OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, ET AL., Petitioner, v. ADMINISTRATORS OF TULANE EDUCATIONAL FUND, ET AL.

CASE NO: 90-89

PLACE: Washington, D.C.

DATE: March 20, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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INTERNATIONAL PRIMATE :
PROTECTION LEAGUE AND ITS :
MEMBERS, ET AL., :
Petitioners :
v. : No. 90-89
ADMINISTRATORS OF TULANE :
EDUCATIONAL FUND, ET AL. :

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Washington, D.C.

Wednesday, March 20, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

MARGARET E. WOODWARD, ESQ., New Orleans, Louisiana;
on behalf of the Petitioners.

RICHARD H. SEAMON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.;
on behalf of the Respondents.

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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear first this morning in argument No. 90-89, the International Primate Protection League and Its Members, et al., v. the Administrators of Tulane Educational Fund.

Ms. Woodward.

ORAL ARGUMENT OF MARGARET E. WOODWARD

ON BEHALF OF THE PETITIONER

MS. WOODWARD: Mr. Chief Justice, and may it please the Court:

Petitioners brought this suit in State court under State law against NIH and two private entities. NIH argues to this Court that it removed to ensure that its Federal defenses would have a fair forum in Federal district court. NIH passes very quickly over the fact that its would-be protector, the Federal district court, quickly dismissed and rejected its vaunted Federal defenses.

What remained in this case then were issues of State law, a serious question whether NIH, the removing party, had any legal interest in this case whatsoever, and article III standing requirements that applied in Federal court but which would not have applied in State court, the forum of choice by petitioners.

On a questionable appeal, the Fifth Circuit

ordered the case dismissed.

QUESTION: But what do you mean on a questionable appeal?

MS. WOODWARD: Mr. Chief Justice, I will try to explain to you what I myself have never understood. When this --

QUESTION: That may be a difficult task.

(Laughter.)

MS. WOODWARD: When this case was first removed to Federal court, NIH accepted service. NIH accepted the issuance of a temporary restraining order against it. That restraining order had not been issued by the State court. We had not had NIH served in State court, because we questioned even at that time NIH's interest in the case. We immediately moved for remand, both on the issue on which this Court has granted certiorari and on the questionable interest of NIH in the case.

The district court was initially skeptical. But after NIH was found out misrepresenting the facts of its involvement to that court, she ordered discovery on the NIH's interest in that case and at the same time heard two successive motions to dismiss. NIH, following the denial of those motions to dismiss, moved for an appeal from the denial of the motion to dismiss.

QUESTION: Do you oppose the motion to dismiss?

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MS. WOODWARD: Yes, Your Honor, we did oppose the motion to dismiss.

QUESTION: I would think that if you hadn't wanted to name them in the first place, you wouldn't have wanted them in the case.

MS. WOODWARD: Mr. Chief Justice, NIH takes the position that our having named them as a party in this suit is an unretractable admission against interest. It was a pleading that was drafted in haste. It was a pleading which we ourselves questioned and which we immediately set about to conduct discovery on. That discovery was ordered by the district court, but the discovery was never concluded, because NIH, which not only resisted any hearing on the merits of this case, but also resisted any inquiry into its interest in this case, refused to comply with discovery. And after discovery had been ordered, NIH brought the appeal.

QUESTION: So, you -- you named NIH as a party.

MS. WOODWARD: Yes, Your Honor. But we --

QUESTION: And you later decided you didn't want them as a party?

MS. WOODWARD: That's correct.

QUESTION: When did you notify the district court of that?

MS. WOODWARD: Your Honor, we notified the

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district court immediately. We had not served NIH.

QUESTION: Can't you dismiss on your own motion under the rules if you could -- haven't served them?

MS. WOODWARD: It was NIH's position that it would intervene as an indispensable party and it was addressing that issue as well as our questioning of their interest in this case. But the court insisted the discovery go forward. But that discovery was forestalled by NIH's taking of an improper appeal from the denial of its motion to dismiss. That -- the denial was not certified by the district court. It was clearly improper.

And as a companion --

QUESTION: That's what you mean term questionable appeal.

MS. WOODWARD: It goes further than that.

As a companion to that notice of appeal, the respondents filed a motion for a stay in the district court. In opposition to the motion for a stay, we urged that the appeal was improper, that the request for a stay was improper --

QUESTION: A stay of what?

MS. WOODWARD: A stay of the temporary restraining order, and more pertinently at that time, a stay of the discovery on NIH's interest in the case that had been ordered by the district court.

We filed our opposition urging that the appeal was improper. And on the night before the motion for stay was to be heard, NIH filed a motion for indicative ruling, with which this Court may be familiar but of which I have never heard and have found no reference to in any legal periodical or case.

The district court entertained that motion for indicative ruling on the morning of the hearing on the motion for stay. I had not had an opportunity to respond, but it was my argument to the court that the court did not have jurisdiction to hear that motion.

The district court --

QUESTION: Well, I wonder if perhaps, Ms. Woodward, if perhaps very likely in response to my question, we aren't getting somewhat away from the question that's presented here -- whether the removal statute authorizes NIH to remove?

MS. WOODWARD: We are, Your Honor, and -- and time is very short here.

We did file a motion to dismiss the appeal in the Fifth Circuit. Our writ for certiorari of course is premised on an assumption that the Fifth Circuit did have jurisdiction over this case, all -- albeit we questioned that jurisdiction as an issue for the Court to address. And if the Court does find that jurisdiction did not lie in the

Fifth Circuit, the appropriate remedy we contend would be for this Court to vacate the decision of the Fifth Circuit and remand the case to the district court for appropriate (inaudible).

QUESTION: Now, as the case comes to us, it's been determined that the petitioners lacked standing.

MS. WOODWARD: Yes, Your Honor.

QUESTION: How is it in that posture that we are able to consider the removal question?

MS. WOODWARD: This is one of the interesting ironies of the case, Your Honor. Article --

QUESTION: Yes, I'm very interested in how you overcome that.

MS. WOODWARD: Article III standing requirements only apply, of course, in Federal court. And presupposed --

QUESTION: And you take the position that there is standing -- there would be standing as a matter of State law in State court --

MS. WOODWARD: Yes, Your --

QUESTION: -- but the Federal courts have determined that you have no standing under article III.

MS. WOODWARD: The Federal courts have determined that we have no standing and this Court did not grant writs on that question, although we attempted to bring it up. So

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that is not squarely before you, but it is also a jurisdictional issue on which the Court has granted writs whether or not section 1442(a) permits removal by a Federal agency to a Federal district court.

Obviously, if the removal was improper then it is improper for article III standing requirements to be imposed on these petitioners who have brought a State claim. And because both are jurisdictional questions, in effect, it seems to me that the threshold jurisdictional question is the jurisdictional question of whether removal was proper in the first place.

One of the greatest injustices in this case is that, as the Fifth Circuit analyzed it, it could reach the standing issue first and did reach the standing issue first. And what it found -- because it found that petitioners lacked standing -- was that not only could petitioners' claims not receive a hearing in Federal court, but also the Federal defenses, which supposedly under Mesa are a prerequisite to the removal, were not entitled to any consideration.

So untested in this Court are the claims and the jurisdictional basis for the court's imposing article III standing requirements.

QUESTION: Are you arguing that the district court and the circuit court and this Court is really required --

are really required to reach the removal issue at some point, because if you base the case simply on lack of standing, it goes back to the State court, at which point NIH removes back to Federal court which goes back to State court based on standing. So we have to reach removal at some point. Is that correct or not?

MS. WOODWARD: Your Honor, I would be happier if I were on that kind of treadmill. What the Fifth Circuit ruled was that there was an absolute right of removal and that our case was not to be remanded as we urged even against the private entities IBR and Tulane University -- but that the case was to be dismissed with prejudice as a whole with no hearing in any court on any issue. And that, it seems to me, is an affront not only to the Constitution and to justice between the litigants but to comity, because the State courts had an interest here. And the State of Louisiana had an interest in seeing its public policy enforced through the claims that were brought by these petitioners.

QUESTION: Well, Ms. Woodward, why -- why isn't it reasonable, assuming that the removal issue was decided correctly, why is it unreasonable for the Federal Government to say, we only want our agents and agencies to be sued by somebody who has standing to sue them as we view standing?

MS. WOODWARD: Your Honor --

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QUESTION: The State can allow other people to be sued on the basis of whatever standing rules they want to develop. That would lead to the conclusion that this case would be res judicata against you as far as NIH and the Federal Government is concerned but not necessarily against other defendants who do not come within the removal statute.

MS. WOODWARD: I would have no objection to --

QUESTION: You would have no problem with that?

MS. WOODWARD: I would have no problem with that, but that is a very large assumption.

QUESTION: Well, are you sure that that assumption is not correct?

MS. WOODWARD: I'm sure that assumption is not correct.

QUESTION: You think that when a Federal court upon removal dismisses the case for lack of standing of one of the -- of one of the parties, the suit cannot be rebrought in State court against the other parties, absent the one who didn't have standing?

MS. WOODWARD: That's not the premise with which I'm disagreeing. You said, assuming that removal was permissible in this case, and I do not assume that removal in this case --

QUESTION: But that's a totally different argument. I was responding to your claim that you -- you

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have been done in by the removal because the Federal Government would have no interest in the standing of these other people. It doesn't. The only consequence I believe of this dismissal is that the Federal officers and the Federal agencies cannot resued in State court. You could -- you could resue anybody else.

MS. WOODWARD: I agree with that.

QUESTION: Okay.

MS. WOODWARD: But to get to the basic question of whether or not section 1442(a) does permit removal by a Federal agency -- I believe that the Court yesterday announced the rule that decides this case in West Virginia University Hospitals v. Casey when it says that the best evidence of congressional purpose is the statutory text adopted by both Houses of Congress. And goes on to say, whereas here the statute's language was plain, the sole function of the court is to enforce it according to its terms.

In this case, the statutory language is plain. It was perfectly clear to me and to a majority of courts until it was translated from the English into a foreign legalese by these respondents. The statute is entitled, Federal Officers Sued or Prosecuted. It commences by saying, "a civil action against any of the following persons may be removed by them."

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As respondents have conceded quite candidly in their brief, "persons" is normally read to exclude reference to the sovereign. That's the first obstacle they face. Then it goes on to say, "any officer of the United States or any agency thereof" comma -- and the punctuation serves a useful function in this statute. It does not say as they would read it, "any officer of the United States, or any agency thereof, or person acting under him." It's to be read together -- "Any officer of the United States or any agency thereof, or person acting under him."

NIH tells us that "him" can sometimes mean "it," "them," the "sovereign." That's certainly true, but him in ordinary English means him.

For any act of -- under color of such office --

QUESTION: Assume it means "her," too, doesn't it?

MS. WOODWARD: Yes, Your Honor, to be sure.

(Laughter.)

QUESTION: I mean if "her," then maybe "it."

MS. WOODWARD: Maybe "it," and in some cases, "it." The problem that they confronted in this case is that in their masterful brief, they have cited to this Court cases that say, you may disregard the statutory title. They have cited cases that say you may disregard the syntax. They have cited cases that say you may disregard the normal reading of "person" or you may disregard the meaning of the

word "him."

However, they have cited to not a single case that says you may disregard the statutory title and the common usage of "person" and the common meaning of "him" and the language of the statute and the legislative history and the majority of the courts who have properly read this statute, in order to embark upon a protectionist fervor of their own which was not shared by Congress when it enacted this statute.

QUESTION: How far back does this statute goes, Ms. Woodward? Do -- do you know? I -- it --

MS. WOODWARD: It goes way back.

QUESTION: It -- you know in the bad old days, you -- you couldn't -- there was no question of suing the agency or suing the United States in its own name. The only way you got at them was by suing a person for mandamus. The theory was that the person was -- if acting beyond his authority -- was not acting as the sovereign.

MS. WOODWARD: That --

QUESTION: So, you know, once upon a time when this was drafted, might it not be that -- that the anticipated effect of it was exactly what the other side is arguing for today?

MS. WOODWARD: No, Your Honor. Because by 1948 when this judiciary code was passed into law, there were

many, many, many agencies. The Burr case had been decided in 1940. Keifer & Keifer had been decided in 1939. The sue and be sued clauses had already been construed by the Court to permit the direct right of action against agencies.

QUESTION: What kind of agencies -- I mean, other things other than the Tennessee Valley Authority and the quasi-private agencies? I'm talking about agencies -- real agencies -- like the Internal Revenue Service, you know. The days when I was in law school, all the Helvering cases -- I heard somebody refer once to the Helvering case. As you know, there were hundreds of Helvering cases.

MS. WOODWARD: Many, many, many real agencies have been created during the period immediately prior to the passage of this act. This was the New Deal and Professor Davis --

QUESTION: And sued -- and sued as such. Sued as such.

MS. WOODWARD: Sued as such under Keifer and Burr. And Congress clearly averted to the fact that agencies would be in court as litigants, because listen to what they did in another section of the judicial code, enacted in the same year.

They held, without any particular difficulty in the English language, at 28 U.S.C. section 1345, "with respect to actions brought by agencies, the district court

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shall have original jurisdiction of all actions commenced by the United States or by any agency or officer thereof." What could be simpler?

And yet respondents would have you believe that when it came to enacting a section placed only a few statutory provisions beyond, Congress was tripping over its tongue and did not know how to speak. But Congress's intent is clear enough, not only in the language of the statute, but in the revisor's notes when it states very briefly, this statute had gone back a long way -- back to reconstruction and even before. There had been in times of national crisis very limited statutes enacted to protect officers against actions in hostile State courts starting with the New England States' resistance to the trade embargo against England, and again during the Civil Way, other statutes.

In 1948, Congress decided to broaden that protection to all officers, but it explained in the revisor's notes, "The revised subsection (a)(1) is extended to apply to all officers and employees of the United States or any agency thereof."

Respondents read this language to mirror the same ambiguity that they attempt to read into the language of the statute. But there are important distinctions in the notes and the statutory language. The statutory language refers to a right of removal by any officer of the United States

or any agent thereof or person acting under him.

Here they explain exactly what the change is. We're now broadening this to apply to all officers and employees of the United States or any agency thereof -- not all agencies -- all officers.

This note is important, too, because respondents would take either of two routes to find a right of agency removal. The first is by reading ambiguity into the statutory language. And the second is by construing this language "or person acting under him" to mean anyone -- any agency, any entity, any anything -- operating under any officer of the United States, tracing all the way up to the President of the United States.

And the reason why it is very important for this Court to attend to that argument is that respondents, NIH, Tulane, and IBR are -- they all contend that Tulane also would be a person acting under an officer and entitled to a move to Federal court.

By that construction, if Tulane is an entity because it has the NIH's vague approval of what it's doing in this case, then anyone who has spent $1 of Federal money or has the approval of any Federal agency or officer for its actions would be entitled to a move to Federal court. And in that case, the Mesa requirement that there be a Federal defense poses no obstacle at all because all of these

respondents say that they do indeed have a Federal defense. And that Federal defense is sovereign immunity because what they contend we are attempting to do here is interfere with the actions of the Federal Government which have been expressed in some terms about which we are not entitled to receive discovery but which they say -- and this Court is instructed to accept as fact -- have something to do with science which is not to be tampered with by us --

QUESTION: Well, now you do concede, I suppose, that the word "person" has a broader meaning than just an individual?

MS. WOODWARD: Your Honor, it can, but to construe "person" to include the sovereign as they have done, is something more. And referring back to the statutory notes, the revisors explained that this was intended to apply to all officers and employees. Tulane is not an employee. The wire tappers in the Camacho case who were sued for a violation of Puerto Rico law were not officers or employees either. There is almost no limit to the number of cases that could be brought in Federal court if this is given so broad a construction. And what it essentially works is an end run against the long-established principle that issues of Federal immunity can be capably decided in State court.

QUESTION: Of course you're really making two arguments with respect to Tulane. One is that it's not a

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person in the individual sense. And a quite separate one that "acting under" means that you be an actual employee.

MS. WOODWARD: Yes, Your Honor.

QUESTION: Is that what you're saying?

MS. WOODWARD: I just think that's far too broad. And that's -- that's a breadth of construction that has been applied to this statute by many, many courts. And it has been applied drawing on the same language that was handed down from Tennessee v. Davis that is repeated at every place in respondents' brief that they could find a place to put it.

The language about hostile State courts, about what is to become of the State government if it is placed at the mercy of hostile State courts. That language has no real currency today. And it's clear also from notes in the revisions to the judiciary --

QUESTION: What do you mean when you say that language has no real currency today?

MS. WOODWARD: That State courts are hostile to the Federal Government and that Federal defenses cannot be safely entrusted to the State courts. I do not believe that --

QUESTION: Well, then if Congress were to follow your view, it should repeal the removal statute I suppose?

MS. WOODWARD: No, Your Honor, because I think

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that there is a distinction to be drawn here between an officer and an agency. And I think it's a logical extension.

QUESTION: Yes, but surely the hostility of State courts doesn't depend on whether it's an officer or the Federal officer before them -- or a Federal agency before them.

MS. WOODWARD: I believe that that part of the removal statute is somewhat antiquated. To me it is. But that is a decision that Congress has made, and the question here is whether it's going to be extended. First of all, it can't be extended judicially because Congress has not expressed any intention to do that. And to the contrary, Congress clearly demonstrated in 1948 that it was not operating from these sorts of protectionist notions.

In the revisions, in the revisors' notes to section 1441, Congress explained -- in explaining its having dropped from the removal statute the right to remove in all diversity cases.

QUESTION: Who is this revisor? You say Congress explained. Who -- who wrote these revisors' notes?

MS. WOODWARD: This is in the House report, volume 8, number 308, at page A133.

QUESTION: Is that a reproduction within the House report of the notes by whom?

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MS. WOODWARD: The revisors' notes.

QUESTION: Who is the revisor then?

MS. WOODWARD: Your Honor, I don't know who the revisor is.

QUESTION: Does it say we agree with all of these notes?

MS. WOODWARD: These are very brief. I looked at them in the Library of Congress. They're entitled, Revisors' Notes, and that's the citation where they can be found. They're also cited in the parties' briefs.

In that House report it says, "All the provisions with reference to removal of controversies between citizens of different States because of inability from prejudice or local influence to obtain justice, have been discarded. These provisions, borne of the bitter sectional feelings engendered by the Civil War and the Reconstruction period have no place in the jurisprudence of a nation since united by three wars against foreign powers.

"Indeed, the practice of removal prejudice or local influence has not been much employed in recent years." And those remarks have equal validity in connection with this case.

With the Court's permission, I would like to reserve my remaining time for rebuttal.

QUESTION: Very well, Ms. Woodward.

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Mr. Seamon, we'll hear now from you.

ORAL ARGUMENT OF RICHARD H. SEAMON

ON BEHALF OF THE RESPONDENT

MR. SEAMON: Mr. Chief Justice, and may it please the Court:

Section 1442(a)(1) of title 28 authorizes removal by, quote, "any officer of the United States and any agency thereof or person acting under him for any act under color of such office." NIH was authorized to remove this action both because it is an agency of the United States, and in the alternative, because it is a person acting under a Federal officer, namely the Director of NIH as well as the Secretary of Health and Human Services. We accordingly urge the Court to affirm the judgment below.

NIH was authorized to remove this case as a Federal agency under the first clause of section 1342(a)(1). We read the first clause to authorize removal either by an officer of the United States or an agency of the United States. We recognize that our reading of the first clause is not the only plausible one. The clause could be read, as petitioners do, to allow removal by officers of the United States and officers of agencies of the United States.

The problem with this reading is that all officers of agencies of the United States are officers of the United States. Petitioners' reading of the first clause therefore

renders the phrase "any agency thereof" superfluous.

We recognize --

QUESTION: Is that clear? You know, officer -- officer of the United States has a quite technical meaning in the Constitution and for many purposes within Federal law. It seems to me you might well be an officer of let's say the TBA or some Federal corporation that is called an agency of the United States without being, in common usage, an officer of the United States.

MR. SEAMON: This Court hasn't often addressed the phrase "officer of the United States." But one case in which it did is United States v. Handy, in 124 U.S. And there it recognized that there is the strict constitutional meaning of officer of the United States which is relatively restricted. But there's also a more popular signification of the term and that can mean officers of various lower departments, other than the departments in the executive branch.

QUESTION: But at the time this was first -- this language was first employed, isn't it reasonable to assume that that narrow meaning of the word, "officer of the United States," was intended in this language?

MR. SEAMON: It's --

QUESTION: And that would certainly explain the language of the statute or agency thereof.

MR. SEAMON: It's plausible, and we concede that. But in a way that's beside the point of the fact that petitioners have to resort to speculation about what might have been on Congress' mind when it drafted this statute. The extent that they have to kind of read Congress' mind, they can't lay a claim to the plain meaning of the statute, which is what they purport to do.

QUESTION: Well, the language was -- has been on the books a long time -- that language. And perhaps it's the more natural reading of the language.

MR. SEAMON: Actually, in some of the early -- "officers of the United States" has been a phrase employed from early times, although in the removal provisions that was not the invariable phrase. Some of the earlier provisions talk about officers acting under the revenue laws. They speak in terms of the laws that the officers are carrying out. I believe that "officers of the United States" was relatively recent vintage in the context of the broader history of these removal provisions.

QUESTION: Well, isn't plausible and a permissible inference for this Court to make that Congress was very careful in drafting the statute to exclude agency removal as you now argue, because they were concerned that there might have been a construction of the statute that would be an implied waiver of sovereign immunity?

MR. SEAMON: That's also plausible, although petitioners haven't raised that argument. Our point is that there are a lot of plausible explanations about what may have been on Congress' mind when it drafted this language. But the point is that it's all speculation. And petitioners couch their whole argument --

QUESTION: Well, you say it's speculation, but sovereign immunity is a well-documented, fundamental doctrine of our jurisprudence. And if we see that drafting the statute the way that you suggest might have raised serious questions about sovereign immunity, it seems to me that's a perfectly legitimate and logical way to interpret the statute, quite consistent with our jurisprudence that we begin with the language of the statute.

MR. SEAMON: We concede that the statutory language is -- can be read to draw some kind of distinction. Our point is more limited which is that it is not the plain meaning of the statute. Petitioners' reading is not compelled under the language alone. You have to resort among other things to the purpose of the statute and its legislative history to discern what Congress' intent is. And when you have to go those further stages, our position is that our reading of the -- both clauses of 1442(a)(1) is just as reasonable as petitioners' is. They cannot lay claim to claiming --

QUESTION: Do you take the position that the notion that the category of officers of the United States and the category of officers of agencies are identical with one another is plain from the face of the statute?

MR. SEAMON: No.

QUESTION: How do you -- how -- what is it that we look to to determine that that's what Congress -- that Congress thought those two categories were co-extensive?

MR. SEAMON: First, let me clarify. Our position is that officers of agencies is a subset, wholly included within the larger set officers of the United States.

QUESTION: Oh, all right. You're right. I see. But that everyone in that subset would be an officer of the United States?

MR. SEAMON: Yes, that's correct.

QUESTION: Is that -- is that point plain from the meaning -- from the text of the statute?

MR. SEAMON: We believe it is among other reasons because subsections (a)(2) through (a)(4) speak in terms of officers of the House and Congress, officers of the court. And as this Court recognized in Mesa v. Arizona, these are -- are essentially redundant provisions. They are now encompassed within the broader meaning of subsection (a)(1). In other words, we would say officers of the court are officers of the United States, officers of the --

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QUESTION: By that do you include all lawyers who are members of the bar of the court?

MR. SEAMON: I'm sorry?

QUESTION: Do you include all lawyers who are members of the bar of the court when you talk about officers of the court?

MR. SEAMON: I believe that members of the bar would be officers of the court. They're denominated as such when they --

QUESTION: Are they officers of the United States?

MR. SEAMON: It would depend on the circumstances.

QUESTION: Well, can we tell from the face of the statute?

MR. SEAMON: We can tell from the face of the statute that officers of agencies in our view are officers of the United States.

Again, our point on --

QUESTION: Mr. Seamon, before we get off of sovereign immunity, what Justice Kennedy was asking about, did the Government raise sovereign immunity as a defense in the State court?

MR. SEAMON: We didn't raise sovereign immunity as a defense in the State court primarily because when -- when you are sued in State court, as NIH was, the first thing you have to do essentially is remove. If you're going

to remove, you have only 30 days. And that has to be the first thing you do. So if it's not raised until the case was --

QUESTION: But you don't think it was waived?

MR. SEAMON: In no sense. I --

QUESTION: Because if it was waived, I assume there's no Federal question here.

QUESTION: Well, you don't plead -- you don't plead sovereign -- you don't plead when you're removing. You remove rather than plead.

MR. SEAMON: It's the filing of a petition and that effects the removal of the case.

At the district court level, NIH filed motions to dismiss that included a defense based on sovereign immunity as well as the supremacy clause, and we made a preemption argument in the district court as well.

QUESTION: When -- after removal if there's no jurisdiction, isn't -- doesn't the statute require that there be a remand rather than a dismissal?

MR. SEAMON: We don't believe that remand was appropriate in this case, because petitioners lack standing. The Fifth Circuit, having determined that the case was properly removed, also held that petitioners lacked standing.

QUESTION: Is that the same as subject matter

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jurisdiction -- lacking standing? Because the statute says if it appears at any time that subject matter jurisdiction is lacking, the case shall be remanded not dismissed.

MR. SEAMON: That's correct. That's the language of section 1447(c). Under these circumstances, plausibly the court could have remanded but it would have been futile because petitioners had lost. It had been established that NIH had a right to be sued in Federal court. They had a right to be sued by plaintiffs with -- petitioners with article III standing. Petitioners didn't have article III standing. They lost. The case was over. They couldn't have done anything in State court had the case been remanded to that -- to that -- to that court.

We note that the --

QUESTION: Well, presumably they still had a cause of action against Tulane, and they also say that the rules for standing in State court are not as strict as article III standing.

MR. SEAMON: We would take the position that they cannot refile this suit simply omitting NIH and any other Federal entity from their -- from their complaint and their allegations. For one thing, I don't see how they would draft a complaint without reference to the Federal entities in this case.

QUESTION: Well, why aren't they entitled to --

to sue NIH if there's just -- if the only ground is no standing? Let's assume that all that was -- the only thing the district court ruled on was standing.

MR. SEAMON: That -- that would be -- if the Fifth Circuit, having ruled on both standing and removal, means that they can't NIH either in Federal court or State court. That would be our position.

And just to return to a point I was making just a moment ago, our position would be that with regard to the question of the disposition -- the treatment of the monkeys -- NIH or at least its director is an indispensable party to any proceedings. Although theoretically petitioners could return to State court and file a new suit and this time omit any reference to NIH, NIH or directors would have to be included in that suit, and in fact it would seek to intervene.

QUESTION: But that -- that's a matter of State law, isn't it? Who is an indispensable party as a defendant in a Louisiana State lawsuit.

MR. SEAMON: Yes, that's correct. And Louisiana appears to follow essentially the same doctrine as the Federal courts do.

QUESTION: Mr. Seamon, may I go back to the text for a moment on a phrase that hasn't been discussed. That is at the point at which subsection 1 moves from a

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description of persons to a description of the subject matter of the action. And the phrase is -- that I'm concerned with -- is "for any act under color of such office." Would you agree that that phrase would refer only to the acts of an officer rather than the acts taken in the name of an agency?

MR. SEAMON: No, we wouldn't agree. We would say that every agency, just like every officer, has an office, and the office is defined by the agency --

QUESTION: The agency acts under color in the same sense that an individual acts under color?

MR. SEAMON: That's right, and to the extent that it exceeds its officers defined by statute, it is -- it is subject to suit. So, again, we do not agree that office only refer to the officer, but also the agency. And in part I am relying on Black's Law Dictionary for that.

QUESTION: Do you have any examples of identical or substantially identical usage in other statutes that -- that has been held to refer to agencies rather than to officers acting under color?

MR. SEAMON: I am not aware of any.

QUESTION: So that so far as you know, this would -- this would be a unique example of that usage, if we were to agree with you?

MR. SEAMON: Again, as far as I know, that --

that's correct. I would just point out that the Constitution speaks in terms of the office of the President. But the -- but the definition of "office" has broader implications as well. Black's Law Dictionary, at any rate, defines "office" without regard to the individuals -- officers. It has a broader meaning and it means -- it's defined as a right and corresponding duty to exercise of public trust. I'm reading selectively here, of course.

QUESTION: But how -- I don't want to cut you off, but how does that relate directly to the question whether the concept of acting under color of office is a concept which can be associated with the agency rather than with the individual?

MR. SEAMON: Our position would be that an agency -- any time an agency takes or purports to be an agency action, such as the promulgation of regulations (inaudible) informal adjudication, that it is acting under the color of its office. It is acting -- and that means within the parameters of its statutes creating its mandate.

Again, we believe that the first clause can be plausibly read in more than one way. And our limited point about the competing interpretations before the Court is simply that petitioners can't lay claim to the plain meaning of the text because of the problem of officers of agencies in --

QUESTION: Well, suppose we don't agree with your reading of this officer or agency and we have to look at the "person" clause. Now, would you explain to me how you define "person" under this statute? Who does that include?

MR. SEAMON: We define person to include natural persons, but not only natural persons, also agencies and corporations and associations.

QUESTION: And in this case -- Tulane as well?

MR. SEAMON: Yes, that's correct. We believe that in the circumstances of this case, Tulane would be entitled to remove and indeed intends to remove if this case is remanded as a person acting under a Federal officer and specifically the acting director of NIH who signed the letter of agreement with Tulane.

QUESTION: So you interpret the word "person" here to include the sovereign?

MR. SEAMON: Yes, that's correct. And that is not a remarkable reading, as we've pointed out in our brief. On many occasions, this Court has interpreted the word person to include sovereign bodies -- State corporations, States themselves. And lower courts have done the same thing.

In connection with this, we point out that the word persons also used in the subsection (a)(2) where it plainly can't be limited to natural persons. Subsection

(a)(2) refers to persons holding land under a Federal officer. And we believe it is plain on the -- on the face of the statute that the word "person" in (a)(2) clearly includes corporations and other entities capable of holding property. And our position is that the word person can't have a more narrower meaning for (a)(1) than it does for (a)(2), where it's clearly not limited to individuals as petitioners argue.

We do believe that it's consistent, not withstanding petitioners' argument to the contrary, for entities like Tulane to remove as persons acting under a Federal officer. In connection with this, it's helpful to consider the court's opinion in The Mayor v. Cooper. It's a very old case. It's in 73 U.S. But in that case, the action was -- concerned the governing body of Nashville, Tennessee. They clearly were not Federal employees, but they were acting under the direction of a military officer. This was a case that arose in the wake of the Civil War.

We think it's perfectly consistent with the spirit of The Mayor versus Cooper, although a concern in earlier provision to interpret section 1442(a) not to be limited to Federal employees but also to include their employers --

QUESTION: Well, you say that -- what is the connection between Tulane and the United States that would justify Tulane in removing here?

MR. SEAMON: There are two justifications, I'm sorry to say only one of which is in the record. One is the letter of agreement between the acting director of Tulane and Tulane University's medical school that provides for Tulane's acting as an assistant to NIH.

QUESTION: The acting director of NIH and to -- a letter from the acting director of NIH to Tulane?

MR. SEAMON: That's correct. It was also signed by the chancellor of the medical school who is -- oversees the Delta Center.

There's been subsequent correspondence, and I'm informed that there is a more formal contract between NIH and Tulane. It works out the details of reimbursement and care of the monkeys.

QUESTION: Did you say that makes Tulane a person acting under him for purposes of the removal statute?

MR. SEAMON: Yes, that's correct.

We would go on to --

QUESTION: Him in that case would be what? NIH or the director of NIH -- which one?

MR. SEAMON: Under our reading it could be -- it could be NIH, but it clearly also is the acting director. He signed the letter that was also signed by the chancellor.

QUESTION: May I ask, Mr. Seamon, just to get it straight in my mind? The Fifth Circuit, which holds that

agencies can remove, doesn't rely on this theory, does it? Doesn't it rely on the theory that you just take the comma out in the plain reading of the statute? That an agency can remove because it's an agency not because it's a person acting on behalf of an officer?

MR. SEAMON: That's correct.

QUESTION: So we don't whether the Fifth Circuit would accept your rationale on the Tulane argument.

MR. SEAMON: That's correct. Other courts have proceeded under the -- under the "person acting under him" clause to include agencies. Actually, one earlier Fifth Circuit decision concerning the National Bank of Texas from the Fifth Circuit relied on that clause. But it appears that the -- presently Fifth Circuit precedent relies on the first.

QUESTION: Could I ask you, the court of appeals decided both the standing question on the removal question?

MR. SEAMON: Yes, that's right.

QUESTION: And decided the standing question first?

MR. SEAMON: It -- the standing discussion is first in its opinion.

QUESTION: Yes, but -- but do you agree that -- that if the court of appeals was right about standing, it nevertheless could reach the removal question?

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MR. SEAMON: I'm sorry. I'm misunderstanding your question.

QUESTION: Well, do you agree that the -- with the court of appeals' decision that there was no standing with these plaintiffs?

MR. SEAMON: Oh, certainly so. As we discussed in --

QUESTION: All right, if you agree with that, do you then agree that the -- that it was proper to reach this -- the removal question?

MR. SEAMON: Absolutely.

QUESTION: Because I take it an officer who's entitled to remove -- let's assume that there is an officer here that was entitled to remove -- that officer is entitled to litigate in the Federal court.

MR. SEAMON: That's right.

QUESTION: But only against a plaintiff who has standing.

MR. SEAMON: That's right.

QUESTION: So that the -- if the district court finds that there is no standing, the district court should dismiss and not remand.

MR. SEAMON: That's right.

QUESTION: And to let the suit go on in the State court, even though the plaintiffs might have standing there.

MR. SEAMON: That's right. That's why we believe the Fifth Circuit disposed of this case properly when it dismissed with prejudice. Petitioners have no right to be back in State court suing NIH or any of the other defendants presently named in this case.

And I would point out that, although petitioners talk about the injustice that seems to have been visited on them, it presupposes the question that's before the court. If NIH had a right to remove this case, it had a right to be sued by petitioners with article III standing. Congress made the judgment in section 1442(a) that officers -- and we would submit agencies -- have a right to go to Federal court rather than to have -- rather than to be sued in State court for intentional infliction of emotional distress.

QUESTION: The standing -- the question here -- it's a jurisdictional question I guess.

MR. SEAMON: Yes, that's correct.

QUESTION: What kind of a jurisdictional question is it?

MR. SEAMON: I think it goes to subject matter jurisdiction.

QUESTION: Well, what about 1447(c)?

MR. SEAMON: We would --

QUESTION: It says that there's a finding -- if at any time it appears that district court lacks subject

matter jurisdiction, the case should be remanded.

MR. SEAMON: We believe that the case should be remanded unless it would be futile to do so. And that this is one of those limited circumstances when remand would be futile because petitioners don't have a right to do anything in State court.

We recognize that in this area, too, there is some tension with the language. We take the position that the First Circuit did, which addressed this question in a case entitled, Maine v. Maine Commissioner of Human Resources. I'm not sure it's cited in any of the briefs. It's a recent case, 876 F.2d. And they held precisely on the position we're taking that when remand would clearly be futile --

QUESTION: Well, subject matter jurisdiction doesn't ordinarily include the concept of standing, does it, Mr. Seamon? Don't we ordinarily think of subject matter jurisdiction as those provisions of title 28 which set out the different bases for a Federal jurisdiction: 1331, 1332, et cetera?

MR. SEAMON: It includes those, but it also includes defects in standing.

QUESTION: What's your authority for that proposition?

MR. SEAMON: No authority immediately comes to mind.

QUESTION: Then why do you assert it?

MR. SEAMON: Because my experience is that you would seek to dismiss a case on standing grounds under 12 -- rule 12(b)(6). It's not --

QUESTION: Which would be based on subject matter jurisdiction and not a lack of -- so you say motions are commonly made under 12(b)(6) which goes to subject matter jurisdiction. Those motions are based on lack of standing?

MR. SEAMON: It occurs to me that there is authority in terms of -- no, I'm sorry, no case is coming to mind.

But that's correct that standing goes to subject matter jurisdiction as do other defenses raised in this case such as sovereign immunity and the fact that NIH was --

QUESTION: Sovereign immunity goes to subject matter jurisdiction? I thought sovereign immunity had to be pleaded if your defending on the merits?

MR. SEAMON: We take the position that sovereign immunity also goes to jurisdiction, so --

QUESTION: Well, it may -- it may go to jurisdiction in some senses, but the word "subject matter jurisdiction" is a fairly technical concept.

MR. SEAMON: That's true. And more generally jurisdiction is a difficult concept because there are lots of different kinds of jurisdiction.

QUESTION: Well, of course the First Circuit must have thought it was subject matter jurisdiction to go through all those contortions.

MR. SEAMON: That's -- that's correct.

QUESTION: 12(b)(6) of course is also a very understated claim on which relief can be granted.

MR. SEAMON: That's correct. And in a way, for purposes of deciding the issue before this Court, it just suffices that clearly NIH's defenses raised in the district court and again in the court of appeals were clearly colorable Federal defenses for purposes of Mesa. The merits, you know, were not litigated before the court of appeals, although they were raised there. But they don't have to be. As the court indicated in Willingham, you do not have to win your immunity defense in order to have the right to remove.

The question here is NIH's right to be in Federal court to litigate these defenses.

QUESTION: May I ask you another question about 1447(c) which seems to require remand rather than dismissal? You say there's a futility exception -- that the litigation in the State court would be futile. Does the -- is the question of whether it would be futile a question of State law or Federal law?

MR. SEAMON: I have not considered that question

before.

QUESTION: It seems to me if it's a question of State law that would be a reason to remand and let the State court decide it. And some of the things you said suggest to me that might be the case.

MR. SEAMON: That may well be.

QUESTION: I can see why if you said for some reason there are no -- there are no defendants except Federal defendants who have properly pleaded sovereign immunity or something like that, that it's perfectly clear as a matter of Federal that the State action couldn't go forward and then your futility exceptancies make a lot of sense. I'm not sure on the facts of this case -- I don't know the case you cited, of course -- that your argument is really as strong.

MR. SEAMON: It may be -- it may be appropriate under certain circumstances to remand to State court, for example, to determine whether a Federal entity is an indispensable party under the State law. It's -- it's a -- it is a difficult question. I don't believe it's necessarily before the Court because Federal rule 81(c) also provides that the Federal rules govern in removed cases. So there are some technical and admittedly difficult questions where the State rules end and Federal rules pick up.

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In my remaining time I would just like to make a couple of points. It seems to me that in many ways, although beyond the difficult questions of jurisdiction, the courts shouldn't forget about the context in which this case has arisen. Petitioners named NIH as the only Federal defendant in this case and that was in paragraph 4 of their complaint, which begins on page 30 of the petition.

In paragraph 6 they expressly ask for an injunction against both NIH, its officers, agents, employees, and representatives. This is really a suit against both officers and the agency. And it simply makes no sense to hold that merely because of the way they pleaded this case that NIH can't remove. We doubt and we think it's absurd to attribute that kind of intention to Congress.

QUESTION: Mr. Seamon, suppose you get a judgment from a State court against an agency as such, not an individual -- not an officer -- but an agency as such. How do you execute upon that judgment without the assistance of a Federal court?

MR. SEAMON: I'm not sure that -- I think that, assuming that you were willing to proceed as petitioners have in this case, is that you simply -- you file to execute under whatever applicable State laws there are. There's no statute authorizing suit against NIH in its own name, and yet petitioners do that.

QUESTION: You move against the Treasury -- the Federal Treasury? And the Federal Treasury says, no, I won't pay. What do you -- do you get a mandamus from the State court? What I'm driving at is maybe there's no need to have the removal in the case of an agency as such, although there is in the case of an officer.

MR. SEAMON: There is in the -- with respect to agencies entitled to sue and be sued in State court and in own name. I mean, I think with respect to agencies like NIH in a sense there's no problem unless you get plaintiffs like petitioners who name agencies even thought they're clearly not authorized to do so.

But there's another category of agencies with -- who are subject to these sue and be sued clause. And as we discussed in their brief -- our brief, there are also these environmental waivers that present problems if the agency is held not entitled to remove.

QUESTION: May a State court issue an injunction against a Federal agency?

MR. SEAMON: I'm sorry?

QUESTION: May a State court issue an injunction against a Federal agency?

MR. SEAMON: Our position is clearly it would not be entitled to do so, although we -- it's quite plausible that had NIH been served as --

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QUESTION: Is there -- meaning -- what is that Tarbell's case?

MR. SEAMON: I think that would stand for that proposition.

QUESTION: Thank you, Mr. Seamon.

Ms. Woodward, do you have rebuttal? You have 4 minutes remaining.

REBUTTAL ARGUMENT OF MARGARET E. WOODWARD

ON BEHALF OF THE PETITIONER

MS. WOODWARD: Thank you, Your Honor.

Justice Kennedy, I do not believe Tarbell's case stands for that proposition. There is a very fine law review article published in the 1966 Yale Law Journal that explains that Tarbell's case cannot be extended to so hold and that would be our position in this case. But I think we're a long way from that discussion.

And on the subject of remand, I think this Court should also take a look at the new judiciary reform act which makes some modest adjustments to section 1441(c) and strikes out the language, "remand all matters not otherwise within its original jurisdiction," and inserts in lieu thereof, "may remand all matters in which State law predominates." That may have been enacted to get around the problems confronted by this Court in Carnegie Mellon University v. Cohelm. But whether or not I think it was

intended to do that, I think it does have some direct application to --

QUESTION: Does your brief cite that?

MS. WOODWARD: It does not, Your Honor. I only just discovered this. It's 104, statute 5114.

QUESTION: Would you please file copies of that with the clerk (inaudible) the court?

MS. WOODWARD: I'd be glad to.

QUESTION: Thank you.

MS. WOODWARD: And to revisit the question that you addressed, Mr. Chief Justice, about Tulane's interest in this case. It's all very interesting that there is an agreement -- a letter agreement -- between NIH and Tulane relating to the issue of custody of these monkeys. But that skips a very important first step, and that is what is NIH's interest in these monkeys other than a political interest. NIH is not the owner of these monkeys. IBR is the owner of these monkeys. Tulane has physical custody of the monkeys.

NIH initially urged to the district court that it's custody --

QUESTION: Perhaps you should have thought of that before you filed your lawsuit naming them as a defendant.

MS. WOODWARD: Your Honor, we thought they were an interested party and we named them as an interested party. It was NIH which jumped in with both feet, removed

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to Federal court, accepted service and suggested to the district court that it would accept a TRO issued against it, the NIH, which I was even requesting because I was satisfied that the temporary restraining order issued against Tulane gave us all the protection that we were seeking in this case.

The State court never issued an injunction against the NIH. The NIH offered to be sued, to be enjoined, and it was over our opposition that we did not believe that they had that kind of interest in this case.

And I find it very peculiar that NIH should try to trump us in standing when its own interest has been questioned by the court and has never been determined. That's the fundamental injustice. And I also think that it's fundamentally unfair to read these statutes broadly to confer Federal jurisdiction. As this Court is well aware Federal courts are, by origin and design, courts of limited jurisdiction. And it is not only unfair but unconstitutional for the Federal courts to exercise jurisdiction and in an area where State law predominates, State issues are paramount, and the Federal interest has not even been tested.

For article III standing to apply so that the Federal interest cannot even be plumbed in the district court to which they have removed is not an appropriate

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exercise of jurisdiction.

QUESTION: Thank you, Ms. Woodward.

MS. WOODWARD: Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:08 a.m., the case in the above-entitled matter was submitted.)

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