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ESSAY

OFFICIATING REMOVAL

LEAH M. LITMAN[†]

For the last several years, the Commonwealth of Pennsylvania has quietly attempted to curtail capital defendants' representation in state postconviction proceedings. In 2011, various justices on the Pennsylvania Supreme Court began to call for federally funded community defender organizations to stop representing capital defendants in state postconviction proceedings.¹ The justices argued, among other things, that the organizations' representation of capital defendants constituted impermissible federal interference with state governmental processes and burdened state judicial resources.² The court also alleged the community defender organizations were in violation of federal statutes, which only authorized the organizations to assist state prisoners in federal, but not state, court.³ It did not take long for the Philadelphia District Attorney's Office to pick up on these signals.⁴ The District Attorney's Office filed suit in state court to preclude all federal community defender organizations from representing defendants in state postconviction proceedings.⁵ But after the community defenders organization removed the suit to federal court, the District Attorney's Office voluntarily dismissed the case.⁶

Then something curious happened. Instead of giving up on the effort altogether, the Pennsylvania Supreme Court, sometimes on its own motion

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¹ See *infra* Part I.B.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

and sometimes at the invitation of the District Attorney's Office, issued orders disqualifying federal community defender organizations from representing prisoners in individual state postconviction proceedings.⁷ The orders disqualified the organizations on the ground that federal law did not authorize them to assist in state postconviction proceedings.⁸ By pursuing the argument in this way, the Commonwealth sought to ensure the issue would be heard in state, not federal court. Under the general removal statute, state postconviction proceedings cannot be removed to federal court,⁹ nor can disqualification motions ancillary to those proceedings be removed to federal court. The community defender organizations have instead sought to remove these cases under a less well-known removal statute providing for the removal of suits directed against acts under color of a federal office.¹⁰

The Pennsylvania litigation is fascinating for a number of reasons. The litigation involves serious allegations about the federal community defenders' actions in state court and whether federal law permits such organizations to represent state prisoners in state court. The case also raises a litany of interesting federal courts questions, for example, whether the statute regulating community defender organizations contains a private right of action that allows the Commonwealth to sue to enforce it.

This Essay focuses on a more basic question. Do federal courts have the power to hear the Commonwealth's claims that the defender organizations should be disqualified from individual postconviction proceedings because their participation in those proceedings violates a federal statute? Several federal district courts reached different conclusions.¹¹ The U.S. Court of Appeals for the Third Circuit recently held the suits were removable under a little-known statute permitting removal of suits against federal officers.¹² While the Third Circuit's bottom line is sound, the Pennsylvania litigation

⁷ *Id.*

⁸ *Id.*

⁹ Compare 28 U.S.C. § 2254 (2012) (authorizing limited habeas proceedings in federal court from state postconviction proceedings), with 28 U.S.C. § 1441 (2012) (authorizing removal of civil actions). See also *infra* Part II.A.

¹⁰ See *infra* notes 60–63 and accompanying text.

¹¹ Compare, e.g., *In re Pennsylvania v. Mitchell*, No. 13-cv-1871, 2013 WL 4193960 (E.D. Pa. Aug. 15, 2013) (holding that removal was proper under 28 U.S.C. § 1442(a) and § 1446(g)), with *In re Commonwealth's Request for Relief*, No. 13-cv-561, 2013 WL 4458885 (M.D. Pa. Aug. 16, 2013) (denying removal under 28 U.S.C. § 1442(a)), *rev'd sub nom. In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457 (3d Cir. 2015).

¹² See *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 474-75 (3d Cir. 2015) (holding that the disqualification proceedings were properly removed under 28 U.S.C. § 1442(a), the federal-officer removal statute).

illustrates several gaps in our jurisdictional policy—gaps that the federal-officer removal statute often fails to address. First, the Pennsylvania litigation illustrates how jurisdictional rules other than the well-pleaded complaint rule ensure that serious issues of federal law may never find their way into federal court. Second, the Pennsylvania litigation shows how basic jurisdictional rules that purportedly ensure against state-court bias—such as the district court’s federal question jurisdiction—fail to address very real possible claims of state-court bias.

I. CASE BACKGROUND

This Part provides some general background on how federal community defender organizations (FCDOs) became involved in state postconviction proceedings and triggered the Pennsylvania litigation.

A. Federal Defenders and State Postconviction Proceedings

Understanding the Pennsylvania litigation requires some background on state postconviction proceedings. Postconviction proceedings occur after a defendant’s conviction has become final, meaning after the culmination of direct review.¹³ Postconviction proceedings are often the first occasion where defendants may raise claims of constitutional error that depend on evidence outside the trial record, including claims that trial counsel was constitutionally ineffective.¹⁴ Although state postconviction proceedings may be the first opportunity for raising these claims, the Supreme Court has held that, as a general rule, defendants have no constitutional right to counsel in postconviction proceedings.¹⁵

Because states are not required to appoint attorneys in all postconviction proceedings, defendants obtain representation in a variety of ways. Some

¹³ See *Greene v. Fisher*, 132 S. Ct. 38, 44 (2011) (“Finality occurs when direct state appeals have been exhausted and a petition for writ of certiorari from this Court has become time barred or has been disposed of.”). Sometimes postconviction proceedings may coincide with a prisoner’s direct appeals. See, e.g., *Martinez v. Ryan*, 132 S. Ct. 1309, 1314 (2012) (“While Martinez’s direct appeal was pending, the attorney began a state collateral proceeding by filing a ‘Notice of Post-Conviction Relief.’”).

¹⁴ See *Martinez*, 132 S. Ct. at 1315 (describing these proceedings as “initial-review collateral proceedings”); see also Eve Brensike Primus, *Effective Trial Counsel After Martinez v. Ryan: Focusing on the Adequacy of State Procedures*, 122 YALE L.J. 2604, 2608-11 (2013) (noting that procedural default rules frequently bar ineffective assistance of counsel claims and other habeas claims).

¹⁵ See *Coleman v. Thompson*, 501 U.S. 722, 752 (1991) (“There is no constitutional right to an attorney in state postconviction proceedings.”); see also *Martinez*, 132 S. Ct. at 1315 (dodging the question of whether *Coleman* created a right to effective counsel in an ineffective assistance at trial claim).

states choose to appoint counsel for postconviction proceedings¹⁶ (but because states are not constitutionally required to appoint counsel, appointed counsel is not required to perform effectively).¹⁷ Defendants may alternatively obtain private representation,¹⁸ or may be represented by federal defender organizations.¹⁹

Federal defenders enter federal postconviction proceedings in several different ways. First, if the defendant was sentenced to death, federal law requires the appointment of counsel in federal postconviction proceedings.²⁰ Second, federal law provides that federal courts may, where “the interests of justice” require, appoint representation for “any financially eligible person” seeking relief in federal postconviction proceedings.²¹ Third, federal law provides that “[p]rivate attorneys shall be appointed in a substantial portion of the cases,” and that procedures for appointing private attorneys “may include . . . [a]ttorneys furnished by a defender organization established in accordance with . . . subsection (g)” of 18 U.S.C. § 3006A.²² Subsection (g) lists two kinds of defender organizations: federal public defender organizations and community defender organizations.²³

But state prisoners challenge their convictions in both state postconviction proceedings and federal postconviction proceedings. And attorneys appointed to represent defendants in federal postconviction proceedings may become involved in state postconviction proceedings for several reasons. For example, attorneys appointed in federal postconviction proceedings are up against a deadline that incentivizes immediate action after the culmination of direct review. The Anti-terrorism and Effective Death Penalty Act (AEDPA) establishes a one-year period of limitations for federal postconviction petitions that generally runs from “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.”²⁴ Although the “time during which a properly filed application for State post-conviction” relief is pending does not count toward that limitations period,²⁵ the window

¹⁶ See *Martinez*, 132 S. Ct. at 1319 (listing states that appoint counsel for collateral proceedings despite the lack of a requirement).

¹⁷ *Coleman*, 501 U.S. at 752.

¹⁸ See, e.g., *Maples v. Thomas*, 132 S. Ct. 912, 916 (2012) (describing a case in which a defendant obtained private counsel for postconviction proceedings).

¹⁹ See *infra* notes 20–28 and associated text.

²⁰ 18 U.S.C. § 3599(a)(1) (2008).

²¹ 18 U.S.C. § 3006A(a)(2)(B) (2010).

²² *Id.* § 3006A(a)(3)(B).

²³ *Id.* § 3006A(g)(2).

²⁴ 28 U.S.C. § 2244(d)(1)(A) (1996).

²⁵ *Id.* § 2244(d)(2).

between finality and the time to file a petition for federal postconviction review narrows quickly. The time preceding the filing of an application for state postconviction relief (which includes the time spent investigating potential claims) counts against the limitations period.²⁶ The time between when the state's highest court adjudicates a petition for state postconviction review and when the U.S. Supreme Court acts on a petition for writ of certiorari from the decision of the state's highest court also counts against the limitations period.²⁷ And an untimely petition for state postconviction review does not toll the federal statute of limitations at all.²⁸ In order to meet this short deadline, counsel for federal postconviction proceedings is often appointed near the culmination of direct review, especially if counsel is expected to investigate claims before raising them in a federal postconviction petition.

There are other reasons besides timing why federal postconviction counsel may become involved during state postconviction proceedings. The claims raised in the state postconviction proceeding may turn on the same facts as claims raised in the federal postconviction proceeding, and some claims will be raised in both the state and federal postconviction proceeding. Indeed, AEDPA greatly circumscribes when federal courts may collect new evidence in federal postconviction proceedings, and federal postconviction review is generally limited to evidence that is part of the state-court record.²⁹ Moreover, a federal court will only grant relief on a claim in a federal postconviction proceeding if the claim was properly raised and presented to a state court, and some claims may only be raised in postconviction

²⁶ See *id.* § 2244(d)(1)(A). The limitations period can also be extended when the Supreme Court recognizes a new right that is retroactively applicable to cases on collateral review; when the state has created an impediment to filing a petition for federal review; or when the factual predicate of a claim could not have been discovered earlier through diligence, but these scenarios will typically be rare. See *id.* § 2244(d)(1).

²⁷ See *Lawrence v. Florida*, 549 U.S. 327, 337 (2007) (holding that the statute of limitations does not toll during the pendency of a certiorari petition to the United States Supreme Court requesting review of denial of state postconviction relief). Thus, the period in which a prisoner waits to hear whether the Supreme Court will review the state court's decision in the state postconviction proceeding counts against the statute of limitations to file a federal postconviction petition.

²⁸ See *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005) (holding that because petitioner's state postconviction petition was untimely, he was not entitled to statutory tolling regarding his federal habeas petition).

²⁹ See 28 U.S.C. § 2254(e) (1996) (limiting circumstances where federal courts may grant evidentiary hearings in federal postconviction proceedings); *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398-1401 (2011) (review of claims raised in federal postconviction proceedings is limited to evidence produced in state proceedings and on state record).

proceedings.³⁰ Thus, counsel's ability to raise federal claims in federal court turns on her ability to raise and develop them in state court.

B. *Pennsylvania Postconviction Litigation*

In 2011, Pennsylvania Supreme Court justices began expressing concerns about federally funded defender organizations representing defendants in state postconviction proceedings. In Pennsylvania, federal law recognizes the community defenders organization as an organization that will provide indigent defense in federal court—the Eastern District of Pennsylvania has “designate[d]” the community defenders “to facilitate CJA [Criminal Justice Act] representation”³¹ and the Middle District of Pennsylvania designated the community defenders as an organization that may be appointed to represent habeas petitioners.³²

In *Commonwealth v. Spotz*, Pennsylvania Chief Justice Castille issued a concurring opinion criticizing the FCDO's involvement in state postconviction proceedings.³³ The Chief Justice maintained, among other things, that federal involvement led to “abusive” briefing practices and that it was not “appropriate, given principles of federalism” for “the federal courts [to] finance abusive litigation . . . that places . . . a burden on [the Pennsylvania Supreme] Court.”³⁴ The opinion accused the FCDO of “obstruct[ing] capital punishment in Pennsylvania at all costs”³⁵ by involving “five lawyers, an investigator, multiple mitigation specialists, and multiple experts” in *Spotz*.³⁶ The opinion emphasized the burden this placed on the state court—it “render[ed] this Court unable to accept and review about five discretionary appeals”—as well as the burden on “prosecutors” and “trial courts.”³⁷ The Chief Justice ended the opinion by calling for the Commonwealth

³⁰ See 28 U.S.C. § 2254(b) (1996); *Wainwright v. Sykes*, 433 U.S. 72, 84-85 (1977) (barring federal habeas corpus review where a state rule required petitioner's confession to be challenged at trial and petitioner proffered no explanation for his failure to object at trial).

³¹ *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 463 (3d Cir. 2015).

³² U.S. DIST. COURT FOR THE MIDDLE DIST. OF PA., CRIMINAL JUSTICE ACT PLAN, § VII, http://www.pamd.uscourts.gov/sites/default/files/cja_plan.pdf [<http://perma.cc/897R-LFL7>] (last visited May 1, 2015).

³³ 18 A.3d 244 (Pa. 2011).

³⁴ *Id.* at 334 (Castille, C.J., concurring). The concurrence also accused some federal defenders of unprofessional conduct in other cases. *Id.*

³⁵ *Id.* at 331.

³⁶ *Id.* at 332. Castille also maintained many of the claims were frivolous and deliberately underdeveloped. *Id.* at 335-36.

³⁷ *Id.*

to determine “whether . . . volunteer federal counsel . . . may properly be precluded from participation in state collateral proceedings.”³⁸

Subsequent opinions echoed these claims. In *Commonwealth v. Sepulveda*, the full court chastised the FCDO for, among other things, “proceed[ing] to Pennsylvania state court” rather than federal court.³⁹ The opinion also repeatedly and disapprovingly noted the number of attorneys and experts involved in the case.⁴⁰ In *Commonwealth v. Padilla*, Chief Justice Castille’s concurring opinion criticized the federal defender for filing an amicus brief in support of the petitioner’s claim, noting that “these sorts of extracurricular (indeed extra-national) activities by the FCDO cause delay in other state capital matters.”⁴¹ The Chief Justice has made similar comments to the media, in which he attributed problems with Pennsylvania’s death penalty system to the FDOC.⁴²

Unsurprisingly, the Philadelphia District Attorney’s Office (Commonwealth) picked up on these signals. After the *Spotz* concurrence, the Commonwealth filed suit in state court to bar FCDO attorneys from representing defendants in state postconviction proceedings.⁴³ The FCDO removed the case to federal court on the ground that the court had jurisdiction under 28 U.S.C. § 1331, the statute conferring jurisdiction over civil actions arising under the laws of the United States.⁴⁴ The Commonwealth then voluntarily dismissed the action.⁴⁵

After the case was dismissed, the Pennsylvania Supreme Court and the Commonwealth began to raise similar claims in individual postconviction proceedings. In *Commonwealth v. Mitchell*, the Commonwealth filed a motion to remove FCDO as counsel on the ground that the FCDO was

³⁸ *Id.* at 349.

³⁹ 55 A.3d 1108, 1151 (Pa. 2012).

⁴⁰ *Id.* at 1120 (“A third FCDO-secured mental health expert . . . met with appellant for a cumulative period of twenty hours”); *id.* at 1151 (“[T]he number of FCDO lawyers and witnesses involved and the extent of the pleadings[] suggest the undertaking was managed with federal funds”).

⁴¹ 80 A.3d 1238, 1290 (Pa. 2013) (Castille, C.J., concurring).

⁴² See, e.g., Ford Turner et al., *State’s Chief Justice Cites “Meddling, Intrusion” in Death Penalty Cases*, READING EAGLE (Dec. 22, 2014), <http://readingeagle.com/news/article/states-chief-justice-cites-meddling-intrusion-in-death-penalty-cases> [<http://perma.cc/56AH-7JV2>] (characterizing Castille’s comments as “blam[ing]” dysfunction in the death penalty system on “unethical intrusions and meddling by a group of federally funded attorneys.”).

⁴³ See *Commonwealth v. Spotz*, 99 A.3d 866, 882 (Pa. 2014) (describing the history of state court litigation regarding “the propriety of the FCDA’s activities in Pennsylvania state courts”).

⁴⁴ See Notice of Removal at para. 4, *In re Appearance of Federal FCDO in State Criminal Proceedings*, No. 11-7531 (E.D. Pa. 2011).

⁴⁵ See *Spotz*, 99 A.3d at 882 (noting that “the Commonwealth filed a notice of dismissal in federal district court” of its removed action).

“violating its funding obligations under federal law” and “the sovereignty of Pennsylvania” by assisting in state postconviction proceedings.⁴⁶ The Supreme Court ordered the matter remanded to the trial court to determine whether or not the FCDO had used federal money to support its activities, and, if so, to remove it as counsel.⁴⁷ The Commonwealth’s motion challenged FCDO attorneys’ ability to represent state prisoners and appear in state court as part of state postconviction proceedings.⁴⁸ The motion accused the FCDO attorneys of unlawfully using federally appropriated funds in those appearances; alternatively, the motion argued that the organizations’ mere appearance in state court was unlawful whether or not the FCDO attorneys were using federal funds in those appearances.⁴⁹ The Commonwealth also challenged the use of “federally-funded” resources or work product, such as investigations or experts, in state postconviction proceedings.⁵⁰ Similar motions or orders followed in *Commonwealth v. Housman*,⁵¹ *Commonwealth v. Johnson*,⁵² *Commonwealth v. Harris*,⁵³

⁴⁶ *In re Pennsylvania v. Mitchell*, No 13-cv-1871, 2013 WL 4193960 at *1, *15 n.16 (E.D. Pa. Aug. 15, 2013).

⁴⁷ *Id.* at *3.

⁴⁸ Motion to Remove Federal Counsel para. 6, *Commonwealth v. Mitchell*, No. 617 CAP (Pa. 2013) (later removed to the Eastern District of Pennsylvania at No. 13-cv-1871). The argument interprets *Harbison v. Bell*, which construed 18 U.S.C. § 3599 to authorize attorneys appointed to represent defendants in their federal postconviction proceedings to also represent defendants in state clemency proceedings, as limiting the state representation to proceedings “subsequent to” a prior request for federal habeas relief. *Id.* (citing *Harbison v. Bell*, 556 U.S. 180 (2009)). In explaining why federally appointed attorneys would not have to provide all of the services listed in § 3599(e), *Harbison* noted, in dicta, that, under the statute “counsel’s representation includes only those judicial proceedings transpiring ‘subsequent’ to her appointment.” *Harbison*, 556 U.S. at 188. But *Harbison* also noted that the statutory provision “that counsel ‘shall represent the defendant throughout every subsequent stage of available judicial proceedings, including . . . all available post-conviction process,’ . . . hardly suggests a limitation on the scope of representation.” *Id.*

⁴⁹ Motion to Remove Federal Counsel, *supra* note 48, at paras. 6, 8.

⁵⁰ See First Step Brief for Appellant at 3-5, *Pennsylvania v. Def. Ass’n of Phila.*, No. 13-3817 (3d Cir. Feb. 18, 2014) (faulting lawyers for introducing “experts” in trial-level state collateral review and using “federally-financed FCDO support staff, computer equipment, [and] research resources”).

⁵¹ Commonwealth’s Rule to Show Cause for Federal Community Defenders’ Authority to Enter into State Case, *Commonwealth v. Housman*, CP-21-CR-246-2001 (Pa. Ct. Com. Pl. Jul. 8, 2013) (later removed to the Middle District of Pennsylvania at No 13-cv-02103) (requesting that the court order FCDO to “show that their presence in this case is not in violation of federal law”).

⁵² Order, *Commonwealth v. Johnson*, No. 532 CAP (Pa. Jan. 4, 2012) (later removed to the Eastern District of Pennsylvania at No. 13:cv-00242) (ordering the FCDO to produce “any federal appointment order it may have secured in this matter”).

⁵³ *In re Pennsylvania v. Harris*, No. 13-62, 2013 WL 4501056, at *1 (E.D. Pa. Aug. 22, 2013) (discussing the Commonwealth’s motion in the underlying state proceeding challenging FCDO representation of Harris).

Commonwealth v. Dick,⁵⁴ *Commonwealth v. Sepulveda*,⁵⁵ and *Commonwealth v. Dowling*.⁵⁶ Some disqualification orders came sua sponte from the Pennsylvania Supreme Court, rather than at the request of the Commonwealth.⁵⁷

In each case, the FCDO attempted to remove the disqualification proceedings to federal court. Some of the cases were removed to the Middle District of Pennsylvania, and some were removed to the Eastern District of Pennsylvania. The Eastern District concluded it had jurisdiction over the disqualification proceedings under the federal-officer removal statute;⁵⁸ the Middle District concluded it did not.⁵⁹ The Commonwealth appealed several of the Eastern District cases to the U.S. Court of Appeals for the Third Circuit, which held that the suits were removable under the federal-officer removal statute.⁶⁰

II. GENERAL REMOVAL AND FEDERAL QUESTION JURISDICTION

In the Commonwealth's initial suit, the Commonwealth affirmatively pressed the argument that federal law precluded FCDOs from representing prisoners in state postconviction proceedings and sought to enjoin all present and future representations. The FCDO was able to remove this lawsuit to federal court on the basis of the district court's federal question jurisdiction. The general removal statute, 28 U.S.C. § 1441, allows defendants to remove to federal court "any civil action" which could have been filed in federal district court.⁶¹ And under 28 U.S.C. § 1331 (the federal question

⁵⁴ Commonwealth's Answer to Corrected PCRA Petition at 60-61, *Commonwealth v. Dick*, (Pa. Ct. Com. Pl. Jan. 25, 2013) (later removed to the Middle District of Pennsylvania at No. 13-cv-00561) (requesting the court to consider the propriety of the FCDO's representation given the Pennsylvania Supreme Court's holding in *Commonwealth v. Mitchell*, No. 617 CAP (Pa. 2013)).

⁵⁵ *Commonwealth v. Sepulveda*, 55 A.3d 1108, 1151 (Pa. Nov. 18, 2012) (remanding to consider "whether the FCDO may or should lawfully represent appellant in this state capital PCRA proceeding").

⁵⁶ *In re Pennsylvania v. Dowling*, No. 13-cv-510, 2013 WL 4458848 (M.D. Pa. Aug. 16, 2013) (addressing "the Commonwealth's motion seek[ing] a judicial determination of whether lawyers employed by the FCDO should be disqualified from representing Mr. Dowling in the PCRA proceeding").

⁵⁷ Order at 3, *Commonwealth v. Johnson*, No. 532 CAP (Pa. Mar. 25, 2013) (later removed to the Eastern District of Pennsylvania at No. 13-cv-00242) ("[O]n remand, the court is directed to determine whether current counsel from the [FCDO] should continue . . . as there is no federal court order authorizing current counsel's involvement in these state court collateral proceedings.").

⁵⁸ *In re Pennsylvania v. Johnson*, No. 13-2242, 2013 WL 4774499 (E.D. Pa. Sept. 6, 2013); *In re Pennsylvania v. Harris*, No. 13-62, 2013 WL 4501056 (E.D. Pa. Aug. 22, 2013); *In re Pennsylvania v. Mitchell*, No. 13-cv-1871, 2013 WL 4193960 (E.D. Pa. Aug. 15, 2013).

⁵⁹ *In re Pennsylvania v. Sepulveda*, No. 13-cv-511, 2013 WL 5782383 (M.D. Pa. Oct. 25, 2013); *In re Pennsylvania v. Dick*, No. 13-561, 2013 WL 4458885 (M.D. Pa. Aug. 16, 2013); *In re Pennsylvania v. Dowling*, 2013 WL 4458848.

⁶⁰ *In re Pennsylvania's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 467-75 (3d Cir. 2015).

⁶¹ 28 U.S.C. § 1441 (2012).

statute), district courts have jurisdiction over “all civil actions arising under the Constitution” and “laws . . . of the United States.”⁶² Under familiar principles of federal jurisdiction, a suit “arises under federal law” where “federal law creates a private right of action and furnishes the substantive rules of decision.”⁶³ That was plainly the case for the Commonwealth’s initial lawsuit—they argued the FCDOs were in violation of a federal statute that also conferred on the Commonwealth a private right of action.

But federal question jurisdiction provides no basis for the FCDO to remove the individual postconviction proceedings in which the Commonwealth has sought to disqualify the FCDO. The suits are not removable even though the Commonwealth is pressing the very same argument for disqualification it did in the initial, removable lawsuit, and even though the Commonwealth’s argument for disqualification sounds entirely in federal law. This section explains the jurisdictional rules that make this so and then discusses the gaps this reveals in our jurisdictional policy.

A. *Jurisdictional Rules*

The well-pleaded complaint rule governs when a suit “aris[es] under” federal law.⁶⁴ Under that rule, a suit arises under federal law if federal law necessarily appears on the face of the plaintiff’s complaint.⁶⁵ This will be the case in two kinds of lawsuits. One is where federal law establishes the plaintiff’s cause of action.⁶⁶ The second is where state law establishes the plaintiff’s cause of action but the state-law claim “necessarily raise[s] a stated federal issue” which is both “disputed and substantial” and exercising jurisdiction would not “disturb[] any congressionally approved balance of federal and state judicial responsibilities.”⁶⁷

The disqualification motions and orders might satisfy a formalistic application of the second standard under *Grable & Sons Metal Products, v. Darue Engineering & Manufacturing Co.* In *Grable*, the plaintiff sought to quiet title to a piece of land. The quiet-title claim required the plaintiff to

⁶² 28 U.S.C. § 1331 (2012).

⁶³ *Mims v. Arrow Fin. Servs.*, 132 S. Ct. 740, 748–49 (2012).

⁶⁴ See *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908) (“[A] suit arises under the Constitution and laws of the United States only when the plaintiff’s statement of his own cause of action shows that it is based upon those laws or that Constitution.”).

⁶⁵ See Gil Seinfeld, *The S&P Litigation and Access to Federal Court: A Case Study in the Limits of Our Removal Model*, 113 COLUM. L. REV. SIDEBAR 123, 127 (2013) (noting that this feature of the well-pleaded complaint rule might bar federal question jurisdiction in then-current major litigation).

⁶⁶ See *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (“A suit arises under the law that creates the cause of action.”).

⁶⁷ *Grable & Sons Metal Prods., v. Darue Eng’g & Mfg.*, 545 U.S. 308, 314 (2005).

“specify ‘the facts establishing the superiority of [its] claim.’”⁶⁸ And the plaintiff argued that it held title because the Internal Revenue Service (IRS) failed to comply with federal laws requiring it to provide notice to property owners before seizing property to satisfy tax obligations.⁶⁹ Because the IRS had failed to do so, the plaintiff maintained it did not obtain title to the plaintiff’s land. The disqualification motions and orders are structured similarly to the plaintiff’s claim in *Grable*: The Commonwealth maintains that the FCDO should be disqualified from representing state postconviction proceedings because their representation violates a federal statute, or the U.S. Constitution. The motions to remove the FCDO as counsel frequently state that the FCDO’s representation “violate[s] . . . federal law” and they should be removed for that reason.⁷⁰ The disqualification orders thus raise a question of federal law because the Commonwealth must refer to and prove a point of federal law to argue their claim.⁷¹

But the disqualification proceedings do not fall within the ambit of the district court’s federal question jurisdiction for another reason: They are not “civil actions” for purposes of federal question jurisdiction. The removal statute only allows defendants to remove a “civil action” that could have been filed in federal district court.⁷² A civil action generally refers to an “action . . . brought to enforce, redress, or protect a private or civil right”⁷³—the initial, freestanding suit that was initially filed by the plaintiff, as opposed to an ancillary motion that was filed to preclude an attorney from participating in an already-filed action.⁷⁴ The Federal Rules of Civil Procedure envision that “[a] civil action is” the suit “commenced by filing a complaint”⁷⁵; there, the phrase civil action also refers to the initial claim for

⁶⁸ *Id.* (citation omitted).

⁶⁹ *Id.* at 310, 314-15.

⁷⁰ See, e.g., Motion to Remove Federal Counsel, *supra* note 48, at paras. 6-9.

⁷¹ When the Third Circuit found that removal by the FCDO was proper in a series of related cases, Chief Judge McKee concurred in the opinion to say that he did not believe the Commonwealth’s disqualification requests and the Court’s disqualification orders were premised on state-law causes of action. *In re Commonwealth’s Motion to Appoint Counsel Against or Directed to Def. Ass’n of Phila.*, 790 F.3d 457, 483-86 (3d Cir. 2015) (McKee, C.J., concurring).

⁷² 28 U.S.C. § 1441 (2012).

⁷³ BLACK’S LAW DICTIONARY 36 (10th ed. 2009) (emphasis added). Previous versions of Black’s Law Dictionary defined a civil action as a synonym for an action at law, which is a “civil suit stating a legal cause of action.” See, e.g., BLACK’S LAW DICTIONARY 32-33, 279 (9th ed. 2009).

⁷⁴ See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559 (2005) (“If the court has original jurisdiction over a single claim in the complaint, it has jurisdiction over a ‘civil action’ within the meaning of § 1367(a) . . .”).

⁷⁵ FED. R. CIV. P. 3.

relief.⁷⁶ Relying in part on this “common meaning” of the phrase “civil action,” the Federal Circuit concluded that a motion to be appointed as conservator—the representative of an estate—was not a “civil action.”⁷⁷ The party seeking to become conservator “was not seeking to enforce a right or redress a wrong.”⁷⁸ The same is true for the disqualification motions—the disqualification requests were not commenced by filing a complaint, and they were not brought to redress a private or civil right.⁷⁹

B. *Jurisdictional Policy*

Although the doctrinal answer is clear—there is no federal question jurisdiction over the disqualification motions made in individual postconviction proceedings—it is somewhat unsatisfying. The doctrine ignores two facts that arguably should be relevant to the jurisdictional analysis.

First, as structured, the disqualification motions call for state courts to adjudicate important questions of federal law: Does federal law permit the FCDO to appear in state postconviction proceedings, and, if it does, do those appearances violate principles of constitutional federalism? But the jurisdictional analysis does not account for the fact that the motions necessarily involve important questions of federal law. The well-pleaded complaint rule is known for diverting important questions of federal law

⁷⁶ *Cf.*, e.g., *Oppenheim v. Campbell*, 571 F.2d 660, 663 (D.C. Cir. 1978) (“[W]e reaffirm the longstanding proposition that the term civil action . . . is a term of art . . . defined as one commenced by filing a complaint [in] court, . . .”).

⁷⁷ *Schindler v. Sec’y of the Dep’t of Health & Human Servs.*, 29 F.3d 607, 609-10 (Fed. Cir. 1994).

⁷⁸ *Id.* at 610.

⁷⁹ Pennsylvania postconviction proceedings are civil in nature; they are not criminal actions that are *not* removable. *See, e.g., Commonwealth v. Haag*, 809 A.2d 271, 284 (Pa. 2002) (“The PCRA system is not part of the criminal proceeding itself, but is, in fact, civil in nature.” (citation omitted)); *Commonwealth v. Martorano*, 89 A.3d 301, 307 (Pa. Super. Ct. 2014) (holding postconviction proceedings to be civil in nature, though not within any statutory category of civil actions over which a Municipal Court had jurisdiction); *cf. Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987) (holding that prisoners have no constitutional right to counsel in Pennsylvania postconviction proceedings because “postconviction relief . . . is . . . civil in nature”). However, the fact that the disqualification proceedings are civil actions does not establish that they are removable. They may still not be removable for other reasons. *Cf. Heck v. Humphrey*, 512 U.S. 477, 487 (1994) (when “a judgment in favor of the plaintiff would necessarily imply the invalidity of his [state] conviction,” a prisoner may not bring a § 1983 damages action because 28 U.S.C. § 2254, the statute governing federal postconviction relief, implicitly limits the cause of action in § 1983); *Schlanger v. Seamans*, 401 U.S. 487, 490 n.4 (1971) (noting that “[t]hrough habeas corpus is technically ‘civil,’ it is not automatically subject to all the rules governing ordinary civil actions” for venue); AM. LAW INST., *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 201 (1969) (“As a matter of policy, . . . proper respect for the states suggests that they should be allowed to use their own courts for routine matters of law enforcement.”)

from federal courts.⁸⁰ The Pennsylvania litigation reveals that other aspects of our jurisdictional policy—here, the “civil action” requirement—also bar entry to federal court.

Second, the jurisdictional analysis does not engage with the real possibility that the state courts may be biased in adjudicating these particular questions of federal law. The Pennsylvania Supreme Court has openly called for FCDOs to be disqualified from representing defendants in postconviction proceedings. Moreover, the Pennsylvania Attorney General may have used individual disqualification motions to make this argument in order to specifically ensure the argument was not adjudicated in or removable to federal court. But these facts do not enter into the jurisdictional analysis at all. Their absence is notable because courts⁸¹ and commentators⁸² frequently justify jurisdictional policy—and specifically the federal courts’ federal question jurisdiction—on the ground that it avoids state courts’ potential bias in adjudicating claims of federal law. There is genuine disagreement about whether state courts, as a general matter, are actually biased against federal rights.⁸³ But whether the federal courts’ federal question jurisdiction guards against actual, hypothetical, or occasional state-court bias, the rules delineating the scope of federal question jurisdiction do not take into account very real claims of potential state-court bias.

III. FEDERAL-OFFICER REMOVAL JURISDICTION

The FCDO focused their removal arguments on another statute that allows for the removal of proceedings directed against actions taken under color of federal law. The Third Circuit recently agreed that the federal-officer removal statute permits the disqualification orders to be heard in federal court.⁸⁴ That answer seems intuitively correct, although there is very little case law interpreting the federal-officer removal statute.

⁸⁰ Seinfeld, *supra* note 65, at 134.

⁸¹ Cf. Grable & Sons Metal Prods., v. Darue Eng’g & Mfg., 545 U.S. 308, 312 (2005) (noting that federal question jurisdiction over state-law claims which implicate “significant federal issues” is justified by “the experience, solicitude, and hope of uniformity that a federal forum offers”); Perez v. Ledesma, 401 U.S. 82, 110 n.7 (1971) (describing the American Law Institute’s opinion that federal jurisdiction may be necessary over cases in which state and federal law conflict due to the “danger of state court hostility to the federal claim”).

⁸² See, e.g., AM. LAW INST., *supra* 79, at 164-68 (noting the possible lack of “sympathy” to federal law); Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95, 97-98, 104-06 (2009) (noting literature on the possibility of state court bias against federal law claims).

⁸³ Seinfeld, *supra* note 65, at 110-14 (noting these arguments).

⁸⁴ *In re Commonwealth’s Motion to Appoint Counsel Against or Directed to Def. Ass’n of Phila.*, 790 F.3d 457, 465-66 (3d Cir. 2015).

In addition to the general removal statute, 28 U.S.C. § 1442 provides that “[a] civil action or criminal prosecution . . . may be removed . . . to the district court” where the suit is “against or directed to” “[t]he United States . . . or any officer (or any person acting under that officer) . . . for or relating to any act under color of such office.”⁸⁵ The federal-officer removal statute defines “civil action” more broadly than the general removal statute: A “civil action” “include[s] any proceeding (*whether or not ancillary to another proceeding*) to the extent that . . . a judicial order, including a subpoena for testimony or documents, is sought or issued.”⁸⁶ The disqualification motions (and orders) are civil actions under this definition: The motions and orders directed the FCDO to provide “documents” establishing they had the authorization to appear in state postconviction proceedings, and the motions sought an order disqualifying the attorneys.⁸⁷ This means the availability of removal turns on two related questions: (1) whether the federal defenders are raising a colorable federal defense; (2) whether the suits are “for or related to” acts under color of federal office.⁸⁸

A. Colorable Federal Defense

Mesa v. California held that removal under § 1442 “must be predicated on the allegation of a colorable federal defense.”⁸⁹ Section 1442, *Mesa* explained, “serves to overcome the ‘well-pleaded complaint’ rule” and allows for removal where “a federal defense [is] alleged.”⁹⁰ In *Mesa*, California initiated criminal proceedings against two U.S. Postal Service employees after they crashed their mailtrucks.⁹¹ *Mesa* explained that while the crashes occurred while the employees were performing their official duties, the employees “ha[d] no federal defense in immunity or otherwise.”⁹² And this made the case different from previous federal-officer removal cases, which

⁸⁵ 28 U.S.C. § 1442(a) (2013).

⁸⁶ *Id.* § 1442(d)(1) (emphasis added).

⁸⁷ *E.g.*, Motion to Remove Federal Counsel, *supra* note 48, at para. 4 (“[T]his Court ordered the FCDO to produce a federal or state appointment order . . .”); *id.* at para. 9 (requesting “an order”).

⁸⁸ Removal is also only available to “persons,” but this includes groups and associations. *See* 1 U.S.C. § 1 (2012) (defining “person” to include various business associations and groups); *In re Commonwealth’s Motion to Appoint Counsel Against or Directed to Def. Ass’n of Phila.*, 790 F.3d 457, 467-68 (3d Cir. 2015) (applying the definition of “person” in 1 U.S.C. § 1 to the same undefined term in § 1442(a)(1) to ultimately hold that a non-profit corporation is a person under the federal removal statute).

⁸⁹ 489 U.S. 121, 129 (1989).

⁹⁰ *Id.* at 136.

⁹¹ *Id.* at 123.

⁹² *Id.* at 138-39; *see id.* at 132-33 (explaining that federal-officer removal must be based on the presence of a federal defense).

turned on whether the officer's conduct was within the scope of their federal authority. In *Tennessee v. Davis*, for example, the State filed murder charges against a federal revenue collector who killed an assailant while seizing an illegal distillery.⁹³ In that case, the agent's claim of self-defense "depended on a question of federal law"—whether federal law authorized the agent to seize the distillery; if it did not, the agent was not lawfully on the property and thus could not raise a claim of self-defense.⁹⁴

The Pennsylvania litigation involves federal law in a way that *Mesa* did not. *Mesa* noted there was "absolutely no federal question" in the case—no part of the case, which concerned whether the postal employees had driven recklessly, turned on any question of federal law.⁹⁵ But in the Pennsylvania litigation, the Commonwealth is arguing that the FCDO's appearances in state postconviction proceedings violate federal law and the FCDO's defense is that they do not.

But the Pennsylvania litigation is different than many cases that may be removed under the federal-officer removal statute. In the majority of cases, the plaintiff will be arguing that the federal-officer violated some state law, and the officer's response will be that federal law authorized them to do so. The Pennsylvania litigation is different because the Commonwealth argues that the FCDO is violating federal law by appearing in state postconviction proceedings. However, this means the FCDO is necessarily raising a federal defense—that federal law permits them to do so. Indeed, *Mesa* reasoned that "the *absence* of a federally created duty" is still "a federal defense" for purposes of removal:

To assert that a federal statute does *not* impose certain obligations whose alleged existence forms the basis of a civil suit is to rely on the statute in just the same way as asserting that the statute *does* impose other obligations that may shield the federal officer against civil suits.⁹⁶

B. For or Related to Acts Under a Federal Office

Whether the FCDO could remove the disqualification proceedings also turned on whether the proceedings were "for or related" to "act[s] under

⁹³ 100 U.S. 257, 260-61 (1879).

⁹⁴ *Mesa*, 489 U.S. at 127-28.

⁹⁵ *Id.* at 138.

⁹⁶ *Id.* at 129-30. *Mesa* also underscored that the federal defense need not be a slam dunk: "[T]he removal statute 'is broad enough to cover all cases where federal officers can raise a colorable defense.'" *Id.* at 133 (citation omitted). See also *Jefferson Cty. v. Acker*, 527 U.S. 423, 431 (1999) ("We do not require the officer virtually to 'win his case before he can have it removed.'" (citation omitted)).

color of” a federal office.⁹⁷ But there is no clear test for when a contractor such as the FCDO is “acting under” a federal office for purposes of § 1442.⁹⁸ The U.S. Supreme Court’s most recent instruction on this issue is *Watson v. Philip Morris Cos.*⁹⁹ *Watson* involved a tort suit alleging that Philip Morris cigarettes used false claims in its advertising about the amount of tar and nicotine in its products.¹⁰⁰ Philip Morris sought to remove the lawsuit on the ground that it had tested its cigarettes pursuant to the methods approved by federal law and thus “acted under” a federal agency.¹⁰¹ *Watson* held that it could not do so: “[A] highly regulated firm cannot find a statutory basis for removal in the fact of federal regulation alone.”¹⁰²

Watson suggested that “[g]overnment contractors fall within the terms of the federal officer removal statute” provided two conditions are met. First, “the relationship between the contractor and the Government” must be “an unusually close one involving detailed regulation, monitoring, or supervision.”¹⁰³ Second, the contractor must have been “authorized to act with or for [federal officers or agents] in affirmatively executing duties under . . . federal law.”¹⁰⁴ To explain when a contractor is affirmatively authorized to act, *Watson* favorably cited a Fifth Circuit case holding that a private manufacturer of Agent Orange was “acting under” a federal agency.¹⁰⁵ *Watson* noted the company “performed a job that, in the absence of a contract with a private firm, the Government itself would have had to perform.”¹⁰⁶ However, in *Watson* there was no “evidence of any delegation of legal authority” to the manufacturer.¹⁰⁷ These two elements—the level of

⁹⁷ *In re Commonwealth’s Motion to Appoint Counsel Against or Directed to Def. Ass’n of Phila.*, 790 F.3d 457, 471 (3d Cir. 2015). Much of the Third Circuit’s reasoning on this point overlapped or focused more on whether the FCDO was acting under a federal office. *See id.* at 472 (finding that the acts involved in the suit were taken under color of federal office because the FCDO employed the attorneys at the center of the suit and its representation of state prisoners in PCRA proceedings was aligned with its duty to provide effective federal habeas representation). Thus, I do not treat these elements of removal separately.

⁹⁸ The lack of precedent may be partially due to the fact that remand orders are not reviewable by courts of appeals. *See* 28 U.S.C. § 1447(d) (2012) (stating that remand orders are not reviewable on appeal or otherwise unless removal was based on §§ 1442 or 1443); *see generally* Andrew D. Bradt, Grable on the Ground: Mitigating Unchecked Jurisdictional Discretion, 44 U.C. Davis L. Rev. 1153 (2011).

⁹⁹ 551 U.S. 142 (2007).

¹⁰⁰ *Id.* at 146.

¹⁰¹ *Id.* at 146-47.

¹⁰² *Id.* at 153.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 151 (citation omitted).

¹⁰⁵ *Id.* at 154 (citing *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1998)).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 156.

federal involvement and a federal duty or delegation—have become the core of lower federal courts’ analysis of federal-officer removal claims.¹⁰⁸

The Third Circuit held that the FCDO is “acting under” a federal agency in these respects.¹⁰⁹ As the court explained, the relationship between the FCDO and the Administrative Office of the U.S. Courts met the requirement of “detailed regulation, monitoring, [and] supervision” because of the “close” relationship between the FCDO and the federal government.¹¹⁰ The FCDO is organized in accordance with the Criminal Justice Act, submits to yearly audits, and is funded “under the supervision of the Director of the Administrative Office of the United States Courts.”¹¹¹ Moreover, it is clear that the FCDO has a “duty” under federal law that Philip Morris lacks: Federal law is not agnostic on whether the Philadelphia FCDO exists. Federal law delegates a function to the FCDO—representing indigent defendants in federal court—that would be performed by a federal public defenders’ organization in the absence of the FCDO.¹¹² The same was not true for Philip Morris—federal law took no position on whether cigarettes should or should not be available; but if they were, federal law required them to be tested in certain ways.¹¹³

In finding the proceedings removable, the Third Circuit rejected the Commonwealth’s argument that suits are removable only if the officer’s actions correspond to a specially authorized “federal duty.”¹¹⁴ As the Third Circuit noted, the Commonwealth’s argument that the asserted federal defense must be a specific authorization to do the particular task being

¹⁰⁸ See, e.g., *Junhong v. Boeing Co.*, 792 F.3d 805, 808-10 (7th Cir. 2015) (drawing from *Watson* the test that “persons ‘acting under’ federal officials are those who provide aid in law enforcement”); *Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1233-34 (8th Cir. 2012) (describing the test from *Watson* as whether the government had “delegated” authority to the company); *City of St. Louis v. Velsicol Chem. Corp.*, 708 F. Supp. 2d 632, 660 (E.D. Mich. 2010) (describing the test from *Watson* as whether the company had “assist[ed] or [] help[ed] carry out, the duties or tasks of the federal supervisor” (citation omitted)); *Marley v. Elliot Turbomachinery Co.*, 545 F. Supp. 2d 1266, 1273-74 (S.D. Fla. 2008) (describing the applicable test as whether the actions occurred in “the course of [the] contractual relationship” with the government); *Orthopedic Specialists v. Horizon Blue Cross/Blue Shield of N.J.*, 518 F. Supp. 2d 128, 135 (D.N.J. 2007) (describing the applicable test as whether the actions were taken “under the ‘direct and detailed control’ of a federal agency” (citation omitted)).

¹⁰⁹ *In re Commonwealth’s Motion to Appoint Counsel Against or Directed to Def. Ass’n of Phila.*, 790 F.3d 457, 474-75 (3d Cir. 2015). See also 18 U.S.C. § 3006A(g)-(i) (2012) (establishing the guidelines for an FCDO and its relationship with the Office).

¹¹⁰ *Id.* at 468-69.

¹¹¹ *Id.* at 461-63 (citation omitted), 469.

¹¹² See *supra* notes 20–23 and associated text.

¹¹³ See *supra* note 102 and associated text.

¹¹⁴ 790 F.3d at 473.

challenged appeared to be inconsistent with *Jefferson County v. Acker*.¹¹⁵ In *Acker*, a county sought to collect occupational taxes from federal judges, and the judges asserted the taxes were barred by intergovernmental tax immunity, which prohibits states from taxing instrumentalities of the federal government.¹¹⁶ The county maintained the collection suits were not removable because there was no “connection between the suits and the judges’ official acts”¹¹⁷; that is, “the judges’ [federal] duties did not require them to resist the tax.”¹¹⁸ *Acker* rejected this argument, reasoning that § 1442 allows for removal where there is “a nexus, a causal connection between the charged conduct” and “asserted official authority.”¹¹⁹ The dissent, by contrast, would have held the suit not removable because “[r]efusing to pay a tax . . . is not an action required by respondents’ official duties.”¹²⁰ *Acker* therefore rejected the idea that suits are removable under § 1442 only where they are trained at conduct specifically required by federal law.

CONCLUSION

This Essay explored the FCDO litigation as a window into the rules governing removal to federal court. The current doctrine governing federal question jurisdiction ensures that many serious federal questions may not make their way into federal court, even in the face of potential state-court bias. The federal-officer removal statute provides a unique stopgap in the FCDO litigation. But § 1442 will not make up for the shortcomings in our general removal policy in every case. The FCDO litigation serves as an important reminder of several gaps in our jurisdictional policy, and, perhaps more importantly, as a reminder that the choice of a forum—and specifically the choice between state and federal court—is not always a neutral one.

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¹¹⁵ *Id.* (discussing *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999)).

¹¹⁶ 527 U.S. at 428-29.

¹¹⁷ *Id.* at 432.

¹¹⁸ 790 F.3d at 473.

¹¹⁹ 527 U.S. at 431 (internal quotation marks and citations omitted).

¹²⁰ *Id.* at 445 (Scalia, J., concurring in part and dissenting in part).