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The Intrusion of Federal Immunity Protection into State Disbarment Proceedings

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The Intrusion of Federal Immunity Protection into State Disbarment Proceedings

INTRODUCTION

During the federal extortion trial of Cook County Commissioner Charles S. Bonk,1 two attorneys testified that they paid Bonk nearly $145,000 in bribes to obtain zoning changes in unincorporated areas of the county which were highly favorable to their developer-clients. One of these attorneys, John M. Daley,2 testified with immunity granted under 18 U.S.C. § 6002,3 which prohibits the use of the witness' testimony, or any information obtained as a result of his testimony, against him in any subsequent criminal proceeding. In addition to this protection, however, Daley's immunity order purportedly prevents the use of this compelled testimony against him in any "administrative proceeding, disciplinary committee, any bar association or state Supreme Court, in connection with any professional disciplinary proceeding or disbarment."4 Immediately following Daley's testimony the Illinois Attorney Registration and Disciplinary Commission began to examine his admissions to determine whether his conduct warranted disciplinary action, presuming that the order had no effect on its power.5 The purpose of this article is

1. United States v. Charles S. Bonk, No. 75 Cr 88 (N.D. Ill., June 6, 1975). Bonk was acquitted by a jury on June 6, 1975, of 12 counts of extortion and five counts of income tax fraud.
2. Daley, 18th Ward Democratic Committeeman of Chicago and cousin of Chicago Mayor Richard J. Daley, testified June 4, 1975. He admitted he paid Bonk, Chairman of the Zoning Committee of the Cook County Board of Commissioners, a total of $45,500 over a period of seven years to make zoning changes favorable to 17 real estate development transactions.
3. 18 U.S.C. § 6002 (1970) provides:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,
(2) an agency of the United States, or
(3) either House of Congress, a joint committee of the two Houses, or a committee or subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

to examine the power of a state to discipline members of its bar, what limits the federal government can place on that right, and what effect, if any, an immunity grant of this form will have on a state's efforts to use the testimony in disciplinary proceedings.

STATE'S RIGHT TO DISCIPLINE BAR MEMBERS

From the inception of the Union all states within our federal system have possessed a wide range of sovereign powers by which they may provide for the public welfare.6 These "police powers" of the states can only be curtailed by the federal government through the exercise of one of its enumerated powers or by some means necessary and appropriate to implement an enumerated power.7 It is only through this approach to the functioning of the federal system that both the federal and state governments can coexist as dual sovereigns within the geographical boundaries of the state.8

Right to Discipline Bar Members

Among the sovereign powers reserved to the states are the right to maintain a judicial system and the right to appoint officers to administer the states' laws.9 These rights include the inherent power to determine the qualifications for office and the conditions upon which their citizens may pursue their various callings.10 These rights, reserved to the states by the Constitution,11 cannot be infringed by the federal government as long as the state legislative and judicial departments remain within their separate sphere of power.12 Activities which are considered beyond the reach of the Congress are those which are completely within a particular state, which do not affect other states, and which do not interfere with the execution of the powers of the federal government.13

This is not to say that the tenth amendment forbids the federal government to resort to all means necessary to exercise some granted power.14 Congress can occupy a field completely, thereby

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8. Tarble's Case, 80 U.S. (13 Wall.) 397, 406 (1871).
11. U.S. CONST. amend. X, provides:
   The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.
suspending any state law.\textsuperscript{15} What is clear however, is that the federal government possesses no inherent power with respect to the internal affairs of the states. The federal government cannot claim any power not granted in the Constitution or provided to it by legislation enacted in the exercise of one of its granted powers. The first problem presented in the Daley grant of immunity, then, is whether Illinois possesses the sole right to regulate the membership of the bar, or whether the federal government can properly interfere with this right through the exercise of its general powers.

At common law the right to discipline members of the bar was an inherent power not dependent on statutes or legislative grants. It was an exclusive right of each particular court to determine who was qualified to become an attorney and what standards of conduct were required to remain one.\textsuperscript{16} At one time state supreme courts handled virtually all disciplinary matters. More recently state courts have employed the bar associations to aid in the regulation of admissions and have delegated the responsibility for preliminary investigations and hearings to discipline committees established by statute.\textsuperscript{17} Through this machinery the state exercises its "legitimate interest in determining whether [an individual] has the qualities of character and the professional competence requisite to the practice of law."\textsuperscript{18} Because the quality of the practice of law affects the public welfare, the states can require high standards for their attorneys.\textsuperscript{19}

\textit{Limits on the State’s Power to Discipline Bar Members}

Although this responsibility is primarily a state concern, limits have been placed upon the exercise of this power when it exceeds the broad confines of due process, or is in conflict with the exercise of a federal power occupying the field. Thus, a state qualification must have some rational connection with the person’s fitness or capacity to practice law and cannot exclude him from the practice of law in a manner, or for a reason that contravenes the due process or equal protection clauses of the fourteenth amendment.\textsuperscript{20} In addition, when Congress has undertaken to federally regulate some area

\textsuperscript{15} Id. at 114.
\textsuperscript{16} \textit{Ex Parte} Secombe, 60 U.S. (19 How.) 9 (1856); Phipps v. Wilson, 186 F.2d 748, 751 (7th Cir. 1951).
\textsuperscript{17} Potts, \textit{Disbarment Procedure}, 24 \textit{Texas L. Rev.} 161, 175 (1946).
\textsuperscript{18} Baird v. State Bar of Arizona, 401 U.S. 1, 7 (1971).
\textsuperscript{20} Schware v. Board of Bar Examiners of New Mexico, 232, 238-39 (1957).
of the law relating to its enumerated powers, a state cannot curtail or expand the practice of law in any manner conflicting with that legislation.\(^{21}\)

For the purposes of this discussion, the most important limitation upon the power of a State in relation to the members of its bar was imposed when the fifth amendment self-incrimination protection, made available to persons in state proceedings in *Malloy v. Hogan*,\(^{22}\) was held to be sufficient in *Spevack v. Klein*\(^{23}\) to protect an attorney from disbarment based solely on his assertion of the privilege at a disciplinary proceeding. In *Spevack*, an attorney refused to answer questions or produce records and papers relating to charges of "ambulance chasing" since it would subject him to possible criminal prosecution. The four justice plurality opinion by Justice Douglas held that the fifth amendment protection applies to lawyers as well as other individuals and "should not be watered down by imposing dishonor of disbarment and the deprivation of a livelihood as a price for asserting it."\(^{24}\) Justice Douglas further noted that the unconstitutionality of imposing a "penalty" for the assertion of the privilege against compelled testimony was not restricted to fine or imprisonment, but extended to any sanction by the government which makes that assertion "costly."\(^{25}\) Thus, for Justice Douglas, "[t]he threat of disbarment and the loss of professional standing, professional reputation and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege."\(^{26}\)

In addition to the right to assert his fifth amendment privilege against self-incrimination, an attorney facing disciplinary sanctions is entitled to procedural due process, including fair notice of the charge and the opportunity to present an explanation and a defense.\(^{27}\) This protection is essential since the proceedings are of an adversary and quasi-criminal nature\(^{28}\) at which the attorney must defend himself or suffer the loss of his livelihood. Disbarment, a proceeding designed to protect the public, is a "punishment or penalty imposed on the lawyer" which requires the state to maintain procedural due process protections.\(^{29}\)

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24. *Id.* at 514.
25. *Id.* at 515.
26. *Id.* at 516.
28. *Id.* at 551.
29. *Id.* at 550.
Another limitation placed on the state's power over the practice of law exists where Congress has established regulations relating to a particular area of law within which it has the enumerated power to govern. One such challenge to a state's right to set standards for the practice of law came in the case of *Sperry v. Florida*, in which Florida sought to limit practice before patent courts within the State to licensed attorneys. Congress, in establishing the patent courts, had authorized the Commissioner of Patents to regulate practice before those specialized courts. The Commissioner's regulations allowed nonlawyers to represent applicants. In denying Florida the absolute right to regulate its courts, the Court said:

Nor do we doubt that Florida has a substantial interest in regulating the practice of law within the State and that, in the absence of any federal legislation, it could validly prohibit nonlawyers from engaging in this circumscribed form of patent practice. But "the law of the State, though enacted in the exercise of powers not controverted, must yield" when incompatible with federal legislation.

The first question that must be considered, then, is whether or not disciplinary proceedings fall within the scope of the self-incrimination clause as it relates to penalties. If this is true, then the immunized testimony could not be used in later disbarment proceedings since it would be a penalty attached to the witness' testimony. On the other hand, if disbarment and suspension fall outside the privilege, it becomes necessary to consider whether Congress intended to interfere with the states' right to regulate attorneys by enacting immunity legislation that goes beyond the constitutional scope of the fifth amendment. Absent such congressional intent, the validity of the Daley grant must rest in the district court's power to expand immunity beyond the scope of the statute to include protection from disbarment. If no congressional intent to interfere can be found, and the district court could not enlarge the scope of immunity, then such unorthodox grants may be inadequate—ineffectual in preventing use of an attorney's testimony in disciplinary proceedings.

**Scope of the Privilege in Prior Immunity Statutes**

Immunity legislation is primarily a compromise between two competing interests: the right of any individual to be free from being

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compelled to testify against himself, and the need for the government to obtain information for the prosecution of crimes—the public's right to every man's evidence. The former was an evidentiary rule of English law that was considered so vital that it assumed the mantel of a constitutional protection; the latter, the sovereign's power over each citizen. It was through an effort to harmonize these often contradictory interests that such immunity grants came to be used and later recognized as "part of our constitutional fabric."

When the Supreme Court first construed the scope of the self-incrimination clause in Boyd v. United States, it became clear that certain types of forfeitures and penalties which are not technically criminal sanctions attached to the act, are nonetheless within the purview of the constitutional privilege. In that case, the government brought a civil forfeiture action against an importer under a federal law which allowed for either fines and imprisonment or for forfeiture of illegally imported goods. Part of the suit involved a discovery order by which the government commanded the production of certain incriminating receipts and documents. The importer's refusal to comply with the order would have resulted in the acceptance of the government's allegations as true. The Court held that for purposes of the fifth amendment protection against compelled testimony, the forfeitures were criminal, since the proceedings, "though they may have been civil in form, are in their nature criminal."

Since the forfeiture was a penalty affixed to a criminal act, it should be considered within the scope of the privilege. In support of this liberal construction of the amendment Justice Bradley, speaking for the Court, said:

It may be that it is an obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get


35. 116 U.S. 616 (1886).

36. Id. at 634.

37. Id.
their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to the gradual depreciation of the right, as if it consisted more in sound than in substance. 38

Although the original source of the phrase is unclear, federal immunity statutes dating from the first legislation in 1857 prevented future prosecution and sought to protect the witness from "any penalty or forfeiture" which might result from his compelled testimony. In discussing the constitutional privilege in *Boyd*, the Court noted the inclusion of the term in the Immunity Act of 1868, 39 which extended "use" immunity to witnesses testifying in federal court. The statute provided that no documents or evidence obtained as a result of judicial proceedings could be used in the prosecution of any crime "or from the enforcement of any penalty or forfeiture by reason of any act or omission of such party or witness."

The Supreme Court first examined the constitutionality of the Immunity Act of 1868 in *Counselman v. Hitchcock*. 40 In that case, the Court held that since the statute only prohibited use of the witness' testimony, and did not protect him from use of any leads obtained through his testimony, it was not a substitute for his fifth amendment privilege. 41 In explicating that privilege, Justice Blatchford said that a strict reading of the amendment would require only that the witness' testimony itself be privileged. However, he maintained that the object of the constitutional protection was to insure that no person, when acting as a witness in any investigation or judicial proceeding, should be compelled to give testimony which

38. *Id.* at 635.
39. Act of Feb. 25, 1868, ch. 13, 15 Stat. 37. Later this became Rev. Stat. 860 (1875), and as such was declared invalid in *Counselman v. Hitchcock*, 142 U.S. 547 (1892). The major provision of the bill was as follows:

Provided: That no answer or pleading of any party, and no discovery or evidence obtained by means of any judicial proceeding from any party or witness in this or any foreign country, shall be given in evidence, or in any manner used against such party or witness, or his property or estate, in any court of the United States, or in any proceeding by or before any officer of the United States, in respect to any crime, or for the enforcement of any penalty or forfeiture by reason of any act or omission of such party or witness: Provided, That nothing in this act shall be construed to exempt any party or witness from prosecution and punishment for perjury committed by him in discovery or testifying as aforesaid.
40. 142 U.S. 547 (1892).
41. *Id.* at 564.
might show, or tend to show, that he had committed a crime.2 The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.4

Justice Blatchford focused on the ancient principle of the law of evidence that a witness "shall not be compelled, in any proceeding to make a disclosure or to give testimony which will tend to criminate him or subject him to fines, penalties or forfeitures."4 The Court found that it was a reasonable construction of the privilege to prohibit the use of evidence obtained from the witness' testimony which links him to the crime as well as his direct admissions. In conclusion the Court said:

We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates.45

In response to Counselman, Congress quickly passed46 the immunity Act of 1893,47 which provided the "transactional immunity" which the decision appeared to require. The constitutional validity of even this broad protection was challenged by a witness called to testify in a federal grand jury investigation into rate-fixing by railroads. In United States v. James,48 this challenge to the statute was

42. Id. at 586.
43. Id. at 562.
44. Id. at 563-64.
45. Id. at 585.
46. Counselman was decided Jan. 11, 1892. Senator Cullum introduced a new immunity bill on Jan. 27, 1892. 23 Cong. Rec. 573 (1892).
47. Act of Feb. 11, 1893, ch. 83, 27 Stat. 443 provided:
  That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, ... on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding. ... 
48. 60 F. 257 (N.D. Ill. 1894).
upheld by Judge Grosscup, who rejected the government's limited construction of the fifth amendment as envisioned by the framers:

Did they originate such privilege simply to safeguard themselves against the law-inflicted penalties and forfeitures? Did they take no thought of the pains of practical outlawry? The stated penalties and forfeitures of the law might be set aside; but was there no pain in disfavor and odium among neighbors, in excommunication from church or societies that might be governed by the prevailing views, in the private liabilities that the law might authorize, or in the unfathomable disgrace, not susceptible of formulation in language, which a known violation of law brings upon the offender. . . . In my opinion, the privilege of silence, against a criminal accusation, guaranteed by the fifth amendment, was meant to extend to all the consequence of disclosure.49

The Supreme Court, however, refused to accept this view, and, in Brown v. Walker,50 upheld the 1893 statute even though it did not protect the witness from the "infamy and disgrace" of his exposure. The five-judge majority opinion made clear that although the statute does not shield the witness from "personal disgrace or opprobrium attaching to the exposure of his crime," such penalty does not exempt him from the duty to testify after he is given immunity.51 The statute became a model for all subsequent federal and state immunity legislation. The scope of the fifth amendment protection was considered to extend only to the criminal penalties attached to a witness' testimony.52

The scope of the penalties attached to a witness' testimony was not challenged again until a member of the Communist Party, ordered to testify under a similar immunity provision, claimed that governmental sanctions which attached to Communist Party membership effectively abrogated his fifth amendment privilege.53 The

49. Id. at 264.
50. 161 U.S. 591 (1896).
51. Id. at 605.
52. For a compilation of the state immunity statutes, see 8 J. WIGMORE, EVIDENCE § 2281, n.11 (McNaughton rev. 1961).
53. 161 U.S. at 605-06.
Second Circuit, while affirming the district court's order compelling
the witness to testify, recognized that new governmental sanctions
not existing at the time of Brown might call for a re-examination of
the principles underlying the Court's decision in that case.\(^5\) However,
in Ullmann v. United States,\(^6\) a seven-justice majority upheld the
Brown v. Walker rationale despite these additional "penalties"
affixed to the testimony. Mr. Justice Frankfurter, announcing the
opinion of the Court, said:

\[\text{The immunity granted need only remove those sanctions which}
\text{generate the fear justifying the invocation of the privilege: The}
\text{interdiction of the Fifth Amendment operates only whenever a}
\text{witness is asked to incriminate himself—in other words, to give}
\text{testimony which may possibly expose him to a criminal charge.}
\text{But if the criminality has already been taken away, the Amend-}
\text{ment ceases to apply.}^7\]

In the dissenting opinion, Mr. Justice Douglas, with whom Jus-
tice Black concurred, cited the wide range of disabilities created by
federal law which affect members of the Communist Party. These
included: inelegibility for employment in the federal government
and defense facilities, disqualification for a passport, the risk of
internment, and the loss of employment in labor unions.\(^8\) In addi-
tion, Communists faced restrictions by state and local governments,
as well as hostility from private employers and the public at large.
Justice Douglas argued that these types of sanctions should be clas-
sified as forfeitures attaching to an admission under compelled testi-
mony, in the same way that the forfeiture of property was classified in
Boyd v. United States. Justice Douglas further maintained:

\[\text{The forfeiture of property on compelled testimony is no more}
\text{abhorrent than the forfeiture of rights of citizenship. Any forfeiture}
\text{of rights as a result of compelled testimony is at war with the Fifth}
\text{Amendment.}^9\]

Justice Douglas called for either the reversal of the lower court
based on Boyd, or for an overruling of Brown v. Walker and adoption
of the minority view in that case which concluded the right to
testimony by the fifth amendment is beyond the reach of Con-
gress.\(^10\) Justice Field's dissent in Brown and Judge Grosscup's opin-

\(^{55}\) United States v. Ullmann, 221 F.2d 760 (2d Cir. 1955), \textit{aff'd} 350 U.S. 422 (1956).
\(^{56}\) 350 U.S. 422 (1956).
\(^{57}\) \textit{Id.} at 431.
\(^{59}\) \textit{Id.} at 442.
\(^{60}\) \textit{Id.} at 440.
tion in *United States v. James*, were cited to show there was strong historical basis for the view that the amendment was designed to protect the accused from all compulsory testimony "which would expose him to infamy and disgrace" as well as that which would lead to a criminal conviction.\(^{61}\) Loss of office, loss of dignity, loss of face were all forms of punishment associated with infamy, which was historically considered to be as effective a punishment as fine and imprisonment.\(^{62}\)

The critical point is that the Constitution places the right of silence *beyond the reach of government*. The Fifth Amendment stands between the citizen and his government. When public opinion casts a person into the outer darkness, as happens today when a person is exposed as a Communist, the government brings infamy on the head of the witness when it compels disclosure. That is precisely what the Fifth Amendment prohibits.\(^{63}\)

**Protection from Disbarment**

The opinions of the Court in *Spevack v. Klein*\(^{64}\) did not focus on the extent to which the self-incrimination clause would provide protection from disbarment to witnesses compelled to testify. Thus, the case left unanswered serious questions regarding the constitutionality of existing immunity statutes.\(^{65}\) Would immunity have to be extended to protect an attorney from disbarment before he could be penalized for refusing to answer? If so, the traditional scope of immunity, securing the witness only against a criminal prosecution, might not be constitutionally sufficient. There was also concern that states would no longer be able to inflict these types of non-criminal penalties upon an attorney forced to disclose incriminating information. Commentators reasoned that if these penalties were deemed to fall within the purview of the self-incrimination privilege the only rational way to force the witness to testify would be to adopt Justice Douglas' view expressed in *Ullmann v. United States*.\(^{66}\)

The question of whether the self-incrimination clause provides protection against disbarment hinges on whether disbarment in itself may be characterized as a criminal sanction for the purpose of

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\(^{61}\) *Id.* at 449.

\(^{62}\) *Id.* at 451.

\(^{63}\) *Id.* at 454.

\(^{64}\) See text accompanying notes 23 through 26 *supra*.

\(^{65}\) *The Supreme Court, 1966 Term, 81 Harv. L. Rev. 69, 202-05 (1967).*

invoking the privilege, rather than a civil proceeding. In order to determine where disbarment falls within the spectrum of civil versus criminal cases, the courts focus on either the legislative purpose of the proceeding, or the affect of the proceeding upon the individual involved.

Based on the first analysis, disbarment proceedings have generally been considered either civil proceedings or sui generis, neither technically criminal nor civil. This traditional view was discussed by Justice Cardozo while serving on the New York Court of Appeals. In *In re Rouss*, an attorney had been compelled to testify under an immunity grant protecting him from any "penalty or forfeiture" which might result from his testimony. Justice Cardozo held that the immunity statute conferred protections only as broad as the fifth amendment privilege and disciplinary proceedings were beyond the scope of that protection.

Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards. . . . Whenever the condition is broken the privilege is lost. . . . To strike the unworthy lawyer from the rolls is not to add to the pains and penalties of crime. The examination into character is renewed; and the test of fitness is no longer satisfied. For these reasons courts have repeatedly said that disbarment is not punishment.

This view interprets the proceedings as remedial rather than penal. They are designed to protect the public, rather than punish the attorney for his conduct.

However, the Supreme Court in *In Re Ruffalo*, emphasized the affect of the proceedings on the individual involved, and characterized disbarment proceedings summarily. The Court stated that "disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer." As a result, the Court found the attorney was entitled to procedural due process, which included fair

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68. 221 N.Y. 81, 116 N.E. 782, cert. denied, 246 U.S. 661 (1918).
69. Id. at 85, 116 N.E. at 783.
70. 390 U.S. 544 (1968).
71. Id. at 550.
notice of the charges and an opportunity to defend or respond.\textsuperscript{72} For these purposes the Court, through Justice Douglas, considered the proceedings "quasi-criminal."\textsuperscript{73} In support of this analysis, Justice Douglas cited an analogous situation involving the criminal aspects of juvenile proceedings, with respect to the self-incrimination protection, in \textit{In re Gault}.\textsuperscript{74} There, the Court weighed the governmental and individual interests involved and held that despite the rehabilitative intentions of the juvenile court system, the interests of the juvenile in a delinquency proceeding are similar to an adult in a criminal proceeding. Therefore, the juvenile could properly invoke the fifth amendment protection.\textsuperscript{75}

State courts have interpreted the scope of \textit{Ruffalo} narrowly, finding that it "hardly stands for an equation of criminal and disciplinary proceedings."\textsuperscript{76} Disciplinary proceedings, unlike juvenile proceedings, cannot result in incarceration and involve a stronger governmental interest.\textsuperscript{77} Since the Supreme Court in \textit{Ruffalo} did not expressly term the proceedings criminal in nature, the state courts have relied on the rationale of \textit{Ullmann} to disbar lawyers who have been granted immunity protection under either state or federal statutes.\textsuperscript{78} This conforms with the established view that neither the failure of the state to prosecute an attorney,\textsuperscript{79} acquittal of a crime,\textsuperscript{80} nor executive pardon for the offense,\textsuperscript{81} have been sufficient to prevent disbarment based on the same act.

State courts have interpreted \textit{Spevack} to make the fifth amendment privilege applicable to disbarment proceedings only to the extent that the state cannot compel testimony which could lead to a criminal charge, or discipline an attorney solely because he invokes the privilege at the disbarment or any other proceeding.

It has been suggested, however, that disbarment be treated as a

\textsuperscript{72} Id.

\textsuperscript{73} Id. at 551.

\textsuperscript{74} 387 U.S. 1 (1966).

\textsuperscript{75} Id. at 33.

\textsuperscript{76} Kelly v. Greason, 23 N.Y.2d 368, 384, 244 N.E.2d 456, 466, 296 N.Y.S.2d 937,951 (1968).

\textsuperscript{77} Black v. State Bar of California, 7 Cal. 3d 676, 684, 499 P.2d 968, 974, 103 Cal. Rptr. 288, 294 (1968), and cases cited therein.


\textsuperscript{79} Cate v. Rivers, 246 S.C. 35, 142 S.E.2d 369 (1965).


\textsuperscript{81} Louisiana State Bar Association v. Ponder, 263 La. 743, 269 So. 2d 228 (1972).
criminal proceeding for all purposes of the fifth amendment privilege. In order to obtain an attorney's testimony, the prosecutor would then be forced to insure protection from disbarment in addition to traditional immunity.\textsuperscript{82} This raises the objectionable possibility that an attorney whose admitted conduct has shown that he is unfit to practice law will be beyond the reach of the state. However, this problem is no different qualitatively than that presented by the operation of immunity statutes in general. It does differ quantitatively since the potential for harm to third persons is increased due to the attorney's continued fiduciary position within the state. This undesirable fact only indicates that the social cost of granting such immunity will often be too high. The system of immunity was intended to serve as a method of balancing these costs to society with the potential benefits that may also be present. In every instance in which immunity is extended, it results not only in social benefit from the use of the testimony, but also in the social cost of foregoing the punishment of the individual. It is doubtful that any court will voluntarily classify its disbarment proceedings as criminal so as to create the privilege. As Justice Cardozo concluded in \textit{In re Rouss}: "We will not declare, unless driven to it by sheer necessity, that a confessed criminal has been entrenched by the very confession of his guilt beyond the power of removal."\textsuperscript{83}

\textbf{SCOPE OF IMMUNITY UNDER 18 U.S.C. § 6002}

In 1970 Congress undertook to consolidate the multitude of federal immunity statutes which had proliferated since 1893. Five new immunity sections\textsuperscript{84} replaced the prior statutes with a comprehensive outline governing the granting of immunity to witnesses before the federal courts, grand jury proceedings, administrative and congressional committee hearings. Congress incorporated the proposals of the National Commission on Reform of Federal Laws,\textsuperscript{85} which had taken a new look at the scope of federal immunity in light of Supreme Court cases beginning with \textit{Murphy v. Waterfront Commission of New York}.\textsuperscript{86} There, the Court held that state grants of imm-


\textsuperscript{83} 221 N.Y. at 85, 116 N.E. at 783.


\textsuperscript{85} \textit{Id.} at 1447-48.

\textsuperscript{86} 378 U.S. 52 (1964).
Community will protect the witness from use of his testimony against him in federal court, as well as any evidence obtained from leads provided in the testimony. This construction of the scope of immunity protection in both federal and state grants, cast doubt as to the necessity of the broad "absolute immunity" from prosecution referred to in the dicta of Counselman, permitting instead merely use/derivative use immunity.

As a result of the Commission's recommendations, Congress adopted a standardized immunity statute which prohibited the use of "testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)" in any criminal case. The legislation also deleted the "penalty or forfeiture" clause, intending the statutory immunity to be as broad as, but no broader than, the privilege against self-incrimination. It is the omission of this clause which bears most directly upon the discussion of the Daley grant of immunity. It was in this specific act that Congress evidenced an intent to confine the immunity to the constitutional privilege as it is presently construed by the Court—to protect the witness from use of his testimony in any subsequent criminal proceedings.

During the formulation of the standardized immunity statute which was later adopted by Congress, the Commission considered the problem surrounding the "penalty or forfeiture" phrase in the then existing provisions. The drafters were particularly troubled by possible judicial interpretation which might give the phrase an independent significance beyond the criminality referred to in the fifth amendment. The Commission Report cites with disapproval the case of Lee v. Civil Aeronautics Board, where an allegedly inattentive co-pilot involved in a mid-air collision was granted immunity and testified in a Civil Aeronautics Board (CAB) administrative hearing. The administrator later brought an action to suspend the pilot's license, but the CAB ruled that he had obtained immunity from penalties and forfeitures including suspension. Although the court of appeals dismissed the case for lack of standing, one judge discussed the merits in the case and agreed with the CAB.

87. Id. at 79.
88. Id. at 77-79. For a discussion of the scope of federal immunity following Murphy, see Wendel, Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion, 10 St. Louis L.J. 327 (1966).
92. 225 F.2d 950 (D.C. Cir. 1955).
The suspension of these pilots would be a forfeiture of a privilege, even if not a right. The immunity statute extends to forfeitures as well as to penalties. The question, then, is whether the proceeding is punitive or merely remedial. In this connection we go to the Fifth Amendment cases. Any reading of the complaint shows the action prayed is purely punitive. The complaint says baldly that the men were careless and therefore ought to be suspended. It does not allege the pilots to be unqualified. I think they were protected by reason of their testimony taken in the investigation.®

It might be possible to distinguish between penal actions taken for improper conduct, which would be protected by an immunity grant, and remedial actions for unfitness, which would not. The Commission felt this clarification process would be further complicated by attempts to give an independent meaning to the "penalty or forfeiture" clause.® "In other words, a focus on this phrase in immunity statutes may lead to conferring a broader protection than needed to replace the constitutional privilege. . . ."® Since the phrase does not appear in the fifth amendment, there is no reason to incorporate it in immunity statutes.® Professor Robert G. Dixon, Jr., of the George Washington University National Law Center, who prepared the Comment on Immunity as a special consultant to the Commission, discussed this aspect of the new law at the Senate hearings:

We do not continue the language from 1893, speaking of a "penalty" or a "forfeiture." I would suggest—and this is in the record—that in one sense the penalty or forfeiture concept is inadvisable. On page 27 of the Commission document there is mention of a case, Lee v. CAB, where the penalty or forfeiture concept seemed to be operating—had that case gone to its conclusion—to protect an airline pilot from loss of a license on the basis of immunity acquired in an accident investigation proceeding. I think that is a little extreme. It goes beyond the scope of the fifth amendment, unless the Court expressly chooses to construe the fifth amendment in that direction.®

This use/derivative use immunity provision was upheld in Kastigar v. United States.® The Supreme Court first rejected the

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93. *Id.* at 953 (Prettyman, J., dissenting).
95. *Id.* at 1416.
96. *Id.*
defendant’s claim that no immunity grant could supplant the fifth amendment privilege of silence, and expressly reaffirmed the holdings of Brown and Ullmann.99 The Court also dismissed the broad language in Counselman as dicta which was unnecessary for the holding of the case. The Kastigar court confined the privilege to actual testimony and any “fruits” in the form of leads and new evidence which were derived from that testimony.100 These protections alone were found to be coextensive with the self-incrimination clause and Congress need not provide anything further. By making the immunity protection as broad as, but no broader than, the fifth amendment privilege, Congress did not intend to interfere with the States’ right to discipline their bar members since these actions have not been considered criminal proceedings.101

THE DALEY GRANT

If it was the intent of Congress to limit the immunity protection under this statute to criminal proceedings, the grant to Daley under section 6002 could be effective only if state disciplinary proceedings are now construed to fall within the meaning of a “criminal case.” Otherwise, the district court’s authority must rest upon some underlying or inherent power which would allow it to interfere with the state’s regulatory powers over its attorneys.

Despite the classification, in Ruffalo, of disciplinary proceedings as being quasi-criminal in nature, courts in Illinois102 and New York,103 which have considered the use of immunized testimony in disbarment proceedings, have held that the self-incrimination protection does not apply. The Court of Appeals of Maryland recently considered the scope of the immunity grant under section 6002 in a case similar to the facts surrounding the Daley case.104 During an ongoing probe into political corruption in the state, an attorney testified in federal court and admitted engaging in illegal transactions. The revelations made under this immunity grant consisted of the major portion of the evidence produced at his disbarment proceedings. The attorney claimed his immunity should protect him

99. Id. at 448.
100. Id. at 453.
101. See text accompanying notes 67 through 81 supra.
from the use of his own testimony against him since the disbarment was essentially a criminal proceeding. The court held that despite language in Spevack and Ruffalo, disbarment proceedings are not criminal since they are not designed or intended as punishment.105

Based upon the holdings in the New York and Illinois cases, our repeated statements that disbarment proceedings are not criminal proceedings, Kastigar, and the traditional view of Anglo-American jurisprudence that disbarment is intended not as punishment, but as protection to the public, we hold that this proceeding is not a "criminal case" within the purview of 18 U.S.C. § 6002 or the Fifth Amendment to the Constitution of the United States.106

We are faced, then, with the following situation. The district court, which has no discretion in granting immunity properly submitted by a U.S. attorney,107 has extended the scope of the protections beyond that required by the Supreme Court and even in direct contravention of the expressed desires of Congress. Congress has the power to expand the scope of the protection beyond that which is constitutionally required, provided protection such as this is necessary for the exercise of federal power.108 However, immunity of this type may be inappropriate in light of the substantial state interest in disciplining attorneys. In any case, that question is not present in Daley, since Congress has declined to exceed the constitutional scope of the fifth amendment.

Can the district court, in ordering the immunity grant upon the recommendation of the U.S. attorney, effectively enlarge the scope of a plainly written statute? In the past, it has been held to be an improper action by the judiciary to consider the scope of an immunity act, which expressly concerned only judicial witnesses, to have been impliedly amended by Congress to pertain to congressional proceedings as well.109 Similarly, whenever federal power is exerted

105. Id. at 311, 329 A.2d at 6.
106. Id. at 312, 329 A.2d at 7.
108. Reina v. United States, 364 U.S. 507, 511 (1960). See Ullmann v. United States, 350 U.S. 422, 436 (1956). In exercise of its conceded power, Congress cannot be restricted from the most effective use of that power by a state power to prosecute criminals. In Adams v. Maryland, 347 U.S. 179, 183 (1954), the Court could not say that the immunity provisions were not "appropriate" and clearly adopted to that end. Congress, in the legitimate exercise of its powers, enacts the supreme law of the land and state courts are bound even though federal law affects their rules of practice. Similarly in People v. Stevater, 77 Misc. 2d 761, 356 N.Y.S. 2d 915 (1972), it was held that when federal courts grant transactional immunity, state courts are barred from bringing any criminal prosecution since Congress may provide immunity beyond the scope of the fifth amendment privilege as construed in Kastigar.
within what would otherwise be the domain of the state, the justification must clearly appear. The Court has not been quick to assume that legislation was meant to affect a significant change in the sensitive relation which exists between the federal and state criminal jurisdictions.

Could the federal courts, because of their inherent concern with the protection of federal criminal prosecutions, interfere with the proper supervision of attorneys by state courts? An analogous situation arose in New York when three attorneys, granted immunity in state court, sought protection of their fifth amendment privilege through federal injunctive relief from disciplinary proceedings based on their testimony. The Second Circuit affirmed the lower court's decision to abstain from the proceedings since the state had a primary interest in adjudicating the continuing professional fitness and character of its officers. The court said:

Today more than ever, the integrity of the bar is of public concern and the state, which licenses those who practice in its courts, and which is the only body that can impose sanctions upon those admitted to practice in its courts, should not be deterred or diverted from the venture by the interloping of a federal court.

**CONCLUSION**

In Illinois, disbarment proceedings remain a noncriminal action through which the State properly exercises control over the members of the bar. This power is among those reserved powers, vested in the states, which cannot be infringed upon by the federal government unless it affirmatively acts in the exercise of its general power. In attempting to interfere with these state proceedings, the district court and the U.S. attorney have exceeded their statutory and discretionary powers with respect to the granting of federal immunity protection.

Perhaps this additional incentive of protection from disbarment or state disciplinary action is needed to obtain full cooperation from attorneys involved in criminal conduct. It might well be true that society will tolerate the continued practice of some of these attorneys in exchange for the removal from public office of officials in-

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involved in the same criminal dealings. It is, however, beyond the discretionary powers of the federal prosecutors to make these value judgments when Congress has not given them the power to grant immunity from disbarment. The state’s interest in the matter remains paramount and unimpaired by this attempted exertion of federal control over disbarment proceedings. Such immunity orders stand in the way of the state’s power to determine an attorney’s fitness to remain a member of its bar.

Patrick E. Deady

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: JOHN DALEY,
A WITNESS BEFORE THE
SPECIAL MARCH 1974 GRAND JURY

ORDER

This matter coming on to be heard on the petition of the UNITED STATES OF AMERICA, by JAMES R. THOMPSON, United States Attorney for the Northern District of Illinois, for an order instructing JOHN DALEY to testify and to produce evidence before the Special March 1974 Grand Jury, said JOHN DALEY being a witness before the said grand jury who has asserted his privilege against self-incrimination, and the Court having considered said petition of the United States Attorney and the letter approving the application of this Court from the Assistant Attorney General of the Criminal Division, United States Department of Justice, attached to said petition:

IT IS HEREBY ORDERED that JOHN DALEY shall not be excused from testifying or from producing books, papers or other evidence before the said grand jury on the ground that the testimony or evidence required of him may tend to incriminate him, and that JOHN DALEY shall proceed forthwith to the place of meeting of the said grand jury and answer the questions which he is asked and produce what evidence is required of him without further asserting his privilege against self-incrimination, and IT IS FURTHER OR-
DERED that no testimony of the witness, JOHN DALEY, compelled under this order (or any information directly or indirectly derived from such testimony or other information) may be used against him in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this order, in accordance with the provisions of Section 6002, Title 18, United States Code.

IT IS FURTHER ORDERED that no testimony of the witness, JOHN DALEY, compelled under this order as above, may be used against him in any administrative proceeding, disciplinary committee, any bar association or state Supreme Court, in conjunction with any professional disciplinary proceeding or disbarment.

Enter:

Edwin A. Robson (Signed)
U.S. DISTRICT COURT JUDGE
Dated at Chicago, Illinois
dthis 18th day of July, 1974.