UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
v.	)	Criminal No. 10-223 (RBW)
WILLIAM R. CLEMENS,	)	
Defendant.	)	

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S
MOTION TO AWARD FEES AND COSTS ASSOCIATED WITH MISTRIAL

Defendant Roger Clemens seeks reimbursement of the fees and costs he incurred in preparation for and during his first trial. These expenses, borne personally by Mr. Clemens, were wasted when the Government caused a mistrial on July 14, 2011. This request comes in response to the express invitation made by the Court during the hearing on September 2, 2011. In its response to this request, the Government does not dispute the Court's statement that "fundamental fairness" should protect Mr. Clemens from having to pay twice for work that must be repeated as a result of the prosecutors' conduct. Indeed, the Government expresses some regret for the financial burdens its conduct has imposed on the Court and Mr. Clemens. *See* Gov't's Opp. to Def.'s Mot., filed Nov. 8, 2011 [D.E. 90] ("Opp."), at 9. Yet the Government takes the bold position that, regardless of what fundamental fairness requires, the Court does "not have authority" to act here. *E.g.*, *id.* at 3.

The Government is wrong. It is not above the law. This Court has an inherent power to sanction parties before it that violate the Court's orders and abuse the judicial process. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–45 (1991). This power does not vanish just because the offending party is the federal government. Indeed, the Government's response cites cases

where courts have considered the imposition of sanctions against the Government to be within the court's inherent powers, *see id.* at 7 n.3 & 8, and in another one of the cases cited in the opposition the prosecutors actually *volunteered* to repay the kinds of fees and costs Mr. Clemens is requesting here. *See United States v. Shagyan*, 652 F.3d 1297, 1309 (11th Cir. 2011) (cited in Opp. for a different proposition at 4).

Rather than try to convince the Court that it should not use its discretion to impose its inherent powers in this instance, the Government relies on three theories to argue that this Court has no power to right the Government's wrong. All three reasons, however, are illusory. The Government's arguments are wholly inapplicable or overstate the law. Specifically:

1. Because Mr. Clemens agrees that he "is not a prevailing party" at least at this point in the litigation, *see* Opp. at 5, the Hyde Amendment, which legislates when fee shifting may be appropriate at the conclusion of a criminal case, is irrelevant to Mr. Clemens's request for fees and costs;

2. There is no settled authority supporting the Government's broad proposition that the doctrine of sovereign immunity, which precludes litigation against government workers acting within the scope of their usual duties, provides "a flat bar" against sanction awards; and

3. The Government's attempt to inject "bad faith" as a "condition precedent" to Mr. Clemens's request completely ignores *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 103 F.3d 1007, 1016 & 1017 n.4 (D.C. Cir. 1997), which is controlling D.C. Circuit authority and holds that a showing of bad faith is not required for an award of attorney's fees to remedy the violation of a court order.

The Court should therefore exercise its discretion to do justice and grant Mr. Clemens relief.

ARGUMENT

In its response, the Government erects three purported obstacles to the application of the Court's inherent powers to sanction the prosecutors for imposing duplicate costs on Mr. Clemens to defend his freedom. Each of these three arguments is misplaced.

1. The Hyde Amendment Is Inapplicable To This Situation By Its Own Terms.

The Government's lead argument hinges on a contention Mr. Clemens does not dispute: Mr. Clemens has not invoked the Hyde Amendment as a basis for seeking compensatory fees and costs. *See* Opp. at 4. Mr. Clemens does dispute, however, the relevance of the Hyde Amendment cases cited in the opposition. The first two pages of argument in the Government's response do nothing but create an irrelevant straw man argument.

In the 1997 Hyde Amendment, Congress authorized federal courts to "award to *a prevailing party* [in a criminal case], 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." Pub. L. No. 105-119, 111 Stat. 2440, 2519 (1997) (reprinted in 18 U.S.C. § 3600A, historical and statutory notes) (emphasis added). The words "a prevailing party" are operative here. From the very first version of the legislation, Congress expressed its intent to apply the Hyde Amendment to shift fees imposed by prosecution only *at the conclusion* of successful defense litigation.[1] Fee awards authorized under the Amendment are designed to remedy the prosecution's "overall litigating position," *see Shagyan*, 652 F.3d at 1315, not isolated, but extremely prejudicial, incidents like the one resulting in a mistrial here. Likewise, there is absolutely no mention of the judicial power to sanction party conduct in the legislation or the legislative history.

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1 *See, e.g.*, 143 Cong. Rec. H7786-04, H7791 (Sept. 24, 1997) (R. Hyde) (explaining need of legislation to address situation where accused "finally prevailed at enormous expense" and desire for relief "after the case is over"); 143 Cong. Rec. H10809-01, H10863 (Nov. 13, 1997) (R. Rogers) (explaining revised language of Amendment would apply "where the defendant is acquitted"); *see also United States v. Gilbert*, 198 F.3d 1293, 1299–1303 (11th Cir. 1999) (explaining legislative history).

Given that context, the intended punch provided by the cases cited in the Government's first argument fails to connect. Three of the four cases upon which the Government relies involve acquittals or other final successful adjudications in favor of a criminal defendant, *see United States v. Wade*, 255 F.3d 833, 835 (D.C. Cir. 2001); *Shagyan*, 652 F.3d at 1308; *United States v. Capener*, 608 F.3d 392, 398 (9th Cir. 2010), and the fourth case involves a conviction and subsequent plea, *see United States v. Beeks*, 266 F.3d 880, 883 (8th Cir. 2001). Likewise, the "net worth" argument the Government notes is irrelevant. *See* Opp. at 5 n.1. The Court should therefore disregard the Government's first roadblock to imposition of fees and costs.

2. The Doctrine Of Sovereign Immunity Does Not Trump The Inherent Judicial Power To Enforce Its Orders.

Sovereign immunity is an "ancient" doctrine that "the sovereign is immune from suit and from liability for damages in the absence of an express waiver of immunity." *Library of Congress v. Shaw*, 478 U.S. 310, 323 (1987) (J. Brennan, dissenting). Immunity "from suit" or "from liability" does not mean, however, that the Government can never be forced to pay money by a court without the Government's permission. Nonetheless, the Government takes this extreme position in its response. In its opposition, the Government specifically argues that the doctrine of sovereign immunity "is *a flat bar* to the assessment of attorney's fees and costs against the federal government" absent a legislative waiver. *See* Opp. at 7 & 9 (emphasis added). This radical argument fails for three reasons: (1) there is no controlling authority for it; (2) the opinions in this Court on the subject are divergent; and (3) such a rule would be contrary to sound public policy.

First, despite the Government's strident statement of the law, there is no controlling authority on the issue of whether sovereign immunity trumps the Court's inherent power to impose sanctions against a federal agency that has violated its orders. None of the cases in the

response on this point are from the Supreme Court or D.C. Circuit. Indeed, in *United States v. Waksberg,* 112 F.3d 1225, 1227 (D.C. Cir. 1997)—the appeal of a case upon which the Government relies—the Court of Appeals expressly declined to address this very issue.

On the other side of the argument, however, the U.S. Supreme Court has held that courts should "not lightly assume that Congress has intended to depart from established principles such as the scope of a court's inherent power." *See Chambers*, 501 U.S. at 49 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). The high court has also noted that "judicially fashioned exceptions to the American Rule" such as sanctions pursuant to inherent powers have never been "repudiated." *Id.* (quoting *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 260 (1975)). In sum, the law binding this Court supports the application of inherent supervisory powers rather than disregards it as the Government suggests.[2]

Second, the authority in the sister courts within this judicial district does not treat the narrow issue raised by the Government as consistently as the Government suggests. At least three judges in this district have either expressly or implicitly found that this Court *may* wield its inherent judicial power against agents for the sovereign. *See Cobell v. Norton*, 226 F. Supp.2d 1, 154–55 (D.D.C. 2002), *reversed on other grounds*, 334 F.3d 1128 (D.C. Cir. 2003) (J. Lamberth); *Armstrong v. Executive Office of President*, 821 F. Supp. 761, 773 (D.D.C.), *reversed on other grounds*, 1 F.3d 1274 (D.C. Cir. 1993) (J. Richey); *United States v. Shelton*, 539 F. Supp.2d 259, 262 (D.D.C. 2008) (J. Urbina); *see also FG Hemisphere Associates, LLC v. Democratic Rep. of Congo*, 637 F.3d 373 (D.D.C. 2011) (affirming authority to issue sanctions on foreign sovereign amenable to suit through the Foreign Sovereign Immunities Act). On the

2 Even the First Circuit decision of *United States v. Horn*, 29 F.3d 754, 760 (1st Cir. 1994), upon which the Government relies heavily despite the fact that it does not bind this Court, explained that the courts' inherent powers are "interstitial" and underlying narrower rules or statutes charting the bounds of sovereign immunity.

other hand, nearly as many judges in this district have held that monetary sanctions *may not be* imposed against the government in light of the doctrine of sovereign immunity. *See Alexander v. F.B.I.,* 541 F. Supp.2d 274, 301 (D.D.C. 2008) (J. Lamberth); *United States v. Waksberg,* 881 F. Supp. 36, 39–41 (D.D.C. 1995), *vacated on other grounds,* 112 F.3d 1225 (D.C. Cir. 1997) (J. Green); *see also Citizens For Responsibility and Ethics in Washington v. Executive Office of the President*, Case No. Civ. A. 07-1577, 2008 WL 2932173, at *5 (D.D.C. July 29, 2008) (J. Facciola).

Indeed, as the Government points out in its response, *see* Opp. at 7 n.3, even the opinions issued by Judge Lamberth on this point are divergent. In *Cobell*, the Chief Judge held that "there is no question that" the Court's inherent power to award expenses, including attorneys' fees, to a party "trumps [the sovereign immunity] doctrine." 226 F. Supp. at 152 & 154; *see also Landmark Legal Foundation v. E.P.A.*, 272 F. Supp.2d 70, 86 (D.D.C. 2003).[3] In *Alexander*, however, Judge Lamberth concluded that sovereign immunity precluded an award of monetary sanctions against the FBI in the context of 28 U.S.C. § 1927 and the court's inherent power in civil proceedings. 541 F. Supp.2d at 299.

In sum, the Government is wrong to argue for imposition of an ironclad rule precluding imposition of sanctions against the U.S. Attorney's Office. The mix of authority cited by the Government and the defense suggests, at most, an open question that has not been conclusively

3 The Government attempts to distinguish *Landmark Legal* in its opposition to no avail. *See* Opp. at 7 n.3. Just because the Court "did not discuss sovereign immunity" in its *Landmark* decision does not mean the Court would have found such an argument persuasive. To the contrary, the fact that *four* oppositions were submitted on behalf of government defendants and *not one* raised sovereign immunity is telling. *See* Memo. of W. Michael McCabe in Opp. to Pl.'s Mot. for Contempt, filed July 16, 2001 (*published at* 2001 WL 36376205); Gary Guzy's Memo. of Law in Opp. to Pl.'s Mot. for an Order to Show Cause, filed July 16, 2001 (*published at* 2001 WL 36376206); Def.'s Opp. to Pl.'s Mot. for an Order to Show Cause, filed July 16, 2001 (*published at* 2001 WL 36376207); Opp. of Carol M. Browner to Pl.'s Mot. for An Order to Show Cause, filed July 16, 2001 (*published at* 2001 WL 36376207).

resolved in this Circuit or by the Supreme Court. But at the end of the day, and contrary to the Government's posturing, there is abundant authority in this and other courts supporting this Court's inherent power to impose such sanctions.[4]

Third, imposition of sanctions irrespective of a putative claim of sovereign immunity serves sound public policy. The rationale provided in the *Cobell*, *Armstrong*, and other cases is better than the rationale set forth in the Government's response and contrary cases. For example, in support of his finding that this Court's inherent power "trumps" the sovereign immunity doctrine in *Cobell*, Chief Judge Lamberth explained:

> [C]ourts have a duty to hold government officials responsible for their conduct when they infringe on the legitimate rights of others. These officials are responsible for seeing that the laws of the United States are faithfully executed. In this case, the laws—the orders of this court—were either ignored or thwarted . . . . The court must hold such government officials accountable; otherwise, our citizens—as litigants—are reduced to mere supplicants of the government, taking whatever is dished out to them. That is not our system of government, as established by the Constitution. We have a government of law, and government officials must be held accountable under the law.

226 F. Supp.2d at 155 (citation omitted). Other courts have similarly stated, "[T]reating . . . prosecutors differently from—and better than—other litigants . . . threaten[s] the separation of powers between the Judicial Branch and the Executive Branch." *See Shagyan*, 652 F.3d at 1325 (J. Edmonson, dissenting).

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4 *See Chambers*, 501 U.S. at 45–46 (recognizing that "federal courts have inherent power to assess attorney's fees against counsel . . . even though the so-called 'American Rule' prohibits fee shifting in most cases"); *In re Good Hope Indus., Inc*, 886 F.2d 480, 482 (1st Cir. 1989) (sanctions imposed over immunity claim); *Adamson v. Bowen*, 855 F.2d 668, 672 (10th Cir. 1988) (same); *United States v. Gavilan Joint Comm'y Coll. Dist*, 849 F.2d 1246, 1251 (9th Cir. 1988) (same); *see also Schanen v. United States DOJ*, 798 F.2d 348, 350 (9th Cir. 1985) (imposing monetary penalty against government under Fed. R. Civ. P. 60(b) without addressing sovereign immunity).

Moreover, when taken to its logical conclusion, the Government's position makes no sense. If the doctrine of sovereign immunity truly does preempt a court's inherent judicial power in any criminal proceeding, then defendants would be forced to endure situations where prosecutors could violate pretrial orders, commit discovery abuses, maliciously run up defense fees, and engage in any number of other imaginable contemptible acts without recourse. In other words, if the Court were broadly barred from imposing monetary sanctions on prosecutors, the executive branch would be free to "treat with impunity the valid orders of the judicial branch." *See Armstrong*, 821 F. Supp. at 773 (citing *Nelson v. Steiner,* 279 F.2d 944, 948 (7th Cir.1960)). The Supreme Court has been understandably unwilling to give the doctrine of sovereign immunity such broad authority in recent decisions. *See, e.g.*, *Richlin Sec. Service Co. v. Chertoff*, 553 U.S. 571, 589–90 (2008) (rejecting the Government's sovereign immunity argument to hold that paralegal fees are recoverable under the Equal Access to Justice Act).[5]

Mr. Clemens respectfully submits that the Court has the power to right the wrong caused by the Government's errors and should exercise that power here. The Government should focus less on trying to restrict this Court's authority and more on ensuring that the power of the prosecutor is fairly and competently exercised. The guidepost here should be fundamental fairness, not the Government's crabbed interpretation of the powers of an Article III Judge.

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5 Courts have also hesitated to let sovereign parties litigate without restraint in other contexts. *See, e.g.*, *Rep. of Philippines v. Westinghouse Elec. Corp.,* 43 F.3d 65, 80 (3d Cir. 1994) (noting the court's ability to impose monetary sanctions despite protections offered under FSIA and stating, "The mere fact of sovereignty does not insulate a litigant from sanction for failure to abide by the rules governing litigation in American courts. It would be perverse to allow a foreign sovereign litigant to 'take our law free from the claims of justice.") (*quoting Nat'l City Bank of New York v. Rep. of China,* 348 U.S. 356, 362 (1955)); *see also, e.g.*, *First City, Texas-Houston, N.A. v. Rafidain Bank,* 281 F.3d 48 (2d Cir. 2002) (affirming monetary sanction against a sovereign instrumentality); *Richmark Corp. v. Timber Falling Consultants,* 959 F.2d 1468 (9th Cir. 1992) (affirming imposition of a $10,000 per day discovery sanction on sovereign instrumentality).

3. The Law Does Not Require A Showing Of Bad Faith Before Levying The Kind Of Award Mr. Clemens Requests.

In its final argument, the Government contends that even if sovereign immunity does not provide an absolute bar to the sanctions Mr. Clemens seeks, the Court is nonetheless precluded from issuing such an order here because it "must make a finding" that the sanctionable conduct was undertaken in bad faith. *See* Opp. at 8. This argument, however, ignores and misstates applicable law. In *Food Lion*, a case discussed in Mr. Clemens's initial motion but omitted entirely from the Government's response, the D.C. Circuit aligned itself with "[n]umerous courts" to hold that a district court has the authority to award legal fees "as part of the compensation that may be ordered to make the plaintiff whole, *even absent a showing of willful disobedience* by the contemnor." 103 F.3d at 1016 (emphasis added); *see also McComb v. Jacksonville Paper Co.,* 336 U.S. 187, 191 (1949) (explaining that prosecutorial intent at the time of contemptible conduct is not a consideration in deciding whether finding of civil contempt is warranted).

The instant briefing began with the Court's question of whether Mr. Clemens should have to "bear that economic expense" associated with the "Government['s] engage[ment] in conduct that in my view clearly was in derogation of clear rulings I made." *See* Ex. 1 to Def.'s Mot. [D.E. 89] at 36:16 – 37:5. The U.S. Supreme Court has held that one facet of a federal court's inherent power applies to this very situation involving "disobedience of a court order." *Chambers*, 501 U.S. at 45 (quoting *Alyeska*, 421 U.S. at 258, and *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967)). Importantly, the *Chambers* court distinguished between (i) that scenario and a trial court's ability to assess attorney's fees as a sanction in that context and (ii) a situation where a trial court is asked to assess fees because "a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 45–46 (quotations omitted).

In other words, while a court may need to make a finding of bad faith before invoking its inherent powers in one set of circumstances, a court need not do so before sanctioning a party for disobeying an order as Mr. Clemens seeks here. In the latter context, the *Food Lion* court specifically observed that "the law is clear in this circuit" that a "finding of bad faith on the part of the contemnor is *not* required." 103 F.3d at 1016 (emphasis in original)); *see also id.* at 1017 n.14 (extending holding to an award of attorney's fees as a sanction to obey a court order); *NLRB v. Blevins Popcorn Co.,* 659 F.2d 1173, 1184 (D.C. Cir. 1981) (explaining that "the intent of the recalcitrant party is irrelevant" for purposes of sanctioning a party for violating an order).

The Government fails to appreciate this distinction in its response. Instead of discussing *Food Lion* and related authority, the opposition cites three cases for the proposition that "*any* exercise of this Court's inherent powers" must be predicated on a finding of bad faith. *See* Opp. at 8 (emphasis in original). In *United States v. Wallace*, 296 F.2d 1214, 1217 (D.C. Cir. 1992), the Court of Appeals reversed a sanction order under 28 U.S.C. § 1927 following the "reckless" failure of counsel to subpoena trial witnesses.[6] In *Shepherd v. American Broadcasting Cos.*, 62 F.3d 1469, 1476–77 (D.C. Cir. 1995), the Court vacated a sanction imposed in civil litigation arising out of alleged discovery practices akin to "fraud or some other quasi-criminal wrongdoing." And in *Ali v. Tolbert*, 636 F.3d 622, 626–27 (D.C. Cir. 2011), the Court remanded a finding that Rule 11 sanctions were not warranted for failure to present the court with a verified answer in an attempt to evade service of process. None of these cases involve the failure of a party to comply with Court orders. Accordingly, to the extent that the Government accurately states a legal requirement in its last argument, that requirement is inapposite to this case.

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6 Notably, even the *Wallace* court characterized the question of whether a showing of bad faith is required before imposing sanctions under Section 1927 is "unsettled." 964 F.2d at 1218.

CONCLUSION

For each of the reasons set forth above and in Mr. Clemens's initial motion, this Court should order the Government to pay reasonable fees and costs in an amount to be determined to Mr. Clemens as a sanction for the prosecutorial actions resulting in a mistrial on July 14, 2011. Contrary to the extreme position in the Government's opposition, this Court *does* have authority to serve fundamental fairness by issuing such an order.

Respectfully submitted,
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