Statement of

Hon. George J. Terwilliger III

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Committee on the Judiciary

Subcommittee on the Constitution and Limited Government

Hearing On

"Legislative Reforms to End Lawfare by State and Local Prosecutors"

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(Submitted for the Record)

Mr. Chairman, ranking member and members of the committee, thank you for inviting me to appear to discuss with you the potential need for Congress to address aspects of so-called "lawfare" by state authorities that targets the work of federal officials. Claims made against and prosecutions charging federal officials in state courts can do great harm to federal operations and upset the delicate balance in law between federal and state governmental authority. My perspective on this issue is the result of 15 years of public service in the US Department of Justice, where I endeavored every day to demonstrate that in fact government can work for the benefit of our citizens, and another 30 years in the private practice of law where I all too often saw the damage that can occurs when law and politics collude and collide.

I have three suggestions for your consideration to curb state "lawfare" targeting federal officials and Executive Branch operations.

First, get these cases into federal court where questions of federal law should be addressed.

Second, put statutory teeth into Chief Justice Marshall's 1819 Supreme Court ruling that the Supremacy Clause bars state authorities from controlling federal government functions in any manner.

Third, provide by law a means to obtain summary dismissal of non-meritorious claims against present *or former* federal officials that interferes with federal operations.

For government to work for the benefit of our citizens, federal officials must be free to act subject only to *federal* constraints that establish the scope of their official authority. In many, if not most instances, such federal officials are also - under federal law -accorded substantial discretion in the execution of their federal duties. As the Supreme Court recognized in *Harlow v. Fitzgerald*[1]*,* the higher the official position, the greater the discretion needed and the greater the deference the law, and courts in particular, need to accord the exercise of that discretion.

Today, however, we are seeing an unprecedented attack on the exercise of lawful discretion at the highest levels in the executive branch of our government. I respect those who may disagree with federal officials' exercise of their discretion. Those disagreeing have no shortage of legitimate means to seek redress through, for example, congressional

[1] 457 US 800, 807 (1981) *("[W]e acknowledged that high officials require greater protection than those with less complex discretionary responsibilities*.")

oversight, political campaigns, as well as public commentary through the vast array of communications channels that exist today.

Such disagreement is a hallmark of our democracy. However, a constitutional line is crossed when state officials, whether they be attorneys general, governors, prosecutors or judges, attempt to use the authority of state law to in any manner control federal officials' work and federal operations. James Madison, writing in the Federalist Papers, explained the necessity of having a Supremacy Clause in the Constitution, noting that *"otherwise, a monster, in which the head was under the direction of the members"* would be created.[2] Chief Justice John Marshall in 1819 laid down the law prohibiting state interference in federal operations when in *McCullough v. Maryland* the Supreme Court ruled conclusively that *"The states have no power to impede, burden or in any manner control the operations of the general government."* [3] In short, the Constitution of the United States establishes beyond any question that under the Supremacy Clause, federal law controls the activity of federal officials, and that state law has no authority to do so.

Today, we are witnessing in general efforts by state authorities to utilize legal actions – "lawfare" - to undermine the supremacy of federal law by attempting to interfere with and control federal government operations, even at the highest levels involving the president and his most senior advisors. Lawfare goes nuclear, however, when states prosecute federal officials or otherwise make claims against them in *state* courts. Such assaults on

[2] Federalist No. 44
[3] 17 U.S. (4 Wheat) 316, 436 (1819)

federalism deserve congressional attention, including by applying the authority of the Supremacy Clause to create a more solid statutory bulwark against state interference.

Congress has over decades, through successive statutes, demonstrated a clear intent that state claims or state prosecutions brought in state courts against federal officials for conduct undertaken pursuant to an official role are to be removed from state court to federal court[4]. A principal reason for that procedure is to ensure that questions of federal law, including those concerning control over federal officials' actvities, should be decided in federal, not state, courts. Otherwise, the vagaries of various state court rulings would create a confusing and confounding tableau of state regulation and constraint on federal operations.

But now, the courts, including federal courts, are frustrating that congressional intent. Until just very recently, for 200 years both present *and former* federal officials doing their jobs who are sued or prosecuted in state court could obtain review of the viability of that state claim in a federal court. In a very unwise decision, in 2023 the 11th Circuit Court of Appeals denied that protection to *former* federal officials. That court went so far as to also claim purported judicial authority to rule on what a presidential advisor working in the West Wing of the White House could or could not do. [5] And now at least one other court has echoed that decision and claimed like power over the co-equal Executive Branch. [6]

[4] 28 USC 1442(a(
[5] See *Georgia v. Meadows*, 88 F.4th 1331 (11th Cir. 2023)
[6] See *Arizona v. Meadows,* No. CV-24-02063-PHX-JJT (D. Ariz. Sep. 16, 2024)

Two members of that 11th Circuit panel, concurring in the result, recognized the chilling effect of having all former federal officials subject to the whims of state claims brought by, for example, politicized state prosecutors. Those judges -appointees of Democrat presidents - wrote: ***"In short, foreclosing removal when states prosecute former federal officers simply for performing their official duties can allow a rogue state's weaponization of the prosecution power to go unchecked and fester."***[7]

Those judges further noted that Congress could revise the law and urged Congress to promptly do so[8]. Congress can do so easily by amending 28 USC 1442(a) to permit expressly removal by both present *and former* federal officials. But in my view, there is more that Congress should do to ensure that such lawfare by state prosecutors cannot act as Lilliputians tying down and tying up the exercise of executive authority and intruding on federal affairs.

Please forgive me for getting technical for a moment, but for Congress to act decisively it needs to act precisely. In order to more solidly provide federal court jurisdiction over state claims against federal officials, Congress needs to make the basis for federal court jurisdiction explicit. It can do so by providing that where a removal case involves one or more questions of federal law, the state case should be removed to federal court so that those federal questions are addressed in federal courts. It is important to make clear that a federal question begets federal jurisdiction. By bringing those federal questions into the federal judicial system, over time the courts of appeal and the Supreme Court can

[7] *Georgia v. Meadows*, US Court of Appeals for the 11th Circuit, No. 23-12958, Slip Op. at 37.
[8] Id.

establish a uniformity of rulings that will govern such questions. Otherwise, leaving such questions for resolution through the courts of the 50 states and their subordinate jurisdictions invites chaos in rulings on federal questions that govern the official activity of federal officers.

There are also further steps that are necessary to effect congressional intent to foreclose states from using their authority to try to control the exercise of discretion by federal officials. In recent times, state prosecutors have brought criminal cases against ranking federal officials in connection with the latter doing their jobs and in so doing have sought authority to have state courts define the nature and extent of such officials' roles, a quintessential federal question.

Fani Willis' prosecution of my client Mark Meadows is a great example. She charged Meadows for following the president's direction to set up and participate with the president in a telephone call with the Georgia Secretary of State. The federal statute establishing the position of presidential assistants states that they ***"shall perform such duties as the President may prescribe."***[9] In bringing such a case, state prosecutors usurped the authority that Congress gave explicitly to the president to specify the duties of his senior aides. Because Mr. Meadows was doing his job as the White House Chief of Staff – the president's most senior advisor - the Georgia case should have been removed to federal court and summarily dismissed under Supremacy Clause immunity. But here we are, years later with those charges still pending - and now the Democrat Attorney General in Arizona

[9] *An Act to Provide for Reorganizing Agencies of the Government,* Section 301, 53 Stat. 561, 565 (1939)

piling on with yet another prosecution charging Meadows based on his conduct as Chief of Staff in the West Wing of White House, the beating heart of the Executive Branch. This is contrary to unmistakable decades of congressional intent and this Congress should act to end the empowerment of state prosecutors to engage in such lawfare aimed at federal officials.

Apart from getting such cases into federal courts, Congress also needs to codify and thereby strengthen the immunity protection federal officials can assert when performing their federal roles. Unless you do, there will be more injustice at the hands of state prosecutors and, even more perniciously, some good people who could take on federal roles will so 'no thanks' because they do not want to be collateral damage in state political lawfare. As the 11th Circuit concurring judges again wrote, ***"And federal officers who are reluctant to do their duty, or a dearth of talented and enthusiastic people willing to serve in public office, could paralyze our democratic-republic system of government."***[10]

At present, the immunity of federal officials from such state claims exists only by judicial decisions of the Supreme Court and inferior federal courts. In my view that is a threat to the separation of powers because it has the potential to allow courts, including federal judges, to themselves exercise oversight and control of executive branch decision making through prolonged litigation brought by state authorities that delves into the exercise of discretion by Executive Branch officials. Evidence that this is a real-life problem today is easy to find.

[10] *Georgia v. Meadows,* supra, Slip Op. at 38.

One need look no further than the numerous lawsuits brought most recently in federal court by state attorneys general seeking to control the exercise of authority vested by the President in an individual acting as a senior presidential advisor. You do not have to be a lawyer to understand that lawsuits -even if eventually won - eat up tremendous amounts of time, money, attention and energy, including by the federal officials subject to them. There may be legitimate policy questions worthy of debate, reconsideration and even change, but lawfare should not be the means to address them.

In my view, Congress should act to simply provide that non-meritorious lawsuits that interfere with federal operations are subject to summary dismissal where there is a preliminary showing that the claim interferes with legitimate Executive Branch decision-making authority and officials' exercise of discretion under it. In this way, there will be a presumption in the law against litigants inviting what too often seems a hostile judiciary to substitute its judgment for that of executive policy-making officials exercising lawful authority provided to them by Congress. This would do no more than codify in statute the deference to Executive authority and discretion that the Supreme Court has said that Separation of Powers dictates.[11]

As importantly, codifying the immunity of federal officials from claims and prosecutions against them by state authorities helps to ensure that, contrary to the foretelling predictions of the 11th Circuit judges above, federal officials can do their jobs unfettered by

[11] See *Trump v United States, -- U.S. –– (2024);* No. 23–939, Decided July 1, 2024

intrusions into their roles by state authorities and, indeed, good people will continue to seek the honor of public service.

I respectfully submit that these are not radical proposals, but rather common-sense ideas for the Congress to consider to end the madness of litigation by state authorities that seeks to control federal officials exercising discretion in performing their federal roles. I further submit that this is especially necessary in regard to claims brought by state officials using the authority of state law. Chief Justice Marshall had it right when he drew a bright line foreclosing state control of federal activities. I humbly suggest it is time for Congress to underscore that bright judicial line with statutory law so federal officials can take that law in front of federal judges and dispose of efforts by state authorities to overstep constitutional bounds.

Thank you.