Enlightening the Forgotten: Removal of State Cases involving Service-members into Federal Courts

Michael C Walsh
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By Michael C. Walsh*

In a little known section1 of the U. S. Code, members of the armed forces have the right to remove, from state court to federal court, any kind of action against them which reasonably relates to their employment2. The statutory language is a clear and straight-forward command for the protection of servicemen. However, it has been little examined by the courts. This article intends to introduce the reader to removal of military cases and provide a unified theory for the protection of military members.

The utility of this statute, 28 U.S.C. § 1442A should not be underestimated. It applies to both state civil cases and state criminal prosecutions3. §1442A also applies to removal of administrative actions4. There is also a general removal statute for all other federal officials, §1442.

History
“This [removal] statute was enacted in 1916 as Article 117 of the Articles of War.”5 Before the 1916 enactment there was no provision for the removal of actions, civil or criminal, against soldiers6. The House of Representative’s Office of Legal Counsel concurs in this description. However, then contemporaneous sources trace the inspiration to a Civil War statute offering removal of state actions for soldiers following presidential command or statute7.

This lack of a removal statute proved to be an absence in the legal tools available to the Army.

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1 This provision of law was last examined in the October 1974 edition of Army Lawyer, where a JAG, adapted, for informational purposes, a memorandum he had written in opposition to remand. See Litigation Division, Litigation Notes: Removal of State Actions to Federal Courts, ARMY LAW., October 1974, at 25.

2 28 U.S.C. § 1442A (authorizing the removal of cases involving armed forces members based on any “act done under color of his office or status” or in relation to which the member may claim “right, title, or authority” under federal law or the laws of war).

3 28 U.S.C. § 1442A (“A civil or criminal prosecution in a court of a State of the United States against a member of the armed forces of the United States… may at any time… be removed for trial into the district court of the United States”)


5 Ohio v. Dorko, 247 F.Supp. 866, 866-867 (N. D. Ohio 1965) (recruiter prosecuted on state manslaughter charges not entitled to removal, even though accident occurred in government car, while on duty, traveling in between duty locations.)

6 “There is now in force no statute of Congress under which an officer or soldier of the army, prosecuted or sued in a State Court, on account of an act performed in the line of his duty, or in a military capacity, can have the proceedings removed to a court of the United States.” (emphasis original) Winthrop’s Military Law and Precedents, 2nd Ed. (1896) (pg 895). Reprinted by the Government Printing office in 1920.

7 James H. Lewis, Removal of Causes from State Courts to Federal Courts § 52b (1923) (tracing the lineage of Article 117 of the Articles of War to the Act of March 3, 1863, c. 81, 12 Stat. 756)
In 1912, the newly minted Judge Advocate General, Brigadier General Enoch Crowder, appeared in front of Congress seeking a comprehensive re-write of the statutes governing the Army. The Articles of War which now govern the conduct of the Army in time of peace and of war have not undergone comprehensive revision for more than a hundred years... The necessity for a comprehensive revision of the code has long been apparent.

General Crowder’s original written report, the *1912 Comparison*, would be included as an appendix in a multi-year saga to revitalize the Articles of War. Only in 1916, just before American entry into World War 1, would Congress finally enact the Article of War. The Articles were revisited in 1918 and finally enacted in 1920 in a form that would exist until the enactment of the UCMJ.

In 1912, General Crowder appeared in front of the House military committee and gave over 5 days worth of testimony. With him appeared the Secretary for War Henry Stimson. The testimony was voluminous and covered a whole range of topics. In describing his rewrite, General Crowder describes a 1911 removal statute for revenue inspectors as his inspiration.

The 62nd Congress, in 1912, considered but did not pass any of the revisions suggested by General Crowder. The 63rd Congress, in 1914, also considered rewriting the laws of war, but failed to pass any substantive changes. Removal, as a discrete topic within the larger confines of military was still strong consideration.

In 1916, with war clouds in Europe drawing the United States ever closer to a state of armed conflict, Congress again undertook to revise the Articles of War. General Crowder again attended committee hearings with the Secretary in support of his proposal for a complete revision.

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8 *Comparison of Proposed New Articles of War with the Present Articles of War and other related statutes.* Pg 1. (B. Gen. Crowder 1912) (containing the letter of transmittal to Congress signed by Secretary of War Henry Stimson) (Herein after “1912 Comparison”). The 1912 Comparison is a bound volume but includes H.R. 23628, a bill in the 62nd Congress.

9 The 1912 testimony of General Crowder was so complete and comprehensive that in 1914, when Congress was again considering the proposal for a rewrite that the Senate Committee did not take testimony, simply relying on the 1912 House Committee hearings. The 1914 Senate Report reads, on pages 19-20:

The House committee conducted a series of hearings on H. R. 23628, between May 14 and May 27, 1912. The report of these hearings was printed, and a copy of the hearings is herewith transmitted and printed as an appendix to this report. Printed in the report of the hearings by the House committee is a letter of the then Secretary of War, Mr. Stimson, presenting the project of revision and recommending its enactment; and likewise a very full exposition by the Judge Advocate General of the Army of the necessity for the revision, its scope and character, and the principal changes embodied therein. No hearings were conducted by the Senate committee in connection with S. 6550

10 *See 1912 Comparison*, pg. 61-62 (identifying Section 33 of the Act of Mar. 3, 1911, regarding removal for revenue inspectors as source of Army removal proposal). *See Also* Hearings before the House Committee for Military Affairs on the revision of the Articles of War, pg. 98-99 (62nd Congress, 1912) (Crowder “I have taken that legislation and built an article of war upon it.”)

11 There were a number of small changes which the 63rd Congress added to the proposal submitted by General Crowder in 1912. Because of small additions to the comprehensive code proposal, the removal provision, which had been numbered Article 116 in Crowder’s proposal, was numbered Article 120 in the 1914 Senate bill.

12 Indeed, the removal statute was listed as number 13 of 16 of the “more important changes” signaled by the bill which passed committee consideration. 56, accompanying S. 1032 – report no. 229, pg 20-22 (63rd Congress, 1914)
revision. See generally Hearings before the House Committee on Military Affairs on the revision of the Articles of War (64th Congress 1916) ("1916 Report"). This time the General engaged Congress in a substantial dialogue, including letters and testimony, proposed drafts, analysis by the General Staff, and memorandums from the War College. Little of those materials remain available, but their presence is clearly referred to throughout the committee hearings. Like the 1914 consideration of the proposed revision, the 1916 Congress relied heavily on the groundwork laid by the 1912 hearings. Congress finally passed the Articles of War, including a removal provision at Article 117. Congress would also revise the Articles of War in 1918-1919, documenting the experiences learned in World War 1. The Articles, as finally enacted in 1920, stood the Army in good stead through World War 2, into the second half of the 20th century.

Civil or Criminal?

When General Crowder submitted his proposal for a removal statute, his draft provided only for the removal of civil suits in state court13. Indeed, Crowder specifically narrowed his removal provision, where the 1911 revenue inspector had provided for removal of both state criminal and state civil actions. It is likely that General Crowder narrowed his proposal to avoid sinking into a quagmire of criminal jurisdiction that hampered the Congress in 1916.

Much of the Congressional consideration in 1916 was focused on the problem of concurrent jurisdiction between the civilian state courts and courts-martial14. Among the proposals floated was an extension of court-martial jurisdiction because, at the time, courts-martial could not try soldiers for civilian crimes15.

The Army’s General Staff, with some reservations on the part of General Crowder, sought to take for themselves a general court-martial power for all soldiers for all offenses. General Crowder’s previous proposal in 1912 was limited to those crimes committed in places where regular American courts were not constituted, such as in a foreign combat operation or in an American possession like Guam or the Philippines which did not have regular state courts. The House Committee was gravely concerned that such a grant of power would set precedent for a general and exclusive court-martial power16. It also raised questions about the subordination of the military to the civil power.

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13 See 1912 Comparison, at 61. (containing Crowder’s proposed text authorizing removal, numbered as Article 116, laid side by side against the revenue inspector statute. Act of Mar. 3, 1911 (36 Stat., 1097))

14 The question of concurrent, or exclusive, court-martial jurisdiction also occupied the Supreme Court in the contemporary case of Caldwell v. Parker, 252 U.S. 376 (1920) (soldier convicted of state murder charges argued that with the new 1916 enactment of Article of War, and state of war, state court had no jurisdiction to try soldier).

15 In this proposed extension, modern army jurists will see the seeds of the current UCMJ worldwide jurisdiction germinating.

16 The following exchange took place in front of the House Committee.

General Crowder. In the first revision of these articles presented to the Congress [in 1912] it was provided that courts-martial might try persons subject to military law for capital crimes committed outside the geographical limits them subject to be tried exclusively in civil courts for all capital crimes committed within the geographical limits of the States of the Union and the District of Columbia. I have never sought to carry the request further. The purpose is to give our soldiers committing these offenses a forum where they will be
Despite the array of complex issues, the removal statute, almost exactly as now existing, emerged. This is remarkable where it is was not what the original drafter had intended, but rather the thoughtful action of Congress addressed to solve several problems, including the extension of criminal court-martial jurisdiction, and the protection of soldier. Effectively, Congress drew a compromise that allowed any soldier threatened, civilly or criminal in state court, to achieve the neutral protection of a civilian federal court, to act as a forum.

**Too Many Cooks**

The Army owes a great deal to General Crowder, not the least for his skills as a draftsman, his patience as a lobbyist, and his dedication to the craft of law. Indeed, the comprehensive re-write was almost exclusively the work of General Crowder over the long term\(^\text{17}\).

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surrounded by adequate constitutional or statutory safeguards. They would be so surrounded in a trial by civil courts within the geographical limits of the States of the Union and the District of Columbia, and, therefore, I did not think of asking that the law be changed in respect of trials within these geographical limits, retaining, in that regard, the existing law, which is based upon the principle that the Army, under all circumstances, in so far as it is practicable, should live in a state of subordination to the civil power. Perhaps there is no single article of this revision which has been more carefully considered, and there has been little disagreement in the discussions we have had respecting this article as to the necessity for giving courts-martial jurisdiction to try capital offenses committed outside the limits named.

The War College Division desires the extension of concurrent jurisdiction to go further and include capital crimes of persons subject to military law whenever and wherever committed. They would have that jurisdiction under any and all circumstances. I am afraid I did not succeed as well as I should in stating to the Senate subcommittee the reasons that the General Staff advanced for this change, and I have stated to the committee of the General Staff that considered this revision that when I appeared before the House committee that they might have an opportunity to defend their recommendation before the House Military Committee. I now make that request in order that you may, if you see fit, ask the Secretary of War to send before you as witnesses, members of the committee of the General Staff which worked upon this revision and any others to testify before you as to the necessity for this further extension which they stand for. Personally I would not object to having the jurisdiction of courts-martial made absolutely concurrent, with the courts of the States and the District of Columbia under all circumstances so as to include offenses committed within the geographical limits of the States of the Union as well as without such limits. It would not lie well within the mouth of a military man to object to this extension if Congress were disposed to grant it, for I do not think that such extension of jurisdiction would be abused

Mr. Gordon. I believe that Congress would be very reluctant to confer that additional jurisdiction within the territory of the United States.

*Hearings before the House Committee on Military Affairs on the revision of the Articles of War*, pg 43-44 (64th Congress 1916).

\(^{17}\) In 1916 Crowder explicated more fully is role in drafting and lobbying for the revision:
However, in 1916 it became apparent that Congress was really, finally serious about fixing the laws relating to the Army. Crowder appeared in front of both House and Senate Committees, not only rehashing his work in 1912 and 1914, but also going over individual lines of text in committee prints.

Crowder also allowed the greater Army input into the final product, taking the law out of the expert hands of the Army’s lawyers and giving the whole Army ownership of its new code. Indeed the General Staff and the War College had a small tiff over the extension of court-martial jurisdiction\textsuperscript{18}. It appears, from Crowder’s testimony that he was relatively indifferent and open-minded, allowing both sides to make their argument. The War College was only recently founded (first class 1904) as a strategic think-tank to advance the Army’s critical thinking. General Macomb actually participated in the lengthy exchange of memorandums, letters, policy papers, and other correspondence exchanged both before and after the committee hearings\textsuperscript{19}. In a memorandum supporting his different opinion, the head of the War College quoted General Crowder at his earlier appearance before the Senate Committee\textsuperscript{20}.

That the revision as a whole has had very careful service consideration. I drew this revision first in 1903, when I was an officer of the General Staff. It slept in the files of the War Department for a good many years, until 1911, when I resumed legal work in the Army and revived the subject. The revision was presented to Congress in April, 1912, and was rather exhaustively considered by the House Military Committee. You will recall that Congress had a rush program of work which held it here until August 24, and the committee never made a formal report on the bill. It is always easy to misjudge the sentiment of a committee, but so far as the expressions during the progress of the hearings went, I concluded, and I think I was justified in doing so, that I was proceeding almost by unanimous consent, and an informal suggestion was made that the Unanimous-Consent Calendar be opened up to it. There seemed to be some necessity for immediate action to meet a situation that existed in Texas at the time, in connection with the efforts of a Regular Army division which was operating down there to convene a court-martial. Relief legislation was introduced in the Senate. I took the opportunity to extend it so as to give me all of the articles which pertain to the military judiciary, and that bill was enacted almost immediately. There has scarcely been a session of Congress when some piecemeal legislation has not been reported Senate then took up the revision measure and passed it three times. So it has had all the consideration you could expect, and there are very few things about the code that have not been explored and passed upon by men who are in earnest in their efforts to get this relief as early as possible.

\textit{Hearings before the House Committee on Military Affairs on the revision of the Articles of War, pg 50-51 (64th Congress 1916).}

\textsuperscript{18} See note 15, supra.

\textsuperscript{19} Not all of the materials survive. However, they are clearly referenced by the speakers and members at the committee hearings. Additionally, the 1916 Report, most invaluably, reproduces much of the correspondence.

\textsuperscript{20} The relevant portion of the committee hearing is as follows:

General Crowder: The General Staff has further revised the article so as to vest this jurisdiction in courts-martial, thus making the jurisdiction of the court-martial concurrent with the civil courts, as to both capital and noncapital crimes. I do not concur in this extension of the court-martial’s jurisdiction, and the Secretary of War has expressed disapproval of the change in his letter transmitting this revision to the Congress.

In other words, the General Staff has undertaken to say that capital crimes committed here at Fort Myer or anywhere else within the geographical limits of
The head of the War College, Brigadier General M. M. Macomb, specifically asked that the Army command structure include and forward his memorandum to the Congressional Committee, which subsequently published it. The fact that Congress had such a wide range of professional opinions and expertise to draw from certainly lends credence and finality to a removal provision which has faced no significant or substantive amendments since it was enacted.

**The “Typical Case”**

So what then, is the typical case for the application of this military specific removal statute? Crowder, in his first unveiling of the removal provision in 1912 credited civil suits against soldiers as the heart of the matter. Crowder continued to remain concerned about soldiers the country shall be tried as well by court-martial as by civil courts. We never have had that law, and I doubt very much whether it is desirable to divorce the Army to that extent from accountability in the civil courts. But I am very much in favor of doing it when the Army is outside of our geographical limits proper: and that is the proposition that I stand for, and not the proposition that is here submitted.

The Chairman. What reasons do the General Staff assign?

General Crowder. I have not seen any reason. They simply recorded a recommendation. I can easily understand the reason, viz, a desire that the Army may handle its own criminal business, and doubtless border conditions to the south of us entered into their consideration and influenced their conclusions. I concede the necessity for autonomy in these matters when the Army is serving under unusual conditions, away from the protection of constitutionally guaranteed rights

Senator Colt. Yes.

Gen. Crowder. But not when they are serving here. I think that here in the United States proper the Army should be under the same accountability as civilians for capital crimes.

Senator Colt. That runs all through the common law, the civil law, in regard to capital crimes, I think. Of course, I can understand that the General Staff, perhaps, would like to take all the power they could in a court-martial.


21 The inaugural introduction of what would become Article 117 of the Articles of war reads as was delivered in the evening session of May 27, 1912 and reads as follows:

General Crowder. We come now to an important article, and one which is new to the code. There are numerous statutes which devolve civil duties upon the Army. Three sections of the Revised Statutes devolve duties of this character upon the Army in the protection of civil rights. Five sections similarly devolve duties upon the Army in the protection of Indians. There are two or three enactments which permit the Army to be utilized for the preservation of public lands, and other provisions of law give the Army duties respecting public health, the preservation of neutrality, and, of course, we have to bear in mind the extensive employment of the Army in time of riot and civil disturbance.
being subjected to civil suits. To that end he is also famous for having written and championed the Soldiers and Sailor’s Civil Relief Act of 1918, which put a 6-month freeze on litigation against any soldier who went to war, voluntarily or not. The act was limited and the sunset provision terminated the Act approximately 18 months after hostilities ended\textsuperscript{22}.

In the performance of these duties officers of the Army come into very close relations with the civil authorities and with the people, and not infrequently are sued in local courts on account of acts done by them under the color of office or military statutes.

Instances of civil suits in State courts of this character are found in the case of Capt. John C. Bates, Infantry-now lieutenant general, retired-sued in 1877 for seizing liquors about to be introduced into Indian country, the seizure being made under the orders of the department commander; in the case of Col. John Brooke-now major general, retired-for a similar seizure on the reservation of Port Union, N. Mex.; and there is the recent case of Capt. Biddle, of the Cavalry, sued for executing an order of the post commander to expel stock found trespassing on the military reservation of Fort Meade, S. Dak. Many other cases might be cited.

When any civil suit is commenced in any court of a State against a revenue officer of the United States, on account of any act done under color of his office, he is, by the act of March 3, 1911, given the right to transfer the litigation to a United States district court. I have taken that legislation and built an article of war upon it, and am asking for a corresponding provision in the case of officers and enlisted men of the Army that are sued in civil courts of a State on account of acts done in the performance of official duty. This is what new article 116 [enacted as 117 four years later] is intended to accomplish. It simply paraphrases the act of Congress of March 3, 1911.

It seems to me that the request is a reasonable one. The authority of an officer or soldier or other person in the military service for acts done in his official capacity is measured by the Federal law, and it seems to me just as well as expedient that when his action in line of duty or under color of his office and military status is brought in question by means of a civil suit there should be a right to transfer to a Federal court.

Mr. Watkins. I think that would be proper if you would let it be shown conclusively that it was for his acts performed in his military capacity, but if he should go out in his own individual capacity, he ought to be responsible.

General Crowder. I think the new article is clear in that regard. I have said “on account of any act done under color of his office or status or in respect to which he claims any right, title, or authority under any law of the United States respecting the military forces or under the law of war.” Is not that sufficient?

Mr. Watkins. I think if he shows clearly that it is in the line of his military duty, that would be proper.

\textit{Hearings before the House Committee for Military Affairs on the revision of the Articles of War, pg. 98-99 (62nd Congress, 1912).}

\textsuperscript{22} The Civil Relief Act, however, proved so popular and effective that Congress re-enacted almost the exact same statute in 1940 before World War 2. The act was improved upon, and expanded. It, and its successor legislation are now the bane of legal services attorneys employed by the military the world over. Within the last ten years,
The second part of this saga will be familiar to the military reader, the four year revitalization of military law which became, in 1950, the Uniform Code of Military Justice (UCMJ). Under the Articles of War, the removal statute was integrated with the military justice laws, but after the UCMJ was enacted the removal provision was separated. It would float in two different places within the U.S. Code before coming to rest at its current place in Title 28 amongst the other removal statutes 23.

Post-enactment legislative history is normally worthless in determining the reach of a statute, or its drafter’s intent24. However, in this case Congress actually cleaned up the language of the removal statute. It also re-enacted it. Meaning that the later legislative history is important to understanding the increased jurisdictional basis that §1442A affords to servicemen. In one relevant exchange, General Hoover appeared in front of the House Committee drafting the UCMJ25. While there, General Hoover stated that the “typical case” under the statute is when a

Congress extended and expanded the act, against the states, to ensure its continued effectiveness in the era of the War on Terrorism and increased service by reservists and guardsmen. See Servicemembers Civil Relief Act (Title 50 appendix of the United States Code, § 501 et. seq.)

23 “[§1442A] has since undergone several inconsequential amendments and has appeared in three different titles of the Code.” Dorko, 247 F.Supp at 867.


25 That passage reads as follows:

General Hoover: …Article 117, relating to the removal of civil suits to the United States civil courts in certain cases has been modified, with an attempt to clarify the language, without change in substance in any regard. Reference to an act of Congress approved March 3, 1911, is not a modern reference and has been eliminated. We are providing that the removal shall be in the manner prescribed by law.

Mr. Elston. This, of course, could not enlarge the jurisdiction of the civil courts?

General Hoover. This is not intended to enlarge the jurisdiction or change the methods of procedure in any respect.

Mr. Elston. In other words, if the court has a rule that suits under a certain amount shall not be entertained, this would not change that rule?

General Hoover. This would not change the present effect of the article in any way. The typical case arising under this article is where a soldier while on guard duty shoots and kills a man, perhaps off a military reservation, at a place where the State courts have jurisdiction. The State court seizes him and proceeds with a homicide trial. This article gives the soldier a right to contend that what he did was under color of his authority as a soldier and that because his act involved the performance of a duty under the laws of the United States he has a right to have the cause taken into the courts of the United States as distinguished from the courts of the State.

Mr. Brooks. But you say the court must otherwise have jurisdiction to handle that type of case?

General Hoover. Oh, yes.
soldier on duty shoots a man and might be prosecuted on state manslaughter charges. This certainly represents a long journey, from General Crowder’s concerns of civil suit to General Hoover’s idea that the statute protects from criminal prosecution of soldiers. General Hoover’s broad jurisdictional understanding of the removal provision is much more in keeping with the 1916 Congressional Committee’s view.

Indeed, General Crowder, though not endorsing criminal jurisdiction in his draft, was questioned by the committee about criminal removal. The Committee drew to the attention of General Crowder to a Pennsylvania state court-martial where a national guardsman killed a striking worker on orders. See 1916 Report, pg 44. The court-martial relieved the guardsman of criminal responsibility, because he was following orders and thereafter the local state civilian court tried the soldier. The Pennsylvania Supreme Court held that the military nature of the crime gave the state court-martial sole jurisdiction.

**Hot and Cold**

Like the legislative evolution of §1442A, the sparse\(^{26}\) case law also is varied on the topic of removal. Similarly, though Congress was distracted with jurisdictional problems, the courts have been distracted with immunity problems and the parallel case law under the general federal removal statute §1442.

The earlier cases seem dismissive of removal for federal officers, even military specific removal\(^{27}\). Later cases show a much more receptive audience\(^{28}\). It is a common sense

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Mr. Brooks. So that a soldier who was charged with embezzlement and claimed that the transaction was under color of his authority as a soldier, if the sum was under $3,000--isn't that the limit now, in trial by Federal courts-

General Hoover. If I have given that impression--

Mr. Brooks. They would not have jurisdiction.

General Hoover. I should like to correct that. I believe that any cause may be taken under this article into the appropriate Federal court having jurisdiction of the person, regardless of other limitations as to jurisdiction.

Mr. Brooks. The test is whether or not he is in the uniform of a soldier and whether it is under color of his authority?

General Hoover. So understand it, yes, sir.

*Hearings before House Committee on Armed Services on sundry legislation affecting the Naval and Military establishment, pg. 2135-2126 (80th Congress 1947).*

\(^{26}\)**In Re: Matter of Marriage of Smith**, 549 F.Supp. 761, 765 (W.D.Tex. 1982) (concluding that a retired servicemen’s military pension is not sufficient federal element to support the exercise of federal jurisdiction)


observation that the courts are skeptical of remote applications\textsuperscript{29} of the statute\textsuperscript{30}. It appears that the skepticism regarding the military has eased since the Vietnam War wrecked large social change across America.

**Uncertainty**

There is no consensus about when the statute may be used. The text of §1442A (military specific) is identical to the general federal officer removal statute, excepting the words “or status” at the end of the list of eligible criteria\textsuperscript{31}. The lack of illuminating case law also presents problems\textsuperscript{32}.

There is also a related question about whether a federal defense is necessary to gain access to the federal forum\textsuperscript{33}. This problem normally arises out of the subsequent consideration of a federal immunity defense. If a federal forum is proper, even in the absence of a federal defense\textsuperscript{34}, it leads to odd, but not necessarily unwelcome circumstances\textsuperscript{35}.

It can be stated with certainty that 28 U.S.C. § 1442A provides an independent basis for jurisdiction; “a district court has jurisdiction to hear an action removed pursuant to 28 U.S.C. § 1442a even if the initial action could not have been commenced by the plaintiff in a federal

\textsuperscript{29}Florida v. Simanonok, 850 F.2d 1429 (11th Cir. 1988) (summarily dismissing, without analysis claim of military retiree seeking removal of state drunk driving charge); Smith 549 F.Supp. at 764-765 (pondering that a military pension might, technically support removal, but declining to exercise jurisdiction for essentially prudential reasons).

\textsuperscript{30}But See Margan v. Chemetron Fire Systems, Inc. 954 F.Supp. 1127, (E.D.Va. 1997) (estate of coast guardsmen entitled to removal in suit relating to deceased’s assignment to defense contractor for testing of sprinkler system); Johnson v. Carter, 939 F.2d 180 (4th Cir. 1991) (policeman who pulled over admiral and was rude sued for defamation; court allowed removal even though US Attorney’s certification that admiral was within scope of duties was “incredible”).

\textsuperscript{31}The language of §§ 1442(a)(1) and 1442a are strikingly similar. With regards to the scope of the actions removable, the only difference between the two sections is the addition of the words “or status” to § 1442a. Historically, however, the courts have not interpreted this addition as being remarkable. When called upon to interpret the scope of § 1442a (or its predecessors) courts have routinely referred to cases involving § 1442 (or its predecessors) for guidance.

\textsuperscript{32}Georgia v. Westlake, 929 F. Supp. 1516, 1519 (M.D. Ga 1996). See Also Ohio v. Dorko, 247 F.Supp. 866, 868 (N.D.Ohio 1965) (“It is contended that the words 'or status' which follow 'under color of office' in Section 1442a indicate an intent on the part of Congress to broaden the protection afforded members of the armed services.”)

\textsuperscript{33}Puerto Rico v. Santos-Marrero, 624 F.Supp. at 310 (“[The Court] agree[s] with the assessment by the Third Circuit Court of Appeals that allegation of a federal defense is not essential for removal and that the original removal statutes were enacted not so much to provide federal forums for federal defenses, as to protect federal officers from interference with the operations of federal government by the State.”)

\textsuperscript{34}A result almost dictated by Willingham v. Morgan. “[T]he test for removal should be broader, not narrower, than the test for official immunity,” Willingham v. Morgan, 395 U.S. 402, 405 (1969).

\textsuperscript{35}Maryland v. Chapman, 101 F.Supp. 335 (D.Md. 1951) (state prosecutor litigating state criminal manslaughter charges against air force pilot for runway mishap—case tried to federal judge even absent federal defense).
It is also a certainty that the actual application of the statute is mechanical. Any court faced with a removal argument ought to follow 28 U.S.C. § 1455, the procedural statute for removal for criminal cases. Even without the benefit of the user-friendly niceties of §1455, the burden is upon the non-removing party to disprove a plausible federal entitlement.

A better policy

It seems better policy to, in light of the lengthy legislative history, recognize that the statute is simply protection for servicemen. In the more modern cases, the Courts have also been animated by the military nature underlying the military specific statute. One court noted that it would be “inimical to discipline of the Armed Forces and unfair to the individual involved” to make the servicemember speculate about the validity of orders he was acting under.

36 Mir v. Fosburg, 646 F. 2d 342 344 (9th Cir. 1980) (military doctor suing superiors on state law grounds—removal proper, immunity not necessarily coextensive).
37 28 U.S.C. §1455 is the procedural statute governing removal of criminal cases to federal court. It also applies to any of the many variations contained within the general federal officer removal statute. §1455 has a number of devices helpful to a federal officer seeking removal, including immediate and automatic removal to federal custody by writ of habeas corpus. The section also provides that the state court may not, after notice is filed, enter final judgment. It also provides for a hearing in federal court on the application for removal, in which only if the notice facially does not make out a plausible claim, may the hearing be denied.
38 §1455, of course, by its own terms does not apply to civil removal. However, it is in some regards inconsistent with the precise terms of the more specific § 1442A. For example §1442A allows removal at any time prior to final judgment, where §1455 encourages early removal, requiring good cause for late application. The good policy is to apply §1455 as much as possible, without contradicting §1442A.
39 The burden would be upon the Plaintiff to allege and prove that Defendant, if acting under the color of his office or status, had no right, title or authority to do the acts complained of because of some statutory limitation upon his powers, or if such action was within powers granted, that the exercise of the granted power was constitutionally void.
40 E.g. Cortright v. Resor, 325 F.Supp. 797 (E.D.N.Y. 1971) (Class Action suit by soldier against Secretary of the Army based on inappropriate use of otherwise lawful discipline to suppress free speech—speaking of “absolute right” of removal); Gilbar v. United States, 108 F.Supp.2d 812 (S.D. Ohio 1999) (Reservist sues other members of company for defamation and libel); Penagaricano v. Llenza, 747 F.2d 55 (1st Cir. 1984) (Puerto Rican technician suing for discrimination—removal proper but noted only in passing, ultimately dismissed as nonjusticiable military matter); Jones v. Newton, 775 F.2d 1316 (5th Cir. 1985) (medical malpractice suit by estate of airman killed in off-post motorcycle crash); Sulger v. Pochyla, 397 F.2d 173 (9th Cir. 1968) (Taxi and Limousine business sues Base Commander and Judge Advocate for slander after they forwarded complaints about service from soldiers to state licensing board); Howard v. Sikula, 627 F.Supp. 497 (S.D.Ohio 1986) (Air Force Reservist sues underlings for complaining to group Commander of planned sick-in/protest); Gamage v. Peal, 217 F.Supp. 384 (N.D.Cal. 1962) (Military officer ordered to report for driver’s license fitness exam sues military doctors for tortuous hospitalization and for defamatory medical report).
41 Montana v. Christopher, 345 F. Supp. 60 (D. Mont. 1972) (Airman, under orders, illegally moved unlit trailer. It was undisputed that there was an emergency situation in regards to a pending flood and snow. Airman notified superior officer of broken lights, ordered to continue.)
“[T]here may conceivably arise a situation in which the conduct of a member of the armed services is better characterized as an action under color of status rather than under color of office.” Dorko, 247 F.Supp. at 868. (reserving for another day the significance of addition of words “or status” as differentiated from general federal officer removal statute).

The confusion about the exactness of the statute’s description of duty would be alleviated by erring on the side of the servicemember, as the congressional committees intended.

“Congress in this field of removal statutes knew what it meant and knew how to state what it meant. More particularly, Congress must have had something specific in mind by including, within the realm of removable cases, those based merely upon “status” as a member of the armed forces. The fact that Congress felt the need to enact, maintain, move, and keep a special removal statute, specifically targeted at military members, gives them a special status to be considered.

The canons of statutory construction in particular command that §1442A and the military personnel it applies to should be given an elevated position. The Antisuperfluousness canon requires that a court read a statute so that no part of the statute or language is left without purpose. §1442A (military) and §1442(a)(1) are almost identical, except the words “or status” at the end of the list. It would literally read the words out of the statute if the only different portion of the statute were given no different effect or construction from its identical brother statute. The military removal statute must be read in comparison to its brother.

The general federal removal statute is long and complex. The general statute offers several slightly different ways that the hook of federal jurisdiction might attach. Some of the hooks require a federal defense others may not. There is also a lengthy procedure for determining whether a claim of federal jurisdiction may be made, requiring the notification of the U.S. Attorney who may chose to certify the federal duties, or may even intervene to defend the federal actor. The military removal statute is straightforward and puts no burden upon the claimant, other than a simple pleading burden to allege federal elements.

The Congressional Committees cited above expressed concern, on several occasions, about the reach or overreach of federal jurisdiction. Nonetheless, the Congress ultimately enacted and re-enacted a protective statute just for the military. The statute is simple to apply, not requiring any certification of duties, or the participation of the U.S. Attorney. Moreover, the federal jurisdiction takes hold immediately, requiring the Court to keep the case unless the statute facially does not apply. Moreover, the non-military litigant bears the heavy burden of disproving

44 “[A] more specific statute will be given precedence over a more general one, regardless of their temporal sequence.” Busic v. United States, 446 U.S. 398, 406 (1980)
45 “The rule against superfluities complements the principle that courts are to interpret the words of a statute in context. See 2A N. Singer, Statutes and Statutory Construction § 46.06, pp. 181-186 (rev. 6th ed. 2000) (‘A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .’ (footnotes omitted)).” Hibbs v. Winn, 542 U.S. 88, 101 (2004).
a plausible claim of federal jurisdiction. Essentially, for the select class of persons protected by the statute it is extremely user-friendly. This evinces a policy for the federal courts to ensure the protection of military members\(^{46}\), even if there is no federal immunity or defense which would automatically dismiss the case.

Indeed, there is no doubt that Congress, under Article I § 8, of the Constitution, possesses extraordinary and complete power to govern and regulate the military in an exclusive fashion. Congress could easily have enacted a statute placing military members out of the power of the state courts at all times, worldwide, without reference to the nature of the offense. “In an unbroken line of decisions from 1866 to 1960, this Court interpreted the Constitution as conditioning the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused.”\(^{47}\) Indeed, the current state of the law is that the Uniform Code of Military Justice applies to its members, worldwide, all the time, whether on-post or not, service-connected or not. Constitutionally, under the Supremacy Clause, any exercise of federal jurisdiction supersedes any state power. The only difference between reality and the posited hypothetical (complete removal of military members from state court jurisdiction) is that the jurisdiction of the court-martial is not exclusive. Therefore, a court must start from the constitutional position that the state courts may only have as much jurisdiction over military members as the Congress allows.

**Conclusion**

Military status is within the plain text of the statute to confer federal jurisdiction. It is supported by a Congressional policy which has only grown more protective of military members, especially since the War on Terrorism\(^ {48}\). Nor, if the argument is believed, is it necessary for a federal defense to be present to achieve the shelter offered by the federal civilian courts as a forum\(^ {49}\). Indeed one recent case offers the model of a statute simply and directly aimed at the protection of servicemen\(^ {50}\).

As a practical matter unless military lawyers are more familiar with the statute, and at least able to advance, in the proper parlance, the arguments for removal the case law and rights will never develop. Therefore it is urged that the military legal community take up the statute as a useful tool when the opportunity presents itself.

\(^{46}\) “It may well be that military personnel require greater protection from potential local interest and prejudice than the civilian federal employee, for the military member is usually a stranger to the state forum.”\(^ {\text{Ohio v. Dorko, 247 F.Supp. 866, 868 (1965)}}\)

\(^{47}\) Solorio v. United States, 483 U.S. 435, 439 (1987) (overruling prior case that offense must be “service-connected” for court-martial to have jurisdiction).


\(^{49}\) In the manner of Maryland v. Chapman, supra.

\(^{50}\) Eddie Watkins v. United States, unpublished. Docket No. 3:08-cv-746-WHB-LRA (S.D. Miss. March 10, 2009) (Man charged with Manslaughter institutes civil complaint against lawyer court appointed to defend him, arguing ineffective assistance and 8 months of abandonment of the case. Period of abandonment occurred while lawyer, member of national guard, was deployed to Bosnia. United States stepped in to defend action against its officer.)