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# Hyde Amendment fee awards rarely granted

## Judges rarely force feds to pay legal bills in 'bad faith' prosecutions.

Federal judges have long held the power to force the government to pay legal bills in criminal cases where government lawyers did not play fair. But the so-called "Hyde Amendment," the mechanism to recoup the cost of a defense, is rarely successful.

Mike Scarcella  
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When a federal trial judge ordered the U.S. Justice Department to pay more than \$600,000 in legal fees as a sanction for a botched drug case against a Florida doctor, prosecutors soon asked an appeals court to overturn the decision.

But a divided U.S. Court of Appeals for the Eleventh Circuit in April upheld a three-judge panel's dismissal of the fee award, saying the malfeasance in the prosecution of Ali Shaygan, a Miami doctor, did not undermine the premise that the case itself was brought in good faith.

Federal judges have long held the power to force the government to pay legal bills in criminal cases where government lawyers did not play fair. But the so-called "Hyde Amendment," the mechanism to recoup the cost of a defense, is rarely successful.

The U.S. Supreme Court this summer is expected to get a chance to assess the Shaygan ruling, a review that comes as members of Congress are looking at ways to reduce instances of prosecutorial misconduct by placing a greater burden on prosecutors to disclose favorable evidence. Criminal defense lawyers said they are hopeful the high court provides guidance to clarify the scope of the Hyde Amendment.

Shaygan's lawyer, David Oscar Markus, said he will file a petition in July targeting whether the bar the Eleventh Circuit set is too high. At issue is whether a trial judge must find an entire prosecution unreasonable, as the Eleventh Circuit said, or whether a showing of significant misconduct during the case can be enough to trigger a fee award.

"The Hyde Amendment is an extraordinary remedy for extreme cases, but it is an important deterrent and necessary check on prosecutors," said Markus of Miami's Markus & Markus. "Although obtaining fees under the Hyde Amendment should be difficult and rare, it should not be defined in such a way as to be insurmountable."

U.S. District Judge Alan Gold in Miami awarded \$601,795 in fees in 2009 in a lengthy ruling that excoriated prosecutors for their alleged misconduct against Shaygan, charged in a narcotics case rooted in the overdose death of a patient.

Gold chided the government's legal team for "win-at-all-cost behavior" that included a parallel, and secret, probe of Shaygan's defense team for possible witness tampering. Prosecutors in the U.S. Attorney's Office for the Southern District of Florida acknowledged making mistakes, but the government denied any bad faith.

"The burden on the defendant of demonstrating that a position is vexatious, frivolous, or in bad faith is very high," an assistant U.S. attorney, Robert Senior, chief of the criminal division in Miami, said in court papers in the Shaygan case. "The Hyde Amendment was specifically designed to place 'a daunting obstacle' on a prevailing defendant," who must show a

prosecution was without foundation.

### **ACTING IN BAD FAITH**

Enacted in 1997, the Hyde Amendment allows judges to award reasonable fees to defendants who are acquitted "if the position of the United States was vexatious, frivolous or in bad faith."

But appellate courts largely have shown a reluctance to force the government to pay up for a failed case, according to interviews with several criminal defense lawyers who track Hyde Amendment issues.

Federal circuit courts in California, New York and Virginia in the past three years have each upheld the denial of legal fees in cases under the Hyde Amendment.

In the U.S. Court of Appeals for the Second Circuit, a three-judge panel in 2009 refused to award more than \$195,675 to two Russian brothers who were acquitted at trial in an extortion case. The trial judge, Brian Cogan of Brooklyn, N.Y., federal district court, said the government made "critical mistakes" in bringing the case, but the Hyde Amendment, he said, doesn't sanction "poor judgment or myopia."

The appeals court in a per curiam order said that had the jury credited the government's evidence it could have found Michael and Alex Mitselmakher guilty. "We acknowledge the district court's criticism of the government's conduct in this case, criticism that the government appears to concede was warranted," the Second Circuit panel said.

The Second Circuit said in the ruling that the court has not examined the meaning of the terms "vexatious, frivolous or bad faith" as they relate to the Hyde Amendment. The statute does not define the terms.

Andrew Frisch, a defense lawyer for one of the defendants in the case, said in an interview that not every isolated instance of alleged misconduct should lead to an order forcing the government to pay defense bills. But, he said, when misconduct affects the position of the government, the ability for a defendant to win back the cost of battling the United States should be on the table.

"This is a real problem. To say judges are averse to hold prosecutors accountable is an understatement," said Frisch, a solo white-collar criminal defense lawyer in New York. "They won't do it. There is nothing holding these prosecutors in check."

### **'UNREASONABLE' PROSECUTION**

Sitting as a full court, the Eleventh Circuit last month divided sharply over whether Shaygan should be entitled to recoup legal fees. The court upheld a panel ruling from August 2011 that vacated the sanction award and refused to find that any of the prosecutors in the Shaygan case engaged in misconduct.

Judge William Pryor Jr., who was on the three-judge panel that originally heard the dispute, said Congress expected trial judges to review the overall prosecution of a defendant to determine whether it was vexatious, frivolous or in bad faith. An objective criminal case, he said, could later become "unreasonable" to prosecute.

"The Hyde Amendment is concerned with wrongful prosecutions, not wrongs that occur during objectively reasonable prosecutions," said Pryor, whom President George W. Bush appointed to the bench. The term "position of the United States," he said, refers broadly to the overall litigation, not to isolated misconduct.

Writing in support of Shaygan, Judge Beverly Martin, appointed to the circuit by President Barack Obama, said the Eleventh Circuit has now created a legal environment where judges are "mere spectators of extreme government misconduct."

Martin, joined by Judge Rosemary Barkett, said the ruling renders the Hyde Amendment "incapable of doing what Congress intended." The judge said the Eleventh Circuit now stands alone in its rule that to discern the "position" of the United States a trial judge just must only look at the foundation of the criminal case itself.

"The government violated Dr. Shaygan's rights, and now, contrary to what Congress has provided, he is left alone to pay the costs he suffered at the hands of these rule breakers," Martin said.

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