SUPREME COURT OF THE UNITED STATES

No. 98–10

JEFFERSON COUNTY, ALABAMA, PETITIONER *v.* WILLIAM M. ACKER, JR., SENIOR JUDGE, UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ALABAMA, AND U. W. CLEMON, JUDGE, UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ALABAMA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 21, 1999]

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE SOUTER, and JUSTICE THOMAS join, concurring in part and dissenting in part.

An officer of the federal courts may remove an action commenced against him in state court "*for* any act under color of office or in the performance of his duties." 28 U. S. C. §1442(a)(3) (emphasis added). In my view, respondents have failed to show a "'causal connection' between the charged conduct and asserted official authority," *Willingham* v. *Morgan*, 395 U. S. 402, 409 (1969). I therefore dissent from Part II of the Court's opinion.

Respondents read Ordinance No. 1120 as creating more than tax liability; in their view, the ordinance makes it unlawful to work if the tax goes unpaid. Building upon this reading, they assert that the county has sued them for performing their duties without a license, a complaint that would clearly establish the causal connection required by 28 U. S. C. §1442(a)(3). This theory, however, is simply inconsistent with the complaints the county filed. It may perhaps be possible under Alabama law for the county to

bring a misdemeanor prosecution against one who engages in a business or profession without having paid the required license fee; and the county may perhaps have a right to enjoin the conduct of a business or the practice of a profession when the license fee has not been paid. But no such action is before us here. Instead, the county has sued each of these respondents for refusing to pay the fee, as evidenced by the fact that the only relief it sought was the money due. See Complaints in Nos. DV9209643 & DV9209695 (Jefferson County District Court). When identifying, for purposes of §1442(a)(3), what a suit is "for," it is necessary to focus, not on grounds of liability that the plaintiff *could* assert, but on the ground *actually* asserted. Regardless of whether Ordinance No. 1120 also purports to proscribe working without a license, *these* suits were only about respondents' refusal to pay the tax. That refusal is thus the act to which we should look in determining whether these suits were brought "for any act under color of office or in the performance of [official] duties."

Refusing to pay a tax, even an unconstitutional one, is not an action required by respondents' official duties, nor an action taken in the *course* of performing their official duties (as was, for example, the alleged physical abuse of an inmate by prison officials in *Willingham*, *supra*). Judges Acker and Clemon may well have been motivated by a desire to vindicate the interests of the federal judiciary. But their refusal to turn over money from their personal funds was not related to the responsibilities of their judicial office.

The opinion for the Court does not dispute this. Instead, it claims that holding the causation requirement unsatisfied would merge the merits issue with the removal issue. *Ante*, at 6–7. Since, the Court appears to reason, this fee might be unconstitutional if it is imposed upon the function of being a federal judge (the merits question), holding

that these suits were not brought "for" their being federal judges would in effect decide the merits. That is illogical. What the *fee* is imposed *upon*, and what the *suits* are *for* are two different questions.[1] If the cases were remanded to state court, respondents would remain free to argue that the burden of this exaction is upon the function of being a federal judge, rather than upon income. To be sure, the facts would be more favorable for that argument if the ordinance had been enforced by a different sort of suit, which *would* have qualified for removal– for example, suits seeking to enjoin respondents from performing their duties rather than suits to collect the unpaid "license fee." But even in the present suits, which do not qualify for removal, respondents could argue that this is a charge prohibited by the intergovernmental tax immunity doctrine. Deciding that the cases were improperly removed would simply mean that that defense would have to be made in state court. For although the removal statute creates an exception to the well-pleaded-complaint doctrine, the exception is not for all federal-question defenses asserted by federal officials, but rather for all suits "*for* any act under color of office or in the performance of [official] duties."

It is enough for the Court that respondents have identified some connection, albeit remote, with their federal offices. See *Ante*, at 7. The majority says that all the circumstances giving rise to these suits must be consid-

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[1] Some confusion may have resulted from the fact that the Government argued this issue in a way that did conflate the merits with removal. See *ante*, at 6. It said that there was no causal connection because "[t]he tax . . . was imposed only upon [the judges] personally and not upon the United States or upon any instrumentality of the United States." Brief for United States as *Amicus Curiae* 20. As I explain above, however, proving who the fee was imposed *upon* does not answer the question of what the suit is *for*.

ered, and "those circumstances encompass holding court in the county and receiving income for that activity." *Ibid.* In other words, *but for* the judges' working– an act unquestionably within the scope of their official duties– they would not have owed taxes under Ordinance No. 1120 and thus would not have been sued. "But for" causation, however, is not enough.

In *Maryland* v. *Soper* (No. 2), 270 U. S. 36 (1926), four prohibition agents and their chauffeur were prosecuted in state court for lying under oath to the state coroner, and they sought to remove the case under a predecessor of the current federal-officer removal statute.[2] According to the agents, they were on their way to report to their superior about a freshly discovered illegal still when they came upon a mortally wounded man in the road. Had they not been *en route* to their superior, the agents argued, they would never have made the discovery that required them to testify before the coroner. We rejected the argument that this established a sufficient connection between their official duty and the obstruction-of-justice prosecution. Although reporting to their superior was certainly among their official duties, the act of testifying before the coroner was not, and it was *the latter* act "on account of" which (or in the terms of the current removal statute, "for" which) they were prosecuted. *Id.*, at 42. So also here, it is not enough that respondents' performance of their judicial duties was a link in the chain of events that brought about

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[2] Section 33 of the Judicial Code provided:
"That when any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States . . . or against any person acting under or by authority of any such officer, on account of any act done under color of his office . . . the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending . . . . 39 Stat. 532, ch. 399."

these suits– that had they not performed their official duties, the fee would not have been assessed, and had the fee not been assessed they would not have been sued for failure to pay it. Acker and Clemon were sued *for* their refusal to pay the tax– and that, as I have said, is not an act required by, or even performed in connection with, cf. *Willingham* v. *Morgan*, 395 U. S. 402 (1969), the duties of their judicial office.

None of this is to suggest, of course, that removal is justified only when the federal officer can prove that the act prompting suit is, beyond doubt, an official one. If that were the case, the merits truly would be subsumed within the jurisdictional question of removal; the defense of qualified immunity, for example, would always be resolved as a threshold jurisdictional question– an odd result when the main point of 28 U. S. C. §1443 is to give officers a federal forum in which to litigate the merits of immunity defenses. See *Willingham* v. *Morgan*, *supra*, at 407. The point is only that the officer should have to identify as the gravamen of the suit an act that was, if not required by, at least closely connected with, the performance of his official functions. 28 U. S. C. § 1443; *Maryland* v. *Soper (No. 1)*, *supra*, at 33; *Willingham* v. *Morgan*, *supra*, at 407–409. What should defeat respondents here is that even though their federal defense is colorable, their claim to have acted in official capacity in not paying the fee is not.

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For the foregoing reasons, I would hold that this case was improperly removed. In view, however, of the decision of a majority of the Court to reach the merits, I join Parts I, III and IV of the Court's opinion. Cf. *Edgar* v. *MITE Corp.*, 457 U. S. 624, 646 (1982) (Powell, J., concurring in part); *United States* v. *Jorn*, 400 U. S. 470, 488 (1971) (Black, J., concurring in judgment).