

Report to NACDL's White Collar Crime Committee  
of the Subcommittee on Reform of the Hyde Amendment<sup>1</sup>

The financial and emotional cost of defending against a federal criminal trial is substantial. Even where the defendant is acquitted of all charges, not only does the damage to his reputation remain, but the acquitted defendant is often financially ruined by the considerable cost in attorney fees and expenses incurred in defending himself at trial.

The law currently does not provide any compensation to the acquitted defendant, not even recovery of legal fees and expenses. The Hyde Amendment does provide that a court may award reasonable attorney fees and expenses to a prevailing party in a criminal case, but only "where the court finds that the position of the United States was vexatious, frivolous, or in bad faith".<sup>2</sup> As a result, in all but the most egregious cases of government misconduct, the Hyde Amendment does not permit an acquitted defendant to recover his attorney fees and expenses.<sup>3</sup>

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<sup>1</sup> The Subcommittee's members are: Phil Kushner, Vivian Shevitz, Todd Foster, Joseph Mancano, Tracy Miner and Jon May. This Report was distributed and discussed at the November 19, 2010 meeting of the White Collar Crime Committee.

<sup>2</sup> 18 U.S.C. 3006A.

During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act, may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be made pursuant to the procedures and limitations (but not the burden of proof) provided for an award under [the Equal Access to Justice Act]....Fees and other expenses awarded under this provision to a party shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision.

<sup>3</sup> As the Eleventh Circuit observed in its discussion of the legislative history:

Even in its earliest form, the Hyde Amendment was targeted at prosecutorial misconduct, not prosecutorial mistake. Representative Hyde spoke in terms of the government "keep[ing] information from [the defendant] that the law says [the government] must disclose," "hid[ing] information," "not disclos [ing] exculpatory information," and "suborn[ing] perjury"-all clear examples of prosecutorial misconduct. 143 Cong. Rec. H7786-04, H7791 (Sept. 24, 1997). The changes to the amendment in the Conference Committee illustrate Congress' intent to limit its scope. The substitution of the narrower language of "vexatious, frivolous, or in bad faith" in place of the broader language about lack of substantial justification, the removal of the phrase "without foundation," and the

We propose a statute which would allow acquitted defendants to recover their attorney fees and expenses without a finding of government misconduct:

If a defendant in a criminal case is found not guilty on all counts, whether as a result of a jury verdict or the ruling of a trial or appellate court, the District Court shall award to that defendant reasonable attorney fees and litigation expenses, unless the District Court finds that special circumstances make the award unjust. This provision shall not apply where the defendant is represented by assigned counsel paid for by the public.

An acquitted defendant would be entitled to recover reasonable attorney fees and expenses, whether found not guilty by a jury, the trial judge or on appeal. But the District Court would have discretion not to award attorneys fees, “if special circumstances make the award unjust.” There undoubtedly are special circumstances where the award of attorney fees would be unjust – such as where the acquittal is a result of the government’s key witness being killed during the trial under suspicious circumstances. By giving the District Court the ability to address these special circumstances, we also eliminate an important potential objection to the proposal.<sup>4</sup>

Another potential objection relates to the cost to the government. How many defendants are acquitted of all charges? How many are represented by retained counsel? What are the costs of defense? According to the Department of Justice, in 2009 it brought criminal charges against 95,206 defendants; of these, 484 were acquitted, which is 0.5%. We do not know whether they were acquitted of all counts. We do not know what portion had retained counsel. The number of acquitted defendants that would be entitled to recovery under this proposal might be considerably less than 0.5%.<sup>5</sup>

The subcommittee also considered whether the proposal permitting recovery of attorney fees and expenses should extend to defendants who were not forced to defend themselves at trial: those whose indictments were dismissed before trial, those who were never indicted, etc. We concluded that it should not. Although we understand the desire to compensate everyone who has incurred costs as a result of federal criminal investigations, the claim – both moral and

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shifting of the burden of proof to the movant all show that Congress meant to sanction and deter prosecutorial misconduct, not prosecutorial zealotry *per se*.

*United States v. Gilbert*, 198 F3d 1292, 1304 (11<sup>th</sup> Cir. 1999).

<sup>4</sup> The exception language (“special circumstances make the award unjust”) and the language excluding assigned counsel are taken from the Hyde Amendment.

<sup>5</sup> If each of the 484 acquitted defendants incurred and recovered \$100,000 in attorney fees and expenses, this would total \$48.4 million, which is 0.18% of the total DOJ outlays of approximately \$27 billion in FY 2009. By way of comparison, the DOJ’s Crime Victims Fund received \$761 million in FY 2009.

financial – of a person who has been acquitted after having had to defend himself in a criminal trial seems greatest.

In addition, we do not want to discourage the government from abandoning or dismissing cases which lack merit; we want to encourage it. The proposal encourages the government to dismiss cases that should not be pursued, since if the government doesn't dismiss, proceeds to trial and loses, it may have to pay the defendant's legal fees and expenses. Requiring the government to pay legal fees when it does dismiss creates the wrong incentives and may even encourage the government not to dismiss when it should and otherwise would.

We also considered changes to the Hyde Amendment to make it easier to recover for government misconduct, such as by specifically stating that Brady violations constitute grounds for an award. But while lowering or clarifying the standards for recovery under the Hyde Amendment may be worthwhile, it does not address the problem facing many acquitted defendants: the financial ruin from having to defend themselves in a federal criminal trial where there is no evidence of government misconduct.

In addition, modifying the Hyde Amendment to make clear that a Brady violation constitutes "bad faith" by the government raises a number of unsettled issues regarding what the government's Brady obligations are, issues which are currently being debated.<sup>6</sup> In addition, although it would be helpful for the courts to have another vehicle with which to deter the government from committing Brady violations, for the defendants who have been acquitted it would be preferable that they obtain reimbursement without having to establish a Brady violation, particularly given the reluctance of courts to make that finding. Moreover, if the effect of finding a Brady violation is that a defendant is entitled to recovery of attorney fees and expenses, this may make courts more reluctant, not less, to find Brady violations.

We felt it preferable not to tie an acquitted defendant's right to recover attorney fees and expenses to government misconduct. Rather than focus on the government's conduct, we would focus on the victim here – the man or woman (or company) that has been found not guilty of federal criminal charges and yet has been financially ruined by having had to defend himself at trial. This is a sympathetic figure who has experienced a citizen's nightmare; having been wrongly accused, having had the courage to fight the charges, and nevertheless having been financially ruined. This proposal would provide a vehicle for these people to at least recover their attorney fees and expenses.

Thus, our proposal addresses a different problem than that addressed by the Hyde Amendment, which it is not intended to modify or replace. Whereas the Hyde Amendment seeks to deter prosecutorial misconduct, and provides that certain of its victims may be reimbursed their attorney fees and expenses, this proposal seeks to reimburse acquitted defendants without regard to the good or bad faith of the prosecutors. In so doing, it recognizes that the wrongly accused are victims too who, having suffered, struggled and prevailed, deserve, at the very least, to be reimbursed the attorney fees and expenses they incurred in defending themselves.

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<sup>6</sup> See, e.g., "Beyond Brady" by Irwin H. Schwartz, *The Champion* (March 2010).