

On the Taxpayer's Dime: Indemnity Rights for Public Officials Accused of Crimes

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Under the common law, a public official generally was not entitled to mandatory indemnification of legal fees if accused of a crime. However, over the past few decades, a majority of states have dealt with this issue through the enactment of statutes that discretionarily permit the indemnity of legal fees for public officials accused of a crime if certain criteria are met. In many states, a public official is entitled to the advancement and/or reimbursement of legal fees if the acts or omissions that gave rise to the criminal charges are (or were) within the scope of his or her employment and the official ultimately was not convicted. The same prerequisites required by state statutes are prevalent in the federal context as well. However, in the federal context, there is an additional method that allows the reimbursement of legal fees if an official was investigated by an Independent Counsel but not indicted. Nonetheless, public officials accused of crimes do not always have to rely on public monies to fund their criminal defense, as many have used private defense funds and, in some instances, campaign funds to pay for their legal fees.

Advancement and/or Reimbursement of Legal Fees

The majority of state statutes that allow for the advancement and/or reimbursement of legal fees to public officials do not condition indemnity rights on whether the official is indicted, provided that the official meets specific, statutory criteria. A number of states allow for the advancement of legal fees and include an obligation that the official repay the fees advanced to him if he is later convicted.¹ In cases where the fees are not advanced, the majority of state statutes allow for the reimbursement of legal fees if the official is ultimately acquitted.

Pre vs. Post Indictment Indemnity Rights

The majority of states do not differentiate between pre- and post- indictment indemnity rights. As discussed more fully below, states usually only condition a public official's right to indemnity on whether the official was acting within the scope of her employment and whether the official is ultimately acquitted. In the federal context, when an official wishes to be reimbursed for legal fees in connection with an Independent Counsel (IC)² investigation, reimbursement is allowed only if the official is not indicted. On the other hand, if the Justice Department elects to represent the public official in a criminal proceeding, the prerequisites for acquiring such representation are very similar to ones required by state statutes.

If a public official is investigated by an IC, but not indicted, the official may obtain reimbursement for some of his legal fees.³ In 1978, Congress passed the IC statute, which "authorized the appointment of an IC to investigate allegations that the President or certain other high-level government or presidential campaign officials may have committed a crime."⁴ Because of the substantial legal fees typically incurred by officials investigated by ICs, Congress passed a reauthorization bill that allowed for the reimbursement of attorneys' fees.⁵ The bill allowed only for the reimbursement of fees if the official can show that, as a target of an IC investigation,⁶ he: (1) was not indicted; (2) was the "subject" of the investigation⁷, and (3) would not have incurred those fees "but for" the IC statute.⁸ Thus, under the reauthorization bill, witnesses and immunized subjects are not covered, nor are the fees of subjects that are ultimately exonerated or acquitted.⁹

Under the reauthorization bill, if "a valid indictment has been issued against a person," the public official will be "ineligible for reimbursement *even if* [the public official was] later acquitted . . . or if the indictment was dismissed."¹⁰ Nonetheless, in a case where a former high government official was indicted and convicted, but on appeal the indictment was held invalid, the court held that reimbursement of legal fees under the IC statute was proper.¹¹ The court reasoned that "it [is]

highly implausible, even under a strict construction of [the statutory] language, that ... [the condition precedent of “no indictment is brought”] intended an *invalid* indictment to defeat an award the same as a *valid* indictment.”¹²

Another method where an official accused of a crime can seek reimbursement and/or advancement of his legal fees in the federal context is through representation by Justice Department attorneys.¹³ Under 28 C.F.R. § 50.15, the Justice Department may provide legal representation to a federal employee criminally charged in his individual capacity. However, such representation is conditioned on the official’s “actions for which representation is requested” appearing “to have been performed within the scope of the employee’s employment.”¹⁴ In addition, the Attorney General must find that providing the representation “would otherwise be in the interest of the United States.”¹⁵ This requirement has been construed as limited to situations where the “executive branch wants to establish the legality of the employee’s conduct,” or where the executive branch wants “to ensure that the threat of outside litigation does not deter employees from vigorously performing their duties.”¹⁶

It is important to note, however, that representation is generally not available in federal¹⁷ criminal proceedings.¹⁸ In federal criminal prosecutions, the interests of the United States are adverse to those of the employee seeking indemnity, making such representation inappropriate.¹⁹ In addition, because representation of federal employees is undertaken to protect the interests of the United States, and not the “personal interests” of the employee, representation in federal proceedings does not advance the interests of the United States.²⁰ Still, the Attorney General can provide representation in federal criminal proceedings after considering, among other factors, “the relevance of any non-prosecutorial interests of the United States.”²¹ If representation is authorized, the Attorney General determines whether “representation by Department attorneys, retention of private counsel at federal expense, or reimbursement to the employee of private counsel fees” is the more appropriate indemnity method under the circumstances.²²

Advancement of Fees

Most states rely on statutes to impose a duty to defend and/or advance legal fees for officials accused of crimes.²³ However, with many of these statutes, the duty arises only under limited circumstances²⁴ and often on a discretionary basis.²⁵ In Michigan, for example, section 691.1408 of the Government Tort Liability Act provides that a governmental agency *may* “pay for, engage, or furnish the services of an attorney to advise the officer or employee as to [a criminal] action, and to appear for and represent the officer or employee in the action” if the action is “based upon the conduct of the officer or employee in the course of employment,” or “if the employee or officer had a reasonable basis for believing that he or she was acting within the scope of his or her authority at the time of the alleged conduct.”²⁶

Similarly, Florida imposes a duty on a government agency to provide a defense for a public official accused of a crime. Section 111.065 of Florida’s Law Enforcement Fair Defense Act provides that an “employing agency shall provide an attorney and pay the reasonable attorney’s fees and costs for any officer in a criminal action ... if the employing agency determines that the officer’s actions that gave rise to the charges” arose “within the scope of the officer’s duties,” and “were not acts ... which constituted a material departure from the employing agency’s ... policies and procedures.”²⁷ Although Florida makes it mandatory for an employing agency to pay for the reasonable costs of an attorney for a law enforcement officer accused of a crime, it does not give the same rights to any other public officials or employee. Section 111.07, which provides for the advancement and/or reimbursement of legal fees incurred by “public officers, employees, or agents” of the “state, county or municipality” does so only in civil actions and not criminal actions.²⁸ Nonetheless, public officials in Florida have been advanced and/or reimbursed legal fees in criminal actions pursuant to the common law principle of indemnity.²⁹

Reimbursement of Legal Fees incurred in successful defense

Many states, through statute or common law, allow for the reimbursement of legal fees incurred by a public official in a criminal defense.³⁰ In a number of states, a government entity may reimburse an official for legal fees incurred if the official was successful in his or her defense against the criminal charges.³¹ However, states have different interpretations of when a party is “successful” for purposes of determining whether the public official is entitled to reimbursement. For example, a New Jersey court held that its indemnity statute did not authorize recovery when an officer’s appeal resulted in reversal of four out of six criminal charges and reduced his dismissal to a suspension.³² In addition, dismissal of charges pursuant to a plea agreement has been held not to constitute a favorable result for purposes of meeting the statutory requirements for reimbursement.³³ On the other hand, a small number of states do not allow for any reimbursement of legal fees incurred by public officials in their defense against criminal charges, regardless of whether the official ultimately prevails.³⁴

Use of Private Defense Funds and Campaign Funds to Finance Legal Defense

Use of Campaign Funds for Legal Fees

Public and elected officials have routinely used their campaign funds to pay for legal expenses.³⁵ Many commentators view the practice as a “misappropriation of funds that contributors intended to be spent on campaigning.”³⁶ Although the Federal Election Commission (FEC) has authorized candidates to use campaign funds to pay legal fees in certain situations closely connected to the campaigns themselves, the FEC, over the years, has put limitations on the use of such funds.³⁷ In 1997, the FEC restricted the payment of legal fees to only those matters relating “directly to allegations arising from campaign or officer holder activity.”³⁸

A number of states impose the same federal restrictions on officials seeking to use campaign funds for defense of criminal charges. For example, in Massachusetts, a public official may use campaign funds to defend against a criminal proceeding if the matter arose “solely as a function of an individual assuming and performing necessary duties and responsibilities as incumbent office holder, candidate, or treasurer of a political committee.”³⁹ On the other hand, many states do not allow office holders to use campaign funds to finance their legal fees incurred in defending a criminal action. For instance, in New Jersey, the Election Law Enforcement Commission permits the use of campaign funds for legal fees only if they are incurred in certain civil actions, but not for defending against criminal charges.⁴⁰ Similarly, the Ohio Elections Committee (“OEC”) allows the payment of attorney fees with campaign funds for representation in declaratory actions or actions brought before the OEC itself, but not for defense of criminal charges.⁴¹ The OEC does, however, allow for the reimbursement of legal fees in defending criminal charges if the indictment is ultimately dismissed for failure to state a prosecutable violation.⁴²

Because the use of campaign funds for legal defense purposes often is restricted, many public officials turn to legal defense funds to finance their legal expenses. Over the past decades, public officials have raised millions of dollars in private donations to fund their legal expenses.⁴³ Members of Congress, as well as executive branch officials, have used legal defense funds.⁴⁴ The obvious reason for the establishment of legal defense funds is the increased cost of litigation, as well as the strict requirements of indemnity statutes.

In 1989, Congress passed the Ethics Reform Act.⁴⁵ With this Act, Congress sought to create uniform gift rules across all branches of government.⁴⁶

The Executive Branch

The Ethics Reform Act allows executive branch employees to establish legal defense funds. However, the Act restricts the making of donations to these funds by “personal friends or from

non-prohibited sources.⁴⁷ Nonetheless, certain loopholes allow public officials to establish legal defense funds that are subsidized by sources other than those specified by the Act. For example, when President Clinton faced substantial legal fees as a result of the Whitewater allegations and the Paula Jones sexual harassment suit, he was able to establish a viable legal defense fund despite these restrictions.⁴⁸ The Office of Government Ethics (“OGE”) advised President Clinton of an exception to the gift rules that would allow him to accept donations from any source.⁴⁹

Another loophole that has been used by members of the executive branch to establish legal defense funds is also endorsed by the OGE. According to the OGE’s General Counsel, “if a legal defense fund is set up by a third party on behalf of an employee (rather than by the employee herself), the donations are not considered gifts at all.”⁵⁰ Thus, many Executive Branch officials are able to avoid the Ethics Reform Act’s restrictions by having others set up a legal defense fund on their behalf.⁵¹

The Federal Legislative Branch

Legal defense funds are subject to U.S. House of Representatives gift rules, which restrict the amount of a donation to \$250 per year from a single person.⁵² However, House members are allowed to get a written waiver of this restriction from the Committee on Standards of Official Conduct, provided that certain conditions are met.⁵³ The main condition that must be satisfied is that “no individual or organization may contribute more than \$5,000 in a single year.”⁵⁴ In addition, the Committee restricts the use of the funds only to the payment of legal expenses.⁵⁵ Unlike state and federal indemnity statutes, legal defense funds are not restricted to legal expenses that arise out of a “member’s ‘performance of official duties,’” and can be used for legal expenses incurred in a wholly private capacity.⁵⁶

The U.S. Senate, on the other hand, does not treat legal defense funds as gifts. The Senate Select Committee on Ethics allows Senators to establish legal defense funds provided that the expenses relate to or arise “by virtue of his or her service in or to the United States Senate.”⁵⁷ This restriction, however, is not “strictly construed.”⁵⁸ Further, the Ethics Committee allows donations of up to \$10,000 per individual or organization per year.⁵⁹ However, the Ethics Committee is more restrictive than the House as to who may donate to a Senator’s legal defense fund. The Committee does not allow donations from corporations, labor unions, foreign nationals, Senate officers, and registered lobbyists.⁶⁰

The Impact of U.S. v. Stein

In *U.S. v. Stein*, a highly publicized federal court decision, the Second Circuit found that federal prosecutors violated the U.S. Constitution by pressuring a corporation, which was under investigation, to refuse to advance legal fees to its employees.⁶¹ In reaching this conclusion, the court held that the defendant employees who were not advanced legal fees by their employers were denied their right to “adequate assistance of counsel” and, thus, the prosecutors violated the Sixth Amendment.⁶² The Court further held that the defendant’s “Sixth Amendment rights did not commence at the start of an official judicial proceeding but rather may be implicated when the government limits a defendant’s access to resources that may be required to defend him- or herself.”⁶³

Although the government argued in *Stein* that the Court’s reasoning will “open up the door” for “future defendants to argue that they have a right to . . . ‘adequate representation’ particularly in the context of the denial of resources,”⁶⁴ it is doubtful that the *Stein* decision had or will have any impact on the laws dealing with indemnity of public officials. Many states already have well-established laws allowing public officials to challenge a public agency’s decision to deny indemnification if the official feels that the decision was arbitrary or capricious.⁶⁵ With this review, most states already have established a “right to adequate representation” for public officials.

Conclusion

Through statutes, many states have allowed public officials to be advanced and/or reimbursed legal fees for their defense against criminal charges. The majority of state statutes restrict the payment of fees only to public officials who are ultimately acquitted and where the actions that gave rise to the criminal charges were within the scope of the officials' employment. Similar restrictions are imposed in the federal context, as well as the use of campaign funds, and to a lesser extent on legal defense funds. On one hand, indemnity of public officials accused of crimes is desirable because it protects honest officials from bogus charges brought against them because of their "public" positions. On the other, restrictions on the right to indemnification serve an important purpose, as they protect taxpayers from bankrolling the legal costs of corrupt public officials and politicians. Fortunately, current indemnity laws have been successful at striking a balance between these two interests, a task that ultimately benefits society as a whole.

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¹ See, e.g., 18 PA. CONS. STAT. ANN. § 5303(a) (2008) (stating that a "public official who is convicted of a felony or a misdemeanor under Federal law or under the laws of this Commonwealth shall be liable for and shall reimburse any public money expended by the Commonwealth to cover the costs incurred by an agency for outside counsel to defend the convicted public official in connection with a criminal investigation and prosecution of such public official").

² See Independent Counsel Statute, 28 U.S.C.A. § 593(f)(1) (2009).

³ See Kathleen Clark, *Paying the Price for Heightened Ethics Scrutiny: Legal Defense Funds and Other ways that Government Officials Pay their Lawyers*, 50 STAN. L. REV. 65, 72 (1997).

⁴ *Id.* at 81 ("[i]n the first two years after the IC statute's enactment, ICs were appointed to investigate alleged cocaine use by Hamilton Jordan, then White House Chief of Staff, and Timothy Kraft, formerly President Carter's appointments secretary").

⁵ *Id.* at 81-82.

⁶ "A target of an investigation may be entitled to reimbursement of attorneys fees" if he meets the prerequisites under the IC statute. See generally *In Re Cisneros*, 454 F.3d 334 (D.C. Cir. 2006).

⁷ The Special Division for appointing Independent Counsel of the U.S. Court of Appeals for the District of Columbia Circuit has defined "subject" as "someone whose conduct was within the scope of the grand jury investigation ... in a way that would lead a reasonably counseled person ... to believe that there was a realistic possibility that he would become a defendant." See Clark, *supra* note 3, at 83.

⁸ *Id.* at 82. See also *In Re Madison Guar. Sav. & Loan*, 373 F.3d 1373, 1376 (D.C. Cir. 2004) (same).

⁹ Julie O'Sullivan, *The Independent Council Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 506 n.146 (1996).

¹⁰ Clark, *supra* note 3, at 83 (emphasis added).

¹¹ The court ultimately did not award the official his legal fees because he did not meet the other requirements of the statute. See *In Re Nofziger*, 925 F.2d 428, 432 (D.C. Cir. 1991).

¹² *Id.* (emphasis in original).

¹³ This method is not restricted to Department of Justice employees but has been used by other federal employees such as employees of the Department of Defense, Department of Commerce, and Department of Treasury. See 32 C.F.R. § 516.30 (2009); 37 C.F.R. § 104.12 (2009); *C. Craig v. Lowe*, No. C-95-3006 MMC (N.D. Cal. Mar. 7, 1996).

¹⁴ 28 C.F.R. § 50.15(a) (2009).

¹⁵ *Id.*

¹⁶ See Clark, *supra* note 3, at 76.

¹⁷ This restriction does not apply to state criminal proceedings since they are considered "outside litigation." *Id.*

¹⁸ See 28 C.F.R. § 50.15(b) (2009).

¹⁹ Department of Justice Representation in Federal Criminal Proceedings, 6 Op. Off. Legal Counsel 153, 154 (O.L.C. 1982).

²⁰ *Id.* (stating that “the United States can no longer be considered to have an interest in establishing the lawfulness of the employee’s conduct, which it seeks to prove unlawful . . . [and] the federal government does not have an interest in relieving its employees of the threat of federal prosecution, as it does in relieving them of the threat and burdens of outside litigation”).

²¹ 28 C.F.R. § 50.15(b)(4) (2009).

²² *Id.*

²³ See, e.g., *Leon County v. Stephen S. Dobson, III. P.A.*, 957 So. 2d 12 (Fla. Dist. Ct. App. 2007); *Burt v. Cannon*, 689 So. 2d 492 (La. Ct. App. 1997); *Wayne Twp. Bd. of Auditors v. Ludwig*, 507 N.E.2d 199 (Ill. App. Ct. 1987); *Bush v. Lakefield*, 399 N.W.2d 169 (Minn. Ct. App. 1987); *Snowden v. Anne Arundel County*, 456 A.2d 380 (Md. 1983); *Valerius v. City of Newark*, 423 A.2d 988 (N.J. 1980).

²⁴ The majority of states only will allow advancement and/or reimbursement of attorneys fees for a public official accused of a crime if the actions that gave rise to the action were in connection with or arose out of the official’s duties. Furthermore, reimbursement is usually only allowed *if* the official is not convicted. See, e.g., 5 I.L.C.S. 350/2 (“Indemnification not allowed if [official] is convicted”); KAN. STAT. ANN. § 75-6108(c) (1980) (“a government entity may refuse to provide for the defense of an action if the government entity determines that the act or omission was not within the scope of such employee’s employment”); N.C. GEN. STAT. ANN. §143-300.4(a)(1) (1967) (“State shall refuse to provide for the defense of a civil or criminal action brought against an employee... if the act or omission was not within the scope ... of his employment as a state employee”).

²⁵ See MICH. COMP. LAWS § 691.1408 (2002); see also CAL. GOV’T CODE § 995.8 (2007) (A “public entity is not required to provide for the defense of a criminal action or proceeding ... brought against an employee or former employee” but “may provide for the defense of a criminal action or proceeding”); CONN. GEN. STAT. § 53-39a (2007) (same); OHIO REV. CODE ANN. §§9.87, 109.361 (2007) (same); UTAH STAT. ANN. § 63-30a-2 (2007) (same); WIS. STAT. §§ 165.25(6), 895.46 (2007) (same).

²⁶ Provision titled “Civil or criminal action against officer, employee, or volunteer of governmental agency; attorney; compromise and settlement; indemnification; reimbursement.” MICH. COMP. LAWS § 691.1408 (2009).

²⁷ Provision titled “Law enforcement or correctional officers, legal action against; employer payment of costs and attorney’s fees or provision of attorney.” FLA. STAT. ANN. § 111.065 (2009).

²⁸ FLA. STAT. ANN. § 111.07 (2009).

²⁹ In a recent case, a Florida court allowed a county commissioner to receive reimbursement for legal fees he incurred in successfully defending against criminal charges that arose out of or in connection with the performance of his duties as county commissioner. The court reasoned that the “common law doctrine providing” for the reimbursement of legal fees “incurred in successfully defending against unfounded allegations of official misconduct” also “applies to criminal proceedings.” *Leon County*, 957 So. 2d at 12.

³⁰ Statutes usually give government entities the *discretion* to reimburse legal fees. See, e.g., statutes cited *supra* note 25.

³¹ Reimbursement is proper if charges against the official are dismissed or he or she is acquitted, presuming the official was acting within the scope of his or her employment and meeting other criteria required by the relevant state statute. See, e.g., *Cislo v. City of Shelton*, 692 A.2d 1255 (Conn. 1997); *Montgomery v. Collins*, 355 So. 2d 1111 (Ala. 1978).

³² See *Waterford v. Babli*, 386 A.2d 906 (N.J. Super. Ct. Law Div. 1978).

³³ See *Kerwick v. Trenton*, 445 A.2d 482 (N.J. Super. Ct. Law Div. 1982).

³⁴ See, e.g., *Semper v. City of Providence*, No. C.A. 96-1828 (R.I. Super. Aug. 22, 2001); *Hall v. Thompson*, 669 S.W.2d 905 (Ark. 1984); *Gove v. Epping*, 41 N.H. 539 (N.H. 1860). These states only allow the reimbursement of fees incurred in the defense of *civil* suits.

³⁵ See Craig S. Lerner, *Legislators As The “American Criminal Class”: Why Congress (Sometimes) Protects The Rights Of Defendants*, 2004 U. ILL. L. REV. 599, 646 (2004) (noting Representative Barney Frank used more than \$120,000 in campaign funds to pay legal expenses connected with allegations about male prostitute).

³⁶ Johnny Carter, *To Provide for the Legal Defense: Legal Defense Funds and Federal Ethics Law*, 74 TEX. L. REV. 147, 183 (1995).

³⁷ See Lerner, *supra* note 35, at 647.

³⁸ *Id.* at 648.

³⁹ See 970 C.M.R. §§ 2.05(4)(a)(2), 2.06(6)(a)(2) (2009).

⁴⁰ See *In Re Election Law Enforcement Commission Advisory Opinion No. 01-2008*, 2008 BL 270280 (N.J. Super. Ct. App. Div. 2008).

⁴¹ See *State v. Ferguson*, 709 N.E.2d 887, 890 (Ohio Ct. App. 1998).

⁴² *Id.*

⁴³ See Carter, *supra* note 36, at 149.

⁴⁴ In June 1994, President and Mrs. Clinton established a legal defense fund after facing more than a million dollars in unpaid legal fees from the Whitewater scandal and a sexual harassment lawsuit. However, legal defense funds are usually established by executive branch employees after they leave office. *Id.* at 156. Also, it is important to note that federal officials are not the only public officials who use legal defense funds. For example, Governor Sarah Palin has established a legal defense fund to defray costs associated with the Alaskan ethics investigation known as “Troopergate.” See William Yardley, *For Gov. Palin, a Rough Return to the Day Job*, N.Y. TIMES, April 16, 2009, available at www.nytimes.com/2009/04/16/us/politics/16palin.html.

⁴⁵ See Carter, *supra* note 36, at 163.

⁴⁶ *Id.*

⁴⁷ *Id.* at 164.

⁴⁸ President Clinton accepted donations for his legal defense fund from lobbyists. After heavy criticism, Clinton announced that “his legal defense fund would no longer accept contributions from registered lobbyists.” *Id.* at 166.

⁴⁹ *Id.* at 165. The exception was “designed to allow the President to accept . . . homemade presents . . . as well as gifts from foreign leaders[;]” however, that did not stop the president from using it as a loophole to allow donations to his legal defense fund from any source.

⁵⁰ See Clark, *supra* note 3, at 94.

⁵¹ *Id.*

⁵² See Carter, *supra* note 36, at 166.

⁵³ *Id.*

⁵⁴ *Id.* at 167.

⁵⁵ *Id.* (noting if there are leftover funds, they must be returned to the contributors or given to charity).

⁵⁶ *Id.* (noting Representative Barney Frank, Mel Reynolds, and Gerry Studds have all used legal defense funds to defend against allegations of “sexual impropriety” and that U.S. House of Representative allows use of legal defense funds for criminal prosecutions).

⁵⁷ *Id.* at 168.

⁵⁸ *Id.* (noting legal defense funds have been used by Senators accused of sexual harassment).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ 541 F.3d 130 (2d Cir. 2008).

⁶² Marc Sackin, *Applying United States v. Stein to New York’s Indigent Defense Crisis: Show the Poor Some Love Too*, 73 BROOK. L. REV. 299, 321 (2007).

⁶³ *Id.* at 323.

⁶⁴ *Id.* at 324 (citing *U.S. v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2007)).

⁶⁵ See, e.g., *O’Brien v. Spitzer*, 24 A.D.3d 9, 11 (N.Y. App. Div. 2005), *rev’d on other grounds*, 851 N.E.2d 1195 (N.Y. 2006).