NOTE

INTERPRETING "POSITION OF THE UNITED STATES" IN THE 1997 HYDE AMENDMENT

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INTRODUCTION

In October 2017, Mario Nelson Reyes-Romero was indicted for unlawful reentry into the United States.[1] During his prosecution, it became apparent that the Department of Homeland Security (DHS) officers who had conducted his initial removal proceedings in 2011 had engaged in serious misconduct. The evidence indicated that Reyes-Romero may have completed a form waiving his right to a hearing before the form was translated into Spanish.[2] It also appeared that a DHS officer, not Reyes-Romero himself, had checked the box waiving Reyes-Romero's

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1. United States v. Reyes-Romero, 959 F.3d 80, 85–86 (3d Cir. 2020), *cert. denied*, 141 S. Ct. 2622 (2021).
2. *Id.* at 85.

right to a hearing.[3] The Western District of Pennsylvania ultimately dismissed the indictment, and Reyes-Romero filed a Hyde Amendment[4] application to recover attorneys' fees from the government on the ground that its position was "vexatious, frivolous, [and] in bad faith."[5] The district court considered the conduct of both the prosecutors and the DHS officers underlying the prosecution and found that Reyes-Romero was plainly "railroaded" out of the country and entitled to attorneys' fees under the Hyde Amendment.[6] However, the Third Circuit reversed. The court held that Hyde Amendment analysis is limited to considering prosecutorial misconduct only, not unlawful actions taken by DHS officers in removal proceedings, despite acknowledging that DHS's initial removal order was "a necessary element" of the ultimate prosecution.[7] As a result, Reyes-Romero was saddled with costs and fees upwards of $73,700.[8]

This outcome is not the result that Congress intended when it passed the Hyde Amendment. Modeled on the Equal Access to Justice Act (EAJA), which shifts attorneys' fees to the government in civil cases where the government's position was not substantially justified, the Hyde Amendment was similarly designed to provide recourse for criminal defendants who prevail against government action that is vexatious, frivolous, or in bad faith.[9] Both the Hyde Amendment and EAJA direct a judge to consider the "position of the United States" in determining whether fee shifting is appropriate. Significantly, Congress defined "position of the United States" in EAJA to cover not only the government's conduct during litigation but also any relevant underlying agency action. Despite Congress's intent that the Hyde Amendment incorporate this definition, many circuit courts have consistently construed "position of the United States" more narrowly, as the Third Circuit did in *Reyes-Romero*, with disastrous consequences for defendants. Although Reyes-Romero petitioned the Supreme Court for certiorari last year, the Supreme Court denied his petition in May of 2021. If presented with a future opportunity, the Court should grant certiorari to resolve the circuit split over the meaning of "position of United States."

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3. *Id.* at 89.

4. The 1997 Hyde Amendment was enacted as part of the $31.8 billion Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act. *See* Act of Nov. 26, 1997, Pub. L. No. 105-119, 111 Stat. 2440 (1997); United States v. Gilbert, 198 F.3d 1293, 1298 (11th Cir. 1999). This Amendment is not to be confused with the 1976 amendment, named after the same legislator, which barred, with limited exceptions, the use of federal funds to pay for abortions. *See* Act of Sept. 30, 1976, Pub. L. No. 94-439, 90 Stat. 1418 (1976).

5. *Reyes-Romero*, 959 F.3d at 90–91.

6. *Id.* at 91, 97.

7. *Id.* at 97–98.

8. *Id.* at 91.

9. *See* 28 U.S.C. § 2412(d)(2)(D) (defining "position of the United States" in EAJA as "in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings"); 143 CONG. REC. H7791 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde, describing how and why the Hyde Amendment is modeled after EAJA).

Part I of this Note will discuss the background of the Hyde Amendment and its passage in Congress. Part II of this Note will survey how the circuit and district courts have interpreted "position of the United States" when considering whether to award fees under the Hyde Amendment. Finally, Part III of this Note will argue that "position of the United States" should be accorded the same definition in the Hyde Amendment as provided in EAJA. The text, legislative evidence, purpose, and other supporting provisions of the Hyde Amendment, including the provision that fee awards "shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under [EAJA]," all indicate that Congress intended "position of the United States" to be interpreted in alignment with EAJA—namely, that it should cover government misconduct both before and during litigation.

I. THE BACKGROUND OF THE HYDE AMENDMENT

The Hyde Amendment was enacted in 1997 as part of the $31.8 billion Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act.[10] The Amendment was introduced during the House floor debate on the Appropriations bill and was offered by Representative Henry Hyde as his version of an amendment that Representative John Murtha had previously sponsored.[11] Representative Murtha's amendment proposed shifting attorneys' fees to the government for members of Congress and their staff members who successfully defended themselves against federal criminal prosecution.[12] However, Representative Hyde felt that Murtha's amendment was both overly narrow and overly broad: too narrow because it covered only members of Congress and congressional staff, and too broad because it only required a defendant's acquittal for attorneys' fees to be awarded.[13] The Hyde Amendment as originally proposed, in contrast, would entitle any prevailing defendant, not just members of Congress, in a federal criminal case to attorneys' fees, unless the court found that the position of the United States was substantially justified.[14]

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10. Act of Nov. 26, 1997, Pub. L. No. 105-119, 111 Stat. 2440; United States v. Gilbert, 198 F.3d 1293, 1298 (11th Cir. 1999).

11. Elkan Abramowitz & Peter Scher, *The Hyde Amendment: Congress Creates a Toehold for Curbing Wrongful Prosecution*, 22 CHAMPION, Mar. 1998, at 23.

12. 143 CONG. REC. H7791 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde).

13. *Id.*

14. *Id.* The originally proposed text of the amendment 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 of title 28, United States Code. 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.

Id. (statement of the Chairman).

Representative Hyde borrowed the idea for and the language of his amendment from the Equal Access to Justice Act (EAJA), which was originally passed in 1980[15] and was renewed by Congress in 1985 without its original sunset provision.[16] In relevant part, EAJA states that "a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."[17] Representative Hyde pointed out that extending EAJA's fee-shifting regime to the criminal context was sensible in large part because of the seventeen years of case law interpreting EAJA. He argued, "[t]here are cases interpreting [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?"[18]

Although the Hyde Amendment passed with overwhelming bipartisan support in a House vote of 340 to 84,[19] some members of the House raised concerns. Representative David Skaggs opposed the bill because he was concerned about passing the amendment as a rider to an appropriations bill without any committee reports or hearings to examine the amendment more closely.[20] Further, Representative Lynn Rivers opposed the bill because she believed that the criminal justice system already effectively protected defendants from frivolous prosecutions, primarily through the constitutional requirements of probable cause and grand juries.[21] Both representatives also cited the Department of Justice's (DOJ) objections that attorneys' fee awards would deplete prosecutorial resources and chill federal prosecutions.[22]

Due to warnings from DOJ that it would urge President Bill Clinton to veto the entire appropriations bill if the Hyde Amendment were included in its then-current form, the Senate passed the bill without the amendment.[23] As a result, the House-Senate Conference Committee convened to adapt Representative Hyde's amendment for passage in both Houses. The Committee made several major changes to the Hyde Amendment—the final version barred recovery of fees by defendants

15. Act of Oct. 21, 1980, Pub. L. No. 96-481, 94 Stat. 2321 (codified in relevant part at 28 U.S.C. § 2412).

16. Act of Aug. 5, 1985, Pub L. No. 99-80, 99 Stat. 183. For present purposes, the most important change was that the amended EAJA defined "position of the United States" to include the position underlying the litigation as well as the government's position in the litigation. *Id.* § 2(c)(2)(D), 99 Stat. at 185 (codified at 28 U.S.C. § 2412 (d)(2)(D)).

17. 28 U.S.C. § 2412(d)(1)(A).

18. 143 CONG. REC. H7791 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde).

19. 143 CONG. REC. H7849-01 (daily ed. Sept. 25, 1997), 1997 WL 590950.

20. 143 CONG. REC. H7791–92 (daily ed. Sept. 24, 1997) (statement of Rep. Skaggs).

21. *Id.* at H7792–93 (statement of Rep. Rivers).

22. *Id.* at H7792 (statements of Rep. Skaggs and Rep. Rivers).

23. *See* United States v. Gilbert, 198 F.3d 1293, 1301 (11th Cir. 1999) (citing Harvey Berkman, *The Wrongly Prosecuted May Get Legal Fees Help*, NAT'L L.J., Nov. 24, 1997, at A10).

represented by public counsel, removed the burden of proof from the government, and provided for the review of evidence ex parte and in camera to protect any classified government information.[24] Most importantly, the Committee replaced the requirement that the position of the United States be "substantially justified" with a requirement that the position of the United States be "vexatious, frivolous, or in bad faith" before attorneys' fees could be awarded.[25] In its report accompanying the revised amendment, the Committee stated: "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."[26] The final text of the Hyde Amendment as enacted states:

> 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 [Nov. 26, 1997], 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 . . . 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.[27]

Although the Hyde Amendment does not define the phrase "position of the United States," the Equal Access to Justice Act does. In EAJA, "position of the United States" means, "in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings."[28] This definition was added to EAJA by Congress in 1985 and has been interpreted by the Supreme Court to require that "only one threshold determination" be made by the court, considering both prelitigation conduct and subsequent litigation positions, to decide whether attorneys' fees should be awarded to a prevailing party.[29] Further, EAJA defines "United States" to include "any agency and any official of the United States acting in his or her official capacity."[30]

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24. H.R. REP. NO. 105-405, at 193–94 (1997).
25. *Id.* at 194.
26. *Id.*
27. Act of Nov. 26, 1997, Pub. L. No. 105-119, tit. VI, § 617, 111 Stat. 2440, 2519 (1997) (emphasis added) (codified at 18 U.S.C. § 3006A note (Award of Attorneys' Fees and Litigation Expenses to Defense)).
28. 28 U.S.C. § 2412(d)(2)(D).
29. Comm'r, INS v. Jean, 496 U.S. 154, 159 (1990).
30. 28 U.S.C. § 2412(d)(2)(C).

II. JUDICIAL INTERPRETATION OF "POSITION OF THE UNITED STATES" IN THE HYDE AMENDMENT

The circuit courts are divided over whether "position of the United States" under the Hyde Amendment should be interpreted in accordance with the same phrase in EAJA. Most circuits that have considered the issue hold that "position of the United States" only covers the conduct of prosecutors during the criminal litigation, an interpretation that is more limited than EAJA's definition of the same term.[31] Some of these circuits believe that only the prosecution's actual litigating position can be considered,[32] while others believe that misconduct by other government officials may be considered only to the extent that prosecutors leverage that misconduct to bring a frivolous, vexatious, or bad faith prosecution.[33] A minority of circuits and some district courts interpret "position of the United States" to have the same meaning in the Hyde Amendment that it does in EAJA and therefore consider both the conduct of prosecutors during litigation and the conduct of any government agents underlying and prior to prosecution.[34]

A. Courts that Do Not Interpret the Hyde Amendment in Accordance with EAJA

The Second, Third, Ninth, and Eleventh Circuits have not incorporated EAJA's definition of "position of the United States" into the Hyde Amendment. These circuits typically consider only the conduct of prosecutors in determining whether attorneys' fees are due under the Hyde Amendment and refuse to award fees for the actions of any government agents leading up to the prosecution.

In *United States v. Bove*, the defendant was acquitted of attempted extortion and extortion conspiracy and unsuccessfully sought attorneys' fees under the Hyde Amendment.[35] The Second Circuit affirmed the denial of fees, recognizing that the Hyde Amendment "apparently borrowed the phrase 'position of the United States' from the Equal Access to Justice Act" but interpreted that phrase to mean "the government's general litigation stance: its reasons for bringing a prosecution, its characterization of the facts, and its legal arguments."[36] The court reasoned that the definition of "position of the United States" given in EAJA could not mean

31. *See, e.g.*, United States v. Bove, 888 F.3d 606, 608 (2d Cir. 2018); United States v. Reyes-Romero, 959 F.3d 80, 92 (3d Cir. 2020), *cert. denied*, 141 S. Ct. 2622 (2021); United States v. Shaygan, 652 F.3d 1297, 1301 (11th Cir. 2011); United States v. Mixon, 930 F.3d 1107, 1110 (9th Cir. 2019); *see also* United States v. Monson, 636 F.3d 435, 439 (8th Cir. 2011) (describing the Hyde Amendment as intending to deter "prosecutorial *misconduct*, not prosecutorial *mistake*," without analyzing the scope of "position of the United States" (emphases added)).

32. *Shaygan*, 652 F.3d at 1301–02.

33. *Reyes-Romero*, 959 F.3d at 92.

34. *See, e.g.*, United States v. Heavrin, 330 F.3d 723, 727–28 (6th Cir. 2003); United States v. Knott, 256 F.3d 20, 31 (1st Cir. 2001); United States v. Gardner, 23 F. Supp. 2d 1283, 1294–95 (N.D. Okla. 1998).

35. No. 07-CR-304S, 2016 WL 6573838, at *1 (W.D.N.Y. Nov. 7, 2016), *aff'd*, 888 F.3d 606.

36. *Bove*, 888 F.3d at 608 n.10.

precisely the same thing in the Hyde Amendment because it does not "appl[y] exactly in a criminal prosecution."[37]

Similarly, in *United States v. Reyes-Romero*, the case discussed in the introduction to this Note, the defendant was prosecuted for unlawful reentry after being removed to El Salvador by the Department of Homeland Security (DHS).[38] The Third Circuit reversed a grant of fees under the Hyde Amendment, reasoning that the district court should not have considered the conduct of DHS officers in determining whether the "position of the United States" was "frivolous, vexatious, or in bad faith."[39] The court explicitly held that EAJA's definition of "position of the United States" should not be incorporated into the Hyde Amendment, determining that only "the position taken by the department and officers charged with administering the prosecution" should be considered.[40] While the Third Circuit did explain that "misconduct by law enforcement officers or other executive departments can be *relevant* to a Hyde Amendment application if prosecutors leverage that misconduct to further a prosecution that has no factual or legal basis or that is brought for purposes of harassment," the court ultimately held that the Hyde Amendment "is concerned only with prosecutorial misconduct" and therefore, "alleged misconduct by DHS or its officers cannot independently create liability for attorney's fees and costs."[41]

The Ninth and Eleventh Circuits take an even narrower approach than the Second and Third Circuits in interpreting "position of the United States." In *United States v. Mixon*, the defendant, a case manager at a federal penitentiary, was indicted for knowingly engaging in a sexual act with a prisoner she was supervising.[42] The Ninth Circuit held that "position of the United States" in the Hyde Amendment means "the government's litigation position" and stated the Amendment does not shift attorneys' fees for "other types of bad conduct by government employees during an investigation."[43] As a result, the court did not consider the alleged improper conduct of an FBI agent and a Bureau of Prisons investigator underlying the defendant's indictment.[44]

Further, in *United States v. Shaygan*, the defendant was indicted for distributing and dispensing controlled substances outside the scope of his professional practice after an undercover investigation by the Drug Enforcement Administration.[45] The Eleventh Circuit overturned an award of attorneys' fees under the Hyde Amendment, holding that a defendant must, "at a minimum, satisfy[] an objective

37. *Id.*
38. 959 F.3d at 84–85.
39. *Id.* at 96–97.
40. *Id.* at 98.
41. *Id.*
42. 930 F.3d 1107, 1110 (9th Cir. 2019).
43. *Id.* at 1111.
44. *Id.* at 1109–10.
45. 652 F.3d 1297, 1301 (11th Cir. 2011), *reh'g en banc denied*, 676 F.3d 1237 (11th Cir. 2012).

standard that the legal position of the United States amounts to prosecutorial misconduct."[46] Dissenting from the Eleventh Circuit's denial of rehearing en banc, Judge Beverly Martin argued that a Hyde Amendment award should be based on "an array of government conduct both before the indictment and during litigation," an interpretation that aligns with EAJA's definition.[47]

Finally, the Eighth Circuit has assumed, without undertaking any analysis, that "position of the United States" in the Hyde Amendment refers to prosecutorial misconduct only. In *United States v. Monson*, the defendant was indicted for various drug and firearm offenses after an investigation by Nebraska law enforcement.[48] The Eighth Circuit affirmed the district court's denial of attorneys' fees under the Hyde Amendment and stated that "[t]he intent of the Hyde Amendment is to deter prosecutorial misconduct, not prosecutorial mistake."[49] Both the defendant and the Eighth Circuit framed their arguments around whether the "government's prosecution" was vexatious or frivolous.[50]

B. Courts that Interpret the Hyde Amendment in Accordance with EAJA

In contrast, the First and Sixth Circuits interpret "position of the United States" in accordance with EAJA's definition and permit consideration of non-prosecutorial government conduct. In *United States v. Knott*, the defendants were indicted for violating the Clean Water Act after two Environmental Protection Agency (EPA) inspectors investigated the defendants' steel mesh plant.[51] The district court suppressed evidence from the EPA's investigation as the fruits of an unlawful search, and after the indictment was voluntarily dismissed, the defendants filed to recover attorneys' fees under the Hyde Amendment.[52] Both the district court and the First Circuit considered the conduct of EPA investigators prior to the criminal litigation in determining whether the government's position was "vexatious, frivolous, or in bad faith,"[53] and the First Circuit explicitly held that "it is permissible for courts to consider the conduct of the investigation" prior to litigation in order to "provide a context in which to assess whether a prosecution was 'vexatious' within the terms of the Hyde Amendment."[54] The court did not discuss whether, consistent with EAJA, the conduct of government agents prior to litigation could create

46. *Id.* at 1312.

47. *Shaygan*, 676 F.3d at 1251 (Martin, J., dissenting) (quoting United States v. Knott, 256 F.3d 20, 31 (1st Cir. 2001)).

48. 636 F.3d 435, 437–38 (8th Cir. 2011).

49. *Id.* at 439.

50. *Id.* at 439–42.

51. 256 F.3d at 23–24.

52. *Id.* at 25–26.

53. *See* United States v. Knott, 106 F. Supp. 2d 174, 180 (D. Mass. 2000) ("After consideration of the conduct of the EPA personnel and the government in connection with this case, this Court finds that the United States' prosecution of defendants, although not provably frivolous or in bad faith, was clearly vexatious."), *aff'd in part, rev'd in part*, 256 F.3d 20 (1st Cir. 2001); *Knott*, 256 F.3d at 31–33.

54. *Knott*, 256 F.3d at 31.

independent Hyde Amendment liability. This is in contrast to the Third Circuit in *United States v. Reyes-Romero*, where the court explicitly limited consideration of agency misconduct to situations in which prosecutors "leverage that misconduct to further a prosecution that has no factual or legal basis or that is brought for the purposes of harassment."[55] While it is possible that the First Circuit might limit Hyde Amendment liability similarly to the Third Circuit in a future case, the First Circuit declined to take that step in *Knott*.

Similarly, in *United States v. Heavrin*, the defendant was indicted for bankruptcy fraud and, after he was acquitted, moved for attorneys' fees under the Hyde Amendment.[56] In interpreting the term "position of the United States," the Sixth Circuit held that "[b]ecause the Hyde Amendment is subject to the procedures and limitations of the EAJA, the term 'position' should be accorded the same meaning under the Hyde Amendment as it is in the EAJA."[57] As a result, the court reasoned that the district court should make just one determination based on the "case as an inclusive whole" in accordance with the Supreme Court's interpretation of "position of the United States" in EAJA.[58] More recently, in *Amezola-Garcia v. Lynch*, the Sixth Circuit affirmed that "position of the United States" has the same meaning in both the Hyde Amendment and EAJA.[59]

Some district courts have also interpreted "position of the United States" in accordance with EAJA's definition and have considered a broad range of governmental conduct in deciding whether to award fees. First, in *United States v. Holland*, the Eastern District of Virginia found the conduct of both the Federal Deposit Insurance Corporation (FDIC) and the prosecution to be "vexatious" under the Hyde Amendment, and assessed fees against the FDIC, DOJ, and U.S. Attorney's Office for the Eastern District of Virginia.[60] Similarly, in *United States v. Gardner*, the Northern District of Oklahoma considered the conduct of IRS agents underlying the defendant's prosecution in determining a fee award under the Hyde Amendment.[61] The court found that "'position of the United States' is a procedure or limitation incorporated into the Hyde Amendment" and stated that "in accordance with the EAJA definition, the term 'position of the United States' includes the activities of the 'agency' involved in this matter and is not limited to

55. 959 F.3d 80, 98 (3d Cir. 2020), *cert. denied*, 141 S. Ct. 2622 (2021).

56. 330 F.3d 723, 727 (6th Cir. 2003).

57. *Id.* at 730.

58. *Id.* (quoting Comm'r, INS v. Jean, 496 U.S. 154, 159 (1990)).

59. 835 F.3d 553, 556 (6th Cir. 2016).

60. 34 F. Supp. 2d 346, 375 (E.D. Va.), *vacated in part on reconsideration*, 48 F. Supp. 2d 571 (E.D. Va. 1999), *aff'd*, 214 F.3d 523 (4th Cir. 2000). The district court ultimately vacated the awards against the FDIC because the defendants' Hyde Amendment petition only requested that the award be paid by the United States Department of Justice and/or the United States Attorney's Office for the Eastern District of Virginia, and thus "the FDIC did not have sufficient notice that attorneys' fees and litigation expenses might be assessed against it." *Holland*, 48 F. Supp. 2d at 581.

61. 23 F. Supp. 2d 1283, 1294–95 (N.D. Okla. 1998).

the litigating position taken by the Department of Justice."[62] It is worth noting, however, that the circuits in which these district courts sit, namely the Fourth and Tenth Circuit, have not yet explicitly weighed in on the interpretation question.

III. "POSITION OF THE UNITED STATES" IN THE HYDE AMENDMENT SHOULD BE INTERPRETED IN ACCORDANCE WITH EAJA'S DEFINITION

"Position of the United States" in the Hyde Amendment should be interpreted in accordance with the definition provided in EAJA. When Congress uses the same language in two statutes with similar purposes, "it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."[63] Further, when interpreting an ambiguous phrase in a statute, the court must be guided by the statute's surrounding provisions.[64] Finally, when statutes are *in pari materia*—on the same subject—they "are to be taken together, as if they were one law."[65] Section A focuses on the text and legislative evidence of the Hyde Amendment and argues that, because Congress borrowed "position of the United States" verbatim from EAJA, Congress intended EAJA's definition to carry over to the Hyde Amendment context. Section B focuses on the purpose of the Hyde Amendment and argues that the EAJA and the Hyde Amendment serve similar purposes and therefore should be construed in alignment. Section C focuses on the structure of the Hyde Amendment and argues that other provisions in the Amendment, especially the explicit command that fee awards "shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under [EAJA]," confirm that Congress intended "position of the United States" to be interpreted in accordance with EAJA's definition. Section D focuses on the *in pari materia* canon of construction and argues that EAJA and the Hyde Amendment are *in pari materia* because they are both fee-shifting statutes, and therefore should be interpreted cohesively. Taken together, these tools of statutory interpretation compel the conclusion that "position of the United States" should mean the same thing in the Hyde Amendment as it does in EAJA—namely, both the government's litigation position and related underlying agency conduct.

A. "Position of the United States" Was Borrowed Verbatim from EAJA

By using the exact phrase "position of the United States" in the Hyde Amendment, Congress intended that text to carry with it its definition from EAJA. "There is a presumption that Congress uses the same term consistently in different statutes,"[66] especially when that term is "obviously transplanted from another legal

62. *Id.* at 1294.

63. Smith v. City of Jackson, 544 U.S. 228, 233 (2005) (plurality opinion).

64. *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 99 (1992).

65. United States v. Freeman, 44 U.S. 556, 564 (1845).

66. Water Quality Ins. Syndicate v. United States, 225 F. Supp. 3d 41, 75 (D.D.C. 2016) (quoting Nat'l Treasury Emp.'s Union v. Chertoff, 452 F.3d 839, 857–58 (D.C. Cir. 2006)); *see also* Hawaiian Airlines, Inc. v.

source."[67] Twelve years before the Hyde Amendment was passed, Congress amended EAJA to clarify the proper definition of "position of the United States" as including both "the position taken by the United States in the civil action" and "the action or failure to act by the agency upon which the civil action is based."[68] Congress's definition makes intuitive sense given the text: EAJA says "position of the United States," not "litigating position of the United States." Congress chose to add this explicit definition specifically to address confusion among the circuits about whether courts conducting a fee award analysis under EAJA could consider conduct outside the government's litigating position—the same interpretive issue that has now arisen under the Hyde Amendment.[69] Therefore, when Congress passed the Hyde Amendment, "position of the United States" had a settled meaning under EAJA; it covered both the government's litigation position and its actions underlying the litigation.

Courts uniformly agree that Representative Hyde patterned the Hyde Amendment after EAJA.[70] And "position of the United States" in particular was borrowed verbatim from that statute,[71] raising the presumption that Congress intended "position of the United States" to have the same meaning in both statutes. This conclusion is bolstered by the repeated references to EAJA and its history by members of Congress during the passage of the Hyde Amendment. The bill's sponsor, Representative Hyde, repeatedly referenced EAJA and its amendments during the House floor debate.[72] He pointed to "17 years of successful interpretation and

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Norris, 512 U.S. 246, 254 (1994) (interpreting an undefined word in an employment contract in a way that was "common in the labor law context").

67. Stokeling v. United States, 139 S. Ct. 544, 551 (2019) (quoting Hall v. Hall, 138 S Ct. 1118, 1128 (2018)).

68. Act of Aug. 5, 1985, Pub. L. No. 99-80, § 2(c)(2)(D), 99 Stat. 183, 185 (1985) (codified as amended at 28 U.S.C. § 2412(d)(2)(D)).

69. *See* H.R. REP. NO. 99-120(I), at 8–9 (1985), *as reprinted in* 1985 U.S.C.C.A.N. 132, 137 (explaining that when EAJA was originally passed "it was understood that 'position of the United States' was not limited to the government's litigation position but included the action—including agency action—which led to the litigation," but because the federal courts were split on its proper meaning, the amendment "clarifies that the broader meaning applies"); *see also* Spencer v. N.L.R.B., 712 F.2d 539, 546–47 (D.C. Cir. 1983) (describing the circuit split in interpreting "position of the United States" in EAJA prior to congressional amendment).

70. *See, e.g.*, United States v. Gilbert, 198 F.3d 1293, 1300 (11th Cir. 1999) ("Hyde patterned his amendment after the Equal Access to Justice Act . . . ."); United States v. Knott, 256 F.3d 20, 28 (1st Cir. 2001) ("The Hyde Amendment was patterned after the Equal Access to Justice Act . . . ."); United States v. Reyes-Romero, 959 F.3d 80, 92 (3d Cir. 2020) (describing the Hyde Amendment as "generally modeled" off of EAJA); United States v. Shaygan, 676 F.3d 1237, 1244 (11th Cir. 2012) (describing the original version of the Hyde Amendment as "patterned after the Equal Access to Justice Act").

71. *See, e.g.*, United States v. Bove, 888 F.3d 606, 608 n.10 (2d Cir. 2018) ("The Hyde Amendment apparently borrowed the phrase 'position of the United States' from the Equal Access to Justice Act . . . ."); *Shaygan*, 676 F.3d at 1251 (Martin, J., dissenting) ("Congress adopted the term 'the position of the United States' from the Equal Access to Justice Act.").

72. Statements of sponsors are accorded significant weight in statutory interpretation. *See* FEA v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976) (noting that statements of sponsors "deserv[e] to be accorded substantial weight in interpreting the statute"); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I*, 65 STAN. L. REV. 901, 978 (2013) (noting that many of the respondents in the authors' study, all of whom were congressional

reinforcement"[73] of EAJA in arguing for its adaption to the criminal context via the Hyde Amendment, which suggests an awareness of EAJA's history and scope.[74] He also consistently used the word "government"[75] rather than "prosecution," "prosecutors," or "Justice Department" in describing whose conduct would be considered in determining fee awards, which is consistent with Congress's broad definition of "position of the United States" in EAJA. Even the representatives who opposed the Amendment seemed to understand its potential to cover non-prosecutorial conduct. For example, Representative Skaggs referred to "persons that may be unjustly prosecuted by the Justice Department and the *law enforcement agencies* of the United States,"[76] suggesting that something more than the prosecution's litigating position could be grounds for a fee award. Representative Rivers made a similar suggestion by referring to disclosure of "law enforcement techniques" during the hearings.[77] Legislative evidence that indicates a "shared consensus" is generally viewed as reliable.[78] These statements by both Democratic and Republican congressmembers indicate that Congress assumed that EAJA's broad definition of "position of the United States" would carry over into the Hyde Amendment context.[79]

Further, the Conference Report on the Hyde Amendment, which accompanied the version of the Amendment ultimately signed into law, indicates that Congress intended a broad range of governmental conduct to be considered in awarding fees. Conference Reports are generally considered "'more authoritative' than comments from the floor."[80] The Report states: "The conferees understand that a grand jury finding of probable cause to support an indictment does not preclude a judge from

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counsels responsible for drafting legislation, were of the opinion that floor statements by a bill's sponsor "should be viewed as more reliable than other types of floor statements").

73. 143 CONG. REC. H7791 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde).

74. Although the Hyde Amendment's burden of proof and substantive standard were both amended significantly in Conference Committee, the phrase "position of the United States" remained unchanged throughout the legislative process. Therefore, the statements of individual representatives regarding the initial formulation of the Amendment still have probative value in parsing Congress' intended meaning of "position of the United States."

75. *See, e.g.*, 143 CONG. REC. H7792 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde) ("What is the remedy, if not this, for somebody who has been unjustly, maliciously, improperly, abusively tried by the Government . . . . [I]f my colleagues are against my amendment, they are saying let the Government do whatever it wants . . . .").

76. *Id.* at H7791 (statement of Rep. Skaggs) (emphasis added).

77. *Id.* at H7793 (statement of Rep. Rivers) ("[T]here may be disclosure or required disclosure and compromise of confidential sources or law enforcement techniques . . . .").

78. While floor statements in opposition of a bill are generally considered unreliable, legislative evidence that indicates a "*shared consensus*" is generally viewed as reliable. Gluck & Bressman, *supra* note 72, at 978.

79. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 696–97 (1979) (noting that while "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law," that presumption is "especially justified" when Members of Congress make "repeated references" to the relevant law).

80. Garcia v. United States, 469 U.S. 70, 76 (1984) (quoting Zuber v. Allen, 396 U.S. 168, 187 (1969)); *see also* Gluck & Bressman, *supra* note 72, at 977 (finding that among respondents, "[b]y far, the types of legislative history viewed as most reliable were committee reports and conference reports in support of the statute").

finding that the government's position was vexatious, frivolous or in bad faith."[81] This statement, albeit brief, suggests that Congress intended district courts, when awarding fees under the Hyde Amendment, to holistically assess governmental conduct, including but not limited to the prosecution's successful procurement of an indictment. Congress was striking a balance: It raised the substantive standard for fee awards to "frivolous, vexatious or in bad faith" to alleviate DOJ's concerns of chilling prosecutions but cautioned the government that it would not be able to rely on a probable cause determination alone to justify its conduct.

Interpreting "position of the United States" to have the same meaning in both statutes is also in accord with Supreme Court and lower court precedent. In *Commissioner, INS v. Jean*, the Court, in interpreting "position of the United States" in EAJA, concluded that the use of the word "position" in the singular form "buttresses the conclusion that only one threshold determination for the entire civil action is to be made," which may encompass "both the agency's prelitigation conduct and the Department of Justice's subsequent litigation positions."[82] The Court reasoned that because "any given civil action can have numerous phases," fee-shifting statutes like EAJA favor "treating a case as an inclusive whole, rather than as atomized line-items."[83] That reasoning applies with equal force to the Hyde Amendment's use of the same phrase, especially given that criminal cases often also have numerous phases. Further, although the Supreme Court has not had the occasion to interpret the Hyde Amendment and EAJA in the same case, the lower courts have used Hyde Amendment cases to assist their interpretations of EAJA,[84] further counseling in favor of interpreting "position of the United States" to have the same meaning in both statutes.

The other differences in text between EAJA and the Hyde Amendment do not compel a different conclusion—they simply indicate that Congress was attuned to concerns raised by opponents of the Amendment regarding the differences between the criminal and civil fee-shifting contexts. The Conference Committee altered the Hyde Amendment's text from EAJA in important ways to provide special safeguards for the government in criminal prosecutions, including for review of evidence ex parte and in camera, shifting the burden of proof to the defendant, and raising the substantive legal standard required to authorize fee shifting.[85] These changes specifically responded to objections raised in the House.[86]

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81. H. R. REP. NO. 105-405, at 194 (1997).

82. 496 U.S. 154, 159 (1990).

83. *Id.* at 161–62.

84. *See* Murkeldove v. Astrue, 635 F.3d 784, 790–91 (5th Cir. 2011) (using *United States v. Claro*, 579 F.3d 452 (5th Cir. 2009), which interpreted the Hyde Amendment requirement that a party "incur" fees, to interpret the same requirement in EAJA); Amezola-Garcia v. Lynch, 835 F.3d 553, 556 (6th Cir. 2016) (interpreting "position" in EAJA using *United States v. Heavrin*, 330 F.3d 723, 730 (6th Cir. 2003), which interpreted "position" in the Hyde Amendment).

85. H. R. REP. NO. 105-405, at 194 (1997).

86. For example, Representative Skaggs found it problematic that the Hyde Amendment merely repeated the "substantial justification" requirement from EAJA and stated that "were the words 'malicious' and 'abuse' in

However, these textual differences are not "overwhelming" and do not overcome EAJA's and the Hyde Amendment's "parallel text and purposes," which counsel in favor of interpreting the two statutes consistently.[87] Further, "position of the United States" is the only textual phrase in the Hyde Amendment that did not change during the drafting process. Had Congress wanted "position of the United States" to mean something different in the Hyde Amendment than it did in EAJA, it arguably would have used different language.

Congress was not required to explicitly include EAJA's definition "position of the United States" in the text of the Hyde Amendment to convey its intent that the phrases be interpreted consistently.[88] Although "it is generally presumed that Congress acts intentionally and purposely in disparate inclusion or exclusion,"[89] Congress both included verbatim the phrase "position of the United States" from EAJA and excluded EAJA's corresponding definition. The interpretive balance tips in favor of intentional inclusion when one considers the entire text of the Hyde Amendment, which "indicates Congress' intent to have proceedings under the Hyde Amendment treated similarly to those under the EAJA."[90] Congress has already been forced to override the courts that interpreted EAJA too narrowly; it should not have to do so again in the Hyde Amendment context.[91] Although congressional silence is sometimes presented as evidence of congressional acquiescence to the dominant position of the circuit courts, the Supreme Court has

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[the Amendment], and maybe those are criteria that ought to be introduced, it would be a different matter." 143 CONG. REC. H7792 (daily ed. Sept. 24, 1997) (statement of Rep. Skaggs). Congress responded to this concern by changing the standard to "vexatious, frivolous or in bad faith." Similarly, Representative Rivers was concerned about "required disclosure and compromise of confidential sources or law enforcement techniques" or "disclosure of classified information." *Id.* at H7793 (statement of Rep. Rivers). Congress responded to this concern by providing for review of evidence ex parte and in camera.

87. *See* Lawson v. FMR LLC, 571 U.S. 429, 459 (2014) (interpreting two statutes consistently in light of their "parallel text and purposes" despite the fact that Congress had failed to incorporate the definition from one statute into the other and that one statute covered a far wider range of conduct than the other).

88. Although EAJA's definition of "position of the United States" explicitly refers to civil actions, Congress arguably intended this definition to be imported into the Hyde Amendment *mutatis mutandis*—that is, with the necessary changes made—to adapt the text of EAJA's definition to the criminal context.

89. Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)).

90. United States v. Truesdale, 211 F.3d 898, 905 (5th Cir. 2000); *see also infra* Part III.C, discussing other provisions of the Hyde Amendment.

91. Although empirical analysis of congressional overrides has suggested that Congress actually is more likely to override Supreme Court statutory decisions where the Court based its interpretation "in significant part on whole act or whole code canons," these overrides occur where the Court finds "plain meaning" due to whole act or whole code comparisons and fails to appropriately consider legislative history and congressional purpose. Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1469 (2014). Here, a whole code interpretation is uniquely appropriate because it is supported by the legislative evidence and congressional purpose and because Congress modeled the Hyde Amendment on EAJA. *See* Anita S. Krishnakumar, *Cracking the Whole Code Rule*, 96 N.Y.U. L. REV. 76, 146 (2021) ("[J]udicial efforts to interpret a later-enacted statute consistently with an earlier statute that served as its model . . . are likely both to further congressional intent and to honor, rather than ignore, legislative process realities.").

repeatedly cautioned that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law,"[92] especially when there is some division among the lower courts, as is present here.[93] Therefore, the text of the Amendment and legislative evidence confirm that it is not only "appropriate but also realistic" to presume that Congress was "thoroughly familiar" with EAJA's definition of "position of the United States" and that it expected the Hyde Amendment "to be interpreted in conformity" with it.[94]

B. The Hyde Amendment and EAJA are Remedial Statutes that Serve Similar Purposes

In addition to sharing the text "position of the United States," the Hyde Amendment and EAJA also share similar purposes. When Congress uses the same language in two statutes with similar purposes, "it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."[95] Both EAJA and the Hyde Amendment were passed to avoid Pyrrhic victories where a litigant successfully defends against an unreasonable or abusive government lawsuit but is financially ruined in the process. Congress passed EAJA in 1980 in response to its concern that persons "may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights."[96] As the D.C. Circuit described the statute: "Congress hoped to provide relief to the victims of abusive governmental conduct, to enable them to vindicate their rights without assuming enormous financial burdens."[97] Seventeen years later, Representative Hyde introduced the Hyde Amendment as "tak[ing] the concepts in the Equal Access to Justice Act and appl[ying] them in the criminal context."[98] Although the Hyde Amendment does not include an official congressional statement of purpose, Representative Hyde made it clear that he intended his Amendment to solve the same problem that EAJA would if it applied to criminal defendants.[99]

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92. United States v. Wells, 519 U.S. 482, 496 (1997) (alteration in original) (internal quotation marks omitted); *see also* Brown v. Gardner, 513 U.S. 115, 121 (1994) ("[C]ongressional silence lacks persuasive significance." (internal quotation marks omitted)).

93. *Wells*, 519 U.S. at 496; *see also supra* Part II, discussing the circuit split in the interpretation of "position of the United States."

94. Cannon v. Univ. of Chicago, 441 U.S. 677, 698–99 (1979) (holding that Congress patterned Title IX after Title VI of the Civil Rights Act of 1964 and intended for them to be interpreted and enforced in the same manner).

95. Smith v. City of Jackson, 544 U.S. 228, 233 (2005).

96. Pub. L. No. 96-481, § 202, 94 Stat. 2321, 2325 (1980) (codified as amended at 5 U.S.C. § 504 note) (setting forth congressional findings and articulating Congress's purpose in enacting the legislation); Sullivan v. Hudson, 490 U.S. 877, 883 (1989) (reiterating the same).

97. Spencer v. N.L.R.B., 712 F.2d 539, 550 (D.C. Cir. 1983).

98. United States v. Troisi, 13 F. Supp. 2d 595, 596 (N.D. W. Va. 1998) (quoting *Comments, Questions, and Answers on the Hyde Amendment*, 105th Cong., 2d Sess. (1997) (statement of Rep. Hyde)).

99. *See* Corley v. United States, 556 U.S. 303, 318 (2009) ("[A] sponsor's statement to the full Senate carries considerable weight . . . .").

Representative Hyde described the problem that the Hyde Amendment was designed to combat as follows:

> If you were to take a piece of paper and sit down and say, what is the most unjust thing in all of the law, you would have to say when you are pursued by somebody, and you are ultimately vindicated, and you have to swallow what can be bankrupting costs. You mortgage your house, you mortgage your future, and you may have won the case, but you have really lost the war because you are bankrupt. So this simply says to Uncle Sam, look, if you are going to sue somebody, and civilly we have had that for 17 years, under my amendment criminally, and you cannot prove substantial justification after the case is over, and the verdict is not guilty, then the prosecution pays something toward the attorney's fees of the victim. That is justice. It may be rough justice, but it is substantial justice.[100]

Although the text of the Hyde Amendment was revised in Conference Committee after Representative Hyde made these statements, the resulting statute was still intended to serve a similar purpose to EAJA by compensating prevailing criminal defendants when the government's conduct met the relevant statutory standard.

Additionally, the fact that EAJA and the Hyde Amendment operate in the civil and criminal contexts, respectively, does not indicate that Congress intended the statutes to serve different purposes. "The best evidence of [a statute's] purpose is the statutory text adopted by both Houses of Congress and submitted to the President."[101] By modeling the text and structure of the Hyde Amendment on EAJA, Congress indicated its belief that the statutes serve similar purposes. Moreover, the use of the exact phrase "position of the United States" is strong evidence that the Hyde Amendment was meant to serve a similar purpose to EAJA, at least with respect to what range of conduct should be considered in deciding fee awards. Given the heightened risks that criminal trials pose to defendants and the structural protections that Congress built into the Hyde Amendment for the government's benefit, there is no reason to think that Congress did not expect EAJA's compensatory rationale to also apply to the Hyde Amendment. Congress's purpose in passing the Hyde Amendment is best served by considering government conduct holistically to determine whether a fee award is appropriate, just as Congress's purpose in passing EAJA was similarly served by "treating a case as an inclusive whole."[102]

The context in which the Hyde Amendment was passed further confirms that Congress intended the Amendment to serve a similar purpose to EAJA, especially regarding EAJA's broad definition of "position of the United States." The Hyde Amendment was proposed and passed during a period of great congressional

100. 143 CONG. REC. H7791 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde).
101. W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98 (1991).
102. Comm'r, INS v. Jean, 496 U.S. 154, 161–62 (1990).

distrust of federal law enforcement agencies, not just of prosecutors.[103] A mere two days before the House's vote on the Hyde Amendment, the Senate Finance Committee opened hearings into questionable investigative conduct by the IRS, a federal agency that later interpreted the Hyde Amendment as imposing attorney fee liability on the agency based on the behavior of agency personnel.[104] This context both explains why the Hyde Amendment received broad bipartisan support and indicates that Congress intended the Hyde Amendment to reach not only the actions of prosecutors but also relevant underlying agency misconduct in criminal cases—exactly the reach of EAJA in the civil context.

In conclusion, both the Hyde Amendment and EAJA are broad remedial statutes that should be interpreted in accordance with their purposes.[105] Congress, by amending EAJA to include the definition of "position of the United States," responded to a then-existing circuit split by resolving the split against the government and in favor of a broader remedy.[106] Therefore, since Congress borrowed "position of the United States" from EAJA to be used in the Hyde Amendment and since the Hyde Amendment serves a similar remedial purpose to EAJA, Congress intended "position of the United States" to mean the same thing in both statutes.

C. The Surrounding Provisions of the Hyde Amendment Support Incorporating EAJA's Definition

The rest of the Hyde Amendment's text supports the conclusion that "position of the United States" should be interpreted using EAJA's definition of the same phrase. "A provision that may seem ambiguous in isolation is often clarified by the

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103. Lawrence Judson Welle, *Power, Policy, and the Hyde Amendment: Ensuring Sound Judicial Interpretation of the Criminal Attorneys' Fees Law*, 41 WM. & MARY L. REV. 333, 340–41 (1999) (describing how "[t]he tragedies of Waco and Ruby Ridge, the accusations of FBI misconduct in the 'File-gate' imbroglio, and the allegations of impropriety at the FBI crime lab coalesced to create a perception that every federal agency was out of control").

104. *Practices and Procedures of the Internal Revenue Service: Hearings Before the S. Comm. on Fin.*, 105th Cong. 2, 288 (1997) (statements of Sen. William V. Roth, Chairman, S. Comm. on Fin., and Sen. Orrin G. Hatch, Member, S. Comm. on Fin.); Internal Revenue Serv., Crim. Tax Div., Mem. No. 200024022, Attorney's Fees Awards Under the Hyde Amendment and the Equal Access to Justice Act (EAJA) (Nov. 12, 1999), https://www.irs.gov/pub/irs-wd/0024022.pdf (advising that the IRS "may be wholly or partially liable for payment of such awards based on the conduct of its personnel during the underlying criminal investigation and/or referral of a case for prosecution").

105. *See*, *e.g.*, Cnty. of Washington v. Gunther, 452 U.S. 161, 178 (1981) (taking a "broad approach" in defining "equal employment opportunity" to avoid an interpretation that would "deprive victims of discrimination of a remedy"). Although the Hyde Amendment is also a waiver of the United States' sovereign immunity, the principle that waivers of sovereign immunity should be strictly construed in favor of the sovereign is inapposite here where other "traditional tools of statutory consideration" compel a different conclusion. Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 589 (2007). Given that traditional tools of statutory construction demonstrate that Congress intended "position of the United States" to mean the same thing in both the Hyde Amendment and EAJA, there is "no need . . . to resort to the sovereign immunity canon because there is no ambiguity left . . . to construe." *Id.* at 590.

106. H.R. REP. NO. 99-120(I), at 7 (1985), *as reprinted in* 1985 U.S.C.C.A.N. 132, 135.

remainder of the statutory scheme . . . ."[107] This is the case with "position of the United States"—the remainder of the Hyde Amendment's text indicates that "position of the United States" is properly interpreted to cover government conduct underlying the prosecution.

First, the Hyde Amendment states that fee awards "shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under [EAJA]."[108] Congress did not specify which procedures and limitations qualify, and the courts of appeals disagree about whether the definition of "position of the United States" from EAJA is a "procedure or limitation" that must be incorporated into the Hyde Amendment.[109] While the definition of "position of the United States" in EAJA is not a procedure, there is a strong argument that it is a limitation —as the Supreme Court has observed, "[a] definition is [a] limitation."[110] Additionally, many circuits have incorporated other definitions from EAJA into the Hyde Amendment context as limitations, including the definition of "fees and other expenses"[111] and the definition of "party."[112]

However, even if the definition of "position of the United States" is not a procedure or limitation, Congress's choice to mandate that the procedures and limitations from EAJA be incorporated into the Hyde Amendment suggests that Congress intended the complete Amendment to be interpreted in light of and in accordance with EAJA. As the Fifth Circuit explained while interpreting a different issue under the Hyde Amendment, "Congress' direction that the procedures of the EAJA should apply to proceedings under the Hyde Amendment evinces its intent that, absent statutory direction to treat the proceedings differently, . . . Hyde Amendment proceedings and EAJA proceedings should be conducted in a like manner."[113] Congress wanted proceedings under the Hyde Amendment to be

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107. United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988).

108. 18 U.S.C. § 3006A note (Award of Attorneys' Fees and Litigation Expenses to Defense).

109. *Compare* United States v. Reyes-Romero, 959 F.3d 80, 97 (3d Cir. 2020) (holding that "EAJA's substantive definition of 'position of the United States' is neither a 'procedure[]' nor a 'limitation[],' so it cannot be read into the Hyde Amendment" (alterations in original)), *cert. denied*, 141 S. Ct. 2622 (2021), *with* United States v. Heavrin, 330 F.3d 723, 730 (6th Cir. 2003) (holding that "[b]ecause the Hyde Amendment is subject to the procedures and limitations of the EAJA, the term 'position' should be accorded the same meaning under the Hyde Amendment as it is in the EAJA").

110. Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co. (Station WIBO), 289 U.S. 266, 276 (1933).

111. *See, e.g.*, United States v. Claro, 579 F.3d 452, 461 (5th Cir. 2009) (incorporating EAJA's requirement that "fees and other expenses" be "incurred" into the Hyde Amendment); United States v. Sherburne, 249 F.3d 1121, 1129 (9th Cir. 2001) (holding that the cap on attorney's fees in EAJA also applies to recovery under the Hyde Amendment).

112. *See, e.g.*, United States v. Knott, 256 F.3d 20, 26–27 (1st Cir. 2001) (holding that the net-worth limitation under EAJA, 28 U.S.C. § 2412(d)(2)(B), also applies to recovery under Hyde Amendment); United States v. Adkinson, 247 F.3d 1289, 1291 n.2 (11th Cir. 2001) (same).

113. United States v. Truesdale, 211 F.3d 898, 905 n.5 (5th Cir. 2000). In *Truesdale*, the Fifth Circuit was deciding whether to treat an appeal of a Hyde Amendment motion for fees under Federal Rule of Appellate Procedure 4(a), which dictates the time limit for filing a civil appeal, or 4(b), which dictates the time limit for filing a criminal appeal. *See id.* at 902–05. The court ultimately held that Rule 4(a), the civil standard, should govern, in part based on its comparison of the Hyde Amendment and EAJA. *Id.* at 905.

"treated similarly to those under the EAJA,"[114] which involves considering the same type of conduct in determining fee awards under both statutes. Additionally, Congress explicitly stated that EAJA's burden of proof should not be incorporated into the Hyde Amendment.[115] This suggests that Congress was aware that certain EAJA provisions were not appropriate in the Hyde Amendment context and said so explicitly; the definition of "position of the United States" was not similarly excluded.

Second, the Hyde Amendment states that "fees and other expenses awarded under this provision to a party shall be paid by the agency over which the party prevails."[116] This language is also modeled after EAJA[117] and is further evidence of Congress's intent that "position of the United States" cover more than prosecutorial misconduct. If Congress intended to limit fee shifting under the Hyde Amendment to instances of prosecutorial misconduct during litigation, it could have specified that fees awarded under the statute will be paid by the Department of Justice or by the "litigating agency." Instead, by using the broader term "agency," Congress left open the possibility that a prevailing party could recover attorneys' fees from a government agency whose conduct prior to or outside of the litigation served as the basis for a fee award. In fact, some district courts have assessed fees against government agencies other than the DOJ for their misconduct prior to the criminal litigation.[118] Thus, it is implausible that Congress wanted both to permit the assessment of attorneys' fees against any government agency and to limit the awarding of fees to instances of prosecutorial misconduct. Overall, the greater statutory context of the Hyde Amendment supports the conclusion that "position of the United States" should be interpreted broadly, as defined in EAJA.

D. EAJA and the Hyde Amendment Are In Pari Materia

The textual, legislative evidence-based, purposive, and contextual arguments above are bolstered by the familiar canon that statutes *in pari materia*, as EAJA and the Hyde Amendment are, should be interpreted cohesively. When statutes are *in pari materia*—on the same subject—it is presumed that if "the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the latter act."[119] Both the Hyde Amendment and EAJA are fee-shifting statutes, and fee-shifting statutes

114. *Id.* at 905.

115. 18 U.S.C. § 3006A note (Awarding of Attorneys' Fees and Litigation Expenses to Defense).

116. *Id.*

117. *See* 28 U.S.C. § 2412(d)(4).

118. *See, e.g.*, United States v. Holland, 34 F. Supp. 2d 346, 375 (E.D. Va. 1999) (granting an award against the DOJ and the FDIC for pre-trial misconduct). The district court ultimately vacated the award against the FDIC because the defendants' amended petition only requested that the award be paid by the DOJ or the U.S. Attorney's Office for the Eastern District of Virginia. *See* United States v. Holland, 48 F. Supp. 2d 571, 581 (E.D. Va. 1999).

119. Reiche v. Smythe, 80 U.S. 162, 165 (1871); *cf.* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 62 (2006) (finding the *in pari materia* doctrine inapplicable where statutes had "linguistic differences").

have been interpreted *in pari materia* even when they cover vastly different areas of the law. Famously, in *West Virginia University Hospitals, Inc. v. Casey*, the court looked at "[a]t least 34 statutes in 10 different titles of the United States Code," including statutes on environmental law, consumer protection law, maritime employment law, health law, and civil rights law, to interpret the phrase "a reasonable attorney's fee" in 42 U.S.C. § 1988.[120] Although the Court's approach in that case has been criticized,[121] no such wide-ranging inquiry is required here to discover the statutory definition of "position of the United States."

The phrase "position of the United States" is only used in four fee-shifting statutes in the entire United States Code: EAJA, the Hyde Amendment, 26 U.S.C § 7430 (which covers fee shifting under the Internal Revenue Code), and 28 U.S.C § 1498 (which covers federal government patent use). Section 7430 awards reasonable litigation costs (including attorneys' fees) and reasonable administrative costs to litigants in any "administrative or court proceeding . . . brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty" under the Internal Revenue Code, except if the "United States establishes that the position of the United States in the proceeding was substantially justified."[122] Section 1498 permits a patent holder whose invention is used or manufactured by the United States without permission to bring an action in the U.S. Court of Federal Claims to recover reasonable compensation from the government.[123] Barring statutory exceptions, reasonable compensation does not include attorneys' fees "if the court finds that the position of the United States was substantially justified."[124]

Of these four statutes, "position of the United States" is only defined in EAJA and § 7430, and both statutes define the phrase similarly. As discussed already, "position of the United States" in EAJA is defined as "the position taken by the United States in the civil action" and "the action or failure to act by the agency upon which the civil action is based."[125] Similarly, in 1996, Congress amended § 7430 to define "position of the United States" as both "the position taken by the United States in a judicial proceeding" and "the position taken in an administrative proceeding."[126] Both of these definitions were on the books before the passage of the Hyde Amendment, and courts "assume that Congress is aware of existing law

120. 499 U.S. 83, 89–90 & n.4 (1991); *see also* Anuj C. Desai, *The Dilemma of Interstatutory Interpretation*, 77 WASH. & LEE L. REV. 177, 232–34 (2020) (discussing *Casey*'s use of the *in pari materia* canon).

121. *See* T. Alexander Aleinikoff & Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning,* West Virginia University Hosps. Inc. v. Casey*, and Due Process of Statutory Interpretation*, 45 VAND. L. REV. 687, 689 (1992).

122. 26 U.S.C.§ 7430(a)(1)–(2), (c)(4)(B)(i).

123. 28 U.S.C § 1498(a).

124. *Id.*

125. 28 U.S.C. § 2412(d)(2)(D).

126. 26 U.S.C. § 7430(c)(7).

when it passes legislation."[127] In contrast, § 1498 does not define "position of the United States."[128]

The Hyde Amendment should be harmonized with EAJA and § 7430 by giving "position of the United States" consistent meaning, especially since the Hyde Amendment explicitly borrowed the phrase from EAJA. In two out of the three times that Congress used "position of the United States" in the fee-shifting context before the passage of the Hyde Amendment, it defined the phrase broadly to cover government conduct both in the relevant litigation and in any related agency proceeding.[129] This statutory usage strongly suggests that "position of the United States" is a term of art that has a specific meaning within the context of fee-shifting statutes and that it had that meaning at the time the Hyde Amendment was passed. Given that Congress affirmatively intended that EAJA and the Hyde Amendment be interpreted consistently,[130] the *in pari materia* canon further reinforces the fact that "position of the United States" in the Hyde Amendment should be harmonized with the above-mentioned fee shifting statutes and should cover both the government's litigating position and any relevant underlying government action.

CONCLUSION

As one scholar has recently argued, comparisons between statutes "are most defensible, and most powerful, when there is evidence that Congress intended for the specific statutes at issue to be construed similarly."[131] Such is the case here. Congress, through the text of the Hyde Amendment itself and through legislative evidence, indicated its desire that "position of the United States" in the Hyde Amendment be interpreted in accordance with the definition of the same phrase in EAJA. By using the verbatim phrase "position of the United States" and modeling the Hyde Amendment to suggest a purpose and procedure parallel to those of EAJA, Congress could not have foreseen the narrow interpretation given to the statute by some federal appellate courts. The Hyde Amendment requires courts to consider both the actions of prosecutors and any governmental conduct underlying the criminal litigation to determine whether the "position of the United States" was "vexatious, frivolous, or in bad faith." However, circuit courts have ignored this congressional command, often with costly consequences for defendants. Mr.

127. Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990).

128. Although the Court of Federal Claims recently interpreted "position of the United States" in § 1498(a) to only cover the "litigation positions taken by the United States in the civil action in which the attorneys' fees were incurred," this interpretation is not binding in the Hyde Amendment context and is distinguishable. Hitkansut LLC v. United States, 958 F.3d 1162, 1168 (Fed. Cir. 2020). The Federal Circuit relied on the absence of any legislative history to the contrary to determine that Congress did not intend EAJA's definition of "position of the United States" to be incorporated into § 1498. *Id*. In contrast, the Hyde Amendment was indisputably modeled on EAJA, and there is both strong legislative and textual evidence indicating that Congress intended the two statutes to be harmonized.

129. 28 U.S.C. § 2412(d)(2)(D); 26 U.S.C. § 7430(c)(7).

130. *See supra* Part III.A.

131. Krishnakumar, *supra* note 91, at 145.

Reyes-Romero petitioned the Supreme Court for certiorari to answer the question of whether "position of the United States" should be given the same meaning in the Hyde Amendment as it has in EAJA, [132] but the Court denied the petition in May 2021.[133] Since the high Court has declined to resolve the circuit split, lower courts should fulfill their duty to give effect to congressional intent by interpreting EAJA and the Hyde Amendment consistently, considering each criminal case "as an inclusive whole" when deciding whether to award fees under the Hyde Amendment.[134] Otherwise, the Hyde Amendment's power to combat injustices like the one Mr. Reyes-Romero experienced will continue to depend on where the government hales a defendant into court.

132. *See* Petition for Writ of Certiorari, Reyes-Romero v. United States, 141 S. Ct. 2622 (2021) (No. 19-1923), 2020 WL 6945921.

133. *Reyes-Romero*, 141 S Ct. 2622.

134. Comm'r, INS v. Jean, 496 U.S. 154, 162 (1990).