



Removal to Federal Court of Cases Against Federal Officials and Agents

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In the United States, the federal government and the states each have their own sets of laws and their own court systems. Federal and state courts generally operate separately, but there is not an absolute division between the federal and state judicial systems. Sometimes, cases may move between state and federal courts. One example of this movement is removal of cases from state court to federal court. In this context, *removal* is a legal term of art that means that a case that was filed in state court moves to federal court and proceeds there instead. (This use of the term is not related to [removal from office](#) of federal officials.) Federal statutes specify the circumstances in which cases may be removed from state to federal court. [One such statute](#) allows for removal of certain civil or criminal proceedings against federal officers or agencies or those acting under their direction. In recent years, defendants in several high-profile cases have sought to invoke the federal officer removal statute to move cases from state to federal court.

This Legal Sidebar provides an overview of the federal officer removal statute. It begins with background on removal generally and the federal officer removal statute in particular. It then briefly summarizes selected litigation involving the statute. The Sidebar concludes by discussing considerations for Congress related to removal from state to federal court of cases involving federal officers and agents.

Removal from State to Federal Court

As a [CRS Report](#) discusses in more detail, there are various ways in which cases may move between the federal and state judicial systems. The term *removal* refers specifically to when a case that began in state court moves to federal court—not the other way around. Both civil and criminal cases may be removed from state to federal court in some circumstances, though removal is more often available in civil litigation.

When filing a civil suit, the plaintiff may be able to choose in certain cases whether to proceed in state or federal court. If the plaintiff files suit in state court, the defendant may sometimes remove the case to federal court and proceed there instead. Several federal statutes allow for removal to federal court in different situations. The most commonly invoked is the general federal removal statute, [28 U.S.C. § 1441](#). Subject to certain exceptions, that statute allows for removal of “any civil action brought in a State court of which the district courts of the United States have original jurisdiction”—that is, any case filed in a state court that could have been filed originally in federal court. The general removal statute applies only

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to civil cases, not criminal cases. [28 U.S.C. § 1446](#) imposes procedural requirements for removal of civil cases, including a 30-day deadline from when the summons is served on the defendant.

On the criminal side, the usual rule is that state criminal prosecutions proceed in state court. Removal statutes—such as the officer removal statute discussed below—create a narrow exception to this rule. When those statutes permit removal of state criminal prosecutions, [special procedures](#) apply. (Federal criminal prosecutions always proceed in federal courts, which have [exclusive jurisdiction](#) over federal criminal cases.)

The federal officer removal statute, codified at [28 U.S.C. § 1442](#), seeks to provide a [neutral federal forum](#) to preserve the [supremacy of federal law](#) and prevent federal officers and their agents from being [improperly sued or punished](#) when they attempt to perform their duties. [28 U.S.C. § 1442\(a\)\(1\)](#) allows for removal of a civil or criminal case against the United States, a federal agency, or a person holding federal office, if the case relates to acts taken “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.” The phrase “under color of ... office” means that the defendant was acting within the scope of their official duties or with actual or apparent legal authority related to their office. Section [1442\(a\)\(1\)](#) also allows for removal of cases against a person acting under the direction of a federal official if the directing official was acting pursuant to their official authority. Other subsections of Section [1442\(a\)](#) allow for removal by certain persons holding property whose title is derived from a federal officer, officers of the courts of the United States acting under color of office or in the performance of their duties, and officers of either house of Congress acting in the discharge of their official duties under orders of the house of Congress.

Additional statutes authorize removal in specified civil or criminal cases against [members of the U.S. Armed Forces](#), certain [civil rights cases](#), and [foreclosure actions against the United States](#). Another statute enumerates certain types of cases that [cannot be removed](#) from state to federal court.

If a state court case is properly removed to federal court, it will proceed in federal court even if the plaintiff prefers a state forum. However, if removal is improper—for example, because the federal courts lack jurisdiction over a case or the defendant missed the removal deadline—the federal court may [remand](#) the case to state court. The court must remand the case if at any time before final judgment it appears it lacks subject matter jurisdiction, even if the plaintiff does not move for remand. The federal court may also [sever and remand](#) specific claims over which it does not have jurisdiction. When civil claims or criminal charges arising under state law proceed in federal court following removal, federal courts [apply state substantive law](#).

Federal Officer Removal Litigation

As a general rule, a party seeking to proceed in federal court [bears the burden](#) of showing that a case falls within the federal courts’ limited subject matter jurisdiction. Thus, to remove a case from state court to federal court, a defendant must show that federal courts have jurisdiction over the case as both a statutory and a constitutional matter. With respect to [statutory requirements](#), to invoke the federal officer removal statute, individual defendants must show that they are covered federal officers who acted in the scope of their official duties or that they acted under the direction of such an officer. Federal agencies may also seek removal under the [statute](#), as may corporations that acted under the direction of federal officers. In all cases, the defendant must demonstrate that the suit or prosecution is “for or relating to any act under color of such office.”

With respect to constitutional requirements, all federal jurisdictional statutes are subject to constitutional limits. [Article III of the Constitution](#) created federal courts with limited jurisdiction over specified categories of “Cases” and “Controversies.” Congress cannot enact legislation to grant federal courts jurisdiction over matters that fall outside those categories. Across all federal court litigation, the two most

commonly invoked grounds for federal jurisdiction are *federal question*, which refers to cases that require interpretation of the Constitution or a federal law or treaty, and *diversity*, which refers to disputes between citizens of different states. Diversity cases and cases involving claims based on federal law often fall within the scope of the general removal statute, and federal officers, like other litigants, may choose to invoke the general statute when available.

Defendants who rely on the federal officer removal statute often do so when the general removal statute does not apply—for example, in criminal cases or civil cases that raise claims only under state law between parties from the same state. The Supreme Court has held that in those cases, to satisfy the constitutional requirements for jurisdiction, the defendant must raise a *colorable defense* based on federal law. The existence of a federal law defense does not bring a case within the general *federal question jurisdictional statute*, because the Supreme Court has construed that statute to grant jurisdiction only when a federal question appears in the plaintiff’s “*well-pleaded complaint*.” However, the presence of a federal defense does satisfy the constitutional requirements for federal question jurisdiction. Often, defendants who invoke the federal officer removal statute raise claims of official immunity from suit or prosecution.

To ensure that a federal forum is available to vindicate federal interests, the Supreme Court has held that the federal officer removal statute should be *construed broadly*. At the same time, the Court has *stated* there that is a “strong judicial policy against federal interference with state criminal proceedings” and that therefore, in 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.”

In 2023 and 2024, the federal officer removal statute gained significant public attention when former President Donald Trump and others who served in his Administration sought to invoke the statute to remove various state and District of Columbia proceedings to federal court.

In the July 2023 case *New York v. Trump*, a New York district court considered former President Trump’s removal of his New York state criminal prosecution for falsifying business records. The district court first considered whether Section 1442(a)(1) allows for removal by former federal officials or only current ones, concluding that the statute applies to both current and former officials. The court *held* that it lacked jurisdiction over the case, however, because former President Trump failed to meet his burden of showing that the prosecution was “‘for or relat[ed]’ to acts taken under color of federal office” because he “was not acting ‘within the scope of [his] authority,’ nor has he been charged ‘for an alleged offence ... warranted by [his] Federal authority.’” The court further held that it lacked jurisdiction because the former President failed to raise a colorable federal defense to liability. Following remand, former President Trump was *convicted in state court* of the charges against him. The Supreme Court’s recent decision related to presidential immunity in *Trump v. United States*, discussed briefly below, *may affect the New York case*.

In *State v. Meadows*, former White House Chief of Staff Mark Meadows removed a Georgia state prosecution for conspiring to interfere in the 2020 presidential election in violation of Georgia’s Racketeer Influenced and Corrupt Organizations (RICO) Act. The district court remanded the case to state court. In a December 2023 decision, the U.S. Court of Appeals for the Eleventh Circuit affirmed. The Eleventh Circuit disagreed with the district court in *Trump*, holding that Section 1442(a)(1) does not apply to former federal officers. The court *reasoned* in part that “a state prosecution of a *former* officer does not interfere with ongoing federal functions—case-in-point, no one suggests that Georgia’s prosecution of Meadows has hindered the current administration.” It further *held* that, even if the statute did apply to former officials, “the events giving rise to this criminal action were not related to Meadows’s official duties.” The court *explained*, “Simply put, whatever the precise contours of Meadows’s official authority, that authority did not extend to an alleged conspiracy to overturn valid election results.” Meadows filed a *petition for a writ of certiorari* in July 2024 seeking Supreme Court review.

In September 2023, while *Meadows* was pending before the Eleventh Circuit, a Georgia district court ruled on a notice of removal from one of Meadows’s co-defendants, former Assistant Attorney General

Jeffrey Clark. Clark removed a Georgia prosecution for violating the Georgia RICO statute and for criminal attempt to commit false statements and writings for drafting a letter to Georgia authorities with the alleged intent to interfere with the 2020 election. In *Georgia v. Clark*, the district court remanded the case. Declining to address the question of whether Section 1442(a)(1) applies to former officials, it held that Clark failed to show that his actions occurred under the color of his federal office because he had not “submitted evidence to meet his burden to show that his actions were causally related to his federal office.” Clark appealed, and as of July 2024, the case remains pending before the Eleventh Circuit.

All of the foregoing cases involved criminal proceedings. In another case, *In re: Jeffrey B. Clark*, the U.S. Court of Appeals for the D.C. Circuit considered Clark’s removal of D.C. Bar disciplinary proceedings against him related to his alleged attempts to interfere with the 2020 election. The district court remanded the proceedings on the ground that neither the federal officer removal statute nor the general removal statute applied because the disciplinary proceedings were not a “civil action” or a “criminal prosecution” that was removable under those statutes. The D.C. Circuit affirmed on alternative grounds, holding that portions of the dispute had become moot and that, even if the disciplinary proceeding were removable, Clark’s notice of removal was untimely.

Outside of these relatively high-profile cases, civil and criminal defendants regularly invoke the federal officer removal statute. For instance, as discussed in a recent edition of *Congressional Court Watcher*, several federal appeals courts have held that the receipt of federal subsidies to create and operate an online patient portal did not cause non-government health care providers to act under a federal officer and at the direction of the federal government such that suits related to the patient portal were removable under Section 1442(a)(1).

Considerations for Congress

The federal officer removal statute may be of interest to Congress in part because it applies to Members. *Members of Congress* have invoked Section 1442(a)(1) to remove to federal court state court cases in which they were defendants. Some have also sought to rely on Section 1442(a)(4), which allows for removal by any “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.” However, courts have held that removal is proper under that subsection only if the defendant was acting “under an order” of a house of Congress.

Lawmakers may also be interested in how the federal officer removal statute interacts with Supreme Court caselaw on presidential immunity. Defendants who invoke the federal officer removal statute often argue that they are immune from suit or prosecution under federal law. It is therefore possible that the Supreme Court’s July 2024 decision in *Trump v. United States*, which related to presidential immunity from criminal prosecution, could affect future litigation under Section 1442(a)(1). Because the Supreme Court majority in *Trump v. United States* held that the President is immune from prosecution in some circumstances, the decision may make it easier for Presidents to raise colorable federal defenses that justify removal in future cases.

Congress has the authority to amend the federal officer removal statute to clarify or change its scope. Any amendment to Section 1442 would be subject to constitutional limits, meaning that Congress could not expand the statute to authorize removal of cases that fall outside of the federal courts’ Article III subject matter jurisdiction. A couple of bills from the past two Congresses have proposed amendments to Section 1442.

First, a proposal from the 117th Congress, the Removal Adjustment Act of 2022 (H.R. 8569), would have amended the federal officer removal statute to provide that no action could be removed under Section 1442(a)(1) “unless the removing party demonstrates a direct causal nexus between the removing party’s actions taken under the color of Federal office and the actions or omissions that are the subject of the plaintiff’s or prosecutor’s claim.” It would have further provided that removal under Section 1442 “shall

be strictly construed and doubts regarding the propriety of removal shall be resolved in favor of remanding the case to State court.”

Second, as noted above, recent court decisions have disagreed about whether the statute applies to former federal officers. Congress has the authority to amend the statute to resolve that question. A proposal from the 118th Congress, the No More Political Prosecutions Act of 2023 ([H.R. 2553](#)), would amend Section 1442(a) to specify that a case may be removed by the “President or Vice President, or a former President or Vice President.”

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