diversity cases with more than $500 in controversy (consistent with the 1789 Act's identical grant of original jurisdiction for those cases to be litigated in federal court).[2] But the monumental import of Congress's decision to allow removal soon became readily apparent—and grew in importance as Congress continued to expand both the scope of original jurisdiction and a defendant's corresponding right to remove state cases that came within that broader jurisdictional scope. It did not take long for sharp battle lines to be drawn.[3]

Over the years, scholars have closely considered removal's many nuances and doctrinal complexities. One of our most thoughtful observers of removal procedure has been Professor Joan Steinman. In her recent article *Waiving Removal, Waiving Remand—The Hidden and Unequal Dangers of Participating in Litigation*, Professor Steinman thoughtfully compares and contrasts the laws governing waiver of a defendant's right to remove a case from state to federal court with waiver of a plaintiff's right to remand a case back to state court.[4] A principal theme of her article is the inequitable imbalance in waiver law. Courts are far less likely to find that a defendant has waived the right to remove a case than they are to find that a plaintiff has waived the right to seek remand.[5] To remedy the imbalance, Professor Steinman proposes statutory changes that would instruct courts to apply more equivalent standards to determine what conduct constitutes a waiver of defendants' right to remove and plaintiffs' right to remand.[6]

Professor Steinman's treatment of the disparities in removal and remand law is sobering and deserves careful consideration by law

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1. First Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789).

2. *Id.*

3. *See generally* EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958, at 127–47 (Oxford Univ. Press 1992) (providing a history of the federal forum and perspectives that illuminate the emergence of removal battlefield).

4. Joan Steinman, *Waiving Removal, Waiving Remand—The Hidden and Unequal Dangers of Participating in Litigation*, 71 FLA. L. REV. 689 (2019).

5. *See id.* at 692.

6. *Id.* at 761–64.

makers. We want to add our voice to her analysis by adding some additional context and perspective on some of the difficulties that accompany removal law. To that end, we offer three examples of how removal law incentivizes defendants to continually find creative, if not dubious, ways to gain access to the federal forum. We refer to these as examples of wrongful removal, by which we mean that all of these are examples in which defendants have invoked arguments to gain access to the federal forum that were—or, still are—highly questionable. Although sound policy reform should never be informed by anecdote, we believe that individual stories are often a very effective way to draw attention to a problem and the need for reform.

I. REMOVAL UNDER THE ALL WRITS ACT

One of the most striking examples of a questionable removal argument was the one made by defendants for many years under the supposed authority of the All Writs Act.[7] Until the U.S. Supreme Court finally put a stop to it in 2002, for a quarter century numerous defendants—whose cases satisfied the requirements for neither diversity[8] nor federal question[9] jurisdiction—removed their cases to federal court solely on the basis of invoking the All Writs Act.[10] Plaintiffs who sought to challenge removal experienced little success as the vast majority of district courts and appellate courts approved reliance on the All Writs Act as a basis for original jurisdiction.[11]

Contrary to the predominant judicial view, several scholars, including Professor Steinman, raised numerous concerns.[12] For starters, the language of the All Writs Act does not explicitly grant original jurisdiction, especially when comparing the Act's language to the other

7. 28 U.S.C. § 1651(a) (2018) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.").

8. *Id.* § 1332.

9. *Id.* § 1331.

10. *See* Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855, 865 (2d Cir. 1988) (approving removal solely on the basis of the use of the All Writs Act for the first time); Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28, 34 (2002) (holding that the All Writs Act cannot serve as a basis for removing a case to federal case).

11. For cases and commentary on this approval, see Xiong v. Minnesota, 195 F.3d 424, 426 (8th Cir. 1999); Bylinski v. Allen Park, 169 F.3d 1001, 1003 (6th Cir. 1999); *In re* Agent Orange Product Liability Litigation, 996 F.2d 1425, 1431 (2d Cir. 1993). *But see* Hillman v. Webley, 115 F.3d 1461, 1469 (10th Cir. 1997) (disallowing the use of the All Writs Act as a basis of original jurisdiction).

12. Lonny Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. PA. L. REV. 401, 426–32 (1999); Joan Steinman, *The Newest Frontier of Judicial Activism: Removal Under the All Writs Act*, 80 B.U. L. REV. 773, 774–75 (2000).

statutory grants of federal jurisdiction.[13] Nor does the history surrounding the enactment of the All Writs Act support its use as a basis of original jurisdiction.[14] However, despite the lack of any obvious textual or historical support, a great many defendants argued that the Act gave federal courts jurisdiction over cases that required the application or enforcement of previous federal court orders.[15] Many lower courts agreed, relying on the Supreme Court precedent that the All Writs Act gave federal courts "the power . . . to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders [the court] has previously issued . . . ."[16] While early cases were more restrictive, requiring "exceptional circumstances" to invoke this grant of jurisdiction,[17] later cases used a much broader application of this theory of law.[18]

Finally, in 2002, the Supreme Court put the kibosh on this practice. In *Syngenta Crop Protection, Inc. v. Henson*, the Court unanimously held that the All Writs Act could not serve as the basis for removal, reasoning that it is neither a source of original jurisdiction nor a substitute for the original jurisdiction requirement.[19] However, by the time this case was decided, almost twenty five years had passed since defendants first began using the All Writs Act to remove cases that lacked true federal subject matter jurisdiction.[20] As troublingly, the remarkable success that defendants enjoyed for so long with removing cases solely on the basis of the All Writs Act incentivized others to continue finding new and creative bases for removal. The result was to perpetuate an unequal system that is ripe for abuse by defendants hoping to push the limits, causing—at a minimum—plaintiffs to bear additional delays and expenses.

II. SNAP REMOVAL

The swift removal of a case before a forum defendant can be served—

13. The other statutes that grant original jurisdiction are worded clearly and both begin with the phrase "[t]he district courts shall have original jurisdiction of . . . ." 28 U.S.C. §§ 1331, 1332.

14. Hoffman, *supra* note 12, at 433–39.

15. *See, e.g.*, *Xiong*, 195 F.3d at 425.

16. United States v. New York Tel. Co., 434 U.S. 159, 172 (1977); Steinman, *supra* note 12, at 795.

17. Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855, 865 (2d Cir. 1988).

18. *See, e.g.*, *Xiong*, 195 F.3d at 426–27 (holding that the defendant's removal of the case was proper because the defendant alleged that the case was in violation of an existing federal consent decree, thus triggering federal jurisdiction under the All Writs Act).

19. Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 34 (2002). Justice Stevens drafted a short concurring opinion solely for the purpose of arguing that the Court should have expressly overruled *U.S. v. New York Tel. Co.*, which, in his opinion, also misconstrued the All Writs Act. *Id.* at 35 (Stevens, J., concurring); United States v. New York Tel. Co, 434 U.S. 159, 172 (1977).

20. *Syngenta Crop Prot.*, 537 U.S. at 28; *Yonkers Racing Corp.*, 858 F.2d at 855.

referred to as a "snap removal"[21]—is another example of how removal law incentivizes defendants to continually find creative, if not dubious, ways to gain access to the federal forum. Unlike removal under the All Writs Act, snap removal remains a means by which certain defendants have been able to gain access to the federal forum.

To understand snap removal, it is necessary first to go back to the foundations of diversity jurisdiction. The accepted wisdom is that the constitutional grant of diversity jurisdiction was meant to minimize the risk of state court bias in favor of local parties.[22] If, however, a non-resident plaintiff chooses to bring suit in state court and it is the defendant who is local, then that would seem to obviate any concern about potential bias to justify making the federal forum available to the defending party. Or at least that's what Congress has thought for many years, going all the way back to 1948, when it first enacted the forum defendant rule.[23] As it currently reads today, the forum defendant rule, which is codified as 28 U.S.C. § 1441(b)(2), provides that a diversity case "may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."[24]

Congress's intent in Section 1441(b)(2) has never been in doubt: there's no need to allow for removal when the defendant is local.[25] Then why did Congress specifically say that a case may not be removed only if any of the parties "properly joined and served" is from the forum? It's clear that what Congress had in mind was to stop a plaintiff from merely naming a non-diverse defendant solely to destroy complete diversity but intentionally never serving them, reflecting her lack of interest in actually including them as a party.[26] Just as clearly, Congress never intended to allow defendants to circumvent the forum defendant rule by allowing them to remove cases before the forum defendant is actually served.[27] Congress enacted Section 1441(b)(2) to prevent defendants with a "home

21. Arthur Hellman et al., *Neutralizing the Stratagem of "Snap Removal": A Proposed Amendment to the Judicial Code*, 9 FED. CTS. L. REV. 103, 104 (2016).

22. *See* Valerie M. Nannery, *Closing the Snap Removal Loophole*, 86 U. CIN. L. REV. 541, 547 (2018).

23. 28 U.S.C. § 1441(b)(2) (2018).

24. *Id.*

25. Hellman et al., *supra* note 21, at 104.; Nannery, *supra* note 22, at 547; Jeffrey W. Stempel et al., *Snap Removal: Concept; Cause; Cacophony; and Cure*, ___ BAYLOR L. REV. ___, ___ (forthcoming 2021); Howard M. Wasserman, *The Mischief Rule, the Forum-Defendant Rule, and a Solution to Snap Removal* 5 (FIU Legal Stud. Rsch. Paper Series, Rsch. Paper No. 20–12, 2020).

26. Wasserman, *supra* note 25, at 5–6 (discussing Congress's addition of "properly joined and served" after the Supreme Court's decision in Pullman Co. v. Jenkins, 305 U.S. 534 (1939)).

27. Swindell-Filiaggi v. CSX Corp., 922 F. Supp. 2d 514, 521 (E.D. Pa. 2013) (refusing to permit snap removal "because doing so produces a result that is at clear odds with congressional intent").

field advantage" in state court from removing the case to federal court.[28] Even those courts that follow the plain language approach tend to note that there are valid public policy concerns with allowing snap removals.[29]

And yet that's exactly what (as of this writing) three federal courts of appeals have allowed, in addition to countless district court decisions upholding the practice.[30] The courts that have allowed snap removal take a literalist textual approach—one that was noticeably absent when removals were being sought pursuant to the All Writs Act residual authority. These courts reason that removal isn't barred until the forum defendant has been "properly served."[31]

There are multiple scenarios when snap removal can come into play. Any forum defendant (at least any with enough resources to justify this expense) might carefully monitor state court dockets and, upon learning of a filing against it, promptly remove the case before the plaintiff is able to even initiate service. This first scenario could involve cases in which it is either the sole defendant or one of many. In addition, and more commonly, sophisticated defendants will promptly remove a case after being contacted by the plaintiff but before service has been effectuated.

You might wonder why a plaintiff would ever alert the defending party/parties after suit is filed but before service. Usually, the most common reasons why a plaintiff would do that is to request waiver of service under Rule 4 or because they are cautiously hopeful that filing of the action itself may be enough to spur the other side to discuss a negotiated settlement before service (and other litigation) costs have to be incurred.

It's certainly worth pointing out that either of these reasons are perfectly legitimate ones and, on the whole, seem like the sorts of things that we would want to encourage. That's certainly true as to waiver of service, which has been a part of the rules since 1993.[32] And while it is true that quick settlements aren't always to be welcomed, it's just as true that our procedural rules should certainly not erect barriers to parties being able to promptly resolve their disputes.

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28. Emily L. Buchanan, *A Comity of Errors: Treading on State Court Jurisdiction in the Name of Federalism*, 55 S. TEX. L. REV. 1, 5 (2013). Removal on the basis of diversity was intended to give defendants a forum free of bias should the plaintiff sue in their home state. When the case is filed in the defendant's home state, the defendant does not need protection from bias. *Id.*

29. Hellman et al., *supra* note 25, at 107.

30. Encompass Insurance Co. v. Stone Mason Rest. Inc., 902 F.3d 147, 154 (3d Cir. 2018); Gibbons v. Bristol-Myers Squibb Co., 919 F.3d 699, 707 (2d Cir. 2019); Tex. Brine Co., L.L.C. v. Am. Arb. Ass'n, Inc., 955 F.3d 482, 486–87 (2020). *See generally* Hellman et al., *supra* note 25.

31. *Encompass Insurance Co*., 902 F.3d at 154; *Gibbons*, 919 F.3d at 707; *Tex. Brine Co.*, 955 F.3d at 486.

32. FED. R. CIV. P. 4, Advisory Committee Notes (1993 Amendments).

Legislation has been proposed that would prevent—or at least reduce—the use of snap removals with the introduction of the Removal Jurisdiction Clarification Act of 2020 (RJCA).[33] If passed, the legislation would mandate that federal judges remand snap removal cases if the plaintiff serves the forum defendant within a specified period of time.[34] It's not an ideal solution since it leaves intact the delays that result from a defendant's snap removal before service. And while the statute's enactment might cause some defendants to hesitate for fear of being sanctioned under Rule 11, others might remain undeterred. After all, a plaintiff might miss the longer deadline to serve the forum defendant and in so doing validate the snap removal.

The courts might eventually decide that snap removal is inconsistent with the forum defendant rule.[35] But until then—or until Congress remedies the problem—defendants will continue to take advantage of snap removal.

III. FEDERAL OFFICER REMOVAL

A third questionable, but often invoked, method to gain access to the federal forum is the federal officer removal statute, 28 U.S.C. § 1442(a)(1).[36] As with snap removal, to this day well-financed defendants continue to advance removal arguments based on this statutory section.

The federal officer removal statute has a long history dating back to the early Nineteenth Century. Its first iteration, enacted by Congress in 1815, was primarily to permit removal of state suits brought against federal customs officials.[37] At the time—still decades before Congress enacted the general federal question statute in 1875—the statutory section's purpose was to avoid state court unwillingness to recognize federal law protections for customs officials.[38] Over the years, this first version of the federal officer removal statute has been modified and expanded. One constant about Section 1442 removal is that it allows

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33. Removal Jurisdiction Clarification Act of 2020, H.R. 5801, 116th Cong. (2020). At the time of this writing, there had not yet been a vote on the proposed Act. After its introduction to the House of Representatives on February 7, 2020, the Act was referred to the Subcommittee on Courts, Intellectual Property, and the Internet on March 10, 2020, where it currently remains. *All Actions: H.R.5801*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/5801/all-actions-without-amendments?s=1&r=2 [https://perma.cc/D7Y8-8SBJ].

34. H.R. 5801 § 2(a).

35. Wasserman, *supra* note 25, at 10–12.

36. 28 U.S.C. § 1441(a)(1) (2018).

37. Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195.

38. Michael E. Klenov, *Preemption and Removal:* Watson *Shuts the Federal Officer Backdoor to the Federal Courthouse, Conceals Familiar Motive*, 86 WASH. U. L. REV. 1455, 1465–66 (2009); Note, *Limitations on State Judicial Interference with Federal Activities*, 51 COLUM. L. REV. 84, 97 (1951).

defendants to gain the federal forum even when the federal issues arise solely based on federal defenses. In this way, Section 1442 is one of the rare examples by which Congress has authorized removal although the federal issue does not arise as part of the plaintiff's well-pleaded complaint.

Codified today at Section 1442(a)(1), the federal officer removal statute facially allows removal by the United States, any federal agency, or "any officer (or any other person acting under that officer) of the United States or of any agency."[39] It is the "acting under" language that corporate defendants have attempted to seize on over the years to try to come within the statute's reach.

For much of the statute's history, most of these attempts have been unsuccessful, but many have tried. The most persistent attempts were by defendants in highly regulated industries. But defense lawyers, paid by the hour and for their creativity, remained determined to keep trying. Their persistence finally paid off—at least initially—when Philip Morris successfully removed a state class action suit alleging deceptive marketing regarding light cigarettes. Their argument was essentially identical to the one that had been previously rejected many other times: that it was so heavily regulated by the Federal Trade Commission (FTC) that the company was in effect "acting under" the FTC's officers.[40] Specifically, they argued that because the FTC required it to test cigarettes using the agency's required protocols and to disclose the results of that testing in all of its marketing and advertising, it was acting under the FTC's direction.[41]

Despite all of the prior failed attempts at coming within Section 1442's reach by Philip Morris and other corporate defendants, Philip Morris's lawyers convinced the district court, and then the Eighth Circuit, that the cigarette manufacturer was indeed subject to enough direct control to come within Section 1442(a)(1).[42]

But the Supreme Court granted certiorari and unanimously reversed. The Court held that a private person is "acting under" a federal agency only if their conduct involves "an effort to assist, or to help carry out, the duties or tasks of the federal superior."[43] In order to establish that it is "acting under" a federal officer, it is not enough for a private party to show that it is required to comply with federal regulations, even "highly detailed" ones. Nor is it enough to show that its activities are "highly supervised or monitored."

> A private firm's compliance (or noncompliance) with

39. 28 U.S.C. § 1441(a)(1).
40. Watson v. Philip Morris Cos., 551 U.S. 142, 154 (2007).
41. *Id.*
42. *Id.*
43. *Id.* at 152.

> federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase "acting under" a federal "official." And that is so even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored.[44]

Rather, to come within Section 1442(a)(1), a private actor must show that the assistance it provides to a federal officer "goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks."[45]

Watson v. Phillip Morris Cos. might have been the last word on most attempts by corporations to rely on the federal officer removal statute, but one should never underestimate motivated persistence and virtually unlimited corporate litigation budgets. So, far from closing any openings to private corporate removals under Section 1442, the Court's decision in *Watson* further emboldened defendants to find new ways to squeeze into the small crevices the Court left open. The widest of those crevices was *Watson*'s observation, in dicta, that some private contractors can invoke the statute if they have a relationship with the federal government that "is an unusually close one involving detailed regulation, monitoring, or supervision."[46]

Post-*Watson*, numerous courts have addressed the scope of Section 1442 removal. To be sure, the majority of courts have correctly rejected efforts to satisfy Section 1442, though the sheer number reflects how frequently defendants try. Troublingly, there have been a number of instances when courts have said that a private party was "acting under" federal supervision to come within Section 1442's reach.[47]

CONCLUSION

Professor Edward Purcell, who has done more than anyone to advance our understanding of the historical foundations of federal diversity jurisdiction and removal, has fully recounted the political fights over the role of removal. As he has noted, individual plaintiffs had many reasons to want to litigate their cases in state court, and they consistently fought hard to do so. By contrast, corporations, in general, strongly preferred to

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44. *Id.* at 153.

45. *Id.*

46. *Id.*

47. Isaacson v. Dow Chemical Co., 517 F.3d 129, 139–40 (2d Cir. 2008); Bennett v. MIS Corp., 607 F.3d 1076, 1087–88 (6th Cir. 2010); Ruppel v. CBS Corp., 701 F.3d 1176, 1186 (7th Cir. 2012); Jacks v. Meridian Res. Co., 701 F.3d 1224, 1235 (8th Cir. 2012); Hurley v. CBS Corp., 648 Fed. Appx. 299, 303 (4th Cir. 2016); Papp v. Fore-Kast Sales Co., 842 F.3d 805, 813 (3d Cir. 2016); Sawyer v. Foster Wheeler LLC, 860 F.3d 249, 254–255 (4th Cir. 2017); Goncalves v. Rady Children's Hosp., 865 F.3d 1237, 1256 (9th Cir. 2017); Caver v. Central Ala. Elec. Coop., 845 S.W.3d 1135, 1146 (11th Cir. 2017); Betzner v. Boeing Co., 910 F.3d 1010, 1015 (7th Cir. 2018); Baker v. Atlantic Richfield Co., 962 F.3d 937, 947 (7th Cir. 2020).

remove those suits to federal court.[48] Removal, thus, became a central procedural battleground influencing litigation outcomes and the underlying social policies and consequences that are impacted by those outcomes.

Legal historians like Purcell, along with the essential doctrinal work by leading removal scholars such as Professor Steinman, and the important empirical work of other scholars, including most notably Professors Ted Eisenberg and Kevin Clermont,[49] have all illustrated the profound consequential effect of removal on outcomes. In short, we have long known that removal means far more than just a change of forum. By focusing attention on the three examples of wrongful removal that we've described, we hope to draw more attention to the problem.

48. PURCELL, JR., *supra* note 3, at 91 (quoting JAMES HAMILTON LEWIS, REMOVAL OF CAUSES FROM STATE TO FEDERAL COURTS 8 (1923)).

49. Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 606 (1998); Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 125 (2002); Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1934 (2009); Theodore Eisenberg & Trevor W. Morrison, *Overlooked in the Tort Reform Debate: The Growth of Erroneous Removal*, 2 J. EMPIRICAL LEGAL STUD. 551, 552 (2005).