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Lynn R. Singband

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THE HYDE AMENDMENT AND PROSECUTORIAL INVESTIGATION: THE PROMISE OF PROTECTION FOR CRIMINAL DEFENDANTS

*Lynn R. Singband**

INTRODUCTION

Kermit Bunn appeared before a federal grand jury in response to a subpoena requiring him to certify the authenticity of corporate documents.[1] He refused to take the oath on the grounds that the prosecutor was not licensed to practice in that state. After this refusal, Bunn added, "I have legal paperwork on all of you [grand jurors]. You need to go get legal counsel." The court reporter recorded these comments, and the district court charged Bunn with contempt for threatening the grand jury. The court issued an order to show cause based on the transcript of the grand jury proceedings and the foreman's testimony that the grand jury members perceived the comments as a threat. Bunn moved for discovery and requested the tape recording of the grand jury proceedings. Although the government did not object, it failed to produce the tape and ultimately dismissed the charges, determining that the statement on the tape was too vague to prove contempt beyond a reasonable doubt.

Though not the most egregious example of prosecutorial misconduct, this case nonetheless illustrates the lack of standards governing the conduct of investigations by federal prosecutors made prior to their charging decisions as well as the lack of guidance about the extent to which federal prosecutors should review evidence on hand or reasonably available before bringing charges.[2] Because federal prosecutors have considerable involvement in the pre-charging investigation and virtual free reign over the charging

* J.D., Fordham University School of Law, 2002. My thanks to Professor Bruce Green for his insight and guidance.

1. *In re* 1997 Grand Jury, 215 F.3d 430, 432-33 (4th Cir. 2000). The entire paragraph references this case.

2. Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in the Investigative Role*, 68 FORDHAM L. REV. 723, 738-47 (1999) (explaining that prosecutors' investigative role is not addressed by ethical authorities and suggesting that prosecutors' broad investigative role should be limited by an ethics rule requiring a proportionality analysis).

decision,[3] it is reasonable to expect that they adhere to some basic principles in conducting these investigations and in deciding what and whom to charge.[4] However, under existing standards set by the United States Constitution, the United States Department of Justice ("DOJ"), federal ethics rules, and the courts, federal prosecutors have very broad and vague guidelines to help them conduct their pre-charging investigation and exercise their charging discretion.[5] Furthermore, the enforcement of these standards by the courts, state disciplinary authorities, and the Office of Professional Responsibility (DOJ's internal review board) is minimal and generally lenient.[6]

In 1997, Congress enacted the "Hyde Amendment," purportedly in an effort to minimize prosecutorial abuse of power in the charging decision by creating a financial remedy for victims of egregious prosecutorial action.[7] The Hyde Amendment allows prevailing criminal defendants with private counsel to collect "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."[8] Current judicial interpretation of the Hyde Amendment standard raises the question of whether the courts' decisions interpreting the law will add to the standard of conduct for prose-

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3. Michael Q. English, Note, *A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?*, 68 FORDHAM L. REV. 525, 531-32 (1999); Bennet L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 395 (1992); Little, *supra* note 2, at 728-729.

4. *See generally* Little, *supra* note 2.

5. *Infra* Part I.B.

6. *Infra* Part I.C.

7. *Infra* Part II.A.

8. The Hyde Amendment states in full:

> 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 granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code. . . . 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.

Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1998), (codified as amended at 18 U.S.C. § 3006A (2000)).

cutors established by pre-existing laws, regulations, and internal guidelines. Commentators are also interested in the extent to which the Hyde Amendment effectively deters prosecutors by introducing financial considerations to the charging decision.

Part I of this Comment describes federal prosecutors' broad charging discretion and the resulting potential for abuse. This Part then examines and critiques the standard of conduct set for federal prosecutors by the United States Constitution, the courts, the DOJ, and ethics rules. Finally, this Part reviews and assesses the various enforcement mechanisms used to insure compliance with the standards of conduct set by these various sources. Part II discusses how current interpretations of the Hyde Amendment have failed to establish a standard of conduct for federal prosecutors different from that established by pre-existing laws, internal regulations, and ethics rules. This Part then considers the effectiveness of the Hyde Amendment as a deterrent mechanism and analyzes the Hyde Amendment's success as a remedy for prevailing criminal defendants. Part III argues that the Hyde Amendment offers the courts an important opportunity to issue opinions detailing how federal prosecutors should exercise their charging discretion.

I. Prosecutors' Discretionary Power: Wrongful Convictions and Current Regulation

A. The Breadth of Prosecutorial Discretion

Federal prosecutors wield an enormous amount of power with broad discretion and few constraints or guidelines.[9] Federal prosecutors have the authority to bring charges, decide what charges to bring, make sentencing recommendations, and control the plea bargaining process.[10] The decision to charge, in particular, puts the

9. For more in-depth analysis and coverage of prosecutorial discretion see Gershman, *supra*, note 3, at 405-09 (explaining expansive power and uncontrolled discretion of prosecutors); Robert Heller, Comment, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. Pa. L. Rev. 1309, 1325 (1997) (recognizing prosecutors' broad power and the need for judicial review of prosecutorial discretion in order to effectively combat selective prosecution); Elkan Abramowitz, *The Hyde Amendment and Wrongful Federal Prosecutions*, N.Y.L.J., Jan. 6, 1998, at 3 (quoting Michael E. Shaheen, Jr., the counsel and lawyer-in-chief of the DOJ's Office of Professional Responsibility). *See generally* Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 Fordham L. Rev. 1511 (2000) (suggesting education as a response to broad, unfettered prosecutorial discretion).

10. Dep't of Justice, Department of Justice Manual: Principles of Federal Prosecution 9-27.000, 9-2.010-2.145 (2000) [hereinafter DOJ Manual]. The Principles of Federal Prosecution were originally promulgated by Attorney General

federal prosecutor in an extremely powerful position.[11] The Principles of Federal Prosecution ("Principles"), the internal manual for the DOJ, only requires a federal prosecutor to demonstrate probable cause by finding that an individual has likely committed a federal offense before deciding to bring charges. After finding probable cause, the federal prosecutor has discretion in deciding which steps to take next in pursuing an investigation or prosecution.[12] Generally, commentators and courts list the same reasons for allowing prosecutors such broad discretion: the need to efficiently use limited resources; prosecutorial expertise in making discretionary decisions; the danger of chilling law enforcement efforts; the potential need for leniency; the danger of a potential increase in frivolous claims by defendants, and the harm to effective crime control a lack of discretion might induce.[13]

The broad discretion given to federal prosecutors in making the charging decision can result in innocent people losing their free-

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Benjamin R. Civiletti on July 28, 1980 and describe the authority of the prosecutor, prosecutors' procedural requirements, and specific instructions as to the prosecution of specific offenses, but not standards or guidelines for exercising prosecutorial discretion. *Id.* Policy limitations on the authority of the United States Attorney to decline prosecutions, to prosecute, and to take other specified action with respect to prosecution of criminal cases are outlined in 9-2.400, Prior Approvals Chart. *Id.* at 9-2.400.

11. Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion—Knowing There Will Be Consequences for Crossing the Line*, 60 LA. L. REV. 371 (2000) (reviewing the breadth of prosecutors' discretion and arguing that defendants have little recourse in response to unchecked prosecutorial discretion); Gershman, *supra* note 3, at 405, 408; Podgor, *supra* note 9, at 1516-17.

12. DOJ MANUAL, *supra* note 10, at 9-27.200. A finding of probable cause is made according to the same standard as that used for the issuance of an arrest warrant or a summons upon a complaint. A finding of probable cause is necessary to prosecute but does not mandate prosecution. Upon a finding of probable cause, a prosecutor has five choices: 1) investigate further; 2) prosecute; 3) decline prosecution and refer to another jurisdiction for consideration; 4) decline prosecution and recommend pre-trial diversion or other non-criminal disposition; or 5) decline prosecution and take no other action. Subsequent sections of the DOJ Manual elaborate on considerations for the prosecutor to take into account in deciding what course to follow. *Id.* at 9-27.220. The prosecutor may not consider race, religion, sex, national origin, political affiliations, personal feelings, or the effect the decision will have on the prosecutor's professional or personal circumstances. *Id.* at 9-27.260.

13. United States v. Armstrong, 517 U.S. 456, 464 (1996) (limiting judicial review of prosecutorial charging discretion in light of the presumption that prosecutors "properly discharged their official duties") (citations omitted); JOSEPH F. LAWLESS JR., PROSECUTORIAL MISCONDUCT §§ 3.02-3.07, 3.28 (2d ed. 1999); Heller, *supra* note 9, at 1326; Lawrence Judson Welle, *Power, Policy, and the Hyde Amendment: Ensuring Sound Judicial Interpretation of the Criminal Attorneys' Fees Law*, 41 WM. & MARY L. REV. 333, 351-55 (1999).

dom.[14] While conviction and sentencing to prison or death is certainly the worst result of prosecutorial abuse of power, the effect of a grand jury subpoena alone can be devastating.[15] Federal prosecutors' exercise of broad discretion in the charging decision has led to convictions and death sentences for defendants despite the existence of evidence demonstrating their innocence.[16] This broad discretion also has allowed prosecutors to pursue investigations relentlessly despite lacking cause to do so[17] and has even permitted them to press charges they subsequently dismissed. The following section reviews the federal prosecutors' standard of conduct established by various sources and explains how wrongful convictions are made possible because of limited guidance as to what is a legitimate exercise of the charging power.[18]

B. Current Standard of Conduct for Prosecutors

1. *The Judiciary*

Courts have limited authority to establish a standard of conduct for prosecutors. The constitutional standard prohibiting selective or vindictive prosecution[19] sets a high burden of proof for defend-

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14. *See generally* Elkan Abramowitz & Peter Scher, *The Hyde Amendment: Congress Creates a Toehold for Curbing Wrongful Prosecution*, CHAMPION, March 1998, at 22, 23; Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 UNIV. CHI. L. SCH. ROUNDTABLE 73, 75-83 (1999) (discussing wrongful prosecutions and how long people spend in jail before their innocence is demonstrated, and referring to the works of Edwin M. Bouchard, Edward Conners, Judge Jerome Frank and Barbara Frank); Lyn M. Morton, Note, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?*, 7 GEO. J. LEGAL ETHICS 1083, 1084-87 (1994) (explaining that examples of prosecutorial abuse of power are on the rise).

15. Hon. John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POL'Y 423, 425-26 (1997) (discussing the negative impact of a grand jury subpoena, an investigation, and an indictment).

16. Moore, *supra* note 11, at 371-74 (using the example of the conviction and sentencing to death of Rolando Cruz to illustrate abuse of prosecutorial discretion).

17. David W. Simon, *Fighting Back: Remedies for the Wrongfully Prosecuted?*, WISCONSIN LAWYER, September 1998, at 10-11 (referring to how the absurd prosecution of Marsha Jones for Medicare fraud resulted in the destruction of her business).

18. *See generally* Bernhard, *supra* note 14; Gershman, *supra* note 3, at 409 (discussing the downsides of discretion especially in death penalty cases); David Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. ILL. U. L. REV. 91, nn. 1, 4-7 & 14 (explaining that many states, Illinois in particular, are rethinking their death penalty policies and procedures after consistent and compelling indications based on DNA testing that innocent people are being sentenced to death).

19. During and after the trial, defendants may bring complaints of prosecutorial misconduct, specifically charges of selective or vindictive prosecution, to the judge's attention. Bordenkircher v. Hayes, 434 U.S. 357, 364-65 (1978). A claim of selective

ants to satisfy before they may bring a claim in an effort to have their convictions dismissed.[20] Because of the high standard, very few defendants are able to bring constitutional claims and even fewer prevail.[21] Courts also have a general supervisory authority, which allows judges to set procedural standards in their courtrooms "to deter governmental misconduct and preserve judicial integrity."[22] However, the Supreme Court has construed that judicial authority very narrowly.[23] Therefore, judges have little ability to set a standard of conduct for federal prosecutors, as their ability to enforce a standard is severely limited.

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or vindictive prosecution alleges that the prosecutor denied the defendant equal protection of the law or due process as a result of the defendant's race, class, gender, or some grudge the prosecutor has against the defendant. Margaret E. McGhee, *Prosecutorial Discretion*, 88 GEO. L.J. 1057, 1061-62 (2000); Lesley E. Williams, Note, *The Civil Regulation of Prosecutors*, 67 FORDHAM L. REV. 3441, 3447-48 (1999); David S. Rudolf & Thomas K. Maher, *Behind Closed Doors: Selective Prosecutions–Questioning the Motives*, CHAMPION, June 1996, at 31, 33 ("claimant must demonstrate that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.'") (quoting United States v. Armstrong 517 U.S. 456, 464 (1996)).

20. Rudolf & Maher, *supra* note 19, at 31 (discussing the decision in *United States v. Armstrong* and the resulting burden on the defendant to win the discovery motion necessary to prove a selective prosecution claim). *See generally* Heller, *supra* note 9.

21. The courts generally only override a prosecutor's discretionary decision when the prosecutor's conduct is so egregious that the defendant suffered prejudice or violation of his constitutional rights. The court relies on a harmless error test; a prosecutor's improper argument will not justify reversal if it is a harmless error. *See* United States v. Hasting, 461 U.S. 499, 508-10 (1983); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 900 (1995) (discussing the availability of reversal of conviction if prosecutor's misconduct resulted in the violation of defendant's constitutional rights); Morton *supra* note 14, at 1103 (explaining that there are two standards for the harmless error test depending on whether the defendant claims there was a constitutional or non-constitutional error). The defendant must demonstrate that the prosecutor's conduct prejudiced him and caused a different result in the case than would have occurred had the prosecutor not behaved improperly. *Hasting*, 461 U.S. at 510-11; Gershman, *supra* note 3, at 424-27 (arguing that because the standard for proving the harmless error test is so high, the wrong incentive is given to prosecutors); Moore, *supra* note 11, at 388 n.118.

22. Gershman, *supra* note 3, at 432. Under their supervisory powers, courts can dismiss cases or indictments in response to ethical misconduct on the part of the prosecutor that caused prejudice to the defendant. Morton, *supra* note 14, at 1089.

23. Gershman, *supra* note 3, at 432 (citing three reasons why the supervisory power is little deterrent or control over prosecutorial misconduct: judges are reluctant to act, exercise of supervisory powers is viewed as an intrusion on the separation of powers, and the exercise of supervisory powers is subservient to the harmless error rule, making it irrelevant).

2. *The Criminal Justice System: Indictment*

Despite the limitations on courts in establishing and enforcing a standard of conduct, the justice system as a whole sets standards for the different phases of prosecution. In order to obtain an indictment and pursue prosecution, the federal prosecutor must demonstrate to a grand jury the existence of probable cause for pressing specific charges against defendants.[24] To satisfy the probable cause standard, prosecutors must demonstrate that they have reason "to believe that the accused committed an offense."[25] The prosecutor need only present inculpatory evidence to the grand jury.[26] Additionally, only the prosecutor presents evidence to the grand jury, making it difficult for jurors not to take the prosecutor's side. Across the board, practitioners acknowledge that if the prosecutor wants a grand jury indictment, the prosecutor will get one.[27] Federal prosecutors and government officials even admit that the probable cause standard fails to act as a screening mechanism.[28] Although the general public perceives the grand jury system as an institution designed to weed out improper and unwarranted prosecutions by requiring proof of probable cause, in reality it is a "rubber stamp" for the prosecutor's charging decision.[29]

3. *The Criminal Justice System: Trial*

Once federal prosecutors obtain an indictment, they move to the trial phase where they must prove guilt beyond a reasonable

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24. *Bordenkircher*, 434 U.S. at 364; Roberta Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. Rev. 923, 938 (1996) (explaining what a prosecutor should know to file charges). *See generally* Moore, *supra* note 11, at 381; Roger Roots, *If It's Not a Runaway, It's Not a Real Grand Jury*, 33 Creighton L. Rev. 821, 825-27 (2000).

25. *Bordenkircher*, 434 U.S. at 364.

26. Brady v. Maryland, 373 U.S. 83, 86-87 (1963) (requiring government to provide defendant with exculpatory evidence); Podgor, *supra* note 9, at 1515 (referring to holding in *United States v. Williams*, 504 U.S. 36 (1992), that prosecutors need not present substantial exculpatory evidence to the grand jury).

27. Roots, *supra* note 24, at 826; Abramowitz, *supra* note 9, at 7 ("Congress has clearly acknowledged the simple truth that the grand jury process no longer serves its historical protective function and now merely exists as a charging mechanism for the prosecutor's office."); John Gibeaut, *Indictment of a System*, A.B.A. J., Jan. 2001, at 34, 36 (explaining that the Supreme Court views the grand jury as an untouchable fourth branch of government).

28. Gerald B. Lefcourt, *High Time for a Bill of Rights for the Grand Jury*, Champion, April 1998, at 5 (referring to Henry Hyde's quotation of William J. Campbell's comments regarding the ease with which prosecutors obtain indictments).

29. Roots, *supra* note 24, at 827.

doubt.[30] However, since the charging decision is limited solely by the easily satisfied probable cause standard, defendants may be dragged through the early stages of prosecution before a thorough investigation, or the defendant's presentation of evidence at trial, makes it apparent that the evidence is insufficient to support the charges. The beyond a reasonable doubt standard may help to vindicate some defendants who are acquitted, but, sometimes, acquittal brings little satisfaction after a lengthy investigation and indictment.[31]

4. *Department of Justice*

In the Principles, the DOJ "provide[s] Federal prosecutors [with] a statement of sound prosecutorial policies and practices for particularly important areas of their work."[32] According to the Principles, federal prosecutors should prosecute if they believe an individual's conduct constitutes a federal criminal offense and the evidence is sufficient to obtain and sustain a conviction.[33] Federal prosecutors should not pursue a prosecution if "[n]o substantial Federal interest would be served by prosecution; [t]he person is subject to effective prosecution in another jurisdiction; [or] [t]here exists an adequate non-criminal alternative to prosecution."[34] The comment to this section of the Principles advises government attorneys not to prosecute unless the evidence will convince the trier of fact.[35] This statement does not imply that the prosecutor should have all the evidence at the time of deciding whether to prosecute, but that the prosecutor should have faith in the availability of the evidence at trial.[36]

While the Principles are not enforceable by a defendant through litigation, they are intended to guide federal prosecutors in their decision making so that prosecutorial decisions are made "rationally and objectively according to the merits of each case."[37] The

30. *In re* Winship, 397 U.S. 358, 361 (1970) (explaining that proving guilt of a criminal charge requires proof beyond a reasonable doubt).

31. *See supra* note 15 and accompanying text.

32. DOJ MANUAL, *supra* note 10, at 9-27.001.

33. *Id.* at 9-27.220.

34. *Id.*

35. *Id.* at cmt. The prosecutor cannot be influenced by the individual's race, religion, sex, national origin, political affiliations, the prosecutor's personal feelings or the effect the decision will have on the prosecutor's professional or personal circumstances. *See id.* at 9-27.260.

36. *Id.*

37. *Id.* The preface to the Principles acknowledges the significant consequences of the decision to prosecute and explains that this decision is a balance between the

United States Attorney's Office has a hierarchical structure that provides oversight and approval of all decision making, yet, ultimately, the soundness of prosecutors' decisions relies on the "character, integrity, sensitivity, and competence" of the people chosen to serve as federal prosecutors.[38] Defendants must rely on the DOJ's Office of Professional Responsibility ("OPR") to review prosecutors' decision making for misconduct.[39] Because there is no independent enforcement of the Principles, and even though the standard expressed is high, in application, federal prosecutors are only held to a probable cause, sufficiency of the evidence standard with respect to their charging decisions.[40]

5. *Ethics Standards*

All lawyers are regulated by codes of professional responsibility, and prosecutors are also subject to their own ethical standards.[41] The American Bar Association Model Rules of Professional Conduct,[42] for example, prohibit a lawyer from suborning perjury,[43] re-

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interests of society in having its laws enforced and the recognition that prosecution has a profound effect on the accused and his family. The significance of the decision then requires that it be regulated to avoid inconsistency while still allowing flexibility. *See id.* at 9-27.140 (noting that while consistency is important, the need for flexibility is necessary to respond to different conditions in the interest of fair and effective law enforcement); *see also id.* at 9-27.150 (discussing the enforceability of these standards); *id.* at 9-27.120 (explaining that each DOJ attorney should be guided by these principles and that each United States Attorney (USA) and each Assistant Attorney General (AAG) should communicate these principles to the attorneys within his office and under his supervision); *id.* at 9-27.130 (stating that each USA and each AAG is responsible for ensuring that prosecutorial decisions are made at the appropriate level of responsibility and according to the Principles and that departures from the Principles are addressed with remedial action including disciplinary sanctions. This section, however, does not define what decisions are appropriate for each level of responsibility or what remedial action is appropriate when improper decisions are made.).

38. DOJ MANUAL, *supra* note 10, at 9-27.001.

39. *Infra* Part I.C.3.

40. See discussion *infra* Part I.C.3.

41. Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 73-4 (1995) (explaining that lawyers are subject to the ethical code of the state in which they are admitted for practice and the professional standards incorporated in the rules of the district courts where they practice).

42. *Id.* at 73 (indicating that most states have adopted either the *ABA Model Rules of Professional Responsibility* or the *ABA Model Code of Professional Responsibility* as their standards for professional conduct).

43. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2000); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102 (1980).

quire a prosecutor to disclose exculpatory evidence,[44] describe the prosecutor as a "seek[er of] justice,"[45] and set probable cause as the standard for making the charging decision.[46] The courts enforce the ethics rules through state disciplinary authorities.[47]

C. Enforcement Mechanisms

Prosecutorial charging discretion is generally unregulated, and commentators consider current regulatory mechanisms inadequate.[48]

1. *State Disciplinary Authorities*

If a federal prosecutor violates an ethical duty, a judge or another attorney may refer the prosecutor to a state disciplinary authority for a hearing and possible sanctions.[49] Unfortunately, this remedy is largely ineffective. Most states do not publicize the filing or disposition of complaints, and state disciplinary authorities, which hear few complaints of prosecutorial misconduct, are unlikely to impose sanctions.[50] According to one analysis, "the [state] disciplinary process [is] almost entirely ineffective in defining and deterring prosecutorial misconduct."[51] As a result, lawyers, and specifically prosecutors, cannot learn from their colleagues' mistakes and understand what behavior is required to satisfy ethical obligations and avoid misconduct complaints.[52] The complaint

44. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2000); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13, DR 7-103 (1980).

45. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1980).

46. MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2000); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(A) (1980).

47. See discussion *infra* Part I.C.1.

48. Green, *supra* note 41, at 91 (arguing that current control methods are inadequate because each assumes the other will respond to misconduct); Abramowitz & Scher, *supra* note 14, at 22 (describing the power of DOJ as a "Leviathan . . . no outsider is capable of oversight"). *See generally Panel Discussion: The Regulation and Ethical Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 737 (1999); Morton, *supra* note 14.

49. Green, *supra* note 41, at 88.

50. *Id.* at 88-90; Morton, *supra* note 14, at 1104-05 (explaining that DOJ protects prosecutors from state disciplinary authorities which generally do not impose sanctions and, when they do, impose lenient ones).

51. Gershman, *supra* note 3, at 444 (describing the "failure of professional disciplinary organizations to deal with such misconduct"); Green, *supra* note 41, at 88.

52. Green, *supra* note 41, at 88-89 (discussing how the secrecy of state disciplinary proceedings inhibits their effectiveness as a guide for prosecutors as to what is misconduct and concluding that such proceedings provide little deterrence).

mechanism also is considered ineffective because state disciplinary authorities are typically underfunded and understaffed.[53]

In addition, the ethics standards enforced by state disciplinary authorities do not create substantive rights or causes of action for defendants.[54] Thus, while a lawyer may be sanctioned for an ethics violation, the affected party has no recourse under the rules for the attorney's conduct.[55] Any sanction imposed on a prosecutor is a personal sanction, which provides no relief for defendants.

2. *Judiciary*

Courts may issue a public reprimand, hold the prosecutor in contempt, or impose a fine on the prosecutor for misconduct in the trial proceedings, but such discipline rarely occurs.[56] Rulings establishing a presumption that the prosecutor has acted appropriately constrain the judiciary's ability to sanction improper behavior.[57] Courts infrequently reprimand attorneys because they tend to defer to prosecutors' decision making.[58] Thus, while public reprimand by the court is significant, it is a rare occurrence, and has a limited impact.[59] Courts also can hold an attorney in contempt, but this occurs only in limited circumstances, because most prosecutorial conduct that could be considered improper is not subject to contempt charges.[60] Additionally, to obtain relief through a claim of selective or vindictive prosecution, the defendant must satisfy a prohibitively high burden of proof.[61]

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53. Meares, *supra* note 21, at 899 (citing Professor Richard Rosen's analysis of the limited use of state regulatory mechanisms as a response to professional misconduct).

54. Morton, *supra* note 14, at 1099.

55. The affected party may have recourse through the judiciary on some other grounds. For example, the defense attorney may charge prosecutorial misconduct as a result of an improper closing argument and in response seek relief for his client. Green, *supra* note 41, at 78-79.

56. For more on the power of courts to curb prosecutorial abuses of power and their reluctance to use those tools see the following sources: Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L. J. 207, 240-42 (2000); Morton, *supra* note 14, at 1089-91.

57. Abramowitz & Scher, *supra* note 14, at 23.

58. United States v. Reyes, 16 F. Supp. 2d 759, 761 (S.D. Tex. 1998) (recognizing that courts should exercise restraint when reviewing prosecutorial decisions).

59. Green, *supra* note 41, at 81-82 (indicating that the impact of public reprimand by a court can be significant because prosecutors care about their reputations, but explaining that district courts rarely "act as disciplinarians").

60. *Id.* at 80-81 (explaining that most conduct considered wrongful occurs outside of court and that it is unusual for courts to provide procedural relief); Meares, *supra* note 21, at 893-94 (discussing the rare use of contempt by courts despite its effectiveness and appropriateness as a response to prosecutorial misconduct).

61. See discussion *supra* Part I.B.1.

3. *Office of Professional Responsibility*

As the internal review mechanism for DOJ, OPR has significant potential to guide prosecutors exercising their discretionary authority by enforcing the standard set out in the Principles. However, OPR has not taken advantage of its authority and access to information to enforce more than the minimal sufficiency of the evidence standard on prosecutors' charging decisions. OPR has only sanctioned outrageous violations of the charging power.

The Attorney General created OPR in 1975[62] to "investigate allegations of misconduct by Department of Justice attorneys that relate to the exercise of their authority to investigate, litigate or provide legal advice."[63] OPR reports the outcome of its investigations to the appropriate management officials in the Department of Justice and, if disciplinary action is warranted, makes a recommendation as to the range of possible sanctions.[64] The supervisory official may choose not to follow the recommendation, but, if he acts contrary to the recommendation, he must notify the Office of the Deputy Attorney General.[65]

Beginning in 1993, OPR has released an annual summary of reports of investigations where there was a finding of intentional misconduct; a demonstrated public interest in the allegations of serious professional misconduct; and an attorney subject to the investigation who requested disclosure.[66] Because of privacy concerns, very few OPR decisions are made public,[67] and those decisions included in the annual summary do not disclose the prosecutors' names and provide very little background or information regarding the bases for the decisions.[68]

OPR investigations generally occur at the behest of private parties, DOJ staff, private attorneys, judges, Congress, inmates and detainees.[69] The office investigates a wide range of prosecutorial

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62. OFFICE OF PROF'L RESPONSIBILITY, DEP'T OF JUSTICE, FISCAL YEAR 1996 ANN. REP. 1 (1996) [hereinafter 1996 REPORT].

63. *Id.* at *Jurisdiction and Functions.*

64. *Id.*

65. *Id.*

66. *Id.*; *see also* Letter from Philip B. Heymann, Deputy Attorney General, to Michael E. Shaheen, Jr., Counsel, Office of Professional Responsibility (Dec. 13, 1993) (on file with author and available from OPR).

67. 1996 REPORT at *Jurisdiction and Functions.*

68. *See, e.g.*, 1996 REPORT at *Examples of Matters Handled by OPR in Fiscal Year 1996.*

69. Each annual report released by OPR contains statistics on referrals, the reasons for investigation, and the results of the investigations. *See, e.g.*, *id.* at *Statistical Summary of OPR Activities in Fiscal Year 1996.*

actions,[70] including the prosecutor's decision to pursue prosecution,[71] the prosecutor's investigative activities,[72] and the prosecutor's decision to dismiss charges.[73] OPR also investigates charges that prosecutors are violating legal requirements such as the obligation to disclose exculpatory information[74] and the duty not to suborn perjury.[75]

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70. Podgor, *supra* note 9, at 1527-28 ("OPR typically investigates the role of the prosecutor in cases involving allegations such as '[a]buse of prosecutorial or investigative authority,' '[m]isrepresentation to the court or opposing counsel,' '[u]nauthorized release of information . . .,' '[i]mproper oral or written remarks to the court or grand jury,' and '[c]onflicts of interest.'") (citations omitted).

71. Office of Prof'l Responsibility, Dep't of Justice, Public Summary of OPR's Report of Investigation into the Allegations of Misconduct Made Against Assistant U.S. Attorney Jack Frels Concerning United States v. Salinas, et al. and United States v. U.S. Currency (1994) [hereinafter Frels Investigation] (investigation of allegation that prosecution was in bad faith).

72. Office of Prof'l Responsibility, Dep't of Justice, Summary of the Investigation by the Office of Professional Responsibility into the Conduct of Assistant United States Attorney Paul Kanter Concerning United States v. Van Engel (1995) [hereinafter Kanter Investigation] (investigation of prosecutor's investigation of defendant's attorney for obstruction of justice).

73. Office of Prof'l Responsibility, Dep't of Justice, Fiscal Year 1997 Ann. Rep. *Examples of Matters Handled by OPR in Fiscal Year 1997*, ex. 16 (1997) [hereinafter 1997 Report] (determining that decision to dismiss charges was not out of concern arising from defendant's claim of vindictive charging).

74. Office of Prof'l Responsibility, Dep't of Justice, Fiscal Year 1998 Ann. Rep. *Examples of Matters Handled by OPR in Fiscal Year 1998*, ex. 1 (1998) [hereinafter 1998 Report] (finding reckless disregard of prosecutorial obligation in failure to produce discoverable material requested by defendant); 1997 Report, *supra* note 73 at *Examples of Matters Handled by OPR in Fiscal Year 1997*, ex. 1 (finding multiple discovery violations were not intentional but an established pattern of conduct indicative of prosecutorial misconduct that justified written reprimand); Office of Prof'l Responsibility, Dep't of Justice, Summary of the Investigation by the Office of Professional Responsibility into the Conduct of Assistant United States Attorney Joseph Frattalone (1996) [hereinafter Frattalone Investigation] (finding that attorney intentionally attempted to withhold information from OPR); *but see* 1998 Report at *Examples of Matters Handled by OPR in Fiscal Year 1998*, ex. 6 (finding no professional misconduct resulting from failure to disclose exculpatory information because attorney made a good faith assessment of the discoverability of the materials); Office of Prof'l Responsibility, Dep't of Justice, Public Report on Investigation of Misconduct Allegations in United States v. Isgro (1994) [hereinafter Isgro Investigation] (finding no intentional violation of disclosure obligation because of prosecutor's reasonable belief that evidence need not be turned over, but reprimanding prosecutor for failing to review testimony to determine necessity of disclosure); Office of Prof'l Responsibility, Dep't of Justice, Fiscal Year 1994 Ann. Rep. *Matters in Which Allegations Were Found to be Unsubstantiated*, para. 10-11 (1994) [hereinafter 1994 Report] (finding no violation of obligation to disclose exculpatory information because DOJ attorney relied on trusted Internal Revenue Service agent and original search for documents).

75. Frels Investigation, *supra* note 71; 1998 Report, *supra* note 74 at *Examples of Matters Investigated by OPR in Fiscal Year* ex. 17 (investigating charge of sub-

There is some deterrent effect from a public reprimand by OPR because of the reluctance of prosecutors to have their names publicly associated with misconduct.[76] The effect is limited, though, because of the general unavailability of OPR decisions and the limited nature of their content. OPR decisions often are reported only in summary format and published without any names.[77] Also, it is difficult for OPR to stay abreast of all complaints of prosecutorial misconduct and fully investigate each one with the resources currently available to the office.[78]

Furthermore, OPR review may reflect organizational bias because it relies on prosecutors sanctioning fellow prosecutors.[79] Consider the potential conflicts arising from the United States Attorney's Office investigating the behavior of one of its prosecutors in response to a charge of misconduct. Such an investigation potentially implicates all United States Attorneys, because bad behavior on the part of one federal prosecutor reflects poorly on all. Because an OPR review of a prosecutor threatens to implicate the prosecutor's entire office, it may have more of a deterrent effect. That, however, does not appear to be the case because OPR rarely sanctions prosecutors.[80] It is only in the most egregious cases, where a prosecutor has violated the law or has been so negligent as to demonstrate willful disregard of duties, that OPR imposes sanctions.[81] By requiring extreme malfeasance, OPR does little to clarify how extensive an investigation prosecutors should complete in order to be certain that they have sufficient evidence to justify prosecution.

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ornation of perjury and finding the prosecutor reasonably did not know the material was false and had reason to believe it was true).

76. Green, *supra* note 41, at 81 (indicating that federal prosecutors care about their reputations).

77. *Id.* at 86.

78. Meares, *supra* note 21, at 899 (describing how eight attorneys cannot patrol the activities of 7500 attorneys). The author later suggests that perhaps additional resources would improve the effect of current mechanisms to control prosecutorial misconduct. *Id.* at 901.

79. *See* Abramowitz & Scher, *supra* note 14, at 23 (arguing that inside attempts to control DOJ have failed); Michael E. Clark, *Nothing to Hyde? The Flood of Wrongful Recovery Suits Has Not Materialized*, CRIM. JUST., Summer 1999, at 10, 16 ("[T]he DOJ's self-policing efforts have simply been inadequate protection for those individuals who have been harmed by aberrant prosecutors and agents.").

80. *See, e.g.*, 1998 REPORT, supra note 74 at *Statistical Summary of OPR Activities in Fiscal Year 1998* para. 4 (indicating that only 15% of the matters closed that year resulted in finding of professional misconduct).

81. Morton, *supra* note 14, at 1109 (noting that "frequently no action is taken").

II. The Hyde Amendment: Passage and Interpretation

A. Prosecution of One of Their Own Prompted Congress to Enact the Hyde Amendment

In response to an eight-year investigation of Congressman Joseph McDade for bribery and racketeering that concluded with an acquittal, Congressmen John Murtha introduced a provision in the House of Representatives granting members of Congress and their staff attorneys' fees upon prevailing in a criminal case in which they were accused.[82] In 1997, Congressman Henry Hyde presented the proposal to the House of Representatives as a response to substantially unjustified and frivolous prosecutions resulting from prosecutorial abuse of power.[83]

Congressman Hyde expanded the language of what is now called the "Hyde Amendment" (the "Amendment") to allow all prevailing criminal defendants with private counsel to collect attorneys' fees unless the government could demonstrate that its position was substantially justified.[84] The final Amendment states:

> [T]he court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) . . ., may award to a prevailing party . . . 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."[85]

82. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998: Hearing on H.R. 2267 Before the Comm. of the Whole*, 105th Congress, H7791 (1997) [hereinafter HEARINGS] (statement of Rep. Henry Hyde); Abramowitz, *supra* note 9; T.R. Goldman, *Putting a Price Tag on Acquittals*, LEGAL TIMES, Oct. 6, 1997, at 2.

83. HEARINGS, *supra* note 82, at H7791 (stating that "[p]eople in government, exercising government power . . . are capable of overreaching . . . [and] pushing people around").

84. Congressman John Murtha's original bill limited the attorneys' fees award to members of Congress or members of their staff and only required that they be acquitted to collect. *Id.* Hyde originally proposed requiring the government to demonstrate its position was substantially justified to avoid payment of attorneys' fees, but in its final form, the Amendment placed the burden on the defendant to prove the government's position was vexatious, frivolous or in bad faith. *Id*; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (codified and amended as 18 U.S.C. § 3006A (1997)).

85. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998*, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519, (codified and amended as 18 U.S.C. § 3006A (1997)).

Hyde easily garnered support for the Amendment from Congress[86] at a time when the public in general was exhibiting discontent with federal law enforcement agencies.[87]

According to the legislative history recording Congressman Hyde's arguments in favor of this rider to the 1997 Appropriations bill,[88] Hyde intended for the Amendment to provide defendants with the same remedy in the criminal arena available to defendants in the civil arena when the government improperly uses its power and thereby causes significant harm to people.[89] The Hyde Amendment reflected Congressman Hyde's concern that broad prosecutorial discretion in making the charging decision occasionally results in aggressive prosecution of innocent people who are hurt financially and personally with virtually no remedy.[90] He argued in favor of "repair[ing] the [economic] wound" inflicted by the government's over zealousness and abuse of power in exercising its discretionary charging power.[91] Congressman Hyde indicated that the award of attorneys' fees through the Hyde Amendment would curb improper prosecutions, restrain the government's abuse of power, and protect innocent defendants.[92]

86. Goldman, *supra* note 82 (citing the Hyde Amendment as an example of the new coalition consisting of the right and left including such groups as the National Association of Criminal Defense Lawyers and mainstream conservative law and order groups).

87. Welle, *supra* note 13, at 339-342 (undermining the widespread support implied by the wide margin in favor of the bill by highlighting the limited consideration given to the bill before its passage, yet also conceding the "pervasive public . . . hostility toward federal law enforcement organizations" and the alliance between liberals and conservatives in support of the measure). Welle refers to Waco, Ruby Ridge, and allegations of and investigations into FBI and IRS misconduct to illustrate the reason for the public perception that federal agencies were out of control. *Id.*; *see also* Morton, *supra* note 14, at 1085 (referring to the "public's growing concern regarding attorney misconduct").

88. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1998).

89. HEARINGS, *supra* note 82, at H7791. Congressman Hyde was referring to the Equal Access to Justice Act, 28 U.S.C. § 2412 (1994) [hereinafter EAJA], which allows civil defendants to sue the government for attorneys' fees and the costs of litigation when the government loses the litigation. *Id.*

90. HEARINGS, *supra* note 82, at H7791 ("If the Government, your last resort, is your oppressor, you really have no place to turn.") *Id.*; Abramowitz & Scher, *supra* note 14, at 23 ("This legislation may go a long way toward providing judicial oversight of DOJ's excesses.").

91. HEARINGS, *supra* note 82, at H7791.

92. *Id.* at H7791-H7793. Congressman Hyde suggested that justice, though perhaps rough justice, meant reimbursement of attorneys' fees when the government was willfully and frivolously wrong. *Id.* at H7791. Willfully and frivolously wrong government behavior, according to Congressman Hyde, includes failure to disclose informa-

B. Criticism of the Hyde Amendment

During the debate in Congress over the Hyde Amendment and in the first months of its enactment, the DOJ argued that the Hyde Amendment undermined the principle that the privilege of American citizenship includes the cost of "defending against a [criminal prosecution]," commonly known as the "American Rule."[93] Advocates of the Hyde Amendment expressed the belief that "defending against an abusive or unjustified prosecution should . . . be an exception to that rule."[94] DOJ representatives, however, feared that making an exception to the American Rule by allowing prevailing criminal defendants to sue for attorneys' fees would only force federal prosecutors to waste resources defending against such claims and would result in large payouts to criminal defendants.[95] Proponents of the Amendment argued that if criminal defendants must make financially based decisions with respect to their defense, then federal prosecutors should also have to keep "one eye on their office budget" when making decisions regarding who to charge.[96]

Critics of the Amendment also argued that forcing federal prosecutors to consider the pocketbook when making charging decisions would stifle prosecution in that federal prosecutors would only try unambiguous cases out of fear of having to pay attorneys' fees if they lost.[97] DOJ charged that the amendment would chill prosecution of difficult cases like rape, where convictions are hard to obtain.[98] However, in any criminal case, the prosecutor must prove his case beyond a reasonable doubt.[99] Since an acquittal alone is insufficient to satisfy the Hyde Amendment standard, awarding attorneys' fees should not affect the decision to prosecute.[100]

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tion as obligated, failure to disclose exculpatory information, subornation of perjury, and a lack of justification for bringing the suit. *Id.*

93. Abramowitz & Scher, *supra* note 14, at 23 (explaining that federal courts generally require each side to pay its own litigation costs).

94. *Id.*

95. *Id.* at 24.

96. Michael J. Sniffen, *Reno Deputy Blasts Bill in Congress to Compensate Acquitted Defendants*, DAILY RECORD, Oct. 24, 1997, at 31 (quoting Deputy Attorney General Eric Holder).

97. Goldman, *supra* note 82 (explaining that critics maintained that the Hyde Amendment would prevent all prosecutions but "the most open-and-shut cases").

98. *Id.*

99. *See supra* note 30 and accompanying text.

100. *In re* 1997 Grand Jury, 215 F.3d 430, 436-37 (4th Cir. 2000) (holding that dismissal of charges is not enough); United States v. Gilbert, 198 F.3d 1293, 1299 (11th Cir. 1999) (explaining that "[I]t is obvious that a lot more is required under the Hyde Amendment than a showing that the defendant prevailed at the pre-trial, trial, or

The Hyde Amendment originated, in part, as a way to offer criminal defendants a remedy already available to civil defendants through the Equal Access to Justice Act ("EAJA").[101] As a result, the Hyde Amendment included the procedures of the EAJA, but not its standard of proof.[102] By incorporating civil law into criminal law, the Hyde Amendment raised questions for some regarding the fundamental differences between the civil and criminal systems. According to some commentators, basing a criminal remedy on a civil law was inappropriate, as there are fundamental differences between criminal and civil litigation.[103] However, supporters maintained that the Hyde Amendment provided a much needed oversight mechanism to respond to prosecutors' abuse of power and the inability of internal mechanisms and courts to control prosecutors.[104]

Other criticisms of the Hyde Amendment involve the ambiguity of language in procedural guidelines that leave a great deal to the courts' discretion.[105] For instance, the Hyde Amendment language does not explain who qualifies as a prevailing party.[106] According to Lawrence Judson Welle, "the language of the Hyde Amendment is grossly ambiguous and leaves the judiciary with an impermissible degree of discretion in defining the scope of the law's application."[107] He further explains that the lack of clarity in the procedural rules of the Hyde Amendment indicates sloppiness on Congress's part in drafting the law.[108] However, poor drafting says

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appellate stages of the prosecution"); United States v. Pritt, 77 F. Supp. 2d 743, 748 (S.D. W. Va. 1999); United States v. Troisi, 13 F. Supp. 2d 595, 597 (N.D. W. Va. 1998). The government's attainment of a grand jury indictment does not preclude the court from finding that the prosecution was vexatious, frivolous or in bad faith. HEARING, *supra* note 82, at H7793.

101. HEARINGS, *supra* note 82, at H7791; Equal Access to Justice Act, 28 U.S.C.A. § 2412 (1994).

102. Abramowitz & Scher, *supra* note 14, at 24.

103. Welle, *supra* note 13, at 356-63; Goldman, *supra* note 82 (highlighting the differences in burdens of proof and available safeguards in civil and criminal procedures).

104. *See, e.g.*, Abramowitz, *supra* note 9 (discussing how the Hyde Amendment may help curb wrongful federal prosecutions).

105. Welle, *supra* note 13, at 370-78 (arguing that the ambiguity of the Hyde Amendment language leaves too much to judges' discretion).

106. Simon, *supra* note 17, at 12.

107. Welle, *supra* note 13, at 334. An analysis of the appropriateness of such procedural discretion is beyond the scope of this Comment; however, further analysis of this area should occur to help insure that the courts implement the Hyde Amendment effectively and appropriately.

108. *See generally id.* (discussing the numerous ways in which Congress erred in its passage of the Hyde Amendment).

little about the potential for courts to use the Hyde Amendment standard to set a standard of conduct for federal prosecutors exercising their charging discretion. The ambiguity of the language leaves much to the courts' discretion; however, courts are not overstepping their authority in interpreting the statute.[109] If Congress does not like the courts' interpretations, then Congress can change the law. Otherwise, courts should apply the plain language of the statute.[110]

A related criticism invokes the belief that courts cannot review the decision to charge because, unlike the prosecutor, the courts do not have access to all the evidence.[111] However, the discovery provision of the Hyde Amendment allows "the court, for good cause shown, [to] receive evidence ex parte and in camera" "[t]o determine whether or not to award fees and costs."[112] Therefore, evidence that may be excluded at trial, which the prosecutor relied on in making the decision to charge, is made available to the court for review to determine the appropriateness of the government's decision to pursue charges.

Furthermore, Congress preserved judicial deference to the federal prosecutor by placing the burden of proof on the defendant.[113] Congress made this concession to the Clinton administration and DOJ after both expressed concern with the government having to prove that its position was substantially justified.[114] This is reason-

109. The judiciary has a long history of reviewing executive decision-making and the Hyde Amendment does not improperly displace the judiciary's historical deference to prosecutors. Heller, *supra* note 9, at 1340-41 (explaining that it is within the courts' province to review agency action for abuse of discretion and that courts regularly review prosecutorial actions for constitutional violations). In fact, the United States Supreme Court has recognized the judicial authority to review federal prosecutors' actions under their supervisory authority. John S. Austin, Note, *Prosecutorial Discretion and Substantial Assistance: The Power and Authority of Judicial Review—* United States v. Wade, 15 CAMPBELL L. REV. 263, 278-79 (1993); Morton, *supra* note 14, at 1089-90. The Court only balks at lower courts creating rights for third parties not established by Congress or the Constitution and for imposing requirements on prosecutors not established by Congress. *See generally* Gleeson, *supra* note 15 (discussing the supervisory authority of courts); *but see* Welle, *supra* note 13, at 342-56 (arguing that the Hyde Amendment violates principles of sovereign immunity, separation of powers, and judicial restraint).

110. United States v. Gilbert, 198 F.3d 1293, 1298 (11th Cir. 1999) (quoting Chapman v. United States, 500 U.S. 453, 462 (1991)).

111. Welle, *supra* note 13, at 352-55.

112. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1998).

113. *See supra* note 84 and accompanying text.

114. Goldman, *supra* note 82.

able, as it is legitimate to expect the prosecutor to act in the interest of justice. On the occasions when the prosecutor does not, however, it is right for Congress to provide the defendant with some recourse and remedy.[115]

The courts offer an objective review of federal prosecutors' behavior that internal review cannot provide.[116] Strengthening internal controls, then, is inappropriate and ultimately ineffective, as internal mechanisms are always subjective and lack independent systemic oversight.[117] As an objective third party, the judge can review the record and any additional information made available by discovery to determine if the prosecutor pursued charges improperly. The judge, as a neutral arbiter, decides based on the presented information and offers both sides equal opportunity to make their case. The judge, outside the influence of DOJ and neutral to the plight of the defendant, faces no negative repercussions for finding one way or another.

C. Current Interpretations of The Hyde Amendment

Since the Hyde Amendment took effect in 1998, courts have resolved a number of claims for attorneys' fees and, in doing so, they have interpreted when "the position of the United States was vexatious, frivolous, or in bad faith."[118] Current judicial interpretation of the Hyde Amendment standard of vexatiousness, frivolousness, and bad faith indicates a standard of conduct for federal prosecutors that requires them to present charges supported by law and by facts and not use their authority to prosecute for wrongful pur-

115. *See* Meares, *supra* note 21, at 901 ("[I]t is a common sense proposition that serious sanctioning of prosecutors on a more regular basis would affect their conduct and, correspondingly, their level of misconduct."); Heller, *supra* note 9, at 1328-31 (acknowledging the economic pressure disfavoring judicial review but arguing that judges are only succumbing to a fear of "too much justice") (citations omitted).

116. Gleeson, *supra* note 15, at 427 (describing judges as "more experienced, more dispassionate, better able to weigh the investigators' legitimate interests . . . and, presumably, wiser," but concluding that judges should not *supervise* criminal investigations).

117. See discussion *supra* Part I.C.3.

118. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1998).

poses,[119] though it does not condemn "simple negligence and benign prosecutorial misjudgment."[120]

Courts have found that Congress intended the Hyde Amendment to impose a standard of conduct on federal prosecutors different from the substantially justified standard established by the EAJA upon which the Hyde Amendment is based.[121] The final language of the Hyde Amendment specifically rejects the substantially justified standard by adopting the procedures and limitations of the EAJA but not its burden of proof.[122] Therefore, the defendant bringing the Hyde Amendment claim must show more than that the government's position was not substantially justified.[123]

1. *Violating the Law Satisfies the Hyde Amendment Standard*

In interpreting the Hyde Amendment standard, some courts limit awards of attorneys' fees to instances when the government's position resembles one of the examples listed by Congressman Hyde during the House debate over the Hyde Amendment: failure to disclose information as obligated, failure to disclose exculpatory information, subornation of perjury, and a lack of justification for bringing the suit.[124] Therefore, violations of existing law, such as the *Brady* doctrine (which requires the government to provide the defendant with any exculpatory evidence it possesses),[125] sufficiently demonstrate a bad faith government position.[126]

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119. United States v. Gardner, 23 F. Supp. 2d 1283, 1295 (N.D. Okla. 1998). The court evaluates the following conduct: 1) "conduct that is clearly unsupported by law;" 2) "conduct that is clearly unsupported by facts;" and 3) "use of the charge for wrongful purposes." *Id.*

120. United States v. Peterson, 71 F. Supp. 2d 695, 698 (S.D. Tex. 1999).

121. *Supra* note 89 and accompanying text; EAJA, 28 U.S.C.A. § 2412 (1994).

122. "Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code." § 617, 111 Stat. at 2440-2519.

123. United States v. Truesdale, 211 F.3d 898, 908-09 (5th Cir. 2000); United States v. Lindberg, No. 99-10371, 2000 WL 1028929, at *3-4 (9th Cir. July 27, 2000).

124. United States v. Gilbert, 198 F.3d 1293, 1304 (11th Cir. 1999).

125. Brady v. Maryland, 373 U.S. 83, 86-87 (1963); *supra* note 26 and accompanying text.

126. The District Court for the District of West Virginia, hearing a Hyde Amendment claim in *United States v. Troisi*, found that it is the "duty of a prosecutor to know about and disclose evidence favorable to a person accused." 13 F. Supp. 2d 595, 596 (N.D. W. Va. 1998) (citing Kyles v. Whitley, 514 U.S. 419, 435 (1995)). In *United States v. Ranger Elec. Communications*, the District Court for the Western District of Michigan found that the prosecutor's failure to reveal exculpatory evidence qualified as a bad faith position under the Hyde Amendment and justified an award of attorney's fees. 22 F. Supp. 2d 667, 676 (W.D. Mich. 1998), *rev'd* 210 F.3d 627 (6th Cir. 2000) (finding that in waiver of sovereign immunity, procedural requirements need to

Similarly, according to OPR, an intentional wrongful act or disregard of duties or obligations constitutes prosecutorial misconduct justifying sanctions.[127] Therefore, an intentional violation of the obligation to disclose exculpatory information qualifies as prosecutorial misconduct, while failure to disclose exculpatory information because of a reasonable belief in its non-discoverability or lack of legitimacy does not.[128] While the Hyde Amendment offers an additional remedy of attorneys' fees not offered by the Principles, ethics rules, and *Brady* doctrine, in this area it adds nothing to the body of law and regulation on which federal prosecutors rely to understand the breadth of their discretion.

2. *Hyde Amendment Requires Prosecutors to Bring Charges with Sufficient Legal and Factual Basis*

Under current interpretations of the Hyde Amendment, a federal prosecution is vexatious, frivolous, or in bad faith if it lacks a sufficient factual and legal basis (meaning a total lack of supporting evidence). In one Hyde Amendment case involving the Federal Deposit and Insurance Corporation ("FDIC"), the court reviewed whether the FDIC's criminal referrals of the defendants and a subsequent federal prosecution were vexatious, frivolous, or in bad faith.[129] According to the court, the government owed the defendants attorneys' fees if "a reasonable FDIC decision-maker and a reasonable [p]rosecutor knew or should have known that the criminal referrals and the continued prosecution were 'lacking justification [and] . . . intended to harass . . . by process of law.'"[130] With

be strictly adhered to; since claimants filed after thirty-day time limit, the award must be revoked).

127. 1998 REPORT, *supra* note 74, at *Examples of Matters Investigated by OPR in Fiscal Year 1998* ex. 1 (finding reckless disregard of prosecutorial obligation in failure to produce discoverable material requested by defendant).

128. FRATTALONE INVESTIGATION, *supra* note 74 (finding prosecutorial misconduct because of prosecutor's failure to inform defendant that possible witness to her innocence was located); *but see* ISGRO INVESTIGATION, *supra* note 74 (reprimanding prosecutor for failure to adequately investigate duty to disclose requested evidence); 1994 REPORT, *supra* note 74. Mistakes and carelessness constituting a pattern of conduct of reckless disregard for prosecutorial obligations, though not intentional, can also constitute prosecutorial misconduct. *See, e.g.*, 1997 REPORT, *supra* note 73; 1998 REPORT, *supra* note 74.

129. United States v. Holland 34 F. Supp. 2d 346, 359 (E.D. Va. 1999) (indicating one element of Hyde Amendment analysis is whether the defendants proved that "the FDIC or the Prosecution was vexatious, frivolous, or in bad faith"), *aff'd*, 214 F.3d 523 (4th Cir. 2000).

130. *Id.* at 360. In the Northern District of West Virginia, the court also applied the reasonable person test to determine whether the "Government's action was justified

respect to the federal prosecutor, the court found the prosecution vexatious because of the insufficiency of evidence in light of the applicable law and inability of the prosecutor to prove guilt beyond a reasonable doubt.[131] The court indicated the impropriety of the prosecutor's reliance on FDIC evidence to support a claim of criminal conduct,[132] for he knew or should have known that the evidence failed to support the charges. The prosecutor clearly thought that pursuing prosecution would only harass the defendants and not serve any criminal justice goals.[133]

Similarly, in *United States v. Knott*,[134] the District Court for the District of Massachusetts found a prosecution vexatious because the government lacked evidence to support the Clean Water Act violation charge and also knew of the lack of supporting evidence.[135] After suppressing much of the government's evidence and reviewing that which remained,[136] the court determined that the government pursued charges despite its knowledge that it lacked supporting evidence and failed to obtain evidence that would have hurt the case from the appropriate discharge site.[137] The government admitted that once most of the sampling information was suppressed, it had insufficient evidence to proceed to trial though "there *was* substantial evidence supporting the charges."[138] The court referred to the defendant's "humiliation at being criminally prosecuted" and the government's harassment of the defen-

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to a degree that could satisfy a reasonable person, and whether a reasonable basis in both law and fact existed." *Troisi*, 13 F. Supp. 2d at 597.

131. *Holland*, 34 F. Supp. 2d, at 364. The prosecution relied on the FDIC's evidence, which the FDIC deemed insufficient to pursue civil penalties, which require a lower burden of proof than criminal offenses. *Id.* The evidence did not demonstrate the requisite intent and, according to the court, the prosecution seemed to be following the FDIC's "in terrorem" policy in pursuing a thirty-one-count indictment. *Id.* The court cited the prosecutor's knowledge of the lack of evidence; duplication of counts based on the same statutes; failure to present supporting evidence for charges; failure to adhere to representations as to intended actions; failure to recognize obvious conflicts in the pleadings as filed by defendants' attorney; and a conflict in representation to support its finding of vexatious and frivolous prosecution. *Id.* at 364-68.

132. *Id.* at 365.

133. *Id.* at 364.

134. 106 F. Supp. 2d 174 (D. Mass. 2000).

135. *Id.* at 179-80.

136. *Id.* at 176. The court suppressed the evidence from the second sampling taken by Environmental Protection Agency investigators without supervision because "EPA exceeded the scope of [defendant's] consent." *Id.*

137. *Id.* at 179 (violating the Clean Water Act requires proof that the defendant discharged industrial waste with a pH of less than 5.0 S.U. into the publicly owned treatment works).

138. *Id.* at 177 (emphasis added).

dant by sending "a virtual 'SWAT team' . . . [to] the [defendant's] facility," in finding that the prosecution, "although not provably frivolous or in bad faith was clearly vexatious."[139] The government's inappropriate investigative methods, lack of supporting evidence, and harassment of the defendant, according to the court, warranted an award of attorneys' fees under the Hyde Amendment.[140]

In enforcing the DOJ Principles, OPR reviews federal prosecutors' decisions to bring charges under a sufficiency of the evidence standard, which demands that federal prosecutors should not bring charges if they do not reasonably believe they have supporting evidence.[141] In the *Kanter Investigation*,[142] OPR evaluated the legitimacy of the prosecutor investigating a defense attorney during the prosecution of the defense attorney's client.[143] OPR questioned whether the prosecutor had a basis for pursuing the investigation,[144] and in the decision held that the prosecutor "had a sufficient factual and legal basis for undertaking and continuing the investigation" and therefore did not commit misconduct.[145] The decision further explained that the prosecutor acted with the approval of the United States Attorney, and therefore did not exercise poor judgment in pursuing the investigation.[146] Interestingly, the government did not challenge the district court's criticism of the investigation as improper, allowing Chief Judge Richard Posner, writing on behalf of a Seventh Circuit panel, to conclude that the government had conceded the "ineptitude of its investigation."[147] Nevertheless, OPR did not find any evidence of misconduct on the part of the prosecutor and determined that he had

139. *Id.* at 180.

140. *Id.* at 179-80. In *United States v. Gilbert*, the District Court for the Southern District of West Virginia decided that a prosecution "without any foundation or basis for belief that it might prevail" qualified as in bad faith. 198 F.3d 1293, 1303 (11th Cir. 1999). *See also* United States v. Adkinson, 247 F.3d 1289, 1292-93 (11th Cir. 2001) (finding prosecution of defendant on conspiracy charges vexatious, frivolous, and in bad faith because the government's position was "foreclosed by binding precedents").

141. FRELS INVESTIGATION, *supra* note 71; KANTER INVESTIGATION, *supra* note 72; *See* discussion *supra* Part I.B.4.

142. KANTER INVESTIGATION, *supra* note 72.

143. *Id.*

144. *Id.* at *Conclusions of the Office of Professional Responsibility.*

145. *Id.*

146. *Id.*

147. *Id.* at *Facts.*

sufficient basis to believe the defense attorney may have engaged in unlawful conduct that merited investigation.[148]

Both the United States Constitution, through its prohibition of selective or vindictive prosecutions,[149] and the Principles, through their admonition against pursuing prosecution out of personal vindictiveness and establishment of the sufficiency of the evidence standard,[150] prohibit federal prosecutors from seeking an indictment for any reason other than that the facts and law warrant doing so.[151] The courts in *Holland* and *Knott* reasoned that a desire to harass the defendants, rather than probable cause, motivated both of the prosecutions at issue in those cases.[152] The prosecutors' conduct in *Holland* and *Knott*, therefore, would have warranted sanctions for violations of the mandate that prosecutors must have a reasonable belief in the sufficiency of the legal and factual basis for charges, and that they may not pursue a prosecution out of vindictiveness or retaliation, regardless of the existence of the Hyde Amendment.

3. *Negligent Conduct Does Not Satisfy the Hyde Amendment Standard*

In a recent Hyde Amendment case described at the beginning of this Comment, the United States Court of Appeals for the Fourth Circuit held that even though the federal prosecutor would have realized the evidence in his possession did not support the charges had he reviewed it more carefully, the defendant still failed to meet the requisite standard of proof to collect attorney's fees.[153] The case involved criminal contempt charges resulting from an alleged threat the defendant made to the grand jury.[154] The federal prosecutor's case rested on the transcript of the grand jury proceedings and the testimony of the grand jury foreman.[155] The facts reported by the court indicated that the government could have earlier ob-

148. *Id.* at *Conclusions of the Office of Professional Responsibility*; *see also* FRELS INVESTIGATION, *supra* note 71 at *Conclusions of the Office of Professional Responsibility* (finding that the prosecutor "had sufficient evidence to prosecute [and] the case met the Department's prosecutive standards").

149. See discussion *supra* Part I.B.1.

150. DOJ MANUAL, *supra* note 10, at 9-27.260.

151. The Principles specifically prohibit pursuing prosecution for reasons other than those warranted by the facts. *See supra* note 35 and accompanying text.

152. United States v. Knott, 106 F. Supp. 2d 174, 180 (D. Mass. 2000); United States v. Holland, 34 F. Supp. 2d 346, 367 (E.D. Va. 1999).

153. *In re* 1997 Grand Jury, 215 F.3d 430, 437 (4th Cir. 2000).

154. *Id.* at 432.

155. *Id.*

tained the evidence that eventually led to it dropping charges.[156] The court determined that although the prosecutor may have been negligent in failing to conduct a more in-depth investigation, the decision to prosecute did not rise to the level of ill intent.[157] Rather, the court held that the prosecutor had a reasonable basis for proceeding against the defendant and did not act vexatiously, frivolously, or in bad faith.[158]

OPR has deferred to the prosecutor's reasonable belief in the integrity of witnesses and evidence in withholding a finding of prosecutorial misconduct despite the fact that the prosecutor relied on evidence containing false information.[159] The office investigated an allegation that the prosecutor used testimony at a hearing he knew or should have known was false, and documents he knew or should have known contained false information.[160] While OPR concluded that one of the documents used as evidence did contain false information, it also found that the attorney acted appropriately in using the document because it contained materially factual information.[161] Using a reasonableness test, OPR determined that the prosecutor's actions did not constitute prosecutorial misconduct.[162] According to the OPR decision, the prosecutor reasonably believed in the truthfulness of the witnesses and evidence, and that reasonable belief was sufficient to overcome the inappropriateness of using false information.[163]

Other courts have decided that prosecutors' negligence in confirming the legal basis for the charges does not violate the Hyde Amendment standard. In *United States v. Truesdale*,[164] the government's failure to charge the appropriate parts of the relevant statute subjected the defendants to a conviction that they narrowly escaped on appeal.[165] With respect to the Hyde Amendment claim, the court explained that the government's allegations focused entirely on bookmaking, yet the cited statute referred to

156. *Id.* at 432-33.

157. *Id.* at 437.

158. *Id.* at 436-37.

159. 1998 REPORT, *supra* note 74 (investigating charge of subornation of perjury, OPR found the attorney reasonably did not know the material was false and had reason to believe it was true). The reported decision does not indicate the basis for a finding of reasonable belief or the level of investigation necessary for such holding. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. 211 F.3d 898 (5th Cir. 2000).

165. *Id.* at 900-01.

gambling promotion, which includes more than just bookmaking.[166] The court overturned the convictions because the circumstantial evidence was inadequate to convince a reasonable jury that the defendants were engaged in bookmaking, and the government failed to charge the section of the statute supported by the evidence.[167] "[T]here was some evidence that Appellants had broken state gambling laws . . . but the government neglected to proceed on this theory."[168] The appellate court acknowledged that the government's investigation was both confused and sloppy, but reasoned that it did not rise to the level of vexatious, frivolous, or bad faith conduct.[169]

In evaluating the legal sufficiency of charges, OPR does not require that the prosecutor demonstrate the legal basis for the charge.[170] In one case, OPR investigated a court of appeals finding that the government was derelict in failing to notify the district court that no case law supported the charges in the indictment.[171] OPR determined that the defendant's pre-sentence motion informed the district court that no legal authority existed for the charges and the government told the court of appeals that no case law was on point.[172] Because of these circumstances, OPR found no prosecutorial misconduct in the DOJ attorney's failure to tell the district court that the indictment lacked supporting case law.[173] In these cases, the courts and OPR reprimanded the prosecutors for sloppiness and incomplete investigation, but did not find prosecutorial misconduct. Despite the ability of the federal prosecutor to have avoided the mistake, the court and OPR considered the action merely negligent, and therefore not worthy of sanction.

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166. *Id.* at 901.

167. *Id.*

168. *Id.* at 909.

169. *Id.* The claimant argued that the government's position was not substantially justified, but the court found that the Hyde Amendment standard is higher. Since the claimant failed to satisfy the lower standard, he certainly did not satisfy the higher standard. *Id.* at 908.

170. Green, *supra* note 41, at 86-87 (discussing OPR's finding in the *Isgro* case).

171. 1994 REPORT, *supra* note 74, at *Matters in which Allegations were Found to be Unsubstantiated.* The appellate court found that the statute upon which the indictment was based did not cover the facts at issue and the prosecutor should have notified the district court that the indictment lacked any legal authority. *Id.*

172. *Id.*

173. *Id.*

D. Current Inadequacies of the Hyde Amendment

In addition to the current failure of the courts to set a clearer standard of conduct for prosecutors through their interpretation of the Hyde Amendment, the Hyde Amendment itself fails to deter prosecutors from bringing vexatious, frivolous, or bad faith charges. While the Hyde Amendment may introduce some nominal factors for prosecutors to consider when making their discretionary decisions, these factors are effectively irrelevant because of their limited application and remoteness to individual prosecutors. Few critics have highlighted the limited deterrent effect of the Hyde Amendment and none have reacted to the fact that current judicial interpretation of the Hyde Amendment standard does not set a higher standard of conduct for prosecutors conducting their investigations than preexisting legal standards.

1. *Introduces Appropriate Financial Considerations with Limited Effect*

If the government feels a financial pinch from Hyde Amendment awards, federal agencies may somehow shift the Hyde Amendment losses to their prosecutors, or they may exert an internal sanction on a prosecutor for failing to rise above a vexatious, frivolous, or bad faith position.[174] Yet, as it stands, the financial burden of the Hyde Amendment is imposed on the government agency and not the individual.[175] It is premature to assume that the government will impose the cost of satisfying Hyde Amendment claims on its employees. Such an assumption ignores the administrative costs involved in determining which prosecutor or prosecutors should bear the financial burden and how the prosecutor will satisfy the cost.

According to Leslie Hagin, counsel and chief lobbyist for the National Association of Criminal Defense Lawyers, the Hyde Amendment restores some balance to a system that otherwise favors the prosecutor by using a financial disincentive to discourage the government from trying a case with less than sufficient evidence.[176] Defendants need to consider their pocketbooks when de-

174. Abramowitz & Scher, *supra* note 14, at 24 (describing how the Hyde Amendment shifts the economic pressure to the prosecutor's office).

175. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1998). "Fees and other expenses awarded . . . shall be paid by the agency." *Id.*

176. *Compare* Goldman, *supra* note 82, *with* Meares, *supra* note 21, at 873 (suggesting the use of financial rewards to encourage prosecutors to charge defendants only with crimes they believe they can prove at trial).

ciding how to proceed against an imminent prosecution, whether justified or not.[177] It is appropriate to require the federal prosecutor to undergo a similar consideration.[178] However, under the Hyde Amendment, the prosecutor is only encouraged to make such a consideration with respect to defendants who have retained counsel.[179] The Hyde Amendment further limits its remedy with a monetary worth restriction that keeps criminal defendants having a net worth of more than two hundred thousand dollars and corporations having more than 500 employees and a net worth of more than seven million dollars from collecting attorneys' fees under this provision.[180] Since most criminal defendants do not retain private counsel,[181] the Hyde Amendment is doing little to equalize the playing field at least from a financial perspective. A financial calculation is a reasonable, necessary, and objective consideration relevant to the decision to charge,[182] which should be expanded to include all criminal defendants.

Unlike judicial sanctions, OPR investigations, or disciplinary authority reviews, the Hyde Amendment allows defendants to bring a complaint regarding the prosecutor's conduct during the original criminal prosecution. The opportunity for recourse empowers defendants after a completely enfeebling experience from which they have little remedy. The psychological impact of having your "day in court" should not be minimized. Therefore, all criminal defendants should have access to this remedy. The Hyde Amendment should be changed in order to allow indigent defendants to collect attorneys' fees, with the proceeds going to the appropriate Public Defender or court fund used to compensate their counsel.[183]

Expanding application of the Hyde Amendment will not result in additional litigation, as defendants have a compelling financial incentive not to bring a Hyde Amendment claim.[184] It is an addi-

177. Abramowitz & Scher, *supra* note 14, at 24.

178. *Id.*; *see generally* Meares, *supra* note 21 (suggesting that implementing financial incentives will help assure proper prosecutions are pursued).

179. § 617, 111 Stat. at 2519.

180. *Id.* The courts are split as to whether these EAJA limitations apply to Hyde Amendment claims. *See, e.g.*, United States v. Knott, 106 F. Supp. 2d 174 (D. Mass. 2000); United States v. Peterson, 71 F. Supp. 2d 695 (S.D. Tex. 1999).

181. Meares, *supra* note 21, at 879 (citing that seventy-five percent of defendants have appointed counsel).

182. *See generally* Meares, *supra* note 21; *but see* Goldman, *supra* note 82 (referring to DOJ's concerns regarding imposition of financial considerations).

183. Simon, *supra* note 17, at 56-57 (proposing that Congress expand the Hyde Amendment to include larger corporations and those prosecuted in state courts).

184. Goldman, *supra* note 82 (explaining that litigation is an expensive alternative to entering into a plea agreement).

tional cost coming on the heels of a costly criminal prosecution and the defendant carries the burden of proof.[185] The effort to collect attorney's fees will come only from a strong belief in the correctness of the claim and the defendant's ability to support the claim. Furthermore, if courts use the Hyde Amendment to set a higher standard of conduct for prosecutors, less people should have reason to bring Hyde Amendment claims.

2. *The Hyde Amendment Offers a Limited Financial Remedy*

After defending oneself against a criminal prosecution, a defendant has suffered a great deal of harm, most of which is irreparable.[186] Spending time in jail, enduring intrusive investigation, and responding to negative public attention affect one's psyche and reputation.[187] There may be loss of friends, family, job, or valuable opportunities. The government cannot repair one's reputation, reverse time, revive lost friendships, or recover missed job opportunities, but it can repay the cost of defending against an improper prosecution. While this may seem insignificant in light of the damage inflicted upon a wrongfully prosecuted person, it at least provides some remedy to a wrongly indicted or convicted defendant.[188] At the very least, the person can avoid bankruptcy and have a place from which to rebuild his or her life.[189]

However, this positive outcome from a successful Hyde Amendment claim is limited to prevailing criminal defendants with private counsel and to those meeting restrictive financial requirements.[190] Additionally, under existing interpretation of the Hyde Amendment, even fewer defendants will enjoy this potential financial remedy because the courts find Hyde Amendment violations only in cases where other statutes already prohibit the challenged behav-

185. Abramowitz, *supra* note 9.

186. See discussion *supra* Part I.A.

187. The potential impact of public condemnation is limited because the burden of paying attorneys' fees is placed on the agency and not the individual prosecutor. "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." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1998).

188. Simon, *supra* note 17, at 57 ("[T]he statute is a powerful tool for successful criminal defendants who have been victimized by federal government overreaching. Lawyers representing criminal defendants . . . now have at least one possible answer when their acquitted client asks, 'What next?'").

189. *See* HEARINGS, *supra* note 82, at H7791; *see also* Part II.A.

190. § 617, 111 Stat., at 2519; *see supra* notes 179 and accompanying text.

ior.[191] Even if a client has a potentially winning Hyde Amendment claim, he or she will still have to endure the hardship of criminal prosecution and prevail in that prosecution before being able to bring a claim. At that point, all the Hyde Amendment can offer is a monetary remedy.

III. THE COURTS COULD DO MORE: SETTING A CLEARER STANDARD OF CONDUCT FOR PROSECUTORIAL INVESTIGATION

Current judicial interpretation of the Hyde Amendment standard sets the same standard of conduct as pre-existing laws, regulations, and guidelines. If Congress meant to limit the Hyde Amendment to the standard set by pre-existing laws and regulations, the law would so indicate. Instead, Congress set forth an independent standard of vexatiousness, frivolousness, and bad faith and did not specifically say that only a *Brady* violation or subornation of perjury should result in an award of attorneys' fees.[192] The courts need to seize this opportunity to define what is a legitimate exercise of the charging decision and outline for federal prosecutors the extent to which they should investigate and review evidence before exercising their charging discretion.

A. Where to Begin? The Plain Meaning of "Vexatious, Frivolous, and in Bad Faith"

Most courts begin their discussion of the Hyde Amendment standard of conduct for prosecutors by defining the clear meaning of the terms.[193] The plain meaning of the phrase "vexatious, frivolous, and bad faith" connotes a prosecution "of little weight or importance," a "groundless lawsuit with little prospect of success often brought to embarrass or annoy the defendant" and "the conscious doing of a wrong because of dishonest purpose or moral obliquity."[194] "'Vexatious,' 'frivolous' and 'bad faith' are words that imply something more [than an overbroad subpoena], something malicious and sinister, designed to annoy or embarrass," as in, for

191. See discussion *supra* Part II.C.

192. *Compare* 111 Stat. 2440, 2519, *with* HEARINGS, *supra* note 82, at H7791 (listing subornation of perjury and failure to disclose exculpatory information as examples of prosecutorial conduct justifying award of attorneys' fees).

193. Welle, *supra* note 13, at 370-72 (stating that it is difficult to define the standard as the precedent does little to help).

194. BLACK'S LAW DICTIONARY 134 (7th ed. 1999) (bad faith), 677 (frivolous), 1559 (vexatious).

example, dishonesty.[195] "The essence of bad faith for purposes of this fee-shifting rule is egregious misconduct that impinges upon the integrity of the judicial process."[196] The dictionary definition of the terms, however, is not the only guidance the courts have in giving meaning to the broad language of the Hyde Amendment.

Relying on the Congressional record, courts have rejected a mere showing that the government's position was not substantially justified as sufficient to demonstrate vexatious, frivolous, or bad faith, and have required defendants to show more than that the government lacked a reasonable basis in law and fact for pursuing charges, and that a reasonable person could not think the charges were correct.[197] However, if the person bringing a Hyde Amendment claim demonstrates that the federal prosecutor's position was "made without a reasonable and competent inquiry," then the claimant will have shown that the prosecutor failed to satisfy, at a minimum, the frivolous element of the Hyde Amendment standard.[198] A reasonable and competent inquiry should include examination of evidence in the prosecutor's possession. When federal

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195. *In re* Grand Jury Subpoena Duces Tecum, 31 F. Supp. 2d 542, 544-45 (N.D. W. Va. 1998).

196. Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part Two)*, 56 LA. L. REV. 1, 57 (1995).

197. *See* discussion *supra* Part II.C. According to the United States Supreme Court, substantially justified indicates having a reasonable basis in law and in fact. Pierce v. Underwood, 487 U.S. 552, 563 (1988) (explaining that the government's position was "substantially justified" if it "had a reasonable basis both in law and in fact") (citations omitted). "'[J]ustified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." Pierce, 487 U.S. at 565 (citation omitted). This requires more than what is needed to avoid sanctions for frivolousness, but not so much as to convince one of the correctness of the position, as long as one may reasonably think the position is correct. *Id.* at 563-68.

198. Samuel J. Levine, *Seeking a Common Language for the Application of Rule 11 Sanctions: What is "Frivolous"?*, 78 NEB. L. REV. 677, 682-83 (1999) (referring to meaning of frivolous as held in Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1140 (9th Cir. 1990)) (internal quotations omitted). A frivolous claim under Rule 11 of the Federal Rules of Civil Procedure ("Rule 11") involves bringing a claim for which "it is patently clear that [the] claim has absolutely no chance of success," a claim "'that is both baseless and made without a reasonable and competent inquiry,'" or a claim with "'no factual or legal basis at all.'" *Id.* (quoting Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1140 (9th Cir. 1990), Davis v. Carl, 906 F.2d 533, 538 (11th Cir. 1990)) (internal quotations omitted), Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985). While many acknowledge that there is no clear and consistent meaning of frivolous in the Rule 11 context, one analysis suggests that in evaluating cases for frivolousness, courts should recognize that cases exist along a continuum from the clearly frivolous to the clearly non-frivolous. *Id.* at 687-89 (explaining that many cases lie in between the two extremes, so it is often difficult to determine if Rule 11 sanctions are appropriate).

prosecutors to ignore such pertinent and available evidence, they are acting frivolously and in bad faith, bringing charges that are baseless and the result of incompetent inquiries.[199] This Comment proposes that courts, through their interpretation of the Hyde Amendment standard, should require federal prosecutors to conduct an investigation broad enough to include review of evidence on hand and, by extension, to reveal evidence readily available and potentially exculpatory or risk having their prosecution deemed vexatious, frivolous, or in bad faith. Such a standard is within the plain meaning of the terms and allows courts to fill a gap in prosecutorial regulation left by pre-existing laws and regulations.

B. The Next Step: Developing a Principle to Guide Prosecutors in Exercising Their Charging Discretion

Prosecutors have very broad and autonomous discretion in the charging decision.[200] There are minimal guidelines provided by the Principles and the probable cause requirement for how extensive an investigation the prosecutor should conduct before making a charging decision.[201] Although prosecutors are expected to have a sufficient basis in law and fact before pursuing an investigation or prosecution,[202] courts and OPR have only sanctioned attorneys who have brought cases they knew had no evidentiary support.[203] As a regulation of or check on prosecutorial discretion and abuse of power, probable cause is ineffective.[204] Probable cause does not explain what step the prosecutor must reach to have gone far enough in the investigation.[205] Therefore, the prosecutor may satisfy probably cause by speaking to only one eyewitness while there may be five other eyewitnesses who would tell a different story.[206] With a little probing, the prosecutor may discover a piece of evi-

199. *Id.* (referring to Townsend v. Holman Consulting Corp. 914 F.2d 1136, 1140 (9th Cir. 1990)).

200. Moore, *supra* note 11, at 374; *see* discussion *supra* Part I.A.

201. Little, *supra* note 2, at 740-41 (stating that the ethical codes and the DOJ Manual say nothing about prosecutorial investigation and suggesting a proportionality rule to minimize the harm investigations can cause).

202. Flowers, *supra* note 24, at 938 (explaining that probable cause is different from a reasonable belief that charges can be substantiated with admissible evidence).

203. *See* discussion *supra* Part II.C.2.

204. *See* discussion *supra* Part I.B.2.

205. English, *supra* note 3, at 533 (describing two views of the probable cause standard).

206. Gleeson, *supra* note 15, at 425 ("[T]he rules of procedure in federal court permit prosecutors to seek convictions based on the uncorroborated testimony of a single accomplice witness.") (citation omitted).

dence indicating that the elements of the crime are not evident, thus making prosecution inappropriate. Recognizing the leniency of the probable cause standard, Congress specified that a grand jury indictment does not preclude a Hyde Amendment claim or a finding that the federal prosecutor violated the Hyde Amendment standard and maintained a vexatious, frivolous, or bad faith position.[207]

Courts can use the Hyde Amendment standard to push prosecutors further along the evidence continuum and require a fuller investigation before bringing charges than the probable cause and sufficiency of the evidence standards currently demand. Courts may reasonably interpret the Hyde Amendment standard of vexatiousness, frivolousness, and bad faith to require that the federal prosecutor do more than interview one witness to acquire readily available evidence and do more to ensure that the proper charges are prosecuted in light of the available evidence. The standard for investigation should set an expectation that the prosecutor must discover and review readily available evidence such as evidence on hand or reasonably acquired. The integrity of the judicial process is threatened when prosecutors ignore evidence or fail to pursue potentially exculpatory evidence. The federal prosecutor as a "minister of justice" serves both the victim and the defendant[208] and concern for the public's safety and welfare should guide the prosecutor's decision making.[209] The prosecutor cannot fully pursue justice and effectively represent both the victim and the defendant if the prosecutor fails to fully investigate before bringing charges.

For example, the prosecutor litigating the underlying criminal suit implicated in *In re 1997 Grand Jury*[210] sought an indictment on the basis of witness testimony without reviewing the available audiotape of the grand jury proceeding, which demonstrated the defendant's innocence.[211] Although, probable cause was satisfied, the court reviewing the Hyde Amendment claim should have found that the prosecution was vexatious, frivolous, and in bad faith because the prosecutor failed to examine exculpatory evidence in his possession. Exculpatory evidence was readily available and the

207. *See supra* note 100 and accompanying text.

208. United States v. Ranger Elec. Communications, 22 F. Supp. 2d 667, 673 (W.D. Mich. 1999); English, *supra* note 3, at 529-30; Flowers, *supra* note 24, at 933-34.

209. DOJ MANUAL, *supra* note 10, at 9-27.001.

210. 215 F.3d 430 (4th Cir. 2000).

211. *Id.* at 432-33.

prosecutor failed to uncover it until after the indictment because nothing required or suggested that the prosecutor should do more than establish probable cause before bringing charges.[212] The Hyde Amendment gives courts the opportunity to demand that prosecutors, in order to demonstrate probable cause for charging purposes, examine all the evidence in their possession prior to charging someone. Therefore, when circumstances similar to those addressed in *In re 1997 Grand Jury* arise, a court should find that the failure to review evidence in the prosecutor's possession constitutes a vexatious, frivolous, and bad faith prosecution. Prosecutors must examine evidence in their possession before bringing charges. Such an interpretation of the Hyde Amendment standard helps advance the ball on developing clearer guidelines for prosecutors exercising their broad charging discretion.

In the case *In re 1997 Grand Jury*, the prosecutor's reliance on a witness's memory, rather than the audio recording of the proceedings, resulted in a groundless lawsuit for which the court should have remedied the defendant. Awarding attorney's fees would have repaired some of the harm to the defendant and, perhaps more importantly, would have prevented future failures to fully investigate available evidence by setting a firm standard by which federal prosecutors should abide in conducting their pre-charging investigation. The intent of the Hyde Amendment was to "protect citizens from the devastating effects of wrongful prosecutions."[213] For the Hyde Amendment to achieve that goal, courts must give the standard some meaning independent of the requirements of other laws and regulations.

Not all cases involve a situation where diligence with respect to review of evidence on hand is enough to prevent wrongful prosecutions. Courts can extend this principle of diligence with respect to consideration of evidence on hand to require prosecutors to obtain readily available evidence having the potential to rebut the charges or demonstrate the person's innocence. Such an opportunity arose in *United States v. Truesdale* when the Fifth Circuit reversed the charges partly because the federal prosecutor's charge failed to cite the correct provision of the gambling statute.[214] In that case, a

212. English, *supra* note 3, at 532-38 (suggesting that the prosecutor's role in finding probable cause could require the prosecutor to be personally satisfied as to guilt); Morton, *supra* note 14, at 1105-07 (indicating that courts have nowhere to turn to discipline prosecutors).

213. Abramowitz & Scher, *supra* note 14, at 24.

214. United States v. Truesdale, 211 F.3d 898 (5th Cir. 2000).

more in-depth investigation would have informed the prosecutor about the lack of evidence supporting the charges, and a more informed legal position would have resulted in the prosecutor bringing the appropriate charges.[215] By demanding a fuller investigation of the legal and factual evidence by the prosecutor in *Truesdale* before pursuing prosecution, the criminal justice system could have saved vast resources and the defendants could have avoided the trauma of criminal prosecution and conviction. Instead, all the damage and harms of prosecution occurred without furthering the pursuit of justice and protecting the public safety. In the future, courts should find that a failure to inspect reasonably available evidence before charging someone constitutes vexatious, frivolous, and bad faith prosecution.

Courts must demand that federal prosecutors pursue convictions only when supported by law and facts, as indicated by a complete pre-charging investigation of evidence on hand and reasonably available evidence. The court should convey to prosecutors that failure to insure the existence of legal and factual support for charges results in a vexatious and frivolous prosecution that the court will find was brought in bad faith. The federal prosecutor should know whether the government's position lacks a foundation before bringing charges because a full investigation of evidence on hand and reasonably available evidence occurred.[216] The court's evaluation of the quality and extent of the investigation can determine what the prosecutor knew or should have known. A finding by the court that the prosecutor failed to consider readily available factual evidence or did not review the state of the law to determine if it supported the charges would indicate a vexatious, frivolous, or bad faith prosecution. Otherwise, the criminal justice system is only a tool for the powerful prosecutor to harass the less powerful criminal defendant.

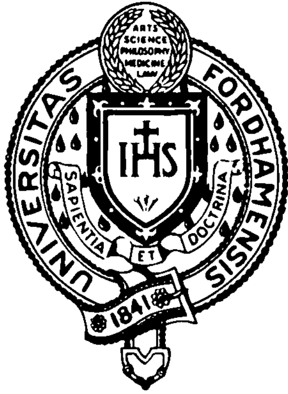
CONCLUSION

Broad prosecutorial discretion on occasion leads to abuse of power, which Congress, the courts, and DOJ try to prevent through

215. *Id. But see* United States v. Sherburne, 249 F.3d 1121, 1128 (9th Cir. 2001) (finding prosecution not vexatious when evidence of innocence comes to light after trial and no defendant presents any evidence indicating prosecutor ignored this new evidence prior to trial).

216. English, *supra* note 3, at 536-37 (explaining the view that prosecutors should do work at the beginning of the investigatory stage and convince themselves beyond a reasonable doubt).

a variety of legal and regulatory mechanisms. However, abuses of power continue to occur, and Congress passed the Hyde Amendment to address just such abuses of power. By offering criminal defendants recourse and remedy and introducing a clearer standard of conduct for prosecutors, the Hyde Amendment provides courts with an opportunity to use judicial review to guide prosecutorial discretion objectively and effectively. Courts should take advantage of this opportunity to establish a more exact standard of conduct for prosecutors conducting investigations and thereby offer defendants needed financial reimbursement after a vexatious, frivolous, or bad faith prosecution.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