

# PHOENIX LAW REVIEW

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VOLUME 5

SPRING 2012

NUMBER 3



PHOENIX  
SCHOOL OF LAW

Published by  
Phoenix School of Law  
Phoenix, Arizona 85004

KEEPING THE DRAGON SLAYERS IN CHECK: REINING IN  
PROSECUTORIAL MISCONDUCT

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*“Society wins not only when the guilty are convicted but  
when criminal trials are fair; our system of the administra-  
tion of justice suffers when any accused is treated unfairly.”*

- Justice William O. Douglas<sup>1</sup>

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\* J.D. 2011, Phoenix School of Law. Thank you to Professor Keith Swisher, Larry Ham-  
mond, and Colin Campbell for providing valuable insight and advice.

<sup>1</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

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## I. INTRODUCTION

“Prosecutors are the most powerful actors in the American criminal justice system.”<sup>2</sup> Further, “[t]he prosecutor has more control over life, liberty and reputation than any other person in America.”<sup>3</sup> Because a prosecutor wields such tremendous power, society requires “assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.”<sup>4</sup> Few would suggest that prosecutors specifically plan to convict an innocent person.<sup>5</sup> Rather, “prosecutorial misconduct stems from a ‘win at all cost’ mentality underlying the desire to further a career, or a firm belief in the defendant’s guilt notwithstanding admissible evidence.”<sup>6</sup> Pace University law professor and expert on prosecutorial misconduct Bennett Gershman asserts that there is no accountability and that “[i]t’s systemic now, and . . . the system is not able to control this type of behavior.”<sup>7</sup>

“Appellate courts only overturn defendants’ convictions for prosecutorial misconduct when the prosecutors’ misdeeds are very serious and result in clear prejudice to the defendant.”<sup>8</sup> Yet, in the rare instance the courts reverse these cases of misconduct, the judicial opinions do not name the offending prosecutor.<sup>9</sup> In fact, “many judges go to great lengths to redact the names of misbe-

<sup>2</sup> Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1061 (2009).

<sup>3</sup> Scott Horton, *The Federal Prosecutor: A Calling Betrayed*, HARPER’S MAG., Sept. 2007, <http://harpers.org/archive/2007/09/hbc-90001135> (quoting Robert H. Jackson, U.S. Attorney Gen., Address at the Department of Justice in Washington (Apr. 1, 1940)).

<sup>4</sup> *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987).

<sup>5</sup> SECTION OF LITIGATION, AM. BAR ASS’N, *CROSSING THE LINE: RESPONDING TO PROSECUTORIAL MISCONDUCT I* (2008).

<sup>6</sup> *Id.*

<sup>7</sup> Brad Heath & Kevin McCoy, *Prosecutors’ Conduct Can Tip Justice Scales*, USA TODAY (Sept. 22, 2010, 1:31PM), [http://www.usatoday.com/news/washington/judicial/2010-09-22-federal-prosecutors-reform\\_N.htm](http://www.usatoday.com/news/washington/judicial/2010-09-22-federal-prosecutors-reform_N.htm).

<sup>8</sup> Gershowitz, *supra* note 2, at 1062.

<sup>9</sup> *Id.* at 1059; James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2126 (2000) (“[E]ven in the face of egregious behavior, orders announcing these reversals rarely single out anyone by name to bear the blame . . . .”); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 172-73 (2004) (“Indeed, few convictions are overturned by virtue of prosecutorial misconduct and, in the rare incidences of reversal, the appellate court opinions invariably neglect to identify the prosecutor by name as a matter of ‘professional courtesy.’”).

having prosecutors from trial transcripts quoted in judicial opinions” and, very often, the offending prosecutor is not disciplined for his misconduct.<sup>10</sup> In the absence of public embarrassment for prosecutors’ misdeeds, there is little external pressure from the criminal justice system to prevent prosecutorial misconduct.<sup>11</sup>

The Office of Professional Responsibility (“OPR”) was created to ensure that Department of Justice (“DOJ”) attorneys continue to perform their duties in accordance with the high professional standards expected of the nation’s principal law enforcement agency.<sup>12</sup> The OPR reports directly to the United States Attorney General and investigates allegations of misconduct relating to the exercise of DOJ attorneys’ authority to investigate, litigate, or provide legal advice.<sup>13</sup> The OPR traditionally has been lax in investigating complaints against government attorneys.<sup>14</sup> Prosecutors are well aware that professional discipline is lax and “the increasing incidence of prosecutorial misconduct suggests that it has become ‘normative to the system.’”<sup>15</sup> “The courts focus on the impact of the misconduct upon the verdict, and professional disciplinary bodies appear unable or unwilling to grapple with ethical violations by prosecutors.”<sup>16</sup>

Because discipline is inadequate and because there is a need for transparency in the naming of violating prosecutors, an Independent Prosecutorial Commission (“IPC”) should be formed.<sup>17</sup> This Commission would not only regulate and discipline offending prosecutors, but would also publish the names of the accused prosecutors, the outcome of the investigation, and the discipline exacted.

Additionally, to reduce incidents of prosecutorial misconduct and to increase public confidence in the administration of justice, Congress should

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<sup>10</sup> Gershowitz, *supra* note 2.

<sup>11</sup> See Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 68 (2005) (“Even when the appellate court reverses a conviction on grounds of prosecutorial misconduct, the prosecutor who engaged in the misconduct generally escapes any repercussions.”); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for “Brady” Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987) (“[A]t present insufficient incentive exists for a prosecutor to refrain from *Brady*-type misconduct.”).

<sup>12</sup> OFFICE OF PROF’L RESPONSIBILITY, DEP’T OF JUSTICE, ANNUAL REPORT 2009 1 (2009), available at <http://www.justice.gov/opr/annualreport2009.pdf>.

<sup>13</sup> *Id.*

<sup>14</sup> See *United States v. Hasting*, 461 U.S. 499, 522 (1983) (“ . . . futility of relying on the Department of Justice disciplinary proceedings”).

<sup>15</sup> Bennett L. Gershan, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 454 (1992).

<sup>16</sup> *Id.*

<sup>17</sup> See *infra* Part IV.A.

revise the Hyde Amendment.<sup>18</sup> Further, the DOJ should adopt and abide by the American Bar Association Model Rules.<sup>19</sup>

This article focuses on all United States Attorneys (including Assistant United States Attorneys) within the DOJ. Part II discusses and illustrates different types of prosecutorial misconduct through various examples of violations and outcomes. Part III describes existing standards and remedies for prosecutorial misconduct, and their deficiencies. Part IV presents recommendations, including the proposal to create and structure an IPC. Part V offers the conclusion that the combination of these remedies will help not only to reduce the likelihood of wrongful convictions, but also will reduce the reversal of rightful convictions.

## II. PROSECUTORIAL MISCONDUCT

Prosecutorial misconduct<sup>20</sup> “has been used to describe any ‘behavior that deliberately seeks an unfair advantage over the accused or a third person, or otherwise seeks to prejudice these persons’ rights.’”<sup>21</sup> Prosecutorial misconduct is not a remote incident by an immoral prosecutor.<sup>22</sup> Rather:

[P]rosecutorial misconduct is largely the result of three institutional conditions: vague ethics rules that provide ambiguous guidance to prosecutors; vast discretionary authority with little or no transparency; and inadequate remedies for prosecutorial misconduct, which create perverse incentives for prosecutors to engage in, rather than refrain from, prosecutorial misconduct. These three conditions converge to create uncertain norms and a general lack of accountability for how prosecutors view and carry out their ethical and institutional obligations.<sup>23</sup>

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<sup>18</sup> See *infra* Part III.D.

<sup>19</sup> See *infra* Part IV.B.

<sup>20</sup> Black’s Law Dictionary adequately defines “prosecutorial misconduct” as “[a] prosecutor’s improper or illegal act (or failure to act), esp. involving an attempt to avoid required disclosure or to persuade the jury to wrongly convict a defendant . . . .” BLACK’S LAW DICTIONARY 1342 (9th ed. 2009).

<sup>21</sup> KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2009 24 (2010), available at [http://law.scu.edu/ncip/file/ProsecutorialMisconduct\\_BookEntire\\_online%20version.pdf](http://law.scu.edu/ncip/file/ProsecutorialMisconduct_BookEntire_online%20version.pdf) (citing BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT (2d ed. 2007)).

<sup>22</sup> Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 400 (2006).

<sup>23</sup> *Id.*

### A. Selected Case Studies

When examining a prosecutor's conduct, courts first determine whether the conduct, when viewed objectively, was improper; courts then determine whether the probable impact of the conduct prejudiced the verdict.<sup>24</sup> This standard has been used to review a broad array of misconduct allegations, including those in the following cases.<sup>25</sup>

#### 1. Failure to Disclose Evidence

In July 2007, the U.S. Court of Appeals for the Ninth Circuit reversed defendant Rachel Jernigan's bank robbery conviction because the government deprived Jernigan of a fair trial by failing to disclose that a similar-looking woman, who the government had charged with other bank robberies, confessed to the robbery Jernigan had allegedly committed.<sup>26</sup>

After Jernigan was charged, arrested, and jailed in 2000 for robbing three Arizona banks, a woman whose description bore an "uncanny physical resemblance" to Jernigan robbed two more area banks.<sup>27</sup> Although the prosecution knew that a person matching Jernigan's description had robbed other nearby banks after Jernigan's arrest, the prosecution did not give this information to defense counsel before trial.<sup>28</sup>

At Jernigan's trial, the defense argued that the defendant had been misidentified.<sup>29</sup> "No physical evidence tied [her] to the robber[ies]."<sup>30</sup> However, the victimized bank teller from the first robbery identified Jernigan soon after the arrest.<sup>31</sup> Five or six months later, several other eyewitnesses also identified Jernigan as the bank robber.<sup>32</sup> Jernigan was convicted and sentenced to 168 months (14 years) in prison.<sup>33</sup> Although the government knew of the other suspect before Jernigan's trial, Jernigan did not hear about the other similar robberies until after her conviction and incarceration.<sup>34</sup>

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<sup>24</sup> United States v. Young, 470 U.S. 1, 11-12 (1985).

<sup>25</sup> See *infra* notes 26, 43, 53, 60, 66, and 76.

<sup>26</sup> United States v. Jernigan, 492 F.3d 1050, 1055, 1057 (9th Cir. 2007).

<sup>27</sup> *Id.* at 1051.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1052.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1051. The Circuit Court noted the getaway vehicle the defendant allegedly used was similar to one used by the other suspect; the banks were near each other; very few bank robbers are either female or Hispanic; and the demand notes passed to tellers had similar sloppy penmanship and used some of the same phraseology. *Id.* at 1055.

The Ninth Circuit, ruling en banc, concluded, “[t]he government has deprived Jernigan of a fair trial and placed a possibly innocent woman behind bars.”<sup>35</sup> The Court ordered a new trial,<sup>36</sup> and the government subsequently filed a motion to dismiss the case.<sup>37</sup> In the motion, prosecutors said another woman confessed to the robbery.<sup>38</sup> The prosecutors stated that although they had interviewed the other woman, they did not believe her confession because elements did not fit with witnesses’ accounts of the original crime.<sup>39</sup> Prosecutors moved for a dismissal because they believed “a jury would likely be confused” about the conflicting details.<sup>40</sup> The district court in 2008 ruled there would be no new trial and dismissed the charges against Jernigan.<sup>41</sup> The prosecutor was not named in the opinion, and there is no indication in the opinion whether any disciplinary action was taken against the prosecutor.<sup>42</sup>

## 2. Improper Attempt to Influence a Witness

In February 1999, the U.S. Court of Appeals for the Fourth Circuit vacated defendant Golding’s conviction for illegally possessing a shotgun because the prosecutor prevented witness testimony, which would have been damaging to her case, by threatening Golding’s wife with prosecution.<sup>43</sup> Further, in closing arguments, the prosecutor “abused her power” by using the wife’s decision not to testify as “indicative of the falsity of the defendant’s story.”<sup>44</sup>

Defendant Golding was charged in a Virginia federal court with being a felon in possession of a shotgun.<sup>45</sup> Although Golding’s wife was ready to testify that the shotgun belonged to her, the prosecutor threatened to prosecute Mrs. Golding for marijuana possession if she testified.<sup>46</sup> The prosecutor further exacerbated this misconduct by repeatedly referencing Mrs. Golding’s failure to testify as proof of the falseness of Mr. Golding’s story.<sup>47</sup> After the defense objection to this line of argument was overruled, the prosecutor, emboldened by the ruling, became even more expansive:

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<sup>35</sup> *Id.* at 1057.

<sup>36</sup> *Id.*

<sup>37</sup> Government’s Motion to Dismiss at 1, *United States v. Jernigan*, 492 F.3d 1050 (9th Cir. 2007) (CR-00-1010-PHX-FJM).

<sup>38</sup> *Id.* at 2.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 3.

<sup>41</sup> *Id.* at 1.

<sup>42</sup> *See generally* *Jernigan* 492 F.3d 1050.

<sup>43</sup> *United States v. Golding*, 168 F.3d 700 (4th Cir. 1999).

<sup>44</sup> *Id.* at 703.

<sup>45</sup> *Id.* at 701.

<sup>46</sup> *Id.* at 702.

<sup>47</sup> *Id.*

She didn't ever come up here and testify. . . . What wife in the world wouldn't just come right on in and tell you the truth, if that was the truth, to prevent her husband from going to prison? . . . [T]here is nothing wrong with her possessing a weapon and ammunition, and she is the one who possessed them, why didn't she just walk right up here and tell you?<sup>48</sup>

The Fourth Circuit found the idea that the prosecutor not knowing the reason for Mrs. Golding's absence as a witness was "at least highly improper."<sup>49</sup> The Court said, "the threat rose to the level of intimidation necessary to constitute an abuse of process."<sup>50</sup> The Court vacated the conviction and remanded the case for a new trial.<sup>51</sup> The prosecutor was not named in the opinion, and there is no indication in the opinion whether any disciplinary action was taken against the prosecutor for her intentional misconduct of improperly influencing a witness.<sup>52</sup>

### 3. Breaching a Plea Agreement

In September 2008, the U.S. District Court for the Northern District of Iowa reduced defendant Dicus's sentence because it determined his plea agreement was clearly violated.<sup>53</sup> Dicus, a convicted felon, was charged in Iowa after a March 2006 search of his home uncovered four gallon-sized bags of marijuana, cash from drug proceeds, ammunition, and miscellaneous drug paraphernalia.<sup>54</sup> He agreed to plead guilty to conspiracy to distribute marijuana and to being a felon in possession of ammunition, and the government agreed not to ask the court to enhance Dicus's prison term.<sup>55</sup> Later, at Dicus's sentencing hearing, the federal prosecutor asked the court to sentence Dicus as a career offender and extend the time Dicus would serve.<sup>56</sup> The district court judge found the request a "clear violation" of the plea agreement and sharply criticized the prosecution's behavior as "beyond blatant" and "egregious."<sup>57</sup> As a result of the government's serious prosecutorial misconduct, the judge sen-

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<sup>48</sup> *Id.* at 703.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 705.

<sup>52</sup> *See generally id.*

<sup>53</sup> *United States v. Dicus*, 579 F. Supp. 2d 1142 (N.D. Iowa 2008).

<sup>54</sup> *Id.* at 1144-45.

<sup>55</sup> *Id.* at 1145-46.

<sup>56</sup> *Id.* at 1147.

<sup>57</sup> *Id.* at 1149.



tenced Dicus to a prison term close to the minimum called for by sentencing guidelines.<sup>58</sup>

The prosecutor was not named in the opinion, and there is no indication in the opinion whether any disciplinary action was taken against the prosecutor for her intentional misconduct of breaching a plea agreement.<sup>59</sup>

#### 4. Harassing, Displaying Bias Toward, or Having a Vendetta Against the Defendant or Defendant's Counsel

In July 2005, the U.S. Court of Appeals for the Eighth Circuit granted a new trial for defendant Holmes because it determined the prosecutor's improper comments during rebuttal closing argument constituted reversible prosecutorial misconduct.<sup>60</sup> Holmes was charged with possession of a firearm by a felon because police, responding to a report of a disturbance at an apartment, found Holmes in possession of an un-holstered revolver.<sup>61</sup> Holmes was convicted and sentenced to 250 months in prison.<sup>62</sup>

The Court found that various comments made during trial showed that the prosecutor "was accusing defense counsel of conspiring with the defendant to fabricate testimony."<sup>63</sup> In granting a new trial, the Court ruled "[t]hese types of statements are highly improper because they improperly encourage the jury to focus on the conduct and role of [defense counsel] rather than on the evidence of the [defendant's] guilt."<sup>64</sup> The prosecutor was not named in the opinion, and there is no indication in the opinion of whether any disciplinary action was taken against the prosecutor for his intentional misconduct.<sup>65</sup>

#### 5. Improper Remarks

In February 2003, the U.S. Court of Appeals for the Eighth Circuit ordered a new trial for defendant Conrad, who was convicted of illegally possessing a

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<sup>58</sup> Order Nunc Pro Tunc at 38, *United States v. Dicus*, 579 F. Supp. 2d 1142 (N.D. Iowa 2008) (No. CR 07-32-MWB).

<sup>59</sup> See generally *Dicus*, 579 F. Supp. 2d at 1142-63.

<sup>60</sup> *United States v. Holmes*, 413 F.3d 770, 772 (8th Cir. 2005).

<sup>61</sup> *Id.* The record is unclear as to what role, if any, Mr. Holmes played in the events leading to the 911 call, reporting a disturbance at the apartment. *Id.*

<sup>62</sup> Criminal Docket at 11, *United States v. Holmes*, 413 F.3d 770 (8th Cir. 2005) (No. 4:03-cr-00163-FJG-1).

<sup>63</sup> *Holmes*, 413 F.3d at 775. The comments referred personally to defense counsel and the necessity for defense counsel to "get his stories straight." *Id.*

<sup>64</sup> *Id.* Holmes agreed to plead guilty in exchange for a shorter sentence of 120 months. *Id.*

<sup>65</sup> See generally *id.*

sawed-off shotgun.<sup>66</sup> Conrad appealed based on allegations of prosecutorial misconduct.<sup>67</sup>

In the original trial, the prosecutor made improper remarks during his opening statement, while eliciting testimony from a witness, and during his closing argument.<sup>68</sup> In his opening statement, the prosecutor indicated that an agent from the Bureau of Alcohol, Tobacco, and Firearms (“ATF”) would testify why the shotgun was regulated.<sup>69</sup> The prosecutor not only attempted to obtain from the ATF agent testimony regarding the shot pattern of the weapon, but also repeatedly argued about the reasons sawed-off shotguns are banned and the particular danger of the weapon.<sup>70</sup> In closing arguments, the prosecutor again discussed the purpose of regulating the weapon.<sup>71</sup>

The Court ruled that the prosecutor knew that the rationale for the regulation had “absolutely no relevance to the issue at trial.”<sup>72</sup> The Court held that “the tenor of the prosecution severely prejudiced the defendant,” and “worked to deprive [Conrad] of a fair trial.”<sup>73</sup> Accordingly, the Court granted Conrad a new trial.<sup>74</sup> The prosecutor was not named in the opinion, and there is no indication in the opinion whether any disciplinary action was taken against the prosecutor for his intentional misconduct.<sup>75</sup>

## 6. Improper Vouching

In January 2003, the U.S. Court of Appeals for the Sixth Circuit affirmed the conviction of defendant White because it determined statements made by prosecutors during closing arguments did not amount to reversible error.<sup>76</sup> In October 1994, police were called to investigate after an 18-wheeler collided with the corner of a motel.<sup>77</sup> With the help of a drug-sniffing dog, they discovered more than 1,000 pounds of marijuana hidden under several boxes of watermelons inside the truck.<sup>78</sup> White was the truck’s owner.<sup>79</sup> White’s son was identified on a bill of lading as the truck’s driver, but the truck was actually

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<sup>66</sup> United States v. Conrad, 320 F.3d 851, 853 (8th Cir. 2003).

<sup>67</sup> *Id.*

<sup>68</sup> *See id.* at 854.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 853.

<sup>73</sup> *Id.* at 856-57.

<sup>74</sup> *Id.* at 858.

<sup>75</sup> *See generally id.*

<sup>76</sup> United States v. White, 58 F. App’x 610, 611 (6th Cir. 2003).

<sup>77</sup> *Id.* at 612.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

driven by Frank Arnold.<sup>80</sup> White was charged with conspiracy to distribute marijuana and possession with intent to distribute.<sup>81</sup>

During closing arguments, the prosecutor explicitly vouched for the credibility of the government's witnesses, "When I put a witness on the witness stand, then, generally, I'm vouching for that witness in the sense that I am believing that his testimony will be true."<sup>82</sup>

The jury found White guilty.<sup>83</sup> The district court denied White's motion for a new trial, and the Sixth Circuit affirmed.<sup>84</sup> The Court stated, "[a]lthough we ultimately agree that the prosecutor's statements during closing arguments were improper and even inexcusable, we hold that the prosecutor's behavior did not amount to reversible error."<sup>85</sup> The Court said its decision "should not be construed as suggesting that we condone the prosecutor's unprofessional behavior in this case."<sup>86</sup> The prosecutor was not named in the opinion, and there is no indication in the opinion whether any disciplinary action was taken against the prosecutor for his intentional misconduct.<sup>87</sup>

The most remarkable part of all the above selected case studies is that, while there were various outcomes to the cases, the opinions neither mentioned any names of the offending prosecutors, nor whether any disciplinary actions were taken against them.

### III. EXISTING STANDARDS AND REMEDIES

As suggested above, "no government official in America has as much unreviewable power and discretion as the prosecutor."<sup>88</sup> While in theory the separation of powers should be a check on prosecutors, it is not.<sup>89</sup> "[J]udges who attempt to impose any meaningful standards have often been thwarted by an unresponsive hierarchy within DOJ, or by appellate courts that are constrained by a rising tide of precedent that has weakened judicial authority . . . ."<sup>90</sup>

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 611.

<sup>82</sup> *Id.* at 617.

<sup>83</sup> *Id.* at 611.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 617.

<sup>86</sup> *Id.* at 619.

<sup>87</sup> *See generally id.*

<sup>88</sup> Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 959 (2009).

<sup>89</sup> *See* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 993 (2006) ("[T]he government faces almost no institutional checks when it proceeds in criminal matters.").

<sup>90</sup> Elakan Abramowitz & Peter Scher, *The Hyde Amendment: Congress Creates a Toehold for Curbing Wrongful Prosecution*, THE CHAMPION, March 1998, [www.nacdl.org/champion/articles/98mar04.htm](http://www.nacdl.org/champion/articles/98mar04.htm).

The following are existing standards and remedies regarding prosecutorial misconduct.

A. *Office of Professional Responsibility*

The OPR was created in 1975 by the DOJ in response to the revelations of ethical abuses and misconduct by DOJ officials in the Watergate scandal.<sup>91</sup> The OPR reports directly to the Attorney General and to the Deputy Attorney General.<sup>92</sup>

The OPR has jurisdiction to investigate allegations of DOJ attorney misconduct “relat[ing] to the exercise of their authority to investigate, litigate or provide legal advice, as well as allegations of misconduct by law enforcement personnel when they are related to allegations of attorney misconduct.”<sup>93</sup> The OPR receives complaints from diverse sources, such as prison inmates, judicial referrals, private parties, and DOJ employees.<sup>94</sup>

The OPR insists that only rarely do prosecutors deliberately violate the rules.<sup>95</sup> Attorney General Eric Holder asserts that the OPR is up to its task and “does a real good job.”<sup>96</sup> Over the last decade, the OPR completed more than 750 investigations and discovered only 68 intentional violations.<sup>97</sup> The department did not identify the cases tarnished by intentional violations and “remove[d] from its public reports any details that could be used to identify the prosecutors involved.”<sup>98</sup>

However, Michael Shaheen, a respected former head of the OPR, has asserted that the OPR has “become ineffective and should close up shop.”<sup>99</sup> Further, he added, “[The OPR] is plagued by a history of delays and bureaucratic layers imposed on it . . . by the end of an investigation—two or three

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<sup>91</sup> *About the Office*, U.S. DEPARTMENT OF JUST., <http://www.justice.gov/opr/about-opr.html> (last updated March 3, 2010).

<sup>92</sup> *Id.*

<sup>93</sup> *Policies and Procedures*, U.S. DEPARTMENT OF JUST., <http://www.justice.gov/opr/polandproc.htm> (last updated Dec. 2010).

<sup>94</sup> OFFICE OF PROF'L RESPONSIBILITY, *supra* note 12, at 9.

<sup>95</sup> Heath & McCoy, *supra* note 7.

<sup>96</sup> Ryan J. Reilly, *DOJ's Oft-Criticized Watchdog Doing 'A Real Good Job' Says Holder*, TPM (Dec. 10, 2010, 12:51 PM), [http://tpmmuckraker.talkingpointsmemo.com/2010/12/dojs\\_of-criticized\\_watchdog\\_doing\\_a\\_real\\_good\\_job\\_says\\_holder.php](http://tpmmuckraker.talkingpointsmemo.com/2010/12/dojs_of-criticized_watchdog_doing_a_real_good_job_says_holder.php). *Contra* Anna Stolley Persky, *A Cautionary Tale: The Ted Stevens Prosecution*, 33 ALASKA B. RAG 1, 21-22 (2009) (statement of Joseph E. diGenova) (“[The Office of Professional Responsibility] has become known as the Bermuda Triangle of complaints against prosecutors. They go in, and they never go out.”).

<sup>97</sup> Heath & McCoy, *supra* note 7.

<sup>98</sup> *Id.*

<sup>99</sup> Ari Shapiro, *Ex-Chief Calls for Scrapping Justice Dept. Watchdog*, NPR (June 1, 2007), <http://www.npr.org/templates/story/story.php?storyId=10634336> (quoting Michael Shaheen, founding director of the OPR).

years later—you find that they’ve labored and brought forth a squeak or a mouse.”<sup>100</sup>

Recently, Attorney General Holder announced the creation of the Professional Misconduct Review Unit (“PMRU”).<sup>101</sup> The PMRU will investigate allegations of “intentional or reckless” professional misconduct stemming from OPR findings,<sup>102</sup> and will “determine whether those findings are supported by evidence and the applicable law.”<sup>103</sup> The PMRU not only will decide whether evidence and law back OPR discoveries, but also will “take over from OPR the responsibility for deciding whether the misconduct merits referral to the [offending] prosecutor’s state bar association for discipline.”<sup>104</sup>

While Attorney General Holder’s efforts may be applauded by some for his attempt to segregate and accelerate the handling of serious misconduct cases, his efforts are seriously flawed for two reasons. First, federal judges have long complained that the OPR’s “internal ethics process seemed rigged to sweep embarrassment under the rug.”<sup>105</sup> The PMRU “doesn’t appear to address those concerns, because it won’t review cases where prosecutors [*were not*] found by OPR to have committed misconduct.”<sup>106</sup> In essence, because the OPR will continue to determine the cases in which prosecutorial misconduct exists, the PMRU must rely on the flawed and ineffective system of the OPR to provide them with cases to investigate. Second, the newly appointed head of the PMRU, Kevin Ohlson, is a long-time trusted aide of Attorney General Holder.<sup>107</sup> Although this appointee may be highly regarded by Attorney General Holder, and may be well qualified, the relationship gives the strong appearance of cronyism. There is also the appearance that, to avoid embarrassment to the DOJ, he will automatically approve the findings of the OPR.

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<sup>100</sup> *Id.*

<sup>101</sup> Memorandum from Eric Holder, U.S. Attorney Gen. on Creation of the Prof’l Misconduct Review Unit to Marshall Jarret, Director, Executive Office for United States Attorneys (Jan. 14, 2011), available at <http://www.justice.gov/opa/documents/pmru-creation.pdf>.

<sup>102</sup> Andrew Ramonas, *Former Holder Chief of Staff to Lead New Misconduct Unit*, MAIN JUSTICE (Jan. 18, 2011, 9:24PM), [www.mainjustice.com/2011/01/18/former-holder-chief-of-staff-to-lead-new-misconduct-unit/](http://www.mainjustice.com/2011/01/18/former-holder-chief-of-staff-to-lead-new-misconduct-unit/).

<sup>103</sup> Holder Memorandum, *supra* note 101.

<sup>104</sup> Ramonas, *supra* note 102.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* (emphasis added).

<sup>107</sup> *See id.* (PMRU Appointee, Kevin Ohlson, was Attorney General Holder’s Chief of Staff and Counselor when Holder was Deputy Attorney General in the Clinton Administration, and also served as Holder’s spokesman in the 1990s when Holder was the U.S. Attorney for the District of Columbia.).

*B. Unwillingness of Judges to Name Offending Prosecutors*

There are a variety of reasons why judges rarely identify prosecutors by name when reversing the prosecutors' cases for misconduct. The following are some of the reasons that demonstrate why trial and appellate judges fail to name offending prosecutors.

First, failing to identify prosecutors by name occurs because some "prosecutors appear daily in front of the same judge."<sup>108</sup> This explanation applies more strongly at the trial level rather than at the appellate level.<sup>109</sup> At the trial level, prosecutors are often assigned to a particular judge's courtroom for an extended time.<sup>110</sup> "A group of prosecutors may be assigned to one judge and appear in court on every matter that is assigned to that judge's courtroom."<sup>111</sup> After each case, "the judge and prosecutor remain to handle the next case," while the defense attorney leaves after he concludes his case.<sup>112</sup> "This constant contact between the same judge and prosecutor may lead the judge to consider that prosecutor 'her' prosecutor."<sup>113</sup> However, appellate judges typically do not have relationships with individual prosecutors.<sup>114</sup> Therefore, this rationale does not apply as easily to appellate courts.<sup>115</sup>

Second, and perhaps more compelling, is that appellate judges may decline to name prosecutors because of their desire to protect their own.<sup>116</sup> Because many appellate judges were once prosecutors themselves, "judges may be reluctant to stigmatize those with whom they identify."<sup>117</sup>

A third "explanation for courts' failure to name prosecutors is simple compassion . . . . Judges might actually believe that the misconduct is an isolated episode."<sup>118</sup> The danger is that the prosecutor's misconduct "is not an isolated incident and that the prosecutor had not been castigated in judicial opinions for prior misconduct because each judge mistakenly believed the prosecutor had

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<sup>108</sup> Roberta K. Flowers, *An Unholy Alliance: The Ex Parte Relationship Between the Judge and the Prosecutor*, 79 NEB. L. REV. 251, 269 (2000); see also Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383, 398 (2007) (explaining that prosecutors are "the ultimate repeat players since they litigate all criminal cases").

<sup>109</sup> See Flowers *supra* note 108.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* In particular, judges and prosecutors are frequently in contact with one another and must depend on each and must rely on the "other's integrity, competency, and assistance." *Id.* (quoting Bennett L. Gershman, PROSECUTORIAL MISCONDUCT, 12-14 & n.71 (1996)).

<sup>114</sup> See *id.* at 253.

<sup>115</sup> See *id.*

<sup>116</sup> Gershowitz, *supra* note 2, at 1085.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 1086.

committed an aberrant mistake that did not justify dragging [his] name through the mud.”<sup>119</sup>

Finally, “there is the possibility that lower court judges disagree with the rules they are enforcing.”<sup>120</sup> “[W]hile judges may feel bound to follow precedents they do not like, they would be reluctant to excoriate prosecutors by name for disobeying rules with which they disagree.”<sup>121</sup> Yet this explanation is not convincing “[b]ecause the harmless error test gives appellate courts [relatively] little room to reverse convictions, rarely does anything short of flagrant misconduct trigger reversal . . . . Thus . . . judges who find enough prejudice to reverse a conviction are likely to be offended by the prosecutor’s clear violation of the rules.”<sup>122</sup>

The more persuasive explanation for the failure of courts to name offending prosecutors is the combination of camaraderie between judges and prosecutors, desire by judges to protect their own, and the compassion of judges for prosecutors.<sup>123</sup> “While [the] reasons [for judicial failure to name prosecutors for their misconduct] have explanatory [value], they are not adequate reasons for declining to name prosecutors who have committed misconduct.”<sup>124</sup>

### C. Harmless Error Doctrine

If prosecutorial misconduct violates a defendant’s constitutional right to a fair trial, a defendant’s conviction might be overturned on appeal. However, reversals are limited because the Harmless Error Doctrine generally precludes relief when the court finds that the prosecutorial misconduct did not fundamentally prejudice the defendant.<sup>125</sup>

The Harmless Error Doctrine was originally developed as an appellate device to “prevent matters concerned with the mere etiquette of trials [or] with the formalities and minutiae of procedure from touching the merits of a verdict.”<sup>126</sup> The test is whether it appears “beyond a reasonable doubt that the

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<sup>119</sup> Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 BERKELEY J. CRIM. L. 395, n.102 (2009).

<sup>120</sup> Gershowitz, *supra* note 2, at 1087.

<sup>121</sup> *Id.* at 1088.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> See *Rose v. Clark*, 478 U.S. 570, 576 (1986) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)) (Stating that “[W]e have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” (internal quotations omitted)).

<sup>126</sup> *Bruno v. United States*, 308 U.S. 287, 294 (1939).

error complained of did not contribute to the verdict obtained.”<sup>127</sup> This doctrine limits the application of constitutional rights so that if error occurs, but the prosecution can prove beyond a reasonable doubt that the error did not affect the judgment, that error is excused.<sup>128</sup> Although the rule was never intended to deny a fair trial,<sup>129</sup> it authorizes appellate courts to affirm a conviction when the defendant’s guilt is clear, even if he may have received an unfair trial.<sup>130</sup>

The rule, which “developed into the most powerful judicial weapon to preserve convictions,” has been a “jurisprudential fiasco” because it alters prosecutorial behavior in the most insidious fashion.<sup>131</sup> This rule “tacitly informs prosecutors that they can weigh the commission of evidentiary or procedural violations not against a legal or ethical standard of appropriate conduct, but rather, against an increasingly accurate prediction that the appellate courts will ignore the misconduct when sufficient evidence exists to prove the defendant’s guilt.”<sup>132</sup>

#### D. Hyde Amendment

In 1998, Congress—without hearings or committee reports—enacted the Hyde Amendment, which permits acquitted defendants to recover legal fees upon a judicial finding that “the position of the United States was vexatious, frivolous, or in bad faith,” unless such an award would be unjust.<sup>133</sup> Any

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<sup>127</sup> *Chapman v. California*, 386 U.S. 18, 24 (1967).

<sup>128</sup> *Id.*

<sup>129</sup> See *Bollenbach v. United States*, 326 U.S. 607, 614 (1946) (stating that “[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.”).

<sup>130</sup> See *Clark*, 478 U.S. at 588-89 (Stevens, J. concurring).

<sup>131</sup> Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 425 (1992).

<sup>132</sup> *Id.* (citing Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 439-40 (1980)).

<sup>133</sup> Pub. L. No. 105-119, Title VI, § 617, 111 Stat. 2519 (1997) (codified at 18 U.S.C. 3006A note (2000)). More fully, Section 617 provides:

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, any award to a prevailing party, other than the United States, a reasonable attorney’s fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be made pursuant to the procedures and limitations (but not the burden of proof) provided for an award under [the Equal Access to Justice Act] . . . Fees and other expenses awarded under this provision to a party shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision.



awards under this Act come out of the budget of the particular offending federal agency, normally the United States Attorney's Office.<sup>134</sup>

“[T]he strong [legislative] support of the Amendment flow[ed] from the pervasive public and congressional hostility toward law enforcement organizations existing at the time of the Hyde Amendment's passage.”<sup>135</sup> The combination of the failed prosecution of former Congressman Representative Joseph McDade,<sup>136</sup> “the tragedies of Waco<sup>137</sup> and Ruby Ridge,<sup>138</sup> [and] the accusations of FBI misconduct in the ‘File-gate’ imbroglio,<sup>139</sup> . . . coalesced to create a perception that every federal agency was out of control.”<sup>140</sup> The legislature thus was “primed to take action, any action, to restrain federal law enforcement authority in light of the pervasive vilification of government agencies.”<sup>141</sup> Consequently, “the alignment of conservatives and liberals, compounded by widespread hostility to federal law enforcement authorities, rendered impotent

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*Id.* at 55-56.

<sup>134</sup> *See id.*

<sup>135</sup> Lawrence Judson Welle, Note, *Power, Policy, and the Hyde Amendment: Ensuring Sound Judicial Interpretation of the Criminal Attorney's Fees Law*, 41 WM. & MARY L. REV. 333, 341 (1999).

<sup>136</sup> Carmine Capasso, Case Comment, *United States v. Knott*, 256 F.3d 20 (1st Cir. 2001), 36 SUFFOLK U. L. REV. 907 n.19 (2003) (citing *United States v. Gilbert*, 198 F.3d 1293, 1299-1303 (11th Cir. 1999) (noting that the statute was originally a floor amendment to appropriations legislation). “After a lengthy investigation, McDade was tried and acquitted of federal bribery and racketeering charges.” *Id.* at 1297. “Representative Hyde sponsored the Amendment and patterned the legislation after the Equal Access to Justice Act.” *Id.* at 1299-1300. Some representatives criticized Rep. Hyde for offering the Amendment without the benefit of formal hearings. 143 CONG. REC. H7786-04 (daily ed. Sept. 24, 1997) (statement of Rep. Skaggs), at \*H7791-92. Others criticized the Amendment for its potential “‘chilling effect’ on federal prosecutions.” *Id.* (statement of Rep. Skaggs), at \*H7792-93 (noting adverse impact of Amendment.).

<sup>137</sup> *See generally Waco: The Inside Story*, PBS, [www.pbs.org/wgbh/pages/frontline/waco/](http://www.pbs.org/wgbh/pages/frontline/waco/) (last visited March 2, 2012) (An FBI raid on the Branch Davidian compound near Waco, Texas culminated in the death of nearly eighty members of the religious sect.).

<sup>138</sup> *See generally The Federal Raid on Ruby Ridge, Idaho*, U.S. SENATE (Sept. 6 - Oct. 19, 1995), <http://law2.umkc.edu/faculty/projects/ftrials/weaver/weaversenate.html> (On August 22, 1992, a standoff between federal marshals and Randy Weaver, a Ruby Ridge, Idaho white separatist who failed to appear in court on weapons charges, resulted in a shootout that left Weaver's unarmed wife and fourteen-year-old son dead.).

<sup>139</sup> *See* Joe Conason, “Filegate” Judge: There's No There There—and Never Was, SALON (Mar. 10, 2010, 12:11 PM), [www.salon.com/news/opinion/joe\\_conason/2010/03/10/filegate/](http://www.salon.com/news/opinion/joe_conason/2010/03/10/filegate/); *see also FBI Files Fiasco*, CNN, <http://www.cnn.com/ALLPOLITICS/1997/gen/resources/fbi.files/> (last visited Mar. 2, 2011) (In 1996, Congressional Republicans discovered the Clinton administration “improperly collected some 700 background FBI files of Republicans,” including a former U.S. Secretary of State, and a former U.S. National Security Advisor.).

<sup>140</sup> Welle, *supra* note 135, at 341; *see also* Nancy Gibbs et al., *The FBI: Under the Microscope*, TIME, Apr. 1997 (“[W]ithout accountability, several things happen . . . Waco, Ruby Ridge, Filegate . . .”).

<sup>141</sup> Welle, *supra* note 135.

any calls for a meaningful deliberation of the practical and legal pitfalls of implementing the Hyde Amendment.”<sup>142</sup>

Opposition to the Hyde Amendment was fierce.<sup>143</sup> The Justice Department fought the Hyde Amendment from the day it was proposed.<sup>144</sup> Federal prosecutors consistently criticized the Hyde Amendment as being unduly burdensome and an unlawful interference with their discretion.<sup>145</sup> In fact, then Attorney General Janet Reno strongly urged President Clinton to oppose the passage of the Hyde Amendment.<sup>146</sup> Some members of Congress criticized the law for its potential “chilling effect,”<sup>147</sup> making prosecutors shy away from worthwhile, but difficult, cases.<sup>148</sup> But Representative Hyde asked his opponents, “[w]hat is the remedy, if not this [amendment], for somebody who has been unjustly, maliciously, improperly, abusively tried by the government, by the faceless bureaucrats who . . . get a U.S. Attorney looking for a notch on his gun?”<sup>149</sup>

Ultimately, Congress overwhelmingly approved the attorney fees measure without full consideration of its consequences.<sup>150</sup> The Hyde Amendment seemingly created “a much-needed vehicle for vindicated criminal defendants to argue that a prosecutor was abusive or that the government engaged in wrongful conduct.”<sup>151</sup> A clear message was sent: “The power wielded by prosecutors is tremendous, and in some instances, prosecutors go too far in pursuing their targets; whether motivated by ambition, vindictiveness, misplaced enthusiasm, or a blinding political agenda.”<sup>152</sup> Passage of the Hyde Amendment was hailed as a victory for defendant’s rights and a timely response to the abusive acts of government officials.<sup>153</sup>

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<sup>142</sup> *Id.* at 342 (For a discussion of the political atmosphere at the time the Hyde Amendment was approved.).

<sup>143</sup> Kevin McCoy & Brad Heath, *Not Guilty, but Stuck with Big Bills, Damaged Career*, USA TODAY, at 1A, [www.usatoday.com/printedition/news/20100928/1ahyde28\\_cv.htm](http://www.usatoday.com/printedition/news/20100928/1ahyde28_cv.htm) (last visited Mar. 2, 2012).

<sup>144</sup> *Id.*

<sup>145</sup> See Abramowitz & Scher, *supra* note 90.

<sup>146</sup> See *id.* at 24. Then Deputy Attorney General Eric Holder Jr., at an October press conference, opined on the Hyde Amendment as “drastic legislation” that could cost taxpayers a fortune in high-stakes payoffs warning that, if the Hyde Amendment became law, people such as the “three Johns” —Gotti, Hinckley, and DeLorean— “could wind up with big taxpayer checks.” *Id.*

<sup>147</sup> 143 CONG. REC. H7786-04 (daily ed. Sept. 24, 1997) (statement of Rep. Rivers), at \*H7793 (Others criticized the Amendment for its potential “chilling effect” on federal prosecutions.)

<sup>148</sup> *Id.* (statement of Rep. Skaggs noting adverse impact of Amendment).

<sup>149</sup> *Id.* (statement of Rep. Hyde).

<sup>150</sup> See Abramowitz & Scher, *supra* note 90 (The House approved the Hyde Amendment by a bipartisan vote of 340-84).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

Yet, the Hyde Amendment is inherently problematic. To receive an award under the Hyde Amendment, the defendant must qualify as a “prevailing party.”<sup>154</sup> A defendant also must show that the prosecutor’s decision to file charges was “vexatious, frivolous, or in bad faith.”<sup>155</sup> Even if these standards are met, a court may deny attorney fees if it finds that “special circumstances make such an award unjust.”<sup>156</sup> Thus, the Hyde Amendment does not permit defendants to recover fees merely when a jury or a judge finds in their favor.<sup>157</sup> If the prosecution can establish reasonable conduct, then a defendant may not recover fees.<sup>158</sup> Because the Hyde Amendment sets such a high standard and was drafted with such vague and ambiguous language, the Amendment is virtually no help to wronged individuals.

#### E. McDade Amendment

The McDade<sup>159</sup> Amendment<sup>160</sup> provides that “[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys of that State.”<sup>161</sup> The McDade Amendment “represented the culmination of years of debate among the Department of Justice, the Congress, the courts, and the

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<sup>154</sup> See *United States v. Campbell*, 134 F. Supp. 2d 1104, 1107 (C.D. Cal. 2001) (forbidding fee award under Hyde Amendment due to defendant’s failure to satisfy prevailing party status). The *Campbell* court noted that the Hyde Amendment does not expressly define the phrase “prevailing party.” *Id.* To determine whether a defendant is a “prevailing party,” the *Campbell* court noted a court must look to the totality of the circumstances. *Id.*

<sup>155</sup> See source cited *supra* note 133 (stating statutory language of Hyde Amendment).

<sup>156</sup> *United States v. Gilbert*, 198 F.3d 1293, 1302 (11th Cir. 1999).

<sup>157</sup> *Id.* at 1299 (finding defendant must show more than victory). In addition to winning the case, the defendant must also establish that there was prior prosecutorial misconduct, not merely prosecutorial mistake. *Id.* at 1304; see also *United States v. Troisi*, 13 F.Supp.2d 595, 597 (N.D. W. Va. 1998) (explaining that acquittal does not automatically entitle defendant to compensation).

<sup>158</sup> See *Troisi*, 13 F. Supp 2d at 597 (noting that the court must determine whether the government acted reasonably in deciding to prosecute). The *Troisi* court concluded that prosecutions are not vexatious when there is sufficient disputed evidence to carry an issue to the jury. *Id.*

<sup>159</sup> See *United States v. McDade*, No. 92-249, 1992 WL 151314, at \*1 (E.D. Pa. June 19, 1992) (Congressman Joseph McDade was indicted on five counts, including “conspiracy, accepting an illegal gratuity by a public official, and RICO violations.”); see also Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 213-14 (2000) (The charges were based on allegations that McDade had accepted campaign contributions in return for favorable treatment for government contractors.). McDade was ultimately acquitted and retained his seat in Congress. *Id.*

<sup>160</sup> See Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 HARV. L. REV. 2080, 2080 (2000). (Congress buried the McDade Amendment within a 920 page appropriations act passed in October 1998.).

<sup>161</sup> 28 U.S.C. § 530B(a) (2006).

private bar about both which branch of government and which level of government—state or federal—should have the authority to determine the ethics rules governing federal prosecutors.”<sup>162</sup>

Prior to the Amendment’s enactment, federal prosecutors “were required to comply with the ethics rules of the jurisdiction in which they were licensed.”<sup>163</sup> The McDade Amendment changed this by “requir[ing] prosecutorial compliance with the ethics rules of every jurisdiction in which an attorney ‘engages in that attorney’s duties,’ rather than merely with the rules of the jurisdiction in which the attorney is licensed,” and by “giv[ing] state ethics rules priority over federal policies without . . . permitting exceptions from compliance when federal policy interests so require.”<sup>164</sup> The prosecution of federal crimes could be hampered “when state ethics rules conflict . . . with federal investigative and prosecutorial techniques.”<sup>165</sup>

This Amendment has many problems, with “ambiguity being the primary issue—and is a burr in the side of the DOJ.”<sup>166</sup> The Amendment “expressly holds federal prosecutors subject to the simultaneous application of state ethical regulations and the local rules adopted by federal courts.”<sup>167</sup> Although these rules are often in alignment, federal courts have vigorously protected their authority to develop local rules to govern the conduct of the attorneys appearing before them. Federal law must be enforced consistently across jurisdictions,<sup>168</sup> and the McDade Amendment “fails to specify whether state or federal regulations control when they conflict.”<sup>169</sup>

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<sup>162</sup> Note, *supra* note 160 (citing *United States v. Hammad*, 846 F.2d 854, 857-58 (2d Cir. 1988) (“upholding federal courts’ power to enforce professional responsibility standards against government attorneys”) (citing *Ethical Standards for Federal Prosecutors Act of 1996: Hearing on H.R. 3386 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong. 2, 64-66 (1996) (statement of Rep. Carlos J. Moorhead, Chairman) (“rejecting DOJ’s claim to exclusive authority to regulate the conduct of federal attorneys”)).

<sup>163</sup> *Id.* at 2080.

<sup>164</sup> *Id.* at 2080-81.

<sup>165</sup> *Id.*

<sup>166</sup> Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3, 16 (2005).

<sup>167</sup> Bradley T. Tennis, Note, *Uniform Ethical Regulation of Federal Prosecutors*, 120 YALE L.J. 144, 153 (2010) (citing 28 U.S.C. § 530B(a) (2006)).

<sup>168</sup> Note, *supra* note 160, at 2097 (identifying an interest in national uniformity for the federal court system); see also McMorrow, *supra* note 166 at 11-13 (noting that federal courts are at least “supposedly uniform” and that “a scheme with no horizontal uniformity [is] anathema to the heart of federal court rule-makers”).

<sup>169</sup> Tennis, *supra* note 167, at 153.

## IV. RECOMMENDATIONS

The proper response to prosecutorial misconduct is “anger and concern for the damage to our country that it brings. The proper reaction is to demand accountability.”<sup>170</sup> To promote accountability and public confidence in the criminal justice system, the Executive Branch should implement various measures. The first measure is the establishment of an IPC to review and investigate the prosecutorial practices of DOJ attorneys and to deter misconduct. The second measure is for Congress to revise the Hyde Amendment and address its inherent problems.<sup>171</sup> Third, the DOJ should adopt and adhere to the American Bar Association Model Rules of Professional Conduct, with an emphasis on sections 3.8(g) and (h).<sup>172</sup>

A. *Create an Independent Prosecutorial Commission*

An IPC should be formed, by Executive Order, as a non-partisan, quasi-judicial regulatory agency of the United States government.<sup>173</sup> The IPC will be independent from the DOJ, will replace the OPR, and will report directly to the United States Attorney General<sup>174</sup> and to the U.S. Department of Justice Office of Inspector General (“OIG”).<sup>175</sup>

Currently, the Attorney General has more direct control over internal investigations of prosecutors by the OPR because the OPR reports solely to the Attorney General.<sup>176</sup> In contrast, the OIG reports jointly to the Attorney General and to Congress.<sup>177</sup> “In theory and in fact, the AG controls the OIG far

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<sup>170</sup> Horton, *supra* note 3.

<sup>171</sup> See *infra* Part IV.C.

<sup>172</sup> MODEL RULES OF PROF'L CONDUCT R. 3.8(g)-(h) (2008).

<sup>173</sup> “An executive order is a specific power of the President and the executive branch as provided by the U.S. Constitution in Article II, Section 1. This power allows the President of the United States the authority to create laws or determine how existing laws should be carried out.” Tricia Ellis-Christensen, *What is an Executive Order?* WISEGEEK, <http://www.wisegeek.com/what-is-an-executive-order.htm> (last visited March 2, 2012).

<sup>174</sup> There should be no constitutional impediment to the creation of such a regulatory commission. The prosecutor is a member of the executive branch of the federal government. The President has the power to remove prosecutors. The IPC reports to the Attorney General and the DOJ OIG, who are a part of the executive branch.

<sup>175</sup> See 5 U.S.C. app. § 3(a) (2006) (The OIG is a statutorily created independent entity within the DOJ that conducts and supervises audits, inspections, and investigations relating to the programs and operations of the DOJ.). The OIG has the authority to issue subpoenas to compel testimony or documents for investigations. *Id.* Currently, the OIG is prohibited from investigating the department's lawyers for misconduct related to their official duties. *Id.* § 8E(b)(3). Congress and the executive branch have limited oversight over the OIG. *Id.* § 5(a). The head of the OIG, the Inspector General, is selected by the president and confirmed by the Senate, and can be removed only by the president. *Id.* § 3(b).

<sup>176</sup> See DOJ OFFICE OF PROF'L RESPONSIBILITY RULES, 28 C.F.R. § 0.39.

<sup>177</sup> Reilly, *supra* note 96, at 2.

less than he controls the OPR.”<sup>178</sup> The Inspector General has much more autonomy given his unlimited term, greater resources, and the fact that he reports to both Congress and the Attorney General.<sup>179</sup> Thus, it makes sense to require the IPC to report to both the Attorney General and the OIG.

The main mission of the IPC is to eradicate incidents of, and to promote public protection from, prosecutorial misconduct. The IPC will oversee the investigation and resolution of all allegations of prosecutorial misconduct of the U.S. Attorneys. To deter misconduct, the IPC will review complaints and conduct random reviews of prosecutorial decisions. The goal is not only to increase public trust in the federal court system, but also to prevent wrongful convictions secured by prosecutorial misconduct.

### 1. Composition of the IPC

The IPC will consist of nine commissioners appointed by the President of the United States and confirmed by the Senate for seven-year terms. To ensure that the IPC remains non-partisan, no more than four commissioners may belong to the same political party. At least two commissioners will be former prosecutors or retired judges, and at least two commissioners will be members of the public. The President will designate one of the commissioners as Chairman, the IPC’s chief executive. The commissioners will have staggered terms, which will expire on October 1 of the expiring year.

The IPC will report directly to the United States Attorney General and to the OIG. The enforcement authority given by the Attorney General and the OIG will allow the IPC to bring ethical enforcement actions against federal attorneys found to have committed prosecutorial misconduct. A commissioner will serve solely at the discretion of the President.

### 2. Organization

The IPC’s functional responsibilities should be organized into three divisions: the Office of Claims Administration, the Office of Investigations, and the Office of Administrative Law. An administrator appointed by, and reporting directly to, the Chairman of the IPC will head each division.

The Office of Claims Administration will receive and review all allegations of prosecutorial misconduct. It will perform an initial review and screening to determine if the claims appear to have merit. This process will help weed out frivolous claims, claims that are vague and unsupported by evidence, and claims of convicted individuals who feel their trials were unfair based solely on

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<sup>178</sup> *Id.* (statement of former DOJ Inspector General, Michael Bromwich).

<sup>179</sup> *See id.*

the fact of their conviction. If the claim is deemed to have merit, it will be forwarded to the Office of Investigations.

The Office of Investigations will perform an extensive inquiry into the allegations of the prosecutorial misconduct. This office may request additional information from the complainant or request a written response from the attorney against whom the allegation was made, and it will review other relevant materials, such as pleadings and transcripts. At the completion of the inquiry, a comprehensive report will be forwarded to the Office of Administrative Law.

The Office of Administrative Law will determine whether a hearing is warranted, or whether the case should be dismissed, based on the investigative findings. This department will be authorized to conduct hearings. Findings and recommendations, whether favorable<sup>180</sup> or unfavorable to the accused prosecutor, will be forwarded to the full commission of the IPC for final disposition. If the accused prosecutor does not agree with the findings and recommendations of the Office of Administrative Law, he will be given the opportunity to appeal the findings directly to the IPC commissioners.

The IPC will review the findings and recommendations from the Office of Administrative Law. Based on this report, the commissioners will decide what, if any, actions should be taken.

### 3. Duties and Responsibilities

The IPC duties and responsibilities will be similar to “[t]he Misconduct Review Board, originally proposed but ultimately excluded from the final version of the Citizens Protection Act [of 1998].”<sup>181</sup> The proposal defined ten specific acts of misconduct:

- (1) in the absence of probable cause seek the indictment of any person;
- (2) fail promptly to release information that would exonerate a person under indictment;
- (3) intentionally mislead a court as to the guilt of any person;
- (4) intentionally or knowingly misstate evidence;
- (5) intentionally or knowingly alter evidence;
- (6) attempt to influence or color a witness’ testimony;
- (7) act to frustrate or impede a defendant’s right to discovery;
- (8) offer to provide sexual activities to any government witness or potential witness;
- (9) leak or otherwise

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<sup>180</sup> See Office of Professional Responsibility, U.S. Department of Justice, Annual Report 2008 10, n.6, <http://www.justice.gov/opr/annualreport2008.pdf> (follow 2008 hyperlink under OPR Annual Reports) (The findings may determine the attorney made an excusable error. An excusable error is an error made “despite the exercise of reasonable care under the circumstances.”).

<sup>181</sup> Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 463 (2001) (citing H.R. 3396, 105th Cong. § 201(a) (1998)).

improperly disseminate information to any person during an investigation; [or] (10) engage in conduct that discredits the [DOJ].<sup>182</sup>

The IPC will have the ability to issue subpoenas to compel testimony or documents for investigations. The IPC will not only report its findings and conclusions in individual investigations, but it also will provide advice to the Attorney General and the OIG concerning the need for changes in policies and procedures that become evident during the course of its investigations.

#### 4. Disciplinary Actions

The IPC will have the authority to “impose an appropriate penalty, including probation, demotion, dismissal, referral of ethical charges, loss of pension or other retirement benefits, suspension, or a referral to a grand jury for possible criminal prosecution.”<sup>183</sup> Additionally, the IPC shall submit findings of ethical violations to the State Bar of the state in which the misconduct occurs.<sup>184</sup>

#### 5. Public Records

The findings of the IPC, whether favorable or unfavorable, will become public record. The information will be available immediately upon electronic filing by the IPC on an online website to allow public access to the records.<sup>185</sup> Naming offending prosecutors likely will have a chilling effect on overzealous prosecutors who may knowingly cross the line and violate a defendant’s constitutional rights.

#### 6. Random Review of Cases

The IPC will review complaints brought to its attention by defendants, judges, and the public. Further, it “[will] conduct random reviews of routine prosecution decisions.”<sup>186</sup> These random reviews will be conducted by the IPC reviewing a “selection of the closed files in a particular prosecution office and an examination of the file entries for each decision.”<sup>187</sup> The IPC will “closely

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<sup>182</sup> *Id.* (citing H.R. 3396, 105th Cong. § 201(a) (1998)).

<sup>183</sup> *Id.* (citing H.R. 3396, 105th Cong. § 201(b) (1998)).

<sup>184</sup> *See generally infra* Part IV.E.

<sup>185</sup> The access will be modeled after the now existing online Public Access to Court Electronic Records (PACER) system, but will not require consumer registration. *See generally Public Access to Court Electronic Records*, PACER, <http://www.pacer.gov> (last visited Feb. 27, 2012).

<sup>186</sup> Davis, *supra* note 181, at 463.

<sup>187</sup> *Id.*



examine charging and plea bargaining decisions and look for compliance with ABA's prosecution standards."<sup>188</sup>

This random review permits "affirmative investigations to discover bad practices, and its random nature is more likely to deter arbitrary prosecution decisions . . . [and] also serve the purpose of commending first-rate prosecution offices, thereby enhancing public confidence in offices that perform their responsibilities properly."<sup>189</sup>

*B. The DOJ to Adopt American Bar Association Model Rules of Professional Conduct*

Prosecutors, as are all lawyers, are subject to some version of professional regulation in every state. Violations of these ethical rules could expose a prosecutor to discipline from the legal profession through state bar associations or disciplinary committees . . . [who] have the power to sanction prosecutors and impose sanctions as serious as disbarment.<sup>190</sup>

However, because there are likely variations between the American Bar Association ("ABA") Model Rules ("Model Rules") and the ethical rules adopted by each state, the DOJ should adopt the ABA Model Rules<sup>191</sup> in an effort to achieve uniform conduct in all offices of federal attorneys, and to allow the IPC to have a single set of rules to regulate.<sup>192</sup> In particular, the DOJ should observe ABA Rules 3.8(g) and (h).<sup>193</sup>

In February 2008, the ABA amended the Model Rules to include subsections (g) and (h) to Rule 3.8.<sup>194</sup> The subsections "impose new ethical duties on a prosecutor who learns of evidence that casts doubt on a conviction."<sup>195</sup> Specifically:

[W]hen a prosecutor "knows of new, credible and material evidence creating a reasonable likelihood" that a convicted

<sup>188</sup> *Id.*; see also *infra* Part IV.B.

<sup>189</sup> Davis, *supra* note 181, at 464.

<sup>190</sup> Tracey L. Meares, *Rewards For Good Behavior: Influencing Prosecutorial Discretion and Conduct With Financial Incentives*, 64 *FORDHAM L. REV.* 851, 898 (1995).

<sup>191</sup> It has been suggested that there should be a "uniform national codification of ethical rules specifically tailored to the demands of federal prosecutors." Tennis, *supra* note 167, at 148. However, because the ABA Model Rules already exist, there is no need to reinvent the wheel.

<sup>192</sup> If any special rules are needed because of national security interests, these additional rules will be submitted to and approved by the IPC.

<sup>193</sup> MODEL RULES OF PROF'L CONDUCT R. 3.8(g)-(h) (2008).

<sup>194</sup> MODEL RULES OF PROF'L CONDUCT, Adopted by House of Delegates (Feb. 11, 2008).

<sup>195</sup> *Id.*

defendant is innocent of the crime, the prosecutor must ‘promptly disclose’ such evidence to the court. Furthermore, if the conviction [occurred] in the prosecutor’s jurisdiction, the prosecutor must both inform the defendant and conduct further investigation. If the conviction was outside the prosecutor’s jurisdiction, the prosecutor must notify the court or another appropriate authority . . . in the jurisdiction that obtained the conviction. [Furthermore,] if the information consists of “clear and convincing evidence” establishing that a convicted defendant in the prosecutor’s jurisdiction did not commit the offense, the prosecutor must “seek to remedy the conviction.”<sup>196</sup>

Despite the ABA’s recommendation, only two states, Idaho and Delaware, have adopted the amendments to Rule 3.8 as is, and three states, Colorado, Tennessee, and Wisconsin, have adopted a modified version of the rule.<sup>197</sup> “Currently, due to the lack of an ethical requirement under most states’ rules of professional conduct, prosecutors act out of their own benevolence rather than an ethical obligation when reopening questionably decided cases.”<sup>198</sup>

The DOJ should observe Model Rules 3.8(g) and (h) for three principle reasons:<sup>199</sup>

First, wrongful convictions occur under the current system, and 3.8(g) and (h) would provide recourse for wrongfully convicted defendants who wish to challenge their convictions with new evidence. Second, the proposed rules are consistent with the current codified duties of prosecutors. Finally, the amendments are necessary to maintain public confidence in the administration of justice.<sup>200</sup>

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<sup>196</sup> Michele K. Mulhausen, Comment, *A Second Chance at Justice: Why States Should Adopt ABA Model Rules of Professional Conduct 3.8(g) and (h)*, 81 U. COLO. L. REV. 309, 311-12 (2010) (citing MODEL RULES OF PROF’L CONDUCT R. 3.8(g)-(h) (2008)).

<sup>197</sup> See CPR POLICY IMPLEMENTATION COMM., AM. BAR ASS’N, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT (2010), [www.americanbar.org/content/dam/aba/migrated/cpr/pic/3\\_8.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/3_8.authcheckdam.pdf). The Rules Committees in eleven jurisdictions are studying the amendments to the rule: Alaska, California, District of Columbia, Hawaii, Nebraska, New Hampshire, New York, North Dakota, Pennsylvania, Vermont, and Washington. *Id.* (New York put the rules in the comments, but only the New York State Bar Association, not the court, adopts the comments.).

<sup>198</sup> Mulhausen, *supra* note 196, at 309.

<sup>199</sup> *Id.* at 322.

<sup>200</sup> *Id.*

### C. *Revise the Hyde Amendment*

Congress should hold hearings and make policy findings to revise the Hyde Amendment. That “the application of attorney fees in the criminal law makes sense” is the basic premise of the Hyde Amendment.<sup>201</sup> “The need advanced in the floor debate by Representative Hyde was speculative and vague . . . [resulting in] an impossibly broad law that seemingly reached the entire universe of governmental misconduct.”<sup>202</sup> Upon completion of the recommended hearings, Congress will better understand the problem and “will be in a better position to enact an efficient and balanced remedy.”<sup>203</sup>

Next, because the statute is vague and ambiguous, “Congress should narrow the statute’s application to those specific types of misconduct that it finds most warrant the attorneys’ fees remedy, including, for example, the failure to disclose exculpatory evidence.”<sup>204</sup> To give courts guidance in the application of the statute, Congress should define important terms such as “vexatious,” “frivolous,” “bad faith,” and “prevailing party,”<sup>205</sup> and Congress should “expressly [adopt] an objective or subjective standard for triggering awards.”<sup>206</sup>

## V. CONCLUSION

Current remedies for prosecutorial misconduct are largely ineffective because of inadequate discipline of offending prosecutors, the lack of transparency in the naming of violating prosecutors, and the lack of uniform ethical rules. This Article argued that forming an IPC to regulate federal prosecutors will help reduce the incidents of prosecutorial misconduct by publicly disclosing the names of prosecutors charged with misconduct, the details of the misconduct, and the discipline imposed. The adoption of the ABA Model Rules will require all federal prosecutors to abide by one set of ethics rules and will achieve uniformity between prosecution offices. In addition, revising the Hyde Amendment will provide those harmed by prosecutorial misconduct a remedy to minimize the financial impact of the harm.

The implementation of the recommendations discussed in this Article will reduce the incidents of prosecutorial misconduct, but it also will restore the public’s faith and confidence in the justice system. Individuals can then rest assured, should they ever be charged with a violation of law, that an overzeal-

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<sup>201</sup> Welle, *supra* note 135, at n.233.

<sup>202</sup> *Id.* at 379.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 380.

<sup>205</sup> Pub. L. No. 105-119, Title VI, § 617, 111 Stat. 2519 (1997) (codified at 18 U.S.C. 3006A note (2000)).

<sup>206</sup> Welle, *supra* note 135.

ous or unethical prosecutor will not violate their constitutional rights. As Justice George Sutherland so eloquently stated:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.<sup>207</sup>

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<sup>207</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935).