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Power, Policy, and the Hyde Amendment: Ensuring Sound Judicial Interpretation of the Criminal Attorney's Fees Law

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POWER, POLICY, AND THE HYDE AMENDMENT: ENSURING SOUND JUDICIAL INTERPRETATION OF THE CRIMINAL ATTORNEYS' FEES LAW

The Hyde Amendment[1] brings something new to criminal justice. Enacted in late 1997, this law allows federal courts to award attorneys' fees to prevailing criminal defendants who show that the position of the United States government was "vexatious, frivolous, or in bad faith." Any awards under this statute come out of the budget of the particular offending federal agency, most likely the United States Attorney's Office.

The Hyde Amendment seeks to apply to criminal suits the well-established procedures and limitations of the Equal Access to Justice Act (EAJA),[2] which provides for similar awards against the Government in civil suits.[3] The proponents of the Hyde Amendment mobilized on the perception that the government can be abusive in bringing criminal prosecutions and thereby devastate the lives of defendants who become financially ruined over the course of their defense.[4] The Hyde Amendment has been hailed as a victory for defendants' rights, and a timely response to the abusive acts of government officials.[5]

This Note looks beyond the veneer and exposes the Hyde Amendment as an unequivocal legislative failure to enact law responsibly and as a threat to the sound functioning of the federal criminal justice system. This assessment rests on two related bases.

First, the Hyde Amendment is a simplistic approach to a complicated problem. Congress enacted the Amendment hastily

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1. Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997). The Hyde Amendment also appears as a note to 18 U.S.C. § 3006A (1997).

2. 28 U.S.C. § 2412 (1994).

3. *See id.*

4. *See infra* notes 16-17 and accompanying text.

5. *See* Elkan Abramowitz & Peter Scher, *The Hyde Amendment*, CHAMPION, Mar. 1998, at 22, 23 ("[T]he Hyde Amendment has put into place a much-needed vehicle for vindicated criminal defendants to argue that a prosecution was abusive or that the government had engaged in wrongful conduct.").

in a highly politicized context of virtually nonexistent opposition, despite the fact that the statute conflicts with well-established and fundamental legal doctrines. Further, Congress did not address these conflicts either during the enactment of the statute or in its ultimate language.

Second, the language of the Hyde Amendment is grossly ambiguous and leaves the judiciary with an impermissible degree of discretion in defining the scope of the law's application. Consequently, this unbridled judicial discretion to review prosecutorial decisions and to impose financial penalties upon the United States Attorneys threatens to weaken the essential function of the executive branch, i.e., the faithful execution of the laws.[6]

This Note consists of four sections. The first section examines the enactment of the Hyde Amendment and exposes the highly politicized context of its passage. The second section discusses both Congress's failure to address three fundamental legal doctrines that directly conflict with the implementation of the Hyde Amendment, and the effect of this failure on judicial interpretation of the statute.

The third section discusses recent district court decisions in which the courts erroneously approached the interpretation of the Hyde Amendment's procedural and substantive provisions. This section also addresses the particular dangers to law enforcement posed by an expansive judicial application of this law. The fourth section recommends various avenues for legislative action that will circumvent the dangers discussed above. In addition, this section introduces a model approach to judicial interpretation that will ensure that courts do not perpetuate the failings of Congress to address the conceptual and doctrinal problems implicated by the Hyde Amendment.

A LEGISLATIVE FOLLY

This section discusses the enactment of the Hyde Amendment. It provides a general factual summary of its provisions followed by an examination of the Amendment's legislative history. After a critical discussion of the political context in which this legisla-

6. *See* U.S. CONST. art. II, § 3.

tion was passed, this section concludes that Congress enacted the Hyde Amendment without due consideration of its consequences.

Enactment of the Hyde Amendment

In its entirety, the Hyde Amendment 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, may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code [EAJA]. To determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence ex parte and in camera (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an informant or undercover agent or matters occurring before a grand jury) and evidence or testimony so received shall be kept under seal. Fees and other expenses awarded under this provision to a party shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision.[7]

Representative Henry Hyde (R-Ill.) introduced this law as a rider to an appropriations bill for the Departments of Commerce, Justice, and State.[8] After thirty minutes of floor debate, and de-

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7. Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997).

8. *See* 143 CONG. REC. H7786, H7790-91 (daily ed. Sept. 24, 1997) (statement of Rep. Skaggs). The original version, introduced by Representative Hyde and approved by the House of Representatives, differed from the final legislation in two important respects. First, the standard for awards was not whether the Government was "vexatious, frivolous, or in bad faith," but rather, whether "the position of the United States was substantially justified." *Id.* at H7791. Second, the original version placed

spite the lack of any hearings or committee reports concerning the impact of the proposal,[9] the House of Representatives passed the amendment by an overwhelming, bipartisan vote of 340-84.[10] The language of the original measure changed[11] in conference committee to ameliorate the intense opposition of the Department of Justice.[12] Virtually no record exists respecting the changes made between the House's initial passage of the measure and its ultimate enactment.[13]

Debate of the Proposal

The thirty-minute floor debate that immediately preceded the House vote on the Hyde Amendment constituted the law's only appreciable legislative history.[14] After introducing the amendment on the floor, Representative Hyde stated the problem the measure was intended to address:

> I have learned in a long life that people do get pushed around, and they can be pushed around by their government. . . . I learned that people in government, exercising government power are human beings, like anybody else, and they are capable of error, they are capable of hubris, they are capable of overreaching, and yes, on very infrequent occa-

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the burden of proof on the Government and did not contain the language referring to disclosure and in camera review of evidence relevant to a Hyde Amendment claim. With respect to the standard for awards and the allocation of the burden of proof, Rep. Hyde's original proposal mimicked the EAJA. *See* 28 U.S.C. § 2142 (1994).

9. *See* 143 CONG. REC. H7849-50 (daily ed. Sept. 25, 1997).

10. *See* 143 CONG. REC. H7786, H7791 (statement of Rep. Skaggs).

11. *See supra* note 8.

12. *See infra* notes 216-17 and accompanying text.

13. *See* United States v. Gardner, 23 F. Supp. 2d 1283, 1287 (N.D. Okla. 1998) ("There is sparse legislative history with respect to the Hyde Amendment and as yet no court has rendered an opinion construing its provisions.").

The conference committee report on the appropriations bill attached to the Hyde Amendment contained but one reference to the measure: "On the Hyde provision, we have language that we believe is acceptable to all parties, that allows the recovery of attorneys' fees in criminal cases where the defendant is acquitted where the court finds that the prosecutor acted vexatiously, frivolously or in bad faith." 143 CONG. REC. H10918, H10919 (daily ed. Nov. 13, 1997).

14. *See* 143 CONG. REC. H7786, H7790-94 (daily ed. Sept. 24, 1997). The debate on the amendment consisted exclusively of statements made by Representatives Henry Hyde, David Skaggs (D-Colo.), and Susan Rivers (D-Mich.). *See id.*

> sions they are capable of pushing people around. . . . If the Government, your last resort, is your oppressor, you really have no place to turn.[15]

Narrowing his focus to the actions taken by federal prosecutors, Hyde queried:

> What if Uncle Sam sues you, charges you with a criminal violation, even gets an indictment and proceeds, but they are wrong. They are not just wrong, they are willfully wrong, they are frivolously wrong. They keep information from you that the law says they must disclose. They hide information. They do not disclose exculpatory information to which you are entitled. They suborn perjury. They can do anything. But they lose the litigation, the criminal suit, and they cannot prove substantial justification. In that circumstance, . . . you should be entitled to your attorney's fees reimbursed and the costs of litigation . . . . That, my friends, is justice.[16]

Representative Hyde further emphasized his concern for the financial welfare of the prevailing defendants by stating his belief that "the most unjust thing in all the law" is that after prevailing in a prosecution the defendant must "swallow what can be bankrupting costs."[17]

Hyde maintained that his proposal, would do "rough justice" in these cases by duplicating in criminal cases the remedies already afforded civil litigants under the EAJA.[18] Hyde stressed the fact that the EAJA scheme was well-established and that awards under that law were "modest."[19] "[T]hat is the law, and it has been the law for 17 years. There are cases interpreting it, interpreting what substantial justification for the Government to bring the litigation is, and we have had 17 years of successful interpretation and reinforcement of that law."[20] It appears from

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15. *Id.* at H7791.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* The strength of this argument is undercut severely by the later substitution in conference committee of the "substantially justified" standard in favor of "vexatious, frivolous, or in bad faith." *See supra* note 8. For a discussion concerning the interpretation of the latter standard, see *infra* notes 190-231 and accompanying

these statements that Hyde saw his proposal as a simple solution to a serious problem.[21]

Hyde's opponents used their short time during the debate to dispel the notion that the amendment was sufficiently uncomplicated that further deliberation on the proposal was unnecessary. Representative Skaggs thought it:

> an extraordinary matter of policy to attempt to bring up for the first time as an amendment to an appropriations bill [a measure that had] been subject to no hearings, no opportunity for representatives of the Justice Department or the criminal defense bar or anyone else to really explicate the implications, the consequences, the costs of a significant change in the way the United States of America would manage its criminal justice responsibilities.[22]

Representative Skaggs agreed that Congress should address the issue of injustice, "[b]ut let us do it in the regular order . . . with an opportunity for interested parties to be heard . . . to make their case about the real consequences of this kind of very, very significant change in national policy."[23] The remarks of Representative Rivers echoed these same concerns.[24] The opposition to the Hyde Amendment, thus, was not as much a frontal assault

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text.

21. *See* 143 CONG. REC. H7793 (statement of Rep. Hyde) ("This is about as simple a concept as there is. We have had it and we have been satisfied with it in civil litigation. I am simply applying the same situation to criminal litigation.").

22. *Id.* at H7791 (statement of Rep. Skaggs).

23. *Id.* at H7792 (statement of Rep. Skaggs). This call for caution was based on the Department of Justice's concern that the attorneys' fees scheme would "have a profound and harmful impact on the Federal criminal justice system" because it would, among other things, "create a monetary incentive for criminal defense attorneys to generate additional litigation in cases in which prosecutors have in good faith brought sound charges, tying up the scarce time and resources that are vital to bringing criminals to justice." *Id.* For a discussion of whether awards under the Hyde Amendment require a showing of subjective bad faith on the part of the Government, see *infra* notes 209-18 and accompanying text.

24. *See* 143 CONG. REC. at H7793 (statement of Rep. Rivers) ("Clearly this is not the sort of proposal that we should pass after just 30 minutes of discussion.").

Representative Rivers further questioned whether there was an actual need for the Hyde Amendment given the 87% conviction rate by United States Attorneys. Representative Hyde's response to this salient concern consisted of the curt remark: "let us pass this law and then we will have some experience and see how many cases are brought that they cannot prove substantial justification." *Id.*

on the merits of the plan, as it was a call for Congress not to take a headstrong and overly simplistic approach to a complicated issue.[25]

Representative Hyde's response to the opposition's eminently reasonable argument for restraint was both cursory and rhetorical. Hyde stated that, "[the opposition] takes refuge in procedure, that this is the inappropriate vehicle to bring this forward. Injustice needs remedy and one seizes their opportunities when they come along."[26] After calls for further deliberation went unheeded, the debate concluded, and the House of Representatives overwhelmingly approved the Hyde Amendment, 340 votes to 84.[27]

At first blush, the wide margin by which the Hyde Amendment passed seems to indicate decisive legislative action in curbing abusive government conduct. The foregoing summary of the legislative record, however, undermines any notion that the House passed the amendment after a careful consideration of its implications. The following subsection offers an explanation for this one-sided outcome through a discussion of the political context in which the Hyde Amendment was passed.

Politics of Passage

One need only look to the political pedigree of the Hyde Amendment to understand the legislation's appeal to Congress. The Hyde Amendment was borne not out of public outcry over federal prosecutors' harassment of the common man. Rather, it originated as an initiative designed to protect only a special minority of Americans: members of Congress and their staff.

In 1996, Representative Joseph McDade (R-Pa) was acquitted of bribery and racketeering charges after mounting an eight-year criminal defense.[28] This outcome inspired Representative John Murtha (D-Pa) to introduce an amendment to the 1997 Com-

25. *See id.* at H7791-94.

26. *Id.* at H7786, H7792 (statement of Rep. Hyde). This argument is less persuasive considering the fact that Henry Hyde was chairman of the House Judiciary Committee at the time, a point raised by Representative Skaggs in the debate. *See id.* at H7793.

27. *See id.* at H7786, H7791 (statement of Rep. Skaggs).

28. *See* Abramowitz & Scher, *supra* note 5, at 23.

merce, Justice, and State Departments' appropriations bill that would allow members of Congress and their staff to recover attorneys' fees from the Government for wrongful prosecutions.[29] In an effort to make the measure more equitable, Representative Henry Hyde, chairman of the House Judiciary Committee, interceded by extending the Murtha Amendment to apply to any prevailing criminal defendant.[30] The Hyde Amendment, while making the language more fair, left intact the Murtha Amendment's spirit of partisanship. The Hyde Amendment, the opposition argued, would reserve exclusively to politicians a claim that their prosecution was "politically motivated" and, thus, wrongful.[31] This special benefit of the Hyde Amendment yields a plausible explanation of the overwhelming congressional support of the law.[32]

A less cynical, and more probable explanation for the strong support of the Hyde Amendment flows from the pervasive public and congressional hostility toward federal law enforcement orga-

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29. *See* 143 CONG. REC. H7786, H7791 (statement of Rep. Hyde).

30. *See id.*

31. During the floor debate, Representative Rivers lashed out against the Hyde Amendment on this ground. Responding to Representative Hyde's claim that his amendment would produce greater equity than Murtha's, Representative Rivers argued:

> I believe [the Hyde Amendment], when distilled down, is nothing more than a variation on the protect Members theme that is already written into this bill. . . . Members can and will claim that their prosecution was politically motivated. The words of [Rep. Hyde] support the suspicion. He argued . . . that there is, quote, a legitimate fear that a prosecutor could become politically involved with the particular case, could feel so compelled to win that he forgets his duty is not to win but to ensure justice.

143 CONG. REC. H7786, H7792 (1997) (statement of Rep. Rivers). The Hyde Amendment's protection of politicians raises special concerns in light of the statutory duty of federal prosecutors to root out the corruption of public officials. *See, e.g.*, C. Keith Hamilton et al., *Bribery of Public Officials*, 30 AM. CRIM. L. REV. 471 (1993); Craig C. Sonsanto & Nancy S. Stewart, U.S. Dep't of Justice, *Federal Prosecution of Election Offenses*, *in* CORPORATE POLITICAL ACTIVITIES 1998: COMPLYING WITH CAMPAIGN FINANCE, LOBBYING AND ETHICS LAWS 625, 637 (Practising Law Inst. ed., 1998). A politician-friendly scheme that imposes financial penalties on prosecutors may chill the enforcement of these laws. *See infra* note 97 and accompanying text.

32. Representative Hyde's own words support the "political motivation" argument. *See* Mark Johnson, *Reimbursement Bill Opposed by Top Prosecutors*, TAMPA TRIB., Nov. 3, 1997, at 3, *available in* 1997 WL 13840944 ("'There is a legitimate fear that a federal prosecutor could become politically involved with a particular case . . . .'" (quoting Rep. Henry Hyde)).

nizations existing at the time of the Hyde Amendment's passage. The tragedies of Waco and Ruby Ridge, the accusations of FBI misconduct in the "File-gate" imbroglio, and the allegations of impropriety at the FBI crime lab coalesced to create a perception that every federal agency was out of control.[33] Commentators branded the FBI as a "dangerous national joke,"[34] portrayed federal prosecutors as "a regulatory Gestapo" who hated the people they served,[35] and lambasted Congress for its failure to clean out the "criminals" in federal law enforcement agencies.[36] Powerful members of Congress expressed similar sentiments immediately prior to the House of Representatives's vote on the Hyde Amendment. Two days before that vote, the Senate Finance Committee opened hearings that publicized certain contemptuous practices of the IRS when dealing with taxpayers.[37] On the first day of these hearings, Senator William V. Roth, Jr. (R-Del.), the chairman of that committee, asserted that the IRS "all too frequently acts as if it were above the law."[38] In addition, Senate Majority Leader Trent Lott (R-Miss.) portrayed the agency as having conducted a "reign of terror" against the taxpayers.[39] These statements elucidate the political context in which Congress considered the Hyde Amendment, and show a legislature primed to take action, any action, to restrain federal law enforcement authority in light of the pervasive vilification of government agencies.

This charged atmosphere weakened the Justice Department's constituency in Congress because there was little to gain politi-

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33. *See* Paul Craig Roberts, *Wider Regulatory Bogs*, WASH. TIMES, Oct. 2, 1997, at A14, *available in* 1997 WL 3685251.

34. Bill Steigerwald, *Taking a Swipe at FBI Failings*, COM. APPEAL, Aug. 3, 1997, at G4, *available in* 1997 WL 11964462.

35. Roberts, *supra* note 33, at A14.

36. *See* Laurie Kellman, *Probes Have Fallen Short of Promised Results*, PHILA. TRIB., Dec. 2, 1997, at 7A, *available in* 1997 WL 11719031; Roberts, *supra* note 33, at A14.

37. *See* John Mintz, *Hearings on IRS Practices Open*, WASH. POST, Sept. 24, 1997, at A4 (expecting the hearings to show that IRS employees used pseudonyms during investigations, improperly designated some taxpayers as tax protesters and tricked taxpayers into signing papers that weakened those taxpayers' legal positions in audits).

38. *Id.*

39. *Id.*

cally and much to lose by opposing a measure that was depicted as keeping abusive prosecutors in check. As a result, the 105th Congress saw an "unusual alliance" between liberals and conservatives with respect to criminal justice issues.[40] Traditionally, conservatives had been ardent supporters of law enforcement agencies, with a "core group of civil libertarians" constituting their opposition.[41] The first session of the 105th Congress, however, saw the undermining of this usually stalwart conservative support because of the firestorm ignited by the discrete, yet highly publicized, events discussed above.[42] Consequently, "[i]n a host of important criminal justice issues—from civil asset forfeiture and oversight of the FBI crime lab to [the Hyde Amendment]—traditional antagonists on the right and left reached across the political divide to join hands."[43] This alignment of conservatives and liberals, compounded by widespread hostility to federal law enforcement authorities rendered impotent any calls for a meaningful deliberation of the practical and legal pitfalls of implementing the Hyde Amendment. As a result, Congress overwhelmingly approved the attorneys' fees measure without full consideration of its consequences.

FUNDAMENTAL RULES OF LAW IGNORED BY CONGRESS

During the only recorded debate on the Hyde Amendment, Representative Henry Hyde made the following statement as he introduced the legislation:

> We have a law called the Equal Access to Justice Act, which provides in a civil case if the Government sues you, and you prevail . . . you are entitled to have attorney's fees and costs reimbursed. That is justice. . . . Now, it occurred to me, *if that is good for a civil suit, why not for a criminal suit*?[44]

Apparently intended to be a rhetorical question, it is nonetheless a critical one, especially when spoken on the floor of Congress in

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40. T.R. Goldman, *The Right Discovers Rights*, LEGAL TIMES, Dec. 22, 1997, at 9.
41. *Id.*
42. *See id*; *supra* notes 33-39 and accompanying text.
43. Goldman, *supra* note 40, at 9.
44. 143 CONG. REC. H7786, H7791 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde) (emphasis added).

the course of passing a provision as unprecedented as the Hyde Amendment. Congress is expected not only to ask, but to answer these questions before making important changes in the law.

This section discusses three fundamental legal problems implicated by the Hyde Amendment, but not addressed in its enactment: 1) judicial restraint in authorizing departures from the American rule and sovereign immunity doctrine; 2) judicial restraint in reviewing discretionary decisions of the prosecutor; and 3) the civil law-criminal law distinction. Each one of these problems represents an answer to Henry Hyde's question: Why not?

The purpose of the following discussion is not to point out the shortcomings of this law for their own sake, but rather to elucidate a serious problem. When Congress passes a statute, yet ignores conflicts between the legislation and fundamental legal doctrines, it fails to give the courts the guidance necessary to interpret those laws. Exclusive judicial reliance on the legislative history of such laws in resolving questions of statutory interpretation only perpetuates this oversight.[45] As a result, courts are properly hesitant to rely solely on the legislative history of such laws because it is a deficient authority on which to resolve doctrinal tensions.[46] In keeping with this argument, the following discussion observes that judicial reliance on the legislative history of the Hyde Amendment is shortsighted due to Congress's three-fold failure to address conflicts of fundamental legal doctrine when enacting this law.

The Hyde Amendment's Departure from the American Rule and Sovereign Immunity Doctrine

Representative Henry Hyde offered the Hyde Amendment as a criminal law version of the Equal Access to Justice Act (EAJA), a law that authorizes the award of attorneys' fees to prevailing civil litigants against the United States if the position of the government was not substantially justified.[47] An examination of

45. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29-37 (1997).

46. *See id.*

47. *See supra* notes 18-20 and accompanying text.

the conceptual implications of the Hyde Amendment, therefore, must be viewed through the lens of the EAJA.

Generally, the EAJA represents a statutory departure from two long-standing jurisprudential concepts. First, the EAJA, to a certain extent, abandons the "American rule," which is the common-law view that, win or lose, a litigant must bear the expense of her own attorney.[48] Second, the EAJA departs from the common-law doctrine of sovereign immunity, which bars suits against the government, unless this immunity is explicitly waived.[49] The proponents of the Hyde Amendment did not expressly address the tension between the amendment and these general principles. The best explanation for this alleged oversight is that the 105th Congress resolved this tension by implicitly borrowing the approach taken by the 96th Congress, which passed the EAJA, through the Hyde Amendment's expressed adoption of the EAJA's "procedures and limitations."[50] This answer to the doctrinal conflict is suspect because it promotes a wholesale substitution of the approach taken to old legislation for original thinking on current legislation. In other words, this response assumes that, in the case of the Hyde Amendment, no new consideration or restrictions were warranted. Were the differences between the two laws negligible, the tension between the Hyde Amendment and the American rule and sovereign immunity doctrine might be resolved by adoption of the EAJA scheme. The EAJA and the Hyde Amendment, however, differ in fundamental ways including their respective purposes, the degree of caution exhibited by each Congress in passing the laws, and the areas impacted by each statute. Before further examining the fundamental differences between the Hyde Amendment and EAJA, a brief review is necessary of the law of awards of attorneys' fees prior to the EAJA's enactment.

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48. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) ("In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser."); Henry Cohen, *Awards of Attorneys' Fees Against the United States: The Sovereign Is Still Somewhat Immune*, 2 W. NEW ENG. L. REV. 177, 177 (1979).

49. *See* Cohen, *supra* note 48, at 177-79.

50. Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997).

Pre-EAJA

In England, the common law routinely awarded attorneys' fees to prevailing litigants in civil suits.[51] In 1796, the Supreme Court of the United States held that American courts would follow their own rule in this area; to wit, judges must not, independent of statutory authority, award costs to prevailing parties.[52] Since then, Congress has from time to time passed legislation explicitly authorizing departures from the American rule, but only to a limited degree.[53] In only two specific areas could federal courts properly award costs beyond the scope of these statutes.[54] A federal court could, pursuant to its inherent power, award reasonable costs to a prevailing litigant against an entity who received a common benefit from the litigation,[55] or against the losing party when that party "'has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'"[56] Prior to the EAJA, however, the federal government enjoyed sovereign immunity from awards of attorneys' fees, even under the judicial exceptions of "common benefit" and "bad faith."[57]

In response to growing criticism that the American rule was too restrictive, some courts sought to expand the judicial exceptions to the doctrine.[58] For instance, courts began awarding attorneys' fees to the prevailing parties in civil litigation that

51. *See Alyeska Pipeline*, 421 U.S. at 247.

52. *See* Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796) ("The general practice of the *United States* is in opposition to [the English rule]; and even if that practice were not [s]trictly correct in principle, it is entitled to the re[s]pect of the court, till it is changed, or modified, by [s]tatute."), *quoted in Alyeska Pipeline*, 421 U.S. at 249-50 (citing subsequent holdings of the Court consistent with this early principle).

53. *See Alyeska Pipeline*, 421 U.S. at 251-63.

54. *See id.* at 257-58.

55. *See id.*; Spencer v. NLRB, 712 F.2d 539, 543 (D.C. Cir. 1983).

56. *Spencer*, 712 F.2d at 543 (quoting F.D. Rich Co. v. United States, 417 U.S. 116, 129 (1974) (dictum)).

57. *See id.* at 544 ("[This benefit] derive[s] from two sources: the general doctrine of sovereign immunity; and 28 U.S.C. § 2412, which, prior to its amendment by the EAJA, was 'consistently construed as immunizing the United States against attorney's fees awards absent clear or express statutory authority to the contrary.'" (quoting NAACP v. Civiletti, 609 F.2d 514, 516 (D.C. Cir. 1979))).

58. *See id.*

exception to the American rule was dubbed: the "private attorney general" exception.[60]

In 1975, in *Alyeska Pipeline Service Co. v. Wilderness Society*,[61] "the Supreme Court called a halt to this *judicially* managed doctrinal innovation."[62] There, the Court reaffirmed its commitment to the position that judges could not award attorneys' fees and costs unless specifically authorized to do so by statute. After an extensive review of the law, the Court explained:

> [T]he approach taken by Congress to this issue has been to carve out *specific* exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limits of [the statute], . . . courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs . . . to award fees in some cases but not others, depending upon the courts' assessment of the importance of the public policies involved in the particular cases.[63]

Essentially, the Court held that, with respect to further departures from the American rule, Congress must lead and the courts must follow. In 1980, Congress heeded the Supreme Court's request for leadership by enacting the EAJA.[64]

The EAJA vs. The Hyde Amendment

The differences between the Hyde Amendment and the EAJA are so substantial that the 105th Congress's failure to adopt extensive "Hyde-specific" provisions is unacceptable given the conflict between the Hyde Amendment's scheme and the American rule and sovereign immunity doctrine. First, the purposes of the EAJA are markedly different from those of the Hyde Amendment. Both the text and legislative history of the EAJA demonstrate the dual concerns of the 96th Congress in passing the law.

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60. *Id.*

61. 421 U.S. 240 (1975).

62. *Spencer*, 712 F.2d at 544 (emphasis added).

63. *Alyeska Pipeline*, 421 U.S. at 269 (emphasis added).

64. Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325 (1980) (current version at 28 U.S.C. § 2412 (1994)).

On the one hand, the EAJA, on its face, seeks to ameliorate the deterrent effect that discouraged litigants from asserting their rights in civil suits against the United States.[65] The legislative record demonstrates a congressional finding that the costs incurred when individuals sue or defend against the United States deters the assertion of claims and defenses.[66] The legislative history also evinces congressional intent to eliminate that inequity by awarding attorneys' fees and costs to certain parties.[67] The EAJA remedy is, thus, a response to a specific problem: the absence of litigation that might otherwise be brought or defended against were attorneys' fees recoverable against the government. As unfashionable as it may sound, a dearth of litigation can be a bad thing when it results in costs both to the individual, who sacrifices the assertion of his or her legal rights, and to society, which suffers the effects of a stunted body of law. The 96th Congress recognized these problems and enacted the EAJA to address them.[68]

The additional purpose of the EAJA is to fortify the established statutory and common law exceptions to the American rule.[69] Legislative reports discuss the intent of the EAJA to ensure that the government "will be subject to the common law and statutory exceptions to the American Rule regarding attorney fees. This change will allow a court in its discretion to award fees against the United States *to the same extent it may presently award such fees* against other parties."[70] In this sense,

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65. *See* Equal Access to Justice Act § 202(c)(1) ("It is the purpose of this title . . . (1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States . . . .").

66. *See* H.R. REP. NO. 96-1418, at 5-6 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4984; H.R. CONF. REP. NO. 96-1434, at 21 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5003, 5010.

67. *See* H.R. REP. NO. 96-1418, at 6, *reprinted in* 1980 U.S.C.C.A.N. at 4984; H.R. CONF. REP. NO. 96-1434, at 21, *reprinted in* 1980 U.S.C.C.A.N. at 5010.

68. *See supra* notes 65-66 and accompanying text.

69. *See* Equal Access to Justice Act § 202(c)(2) ("It is the purpose of this title . . . (2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the 'American rule' respecting the award of attorney fees.").

70. H.R. REP. NO. 96-1418, at 6, *reprinted in* 1980 U.S.C.C.A.N. at 4984 (emphasis added).

the EAJA does not break new ground, but rather, preserves the exceptions to the American rule that have developed over the course of a century.

Although it adopts a scheme similar to that of the EAJA, the Hyde Amendment does not share the purposes of its progenitor. There is no evidence that the 105th Congress found that the assertion of legal rights was deterred in the criminal context, for example, that criminal defendants pled guilty rather than asserting defenses due to the expense of going to trial. Instead, the Hyde Amendment was concerned solely with satisfying a *moral duty* to reimburse prevailing defendants for litigation expenses.[71] Unlike the Hyde Amendment, the individual reimbursement of costs is a *consequence*, not a *purpose* of the EAJA. Furthermore, the Hyde Amendment's compensation of litigation costs as an objective is distinct from the "deterrent-diminishing" purposes of the EAJA. Nor can it be said that the Hyde Amendment reflects the EAJA's purpose of merely ensuring the applicability of established exceptions to the American rule because no such exceptions existed in the criminal area before the Hyde Amendment. The Hyde scheme of awarding attorneys' fees to prevailing criminal defendants is unprecedented.[72] The irreconcilable differences between the purposes of these laws cast serious doubt on

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71. *See supra* note 17 and accompanying text. One might argue that an additional purpose of the Hyde Amendment is to curb the abusive actions of government officials. This is not the case, however, despite rhetoric in the affirmative. The Hyde Amendment expressly denies its remedy to defendants represented by publicly funded counsel. *See* Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997). Consequently, prosecutors need not worry about running afoul of the Hyde Amendment when prosecuting poor people. If the statute were honestly intended to deter the evils of prosecutorial misconduct, there would be no reasonable cause for this distinction. With respect to the law's deterrent effect on the prosecutor, there is no substantive difference between an attorneys' fees award that goes to a private law firm and one that goes to a public defender's office. Logic suggests that the public should be reimbursed for conducting an unnecessary defense to the same extent as the private individual. Admittedly, defendants, not lawyers, receive the awards under the statute, but this distinction lacks substance. Congress could easily have provided a cause of action for publicly funded legal services and, thereby, retained the principle of deterrence. The most disturbing aspect of the exemption of indigents from this purportedly *remedial* law, however, is that it arbitrarily promotes prosecutions of this class of persons because in such cases the government is beyond the reach of the Hyde Amendment.

72. *See supra* notes 53-57 and accompanying text.

the sufficiency of the 105th Congress's approach to resolving the American rule/sovereign immunity tension.

Second, the level of consideration in the 96th Congress's passage of the EAJA was substantially greater than that of the 105th Congress's passage of the Hyde Amendment. Prior to its enactment, the EAJA was the subject of multiple hearings[73] and congressional reports.[74] These reports discussed nearly every aspect of the law, from the purposes of the EAJA and congressional findings[75] to the definition of the standard for awards under the law.[76] Further, Congress placed stringent requirements on recovery under the EAJA, including: net-worth limitations on who may recover fees,[77] a thirty-day time limit for filing a claim,[78] and an hourly rate cap for attorneys' fees.[79] Most telling of the cautious approach of the 96th Congress was the inclusion of a sunset provision, which stated that the EAJA would be automatically repealed after three years.[80] These considerations reflect a conscientious legislature, one that was mindful of the issues implicated by the law they sought to pass and was careful to strike the appropriate balance between innovation and established doctrine.

The enactment of the Hyde Amendment, however, indicates no such restraint or judgment. No reports, hearings, or substantive debate informed the enactment of the amendment.[81] The legislative record of the Hyde Amendment is limited to a highly rhetorical argument in support of the law that evades criticism rather than addressing its substance.[82] The only guidance provided as to the standard for awards by the floor debate of the amendment was negated when the standard changed in confer-

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73. *See* H.R. REP. NO. 96-1418, at 6-8, *reprinted in* 1980 U.S.C.C.A.N. at 4984-87.

74. *See, e.g.*, H.R. REP. NO. 96-1418, *reprinted in* 1980 U.S.C.C.A.N. 4984; H.R. CONF. REP. NO. 96-1434, *reprinted in* 1980 U.S.C.C.A.N. 5003.

75. *See* H.R. REP. NO. 96-1418, at 5-8, *reprinted in* 1980 U.S.C.C.A.N. at 4984-87.

76. *See id.* at 10-11, *reprinted in* 1980 U.S.C.C.A.N. at 4988-90.

77. *See* Equal Access to Justice Act § 204(a), 28 U.S.C. § 2412(d)(2)(B) (1994).

78. *See* 28 U.S.C. § 2412(d)(1)(B).

79. *See id.* § 2412(d)(2)(A)(ii).

80. *See* Equal Access to Justice Act § 204(c), *repealed by* Pub. L. No. 99-80, § 6(b)(2), 99 Stat. 186 (1985).

81. *See supra* notes 9-10 and accompanying text.

82. *See supra* notes 9-10 and accompanying text.

ence committee.[83] Further, although it adopts the "procedures and limitations" of the EAJA, the Hyde Amendment fails to explain how inclusively this clause should be interpreted.[84] The amendment's most conspicuous omission, however, is that of a sunset provision, which would have authorized application of the statute for a fixed period, followed by its automatic repeal. In short, the failure of the 105th Congress to consider the Hyde Amendment to a comparable degree as its EAJA predecessors further invalidates the former's approach to resolve "by substitution"[85] the American rule and sovereign immunity tension.

Finally, the EAJA and the Hyde Amendment differ remarkably with respect to the policy areas affected by each law. Whereas the EAJA represents the next step in the continuing development of attorneys' fees awards in civil litigation, the Hyde Amendment is an unprecedented foray into the criminal law. As discussed above, with respect to the level of consideration of its attorneys' fees statute, the 105th Congress failed to emulate the 96th Congress. This failure is even more serious in light of the novelty of the Hyde Amendment scheme with its ill-considered impact on issues of criminal procedure, none of which are implicated by the EAJA.[86] Because the Hyde Amendment affects matters not even remotely implicated by the EAJA, the former law's naked substitution of the latter's approach to resolving issues of doctrinal conflict is fallacious.

Summary

The foregoing differences between the EAJA and the Hyde Amendment demonstrate the insufficiency of the 105th Congress's approach to resolving the conflict between the Hyde Amendment and the American rule and sovereign immunity doctrine. As a consequence, no indication exists that Congress contemplated these principles during the enactment of the Hyde Amendment. Certainly, the legislative record shows no balancing

83. *See supra* notes 11-14 and accompanying text.

84. For a discussion of the implications of this failure, see *infra* notes 176-81 and accompanying text.

85. *See supra* text accompanying notes 47-50.

86. *See infra* notes 139-42 and accompanying text.

of the role of established doctrines against the need for departure from such rules. Nor does it guide courts in reconciling the goal of the Hyde Amendment with the Supreme Court's holding in *Alyeska Pipeline* that Congress, not the courts, must strike the balance when departing from the American rule and sovereign immunity doctrine. For this reason, the legislative record is of little help to courts when interpreting the provisions of the Hyde Amendment.

Unfortunately, the American rule and sovereign immunity doctrine are not the only conflicting, constitutive legal theories ignored by the Hyde Amendment's enactment and, thus, they are not the only grounds on which to refute the value of its legislative history to subsequent judicial interpretation of the statute. The Hyde Amendment also collides with the doctrine of separation of powers, which the Supreme Court has consistently interpreted as prohibiting the judicial branch from reviewing the discretionary acts of the executive branch.[87]

Separation of Powers: Prosecutorial Discretion, Judicial Restraint, and the Hyde Amendment

The Hyde Amendment authorizes federal courts to review the nature and quality of the decisions made by executive agencies, especially prosecutor's offices, in determining whether the position of the government was "vexatious, frivolous, or in bad faith."[88] Henry Hyde viewed the amendment as a means by which to check the actions of overzealous prosecutors.[89] He placed great confidence in the ability of judges to decide properly when to penalize objectionable conduct on the part of the executive.[90] Despite their good intentions, however, the proponents of

87. In *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967), then Judge Burger observed that "[i]t follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary power of the attorneys of the United States in their control over criminal prosecutions." *Id.* at 481.

88. *See infra* notes 219-31 and accompanying text.

89. *See supra* note 16 and accompanying text.

90. *See* 143 CONG. REC. H7786, H7793 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde) ("[T]he judge makes the decision; the U.S. attorney does not, the jury does not. The judge who has heard the case has heard all the evidence.").

the Hyde Amendment failed to recognize that these aims are in direct conflict with longstanding principles that have been consistently upheld by the Supreme Court regarding judicial review of prosecutorial decisions. Any analysis of the Hyde Amendment must be viewed in the context of these precedents.

In *Wayte v. United States*,[91] a criminal defendant challenged the decision of the United States Attorney to prosecute him for his failure to register for selective service. The defendant alleged that he was unconstitutionally singled out for prosecution because of his outspoken opposition to the draft.[92] The trial court dismissed the charges, but the court of appeals reversed the trial court's decision.[93] Approaching the issue of selective prosecution, the Supreme Court prefaced its analysis with this summary of the constitutional role of the prosecutor:

> In our criminal justice system, the Government retains "broad discretion" as to whom to prosecute. "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."[94]

The Court then turned its attention to the proper role of the courts in reviewing prosecutorial decisions and asserted that, "[t]his broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review."[95] The Court noted several factors involved in prosecutorial decisions that "are not readily susceptible to the kind of analysis the courts are competent to undertake."[96] In short, the Court raised doubts as to ability of courts to review prosecutors' discretionary decisions.

The belief that judicial review of these decisions would be inadequate was but one cause for the Court's concern over in-

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91. 470 U.S. 598 (1985).
92. *See id.* at 604.
93. *See id.* at 604-06.
94. *Id.* at 607 (citations omitted) (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)).
95. *Id.*
96. *Id.*

terference with separation of powers. The Court recognized:

> Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.[97]

Recognition of these pitfalls led the Court to permit selective prosecution claims only in limited circumstances, specifically those involving suspect classifications such as race or religion.[98]

Two years after this decision, the Supreme Court revisited the subject of the respective roles of the prosecutor and the courts. In *Town of Newton v. Rumery*,[99] respondent faced criminal charges of witness tampering and entered into a release-dismissal agreement with a prosecutor. The agreement provided that the respondent would give up a related civil rights claim against the government in exchange for dismissal of the pending criminal charges.[100] The respondent subsequently attacked the validity of such agreements on public policy grounds, arguing that these agreements were improper uses of prosecutorial discretion.[101]

In rejecting the respondent's argument that courts should invalidate release-dismissal agreements, the Supreme Court renewed its deferential stance toward claims of improper prosecutorial conduct. Citing *Wayte* and related cases, the Court elaborated:

> Our decisions in those cases uniformly have recognized that courts normally must defer to prosecutorial decisions as to whom to prosecute. The reasons for judicial deference are well known. Prosecutorial charging decisions are rarely sim-

97. *Id.* at 607-08.
98. *See id.* at 608.
99. 480 U.S. 386 (1987).
100. *See id.* at 390.
101. *See id.* at 391.

> ple. In addition to assessing the strength and importance of a case, prosecutors also must consider other tangible and intangible factors, such as government enforcement priorities. Finally, they also must decide how best to allocate the scarce resources of a criminal justice system that simply cannot accommodate the litigation of every serious criminal charge.[102]

As it did in *Wayte*, the Court concluded that "[b]ecause these decisions 'are not readily susceptible to the kind of analysis the courts are competent to undertake,' we have been 'properly hesitant to examine the decision whether to prosecute.'"[103]

Recently, the Supreme Court reinforced the rule requiring judicial deference to prosecutorial decisions. In *United States v. Armstrong*,[104] the Court was called upon to set the threshold necessary to obtain discovery in a selective prosecution claim alleging improper use of the prosecutor's charging authority.[105] In refusing to set a low standard for such claims, the Court cited the now familiar language of *Wayte* in its effort to clarify further the rationale for judicial restraint:

> The Attorney General and United States Attorneys retain "broad discretion" to enforce the Nation's criminal laws. They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3; . . . . As a result, "[t]he presumption of regularity supports" their prosecutorial decisions and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."[106]

The constitutional presumption required by the separation of powers doctrine, however, was not the only factor relevant to the Court's analysis. Once again, the Court doubted the competence of courts to second-guess prosecutorial decisions.[107] The

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102. *Id.* at 396 (citation omitted).
103. *Id.* (quoting *Wayte*, 470 U.S. at 607-08).
104. 517 U.S. 456 (1996).
105. *See id.* at 458.
106. *Id.* at 464 (citations omitted).
107. *See id.* at 465 ("Judicial deference to the decisions of [prosecutors] rests in

Armstrong decision represents yet another affirmance of the fundamental doctrine of judicial deference that characterizes the respective roles of the executive and judicial branches.

Legislation that authorizes broad judicial review of exercises of prosecutorial discretion cannot be reconciled with these precedents. The Court's language on this issue is unequivocal.[108] The potency of the rule of judicial restraint does not depend on the presence or absence of legislative intent consistent with it. This is because the rule is derived from the separation of powers doctrine,[109] which is fundamental in the scheme of American constitutional law.[110]

The Hyde Amendment, however, authorizes a plan in direct conflict with these principles. It asks courts to review any number of prosecutorial decisions in order to determine whether a government action was "vexatious, frivolous, or in bad faith."[111] There is no indication that Congress considered separation of powers arguments at all in the passage of this law. Neither the statute nor its legislative record contains reference to the Supreme Court decisions discussed above. The debate of the Hyde Amendment contains no discussion of the separation of powers doctrine or its concomitant rule requiring judicial deference to prosecutorial decisions.[112] Congress neither held hearings at which the Justice Department could have argued these concerns nor produced any reports expressing its findings as to the appropriate balance of the competing interests implicated by the Hyde Amendment.[113] In short, the enactment of the Hyde Amendment

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part on an assessment of the relative competence of prosecutors and courts.").

108. *See supra* note 102 and accompanying text.

109. *See supra* notes 87, 106 and accompanying text.

110. *See, e.g.*, Hampton & Co. v. United States, 276 U.S. 394, 406 (1928) ("[I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power.").

111. For a discussion of the scope of this language, see *infra* notes 190-231 and accompanying text.

112. Representative Rivers's concerns that the Hyde Amendment "would work a fundamental change in our legal system and . . . pose a substantial obstacle to the accomplishment of [the Justice Department's] essential mission" were ignored by Representative Hyde in the floor debate on the measure. 143 CONG. REC. H7786, H7793 (daily ed. Sept. 24, 1997) (statement of Rep. Rivers).

113. *See id.* at H7791 (statement of Rep. Skaggs).

completely ignored the serious conflict between the separation of powers doctrine and its plan to award attorneys' fees against federal prosecutors. As a consequence, courts should hesitate to rely on the legislative record when construing the provisions of the Hyde Amendment and must address the conflicts ignored by Congress. The next section briefly discusses the distinction between the civil and criminal law. This subject represents the third conceptual area implicated by the Hyde Amendment scheme, but ignored by Congress in the law's enactment.

The Civil-Criminal Distinction[114]

During the debate of the Hyde Amendment, opponents complained that the enactment of the measure was rushed and lacked adequate consideration of critical issues.[115] Representative Hyde defended his amendment on the ground that because a scheme for awarding attorneys' fees against the government had operated successfully in the civil law for seventeen years, his plan would work smoothly in the criminal system as well.[116] The existence of pronounced differences between the two systems, however, significantly undercuts Hyde's position that the EAJA can be implemented easily in the criminal law without additional consideration.

This section discusses two categories of differences between the civil and criminal paradigms: substantive and procedural. Distinctions of both substance and process between the civil and criminal law are as pronounced as they are numerous.[117] Substantively, the civil and criminal systems fundamentally differ in their respective purposes.[118] Procedurally, each system is subject

114. The civil-criminal law distinction contemplates philosophical points beyond the scope of this Note. Because the civil-criminal law distinction is less a jurisprudential doctrine and more a set of broad systemic differences, this section merely introduces its relevant aspects, rather than attempts a comprehensive discussion of them. For a symposium on the civil-criminal distinction and related issues, see Symposium, *The Civil-Criminal Distinction*, 7 J. CONTEMP. LEGAL ISSUES 1 (1996).

115. *See supra* notes 112-13 and accompanying text.

116. *See* 143 CONG. REC. H7786, H7791 (statement of Rep. Hyde).

117. *See generally* William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 3-7 (1996) (detailing the constitutional lines between criminal and civil law and between substance and process).

118. *See infra* notes 120-21 and accompanying text.

to its own rules, statutory provisions and constitutional requirements.[119] Neither category of distinctions, however, was considered adequately in the enactment of the Hyde Amendment.

Substantive Distinctions

The purposes of the civil and criminal systems vary greatly. Simply put, the purpose of the civil law is to compensate individual injury.[120] The criminal law, on the other hand, seeks to protect the public through the punishment of wrongdoing.[121] The civil system narrowly protects individual interests, whereas, the criminal system broadly protects the public at large.[122] Furthermore, civil suits are, for the most part, initiated by individuals primarily interested in receiving monetary compensation,[123] while criminal prosecutions are brought by the government itself to further the more ambiguous goals of effective public safety and the administration of justice.[124] Consequently, the initiation and litigation of criminal charges, i.e., the purview of the prosecutor, are subject to a broader range of considerations than are those of civil claims.[125]

The prosecutor has a special function in the criminal justice system that exceeds that of merely winning cases. Justice Sutherland best explained this role:

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119. *See infra* notes 139-40 and accompanying text.

120. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 7 (5th ed. 1984) ("The civil action . . . is commenced and maintained by the injured person, and its primary purpose is to compensate for the damage suffered, at the expense of the wrongdoer."); 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 1.3, at 17 (1986) ("The function of tort law is to compensate someone who is injured for the harm he has suffered.").

121. *See* KEETON ET AL., *supra* note 120, at 7 ("The purpose of [a criminal prosecution] is to protect and vindicate the interests of the public as a whole by punishing . . . ."); LAFAVE & SCOTT, *supra* note 120, at 17 ("The aim of the criminal law . . . is to protect the public against harm, by punishing harmful results of conduct or at least situations (not yet resulting in actual harm) which are likely to result in harm if allowed to proceed further.").

122. *See* KEETON ET AL., *supra* note 120, at 7.

123. *See id.*

124. *See* LAFAVE & SCOTT, *supra* note 120, at 17 ("With crimes, the state itself brings criminal proceedings to protect the public interest but not to compensate the victim; with torts, the injured party himself institutes proceedings to recover damages . . . ." (footnote omitted)).

125. *See infra* notes 126-27 and accompanying text.

> 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.[126]

The Supreme Court has recognized that the myriad factors that form the basis of prosecutorial decisions are not easily reduced into reviewable terms.[127] Accordingly, a plan imposing financial penalties, such as attorneys' fees, upon the prosecuting authority for bringing improper claims is a questionable proposition because such would compel courts to review the propriety of the prosecutor's judgments. Unlike the criminal context, the award of attorneys' fees and its concomitant deterrent effect on the bringing of improper claims is conceptually consistent with the goals of the civil system, the principal concern of which is the balancing of pecuniary interests.[128] A law authorizing awards of attorneys' fees against the prosecuting authority, therefore, must duly recognize the tensions implicated by both the special role of the prosecutor and the differing goals of the criminal and civil systems.

The proponents of the Hyde Amendment, however, evinced no recognition of these disparities. At the time the House of Representatives approved the Hyde Amendment, the measure was virtually identical to the civil EAJA, most importantly with respect to the standard for awards and the burden of proof.[129] Eventually, the conference committee changed the standard for

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126. Berger v. United States, 295 U.S. 78, 88 (1935), *overruled on other grounds by* Stirone v. United States, 361 U.S. 212 (1960).

127. *See supra* note 102 and accompanying text. For further discussion of these factors, see Lance M. Africk, *Prosecutorial Discretion: Striking a Balance*, 36 LA. B.J. 16, 16-19 (1988).

128. *See* KEETON ET AL., *supra* note 120, § 3, at 15 ("[The tort law's] primary purpose, of course, is to make a fair adjustment of the conflicting claims of the litigating parties.").

129. *See supra* note 8.

awards and burden of proof,[130] most likely yielding to threats of an executive veto of the entire appropriations bill.[131] As will be discussed extensively in the third section of this Note, the breadth of the revised standard still fails to give due recognition to the important interests threatened by the Hyde Amendment's scheme.[132] For now, a brief introduction to the language of the standard will suffice.

The Hyde Amendment authorizes a court to award attorneys' fees against the United States if it finds that the position of the government was "vexatious, frivolous, or in bad faith."[133] This standard differs from that under the Hyde Amendment's civil counterpart, the EAJA, which demands that the government's position be "substantially justified" if it is to avoid a financial penalty.[134] The Hyde Amendment standard, however, finds its origin in the common law of *civil* awards of attorneys' fees. The "vexatious" and "bad faith" standards are merely the Supreme Court's elaborations on the previously discussed,[135] common law exceptions to the American rule.[136] Similarly, "frivolous" has long been the standard for awards of attorneys' fees to prevailing defendants in civil rights litigation.[137] Accordingly, it cannot be maintained that the transformation of the Hyde Amendment's standard from "substantially justified" to "vexatious, frivolous, or in bad faith" was a response to the special considerations

130. *See supra* note 8; *infra* note 217 and accompanying text.

131. *See supra* note 12 and accompanying text; *infra* note 216 and accompanying text.

132. *See infra* notes 152-231 and accompanying text.

133. *See supra* note 7 and accompanying text.

134. *See supra* note 8.

135. *See supra* notes 59-64 and accompanying text.

136. *See* F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974) ("We have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted *in bad faith, vexatiously*, wantonly, or for oppressive reasons . . . ." (emphasis added)).

137. *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978) (holding that courts may award attorneys' fees to prevailing defendants under the Civil Rights Act of 1964 upon a finding that plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith"). When enacting the EAJA, the 96th Congress used this standard as a frame of reference to formulate the "substantially justified" standard. *See* H.R. REP. NO. 96-1418, at 10, 14 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4988-89, 4992-93.

raised by the amendment's unprecedented application to the criminal context.[138]

Procedural Distinctions

The most pronounced procedural line separating the civil and criminal systems is a constitutional one. The United States Constitution offers sweeping protections to criminal defendants, while extending relatively few protections to civil litigants.[139] The constitutional law of criminal procedure "has the look of a code designed for comprehensive coverage" while the rest of the spectrum of constitutional law "is much more vague and open-ended and applies much more rarely."[140] Because the Constitution itself provides so few protections in matters of civil procedure, the need for attorneys' fees statutes in the civil system is not surprising. By the same token, in light of the numerous constitutional restraints already placed on the prosecuting authority, the need for similar statutes in the criminal context is dubious.

The 105th Congress's approach to the Hyde Amendment was flawed not in its recognition of a need for awards of attorneys' fees in the criminal context in the face of significant pre-existing protections, but rather in its complete failure to explicate the

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138. This transformation has no clear explanation. *See* United States v. Gardner, 23 F. Supp. 2d 1283, 1288 (N.D. Okla. 1998) ("There is little history to explain the transformation of Representative Hyde's original proposed amendment into its present form."). Presumably the change was a concession to the Hyde Amendment's opponents, who wanted the standard to require a showing of *subjective bad faith* on the part of the Government. *See* 143 CONG. REC. H7786, H7792 (daily ed. Sept. 24, 1997) (statement of Rep. Skaggs) ("Were the words 'malicious' and 'abusive' in [Representative Hyde's] amendment, and maybe those are criteria that also ought to be introduced, it would be a different matter. Those were not standards that are in his amendment although they were certainly the standards invoked in his rhetoric."); *see also infra* notes 210-18 and accompanying text (discussing whether the language change was a meaningful concession with respect to this requirement).

139. *See* Stuntz, *supra* note 117, at 1 ("Criminal procedure is almost completely constitutionalized; civil procedure is not."). Stuntz notes that criminal defendants enjoy protections with respect to searches and seizures, self-incrimination, right to counsel, disclosure of exculpatory evidence, jury selection, equal protection, rules of evidence, right of confrontation, double jeopardy and general due process considerations that are unequaled in the civil law. *See id.* at 3-4.

140. *Id.* at 3.

balance it struck, if any, with respect to those protections.[141] As a result, Congress's omissions have left the courts without guidance as to how to harmonize the broad and ambiguous authorization of the Hyde Amendment with pre-existing rights enjoyed by criminal defendants. Congress may have intended that the EAJA guide judicial application of the Hyde Amendment, but if this is the case, it failed to recognize that the EAJA is worthless to courts in achieving this harmony because the EAJA in no way implicates issues of constitutional criminal procedure.[142]

In summary, the three-fold failure of Congress to recognize and resolve areas of profound conflict between the Hyde Amendment and fundamental legal principles raises serious doubts as to whether Congress rationally approved this measure. As introduced earlier, these omissions in the legislative process create significant problems with respect to judicial interpretation of the Hyde Amendment. In order to appraise fully these problems, a brief discussion of the general rules of statutory interpretation is appropriate.

Statutory Interpretation and the Hyde Amendment

It is well-established that courts must begin statutory analysis with the text of the statute.[143] "All judicial approaches to statutory interpretation are framed by the constitutional truism that the judicial will must bend to the legislative command."[144] If the language is plain, "the sole function of the courts is to en-

141. The only indication that Congress struck a balance is a single sentence pertaining to a single issue implicated by this discussion. In its brief treatment of the Hyde Amendment, the House Conference Committee report on the Commerce, Justice and State appropriations bill provided, "[t]he conferees understand that a grand jury finding of probable cause to support an indictment does not preclude a judge from finding that the government's position was vexatious, frivolous or in bad faith." H.R. CONF. REP. NO. 105-405, at 194 (1997).

142. *See infra* notes 152-89 and accompanying text (discussing the consequences of the lack of guidance to courts in this area).

143. *See* Caminetti v. United States, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed . . . .").

144. ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 4 (1997).

force it according to its terms."[145] When the answer to a question of statutory interpretation is not clear from the plain meaning, judges often must resort to use of the legislative history.[146]

At the very least, the propriety of judicial use of legislative materials as evidence of congressional intent is unsettled. Critics of judicial use of legislative history maintain that it is undemocratic[147] and unreliable.[148] As a matter of course, judges should be cautious in making use of legislative history when giving meaning to the indistinct language of a statute.[149]

Some legislative materials are less probative of legislative intent than others. Criticism has been specifically directly toward the value of floor debates because they are notoriously unreliable sources of Congress's intent.[150] The unreliability of

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145. *Caminetti*, 242 U.S. at 485.

146. *See* MIKVA & LANE, *supra* note 144, at 22.

147. *See* Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring) ("Committee reports, floor speeches, and even colloquies between Congressmen . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President."); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 375 ("Legislative materials . . . at best can shed light only on the 'intent' of that small portion of Congress in which such records originate; they therefore lack the holistic 'intent' found in the statute itself.").

148. *See* MIKVA & LANE, *supra* note 144, at 30. *But see* Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 306 (1990) ("[L]egislative history is the authoritative product of the institutional work of the Congress. It records the manner in which Congress enacts its legislation, and it represents the way Congress communicates with the country at large.").

149. *See* MIKVA & LANE, *supra* note 144, at 33.

150. *See* Weinberger v. Rossi, 456 U.S. 25, 35 n.15 (1982) ("The contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history." (citations omitted)); Eric Lane, *Legislative Process and Its Judicial Rendering*, 48 U. PITT. L. REV. 639, 649 (1987) ("[M]ost statements on the floor do not relate to the deliberative process, . . . but politically to their constituents and interest groups. Occasionally, however, there will be an actual floor debate in which an analysis of the bill is undertaken."). As discussed earlier, Representative Hyde's floor statements in support of his amendment were closer to the former characterization than the latter because he failed to analyze the substantive implications of the law, instead, settling for rhetoric presumably calculated to play upon widespread fear of and disdain for federal law enforcement. *See supra* notes 15-17 and accompanying text.

The absence of a committee report on the Hyde measure weighs in against the use of legislative history to resolve critical ambiguities under the law. *See* Thornburg v. Gingles, 478 U.S. 30, 43 n.7 (1986) ("We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill."

floor debates in this regard is of special concern to the present discussion because the entire legislative history of the Hyde Amendment consists of a single, thirty-minute floor debate.

Based on the foregoing discussion, the conclusion is unavoidable that the legislative record of the Hyde Amendment is of virtually no value to courts in interpreting that statute. Not only is it of questionable value for the same reasons as are all legislative materials, especially floor debates, but also in light of the circumstances of the Hyde Amendment's enactment. The statements of Representative Hyde in the floor debate were highly rhetorical and lacking any substantive discussion of the problems implicated by his proposal.[151] The 105th Congress enacted the amendment in a headlong and indiscriminate manner in an environment of nominal opposition resulting from the political appeal of the measure and the demonization of federal law enforcement agencies. As a result, the enactment of the Hyde Amendment left unresolved the serious conflicts between its aims and fundamental legal doctrines reflected in the Constitution and the decisions of the Supreme Court. These ambiguities create a danger that, should the courts fail to recognize the implications of these conflicts when interpreting the Hyde Amendment, the significant interests embodied in these legal doctrines will go unrealized. For example, when resolving critical statutory questions under the Hyde Amendment, courts may erroneously rely upon its deficient, in quality and quantity, legislative history. If, in interpreting the amendment, courts do not address these significant doctrinal interests, as Congress failed to do, these issues will be forever neglected to the detriment of executive law enforcement agencies and, hence, to the public at large.

(citations omitted)).

151. Indeed, the statements of Representative Hyde reflect an almost deliberate indifference to the complexities of his plan. Responding to calls from opponents for hearings and reports on the measure, Representative Hyde stated, "This is about as simple a concept as there is. We have had [the EAJA] and we have been satisfied with it in civil litigation. I am simply applying the same situation to criminal litigation." 143 CONG. REC. H7786, H7793 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde).

JUDICIAL PERPETUATION OF THE FOLLY

This section examines recent district court decisions in which courts have erroneously approached the interpretation of the Hyde Amendment.[152] Specifically, this section focuses on cases in which courts have run afoul of the dangers just introduced; these courts have placed near exclusive reliance on the legislative history in interpreting the provisions of the attorneys' fees law. Treating the sweeping language of the Hyde Amendment's floor debate as dispositive of important questions of interpretation, the decisions of these courts provided little, if any, substantive analysis of the important issues implicated by the scheme, while paving the way for broad application of the statute. The courts, thus, repeated the failure of Congress to account adequately for the serious doctrinal conflicts discussed in the second section. As will be discussed, the expansive meanings given the Hyde Amendment's provisions by these decisions pose serious threats to effective law enforcement.

Interpretations of the Hyde Amendment's Procedural Provisions

In *United States v. Gardner*,[153] one of the first reported decisions to interpret the Hyde Amendment, the district court fell prey to the lure of legislative history as a substitute for independent judicial analysis. In *Gardner*, the IRS investigated, and the United States Attorney's Office later prosecuted, a defendant tax preparer for numerous violations of the tax law.[154] Shortly before a hearing on the defendant's motion to dismiss, the government sought dismissal of the charges without prejudice. The court dismissed three counts with prejudice and the remaining fifteen counts without prejudice.[155] Subsequently, the defendant sought

152. The Hyde Amendment contains numerous provisions for courts to interpret. For the purposes of this discussion, these are divided into procedural and substantive provisions. Procedural provisions primarily refer to the "pursuant to the procedures and limitations" language of the Hyde Amendment and involve the applicability of the law to a given set of facts. Substantive provisions refer to the law's standard for awards, that is, "vexatious, frivolous, or in bad faith." Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997).

153. 23 F. Supp. 2d 1283 (N.D. Okla. 1998).

154. *See id.* at 1285-86.

155. *See id.*

an award of attorneys' fees under the Hyde Amendment in the amount of $108,332.91.[156]

The government opposed the defendant's claims on numerous procedural grounds. First, it argued that the defendant was not a "prevailing party" under the Hyde Amendment because the government had the authority to reindict him and that dismissal without prejudice might rest on factors other than the government's improper behavior.[157] Second, the government argued that the dismissal was not a "final judgment," and therefore, defendant's claim was premature.[158] Third, and finally, the government urged that the defendant's claim should be barred because of his failure to demonstrate his qualification for an award by asserting that his net worth was under the jurisdictional amount.[159] Faced with these procedural questions, the court sought the answers by reference to the legislative record of the Hyde Amendment's enactment.

Although the court initially noted the "sparse legislative history with respect to the Hyde Amendment,"[160] it proceeded to examine what little legislative record exists, focusing particularly on the floor debate.[161] After excerpting the more rhetorical portions of Representative Henry Hyde's speech, the court held:

> Based on these statements, and without any *evidence of legislative intent to the contrary*, the Court believes that Representative Hyde's intent in introducing this measure was to import the Equal Access to Justice Act to the *fullest extent possible* to the criminal context. This view will guide the

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156. *See id.*

157. *See id.* at 1290.

158. *See id.* The *Gardner* court interpreted the Hyde Amendment as incorporating the time limit for filing claims under the EAJA, which provides:

> [a] party seeking an award of fees and other expenses shall, within thirty days of *final judgment* in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection.

28 U.S.C. § 2412(d)(1)(B) (1994) (emphasis added).

159. *See Gardner*, 23 F. Supp. 2d. at 1292-93. The *Gardner* court also interpreted the Hyde Amendment as incorporating the eligibility requirements under the EAJA, which limits fee awards to "an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed." 28 U.S.C. § 2412(d)(2)(B).

160. *Gardner*, 23 F. Supp. 2d at 1287.

161. *See id.* at 1287-89.

> Court's consideration of each of the contested provisions of the Amendment under the standard rules of statutory construction.[162]

Consistent with its expansive view of the scope of the Hyde Amendment, the court interpreted, with only perfunctory analysis, each of the contentious procedural provisions in the defendant's favor.

The court's disposition of the "final judgment" issue offers an especially troubling example of the use of dubious legislative history as compelling authority. The government argued that a decision of the Supreme Court, which held that dismissal of charges without prejudice is not a "final judgment,"[163] coupled with the fact that it could easily reindict, precluded a finding there had been a final judgment in the defendant's case. Ignoring this precedent, the court found that the dismissal without prejudice *was* a final judgment under the Hyde Amendment.[164] The court attempted to justify its departure from precedent and sound reasoning on the notion that to rule in favor of the government would be "inconsistent with both logic and the purpose behind the statute, which is to deter vexatious governmental conduct."[165]

The approach of the court was erroneous insofar as it treated the legislative history of the Hyde Amendment as the touchstone of statutory interpretation. The court failed to examine independently and critically the implications of the Hyde Amendment within the context of established legal doctrine. For example, the court presumed that Congress intended the Hyde Amendment to apply "to [the] fullest extent possible" in the absence of "evidence of legislative intent to the contrary." This notion flies in the face of the *Alyeska Pipeline* holding that federal courts are not permitted to extend departures from the American rule and sovereign immunity doctrine without *specific* statutory guidance.[166] The Supreme Court, it seems, requires the *presence of evidence*

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162. *Id.* at 1289 (emphasis added).
163. *See id.* at 1292 (citing Parr v. United States, 351 U.S. 513, 518 (1956)).
164. *See id.* at 1292-93.
165. *Id.* at 1292.
166. *See supra* notes 61-64 and accompanying text.

of legislative intent in the affirmative before it would permit a court to ignore precedents and sound opposing arguments, and apply an attorneys' fees law to its outer limits.[167]

Further, the court gave no recognition to the Hyde Amendment's implication of the separation of powers doctrine or of issues pertaining to the civil-criminal distinction. The court apparently assumed that Congress dutifully pondered these issues in the enactment of the Hyde Amendment and struck a reasonable balance of the interests.[168] As discussed above, however, such was not the case. In short, the *Gardner* court perpetuated the same faults of Congress in its attempt to delineate the scope of the Hyde Amendment's procedural provisions.

The decision in *United States v. Ranger Electronic Communications, Inc.*[169] further illustrates the potential for uncritical judicial adoption of the Hyde Amendment's floor debate as dispositive authority in the interpretation of key procedural provisions. The *Ranger* court's approach, however, was even more misguided than that in *Gardner* because *Ranger* relied on the Hyde Amendment's dubious legislative record not merely to reach to its literal limits of law, but to exceed them.

In *Ranger*, the underlying action was a prosecution of defendants, the executives of an electronics company, for alleged violations of FCC laws pertaining to the importation of illegal radios.[170] During trial, the government's chief witness admitted to lying to the United States about bank records, which were relevant to the witness' credibility, in order to avoid cross-examination concerning those records.[171] Following this disclosure, some defendants accepted plea agreements providing for the dismissal of certain charges against them with prejudice.[172] Soon after, the defendants discovered the existence of exculpatory evidence in internal FCC memoranda.[173] Thus, the defendants sought attorneys' fees under the Hyde Amendment because the govern-

167. *See supra* notes 61-64 and accompanying text.
168. *See Gardner*, 23 F. Supp. 2d at 1289.
169. 22 F. Supp. 2d 667 (W.D. Mich. 1998).
170. *See id.* at 669-70.
171. *See id.*
172. *See id.* at 670-71.
173. *See id.* at 671-73.

ment failed to disclose this exculpatory evidence as required by law.[174]

The court was required to interpret the Hyde Amendment's time limitation because a dispute arose as to whether the defendants had filed a timely claim under the law.[175] The Hyde Amendment does not speak explicitly to time limits; rather, it adopts the "procedures and limitations" of the EAJA.[176] One of the limiting provisions of the EAJA states that claims for attorneys' fees must be filed within thirty days of a final judgment from which there is no appeal.[177] The defendants in *Ranger* failed to file within this period of time, but argued that this delay was due to the government's underlying failure to disclose materials.[178]

Presumably, the plain meanings of both the Hyde Amendment and the EAJA preclude an award in the case of a late filing. The *Ranger* court, however, held that the explicit thirty-day time limitation in the EAJA did not apply to claims under the Hyde Amendment, despite the latter law's adoption of the former's "procedures and limitations."[179] The court surmised that the "EAJA time limitation works differently in criminal cases," due to the interplay of the double jeopardy clause.[180] The court, thus, faced a fundamental problem clearly resulting from Congress's failure to account adequately for the civil-criminal distinction in enacting the Hyde Amendment. As discussed above, Congress provided no guidance to the courts as to what EAJA "procedures and limitations" would carry over to the criminal context, let alone how the courts should reconcile the ones that do transfer with the unique concepts of criminal procedure such as double jeopardy.[181]

The court resolved the conflict by altogether eliminating the thirty-day provision. As in *Gardner*, the court based this falla-

174. *See id.*
175. *See id.* at 675-76.
176. *See supra* note 7 and accompanying text.
177. *See* Equal Access to Justice Act § 1(d)(2), 28 U.S.C. § 2412(d)(1)(B) (1994).
178. *See Ranger*, 22 F. Supp. 2d at 675.
179. *See id.* at 674-75.
180. *Id.* at 674
181. *See supra* notes 139-42 and accompanying text.

cious decision entirely on a liberal use of the Hyde Amendment's legislative record.[182] As a result, the court rejected the thirty-day time limit in favor of a rule of reason in cases in which the government fails to disclose evidence.[183]

The court claimed that canons of interpretation further buttressed its reasoning.[184] The general principles relied upon by the court in reaching its broad interpretation included the notions that: "all statutes should be read fully and interpreted judiciously rather than mechanically,"[185] "remedial statutes should be interpreted in accordance with their remedial purposes,"[186] and the "'cardinal principle of statutory construction is to save and not to destroy.'"[187] Conspicuously absent from the court's reasoning is any recognition of the *specific principles* provided in *Alyeska Pipeline* and the *Wayte* line of cases. As discussed earlier, those decisions mandate the exercise of judicial restraint in departing from the American rule and in reviewing the propriety of prosecutorial decisions. In other words, the court ignored the pertinent case law and, instead, based its departure from the plain meaning of the Hyde Amendment upon malleable canons of statutory interpretation.[188]

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182. *See Ranger*, 22 F. Supp. 2d at 675 ("The legislative history of the Amendment supports the creation of a limited extension of the application period in such a circumstance.").

183. *See id.* Even if it is assumed that reliance on the Hyde Amendment's floor debate is proper, the court failed to point out that proponents of the Hyde Amendment argued that one of its strengths was adopting the established limitations of the EAJA. *See* 143 CONG. REC. H7786, H7791 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde) ("[T]hat is the law, and it has been the law for 17 years. There are cases interpreting it . . . and we have had 17 years of successful interpretation and reinforcement of that law.").

184. *See Ranger*, 22 F. Supp. 2d at 675. *See generally* MIKVA & LANE, *supra* note 144, at 23-24 ("*Canons of construction* are judicially crafted maxims for determining the meaning of statutes. . . . Canons expressly intend to limit judicial discretion by rooting interpretive decisions in a system of aged and shared principles from which a judge may draw a 'correct', unchallengeable rule of 'how to read.'" (quoting Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rule or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 399 (1950))).

185. *Ranger*, 22 F. Supp. 2d at 675 (citing Connecticut v. National Bank of Germain, 503 U.S. 249, 255 n.1 (1992)).

186. *Id.* (citing County of Washington v. Gunther, 452 U.S. 161, 178 (1981)).

187. *Id.* (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937)).

188. Critics have observed that "canons are not a system or body of principles that provide the 'correct reading,' but are a grab bag of individual rules, from which a

These flawed interpretations of the procedural provisions of the Hyde Amendment demonstrate the consequences of the 105th Congress's failure to address adequately the full implications of the law. The sheer number and complexity of the statutory questions left open to judicial interpretation invalidates Representative Hyde's presumption that application of the EAJA to the criminal context "is about as simple a concept as there is."[189] That the first judicial interpretations of the law have resulted in departures from precedent and in judicially fashioned exceptions to the plain meaning of the statute, based entirely on dubious legislative history and flexible "canons," is evidence of the serious problems inherent in the application of the Hyde Amendment. Having failed to provide adequate guidance, Congress has left the courts to rely upon inferior tools to carry out a forbidden mission: the autonomous circumscription of a policy that conflicts with established legal doctrines.

The Hyde Amendment's Substantive Standard

Defining the Standard

Under the Hyde Amendment, a court may award attorneys' fees to eligible claimants if it finds the position of the government to be "vexatious, frivolous, or in bad faith" (hereinafter "the standard"). The precise meaning of this standard is not clear from either the statute itself or its legislative history. As discussed above, the legislative record consisted almost exclusively of the floor debate of the proposed amendment.[190] Recall, however, that the debate discussed a completely different standard and that little information exists as to the transformation of the proposed language into the ultimate standard.[191] Consequently, the legislative history provides little guidance in defining the standard.

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judge can choose to support his or her view of the case." MIKVA & LANE, *supra* note 144, at 25; *see* Llewellyn, *supra* note 184, at 401 ("[T]here are two opposing canons on almost every point.").

189. 143 CONG. REC. H7793 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde).

190. *See supra* note 14 and accompanying text.

191. *See supra* note 8.

Reference to the 96th Congress's enactment of the EAJA supplies some information pertaining to the Hyde Amendment's standard. The 96th Congress fashioned a new yardstick for attorneys' fees awards and, unlike the 105th Congress, explained where that standard fell on the known spectrum of established legal paradigms.[192] According to the 96th Congress, the "substantially justified" measure rested between an automatic award and the standard under civil rights statutes.[193] Judicial interpretations of civil rights statutes yielded language identical to the "frivolous" and "vexatious" standards of the Hyde Amendment.[194] Similarly, other court decisions, explicating the common-law rules for civil awards of attorneys' fees, have established meanings for "vexatious" and "bad faith."[195] These decisions should be useful in defining the standard under the Hyde Amendment.

In fixing the "substantially justified" standard under the EAJA, the 96th Congress used the Supreme Court's decision in *Christiansburg Garment Co. v. EEOC*,[196] as a frame of reference.[197] In *Christiansburg*, the Supreme Court, attempting to formulate the proper standard for attorneys' fees awards under the Civil Rights Act of 1964, reviewed the interpretations of two courts of appeals.[198] The courts of appeals held, respectively, that courts should determine whether the action was "'unfounded, meritless, frivolous or vexatiously brought,'"[199] and whether the

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192. The "substantially justified" standard of the EAJA:

> is a new one . . . intended to serve as a "middle ground" between an automatic award of fees to a successful party and permitting fees only where the government's position was arbitrary or *frivolous*. . . . The standard falls in between the common law *"bad faith"* exception and an automatic award of attorney's fees to prevailing parties.

Berman v. Schweiker, 531 F. Supp. 1149, 1153-54 (N.D. Ill. 1982) (emphasis added), *aff'd*, 713 F.2d 1290 (7th Cir. 1983).

193. *See id.*

194. *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).

195. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257-59 (1975).

196. 434 U.S. 412 (1978).

197. *See* H.R. REP. NO. 96-1418, at 10, 14 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4988-89, 4992-93.

198. *See Christiansburg*, 434 U.S. at 420-21.

199. *Id.* (quoting United States Steel Corp. v. United States, 519 F.2d 359, 363 (3d Cir. 1975)).

action was "'unreasonable, frivolous, meritless or vexatious.'"[200] The Court concluded that the concept embodied in the two standards was correct and held that lower courts could award attorneys' fees under the statute upon a finding that the litigation was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."[201]

In another case, however, the Court held that under a common-law exception to the American rule, judges may award attorneys' fees when the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[202] Unfortunately, these decisions do not establish a clear, workable definition. Instead, the opinions reiterate the same set of abstract words,[203] as if trying to conjure up a meaningful and definite standard by incantation.

Courts face this same problem in the context of determining whether appeals are frivolous and, therefore, violative of the rules of procedure. It has been noted that:

> [T]he definition of a frivolous appeal is a basic question that confronts a court when determining whether to impose a sanction. . . . Unfortunately, . . . "[f]rivolity, like obscenity, is often difficult to define." To a certain degree the courts of appeals have dealt with frivolous appeals by doing little more than describing what they see and labeling it as frivolous.[204]

Because this type of language defies clear judicial definition, the standard under the Hyde Amendment, like similar standards in other contexts, grants judges considerable discretion when applying it to a given set of facts.

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200. *Id.* (quoting Carrion v. Yeshiva Univ., 535 F.2d 722, 727 (2d Cir. 1976)).

201. *Id.*

202. F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974), *noted in* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257 (1975).

203. *See Christiansburg*, 434 U.S. at 421. This approach seeks to define legal standards by repeatedly describing them in different terms, without reference to legal authorities. For instance, in a recent case interpreting the Hyde Amendment's substantive standard, the district court used quotes from *Merriam-Webster's* definitions of "vexatious" and "frivolous" to construct its test for determining liability, without reference to substantive legal authority. *See* United States v. Holland, 34 F. Supp. 2d 346, 359-60 (E.D. Va. 1999).

204. Robert J. Martineau, *Frivolous Appeals: The Uncertain Federal Response*, 1984 DUKE L.J. 845, 850.

The Supreme Court's holding in *Pierce v. Underwood*[205] supports this conclusion. Faced with a circuit-split as to the standard of review under the EAJA, the Court held that the appropriate question in reviewing a lower court finding that the position of the government was not "substantially justified" was whether the lower court abused its discretion.[206] In rejecting a de novo standard, the Court placed great faith in the accuracy of the trial judge's decisions.[207] Most importantly, the Court established the "deferential" abuse of discretion standard due to its recognition of the "'sheer impracticability of formulating a rule of decision for the matter in issue. Many questions that arise in litigation are not amenable to regulation by rule because they involve multifarious, fleeting, special, narrow facts that utterly resist generalization.'"[208] In short, the Supreme Court held that the substantive standard under the EAJA granted the courts considerable discretion that would not ordinarily be subject to review.

Cases interpreting the Hyde Amendment have yet to reach the appellate level, therefore, the question is open as to the appropriate standard of appellate review. The kinship between the Hyde Amendment and the EAJA, however, suggests that the *Pierce* holding will be applied to the Hyde Amendment milieu. If this occurs, the scope of judicial discretion under the Hyde Amendment would, indeed, be sweeping.

The Requirement of Subjective Bad Faith

Before turning to the implications of the Hyde Amendment's sweeping grant of judicial discretion, it is important to discuss one further issue relevant to the definition of the standard. The Hyde Amendment's inquiry into the conduct of the government raises the concomitant issue of whether a court must decide that the government acted with *subjective bad faith* in order to find a violation under the measure.[209] Not surprisingly, the statute is

205. 487 U.S. 552 (1988).
206. *See id.* at 559.
207. *See id.* at 559-60.
208. *Id.* at 561-62 (quoting Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 662 (1971)).
209. This issue is implicated in other contexts in which similar standards apply.

silent on this point and, consistent with its level of guidance in other matters, leaves the resolution of this issue up to the courts. A number of courts have held that the absence of subjective bad faith is not a bar to awards under the Hyde Amendment.[210] The Supreme Court's interpretation of the civil rights law standard in *Christiansburg* ostensibly supports the conclusion that the Hyde Amendment is an objective rather than a subjective standard.[211]

The Hyde Amendment's legislative record, however, raises doubts about the accuracy of this conclusion.[212] During the floor debate, Representative Hyde pointed to situations of "malicious" and "willfully wrong" government prosecutions as forming the basis for the proposed law.[213] These words describe conduct with a subjective component of intent or bad faith. Presumably con-

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See, e.g., Martineau, *supra* note 204, at 854 (discussing the requirement of subjective bad faith in the area of frivolous appeals).

210. *See* United States v. Holland, 34 F. Supp. 2d 346, 360 (E.D. Va. 1999) (establishing as a substantive standard that the government "should have known" that its conduct was of a particular improper character); United States v. Gardner, 23 F. Supp. 2d 1283, 1293 (N.D. Okla. 1998) (citing with approval Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978)); United States v. Ranger Elec. Communications, Inc., 22 F. Supp. 2d 667, 673-74, 676 (W.D. Mich. 1998) (holding that when the government's alleged "bad faith" is its failure to disclose exculpatory evidence, subjective bad faith is not required); United States v. Troisi, 13 F. Supp. 2d 595, 596 (N.D. W. Va. 1998) ("[I]n the law enforcement context, 'bad faith' includes a 'reckless disregard for the truth.'" (quoting Franks v. Delaware, 438 U.S. 154, 171 (1978))).

For a discussion of subjective and objective standards, see Flaherty v. Flaherty, 646 P.2d 179, 186-87 (Cal. 1982).

211. *See supra* notes 196-201 and accompanying text.

212. One purpose of this Note has been to expose the faults of judicial reliance on the legislative history in resolving questions under the Hyde Amendment. This discussion uses the legislative history only to inform the issue of the subjective bad faith requirement, rather than to resolve it.

213. 143 CONG. REC. H7786, H7791 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde) ("[I]f [the prosecution] was an abuse of process, if it was frivolous, if it was malicious, then the victim, the defendant who has prevailed, is entitled to attorney's fees, . . . What if Uncle Sam sues you, . . . but they are wrong. They are not just wrong, they are willfully wrong . . . you should be entitled to your attorney's fees reimbursed and the costs of litigation."); *see also Legislation Would Pay Fees of Acquitted; Critics Say Defendants like Hinckley, Gotti Would Get Free Lawyers*, BALTIMORE SUN, Oct. 24, 1997, at 12A, *available in* 1997 WL 5535997 [hereinafter *Fees of Acquitted*] ("'What is your remedy if not this for somebody who has been unjustly, maliciously, improperly, abusively tried by the government, by the faceless bureaucrats?'") (quoting Rep. Hyde).

cerned that the ambiguities in the text of the amendment might lead to doubts as to whether a subjective state of mind was a necessary element for awards, Hyde's opponents seized upon his statements:[214]

> I think the gentleman proves too much. Were the words "malicious" and "abusive" in his amendment, and maybe those are criteria that also ought to be introduced, it would be a different matter. Those were not standards that are in his amendment although they were certainly the standards invoked in his rhetoric. But it is exactly those kinds of questions about which we need a more deliberative examination of this proposed change than is admitted this evening.[215]

In short, the statements made by both sides during the debate suggest that the substantive standard under the Hyde Amendment should be a subjective one.

In fact, the lack of an expressly *subjective* standard in the original version of the amendment, the one that passed the House of Representatives, undoubtedly fueled the Administration's opposition to the Hyde Amendment and triggered its threats of a veto of the entire appropriations bill.[216] Reporting the revised standard, the conference committee ambiguously stated they had reached a compromise resulting in the change from a "substantially justified" standard to the "vexatious, frivolous, or in bad faith" language.[217] Whether this compromise meant that the new language contained a requirement of subjective bad faith is unclear. This question, negligently left open by Congress, is of critical importance in determining the scope of the Hyde Amendment. As discussed above, current judicial in-

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214. Recall that during this debate the standard was "substantially justified" as opposed to "frivolous, vexatious or in bad faith." *See supra* note 8.

215. 143 CONG. REC. H7786, H7792 (daily ed. Sept. 24, 1997) (statement of Rep. Skaggs).

216. *See id.*; Harvey Berkman, *The Wrongly Prosecuted May Get Legal Fees Help*, NAT'L L.J., Nov. 24, 1997, at A10 ("The Department of Justice . . . had pledged to seek a presidential veto of the legislation to which the rider was attached . . . unless the Hyde amendment was dropped.").

217. *See supra* note 138 and accompanying text; *see also* Berkman, *supra* note 216, at A10 ("But a House-Senate conference committee voted to keep the [Hyde Amendment], and negotiators for Congress and the Justice Department crafted the compromise language.").

terpretations have rejected the subjective requirement.[218] Unfortunately, court decisions rejecting the subjective standard consequently increase the discretion of courts in deciding awards and, thereby, expand the sweep of the Hyde Amendment.

Persistent Problems

The vagueness and flexibility of the Hyde Amendment's substantive standard, with its attendant grant of broad judicial discretion, are undesirable for two related reasons. First, this expansive discretion *itself* is incompatible with the holdings of the Supreme Court. The *Wayte*, *Newton*, and *Armstrong* decisions unequivocally prohibit the use of roving judicial authority to review the propriety of prosecutorial decisions.[219] The fundamental notions of separation of powers dictate that federal courts possess only *narrow* authority to review these decisions.[220] The uncertain and permissive substantive standard of the Hyde Amendment stands in clear contravention of these rules.

Second, and more importantly, the broad judicial discretion granted by the Hyde Amendment's standard, compounded by the vagaries of court interpretations of its procedural provisions,[221] increases the scope of the statute to a potentially harmful extent. The effectiveness of the prosecutor in faithfully executing the laws is essential to the safety and welfare of the public.[222] Authorizing roving judicial review of prosecutorial decisions in the Hyde Amendment may undermine fair and effective law enforcement by decreasing the resources available for unquestionably valid prosecutions due to expenditures of time and money in defending against Hyde Amendment claims,[223] requiring disclosure of law enforcement methods and confidential in-

218. *See supra* note 210 and accompanying text.
219. *See supra* notes 91-107 and accompanying text.
220. *See supra* notes 91-107 and accompanying text.
221. *See supra* notes 152-89 and accompanying text.
222. *See* U.S. CONST. art. II, § 3.
223. *See Fees of Acquitted*, *supra* note 213; *see also* Town of Newton v. Rumery, 480 U.S. 386, 395-96 (1987) (discussing the need to protect prosecutors from the burdens of defending against baseless claims of improper government conduct and noting that "[prosecutors] must decide how best to allocate the scarce resources of [the] criminal justice system . . . ").

formation,[224] arbitrarily increasing the incentives for prosecuting indigents because they are likely ineligible for awards under the Hyde Amendment,[225] and chilling prosecutions overall and particularly in "political" cases.[226]

The *Gardner* decision illustrates the precarious relationship between expansive judicial review and critical issues of law enforcement policy. In *Gardner*, two disputes arose related to the proper scope of discovery under a Hyde Amendment claim. First, the parties argued over whether the court's review should be "limited to objective documentary evidence such as transcripts or pleading or grand jury testimony" as it was under the EAJA, or whether it extended to evidence "outside the record." Second, they argued over whether the definition of "position of the United States" under the Hyde Amendment should be restricted to the government's conduct in the litigation or extended to reach that of investigating agents prior to the initiation of formal charges. Although the statute failed to answer clearly either question, the court resolved both issues against the government, resting its conclusions on the Hyde Amendment's dubious legislative history.[227] The court also focused on the provision within the amendment for in camera judicial review of materials.[228] The court seized upon this provision and compelled the production of not only all the prosecution's internal documents pertaining to the case, but also those of the investigating agency.[229] Such broad discovery in cases alleging prosecutorial

224. *See* United States v. Armstrong, 517 U.S. 456, 465 (1996) ("Examining the basis of a prosecution . . . may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." (quoting Wayte v. United States, 470 U.S. 598, 607 (1985))).

225. *See supra* note 71.

226. *See Armstrong*, 517 U.S. at 465 ("Examining the basis of a prosecution . . . threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry . . . ." (quoting *Wayte*, 470 U.S. at 607)); *supra* note 31 and accompanying text.

227. *See* United States v. Gardner, 23 F. Supp. 2d 1283, 1296 (N.D. Okla. 1998) ("[T]he Hyde Amendment . . . contemplates an expansion of the record traditionally available to the Court for the purpose of assessing an applicant's claim. . . . There is nothing in the plain language or the legislative history to support this narrow view of the Amendment.").

228. *See id.*

229. *See id.* at 1295-96.

misconduct has greatly troubled the Supreme Court, leading it to require a "substantial threshold showing" before allowing courts to compel the prosecution's production of documents.[230] This reflects yet another conflict among judicial interpretations of the competing policies of effective law enforcement and the Hyde Amendment. As a practical matter, an expansive application of the Hyde Amendment promises to lead to more discovery demands.[231] Consequently, the statute threatens to drain the government's (both prosecutor's and investigating agencies') time and resources, not only with respect to the ultimate award of fees, but also as to forced compliance with discovery orders.

In short, judicial interpretation of the Hyde Amendment implicates myriad problems. The statute raises numerous procedural questions, yet provides little guidance in resolving them. The defining characteristic of the Hyde Amendment's substantive standard is that it defies definition. Courts that have faced these problems have taken erroneous approaches to finding solutions to the puzzle. Confronted with an ambiguous statute, they have relied on flawed legislative history and upon their own discretion in defining the parameters of the amendment. At the same time, the courts have failed to give due recognition to conflicts between the Hyde Amendment scheme and fundamental legal doctrines. As a result, the courts have perpetuated the folly of the legislature and, thereby, increased the potential for significant harm to the essential executive function. What follows are modest recommendations for legislative and judicial action that will militate against this threatened harm.

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230. Wade v. United States, 504 U.S. 181, 186 (1992), *cited with approval in Armstrong*, 517 U.S. at 463.

231. It should be noted that after the court ordered the broad discovery in *Gardner*, the government settled the defendant's claim in the amount of $75,000. *See* David Harper, *Tax Preparer Settles with Government*, TULSA WORLD, Jan. 27, 1999, *available in* 1999 WL 5388482. This case raises the concern of whether the government would simply settle a claim rather than reveal its secrets, thus, injecting an economic analysis into the mix that would make a Hyde Amendment award turn on the extent to which the claim hampered the legitimate law enforcement goals, rather than on its merits.

RECOMMENDATIONS

A number of steps can be taken to cure the faults of the Hyde Amendment. First, and most importantly, the legislature must address the ambiguities implicated by this law.[232] In passing the statute, Congress acted in an indiscriminate manner, leaving a host of important issues unresolved. The need for guidance in these areas is great. A revision of the Hyde Amendment would eliminate many of the problems raised in this Note.

Before turning to specific revisions, however, it must be observed that any reconsideration of the Hyde Amendment should begin with its basic premise.[233] Opponents of the measure doubted whether there was "actually a need for this kind of proposal."[234] The need advanced in the floor debate by Representative Hyde was speculative and vague.[235] The result was an impossibly broad law that seemingly reached the entire universe of governmental misconduct. By enacting the Hyde Amendment in such an ambiguous fashion, Congress improperly left all the important policy decisions to the courts.

To remedy this problem, Congress should hold hearings and make the policy findings that the courts are prohibited from doing. After giving interested parties an opportunity to be heard, Congress should have a more precise understanding of the problem and will be in a better position to enact an efficient and balanced remedy. To be sure, there are many ways to address the multifarious issue of governmental misconduct. If Congress finds that indictments are insufficient to protect against baseless prosecutions, it should retool the grand jury system.[236] If ethical rules, which already protect against prosecutorial abuse, are

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232. It seems that Representative Hyde considered the Judiciary Committee's return to the issues presented by his amendment. *See* 143 CONG. REC. H7786, H7794 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde) ("That is not to say we will not deal with it in the Committee on the Judiciary, I am sure we will, but there may be no need to after it passes.").

233. The basic premise being that the application of attorneys' fees in the criminal law makes sense.

234. 143 CONG. REC. H7793 (statement of Rep. Rivers).

235. *See supra* notes 15-21, 26 and accompanying text.

236. *See generally* Gerald B. Lefcourt, *High Time for a Bill of Rights for the Grand Jury*, CHAMPION, Apr. 1998, at 5 (discussing the need for reform of the grand jury system).

deficient, Congress should reform them.[237] Congress should consider alternatives to the Hyde Amendment, such as programs that promote high ethical standards through financial rewards as opposed to punishments.[238] Alternatives to the Hyde Amendment may be more desirable considering the conceptual conflicts implicated by the attorneys' fees scheme. At the very least, Congress should exercise its own oversight responsibilities in the area of prosecutorial misconduct, not abdicate them to the courts.

If it decides that the Hyde Amendment is worth saving, Congress should consider taking the following steps in revising the statute. First, rather than have a "catch-all" remedy, 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. Second, Congress should abandon the shortcut approach[239] to the Hyde Amendment's procedural application and revise the statute to explicitly provide for its *own* particular procedures. Third, Congress should include a sunset provision, like that of the EAJA, in recognition of the unprecedented nature of awarding attorneys' fees in the criminal context. Fourth, the legislature should provide guidance to the courts by expressly adopting an objective or subjective standard for triggering awards. Finally, and most importantly, Congress must responsibly resolve the conceptual conflicts posed by the Hyde Amendment by making express findings regarding the appropriate balancing of interests, with reference to specific doctrines and precedents.

The need for responsible legislative reconsideration of the Hyde Amendment cannot be stressed enough. In the meantime,

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237. In the 105th Congress, for instance, Representatives McDade and Murtha sought to reform the current ethical rules under which federal prosecutors work and to enhance the enforcement of such rules through legislation dubbed the Citizens Protection Act. *See* 144 CONG. REC. E301 (daily ed. Mar. 5, 1998).

238. *See, e.g.*, Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 852 (1995) ("[A] system of financial rewards could influence the public prosecutor's charging decisions and control prosecutorial misconduct occurring at trial.").

239. This is meant to refer to the Hyde Amendment's vague incorporation of the EAJA's "procedures and limitations."

however, courts are placed in the unfortunate position of deciding the many unresolved and important questions raised by the statute. Fortunately, a proper approach to judicial interpretation of the Hyde Amendment exists.

The following suggestions should guide a court's analysis of this statute. First, courts should avoid all substantive use of the Hyde Amendment's legislative history, let alone its use to support broad applications of the measure. Second, courts must recognize that they are bound by the principles of restraint embodied in the *Alyeska* and *Wayte* decisions. When confronted with an ambiguity under the Hyde Amendment, courts should adhere to precedent and resolve uncertainties *against* an award of attorneys' fees. Third, for their own part, the courts must recognize and resolve the civil-criminal distinctions implicated by the Hyde Amendment's insertion of a traditionally civil remedy into the criminal context, rather than erroneously assume that Congress considered these issues. Once again, judicial restraint should guide the resolution of these distinctions given their fundamental nature.

Currently, at least one court has interpreted the Hyde Amendment consistent with these recommendations.[240] In *United States v. Reyes*,[241] the prevailing defendant, a lobbyist acquitted of bribery charges, sued the United States for attorneys' fees under

240. In *United States v. Holland*, 34 F. Supp. 2d 346 (E.D. Va. 1999), the district court's opinion resolving a Hyde Amendment claim fell short of the mark with respect to the proper approach to interpretation argued in this Note. It is conceded that the court properly refused to use the slanted and sparse legislative record to resolve important questions and that the court ultimately cited the *Wayte* line of cases as suggesting some measure of judicial restraint. *See id.* at 360. By the time the court invoked this restraint, however, it had already interpreted against the government key questions relating to both the Hyde Amendment's "procedures and limitations" provision and the formulation of its substantive standard. *See id.* In fact, the court understood the *Wayte* line of decisions to require merely judicial restraint in weighing the evidence. To the contrary, this Note argues that these cases demand judicial restraint from the beginning of a court's interpretation of the Hyde Amendment. The Hyde Amendment not only grants sweeping judicial discretion in deciding ultimate questions of fact, but, more importantly, in formulating the antecedent law that governs the applicable procedural rules and substantive standard under the attorneys' fees statute. In other words, separation of powers concerns are relevant from the outset of the inquiry, not merely in the final analysis.

241. 16 F. Supp. 2d 759 (S.D. Tex. 1998).

the Hyde Amendment.[242] The court's disposition of the claim illustrates the proper approach to interpretation of the statute. The court used only that portion of the Hyde Amendment's legislative history that clearly answered specific questions, such as which party bears the burden of proof and what precedents inform the substantive standard, as opposed to using it wholesale to fill in the statute's major conceptual gaps.[243] The court properly avoided use of the sweeping rhetoric of the Hyde Amendment's floor debate.[244] Most importantly, however, the *Reyes* court grounded its approach to the claim in the context of the precedents discussed above. The court explained, "[i]n examining [defendant's] motion, the Court notes that case precedent requires that the Court practice restraint when reviewing prosecutorial decisions."[245] After citing the principles of judicial deference embodied in *Rumery* and *Wayte*, the court concluded: "[a]ccordingly, the Court will analyze the Government's decision to prosecute within the limitations stated above."[246] In sum, *Reyes* provides a useful, model approach for subsequent interpretations of the Hyde Amendment.

CONCLUSION

The Hyde Amendment provides a shameful example of the type of law that results from the thoughtless and unreflective exercise of legislative power. In response to a speculative problem, the 105th Congress enacted this sweeping and ill-conceived initiative. It did so in an atmosphere marked by stifled opposition, a dearth of deliberative process, and little, if any, regard for the theoretical or practical implications of this unprecedented scheme to introduce the foreign species of the civil law of attorneys' fees awards into the criminal ecosystem. Along the way, Congress either failed to grasp, or simply dismissed, the fact that the essence of its proposal clashed with established law and

242. *See id.* at 760.
243. *See id.* at 761.
244. *See id.* at 760 (finding that generally there is no need to inquire past the plain language of the Hyde Amendment).
245. *Id.* at 761.
246. *Id.*

sound public policy. Congress's attempt in *one* paragraph to inject revolutionary concepts into the criminal law, using a simple cross-reference to a civil law's procedures and limitations, demonstrates a "one size fits all" approach that is incongruous with a proper representative democracy. With its abdication of the legislative function, Congress has asked the courts to make the law in areas previously foreclosed to them by the Supreme Court.

The onus is on the judiciary to serve the people where Congress has failed them. Rather than wield gratuitous, law-making authority, the courts should narrowly interpret the Hyde Amendment's procedural and substantive provisions. To do otherwise constitutes a departure from legal norms, unreasonably threatens effective law enforcement, and places the judiciary's imprimatur on the deficiency of process by which Congress enacted this law. Only through sound interpretation will the judiciary avoid perpetuation of a legislative folly.

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