FEDERAL OFFICER CRIMINAL CASE REMOVAL

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Recent events have brought the federal officer removal statute to the fore. The statute allows a defendant to remove a criminal prosecution to federal court, provided that the allegedly criminal behavior was performed by the defendant as a federal officer under color of office and provided that the defendant has a federal defense. Current litigation has exposed several open, important questions under the statute, which this Article confronts. On the question of who qualifies as an "officer" who can remove under the statute, it argues that removal is available both to former officers and to presidents. On the question of how to determine whether prosecution of an inchoate crime—such as conspiracy—is removable, it invokes Supreme Court precedent to argue that the key inquiry is whether the officer's official duties are essential to the alleged criminal conduct, but it also notes that a recent statutory amendment suggests even broader availability of removal.

The Article then turns to criminal cases with multiple charges and multiple defendants. It argues that a defendant must justify removal of each charge under the statute separately; a charge without an independent basis for removal should remain in state court. In a case with multiple defendants, each defendant should be treated separately. The acquiescence of co-defendants should not be required for federal officer removal. Moreover, the federal court should hear only the charges (appropriately removed) against that defendant; charges against other defendants should remain in state court (absent a valid basis for removal for each charge).

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TABLE OF CONTENTS

INTRODUCTION

Federal law allows a federal officer facing state criminal charges to remove the charges for trial in federal court.[1] Now codified at § 1442(a)(1) of Title 28 of the United States Code, the provision has its origins in several nineteenth-century enactments.[2]

While the last century has seen only sporadic attempts to invoke the statute, today, criminal removal under § 1442(a) has sprung to life again. Prosecutors in New York County, New York, and Fulton County, Georgia, are now pursuing criminal charges against former President Donald Trump, with the Georgia case naming numerous

1. Section 1442(a)(1) currently provides:

> A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
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> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. § 1442(a)(1).

2. *See infra* notes 40–44 and accompanying text.

co-defendants, some of them former federal officers.[3] Prosecutors in the New York case charged Trump with thirty-four counts of falsifying business records, arising out of a payment to Stephanie Clifford to secure her agreement not to publish details about her interactions with Trump.[4] The Georgia state prosecution centers around a massive alleged conspiracy to commit election interference under Georgia's racketeering influenced and corrupt organizations (RICO) statute, with other defendants facing other specific counts. In addition, prosecutors in Arizona have lodged charges of a "fake elector" conspiracy, fraud, and forgery against numerous defendants in a criminal case now pending in Maricopa County state court.[5]

Defendants in these prosecutions moved—unsuccessfully, at least to date—to remove their cases to federal court. The federal district court in New York rejected President Trump's effort at removal on the grounds that (1) any actions taken by Trump were not taken under color of office as required by § 1442(a),[6] and (2) Trump offered no viable federal defense to the charges,[7] a requirement that the Supreme Court grafted onto § 1442(a) removal in its 1989 decision in *Mesa v. California*.[8] Trump filed, but then dismissed, an appeal on the removal question.[9]

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3. *See* Grand Jury Indictment, People v. Trump, No. 71543-23 (N.Y. S. Ct. Mar. 30, 2023); Indictment, State v. Trump, No. 23SC188947 (Ga. Super. Ct. Aug. 14, 2023).

4. Clifford had appeared in adult films under the name Stormy Daniels. *See* New York v. Trump, 683 F. Supp. 3d 334, 338 (S.D.N.Y.), *appeal dismissed*, No. 23-1085, 2023 WL 9380793 (2d Cir. Nov. 15, 2023).

5. *See* Grand Jury Indictment at 3–12, 17, State v. Ward, No. CR2024-006850 (Ariz. Super. Ct. Apr. 23, 2024).

6. *See Trump*, 683 F. Supp. 3d at 343–46.

7. *See id.* at 346–50.

8. 489 U.S. 121, 129–39 (1989).

9. New York v. Trump, No. 23-1085, 2023 WL 9380793, at *1 (2d Cir. Nov. 15, 2023).

Following his conviction on these charges and while awaiting sentencing, President Trump again filed to move the case to federal court, arguing that (i) the New York state courts had been biased against him, resulting in an improper trial, and (ii) he was immune from prosecution under the Supreme Court's June 2024 decision in *Trump v. United States*, 603 U.S. 593 (2024), which recognized some degree of presidential immunity from criminal prosecution. *See id.* at 2347 ("The President therefore may not be prosecuted for exercising his core constitutional powers, and he is entitled, at a minimum, to a presumptive immunity from prosecution for all his official acts."); New York v. Trump, No. 23 Civ. 3773, 2024 WL 4026026, at *1 (S.D.N.Y. Sept. 3), *appeal docketed*, No. 24-2299 (2d Cir. Dec. 20, 2024). The federal district court rejected this attempt, explaining that it lacked jurisdiction to address whether the state courts had wrongly resolved the first issue, that the federal district court's earlier holding that the former president was not being prosecuted for official acts precluded the second argument, and that the former president had not demonstrated the "good cause" required under 28 U.S.C. § 1455(b)(1) to file for removal after trial, and

The Georgia case prompted removal petitions from a few defendants (though not then-former President Trump).[10] Most prominently, the removal petition filed by Mark Meadows, who served as President Trump's final Chief of Staff in his first term, was rejected by both the U.S. District Court for the Northern District of Georgia and then by the U.S. Court of Appeals for the Eleventh Circuit.[11] The district court reasoned that Meadows was required, but failed, to show that the "heart" of the criminal allegations against him, or the "heavy majority" of overt acts alleged against him, fell within his official capacities.[12] The Eleventh Circuit endorsed the district court's reasoning,[13] but also introduced a separate threshold reason to reject Meadows's removal petition: The court interpreted § 1442(a) to apply only to current federal officers, not former ones.[14] In late February 2024, the Eleventh Circuit denied Meadows's petition for en banc review.[15] Meadows filed a petition for writ of certiorari with the U.S. Supreme Court[16] that the Court denied.[17]

Jeffrey Clark, who served as an Assistant Attorney General in President Trump's first administration and has been charged with criminal RICO conspiracy and attempt to commit false statements

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had failed to meet the requirements of 28 U.S.C. § 1455(b)(2) to file a second request for removal by showing either that the grounds for removal "not existing at the time of the original notice," or that "good cause" justified the second filing. *See Trump*, 2024 WL 4026026, at *1–2. Former President Trump has since appealed the district court's decision to the Second Circuit. *See* Lauren del Valle & Paula Reid, *Trump Appeals to Move New York Hush Money Case to Federal Court*, CNN (Sept. 4, 2024), https://perma.cc/J23J-FVAN.

10. Former President Trump initially indicated that he would attempt to remove the Georgia case. *See* Daniel Barnes & Dareh Gregorian, *Trump Says He May Seek to Move His Georgia Criminal Case to Federal Court*, NBC NEWS (Sept. 7, 2023), https://perma.cc/EHR3-4RVM. In the end, however, he decided against removal. *See* Kate Brumback & Jeff Amy, *Trump Won't Try to Move Georgia Case to Federal Court After Judge Rejected Similar Bid by Meadows*, AP NEWS (Sept. 28, 2023), https://perma.cc/UXD3-6MEW.

11. *See* Olivia Rubin, *Federal Appeals Court Rejects Mark Meadows' Bid to Move His Georgia Election Case to Federal Court*, ABC NEWS (Dec. 18, 2023), https://perma.cc/98X6-5K2Y.

12. *See* Georgia v. Meadows, 692 F. Supp. 3d 1310, 1322–32 (N.D. Ga.), *aff'd*, 88 F.4th 1331 (11th Cir. 2023), *cert. denied*, No. 24-97, 2024 WL 4743081 (U.S. Nov. 12, 2024).

13. *See* Georgia v. Meadows, 88 F.4th 1331, 1343–50 (11th Cir. 2023), *cert. denied*, No. 24-97, 2024 WL 4743081 (U.S. Nov. 12, 2024).

14. *See id.* at 1338–43.

15. *See* Mike Levine, *Mark Meadows Loses Latest Bid to Move Georgia Election Case to Federal Court*, ABC NEWS (Feb. 28, 2024), https://perma.cc/DAA7-3PW4.

16. *See* Petition for Writ of Certiorari, Meadows v. Georgia, No. 24-97, 2024 WL 3606705 (U.S. July 26, 2024).

17. *Meadows*, No. 24-97, 2024 WL 4743081 (U.S. Nov. 12, 2024).

and writings,[18] also saw his removal petition denied by the federal district court on similar grounds to Meadows's petition.[19] Relying on the decision in *Georgia v. Meadows*, the Eleventh Circuit affirmed that ruling.[20]

Removal was also sought by three individuals who met at the Georgia State Capitol following the 2020 election to serve as alternate electors in favor of Donald Trump (even though Georgia had certified incoming President Joe Biden's victory).[21] The district court rejected all three of these petitions, reasoning that (1) electors are not federal officers within the ambit of § 1442(a),[22] and (2) even if electors generally would qualify as federal officers, the three individuals were, in any event, not duly appointed as electors so they did not fall within § 1442(a)'s reach.[23] The Eleventh Circuit consolidated the appeals under the caption *Georgia v. Shafer* and, as in the *Clark* case, explained that the court of appeals' decision in *Georgia v. Meadows* foreclosed the possibility of removal: Even if the defendants ever were federal officers, they no longer were.[24]

Notably, one panel member in the appeals of *Clark* and of the electors questioned the Eleventh Circuit's holding in *Georgia v. Meadows*. Circuit Judge Britt Grant—who did not serve on the *Meadows* panel—concurred in the affirmances in *Clark* and *Shafer* on the ground that those panels were constrained by the court's holding in *Meadows*.[25] But she then argued that *Meadows* had been wrongly decided and that § 1442(a) properly construed does extend to former federal officers.[26]

In addition to filing to remove the criminal case against him in Georgia, Mark Meadows filed removal papers in the Arizona criminal

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18. *See* Georgia v. Clark, No. 1:23-CV-03721, 2023 WL 7012663, at *1–2 (N.D. Ga. Sept. 29, 2023), *aff'd*, 119 F.4th 1304 (11th Cir. 2024).

19. *See id.* at *4–9.

20. Georgia v. Clark, 119 F.4th 1304, 1307 (11th Cir. 2024).

21. Georgia v. Latham, No. 1:23-CV-03803, 2023 WL 11962288, at *1–2 (N.D. Ga. Sept. 29, 2023), *aff'd sub nom.* Georgia v. Shafer, 119 F.4th 1317 (11th Cir. 2024); Georgia v. Shafer, No. 1:23-CV-03720, 2023 WL 11962286, at *1–2 (N.D. Ga. Sept. 29. 2023), *aff'd*, 119 F.4th 1317 (11th Cir. 2024); Georgia v. Still, No. 1:23-CV-03792, 2023 WL 11962287, at *1–2 (N.D. Ga. Sept. 29, 2023), *aff'd sub nom.* Georgia v. Shafer, 119 F.4th 1317 (11th Cir. 2024).

22. *Latham*, 2023 WL 11962288, at *3–6; *Shafer*, 2023 WL 11962286, at *4–7; *Still*, 2023 WL 11962287, at *3–6.

23. *See Latham*, 2023 WL 11962288, at *7–10; *Shafer*, 2023 WL 11962286, at *7–10; *Still*, 2023 WL 11962287, at *7–10.

24. Georgia v. Shafer, 119 F.4th 1317, 1320–21 (11th Cir. 2024).

25. *See id.* at 1334 (Grant, J., concurring) ("Under *Georgia v. Meadows*, the defendants here are not entitled to remove their state criminal prosecutions to federal court because they are not currently federal officers."); *Clark*, 119 F.4th at 1317 (Grant, J., concurring) ("For the reasons outlined in my separate opinion in *Georgia v. Shafer*, I respectfully concur." (citation omitted)).

26. *See Shafer*, 119 F.4th at 1334–35.

case.[27] In September 2024, the U.S. District Court for the District of Arizona denied Meadows's removal effort, offering two alternate grounds for its decision.[28] First, the court reasoned that Meadows had failed to establish the "good cause" required by statute to file for removal more than thirty days after arraignment.[29] Second, the court held the conduct charged by the state was not related to Meadows's official actions;[30] in so doing, the court expressly adopted the Eleventh Circuit's "heart of the indictment" standard.[31]

The rediscovery of federal officer criminal removal has highlighted issues of considerable import that—surprisingly—remain unresolved. First, consider the question of whether the provision allows removal by anyone facing prosecution for official duties undertaken as a federal officer or whether the statute's benefit is limited to *current* federal officers who are indicted by the state. The Eleventh Circuit recently opted for the latter, more restrictive interpretation.[32] In contrast, in 2023, the U.S. District Court for the Southern District of New York reached the opposite conclusion.[33]

Second, is a president a federal officer for purposes of § 1442? Decisions by the federal district court in New York indicate that a president can invoke removal under § 1442.[34] At the same time, arguments that the president is not a federal officer surfaced in the litigation over whether President Trump could be removed from the ballot during the 2024 election cycle. Do these arguments (assuming their validity in one context) apply in the context of § 1442?

Third, what degree of activity as a federal officer empowers the federal officer to remove a criminal charge for an inchoate crime under § 1442? In the context of the Georgia state RICO conspiracy case, the Eleventh Circuit held that removal is proper only if the "heart" of the state's allegations and the "gravamen" of the suit—

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27. Notice of Removal of Crim. Prosecution Pursuant to 28 U.S.C. §§ 1442 & 1455 and Request for Leave to File Notice Based on Good Cause, Arizona v. Meadows, No. CV-24-02063-PHX, 2024 WL 4198384 (D. Ariz. Sept. 16, 2024).

28. *Meadows*, 2024 WL 4198384, at *1.

29. 28 U.S.C. § 1455(b)(1); *Meadows*, 2024 WL 4198384, at *3–5.

30. *Meadows*, 2024 WL 4198384, at *5–7.

31. *Id.* at *7 (quoting Georgia v. Meadows, 88 F.4th 1331, 1344 (11th Cir. 2023)).

The Arizona federal court declined to address the argument that § 1442(a) removal is available only to current federal employees. *See id.* at *3 n.1.

32. *See* Georgia v. Meadows, 88 F.4th 1331, 1338–43 (11th Cir. 2023), *cert. denied*, No. 24-97, 2024 WL 4743081, at *1 (U.S. Nov. 12, 2024).

33. New York v. Trump, 683 F. Supp. 3d 334, 343 (S.D.N.Y.), *appeal dismissed*, No. 23-1085, 2023 WL 9380793 (2d Cir. Nov. 15, 2023).

34. *See id.* The federal appellate court in the District of Columbia also allowed President Trump (while President) to remove a civil action under § 1442(a), thus accepting, if implicitly, that the president qualifies as an officer under § 1442(a). *See* K&D LLC v. Trump Old Post Off. LLC, 951 F.3d 503, 506–08 (D.C. Cir. 2020).

which it defined (as had the lower court) as the "heavy majority" of the alleged overt acts—implicate the federal officer's responsibilities.[35] But, whether for an inchoate crime or not, Supreme Court precedent seems to point to an inquiry into whether the officer's official duties are essential to the alleged criminal acts. Moreover, the Eleventh Circuit opinion essentially ignores a 2011 amendment to § 1442 that seemingly expanded the scope of removal.[36]

Fourth, assuming a federal officer successfully removes to federal court a state criminal charge against her, do other charges in a broader criminal case follow that charge to federal court? Here, no less a source than Wright & Miller's *Federal Practice and Procedure* treatise declares that § 1442(a) effects removal of the entire case, not just a single count.[37] But, even if this is an accurate statement of law in the civil context, there are reasons to doubt this conclusion in the context of criminal prosecutions.

If § 1442 does not mandate removal of an entire criminal case, then other questions arise. For example, do other charges against that officer (that do not implicate the officer's responsibilities or for which the officer lacks a viable federal defense) also shift to federal court, or do they remain in state court?

And what about charges brought against co-defendants? If they cannot themselves remove the charges against them to federal court—or if they perhaps could but opt against seeking removal—does that act as a bar to removal of the original officer's otherwise valid removal? That would be the case under traditional removal under § 1441, where unanimity of defendants is required for removal.[38] Alternatively, if all defendants agree to removal (or perhaps even if some do not accede), does the removal of a charge against one defendant under § 1442 effect removal of all charges against all defendants in the case, as the *Federal Practice and Procedure* treatise asserts?[39]

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35. *Meadows*, 88 F.4th at 1344.

36. *See* Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545.

37. 14C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3726 (4th ed. 2024) ("Because Section 1442(a)(1) authorizes removal of the entire action even if only one of the controversies it raises involves a federal officer or agency, the section creates a species of statutorily-mandated supplemental subject-matter jurisdiction."). I critique this assertion below. *See infra* Section IV.B.2.

38. *See* WRIGHT ET AL., *supra* note 37, § 3730.

39. *See* Devan Cole, *Trump May Try to Move the Fulton County Criminal Case to Federal Court. Here's Why*, CNN (Aug. 22, 2023), https://perma.cc/39YW-M9QK (noting, with respect to the Georgia state prosecution: "Some major questions over the removal possibility loom large, including whether a successful removal bid would transfer the entire case of 19 people to federal court or if it would allow the defendant to sever their case from the others, with some remaining in state court.").

This Article considers these important, undecided questions about the invocation of federal officer criminal removal. Beyond the setting of recent prosecutions, polarization in the country shows no signs of abating. It seems likely that conflicts between states and federal officials, and thus activities that might lead (rightly or wrongly) to state criminal charges against federal officials, will increase.[40]

The Article proceeds as follows. Part I offers a brief overview of the federal officer criminal removal provision.

Part II confronts questions about who qualifies as an "officer . . . of the United States." It argues that current and former federal officers and presidents should both qualify as "officer[s]" who can seek removal under § 1442(a).

Part III addresses the broader question of how a court should determine whether a criminal charge implicates activity taken by a federal officer "under color of such office." It focuses on the difficult setting—but one perhaps likely to occur with increasing frequency—where a federal officer is charged with an inchoate crime, such as conspiracy. It argues that while the Eleventh Circuit's decision in *Georgia v. Meadows*[41] may be correct that removal should not be allowed based upon a single official act, it was incorrect to focus on whether the "heavy majority" of overt acts fall under the officer's color of office. Instead, Supreme Court precedent directs courts to look to whether the officer's official duties are essential to the conduct alleged in the indictment. It also discusses the 2011 amendment to § 1442 that lowered the hurdle for removal further still.

Part IV considers issues arising in criminal cases involving multiple charges against a single defendant as well as charges against multiple defendants. It argues that the better answer is that § 1442(a) allows removal on a charge-by-charge basis. Only the charges against a criminal defendant that independently meet § 1442(a)'s requirements should move to federal court. The remaining charges against that defendant should remain in state court.

In the context of multiple defendants, a defendant need not have the acquiescence of her co-defendants to remove charges against her under § 1442(a). And, as above, only the removable charges against that defendant move to federal court; charges against any co-

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40. Consider, for example, a new Utah law that "establishes a framework for the Legislature, by concurrent resolution, to prohibit the enforcement of a federal directive within the state by government officers if the Legislature determines the federal directive violates the principles of state sovereignty." Constitutional Sovereignty Act, S. 57, 2024 Gen. Sess. (Utah 2024); *see* Eric Levenson, *Utah's New 'Sovereignty Act' Sets Up a Process to Overrule the Federal Government. But Is It Constitutional?*, CNN (Feb. 19, 2024), https://perma.cc/3Z72-5FMJ.

41. 88 F.4th 1331, 1343–50 (11th Cir. 2023), *cert. denied*, No. 24-97, 2024 WL 4743081 (U.S. Nov. 12, 2024).

defendants remain in state court (unless they independently meet § 1442(a)'s requirements).

I. A BRIEF HISTORY OF THE FEDERAL OFFICER REMOVAL STATUTE

Concern over state court jurisdiction as to actions against federal officers dates back to the early 1800s.[42] Objections in New England to trade embargoes imposed during the War of 1812 prompted Congress to enact the first statutory authority for federal officer removal.[43] Over the course of the 1800s, state hostility to federal revenue laws and officers fostered confrontations that sometimes resulted in litigation involving, and criminal prosecutions of, federal officers; this led Congress to create broader, permanent removal authority.[44] In the landmark 1879 case of *Tennessee v. Davis*,[45] the Supreme Court upheld the constitutionality of such removed prosecutions.[46] Congress codified the modern version of the statute at 28 U.S.C. § 1442(a) as part of its 1948 modernization of the Judicial Code, enlarging at the time the scope of the statute beyond the setting of revenue collection.[47]

The current version of § 1442(a) allows "any officer (or any person acting under that officer) of the United States" to remove "[a] civil action or criminal prosecution that is commenced in a State court . . . for or relating to any act under color of such office."[48] Until 2011, the provision allowed removal of actions "for any act under color of such office," but an amendment that year provided the current language, allowing removal of actions "for *or relating to* any act under color of such office."[49] The 2011 amendment expanded the universe of cases that can be removed to federal court.[50]

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42. For a full discussion of federal officer removal statutes up to the late nineteenth century, see FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 61 & nn.21–22 (1928).

43. *See* Watson v. Philip Morris Cos., 551 U.S. 142, 147–48 (2007); Willingham v. Morgan, 395 U.S. 402, 405 (1969).

44. *See Watson*, 551 U.S. at 148.

45. 100 U.S. 257 (1879).

46. *Id.* at 262–72. For discussion, see Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Court*, 97 VA. L. REV. 243, 278–80 (2013).

47. *See Watson*, 551 U.S. at 148.

48. 28 U.S.C. § 1442(a)(1).

49. *See* Removal Clarification Act of 2011, Pub. L. No. 112-51, § 2(b)(1)(A), 125 Stat. 545, 545 (emphasis added).

50. The House Report accompanying the proposed bill explained that the legislation "permit[s] removal by Federal officers 'in an official or individual capacity, for or relating to any act under color' of their office. This is intended to broaden the universe of acts that enable Federal officers to remove to Federal court." H.R. REP. NO. 112-17, pt. 1, at 6 (2011), *as reprinted in* 2011 U.S.C.C.A.N. 420, 425. *But see* 157 CONG. REC. H1372 (daily ed. Feb. 28, 2011) (statement of

The Supreme Court has read an additional requirement into § 1442(a) to avoid serious constitutional questions that might otherwise arise. Specifically, the Supreme Court has required that "[f]ederal officer removal under 28 U.S.C. § 1442(a) . . . be predicated upon averment of a federal defense."[51]

Two related justifications underlie the federal officer criminal removal provision. First, without the availability of removal, states could deploy criminal prosecutions to delay, stall, and ultimately undermine the functions of the federal government. As the Court explained in its 1879 decision in *Davis*, the federal government "can act only through its officers and agents, and they must act within the states."[52] And, if "those officers can be arrested and brought to trial in a state court for an alleged offense against the law of the state, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection," then "the operations of the general government may at any time be arrested at the will of one of its members."[53] The state courts, in other words, could effectively "paralyze the operations of the [federal] government."[54] Moreover, Supreme Court review of the state courts is insufficient to protect the federal government's interests here: After all, "even if, after trial and final judgment in the state court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution and the exercise of acknowledged federal power arrested."[55]

Second, federal officer removal provides an accused federal officer with a forum free of bias that might attend adjudication in state court. As the Supreme Court has explained, "State-court proceedings may reflect 'local prejudice' against unpopular federal laws or federal officials."[56] Thus, "[t]he act of removal permits a trial upon the merits of the state-law question free from local interests or prejudice."[57]

Rep. Sheila Jackson Lee) ("H.R. 368 does not make any changes to the underlying removal law. It simply clarifies 28 U.S.C. [§] 1442(a) by including any proceeding to the extent that in such a proceeding, a judicial order, including a subpoena for testimony or documents, is sought or issued.").

51. Mesa v. California, 489 U.S. 121, 139 (1989).

52. Tennessee v. Davis, 100 U.S. 257, 263 (1879).

53. *Id.*

54. *Id.*

55. *Id.*

56. Watson v. Philip Morris Cos., 551 U.S. 142, 150 (2007) (quoting Maryland v. Soper (No. 1), 270 U.S. 9, 32 (1926)).

57. Arizona v. Manypenny, 451 U.S. 232, 241–42 (1981); *see Soper (No. 1)*, 270 U.S. at 32 (noting "possible local prejudice, by state prosecutions instituted against federal officers in enforcing such laws"); Willingham v. Morgan, 395 U.S. 402, 407 (1969) ("Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum.").

Notwithstanding, these two justifications for federal officer criminal removal, the Court has indicated that federal officer removal ought to be more readily available in civil cases than criminal ones. In the civil context, the Court has explained that the policy underlying officer removal "should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1)."[58] But policy considerations are more complex in the criminal context. On the one hand, a state criminal prosecution is more likely to disturb the smooth operations of the federal government than a state civil proceeding.[59] On the other hand, a state's interest in retaining jurisdiction over criminal proceedings brought in its name is higher than its interest in retaining civil jurisdiction.[60] In the face of heightened state *and* federal interests in the criminal context, the Supreme Court has imposed a higher hurdle for federal court jurisdiction.[61]

With respect to lawyers and governing law, even if a state criminal prosecution is properly removed to federal court, the state remains represented by state prosecutors.[62] State law governs the substance of the criminal charges, but the Federal Rules of Criminal Procedure govern procedural aspects of the proceedings.[63] The state retains any right to appeal that it otherwise enjoys under governing state law.[64]

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58. *Willingham*, 395 U.S. at 407.

59. *See supra* text accompanying notes 52–55 (explaining how criminal prosecutions of federal officers could undermine federal governmental operations and grind them to a halt).

60. *See* Younger v. Harris, 401 U.S. 37, 43–45 (1971).

61. *See* Stefanelli v. Minard, 342 U.S. 117, 121 & n.2 (1951) (noting that respect for a "State's enforcement of its criminal law" had "received striking confirmation even where an important countervailing federal interest"—specifically, the possibility of removal to federal court—"was involved"); *see also Willingham*, 395 U.S. at 409 n.4 (noting in dicta in a § 1442 civil removal case that, "[w]ere this a criminal case, a more detailed showing might be necessary because of the more compelling state interest in conducting criminal trials in the state courts").

62. *See* Jonathan Remy Nash, *Nontraditional Criminal Prosecutions in Federal Court*, 53 ARIZ. St. L.J. 143, 193–94 (2021). Some states codify the point. For example, Georgia law provides:

> Whenever any criminal prosecution commenced by this state against any person for a violation of the laws of this state is removed to a United States district court pursuant to Chapter 89 of Title 28 of the United States Code, it shall be the duty of the district attorney of the circuit from which the case was removed, in association with the Attorney General, to appear for the state as the prosecuting officers of the state.

GA. CODE ANN. § 15-18-7 (2024).

63. *See* Arizona v. Manypenny, 451 U.S. 232, 241 (1981) ("[Upon removal,] the federal court conducts the trial under federal rules of procedure while applying the criminal law of the State." (citing Tennessee v. Davis, 100 U.S. 257, 271–72 (1879))); Nash, *supra* note 62, at 191–92.

64. *See Manypenny*, 451 U.S. at 239–50; Nash, *supra* note 62, at 193.

II. WHO QUALIFIES AS A FEDERAL OFFICER?

In this Part, I consider the outer bounds of who qualifies as an "officer" under § 1442(a). I first explore whether a former officer qualifies as an officer. The Eleventh Circuit has held to the contrary; I argue that this conclusion is erroneous.

Second, I address whether a president can invoke § 1442(a) as an officer. I argue that the president is eligible to invoke removal under § 1442(a).

A. Does a Former Federal Officer Qualify as a Federal Officer?

Can a person who was once a federal officer, but no longer is, seek removal under § 1442(a)? This question has divided courts hearing litigation involving former President Trump and members of his administration. In *New York v. Trump*,[65] the U.S. District Court for the Southern District of New York rejected former President Trump's effort to remove the prosecution brought by the New York County District Attorney.[66] But, the court did so based on its conclusion that the former president was not being prosecuted for actions taken under color of law and that the former president lacked a federal defense.[67] Before reaching those conclusions, the court opined:

> The parties assume, and I hold, that Trump, although not presently a federal officer, can remove a case otherwise qualified for removal. It would make little sense if this were not the rule, for the very purpose of the Removal Statute is to allow federal courts to adjudicate challenges to acts done under color of federal authority.[68]

More recently, the U.S. Court of Appeals for the Eleventh Circuit undertook a closer examination of the issue in connection with the Georgia state racketeering prosecution of numerous officials for election interference.[69] Mark Meadows, who had served as former President Trump's final Chief of Staff, sought removal of criminal charges brought against him by the State of Georgia.[70] After the district court ruled against Meadows (on the ground that the heart of the actions charged did not fall within Meadows's official duties), the Eleventh Circuit raised sua sponte the question of whether § 1442 applied to *former* federal officials.[71] Following supplemental briefing,

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65. 683 F. Supp. 3d 334 (S.D.N.Y.), *appeal dismissed*, No. 23-1085, 2023 WL 9380793 (2d Cir. Nov. 15, 2023).

66. *Id.* at 351.

67. *Id.*

68. *Id.* at 343.

69. *See* Georgia v. Meadows, 88 F.4th 1331, 1343–50 (11th Cir. 2023), *cert. denied*, No. 24-97, 2024 WL 4743081 (U.S. Nov. 12, 2024).

70. *See id.* at 1335–36.

71. *See id.* at 1337–38.

the court concluded that former officials could not avail themselves of § 1442(a).[72] After confirming that neither the Supreme Court nor the Eleventh Circuit had ever approved the application of the statute with respect to a former official,[73] the court largely rested this conclusion on what it saw as the plain language of the statute and on a 2023 en banc decision addressing the phrasing "officer and employee" in a federal criminal statute.[74]

While the Eleventh Circuit's holding finds some support in the language of § 1442(a), the better answer is that § 1442(a) does allow for removal of charges by former federal officers where the charges implicate behavior undertaken by them (as federal officers) while they were serving as federal officers.[75] One of the fundamental justifications for federal officer criminal removal is the threat that state criminal proceedings against officers would pose to the ability of the federal government to perform its basic functions.[76] From the perspective of this policy justification, the prosecution of a *former* federal officer poses no *direct* threat to ongoing government operations.[77] But this conclusion ignores another justification for federal officer criminal removal: to provide federal officers with an unbiased forum within which to litigate criminal charges brought against them.[78] To the extent that a state court forum is likely to be biased against a federal officer, it is entirely plausible that that same bias would persist even after the officer had left her office. Beyond that, it is conceivable that a *current* federal officer could modulate her

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72. *See id.* at 1338–43.

73. *See id.* at 1341.

74. *See id.* at 1338–41.

75. If the provision as currently constituted does *not* allow for removal by former officers, Congress should certainly amend the statute—as urged by two members of the Eleventh Circuit panel who held it inapplicable to former officers. *See id.* at 1350–51 (Rosenbaum, J., concurring, joined by Abudu, J.).

76. *See supra* text accompanying notes 52–55.

77. *See Meadows*, 88 F.4th at 1343 ("[A] state prosecution of a former officer does not interfere with ongoing federal functions . . . .").

One can argue that a current federal officer could see the indictment of a former office as a potential threat to her later, and in response to that threat modulate the conduct of her current position. The court of appeals' response to this point was that "no one suggests that Georgia's prosecution of Meadows has hindered the current administration." *Id.* But, given ongoing federal prosecutions by a special counsel into Trump and his compatriots, it is hard to envision the Department of Justice filing an amicus brief in the case on a point that favored a former member of the Trump administration. Indeed, one would think that, had the Department of Justice weighed in at all in the case, there would be accusations of interference in a state prosecution. Finally, it is hard to imagine a federal employee filing an amicus brief on the point if the Department of Justice did not.

78. *See supra* text accompanying notes 56–57.

conduct out of concern about facing criminal charges in state court after her service ended.[79]

The Eleventh Circuit rested its conclusion largely on the plain language of § 1442(a). The court ordered supplemental briefing specifically in light of the court's 2023 en banc decision in *United States v. Pate*.[80] The court in *Pate* held that a federal criminal provision proscribing the filing of false liens against federal officers and employees does not extend to the filing of liens against former officers and employees.[81]

The en banc court in *Pate* relied primarily on the plain language of the words "officers and employees."[82] Yet the court recognized that, despite its holding, it was possible that the terms "officers" and "employees" *could* include former officers and employees in other contexts.[83] As the Eleventh Circuit noted, the Supreme Court itself has held that they can.[84] The court then turned to statutory structure, context, and history to support its restrictive interpretation.[85] The federal criminal provision under which *Pate* was charged—18 U.S.C. § 1521—proscribes the filing of false liens but defines the class of

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79. *See supra* note 77; *cf.* Trump v. United States, 603 U.S. 593, 613 (2024) ("A President inclined to take one course of action based on the public interest may instead opt for another, apprehensive that criminal penalties may befall him upon his departure from office."); Georgia v. Shafer, 119 F.4th 1317, 1335 (11th Cir. 2024) (Grant, J., concurring) ("[T]he Supreme Court's conclusion that executive decisionmaking could be 'distorted by the threat of future litigation' is in serious tension with the *Meadows* panel's conclusion that the purpose of the federal-officer removal statute is limited to" shielding current officers." (quoting *Trump*, 603 U.S. at 615)).

80. 84 F.4th 1196 (11th Cir. 2023) (en banc).

81. *Id.* at 1198. Specifically, 18 U.S.C. § 1521 provides:

> Whoever files . . . any false lien or encumbrance against the real or personal property of an individual described in section 1114, on account of the performance of official duties by that individual, knowing or having reason to know that such lien or encumbrance is false . . . shall be fined under this title or imprisoned for not more than 10 years, or both.

In turn, 18 U.S.C. § 1114 makes it a federal crime to

> kill[] or attempt[] to kill any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance.

Thus, § 1521 incorporates by direct reference § 1114's protection of federal "officer[s] and employee[s]."

82. *Pate*, 84 F.4th at 1201–03.

83. *Id.* at 1208 ("None of this, of course, is to say that the terms 'officer' and 'employee' can *never* include formers.").

84. *See id.*

85. *See id.* at 1209.

protected individuals—"any office or employee of the United States"—by reference to another statutory provision, 18 U.S.C. § 1114.[86] But, while Congress had left § 1521 unamended, it had, in the meantime, amended two other criminal provisions with references to § 1114 to explicitly encompass "former" officers and employees.[87] This, the court concluded, reflected a congressional intent to leave former officers and employees beyond § 1521's reach.[88]

The court also pointed to "rights" that citizens—including "unsympathetic defendants"—enjoy: the right "to receive fair notice when the law criminalizes conduct" and the right to "be punished for only those acts that the *legislature* has criminalized."[89] In other words, the court saw it appropriate to have the prosecution, not the criminal defendant, bear the risk of ambiguity in the statutory language.

The *Meadows* court's application of *Pate* to § 1442(a) is problematic. I take no position here on whether *Pate* was correctly decided, but even assuming that it was, *Pate* does not control in the § 1442(a) context.[90] Neither the *Pate* court's point about statutory structure and history nor its point about limiting criminal liability translates to the setting of § 1442(a) removal.

Begin with the statutory structure and history. The *Meadows* court invoked the *Pate* court's interpretation of § 1521 compared to other related provisions as a model for interpreting § 1442(a).[91] The crux of the interpretive logic advanced in *Pate* was that the criminal provision at issue there was not amended to include former officers and employees, while other provisions that referenced the same section were.[92] The *Meadows* panel highlighted the fact that, unlike § 1442(a)(1), § 1442(b) explicitly extends to someone "who is, or at the

86. *See* sources cited *supra* note 81.

87. *See Pate*, 84 F.4th at 1202 (discussing 18 U.S.C. §§ 111, 115).

88. *See id.* at 1202–03.

89. *Id.* at 1212.

90. While concurring in the Eleventh Circuit's holding that Jeffrey Clark and the 'alternate' Georgia electors could not remove their criminal prosecutions to federal court on the ground that the *Meadows* case was binding precedent, Judge Britt argued that *Meadows* "was, and is, incorrect." Georgia v. Shafer, 119 F.4th 1317, 1334 (11th Cir. 2024) (Grant, J., concurring); *see* Georgia v. Clark, 119 F.4th 1304, 1317 (11th Cir. 2024) (Grant, J., concurring) ("For the reasons outlined in my separate opinion in *Georgia v. Shafer*, I respectfully concur." (citation omitted)). Judge Britt, who had dissented from the court's en banc opinion in *Pate*, reiterated her disagreements with *Pate*. *See Shafer*, 119 F.4th at 1334–35. She also argued that *Meadows* was wrong even if the conclusion in *Pate* was correct. *See id.* at 1335.

91. *See* sources cited *supra* note 81.

92. *See* cases cited *supra* notes 86–88.

time the alleged action accrued was, a civil officer of the United States."[93]

The comparison drawn by the *Meadows* court, however, is inapt. Although § 1442 happens today to host both § 1442(a)(1) and § 1442(b), § 1442(b) has an origin distinct from § 1442(a)(1). While § 1442(a)'s earliest progenitor dates back to 1833, § 1442(b)'s predecessor harkens back only to 1872.[94] Moreover, what is now § 1442(b) already included explicit language about 'former' officers when it was codified in 1948 along with the predecessor to § 1442(a)(1) under current § 1442.

The *Meadows* court emphasized that § 1442(b)'s predecessor in 1872 was fashioned on § 1442(a)'s predecessor.[95] And, the court reasoned, the fact that "Congress expressly cross-referenced the predecessor to subsection (a) in the enacted text of the predecessor to subsubsection (b) . . . reinforces the presumption that the variance in language between the two provisions reflects a deliberate choice."[96] However, one can take much more from Congress's failure to amend one section while amending two other related statutes than from Congress's decision to leave an existing statute intact when *enacting* a new one.[97]

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93. *See* Georgia v. Meadows, 88 F.4th 1331, 1339 (11th Cir. 2023), *cert. denied*, No. 24-97, 2024 WL 4743081 (U.S. Nov. 12, 2024); 28 U.S.C. § 1442(b) ("A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.").

94. *See Meadows*, 88 F.4th at 1340.

95. *See id.* at 1340–41 ("*See* 17 Stat. 44 (Mar. 30, 1872) (predecessor to subsection (b), providing that removal shall occur 'in the same manner as now provided for . . . by the provisions of section three of the act of March second, eighteen hundred and thirty-three [predecessor to subsection (a)]').").

96. *Id.*

97. To use an example, consider 28 U.S.C. § 1352, enacted in 1948, which provides in pertinent part: "The district courts shall have original jurisdiction, concurrent with State courts, of any action on a bond executed under any law of the United States . . . ." (A subsequent amendment in 1980 clarifies that the jurisdiction is exclusive of certain Court of International Trade jurisdiction. *See* Pub. L. No. 96-417, § 506, 94 Stat. 1727, 1743 (1980).) The legislative history from 1948 states: "The new section also makes clear that it does not affect the right to prosecute such actions in State courts." H.R. REP. NO. 80-308, at A124 (1947); *see also* 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2972 (3d ed. 2024).

At the time, there were on the books numerous statutes that began (as they still do today) with the same language: Consider the grants of federal question jurisdiction (now codified at 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.")) and federal diversity jurisdiction (now codified at

The *Meadows* court's reliance on a distinction between subsections (a) and (b) of § 1442 is all the stranger because subsection (b) is in a state of essential desuetude. As far back as 1999, the American Law Institute (ALI) recommended that § 1442(b) be repealed as "obsolete."[98] The ALI explained that the provision had "not been invoked in any reported case since the 1948 revision of the Judicial Code, leaving aside cases in which '§ 1442(b)' has been cited by typographical error,"[99] a result that I used a Westlaw search to confirm persists today.[100] In short, § 1442(b) is today a dead letter,

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28 U.S.C. § 1332(a)(1) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States . . . ."). These statutes do not specify that the jurisdiction thus granted is concurrent with the state courts, yet there is no doubt that the jurisdiction so granted is indeed concurrent. No one argues that, by failing to amend these other jurisdictional statutes when it enacted § 1352 in 1948, Congress implicitly made "a deliberate choice" to leave the federal question and diversity jurisdiction exclusively federal. *Meadows*, 88 F.4th at 1340–41.

98. AM. L. INST., FEDERAL JUDICIAL CODE REVISION PROJECT 401 (2004) (relevant portion approved in 1999) ("Present § 1442(b) is deleted as obsolete . . . ."); *id.* at 406–07 ("Present § 1442(b) may more confidently be pronounced to be obsolete . . . . Present § 1442(b) appears to have originated in 1872 when removal was still governed by § 12 of the Judiciary Act. Under that provision, removal was permitted in a diversity action only when an alien or a nonresident defendant was sued by 'a citizen of the state in which suit is brought.' The predecessor of § 1442(b) expanded the right of removal to permit a nonresident defendant, if a federal officer, to remove a suit brought by an alien rather than a forum-state-citizen plaintiff. The significance of this special right of removal was reduced when the expansive jurisdictional statute of 1875 and the subsequent removal statutes of 1887 and 1888 permitted a nonresident defendant to remove any diversity or alienage action that could have been brought originally in federal court[—]the only advantage then granted to nonresident federal officers was to remove suits by aliens regardless of the amount in controversy . . . . The predecessor of present § 1442 thereafter functioned only as the source of occasional confusion . . . before becoming invisible in the published reports." (citations omitted)); *see also* Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 724–25, 767 (1986) (explaining that, for a period, the Supreme Court interpreted the Judiciary Act of 1875 to allow removal based on federal defenses, which provided federal officer defendants in civil cases with ready access to a federal venue).

99. AM. L. INST., *supra* note 98, at 406.

100. I ran the search 'adv: "28 U.S.C." /2 1442(b)' on Westlaw's Federal Cases database. The search, which I conducted in February 2025, produced forty-eight cases. Of those, forty-five cases involved evident mis-citations, either by courts or parties. *See, e.g.*, Ute Indian Tribe of the Uintah & Ouray Rsrv. v. Ute Distrib. Corp., 455 F. App'x 856, 862 (10th Cir. 2012) ("The Tribe's removal order also referred to 28 U.S.C. § 1442(b)(2). No such subsection exists. *See* 28 U.S.C. § 1442(b). The Tribe likely meant to refer to 28 U.S.C. § 1442(a)(2) . . . ."). One case quickly dismissed an attempted invocation of § 1442(b). *See* Iowa v. Johnson,

and the Eleventh Circuit's attempt to divine meaning for § 1442(a) in juxtaposition with it was misplaced.

The *Pate* court's exhortations about protecting the rights of the accused similarly do not resonate in the § 1442(a) context. Limiting the statutory scope to current, and not former, officers protected the rights of the accused in *Pate*, but in the § 1442(a) context a similar reading detracts from the accused's arsenal.

Moving beyond *Pate*'s shadow, it is patently difficult to square the limited reading of § 1442(a) with court interpretations of other removal provisions that do not explicitly embrace "former" officers and employees yet are interpreted to include them. Section 1442(a) allows for removal to federal court of "[a] civil or criminal prosecution in a court of a State of the United States against a member of the armed forces of the United States,"[101] yet the statute has been interpreted to allow retired members of the armed forces to invoke it.[102] The Westfall Act provides that, where an "employee" of the United States is sued for damages arising out of a negligent or wrongful act or omission, "[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed . . . to the district court of the United States" and "shall be deemed to be an action or proceeding brought against the United States."[103] Despite the facially restrictive reference to "employee," the Act has been interpreted to apply to former employees as well.[104]

The interpretation of the *Meadows* court would lead to the anomalous result that those acting under the direction of former federal officers receive greater protection under § 1442 than the former federal officers themselves. Section 1442(a) allows for removal

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976 F. Supp. 812, 816–17 (N.D. Iowa 1997) ("[T]here are no allegations that this is a personal action commenced by an alien against citizens who are civil officers of the United States, because the State of Iowa, not an alien, instituted the action and there are no allegations that the defendants are civil officers of the United States. 28 U.S.C. § 1442(b)."). Another case was the Eleventh Circuit's opinion in *Meadows*. The final case, *Goffner v. Avondale Industries, Inc.*, No. 22-3047, 2024 WL 2844542 (E.D. La. June 5, 2024), cited § 1442(b) in its explication of the Eleventh Circuit's decision in *Meadows*, which the district court ultimately rejected. *Id.* at *3–4.

101. 28 U.S.C. § 1442(a).

102. *See* Donaldson v. United States, No. 09-cv-1049-Orl-28GJK, 2011 WL 915571, at *1 & n.2 (M.D. Fla. Mar. 16, 2011) (defendant able to remove despite, it seems, previous honorable discharge from Navy).

103. 28 U.S.C. § 2679(d)(2).

104. *See, e.g.*, Schneider v. Kissinger, 412 F.3d 190, 191–93 (D.C. Cir. 2005) (former National Security Advisor); Sanders v. Williams, 34 F. App'x 675, 676 (10th Cir. 2002) (retired Internal Revenue Service agent).

by "any person acting under [a federal] officer."[105] It seems that such a person need not *at the time of removal* be acting under the direction of a federal officer; rather, removal will be available so long as the person was acting under the direction of a federal officer at the time the cause of action accrued.[106] But why should a person, not a federal officer, enjoy greater access to removal than a federal officer? There is no good answer to this question.

B. Does the President Qualify as a Federal Officer?

Section 1442(a)(1) empowers "any officer . . . of the United States" to seek removal. Does the president of the United States qualify as an "officer" for § 1442(a)(1) purposes? An initial reading of the statute suggests little reason to think otherwise, and the U.S. District Court for the Southern District of New York took that view when former President Trump sought to remove the New York County D.A.'s prosecution.[107] The U.S. Court of Appeals for the District of Columbia Circuit also accepted that position (evidently without objection or reflection) in a 2020 civil decision.[108]

Recent litigation over the scope of similar language in the Fourteenth Amendment's Disqualification Clause draws at least the obviousness of that conclusion in question. Section 3 of the Fourteenth Amendment precludes from serving as "a Senator or Representative in Congress, or elector of President and Vice President, or [from] hold[ing] any office, civil or military, under the United States" anyone who, "having previously taken an oath, . . . as an officer of the United States . . . , to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof."[109] Among various arguments mounted against disqualifying former President

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105. 28 U.S.C. § 1442(a)(1).

106. The *Georgia v. Meadows* court emphasized that "Meadows identifies no precedent from either the Supreme Court or this Court permitting removal under section 1442(a)(1) by a former officer." 88 F.4th 1331, 1341 (11th Cir. 2023), *cert. denied*, No. 24-97, 2024 WL 4743081 (U.S. Nov. 12, 2024). The court noted that, "in *Maryland v. Soper*, the defendants 'averred that they were Federal prohibition agents' at the time of removal." *Id.* (quoting Maryland v. Soper (No. 1), 270 U.S. 9, 22 (1926)). True though that is, the *Meadows* court did not mention that a fifth defendant—one William Trabing—was not a federal officer at all, but rather "was their chauffeur, and was assisting them and was acting under the authority of the [federal] prohibition director." *Soper (No. 1)*, 270 U.S. at 22. There was no suggestion that Trabing averred that he continued in that role at the time of removal, yet the Court did not suggest that removal was improper on that ground.

107. *See* New York v. Trump, 683 F. Supp. 3d 334, 343 (S.D.N.Y.), *appeal dismissed*, No. 23-1085, 2023 WL 9380793 (2d Cir. Nov. 15, 2023).

108. *See* K&D LLC v. Trump Old Post Off. LLC, 951 F.3d 503, 508 (D.C. Cir. 2020).

109. U.S. CONST. amend. XIV, § 3.

Trump from the ballot, some have argued that the constitutional language "office . . . under the United States" and/or the language "officer of the United States" does not include the President. Indeed, the Colorado trial court ruled that (i) the office of the presidency is not an "office under the United States,"[110] and (ii) the President is not an "officer of the United States" under the Fourteenth Amendment.[111] The Colorado Supreme Court reversed the trial court on both points,[112] and an Illinois trial court has reached the same conclusion.[113] The Supreme Court ultimately reversed the Colorado Supreme Court's decision. All the Justices agreed that the state lacked authority to bar Trump from the ballot, but neither the majority opinion nor the concurrences addressed the question of whether any Section 3 language applies to the President.[114] Scholars have also debated the sweep of the constitutional provision.[115]

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110. *See* Anderson v. Griswold, No. 2023CV32577, 2023 WL 8006216, at *43–44 (Colo. D. Ct. Nov. 17, 2023), *aff'd in part & rev'd in part*, 543 P.3d 283 (Colo. 2023), *rev'd on other grounds sub nom.* Trump v. Anderson, 144 S. Ct. 662 (2024).

111. *See id.* at *45.

112. *See* Anderson v. Griswold, 543 P.3d 283, 319–25 (Colo. 2023), *rev'd on other grounds sub nom.* Trump v. Anderson, 144 S. Ct. 662 (2024).

113. *See Trump Is Disqualified from Illinois Ballot, Judge Rules*, REUTERS (Feb. 28, 2024), https://perma.cc/M6WJ-JJ9Q.

114. *See* Trump v. Anderson, 144 S. Ct. 662, 671 (2024).

President Trump had appealed the Illinois decision within the Illinois state judicial system, *see* Sabrina Willmer & Erik Larson, *Trump to Stay On Illinois Ballot as He Appeals Jan. 6 Ban*, BLOOMBERG (Feb. 29, 2024), https://perma.cc/38EH-Y2BD, but the Supreme Court's resolution of the Colorado case put an end to the Illinois litigation as well, *see* Chris Tye, *Illinois Effort to Keep Trump Off Ballot Is Over After U.S. Supreme Court Ruling*, CBS NEWS CHI. (Mar. 5, 2024), https://perma.cc/TD9D-SCUM.

115. *Compare* William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605, 729–30 (2024) (asserting that Section Three is triggered by actions of individual who previously served as president, and precludes people who fall within its coverage from serving in the future as president), *with* Josh Blackman & Seth Barrett Tillman, *Is the President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment?*, 15 N.Y.U. J.L. & LIBERTY 1, 5 (2021) [hereinafter Blackman & Tillman, *Is the President an Officer*] (to the contrary), *and* Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28 TEX. REV. L. & POL. 350, 366–67 (2024) [hereinafter Blackman & Tillman, *Sweeping and Forcing*] (same). *See also* Kurt T. Lash, *The Meaning and Ambiguity of Section Three of the Fourteenth Amendment*, 47 HARV. J.L. & PUB. POL'Y 309, 318–19 (2024) (assessing Section Three as substantially ambiguous, and noting that "the only thing that is clear about the text of Section Three" is that it "empowered Congress to prevent leading rebels from returning to Congress, skewing local slates of presidential electors, or receiving appointments to federal or state offices absent permission from two-thirds of both Houses of Congress"). *See generally* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87 (2021) (providing a detailed

In the end, it seems that—whatever the merits of the Fourteenth Amendment arguments, a position on which I do not take here—the better answer is that presidents *can* avail themselves of removal under § 1442(a). For one thing, to whatever extent they are meritorious, many arguments about the scope of "officers" under the Fourteenth Amendment are specific to that constitutional provision. The Colorado trial court in the Trump ballot access litigation noted, as has Professor Kurt Lash, that an earlier draft of the Amendment included an explicit reference to the President and Vice President but that language was dropped.[116] But of course, that argument has no application in the context of § 1442. Indeed, the progenitor of § 1442(a) long predates the Fourteenth Amendment.[117]

The Colorado trial court concluded, and aligned scholars argue, that the Fourteenth Amendment does not preclude a former president—even one who engaged in an insurrection—from holding office again because the Amendment specifies that an officer so precluded must have "taken an oath . . . to support the Constitution of the United States," and the President's oath differs from the oath taken by other officers.[118] Again, whatever the merit of this argument in the context of the Fourteenth Amendment, § 1442 includes no such qualifying language based upon the language of the oath an officer has (or has not) taken.

Even leaving arguments grounded in the Fourteenth Amendment to the side, there are still other arguments weighing against a president invoking § 1442(a) as an "officer . . . of the United States." The U.S. district court hearing former President Trump's effort to remove the New York County District Attorney's prosecution noted statements by the Supreme Court from other contexts, which state that[119] "[u]nless a person in the service of the government . . . holds his place by virtue of an appointment by the president, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States,"[120] and that "[t]he people do

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history of Section Three and of Congress's eventual grant of amnesty from Section Three's disabilities).

Many law professors also submitted amicus briefs before the Supreme Court. *See Trump v. Anderson*, SCOTUSBLOG (2025), https://perma.cc/SNH2-63EL (listing amicus briefs by numerous professors and groups of professors).

116. *See* Anderson v. Griswold, No. 2023CV32577, 2023 WL 8006216, at *43 (Colo. D. Ct. Nov. 17, 2023), *aff'd in part & rev'd in part*, 543 P.3d 283 (Colo. 2023), *rev'd on other grounds sub nom.* Trump v. Anderson, 144 S. Ct. 662 (2024); Lash, *supra* note 115, at 329–30.

117. *See supra* Part I.

118. *See Anderson*, 2023 WL 8006216, at *45; Blackman & Tillman, *Is the President an Officer*, *supra* note 115, at 24.

119. *See* New York v. Trump, 683 F. Supp. 3d 334, 343 (S.D.N.Y.), *appeal dismissed*, No. 23-1085, 2023 WL 9380733 (2d Cir. Nov. 15, 2023).

120. United States v. Mouat, 124 U.S. 303, 307 (1888).

not vote for the 'Officers of the United States.'"[121] These statements did not dissuade U.S. District Court Judge Alvin Hellerstein in the *Trump* case from opining (though as "dictum, unnecessary for the decision that I reach"[122]) that "the President should qualify as a 'federal officer' under the removal statute."[123]

The conclusion that § 1442(a) extends to presidents is consistent with extant court holdings by some courts of appeals that members of Congress qualify as "officer[s] of the United States" under § 1442(a)(1).[124] Like the president, members of Congress are elected, not appointed.[125] Indeed, unlike the president, they are not members of the executive branch.[126] Nevertheless, courts have concluded that they qualify as "officer[s] of the United States" for § 1442(a) purposes.[127]

At the end of the day, it seems that the better answer is that, under the existing statute,[128] a president enjoys the prerogative to remove a state criminal prosecution (provided, of course, that all the requirements of the statute are met). While it might be said that

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121. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 497–98 (2010) (quoting U.S. CONST. art. II, § 2, cl. 2).

122. *Trump*, 683 F. Supp. 3d at 343. The judge saw his holding on former officers as dicta because of his ultimate conclusion that removal was unavailable because (i) the prosecution did not involve actions taken by former President Trump under color of law, *see id.* at 345–46, and (ii) former President Trump lacked any viable federal defense to the state's charges, *see id.* at 346.

123. *Id.* at 343.

124. *See* Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 412, 415 (D.C. Cir. 1995) (members of Congress can seek removal under § 1442(a)); Williams v. Brooks, 945 F.2d 1322, 1324–25 n.2 (5th Cir. 1991) ("[R]emoval is proper under section 1442(a)(1) . . . as a congressman is an 'officer of the United States' within the meaning of that subsection."); Richards v. Harper, 864 F.2d 85, 86 (9th Cir. 1988) (describing members of Congress "as officers of the United States [who] may remove an action from state to federal court").

It is true that § 1442(a)(4) allows removal by "[a]ny officer of either House of Congress, for or relating to any act in the discharge of his official duty under an order of such House." 28 U.S.C. § 1442(a)(4). In ordinary circumstances, a U.S. Representative or Senator will not have undertaken any relevant "act in the discharge of his official duty under an order of such House." *Id.* Thus, removal under § 1442(a)(4) will ordinarily be unavailable to elected representatives. *See, e.g.*, *Williams*, 945 F.2d at 1324 n.2 ("Removal jurisdiction would appear not to lie under section 1442(a)(4), as Congressman Brooks was not acting 'under an order of' the House of Representatives.").

125. U.S. CONST. art. I, § 2, cl. 2.

126. *See id.* art. I, § 1.

127. *See Brown & Williamson Tobacco Corp.*, 62 F.3d at 412, 415 (members of Congress can seek removal under § 1442(a)).

128. A bill currently pending before the House of Representatives would amend § 1442(a) explicitly to cover "[t]he President or Vice President, or a former President or Vice President." No More Political Prosecutions Act, H.R. 2553, 118th Cong. § 2(a)(2) (2023).

certain settings (such as the Fourteenth Amendment) call for narrower interpretations of 'officer of the United States,' there is no reason to think that § 1442(a) is such a setting.

III. WHEN IS THE PROSECUTION OF A FEDERAL OFFICER FOR AN INCHOATE CRIME REMOVABLE?

In this Part, I consider when § 1442 allows a federal officer to remove to federal court a state criminal prosecution for an inchoate crime. The Eleventh Circuit in the *Meadows* case addressed this question,[129] reasoning that (i) the fact that Meadows faces conspiracy charges required examining the defendant's alleged association with the conspiracy and the "heavy majority" of alleged overt acts,[130] and (ii) a required "causal nexus" between Meadows's official acts and the alleged crimes was not met.[131] While the *Meadows* court's conclusion that Meadows could not validly remove the prosecution may be defensible, the court's reasoning falls short in two ways. First, the court's assertion that removal of a conspiracy charge requires that a "heavy majority of overt acts" relate to the officer's duties does not follow from governing precedent and goes beyond the statutory directive.[132] Second, the court's causal nexus requirement is inconsistent with the 2011 amendment of § 1442(a).

The starting point for understanding the scope of federal officer criminal removal must be a trilogy of cases captioned *Maryland v. Soper* that reached the Court during Prohibition.[133] The *Soper* cases represent perhaps the Court's greatest engagement in the criminal context with the requirement that a federal officer be charged with behavior taken under color of office in order to remove under § 1442. The cases involved state criminal charges against federal agents enforcing Prohibition, along with their chauffeur.[134] According to the federal officers, they followed orders from a superior to investigate an illegal distilling operation.[135] They encountered a group of men who fled when the federal officers announced their presence.[136] Then, as they were returning to their vehicle to report what happened to their

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129. This was an alternate holding to the court's first conclusion that § 1442(a) is unavailable to former federal officers. *See* Georgia v. Meadows, 88 F.4th 1331, 1343 (11th Cir. 2023) ("Even if section 1442(a)(1) applied to former officers, we would still affirm because Meadows fails to prove that the conduct underlying the criminal indictment relates to his official duties."), *cert. denied*, No. 24-97, 2024 WL 4743081 (U.S. Nov. 12, 2024).

130. *See id.* at 1344–45.

131. *See id.* at 1348–50.

132. *See id.* at 1344.

133. *See* Maryland v. Soper (No. 1), 270 U.S. 9 (1926); Maryland v. Soper (No. 2), 270 U.S 36 (1926); Maryland v. Soper (No. 3), 270 U.S. 44 (1926).

134. *See Soper (No. 1)*, 270 U.S. at 20–22.

135. *See id.* at 23.

136. *See id.* at 23–24.

superior, they came upon a severely wounded man.[137] Though they took the man for medical care, he passed away.[138] Prosecutors in Harford County, Maryland, charged four officers and the chauffeur with murder.[139] In addition, based on testimony given to the coroner after they had been arrested for the murder, the state prosecutors charged the officers and chauffeur with obstruction of justice and also charged one agent with perjury.[140]

In three separate opinions, the Supreme Court was largely unreceptive to the defendants' efforts to remove the charges against them to a federal forum. The Court emphasized the need for a federal officer seeking removal to establish a "causal connection between what the officer has done under asserted official authority and the state prosecution."[141] The burden is on the officer to show that "the prosecution of him, for whatever offense, has arisen out of the acts done by him under color of federal authority and in enforcement of federal law."[142] In so doing, the officer "should be candid, specific and positive in explaining his relation to the transaction growing out of which he has been indicted, and in showing that his relation to it was confined to his acts as an officer."[143]

With respect to the murder charge, the Court was of the view that the removal petition was merely rote.[144] More, the Court explained, was required before removal could occur:

> These averments amount to hardly more than to say that the homicide on account of which they are charged with murder was at a time when they were engaged in performing their official duties. They do not negative the possibility that they were doing other acts than official acts at the time and on this occasion, or make it clear and specific that whatever was done by them leading to the prosecution was done under color of their federal official duty.[145]

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137. *See id.* at 24.

138. *See id.*

139. *See id.* at 21.

140. *See* Maryland v. Soper (No. 2), 270 U.S. 36, 40–41 (1926); Maryland v. Soper (No. 3), 270 U.S. 44, 45 (1926).

141. *Soper (No. 1)*, 270 U.S. at 33; *see also id.* ("It is enough that his acts or his presence at the place in performance of his official duty constitute the basis, though mistaken or false, of the state prosecution.").

142. *Id.*

143. *Id.* at 35. (The Westlaw version of the case reports the word "indicted" as "indicated"; the original case correctly includes the word "indicted.").

144. *See id.* at 34 ("We think that the averments of the amended petition in this case are not sufficiently informing and specific to make a case for removal . . . . [T]he only averments important in directly connecting the prosecution with their acts are at the opening and close of their petition.").

145. *Id.* at 35. The Court further elucidated:

The Court granted the state's request for mandamus, though it gave the federal district judge the discretion to allow the defendants to amend their removal petition.[146]

The Court was "absolute" in its conclusion that the obstruction of justice and perjury charges should be remanded to state court.[147] These charges, the Court reasoned, did not arise of out behavior that fell within the agents' color of office.[148] As the Court explained, "The defendants, when called upon to testify before the coroner, were not obliged by federal law to do so."[149]

The *Soper* cases thus established three important points about federal officer criminal removal. First, whatever the legal standard for color of office is, a court must apply that standard to each charge separately.[150] Second, perfunctory and conclusory statements about

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> They do not allege what was the nature of Wenger's fatal wound, whether gunshot or otherwise, whether they had seen him among those who brought the still and fled, or whether they heard, or took part in any shooting. They do not say what they did, if anything, in pursuit of the fugitives. It is true that in their narration of the facts, their nearness to the place of Wenger's killing and their effort to arrest the persons about to engage in alleged distilling are circumstances possibly suggesting the reason and occasion for the criminal charge and the prosecution against them. But they should do more than this in order to satisfy the statute. In order to justify so exceptional a procedure, the person seeking the benefit of it should be candid, specific and positive in explaining his relation to the transaction growing out of which he has been indicted, and in showing that his relation to it was confined to his acts as an officer.

Id.

146. *See id.* at 35–36.

147. *See* Maryland v. Soper (No. 2), 270 U.S. 36, 44 (1926) ("As the indictment in this case was not removable under § 33, the mandamus to the Judge of the District Court to remand it to the Circuit Court for Harford County, Maryland, must be made absolute. The writ need not issue, however, as Judge Soper's return indicates that he will act upon an expression of our views."); Maryland v. Soper (No. 3), 270 U.S. 44, 45 (1926) ("[W]e must hold that there was no ground for removing the prosecution of Ely for perjury, and that the mandamus to require the remanding of the removal should be made absolute.").

148. *See Soper (No. 2)*, 270 U.S. at 42–44; *Soper (No. 3)*, 270 U.S. at 45.

149. *Soper (No. 2)*, 270 U.S. at 43. The Court clarified:

> [E]ven under state law, they might have stood mute, because the proceeding was one in which they were accused of crime. They themselves show that they voluntarily made the statements upon which these indictments were founded. While of course it was natural that if not guilty they should have responded fully and freely to all questions as to their knowledge of the transaction, with a view of showing their innocence, nevertheless their evidence was not in performance of their duty as officers of the United States.

Id.

150. This follows from the Supreme Court's careful, distinct treatment of each of the three charges.

that link will not suffice.[151] Third, it falls on a federal officer seeking removal to establish a causal link between the officer's official duties and the state law charges.[152] This "causal nexus" requirement seems to require that the officer's federal duties be *essential* to the behavior that the state has charged as criminal; this jibes with the emphasis by the Court in another case arising out of Prohibition enforcement—*Colorado v. Symes*[153]—on focusing on "[t]he outstanding fact" in the case.[154]

The third point—that is, the notion that a "causal connection between what the officer has done under asserted official authority and the state prosecution"[155]—is likely no longer required in all cases by virtue of the 2011 amendment to § 1442(a).[156] That amendment expanded the set of cases removable to federal court by authorizing removal not only of prosecutions "for . . . any act under color of . . . office,"[157] but also for prosecutions "relating to any act under

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As I discuss below, the *Soper* Court's distinct treatment of each charge may have ramifications as to the question of whether a federal court has supplemental jurisdiction over charges against a defendant that are not independently removable when it does have jurisdiction over one charge against that same defendant. *See infra* text accompanying notes 189–92.

151. *See supra* text accompanying notes 143–45. To similar effect on this point is another case arising out of Prohibition enforcement. *See* Colorado v. Symes, 286 U.S. 510, 514 (1932). There, the State of Colorado charged a federal agent with murder. *Id.* In his petition to remove the prosecution to federal court, the officer explained that he had tried to arrest the murder victim for having and trying to drink from a bottle of wine; in an ensuing scuffle, the officer had struck the victim on the head with his gun. *See id.* at 515–16. Together with another federal officer, the officer had arrested the victim and others involved in the scuffle; the victim later passed away from his wounds while in jail. *See id.* at 516–17. The Court emphasized that "[t]he burden is upon him who claims the removal plainly to set forth . . . all the facts relating to the occurrence, as he claims them to be, on which the accusation is based." *Id.* at 518–19.

The Court concluded that the officer's removal petition did "not measure up to the required standard." *Id.* at 520. The Court zeroed in on "[t]he outstanding fact" in the case—"that petitioner killed Smith by intentionally striking him on the head with a gun"—as "the basis of the state's prosecution." *Id.* And, on that point, the statements in the officer's petition were "not such as would naturally be employed by one desiring fully to portray what happened." *Id.*

The Court thus granted the state's request for remand, albeit—as in the first *Soper* opinion—subject to the district judge's discretion to allow the officer to amend his petition and submit additional evidence. *See id.* at 521.

152. *See supra* text accompanying notes 141–43.

153. 286 U.S. 510 (1932).

154. *Id.* at 520.

155. Maryland v. Soper (No. 1), 270 U.S. 9, 33 (1926).

156. *See supra* notes 48–49 and accompanying text.

157. The House Report accompanying the proposed bill explained that the legislation "permit[s] removal by Federal officers 'in an official or individual capacity, for or relating to any act under color' of their office. This is intended to broaden the universe of acts that enable Federal officers to remove to Federal

color of . . . office."[158] A number of federal courts of appeals have concluded that this amendment opens another avenue to removal, rendering the *Soper*'s causal nexus no longer a strict requirement for removal.[159]

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court." H.R. REP. NO. 112-17, pt. 1, at 6 (2011), *reprinted* 2011 U.S.C.C.A.N. 420, 425. *But see* 157 CONG. REC. H1372 (daily ed. Feb. 28, 2011) (statement of Rep. Sheila Jackson Lee) ("H.R. 368 does not make any changes to the underlying removal law. It simply clarifies 28 U.S.C. [§] 1442(a) by including any proceeding to the extent that in such a proceeding, a judicial order including a subpoena for testimony or documents, is sought or issued.").

158. *See* Removal Clarification Act of 2011, Pub. L. No. 112-51, § 2(b)(1)(A), 125 Stat. 545, 545 (amending the statute by "striking 'capacity for' and inserting 'capacity, for or relating to'"); Latiolais v. Huntington Ingalls, Inc., 951 F.3d 286, 292 (5th Cir. 2020) (en banc) ("By the Removal Clarification Act, Congress broadened federal officer removal to actions, not just *causally* connected, but alternatively *connected* or *associated*, with acts under color of federal office."); District of Columbia v. Exxon Mobil Corp., 89 F.4th 144, 155 (D.C. Cir. 2023) ("[I]n 2011, Congress broadened the statute to allow removal of suits 'for *or relating to*' any act under color of such office." (emphasis added) (quoting Removal Clarification Act of 2011, Pub. L. No. 112-51, § 2, 125 Stat. 545, 545)).

159. Moore v. Elec. Boat Corp., 25 F.4th 30, 35 (1st Cir. 2022) ("Circuits have consistently given this requirement a broad reading and held that no causal link is required."); *see id.* ("The First Circuit nexus standard is not a causal requirement and is not to be understood as anything more than a 'related to' nexus." (quoting Rhode Island v. Shell Oil Prods. Co., 979 F.3d 50, 59 (1st Cir. 2020), *vacated on other grounds*, 141 S. Ct. 2666 (2021) (Mem.))); *In re* Commonwealth's Motion to Appoint Couns. Against or Directed to Def. Ass'n of Phila., 790 F.3d 457, 471 (3d Cir. 2015) ("[I]t is sufficient [under the 2011 amendment] for there to be a 'connection' or 'association' between the act in question and the federal office." (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992))); Sawyer v. Foster Wheeler LLC, 860 F.3d 249, 258 (4th Cir. 2017) (same); *Latiolais*, 951 F.3d at 292 ("By the Removal Clarification Act, Congress broadened federal officer removal to actions, not just *causally* connected, but alternatively *connected* or *associated*, with acts under color of federal office."); Baker v. Atl. Richfield Co., 962 F.3d 937, 944 (7th Cir. 2020) ("We . . . join all the courts of appeals that have replaced causation with connection and expressly adopt that standard as our own."); Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238, 1251 (10th Cir. 2022) (same); *Exxon Mobil Corp.*, 89 F.4th at 155 ("After the amendment, the statute does not require a causal connection between acts taken under color of federal office and the basis for the action.").

Two circuits have nominally retained a 'causal nexus' requirement, but they acknowledge that the 2011 amendment has drained that requirement of any true 'causal' requirement. *See* Minnesota v. Am. Petroleum Inst., 63 F.4th 703, 715 (8th Cir. 2023) ("Though we have continued to describe the standard in terms of 'causal connection,' the causal connection required by § 1442(a)(1) is for the activity in question to relate to a federal office." (citations omitted)); DeFiore v. SOC LLC, 85 F.4th 546, 557 n.6 (9th Cir. 2023) ("We read our 'causal nexus' test as incorporating the 'connected or associated with' standard reflected in Congress's 2011 amendment and the Supreme Court's decisions." (citing

What does the foregoing discussion mean for cases like *Meadows* involving an inchoate crime like conspiracy? While the *Meadows* court indicated that it was entering vastly new terrain because one of the charges Meadows faced was inchoate,[160] in fact, the lessons drawn above from the *Soper* cases provide significant guidance.

First, since the court should examine each charge separately if there is an inchoate charge and another charge, the court should examine each charge separately for possible removal under § 1442. In fact, the Eleventh Circuit in *Meadows* technically failed to do this, though that shortcoming was probably an unimportant one in the end. In addition to conspiracy, the Georgia indictment against Meadows includes the charge of soliciting the violation of a public officer's oath, and the Eleventh Circuit omitted discussion of whether that charge met the requirements of § 1442. That seems to be a harmless oversight;[161] however, since the solicitation charge arises out of Meadows's effort to convince Georgia Secretary of State Brad Raffensperger to change the election results that he had already certified,[162] the district court below quickly—and correctly—concluded that the contact with Raffensperger was beyond the duties of Meadows's federal office.[163]

Goncalves v. Rady Child.'s Hosp. San Diego, 865 F.3d 1237, 1244–45 (9th Cir. 2017))).

One circuit—the Second—has observed, though perhaps without directly confronting the issue, that it has "continued to apply the casual-nexus requirement in our binding and precedential opinions long after 2011." *Exxon Mobil Corp.*, 83 F.4th at 145 n.7 (citing Agyin v. Razmzan, 986 F.3d 168, 179 (2d Cir. 2021)).

160. *See* Georgia v. Meadows, 88 F.4th 1331, 1344–45 (11th Cir. 2023), *cert. denied*, No. 24-97, 2024 WL 4743081 (U.S. Nov. 12, 2024).

161. Were in fact the charge of solicitating the violation of a public officer's oath properly removable, then the court would have to confront the question of whether § 1442(a) provides supplemental jurisdiction for the removal of the other claim (for RICO conspiracy) against Meadows and also for the charges against Meadows's co-defendants. Based on the arguments I make below, the charges against the co-defendants would not be removable. *See infra* Section IV.B.2. As for the other claim against Meadows, while my assessment below is that the question of whether that claim might accompany the first claim to federal court is closer, still federal jurisdiction over the other claim is probably lacking as well. *See infra* Section IV.A.

162. *See Meadows*, 88 F.4th at 1335–36.

163. *See* Georgia v. Meadows, 692 F. Supp. 3d 1310, 1332 (N.D. Ga. 2023), *aff'd*, 88 F.4th 1331 (11th Cir. 2023), *cert. denied*, No. 24-97, 2024 WL 4743081 (U.S. Nov. 12, 2024). The district court referred back to its analysis of the RICO conspiracy charge, where the contact with Raffensperger served as one of the acts underlying that charge. *See id.* at 1330–31; *see also id.* at 1320 n.7 ("This Court primarily focuses on the Indictment's RICO charge because the other charge against Meadows, soliciting a violation of an oath by a public official, is also alleged as an overt act (with evidence submitted) in support of the RICO charge."). The court of appeals did address the same act in the context of the

The second point drawn from the *Soper* cases directs the court to take a skeptical view of a defendant's assertions about the scope of her office. This directive can be applied readily where an inchoate crime is charged, and the Eleventh Circuit did just that.[164]

The third point drawn from the *Soper* cases calls, at least to the extent that one relies upon the "prosecution for an official act" path in the current statute, for the court to examine whether the federal officer's duties are essential to the behavior that the state has charged as criminal.[165] This "essence" approach is broadly consistent with some, but not all, of the analysis undertaken by the Eleventh Circuit in the *Meadows* case.[166] The *Meadows* court followed the lead of the district court and explained that the governing question was whether the "heart" of, "gravamen" of, and "heavy majority of overt acts charged in," the state's indictment fell within Meadows's official duties.[167] The notion of looking to the gravamen, or heart, of a

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RICO charge and concluded that it lay beyond Meadows's official duties. *See Meadows*, 88 F.4th at 1349 ("[T]he Hatch Act limits a federal officer's electioneering. Meadows had no official authority to operate on behalf of the Trump campaign. But he offers no other plausible justification for calling and soliciting Secretary Raffensperger to alter the certified returns for Georgia electors.").

164. *See Meadows*, 88 F.4th at 1345–48; *see also id.* at 1346 ("We cannot rubber stamp Meadows's legal opinion that the President's chief of staff has unfettered authority . . . .").

165. *See* Maryland v. Soper (No. 1), 270 U.S. 9, 33 (1926).

166. *Meadows*, 88 F.4th at 1344.

167. *Id.* at 1344 (first citing Mayor of Balt. v. BP P.L.C., 31 F.4th 178, 234 (4th Cir. 2022); and then citing Jefferson Cnty. v. Acker, 527 U.S. 423, 447 (1999) (Scalia, J., concurring in part and dissenting in part)).

The precedential provenance of these standards is less than clear. The *Meadows* court relied upon the Fourth Circuit's opinion in *Mayor of Baltimore v. BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022), for the notion that it should look at the "heart" of [the plaintiff's] claims," *id.* at 234. But *BP* was a civil case involving claims (such as public and private nuisance, and various tort claims), best described as not inchoate, by a municipality against multinational oil and gas companies, *id.* at 194–95, where the defendants (not themselves federal officers, of course) claimed to have been "acting under [a federal] officer," 28 U.S.C. § 1442(a)(1). *See BP*, 31 F.4th at 228. In short, the *BP* case called upon the court to determine whether the scope of federal official directives was sufficient to justify removal by non-federal actors. That inquiry was unnecessary in the *Meadows* case, where there was no question that Meadows had been a federal officer at the time of the alleged actions. And the fact that *BP* did not involve inchoate claims further leaves the applicability of the reasoning from that case in doubt.

The district court and court of appeals in *Meadows* drew "gravamen" from an opinion by Justice Scalia concurring in part and dissenting in part in a case not involving an inchoate criminal charge, but rather a civil case involving an effort by a county to tax federal judges working in the state. *Acker*, 527 U.S. at 447 (Scalia, J., concurring in part and dissenting in part); *id.* at 427 (majority opinion). In highlighting the importance of "the gravamen of the suit," however,

criminal charge aligns nicely with determining whether an officer's duties are essential to the charge. On the other hand, consideration of whether a "heavy majority of overt acts charged" lie within the officer's duties is not in line with the 'essence' inquiry.[168] Neither the

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Justice Scalia cited to one of the *Soper* cases. *See id.* at 447–48 (Scalia, J., concurring in part and dissenting in part).

Neither the court of appeals nor the district court in *Meadows* provided a citation for the phrase "heavy majority of overt acts"; the court of appeals merely quoted the district court. *Meadows*, 88 F.4th at 1344. The district court quickly and without explanation passed it off as interchangeable with "gravamen," *Meadows*, 692 F. Supp. 3d at 1332 ("[T]he Court finds insufficient evidence to establish that the gravamen, or a heavy majority of overt acts alleged against Meadows[,] relate to his role as White House Chief of Staff."), and the court of appeals offered no additional explanation. *Meadows*, 88 F.4th at 1344.

168. *Meadows*, 88 F.4th at 1344. Indeed, the *Meadows* panel relied on the importance of the proportion of overt acts, *id.* at 1345, in an effort to distinguish an earlier Eleventh Circuit decision—*Baucom v. Martin*, 677 F.2d 1346 (11th Cir. 1982)—but the 'essence' approach provides a stronger basis on which to distinguish the precedent. The *Meadows* court described *Baucom* as a case where the appellate court had "affirm[ed] Supremacy Clause immunity for a Federal Bureau of Investigations agent facing prosecution under Georgia's RICO statute for allegedly administering one bribe." *Id.* (citing *Baucom*, 677 F.2d at 1347–48). The panel then distinguished *Baucom* on the grounds that (i) "*Baucom* was a Supremacy Clause immunity case and did not concern the propriety of federal-officer removal," and (ii) "[e]ven if it had, the charge against Baucom alleged only one overt act, so that act represented the 'heart' of the state prosecution." *Id.*

But in fact, *Baucom* was *not* a case that involved a prosecution under Georgia's RICO statute. *Baucom*, 677 F.2d at 1347–48. The *Meadows* district court described the case in a similarly erroneous way. *See Meadows*, 692 F. Supp. 3d at 1321 (describing *Baucom* as a case where "the Eleventh Circuit evaluated whether an FBI agent, as a federal officer, had a federal immunity defense under the Supremacy Clause against a Georgia RICO charge"). Rather, the FBI agent had set up a sting operation to try to catch a Georgia state prosecutor accepting bribes—with the hope of assembling *federal* criminal RICO charges—but the prosecutor had "turned the tables" and instead had the sting participants arrested for trying to bribe him. *See Baucom*, 677 F.2d at 1347–48. After a state prosecution was brought against the sting participants for attempted bribery, the FBI agent—before any charges were lodged against him—sued for injunctive and declaratory relief on the ground that the Supremacy Clause immunized him from suit, with the district granting, and the court of appeals affirming, declaratory relief. *See id.*

While the *Meadows* court was correct that *Baucom* "did not concern the propriety of federal-officer removal," still it seems rather clear that, had state charges been brought against the FBI agent, the agent would have had a strong argument for removal. *See Meadows*, 88 F.4th at 1345. And that is not because—as the *Meadows* court stated—the charge against the agent consisted of "only one overt act." *See id.* After all, there was at the time no charge against the agent (and indeed any charges pending against other defendants were not brought under the state RICO statute). *See Baucom*, 677 F.2d at 1347–48. Rather, the agent's claim for removal would have been strong because it is clear that any charges that could have been brought, however they were framed, would have

court of appeals nor the district court provided a citation for this phrasing.[169] Moreover, a small number of overt acts (or even a single overt act) can be essential to a criminal conspiracy. There seems to be little reason to require that official duties give rise to a majority, let alone a heavy majority, of overt acts.[170]

It bears emphasis, however, that the *Meadows* court's deployment of the "gravamen" test rests on the "prosecution for an official act" path in the current statute.[171] But the statute's 2011 amendment opened up an alternative path for federal officer removal: if the prosecution "relat[es] to any act under color of such office."[172] The Eleventh Circuit in *Meadows* parroted the language of the amended statute,[173] but it did not acknowledge the importance of this amendment. Instead, the *Meadows* panel required a causal nexus, without even so much as a suggestion that the amended version of the statute likely drained 'causation' out of the inquiry.[174]

It would seem that, to whatever extent the Eleventh Circuit's "gravamen" inquiry is the same as a 'causal nexus' requirement, it demands more than what the amended statute now allows: removal

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centered on behavior that rested on the agent's official duties. In other words, any charges would necessarily have arisen out of his official responsibilities.

169. *See Meadows*, 88 F.4th at 1344; *Meadows*, 692 F. Supp. 3d at 1332.

170. *See Meadows*, 88 F.4th at 1344. Indeed, were the "heavy majority" inquiry the correct test, *see id.*, then prosecutors could conceivably manipulate forum availability by listing additional acts in an indictment.

171. *See id.*

172. *See supra* note 48 and accompanying text.

173. *See, e.g.*, *Meadows*, 88 F.4th at 1343 ("Meadows fails to prove that the conduct underlying the criminal indictment relates to his official duties.").

174. *See, e.g.*, *id.* at 1343–44 ("[W]e must identify the 'act' or charged conduct underlying Georgia's prosecution, the scope of Meadows's federal office, and the existence of a causal nexus between Meadows's conduct and his office.").

In a 2017 case, the Eleventh Circuit acknowledged the impact of the 2011 amendment, explaining that "[t]he phrase 'relating to' is broad and requires only 'a "connection" or "association" between the act in question and the federal office,'" Caver v. Cent. Ala. Elec. Coop., 845 F.3d 1135, 1144 (11th Cir. 2017) (quoting *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)), and that "[t]he hurdle erected by this requirement is quite low," *id.* (quoting Isaacson v. Dow Chem. Co., 517 F.3d 129, 137 (2d Cir. 2008)). Other circuits have read the Eleventh Circuit in *Caver* to have acclimated the preexisting 'causal nexus' standard to the lower 'relating to' standard. *See* Latiolais v. Huntington Ingalls, Inc., 951 F.3d 286, 292 (5th Cir. 2020) ("The Eleventh Circuit, while persisting with the 'causal connection' test, has cited the amended 'relating to' language and essentially implemented a connection rationale for removal." (citing *Caver*, 845 F.3d at 1144 & n.8)); Baker v. Atl. Richfield Co., 962 F.3d 937, 944 (7th Cir. 2020) (same). Be that as it may, while the *Meadows* court did cite *Caver* for the proposition that "the bar for proof" for the causal nexus is "quite low," *Meadows*, 88 F.4th at 1348 (quoting *Caver*, 845 F.3d at 1144), its analysis did not conform to that description, *see id.* at 1348–50.

where the criminal charge "relat[es] to" an officer's duties.[175] Some less stringent connection between the charge and duties—one that accepts an attenuated relationship between the two—instead should apply. It seems, in other words, that on this question, the *Soper* cases could have come out differently under the alternate path to removal now authorized by the amended statute.

Could a single overt act undertaken by an officer under color office—as the courts in *Meadows* concluded was the case[176]—be a sufficient ground for removal under § 1442(a)'s "relates to" standard?[177] The newly amended wording of the statute seems potentially capacious enough, and there are surely ample policy reasons to justify removal even where the role of the federal officer as such is relatively minimal. It bears emphasis, after all, that removal to federal court does not ensure a judgment in the federal officer's favor; it merely offers a forum where, at least in theory, bias that could exist against a federal-officer defendant would be minimized.

In any event, even if the result reached by the Eleventh Circuit in *Meadows* is correct, its reasoning falls short. Lack of clarity on the causal nexus requirement plagues the opinion. Beyond that, the opinion fails to consider, let alone address, the fact that the amended statute allows removal even in the absence of a causal nexus between the crime charge and the officer's duties.

IV. HOW DOES § 1442(A) APPLY IN A CRIMINAL CASE WITH MULTIPLE CHARGES?

Many criminal cases involve multiple charges against a single defendant and/or charges against multiple defendants. What happens when a defendant can meet the requirements of § 1442(a) with respect to only one charge? Do other charges against that same defendant accompany the defendant to federal court? If there are multiple defendants, is the assent of other defendants necessary before removal can occur (as it would be in the ordinary civil removal context)? And do charges against co-defendants follow the removing defendant to federal court? Section IV.A addresses the first question (involving multiple charges against a single defendant); Section IV.B addresses the latter two questions (about cases with multiple defendants).

175. *See* 28 U.S.C. § 1442(a)(3).

176. *See Meadows*, 88 F.4th at 1348–49 (noting "agree[ment]" with the district court's conclusion that only one overt act—a text to a member of Congress seeking "the phone number of the 'leader of PA Legislature'"—was "related to Meadows's official duties").

177. 28 U.S.C. § 1442(a)(3).

A. Multiple Charges Against a Single Defendant

Criminal defendants often face multi-count indictments. What if a defendant successfully can establish entitlement to removal under § 1442(a) with respect to only charge? Do the other charges follow the defendant to federal court? There seems to be no jurisdictional reason of constitutional magnitude that they could not, but Supreme Court precedent suggests that the statute should be interpreted to limit removal only to those charges where § 1442(a)'s requirements have been established.

Let us postulate a criminal case that lodges two counts against the same defendant. The defendant can validly remove count one to federal court under § 1442(a) but cannot remove count two to federal court under § 1442(a) or under any other provision of law.

Federal court jurisdiction is appropriate only if there is both constitutional subject-matter jurisdiction *and* statutory subject-matter jurisdiction.[178] In *United Mine Workers of America v. Gibbs*,[179] the Supreme Court recognized that the Constitution extends the jurisdiction of the federal courts to claims that are so closely related to another claim—a claim as to which there *is* proper independent federal court jurisdiction—that they "derive from a common nucleus of operative fact."[180] And, since the Court has also made clear that the Constitution extends the federal judicial power to both civil *and criminal* cases,[181] it seems well established that constitutional supplemental-claim jurisdiction would extend to all charges against a criminal defendant arising out of the same transaction or occurrence. But constitutional jurisdiction is only necessary, not sufficient, for federal court jurisdiction.[182]

Let us turn to statutory subject-matter jurisdiction. Congress has enacted a supplemental jurisdiction statute that empowers district courts to exercise jurisdiction over supplemental claims—28 U.S.C.

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178. *E.g.*, Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) ("Subject-matter jurisdiction . . . is an Art. III as well as a statutory requirement . . . .").

179. 383 U.S. 715 (1966).

180. *Id.* at 725.

181. The Court in *Tennessee v. Davis* explained that Article III

> embraces alike civil and criminal cases arising under the Constitution and laws. Both are equally within the domain of the judicial powers of the United States, and there is nothing in the grant to justify an assertion that whatever power may be exerted over a civil case may not be exerted as fully over a criminal one. And a case arising under the Constitution and laws of the United States may as well arise in a criminal prosecution as in a civil suit.

100 U.S. 257, 264 (1879) (citation omitted).

182. CONG. RSCH. SERV., R44967, CONGRESS'S POWER OF COURT DECISIONS: JURISDICTION STRIPPING AND THE RULE OF KLEIN 1–4 (2024).

§ 1367.[183] If that section applies, the availability of statutory supplemental-claim jurisdiction would be clear. That provision, however, does not apply to the setting of federal officer removal.[184] Section 1367(a) provides for "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution" where the underlying civil action is one as to which "the district courts ha[s] original jurisdiction."[185] By its plain terms, § 1367 has no application to cases removed under § 1442 since there is no jurisdictional provision that would give the district court *original jurisdiction* over such cases.[186] Moreover, any claim to § 1367's applicability in the criminal context falls flat since the provision applies only to "civil action[s]."[187]

The fact that § 1367 is inapplicable does not foreclose the possibility that § 1442 itself confers supplemental jurisdiction upon the federal courts. Indeed, pre-section 1367 precedent—which presumably still governs where § 1367 is inapplicable—strongly suggests that there *would be* supplemental jurisdiction. In its 1989 decision in *Finley v. United States*,[188] the Supreme Court confirmed that it routinely read jurisdictional statutes to extend supplemental-*claim* jurisdiction, jurisdiction over related claims against the same party.[189] But it also explained that it was less likely to read statutes to embrace supplemental-*party* jurisdiction, jurisdiction over related claims against the same party.[190] This strongly suggests that the

183. 28 U.S.C. § 1367. The enactment of that provision in 1990 united what had been called pendent jurisdiction and ancillary jurisdiction under the umbrella of supplemental jurisdiction. *See* 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: JURISDICTION & RELATED MATTERS § 3523 (3d ed. 2008).

184. Courts have occasionally ruled otherwise, though without justification. *See, e.g.*, Crocker v. Borden, Inc., 852 F. Supp. 1322, 1327 (E.D. La. 1994) (stating that § 1367, "which was enacted in 1990, is applicable" to an action removed to federal court under § 1442(a)(1)).

185. 28 U.S.C. § 1367(a).

186. The Supreme Court has asserted that § 1367(a) "applies with equal force to cases removed to federal court as to cases initially filed there," since "a removed case is necessarily one 'of which the district courts . . . have original jurisdiction.'" City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 165 (1997) (quoting 28 U.S.C. § 1367(a)). It seems clear, however, that the Court's statement applies to typical removal under § 1441, and not to other, more esoteric removal provisions: Immediately after that statement, the Court cited § 1441 and *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 357 (1988), a case involving § 1441 removal. *See Int'l Coll. of Surgeons*, 522 U.S. at 165.

187. 28 U.S.C. § 1367(a).

188. 490 U.S. 545 (1989).

189. *See id.* at 548–49 ("[W]e have held, without specific examination of jurisdictional statutes, that federal courts have 'pendent' claim jurisdiction . . . to the full extent permitted by the Constitution.").

190. *See id.* at 549; *infra* text accompanying notes 210–12.

§ 1442(a) grant includes an implicit grant of supplemental-claim jurisdiction that should cover additional charges against the same defendant.

That said, the Court's pre-section 1367 pendent jurisdiction cases all involved jurisdictional grants over civil cases, not criminal ones.[191] Moreover, the Court's treatment of the charges against the Prohibition agents in the three *Maryland v. Soper* cases strongly suggests that an independent basis for federal jurisdiction is required for each charge. For one thing, the *Soper* Court addressed each charge in a separate case.[192] More importantly, while the Court left the district judge with discretion to allow the defendants to revise their petition to sustain the removal of the murder charge,[193] it outright directed the lower court to remand the obstruction and perjury charges to the state courts.[194] If supplemental jurisdiction were available, one would have expected the Court to have limited the remand orders for obstruction and perjury to allow for the possibility that the defendants could successfully justify removal of the murder charge.

In addition, policy considerations argue against supplemental-claim jurisdiction over criminal charges with no independent basis for federal jurisdiction. As noted above, the Court has expressed a greater openness to federal officer removal of civil actions than criminal prosecutions.[195] This suggests that, even if the Court's pre-*Finley* holdings apply in civil federal officer removal cases, they should not apply in the criminal setting.

In the end, it seems the better answer is that each charge against a defendant must have an independent basis for federal court jurisdiction. That result aligns with policy considerations, which suggest that a state's interest in retaining jurisdiction over criminal cases is paramount.

B. Multiple Defendants

In a multiparty criminal case where only one defendant can successfully invoke § 1442(b), two questions arise. First, does the fact that some defendants cannot seek removal—and perhaps some who presumably could seek removal do not—preclude other defendants from effecting removal? Second, does successful removal under § 1442(b) by one defendant effect removal of the claims against the co-defendants? I address each question in turn.

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191. *See* Thomas Jamison, *Pendent Party Jurisdiction: Congress Giveth What the Eighth Circuit Taketh Away*, 17 WM. MITCHELL L. REV. 753, 756–60 (1991).

192. That said, this conceivably could have been a consequence of Maryland charging procedures at the time, or of the procedural route that the various charges took.

193. *See* case cited *supra* note 146 and accompanying text.

194. *See* case cited *supra* note 147 and accompanying text.

195. *See supra* notes 58–61 and accompanying text.

1. Does Lack of Unanimity Preclude Removal Under § 1442(a)?

Federal officer removal cases involving multiple defendants have tended to be civil actions. In that setting, lower federal courts have held that a lack of unanimity among defendants does not preclude removal,[196] in contrast to the general civil removal statute, 28 U.S.C. § 1441(a).[197] This conclusion is consistent with textual distinction between the two statutory provisions: While § 1441(a) provides for removal "by the defendant or defendants,"[198] § 1442(a) allows for removal "by them," with them—in the case of subsection (a)(1)—referring to "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity."[199] Thus, § 1442(a) can be read to refer to a proper subset of all defendants, while § 1441(a) is far less susceptible to such an interpretation.

Moreover, requiring unanimity would be inconsistent with the policy underlying the federal officer removal statute. The statute is designed to provide federal officers with access to a federal forum to adjudicate the claims brought against them.[200] It would undermine that policy if each defendant had an effective veto over removal of the claims against the federal officer. Indeed, if that were the rule, plaintiffs (including state authorities) might deliberately include multiple defendants with the hope that (at least) one of those defendants would opt against removal.[201]

The conclusion of lower federal courts in the civil context that unanimity is not required thus seems correct. Moreover, the textual distinction and policy arguments that support that conclusion easily translate to the criminal context. In short, a lack of unanimity among defendants should not preclude a federal officer from proceeding with removal in either a civil or criminal context.

196. *See, e.g.*, Ely Valley Mines, Inc. v. Hartford Accident & Indem. Co., 644 F.2d 1310, 1315 (9th Cir. 1981).

197. *See* WRIGHT ET AL., *supra* note 37, § 3730.

198. 28 U.S.C. § 1441(a).

199. *Id.* § 1442(a).

200. *See supra* text accompanying notes 56–57.

201. *See* Bradford v. Harding, 284 F.2d 307, 310 (2d Cir. 1960) ("[T]he policy of the section would be frustrated if a plaintiff or a prosecutor, by joining non-federal defendants with no desire to remove, could retain the suit in a tribunal that might 'administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government.'" (quoting Tennessee v. Davis, 100 U.S. 257, 263 (1879))).

2. Does Successful Removal by One Defendant Under § 1442(a) Remove the Entire Criminal Case Against All Co-Defendants to Federal Court?

Just because lack of unanimity among defendants should not be required for removal to federal court does not mean that a successful removal of a criminal case by one defendant under § 1442 should also remove the charges against that defendant's co-defendants. If the conclusion in Section IV.A above—that the federal courts lack subject-matter jurisdiction over nonremovable charges against the same defendant—holds, then a fortiori federal courts also lack jurisdiction over charges against co-defendants. But the conclusion in Section IV.A is not free from doubt; if indeed jurisdiction over other charges against a single defendant is available, then jurisdiction might also be available over charges against co-defendants.

Lower federal courts have held in the civil context that a successful removal under § 1442(a) removes the entire case.[202] They have done so, however, without much reasoning—often citing the venerable *Federal Practice and Procedure* treatise as the authority,[203] with that treatise itself providing little more than a conclusory statement on the point.[204]

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202. *See, e.g.*, Gov't of P.R. v. Express Scripts, Inc., 119 F.4th 174, 185 (1st Cir. 2024) ("[I]f a single [civil] defendant properly removes under § 1442, the entire action . . . must be removed to federal court.").

203. *See, e.g.*, Savoie v. Huntington Ingalls, Inc., 817 F.3d 457, 463 (5th Cir. 2016); Sawyer v. Foster Wheeler LLC, 860 F.3d 249, 257 (4th Cir. 2017); Morgan v. Huntington Ingalls, Inc., 879 F.3d 602, 606 n.4 (5th Cir. 2018); Baker v. Atl. Richfield Co., 962 F.3d 937, 945 (7th Cir. 2020).

Some courts have in the past engaged in more analysis, *see, e.g.*, Murphy v. Kodz, 351 F.2d 163, 165–67 (9th Cir. 1965), but this was before a string of Supreme Court decisions, culminating in *Finley v. United States*, 490 U.S. 545, 556 (1989), severely restricted the availability of statutory supplemental-party jurisdiction. *See infra* notes 210–19 and accompanying text.

In one removed federal criminal case, the federal district court did assert that one removable claim sufficed to remove the entire action. Georgia v. Heinze, 637 F. Supp. 3d 1316, 1325 & n.8 (N.D. Ga. 2022). That statement was dicta, however, since the court had found that each of the two defendants in that case had properly invoked § 1442. *See id.* at 1321–25. Moreover, the court cited only civil authority under § 1442 in support of its conclusion. *See id.* at 1325 n.8.

204. The *Federal Practice and Procedure* treatise states: "Because Section 1442(a)(1) authorizes removal of the entire action even if only one of the controversies it raises involves a federal officer or agency, the section creates a species of statutorily-mandated supplemental subject-matter jurisdiction." WRIGHT ET AL., *supra* note 37, § 3726. But there is no justification given for the assertion ("Section 1442(a)(1) authorizes removal of the entire action even if only one of the controversies it raises involves a federal officer or agency") in the dependent clause of the sentence. *Id.* Moreover, the logical sequencing in the sentence is incorrect: Only *if* § 1442(a) includes a grant of supplemental-party jurisdiction will the section authorize removal of the entire action. Yet the sentence as crafted instead assumes that the provision authorizes removal of the

The discussion in this Section will confirm that the Constitution authorizes the removal of an entire criminal case where the case includes charges against a federal officer that are properly removed. In other words, Congress could extend federal jurisdiction over the counts (whether civil or criminal) against all defendants if it so chose. However, the existing statutory regime does not allow a removing criminal defendant to bring the criminal charges against co-defendants with her to federal court.[205] The right of a removing civil defendant to bring his co-defendants with him is not as clear as courts have claimed. But, even if civil cases are removed in full under § 1442(a), the same should not be true in the criminal context. Indeed, policy considerations that justify the removal of entire cases in the civil context do not translate to the criminal side.

As discussed above, in order to hear a (first) claim under state law based upon proper federal jurisdiction as to another (second) claim, a federal court must have so-called 'supplemental jurisdiction' as to the first claim.[206] Where both claims are lodged against the same actor—as was the case in Section IV.A above—the court must have 'supplemental-claim jurisdiction.'[207] In contrast, in the setting under consideration here, the claims are directed against distinct actors, and so the court must have 'supplemental-party jurisdiction.'[208]

Just as the Court's decision in *United Mine Workers v. Gibbs* confirms the availability of constitutional supplemental-claim jurisdiction, so too does it confer constitutional supplemental-party jurisdiction over charges against non-federal officers.[209] But, as I have discussed above, constitutional jurisdiction is only a necessary condition; statutory supplemental-party jurisdiction is also required.

Turning to statutory subject-matter jurisdiction, § 1367 does provide for supplemental-party jurisdiction.[210] However, for the reasons discussed above in Section IV.A, § 1367 has no application where removal is effected under § 1442(a).[211]

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entire case and uses it to justify the further point that the provision *must therefore* include a grant of supplemental-party jurisdiction. And that second point requires considerably more analysis after the Court's 1989 decision in *Finley v. United States*, 490 U.S. 545 (1989). *See* sources cited *infra* notes 210–19 and accompanying text.

205. *See generally* 28 U.S.C. §§ 1442, 1442(a), 1443.

206. The enactment of 28 U.S.C. § 1367 in 1990 united what had been called pendent jurisdiction and ancillary jurisdiction under the umbrella of supplemental jurisdiction. *See* WRIGHT ET AL., *supra* note 183, § 3523.

207. *See* case cited *supra* notes 188–89 and accompanying text.

208. *See supra* text accompanying note 190.

209. *See supra* text accompanying notes 180–81.

210. 28 U.S.C. § 1367(a) (providing the district courts with "supplemental jurisdiction," including "claims that involve the joinder or intervention of additional parties").

211. *See supra* notes 180–84 and accompanying text.

The fact that § 1367 is inapplicable does not eliminate the possibility that § 1442 itself confers supplemental-party jurisdiction upon the federal courts. This seems implicitly to be the holding that the *Federal Practice and Procedure* treatise—and the lower federal courts following it—have reached in upholding removal of entire civil cases based on the successful invocation of § 1442 by one defendant.[212] But pre-section 1367 precedent (which again presumably still governs where § 1367 is inapplicable) poses obstacles. Two Supreme Court cases read jurisdictional statutes that conferred subject-matter jurisdiction over "civil actions"—like the civil side of § 1442—as not including grants of supplemental-party jurisdiction.[213] Neither the treatise nor the later cases following the treatise take account of those cases.[214]

First, in *Aldinger v. Howard*,[215] the Court held that a statute that conferred original jurisdiction over federal civil-rights claims against state actors[216] did not extend supplemental jurisdiction over a state-law claim against a party whom a § 1983 claim could *never* be brought.[217] Then, in *Finley v. United States*, the Court found that Congress did not confer supplemental-party jurisdiction under the Federal Tort Claims Act (FTCA).[218] The Court explained that the FTCA's jurisdictional statute

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212. *See* WRIGHT ET AL., *supra* note 37, § 3726; *see also* Baker v. Atl. Richfield Co., 962 F.3d 937, 945 (7th Cir. 2020); Morgan v. Huntington Ingalls, Inc., 879 F.3d 602, 606 (5th Cir. 2018).

213. *See* Aldinger v. Howard, 427 U.S. 1, 16–17 (1976) (discussing supplemental-party jurisdiction under 28 U.S.C. § 1343); Finley v. United States, 490 U.S. 545, 555–56 (1989) (discussing supplemental-party jurisdiction under the FTCA).

214. The *Federal Practice and Procedure* treatise asserts that § 1442(a) "creates a species of statutorily-mandated supplemental subject-matter jurisdiction." WRIGHT ET AL., *supra* note 37, § 3726. But post-*Aldinger* and *Finley* (and without any aid from § 1367), that conclusion requires considerable inquiry, which the treatise does not provide.

215. 427 U.S. 1 (1976).

216. *Id.* at 18–19; 28 U.S.C. § 1343(a)(3) (conferring jurisdiction over "any civil action . . . commenced by any person . . . [t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States").

217. *Aldinger*, 427 U.S. at 17 ("Parties such as counties, whom Congress *excluded* from liability in § 1983, and therefore by reference in the grant of jurisdiction under § 1343(3), can argue with a great deal of force that the scope of that 'civil action' over which the district courts have been given statutory jurisdiction should not be so broadly read as to bring them back within that power merely because the facts also give rise to an ordinary civil action against them under state law.").

218. *Finley*, 490 U.S. at 552–56. In between *Aldinger* and *Finley*, the Court also rejected supplemental-party jurisdiction in *Owen Equipment & Erection Co.*

> confers jurisdiction over "civil actions on claims against the United States." It does not say "civil actions on claims that include requested relief against the United States," nor "civil actions in which there is a claim against the United States"—formulations one might expect if the presence of a claim against the United States constituted merely a minimum jurisdictional requirement, rather than a definition of the permissible scope of FTCA actions. . . . [W]e conclude that "against the United States" means against the United States and no one else.[219]

The Court's reasoning in *Finley* argues against recognizing supplemental-party jurisdiction under § 1442(a). In language reminiscent of the FTCA jurisdictional provision, § 1442(a) speaks of "civil action[s] . . . against or directed to . . . any officer (or any person acting under that officer) of the United States."[220] Still, some have argued that similarly worded civil jurisdictional statutes include grants of supplemental-party jurisdiction.[221] In any event, to whatever extent lower courts are correct that § 1442(a) conveys civil supplemental-party jurisdiction, the road to that conclusion is more complicated than they have acknowledged.

Let us return to this Article's focus on removal in criminal cases. Even if § 1442 is better read to include a grant of supplemental-party jurisdiction in the civil context, the road to that conclusion is far more difficult in the criminal context. There, § 1442 substitutes "criminal prosecution" for "civil action."[222] While "civil action" can be read broadly as a substitute for a case, including multiple claims and parties,[223] the term "criminal prosecution" does not seem as broad. Congress could have used broader phraseology—wording such as "criminal action" or "criminal case"—but did not.[224]

Moreover, policy considerations that recognize supplemental-party jurisdiction in the civil context do not support that approach in

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v. Kroger, 437 U.S. 365 (1978). There, the Court's decision turned on the fact that the suggested invocation of supplemental-party jurisdiction would have run afoul of complete diversity requirement under 28 U.S.C. § 1332. *See id.* at 374–75, 377.

219. *Finley*, 490 U.S. at 552 (quoting 28 U.S.C. § 1346(b)).

220. 28 U.S.C. § 1442(a)(1).

221. *See* Jonathan Remy Nash, *Pendent Party Jurisdiction Under the Foreign Sovereign Immunities Act*, 16 B.U. INT'L L.J. 71, 107–16 (1998) (arguing that the Foreign Sovereign Immunities Act's removal jurisdiction provision includes a grant of pendent-party jurisdiction).

222. *See* 28 U.S.C. § 1442(a).

223. *See* FED. R. CIV. P. 2 ("There is one form of action—the civil action.").

224. Indeed, the phrasing "criminal prosecution" brings to mind the language of the statute granting federal district courts original jurisdiction "of all offenses against the laws of the United States." 18 U.S.C. § 3231. At the same time, that jurisdiction is expressly qualified as "exclusive of the courts of the States." *Id.* The provision then adds: "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." *Id.*

the criminal context. Concerns of judicial economy loom large in the civil context. Trying claims separately imposes costs on parties and on the courts (here in both the state and federal systems). Moreover, such an approach can run the risk of generating inconsistent verdicts.[225] In keeping with this notion, the Federal Rules of Civil Procedure allow for liberal joinder.[226] And, while they do also allow for severance of claims in appropriate circumstances, they provide no definitive right to severance.[227]

At the same time, even in the civil context, the Supreme Court has recognized that concerns of efficiency cannot trump a statutory jurisdictional regime that by its terms vests federal jurisdiction over some claims, but not over other, related claims. In finding that Congress did not confer supplemental-party jurisdiction under the FTCA, the Court in *Finley* observed:

> Because the [Federal Torts Claims Act] permits the Government to be sued only in federal court, our holding that parties to related claims cannot necessarily be sued there means that the efficiency and convenience of a consolidated action will sometimes have to be forgone in favor of separate actions in state and federal courts.[228]

In short, policy considerations are consistent with recognizing supplemental-party jurisdiction in the civil context but will not always carry the day.

Whatever weight concerns of judicial economy are due in the civil context, they surely are of far less moment in the criminal context. Put bluntly, the overarching goal of criminal adjudication is just outcomes, not cost savings. Thus, severance of cases against criminal defendants turns on concerns of justice, not cost.[229] To be sure, all else equal, it is certainly preferable to adjudicate cases—including criminal cases—at less expense if that is possible.[230] But the context

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225. *See, e.g.*, Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 819 (1976) (noting that "piecemeal adjudication" can lead to "inconsistent dispositions of property").

226. *See* FED. R. CIV. P. 20 (captioned "Permissive Joinder of Parties").

227. *See* FED. R. CIV. P. 21 (noting that a court "may" sever certain claims but is under no definite obligation to sever).

228. Finley v. United States, 490 U.S. 545, 555 (1989), *superseded by statute*, Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, 104 Stat. 5113, *as recognized in* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005).

229. *See, e.g.*, *Joinder & Severance*, AM. BAR ASS'N (2025), https://perma.cc/B4FU-C7HP.

230. *See* Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 VAND. L. Rev. 349, 354 (2006).

It bears noting that there are cases with co-defendants where severance can help avoid a constitutional conundrum:

of federal officer removal introduces another policy consideration that is far less relevant, if it is relevant at all,[231] in the civil context: the implications for state sovereignty. While diversity jurisdiction allows federal courts to hear state-law *civil* claims on a regular basis,[232] and, indeed, state courts generally enjoy concurrent jurisdiction to hear federal-law *civil* claims,[233] state court prosecutions are generally heard *only* in state court.[234] And, while the federal officer removal statute allows state prosecutions to proceed in federal court under limited circumstances,[235] it nevertheless is clear that such occurrences infringe to some degree on state sovereignty.[236] Thus,

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> Issues arise when the confessing defendant refuses to testify by invoking her Fifth Amendment privilege against self-incrimination. Using a non-testifying codefendant's confession to determine the guilt of any other codefendants while preventing them from exercising their right to cross examine, the confessor violates the Confrontation Clause. Severing the confessing and non-confessing codefendants' trials, thereby allowing the confession to be admitted in the confessing codefendant's trial, but not in the other codefendants' trials, seems to be an obvious solution. Unfortunately, the judiciary has long favored the use of joint trials.

Schuyler C. Davis, *No Substitution for Justice: Solving the* Bruton *Problem Through Per Se Trial Severance*, 50 U. MEM. L. REV. 695, 702 (2020) (footnotes omitted).

231. The state may often have little or no interest in the outcome of private litigation. At other times, the state itself may be a party to civil litigation, or the state may otherwise prefer to have a policy role in the development of law in the area. *See, e.g.*, Burford v. Sun Oil Co., 319 U.S. 315, 327 (1943).

232. *See* 28 U.S.C. § 1332.

233. *See* Tafflin v. Levitt, 493 U.S. 455, 458–67 (1990) (noting the general broad presumption in favor of state court concurrent jurisdiction over federal claims and holding that the states had concurrent jurisdiction over civil claims under a federal statute even though that statute allowed for (separate) federal criminal liability).

234. Similarly, federal criminal prosecutions are, and perhaps constitutionally must be, heard in federal court. *See* Martin v. Hunter's Lessee 14 U.S. (1 Wheat.) 304, 337 (1816) ("No part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals."); Collins & Nash, *supra* note 46, at 296–315.

235. In addition, Congress has provided for removal of state-court criminal prosecutions under other limited circumstances. *See* 28 U.S.C. § 1442(a) (removal of prosecutions against members of the armed forces); *id.* § 1443(1) (allowing for removal of prosecution "[a]gainst any person who is denied or cannot enforce in the [state] courts . . . a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof"). For discussion, see Nash, *supra* note 62, at 190–91.

236. *See* Arizona v. Manypenny, 451 U.S. 232, 243 (1981) ("Because the regulation of crime is pre-eminently a matter for the States, we have identified 'a strong judicial policy against federal interference with state criminal proceedings.'" (quoting Huffman v. Pursue, Ltd., 420 U.S. 592, 600 (1975))); *supra* text accompanying notes 59–61.

whatever cost benefit might result from allowing removal of charges against non-federal officers along with the charges against a federal officer, it would seem that the affront to state sovereignty would be a greater counterweight.

So, too, are inconsistent verdicts less of an issue in the criminal context than in the civil one. Criminal verdicts are inconsistent if one defendant is convicted of the same behavior that another defendant is not,[237] but still, those inconsistent verdicts cannot require parties to act in ways that are themselves inherently inconsistent.

Of course, regardless of the direction in which policy considerations may point, the federal courts have and should exercise jurisdiction if the Constitution and congressional statute provide it.[238] Here, however, policy and statutory interpretation align. And, while the federal courts have constitutional jurisdiction to hear claims against non-federal officers closely related to removed claims against federal officers, they lack statutory authorization to do so, at least in the criminal context.[239] Thus, a person who successfully invokes the federal officer removal statute cannot bring her co-defendants with her to federal court.

CONCLUSION

In this Article, I have considered open, important questions under the federal officer removal statute. On the question of who qualifies as an "officer" under the statute, I have argued that former federal officials should be, and are, covered by the provision. I have also argued that the President can remove under the provision.

On the topic of the standard for color of office, I have argued that the Eleventh Circuit's standard of looking to whether the heavy majority of overt acts fall within the officer's duties is too limiting. Rather, courts should ask whether the officer's duties are essential to the conduct alleged in the indictment to be criminal. Beyond that, recourse must be had to the 2011 amendment that expanded the scope of § 1442 federal officer removal.

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237. *See* Leipold & Abbasi, *supra* note 230, at 354–55.

238. *See* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (noting "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them").

239. *See, e.g.*, Texas v. Martin, No. 3:24-cv-00645-S (BT), 2024 WL 1976596, at *2 (N.D. Tex. Apr. 3, 2024) ("The only criminal cases that are removable to federal court are those brought in state court against '(1) officers, agencies, or agents of the United States (§ 1442), (2) members of the armed forces (§ 1442(a)), or (3) defendants when a state court refuses (or is unable) to enforce their federal (race-based) civil rights (§ 1443).'"); California v. Smith, No. 24-cv-1629-WQH-JLB, 2024 WL 4227050, at *1 (S.D. Cal. Sept. 18, 2024) ("Criminal state-court actions may be removed to federal court only under the limited circumstances set out in 28 U.S.C. §§ 1442, 1442(a), and 1443.").

In the context of a criminal case with multiple charges lodged against a defendant, I have shown that there is ambiguity as to whether a defendant can remove all charges against her if only a single charge falls under § 1442(a)'s scope. Still, Supreme Court precedent suggests that the better answer is that only that charge is subject to removal.

Finally, in the context of a criminal case with multiple defendants, I have shown that a defendant in a state-law criminal case who can successfully invoke the federal officer removal statute can remove the case against her to federal court even over the object of her co-defendants. Moreover, the charges against the co-defendants will remain in state court (unless other co-defendants have an independent basis for removal). The ability of a single defendant to remove *an entire civil case* to federal court by invoking the federal officer removal statute is arguable (though surely not as clear as courts that have spoken on the issue have suggested). But in the criminal context, the outcome is clear: Removal affects only the charge(s) against the defendant(s) who successfully invokes the federal officer removal statute.