NAAUSA NEWS

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EOUSA Director Responds to NAAUSA's Concerns

Ken Melson, the Director of the Executive Office for United States Attorneys, recently gave NAAUSA the opportunity to ask him about EOUSA and its response to NAAUSA's priorities. This is the first time in NAAUSA's 15-year history that a Director has agreed to such an exchange. Mr. Melson's responses to the six questions that follow illustrate why NAAUSA wrote to President Obama recommending that Mr. Melson be retained as Director of the Executive Office for U.S. Attorneys.

1. **NAAUSA:** In Congressional testimony before a House subcommittee on November 1, 2007, DOJ indicated that the Department was still examining the legislation promoted by NAAUSA that would bring the retirement benefits of AUSAs into line with those received by federal law enforcement officers and probation and pretrial services officers. What needs to happen to secure DOJ's support?

   MELSON: All proposed legislation is reviewed by the Office of Management and Budget (OMB), and OMB considers the views of agencies across the Federal government. Neither the Department in general nor EOUSA in particular can endorse legislative proposals on their own. As noted in the NAAUSA newsletter, the Congressional Budget Office concluded that the AUSA retirement legislation would cost about $94 million per year over a 10 year period. While NAAUSA and EOUSA have worked together on a proposal to meet that fiscal challenge, the Department is concerned that the proposal would not cover the costs of enhanced retirement for Department Trial Attorneys.

   I was pleased to have had the opportunity to testify before the committee and to have worked closely with NAAUSA, probably more closely than any other Director, in reviewing the retirement proposals and suggesting ways to insure that the program, if approved, is fully funded for AUSAs. I also applaud NAAUSA for its persistent efforts. I will continue to work closely with NAAUSA on this and other issues.

2. **NAAUSA:** Some AUSAs, especially those in supervisory positions, do not receive the annual salary adjustment received by most other federal employees, since AUSA pay cannot surpass the salary of a United States Attorney, and AUSA salaries have hit the cap. In many districts, the Special Agents-in-Charge of federal law enforcement agencies are paid more than the presidentially-appointed United States Attorney. Does EOUSA support lifting the cap on AUSA pay? How can the overall compensation package of AUSAs be improved? What is being done by EOUSA to secure those improvements? Has EOUSA done or is it now doing a comprehensive comparison of pay and compensation benefits or USAs, AUSAs and agents.

   MELSON: The pay for United States Attorneys and Assistant United States Attorneys is capped at Executive Level IV, currently $153,200. That cap is set by statute, 28 USC §548. We have had on-going discussions with the Attorney General's Advisory Committee (AGAC) in regard to seeking congressional approval to lift the AUSA pay cap. To alleviate supervisory compression issues immediately, EOUSA, with the concurrence of the AGAC, has instituted and encouraged pay incentive alternatives for supervisors.

   Key improvements made to address the AUSA compensation package include a recent amendment to the attorney pay plan, which allows offices to pay one-time bonuses to AUSAs as part of their Annual Performance Review, and an increase in the amount of Special Act Awards that may be given to AUSAs without EOUSA approval. The cap on the amount of Special Act Awards given to supervisors without EOUSA approval has been increased. In addition, we significantly increased the percentage of

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Revamped Website

NAAUSA has completely revamped the website to make it more user friendly. The website address is the same **www.naausa.org**. Members' suggestions on material to add to the site are encouraged.

NAAUSA NEWS

The *NAAUSA News* provides members of the National Association of Assistant United States Attorneys with information on legal, congressional and federal employee developments affecting AUSAs.

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The NAAUSA News reports on views of Assistant United States Attorneys in their capacity as members of NAAUSA and not as employees of the Department of Justice.

EOUSA Creates New Student Loan Repayment Program

Responding to NAAUSA's plea for action, the Executive Office of United States Attorneys has established a new student loan repayment program to provide greater resources to more AUSAs in need of financial assistance, while also reducing paperwork in the application process. Under the program, United States Attorney district offices will have greater control, discretion and funding to provide student loan repayment assistance to recruit or retain highly qualified AUSAs. Details regarding the program are found in USAP 3-4.537.001.

NAAUSA last year urged EOUSA to exercise available component authority to establish its own student loan repayment program. NAAUSA pointed to inefficiencies and delays in the Department of Justice-wide program, in which EOUSA had participated in the past. Responding in part to NAAUSA's encouragement, EOUSA in September announced the establishment its own student loan repayment program. This action is one more way that NAAUSA has advanced the interests of AUSAs, in this case assisting younger AUSAs saddled with thousands of dollars in law school and undergraduate loans.

Under the new EOUSA student loan repayment program, EOUSA will allocate among the 93 district offices funds for Fiscal Year 2009 for student loan repayment assistance to newly hired AUSAs and incumbent AUSAs. As before, the foremost factor governing whether student loan repayment funds will be made available in each case is the assurance that the assistance helps to recruit or retain a highly qualified AUSA. The maximum student loan repayment authorized by the federal statute governing student loan repayment assistance is $10,000 per calendar year, and $60,000 per employee. Student loan repayments made for recruitment and retention purposes will be fully funded by the district in which the AUSA is employed.

Under the new program, a district office may make available up to $10,000 in student loan repayment assistance in any calendar year available to an AUSA and total assistance may be up to $60,000. Before receiving the loan repayment assistance, an AUSA must agree to remain employed in a United States Attorney's Office or EOUSA for at least 3 years and maintain an acceptable level of performance during that time. For repayment assistance up to $30,000, the service agreement period is three years. The service agreement may require one additional year for each additional $10,000 of assistance.

An AUSA may receive student loan repayment assistance in addition to other recruitment or retention incentives. Payments may be made in a lump sum as long as they don't exceed the $10,000 per calendar year limitation on student loan repayments imposed by statute (5 U.S.C. 5379). Repayment is required for the full amount if the AUSA fails to complete the service agreement period, either because the AUSA leaves DOJ voluntarily or is separated involuntarily for reasons of misconduct or performance. Payments may be applied only to indebtedness outstanding at the time EOUSA and the AUSA enter into the service agreement. Student loan repayments are taxable, and are not subject to the limitation on aggregate pay.

Offices may use specialized funds, e.g., Health Care Fraud or Affirmative Civil Enforcement, to provide student loan repayment assistance in aid of recruitment or retention. Before making the assistance available, the district office must gain the approval of the Assistant Director, EOUSA Personnel Staff, through paperwork submitted at least 30 days prior to the requested effective date. Details on the paperwork that must be in the package being submitted for approval may be found in USAP 3-4.537.001.

NAAUSA Makes Recommendations on Key Personnel and Policy Issues to New Administration

NAAUSA did not wait for the inauguration of President Obama and the confirmation of a new Attorney General to begin to discuss a variety of important issues with the new administration and Congress. Soon after the November elections, NAAUSA reached out to the Obama transition team, and over the course of December and January provided recommendations regarding key personnel and policy issues. Through three letters, NAAUSA communicated its views to the Obama administration and the Congress about the retention and appointment of U.S. Attorneys, endorsed the nomination of Eric Holder as Attorney General, and urged the retention of Kenneth Melson as Director of the Executive Office of United States Attorneys. Each of the letters is posted on the NAAUSA website.

On December 15, 2008 NAAUSA wrote to then President-elect Obama, urging him to keep some of the top incumbent U.S. Attorneys and not release all 93 U.S. Attorneys in a wholesale fashion. NAAUSA recommended that the Administration consider the reappointment of incumbent United States Attorneys who have provided "exceptional service" during their tenure. NAAUSA alternatively recommended that the President-elect, in making new U.S. Attorney appointments, follow the practice of previous presidents by looking first to the pool of career Assistant United States Attorneys, many of whom possess the leadership skills, substantial litigation experience, and integrity to perform the job. NAAUSA's views were spotlighted in the January 7, 2009 issue of the National Law Journal.

NAAUSA also endorsed the nomination of Eric Holder to become Attorney General. In a December 18, 2008 letter to the Senate Judiciary Committee, NAAUSA praised Mr. Holder for his significant experience, qualifications and integrity. President Richard Delonis wrote, "Mr. Holder's experience as a senior-level DOJ official, federal prosecutor and municipal judge make him an exceptionally well-qualified candidate to serve as our nation's top law enforcement official … Mr. Holder possesses a deep understanding of the Department of Justice, its operations and its culture, having served as Deputy Attorney General from 1997-2001 and previously as the United States Attorney for the District of Columbia from 1993-97. During his tenure at the Department of Justice, Mr. Holder earned the wide respect of the Department's employees, including Assistant United States Attorneys and members of the law enforcement community. He became known as a strong and impartial proponent of the Department's independence and integrity. These virtues are particularly timely, given the circumstances surrounding the dismissal of some United States Attorneys over the last several years. "

Joining with the National District Attorneys Association and other law enforcement organizations, NAAUSA participated in a January 8, 2009 press conference with Senate Judiciary Committee Chairman Patrick Leahy (D-VT) to support Mr. Holder's nomination as Attorney General.

NAAUSA also urged President-elect Obama and the transition team to reappoint Kenneth Melson as Director of EOUSA. In a January 5, 2009 letter to President-elect Obama, President Delonis wrote, " … [t]he events of the past two years surrounding the removal of several United States Attorneys underscore the need to assure that the Executive Office of United States Attorneys within the Department of Justice is led by a highly skilled and experienced leader. We firmly believe that Ken Melson, the incumbent EOUSA Director, is the right person for that job. While the Attorney General ultimately possesses the legal authority to name the EOUSA Director, we take this opportunity to bring to your attention the invaluable leadership that Ken Melson has provided to the Justice Department. Since May 2007, in the wake of the United States Attorney firings, Mr. Melson has served as Director of EOUSA and, in that capacity, has earned the highest respect of United States Attorneys and Assistant United States Attorneys. He has restored integrity and confidence to the management and operations of U.S. Attorney Offices across the country."

Delonis continued, "Prior to his appointment to the EOUSA Directorship, Mr. Melson served as a federal prosecutor in the Department of Justice for nearly 24 years. He possesses the seasoned judgment and insight of the law, litigation, and the public good. Under his leadership, additional resources for U.S. Attorney operations have been secured and effective management initiatives and practices installed. Given his exemplary track record and the value of continuity in the leadership of EOUSA, we ask that you give the utmost consideration to Ken Melson's continued service as EOUSA Director."

If NAAUSA Never Existed

If NAAUSA never existed, the Executive Office of U.S. Attorneys would not have instituted a Student Loan Repayment Program that includes a number of NAAUSA recommendations, is geared specifically to AUSAs and includes a substantial increase in funding.

Member Survey

NAAUSA is developing an online membership survey to help its Board develop initiatives and priorities for the new Administration and the 111th Congress. Watch for an email with the survey link.

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payroll funds that offices can use for bonuses and awards in FY 2008 and plan to take similar action in FY 2009.

EOUSA has also worked with the U.S. Attorneys to expand and simplify the student loan repayment program, allowing a greater number of AUSAs to receive assistance in more circumstances. In addition, a study is underway to eliminate the disparity between the pay of GS attorneys (DOJ attorneys) and of AUSAs, who are on an administratively determined pay plan.

We continue to look for ways to provide more flexibility to USAs to reward AUSAs for their outstanding work.

3. **NAAUSA:** Some USAOs are now hiring new AUSAs with less experience, and a lower starting salary, than five years ago. Is this due to budget limitations or other factors? What steps are being taken to ensure that the quality and quantity of the work performed by AUSAs is not reduced by hiring less experienced AUSAs?

MELSON: While hiring practices in the USAOs vary by District, over the past few years, many AUSAs have retired, either through regular retirement or as a result of early-out retirement programs, which were implemented to deal with budget shortfalls in the lean years. Managing our payroll dollars to maximize our ability to fill new positions and vacancies in existing positions requires a workforce diversified in experience and salary.

To ensure that the quality and quantity of work performed by AUSAs is not diminished, we have planned additional courses for less experienced AUSAs at the NAC and produced more courses for Video on Demand. We are also planning training for individual districts with a high number of new AUSAs, and developing more supervisory training to assure proper supervision of new AUSAs. We also hope that the mentoring program, institute a few years ago, will be a robust program in each district.

4. **NAAUSA:** Secure parking is in short supply in nearly every USAO, endangering AUSAs who have no alternative but to park in non-secure lots often a substantial distance from the office. In fact, in a recent survey of AUSAs this issue was identified as the single most important security issue. What steps, if any, are being taken to insure that AUSAs are provided with secure parking?

MELSON: Obtaining secure parking for all of our employees is a huge challenge, but one that we have our Facilities Staff studying. One of the challenges we face is that much of the commercial space that we occupy provides parking spaces to office tenants and the general public, so it is not always possible to provide separate, secure parking spaces in those facilities. If secure parking is away from the USAO, we still face the issue of security while going to and from the parking facility. We are also working with the AGAC/OMB Security Working Group on this challenge. While secure parking may not always be available or possible to obtain, our Security Programs Branch is there to ensure that we make every effort to secure the safety of all of our employees when they are the targets of threats.

5. **NAAUSA:** AUSAs prosecute some of the most dangerous and violent criminals in the world and every year dozens of AUSAs are threatened or assaulted by those criminals. Firearms are an effective tool for personal protection. The current DOJ policy of USMS deputation to permit an AUSA to carry a firearm is slow and, in practice, dependent on the announcement of a perpetrator's intention to act. Why doesn't the Department follow the lead of some states and provide firearms carry authorization to all AUSAs who request firearms carry authority, carry high-risk caseloads, and establish they are properly trained and proficient in the use of firearms?

MELSON: We have been working with the Security Programs Staff to expedite deputation in appropriate circumstances. The implementation of automatic carry authority is a complex process and requires high-level approval plus enhanced programmatic oversight to ensure armed AUSAs and the public are protected. We are currently exploring various alternatives with the Security Programs Staff and the Security Working Group. The continued number of threats to AUSAs is of serious concern and we remain committed to reacting quickly through the Security Programs Staff to meet the safety needs of our employees. I would again urge any employee who is threatened to immediately report the threat to their supervisor so we can assist them by immediately preparing an appropriate response.

6. **NAAUSA:** As Director of EOUSA what do you see as your biggest challenges?

MELSON:

- **Recruiting, training and mentoring outstanding employees;**
- **Insuring that the U.S. Attorney community continues its high standards of ethics, professionalism, and dedication; and**
- **Securing adequate financial resources to allow U.S. Attorney Offices to fulfill their mission by recording the good work that is being done in our LIONS and USA-5 and 5A systems. EOUSA's effort to retain and obtain resources depends significantly on our ability to show Congress the fruits of our work, which includes the number of cases in various program categories and the effort being put forth in prosecution initiatives.**

DOJ Employees are Big Campaign Contributors

Department of Justice employees are ranked third, behind the Departments of State and Education, in donors to the campaign of President Barack Obama, according to the Center for Responsive Politics.

NAAUSA Works With DOJ to Stop Intrusive DOJ-OIG Legislation in Congress

It's easier to stop legislation than to pass it in Congress. NAAUSA proved that point last fall, when it succeeded in blocking a House proposal to overhaul the framework within the Department of Justice for the investigation of allegations of wrongdoing by AUSAs and other DOJ attorneys.

Under current law, the Office of Professional Responsibility within DOJ possesses the exclusive authority to investigate allegations of professional misconduct by DOJ attorneys. But a piece of legislation approved by the House of Representatives sought to broaden the authority of inspectors general across the government and threatened to expand the authority of the DOJ-OIG and diminish OPR's role.

Last summer, the House passed legislation (H.R. 928) that extended to the DOJ Office of Inspector General the authority to investigate alleged DOJ attorney misconduct, the same authority already possessed by OPR. This threatened to create an unwieldy situation in which both OPR and the DOJ-OIG could pursue duplicative or even inconsistent investigations of alleged AUSA misconduct. It also threatened to open the door to more intrusive investigations of AUSAs by the IG, under procedures that tend to be less fair than those conducted by OPR. (The infirmities of the House measure were detailed in the Sept/Oct 2008 issue of the *NAAUSA News*.)

As a result, NAAUSA aggressively lobbied the Senate and convinced its lawmakers to refrain from giving the DOJ Inspector General investigative authority over AUSAs and other DOJ attorneys. Those efforts paid off. The Inspector General reform legislation (Public Law 110-409), signed by President Bush on October 14, 2008, permitted OPR to retain its exclusive role and barred DOJ-OIG from investigating allegations of professional wrongdoing by AUSAs and Department of Justice attorneys.

While it cannot be said with absolute certainty that NAAUSA alone saved the day, it certainly can be said that had NAAUSA not actively lobbied Congress to retain the current system, it would have been far more likely that Congress would have established a duplicative and potentially unfair system that was detrimental to AUSA interests and DOJ's internal investigative processes.

When a Prosecution Comes with a Price: A Prosecutor's Primer on the Hyde Amendment

By Debra L. Roth and Peter E. Mina, Shaw, Bransford, Veilleux & Roth, P.C.

When a prosecutor pursues a case against a criminal defendant, the presumption is that the prosecution is founded on an initial finding of probable cause and is further substantiated by compelling evidence to ultimately support a guilty finding. However, when a prosecution is undertaken lacking a fundamental basis, which goes beyond a simple failing, it can constitute prosecutorial misconduct. In 1997, given the potentially high cost of criminal defense, Congress attempted to reimburse defendants who succeeded in defeating a deficient prosecution by passing the "Hyde Amendment" to the Equal Access to Justice Act ("EAJA"),[1] which allows for recovery of attorney fees by defendants in criminal cases who prevail over prosecutions which are "vexatious, frivolous, or in bad faith." The language of the Amendment provides that:

> "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 [Nov. 26, 1997], 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. To determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence ex parte and in camera (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an informant or undercover agent or matters occurring before a grand jury) and evidence or testimony so received shall be kept under seal. 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."[2]

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Below, we explain the contours of the Amendment in order to provide an understanding of the line between zealous advocacy and misconduct that could place a significant financial burden on the Department of Justice and lead to administrative action against the offending prosecutor.

I. The Legislative Origins of the Hyde Amendment.

A. The Equal Access to Justice Act and Congressional Impetus to Extend Right of Recovery to Criminal Defendants.

In 1980, the Equal Access to Justice Act was enacted to reimburse prevailing defendants in civil cases brought by the United States for their attorney fees if it cannot show that its case against the defendant was "substantially justified," unless "special circumstances make an award unjust."[3] Under the EAJA, an award of attorney fees is mandatory should the government be unable to meet its burden, however the fees are capped at a rate of $125/hr and the defendant must have a net worth of less than $2 million.[4]

In 1996, Representative Joseph McDade (R-Pa.) was acquitted after an eight-year struggle contesting unjustified bribery and racketeering charges.[5] A year later, Representative John Murtha (D-Pa.) proposed an amendment to an appropriations bill providing that members of Congress and their staff would be reimbursed for the legal expenses attributable to the successful defense of criminal charges. Going beyond initial legislative proposals that would have only covered members of Congress and their staff,[6] House Judiciary Committee Chairman Henry Hyde (R-Il) went one step further, proposing an amendment to grant attorney fees to all successful criminal defendants against unjustified federal prosecutions.[7]

B. Concerns Raised by the Department of Justice and the Resulting Compromise.

Though the Hyde Amendment was passed by the House of Representatives by an overwhelming margin, it faced stiff opposition from the Justice Department contending that the amendment would "have a profound and harmful impact on the Federal criminal justice system, by tying up scarce resources needed to pursue legitimate prosecutions" and by unnecessarily weakening prosecutors' "resolve to pursue tough but sometimes very necessary cases," include rape, child molestation and Violence Against Women Act cases that often involve reluctant witnesses and difficult evidentiary and proof matters.[8]

As a result of the Justice Department's efforts, substantial concessions were made to address these concerns. First, the standard of substantial justification was scrapped in favor of a showing that the prosecution was "vexatious, frivolous or in bad faith."[9] Further, unlike the EAJA which makes an award of fees mandatory upon a finding that a prosecution was not substantially justified, the Hyde Amendment only provided that a court "may award" fees and costs against the unsuccessful agency.[10] Importantly, the Hyde Amendment shifted the burden of proof from the prosecution to the defendant to show that the prosecutor's case was vexatious, frivolous or in bad faith.[11] Finally, the Hyde Amendment allowed prosecutors to present additional evidence ex parte and in camera in order to provide additional justification for their decision to prosecute and such evidence would be kept under seal.[12]

Despite these concessions, the Hyde Amendment does place a particular burden on an offending federal agency that is absent from the EAJA: fees and expenses awarded under the Hyde Amendment "shall be paid by the Agency over which the party prevails from any funds made available to the Agency by appropriation."[13] The Hyde Amendment expressly prohibits any additional appropriations to provide for the payout of fees and expenses to prevailing defendants.[14] Therefore, the cost of unjust prosecutions is born directly by the offending agency and not simply drawn from the Treasury.[15]

II. Prosecutorial Mistake v. Prosecutorial Misconduct

A. Judicial Interpretation: A High Bar for Criminal Defendants, Deference to Prosecutorial Judgment.

In interpreting the Hyde Amendment, courts have predominantly set a high bar for defendants to reach in order to recover fees. In doing so, courts have found that the purpose of the Hyde Amendment is not to punish prosecutorial zealousness per se, but rather to sanction misconduct.[16] The Hyde Amendment "places a daunting obstacle before defendants who seek to obtain attorney fees and costs from the government following a successful defense of criminal charges."[17]

The Hyde Amendment expressly prohibits any additional appropriations to provide for the payout of fees and expenses to prevailing defendants.[14] ***Therefore, the cost of unjust prosecutions is born directly by the offending agency and not simply drawn from the Treasury.***[15]

This high standard and acknowledgement of the right of prosecutors to zealously advocate for their clients, has led to a relatively small number of cases that have resulted in an award of fees. According to Department of Justice statistics, available online via the Department's website, while the Department filed nearly 200,000 criminal cases in federal courts as of May 2001, only 109 Hyde Amendment claims had been filed and reported to the Department in the same time frame, of which the United States won 64 and lost twelve, with one ending in settlement. In drafting this article, we conducted our own search for Hyde Amendment cases adjudicated since the Amendment's enactment in 1997. Despite the DOJ's reporting of 109 claims as of 2001, we were only able to find 62 federal district court cases available on Westlaw. Of these 62 district court cases, we found only 9 cases in which fees were awarded.[18] Thirty-seven of these 62 district court cases available on Westlaw were appealed, including 7 of the 9 cases in which fees were awarded. The courts of appeals granted fees in 7 of the 37 appeals including 4 reversals of district court denials of fees and 3 affirmances of fee awards. Of the seven appeals in which fees were awarded, two were cases in which the appellate court held that the district court applied the incorrect standard of review, one case dispatched the appeal on procedural grounds and four cases were determinations based on the facts.[19] Appeals of Hyde Amendment claims are reviewed on an "abuse of discretion" standard.[20]

B. Who Has the Right of Recovery?

In order to recover fees, a successful criminal defendant must establish standing under the statute. A criminal defendant must prove that he or she is a "prevailing party." In U.S. v. Campbell,[21] the Court relied on the Supreme Court's interpretation of a "prevailing party" under the EAJA in Buckhannon Bd. & Care Home Inc. v. West Virginia Dep't of Health and Human Res.,[22] holding that only "enforceable judgments on the merits and court ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees."[23] Further, a prevailing party is one who has "received at least some relief on the merits of his claim."[24] In Campbell, the Court found that a defendant whose indictment was dis-

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missed after completing a diversion agreement is not a prevailing party for Hyde Amendment purposes.[25] A finding that a defendant is not a prevailing party precludes an award of fees, even if the government's position was vexatious, frivolous or in bad faith.[26]

C. What is "Vexatious, Frivolous or in Bad Faith"?

After proving that the movant for fees has standing to recover,[27] the criminal defendant must meet the heightened burden of proof under the Hyde Amendment. Unlike the "substantially justified" standard of the EAJA, a criminal defendant must show that the position of the United States was either "vexatious," "frivolous" or in "bad faith."[28] Importantly, this is an affirmative burden on the defendant, not on the government to prove that its position did not meet this standard, as is required under the EAJA.[29] Further, even if the standard is met by the defendant, the award of fees remains at the discretion of the court.[30]

When assessing whether the position of the United States was vexatious, frivolous or in bad faith, the district court should therefore make only one finding which should be based on the "case as an inclusive whole."[31] The fact that only one count among many is frivolous or not frivolous is not determinative as to whether a defendant should receive an award under the Hyde Amendment. "Conduct must characterize the position of the United States. Not all vexatious, frivolous or bad faith conduct justifies an award."[32] Further, in evaluating the government's position, courts have assessed the basis for pursuing charges at the time they were filed, including consideration of evidence subsequently suppressed "provided [the government] could articulate in good faith, a reasonable position on the suppression issue."[33]

Because the statute fails to define "vexatious," "frivolous" or in "bad faith," a number of circuits have relied on dictionary definitions of the terms, with some variations, in order to analyze the sufficiency of a petition for fees under the Hyde Amendment. For example, while there is debate among the circuits as to whether the definition of "vexatious" includes a subjective component[34], most circuits agree that its definition goes beyond a showing that the prosecution's case lacked a reasonable basis, the essence of "frivolous," to the intent of the prosecutor.[35] Pursuing an aggressive legal strategy or novel legal argument will not be grounds for a claim that the prosecution was vexatious, frivolous or in bad faith.[36] In Gilbert, the defendant was denied fees when a conviction was reversed after it was determined that he was charged for a crime that had occurred beyond the statute of limitations.[37] The issue of when the statute of limitations began to run was one of first impression in the circuit and the court refused to find

bad faith in such a circumstance.[38] A frivolous position is "one lacking reasonable basis or where the government lacks a reasonable expectation of attaining sufficient material evidence by the time of trial."[39] Further, courts have continued to draw a clear line between mistake and misconduct.[40]

However, when the prosecution's case is so fundamentally without basis and is pursued in the face of substantial exculpatory evidence, the protections of the Hyde Amendment are triggered. For example, in U.S. v. Braunstein,[41] the court reversed a lower court decision denying fees when it found the government's position to be frivolous because the government had presented no affirmative evidence or testimony to support a charge of wire fraud against the defendant.[42] Further, the prosecution possessed exculpatory evidence months before seeking an indictment.[43] As a result the court found that the prosecution was pursued vexatiously or in bad faith.[44]

Similarly, in U.S. v. Adkinson,[45] the Eleventh Circuit found that when the Government improperly joined defendants in a bank-fraud conspiracy it did so vexatiously, frivolously and in bad faith because it did so "with full knowledge that it was contrary to recent and controlling precedent and this misjoinder induced the grand jury to indict the defendant."[46] The government's faulty evidence to establish joinder not only induced a grand jury to indict, but "under the circumstances of this case, this evidence obviously invited the jury to convict for conduct not, ultimately, even alleged to be a crime."[47]

In one of the most blatant examples of prosecutorial misconduct in Hyde Amendment litigation, the government conceded liability in Aisenberg.[48] Aisenberg pertained to the prosecution of two parents for murder following the disappearance of their five-month old daughter. A magistrate judge found that county detectives had made a series of false statements in obtaining a wiretap application to monitor defendants and subsequently in obtaining extensions of the application, doing so with reckless disregard for the truth.[49] Further, the government reported conversations that could not reasonably have been heard from the audio recordings and intercepted communications that were unrelated to offenses included in permissible wiretaps.[50] Finally, after redacting the unintelligible conversations the extension applications did not support probable cause to believe the Aisenbergs had committed murder.[51] Prosecutors, in relying on fraudulently obtained evidence, moved far beyond zealous advocacy to a prosecution that served to harass the defendants such that an award of fees was justified.

In evaluating the totality of the government's position, courts have recognized the complexity of the trial process and have granted latitude to prosecutors to exercise judgment and discretion without the fear of excessive post-mortem second-guessing, instead requiring a showing of misconduct in order to justify an award of fees. The decisions of federal courts have largely assuaged the initial concerns of the Justice Department by granting significant deference to the decisions of prosecutors, which are often based on forecasts of court rulings and expected testimony while setting the outer boundaries of prosecutorial conduct.

III. Conclusion

The Hyde Amendment was intended to serve as a deterrent to prosecutors from crossing the line from zealous advocacy to misconduct. The provisions of the statute have been interpreted by courts across the country as a means of punishing prosecutors who base their cases not on credible evidence and well developed legal arguments, but rather on an intent to harass the defendant through the pursuit of baseless charges. A finding of liability under the Hyde Amendment can lead not only to a financial burden on the Department of Justice through a reimbursement of attorneys fees, but also can lead to a disciplinary action as well as the potential for a Bivens claim against the individual prosecutor. In sum, knowledge of the Hyde Amendment provides a prosecutor an additional reminder of the limits of his or her authority when exercising prosecutorial discretion.

The fact that only one count among many is frivolous or not frivolous is not determinative as to whether a defendant should receive an award under the Hyde Amendment. "Conduct must characterize the position of the United States. Not all vexatious, frivolous or bad faith conduct justifies an award."[32]

1 28 U.S.C. §2412 et seq., codified at 18 U.S.C. §3006A statutory note (Pub. Law 105-119, Title VI, §617, Nov. 26, 1997, 111 Stat. 2519).

2 Id.

3 28 USC §2412 (d)(1)(A).

4 28 USC §2412 (d)(2)(A)(ii), (B)(i).

5 "Congressman Wins Acquittal on Bribery," New York Times, August 2, 1996.

6 "The Hyde Amendment: Congress Creates a Toehold for Curbing Wrongful Prosecution," The Champion 22, 23 (Mar. 1998).

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If NAAUSA Never Existed

If NAAUSA never existed, AUSAs and all other Department of Justice Attorneys would not be entitled to comp time for off-duty official travel per Public Law 109-425.

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7 143 Cong. Rec. H7791 (Sept. 24, 1997).
8 Id. at H7792-93.
9 18 U.S.C. §3006A.
10 Id.
11 Id.
12 Id.; The Hyde Amendment does not grant defendants the ability to conduct discovery as a matter of right nor establishes the entitlement to a hearing on the merits of the petition. U.S. v. Truesdale, 211 F.3d 898, 907 (5th Cir. 2000). Discovery is granted only for "good cause" shown. U.S. v. Schneider, 395 F.3d 78, 92 (2nd Cir. 2005); U.S. v. Aubrey, 290 F.Supp.2d 1215, 1220 (D.C. Mont. 2003).
13 Id.
14 Id.
19 See U.S. v. Holland, 214 F.3d 523 (4th Cir. 2000); U.S. v. DeJong, 26 Fed. Appx. 626 (9th Cir. 2001); U.S. v. Sherburne, 249 F.3d 1121 (9th Cir. 2001) (discussed infra at p.9); U.S. v. Braunstein, 281 F.3d 982 (9th Cir. 2002) (discussed infra at pp.10-11); U.S. v. Wilson, 113 Fed. Appx. 17 (5th Cir. 2004); U.S. v. Adkinson, 360 F.3d 1257 (11th Cir. 2004) (discussed infra at p. 11); U.S. v. Aisenberg, 358 F.3d 1327, (11th Cir. 2004).
20 U.S. v. Lindberg, 220 F.3d 1120, 1124 (9th Cir. 2000).
21 291 F.3d 1169, 1172 (9th Cir. 2002).
22 532 U.S. 598 (2001).
23 Id.
24 Id.
25 Id.
26 U.S. v. Sriram, 482 F.3d 956, 959 (7th Cir. 2007) (defendant who was convicted but received a light sentence is not a prevailing party); U.S. v. Beeks, 266 F.3d 880 (8th Cir. 2001) (defendant is not a prevailing party when first conviction was reversed, but defendant pled guilty at second trial).
27 Once a defendant establishes his standing as a prevailing party, he must also prove that his net worth falls short of $2 million. "A movant's bare assertion that his or her net worth falls short of two million dollars will be insufficient to satisfy this burden." A signed affidavit by the movant, however, has been considered sufficient evidence to establish that a party's net worth is below the statutory limit. U.S. v. Heavrin, 330 F.3d 723, 733 (6th Cir. 2003).
28 18 U.S.C. §3006A.
29 28 U.S.C. §2412(d)(1)(A).
30 18 U.S.C. §3006A.
31 Heavrin, 330 F.3d at 730.
32 Schneider, 395 F.3d 78, 90 (2nd Cir. 2005).
33 U.S. v. Knott, 256 F.3d 20, 35 (1st Cir. 2001); Conversely, evidence acquired after the trial cannot be considered in the court's Hyde Amendment analysis absent "a showing of something more, such as, for instance, proof that the government deliberately suppressed, or willfully ignored, relevant evidence." Sherburne, 249 F.3d at 1128.
34 Sherburne, 249 F.3d. at 1127; But see Knott, 256 F.3d at 29 (holding that definition of "vexatious" does not include an inquiry into the prosecutor's motivations, rather that the government's conduct must, "when viewed objectively, manifest an intent to harass or annoy").
35 Id; Schneider, 395 F.3d at 86, n. 3.
36 Heavrin, 330 F. 3d at 729.
37 198 F.3d at 1296.
38 Id. at 1303.
39 Heavrin, 330 F.3d at 730.
40 Truesdale, 211 F.3d at 909 (holding that a prosecutor's confusion and sloppiness is not equivalent to vexatiousness or frivolousness)
41 281 F.3d 982 (9th Cir. 2002).
42 Id. at 996.
43 Id.
44 Id.
45 247 F.3d 1289, 1292 (11th Cir. 2001).
46 Id.
47 Id.
48 358 F.3d 1327
49 Id. at 1333.
50 Id.
51 Id.

In evaluating the totality of the government's position, courts have recognized the complexity of the trial process and have granted latitude to prosecutors to exercise judgment and discretion without the fear of excessive post-mortem second-guessing, instead requiring a showing of misconduct in order to justify an award of fees.

15 As in the EAJA, fees are capped at $125 per hour unless special factors are present to justify a higher rate. Special factors, however, do not include the novelty or difficulty of the issues, undesirability of the case, the work and ability of counsel and the results obtained. The concession of liability is also not a factor. Pierce v. Underwood, 487 US 552, 573 (1988); U.S. v. Aisenberg, 358 F.3d 1327, 1340-1341, 1346 (11th Cir. 2004).
16 U.S. v. Gilbert, 198 F.3d 1293, 1304 (11th Cir. 1999) (internal citations omitted).
17 Id. at 1302-03.
18 We operated under the assumption that all of the cases in which fees were awarded would be included in Westlaw's database.

If NAAUSA Never Existed

If NAAUSA never existed, AUSAs would not be reimbursed for half the cost of professional liability insurance. NAAUSA successfully lobbied Congress in 1999 to include AUSAs in the legislation, P.L. 106-58, to authorize federal agencies to pay half the cost of professional liability insurance.

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NAAUSA Supports Kansas Firearms Bill for AUSAs

NAAUSA has endorsed legislation under consideration by the Kansas state legislature that would allow properly licensed and trained federal, state and county prosecutors to carry concealed firearms in public locations, including state courtrooms. The bill would assure government litigators the same kind of conceal-and-carry firearm protection already available to law enforcement officers. The measure was unanimously passed the Kansas Senate, 39-0, in late January and now awaits action in the Kansas House.

The legislation would amend the Kansas Personal and Family Protection Act, passed in 2006, to permit federal, state and county litigators to carry concealed firearms in certain public locations, including county courthouses, so long as they have been properly trained and licensed to own and operate a firearm. The authority to carry a firearm into a county courthouse will be particularly helpful, NAAUSA member Greg Hough (Kansas) said, given the frequency of occasions in which AUSAs must visit a county courthouse to review evidence and consult with law enforcement personnel in "adopted" cases.

Nearly fifty AUSAs in the state of Kansas are employed in United States Attorney Offices in Wichita, Kansas City and Topeka.

Kansas Senator Derek Schmidt, the chief Senate sponsor of the bill, told the Topeka Capital-Journal, "Prosecutors deal with the same group of often-unsavory characters that law enforcement officers deal with." "They have personal safety issues that are more similar to those of law enforcement officers than those of most other citizens."

In a January 14 letter to Schmidt endorsing the legislation, NAAUSA President Richard Delonis said, "The daily dangers faced by an Assistant United States Attorney are extensive and endless … It is not uncommon for a criminal defendant or an associate of that defendant to purposely seek to intimidate an Assistant United States Attorney to derail their prosecutorial effort or to seek reprisal for the conviction brought about by the same attorney … We are aware of Assistant United States Attorneys in Kansas who have been vulnerable to or specifically targeted for attack by highly dangerous and violent career offenders and organized criminal and terrorist groups … As a result of [these] vulnerabilities … the United States Attorney and Assistant United States Attorneys in the state of Kansas are subject to the threat of harm, especially because of the infirmity of Kansas law to extend to them the privilege to carry a concealed firearm in many public locations, including county courthouses, even if they are properly licensed and trained in the use of a firearm. Your legislation would help to close this gap."

Delonis continued, "It is well-recognized that firearms represent an effective personal security tool when judiciously placed in the hands of law enforcement officers and others who help to assure public safety. Your legislation responds to the increasing vulnerabilities, threats and assaults faced by federal, state and county litigators. It is narrowly and reasonably crafted, and desirably promotes and expands the assurance of public safety. We urge the Kansas state legislature to adopt it."

The text of the NAAUSA letter is available on the NAAUSA website.