

**OUTING—AND OUSTING—THE “HIDDEN” HYDE:
TOWARD REPEAL AND REPLACEMENT OF THE HYDE
AMENDMENT**

*Rebecca K. Stewart**

ABSTRACT

Poorly crafted statutes have always created interpretive quandaries for judges and litigants, and these problems naturally tend to be exacerbated when substantive legislation is passed as a result of less than substantive legislative processes, such as through limitations riders to appropriations bills. However, these issues become vastly more troublesome when Congress intentionally subverts measures intended to restrain such processes. This Article examines the passage of one such rider, commonly known as the Hyde Amendment, exploring its origins and curious subtextual codification, and analyzing its life in the federal courts over more than a dozen years.

The Article argues that early misreadings of the Hyde Amendment and reliance on improper authority resulted in unreasoned decisions that were unevenly adopted and assembled into a patchwork of varying opinions, thwarting what Congress had presumed would be a streamlined and fairly typical interpretive role for the courts and creating numerous circuit splits. The Article also explains how the Amendment, in its final form, works more injustice than justice by creating financial disincentives for prosecutorial misconduct, but only in favor of a narrow class of citizens, leaving indigent defendants in particular on more unequal footing than they already are.

In addition to laying out a categorical analysis of the Hyde Amendment cases decided to date, intended to assist judges and practitioners dealing with new claims, the Article offers suggestions

* Assistant Professor of Law, Thurgood Marshall School of Law. J.D., 2001, Harvard Law School; B.A., 1998, University of Texas at Austin. Research supporting the completion of this article was facilitated by a summer stipend generously awarded by Thurgood Marshall School of Law. I thank those attorneys at the former Mayor, Day, Caldwell & Keeton who provided the inspiration for this Article. I am deeply grateful for their suggestions regarding the Article's progression of parts and their insight into the case history discussed herein.

for remedying the ongoing quagmire. These range from detailed suggestions on how legislators could revise the Amendment to the Article's ultimate call for the statute's repeal and substitution with measures that will more likely effectuate its goals, eliminating its current discriminatory effect and bringing about more justice for all citizens.

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INTRODUCTION

In the fall of 1997, an appropriations bill was weaving its way through the routine network of congressional approval.¹ This bill, however, was all but ordinary, for tacked upon it was a peculiar rider—now known in its final form as the Hyde Amendment²—that posed potentially extraordinary consequences for the way federal law enforcement is administered and perceived in the United States.³ Strategically commandeering the otherwise innocuous appropriations bill as a host for his amendment, Representative Henry Hyde launched a quiet attack on the leviathan that the Department of Justice (“DOJ”) had become in recent years.⁴ The terse rider, aimed

1. H.R. 2267, 105th Cong. (version 2, Oct. 2, 1997); *see generally* H.R. REP. NO. 105-264 (1997) (summarizing H.R. 2267 and proposed amendments thereto).

2. The Hyde Amendment, enacted as Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997), is codified only as a statutory note to 18 U.S.C. § 3006A (2006), and should not be confused with an earlier, “temporary” non-codified statutory provision, also known as the “Hyde Amendment,” which was originally enacted as Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976), and has been reenacted continuously ever since. Will Tress, *Lost Laws: What We Can’t Find in the United States Code*, 40 GOLDEN GATE U. L. REV. 129, 155 (2010). The earlier and better known of the two eponymous amendments limits the use of federal funds to pay for abortions, *see id.*, and has followed the pattern of typical limitations riders in that it only applies to the fiscal year to which the appropriation applies. *See* Jennifer Mason McAward, *Congress’s Power to Block Enforcement of Federal Court Orders*, 93 IOWA L. REV. 1319, 1336 (2008) (discussing limitations on appropriations riders).

3. *See infra* notes 34, 44, 51 and accompanying text (discussing the broad ramifications that the proposed amendment would have had on federal prosecutions). The practice of passing substantive legislation through appropriations riders has long been criticized as subverting the integrity of the legislative process, “undermining the goal[s] of deliberative government,” and being inconsistent with the notion of separation of powers. *E.g.*, Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 503-04, 527 (1997). What is even more unusual about this particular rider and the rider that eventually followed is that unlike so-called “limitations” riders, which can be constitutionally acceptable, *cf.* McAward, *supra* note 2, at 1336-42, these riders did not actually limit federal spending. Instead, the rider in its proposed form mandated spending, *see infra* note 6, and the rider in its final form permitted it. *See infra* note 12. This raises questions as to whether the measure was an appropriate exercise of legislative power, particularly considering that each rider avoided the presumption that limitations riders are temporary measures, *see* Tress, *supra* note 2, at 142, by extending its provisions not only to the year of enactment but “any fiscal year thereafter.” *See infra* text accompanying notes 6 and 12.

4. *See generally* JIM MCGEE & BRIAN DUFFY, *MAIN JUSTICE: THE MEN AND WOMEN WHO ENFORCE THE NATION’S CRIMINAL LAWS AND GUARD ITS LIABILITIES* (1996) (exploring the expansion of power in the Criminal Division of the Department of Justice in the early 1990s). In *Main Justice*, the authors note the concomitant price of the increase in prosecutorial resources:

An institution strong enough to combat the nation’s worst enemies risks becoming huge and impersonal, its personnel desensitized to the impact of draconian legal measures. Because the federal system is run by human

at deterring prosecutorial misconduct and compensating the victims of unjust prosecutions, read:

During fiscal year 1997 and in any fiscal year thereafter, the court, in any criminal case pending on or after the date of the enactment of this Act, shall award, and the United States shall pay, to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation costs, unless the court finds that the position of the United States was substantially justified or that other special circumstances make an award unjust. Such awards shall be granted pursuant to the procedures and limitations provided for an award under section 2421 [sic] of title 28, United States Code.⁵ 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.⁶

Representative Hyde's proposed amendment met with overwhelming bipartisan support; the House approved the rider in late September by a vote of 340 to 84.⁷ The DOJ, however, feared that the proposed amendment would drain the DOJ's appropriations with an onslaught of litigation.⁸ The DOJ issued a threat: if the Senate adopted the amendment, the DOJ would seek a presidential

beings, it is not immune to excessive zeal, personal ambition or political malice. Unfair or unprofessional prosecutions are the exception, but their number and severity are on the rise.

Id. at 9. It was precisely this threat—once it had begun to touch the lives of those in Congress—that Representative Hyde sought to address with his proposed amendment. See *infra* notes 19-20 and accompanying text. Notably, Representative Hyde himself had been the subject of lengthy federal investigations and a prosecution. See John Cook, *Conservative 'Lion' Henry Hyde Was Targeted by Feds in a Four-Year Bribery Investigation*, GAWKER, (Jan. 29, 2010, 1:41 PM), <http://gawker.com/5459639/conservative-lion-henry-hyde-was-targeted-by-feds-in-a-four-year-bribery-investigation>. Whether Representative Hyde would have been able to take advantage of the Hyde Amendment had his own investigation and prosecution occurred after the Amendment's passage is a question left unanswered, as the investigation eventually ceased, *id.*, and the prosecution was settled. David Moberg, *The Real Henry Hyde Scandal*, SALON, (June 7, 1999, 12:00 PM), <http://www.salon.com/news/feature/1999/06/07/hyde>.

5. Section 2412 of Title 28 is the Equal Access to Justice Act ("EAJA"), which authorizes the award of attorneys' fees and costs to private parties who prevail against the government in civil actions unless the government establishes that its position was "substantially justified." 28 U.S.C. § 2412 (2006).

6. 143 CONG. REC. H7791 (daily ed. Sept. 24, 1997).

7. 143 CONG. REC. H20157-58 (daily ed. Sept. 25, 1997); see also *infra* note 23 and accompanying text (exploring the popularity of the measure in the House).

8. See Michael E. Clark, *Nothing to Hyde? The Flood of Wrongful Recovery Suits Has Not Materialized*, 14 CRIM. JUST. 10, 10 (1999) (discussing the "grave consequences" DOJ spokesmen suggested would result if the amendment were enacted as proposed).

veto of the entire appropriations bill to which the amendment was attached.⁹ The threat was effective; a House-Senate Conference Committee was appointed and immediately began to redraft the proposed amendment, reaching a compromise in just three weeks' time¹⁰ that resulted in the Hyde Amendment as we know it today:¹¹

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. 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.¹²

The law born of this compromise—a product of Representative Hyde's laudable (and perhaps not-so-laudable) intentions¹³ and the imprecise drafting of a conference committee rushed to provide resolution—has now had thirteen years in the courts to mature, yet

9. See 143 CONG. REC. H7791-92 (statement of Rep. Skaggs) (noting the administration's statement of policy on the amendment); see also Harvey Berkman, *The Wrongly Prosecuted May Get Legal Fees Help*, NAT'L L.J., Nov. 24, 1997, at A10; cf. Elkan Abramowitz, *The Hyde Amendment and Wrongful Federal Prosecutions*, N.Y. L.J., Jan. 6, 1998, at 3 (describing "intense lobbying effort by the Justice Department in opposition to" the amendment).

10. See 143 CONG. REC. 26540-41 (1997) (statement of Rep. Rogers).

11. The bill was signed by the House and Senate on Nov. 24, 1997, and by the President on Nov. 26, 1997. See 143 CONG. REC. 26709, 26711 (1997).

12. Hyde Amendment, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (codified at 18 U.S.C. § 3006A (2006) (historical and statutory notes)).

13. See *infra* notes 20-23, 28-33, 41 and accompanying text; see also Craig S. Lerner, *Legislators as the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599, 641-49 (2004) (likening the creation of the Hyde Amendment to the "production of sausage," exploring congressional motives for passing the Hyde Amendment, and concluding that "protection for criminal defendants may often originate in unsavory legislative schemes").

the Amendment¹⁴ remains ambiguous.¹⁵ Rather than finding consistent application and clarifying interpretation in the federal courts, the courts' wrangling with the Amendment's language and standards have left it with shortcomings so extreme as to undermine almost wholly the purpose that Representative Hyde enunciated.¹⁶ It is thus the purpose of this Article to analyze the shortcomings of the Amendment and offer suggestions for how best to remedy these deficiencies.

Accordingly, Part I of the Article discusses in greater detail the legislative genesis of the statute, the reasons why application of the Amendment in its current form is tortuous rather than clear, and explains the origin of courts' interpretive stances toward the Amendment. Part II examines the case history of an applicant under the Amendment as a paradigm for understanding the purposes and workings of a typical Hyde Amendment claim at the district court level and in order to highlight one of the Amendment's fundamental weaknesses. In Part III, the Article analyzes the conflicts left by various courts' interpretations of the Amendment. Finally, Part IV proposes suggestions for revisiting the Hyde Amendment in hopes that a substitution will better meet the original purposes of the Amendment and remedy the disorder and unfairness that has emerged as a result of its poor drafting and fragmented interpretation.

I. THE HISTORY OF THE HYDE: THE AMENDMENT'S INCEPTION AND LEGISLATIVE EVOLUTION

As several of the courts that have attempted to construe the Amendment have noted,¹⁷ the legislative history of the Hyde Amendment is sparse.¹⁸ But the history that can be pieced together

14. For purposes of clarity, the Hyde Amendment as finally adopted is hereinafter referred to in short form as the "Amendment," in order to distinguish it from the previously discussed amendment that was proposed but not approved and from other proposed amendments discussed herein.

15. See *infra* Part III (describing authorities in conflict on various aspects of the Amendment's application).

16. See *id.*

17. See, e.g., *United States v. Gilbert*, 198 F.3d 1293, 1299 (11th Cir. 1999); *United States v. Adkinson*, 256 F. Supp. 2d 1297, 1310 (N.D. Fla. 2003); *United States v. Gardner*, 23 F. Supp. 2d 1283, 1287 (N.D. Okla. 1998).

18. What legislative history there is pertains to the introduction and passage of the Amendment in the House in its original form *before* the Conference Committee's changes. *Gardner*, 23 F. Supp. 2d at 1287-88; accord Lawrence Judson Welle, Note, *Power, Policy, and the Hyde Amendment: Ensuring Sound Judicial Interpretation of the Criminal Attorneys' Fees Law*, 41 WM. & MARY L. REV. 333, 336 (1999) ("Virtually no record exists respecting the changes made between the House's initial passage of the measure and its ultimate enactment."). As such, the only substantial legislative history available is the history of an amendment that was never adopted.

tells an informative story, setting the stage upon which conflict and confusion were to erupt.

A. *Origins*

Had the victim compensation scheme underlying the Amendment been adopted as originally conceived, this Article might today be analyzing the “Murtha Amendment,” for Representative Hyde’s original proposition came about as a response to a similar amendment proposed by Representative John Murtha to the 1997 Commerce, Justice, and State Departments’ appropriations bill.¹⁹ Representative Hyde recognized Representative Murtha’s amendment as underinclusive, as it was designed to protect only members of Congress and their staffs.²⁰ Thus, Representative Hyde

19. See 143 CONG. REC. H7791 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde); see also Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. REV. 1, 48 n.208 (1999) (describing congressional dissatisfaction with prosecutions that hit close to home that led to Representative Murtha’s “assault on overzealous and lawbreaking officials in the U.S. Department of Justice”) (citing Bill Moushey, *Murtha Seeking Prosecutor Limits*, PITT. POST-GAZETTE, Feb. 3, 1999, at A1).

20. Representative Murtha’s amendment was inspired by the trial and acquittal of a fellow Representative, Joseph McDade, who had been forced to defend himself for eight years on charges of bribery and racketeering. See *Gilbert*, 198 F.3d at 1299; Elkan Abramowitz & Peter Scher, *The Hyde Amendment: Congress Creates a Toehold for Curbing Wrongful Prosecution*, 22 CHAMPION 22, 22-23 (1998). Representative Hyde alluded to this in a somewhat cryptically phrased plea to the House, saying:

Now, in the bill, the gentleman from Pennsylvania [Mr. MURTHA] having in mind the case of someone we all know who went through hell, if I may use the term, for many years of being accused and finally prevailed at enormous expense, one he will never get out from under, but that brought to mind these circumstances and what could we do about them.

143 CONG. REC. H7791 (statement of Rep. Hyde) (alteration in original).

It is uncertain whether Representative Hyde’s true motivation in offering the amended wording was to ensure that what appeared to be a piece of completely self-interested, hidden, yet substantive legislation would survive, by steering it with egalitarian language away from the public outrage that may have erupted from the eventual discovery of its passage as an appropriations rider. What is certain, however, is that Representative Hyde’s language of equitability became a critical piece of the legislative history of the Amendment to which courts turned as the basis for judicial interpretation of the Amendment’s purpose and construction of its application. See, e.g., *United States v. Holland*, 34 F. Supp. 2d 346, 357-58 n.18 (E.D. Va. 1999) (quoting Rep. Hyde’s language to the effect that if the Equal Access to Justice Act “is good for a civil suit, why not for a criminal suit”).

However, at least one House member remained steadfastly convinced that the proposal was still merely about protecting members of Congress. See 143 CONG. REC. H7792-93 (statement of Rep. Rivers); see also *infra* text accompanying note 45. Ironically, many courts have interpreted the Amendment’s adoption of the EAJA’s procedures and limitations to impose an eligibility cap on those who can recover based on personal net worth, see *infra* Part III.A.1, note 94 and accompanying text, which would preclude many members of Congress from being able to recover should they find themselves subject to prosecution. See, e.g., Kevin Drawbaugh, *Get Elected to*

proposed his own version of the amendment,²¹ offering the following words on the House floor to support his notion that the measure ought to be made more equitable:

The gentleman from Pennsylvania [Mr. MURTHA] decided to put in the bill an amendment that said for a Congressman or a member of the Congressman's staff, if they are sued by the Government criminally and they prevail, the Government owes them attorney's fees. I felt that was inappropriate. First of all, it is too narrow. It only covers Congressmen and congressional staff. If it is good enough for them, it ought to be good enough for any citizen.²²

Representative Hyde's proposal was immensely successful in the House,²³ which approved the proposed amendment with only a half hour of late evening debate and without any committee reports or hearings examining its broad implications.²⁴ That is not to say, however, that there was no opposition to the amendment or that its potential impact was entirely ignored in the House. Although directed at a version of the amendment that never became law, Representative Hyde's introduction of the amendment²⁵ and the

Congress and Get Rich: Study, REUTERS (Mar. 13, 2008, 5:04 PM), <http://www.reuters.com/article/2008/03/13/us-usa-congress-wealth-idUSN1330776120080313> (reporting the "median net worth of senators" at \$1.7 million and of House members at \$675,000).

21. See *supra* text accompanying notes 5-6.

22. 143 CONG. REC. H7791 (statement of Rep. Hyde) (alteration in original).

23. The measure passed by a margin of more than four to one. See 143 CONG. REC. H20157- 58 (daily ed. Sept. 25, 1997). Commentator Lawrence Welle offers two potential explanations for the strong support that Representative Hyde's proposal received in the House. Welle, *supra* note 18, at 339-42. First, although Representative Hyde's proposed amendment made the language of the Murtha Amendment more equitable by extending its proposed protections to all prevailing criminal defendants, the effect of Representative Hyde's proposal was nevertheless to preserve for politicians the exclusive benefit of being able to claim that any prosecutions against them were "politically motivated' and, thus, wrongful." *Id.*

Second, there was "pervasive public and congressional hostility toward federal law enforcement organizations existing at the time of the Hyde Amendment's passage." *Id.* at 340-42 (describing the charged atmosphere after FBI and DOJ scandals in crime labs and at Waco and Ruby Ridge; stating that "there was little to gain politically and much to lose by opposing a measure that was depicted as keeping abusive prosecutors in check"). "As a result," Welle proposes, the amendment was approved by the House "without full consideration of its consequences." *Id.*

The lack of consideration may also have had to do with the procedures under which the debate was conducted, which waived critical House Rules meant to prevent appropriations measures from working substantive changes in the law, see *infra* note 26, and which relegated debate of the amendment to an after-hours affair, separating the vote on the amendment out until the next day. See 143 CONG. REC. H7770 (Statement of Rep. Rogers).

24. See 143 CONG. REC. H7791-94 (chronicling debate); see also Welle, *supra* note 18, at 335-36 (noting lack of further consideration).

25. 143 CONG. REC. H7791 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde).

thirty minutes of floor debate that followed provided those House members in attendance that night with an opportunity to consider the purposes and policies of the proposed amendment, as stated by Representative Hyde, and to elucidate arguments against it, thereby forming the only appreciable body of legislative history that exists for the law today.²⁶ Despite the fact that the law was substantially changed by the Conference Committee's compromise language, court after court has looked to this House floor debate when interpreting the meaning of the final Amendment.²⁷ Thus, the rationales expounded by Representative Hyde for adopting his version of the proposed amendment, regardless of the fact that they do not always extend with full logical force to the Amendment as it was finally adopted, have been incorporated into the interpretation of the Amendment through the process of statutory construction.

B. *The House Debate*

Representative Hyde introduced his amendment into the House by addressing the types of injustice that the measure sought to curb:²⁸

I have learned in a long life that people do get pushed around, and they can be pushed around by their government. . . . [P]eople 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 occasions they are capable of pushing people around. . . . If the Government, your last resort, is your oppressor, you really have no place to turn. . . .

. . . .

26. See *supra* note 18 (discussing the Amendment's sparse history). Notably, per House Resolution 239, House Rule XXI(2), which prevents appropriations measures from effectuating substantive changes in the law, see *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190-91 (1978), was waived for purposes of debate on the Hyde Amendment, thus further marginalizing the value of the debate that did occur. 143 CONG. REC. H7755 (Statement of Rep. Dreier).

27. See, e.g., *United States v. Aisenberg*, 358 F.3d 1327, 1341-42 (11th Cir. 2004); *United States v. Knott*, 256 F.3d 20, 28 (1st Cir. 2001); *United States v. Gilbert*, 198 F.3d 1293, 1299-1305 (11th Cir. 1999); *United States v. Wade*, 93 F. Supp. 2d 19, 22 (D.D.C. 2000); *United States v. Ranger Elec. Commc'ns, Inc.*, 22 F. Supp. 2d 667, 675 (W.D. Mich. 1998), *rev'd*, 210 F.3d 627 (6th Cir. 2000); *United States v. Troisi*, 13 F. Supp. 2d 595, 596-97 (N.D. W. Va. 1998); *United States v. Gardner*, 23 F. Supp. 2d 1283, 1288-89 (N.D. Okla. 1998).

28. Apparently disregarding the devastating mental, emotional, and social losses attendant to unfounded incarcerations, see, e.g., Adrian T. Grounds, *Understanding the Effects of Wrongful Imprisonment*, 32 CRIME & JUST. 1, 22-41 (2005), Representative Hyde labeled the financial impact on vindicated criminal defendants "the most unjust thing in all of the law." 143 CONG. REC. H7791 (statement of Rep. Hyde).

... 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.²⁹ They hide information. They do not disclose exculpatory information to which you are entitled. They suborn perjury. They can do anything.³⁰

By making applicable to defendants in criminal cases a remedy that was already available under the Equal Access to Justice Act (“EAJA”) to prevailing defendants in civil cases, Representative Hyde averred that the amendment could do “rough justice” and “repair . . . the economic wound” imposed by prosecutions that were not substantially justified.³¹ He pointed out the sensibility of extending the EAJA—a law with an established body of interpretation surrounding it—to the criminal context and the supposed simplicity with which the EAJA could be applied in that realm:³² “There are cases interpreting [the EAJA], 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. . . . Now, it occurred to me, if that is good for a civil suit, why not for a criminal suit?”³³

The proposal met opposition, however, from Representative David Skaggs, who thought the measure impetuous, citing the lack of hearings or other opportunities to “explicate the implications, the consequences, the costs of a significant change in the way the United

29. Compelled by the *Brady* doctrine, the government must disclose information to a criminal defendant that is favorable to the defendant and material to guilt or punishment; suppression of such material constitutes a violation of due process. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Nondisclosure of *Brady* material is a common ground for Hyde Amendment claims, *see, e.g., infra* text accompanying notes 153-54, 219-20, and accounts for a large number of misconduct cases, *see infra* notes 359-60 and accompanying text.

30. 143 CONG. REC. H7791 (statement of Rep. Hyde).

31. *Id.*

32. *Id.*; *see also* 143 CONG. REC. H7793 (statement of Rep. Hyde) (discussing the application of the substantial justification standard). However, reconciling the EAJA with the criminal context of the Hyde Amendment has been far from simple. *See infra* Part III.

33. 143 CONG. REC. H7791 (statement of Rep. Hyde). The applicability of this concept is substantially diminished by the Conference Committee’s changes to the amendment. For example, Representative Hyde’s proposed amendment, like the EAJA, placed the burden on the government to prove the prosecution was “substantially justified,” but the Hyde Amendment, as enacted, places the burden on the defendant to show that the government’s “prosecution was vexatious, frivolous, or brought in bad faith.” *See United States v. Milloy*, 75 F. Supp. 2d 1276, 1278 (D.N.M. 1999) (quoting *United States v. Troisi*, 13 F. Supp. 2d 595, 596 (N.D. W. Va. 1998)) (noting the burden reallocation as a “salient difference” when construing legislative intent). This distinction and others of equal significance are examined in detail in Part III *infra*.

States of America would manage its criminal justice responsibilities.”³⁴ Unable to call upon the House Rules designed to prevent appropriations measures from effectuating changes in existing law,³⁵ Representative Skaggs further noted for the record that “to attempt in the context of a floor amendment on an appropriations bill to address this issue I think does enormous disservice to the kind of standards of careful and thoughtful and considered work that this House ought to be doing.”³⁶ He felt, rather, that the “question of injustice” should be considered “in the regular order” of congressional business.³⁷

Moreover, Representative Skaggs noted, the sort of standard mentioned by Representative Hyde in his remarks on the floor³⁸ was absent from the amendment itself: “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.”³⁹

Representative Rivers also expressed opposition to Representative Hyde’s proposal, echoing Representative Skaggs’s concerns about precipitate action on an appropriations measure being used to effectuate substantive legal change⁴⁰ and averring some suspicions of her own:

While the claim is that this amendment will produce greater equity by eliminating differences between the treatment of Members and ordinary citizens and greater efficacy within the Justice Department, I believe it will do neither. Frankly, I believe this new proposal, when distilled down, is nothing more than a variation on the protect Members theme that is already written into this bill.⁴¹

Representative Rivers also thought the amendment unnecessary as “[o]ur judicial system already provides many protections to seal defendants from frivolous cases,” such as the Fifth Amendment’s requirement of probable cause and the screening function of the

34. 143 CONG. REC. H7791 (statement of Rep. Skaggs).

35. *See supra* note 26 (discussing the waiver of traditional procedural protocol for the Hyde Amendment debate).

36. 143 CONG. REC. H7791 (statement of Rep. Skaggs).

37. 143 CONG. REC. H7792 (statement of Rep. Skaggs).

38. *See supra* text accompanying notes 28-30 (describing cases where prosecutors “are not just wrong, they are willfully wrong, they are frivolously wrong”).

39. 143 CONG. REC. H7792 (statement of Rep. Skaggs).

40. 143 CONG. REC. H7793 (statement of Rep. Rivers) (“Clearly this is not the sort of proposal that should pass after just 30 minutes of discussion. It would work a fundamental change in our legal system and, according to the Department of Justice, would pose a substantial obstacle to the accomplishment of their essential mission.”).

41. 143 CONG. REC. H7792 (statement of Rep. Rivers).

grand jury.⁴² She felt the amendment offered “nothing more in terms of deterring errant prosecution” because it merely created “a forum for Members of Congress to argue that they have been unjustly targeted for political reasons.”⁴³ Rather, Representative Rivers viewed the amendment as “harmful,” with the potential to put a “chilling effect” on federal prosecutions and to create “a form of prosecutorial poker wherein wealthy defendants who can and do spend large amounts of money on dream team defense counsel can raise the stakes regarding their possible prosecution.”⁴⁴

In response to such opposition, Representative Hyde offered this pragmatic reply: “The gentlelady said the Constitution will protect us all. The Constitution protects you, but it will not pay your bills. That Constitution you carry in your pocket, the landlord will not take that and your lawyer will not take that. They want to get paid with cash.”⁴⁵ He also defended his decision to introduce the Amendment in the context of the appropriations bill as a matter of practicality:

The only reason it is here now, I saw the Murtha amendment, it was coming to the floor, and I thought we could do it better. That is all. I am trying to improve someone else’s amendment to make it fairer, to make it not too broad, and to give a standard. That is why we are here.⁴⁶

Downplaying the need for further reconsideration of a proposal that could impact the criminal justice system profoundly, Representative Hyde urged, “let us pass this law and then we will have some experience 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.”⁴⁷

And so it was. Despite the aleatory nature of the approach that Representative Hyde was exhorting, the measure passed in the House with enthusiastic support.⁴⁸ But Representatives Skaggs and Rivers had successfully planted seeds of concern during the House debate, for the measure did not receive immediate passage through Congress notwithstanding the House’s bipartisan support of the Amendment.⁴⁹ The Senate’s version of the appropriations bill did not

42. 143 CONG. REC. H7793 (statement of Rep. Rivers).

43. *Id.*

44. *Id.*

45. *Id.* (statement of Rep. Hyde).

46. 143 CONG. REC. H7794 (statement of Rep. Hyde).

47. 143 CONG. REC. H7793-94 (statement of Rep. Hyde).

48. *See supra* text accompanying note 7 (indicating the measure was approved by a vote of 340 to 84).

49. *See* Joseph F. Savage Jr. & Geoffrey M. Stone, *Recovering Attorneys’ Fees After Wrongful Federal Prosecutions: New Amendment Opens the Door*, 12 WHITE-COLLAR CRIME REP. 1, 2 (1998).

contain Representative Hyde's proposal,⁵⁰ and the executive branch's vehement opposition to the proposed amendment demanded that the measure be recrafted before adoption by the Senate or vetoed.⁵¹ Thus, it is not surprising that once the House-Senate Conference Committee convened to resolve the issue, the "DOJ was successful in influencing the ultimate language that emerged in the compromise bill."⁵²

C. The Conference Committee Compromise

As noted previously, virtually no history exists to explain the transformation of the Amendment by the House-Senate Conference Committee from Representative Hyde's proposal to the Amendment's current form,⁵³ but the compromise that the Committee drafted was readily accepted by Congress and signed into law.⁵⁴ The alterations, though, were dramatic. The Committee specifically barred recovery of fees by defendants represented by public counsel; removed the burden of proof from the government; replaced Representative Hyde's "substantially justified" standard with the requirement that the court must find the position of the United States "vexatious, frivolous, or in bad faith;"⁵⁵ and added language providing for the

50. *Id.*

51. *See supra* note 9 and accompanying text; Savage & Stone, *supra* note 49, at 2. Savage and Stone's article describes the Justice Department's opposition to the amendment as follows:

The Department of Justice, in particular, contended that the Hyde Amendment would unnecessarily deplete prosecutorial and judicial resources by forcing the government to litigate its "justification" following every acquittal. The Justice Department further claimed that allowing courts to second guess prosecutions, coupled with the significant risk of draining the department's limited funds, would discourage prosecutors from bringing legitimate claims.

Id.; *see also* 143 CONG. REC. H7792 (statement of Rep. Skaggs) (reading to the House from the "administration's statement": "It would 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").

Representative Hyde's response to these criticisms was a curt: "I would hope this would take some time and resources from the Justice Department. They might think twice about bringing cases for which there is no substantial justification." 143 CONG. REC. H7792 (statement of Rep. Hyde).

52. Abramowitz & Scher, *supra* note 20, at 24.

53. *See supra* notes 17-18 and accompanying text.

54. *See supra* notes 10-12 and accompanying text.

55. Savage & Stone suggest that this language was culled from the Firearms Owner's Protection Act of 1986, 18 U.S.C. § 924(d)(2)(B) (2006), which allows "reimbursement of reasonable attorneys' fees to a prevailing party in actions brought by the Bureau of Alcohol, Tobacco, and Firearms, when the court finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith"—the "without foundation language" having been omitted as "permitting

review of evidence *ex parte* and *in camera*.

In its only statement regarding the revised Amendment, the Conference Committee elucidated a single, important rule: “The 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.”⁵⁶ Other than the help accorded by that proviso, the courts were left on their own to interpret the Hyde Amendment with nothing more than a legislative history of House debate that applied to a rejected version of the Amendment and with the case history of the EAJA, which—after the Conference Committee’s reallocation of burdens and substituted standard—could no longer be applied directly to Hyde Amendment cases. Thus, the stage was set for conflicts among the courts that would construe the Amendment in the coming years. These conflicts are explored in Parts II and III.

II. A CASE STUDY: *UNITED STATES V. PETERSON*

George Jerry Mueck was the administrator of Spring Shadows Glen Psychiatric Hospital in Houston, Texas—a hospital now infamous as being at the center of the first case ever to allege criminal activity in connection with the recovery of allegedly false memories by psychiatric patients.⁵⁷ When the Hospital’s dissociative disorders unit was closed in March 1993,⁵⁸ some of the hospital’s patients filed and litigated civil malpractice suits against several hospital directors and employees, including Mr. Mueck.⁵⁹ One of the civil cases went to trial in August 1997.⁶⁰ Two weeks after the verdict, grand jury subpoenas for documents were served on three of the hospital’s directors, as well as on the parent corporation of the entity that operated the hospital, and a second subpoena shortly followed.⁶¹ Pursuant to these subpoenas, over 25,000 pages of hospital documents were produced to the government on September 29, 1997, and another 20,000 pages were produced on October 29, the very day the indictment was returned,⁶² which charged Mr. Mueck and four other defendants with one count of conspiracy and fifty-nine

recovery too easily.” *See supra* note 49, at 2 (internal quotations omitted).

56. H. R. REP. NO. 105-405, at 194 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2941, 3045.

57. *See* Sarah A. Klein, *Memory Recovered-or Invented*, AM. MED. NEWS, Dec. 8, 1997.

58. *Id.*

59. *See* Brief in Support of Jerry Mueck’s Application for Attorneys’ Fees and Expenses, at 1-2, *United States v. Peterson*, 71 F. Supp. 2d 695 (S.D. Tex. 1999) (Crim. No. H-97-237) [hereinafter *Application for Attorneys’ Fees*].

60. *Id.* at 2.

61. *Id.* at 2-3.

62. *Id.* at 3.

counts of mail fraud.⁶³ From the defendants' perspective, "neither the government nor the grand jury could have reviewed all, or even most" of the hospital documents.⁶⁴

Nevertheless, the trial proceeded for five months, until February of 1999, "when the Court declared a mistrial due to an insufficient number of remaining jurors to continue the trial."⁶⁵ The government subsequently moved to dismiss the indictment.⁶⁶ When defense counsel were allowed to meet with the dismissed jurors, "it was the uniform reaction of the jurors with whom counsel spoke that they did not understand 'even why Mr. Mueck was here.'"⁶⁷ Mr. Mueck thus proceeded to file his application for recovery of attorneys' fees pursuant to the Hyde Amendment.⁶⁸

Mr. Mueck's application focused on the government's prosecution of him as the administrator of the hospital, which it characterized as "vexatious" within the meaning of the Hyde Amendment.⁶⁹ The application described how the government's theories against Mueck in the case were legally and factually flawed and how the government never challenged any of Mueck's analyses of its theory of liability; rather, the government changed its theory of the case three times in response to Mueck's analysis of its theories.⁷⁰ Ultimately, however, the merits of Mr. Mueck's application were never

63. *See id.* at 9. The government's allegation was that the defendants had attempted to defraud patients' insurance companies by improperly diagnosing patients as suffering from Multiple Personality Disorder. *See* United States of America's Opposition to Defendants' Motions to Recover Attorney's Fees and Litigation Expenses From the Justice Department Pursuant to "the Hyde Amendment" and Memorandum of Law at 3, *United States v. Peterson*, 71 F. Supp. 2d 695 (S.D. Tex. 1999) (Crim. No. H-97-237) [hereinafter *Opposition Motion*].

64. Application for Attorneys' Fees, *supra* note 59, at 3.

65. *See* *United States v. Peterson*, 71 F. Supp. 2d 695, 697 (S.D. Tex. 1999).

66. *Id.*

67. Application for Attorneys' Fees, *supra* note 59, at 32.

68. *See generally* Application for Attorneys' Fees, *supra* note 59.

69. *See id.* at 8. Mr. Mueck's brief argued that a "vexatious" prosecution was one that was brought "without reasonable or probable cause or excuse," *id.*, a definition from *Black's Law Dictionary* that the district court adopted in its opinion. *See Peterson*, 71 F. Supp. 2d at 698. But while Mr. Mueck argued that good faith prosecutions could be vexatious if the government did not act reasonably in its decision to prosecute (or, in Mr. Mueck's case, to *continue* to prosecute after abandoning theory after theory), *see* Application for Attorneys' Fees, *supra* note 59, at 8-9.), the court concluded:

[T]he Hyde Amendment does not apply when the position of the United States is the product of simple negligence or benign prosecutorial misjudgment, and may not apply even when the government has so little proof of guilt that no rational trier of fact could find the defendant guilty beyond a reasonable doubt.

Peterson, 71 F. Supp. 2d at 698.

70. *See* Application for Attorneys' Fees, *supra* note 59, at 13, 18.

considered by the district court, which denied his case on procedural grounds alone.⁷¹

At the root of the court's understanding (or perhaps misunderstanding) of Mr. Mueck's eligibility for applying to recover attorneys' fees was the problem of applying the "procedures and limitations" of the EAJA to applicants under the Hyde Amendment, as required by the Amendment's text.⁷² The EAJA lays out two separate provisions by which EAJA applicants may seek recovery—section (b) and section (d).⁷³ Recognizing this, Mueck's attorneys proceeded to apply for recovery under section (b) of the Act.⁷⁴ Mueck's brief reasoned as follows:

Section (b) of the [EAJA] provides for recovery of attorneys' fees and expenses by a prevailing party "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." The Hyde Amendment is a statute that qualifies an applicant to proceed under this provision.⁷⁵ Section (d) of the Act provides for a similar recovery by a prevailing party "unless the Court finds the position of the United States was substantially justified." Certain eligibility restrictions attend applications made under section (d) that do not apply to applications brought under section (b). . . .

. . . . Mr. Mueck elects to proceed under section 2412(b) of the EAJA, as incorporated by the Hyde Amendment. The requirements for such an award are (1) that he is a prevailing party, and (2) that the position of the United States was vexatious, frivolous, or in bad faith.⁷⁶

The government, however, took a different position, stating that "[u]nder the EAJA, . . . a party's application must show the party 'is eligible to receive an award' of attorneys' fees and litigation expenses. In the case of individuals, Section 2412(d)(1)(B) limits awards to those 'individuals whose net worth did not exceed \$2,000,000 at the time the civil action was filed.'"⁷⁷ The government argued that this limitation applied to Mueck despite his election to proceed under § 2412(b), not § 2412(d).⁷⁸ The government did not dispute an

71. *Peterson*, 71 F. Supp. 2d at 702.

72. *See supra* text accompanying note 12.

73. *See infra* text accompanying note 107 (explaining the EAJA election of remedies process).

74. *See* Application for Attorneys' Fees, *supra* note 59, at 6-7.

75. The viability of this step in the brief's reasoning, which had at the time successfully been utilized in one of the earliest cases to consider the issue, *see infra* text accompanying notes 84-85, is critiqued *infra* at note 122 and Part IV.A.

76. Application for Attorneys' Fees, *supra* note 59, at 6-7 (internal citations omitted).

77. Opposition Motion, *supra* note 63, at 23.

78. *See id.* at 23 n.9 and accompanying text.

applicant's privilege to seek recovery by electing to proceed under one section or the other, but reasoned:

The Hyde Amendment does not state that defendants can avoid the EAJA's limitations contained in § 2412(d) by electing to proceed under § 2412(b). Rather, the new law requires that the limitations of the EAJA apply, and does not differentiate between claims filed under § 2412(b) or § 2412(d). Thus, a narrow construction⁷⁹ of the Amendment requires that *all* limitations contained in the EAJA, both in Sections 2412(b) and (d), apply to Hyde Amendment claims. Accordingly . . . the [net worth] requirements set forth in § 2412(d)(1)(B) apply to Mueck's and the other defendants' claims, even if they seek to recover fees and expenses under §2412(b).⁸⁰

Because Mueck did not submit proof of a net worth below \$2,000,000, the government asserted that his application had to be dismissed.⁸¹

Applying this same logic, the government contended that another requirement outside the bounds of EAJA § 2412(b)—namely, § 2412(d)(1)(A)'s requirement that the fees be “incurred by” the prevailing party—applied to bar Mr. Mueck's application for recovery because his fees were paid by his employer.⁸²

The court, perhaps sensing a viable way out of ruling on the merits of Mr. Mueck's application, embraced the government's conclusions, though by slightly different reasoning.⁸³ Although the court recognized that a prior case, *United States v. Holland*,⁸⁴ had held that an “applicant who elected to proceed under § 2412(b) was not subject to the procedures and limitations of § 2412(d),”⁸⁵ it nevertheless decided that the limitations of § 2412(d) applied to all

79. As has long been observed as true of virtually every case that invites statutory construction, varying and sometimes opposing canons can be factored in to each court's analysis in Hyde Amendment cases. See Karl L. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950). For example, a court could choose to focus on the canon that waivers of sovereign immunity should be narrowly construed, like the court in *Peterson* did, see *infra* note 88 and accompanying text, while another could choose to focus on a competing canon, such as one requiring remedial statutes be broadly construed, See, e.g., Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 154 n.216 (2010). These and other competing canons are discussed *infra* at notes 132, 134, 311-13 and accompanying text.

80. Opposition Motion, *supra* note 63, at 23 n.9 (citations omitted) (emphasis in original).

81. See *id.* at 23-24.

82. See *id.* at 24.

83. See *United States v. Peterson*, 71 F. Supp. 2d 695, 699 (S.D. Tex. 1999) (asserting that the limitations in § 2412(d) apply to applications made under the Hyde Amendment).

84. 34 F. Supp. 2d 346 (E.D. Va. 1999), *vacated in part on other grounds*, 48 F. Supp. 2d 571 (E.D. Va. 1999), *aff'd*, 214 F.3d 523 (4th Cir. 2000); see also *infra* Part III.A.2 (discussing *Holland* and its subsequent history).

85. *Peterson*, 71 F. Supp. 2d at 700 (citing *Holland*, 34 F. Supp. 2d at 358-59).

applications under the Hyde Amendment based on several factors.⁸⁶ First, the court argued that the plain language of the statute required its conclusion and that if it accepted Mr. Mueck's argument, every Hyde litigant would choose to proceed under § 2412(b) and avoid all limitations.⁸⁷ Additionally, as a waiver of sovereign immunity, the Amendment must be narrowly construed; if Congress had meant for the limitations of § 2412(d) *not* to apply to applicants under § 2412(b), "then appropriate language could have been inserted in the legislation."⁸⁸ Finally, the court considered the language of EAJA § 2412(d)(1)(A) to be a model for the language of the Hyde Amendment and believed that Representative Hyde's remarks in Congress indicated that applications under the Amendment "should be scrutinized in the same manner as [those] brought under § 2412(d) of the EAJA."⁸⁹

Having so concluded, the court declared Mr. Mueck's application for recovery of fees procedurally barred, perhaps because he was wealthy, and definitely because his employer had assumed the expense of his legal fees.⁹⁰ Whether the government's unrelenting pursuit of the hospital administrator had been vexatious, frivolous, or in bad faith was of no consequence. By the court's estimation, a law that had, at its core, the goal of addressing prosecutorial misconduct was able to be disregarded—was, in fact, *designed* to be disregarded—when the party seeking to enforce its goals was wealthy or indemnified by his employer.⁹¹ The fact that such parties might be in a unique position to more fully effectuate this goal than those parties to which the court believed the law did apply was one that escaped the court's consideration, and one that continues to be ignored by courts eager to dispose of these cases on procedural grounds.

III. THE PANOPLY OF CONFLICTING AUTHORITIES

While *United States v. Peterson* is illustrative of a few of the more immediate problems that the federal courts faced when initially interpreting the Hyde Amendment, a host of other issues left open by its careless drafting and sparse history have also come to light, many

86. *Peterson*, 71 F. Supp. 2d at 699.

87. *See id.* at 699-700; *see also infra* notes 124, 309-10 and accompanying text (explaining the accuracy of this conclusion is rebuttable, as proceeding under section (b) has its own disadvantages).

88. *Peterson*, 71 F. Supp. 2d at 700.

89. *Id.*

90. *See id.* (finding that Mueck failed to prove that his net worth was less than \$2,000,000 and that he incurred the costs of litigation himself, as required by § 2412(d)).

91. *See id.* at 699 (observing that the Hyde Amendment requires that awards be granted only after the limitations of § 2412 are satisfied).

of which continue to persist as circuit splits.⁹² It is the purpose of this Part to examine these persistent problems by reference to the various cases that have addressed them, highlighting issues that are ripe for uniform resolution by Congress or the Supreme Court, while also providing a practical analysis of the more pertinent cases that have grappled with these issues for use by those who may be litigating Hyde claims.

A. *The Procedures and Limitations of the EAJA:
The “(b) Versus (d)” or “Election of Sections” Issue and Its
Ramifications*

One of the most difficult and fundamental issues that courts have encountered in interpreting the Hyde Amendment is the issue exposed by *United States v. Peterson*: whether the Amendment’s incorporation of the “procedures and limitations” of the EAJA requires that the limitations of EAJA § 2412(d) apply to every application made under the Hyde Amendment; or, stated another way, whether the choice that an EAJA applicant has to proceed under § 2412(b) or § 2412(d) is also available to an applicant under the Hyde Amendment.⁹³ As illustrated in Part II, the question has profound consequences for applicants under the Amendment. Among other limits imposed by § 2412(d) that are not imposed by § 2412(b) are the limitations on net worth⁹⁴ and the requirement that costs must be “incurred by” the prevailing party,⁹⁵ “which has been interpreted to mean that the prevailing party must have personally

92. While courts regularly assume the role of filling in gaps and resolving ambiguities in statutory language through the slow and sometimes inefficient process of statutory construction, the interpretation of the Hyde Amendment has posed problems of peculiar difficulty. Ironically, many of the problems posed by the language of the Hyde Amendment arose by virtue of Congress’s ostensible attempt to avoid protracted statutory interpretation and construction. *See supra* notes 32-33 and accompanying text (describing Representative Hyde’s vision that the seventeen years of EAJA interpretation would assist in interpreting the Hyde Amendment). Resolution of many of the issues posed by the Hyde Amendment have been complicated by this slapdash attempt to pre-fill gaps that were sure to arise in what Congress ought to have realized had become a very different statute than the one originally proposed as an analogue to the EAJA. By adopting provisions from the EAJA that directly conflict with the stated goals and language of the Hyde Amendment, *see* discussion *infra* Part IV.B.2, the courts have been forced to harmonize two incongruent statutes. Free neither to ignore the EAJA and interpret the Amendment’s unclear provisions traditionally—by reference solely to the text and legislative history of the Amendment itself—nor to ignore Congress’s intent to interpret the Hyde Amendment by reference to the EAJA and its history, it is no wonder that the courts have come to varying conclusions about the proper interpretation of the Amendment.

93. 71 F. Supp. 2d 695, 699-700 (1999).

94. 28 U.S.C. § 2412(d)(2)(B) (2006).

95. 28 U.S.C. § 2412(d)(1)(A) (2006).

paid [its] fees.”⁹⁶

Thus, if all § 2412(d) limits are imposed upon every applicant, individuals with a net worth of over \$2 million, businesses with a net worth of over \$7 million and 500 employees, and any individual who may be indemnified by such an organization are precluded from invoking the Amendment. The resolution of the issue, then, has an even more profound consequence than that of individual justice: whether the Amendment can truly be effective in reaching its goal of deterring prosecutorial misconduct for the benefit of all.⁹⁷ This issue was among the first of the many thorny questions encountered by the district courts that received the earliest Hyde applications.

1. Early Treatment of the “Election of Sections” Question

*United States v. Gardner*⁹⁸ was the earliest case to examine a motion for attorneys’ fees under the Hyde Amendment.⁹⁹ The case involved the Hyde application of Richard Gardner, a tax preparer who had been indicted on over twenty counts of tax and bankruptcy

96. *United States v. Holland*, 34 F. Supp. 2d 346, 358 (E.D. Va. 1999) (citing *United States v. Paisley*, 957 F.2d 1161, 1164 (4th Cir. 1992)), *vacated in part on reconsideration*, 48 F. Supp. 2d 571 (E.D. Va. 1999), *aff’d*, 214 F.3d 523 (4th Cir. 2000). *But cf.* *Ceglia v. Schweiker*, 566 F. Supp. 118, 122-23 (E.D.N.Y. 1983) (finding in the EAJA context that a prevailing party represented free of charge by a legal services organization may be deemed to have “incurred” attorneys’ fees for purposes of § 2412(d)).

97. *See infra* Parts IV.A., C. (further considering this issue).

98. 23 F. Supp. 2d 1283 (N.D. Okla. 1998).

99. *Gardner* was only the second case to deal with the Hyde Amendment, however. *United States v. Chan*, 22 F. Supp. 2d 1123 (D. Haw. 1998), had previously taken up consideration of the Amendment, though only in the context of a footnote. *Chan* involved a request for recovery of attorneys’ fees under the EAJA in a case in which the government had violated its plea agreement with the defendant. *See id.* The government argued that the defendant was not entitled to recover attorneys’ fees because the action was criminal in nature, and the EAJA provided for recovery of fees only in civil actions. *See id.* at 1127. The court held that as an ancillary motion to the criminal case, the motion for restitution should be “characterized as a civil action for purposes of the EAJA,” and found the award justified. *Id.* But in the alternative, the court noted, if the action was “characterized as criminal for purposes of obtaining attorneys’ fees, then the recently enacted Hyde Amendment would apply.” *Id.* at 1127 n.3.

The *Chan* court thus assumed, without considering the matter further, or formally deciding, that a motion itself under the Hyde Amendment is criminal rather than civil in nature. The distinction, though, is critical, as it can have serious consequences for an applicant’s ability to raise issues on appeal, *see infra* notes 140-43 and accompanying text (discussing *Holland III*), as well as the time limits for filing an appeal from the denial of a Hyde Amendment application. Not surprisingly, the circuits that have considered the latter issue have come to differing conclusions on the matter, resulting in yet another split. *Compare, e.g., In re 1997 Grand Jury*, 215 F.3d 430 (4th Cir. 2000) (finding that Hyde Amendment actions are to be construed as civil in nature), *and United States v. Truesdale*, 211 F.3d 898 (5th Cir. 2000) (same), *with United States v. Robbins*, 179 F.3d 1268 (10th Cir. 1999) (according with *Chan*). *See also infra* Part III.B.4 (discussing this split in more detail).

fraud.¹⁰⁰ Following dismissal of all charges against him, Gardner filed for recovery of attorneys' fees and expenses.¹⁰¹ In considering his application, the court became the first to construe the Hyde Amendment's incorporation of the "procedures and limitations" of the EAJA.¹⁰²

Recognizing the dearth of legislative "history to explain the transformation of Representative Hyde's original proposed amendment into its present form[.]"¹⁰³ the court nonetheless relied on Representative Hyde's statements introducing the Amendment on the floor of the House¹⁰⁴ to conclude that "in using the phrase 'procedures and limitations' in the Hyde Amendment, Congress intended to import the civil EAJA provisions to the criminal context to the fullest extent possible."¹⁰⁵ As the court went on to find that the net worth limitation of § 2412(d) was applicable to Gardner,¹⁰⁶ the

100. *See Gardner*, 23 F. Supp. 2d at 1285-86.

101. *See id.* at 1286.

102. *See id.* at 1287.

103. *Id.* at 1288.

104. *See* 143 CONG. REC. H7791 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde) ("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, if the Government cannot prove substantial justification in bringing the suit, you are entitled to have attorney's fees and costs reimbursed. That is justice."); 143 CONG. REC. H7793 (statement of Rep. Hyde) ("I am simply applying the same situation to criminal litigation.").

105. *Gardner*, 23 F. Supp. 2d at 1289. Perhaps recognizing that resting its conclusion on the fact that "[t]he phrase 'procedures and limitations' in the final version of the statute was also present in Representative Hyde's original proposal" completely ignored the end result that what Representative Hyde was arguing for was never passed by Congress, *see supra* Part I.A, the court in *Gardner* offered three additional justifications for its decision:

First, nothing in the language of the statute or the legislative history suggests that there is any independent jurisprudence associated with the phrase "procedures and limitations" or that the phrase has a meaning separate from the meaning of a definition. Second, nothing in the statute or legislative history indicates the manner in which a court is to distinguish between a non-incorporated "definition" and an incorporated "procedure and limitation." . . .

Third, all terms of the EAJA, including definitions, should be incorporated into the Hyde Amendment to the extent applicable because all definitions generally operate as limitations.

23 F. Supp. 2d at 1289. The court's focus on eliminating the distinction between "definitions," on the one hand, and "procedures and limitations," on the other, does little to resolve the "(b) versus (d)" problem, however, as the EAJA explicitly states that such definitions are "[f]or the purposes of . . . subsection [D]," not for the EAJA's other sections. *See* 28 U.S.C. § 2412(d)(2) (2006).

106. *See Gardner*, 23 F. Supp. 2d at 1293. The court recognized that EAJA fee awards are limited by § 2412(d)(2)(B) to individuals "whose net worth did not exceed" \$2 million at the time the action was filed and that the "prevailing party must show in the fee application that he is eligible to receive an award." *Id.* Although Gardner had failed to allege his net worth in his Hyde Amendment application, the court held that

upshot of its conclusion regarding Congress's intent was apparently that importing the EAJA provisions to the "fullest extent possible" meant making the definitions of § 2412(d) applicable to all applicants, rather than retaining the EAJA's procedure of distinguishing between the § 2412(b) and (d) methods of recovery.¹⁰⁷

Gardner was merely the first of many cases to dispose of a Hyde application by acting summarily through such a presumption. While the first court to directly analyze whether the EAJA's procedure of distinguishing between sections was applicable in the Hyde context came to the opposite conclusion,¹⁰⁸ several of the other early courts to face the (b) versus (d) distinction agreed with the assumption of the *Gardner* court, either explicitly or by presumption.¹⁰⁹ They disregard

this failure was "not a jurisdictional defect" in the Hyde context and allowed him to satisfy the requirement by providing an affidavit stating that his net worth was below the limit. *Id.* *But see* *United States v. Peterson*, 71 F. Supp. 2d 695, 700 (S.D. Tex. 1999) (holding a Hyde Amendment applicant "procedurally barred from recovering attorneys' fees and expenses because he failed to prove that he personally paid his attorneys' fees and that he was an individual with a net worth of less than \$2,000,000 when the action was filed").

107. This reasoning is critiqued *infra* in Part IV.B; thus, it is sufficient here to note that the framework of the EAJA is recognized as having "two distinct and express statutory waivers of sovereign immunity permitting the recovery of attorneys' fees in lawsuits brought by or against the United States." *Kerin v. U.S. Postal Serv.*, 218 F.3d 185, 189 (2d Cir. 2000) (citing *Wells v. Bowen*, 855 F.2d 37, 46 (2d Cir. 1988), for the proposition that "these two bases 'stand[] completely apart.>"). As explained in *Kerin*,

Section 2412(d) is . . . an entirely statutory basis for the award of attorneys' fees. . . .

. . . . § 2412(b) . . . effectively codifies the common law exceptions to the traditional American rule that each party will ordinarily bear its own fees and costs. . . .

Thus, not only are §§ 2412(b) and (d) statutorily distinct, but the elements required to sustain a fee award under each subsection are different as well.

Id. at 189-91. *Accord, e.g.*, *Hyatt v. Shalala*, 6 F.3d 250, 253-54 (4th Cir. 1993) (demonstrating how parties claiming attorneys' fees under the EAJA may proceed under § 2412(b) or (d)).

108. *United States v. Holland (Holland I)*, 34 F. Supp. 2d 346 (E.D. Va. 1999), *vacated in part on other grounds*, *United States v. Holland (Holland II)*, 48 F. Supp. 2d 571 (E.D. Va. 1999), *aff'd*, *United States v. Holland (Holland III)*, 214 F.3d 523 (4th Cir. 2000). A full discussion of *Holland I* and its subsequent case history appears *infra* in Part III.A.2, as *Holland I* espouses what is now the minority view on the "election of sections" issue.

109. *Compare* *United States v. Knott (Knott I)*, 106 F. Supp. 2d 174, 178 (D. Mass. 2000) (considering whether a Hyde applicant may make the same election between proceeding under § 2412(b) or (d) as civil litigants may make in claims under the EAJA, and concluding that they may not), *rev'd in part on other grounds*, *United States v. Knott (Knott II)*, 256 F.3d 20 (1st Cir. 2001), *and* *United States v. Peterson*, 71 F. Supp. 2d 695, 699-700 (S.D. Tex. 1999) (considering the "election of sections" option directly as well), *with* *United States v. Ranger Elec. Commc'ns, Inc. (Ranger I)*, 22 F. Supp. 2d 667, 674-76 (W.D. Mich. 1998) (presuming without analysis, like *Gardner*, that the limitations to recovery under § 2412(d) of the EAJA apply to all applications under the Hyde Amendment), *rev'd for lack of jurisdiction*, *United States*

that the “procedures and limitations” of 28 U.S.C. § 2412 that were to be applied when construing the Hyde Amendment necessarily include those that are specifically tailored to § 2412(d) alone, despite the myriad problems that arise from the fact that several words and phrases in the Hyde Amendment directly conflict with a procedure or limitation listed in § 2412(d).¹¹⁰ This trend continued with the cases that found their way to the circuit courts as well.¹¹¹ The result is an issue that, though clearly trending toward the outcome of the *Gardner* line of cases,¹¹² nevertheless lacks firmly settled treatment

v. Ranger Elec. Commc'ns, Inc. (*Ranger II*), 210 F.3d 627 (6th Cir. 2000), *overruled on other grounds* by *Scarborough v. Principi*, 541 U.S. 401 (2004), and *United States v. Oatman (Oatman I)*, No. 98-CR-80774-DT, 1999 U.S. Dist. LEXIS 18005, at *2 (E.D. Mich. Oct. 27, 1999) (presuming the same), *aff'd*, *United States v. Oatman (Oatman II)*, 238 F.3d 425 (6th Cir. 2000) (per curiam) (unpublished table decision).

Knott I and *Oatman I* are illustrative of the two primary methods by which most of the early district courts faced the “(b) versus (d)” issue. The court in *Knott I*, like those in *Holland I* and *Peterson* before it, gave at least some direct consideration to the issue of whether an applicant could elect to proceed under subsection (b) or (d). See *Knott I*, 106 F. Supp. 2d at 178. Acting on grounds that “[n]o Circuit Court of Appeals has yet construed the Hyde Amendment’s incorporation of the procedures and limitations of the EAJA and the district courts which have addressed this issue are split[.]” the court in *Knott I* chose to adopt the reasoning in *Peterson* and ruled that the limits of EAJA § 2412(d) should apply to all applications made under the Hyde Amendment. *Id.* (recognizing the approach of the district court in *Holland I*, though omitting to convey by subsequent history the Fourth Circuit’s later recognition that the order in *Holland I* had not effectively been raised on appeal for review, thus leaving intact the *Holland I* opinion’s adoption of the “election of sections” interpretation, which result will be discussed further in Part III.A.2, *infra*). The *Oatman I* opinion, by contrast, did not pause to address the issue directly and is thus illustrative of the “presumptive” camp of cases. See *Oatman I*, 1999 U.S. Dist. LEXIS 18005, at *2 (holding that § 2412(d) rendered the court without jurisdiction to consider the applicant’s claim, thus presuming that subsection (d) necessarily controlled the case’s outcome, despite the applicant’s insistence that the filing deadline was “unclear”).

110. For example, the Hyde Amendment anticipates the need for additional evidence and testimony to assist in making award determinations, see *supra* text accompanying note 12 (regarding the receipt of evidence in camera and testimony kept under seal), whereas § 2412(d) expressly prohibits such evidence. See 28 U.S.C. § 2412(d) (2006) (mandating that determinations be made on the basis of the record alone); see also *United States v. Aisenberg*, 247 F. Supp. 2d 1272, 1289-1308 (M.D. Fla. 2003), *rev’d on other grounds*, 358 F.3d 1327 (11th Cir. 2004) (discussing other conflicts).

111. Compare, e.g., *Aisenberg*, 358 F.3d at 1340-42 (considering directly whether a Hyde Applicant may make the same election between proceeding under § 2412(b) or (d) as civil litigants may make in claims under the EAJA and concluding that they may not), and *Ranger II*, 210 F.3d at 631 (deciding the same), with *United States v. Hristov*, 396 F.3d 1044, 1046 (9th Cir. 2005) (merely assuming, like *Gardner* and *Ranger I*, that the limitations to recovery under § 2412(d) of the EAJA apply to all applications under the Hyde Amendment, calling § 2412(d)(1)(B) and (d)(2)(B) “filing requirements” of the Amendment).

112. See *infra* Part III.A.3.

among all federal courts and is thus ripe for clarification. The following discussion highlights the variance in treatment of the issue.

2. The *Holland* View

The *Holland* case¹¹³ represents the view that the Hyde Amendment's incorporation of the procedures and limitations of 28 U.S.C. § 2412 means that petitioners under the Hyde Amendment may elect to proceed under § 2412 (b) or § 2412 (d), just as petitioners under the EAJA may so elect.¹¹⁴ Although in the minority of cases that have analyzed the issue, *Holland* remains good law, having withstood numerous opportunities for repudiation from within the Fourth Circuit.¹¹⁵ As a result, its history merits close attention.

Holland involved the Hyde Amendment applications of two bank officers ("the Hollands") who had been acquitted of all charges in a criminal prosecution against them.¹¹⁶ The district court in *Holland I* considered the "(b) versus (d)" issue directly, recognizing that before it could rule on the merits of the Hollands' motion, it first had to "determine which section or sections of the [EAJA] apply to the Hollands' Application through its incorporation in the Amendment."¹¹⁷

The government asserted "that the Amendment incorporates all of the procedures and limitations of section 2412(d) of the EAJA for all Hyde Amendment Applications," but the court disagreed, noting that "at the time of the Amendment's passage case law allowed parties claiming attorney's fees under the EAJA to elect whether to proceed under section 2412(b) or under section 2412(d)."¹¹⁸ The court thus concluded that "Hyde Amendment applicants in criminal cases may make the same election as civil litigants may make in claims under the EAJA[.]" and that accordingly, the Hollands were permitted to "proceed under section 2412(b), free of section 2412(d) limitations."¹¹⁹ "Had Congress intended to limit an applicant's rights to those granted by section 2412(d)," the court remarked, "it could have said so."¹²⁰ Furthermore, the court reasoned, "[t]here is no reason to believe the Hyde Amendment intended to confer lesser rights upon criminal defendants than the EAJA conferred upon civil

113. *Holland I*, 34 F. Supp. 2d 346 (E.D. Va. 1999), *vacated in part on other grounds*, *Holland II*, 48 F. Supp. 2d 571 (E.D. Va. 1999), *aff'd*, *Holland III*, 214 F.3d 523 (4th Cir. 2000).

114. *See Holland I*, 34 F. Supp. 2d at 358.

115. *See infra* notes 143-45 and accompanying text.

116. *See Holland I*, 34 F. Supp. 2d at 353-55.

117. *Id.* at 357.

118. *Id.* (citing *Hyatt v. Shalala*, 6 F.3d 250 (4th Cir. 1993); *Am. Hosp. Ass'n v. Sullivan*, 938 F.2d 216, 219 (D.C. Cir. 1991)).

119. *Holland I*, 34 F. Supp. 2d at 358.

120. *Id.* at 357.

litigants.”¹²¹

The court further determined, through arguably circular reasoning,¹²² that because EAJA “[s]ection 2412(b) applies in situations where ‘the common law or a statute specifically provides for such an award,’ and the Hyde Amendment,” which incorporates § 2412, “meets the description of such a statute[;]” it “unambiguously permits a Hyde Amendment Application pursuant to section 2412(b).”¹²³ Although the government argued that “Hyde’s reference to ‘procedures and limitations’ necessarily refers solely to section 2412(d) or refers to section 2412(b) merged with section 2412(d) because . . . only section 2412(d) contains procedures and limitations,” the court pointed out that § 2412(b) does indeed contain limitations.¹²⁴ The result of the court’s conclusions was that the

121. *Id.* The court paused here to consider the Amendment’s legislative history. *See id.* at 357-58 n.18. Though careful to point out that the court need not have contemplated the issue, “since it [did] not find the applicable statutes ambiguous,” it nevertheless noted:

As originally drafted, the Hyde Amendment appeared to track section 2412(d) of the EAJA in that it required the United States to prove that its prosecution was substantially justified. However, in its final form, the Hyde Amendment omitted the substantial justification standard and revised the burden of proof via the requirement of proof that the prosecution was vexatious, frivolous, or in bad faith. Such a change could be interpreted as an indication that the Amendment, in its final form, would allow defendants to proceed under section 2412(b).

Id. (citations omitted).

122. Note that the court need not have taken this approach to reach the same result. Because § 2412(b) permits an award pursuant to either “the common law *or* under the terms of any statute which specifically provides for such an award,” 28 U.S.C. § 2412(b) (2006) (emphasis added), there is logically no need to resort to the Hyde Amendment itself as a statute triggering the section’s applicability. Rather, § 2412(b) may be invoked through the common law, which itself contains fee-shifting remedies for actions taken “in bad faith, vexatiously, wantonly, or for oppressive reasons.” *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 258 (1975) (quoting *F.D. Rich. Co. v. United States*, 417 U.S. 116, 129 (1974)) (internal quotation marks omitted); *Alyeska Pipeline*, 421 U.S. at 258-59 (recognizing judicially-crafted exceptions to the “American Rule” that each party typically pays its own litigation costs); *see also infra* notes 165-69 and accompanying text (describing the Sixth Circuit’s overstatement of the problem of “circularity”).

123. *Holland I*, 34 F. Supp. 2d at 358.

124. *Id.* Specifically, the court explained:

Section 2412(b) contains its own limitations which provide that the court may award such fees: (1) to the prevailing party; (2) against the United States or its agents; and that (3) the United States shall be liable . . . to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

Id. (alteration in original) (internal quotations omitted). Notably, unlike awards under § 2412(d), which are mandatory if the requirements of that section are met, *see* 28 U.S.C. § 2412(d) (using the mandatory language “shall”), § 2412(b) makes awards discretionary with the court, *see* 28 U.S.C. § 2412(b) (using the permissive language

Hollands' application was not burdened by the limits in EAJA § 2412(d), which could have been fatal to the motion.¹²⁵

Notably, the court did not suggest that the limitations of EAJA § 2412(d) were inapplicable in the Hyde context, as some later courts erroneously represented;¹²⁶ rather, it simply took the position that the Hyde Amendment presumably included all of the procedures and limitations of § 2412, including the procedure of allowing an election of remedies between subsections (b) and (d).¹²⁷ Accordingly, after finding vexatious conduct on the part of the government, the court granted the Hollands' application for recovery.¹²⁸

The government moved for reconsideration in *Holland II*,¹²⁹ suggesting that the court's decision to retain the EAJA's election of sections procedure rendered the Hyde Amendment unconstitutional as applied because it abridged the separation of powers doctrine by allowing the court to "punish the executive or provide a windfall for defendants."¹³⁰ The government also argued that "because the Hyde Amendment is a waiver of sovereign immunity, it is to be strictly construed in favor of the United States," and that the "[c]ourt's construction of the Hyde Amendment transgress[ed] this canon."¹³¹

The court responded to these arguments by ruling as an initial matter that the issue was not appropriate for reconsideration

"may"), thereby providing an additional limitation on an applicant's ability to recover that would not exist if an election was made to proceed under § 2412(d).

125. The court noted that "[s]ince the Court is ruling that section 2412(b) of the EAJA applies, it does not FIND that [§ 2412(d)'s limitation that the prevailing party must have *personally* paid the fees] applies to this Application for criminal attorney's fees and litigation costs, as section 2412(b), unlike section 2412(d) does not use the key phrase '. . . incurred by that party . . .'" *Holland I*, 34 F. Supp. 2d at 358 n.19 (third and fourth alterations in original). For further consideration of the issue of fee payers, see *infra* Part IV.B.3.a.

126. *E.g.*, *Ranger II*, 210 F.3d 627, 632 (6th Cir. 2000), *overruled on other grounds* by *Scarborough v. Principi*, 541 U.S. 401 (2004).

127. *See Holland I*, 34 F. Supp. 2d at 357.

128. *Id.* at 360, 375. Specifically, the court found that the FDIC and prosecution were agencies acting in concert, *see id.* at 359 n.21, and apportioned damages between them, *id.* at 375, after finding that each had engaged in vexatious conduct by having improperly pursued criminal charges on knowingly insufficient evidence. *See id.* at 361-67.

129. 48 F. Supp. 2d 571 (E.D. Va. 1999), *aff'd*, *Holland III*, 214 F.3d 523 (4th Cir. 2000). Though the government did not specify the rule pursuant to which it sought reconsideration, the court determined that the only applicable rule, considering the time period within which the government submitted its motion, was *Federal Rule of Civil Procedure* 60(b), which "does not authorize a motion merely for reconsideration of a legal issue." *See Holland II*, 48 F. Supp. 2d at 573. Instead, the court noted, it would be permitted to vacate its judgment only if such an extraordinary remedy would be "appropriate to accomplish justice." *Id.* (quoting *Compton v. Alton S.S. Co.*, 608 F.2d 96, 102 (4th Cir. 1979)).

130. *Holland II*, 48 F. Supp. 2d at 574 (internal quotations marks omitted).

131. *Id.*

because the government did not offer “any new facts or evidence, but merely request[ed] that the Court change its mind about its interpretation,” which is “not the purpose of a motion for reconsideration.”¹³² Nevertheless, the court further responded that even if it did “reexamine its interpretation of the EAJA as incorporated into the Hyde Amendment, the court would reach the same conclusion” as it had in *Holland I*.¹³³ The court in *Holland II* summarized its position as follows:

In enacting the Hyde Amendment, Congress was presumed to have knowledge of the existing case law allowing petitioners under the EAJA to proceed under Section 2412(b) or (d). Moreover, “once Congress has waived sovereign immunity over a certain subject matter, we cannot assume the authority to narrow the waiver Congress intended.”¹³⁴

The court in *Holland II* thus reaffirmed the *Holland I* holding, albeit arguably in dicta, that applicants under the Hyde Amendment have the same power as EAJA applicants have in electing to proceed under either § 2412(b) or (d).¹³⁵ As a result, the fact that the Hollands did not themselves incur any fees in the case had “no effect on the Court’s findings.”¹³⁶ In other words, because the Hollands had

132. *Id.*

133. *See id.* at 574-75.

134. *Id.* at 575 (quoting *Jones v. Brown*, 41 F.3d 634, 638 (4th Cir. 1994)). Long-standing United States Supreme Court precedent has also recognized that when construing a statute that waives sovereign immunity, a court must be careful not to “assume the authority to narrow the waiver that Congress intended,” *United States v. Kubrick*, 444 U.S. 111, 118 (1979), nor “as a self-constituted guardian of the Treasury[,] import immunity back into a statute designed to limit it.” *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955).

In fact, in a recent Supreme Court case interpreting the EAJA itself, the Court rejected the government’s position that under the sovereign immunity principle requiring “strict construction” of ambiguous waivers courts should choose the interpretations that would produce lower awards. *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008). Instead, even having acknowledged that “some ambiguity” subsisted to some extent in the language of the EAJA, the Court nevertheless relied on a prior interpretation of a completely different fee-shifting statute and adopted a reading of the terms at issue that Court recognized as a “broad construction.” *Id.* at 580-81.

135. The *Holland I* judgment was vacated in part, but on other grounds: the court found that due process concerns had been implicated because “the FDIC did not have sufficient notice that attorneys fees and litigation expenses might be assessed against it.” *Holland II*, 48 F. Supp. 2d at 581. Accordingly, the court vacated its judgment against the FDIC and assessed the full amount of damages “against the Department of Justice and the United States Attorney’s office for the Eastern District of Virginia, jointly and severally.” *Id.* at 582. The government’s motion for reconsideration with respect to all other aspects of the *Holland I* opinion was denied, leaving the court’s reasoning with respect to the “election of sections” issue firmly intact. *See id.* at 581-82.

136. *Id.* at 575 n.3. The court based this determination on the fact that the Hollands

elected to proceed under subsection (b), subsection (d)'s effective prohibition on recovery by those whose fees have been paid by others did not bar their recovery. As the court pointed out, "[t]he Hyde Amendment specifies only one instance in which a recovery is unavailable—where the defendant is represented by assigned counsel paid for by the public."¹³⁷

On appeal to the Fourth Circuit, the government took a different approach. The issue in *Holland III* was merely "whether Hyde Amendment proceedings are civil or criminal in nature, and whether the Federal Rules of Civil or Criminal Procedure apply accordingly."¹³⁸ The question was one of first impression in the circuit, though it had been considered by various other courts and resulted in a split.¹³⁹ The Fourth Circuit agreed with the district court that the Hyde Amendment proceedings are civil in nature and, as a consequence, ruled that the government had not successfully appealed the order of the district court in *Holland I*, effectively preserving the court's position that the Hyde Amendment incorporated the EAJA's election of sections procedure.¹⁴⁰

Thus, even though the Fourth Circuit did not itself take up the issue for independent consideration,¹⁴¹ because it affirmed the

"were conditionally reimbursed by the Bank, and . . . any recovery from th[e] petition [would] be repaid to the Bank." *Id.*

137. *Id.*

138. 214 F.3d 523, 525 (4th Cir. 2000). The government's purpose was to persuade the Court of Appeals for the Fourth Circuit that Hyde Amendment proceedings are criminal in nature. *See id.* While the government conceded that its appeal from the denial of the motion for reconsideration would not raise the *Holland I* judgment for review if Hyde Amendment proceedings were civil in nature, it insisted that appeal from the denial of a motion for reconsideration in the criminal context "necessarily raise[s] the underlying judgment for review." *Id.* (alteration in original) (quoting *United States v. Dickerson*, 166 F.3d 667, 678 n.10 (4th Cir. 1999)).

139. *See* discussion *supra* note 99.

140. *See Holland III*, 214 F.3d at 526.

141. Although the Fourth Circuit only took up the civil versus criminal issue, it reasoned that "[T]he focus of the statute is . . . not on forcing the government to pay fees as a form of punishment," but on compensating those who have incurred fees. *Id.* While such language at first appears to suggest that the "incurred by" language of EAJA § 2412(b) should be imported back into the *Holland I* framework in which an applicant may choose whether to utilize the procedures of EAJA section 2412(b) or (d) (and, concomitantly, appears to destroy the meaningfulness of the "choice" for an applicant whose fees have been paid by his or her employer), when analyzed in context, it is apparent that this dicta was not likely intended to undermine—and in fact, likely supports—the *Holland I* court's holding. When the Fourth Circuit noted that "those individuals who did not incur fees cannot be awarded those fees," *id.* at 526, its citation did not reference EAJA § 2412(d), but rather the Hyde Amendment itself, quoting, "[T]he court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) . . . may award [fees]." *Id.* at 524 n.1. Thus, the Fourth Circuit's focus on assigned counsel more likely indicates agreement with the reasoning of *Holland I* and *Holland II*, which did not

decision of the district court in *Holland II* (which had denied the government's motion to reconsider *Holland I* except with respect to the charges against the FDIC),¹⁴² Hyde applicants in the Fourth Circuit were left with a choice to utilize the procedures of § 2412(b) or those of § 2412(d). Since *Holland III*, those courts within the Fourth Circuit that have, either directly or indirectly, been called upon to address any of the provisions of § 2412(d) have typically left their decisions unpublished,¹⁴³ rendering them nonbinding.¹⁴⁴ And those that have made their way into the reporters generally make no reference to the requirements of § 2412(d) whatsoever.¹⁴⁵ Thus,

prohibit *non-public* fee payers so long as the applicant had elected to utilize the procedures of EAJA § 2412(b).

The *Holland III* court avoided the serious consequences of the fee payer issue by choosing not to recognize that there is a deterrence rationale to the Amendment. *Id.* at 526 (focusing on restitution). But many other courts have recognized Representative Hyde's common sense notion that deterrence is at the heart of the Amendment. *See, e.g.*, *United States v. Monson*, 636 F.3d 435, 439 (8th Cir. 2011) (citing *United States v. Bowman*, 380 F.3d 387, 391 (8th Cir. 2004)) ("The intent of the Hyde Amendment is to deter prosecutorial misconduct . . ."); *see also* *United States v. Schneider*, 395 F.3d 78, 86 (2d Cir. 2005); *United States v. Knott*, 256 F.3d 20, 30 (1st Cir. 2001) (quoting *United States v. Gilbert*, 198 F.3d 1293, 1304 (11th Cir. 1999)); *United States v. Pritt*, 77 F. Supp. 2d 743, 746-47 (S.D. W. Va. 1999). For further consideration of this issue and the fee payer issue, *see infra* Part IV.B.

142. *See supra* note 135.

143. *See* *United States v. Harris*, No. 5:07CR22, 2008 WL 6722775, at *1 n.2 (N.D. W. Va. July 11, 2008) (suggesting in dicta that the net worth limitation imposed by the EAJA is incorporated into the Hyde Amendment); *Hicks v. U.S. Attorney's Office*, No. 1:06CV70599, 2007 WL 1555169, at *2 n.2 (W.D. Va. May 24, 2007) (noting the *Holland* line leaves open the question whether the net worth requirements of § 2412(d) necessarily apply to the Hyde Amendment); *Boone v. U.S. Attorney*, No. 7:06CV00006, 2006 WL 1075010, at *2 (W.D. Va. April 21, 2006) (expressly disagreeing with the *Holland* line's retention of the EAJA's election of sections procedure). *But see* *United States v. Brodnik*, No. 1:09-cr-00067, slip op. at *1, 2011 WL 2078547 (S.D. W. Va. May 25, 2011) (dismissing a Hyde application filed in a criminal action where the applicant did not respond to the government's motion to dismiss on grounds that the applicant's motion was untimely pursuant to § 2412(d)).

144. *See* *Hogan v. Carter*, 85 F.3d 1113, 1118 (4th Cir. 1996) (noting Fourth Circuit treatment of unpublished authority).

145. In *United States v. Brvenik*, the court laid out the burdens of the petitioner in a Hyde Amendment case in the Fourth Circuit, listing only the need to prove:

- (1) that the case was pending on or after November 26, 1997, the date of the enactment of the Hyde Amendment;
- (2) that the case was a criminal case;
- (3) that the Petitioner was not represented by assigned counsel paid for by the public;
- (4) that the Petitioner was the prevailing party;
- (5) that the prosecution was vexatious, frivolous, or in bad faith;
- (6) that the attorney's fees were reasonable; and
- (7) that there are no special circumstances that would make such an award unjust.

487 F. Supp. 2d 625, 627-28 (D. Md. 2007) (citing *United States v. Bunn (In re 1997*

although standing in sharp contrast to the rules of the First, Fifth, Sixth, Ninth, and Eleventh Circuits, as described *infra* in Part III.A.3, the *Holland* rule still offers some Hyde applicants the “election of sections” procedure contained in the EAJA. Because of the impact that the rule has on the effectiveness of the Amendment both as a means of restitution and deterrence, this conflict is in need of resolution. Proposals regarding this issue, and those discussed in the remainder of this Part, are addressed further in Part IV.

3. The Opposing View

As mentioned, a handful of circuits have come to a different conclusion in their resolution of the “(b) versus (d)” issue or those that arise from the issue.¹⁴⁶ The earliest of the circuit courts to consider the issue directly—the Sixth, in *Ranger II*¹⁴⁷—relied on a misreading of the text of the Hyde Amendment to argue that only through “circular” reasoning could the EAJA’s “election of sections” procedure apply in Hyde Amendment cases, an argument that other circuits soon adopted.¹⁴⁸

The appeal before the Sixth Circuit in *Ranger II* was from a district court’s award of fees to an electronics company called Ranger.¹⁴⁹ In the criminal case, the charges against Ranger had been

Grand Jury), 215 F.3d 430, 436 (4th Cir. 2000), which also listed the requirements only as such, and *United States v. Pritt*, 77 F. Supp. 2d 743, 747 (S.D. W. Va. 1999), which itself quoted *Holland I* for the requirements). Arguably, had the district courts in *Brvenik* or *Pritt* or the Fourth Circuit in *1997 Grand Jury* felt that the net worth and fee payor limitations of § 2412(d) were applicable to every Fourth Circuit applicant under the Amendment, presumably they would have listed proof of net worth among the pleading requirements.

While it is possible that the potential limitations of § 2412(d) simply would not have been an issue in *Brvenik*, *Pritt*, or *1997 Grand Jury*, neither the district nor the circuit court limited its list of elements for recovery to those that were at issue in the case. In fact, in each case, only one of the seven listed items was addressed. *See Brvenik*, 487 F. Supp. 2d at 628-32 (addressing only whether “the prosecution was ‘vexatious, frivolous, or in bad faith’”); *accord Pritt*, 77 F. Supp. 2d at 747; *1997 Grand Jury*, 215 F.3d at 436-37, n.10. Thus, it is reasonable to assume that the element lists in these published Fourth Circuit cases illustrate a continued philosophy that recognizing the “election of sections” procedure of the EAJA remains the correct approach in the Fourth Circuit.

146. *See* *United States v. Aisenberg*, 358 F.3d 1327, 1340-42 (11th Cir. 2004); *United States v. Knott*, 256 F.3d 20, 26-27 (1st Cir. 2001); *Ranger II*, 210 F.3d 627, 632-33 (6th Cir. 2000), *overruled on other grounds by* *Scarborough v. Principi*, 541 U.S. 401 (2004); *see also* *United States v. Claro*, 579 F.3d 452, 457 (5th Cir. 2009) (assuming that the “limitations” of U.S.C. § 2412(d) are those that the Hyde Amendment incorporated); *cf.* *United States v. Hristov*, 396 F.3d 1044, 1046 (9th Cir. 2005) (assuming that § 2412(d)(1)(B) and (d)(2)(B) are “filing requirements” of the EAJA that were incorporated into the Hyde Amendment).

147. *Ranger II*, 210 F.3d 627 (6th Cir. 2000).

148. *Id.* at 633; *see Aisenberg*, 358 F.3d at 1341; *Knott*, 256 F.3d at 27.

149. The case originally involved two defendants, Ranger and an associated

dismissed with prejudice on the government's motion shortly after a jury had been sworn to try the case.¹⁵⁰ Ranger then moved for attorneys' fees under the Hyde Amendment on the basis that the government had concealed exculpatory *Brady* evidence.¹⁵¹ The district court agreed that the violations constituted "bad faith" within the meaning of the Hyde Amendment, but it was temporarily stymied in its attempt to award fees by its assumption that the thirty-day filing limitation imposed by § 2412(d) of the EAJA applied to Ranger's application.¹⁵² Although the exculpatory evidence upon which Ranger based its Hyde Amendment application was not revealed to Ranger until after the expiration of the thirty-day limitation period, applying the limitations of EAJA § 2412(d) could have precluded recovery on the basis that the application was not timely filed.¹⁵³ However, the district court avoided this by holding that the time period for filing an application in such circumstances should be extended to allow a reasonable time in which to discover the *Brady* violation; accordingly, the court concluded that Ranger's motion was in fact timely and granted its application for fees.¹⁵⁴

On appeal, although recognizing that pursuant to Supreme Court precedent, awards or denials of attorneys' fees under the EAJA are ordinarily reviewed under an abuse of discretion standard,¹⁵⁵ the Sixth Circuit held that "the EAJA time limit in section 2412(d) is jurisdictional, and rulings applying such limit are reviewed de novo by this court."¹⁵⁶ Having so concluded, the Sixth Circuit positioned itself to reopen the district court's ruling and become the first circuit court to formally address the extent of the Hyde Amendment's incorporation of the "procedures and limitations" of the EAJA.

corporation; the charges against the associated corporation were resolved by plea agreement before trial. *See Ranger II*, 210 F.3d at 630.

150. *See Ranger I*, 22 F. Supp. 2d 667, 669 (W.D. Mich. 1998), *rev'd for lack of jurisdiction*, *Ranger II*, 210 F.3d 627 (6th Cir. 2000), *overruled on other grounds by Scarborough v. Principi*, 541 U.S. 401 (2004).

151. *See id.* at 672-74; *see also supra* note 29, at 15 (explaining the *Brady* requirements).

152. *See Ranger I*, 22 F. Supp. 2d at 674-75.

153. *See id.* at 675.

154. *See id.* at 676.

155. *See Ranger II*, 210 F.3d at 631 (citing *Pierce v. Underwood*, 487 U.S. 552 (1988)).

156. *Ranger II*, 210 F.3d at 631. In support of this conclusion, the court simply cited an unpublished opinion of its own circuit, *United States v. Lindert*, No. 96-4321, 1998 WL 180519 (6th Cir. Apr. 8, 1998), and a Ninth Circuit opinion, *Brown v. Sullivan*, 916 F.2d 492 (9th Cir. 1990), for the proposition that "issues concerning the proper interpretation of the EAJA are reviewed de novo." *Ranger II*, 210 F.3d at 631. The court's position that the question before it was "jurisdictional" was later rejected by the United States Supreme Court. *Scarborough v. Principi*, 541 U.S. 401, 413-14 (2004). *See infra* text accompanying notes 170-75 (discussing this development).

The government argued on appeal that the district court's award of fees was improper because Ranger's request for fees was not timely,¹⁵⁷ but Ranger contended that this catch-22 resulted solely from the government's failure to disclose the *Brady* materials.¹⁵⁸ Ranger argued instead that "the Hyde Amendment permits a party to seek attorneys' fees and costs under section 2412(b) of the EAJA without satisfying the requirements of section 2412(d)."¹⁵⁹ Recognizing that the courts that had considered the issue at the time were split,¹⁶⁰ the Sixth Circuit sided with the *Peterson* line of cases, stating:

We believe the correct interpretation of the procedures and limitations of the EAJA as incorporated in the Hyde Amendment includes the limitations of section 2412(d). Section 2412(b) directs the applicant to look for an independent statute which gives a remedy of attorneys' fees and expenses independent of the EAJA.¹⁶¹ As the Hyde Amendment incorporates the EAJA, it would be circular to go back to the Hyde Amendment to treat it as an independent statute giving the right to attorneys' fees without the thirty-day limitation. In addition, as this is a waiver of sovereign immunity, some limitations must be applicable to the filing of a claim.¹⁶²

Accordingly, the court held that § 2412(d)'s thirty-day time limit for filing applied and that concomitantly it had no jurisdiction over Ranger's application.¹⁶³ Thus, the Sixth Circuit reversed the ruling of *Ranger I*, setting forth as the rule of the circuit that "the procedures and limitations of the EAJA as incorporated in the Hyde Amendment include[] the limitations of section 2412(d)."¹⁶⁴

The Sixth Circuit's reasoning contained two substantial flaws, however. First, it based its assumption that the district court's award of fees pursuant to 28 U.S.C. § 2412(b) was improper on a distinct misreading of the language of the Hyde Amendment, which enabled the Sixth Circuit to significantly overstate the "circularity" problem. It claimed that EAJA "[s]ection 2412(b) directs the applicant to look for an *independent statute* which gives a remedy of attorneys' fees and expenses *independent* of the EAJA,"¹⁶⁵ and then concluded that because "the Hyde Amendment incorporates the

157. See *Ranger II*, 210 F.3d at 628.

158. See *id.* at 632.

159. *Id.*

160. *Id.*

161. As discussed *infra* in the text accompanying notes 165-75, this is a distinct misreading of the language of the Amendment.

162. *Ranger II*, 210 F.3d at 633. *But see* discussion *infra* at Part IV.B.2.

163. See *Ranger II*, 210 F.3d at 633-34.

164. *Id.* at 633.

165. *Id.* (emphasis added).

EAJA, it would be circular to go back to the Hyde Amendment to treat it as an independent statute” giving rise to the operation of 28 U.S.C. § 2412(b).¹⁶⁶

In reality, however, § 2412(b) contains no such “*independent statute*” language; rather, it directs applicants to look *either* to the “the common law *or . . .* the terms of *any* statute which specifically provides for such an award.”¹⁶⁷ Thus, even presuming that it would be circular to turn from the EAJA to the Hyde Amendment itself as a statute “which provides for awards of reasonable attorneys’ fees and other litigation expenses,”¹⁶⁸ certainly, turning to the common law would not be circular whatsoever.¹⁶⁹ Yet, the Sixth Circuit, ignoring the plain language of the Hyde Amendment itself, either overlooked or intentionally disregarded this critical portion of the text.

Second, the Sixth Circuit erred when it based its reversal on an assumption that the time limit in EAJA § 2412(d) was “jurisdictional” and that the lower court was thus out of bounds when assuming jurisdiction to issue its opinion granting an award.¹⁷⁰ This flawed determination, relying only on nonbinding authority,¹⁷¹ was overruled by the United States Supreme Court a few years later in *Scarborough v. Principi*.¹⁷² *Scarborough* held that § 2412(d)’s “30-day deadline for fee applications and its application-content specifications are not properly typed ‘jurisdictional.’”¹⁷³ Specifically, the Court held that § 2412(b) does not involve subject matter jurisdiction at all, but instead addresses a “mode of relief [that is] ancillary to the judgment of a court that [already] ha[d] plenary jurisdiction” of the underlying case out of which the fee application arose.¹⁷⁴ Significantly, the Supreme Court left open the possibility for the sort of equitable tolling and relation back of amended applications that the *Ranger I* court had accepted in the first place.¹⁷⁵

Whether rightly or wrongly decided, the First Circuit in *Knott II* and the Eleventh Circuit in *Aisenberg* soon followed suit with determinations that the Hyde Amendment did not preserve the “election of sections” procedure of the EAJA.¹⁷⁶ In each case, the circuit court referenced the “circularity” proposition offered by

166. *Id.*

167. 28 U.S.C. § 2412(b) (2006) (emphasis added).

168. Application for Attorneys’ Fees, *supra* note 59, at 1.

169. See *infra* Part IV.B (discussing this issue and its ramifications).

170. See *Ranger II*, 210 F.3d 627, 631, 634 (6th Cir. 2000).

171. See *supra* text accompanying note 156.

172. See 541 U.S. 401, 413-14 (2004).

173. *Id.* at 414 (citing *Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004)).

174. *Scarborough*, 541 U.S. at 413.

175. See *id.* at 418-23.

176. See *United States v. Aisenberg*, 358 F.3d 1327, 1339-40 (11th Cir. 2004); *Knott II*, 256 F.3d 20, 26-27 (1st Cir. 2001).

Ranger II in justifying its position.¹⁷⁷ In both situations, the Supreme Court denied certiorari review of the ultimate decisions.¹⁷⁸ Likewise, the Supreme Court refused to take on the issue when presented with it after *Oatman*, which represented the presumptive camp of early cases that neglected to examine whether there could or should be an “election of sections” between § 2412(b) and (d), merely assuming without analysis that subsection (d) limits applied to all Hyde Amendment applications.¹⁷⁹ This camp of cases was eventually joined by the Fifth and Ninth Circuits as well, both of which soon issued opinions with results suggesting that the “election of sections” procedure of the EAJA would not be retained in either circuit.¹⁸⁰ Thus, in five circuits, the option that a party has under the EAJA to proceed under § 2412(b) or (d) is no longer available to Hyde Amendment applicants; decisions that arose, in each case, on either a misreading, or a presumptive reading, of the Hyde Amendment.

4. Open Jurisdictions

None of the district or circuit courts of appeals within the seven remaining circuits—the Second, Third, Seventh, Eighth, Tenth, Federal, and D.C. Circuits—has issued an opinion analyzing the “(b) versus (d)” issue directly. In fact, only one published decision, from the Southern District of New York, even appears to take a presumptive stand on the issue of whether EAJA § 2412 (d) limits apply to all applicants under the Hyde Amendment.¹⁸¹ Thus, in the

177. See *Aisenberg*, 358 F.3d at 1341; *Knott II*, 256 F.3d at 27.

178. *United States v. Aisenberg*, 358 F.3d 1327 (11th Cir. 2004), *cert denied*, 543 U.S. 868 (2004); *Knott II*, 256 F.3d 20 (1st Cir. 2001), *cert. denied sub nom.*, *Riverdale Mills Corp. v. United States*, 534 U.S. 1127 (2002).

179. See *Oatman I*, Cr. No. 98-CR-80774-DT, 1999 U.S. Dist. LEXIS 18005 (E.D. Mich. Oct. 27, 1999), *aff'd per curiam*, *Oatman II*, 238 F.3d 425 (6th Cir. 2000) (unpublished table decision), *cert denied*, 532 U.S. 974 (2001); see also *supra* note 109.

180. See *United States v. Claro*, 579 F.3d 452, 457 (5th Cir. 2009) (holding that “the ‘procedures and limitations’ incorporated by the Hyde Amendment are those in subpart (d)” of 28 U.S.C. § 2412); *United States v. Hristov*, 396 F.3d 1044, 1046 (9th Cir. 2005) (assuming that EAJA § 2412(d)(1)(B) and (d)(2)(B) were “filing requirements” that were incorporated into the Hyde Amendment).

181. See *United States v. Gladstone*, 141 F. Supp. 2d 438, 445 (S.D.N.Y. 2001). The district court in *Gladstone* noted:

[W]hile the Hyde Amendment does not define the term ‘prevailing party,’ it incorporates the procedures and limitations of the EAJA, which . . . is where the provisions to seek attorney’s fees appear in 28 U.S.C. § 2412(b) and § 2412(d). As has been determined in numerous persuasive cases, it is § 2412(d) that applies here

Id. While the court’s language is a bit unclear, and whether the defendant attempted to proceed pursuant to § 2412(b) is unclear from the case, it is clear that the court rejected the defendant’s argument that the net worth limitation should not apply, effectively eliminating, without having necessarily decided, the possibility that the defendant could have chosen to proceed under § 2412(b). See *id.*

Fourth Circuit, as well as the Second, Third, Seventh, Eighth, Tenth, Federal, and D.C. Circuits, the issue is open for interpretation. Not unsurprisingly, Hyde Amendment applicants have continued to latch on to the *Holland* line of cases, not only in the Fourth or other unsettled circuits but even in settled circuits, asking federal courts to consider the force of the argument that a Hyde Amendment applicant should in fact have the same “election of sections” option as an EAJA applicant does.¹⁸² A number of courts have taken the time to consider the issue, recognizing the value in a thorough analysis.¹⁸³

The result is that Hyde Amendment applicants have different arguments available to them, and potentially different limitations applied to them, depending on the jurisdiction in which they are eligible to file their applications. Although there is predictability in this regard for applicants in the First, Fifth, Sixth, Ninth, and Eleventh Circuits,¹⁸⁴ and perhaps some in the district courts of New York,¹⁸⁵ practically speaking, it should not matter whether one applies for relief under the federal Hyde Amendment in Virginia as opposed to Texas; yet, in fact it does. Unfortunately, as this Article will discuss further, this is only one area in which unsettled or hastily decided issues thwart equal treatment of applicants under the Amendment.¹⁸⁶

5. Ramifications of Choosing an Interpretation of the “(b) Versus (d)” Issue

Once a court has decided whether to follow the *Holland* line of permissive reasoning, or has rejected it through the *Ranger II* “circularity” analysis or the “presumptive” approach of cases like *Oatman*, certain results flow from the decision obviously enough. For instance, a ruling that a Hyde Amendment applicant may choose to proceed under the procedures of 28 U.S.C. § 2412(b) means that the applicant need not fall within the net worth limitations of § 2412(d), that the applicant need not have personally paid the fees at issue,

182. See, e.g., *Masterson v. United States*, 200 F. Supp. 2d 94, 98-99 (D.R.I. 2002).

183. For instance, in *Masterson*, the District Court of Rhode Island devoted several pages of an opinion to a discussion of the possibility of Hyde Amendment applicants using the “election of sections” option, even though the issue had already been settled in the First Circuit. See *id.* at 98-101. Likewise, the district court’s opinion in *Aisenberg*, which provides one of the most thorough analyses of the “(b) versus (d)” issue to date, devoted close to twenty pages to its consideration of the issue and all its ramifications, notably, in a case where the government had already conceded that the applicant doubtless warranted the award. See *United States v. Aisenberg*, 247 F. Supp. 2d 1272, 1289-1308 (M.D. Fla. 2003), *rev’d on other grounds*, 358 F.3d 1327 (11th Cir. 2004).

184. See *supra* Part III.A.3.

185. See *supra* note 179 and accompanying text.

186. See *infra* Part III.B.

and that the award need not be limited by § 2412(d)'s cap on recovery.¹⁸⁷ Conversely, a ruling that § 2412(d) limitations apply to all applications under the Hyde Amendment requires that an applicant not have a net worth in excess of the statutory maximum; requires, in most cases, that the applicant have paid his or her own fees;¹⁸⁸ and limits the reimbursement of attorneys' fees to \$125 per hour.¹⁸⁹

Some results are apparently more abstruse, however. For example, a ruling that § 2412(d) limitations apply to every Hyde Amendment applicant brings into play the § 2412(d)(1)(B) requirement that a judgment be "final" before an applicant is eligible for recovery. Although this requirement is specifically defined in § 2412(d)(2)(G) as "a judgment that is final and not appealable," how to apply this seemingly clear definition has apparently been rather recondite. While the definition has sometimes been applied easily enough—for example, to proclaim summarily that dismissal without prejudice "constitute[s] a final judgment,"¹⁹⁰—it is clear that other courts are confounded by the difficult problem of importing a definition meant to be used in the civil context into litigation ancillary to the criminal context.¹⁹¹

187. Section 2412(b)'s only limitation on the dollar amount an applicant can recover is that it be "reasonable." 28 U.S.C. § 2412(b) (2006). The calculation of fees in such a situation was described by the Second Circuit in *Kerin v. United States Postal Serv.*, 218 F.3d 185, 190 (2d Cir. 2000), as follows:

In order to determine a "reasonable" fee pursuant to § 2412(b), the [court] normally calculates a so-called lodestar figure, which is arrived at by multiplying the number of hours reasonably expended on the litigation . . . by a reasonable hourly rate. The lodestar should be based on prevailing market rates for comparable attorneys of comparable skill and standing in the pertinent legal community. If the reasonable hourly rate is higher than the statutory cap of § 2412(d), § 2412(b) exposes the government to liability for costs and fees above and beyond the limit set by section 2412(d).

Id. at 190 (internal citations and punctuation omitted).

188. In most cases, this has been interpreted to mean that the applicant must have personally paid the fees. *See supra* note 96 (discussing *Ceglia v. Schweiker*, 566 F. Supp. 118 (E.D.N.Y. 1983), which found in the EAJA context that a prevailing party represented free of charge by a legal services organization may be deemed to have "incurred" attorneys' fees for purposes of § 2412(d)); *see also* *United States v. Claro*, 579 F.3d 452, 464-67 (5th Cir. 2009) (finding, as a general rule, that fees are "incurred" when a litigant has a legal obligation to pay them, but also recognizing unusual circumstances where fees have been allowed in EAJA cases despite no legal obligation on the part of the prevailing party to pay, because doing so furthers the congressional intent underlying the EAJA).

189. This generally is the case, though § 2412 does provide that "an increase in the cost of living or a special factor" may "justif[y] a higher fee." *See* 28 U.S.C. § 2412(d)(2)(A)(ii).

190. *See, e.g., United States v. Milloy*, 75 F. Supp. 2d 1276, 1277 (D.N.M. 1999).

191. For instance, the court in *Peterson*, rather than considering the finality question, evaded the issue by "[a]ssuming without deciding . . . that dismissal without

The confusion inherent in these cases simply serves to illustrate that the incorporation of the civil rules of the EAJA into the criminal context—out of which Hyde Amendment applications arise—is provocative, even in what should be the most straightforward of applications. Moreover, the fundamental underlying question of whether to allow recovery under § 2412(b) alone or whether § 2412(d) applies to all motions filed pursuant to the Amendment spins off problem after problem with which courts and applicants must struggle. It is for these reasons, among others, that it has grown apparent that the Hyde Amendment, in its current form, is in need of serious reconsideration.

B. Problems in Interpreting the Hyde Amendment Itself

Although the more tortuous problems with the Hyde Amendment have sprung from the complications of early courts trying to import the “procedures and limitations” of the EAJA into the Amendment,¹⁹² merely attempting to interpret the text of the Amendment itself has also resulted in an array of contradictory decisions. This, too, points to the need for a reconsideration of the Amendment. A number of these issues are discussed below.

1. “Prevailing” Parties

The Hyde Amendment itself poses the requirement that a party is the “prevailing” party in a criminal case in order to recover attorneys’ fees and expenses, but the Amendment offers no definition of what it means to prevail.¹⁹³ Predictably, courts have interpreted the requirement in conflicting ways due to this lack of clarity, particularly in determining whether a dismissal renders a party “prevailing.”

With respect to the question of whether a dismissal renders a party “prevailing,” right from the beginning, some courts said yes as a matter of course, some likewise said no, and others took a more

prejudice of the Indictment . . . was a final judgment” and decided that the merits of the case did not warrant an award. 71 F. Supp. 2d 695, 700 (S.D. Tex. 1999). The *Gardner* court also did not reach its conclusion by simply applying the EAJA’s definition; rather, the court rejected the government’s proposition that a pre-trial dismissal was not final because it could be re-filed, not because the court deemed this logic unpersuasive but due to the circumstances of the particular case: the government had stated specifically that it would not prosecute Mr. Gardner again. See *United States v. Gardner*, 23 F. Supp. 2d 1283, 1292 (N.D. Okla. 1998); see also *Ranger II*, 210 F.3d 627, 634-38 (6th Cir. 2000) (Jones, J., concurring), *overruled on other grounds by Scarborough v. Principi*, 541 U.S. 401, 413-14 (2004) (struggling with the issue and reasoning that “in the criminal context, an order is final . . . only after both conviction and sentencing”).

192. See *supra* Part III.A.1.

193. The only “prevailing party” definition offered by the EAJA is specifically tailored to eminent domain proceedings. See 28 U.S.C. § 2412(d)(2)(H).

deliberative approach. For example, in *United States v. Knott*, the government argued that because it voluntarily moved to dismiss an indictment against Hyde Amendment applicants prior to trial, the applicants had not been rendered “prevailing” parties.¹⁹⁴ In support of this, the government offered the following reasoning:

(1) there is no bar to [the government] obtaining a new indictment charging exactly the same offenses,

(2) a voluntary dismissal without prejudice may rest on any number of factors, the vast majority of which have nothing to do with the defendants’ guilt or innocence or whether the government acted improperly,

(3) the determination that a defendant is a prevailing party based upon a voluntary dismissal may be an incentive for prosecutors not to dismiss cases, and

(4) the Court would have to conduct a “minitrial” for each dismissal without prejudice to consider the prosecutor’s motives, wasting judicial resources, intruding on the Government’s deliberative process and infringing on separation of powers.¹⁹⁵

Despite this logic, the district court found that the applicants in the case were, in fact, prevailing parties for purposes of the Hyde Amendment.¹⁹⁶ In support of its decision, the court stated that “[t]hose reasons were rejected by the court in *United States v. Gardner*, when it determined that the government’s voluntary dismissal of the charges against a defendant made him a ‘prevailing party’ under the Hyde Amendment.”¹⁹⁷

The court in *Knott I*, however, was proceeding on an incorrect reading of the decision in *Gardner*. Although other district courts had determined that dismissal without prejudice in itself rendered parties “prevailing,”¹⁹⁸ the court in *Gardner* had specifically rejected “any bright-line rule that all dismissals without prejudice render a claimant a ‘prevailing party’ under the Hyde Amendment.”¹⁹⁹ Rather, the court believed, “this question must be answered considering the facts and circumstances of each case.”²⁰⁰ Based on

194. *Knott I*, 106 F. Supp. 2d 174, 177 (D. Mass. 2000), *rev’d in part on other grounds*, *Knott II*, 256 F.3d 20 (1st Cir. 2001).

195. *Id.*

196. *Id.*

197. *Id.* (citation omitted).

198. *See, e.g.*, *United States v. Milloy*, 75 F. Supp. 2d 1276, 1276 (D.N.M. 1999); *United States v. Peterson*, 71 F. Supp. 2d 695, 700 (S.D. Tex. 1999) (“[a]ssuming without deciding . . . that dismissal without prejudice of the Indictment” against the applicants rendered them prevailing parties).

199. *United States v. Gardner*, 23 F. Supp. 2d 1283, 1291 n.11 (N.D. Okla. 1998).

200. *Id.*; *accord* *United States v. Campbell*, 134 F. Supp. 2d 1104, 1107 (C.D. Cal. 2001) (quoting *Gardner*, 23 F. Supp. 2d at 1291 n.11) (noting that a court must look to the totality of the circumstances when determining whether a party is “prevailing” for

the “totality of the circumstances,” including the government’s dropping of charges “and the fact that Mr. Gardner won the relief that he sought,”²⁰¹ the applicant qualified as a prevailing party.²⁰²

Other cases came out diametrically opposed to the decision in *Knott*. In *In re Grand Jury Subpoena Duces Tecum*,²⁰³ for example, the court adopted the analysis of the Seventh Circuit in *Szabo Food Service, Inc. v. Canteen Corp.*,²⁰⁴ reasoning that “[a dismissal without prejudice] suggests that further litigation is anticipated . . . which makes it more like a draw than a victory for the defendant.”²⁰⁵ Adopting the reasoning of Judge Easterbrook that “when a defendant remains at a risk of another suit on the same claim, he can hardly be considered to be in the same position as a defendant who no longer faces the claim due to a dismissal with prejudice,” the court agreed that dismissals without prejudice simply do *not* render defendants prevailing parties.²⁰⁶

The vetting of the issue in the circuit courts rendered the issue no more clear. Some courts tried to provide a definition,²⁰⁷ others looked back to the Amendment’s legislative history for guidance,²⁰⁸ and the others simply added to the list of fact-specific circumstances that would or would not qualify an applicant as a prevailing party.²⁰⁹

For example, in *United States v. Campbell*,²¹⁰ the Ninth Circuit reviewed the judgment of a district court that had adopted the *Gardner* “totality of the circumstances” approach to deny relief to a Hyde Amendment applicant.²¹¹ To determine that the applicant had not “prevailed” due to dismissal of the mail fraud charges on which

Hyde Amendment purposes), *aff'd*, 291 F.3d 1169 (9th Cir. 2002).

201. The court had pointed out earlier that although the Hyde Amendment did not define the term “prevailing party,” in other contexts, the term had been defined as “one who win[s] the relief it seeks.” *Gardner*, 23 F. Supp. 2d at 1289 (internal quotation marks omitted) (alteration in original) (citing *Dahlem v. Bd. of Educ. of Denver Pub. Schs.*, 901 F.2d 1508, 1512 (10th Cir. 1990)).

202. *Gardner*, 23 F. Supp. 2d at 1291.

203. 31 F. Supp. 2d 542 (N.D. W. Va. 1998).

204. 823 F.2d 1073, 1076-77 (7th Cir. 1987).

205. *In re Grand Jury*, 31 F. Supp. 2d at 544 (alterations in original) (quoting *Best Indus., Inc. v. CIS BIO Int'l*, 134 F.3d 362 (4th Cir. 1998)).

206. *In re Grand Jury*, 31 F. Supp. 2d at 544.

207. *E.g.*, *United States v. Campbell*, 291 F.3d 1169, 1171-72 (9th Cir. 2002); *see infra* text accompanying notes 210-16 (discussing *Campbell*).

208. *See e.g.*, *United States v. Chapman*, 524 F.3d 1073, 1089 n.6 (9th Cir. 2008); *see infra* text accompanying notes 217-24 for a discussion of *Chapman*.

209. *E.g.*, *United States v. Sriram*, 482 F.3d 956, 958-59 (7th Cir. 2007) (holding convicted defendants nonprevailing), *vacated on other grounds*, 552 U.S. 1163 (2008); *see infra* text accompanying notes 225-27 for a discussion of this and other fact-specific cases.

210. 291 F.3d 1169 (9th Cir. 2002).

211. *See id.* at 1171-72.

he had been indicted, the district court had relied on the facts that (1) the applicant had not been “acquitted or otherwise exonerated,” (2) he had “signed a diversion agreement” admitting he had paid for referrals, and (3) he had “performed community service and submitted to probation-like reporting.”²¹² The Ninth Circuit, noting that neither the Hyde Amendment nor any definitive case law provided a definition of “prevailing party”²¹³—as well as the fact that it could affirm the district court’s conclusion through a different analysis, so long as it had support in the record—chose to adopt a definition that had been previously used by the Supreme Court in interpreting the Fair Housing Amendments and Americans with Disabilities Acts and recently adopted by the circuit in an EAJA case.²¹⁴ This definition requires that in the Ninth Circuit, Hyde applicants must prove that they “receive[d] at least some relief on the merits of [their] claim[s].”²¹⁵ Likening the applicant’s treatment “to that of a convicted defendant,” the Ninth Circuit affirmed the denial under its new definition.²¹⁶

The court later applied *Campbell*’s formulation in *United States v. Chapman*,²¹⁷ which hinted at the difficulty of interpreting the issue with a definition adopted from the civil context and continued the tradition of looking back to the legislative history of the Amendment to parse meaning out of ambiguous terms.²¹⁸ The Ninth Circuit in *Chapman* affirmed the district court’s denial of a Hyde Amendment award where the lower court had dismissed an applicant’s indictment, with prejudice,²¹⁹ “based on the government’s failure to disclose documents and the prosecutor’s affirmative misrepresentations to the court.”²²⁰ The circuit court, applying an abuse of discretion standard, based its decision on the fact that “[t]he district court never suggested that this prosecutorial misconduct was relevant to Defendants’ guilt or innocence,” but instead “intended to sanction the government’s flagrant *Brady/Giglio* and procedural

212. *Id.* at 1171.

213. *Id.* at 1171-72 (citing, by comparison, *United States v. Beeks*, 266 F.3d 880, 883 (8th Cir. 2001), and *Knott II*, 256 F.3d 20, 25 n.3 (1st Cir. 2001)).

214. *See Campbell*, 291 F.3d at 1172 (incorporating the “prevailing parties” definition of *Buckhannon Board & Care Home, Inc. v. West Virginia Dep’t of Health and Human Resources*, 532 U.S. 598, 603-04 (2001), as adopted by the Ninth Circuit in *Perez-Arellano v. Smith*, 279 F.3d 791, 794 (9th Cir. 2002)).

215. *Campbell*, 291 F.3d at 1172 (quoting *Buckhannon*, 532 U.S. at 603).

216. *Campbell*, 291 F.3d at 1172.

217. 524 F.3d 1073 (9th Cir. 2008).

218. *See id.* at 1089 n.6.

219. *See id.* at 1084 n.4 (noting that although the district court had not specified whether the dismissal was with or without prejudice, circumstances indicated that it was a dismissal with prejudice and the circuit court was treating it as such).

220. *Id.* at 1089.

violations and the misrepresentations used to conceal these violations.”²²¹

The Ninth Circuit was careful to note, however, that such was not to say that “a dismissal for flagrant discovery violations could not, in other cases, constitute a sufficient judgment on the merits to bestow a defendant with ‘prevailing party’ status.”²²² Recognizing Representative Hyde’s original intent to prevent prosecutors from hiding information,²²³ the court posited that “[i]f documents were *intentionally* withheld to bolster the prosecution’s case, that misconduct would be relevant to the defendant’s innocence,” and “a dismissal on those grounds could” thus render a party prevailing.²²⁴

Some courts have avoided this problem altogether by issuing narrow conclusions or operating on the basis of presumptions about what can or cannot suffice to render a defendant a “prevailing party” based on the specific and sometimes unique facts before the court. For instance, although the court did not analyze the issue directly, the Eleventh Circuit necessarily presumed that defendants were prevailing parties in a case when it ruled that a district court had abused its discretion in denying Hyde Amendment fees because it was “beyond cavil that the government’s prosecutorial position was foreclosed by [the] binding precedent.”²²⁵ Similarly, one court had the opportunity to opine that intervenors in a case were not prevailing parties, particularly where the charged parties had been convicted.²²⁶ Likewise, responding to an argument that the “government fell so far short of obtaining the relief it sought” that the defendant should be deemed a prevailing party under the Hyde Amendment, the Seventh Circuit in *United States v. Sriram* was able to issue a bright-line rule that “[a] defendant who is convicted and sentenced is not the prevailing party even if the sentence is light; the government is the prevailing party.”²²⁷

221. *Id.*

222. *Id.* at 1089 n.6.

223. *See id.* (finding that “[t]he legislative history of the Hyde Amendment makes clear that it was intended to protect against some types of disclosure violations,” and quoting Representative Hyde in the floor debate for the proposition that “the amendment would apply when prosecutors ‘keep information from you that the law says they must disclose,’ when they ‘hide information,’ and when they ‘do not disclose exculpatory information to which you are entitled’”) (citations omitted).

224. *Id.* (emphasis in original).

225. *United States v. Adkinson*, 247 F.3d 1289, 1293 (11th Cir. 2001) (internal citations omitted).

226. *See United States v. Wade*, 93 F. Supp. 2d 19, 22 (D.D.C. 2000).

227. *United States v. Sriram*, 482 F.3d 956, 958-59 (7th Cir. 2007), *vacated on other grounds*, 552 U.S. 1163 (2008). Yet query, for instance, what would happen to a defendant who was convicted on a single misdemeanor charge that was properly joined to a case comprising numerous felony charges that were later found to have been pursued in bad faith. *Sriram* would seem to suggest that in the Seventh Circuit, the

Left with such an array of precedents, how should courts decide which approach to take? How should potential applicants decide whether it is worth risking the legal costs of applying under the Amendment when the merits of their case may not even be heard because they could be deemed—unpredictably—not “prevailing”?²²⁸ Simply put, the uncertainty surrounding this aspect of the Amendment, even after more than a dozen years in the courts, points to the conclusion that the Amendment should be rethought. When both the ability to viably pursue a Hyde Amendment claim and the deterrent effect on prosecutors can vary so much from circuit to circuit, even for applicants charged with the same or similar misconduct,²²⁹ the time has come to put the situation to rights.

2. Defining the Standards

The text of the Hyde Amendment provides that attorneys’ fees may be awarded to prevailing parties in criminal cases “where the court finds that the position of the United States was vexatious, frivolous, or in bad faith,”²³⁰ but gives no definitions for these terms, leaving room for a host of interpretations. It is not surprising, then, that courts have defined the terms “vexatious,” “frivolous,” and “bad faith” variously, as most courts first state that in the absence of a statutory definition, the words “must be given their ordinary

defendant could expect no relief on a Hyde Amendment claim due to the (perhaps even intentional) coupling of the unfounded charges with the single related misdemeanor offense, despite the fact that a prosecutor’s dogged pursuit of knowingly unfounded felony charges could arguably meet the “vexatious, frivolous, or in bad faith” standard had it not been coupled with the viable misdemeanor charge. *See id.* at 959. It would be a palpable irony indeed were a rule like this to be interpreted by prosecutors as a sort of insurance policy against going ahead and “trying out” higher charges for what they knew to be merely acts associated with misdemeanors.

In the Sixth Circuit, the court has held that the government’s “position” means its case as a whole, so that “[e]ven if the district court determines that part of the government’s case has merit, the movant might still be entitled to a Hyde Amendment award if the court finds that the government’s ‘position’ as a whole” met the standard. *United States v. Heavrin*, 330 F.3d 723, 730 (6th Cir. 2003). Although *Heavrin* does not speak directly to whether its standard would apply in the case of a partial conviction, if our hypothetical defendant were proceeding in the Sixth Circuit, he or she would arguably have a much better chance at success than in the Seventh. *See id.* These sorts of disparities, and in particular, the wide range of incentives or disincentives they impose upon prosecutorial charging and trial decisions, illustrate why the continued worth of the Hyde Amendment, at least in its current form, is in serious question.

228. Consider, for example, a potential applicant in the Third or Fourth Circuit whose case was dismissed without prejudice: how can he or she know whether a court will take the “yes” approach of *Knott*, the “no” approach of *In re Grand Jury Subpoena Duces Tecum*, or the deliberative approach of *Gardner*?

229. *See supra* notes 225-28 and accompanying text.

230. Hyde Amendment, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (codified at 18 U.S.C. § 3006A (2006) (historical and statutory notes)).

meaning,”²³¹ and then often turn to varying dictionary definitions of the terms.²³² These are often based upon definitions contained in *Black’s Law Dictionary*,²³³ the sixth edition of which was current at the time of the Amendment’s passage,²³⁴ though not uniformly

231. *See, e.g.*, *United States v. Gilbert*, 198 F.3d 1293, 1298 (11th Cir. 1999) (quoting *Chapman v. United States*, 500 U.S. 453, 462 (1991)).

232. The Fourth and Eleventh Circuits have relied on *Black’s Law Dictionary* to define all of the terms. *See United States v. Bunn (In re 1997 Grand Jury)*, 215 F.3d 430, 436 (4th Cir. 2000) (defining “vexatious” as “without reasonable or probable cause or excuse,” “frivolous” as “groundless . . . with little prospect of success; often brought to embarrass or annoy the defendant,” and “bad faith” as “not simply bad judgment or negligence, but rather . . . the conscious doing of a wrong because of dishonest purpose or moral obliquity; . . . a state of mind affirmatively operating with furtive design or ill will”) (second alteration added) (internal quotations omitted); *see also Gilbert*, 198 F.3d at 1298-99 (supplementing these definitions with definitions from other cases and finding that “vexatious” could also be described as “frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith,” and that “bad faith” could be defined to include “reckless disregard for the truth”) (internal quotations omitted). The Sixth Circuit adopted the *Black’s Law Dictionary* definitions for “vexatious” and “bad faith” but chose its own definition for “frivolous.” *See United States v. Heavrin*, 330 F.3d 723, 728-29 (6th Cir. 2003) (defining “frivolous” as “lacking a reasonable legal basis or where the government lacks a reasonable expectation of attaining sufficient material evidence by the time of trial”).

The Fifth Circuit to date has merely determined that “vexatious, frivolous, or in bad faith” is more demanding than “not substantially justified.” *See United States v. Truesdale*, 211 F.3d 898, 909 (5th Cir. 2000). The Ninth Circuit, for quite some time, found it “unnecessary to settle on a precise formula” for all terms, *see United States v. Lindberg*, 220 F.3d 1120, 1125 (9th Cir. 2000), though it later settled on unusual and specific terms for vexatious. *See infra* notes 238-40. The Second Circuit still seems proud that it “has never ‘parse[d] the precise meaning’ of the terms ‘vexatious,’ ‘frivolous,’ or ‘in bad faith,’” *see United States v. Mitselmakher*, 347 F. App’x 649, 650 (2d Cir. 2009) (alteration in original) (quoting *United States v. Schneider*, 395 F.3d 78, 86 (2d Cir. 2005)), yet it has noted, while careful to insist that it was not engaging in “such an exegetical exercise” as actually parsing the terms, that dictionary definitions of the terms that it was electing not to construe were consonant with its determination that the Hyde Amendment did not provide relief to the applicant. *See Schneider*, 395 F.3d at 86 & n.3. In short, the definitions the circuits have adopted or declined to adopt are all across the board. *See also infra* text accompanying notes 238-56 (illustrating the disagreements between courts and consequences thereof).

Even when using *Black’s Law Dictionary*, however, courts elect to adopt different parts of the definition or use different editions of the dictionary and end up with varying citations. *Compare, e.g.*, *United States v. Pritt*, 77 F. Supp. 2d 743, 747 (S.D. W. Va. 1999) (defining “frivolous” as “clearly insufficient on its face[.] . . . presumably interposed for mere purposes of delay or to embarrass”) (quoting BLACK’S LAW DICTIONARY 668 (6th ed. 1990)), *with United States v. Milloy*, 75 F. Supp. 2d 1276, 1277 (D.N.M. 1999) (defining “frivolous” as “[l]acking a legal basis or legal merit; not serious; not reasonably purposeful”) (quoting BLACK’S LAW DICTIONARY 677 (7th ed. 1999)) (alteration in original), *and United States v. Peterson*, 71 F. Supp. 2d 695, 698 (S.D. Tex. 1999) (defining “frivolous” as “of little weight or importance”) (quoting BLACK’S LAW DICTIONARY 668 (6th ed. 1990)).

233. *See supra* note 232.

234. *United States v. Ali*, No. 06-CR-200 (ENV), 2008 WL 4773422, at *11 (E.D.N.Y.

consulted.²³⁵ As one commentator noted, “[u]nfortunately, these decisions do not establish a clear, workable definition. Instead, the opinions reiterate the same set of abstract words, as if trying to conjure up a meaningful and definite standard by incantation.”²³⁶

“Vexatious,” for instance, has been defined variously by the circuit courts that have attempted to address it, most commonly following the Eleventh Circuit’s definition of “vexatious” as “without reasonable or probable cause or excuse,”²³⁷ but also in the Ninth Circuit as requiring two components, one objective and one subjective.²³⁸ Under the latter view, there must be an “objectively deficient” prosecution (meaning that the prosecution lacked merit, reasonable cause, probable cause, or sufficient grounds) and a “subjective” element of “some ill intent,”²³⁹ requiring a subjective “maliciousness” or “intent to harass.”²⁴⁰ The First Circuit has rejected both the Ninth Circuit’s “subjective malice” standard and the Eleventh’s “absence of probable cause” standard,²⁴¹ holding instead that vexatiousness requires that the prosecution must have lacked “legal merit or factual foundation” and have been based on “*objective* evidence of . . . improper motive,”²⁴² a distinction that has confused at least the Eighth Circuit, which has hinted that it might adopt the First Circuit standard, but identifies that standard in a way that correlates to the Ninth Circuit’s rule.²⁴³ Even on the basis of the splits between the circuits on this one term alone, it is clear that the statute is not being uniformly applied.

Although the lack of uniformity is somewhat less palpable with respect to definitions of “bad faith,”²⁴⁴ defining “frivolous” has proven

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235. See *supra* note 232.

236. Welle, *supra* note 18, at 372.

237. *Gilbert*, 198 F.3d at 1298-99 (quoting BLACK’S LAW DICTIONARY 1559 (7th ed. 1999)); accord *United States v. True*, 250 F.3d 410, 423 (6th Cir. 2001); *In re 1997 Grand Jury*, 215 F.3d at 436; see also *United States v. Monson*, 636 F.3d 435, 439 (8th Cir. 2011) (citing *United States v. Porchay*, 553 F.3d 704, 711 (8th Cir. 2008) (relying on *Gilbert*); *United States v. Adkinson*, 247 F.3d 1289, 1291 (11th Cir. 2001) (citing and applying the standard from *Gilbert*).

238. *United States v. Sherburne*, 249 F.3d 1121, 1126-27 (9th Cir. 2001).

239. *Id.* at 1126-27, 1127 n.5.

240. *Id.* at 1126.

241. See *Knott II*, 256 F.3d 20, 29-30 (1st Cir. 2001).

242. *Id.* at 29, 31 (emphasis added).

243. See *Monson*, 636 F.3d at 439-40 n.4 (citing *Knott II* for the proposition that vexatiousness has both an “objective” and “subjective” component, despite *Knott II*’s rejection of that standard from *Sherburne* in favor of one with two “objective” components, see *Knott II*, 256 F.3d at 29); see also *supra* text accompanying notes 238-41 (explaining the differences between the approaches of *Knott II* and *Sherburne*).

244. Most circuits that have addressed “bad faith” have adopted the definition set forth by the Eleventh Circuit in *Gilbert* and reproduced *supra* note 232. *E.g.*, *United*

no less problematic than defining “vexatious.” The Sixth Circuit, for instance, has deemed a “frivolous” position “one lacking a reasonable legal basis or where the government lacks a reasonable expectation of [obtaining] sufficient material evidence by the time of trial,”²⁴⁵ which would seem to overlap significantly with the “without reasonable or probable cause” definition it employs for “vexatiousness,”²⁴⁶ although other courts have identified as a distinction between “vexatiousness” and “frivolousness” that “frivolousness” requires no improper motive.²⁴⁷ The Eighth Circuit has defined it as “utterly without foundation in law or fact,”²⁴⁸ and the Tenth Circuit has added “not serious; not reasonably purposeful.”²⁴⁹ The Eleventh Circuit in *Gilbert* defined “frivolous” as “[g]roundless . . . with little prospect of success; often brought to embarrass or annoy the defendant,”²⁵⁰ as did the Ninth Circuit,²⁵¹ which also adopted *Gilbert’s* view that a case is frivolous when “the government’s position was foreclosed by binding precedent or so obviously wrong as to be frivolous.”²⁵² Perhaps recognizing the futility in either adopting a definition that overlaps substantially with another or adopting a definition with terms as malleable,

States v. Isaiah, 434 F.3d 513, 522 (6th Cir. 2006); United States v. Pease, 137 F. App’x 220, 226 (11th Cir. 2005); United States v. Manchester Farming P’ship, 315 F.3d 1176, 1185 (9th Cir. 2003); United States v. Bunn (*In re 1997 Grand Jury*), 215 F.3d 430, 436 (4th Cir. 2000); see also United States v. Lain, 640 F.3d 1134, 1137 (10th Cir. 2011) (quoting BLACK’S LAW DICTIONARY 1596 (8th ed. 2004)) (defining “bad faith” as “[d]ishonesty of belief or purpose,” rather than using the sixth edition, which was in effect at the time of the Amendment’s passage). Other circuits have avoided adopting a definition altogether, simply ruling that certain acts were not “in bad faith” without defining the term, e.g., United States v. Porchay, 533 F.3d 704, 711 (8th Cir. 2008), similar to the way in which some courts have dodged committing to a definition of “frivolous,” see *infra* note 254 and accompanying text, or have used, but not adopted, dictionary definitions of the term. See United States v. Schneider, 395 F.3d 78, 86-90 (2d Cir. 2005).

245. *Isaiah*, 434 F.3d at 520 (alteration in original) (quoting United States v. Heavrin, 330 F.3d 723, 729 (6th Cir. 2003)).

246. See *supra* note 232.

247. See United States v. Bowman, 380 F.3d 387, 391 (8th Cir. 2004) (citation omitted).

248. United States v. Porchay, 533 F.3d 704, 711 (8th Cir. 2008) (quoting *Bowman*, 380 F.3d at 390 (8th Cir. 2004)).

249. United States v. Lain, 640 F.3d 1134, 1137 (10th Cir. 2011) (quoting BLACK’S LAW DICTIONARY 692 (8th ed. 2004)).

250. United States v. Gilbert, 198 F.3d 1293, 1299 (11th Cir. 1999) (alteration in original) (quoting BLACK’S LAW DICTIONARY 668 (6th ed. 1990)).

251. United States v. Capener, 608 F.3d 392, 401 (9th Cir. 2010) (citing United States v. Manchester Farming P’ship, 315 F.3d 1176, 1183 (9th Cir. 2003)), *cert. denied*, 131 U.S. 97 (2011); accord United States v. Braunstein, 281 F.3d 982, 995 (9th Cir. 2002) (quoting *Gilbert*, 198 F.3d at 1304).

252. *Manchester Farming*, 315 F.3d at 1183.

subjective, and functionally empty as “obviously wrong,”²⁵³ other circuits have elected to take a noncommittal approach, ruling that certain acts were not “frivolous” without defining the term for their district courts to follow and thus sidestepping the responsibility altogether.²⁵⁴

Where courts are left befuddled by an array of divergent precedents and avoiding their roles as legislative gap-fillers, it is clear that Congress’s intent has not been, and likely will not be, effectuated. Granted, had Congress provided definitions for these terms, the tractability of words (even those that have been defined by a greater number of words) ensures that a variety of outcomes could nevertheless result even from courts applying the “same” definition in different circumstances. Yet the malleability of language is a problem common to statutory interpretation, and legislators have come to know that the results can at least be mitigated, even if not eradicated, by providing definitions designed for use with new statutes. The fact that, in the Hyde Amendment context, the drafters did not take pause to define even simply these three key terms that are called into question in nearly every case has complicated the interpretive role of the courts to a greater degree than usual—or perhaps even constitutionally acceptable²⁵⁵—and served to ensure that applicants in one jurisdiction cannot possibly be subject to the same standard as applicants in another, a situation that ought not persist for long in the federal courts.²⁵⁶

253. See, e.g., *Capener*, 608 F.3d at 401-02 (overturning a lower court’s Hyde Amendment award on grounds that the prosecution’s decision not to investigate its theory, in reliance on an expert who did not indicate a need for further investigation, was not “obviously wrong”).

254. See, e.g., *United States v. Mitselmakher*, 347 F. App’x 649, 650 (2d Cir. 2009) (declining to provide definitions for “frivolousness” or any of the Amendment’s terms, but affirming the district court’s rejection of defendants’ argument that the government pursued a theory that was “foreclosed by precedent and obviously wrong,” which was based on a definition of frivolousness that defendants appear to have borrowed from the Ninth Circuit. See, e.g., *Manchester Farming*, 315 F.3d at 1183); cf. *United States v. Lawrence*, 217 F. App’x 553, 554 (7th Cir. 2007) (noting, in finding that the defendant below had not met his burden in trying to prove that his prosecution was foreclosed by precedent, that it found the defendant’s definitions of the Hyde Amendment’s terms “instructive” rather than adopting definitions of any of the terms on its own or applying either the defendant’s or another court’s definition of “frivolous” individually).

255. See *Welle*, *supra* note 18, at 334 (noting that “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”).

256. See *infra* notes 282-86 and accompanying text (discussing the debate over the value of letting unsettled issues of federal law “percolate” in the courts); see also, e.g., *Allapattah Servs., Inc. v. Exxon Corp.*, 362 F.3d 739, 764, 767-68 (Tjoflat, J., dissenting) (citing William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 11-12 (1986)) (urging the Supreme Court to resolve uncertain

3. The Scope of Discovery

Because the substantive finding by the court in a Hyde Amendment case depends in part upon the intent of the prosecutors involved in the case, whether subjective or objective,²⁵⁷ discovery of internal prosecution documents and testimony from government personnel would seem to be a reasonable need of an applicant.²⁵⁸ The Hyde Amendment appears to contemplate this need by its provision that “[t]o 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.”²⁵⁹ The Amendment even anticipates that the evidence that the court receives “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,”²⁶⁰ all of which stands in sharp contrast to the EAJA’s simple statement that a party’s right to recovery thereunder “shall be determined on the basis of the record.”²⁶¹ Under traditional methods of statutory interpretation, the EAJA’s language should simply be superseded by the language of the Hyde Amendment. Nevertheless, the extent to which the courts will consider evidence outside the record, and more importantly, the extent to which the courts will allow what is discovered in camera to be released to the former defendant, remains unclear. The courts that have embraced these issues have reached divergent results.

The case that set the issue into motion in the courts was *United States v. Gardner*,²⁶² a case that has been recognized as the “only one” to discuss directly “whether [the Hyde Amendment] allows a defendant to obtain discovery,”²⁶³ and which thus warrants particular attention. In *Gardner*, the government took the position

federal issues rather than continuing to let them “percolate,” and quoting Justice Rehnquist as saying that “Congress should not be held to have laid down one rule in North Carolina and another rule in North Dakota simply because the Court of Appeals for the Fourth Circuit and the Court of Appeals for the Eighth Circuit disagree with one another on the meaning of a federal statute”); Ruth Bader Ginsberg, *Remembering Justice White*, 74 U. COLO. L. REV. 1283, 1285 (2003) (noting Justice White’s “unswerving view that the [Supreme] Court ought not let circuit splits linger” and sharing that she feels “a certain unease” when she votes “to let an issue percolate longer and resist taking it up when the split is still shallow”).

257. See *supra* text accompanying notes 238-43.

258. See *Savage & Stone*, *supra* note 49, at 4 (noting that “[t]he need for discovery can be critical in assessing subjective intent”).

259. Hyde Amendment, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (codified as amended at 18 U.S.C. § 3006A (2006) (historical and statutory notes)).

260. *Id.*

261. 28 U.S.C. § 2412(d)(1)(B) (2006).

262. 23 F. Supp. 2d 1283 (N.D. Okla. 1998).

263. *United States v. Aubrey*, 290 F. Supp. 2d 1215, 1217-18 (D. Mont. 2003).

that the court could “only consider the record developed in the criminal case, which is limited to objective documentary evidence such as transcripts or pleadings or grand jury testimony.”²⁶⁴ Gardner, of course, offered the language of the Hyde Amendment quoted above to contend that the court should examine the government’s conduct more broadly.²⁶⁵ The court ruled that “the scope of the record in any Hyde Amendment case must be determined by a review of all the facts and circumstances,” and determined that “a comprehensive examination of Government conduct should occur,” as the objective record in the case had established “a sufficient basis of infirm governmental conduct . . . to justify further inquiry.”²⁶⁶

Gardner thus requested discovery “with respect to certain types of evidence, including internal IRS reports, memoranda of witness interviews, internal Department of Justice documents, depositions of several IRS agents, and depositions of the United States Attorney and an Assistant United States Attorney.”²⁶⁷ Noting that the Hyde Amendment “expressly contemplates an expansion of the record traditionally available to the Court for the purpose of assessing an applicant’s claim,” and that “Congress was aware of the potentially invasive effect of the statute and sought to put in place an *ex parte* and *in camera* review procedure to protect against the ill-effects of any such invasion,” the court allowed all of Gardner’s requests other than those for depositions.²⁶⁸ Before concluding, the court also paused to justify its decision by pointing out that “in dealing with selective prosecution and prosecutorial vindictiveness claims, other courts have ordered broad discovery by the Government, often ordering production to the opposing party, as well as evidentiary hearings.”²⁶⁹ *Gardner* thus set the stage for later cases that presumed that discovery is theoretically available to those defendants who are able to show good cause.²⁷⁰

264. 23 F. Supp. 2d at 1294. The government based this view on the language of EAJA § 2412(d)(1)(B), calling it a “procedure” intended to be incorporated into the Amendment. *See id.*

265. *See Gardner*, 23 F. Supp. 2d at 1293 (noting Gardner’s request to examine both DOJ and IRS conduct).

266. *Id.* at 1295.

267. *Id.* at 1295-96.

268. *Id.* at 1296-97.

269. *Id.* at 1297 n.25.

270. *See, e.g.,* United States v. Lindberg, 220 F.3d 1120, 1126 (9th Cir. 2000) (presuming discovery is available, though upholding the district court’s denial of defendant’s discovery request because “his claims centered on the government’s lack of proof”); United States v. Aubrey, 290 F. Supp. 2d 1215, 1217-20 (D. Mont. 2003) (assuming without deciding that discovery is available, though denying defendant’s discovery request for lack of good cause, and holding the defendant must establish that the government was motivated by “improper considerations” in order to receive

Other cases, however, including some circuit court decisions,²⁷¹ have treated the matter quite differently. Although no cases have found occasion to rule expressly that the Hyde Amendment does not permit discovery to be awarded to a defendant,²⁷² the Fifth Circuit in dicta in *United States v. Truesdale*, for example, claimed that “[i]t is clear that the Amendment, especially when read in conjunction with the EAJA, does not provide for discovery or a hearing as a matter of right.”²⁷³ To the contrary, the Fifth Circuit concluded, “[i]t appears the provision for in camera review of evidence was included to enable the *government* to defend *itself* against Hyde Amendment motions and at the same time protect confidential information.”²⁷⁴ Although also in dicta, the Second Circuit in *United States v. Schneider* agreed with *Truesdale*’s reasoning and took it one step further by opining that the text of the Hyde Amendment “contains no indication of intent to grant a court the authority to order the production of government materials.”²⁷⁵ The Second Circuit reasoned instead:

First, the statute’s authorization to the court to “receive” evidence *ex parte* and *in camera* says nothing about authorization to order its production. Second, the term “for good cause shown” relates only to the need for *ex parte* and *in camera* inspection to protect the confidentiality of sensitive government materials, not to the movant’s need to acquaint the court with the government’s materials in order to show entitlement to relief. The bill’s legislative history indicates that the clause was added to address legislators’ concerns that proceedings under the Amendment might “compromise . . . confidential sources or law enforcement techniques.” In short, nothing in the words of the statute suggests that the court has the power to order the government to produce materials, either to the defendant or to the court, *ex parte* and *in*

discovery); *United States v. Gugnani*, 178 F. Supp. 2d 538, 546 (D. Md. 2002) (recognizing the court’s discretion to allow discovery pursuant to applicant’s request); *United States v. Milloy*, 75 F. Supp. 2d 1276, 1277 n.3 (D.N.M. 1999) (finding that discovery was not warranted but citing *Gardner* in support of the idea that discovery could be granted pursuant to defendant’s request).

271. See *United States v. Schneider*, 395 F.3d 78, 91 (2d Cir. 2005); *United States v. Truesdale*, 211 F.3d 898, 907 (5th Cir. 2000).

272. See *Schneider*, 395 F.3d at 91 (declining to resolve whether the Hyde Amendment provides discovery and a hearing, though opining on the issue); *Truesdale*, 211 F.3d at 906-07 (noting that “[t]he scope of discovery allowable or required upon request of a movant for attorney’s fees pursuant to the Hyde Amendment” was not an issue it needed to address because the movants had not requested discovery or a hearing at the district court level).

273. *Truesdale*, 211 F.3d at 907.

274. *Id.* (emphases added).

275. *Schneider*, 395 F.3d at 91 (stating that “[a]lthough we have no need to resolve the question in this case and do not do so, we believe the position of the government, and the Fifth Circuit in *Truesdale*, may have merit”).

camera.²⁷⁶

The question of the scope of discovery, then, is in a state of some limbo, with some courts recognizing that discovery ought to be allowed but rarely awarding it, and others opining that it ought not be allowed but declining to rule so explicitly. Because the results in these cases stand so opposed and because a court's willingness to expand the scope of discovery in a Hyde Amendment case can be critical to an applicant's success (and by extension, the Amendment's success at preventing wrongful prosecutions), any revision of the Hyde Amendment would necessarily be incomplete without a clarification of the Amendment's discovery provision.

4. The Nature of the Case and Time for Appeal

As mentioned briefly in Part III.A.1,²⁷⁷ one of the earliest circuit splits to arise with regard to the interpretation of the Hyde Amendment was over the issue of whether Hyde Amendment proceedings are civil or criminal in nature and what rules of procedure and filing deadlines govern as a consequence. The first circuit-level case to encounter the issue was *United States v. Robbins*, where the Tenth Circuit determined, with fairly sparse reasoning, that appeals from Hyde Amendment proceedings are criminal matters governed by Federal Rule of Appellate Procedure 4(b), which would provide only ten days in which a Hyde Amendment applicant could appeal after entry of the judgment or order denying fees in the district court.²⁷⁸

Several circuits have now expressed disagreement with the Tenth Circuit's decision in *Robbins*, holding instead that Hyde Amendment actions are civil in nature and appeals therefrom are accordingly governed by the thirty-day filing deadline in Federal Rule of Appellate Procedure 4(a)²⁷⁹ (which comes out to sixty days in cases in which the United States is a party).²⁸⁰ Even the Tenth Circuit itself has called *Robbins* an "outlier;" yet, as it has also recognized, "[a]bsent an intervening change in the law" or review by

276. *Id.* at 91-92 (quoting 143 CONG. REC. H7793 (daily ed. Sept. 24, 1997) (statement of Rep. Lynn Rivers)) (citation omitted).

277. *See supra* note 99.

278. *See* 179 F.3d 1268, 1270 (10th Cir. 1999).

279. *United States v. Braunstein*, 281 F.3d 982, 992-93 (9th Cir. 2002); *accord* *United States v. Wade*, 255 F.3d 833, 837-39 & n.5 (D.C. Cir. 2001); *United States v. Bunn (In re 1997 Grand Jury)*, 215 F.3d 430, 437 (4th Cir. 2000); *United States v. Truesdale*, 211 F.3d 898, 902-03 (5th Cir. 2000); *cf.* *United States v. Holland*, 214 F.3d 523, 525-27 (4th Cir. 2000) (determining, for purposes of deciding whether a timely appeal from a denial of rehearing raised an underlying judgment for review, that Hyde Amendment proceedings are civil in nature and that the Federal Rules of Civil Procedure applied).

280. *Wade*, 255 F.3d at 838.

the entire Tenth Circuit en banc, the case “is still controlling in the circuit.”²⁸¹ Thus, this issue, along with the several others discussed in this Part, illustrates yet another reason why the Hyde Amendment is not functioning well in its current incarnation. It is thus the purpose of the following Part to consider this and other issues with which courts have struggled in interpreting the Amendment and thereby to craft suggestions for a more reasoned approach to achieving the goals the Hyde Amendment has attempted to pursue.

IV. THE FUTURE OF THE HYDE AMENDMENT

As the preceding Parts have shown, although it is frequently the burden of the courts to resolve lacunae left open by legislative enactments, it has been impossible for courts to interpret the various provisions of the Hyde Amendment and its interactions with the EAJA in consonance, even after more than a dozen years’ experience. More importantly, it has been difficult for the courts to do so in a way that truly effectuates the Amendment’s goals. What, then, should be done about the Amendment going forward?

A few possibilities arise: First, the Amendment could be left as is to continue to “percolate”²⁸² in the courts until the United States Supreme Court sees fit to resolve some of the open questions left by the various circuits’ interpretations of the Amendment. Second, Congress could take the opportunity to revise the statute, clarifying questions that the courts have brought to light and honing the provision to help it better reach its goals. Alternatively, Congress could recognize that it provides an inefficient and ineffectual route for meeting those goals, and thus take a step back from the Amendment and choose to abandon it altogether in favor of other measures that might better effectuate those goals. It is the purpose of this Part to explore each of these possibilities in light of the purposes of the Amendment.

281. *In re* Special Grand Jury 89-2, 450 F.3d 1159, 1167-68 (10th Cir. 2006) (quoting *United States v. Chanthadara*, 230 F.3d 1237, 1260 (10th Cir. 2000)).

282. The concept of allowing unresolved or ambiguous questions of federal law to “percolate” in the lower courts before the United States Supreme Court addresses them has been the subject of debate, even amongst Justices who have served during some of the Hyde Amendment’s own “percolation” years. *Compare, e.g.*, *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J. dissenting) (noting that the Supreme Court has “recognized that when frontier legal problems are presented, periods of ‘percolation’ in . . . courts may yield a better informed and more enduring final pronouncement”), *with* Rehnquist, *supra* note 256, at 11 (arguing that litigants ought not be subject to varying interpretations of federal laws simply because circuit courts disagree, opining that to “suggest that it is actually desirable to allow important questions of federal law to ‘percolate’ in the lower courts for a few years before the Supreme Court takes them on seems to me a very strange suggestion; at best it is making a virtue of necessity”).

A. *The Percolation Approach*

One obvious response to the question of what should be done with the Hyde Amendment would be for Congress to take no action, allowing the Amendment to continue to wind its way through the slow channels of judicial construction as it has done since the late 1990s. Giving statutes time to “percolate,” as this is known, arguably results in some benefits, foremost among them the vetting of possible solutions to issues of interpretation.²⁸³ But in this case, it seems the benefits offered by this approach have already been eked out over the fourteen years the statute has had to percolate, as novel arguments are not arising with any frequency in Hyde Amendment cases and the disagreements that have occurred have been established for some time,²⁸⁴ with courts merely latching on to one or another early interpretation.²⁸⁵ Surely then, the open questions of the Hyde Amendment are ripe for resolution. As one judge remarked in a case with issues that had been vetted only a decade, after so many “years of percolation, it is time . . . to smell the coffee.”²⁸⁶

B. *The Redrafting Approach*

A more direct approach to resolving some of the problems inherent in the Hyde Amendment would be for Congress to take another look at the statute, with the benefit of the statute’s having “percolated” for more than a decade. While the Supreme Court could certainly resolve the numerous splits that have arisen from the circuits’ varying interpretations of the Amendment, its doing so would doubtless take quite a while, as each split and source of disagreement is unlikely to arise together for consideration in a single case.²⁸⁷ Moreover, the Court’s workload and trends in interpreting statutes indicate both that the Court has neither the opportunity nor the inclination to consider the value of the lower courts’ percolation efforts.²⁸⁸

Most importantly, although the Court’s involvement would at least result in some amount of resolution, its need to adhere to the

283. See Todd J. Tiberi, Comment, *Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?*, 54 U. PITT. L. REV. 861, 864-69 (1993) (outlining both benefits and detriments to percolation).

284. For example, the differences in approach to the “Election of Sections” question and the split over whether Hyde cases are civil or criminal have existed since 2000. See *supra* notes 108-09.

285. See, e.g., *supra* text accompanying notes 147-48, 176-77.

286. *Johnson v. United States R.R. Ret. Bd.*, 969 F.2d 1082, 1093 (D.C. Cir. 1992).

287. Considering the outcome-determinative nature of some of the open issues, it is possible that even with several splits involved in a case before it, the Court could resolve the precise question presented for review or decide the outcome of a case without addressing each split.

288. Tiberi, *supra* note 283, at 891.

principles of *stare decisis* and judicial restraint would not allow it the leeway that Congress would have to consider whether the varying interpretations of the Amendment are allowing it to reach its goals and thus directly revise and polish its language to effectuate those goals. Congress, then, would appear to be the body most readily equipped not only to address the Amendment's several fallacies in unison and to consider the percolative efforts of the lower courts but also to harmonize the revised provision with the legislative intent behind its passage. Indeed, Representative Hyde himself anticipated the need for the legislature to revisit the Amendment after it passed and the legislature had some experience with it.²⁸⁹ It is thus the purpose of the next several subparts to consider the breadth of this intent and the interpretive obstacles that have thwarted it, thereby warranting revisitation.

1. The Goals of the Hyde Amendment

As discussed in Part I, both the language and history of the Hyde Amendment suggest that its purposes are to prevent prosecutorial misconduct by deterrence and to compensate those who have been wrongfully prosecuted by the government. These are certainly the effects of those fee awards that have been granted under the Amendment, and if we take the position that these are indeed the goals of the Amendment, any re-draft of the Amendment must pursue the difficult task of meeting both these goals.

There are some, however, who would argue that deterrence is not a purpose of the Hyde Amendment at all—that its only goal is remuneration.²⁹⁰ According to this position, “curb[ing] the abusive actions of government officials” is not a purpose of the Hyde Amendment, “despite rhetoric in the affirmative,” because “the Hyde Amendment expressly denie[d] its remedy to defendants represented by publicly funded counsel.”²⁹¹ “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.”²⁹²

289. See *supra* text accompanying note 47.

290. See Welle, *supra* note 18, at 348 n.71.

291. *Id.*

292. *Id.* Yet there is, in fact, a reasonable cause for the distinction, if one considers the implications of allowing defendants represented by federal public defenders to recover fees. Who would litigate for recovery of such fees? The appointed public counsel? At whose election—the defendant's? The defender's office? Would this litigation, which, statistically speaking, would likely be lost, be paid for with public funds as well? And could all of this raise broader constitutional concerns?

Assuming that the publicly represented defendant would be ineligible to receive and retain the funds herself, the funds would presumably have to be paid over

While this argument buckles under reasoned consideration and functions more as a criticism of the Amendment's reach than empirical proof that the Amendment was not intended to deter prosecutorial misconduct, it certainly brings to light one of the primary criticisms of the Amendment, which will be discussed further in Part IV.C. And indeed, when one considers the immediate appeal of the argument in conjunction with the fact that under most interpretations of the Amendment, prosecutors really do have no reason to fear "running afoul of the Hyde Amendment"²⁹³ when prosecuting wealthy individuals, businesses, or those whose fees have been paid by an indemnitor because of the limitations of EAJA § 2412(d), it can begin to look as though deterrence is really not a goal of the Amendment. But as we have seen, most courts have embraced the common-sense conclusion that deterrence is in fact a goal of the Amendment and put faith in the Amendment's legislative history, which indicates unambiguously that this motivation is accepted as one of the major purposes behind the passage of the Amendment.²⁹⁴ Thus, the appearance that curbing prosecutorial misconduct is not a goal of the Amendment is more an illusion, brought on by the malfunctioning of the Amendment's history of inartful interpretation. If this goal is ever to be effectuated, the original intent of the Amendment must be made clear.

2. Solving the "Election of Sections" Issue: Defining the Waiver of Sovereign Immunity

One major problem standing in the way of the Amendment's effectuating its deterrence goal, as well as its goal of partial restitution, is the confusion in the courts over the EAJA's option to proceed under either § 2412(b) or (d), discussed in Part III.A. If

to the public counsel (as they typically would in the corporate fee payer context by virtue of independent contractual obligation), and the mechanism for such a shift could implicate constitutional questions. For instance, would a court's making a decision to shift funds from the U.S. Attorney's office that prosecuted the case—a part of the executive branch—to the Federal Public Defender's office that defended it—the budget for which comes out of allocations made to the United States Courts themselves, *see* 18 U.S.C. § 3006A(g)(2)(A), (i) (2006)—constitute, in essence, an improper usurpation of the power to make a United States budgetary allocation, a function reserved to the legislative branch? Ought courts be permitted to move funds from the executive branch into an organization funded by allocations made to and managed by the courts themselves?

These problems alone indicate that it is arguably reasonable, though hardly laudable, that in the rushed atmosphere that generated the final version of the Hyde Amendment, Congress neglected to hammer out a mechanism for insuring that the Amendment's deterrence rationale was boosted by making the provision open to indigent defendants.

293. Welle, *supra* note 18, at 348 n.71.

294. *See supra* Part I.B.

applicants in all jurisdictions had the opportunity to proceed under § 2412(b) alone, the limitations on net worth and fee payers would not operate to prevent the Amendment from reaching its deterrence goals, as they now do.²⁹⁵ Yet as discussed previously,²⁹⁶ applicants have been prevented from taking this approach in many cases because of courts adopting the flawed logic of the Sixth Circuit in *Ranger II*,²⁹⁷ viewing such an approach as suffering from a “circularity” problem.²⁹⁸ However, this view ignores the simple fact that any circularity in the *Holland* approach is entirely avoidable by turning to § 2412(b)’s provision that it applies where the common law (as opposed to a statute) provides for such awards.²⁹⁹ The operation of this process has been misunderstood by the courts and has thus resulted in most jurisdictions finding that the net worth and fee payer limitations of EAJA § 2412(d)—exactly those provisions that most undermine the Amendment’s effectiveness at deterrence³⁰⁰—necessarily apply to all Hyde Amendment applicants.³⁰¹ This need not be the case.

Under the common law, a court may assess attorneys’ fees when the losing party has “acted in bad faith, vexatiously, wantonly, or for oppressive reasons.”³⁰² This provision of the common law is a judicially crafted exception to the “American rule” that litigants pay their own attorneys’ fees and that attorneys’ fees are not recoverable by the prevailing litigant in federal litigation in the absence of statutory authorization.³⁰³ The court in *United States v. Peterson*,³⁰⁴ for example, gave the impression that when this exception operates as a waiver of sovereign immunity, it applies only in the civil context,³⁰⁵ but it cited no authority that supports this notion. The

295. See *supra* text accompanying notes 94-96.

296. See *supra* text accompanying notes 162-69.

297. 210 F.3d 627, 633 (6th Cir. 2000).

298. See *supra* note 177 and accompanying text.

299. 28 U.S.C. § 2412(b) (2006).

300. See *supra* text accompanying notes 93-97.

301. See, e.g., *infra* notes 304-07 and accompanying text (discussing *United States v. Peterson*).

302. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 258-59 (1975) (quoting *F.D. Rich Co. v. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974)).

303. See *Alyeska Pipeline*, 421 U.S. at 257-60.

304. 71 F. Supp. 2d 695 (S.D. Tex. 1999).

305. *Id.* at 699. The court reasoned:

Section 2412(b) waives sovereign immunity in order to subject the United States to liability for the attorney’s fees and expenses of a prevailing party in a civil action “to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.” Under Mueck’s theory, he must therefore apply for fees either as provided by “common law” or as provided by a statute. The “American rule” permits fee shifting in a civil case at common law only when

reason for this assumption, though, is that prior to the Hyde Amendment, such waiver did only apply only in the civil context, via the EAJA. It was the purpose of EAJA § 2412(b), however, to make the “bad faith” exception applicable in suits against the United States.³⁰⁶ § 2412(b) of the EAJA, in other words, waived sovereign immunity in civil cases, making the government liable for attorneys’ fees and expenses to the same extent that any other party would be liable under the common law exception to the American rule. Because any other party would be liable under the common law for acting in “bad faith, vexatiously, wantonly, or for oppressive reasons,” § 2412(b) was passed in order that the government could be found liable for acting the same way.³⁰⁷

The EAJA, though, by its own terms, applied to civil actions. When the Hyde Amendment came along, its purpose was to make the provisions of the EAJA applicable to parties who had prevailed in the criminal context.³⁰⁸ Thus, just as Congress waived sovereign immunity in the civil context by adopting § 2412(b) of the EAJA, Congress waived sovereign immunity in the criminal context by adopting the Hyde Amendment pursuant to the procedures and limitations of the EAJA. Accordingly, the government can now be liable for attorneys’ fees to the same extent that any other party would be liable under common law, even in the context of a criminal action.³⁰⁹

When viewed through this framework, it seems self-evident that

the losing party acted in bad faith, vexatiously, wantonly, or for oppressive reasons, and an application by a prevailing party may be made in a civil action under § 2412(b) on that basis. Applicant Mueck, however, in this criminal case asserts no entitlement to fees under the common law fee shifting rule applicable in civil cases. Instead, he relies upon a federal statute, the Hyde Amendment, which does apply to criminal cases.

Id. at 699 (internal citation omitted).

306. See H.R. REP. NO. 96-1418 (1980), reprinted in 1980 U.S.C.A.A.N. 4984, 4987; see also *Kerin v. United States Postal Serv.*, 218 F.3d 185, 189-90 (2d Cir. 2000) (stating that “Section 2412(d) is . . . an entirely statutory basis for the award[,]” while “2412(b) specifically incorporates the applicable common law . . . and effectively codifies the common law exceptions to the traditional American rule”).

307. *Alyeska Pipeline*, 421 U.S. at 258-59 (quoting *F.D. Rich Co.*, 417 U.S. at 129).

308. See *supra* text accompanying notes 31-33.

309. Unless it may be assumed that the “vexatious, frivolous, or in bad faith” standard of the Hyde Amendment was intended wholly to *replace* the stricter standard of the common law rather than act in concert with it—arguably an untenable conclusion since a waiver of sovereign immunity is involved—an applicant could not recover under § 2412(b) merely by showing that the government’s charge had been “frivolous.” In order to recover under that portion of the Hyde standard, an applicant would be forced to proceed under the limitations of § 2412(d), which lends credence not only to the argument that both the (b) and (d) modes of recovery should be available to Hyde applicants but also makes sense that stricter limitations should come into play when attempting to recover under a standard that is arguably easier to meet.

a Hyde Applicant should indeed be able to proceed under either 28 U.S.C. § 2412(b) or (d)—that this choice is a procedure of the EAJA meant to be incorporated into the operation of the Hyde Amendment, and that subsection (b) cannot simply be read out of the Amendment’s incorporation of § 2412.³¹⁰ What the courts in *Ranger* and *Peterson* did succeed in pointing out, however, was that the Amendment as adopted was poorly written, leaving its interpretation open to suggestion. Because the Amendment effectuates a waiver of sovereign immunity, such courts have understandably been hesitant to allow recovery, as waivers of sovereign immunity are required by longstanding canons of statutory construction to be strictly construed.³¹¹ Such hesitancy, however, is in conflict with opposite canons of construction that direct that once Congress has waived sovereign immunity, the courts cannot assume the authority to narrow that waiver³¹² and that remedial statutes are to be broadly construed.³¹³ It is for this reason that, were the Hyde Amendment to be revised, Congress should abandon the framework of reliance on the EAJA and instead establish the extent of its waiver of governmental immunity in an independent statute in certain enough terms that courts will be able both to make awards according to more uniform standards and meet the Amendment’s goals.

310. Admittedly, this procedure is somewhat susceptible to the criticism that the *Peterson* court pointed out: that if there were a choice between proceeding under section (b) or (d), “every” litigant would choose section (b) and avoid all limitations, effectively writing (d) out of the analysis. *Peterson*, 71 F. Supp. 2d at 699-700. But the argument goes too far and ignores equally powerful criticisms. First, the logic only stands up until it is turned around on itself; that is, the corollary of the *Peterson* argument is that presuming that the “procedures and limitations” of the EAJA should include those of § 2412(d) in every Hyde Amendment case effectively writes § 2412(b) out of the analysis. The court in *Peterson* pointed out that if Congress had meant for the limitations of § 2412(d) not to apply, “then appropriate language could have been inserted in the legislation,” and that it seems “untenable . . . to argue that when Congress incorporated the ‘procedures and limitations’ of Section 2412, that it was oblivious to, or intended implicitly to exclude, the specific procedures and limitations contained in § 2412(d),” *id.* at 700, but it failed to recognize that the exact same argument is true with respect to § 2412(b). *See United States v. Holland*, 34 F. Supp. 2d 346, 357 (E.D. Va. 1999) (noting that if Congress’s intent was to limit applicants to proceeding under § 2412(d), “it could have said so”), *vacated in part on other grounds*, 48 F. Supp. 2d 571 (E.D. Va. 1999), *aff’d*, 214 F.3d 523 (4th Cir. 2000). Additionally, allowing an applicant to proceed under § 2412(b) does not allow the avoidance of “all” limitations. *See supra* notes 124, 309 (discussing limitations of, and different standards available under, § 2412(b)).

311. *See supra* text accompanying notes 88, 131, 162. *But see supra* note 134 (discussing the Supreme Court’s rejection of the government’s push for a strict construction in *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2010), a case involving a sovereign immunity waiver under the EAJA).

312. *See supra* text accompanying note 134.

313. *See supra* note 79.

3. The Procedures and Limitations of a Revised Hyde Amendment

Presuming reliance on the EAJA itself cannot workably or sufficiently effectuate the purposes of the Hyde Amendment,³¹⁴ the question becomes what “procedures and limitations” a revised Amendment ought to adopt. Clearly, a stand-alone Amendment would need to define who has standing to make a claim pursuant to its provisions and what the standard and burden of proof will be, in addition to clarifying the sub-questions the Amendment has taught us will arise as a result of these provisions—whether the procedure is civil or criminal in nature and what rules concomitantly apply, as well as whether discovery will be permitted in order to implement the system. The remainder of this Part thus provides suggestions for how the Hyde Amendment could best be revised, should Congress be persuaded to revisit it.

a. Who May Apply

In order to restore the Hyde Amendment to its originally intended breadth without creating unwanted avenues for an onslaught of claims, stricter limitations would need to be set in those areas that threaten least to undermine the goals of the Amendment. Such “trimming” may be appropriate in the area of who has standing to recover under the Amendment. Certainly a party must be “prevailing,” but as we have seen, what constitutes “prevailing” in the Hyde context has been interpreted differently by different courts.³¹⁵ Thus, a definition is required.

While prosecutorial indiscretions may occur at any stage of a case, one way to limit the universe of potential claims would be to prevent claims for conduct that occurs pre-indictment. This would allow necessary deference to prosecutorial decision-making and respect the role of the grand jury.³¹⁶

314. As one commentator noted, “[t]he 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.” Welle, *supra* note 18, at 346.

315. See *supra* Part III.B.1.

316. It may be argued that the better way to avoid what the Amendment is trying to prevent altogether would be to stop the prosecution before it starts by preventing the generation of unfounded indictments. Even the House-Senate Conference Committee report accompanying the Hyde Amendment may have recognized that the grand jury, as it operates today, does not serve its purpose as well as it should, when it made note that “[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 . . . [prosecution] was vexatious, frivolous or [brought] in bad faith.” H.R. REP. NO. 105-405, at 194 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2941, 3045. Granted, if the grand jury could better serve its function and wrongful indictments were not made, remuneration would not be necessary in most cases and deterrence would have been accomplished right from

Similarly, it would be prudent to clarify what “final judgments” could render a party “prevailing” and thus eligible for application. As mentioned previously, some courts have allowed voluntary dismissals without prejudice to render a party prevailing for purposes of a Hyde Amendment claim. But if every time the government dismisses a case without prejudice, the former defendant is able to bring a Hyde claim, not only would there be a potential for an onslaught of litigation against the government, the government might in response be encouraged to hold on to cases about which it is doubtful and take a chance on obtaining a conviction. This would be a particularly egregious outcome if the government were encouraged to conceal exculpatory evidence or suborn perjury to avoid a Hyde Amendment claim.

Additionally, allowing dismissals without prejudice to render a party prevailing could result in prosecutors offering plea bargains dismissing cases that make the defendant agree that he or she will not try to recover fees. In such a situation, how much meaningful choice would a defendant have? He could risk the loss of liberty and financial wherewithal if he says no to the agreement, or he could agree and have the matter dropped but be left without financial recourse. Thus, limiting the availability of a Hyde claim to those who have achieved a final victory in which re-indictment is not a possibility seems a reasonable way to limit claims and preserve the deterrence goals the Amendment sought to address.

Other provisions of the Amendment could better effectuate its goals by being broadened. As mentioned, an act without a limitation on net worth would create a system more effective at reaching what the breadth of the original Hyde Amendment tried to reach—a system in which those who have been forced to pay to protect themselves from unjust criminal sanctions may be compensated, at least economically, for their loss, as well as a system in which such conduct is deterred by the threat of such compensation. The ability to meet the second goal is necessarily undermined if prosecutors have no reason to fear overzealousness when pursuing the wealthy, just as

the start. Yet, years of criticism and review of the grand jury system in America have yet to yield a solution to the problem of the grand jury’s loss of autonomy. See generally The Commission to Reform the Federal Grand Jury, *Feature: Federal Grand Jury Reform Report & ‘Bill of Rights’*, 24 CHAMPION 16 (2000) (suggesting fundamental changes to the grand jury system); William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174 (1973) (proposing an alternative system for initiating a prosecution). Moreover, there are those cases in which the grand jury’s indictment may have been legitimate, but the prosecutor acted vexatiously during some later stage of the case, e.g., by hiding *Brady* material or suborning perjury. In those contexts, a refurbished Hyde Amendment would still be of benefit even if the grand jury system were to be “fixed.” Nevertheless, it is the purpose of Part IV.C to consider these sorts of alternatives to revising the Amendment and whether they may better assist in reaching its ultimate goals.

it is undermined if they have no reason to fear overzealousness when pursuing the poor.³¹⁷ Moreover, when this overzealousness occurs in the criminal context—where loss of liberty is at stake rather than economic loss alone—it is fundamentally unfair to limit the ability to seek recovery to those who fall in the not-too-poor but not-too-wealthy category.³¹⁸ Elimination of the net worth provisions would also have the benefit of increased deterrence by opening the door to large companies that have paid the legal fees of their employees to sue to recover their funds.

As Representative Hyde recognized, recovery of attorneys' fees will not make a wrongfully prosecuted citizen whole; what this Amendment was designed to effect was "rough justice," and economic remuneration is but one component of that type of justice. Another component, no less important to those of moderate means than to those of wealth, is the vindication that one who has been unjustly prosecuted receives by the legislatively—and judicially—ordered shifting of part of the cost of the case to the prosecutor's office that pursued the matter inappropriately. This remedy is not punitive but rather affirms that our system of law recognizes it as unjust when anyone, or any institution, other than the government itself should be forced to pay the price for its indiscretions.

b. The Standard and Burden

Possibly the most significant way to keep in check the number of applications brought pursuant to these new eligibility requirements without undermining the effectuation of the Amendment's objects would be to define and strengthen the standard and burden of proof for recovery beyond that which Representative Hyde originally proposed. Certainly Hyde's "not substantially justified" standard is too broad, and imprecise designations like *Truesdale's* "more demanding . . . than . . . 'not substantially justified'"³¹⁹ would simply be too discretionary to discourage frivolous applications effectively. What is needed for a redrafting of the Amendment's standard are precise definitions of the terms "frivolous," "vexatious," and "in bad faith," with each seeking to eliminate as much redundancy and judicial discretion as possible. With less amorphous and stronger definitions in place, would-be litigants could, in theory, make more

317. However, as discussed *supra* in note 292, there are obstacles to broadening the Amendment to include payments to litigants who were represented by public counsel, which is one of the primary reasons why abandonment of the Amendment may be preferable to revision of the Amendment, as discussed *infra* in Part IV.C.

318. Although the matter does not yet seem to have been raised in the Hyde Amendment context, it has been held in the EAJA context that the net worth limitation does not operate as a violation of equal protection. See *Richard v. Hinson*, 70 F.3d 415, 417-18 (5th Cir. 1995).

319. *United States v. Truesdale*, 211 F.3d 898, 909 (5th Cir. 2000).

reasoned assessments as to whether to pursue Hyde Amendment applications to begin with, thereby limiting the annual pool of applicants.

Percolation of the undefined standard in the courts has taught us that adoption of a definition of “bad faith” from one of the circuits should be a fairly straightforward matter.³²⁰ With respect to the terms “vexatious” and “frivolous,” however, new definitions should be crafted that avoid overlap³²¹ as well as the use of one term to define the other.³²² Other “empty” definitional terminology (for example, terms such as “obviously wrong” or “not serious” to describe “frivolous”)³²³ should be eliminated; instead, each term ought to incorporate to the greatest extent possible specific and objectively verifiable concepts such as the “foreclosed by binding precedent” found to be frivolous in several courts.³²⁴ Consideration must also be given to the type of evidence necessary to support a finding of frivolousness versus a finding of vexatiousness. In particular, each definition should indicate whether subjective or objective evidence is required and whether malice or some other finding of intent is a necessary component.³²⁵

In order to tighten the reins on recovery even further, a re-drafted Hyde Amendment could also adjust the burden of proof, in addition to keeping the burden on the applicant rather than on the government as originally intended. Although use of the “preponderance of the evidence” standard may be the sole issue on which cases interpreting the Hyde Amendment have not been in disagreement,³²⁶ it might be helpful to raise the burden of proof further so as to limit the realm of possible applicants to those most likely to have meritorious petitions. Adoption of a “clear and convincing” standard would not bring the analysis to a clearly criminal level, but it would ensure both that prosecutors acting within the bounds of their proper discretion had no reason to fear that wealthy defendants with crafty attorneys could pursue them without reasonable foundation, as well as that the most serious cases

320. *See id.*; *supra* notes 232, 244. As several courts have already adopted *Gilbert’s* definition, it would serve as a good starting point.

321. *See supra* text accompanying notes 245-46.

322. *See, e.g.*, *United States v. Gilbert*, 198 F.3d 1293, 1299 (11th Cir. 1999) (using “frivolous” to define “vexatious”).

323. *See supra* notes 232, 254.

324. *E.g.*, *United States v. Manchester Farming P’ship*, 315 F.3d 1176, 1183 (9th Cir. 2003) (quoting *United States v. Braunstein*, 281 F.3d 982, 995 (9th Cir. 2002)); *United States v. Adkinson*, 247 F.3d 1289, 1293 (11th Cir. 2001) (quoting *United States v. Adkinson*, 158 F.3d 1147, 1164 (11th Cir. 1998)).

325. The definitions of bad faith previously utilized by the courts typically involve an element of maliciousness. *See supra* notes 232, 244.

326. *See United States v. Truesdale*, 211 F.3d 898, 908 (5th Cir. 2000).

of prosecutorial misconduct would be given proper attention in the courts, as the judiciary would not be overburdened with cases of lesser magnitude.

c. Clarification of the Nature of a Case and the
Discovery Provision

In line with a majority of the courts to have considered the issue,³²⁷ a revised Hyde Amendment should clarify that its proceedings are civil proceedings ancillary to the government's criminal case, to which the Federal Rules of Civil and Appellate Procedure apply. And because the substantive evidentiary finding by a court in a Hyde case—which this Article argues should be subject to a higher burden³²⁸—will depend in large part upon the objectives of the prosecutors involved, the discovery provision should be clarified to indicate that a limited amount of discovery is permitted.

The permissible discovery could reasonably be restricted in scope to a specific number of requests for internal prosecution documents and testimony from government personnel. Without any such discovery, the deterrence effects of the Amendment would likely wane under the higher burden, and providing evidence to meet that burden could prove prohibitive other than in those cases in which the government has already admitted improper conduct. Such discovery should further be limited to the extent necessary to protect the government's legitimate prosecutorial techniques, such as through redactions approved in camera prior to the release of internal documents to the former defendant. Moreover, to discourage frivolous applicants, a revised statute should indicate that discovery awards are limited to instances where the objective evidence in the case establishes a basis of infirm governmental conduct sufficient to warrant further inquiry, such as the Eleventh Circuit set forth in *Gardner*.³²⁹ By balancing opportunities for discovery in suspect cases with a defined burden and limited scope for what is discoverable, perhaps Representative Hyde's desire for "rough" but "substantial" justice could better be effectuated in a world in which, as he put it, "Uncle Sam . . . can do anything."³³⁰

4. Effectiveness

Part III of this Article aimed to make explicit each of the problems that have arisen from the careless pastiche of the Amendment's original authorship and the courts' difficulties in interpreting the statute's conflicting directives. This was done in

327. See *supra* note 279.

328. See *supra* Part IV.B.3.b.

329. See *United States v. Gardner*, 23 F. Supp. 2d 1283, 1295-96 (N.D. Okla. 1998).

330. 143 CONG. REC. H7791 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde).

hopes that the Article might be used as a springboard by which to skip to the job of addressing the statute's problems without having to disentangle them from the web of confusion into which they are woven.

While the suggestions in Part IV.B.3 provide a starting point for drafting a second revised Hyde Amendment, as the previous Parts have shown, it is a task that ought not be treated impetuously if undertaken yet another time. The first round of revisions made to Representative Hyde's original proposal in the Conference Committee wreaked havoc on the courts' abilities to interpret the statute and thoroughly dulled its ability to meet its original goals, a result that any potential redraft would need to be careful to avoid. If undertaken, a second pass at the Hyde Amendment should happen as a matter of the regular course of congressional business, so that it may be fully vetted by the congressional committee charged with oversight of the substantive law involved (rather than by the Appropriations Committee), reflect a true consensus of Congress, and result in codification within the text of the United States Code itself rather than being hidden in notes to the Code's provisions for the representation of indigent defendants, who receive no benefit from the Amendment and, as Part IV.C discusses, bear the brunt of the Amendment's failings.

Yet as Part I has shown, despite the language of inclusiveness Representative Hyde used when rallying support for the Amendment and elucidating its goals,³³¹ perhaps the Amendment's history—from its self-serving start as a “members only” allocations rider³³² to its eventual burial within the law as no more than a statutory note³³³—indicates that regardless of any attempts to refine and polish its language, the Amendment will forever be a tarnished, ineffective tool unlikely to effect the kind of change that Representative Hyde's words sounded so eager to arouse.³³⁴ Perhaps rather than revising the Amendment, thought should instead be given to recognizing the Amendment as what it is—a botched attempt at securing political and financial protections for Congress members by extending similar financial protections to a limited class of others—and to refocusing the resources that would be expended on its application in the future. It is thus the purpose of the next subpart to consider such an alternative approach.

C. The Repeal and Replacement Approach

As seen in Parts II and III, as most courts have interpreted it,

331. See *supra* text accompanying notes 21-22 and Part I.B.

332. See *supra* note 20 and text accompanying note 41.

333. See *supra* note 2.

334. See *supra* text accompanying notes 21-22 and Part I.B.

the Hyde Amendment is designed to offer a remedy only to a specific class of wrongfully pursued citizens: those not-too-poor and not-too-rich. While the eligibility requirements ensure that those who are most likely to have felt the financial burden of an improper prosecution are at least eligible to apply for recovery of fees, these limitations arguably cause the Amendment to effectuate less of the “rough justice” for which Representative Hyde advocated than it generates injustice in terms of the Amendment’s deterrence effects.³³⁵

First and most importantly, *all* indigent defendants are excluded from the Hyde Amendment’s provisions³³⁶ and, as a result, are excluded from its protections. The Amendment’s intended effect of creating internal self-policing in those prosecuting middle class citizens simply has no analogue with respect to those prosecuting the poor. Likewise, in a majority of the jurisdictions to have considered the issue,³³⁷ those with a net worth of more than \$2 million before trial are also left exposed to undeterred prosecutorial overzealousness.³³⁸ Moreover, for those with a net worth of less than \$2 million, the inability to invest even more money into an ancillary case after already having expended potentially bankrupting sums on attorneys’ fees³³⁹ defending against or trying to avoid an unjust or biased prosecution may in many cases prevent even the theoretically eligible from feeling secure enough to roll the dice by filing a follow-up suit of their own. The result is that the Hyde Amendment gives prosecutors few defendants to fear in the first place, and those who do get the benefit of the Amendment’s protective intent are only those who are already lucky enough to be able to afford private counsel.

Yet because prosecutors have limited resources and limited means to pursue the multitude of cases with which they are faced,³⁴⁰ it should already be less likely that a prosecutor will take a vengeful, biased, or even sloppy tack putting together a case against a defendant represented by private counsel or firms, which can typically “spend more time preparing their cases and mount[ing] more vigorous defenses”³⁴¹ than can public counsel. The effect, albeit

335. See *supra* text accompanying note 31.

336. See *supra* text accompanying note 12.

337. See *supra* Part III.A.3.

338. See, e.g., *United States v. Adkinson*, 256 F. Supp. 2d 1297, 1309 n.6 (N.D. Fla. 2003).

339. See Sarah Ribstein, Note, *A Question of Costs: Considering Pressure on White-Collar Criminal Defendants*, 58 DUKE L.J. 857, 863-66 (2009) (explaining the high costs of white collar criminal defense).

340. See Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 267-72 (2011) (detailing enormous prosecutor caseloads throughout the United States).

341. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L.

inadvertent, is that the Amendment encourages the perpetuation of greater injustice against those who can least afford to protect themselves.³⁴² This would seem to be particularly true with respect to those cases that warrant the greatest levels of punishment and curtailment of personal liberty, such as those involving violent or deadly crimes, where there can often be intense public pressure to secure a conviction.³⁴³

With the stakes already shifted in favor of those with private attorneys, the Hyde Amendment adds little deterrence to the overall scheme of prosecution in the United States and gives no incentive whatsoever to prosecutors to avoid pursuing flimsy cases against indigent defendants. Unfortunately, these defendants in particular have no voice through which to challenge this effect, as they simply have no seat at the table. For obvious reasons, they are unlikely to find a voice through their legislators, and unlike a party directly impacted by a legislative enactment, these defendants have no way to challenge the statutory mechanism that is causing the problem in court.

The few who do have access to the courts on a Hyde claim after a wrongful prosecution have interests that are divergent from the interests of a wrongfully pursued indigent defendant. A party pursuing a Hyde claim presumably already received at least as much of the benefit of the deterrence of prosecutorial misconduct as did anyone else in his or her jurisdiction. These litigants are in court because they are at the stage where they are ready to take advantage of its compensation scheme, not because they want to enforce its deterrence effects. Instead, the only parties with an interest in changing the Amendment are extremely wealthy individuals and corporations who have already been targeted—who are thus also interested more in compensation than deterrence—and indigent defendants, to whom the Amendment's protections do not apply and who are therefore most exposed to the risk of arbitrary or weakly substantiated prosecutions.³⁴⁴ Accordingly, the job of truly

REV. 2464, 2479 (2004).

342. *Cf.* Gershowitz & Killinger, *supra* note 340, at 286 (describing how overburdened prosecutors may allow innocent defendants to “languish in jail for longer than necessary,” while “proactive defense attorneys” may spur prosecutors to investigate and dismiss questionable cases more quickly).

343. *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 327-29 (2006) (describing effects of public and institutional pressure on prosecutorial conviction psychology).

344. Notably, courts have recognized a constitutional due process right to have charging decisions free from arbitrariness, but this right has been found in most circumstances to have no judicial remedy. *See* United States v. Redondo-Lemos, 955 F.2d 1296, 1299-1300 (9th Cir. 1992), *overruled en banc on other grounds*, United States v. Armstrong, 48 F.3d 1508 (9th Cir. 1995), *rev'd*, 517 U.S. 456 (1996) (deciding that this is an issue that should be addressed by the legislature for separation of

remedying the Hyde Amendment's failures is one that belongs to the legislature.

But what realistically would best help it meet the goals that Representative Hyde urged lay beneath its passage?³⁴⁵ To be sure, if the Amendment's avenues for recourse were open to all classes of wrongfully pursued criminal defendants, then its deterrence effects would concomitantly extend to all classes of potential criminal defendants. Yet, as mentioned previously, the concept of opening up the Amendment's mechanisms to those who have been represented by public counsel (so as to extend its protective deterrent effects to the indigent) is likely institutionally, if not constitutionally, unsound.³⁴⁶ Even if it were possible, such a shift could result in prohibitively high transaction costs for the criminal justice system overall, in that it would divert resources toward ancillary litigation and away from the main business of prosecution and public defense alike, both of which are already undersupported as it is.³⁴⁷ And although Congress would do well to modify the Amendment so as to provide much needed definitions and resolve those issues on which the circuits have split, this remedy can only go so far in terms of helping the Amendment meet the deterrence goals that Representative Hyde indicated were the foundation for the provision.³⁴⁸

As a result, rather than continuing to let the Amendment confer disproportionate benefits on those citizens who are already more advantaged in the realm of criminal prosecutions than their indigent brethren, perhaps Congress should recognize the disparity that this carefully buried little piece of self-perpetuating legislation³⁴⁹ is working and lay it permanently to rest. Granted, such an ultimate interment of the Amendment would ensure the disappearance of whatever deterrence the provision may currently be generating. But in its place should accrue funds that previously would have been expended both paying out awards in, and defending against, Hyde Amendment cases.³⁵⁰ Such funds, if carefully reallocated, could

powers reasons).

345. See *supra* text accompanying notes 28-33.

346. See *supra* note 292, at 348 n.71.

347. See Gershowitz & Killinger, *supra* note 340, at 267-75 (outlining the problem of understaffing and excessive case loads for prosecutors and public defense attorneys, along with inadequacy of support staff).

348. See *supra* text accompanying notes 28-33.

349. See *supra* note 3 (describing how the rider avoided the presumption of temporariness and need for annual renewal).

350. It is difficult as an outsider to ascertain how much prosecutorial funding is expended on Hyde Amendment cases each year. While it is possible to calculate how much gets paid out in published awards, see, e.g., *United States v. Shaygan*, 661 F. Supp. 2d 1289, 1325 (S.D. Fla. 2009) (awarding \$601,795.88 in attorneys' fees and

create a useful legacy for the retired Amendment, one that fuels better prosecutorial decisionmaking, and consequently, reduces the need for restitution to wrongfully pursued citizens.

Instead of allowing the funds previously spent paying out and defending against Hyde Amendment awards to be reabsorbed into the general operating budgets of prosecutors' offices, Congress should assess the average annual value of these losses on a per-office basis and mandate the reallocation of those funds to programs that will help effectuate the Amendment's goal of encouraging prosecutorial fairness. If each office were compelled to invest in such programs from its own budget in proportion to the cost to taxpayers that each office had generated by virtue of paying and defending against Hyde applications, perhaps the need for citizens to bring such claims would be reduced from within, creating both fairness and efficiency for all citizens.

But what types of programs would be useful? Some commentators have suggested the use of incentivizing tools to curb misconduct, such as financial rewards³⁵¹ or professional advancement.³⁵² Yet while such tools (along with suggestions for tighter ethical rules³⁵³ and sanctions)³⁵⁴ might theoretically help ensure that prosecutors do not consciously opt to engage in misconduct, they neglect to recognize that misconduct occurs not only from rational decision-making but also from both ignorance and inexperience, as well as from unconscious bias.³⁵⁵ Accordingly, this Article proposes that funds saved as a result of repeal of the Hyde Amendment be allotted to both increased training and oversight, the combination of which would be useful to curb all misconduct,

costs); *United States v. Von Schlieffen*, No. 93-187-CR, 2009 WL 577720, at *4 (S.D. Fla. Mar. 5, 2009) (awarding \$356,824 in attorneys' fees and costs); *United States v. Aisenberg*, 358 F.3d 1327, 1352 (11th Cir. 2004) (awarding \$1,494,650.32 in fees and costs), other Hyde cases settle for undisclosed amounts, *see, e.g.*, Barry Tarlow, *Hit 'em Where it Hurts*, 27 *CHAMPION* 50, 55 (2004) (describing a settlement for undisclosed sums after applicant had requested \$155,000 from the district court in *United States v. Braunstein*, 281 F.3d 982, 997 (9th Cir. 2002)). More importantly, due to the small number of awards made, the prosecutorial resources expended in defending against Hyde Amendment cases are presumably much larger than those in paying out awards.

351. *See generally* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *FORDHAM L. REV.* 851 (1995).

352. *See* Alafair S. Burke, *Talking About Prosecutors*, 31 *CARDOZO L. REV.* 2119, 2123 n.21 (2010) (listing suggestions from other commentators).

353. *See* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 *WM. & MARY L. REV.* 1587, 1590 (2006) (discussing more stringent ethical rules to prevent prosecutors from engaging in misconduct to secure convictions).

354. *See id.*

355. *See id.* at 1593-1602 (discussing confirmation bias, selective information processing, belief perseverance, and avoidance of cognitive dissonance).

whether intentional or unintentional.

1. Training

The use of education as a tool for curbing prosecutorial misconduct and ensuring fairness in charging decisions has been the subject of numerous scholarly proposals, some of which set forth suggestions for implementing workable programs that could be used by prosecutors' offices.³⁵⁶ The potential value of such programs is illustrated by facts such as those underlying the recent Supreme Court case of *Connick v. Thompson*,³⁵⁷ which revealed how prosecutors in some jurisdictions can gain tremendous authority without even the basic training necessary to understand how to comply with ethical disclosure duties such as basic *Brady* obligations.³⁵⁸ With respect to *Brady* issues alone, "thousands of decisions" reviewing failures to comply with mandatory disclosure provisions have resulted in hundreds of reversed convictions,³⁵⁹ which "continue to occur at high rates" in state as well as federal courts.³⁶⁰ While training at the federal level is already more thorough than that typically given at the state level,³⁶¹ recent federal decisions have outlined the frequency of misconduct cases occurring on the federal level,³⁶² and federal judges have linked the need for more training to the persistence of such violations.³⁶³ Accordingly, allotting a portion of the funds each office saved by virtue of repeal of the Hyde Amendment to increased training should offer value where once there was loss.

356. See Ellen Yaroshesky, *Foreword: New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943, 1946-47 (2010).

357. 131 S. Ct. 1350 (2011) (alleging failure to train on *Brady* obligations).

358. *Id.* at 1379 (Ginsburg, J., dissenting).

359. Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV., 685, 686 (2006).

360. Andrew Smith, Note, *Brady Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny*, 61 VAND. L. REV. 1935, 1938 (2008).

361. For example, the DOJ now requires *Brady* training for all new Assistant U.S. Attorneys. See, e.g., UNITED STATES ATTORNEYS MANUAL § 9-5.001(E) (2008), available at www.justice.gov/usao/eousa/foia_reading_room/usam/.

362. See *United States v. Jones*, 686 F. Supp. 2d 147, 151 n.2 (D. Mass. 2010) (listing "[r]ecent, prominent . . . cases involving *Brady* violations").

363. See *id.* at 150 (quoting *United States v. Jones*, 620 F. Supp. 2d 163, 183 (2009)) (noting that the discovery-related training provided to one federal prosecutor was "obviously inadequate to serve its intended purpose"); accord Barbara Grzincic, *Corruption Trials, Chicago-style*, ON THE RECORD (July 30, 2009), <http://thedailyrecord.com/ontherecord/2009/07/30/corruption-trials-chicago-style> (quoting Judge Friedman of the Federal District Court for the District of Columbia as stating, "I don't think prosecutors understand their *Brady* obligations").

2. Oversight

Increased training alone would offer an improvement over the current state of affairs; however, combining increased training with increased oversight could fill gaps that training alone might leave. While prosecutorial overzealousness and the culture of winning observable in many prosecutors' offices may account for some of the misconduct that occurs, recent cognitive research has shown that prosecutorial bias in many cases is not a matter of good or bad ethics; rather, there are neurological reasons why prosecutorial bias exists.³⁶⁴ Cognitive phenomena such as "confirmation bias," which causes people to favor information that confirms a working hypothesis over disconfirming information, and "selective information processing," which causes people to weigh evidence that supports prior beliefs more heavily than that which contradicts those beliefs, can affect prosecutorial cognition,³⁶⁵ causing a sort of "tunnel vision"³⁶⁶ that can result in the wrongful pursuit of innocent suspects even where prosecutors are unaware of the bias they hold.

Thus, in addition to training prosecutors to be more cognizant of such tendencies, as has been recommended by those studying such biases,³⁶⁷ including more disinterested oversight in the prosecutorial decision-making process could also help ensure that even well-meaning prosecutors do not engage in behavior that would trigger eligibility for a Hyde Amendment claim. Professor Alafair Burke, a former prosecutor, has suggested a model for oversight that would work well in this context: a "fresh look" process by which uninvolved attorneys or advisory committees could provide neutral feedback on prosecutorial decisions.³⁶⁸ This would be particularly helpful in terms of avoiding behavior that would trigger the Hyde Amendment if employed at critical junctures, such as at the charging decision.³⁶⁹ Similarly, in those offices needing the most help, new oversight positions devoted solely to such review could be created with non-prosecutor attorneys staffing the jobs.³⁷⁰ By directing funds formerly expended in remunerating wrongfully targeted citizens toward

364. See Burke, *supra* note 353, at 1589-91 (suggesting that cognitive biases prevent misconduct remedies based on risk and reward from being effective).

365. *Id.* at 1594-1602; see also Findley & Scott, *supra* note 343, at 317-21 & n.200 (identifying "hindsight bias," "outcome bias," and "a host of other psychological phenomena" that contribute to the problem of biased prosecutorial judgment).

366. Findley & Scott, *supra* note 343, at 307-22.

367. See Burke, *supra* note 353, at 1616-17; Findley & Scott, *supra* note 343, at 370-71, 374 (noting proposals by others in the field identifying training as an "important and frequently suggested part of the solution").

368. See Burke, *supra* note 353, at 1621-22.

369. *Id.*

370. *Id.* at 1622.

committees or positions tasked with implementing such review, hopefully, the need for future recompense would eventually disappear.

CONCLUSION

From just about any perspective, the Hyde Amendment is a botched piece of legislation. At a minimum, it should be revised, as suggested in Part IV.B. However, because the Amendment works discriminately in favor of only one particular class of citizens, the Amendment's continued potential for benefitting the accused is marginal in comparison to its discriminatory potential. The suggestions made in Part IV.C, if implemented, have the power to decrease threats to due process caused by prosecutorial misconduct while simultaneously increasing both fairness and efficiency. Not only would the repeal and replacement approach ensure that less taxpayer money would end up being paid out to exonerated former defendants, but also, with heightened education, less taxpayer money should be wasted on convictions lost due to misconduct. This, in turn, would lead to greater victim satisfaction, an area of impact often overlooked when considering the effects of prosecutorial misconduct. Additionally, without an influx of Hyde claims to defend against each year, prosecutor's offices would also have more time to pursue legitimate cases that might otherwise have not been prosecuted, thus resulting in both greater overall efficiency and efficacy. Consequently, Congress should consider not just revising the Amendment but repealing it altogether, replacing its backward-looking expenses with true investments in the future.