Volume 92 | Issue 3 Article 2

April 1990

Clearly Erroneous: The Fourth Circuit's Decision to Uphold Removal of a State-Bar Disciplinary Proceeding under the Federal-Officer Removal Statute

Franklin D. Cleckley
West Virginia University College of Law

West Virginia Law Review

Volume 92 Spring 1990 Number 3

CLEARLY ERRONEOUS: THE FOURTH CIRCUIT'S DECISION TO UPHOLD REMOVAL OF A STATE-BAR DISCIPLINARY PROCEEDING UNDER THE FEDERAL-OFFICER REMOVAL STATUTE

FRANKLIN D. CLECKLEY*

* Arthur B. Hodges Professor of Law, West Virginia University College of Law; A.B. 1962, Anderson College; J.D. 1965, Indiana University at Bloomington; LL.M. 1969, Harvard University.

I. INTRODUCTION

An appellate decision that rests upon inapposite authority, faulty analysis, or unsound reasoning is hardly uncommon in American law. When such a case promises to cause harm to important interests, however, academic analysis and criticism become imperative. Such a case is *Kolibash v. Committee on Legal Ethics*,[1] wherein the United States Court of Appeals for the Fourth Circuit recently held that a West Virginia State Bar Association's disciplinary proceeding against a United States attorney could be removed to federal district court under the federal-officer removal statute.[2]

The decision in *Kolibash* is best described as clearly erroneous. The court's reliance upon authority, its legal and factual analysis, and its application of law and policy to facts are riddled with errors. The decision in the case, that the removal of the disciplinary proceeding satisfied statutory requirements, is thus without foundation. If the Fourth Circuit's application of the law had been correct and its reasoning sound, it would have been compelled to hold that the United States Attorney's removal petition failed in several crucial respects to satisfy the requirements of section 1442, and that the district court's decision to remand the proceeding to the state system should be affirmed.

---

1. 872 F.2d 571 (4th Cir. 1989).

2. 28 U.S.C. § 1442 (1982). For the pertinent provisions of the removal statute, see the text accompanying note 9 *infra*.

This case deserves comment and analysis because it has unjustifiably harmed the legitimate interests of the state of West Virginia in that it has allowed a federal district court, without congressional authorization, to deprive a state supreme court and bar association of their rightful authority to regulate attorney misconduct and membership of the state bar. This case also creates a dangerous precedent that threatens to lend the semblance of legitimacy to other efforts to promote unwarranted federal intrusion into an area that has traditionally been and should remain the exclusive province of the states. This article will identify the major flaws and deficiencies of the *Kolibash* opinion and will show that the case places vital and well-established principles of federalism in jeopardy. The article's main thesis is that the decision should be overruled.

The facts of the case are as follows. It began when an individual who had been convicted of federal drug charges complained to the West Virginia State Bar Association that an Assistant United States Attorney for the Northern District of West Virginia had engaged in professional misconduct while prosecuting the government's case against him. In particular, the individual alleged that the prosecutor had first represented the defendant as a private attorney during a federal grand-jury investigation and then, after joining the United States Attorney's office, had participated in the case on the government's side by questioning witnesses before the grand jury. After the defendant was convicted, the Court of Appeals for the Fourth Circuit reversed the conviction and dismissed the indictment on the ground that the Assistant United States Attorney's conflict of interest had violated the defendant's due-process rights.[3]

While investigating the prosecutor's conduct, the bar association expanded its inquiry to include his supervisor, William A. Kolibash, the United States Attorney for the Northern District of West Virginia. On April 30, 1987, the state bar's Committee on Legal Ethics formally accused Kolibash of violating its *Code of Professional*

3. United States v. Schell, 775 F.2d 559, 565-66 (4th Cir. 1985), *cert. denied*, 475 U.S. 1098 (1986).

Responsibility[4] by failing to supervise his associate adequately and by failing to disclose relevant information to the trial court during its investigation of the conflict-of-interest charges. Kolibash insisted that he had done nothing improper and that he had instructed his colleague to isolate himself from cases involving persons whom he had previously represented.

On May 6, 1987, Kolibash petitioned to remove the state-bar disciplinary proceeding to the United States District Court for the Southern District of West Virginia under 28 U.S.C. § 1442. The Committee on Legal Ethics then filed a motion pursuant to 28 U.S.C. § 1447,[5] asking the district court to remand the proceeding to the state system on the ground that it was removed improvidently and without jurisdiction. On April 21, 1988, the district court remanded the proceeding, stating that the licensure of attorneys was basically a state function and that the charges against Kolibash would be adjudicated fairly in the state system. Kolibash then appealed the remand order to the Fourth Circuit. In an opinion by Judge Wilkinson, a three-judge panel of the court of appeals held that removal of the proceeding satisfied the requirements of section 1442, and that the district court had erred by divesting itself of jurisdiction over the case.[6]

Before reaching the merits of Kolibash's appeal, the Fourth Circuit had to interpret and apply the federal statute governing the reviewability on appeal or otherwise of district-court orders remanding removed cases to state courts. At that time, the statute, 28 U.S.C. § 1447, provided in pertinent part:

---

4. CODE OF PROFESSIONAL RESPONSIBILITY (1978). The Code that was in effect at the time of Kolibash's alleged misconduct can be found in the Court Rules volume of the WEST VIRGINIA CODE (1982) at page 281. It was adopted and promulgated by the West Virginia Supreme Court of Appeals on June 9, 1970, became effective on July 1, 1970, and was amended in 1977 and 1978. On January 1, 1989, the Code was superseded and replaced by the *Rules of Professional Conduct*, which was adopted and promulgated by the Supreme Court of Appeals on June 30, 1988.

5. 28 U.S.C. § 1447 (1982). For the pertinent provisions of the statute, see the text accompanying note 7 *infra*.

6. The facts of the case are summarized by the court of appeals in *Kolibash*, 872 F.2d at 572. Although charges of professional misconduct formed the basis for the *Kolibash* decision, this article neither expresses nor implies any opinion as to whether William A. Kolibash or any other attorney in the office of the United States Attorney for the Northern District of West Virginia did in fact violate the *Code of Professional Responsibility*.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case . . . . The State court may thereupon proceed with such case.
(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . .[7]

As interpreted by the United States Supreme Court, the purpose of these provisions is "to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues."[8] By permitting appellate review of the remand order in *Kolibash*, the Fourth Circuit ran afoul of this congressional purpose.

The removal statute, 28 U.S.C. § 1442, which the court applied when deciding the case on its merits, provides in pertinent part:

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons 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:
(1) Any officer of the United States or any agency thereof, or person acting under him, for 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.[9]

Acting under the authority of the constitutional doctrine of federal supremacy,[10] Congress enacted this statute and its predecessors " 'to provide a federal forum for cases where federal officials must raise defenses arising from their official duties . . . [and] to protect federal officers from interference by hostile state courts.' "[11] The federal government, as the Supreme Court first said over a century ago[12] and has recently reiterated,

---

7. 28 U.S.C. § 1447 (1982). Subsection (c) was amended November 19, 1988, Pub. L. No. 100-702, Title X, § 1016(c), 102 Stat. 4670 (codified as amended at 28 U.S.C.A. § 1447(c) (West Supp. 1989)), and now provides: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

8. Thermtron Products v. Hermansdorfer, 423 U.S. 336, 351 (1976). *See also* United States v. Rice, 327 U.S. 742, 751 (1946) (when enacting removal statutes that preceded section 1442, Congress "den[ied] any form of review of an order of remand" in order to "establish[] the policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction . . . .").

9. 28 U.S.C. § 1442(a) (1982).

10. *See* Willingham v. Morgan, 395 U.S. 402, 405 (1969).

11. Mesa v. California, 109 S. Ct. 959, 969 (1989) (citation omitted) (quoting *Willingham*, 395 U.S. at 405).

12. Tennessee v. Davis, 100 U.S. 257, 263 (1880).

> can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, 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,—if their protection must be left to the action of the State court,—the operations of the general government may at any time be arrested at the will of one of its members.[13]

"The act of removal permits a trial upon the merits of the state-law question free from local interests or prejudice."[14]

Federal-officer removal "was first invoked in times of crisis and thereafter always limited to special situations deemed to present special needs."[15] The earliest removal statutes were designed to protect federal officers charged with carrying out federal laws strongly opposed by state and local authorities in one region of the country or another.[16]

For example, in reaction to New England's opposition to the trade embargo declared during the War of 1812, Congress in 1815 enacted a statute, limited in duration, providing for the removal to federal court of any state prosecution or civil lawsuit brought against federal customs officials because of their collection of customs duties.[17] Another example occurred in 1833, when South Carolina sought to nullify federal customs laws by making their enforcement a state crime, and Congress reacted by enacting a permanent version of the earlier removal provision.[18] Congress subsequently passed a series of

---

13. *Mesa*, 109 S. Ct. at 963 (quoting *Davis*, 100 U.S. at 263).

14. Arizona v. Manypenny, 451 U.S. 232, 241-42 (1981) (citations omitted).

15. P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1057 (3d ed. 1988) [hereinafter HART AND WECHSLER].

16. *See* Willingham v. Morgan, 395 U.S. 402, 405-06 (1969); California v. Mesa, 813 F.2d 960, 964 (9th Cir. 1987), *aff'd*, 109 S. Ct. 959 (1989); HART AND WECHSLER, *supra* note 15, at 1057-59; Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 805-10 (1965); Strayhorn, *The Immunity of Federal Officers from State Prosecutions*, 6 N.C.L. REV. 123, 129-33 (1927); Note, *Removal of Suits Against Federal Officers: Does the Malfeasant Mailman Merit a Federal Forum?*, 88 COLUM. L. REV. 1098, 1099-1100 (1988).

17. Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 198. *See Willingham*, 395 U.S. at 405 (1969); HART AND WECHSLER, *supra* note 15, at 1057-58; Amsterdam, *supra* note 16, at 806; Strayhorn, *supra* note 16, at 130; Note, *supra* note 16, at 1099.

18. Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 633. *See Willingham*, 395 U.S. at 405; HART AND WECHSLER, *supra* note 15, at 1058; Amsterdam, *supra* note 16, at 806-07; Strayhorn, *supra* note 16, at 129-30; Note, *supra* note 16, at 1099.

measures granting the right of removal to other federal officers,[19] including internal-revenue agents,[20] members of Congress,[21] and Prohibition agents.[22] In 1948 Congress finally adopted the fully general language now contained in 28 U.S.C. § 1442(a)(1), which extends the right of removal to all federal officers.[23] While the scope of the removal statutes was expanding, their purpose remained constant: to allow removal, not whenever a state action is brought against a federal officer, but only when the enforcement of a substantive federal law or policy is challenged by the authority of a state.[24] "Congress has been careful not to interfere with the rights of the states, except along the lines where past experience has pointed out the necessity."[25]

Because no credible threat of state interference with the exercise of federal authority was posed in *Kolibash*, the decision in the case cannot be reconciled with the purposes that Congress and the courts have understood the federal-officer removal statutes have served since 1815.

In *Kolibash* the court of appeals faced three specific issues of statutory interpretation. The first, discussed briefly by the court, is whether the provision of section 1447(d), which states that a district court order remanding a case to the state court "is not reviewable on appeal or otherwise," barred review of the remand order by the Court of Appeals for the Fourth Circuit.[26] The court held that it did not.[27] The second issue, discussed at some length by the court, is whether the state-bar disciplinary proceeding was commenced against Kolibash for acts performed "under color" of his federal

19. *See Willingham*, 395 U.S. at 405-06; HART AND WECHSLER, *supra* note 15, at 1058-59; Amsterdam, *supra* note 16, at 808-10; Strayhorn, *supra* note 16, at 130-33; Note, *supra* note 16, at 1099-1100.

20. Act of Mar. 7, 1864, ch. 20, § 9, 13 Stat. 14, 17.

21. Act of Mar. 3, 1875, ch. 130, § 8, 18 Stat. 371, 401.

22. Act of Oct. 28, 1919, ch. 85, tit. II, § 28, 41 Stat. 305, 307, 316.

23. Act of June 25, 1948, ch. 646, § 1442, 62 Stat. 869, 938. *See Willingham*, 395 U.S. at 406; Note, *supra* note 16, at 1100.

24. *See* Note, *supra* note 16, at 1099.

25. Strayhorn, *supra* note 16, at 129.

26. 872 F.2d at 573.

27. *Id.*

office, within the meaning of section 1442(a)(1).[28] The court concluded that it was.[29] The third statutory issue, also discussed briefly, is whether the disciplinary proceeding was a "civil action or criminal prosecution commenced in a State court," within the meaning of section 1442(a).[30] The court held that it was.[31] As this article tries to show, each of these conclusions is invalid because it is in conflict with congressional intentions and with judicial interpretations of the statutes in question.

The most glaring deficiency of the Fourth Circuit's decision in *Kolibash* is that it cannot be squared with either the holding or the reasoning of the Supreme Court's most recent decision interpreting the federal-officer removal statute, *Mesa v. California*.[32] Decided just two weeks before *Kolibash*, *Mesa* considered the issue of whether petitioners, mail-truck drivers employed by the United States Postal Service, could remove to federal district court, pursuant to 28 U.S.C. § 1442(a)(1).[33] The case involved state criminal prosecutions for misdemeanor manslaughter and speeding, which had arisen out of traffic accidents that occurred while they were performing their duties as postal employees.[34] In an opinion by Justice O'Connor, a unanimous Supreme Court held that "[f]ederal officer removal under 28 U.S.C. § 1442(a) must be predicated on averment of a federal defense."[35] The truck drivers, the Court said, could not remove their cases because it was not possible for them to aver federal defenses to the state prosecutions.[36]

The *Mesa* Court's holding, which reaffirms "an unbroken line of . . . decisions extending back nearly a century and a quarter,"[37] rests upon three distinct but related considerations that have long formed the Court's interpretation of the congressional intentions

28. *Id.* at 574-76.
29. *Id.* at 576.
30. *Id.*
31. *Id.*
32. 109 S. Ct. 959 (1989).
33. *Id.* at 691-92.
34. *Id.*
35. *Id.* at 970.
36. *Id.* at 967.
37. *Id.* at 967.

underlying the federal-officer removal statutes. The first and most general consideration is that federal-officer removal is only warranted in cases presenting a federal question that must be decided in a federal forum to ensure the protection of important federal interests.[38] The second consideration is that removal is not warranted where the purpose served by the action sought to be removed is highly important to the state, and the state interest in deciding the matter in the state courts outweighs the federal interest in removal.[39] The third consideration is that a mere possibility of state hostility to federal authority, without any showing or allegation of such hostility, is insufficient to support removal.[40]

Judge Wilkinson's opinion in *Kolibash* is fatally flawed in that it fails to appreciate that the facts of the case do not satisfy the rule reaffirmed in *Mesa*. United States Attorney Kolibash neither did, nor could aver a federal defense of official immunity or any other federal defense to the charges filed against him by the West Virginia State Bar Committee on Legal Ethics. In addition, the opinion fails to recognize that the reasoning that supports the Supreme Court's holding in *Mesa* is equally applicable in *Kolibash*. In *Kolibash*, as in *Mesa*, no appreciable federal interest was served by removal, the case implicated important state rather than federal interests, and the federal officer failed to make any showing or even allegation of state hostility to federal authority. Thus, if the Fourth Circuit had applied the holding and the policy underpinnings of *Mesa* carefully in *Kolibash*, it would have held that a state-bar disciplinary proceeding brought against a United States Attorney, like the state criminal prosecutions at issue in *Mesa*, cannot be removed to federal district court pursuant to 28 U.S.C. § 1442.

II. The Lack of Legal Grounds for the *Kolibash* Decision

A. The Unreviewability on Appeal of the District Court's Remand Order

The West Virginia State Bar argued in *Kolibash* that 28 U.S.C. § 1447(d), which provides that "[a]n order remanding a case to the

38. *See id.* at 969-70.
39. *See id.* at 969.
40. *See id.* at 969-70.

State court from which it was removed is not reviewable on appeal or otherwise," meant what it said and barred review of the remand order by the Court of Appeals for the Fourth Circuit.[41] Despite the facial breadth and absoluteness of the statutory prohibition, the court of appeals rejected the argument and refused to dismiss Kolibash's appeal. Its reasoning was as follows:

> Section 1447(d) does not bar review in all cases. *See Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). Sections 1447(c) and 1447(d) are *in pari materia* and are to be construed accordingly. A remand order is therefore immune from review only if it invokes the grounds specified in § 1447(c)—i.e., "that removal was improvident and without jurisdiction." *Id.* at 345-46.
>
> Although a district court is not required to invoke the specific language of § 1447(c), the court's failure in this case to pose the propriety of remand in the terms of the statute is a factor in determining whether its order is reviewable. Here, the district court did not apply the § 1447 standard. It focused instead on the state interest in regulating and policing professional misconduct. This consideration, however, is not dispositive in determining whether the state disciplinary proceeding was improvidently removed under the federal officer removal statute. The remand order represented a discretionary decision by the district court not to hear a certain case on grounds of public policy and is therefore reviewable on appeal. As the Supreme Court recognized in *Thermtron*, Congress did not intend "to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute." 423 U.S. at 351.[42]

The court is correct to say that section 1447(d), as interpreted by the United States Supreme Court in *Thermtron Products v. Hermansdorfer*,[43] does not bar review in all cases. But the Fourth Circuit's analysis is inconsistent with the facts of the case. The inconsistency appears based on the court's assertion that the statute does not preclude review in *Kolibash* because "the district court did not apply the § 1447 standard" when it remanded the Kolibash disciplinary proceeding and instead reached a "discretionary decision" "not to hear [the] case on grounds of public policy."

Thermtron Products v. Hermansdorfer involved a properly removed diversity case remanded to the state court by the United

41. 872 F.2d at 573.

42. *Id.* (citations omitted) (citing Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976)).

43. 423 U.S. 336 (1976).

States District Court, not on statutory grounds, but on the plainly non-statutory ground that the district court's docket was too crowded to permit a trial of the case within the foreseeable future.[44] The issue in the case was "whether § 1447(d) . . . bars review where a case has been properly removed and the remand order is issued on grounds not authorized by § 1447(c)."[45] The Supreme Court said:

> [R]espondent [the district judge] did not purport to proceed on the basis that this case had been removed "improvidently and without jurisdiction." Neither the propriety of the removal nor the jurisdiction of the court was questioned by respondent in the slightest. . . . Instead, the District Court's order was based on grounds wholly different from those upon which § 1447(c) permits remand. The determining factor was the District Court's heavy docket . . . . This consideration . . . is plainly irrelevant . . . to the question whether this cause was removed "improvidently and without jurisdiction" . . . .
>
> . . . .
>
> . . . The District Court exceeded its authority in remanding on grounds not permitted by the controlling statute.
>
> . . . Section 1447(d) is not dispositive of the reviewability of remand orders in and of itself. That section and § 1447(c) must be construed together . . . . These provisions . . . "are *in pari materia* [and] are to be construed accordingly rather than as distinct enactments . . . ." This means that only remand orders issued under § 1447(c) and invoking the grounds specified therein—that removal was improvident and without jurisdiction—are immune from review under § 1447(d).[46]

As interpreted in *Thermtron*, section 1447(d) is an absolute bar to all forms of appellate review of a district court's remand order if the order was "issued on the grounds specified in § 1447(c)." But if the order was based upon "grounds not specified in the statute and not touching the propriety of the removal," review is available.[47] The reviewability of the remand order in *Kolibash* thus turns on whether the order was based on a non-statutory ground or on one of the statutory grounds, lack of jurisdiction or improvident removal.

In the passage from *Kolibash* quoted above, the Fourth Circuit asserts that the remand order in *Kolibash* is analogous to the one

---

44. *Id.* at 339.
45. *Id.* at 343.
46. *Id.* at 343-44, 345-46 (footnotes and citations omitted).
47. *Id.* at 351, 352.

in *Thermtron* in that it was grounded in non-statutory considerations of "public policy." As is typical of the *Kolibash* opinion, the court's statements on this issue are for the most part conclusory and unsupported by analysis. Even if the court had elaborated upon its reasoning, however, it seems doubtful that it would have been able to justify its characterization of the grounds for the remand order.

Admittedly, the memorandum opinion of United States District Judge Knapp in *In re Kolibash*[48] does not explicitly invoke 28 U.S.C. § 1447(c) or its language as the basis for the remand. As the Fourth Circuit concedes in *Kolibash*,[49] however, the Supreme Court decided in *Gravitt v. Southwestern Bell Telephone Co.*[50] that a remand order may be reviewable even though it makes no reference to that section or its language.[51] In *Gravitt* the district court, describing the case as "improperly removed," had remanded a state tort action because of a lack of complete diversity of citizenship among the parties.[52] The Supreme Court looked to the nature of the grounds of the remand rather than to the language used by the district court and found the grounds to be jurisdictional and thus "plainly within the bounds of § 1447(c)."[53] Although the Fourth Circuit asserts in *Kolibash* that "the court's failure in this case to pose the propriety of remand in the terms of the statute is a factor in determining whether its order is reviewable,"[54] *Gravitt* makes clear that the issue in cases like *Kolibash* is not whether the district court invoked the specific language of section 1447(c) but whether the grounds of the remand were jurisdictional in nature.

Regrettably, Judge Knapp's opinion does not clearly and precisely articulate the grounds of the remand. Although *Kolibash* appears to be the only case yet decided by the Fourth Circuit in which the grounds of the remand are not clearly identified, *Thermtron* and *Gravitt* clearly imply, and other courts of appeals have held, that

48. Civ. Act. No. 2:87-0444 (S.D. W. Va. Apr. 20, 1988).
49. 872 F.2d at 573.
50. 430 U.S. 723 (1977) (per curiam).
51. *Id.* at 723-24.
52. *Id.*
53. *Id.* at 723.
54. 872 F.2d at 573.

when called upon to review the remand order in such a case, the appellate court should make its determination of reviewability on the basis of the grounds that were actually in the judge's mind when he or she remanded the case, as indicated by the judge's language and any other available evidence.

For example, *Kunzi v. Pan American World Airways*,[55] decided by the Court of Appeals for the Ninth Circuit, is similar to *Kolibash* in that the district court had remanded a removed case without specifying the grounds for doing so.[56] The court of appeals reviewed the entire record and found evidence of the grounds in the form of various statements by the district judge, one of which (from the remand order) expressed doubts as to " 'whether removal of any of the action at bar was proper,' " and another of which (from a hearing) expressed doubts as to whether the court had " 'subject matter jurisdiction over the entire case.' "[57] The Ninth Circuit concluded:

> A common-sense reading . . . would indicate that [a concern about a lack of jurisdiction] was implicit in the court's references—in both of the transcripts and the remand order—regarding whether removal was proper. This is the only sensible reading since jurisdictional concerns were the sole basis for the court's initial questioning of the propriety of removal. Considering the entire record, . . . it is apparent the district court concluded that . . . it lacked jurisdiction over the entire case. [W]e find that this is a jurisdictional determination that falls within section 1447(c), and is thus unreviewable.[58]

Notwithstanding the Fourth Circuit's unsupported assertion that the remand order in *Kolibash* "represented a discretionary decision by the district court not to hear [the] case on grounds of public

---

55. 833 F.2d 1291 (9th Cir. 1987).

56. *Id.* at 1293.

57. *Id.* at 1293-94 (emphasis omitted).

58. *Id.* at 1294 (footnote omitted). The Court of Appeals for the Fifth Circuit resolved uncertainty surrounding the grounds of a remand in a similar way in *In re* Weaver, 610 F.2d 335 (5th Cir. 1980). In that case "the district court did not refer to § 1447(c), nor did it mention the phrase 'removed improvidently and without jurisdiction.' It merely concluded that removal, if it had been proper at all, was no longer available after petitioners had sought the dissolution of the injunction in state court." *Id.* at 337. The court of appeals held:

> Even though the specific language of § 1447(c) was not used, it seems apparent that at the time of the remand order, Judge Edenfield believed the case was not removable, leading to the logical inference that he felt jurisdiction was lacking. Such a holding is within the guidelines of § 1447(c).

Id.

policy,"[59] the district court's opinion in *In re Kolibash* in fact contains clear indications that the remand was actually based, not on public-policy grounds, but rather on jurisdictional grounds and was thus within the scope of section 1447(c). The clearest and most unambiguous indication of the jurisdictional basis of the remand is Judge Knapp's statement near the end of his opinion that "there would appear to be *no specific right conferred on the parties herein charged by the statute in question that would require an adjudication of the proceeding authorized by the law of this state in a federal court.*"[60] If the judge had understood the federal-officer removal statute to grant jurisdiction over the Kolibash disciplinary proceeding to the United States District Court, as the Fourth Circuit claims, he certainly would not have made this statement. A removal statute can only create federal jurisdiction over a particular action by authorizing the defendant in the action to remove it from state to federal court, that is, by *conferring a right upon the defendant to have the matter resolved in a federal court.* Indeed, that is the "motivating concern" of the removal statutes—to "grant a right to a federal forum" when necessary "to protect litigants against local prejudice, influence, and discrimination."[61]

To say, as Judge Knapp does, that the removal statute confers no right upon Kolibash that would require adjudication of the disciplinary proceeding in a federal court is to say clearly and unambiguously that the statute does not authorize removal of the proceeding, that is, that "the case was removed improvidently and without jurisdiction."[62] Thus, as in *Kunzi v. Pan American World Airways*,[63] "the only sensible reading" of the remand order in *Kolibash* understands the grounds of the remand to be within the scope of section 1447(c). It follows that section 1447(d) barred appellate review of the remand, and that the Fourth Circuit erred by refusing to dismiss Kolibash's appeal.

---

59. 872 F.2d at 573.

60. *In re* Kolibash, Civ. Act. No. 2:87-0444, mem. op. at 5 (S.D. W. Va. Apr. 20, 1988) (emphasis added).

61. Rothner v. City of Chicago, 879 F.2d 1402, 1407 (7th Cir. 1989).

62. *In re* Kolibash, Civ. Act. No. 2:87-0444, mem. op. at 5 (S.D. W. Va. Apr. 20, 1988).

63. 833 F.2d 1291, 1294 (9th Cir. 1987). *See* text at note 57 *supra*.

Although somewhat ambiguous, the other considerations cited by Judge Knapp as grounds for his decision to remand the proceeding are fully consistent with this interpretation of the remand order. One of the grounds identified by the judge is that "licensure of professionals is basically a state function."[64] The Fourth Circuit correctly stated that "[t]his consideration . . . is not dispositive in determining whether the state disciplinary proceeding was improvidently removed,"[65] but it does not follow that the consideration is "plainly irrelevant," like the grounds for the remand in *Thermtron*, to the issue of jurisdiction.[66] In fact, as the Supreme Court's opinion in *Mesa v. California*[67] shows, the degree to which the regulation of a particular activity has traditionally been within the province of the states or implicates important state interests is an important factor in the determination of whether proceedings that arise out of that kind of regulation are removable to federal court.[68]

Thus, in stating that the licensure of professionals is basically a state function, Judge Knapp may well have meant to identify a consideration that *supports the conclusion* (though it is not, as the Fourth Circuit notes, "dispositive" of the issue) that section 1442 does not grant federal jurisdiction over a disciplinary proceeding brought by a state bar association to determine a United States Attorney's fitness to remain a member of the state bar. Moreover, this interpretation of the remand order is more plausible than the Fourth Circuit's interpretation, which suggests that Judge Knapp's statement on the licensure of professionals identifies a purely discretionary policy ground for remanding the proceeding. The reason is that the jurisdictional interpretation, unlike the policy interpretation, is not inconsistent with the trial judge's statement that the removal statute conferred no right upon Kolibash to have his disciplinary proceeding adjudicated in a federal court.

Judge Knapp's remand order also contains the following passage:

---

64. *In re* Kolibash, mem. op. at 4.
65. 872 F.2d at 573.
66. Thermtron Products v. Hermansdorfer, 423 U.S. 336, 344 (1976).
67. 109 S. Ct. 959, 969-70 (1989).
68. *See infra* notes 165-91 and accompanying text.

> State bar members who serve as federal officials are no less subject to the requirements of the CODE OF PROFESSIONAL RESPONSIBILITY that is the cornerstone of licensure to practice the profession in this state. Indeed the local court rules of the United States District courts . . . make membership in the West Virginia State Bar a requirement for practice before these courts. This prerequisite carries with it the obligation to observe the CODE OF PROFESSIONAL RESPONSIBILITY imposed on all members and subjects that member to any disciplinary action provided by the By-Laws of the West Virginia State Bar.[69]

This passage is also ambiguous but can be fairly interpreted as an affirmation of a jurisdictional ground for remanding the Kolibash disciplinary proceeding to the West Virginia system. Under that interpretation, the meaning of the passage might be rendered as follows:

> All members of the state bar, including those who serve as United States Attorneys, are required to adhere to the *Code of Professional Responsibility*. In order to enforce this requirement and to ensure that only those persons who are ethically fit remain members of the bar, the state supreme court, acting through the state bar association, has jurisdiction over disciplinary proceedings brought against attorneys for the purpose of determining their ethical fitness. Moreover, in order to ensure the integrity of the state bar, on which the integrity of the federal bar depends, the state supreme court's jurisdiction over disciplinary proceedings is inherent and permanent and cannot be transferred to the federal district court pursuant to the federal-officer removal statute.

Once again, since this jurisdictional interpretation accommodates not only the language of the quoted passage itself but the rest of Judge Knapp's opinion as well, it is more plausible than the Fourth Circuit's public-policy interpretation, which is inconsistent with some of the language of the district court's opinion.

The conclusion that the grounds of the remand in *Kolibash* were jurisdictional is further supported by what Judge Knapp's opinion does *not* contain. If the Fourth Circuit were correct to interpret the remand decision as "a discretionary decision by the district court not to hear [the] case on grounds of public policy,"[70] we would expect Judge Knapp's opinion to contain some indication that, in his view, the Kolibash disciplinary proceeding was within the district court's "jurisdictional power," and that remanding the case was not

69. *In re* Kolibash, Civ. Act. No. 2:87-0444, mem. op. at 4-5 (S.D. W. Va. Apr. 20, 1988).
70. 872 F.2d at 573.

mandatory but merely desirable because it "would be better heard in state court."[71] But no such indications are to be found. On the contrary, unlike the district court opinion in *Thermtron Products v. Hermansdorfer*, which did not question "the propriety of the removal,"[72] Judge Knapp's opinion implies that removal of the Kolibash proceeding was improper because it deprived the state supreme court and the state bar of their authority to regulate the licensure of members of the legal profession.

As interpreted by the United States Court of Appeals for the Fifth Circuit in *In re Merrimack Mutual Fire Insurance Co.*,[73] *Thermtron* "announced only a narrow rule that was intended to be limited to the extreme facts of that case."[74] "[I]t appears," said the Fifth Circuit, "that *Thermtron* was intended to be strictly limited to those cases in which a district judge has actually stated that he is not relying on § 1447(c) in ordering a remand."[75] As evidence supporting this interpretation of the case, the court cites the fact that "[t]he *Thermtron* Court never stated that it was willing to construe the seemingly-absolute bar of § 1447(c) as extending beyond the exceptional facts of that case" and also the fact that in *Gravitt* the Court "specifically refused to extend *Thermtron*" "to permit appellate courts to correct remand orders that are plainly incorrect on their face."[76]

Several other courts of appeals have also construed *Thermtron* narrowly.[77] In addition, leading academic authorities have expressed the view that "[t]he exception recognized in *Thermtron* is quite nar-

---

71. Scott v. Machinists Automotive Trades Dist. Lodge No. 190, 827 F.2d 589, 592 (9th Cir. 1987).

72. 423 U.S. 336, 343-44 (1976).

73. 587 F.2d 642 (5th Cir. 1978).

74. *Id.* at 647.

75. *Id.* at 648. *Accord* Division of Archives, History and Records Management v. Austin, 729 F.2d 1292, 1293 (11th Cir. 1984); *In re* Weaver, 610 F.2d 335, 337 (5th Cir. 1980).

76. 587 F.2d at 647-48.

77. *See, e.g.*, Nasuti v. Scannell, 792 F.2d 264, 269 (1st Cir. 1986) (*Thermtron* carves out a "very narrow exception" to the section 1447(d) ban on review of remand orders.); General Elec. Co. v. Byrne, 611 F.2d 670, 672 n.3 (7th Cir. 1979) (per curiam) ("very limited exception"); Midland Mortgage Co. v. Winner, 532 F.2d 1342, 1344 (10th Cir. 1976) (per curiam) ("narrow execption").

row and probably limited in application to unusual situations, such as that presented in that case."[78]

Since the district court in *Kolibash* did not expressly invoke non-statutory grounds as the basis for its remand of the disciplinary proceeding, it is clear that, as interpreted by the Fifth Circuit, *Thermtron* provides no support for the Fourth Circuit's decision in *Kolibash*. On the contrary, if the Fifth Circuit's interpretation of *Thermtron* is correct, then *Kolibash* is plainly erroneous because the facts of the case do not fall within the narrow exception to the statutory prohibition of appellate review carved out by the United States Supreme Court.

B. The "Under Color of Office" Requirement and the Averment of a Federal Defense: The Insufficiency of the Pleadings

After deciding that the remand order in *Kolibash* was reviewable, the Fourth Circuit moved on to the question of whether the district court was correct to remand the disciplinary proceeding to the West Virginia system. The West Virginia State Bar argued that removal was improvident and without jurisdiction, and that the district court therefore had proper grounds on which to divest itself of jurisdiction. But the court of appeals disagreed, holding that all of the requirements of section 1442 were satisfied.[79] The second specific issue of statutory interpretation considered by the court, and the one with which it is mainly concerned in its opinion, is whether the disciplinary proceeding was brought against Kolibash for an act performed "under color" of his federal office, within the meaning of section 1442(a)(1). Judge Wilkinson's opinion acknowledges that, as

---

78. 14A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3740, at 595-96 (1985). Another commentator has noted that

> in *Thermtron* the Court . . . stated the exception in narrow terms, allowing review only because the district court did not even 'purport' to proceed on the basis of 1447(c) and because the district court remanded on grounds that were 'wholly different' [from] and 'plainly irrelevant' to the provisions of section 1447(c) . . . .

Note, *Remand Order Review After Thermtron Products*, 1977 U. ILL. L.F. 1086, 1104 (footnote omitted).

79. 872 F.2d at 572.

interpreted in *Mesa v. California*,[80] the statutory phrase "for any act under color of . . . office"[81] means "whenever a federal defense can be alleged by the federal officer seeking removal."[82] After a brief examination of Kolibash's pleadings, the court concluded that he did satisfactorily aver a federal defense of official immunity to the disciplinary proceeding.[83] But the court's conclusion is supported neither by facts nor by law.

The court set forth its reasoning and its conclusion in the following passage:

> Although 28 U.S.C. § 1442(a) generally requires the specific averment of a federal defense, the Supreme Court has explicitly left unresolved the question of whether "careful pleading, demonstrating the close connection between the state prosecution and the federal officer's performance of his duty, might adequately replace the specific averment of a federal defense." In such circumstances, pleading by traverse may warrant removal. We think that this is such a case.
>
> In his removal petition, for example, Kolibash demonstrates that his alleged misconduct grew out of acts performed by him in the course of his duties as a federal officer . . . . [T]he State Bar's charges arose out of Kolibash's alleged negligent supervision of one of his subordinates, which occurred while Kolibash was acting in his capacity as the United States Attorney for the Northern District of West Virginia. In his answer to the State Bar's charges, Kolibash denied that any misconduct occurred. We believe that such pleading is akin to pleading a defense of immunity and that, in any event, the more liberal pleading requirements noted in *Mesa* are particularly well suited to the circumstances of this case.[84]

In this passage, and in its later statement that " 'it is the state's power to subject federal officers to the state's process that § 1442(a)(1) curbs,' "[85] the *Kolibash* court appears to imply that despite invoking the stricter federal-defense interpretation, it favors a more liberal interpretation of the "under color of office" requirement that permits removal whenever a federal officer is subjected to state process " 'for the manner in which he has performed his federal duties.' "[86] But it is well settled that the federal-officer

---

80. 109 S. Ct. 959 (1989).

81. 28 U.S.C. § 1442(a)(1) (1982).

82. 872 F.2d at 574 (citation omitted).

83. *Id.*

84. *Id.* (citation omitted) (quoting *Mesa*, 109 S. Ct. at 966).

85. 872 F.2d at 576 (quoting Nationwide Investors v. Miller, 793 F.2d 1044, 1047 (9th Cir. 1986)).

86. *Mesa*, 109 S. Ct. at 962 (quoting Brief for Petitioners at 8).

removal statute is not to be construed so expansively.[87] In *Mesa*, the United States Supreme Court reaffirmed a long line of previous decisions by explicitly rejecting the broad interpretation of section 1442 that the Fourth Circuit appears to embrace in *Kolibash*.[88] If *Kolibash* does in fact rest upon such an interpretation of the statute, the decision is plainly incorrect.

The passage quoted above, in which the Fourth Circuit evaluates Kolibash's pleadings, appears to contain two distinct conclusions. The first is that Kolibash did in fact satisfactorily plead the federal defense of official immunity; the second is that, even if he did not do so, his pleadings were nevertheless sufficient to satisfy section 1442 because they satisfied the "careful pleading" dictum in *Mesa*. Once again, the court fails to explain adequately the reasoning by which it arrives at its conclusions. Even if it had done so, however, it is unlikely it could have demonstrated that either conclusion is warranted.

---

87. *See, e.g.*, Michigan v. Banning, 88 F. Supp. 449 (E.D. Mich. 1950). The *Banning* court said:

> It appears to this court that defendants labor under the impression that since admittedly they are federal employees all they must do is to so state and to add to their petitions for removal that all acts done by them were done under color of their federal office; that then the case is automatically removed to this court.
>
> This . . . is not true under . . . § 1442 of Title 28 U.S.C.A. . . . [A]pplication of the law is . . . limited to those acts done by those employees "under color of such office." Furthermore, this fact must affirmatively appear, not alone by a broad statement in the petition to that effect, but by direct averments which must exclude possibility that any of their alleged acts was not justified by their federal duty.

Id. at 450 (citations omitted). *See also Mesa*, 109 S. Ct. 959. The *Mesa* court stated the opposing views and concluded as follows:

> We granted the United States' petition for certiorari . . . to resolve a conflict among the Courts of Appeals concerning the proper interpretation of sec. 1442(a)(1). . . .
>
> . . . .
>
> . . . The United States, largely adopting the view taken by the Court of Appeals for the Third Circuit in *Pennsylvania v. Newcomer*, 618 F.2d 246 (1980), would read "under color of office" to permit removal "whenever a federal official is prosecuted for the manner in which he has performed his federal duties . . . ." Brief for Petitioners 8. California, following the Court of Appeals below, would have us read the same phrase to impose a requirement that some federal defense be alleged by the federal officer seeking removal.
>
> . . . .
>
> . . . Federal officer removal under 28 U.S.C. § 1442(a) must be predicated upon averment of a federal defense.

Id. at 969-70.

88. 109 S. Ct. at 962, 970.

Consider first the court's second conclusion. Even under the "more liberal pleading requirements" to which the *Mesa* Court refers in dictum, Kolibash's pleadings had to "demonstrat[e] the close connection between the state prosecution and the federal officer's performance of his duty" in order to satisfy the "under color of office" requirement.[89] The court of appeals assumes that the pleadings did in fact demonstrate this connection, but the assumption is unwarranted. As Justice O'Connor noted in *Mesa*, the Supreme Court first suggested that pleadings demonstrating such a connection "might adequately replace the specific averment of a federal defense"[90] in the earlier case of *Maryland v. Soper (No. 1)*,[91] the continuing validity of which the Court has recently affirmed.[92] The Court has made it clear, however, that neither *Soper (No. 1)*, *Mesa*, nor any other decision has "eliminated the general requirement that federal officer removal be predicated on the existence of a federal defense."[93] This means that even though a federal officer may not have to *plead a federal defense specifically* in order to satisfy the removal statute, he or she does have to *plead specific facts showing that a federal defense exists.*

The United States Supreme Court indicated in *Soper (No. 1)* what kinds of facts must be pleaded in order for this requirement to be satisfied:

> There must be a causal connection between what the officer has done under asserted official authority and the state prosecution. It must appear 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, and he must *by direct averment exclude the possibility* that it was based on acts or conduct of his, not justified by his federal duty.
>
> . . . .
>
> [The] averments [in this case] amount to hardly more than to say that the homicide on account of which [the federal officers] 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 . . . or make it *clear and specific* that whatever was done by them leading

89. *Id.* at 966.
90. *Id.*
91. 270 U.S. 9 (1926).
92. *See Mesa*, 109 S. Ct. at 965-67.
93. *Id.* at 966, 970.

to the prosecution was done under color of their federal official duty.[94]

The Court elaborated further upon the pleading requirements in the later case of *Colorado v. Symes*:

> [T]he petition before us . . . does not measure up to the required standard. . . . . . [It is] not calculated to give *specific information as to the details* of the occurrence. The statements of the petition are so vague, indefinite and uncertain as not to commit petitioner in respect of essential details of the defense he claims. They are not sufficient to enable the court to determine whether his claim of immunity rests on any substantial basis or is made in good faith.[95]

Thus, in order to "demonstrat[e] the close connection between the state prosecution and the federal officer's performance of his duty," as required by the "careful pleading" dictum of *Mesa*, Kolibash would have had to plead "the details of the occurrence," facts that made it "clear and specific," even if he did not specifically aver, that he had a federal defense to the ethics charges brought against him—facts that made it clear and specific, that is to say, that state ethics charges were filed against him as a consequence of acts that he had a federal duty to perform and not as a consequence of acts outside the scope of his federal duties. But Kolibash's pleadings were not nearly detailed or specific enough to satisfy these requirements. As the court noted in *Kolibash*, the pleadings made only the general claims that Kolibash's alleged misconduct grew out of acts performed by him in the course of his federal duties, and that he had not engaged in any misconduct.[96] The court's second conclusion, that Kolibash's pleadings were sufficient to satisfy the "careful pleading" dictum of *Mesa*, is thus unwarranted.

Moreover, *Maryland v. Soper (No. 1)* clearly shows that the Fourth Circuit's first conclusion, that Kolibash satisfactorily pleaded the federal defense of immunity, is also insupportable. Although the Supreme Court's decision in *Soper (No. 1)* "assumed that a situation could arise in which a petition that pleaded by traverse might warrant removal,"[97] the Court in that case also rejected pleadings that

94. 270 U.S. at 33, 35 (emphasis added).
95. 286 U.S. 510, 520-21 (1932) (emphasis added).
96. 872 F.2d at 574.
97. *Mesa*, 109 S. Ct. at 966.

were analogous in both form and content to those of Kolibash.

Soper (No. 1) involved federal Prohibition agents who sought to remove a state murder prosecution to federal court.[98] The agents had pleaded that they were charged with committing a homicide while discharging their federal duties as Prohibition officers. After attempting unsuccessfully to arrest some men for possession of an illegal still, the officers had said, they discovered a wounded man lying near the still and took him for medical treatment to a nearby town, where he was pronounced dead.[99] Chief Justice Taft, in his opinion for the Court, rejected the removal petitions on the ground that the averments contained in them were "not sufficiently informing and specific to make a case for removal."[100] The averments were insufficient, the Court said, because they only asserted that the acts of alleged misconduct had occurred "at a time when [the federal officers] were engaged in performing their official duties" and did not "negative the possibility that they were doing other acts than official acts at the time."[101]

The pleadings of United States Attorney Kolibash were no more "informing and specific" than those of the Prohibition officers in *Soper (No. 1)*. Kolibash's pleadings were analogous to those in *Soper (No. 1)* in that they contained an assertion that the alleged misconduct occurred while the federal officer was performing official duties, a brief denial of wrongdoing, and no statement that explains the causal connection between what was done under federal authority and the state proceeding. In addition, Kolibash's factual assertions, like those in *Soper (No. 1)*, fail to exclude the possibility

98. 270 U.S. at 34-35.

99. *Id.* at 22-24.

100. *Id.* at 34.

101. *Id.* at 35. In elaborating further upon the deficiencies of the pleadings, the Court said:

> 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.

that the state proceeding was based on conduct not justified by his federal duties. Thus, absent persuasive reasons to treat disciplinary proceedings differently from criminal prosecutions as far as the statutory pleading requirements for federal-officer removal are concerned, the Fourth Circuit should have held in *Kolibash* that *Soper (No. 1)* was controlling precedent, that Kolibash's pleadings, like those in *Soper (No. 1)*, did not aver a federal defense, and that the district court was correct to remand the disciplinary proceeding to the state system because it was removed improvidently and without jurisdiction.

Rather than require Kolibash to plead with a high degree of specificity, in accordance with United States Supreme Court precedent, the *Kolibash* court applied a different and incompatible pleading rule, one that would sustain the most general and conclusory pleadings. It appears, in other words, that the Fourth Circuit labored under the impression that in removal cases involving federal officers, "a broad statement in the [removal] petition" to the effect that "all acts done by them were done under color of their federal office" is sufficient to satisfy the statute.[102] But as we have seen, "[t]his . . . is not true under . . . § 1442."[103]

The court of appeals argued that *Kolibash* is distinguishable from *Mesa*, but its arguments are unpersuasive. One of the court's grounds for distinction is that *Mesa* involved a criminal prosecution and *Kolibash* a "quasi-civil proceeding."[104] If the court were able to show that the disciplinary proceeding removed in *Kolibash* did in fact resemble a civil action more closely than a criminal prosecution, it would be at least arguable that the relatively strict pleading requirements applied to criminal prosecutions in *Mesa* and *Soper (No. 1)* were inapplicable in *Kolibash*, and that the applicable pleading requirements were the more liberal ones that the Supreme Court applied to a civil action in *Willingham v. Morgan*.[105]

The *Willingham* petitioners, the warden and chief medical officer of a federal penitentiary, sought to remove to federal court a state

102. Michigan v. Banning, 88 F. Supp. 449, 450 (E.D. Mich. 1950).
103. *Id.*
104. 872 F.2d at 576.
105. 395 U.S. 402, 409-10 (1969).

tort action brought against them by a prisoner in the institution at which they were employed.[106] Justice Marshall, writing for a unanimous Court, said:

> *In a civil suit of this nature*, we think it was sufficient for petitioners to have shown that their relationship to respondent derived solely from their official duties. . . . [O]nce petitioners had shown that their only contact with respondent occurred inside the penitentiary, while they were performing their duties, we believe that they had demonstrated the required "causal connection." The connection consists, simply enough, of the undisputed fact that petitioners were on duty, at their place of federal employment, at all the relevant times.[107]

But the Court added in dictum: "*Were 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."[108] Thus, if the disciplinary proceeding in *Kolibash* were more analogous to a civil action than to a criminal prosecution, and if the holding in *Willingham* were therefore applicable to *Kolibash*, the Fourth Circuit's conclusion that Kolibash's pleadings were sufficient to warrant removal would be more plausible. This is true since Kolibash did plead that the alleged misconduct took place while he was performing his federal duties at his place of federal employment.

The argument that the Kolibash disciplinary proceeding should be classified as civil and that *Kolibash* is hence controlled by *Willingham* cannot withstand scrutiny, however. In the first place, disciplinary proceedings, which the Fourth Circuit labels "quasi-civil," can impose punitive sanctions and for that reason can also be, and have been, described as "quasi-criminal."[109]

Second, because of the "compelling state interest" in having cases involving charges of professional misconduct adjudicated by the state-bar ethics committee and the state supreme court,[110] the Kolibash disciplinary proceeding, which implicates highly important state interests, more closely resembles a criminal prosecution than a civil

---

106. *Id.* at 403.

107. *Id.* at 409 (footnote omitted) (emphasis added).

108. *Id.* at 409 n.4 (emphasis added) (citing Colorado v. Symes, 286 U.S. 510 (1932); Maryland v. Soper (No. 1), 270 U.S. 9 (1926)).

109. *See infra* note 196 and accompanying text.

110. *See infra* notes 225-38 and accompanying text.

action. It is therefore the dictum and not the holding in *Willingham* that applies to *Kolibash*.

Third, the explanation of *Willingham* that the Supreme Court provided in *Mesa* made clear that *Kolibash* must be classified with *Mesa* and *Soper (No. 1)* and not with *Willingham*:

> In *Willingham* we adverted to the causal connection test of *Soper (No. 1)*, not as a substitute for the averment of an official immunity defense, but as a means of delimiting the pleading requirements for establishing a colorable defense of that nature. . . . [W]e decline to divorce the federal official immunity defense from the pleadings required to allege it and transform those pleading requirements into an independent basis for jurisdiction.[111]

Thus, contrary to what the Fourth Circuit appears to suppose in *Kolibash*, a federal officer claiming immunity must do more than plead facts showing that the alleged misconduct occurred while he or she was performing federal duties in order to satisfy the removal statute. The officer must first aver a "colorable" federal defense of official immunity. If he or she can aver such a defense, then the more liberal pleading requirements of *Willingham* apply. If, on the other hand, the officer "ha[s] not and could not present an official immunity defense," that is, if such a defense is not colorable, "the liberal pleadings sufficient to allege an official immunity defense . . . in *Willingham* are inapplicable."[112]

Because federal-officer immunity is a valid defense in many state tort actions, the United States Supreme Court concluded in both *Willingham* and *Mesa* that such a defense was colorable in *Willingham*, and that the prison officials in the case therefore needed only to satisfy the more liberal pleading requirements. But because federal officials are never immune to state criminal prosecutions brought against them for acts not authorized by federal law, the *Mesa* court concluded that the mail-truck drivers in that case did not and could not aver a colorable immunity defense and therefore could not take advantage of the liberal pleading requirements of *Willingham*.[113]

---

111. 109 S. Ct. at 966-67 (citation omitted).
112. *Id.* at 967 (citation omitted).
113. *Id.*

Kolibash is clearly analogous to the removal cases involving criminal prosecutions, like *Mesa* and *Soper (No. 1)*, and disanalogous to the cases involving civil actions, like *Willingham*. The reason is that the defense of official immunity is no more available to a prosecutor facing a disciplinary proceeding than it is to a mail-truck driver facing criminal prosecution for a traffic offense.[114]

C. The "Under Color of Office" Requirement and the Averment of a Federal Defense: The Unavailability of an Immunity Defense

Leaving aside the question of the sufficiency of the actual pleadings, the Fourth Circuit's opinion in *Kolibash* is undermined by its failure to perceive that it is difficult, if not impossible, even to imagine how a United States Attorney could, in theory, avail himself or herself of a colorable federal defense of official immunity to a state-bar disciplinary proceeding. Conceivably, a federal attorney might attempt to base such a defense upon *In re Neagle*,[115] in which the United States Supreme Court decided that "if [a federal officer] is held in the state court to answer for an act which he was authorized to do by the law of the United States, . . . and if in doing that act he did no more than what was necessary and proper for him to do, he *cannot* be guilty of a crime under the law of the State of California."[116]

An example of a case in which a claim of *In re Neagle* immunity was colorable is *City of Norfolk v. McFarland*,[117] which involved a federal investigator who received a speeding citation while hurrying to stage a raid on an illegal distillery. The district court held that the prosecution brought against the investigator was removable because he was acting under color of office when stopped by the police officer.[118] But it is difficult to see how the claim that "the acts complained of were justified by [his] duties under federal law"[119]

---

114. *See infra* notes 115-42 and accompanying text.
115. 135 U.S. 1 (1890).
116. *Id.* at 75 (emphasis in original).
117. 143 F. Supp. 587 (E.D. Va. 1956).
118. *Id.* at 590.
119. California v. Mesa, 813 F.2d 960, 965 (9th Cir. 1987), *aff'd*, 109 S. Ct. 959 (1989).

could be colorable if made by a federal prosecutor facing ethics charges. It is virtually inconceivable that a prosecutor's federal duties could ever require him or her to violate the *Code of Professional Responsibility* or the *Rules of Professional Conduct*.

The United States Attorney who sought to claim *In re Neagle* immunity to a state-bar disciplinary proceeding would almost inevitably find himself or herself in the same position as the federal narcotics agent in *Morgan v. California*,[120] whose claim of immunity to state charges of driving under the influence of alcohol was rejected by the Court of Appeals for the Ninth Circuit on the ground that he had "not demonstrated how it would be necessary and proper for him to drive while under the influence in order to carry out his federal duty of meeting with an informant."[121] It is certain, in any event, that there exists in fact no federal law that requires a federal prosecutor to supervise subordinates in a manner prohibited by the state bar's code of professional ethics.

A United States Attorney might also attempt, in a disciplinary proceeding, to base a defense on the immunity of federal and state prosecutors to civil liability for damages for common-law or constitutional torts committed while acting within the scope of their prosecutorial duties.[122] As the Supreme Court has said, prosecutorial immunity to tort damages is grounded in a concern that "harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by the public trust."[123] Citing Supreme Court cases that recognize the immunity of prosecutors and other government officials to "state and federal damages actions," the Fourth Circuit concluded in *Kolibash* that "[p]olicies supporting the doctrine of official immunity are plainly implicated here" because "state professional disciplinary proceedings could be used to interfere with the duties of federal officials."[124]

---

120. 743 F.2d 728 (9th Cir. 1984).

121. *Id.* at 733.

122. *See, e.g.*, Butz v. Economou, 438 U.S. 478, 515-17 (1978); Imbler v. Pachtman, 424 U.S. 409 (1976); Yaselli v. Goff, 275 U.S. 503 (1927), *mem. aff'g* 12 F.2d 396 (2d Cir. 1926).

123. *Imbler*, 424 U.S. at 423.

124. 872 F.2d at 574-75.

The United States Supreme Court made it clear in *Mesa v. California*,[125] however, that a prosecutorial-immunity defense, if asserted by a United States Attorney facing state ethics charges, would not be colorable. This is the clear implication of what the Court says about whether the postal employees in *Mesa* could aver a federal defense of immunity: "Mesa and Ebrahim . . . could not present an official immunity defense to the state criminal prosecutions brought against them. This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law."[126] The reasoning expressed here by the Supreme Court is just as applicable to the facts of *Kolibash* as it is to those of *Mesa*. Just as the Supreme Court has never suggested that those officials who enjoy civil liability are "beyond the reach of the criminal law," it has also never suggested that such officials, if they are lawyers, are beyond the reach of disciplinary proceedings. On the contrary, the Court has stated on several occasions, both explicitly and implicitly, that *prosecutors, although immune to civil liability, remain at the same time amenable to state-bar disciplinary proceedings.*

The Supreme Court explicitly stated that prosecutors are not immune to disciplinary proceedings[127] in *Imbler v. Pachtman*,[128] which

---

125. 109 S. Ct. 959 (1989).

126. *Id.* at 967 (quoting Imbler v. Pachtman, 424 U.S. 409, 429 (1976)).

127. The Court's prior decision in *Barr v. Matteo*, 360 U.S. 564, 576 (1959) (plurality opinion), makes the same point by implication:

> We are told that we should forbear from sanctioning any such rule of absolute privilege lest it open the door to wholesale oppression and abuses on the part of unscrupulous government officials. . . . [T]here are of course other sanctions than civil tort suits available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner.

This passage echoes an earlier statement made by Chief Judge Learned Hand of the Court of Appeals for the Second Circuit. Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) ("There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors."), *mem. cert. denied*, 339 U.S. 949 (1950).

Both *Barr* and *Gregoire* have been interpreted as authority for the proposition that official immunity to disciplinary proceedings does not exist. Sauber v. Gliedman, 283 F.2d 941, 944 (7th Cir. 1960) ("Although the official may be immune to civil tort liability, he may nevertheless be subject to discipline and professional censure where warranted.") (citing Barr v. Mateo, 360 U.S. at 576; Gregoire v. Biddle, 177 F.2d at 581), *cert. denied*, 366 U.S. 906 (1961).

128. 424 U.S. 409 (1976).

is cited in *Kolibash* for the policy concerns that underlie the common-law civil immunity of prosecutors.[129] In *Imbler* the petitioner brought a civil-rights action against a state prosecutor under 42 U.S.C. § 1983 seeking damages for loss of liberty allegedly caused by unlawful prosecution.[130] The Supreme Court held, in an opinion by Justice Powell, that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983."[131]

One reason the Supreme Court gave for its holding was that "the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs."[132] For one thing, the Court said, prosecutors remain subject to criminal liability for their "willful acts."[133] "Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his *amenability to professional discipline by an association of his peers.*"[134] The only "association" of a lawyer's peers that can subject him or her to discipline is obviously the state bar association. Although it is obiter dictum, the quoted statement shows unequivocally that the Supreme Court is no more willing to countenance prosecutorial immunity to disciplinary proceedings initiated by the state bar than it is to accept official immunity to criminal liability in cases like *Mesa*.

The Court's view is that if prosecutors are to be immune to civil liability, they must remain subject to both state-bar disciplinary proceedings and criminal prosecution so that the public will have some means of deterring and preventing prosecutorial misconduct. As the Court said in a later case, "[t]he organized bar's development and enforcement of professional standards for prosecutors also lessen

129. 872 F.2d at 574.
130. 424 U.S. at 415-16.
131. *Id.* at 431 (footnote omitted).
132. *Id.* at 428-29.
133. *Id.* at 429 (footnote omitted).
134. *Id.* (footnote omitted) (emphasis added). In the footnote the Court cites, inter alia, the MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1980), which enumerates some of the ethical responsibilities of the prosecutor.

the danger that absolute immunity will become a shield for prosecutorial misconduct."[135]

The *Imbler* Court's use of the word *moreover* when referring to the prosecutor's "amenability to professional discipline" implies that it regards disciplinary proceedings as an even more valuable weapon than criminal prosecution in the fight against prosecutorial abuse of power. Because the respondent in *Imbler* was a state prosecutor, it might be thought that the Court's dictum refers only to state prosecutors. The general language of the opinion ("prosecutors"; "a prosecutor") and its reasoning are, however, equally applicable to United States Attorneys. Moreover, in *United States v. Hasting*,[136] decided seven years after *Imbler*, the Supreme Court stated explicitly that the United States District Courts might respond to cases of misconduct on the part of United States Attorneys by ordering them to show cause why they should not be disciplined.[137] In addition, other courts have consistently said that government attorneys, both federal[138] and state,[139] are not immune to state-bar disciplinary pro-

135. Malley v. Briggs, 475 U.S. 335, 343 n.5 (1986).

136. 461 U.S. 499 (1983).

137. *Id.* at 506 n.5.

138. *E.g.*, United States v. Helmandollar, 852 F.2d 498, 502 n.3 (9th Cir. 1988) (United States Attorney is subject to "discipline by the legal profession" for prosecutorial misconduct) (dictum); United States v. Page, 828 F.2d 1476, 1480 (10th Cir. 1987) (if United States Attorney "has violated ethical or legal canons . . . the proper remedy is a disciplinary action against him") (dictum), *cert. denied*, 484 U.S. 989 (1987); Barrett v. United States, 798 F.2d 565, 573 (2d Cir. 1986) (federal attorney who defends government is entitled to absolute civil immunity, but "an alternative remedy for abuse exists in the availability of professional disciplinary proceedings") (dictum); United States v. Starusko, 729 F.2d 256, 264 (3d Cir. 1984) (United States Attorney who violates rules of professional conduct is "subject . . . to disciplinary sanctions") (dictum); Ramos Colon v. United States Attorney, 576 F.2d 1, 6 (1st Cir. 1978) (in case of misconduct by United States Attorney, district court has discretion to decide whether to "report[] the misconduct to the appropriate professional association") (dictum); Sauber v. Gliedman, 283 F.2d 941, 944 (7th Cir. 1960) (Special Assistant to U.S. Attorney General acting as federal prosecutor "may be immune to civil tort liability" but "may nevertheless be subject to discipline and professional censure where warranted") (dictum), *cert. denied*, 366 U.S.906 (1961); United States v. Kelly, 543 F. Supp. 1303, 1314 (D. Mass. 1982) (matter of United States Attorney's alleged misconduct "referred to the Massachusetts Board of Bar Overseers to assess the need for disciplinary proceedings"), *supplemented*, 550 F. Supp. 901 (D. Mass. 1982); Lusk v. Hanrahan, 244 F. Supp. 539, 540 (E.D. Ill. 1965) (United States Attorney, although immune to civil liability, remains subject to disciplinary proceedings) (dictum). *See also In re* Sylvester, 41 F.2d 231, 236 (S.D.N.Y. 1930) ("the United States attorney and his aides are not privileged characters, but are subject to precisely the same rules and penalties . . . as other members of the bar of this court").

139. Schloss v. Bouse, 876 F.2d 287, 292 (2d Cir. 1989) (absolute immunity from suits for damages does not insulate district attorney against "other types of sanctions," including "professional

ceedings. In the earlier case of *Minns v. Paul*,[140] a different three-judge panel from the Fourth Circuit acknowledged the implications of *Imbler*. *Minns* invoked the Supreme Court's observation in *Imbler*, that prosecutorial immunity to suits for damages under section 1983 "does not leave the public powerless to deter misconduct or to punish that which occurs,"[141] as one of the grounds for its holding that the doctrine of absolute immunity covers court-appointed defense attorneys as well as prosecutors. But the Fourth Circuit's decision in *Kolibash*, by allowing the removal of the West Virginia State Bar Association disciplinary proceeding to federal court, eliminates Kolibash's "amenability to professional discipline by an association of his peers" and thus flies in the face of *Imbler* and numerous other cases. If the court of appeals had followed the reasoning of *Mesa* and *Imbler* through to its logical conclusion, it would have found in *Kolibash* that just as "Mesa and Ebrahim . . . could not present an official immunity defense to the state criminal prosecutions brought against them"[142] in California, so also Kolibash could not aver an immunity defense to the state-bar disciplinary proceeding brought against him in West Virginia. Such a finding

---

discipline") (dictum); Solles v. Israel, 868 F.2d 242, 245 (7th Cir. 1989) ("The State Bar Grievance Committee found that the prosecutor's pre-trial conduct violated four disciplinary rules or canons of ethics."), *cert. denied*, 109 S. Ct. 2457 (1989); Buffington v. Copeland, 687 F. Supp. 1089, 1104 n.12 (W.D. Tex. 1988) ("further disciplinary action against [District Attorney] Conaway is not foreclosed") (dictum); Lundblade v. Doyle, 376 F. Supp. 57, 60 (N.D. Ill. 1974) (remedy for non-feasance by state's attorney is "professional censure") (dictum); People v. Attorneys Respondent, 162 Colo. 174, 175-77, 427 P.2d 330, 330-31 (1967) (en banc) (per curiam) (district attorney's filing of criminal complaint against debtor in order to assist private client in collecting debt warrants reprimand); *In re* Nace, 490 A.2d 1120, 1124 (D.C. 1985) (prosecutors are not immune to complaints to and discipline by Board on Professional Responsibility) (dictum); Foster v. Pearcy, 270 Ind. 533, 537, 387 N.E.2d 446, 449 (1979) ("prosecutors are still subject to professional discipline if their actions stray beyond the bounds of ethical conduct") (dictum), *cert. denied*, 445 U.S. 960 (1980); Chicopee Lions Club v. District Attorney, 396 Mass. 244, 253, 485 N.E.2d 673, 678 (1985) (absolute immunity of district attorney to civil liability does not render public powerless because "bar discipline proceedings are available mechanisms which may serve to check an overzealous district attorney") (dictum); *In re* Truder, 37 N.M. 69, 70-72, 17 P.2d 951, 951-52 (1932) (per curiam) (district attorney's filing of civil suit against defendant whom he had previously prosecuted for voluntary manslaughter for same acts held professional misconduct); State v. Cameron, 30 Wash. App. 229, 231, 633 P.2d 901, 903-04 (Wash. Ct. App. 1981) ("A completely unfounded information may subject the prosecutor to . . . disciplinary proceedings.")

140. 542 F.2d 899 (4th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977).

141. *Id.* at 902.

142. *See supra* note 126 and accompanying text.

would have precluded removal of the proceeding pursuant to section 1442.

D. The Absence of Other Federal Interests Sufficient to Support Removal

The Fourth Circuit contended that even if Kolibash neither did nor could aver a federal defense to the disciplinary proceeding brought against him by the West Virginia State Bar, other federal interests sufficient to support removal of the proceeding to federal court were at stake.[143] The court makes four brief arguments in support of this contention. All four arguments are fallacious.

The first argument runs as follows: "Kolibash's alleged misconduct . . . arose out of a federal grand jury drug investigation and a subsequent criminal trial in federal district court. Significant federal interests are therefore involved regardless of whether Kolibash has a federal defense to the state professional disciplinary proceeding."[144] In this respect, the Fourth Circuit asserts, *Kolibash* is distinguishable from *Mesa*, which involved the prosecution of state rather than federal crimes.[145] The first argument is without merit. It is true that Kolibash's alleged misconduct took place during the investigation and trial of federal crimes, and that there was a federal interest in that investigation and trial. However, once the disciplinary action had been commenced in the state system, and Kolibash had petitioned for removal under section 1442, the issue in the case, as in *Mesa v. California*, was whether any "significant federal interest [would be] served *by removal.*"[146] The federal interest *in the original investigation and trial* hardly implies, as the Fourth Circuit appears to have assumed, a federal interest *in removal of the disciplinary proceeding to federal court.*

Since the state disciplinary proceeding was distinct and separate from the federal criminal prosecution in which the alleged misconduct occurred and, moreover, was not even commenced, as the Fourth

143. *Kolibash*, 872 F.2d at 571.
144. *Id.* at 575.
145. *Id.*
146. *Mesa*, 109 S. Ct. at 970 (Brennan, J., concurring) (emphasis added).

Circuit acknowledged,[147] until after that prosecution was completed, removal of the proceeding could not possibly have enhanced the ability of the United States Attorney's office to investigate or prosecute federal crimes as the Fourth Circuit implies. In addition, the purpose of the disciplinary proceeding was the state purpose of determining whether Kolibash was fit to practice law in West Virginia and not the federal purpose of determining whether a federal crime had been committed. In this respect *Kolibash* is analogous to *Mesa* and not distinguishable from it, as the court of appeals asserted. It is thus difficult to see how the Fourth Circuit's conclusion that the federal interest in prosecuting federal crimes was served by removing the disciplinary proceeding to the district court can be defended.

The court's second argument is that *Kolibash* also raised another kind of federal question:

> There is a world of difference between the duties of prosecutorial supervision involved here [in *Kolibash*] and the circumstances of *Mesa* where the federal postal employees seeking removal clearly "could not present an official immunity defense to the state criminal prosecutions brought against them." Indeed, this case . . . involves the extent of a United States Attorney's responsibility for the acts of his subordinates . . . .[148]

The court did not explain exactly what this "world of difference" consisted of or why it was legally significant. However, the court appears to imply that whereas the state criminal prosecutions brought against the postal employees in *Mesa* could not possibly raise a federal question, the disciplinary proceeding brought against Kolibash did raise such a question, namely, the extent of a United States Attorney's "responsibility" for the acts of his subordinates.

This second argument fails because the court of appeals is wrong to assume, as it evidently does, that the question of the scope of a United States Attorney's responsibility for the acts of his or her subordinates was a federal question. In fact, the question was not one of federal law but one of professional ethics in the state of West Virginia. More specifically, the issue was not whether, as a matter of federal authority, United States Attorney Kolibash was

147. 872 F.2d at 572.

148. *Id.* at 575 (citations omitted) (quoting *Mesa*, 109 S. Ct. at 967).

responsible for the acts of his subordinate, but rather, whether Kolibash did in fact violate his ethical responsibilities as a member of the West Virginia bar.

The state bar association charged that by failing to prevent the Assistant United States Attorney from participating in a federal investigation and prosecution of persons whom the attorney had previously represented, Kolibash violated DR 1-102(A)(5) of the *Code of Professional Responsibility*, which provides that a lawyer shall not "[e]ngage in conduct that is prejudicial to the administration of justice,"[149] or violated DR 6-101(A)(3), which states that a lawyer shall not "[n]eglect a legal matter entrusted to him."[150] The resolution of that issue does not depend on federal law applicable only to federal prosecutors but on the code of professional ethics applicable to West Virginia lawyers generally.

If the court's argument here is that Kolibash, unlike the postal employees in *Mesa*, averred a colorable federal defense of official immunity to the disciplinary proceeding because he claimed that federal law required or authorized him to supervise the Assistant United States Attorney in the way that he did, the argument is unpersuasive. As noted above,[151] a defense consisting of nothing more than the vague, unsubstantiated, and implausible implication that federal law required or authorized violations of the *Code of Professional Responsibility* can hardly be described as colorable. Moreover, Kolibash failed to specify any such federal law in his pleadings or to plead any other specific facts sufficient to support the conclusion that he actually did aver a colorable defense of this kind.

The third argument the *Kolibash* court made to support its conclusion that there was a federal interest in removal is as follows:

> *Mesa* involved a criminal prosecution. This case [*Kolibash*] involves a hybrid, quasi-civil proceeding. Civil proceedings, of course, are not subject to the checks which normally attend the criminal process and may be instituted at the behest of a single individual. Although the State Bar is the formal party at interest, the action here has its origin in a single complaint—that of [one individual]. That

149. CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(5) (1978).
150. *Id.* DR 6-101(A)(3).
151. *See supra* note 119 and accompanying text.

complaint went to the heart of a critical federal function—a United States Attorney's supervision of his own staff.[152]

Once again, the court's argument is invalid. In the first place, the court's assertion that the disciplinary action brought against Kolibash was not a criminal but a "quasi-civil proceeding" flatly contradicts the Supreme Court's characterization of such proceedings. In *In re Ruffalo*[153] the Supreme Court stated that, at least for due-process purposes, disbarment proceedings similar to those involved in *Kolibash* are "proceedings of a quasi-criminal nature,"[154] and a number of other courts have expressed the same view.[155]

The reason given by the Fourth Circuit for categorizing state-bar disciplinary proceedings as "quasi-civil" is that they "are not subject to the checks which normally attend the criminal process and may be instituted at the behest of a single individual."[156] This assertion is demonstrably false. It is true that disciplinary proceedings may be initiated, as in *Kolibash*, in response to the complaint of a single individual, but this does not by itself establish that such proceedings are not subject to the checks that normally attend the criminal process. Criminal prosecutions may also result from an individual's complaint. The important consideration is whether the decision to commence the action lies entirely within the discretion of a private individual. In this respect disciplinary proceedings resemble criminal prosecutions far more closely than they do civil actions. The reason is that "the law does not authorize an individual to institute and maintain a formal action against a lawyer for dis-

152. 872 F.2d at 576.

153. 390 U.S. 544 (1968).

154. *Id.* at 551 (citation omitted).

155. *E.g.*, Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 438 (1982) (Brennan, J., concurring) (referring to "quasi-criminal nature of bar disciplinary proceedings"); *In re* Thalheim, 853 F.2d 383, 388 (5th Cir. 1988) ("Attorney disbarment and suspension cases are quasi-criminal in character."); Razatos v. Colorado Supreme Court, 746 F.2d 1429, 1435 (10th Cir. 1984) (attorney disciplinary proceedings are "'quasi-criminal' in nature"), *cert. denied*, 471 U.S. 1016 (1985); Charlton v. FTC, 543 F.2d 903, 906 (D.C. Cir. 1976) ("disciplinary proceedings 'are adversary proceedings of a quasi-criminal nature'"); Erdmann v. Stevens, 458 F.2d 1205, 1209 (2d Cir. 1972) ("a court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than to a civil proceeding" because such a proceeding may result in serious punishment, including loss of livelihood and reputation), *cert. denied*, 409 U.S. 889 (1972).

156. *Kolibash*, 872 F.2d at 576.

barment."[157] The power to bring a disciplinary proceeding resides exclusively in the courts and in the bar committees they have authorized to supervise attorney conduct. The United States Court of Appeals for the Eighth Circuit has explained the role of the individual complainant: "An individual may, acting as an informer, make available to the . . . court pertinent information bearing upon the qualifications or professional conduct of a member of the . . . bar. Beyond that point the individual may not exercise control over the proceedings. Further action, if any, becomes the responsibility of the court."[158] Thus, a disciplinary proceeding, like a criminal prosecution and unlike a civil action, cannot be initiated unless the complainant can persuade a number of impartial officials that his or her complaint has merit.

In West Virginia the state bar association's Committee on Legal Ethics, which is "the instrumentality of the supreme court of appeals,"[159] investigates and screens complaints. The committee thus operates as a check on the unbridled power of the private complainant in cases of alleged attorney misconduct,[160] just as the prosecutors and the grand jury do in cases involving allegations of

---

157. Mattice v. Meyer, 353 F.2d 316, 318 (8th Cir. 1965), *cert. denied*, 383 U.S. 939 (1966); *accord* Ramos Colon v. United States Attorney, 576 F.2d 1, 5-6 (1st Cir. 1978); *In re* Phillips, 510 F.2d 126, 126 (2d Cir. 1975) (per curiam); Ginsburg v. Stern, 125 F. Supp. 596, 603 (W.D. Pa. 1954), *aff'd*, 225 F.2d 245 (3d Cir. 1955) (en banc).

158. Mattice v. Meyer, 353 F.2d at 319.

159. BY-LAWS OF THE WEST VIRGINIA STATE BAR art. VI, § 4 (1988).

160. *Id.*

> There shall be a committee known as "the committee on legal ethics of The West Virginia State Bar," which shall have jurisdiction to make investigations . . . of every complaint, request and information respecting legal ethics, unprofessional conduct, [or] malpractice . . . which may come before it, and to hold hearings thereon and make such findings and recommendations and take such other action as is authorized by this article.
>
> . . . .
>
> The Investigative Panel of the Committee on Legal Ethics shall be responsible for conducting investigations on behalf of the committee. Bar counsel and committee counsel shall have authority . . . to collect evidence and information for the Investigative Panel concerning any complaint . . . .
>
> Bar counsel and committee counsel are . . . authorized . . . to recommend . . . the dismissal of complaints which counsel deems to be unjustified . . . .
>
> . . . When the investigation is completed the [Investigative Panel] shall either (1) direct closing of the file . . .; or (2) upon a finding that probable cause exists to hold a hearing, recommend to the Hearing Panel that a formal hearing be held . . . .

Id. at §§ 4, 12.

criminal activity. Therefore, in *Kolibash*, the Fourth Circuit's argument rests upon a false premise, insofar as it argues that there is a federal interest in the removal of a disciplinary proceeding brought against a United States Attorney because private individuals have unlimited power to disrupt the work of federal prosecutors by instituting such proceedings.

The fourth argument the court of appeals made in *Kolibash* is that although "[r]egulation of the legal profession . . . implicates significant state interests, . . . the federal interest in protecting federal officials in the performance of their federal duties is paramount."[161] Such protection is necessary, the court believes, because "federal officials may be subject to potentially abusive state process":[162]

> Although we intimate no view as to the underlying merits of the present action, state professional disciplinary proceedings could be used to interfere with the duties of federal officials, including the President of the United States, the Secretary of State, and the Attorney General of the United States, all of whom may be lawyers. Federal prosecutors too may be targets of retaliatory state proceedings . . . .[163]

This argument might be thought to establish a reasonable basis for the decision in *Kolibash*, if not for the fact that in *Mesa* the Supreme Court explicitly rejected a similar argument as insufficient to establish a predicate for federal-officer removal under 28 U.S.C. § 1442(a):

> In these prosecutions, no state court hostility or interference has even been alleged by petitioners . . . .
>
> . . . .
>
> . . . We are simply unwilling to credit the Government's ominous intimations of hostile state prosecutors and collaborationist state courts interfering with federal officers by charging them with traffic violations and other crimes for which they would have no federal defense in immunity or otherwise. That is certainly not the case in the prosecutions of Mesa and Ebrahim . . . .[164]

Thus, according to the United States Supreme Court, the abstract possibility of state hostility to a federal officer or to the enforcement

---

161. 872 F.2d at 575.
162. *Id.* (citation omitted).
163. *Id.*
164. 109 S. Ct. at 969.

of federal law is not enough to meet the statutory requirements for removal. Unless the federal officer seeking removal shows or at least alleges that such hostility actually exists, his or her petition for removal must be denied.

United States Attorney Kolibash made no such showing or allegation. The Fourth Circuit's opinion contains "ominous intimations" of state-bar ethics proceedings brought for reasons of state hostility to a federal prosecutor. But there is no more reason to credit such intimations in *Kolibash* than there was in *Mesa*. The decision of the court of appeals in *Kolibash* that the mere possibility of state harassment satisfies section 1442 thus plainly contravenes the Supreme Court's holding in *Mesa*.

E. The Inconsistency of Kolibash *with Supreme Court Precedent Recognizing the Important State Interest in Regulating Attorney Misconduct*

One of the policy considerations that supports the United States Supreme Court's holding in *Mesa*, that criminal prosecutions brought against mail-truck drivers for manslaughter and traffic violations cannot be removed to federal court, is the importance of the state's interest in the regulation of crime. In *Mesa* the Court said:

> [U]nder our federal system, it goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government. 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.[165]

The Court concluded by saying: "It is hardly consistent with this 'strong judicial policy' to permit removal of state criminal prosecutions of federal officers and thereby impose potentially extraordinary burdens on the States when absolutely no federal question is at issue in such prosecutions."[166]

The above reasoning of the *Mesa* Court is equally applicable to *Kolibash*. For the Supreme Court has said repeatedly that the reg-

---

165. *Id.* (quoting Arizona v. Manypenny, 451 U.S. 232, 243 (1981)).
166. *Id.* at 969.

ulation of the licensing and professional conduct of attorneys is, like the regulation of crime, a matter for the states. Thus, in an early case presenting a challenge to the refusal of the Supreme Court of Virginia to admit a woman to its bar, the Supreme Court said that the highest court of the state had the sole power to determine whether women should be admitted to practice in Virginia.[167] More recently, in reviewing the refusal of the Supreme Court of Illinois to admit an applicant to the state bar, the Court stated that "[t]he responsibility for choice as to the personnel of its bar rests with Illinois."[168]

In *Leis v. Flynt*,[169] which involved a constitutional challenge to an Ohio trial court's refusal to allow two out-of-state attorneys to represent defendants in a pending state criminal case, the Court stated:

> Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They are also responsible for the discipline of lawyers.[170]

The Court expressed the same view in *Ohralik v. Ohio State Bar Association*,[171] which presented a first-amendment challenge to disciplinary proceedings brought against an Ohio attorney by the state bar association because of his personal solicitation of accident victims as clients:

> The state interests implicated in this case are particularly strong. . . . [T]he State bears a special responsibility for maintaining standards among members of the licensed professions. "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'"[172]

---

167. *In re* Lockwood, 154 U.S. 116, 118 (1894).

168. *In re* Summers, 325 U.S. 561, 570-71 (1945).

169. 439 U.S. 438 (1979) (per curiam).

170. *Id.* at 442 (footnote omitted).

171. 436 U.S. 447 (1978).

172. *Id.* at 460 (citations omitted) (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975)). The Court adds in a footnote:

> The organized bars, operating under codes approved by the highest state courts pursuant to statutory authority, have the primary responsibility for assuring compliance with pro-

These foregoing statements concerning the strength of the state interest in regulating the legal profession are obviously very similar to the one made in *Mesa* concerning the importance of the state interest in regulating crime, cited by the Court as one of the grounds of its decision in that case. It follows, as Judge Lumbard of the United States Court of Appeals for the Second Circuit has said, that "when state courts . . . initiate an inquiry into an attorney's conduct, they deal with a matter of such great importance to the state and its citizens that federal courts should be as slow to intervene in those proceedings as in state criminal proceedings."[173] In *Kolibash*, the Court of Appeals for the Fourth Circuit failed altogether to take the Supreme Court's "strong policy" against federal interference with state-bar disciplinary proceedings into account. On the basis of that policy and the absence of any federal defense or other federal question from the disciplinary proceeding at issue in the case, the Fourth Circuit should have rejected the removal petition of United States Attorney Kolibash.

The federal courts of appeals have also generally recognized that the regulation of attorney conduct is a matter for the states.[174] The Court of Appeals for the Fourth Circuit has itself acknowledged that "[e]nforcement of ethical standards is the primary concern of the state courts and of state associations of lawyers and judges."[175] The decision in *Kolibash* is thus in conflict with other cases decided by the Fourth Circuit, other courts of appeals, and the United States Supreme Court.

---

fessional ethics and standards by the more than 400,000 lawyers licensed by the States. The means employed usually are disciplinary proceedings initially conducted by voluntary bar committees, subject to judicial review.

Id. at 466 n.28.

173. Erdmann v. Stevens, 458 F.2d 1205, 1213 (2d Cir. 1972) (concurring opinion) (footnote omitted), *cert. denied*, 409 U.S. 889 (1972).

174. *E.g.*, Doe v. Board on Professional Responsibility, 717 F.2d 1424, 1428 (D.C. Cir. 1983) ("State courts . . . possess exclusive authority to regulate admission to their respective state bars and bear responsibility for disciplining errant bar members."); *In re* Abrams, 521 F.2d 1094, 1105 (3d Cir.) (Rosenn, J., concurring) ("admission to the bar and discipline of attorneys is peculiarly within the province of the states"), *cert. denied*, 423 U.S. 1038 (1975); Saier v. State Bar, 293 F.2d 756, 759 (6th Cir. 1961) ("License to practice law, the continuation of such license, regulation of the practice and the procedure for disbarment and discipline are all matters that are within the province of an individual state."), *cert. denied*, 368 U.S. 947 (1961).

175. Goodson v. Peyton, 351 F.2d 905, 907 (4th Cir. 1965).

The United States Supreme Court's "strong policy" against federal-court interference with state-bar disciplinary proceedings also manifests itself in *Middlesex County Ethics Committee v. Garden State Bar Association*.[176] In that case the Court was called upon to decide whether principles of comity and federalism require a federal court to abstain from considering a challenge to the constitutionality of state-bar disciplinary rules that are the subject of pending disciplinary proceedings. The New Jersey state-bar proceedings at issue were similar to those involved in *Kolibash* in that they arose out of professional-misconduct charges brought against an attorney by a state-bar ethics committee acting as the administrative arm of the state supreme court.

In the leading abstention case, *Younger v. Harris*,[177] the Court noted that "[s]ince the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts."[178] One of the main reasons for this policy, the Court said, is

> the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.[179]

Applying these principles to the issue of state-bar disciplinary proceedings, the Supreme Court stated in *Middlesex County Ethics Committee* that the policies that justify federal-court abstention "are fully applicable to noncriminal judicial proceedings when important state interests are involved."[180] Once again the Court characterized the state interest in regulating the professional conduct of attorneys as a highly important one:

> The State of New Jersey, in common with most States, recognizes the important state obligation to regulate persons who are authorized to practice law. . . .

---

176. 457 U.S. 423 (1982).
177. 401 U.S. 37 (1971).
178. *Id.* at 43.
179. *Id.* at 44.
180. 457 U.S. at 432 (citing Moore v. Sims, 442 U.S. 415, 423 (1979); Huffman v. Pursue, Ltd., 420 U.S. 592, 604-05 (1975)).

> The State of New Jersey has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses. States traditionally have exercised extensive control over the professional conduct of attorneys. The ultimate objective of such control is "the protection of the public, the purification of the bar and the prevention of a reoccurrence."[181]

Significantly, the Court added that "[t]he State's interest in the professional conduct of attorneys involved in the administration of criminal justice is of special importance."[182]

Because of "[t]he importance of the state interest in the pending state judicial proceedings," and also because "the constitutional claims of respondents can be determined in the state proceedings," and "there is no showing of bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate," the Court held that the federal courts should abstain from intervening.[183] Justice Brennan, concurring in the judgment, summarized succinctly the reasoning that supports the holding:

> [F]ederal courts should show particular restraint before intruding into an ongoing disciplinary proceeding by a state court against a member of the State's bar, where there is an adequate opportunity to raise federal issues in that proceeding. The traditional and primary responsibility of state courts for establishing and enforcing standards for members of their bars and the quasi-criminal nature of bar disciplinary proceedings call for exceptional deference by the federal courts.[184]

Prior to the Supreme Court's decision in *Middlesex County Ethics Committee*, several of the United States Courts of Appeals handed down similar decisions, which recognized the importance of the state interest in regulating attorney misconduct and held that principles of comity require federal-court abstention from pending state-bar disciplinary proceedings.[185] In one of those cases, *Erdmann v. Stev-*

---

181. 457 U.S. at 432-34 (footnote and citations omitted).

182. *Id.* at 434.

183. *Id.* at 435.

184. *Id.* at 438 (concurring opinion) (citations omitted).

185. Gipson v. New Jersey Supreme Court, 558 F.2d 701 (3d Cir. 1977). The court stated:

> [T]he field of state attorney discipline is one that is particularly well suited to the principle of federal court non-interference. The traditional power of the state courts to establish standards for members of their bars and to discipline them . . . suggests that incursions by federal courts into ongoing disciplinary proceedings would be peculiarly disruptive of notions of comity.

Id. at 703-04 (footnotes omitted); Anonymous v. Association of the Bar, 515 F.2d 427 (2d Cir. 1975),

ens, Judge Lumbard of the Court of Appeals for the Second Circuit explained with some specificity what is at stake for the states:

> The state "has a legitimate interest in determining whether [an individual] has the qualities of character and the professional competence requisite to the practice of law." Indeed the state's responsibility in these matters is primary. A lawyer to practice anywhere in the United States must first be admitted to the bar of one of the states. In New York, as in all of the states, the proper functioning of the judicial system depends upon the competence and integrity of the members of the bar and their compliance with appropriate standards of professional responsibility.[186]

The Supreme Court's policy of refusing to allow the federal courts to intervene in state disciplinary proceedings is also evident in those cases in which the Court has considered disbarment decisions handed down by state supreme courts. Thus, in a landmark case involving an attorney disbarred by the Supreme Court of Michigan, *Selling v. Radford*,[187] the Court said: "[W]e have no authority to re-examine or reverse as a reviewing court the action of the Supreme Court of Michigan in disbarring a member of the Bar of the courts of that state for personal and professional misconduct . . . ."[188] Likewise, in a case involving an attorney disbarred in Louisiana, *Theard v. United States*,[189] the Court said that, except for its power to review their constitutionality, "[i]t is not for this Court . . . to sit in judgment on Louisiana disbarments."[190] The foregoing two cases have been understood to stand for the proposition that the federal courts

---

cert. denied, 423 U.S. 863 (1975).

> The interest of the state court in adjudicating the continuing professional fitness and character of its own officers is . . . great . . . . [T]he state which licenses those who practice in its courts, and which is the only body that can impose sanctions upon [them], should not be deterred or diverted from the venture by the interloping of a federal court.

Id. at 432; Erdmann v. Stevens, 458 F.2d 1205 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972).

> [T]he effective functioning of any court depends upon its ability to command respect . . . . [I]f a state court were subject to the supervisory intervention of a federal overseer at the threshold of the court's initiation of a disciplinary proceeding against its own officer, the state judiciary might suffer an unfair and unnecessary blow to its integrity and effectiveness.

Id. at 1210.

186. 458 F.2d at 1213 (concurring opinion) (citation omitted) (quoting Baird v. State Bar, 401 U.S. 1, 7 (1971)).

187. 243 U.S. 46 (1917).

188. *Id.* at 50.

189. 354 U.S. 278 (1957).

190. *Id.* at 281.

in general have no jurisdiction to review an order of a state court disbarring an attorney.[191] If a decision in a disciplinary proceeding is not reviewable by the Supreme Court or any other federal court after it has been made by a state supreme court, then surely such a decision should not be made in the first instance by a federal district court.

As the numerous cases in which the Supreme Court and the courts of appeals have recognized the importance of the state interest in regulating attorney misconduct clearly show, *Kolibash* is entirely inconsistent with a large and diverse body of prior law and the policies and reasoning that underlie and justify it. *Kolibash* is at odds with many decisions on federalism, comity, federal-court abstention, and the subject-matter jurisdiction of the federal courts. In the absence of clear and unmistakable congressional authorization or other compelling justification, neither of which was present in *Kolibash*, the Fourth Circuit should not have rendered a decision that is impossible to reconcile with established doctrine.

F. The "Civil Action or Criminal Prosecution" Requirement: The Special Status of Disciplinary Proceedings

With regard to the third issue of statutory construction decided in *Kolibash*, the West Virginia State Bar Association argued that regardless of whether the "under color of office" test was met, the disciplinary proceeding brought against Kolibash was not a "civil action or criminal prosecution commenced in a State court"[192] and was therefore not removable under section 1442.[193] The Fourth Circuit rejected "such a narrow reading of the removal provision"[194] and explained its reasoning as follows:

> The central concern of the removal statute is that a federal officer or agent shall not be forced to answer for acts performed under color of his office in

191. *E.g.*, Ginger v. Circuit Court, 372 F.2d 621, 625 (6th Cir.), *cert. denied*, 387 U.S. 935 (1967); Clark v. Washington, 366 F.2d 678, 680-81 (9th Cir. 1966); Gately v. Sutton, 310 F.2d 107, 108 (10th Cir. 1962).

192. 28 U.S.C. § 1442(a) (1982).

193. 872 F.2d at 576.

194. *Id.*

> anything but a federal forum. Regardless of what label is attached to the proceeding, § 1442(a)(1) should be construed in light of this purpose. The form that the state action takes is therefore not controlling; "it is the state's power to subject federal officers to the state's process that § 1442(a)(1) curbs."
>
> The Committee on Legal Ethics is defined as an instrumentality of the West Virginia Supreme Court of Appeals and its procedures are adjudicatory in nature. The Committee is authorized to hold evidentiary hearings, subpoena witnesses, take testimony under oath in an adversary proceeding, and otherwise conduct itself as a court. It also makes factual findings and recommends attorney sanctions to the West Virginia Supreme Court of Appeals. A Committee investigation can result in public reprimands, suspensions, or disbarment of lawyers who practice in West Virginia. To hold this proceeding outside the operation of the removal statute would be to elevate form over substance. If a state investigative body operates in an adjudicatory manner, and if a federal officer or his agent is subject to its process, the statutory requirements of § 1442(a)(1) are satisfied.[195]

The above reasoning is fatally flawed because its central premise—namely, the assumption that a disciplinary proceeding can force a federal prosecutor "to answer" in a state forum "for acts performed under color of his office"—is false. In addition, the court's conclusion, that a disciplinary proceeding is a "civil action or criminal prosecution commenced in a State court," is in conflict with well-settled legal doctrine in the state of West Virginia and throughout the nation.

The Fourth Circuit is obviously correct in saying that state-bar disciplinary proceedings can result in the punishment of attorneys. That fact has led the Supreme Court to describe such proceedings as "quasi-criminal" and to hold that attorneys against whom they are brought are entitled to procedural due process.[196] But the issue under section 1442 is not whether a disciplinary proceeding is quasi-criminal but whether it is a "civil action or criminal prosecution." It does not follow from the fact that such a proceeding is quasi-criminal in nature that it is a criminal prosecution. As the Supreme Court of Appeals of West Virginia[197] and

195. *Id.* (citations omitted) (quoting Nationwide Investors v. Miller, 793 F.2d 1044, 1047).

196. *In re* Ruffalo, 390 U.S. 544, 550-51 (1968). *See supra* note 154 and accompanying text.

197. *See* Committee on Legal Ethics v. Graziani, 157 W. Va. 167, 171-72, 200 S.E.2d 353, 355 (1973) (per curiam) ("It is true that one case decided by the Supreme Court of the United States, *In re* Ruffalo, . . . indicated that disbarment proceedings were quasi-criminal . . . . However, a quasi-criminal proceeding does not mean it is a criminal proceeding . . . ."), *cert. denied*, 416 U.S. 995 (1974).

other courts[198] have recognized, quasi-criminal proceedings and criminal prosecutions are distinct and should not be confused.

The gist of the Fourth Circuit's argument is that a disciplinary proceeding falls within the statutory category because such a proceeding can subject a federal officer to state process, adjudication, and punishment for acts performed "under color of office," which is precisely what the removal statute is intended to prevent. Once again, however, the court did not explain its reasoning adequately. In particular, it did not explain why it assumed, as if it were self-evidently true, that a disciplinary proceeding, like an ordinary civil action or criminal prosecution, can force a federal officer to answer in a state forum for acts performed "under color of office." A disciplinary proceeding would certainly have that capability if "acts performed under color of . . . office" were synonymous with "acts performed in the course of federal employment," that is, if the purpose of the removal statute were to ensure that federal officers never have to answer in a state forum for anything they have done while performing their federal duties. But as we have seen, that is not its purpose; its purpose, rather, is to guarantee to federal officers a federal forum only in cases where the officers can aver and have averred a federal defense (or can raise and have raised some other federal question).[199]

The Fourth Circuit's argument must be, therefore, that the disciplinary proceeding brought against Kolibash should be counted as a "civil action or criminal prosecution" because the proceeding could subject him to state process, adjudication, and punishment in a state forum, despite his having averred a federal defense to the charges of professional misconduct (or having raised some other federal question). The court's argument is unpersuasive because, as we have seen, the court failed to demonstrate that Kolibash did in fact aver a federal defense, or that he did in fact raise some other federal question, or even that it was possible for a federal prosecutor to

198. *See, e.g., In re* McKay, 280 Ala. 174, 180, 191 So. 2d 1, 7 (1966) (per curiam) ("Disbarment proceedings are neither civil nor criminal, but are sui generis. In their criminal aspect they are at most quasi criminal.").

199. *See supra* notes 9-41 and accompanying text.

aver a federal defense or raise a federal question in a disciplinary proceeding.[200]

It has been argued here that a disciplinary proceeding brought against a United States Attorney does not in fact permit the averment of the federal defense of official immunity or any other federal defense.[201] In addition, it has been argued that the issue presented by such a proceeding—namely, whether the prosecutor's conduct violated the ethical standards of the state bar—is not in fact a federal question but a state question.[202] If these arguments are sound, they demonstrate the falsity of the Fourth Circuit's assumption that a disciplinary proceeding can force a United States Attorney to answer in a state forum for acts performed under color of federal office and the invalidity of its conclusion which rests on that assumption, that a disciplinary proceeding is a "civil action or criminal prosecution" within the meaning of the removal statute.

The Fourth Circuit's conclusion on the "civil action or criminal prosecution" issue also conflicts with the account of state-bar disciplinary proceedings given by the Supreme Court of Appeals of West Virginia. Although the issue of whether a disciplinary proceeding commenced by the bar association of a particular state on behalf of the state supreme court is a civil action or criminal prosecution for the purposes of the removal statute is an issue of federal law, it is clear that a federal court must base its resolution of the issue on the way in which the supreme court of the state in question has characterized such proceedings.

In *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*,[203] one of the issues faced by the Supreme Court was whether "state bar disciplinary hearings . . . constitute an ongoing state judicial proceeding"[204] within the meaning of the abstention doctrine of *Younger v. Harris*.[205] Although this was a question of federal law,

200. *See supra* notes 115-64 and accompanying text.
201. *See supra* notes 115-42 and accompanying text.
202. *See supra* notes 165-91 and accompanying text.
203. 457 U.S. 423 (1982).
204. *Id.* at 432.
205. 401 U.S. 37 (1971).

the Court sought the answer in the law of New Jersey. After examining what the state supreme court had said about the nature of disciplinary proceedings in a number of cases, the Court concluded: "It is clear beyond doubt that the New Jersey Supreme Court considers its bar disciplinary proceedings as 'judicial in nature.'"[206] "As such," the Court held, "the proceedings are of a character to warrant federal-court deference."[207] In a similar case recently decided by the Court of Appeals for the Fourth Circuit, Judge Wilkinson relied upon state law in the same way.[208]

In the analogous situation presented by *Kolibash*, the Fourth Circuit should have based its determination of whether a disciplinary proceeding is a civil action or criminal prosecution within the meaning of section 1442 on the West Virginia Supreme Court's characterization of such proceedings. In West Virginia "[i]t is well-settled that disbarment proceedings . . . are neither civil actions nor criminal prosecutions but are special proceedings peculiar in their nature."[209] Thus, if the court of appeals had relied upon West Virginia law as it should have in *Kolibash*, it would have concluded that removal of the disciplinary proceeding did not satisfy the "civil action or criminal prosecution" requirement of section 1442.

Most other jurisdictions are in agreement with West Virginia as to the nature of state-bar disciplinary proceedings. A few courts have

---

206. *Middlesex County Ethics Comm.*, 457 U.S. at 433-34 (footnote omitted). In a footnote the Court adds: "The New Jersey Supreme Court has concluded that bar disciplinary proceedings are neither criminal nor civil in nature, but rather are *sui generis*." *Id.* at 433 n.12 (citations omitted).

207. *Id.* at 434. *See also* Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 239-40 (1984) (federal court deciding whether takings authorized by state statute violate "public use" requirement of fifth and fourteenth amendments is bound by determination of state legislature that enacted statute).

208. Telco Communications, Inc. v. Carbaugh, 885 F.2d 1225, 1228 (4th Cir. 1989) (Wilkinson, J.) (for purposes of *Younger* abstention doctrine, administrative proceeding is not judicial in nature "if state law expressly indicates that the proceeding is not a judicial proceeding").

209. Committee on Legal Ethics v. Pence, 161 W. Va. 240, 249, 240 S.E.2d 668, 673 (1977) (per curiam) (citations omitted); *accord* Daily Gazette Co. v. Committee on Legal Ethics, 326 S.E.2d 705, 711 (W. Va. 1984); Committee on Legal Ethics v. Graziani, 157 W. Va. 167, 171-72, 200 S.E.2d 353, 355 (1973) (per curiam), *cert. denied*, 416 U.S. 995 (1974); *In re* Brown, 157 W. Va. 1, 7-8, 197 S.E.2d 814, 817-18 (1973) (per curiam); *see also In re* Pauley, 314 S.E.2d 391, 399-400 (W. Va. 1983) (judicial disciplinary proceedings are neither civil nor criminal but have unique purpose of maintaining proper administration of justice).

described such proceedings as civil rather than criminal in nature,[210] most often in the context of determining what burden-of-proof standard applies.[211] But the overwhelming majority of courts, both federal[212] and state,[213] have stated that disciplinary proceedings are neither civil actions nor criminal prosecutions but are sui generis. Thus, for example, the United States Court of Appeals for the Seventh Circuit says that

> disbarment and suspension proceedings are neither civil nor criminal in nature but are special proceedings, sui generis, and result from the inherent power of courts over their officers. Such proceedings are not lawsuits between parties litigant but rather are in the nature of an inquest or inquiry as to the conduct of the respondent.[214]

The Court of Appeals for the Eighth Circuit takes a similar view:

---

210. *E.g.*, Committee on Professional Ethics v. Bromwell, 389 N.W.2d 854, 857 (Iowa 1986) (for purposes of rules on admissibility of evidence, disciplinary proceedings are not criminal but special civil proceedings); Zuckerman v. Greason, 20 N.Y.2d 430, 438, 231 N.E.2d 718, 721, 285 N.Y.S.2d 1, 6 (1967) (for fifth-amendment purposes, disciplinary proceedings are not criminal but civil), *cert. denied*, 390 U.S. 925 (1968).

211. *E.g.*, *In re* Shannon, 274 Ark. 106, 621 S.W.2d 853, 854 (1981); Office of Disciplinary Counsel v. Wittmaack, 513 Pa. 609, 620-21, 522 A.2d 522, 527 (1987); State v. Wildermuth, 76 Wis. 2d 476, 481, 251 N.W.2d 779, 781 (1977) (per curiam).

212. Razatos v. Colorado Supreme Court, 746 F.2d 1429, 1435 (10th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985); Standing Comm. on Discipline v. Ross, 735 F.2d 1168, 1170 (9th Cir.), *appeal dismissed, cert. denied*, 469 U.S. 1081 (1984); *In re* Echeles, 430 F.2d 347, 349 (7th Cir. 1970); Mattice v. Meyer, 353 F.2d 316, 319 (8th Cir. 1965), *cert. denied*, 383 U.S. 939 (1966).

213. *In re* McKay, 280 Ala. 174, 180, 191 So. 2d 1, 7 (1966) (per curiam); *In re* Mackay, 416 P.2d 823, 838 (Alaska 1964), *cert. denied*, 384 U.S. 1003 (1966); Yokozeki v. State Bar, 11 Cal. 3d 436, 447, 521 P.2d 858, 865, 113 Cal. Rptr. 602, 609 (en banc) (per curiam), *cert. denied*, 419 U.S. 900 (1974); State v.Peck, 88 Conn. 447, 452-53, 91 A. 274, 276 (1914); State *ex rel.* Florida Bar v. Dawson, 111 So. 2d 427, 431 (Fla. 1959); *In re* Moore, 453 N.E.2d 971, 973 (Ind. 1983) (per curiam); *In re* Czachorski, 41 Ill. 2d 549, 554, 244 N.E.2d 164, 167 (1969); State v. Scott, 230 Kan. 564, 566, 639 P.2d 1131, 1134 (1982) (per curiam); Anne Arundel County Bar Ass'n v. Collins, 272 Md. 578, 582-83, 325 A.2d 724, 727 (1974); Bar Ass'n v. Casey, 211 Mass. 187, 191-93, 97 N.E. 751, 753-54 (1912); *In re* Rerat, 232 Minn. 1, 4-5, 44 N.W.2d 273, 274-75 (1950); *In re* Prisock, 244 Miss. 427, 143 So. 2d 434, 436 (1962); *In re* Mills, 539 S.W.2d 447, 450 (Mo. 1976) (en banc); State v. Merski, 121 N.H. 901, 909, 437 A.2d 710, 714-15 (1981) (per curiam), *cert. denied*, 455 U.S. 943 (1982); *In re* Logan, 70 N.J. 222, 227, 358 A.2d 787, 790 (1976) (per curiam); Ohio State Bar Ass'n v. Illman, 45 Ohio St. 2d 159, 161-62, 342 N.E.2d 688, 690 (per curiam), *cert. denied*, 429 U.S. 824 (1976); *In re* Evinger, 604 P.2d 844, 845 (Okla. 1979); *In re* Holman, 297 Or. 36, 682 P.2d 243, 260 (1984) (en banc) (per curiam); *In re* Kunkle, 88 S.D. 269, 280, 218 N.W.2d 521, 527, *cert. denied*, 419 U.S. 1036 (1974); Memphis & Shelby County Bar Ass'n v. Vick, 40 Tenn. App. 206, 213-14, 290 S.W.2d 871, 875 (Tenn. Ct. App. 1955), *cert. denied*, 352 U.S. 975 (1957); *In re* Sherman, 58 Wash. 2d 1, 8, 363 P.2d 390, 391 (1961) (en banc) (per curiam).

214. *In re* Echeles, 430 F.2d 347, 349 (7th Cir. 1970).

> In a disbarment proceeding, the petition does not initiate an *action*, either civil or criminal. Rather, "[s]uch a petition invokes the inherent power of the courts to maintain the integrity of the bar and to see that courts and its members do not fall into disrepute with the general public through unprofessional or fraudulent conduct."[215]

Because an attorney is an officer of the court that admitted him or her to the bar, "[t]he court, by reason of the necessary and inherent power vested in it to control the conduct of its own affairs and to maintain its own dignity, has a summary jurisdiction to deal with the alleged misconduct."[216]

The proceeding that results from the exercise of that jurisdiction is neither a civil action nor a criminal prosecution. A disciplinary proceeding is not a civil action because

> [a] civil action is one between parties. Here [in a disciplinary proceeding], an attorney is called to answer to the court of his appointment for his conduct as an officer of that court. The inquiry is directed solely to his continued fitness. There is no plaintiff. The State is not a party . . . . There may be . . . one who has called the court's attention to alleged misconduct, but he is in no sense a party, and has no interest in the outcome save as all good citizens or worthy members of the bar may have. The complaint made, the court controls the situation and procedure, in its discretion, as the interests of justice may seem to it to require.[217]

Nor is a disciplinary proceeding, albeit "quasi-criminal," a criminal prosecution, since it is not commenced by the state. Moreover, as the supreme court of West Virginia has said, its purpose "is not punishment but rather the protection of the public and the reassurance of the public as to the reliability and integrity of attorneys."[218] "[A] clear distinction exists between proceedings whose

---

215. Mattice v. Meyer, 353 F.2d 316, 319 (8th Cir. 1965) (citations omitted) (emphasis in original), *cert. denied*, 383 U.S. 939 (1966).

216. Bar Ass'n v. Casey, 211 Mass. 187, 192, 97 N.E. 751, 754 (1912); *accord Ex parte* Bradley, 74 U.S. (7 Wall.) 364, 374 (1868) ("If guilty of . . . any . . . act of official or personal dishonesty and oppression, [attorneys] become subject to the summary jurisdiction of the court."); *Ex parte* Wall, 107 U.S. 265, 273 (1883) ("a court has power to exercise a summary jurisdiction over its attorneys . . . to punish them . . . for misconduct . . . and, in gross cases of misconduct, to strike their names from the roll"); State *ex rel.* Sheiner v. Giblin, 73 So. 2d 851, 851-52 (Fla. 1954); *In re* Keenan, 287 Mass. 577, 582, 192 N.E. 65, 68 (1934).

217. State v. Peck, 88 Conn. 447, 452, 91 A. 274, 276 (1914).

218. Committee on Legal Ethics v. Mullins, 159 W. Va. 647, 651, 226 S.E.2d 427, 428 (1976); *accord, e.g., Ex parte* Wall, 107 U.S. 265, 273 (1883); *In re* Echeles, 430 F.2d 347, 349 (7th Cir. 1970); *In re* Logan, 70 N.J. 222, 227, 358 A.2d 787, 790 (1976) (per curiam).

essence is penal, intended to redress criminal wrongs by imposing sentences of imprisonment . . . , and proceedings whose purpose is remedial, intended . . . to safeguard the interests of the public by assuring the continued fitness of attorneys licensed by the jurisdiction to practice law."[219]

One reason the Fourth Circuit gives for its conclusion in *Kolibash* that a disciplinary proceeding is a "civil action or criminal prosecution commenced in a State court" is that such a proceeding is an "adversary proceeding."[220] This is, however, a misconception. A disciplinary proceeding is not adversarial in nature because, as the Supreme Judicial Court of Massachusetts explains,

> [it] is not a proceeding between two parties where the court is asked to adjudicate conflicting claims as to some right, corporeal or incorporeal, and where a decision favorable to one party is necessarily to that extent unfavorable to the other. It is rather in the nature of an inquest or inquiry as to the conduct of the respondent. In the result of this inquiry the [bar] association has no interest. It can gain nothing nor can it lose anything whatever may be the result. It simply calls the attention of the court to the alleged misconduct of an attorney, not for the purpose of obtaining redress of any grievance suffered by itself, but only that the court, if so disposed, may inquire into the charge and act accordingly.[221]

The view that disciplinary proceedings are neither civil actions nor criminal prosecutions appears to receive the endorsement of the Supreme Court of the United States in *Middlesex County Ethics Comm. v. Garden State Bar Ass'n.*[222] In that case the Court stated that the New Jersey Supreme Court has characterized such proceedings as "neither criminal nor civil in nature."[223] As authority for that statement, the Court cited not just a case decided by the New Jersey Supreme Court but the American Bar Association's

---

219. *In re* Daley, 549 F.2d 469, 475 (7th Cir.), *cert. denied*, 434 U.S. 829 (1977).

220. 872 F.2d at 576.

221. Bar Ass'n v. Casey, 211 Mass. 187, 191, 97 N.E. 751, 753 (1912); *accord* Kentucky Bar Ass'n v. Signer, 558 S.W.2d 582, 583 (Ky. 1977); *In re* Richards, 333 Mo. 907, 915-16, 63 S.W.2d 672, 675-76 (1933) (en banc); *In re* Black, 228 Or. 9, 11, 363 P.2d 206, 207 (1961) (en banc); *In re* Little, 40 Wash. 2d 421, 430, 244 P.2d 255, 259 (1952) (en banc). *But see In re* Ruffalo, 390 U.S. 544, 551 (1968) (for due-process purposes disciplinary proceedings are "adversary proceedings of a quasi-criminal nature"); Charlton v. Federal Trade Comm'n, 543 F.2d 903, 906 (D.C. Cir. 1976); Attorney K v. Mississippi State Bar Ass'n, 491 So. 2d 220, 222 (Miss. 1986).

222. 457 U.S. 423 (1982).

223. *Id.* at 433 n.12.

Standards for Lawyer Discipline and Disability Proceedings as well, thereby implying that the characterization is apt generally and not just in New Jersey.[224]

In *Kolibash* the Fourth Circuit failed to give any compelling reason for deviating from this well-established line of authority and, therefore, failed to justify its conclusion that a disciplinary proceeding is a "civil action or criminal prosecution" within the meaning of the removal statute.

G. *The Inherent Right of Courts to Discipline Their Officers*

The decision in *Kolibash* prevents the Supreme Court of Appeals of West Virginia from exercising a fundamental right that inheres in all courts, namely, the right to review the moral fitness of a member of its bar and to remove him from the rolls if he proves to be unfit to serve as an officer of the court.

More than a century ago the Supreme Court of the United States recognized that the "power of removal from the bar is possessed by all courts which have authority to admit attorneys to practice."[225] More recently, in *In re Snyder*,[226] the Court reaffirmed that courts have "an inherent authority to suspend or disbar lawyers."[227] "This inherent power derives from the lawyer's role as an officer of the

---

224. "The New Jersey Supreme Court has concluded that bar disciplinary proceedings are neither criminal nor civil in nature, but rather are *sui generis*. *In re Logan*, 70 N.J. 222, 358 A.2d 787 (1976). *See also* ABA STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS § 1.2 (Proposed Draft 1978)." *Id.* The *ABA Standards*, as adopted in 1979, provide that "[l]awyer discipline and disability proceedings are *sui generis*." ABA STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS § 1.2 (1979), *reprinted in* PROFESSIONAL RESPONSIBILITY 375 (T. Morgan & R. Rotunda eds. 1989). *Middlesex County Ethics Comm.* is cited for the proposition that disciplinary proceedings are neither civil nor criminal in Standing Comm. on Discipline v. Ross, 735 F.2d 1168, 1170 (9th Cir.) ("The nature of a disciplinary proceeding is neither civil nor criminal, but an investigation into the conduct of the lawyer-respondent. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 433 n.12 . . . (1982)."), *appeal dismissed, cert. denied*, 469 U.S. 1081 (1984).

225. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 354 (1871); *accord Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 512 (1873).

226. 472 U.S. 634 (1985).

227. *Id.* at 643 (citations omitted).

court which granted admission."[228] The Court has also said that the power of courts "to punish attorneys . . . for misbehavior in the practice of the profession" has been "recognized and enforced ever since the organization of courts, and the admission of attorneys to practice therein. If guilty of . . . any . . . act of official or personal dishonesty and oppression, they become subject to the summary jurisdiction of the court."[229]

The proposition that any court that has the power to admit attorneys to practice also has the inherent power to discipline and disbar them appears to have won the universal assent of the nation's other courts as well.[230] The Supreme Court's description of the power of the courts to conduct disciplinary proceedings as "inherent" indicates clearly that one court cannot lawfully deprive or divest another of this power. The Fourth Circuit's decision in *Kolibash* contravened this well-settled principle by disempowering the Supreme Court of Appeals of West Virginia to conduct an inquiry into the fitness of William A. Kolibash to continue to serve as one of its officers.

It is also well settled that a state supreme court has a right to inquire into and regulate the unethical conduct of a member of the

---

228. *Id.* The *Snyder* Court cites Theard v. United States, 354 U.S. 278, 281 (1957), in which the Court says: "[T]he state judicatures . . . have autonomous control over the conduct of their officers, among whom . . . lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court." *Accord* Phipps v. Wilson, 186 F.2d 748, 751 (7th Cir. 1951) ("An attorney is an officer of the court before which he has been admitted to practice. The power to discipline or disbar such officer for unprofessional conduct is inherent in the court . . . .").

229. *Ex parte* Bradley, 74 U.S. (7 Wall.) 364, 374 (1868); *accord Ex parte* Wall, 107 U.S. 265, 273 (1883) ("a court has power to exercise a summary jurisdiction over its attorneys . . . to punish them . . . for misconduct . . . and, in gross cases of misconduct, to strike their names from the roll").

230. *E.g.*, Koden v. United States Dep't of Justice, 564 F.2d 228, 233 (7th Cir. 1977) ("It is elementary that any court . . . which has the power to admit attorneys to practice has the authority to disbar or discipline attorneys for unprofessional conduct."); *In re* Rhodes, 370 F.2d 411, 413 (8th Cir.), *cert. denied*, 386 U.S. 999 (1967); *In re* Patterson, 176 F.2d 966, 967 n.1 (9th Cir. 1949); *In re* Spicer, 126 F.2d 288, 289 (6th Cir. 1942); *In re* Claiborne, 119 F.2d 647, 650 (1st Cir. 1941); Laughlin v. Wheat, 95 F.2d 101, 101 (D.C. Cir. 1937); DeKrasner v. Boykin, 54 Ga. App. 29, 35, 186 S.E. 701, 704 (1936) (courts have "necessary incidental power[] . . . to admit, suspend, discipline, or disbar an attorney"); *In re* Roth, 398 Ill. 131, 135, 75 N.E.2d 278, 279-80 (1947) (power to admit attorneys to bar "implies" power to disbar, which is "inherent" in state supreme court); *In re* Rudd, 310 Ky. 630, 632, 221 S.W.2d 688, 689 (1949) (per curiam) ("All courts have, as an incident of the power to admit attorneys to their bar, the power to disbar them . . . ."); R.J. Edwards, Inc. v. Hert, 504 P.2d 407, 411 (Okla. 1972).

state bar, even if that conduct has occurred in a federal court rather than a state court or in a foreign jurisdiction rather than within the state. In *In re Sawyer*,[231] for example, a member of the territorial bar of Hawaii was charged by the Hawaii Bar Association, on behalf of the Supreme Court of Hawaii, with professional misconduct because she had publicly criticized a criminal trial pending in the United States District Court for the District of Hawaii in which she was an attorney of record.[232] The state supreme court suspended her from its bar for one year, and she appealed.[233] One of the respondent's arguments on appeal, as paraphrased by the United States Court of Appeals for the Ninth Circuit, was that "[w]hatever [she] did was none of the business of the territorial court because the conduct concerned the federal court."[234] To this argument the court of appeals replied: "But the state (here the territory) is the primary jurisdiction that sponsors a lawyer, that mainly presents him to the public. It has an interest. Even had the conduct been in open federal court, still the state has an interest."[235]

The Supreme Court of New Jersey elaborated further upon the above reasoning in *In re Isserman*.[236] In that case the court disbarred a New Jersey attorney for contemptuous behavior during a trial in the United States District Court for the Southern District of New York.[237] In replying to the respondent's argument that the supreme court of his home state should not impose sanctions in excess of those imposed by the federal court in New York, the Supreme Court of New Jersey says:

> New Jersey is primarily responsible for the respondent's conduct at the bar. He is not a member of the bar of any other state and he has been permitted to practice elsewhere solely by virtue of his admission to the bar here. The respondent must be judged by the standards of practice prevalent here. . . . In fairness to the courts of other jurisdictions and out of a decent respect for the opinion of the people of this State, we cannot permit a lawyer admitted to practice in New

231. 260 F.2d 189 (9th Cir. 1958), *rev'd on other grounds*, 360 U.S. 622 (1959).
232. *Id.* at 191-93.
233. *Id.* at 196.
234. *Id.* at 201.
235. *Id.* (citation omitted).
236. 9 N.J. 269, 87 A.2d 903 (1952), *cert. denied*, 345 U.S. 927 (1953).
237. *Id.* at 279, 87 A.2d at 907.

> Jersey to do in the courtroom of another jurisdiction what he would never have been allowed to do here. To do so would bring into disrepute our bar, our bench and our entire judicial establishment.[238]

Similarly, in *Kolibash* the state of West Virginia and its Supreme Court of Appeals have a legitimate interest in disciplining any attorney, including a United States Attorney, who is a member of the state bar and whose conduct in a United States District Court or in a case pending in a district court does not meet the ethical standards of the state supreme court and the state bar association. It was West Virginia that primarily sponsored Kolibash as an attorney, presented him to the public, and was responsible for his conduct at the bar. He was licensed to practice in the federal district court by virtue of being licensed to practice by the Supreme Court of Appeals of West Virginia.

For the state supreme court to allow Kolibash to engage in professional misconduct as United States Attorney would bring both the bar and the bench of West Virginia into disrepute. West Virginia and its supreme court had not only an interest in bringing a disciplinary proceeding against Kolibash but an inherent right to determine for themselves whether his conduct as United States Attorney disqualified him from remaining an officer of the Supreme Court of Appeals of West Virginia. Surely it cannot have been Congress's intention, when enacting the federal-officer removal statute, to permit the federal courts to deny a state and its highest court that inherent right without any adequate justification for doing so, as the Fourth Circuit has done in *Kolibash*.

H. The Inconsistency of Kolibash *with Precedent in the Fourth Circuit and Other Jurisdictions*

In addition to the United States Supreme Court precedents and other cases already discussed, *Kolibash* is inconsistent with at least two significant recent decisions. One case is *In re Braverman*,[239] in

238. *Id.* at 278-79, 87 A.2d at 907. *See also* Hancock v. Andrews, 161 F.2d 547, 548 (5th Cir. 1947) (acknowledging that "disciplinary action [may be] taken by State Courts against an attorney for unprofessional conduct in a case pending in the Federal Court").

239. 549 F.2d 913 (4th Cir. 1976).

which the Court of Appeals for the Fourth Circuit itself recognized explicitly, both in its holding and in its reliance upon precedent, the principle of federal-court deference to state regulation of attorney misconduct. The other case is *Waters v. Barr*,[240] in which the Supreme Court of Nevada persuasively defends the proposition that United States Attorneys licensed to practice law in Nevada are amenable to being disciplined by the state supreme court.

The issue in *In re Braverman* was whether the United States District Court for the District of Maryland had acted improperly in denying a disbarred attorney's petition for reinstatement as a member of the bar of that court after he had been reinstated as a member of the state bar by the Maryland Court of Appeals.[241] Because the district court had not shown "a proper deference to the considered judgment of the coordinate Maryland Court of Appeals," and because the reasons given by the district court for declining reinstatement were without evidentiary support, the Fourth Circuit reversed and instructed the district court to readmit Braverman to its bar.[242]

The Fourth Circuit's opinion in *In re Braverman* relies extensively upon a case decided by the Court of Appeals for the Third Circuit, *In re Dreier*,[243] which stands for the general proposition that the states should take the lead in determining the ethical fitness of members of the bar, and that the federal courts should follow where the states lead. *In re Dreier* involved a Pennsylvania attorney convicted of bribery and other state crimes and subsequently suspended from the practice of law for one year by a county court.[244] Four years later, by which time he was once again a member in good standing of the bar of the Supreme Court of Pennsylvania and of the county bar, the United States District Court for the Middle District of Pennsylvania denied the attorney admission to its bar because of his criminal record.[245] The Third Circuit reversed the district court's or-

240. 103 Nev. 694, 747 P.2d 900 (1987).
241. 549 F.2d at 913-14.
242. *Id.* at 921.
243. 258 F.2d 68 (3d Cir. 1958).
244. *Id.*
245. *Id.* at 68-69.

der and remanded the case for further proceedings.[246] In *In re Braverman* the Fourth Circuit said:

> The court [in *In re Dreier*] had this to say that is especially applicable to *Braverman's* case:
>
> > Under [the rule in this district], and the similar rules in force in most other federal district courts and in the courts of appeals, reliance is largely placed by the court upon the courts of the states for determining the qualifications of persons seeking admission to the bar. . . . *[T]here is no federal procedure for examining applicants* either as to legal ability or moral character and so reliance is placed on prior admission to the bar of a state supreme court.
> >
> > . . . .
> >
> > Certainly an erring lawyer who has been disciplined and . . . has been rehabilitated and *restored to his place at the bar by the court which knows him best* ought not to have what amounts to an order of permanent disbarment entered against him by a federal court solely on the basis of an earlier criminal record and without regard to his subsequent rehabilitation.[247]

In re Dreier thus expresses the view that the federal court should defer to the decision the state has made concerning whether an attorney is ethically qualified to practice law because the state supreme court and the state bar, unlike the federal court, have an established procedure by which to determine an attorney's ethical fitness and therefore "know him best" in this respect.

Having adopted this view as its own in *In re Braverman*, the Fourth Circuit then loses sight of the need for federal-court deference to state regulation of attorney misconduct in *Kolibash*. As in *In re Dreier* and *In re Braverman*, the state bar association and the state supreme court in *Kolibash* had established procedures not available to the federal court for assessing the moral character of an attorney and were also much more familiar than the federal court with the provisions of the state's *Code of Professional Responsibility*. For these reasons, among others, and for the sake of consistency, the Fourth Circuit should have held in *Kolibash*, as it did in *In re Braverman*, that the state bar and supreme court were in a better position than the federal district court to decide whether

246. *Id.* at 70.

247. 549 F.2d at 921 (quoting *Braverman*, 258 F.2d at 69) (emphasis added).

an attorney was guilty of professional misconduct and deserving of discipline.

Although far from being in total agreement with *Kolibash*, *Waters* raised the issue of whether the Supreme Court of Nevada had jurisdiction to bring disciplinary proceedings against Assistant United States Attorneys who were members of the State Bar of Nevada for acts they committed while performing their federal duties.[248] The *Waters* court held: "There is no question that an attorney may be subjected to discipline from any bar association to which he is a member. Thus, this court clearly has jurisdiction to discipline the Assistant United States attorney who is a member of the State Bar of Nevada."[249] In addition, the court said:

> [T]he fact that Nevada attorneys have been functioning as Assistant United States attorneys in the federal courts does not insulate them from accountability for misbehavior if this is performed in Nevada and affects other Nevada attorneys, or affects the integrity of the State Bar of Nevada, even if the misbehavior in question is effectuated in whole or in part through activities in the federal courts. . . .
>
> . . . .
>
> . . . United States attorneys appearing on behalf of the government in the federal district courts in Nevada are engaged in the practice of law in Nevada. Further, this state has a compelling interest in regulating the legal profession within this state. The regulation of the legal profession is a proper exercise of state power, and that power includes the authority to impose sanctions for any misconduct of federal prosecutors practicing law within the state . . . .[250]

Although *Waters* was obviously not binding precedent in *Kolibash* and did not involve interpretation or application of the federal-officer removal statute, the issues considered in the case are closely enough related to those raised by *Kolibash* that the Fourth Circuit might have been expected to take the decision into account. However, the court decided *Kolibash* without even glancing at *Waters*. In its recognition of the important state interest in regulating attorney misconduct and of the inherent right of the state supreme

248. 103 Nev. 694, 695-96, 747 P.2d 900, 901-02 (1987).

249. *Id.* at 697, 747 P.2d at 902 (citing Theard v. United States, 354 U.S. 278 (1957); *In re* Isserman, 345 U.S. 286 (1953), *judgment set aside on other grounds*, 348 U.S. 1 (1954) (per curiam); *In re* Sawyer, 260 F.2d 189 (9th Cir. 1958), *rev'd on other grounds*, 360 U.S. 622 (1959)).

250. *Id.* at 697-98, 747 P.2d at 902.

court and the state bar to bring disciplinary proceedings against any member of the bar, including a United States Attorney, *Waters* is clearly consistent with applicable United States Supreme Court precedents and other authority and thus illustrates the kind of opinion the Fourth Circuit might have written in *Kolibash* had the court chosen to render a decision that was in accordance with well-settled principles of law.

I. The Inconsistency of Kolibash *with Practices in Other Federal Courts*

The Fourth Circuit's assumption in *Kolibash* that a state bar association and a state supreme court cannot be trusted to determine fairly and accurately whether a United States Attorney has engaged in professional misconduct is not shared by other federal courts. This is evident in the fact that the federal courts commonly refer, or express their willingness to refer, charges of misconduct on the part of federal prosecutors to state-bar ethics committees for adjudication.

For example, in *United States v. Kelly*,[251] an Assistant United States Attorney was accused of egregious misconduct, including the intentional solicitation of false testimony and reliance upon it at trial.[252] The United States District Court for the District of Massachusetts concluded that "the public interest requires . . . that . . . the matter of former Assistant U. S. Attorney Lloyd Macdonald's conduct be referred to the Massachusetts Board of Bar Overseers to assess the need for disciplinary proceedings."[253] Similarly, in *Ramos Colon v. United States Attorney*,[254] in which a United States Attorney was accused of acting in bad faith in prosecuting a defendant for his political beliefs, knowing that the government had insufficient evidence to convict, the United States Court of Appeals for the First Circuit recognized that one of the "sanctions available

251. 543 F. Supp. 1303 (D. Mass.), *supplemented*, 550 F. Supp. 901 (D. Mass. 1982).
252. 543 F. Supp. at 1304.
253. *Id.* at 1314.
254. 576 F.2d 1 (1st Cir. 1978).

to the district court" was "reporting the misconduct to the appropriate professional association."[255]

Kolibash is clearly at odds with decisions such as *Kelly* and *Ramos Colon*, which rest upon the assumption, not that the state bar associations and supreme courts pose a threat of harassment or biased adjudication to federal prosecutors, but that these state agencies can, at least in the absence of evidence to the contrary, be relied upon to conduct disciplinary proceedings in a responsible and impartial manner and to reach fair decisions, whether the lawyers charged with misconduct are private practitioners or United States Attorneys.

The premise of *Kelly*, *Ramos Colon*, and countless other cases[256] is that "the United States Attorney and his aides are not privileged characters, but are subject to precisely the same rules and penalties, and to the same summary jurisdiction, as other members of the bar."[257] The *locus classicus* of the idea expressed by the foregoing premise is *United States v. Maresca*,[258] in which Judge Hough of the Court of Appeals for the Second Circuit made the following famous statement concerning the status of United States Attorneys vis-a-vis other members of the bar:

> Whenever an officer of the court has in his possession or under his control books or papers, or . . . any other articles in which the court has official interest, and of which any person . . . has been unlawfully deprived, that person may petition the court for restitution. This I take to be an elementary principle, depending upon the inherent disciplinary power of any court of record.
>
> Attorneys are officers of the court, and the United States attorney does not by taking office escape from this species of professional discipline. Thus power to entertain this motion depends on the fact that the party proceeded against is an attorney, not that he is an official known as the United States attorney.[259]

This passage, which has been cited with approval by a great many courts,[260] including the Supreme Court of the United States[261] and

255. *Id.* at 6 (footnote omitted).

256. *See supra* note 138.

257. *In re* Sylvester, 41 F.2d 231, 236 (S.D.N.Y. 1930).

258. 266 F. 713 (S.D.N.Y. 1920).

259. *Id.* at 717.

260. *E.g.*, *In re* Grand Jury Proceedings, 450 F.2d 199, 208 (3d Cir. 1971) (en banc), *aff'd sub. nom.* Gelbard v. United States, 408 U.S. 41 (1972); Grant v. United States, 282 F.2d 165, 168-69 (2d Cir. 1960) (Friendly, J.); *In re* Sylvester, 41 F.2d at 236.

261. Cogen v. United States, 278 U.S. 221, 225 (1929) (Brandeis, J.).

the Court of Appeals for the Fourth Circuit,[262] expresses the generally prevailing view that United States Attorneys are subject to the same disciplinary procedures and sanctions as other members of the bar. The *Kolibash* decision, which exempts a United States Attorney from the state-bar disciplinary proceedings to which all other members of the West Virginia bar are subject, is plainly an aberration.

III. The Policy Considerations Militating Against the *Kolibash* Decision

The *Kolibash* decision is not only inconsistent with applicable law but unwise from the standpoint of policy. In the first place, the decision is likely to promote inconsistency between federal courts and state supreme courts with regard to the way in which they adjudicate professional-misconduct cases. In a concurring opinion in *In re Abrams*,[263] Judge Rosenn of the United States Court of Appeals for the Third Circuit explains why consistency between the federal and state courts is desirable in such cases:

> A[n] . . . important policy behind the need to avoid disparate sanctions by the federal and state courts is the maintenance of public confidence in our legal system and in the bar. Disbarment is designed to protect the public. The district court's action [in disbarring Abrams after the Supreme Court of New Jersey had merely suspended him from practice for one year] permits Abrams to practice in the state, but not the federal, system. Such an anomaly can only lead to confusion in the minds of the public, which justifiably may speculate why an attorney not qualified to practice in a federal court has sufficient moral character to practice in the state court. Unless an exceptional reason of record justifies such disparate treatment, its effect will, in my opinion, render a grave disservice to the public.[264]

Presumably mindful of such considerations, the Supreme Court of the United States has said that in order to ensure consistency in this area, the federal courts should, in the absence of compelling reasons to do otherwise, conform their decisions in cases of professional misconduct to the decisions made by the states.

---

262. Austin v. United States, 297 F.2d 356, 358 n.2 (4th Cir. 1961).
263. 521 F.2d 1094 (3d Cir.), *cert. denied*, 423 U.S. 1038 (1975).
264. 521 F.2d at 1106 (concurring opinion) (citation omitted).

In *In re Isserman*,[265] for example, the Court said: "[T]his Court will, in the absence of some grave reason to the contrary, follow the finding of the state that the character requisite for membership in the bar is lacking."[266] But consistency is not likely to be achieved if the federal courts take it upon themselves to make decisions in disciplinary cases that are entirely independent of those made by the states. As Chief Judge Kaufman of the United States District Court for the District of Maryland has recently said in a closely related context,

> unless some very strong need is present, a federal district court should not establish independent procedures and mechanisms to investigate the private and professional character of applicants for admission to the bar of its court but should rely on the procedures and mechanisms which have been adopted by the highest court of the state, working in conjunction with and in review of the lower state courts and the state bar associations. To do otherwise would cause exactly the confusion which Judge Rosenn referred to in his concurring opinion in *In re Abrams*.[267]

To allow the federal district courts of a state, as *Kolibash* did, to establish independent procedures for deciding whether United States Attorneys have violated the state bar's code of professional ethics, while the state bar association and the state supreme court apply that same code in cases involving all other attorneys, is to invite inconsistency of interpretation and application of the state's standards and unequal treatment of attorneys across cases that are similar with respect to the professional misconduct that has been committed. Consistency is difficult enough to achieve when the only problem to be resolved is whether the federal court should or should not abide by prior disciplinary decisions made by the state supreme court. When the federal court is charged with making the initial application of state ethics standards in some cases and the state system with doing so in other cases, the consistency problem is exacerbated. The problem then becomes one of coordinating the decisions of two independent tribunals, neither of which is necessarily even aware of what the other has done or is doing in similar cases.

---

265. 345 U.S. 286 (1953).

266. *Id.* at 288 (citing Selling v. Radford, 243 U.S. 46 (1917)).

267. *In re* G.L.S., 586 F. Supp. 375, 381 (D. Md.) (dissenting opinion) (citation omitted), *aff'd*, 745 F.2d 856 (4th Cir. 1984).

Once again, the Fourth Circuit's lack of concern in *Kolibash* about potential problems of inconsistency between state and federal decision making is puzzling and ironic in light of the court's recognition in *In re Braverman* of the importance of "symmetry in the standards of qualification of coordinate courts in the same state . . . ."[268] In addition, in the latter case the court quotes with approval the portion of Judge Rosenn's concurring opinion in *In re Abrams* that explains why consistency is important from a policy standpoint.[269] Because the Fourth Circuit was aware in *In re Braverman* of the need to achieve consistency between state and federal sanctions in any particular case, it is difficult to understand how it could later fail to perceive that its decision in *Kolibash* was likely to give rise to a different but related type of inconsistency, namely, inconsistency between the way in which a particular kind of professional misconduct is dealt with by the federal district court when it has been committed by a federal prosecutor and the way in which that same kind of misconduct is dealt with by the state system when it has been committed by an attorney who is not a federal officer.

To extend the argument Judge Rosenn made in *In re Abrams*, it is plainly a disservice to members of the public to place them in the position of having to wonder why one attorney who has engaged in a particular variety of misconduct has been disbarred and another guilty of the same misconduct has not. Moreover, it is an injustice to members of the bar to allow similarly situated attorneys to receive widely disparate sanctions. The Fourth Circuit could have minimized the chances that such problems would arise by holding in *Kolibash* that all disciplinary proceedings brought for the purpose of determining an attorney's fitness to remain a member of the West Virginia bar must be conducted by a single agency, the state bar association, acting under the authority of the state supreme court.

Judge Rosenn's concurrence in *In re Abrams* called attention to a second important policy consideration that is poorly served by the *Kolibash* decision. The judge said:

---

268. 549 F.2d at 914.

269. *Id.* at 921 (quoting *In re* Abrams, 521 F.2d at 1106 (concurring opinion)).

> The imposition of disbarment by the federal court when the state has imposed only suspension implicitly attacks the regularity and judgmental values of the state proceedings, implying that the sanction chosen by the state courts is inappropriate. This result is bound to create tensions between the state and federal judiciaries.[270]

Judge Rosenn is obviously referring here to cases in which the federal and state courts impose different sanctions on an attorney for the same misconduct. Judge Rosenn's reasoning is equally applicable, however, to cases in which the sanction imposed on a United States Attorney by the federal court for a particular kind of ethical infraction differs from the sanction imposed on a state prosecutor or a private attorney by the state supreme court for similar misconduct. If a federal district court following *Kolibash* were to reach a decision, in a disciplinary case involving a federal attorney, that was inconsistent with a decision made by the state supreme court in a similar case or with the decision the state court would have made in the same case, the tensions of which Judge Rosenn speaks might easily arise between the state and federal judiciaries.

A third policy consideration that casts doubt on the desirability of *Kolibash* is that the decision places responsibility for adjudicating a case involving charges of attorney misconduct in the hands of a tribunal that has had little, if any, experience deciding such cases and consequently lacks the expertise necessary to do so judiciously. From a policy standpoint it would obviously be preferable to entrust this responsibility to the state bar association and the state supreme court, which are much more familiar with the state's rules of professional conduct, applicable precedent, customary sanctions, and other considerations that should inform decision making in such cases.[271] Concerning the analogous question of whether state criminal prosecutions should be removed to federal court, "[s]ome courts argue that unfamiliarity with state criminal law is [a] reason to limit removal of state prosecutions."[272] This argument obviously applies to removal of state-bar disciplinary proceedings as well.

---

270. 521 F.2d at 1105-06 (concurring opinion).

271. *See supra* notes 239-62 and accompanying text.

272. Note, *supra* note 16, at 1107 n.58. As an example, the author of the Note cites California v. Mesa, 813 F.2d 960, 966 (9th Cir. 1987), *aff'd*, 109 S. Ct. 959 (1989), in which the court of appeals points out that "[u]nder the diversity jurisdiction, federal courts have long entertained civil suits turning solely on state substantive law," implying thereby that the same is not true of criminal prosecutions. *Id.*

A fourth policy consideration that militates against construing the removal statute to allow removal of disciplinary proceedings brought against federal attorneys is that such a construction adds unnecessarily to the already burdensome caseload of the federal district courts. The Court of Appeals for the Ninth Circuit cites a similar "practical consideration[]" as one of the grounds for its decision in *California v. Mesa*, which the United States Supreme Court later affirmed:

> Congress could not have intended 28 U.S.C. § 1442(a)(1) to turn the federal courts into a special traffic court for federal employees. Whatever remote federal interests are implicated by state traffic regulation of postal vehicles, the overcrowded district courts do not need a new category of pesky cases turning solely on state law.[273]

By the same token, because the federal interests that are implicated by state regulation of attorney misconduct are "remote," and state-bar disciplinary proceedings brought against federal officers turn solely on the state code of professional ethics, there is every reason to assume that Congress did not intend to increase the already heavy burdens of the federal courts by having them serve, pursuant to the removal statute, as special disciplinary tribunals for United States Attorneys.

As the United States Supreme Court has repeatedly said, the purpose that Congress had in view when it enacted the federal-officer removal statute and its predecessors was to prevent the paralysis of the federal government by state courts hostile to federal authority. Removal of the Kolibash disciplinary proceeding simply does not serve that purpose.

In the first place, Kolibash made no showing or allegation of state hostility to federal authority. Once again, the Ninth Circuit's reasoning in *Mesa* is equally applicable to *Kolibash*. Although a concern about state prejudice against federal interests might be "compelling in the context of civil rights law or some realm of federal authority likely to encounter antagonism in state court, [t]here is simply no reason to believe" that federal prosecutors charged with

273. 813 F.2d 960, 967 (9th Cir. 1987), *aff'd*, 109 S. Ct. 959 (1989).

ethics violations "will not get a fair shake in state court."[274] Second, a disciplinary proceeding is neither a civil action nor a criminal prosecution and thus is not the sort of proceeding that Congress regarded as a potential threat to the enforcement of federal law when it enacted the statute. Third, since the Supreme Court and other courts have said that federal prosecutorial immunity to state-bar disciplinary proceedings does not exist, United States Attorney Kolibash did not and could not aver a colorable federal defense to the disciplinary proceeding brought against him. In this crucial respect *Kolibash* differs from the cases with which Congress was concerned when it enacted the removal statute. For all of the foregoing reasons, the substantial federal interests that federal-officer removal was intended to protect do not come into play in *Kolibash*.

Judicial interpretation of the federal-officer removal statute inevitably involves the striking of a "delicate balance between federal and state interests."[275] Whereas the federal interests at stake in *Kolibash* were extremely attenuated, the state interests were very substantial. At issue for West Virginia was the traditional prerogative of the state to protect the public against attorney misconduct and the inherent authority of the state supreme court to inquire, with the assistance of the state bar association, into the ethical fitness of one of its officers and to discipline or disbar him if necessary. As Congress and the United States Supreme Court have long recognized, these state interests, like the state interest in the regulation of crime, go to the heart of state sovereignty and, therefore, deserve deference from the federal government.

In *California v. Mesa* the Ninth Circuit weighed the competing state and federal interests and concluded that "[t]he attenuated federal interest in ensuring that [the] trial [of the postal workers] be unbiased does not justify an invasion of the state's authority to police its streets."[276] Since the federal interests implicated in *Kolibash* were just as trivial as those in *Mesa*, and the state interests were just as significant, the Fourth Circuit should have held in *Kolibash*,

274. 813 F.2d at 966-67 (citations omitted).
275. *Id.* at 964.
276. *Id.* at 965.

as the Ninth Circuit and the Supreme Court did in *Mesa*, that removal of the state proceeding to federal court was not authorized by the statute.

IV. Conclusion

The United States Court of Appeals for the Fourth Circuit had no legal authority to decide *Kolibash v. Committee on Legal Ethics* on the merits in the first place because the district court's remand of the Kolibash disciplinary proceeding to the state system was implicitly grounded in jurisdictional concerns and was therefore unreviewable under 28 U.S.C. § 1447(d). Moreover, the court of appeals had no legal authority on which to base the decision it reached in the case. On the contrary, *Kolibash* is in direct conflict with the holdings and reasoning of a number of United States Supreme Court precedents that interpret the federal-officer removal statute and with a substantial corpus of other applicable authority. The decision is not only unjustifiable as a matter of law but also undesirable as a matter of policy, and is therefore, clearly erroneous.

In short, Judge Wilkinson's opinion in *Kolibash* has already done considerable harm to the legitimate interests of the state of West Virginia, its supreme court, and its bar. In order to prevent *Kolibash* from causing further harm, and in order to remove its taint from the law of the Fourth Circuit, the court of appeals should now acknowledge its errors and should overrule the decision as expeditiously as possible.