



## **SDNY "Believe[s]" In Dictum That President An "Officer of the United States" for purposes of Federal Officer Removal Statute**

Josh Blackman

July 19, 2023

In May, Seth Barrett Tillman and I discussed on [Lawfare](#) whether the President was an "Officer of the United States" for purposes of the federal officer removal statute. The New York District Attorney argued that Trump was not an "Officer of the United States." And Trump countered that he was an "Officer of the United States"—at least for purposes of the federal officer removal statute.

Today, the District Court granted the District Attorney's motion to remand the case to the Federal Court. There are three paragraphs that discuss this "officer" issue:

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.

The more difficult question is whether a President is an "officer ... of the United States" within the meaning of § 1442(a)(1). The People argue that the Supreme Court has interpreted federal statutes referring to an "officer of the United States" to include appointed, but not elected, officers. See *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 497-98 (2010) ("The people do not vote for the 'Officers of the United States.'" (quoting U.S. Const. art. II, § 2, cl. 2)); *United States v. Mouat*, 124 U.S. 303, 307 (1888) ("[A] person in the service of the government" who does not "hold[] his place by virtue of an appointment ... is not, strictly speaking, an officer of the United States."). Trump notes that the D.C. Circuit previously allowed him to remove a civil action to federal court under § 1442 while in office, *K&D LLC v. Trump Old Post Off LLC*, 951 F.3d 503, 505 (D.C. Cir. 2020), and cites to several cases permitting federal officer removal for elected members of Congress, see *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 412-415 (D.C. Cir. 1995); *Williams v. Brooks*, 945 F.2d 1322, 1324 n.2 (5th Cir. 1991); *Richards v. Harper*, 864 F.2d 85, 86 (9th Cir. 1988).

I believe that the President should qualify as a "federal officer" under the removal statute but, as is evident from the discussion below, the proposition is dictum, unnecessary for the decision that I reach.

It is unusual for an opinion to use the verb "believe," rather than *conclude* or *determine*. There is also no analysis here. I'm not sure how much weight we can place in this dictum, if any.

In any event, the issue is clearly preserved for appeal. (Remember, remand orders for the federal officer removal statute can be appealed.)

*Josh Blackman is an associate professor of law at the South Texas College of Law Houston who specializes in constitutional law, the U.S. Supreme Court, and the intersection of law and technology. Blackman is the author of the critically acclaimed Unprecedented: The Constitutional Challenge to Obamacare.*