

**NLWJC - Kagan**

**DPC - Box 011 - Folder 015**

**Crime - Hyde Legal Fees Amendment**

Crime - Hyde legal fees amendment

THE WHITE HOUSE  
WASHINGTON

10-22-97

RAHM/ELENA/BRUCE:

ATTACHED PLEASE FIND SOME INFO  
ON ONE HYDE AMENDMENT TO THE  
CJS APPROP. AS YOU WILL SEE FROM  
THE ATTACHED TALKING PTS.,

THIS "SOFT ON CRIME" PROVISION  
WILL SHIFT RESOURCES FROM  
PROSECUTORS (+, THIS, DRUG ~~DEALS~~ +  
GANG CASES) TO PAY FOR  
CERTAIN CRIMINAL DEFENDANTS  
LITIGATION COSTS. IN FACT, DOJ  
SAYS THAT MANUEL NORIEGA  
COULD HAVE BENEFITED FROM  
THE HYDE AMENDMENT. &

THINK WE SHOULD LET STEW (R'S)  
HAND ON THIS PROVISION TO GAIN  
SOME LEVERAGE IN THE CJS  
BILL! THEY'VE HURT US W/MUCH LESS...

JOSE

## HYDE AMENDMENT FACT SHEET

- Congressman Henry Hyde authored and the House passed an amendment to the House version of the Commerce, Justice, State and the Judiciary Appropriations bill that would require the United States, in a criminal case, to pay "to a prevailing party . . . 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." The Attorney General would recommend that the President veto this appropriations bill if the amendment is included when the bill is sent to the President.
- The Hyde amendment threatens to undermine the public's interest in effective law enforcement. It even leads to the disturbing prospect of courts awarding taxpayers' funds to convicted criminals and allowing criminals pursuing these funds to tie up law enforcement and judicial resources.
- Under the Hyde amendment, criminals who have been convicted of some charges in a case would be allowed to pursue fees and costs for other charges in which the government did not "prevail." What does this really mean? It means that, if the Hyde amendment had been in effect:
  - Manuel Noriega, who was acquitted on two counts in the same case in which he was convicted on charges of conspiracy to import and distribute cocaine and cocaine possession, could have sought taxpayer funds to reimburse him on the two counts.
- Furthermore, for a variety of reasons, some cases which are appropriately brought by prosecutors may not result in convictions on any charge. Some examples for why this sometimes occurs:
  - In a criminal case, the standard of proof for a conviction is that the defendant be found guilty "beyond a reasonable doubt." A determination by a jury that this high standard of proof has not been met, and thus an acquittal is appropriate, does not lead to the conclusion that a prosecution was improperly brought.
  - In bringing the case, the government may have relied upon evidence which was later suppressed under the exclusionary rule.
  - The trial may end with charges being dismissed because of a hung jury. In some such cases, all but one juror favor convicting the defendant.
- For example, if the Hyde amendment had been in effect, John Gotti could have pursued a claim for fees and costs for his

acquittal on all counts in the first trial in which the government charged him with racketeering and murder. In a subsequent trial on similar charges, he was found guilty and is now serving life without possibility of parole. If in a ten-month trial with three attorneys each working only 40 hours per week, someone in a position such as Gotti could have collected over \$600,000. Should a criminal such as Gotti be given the opportunity to be paid huge sums by the taxpayers?

- In another example, would we have wanted John Hinckley, who was found not guilty by reason of insanity, to have had the opportunity to pursue a claim for taxpayers to pay for defending his attempt to assassinate President Reagan?
- This amendment would have a chilling effect on the exercise of prosecutorial discretion, particularly by injecting financial considerations into the decisions of whether to proceed with tough-to-win, but critical cases such as rape cases which hinge on the word of the victim, child sex abuse cases which hinge on the testimony of inarticulate child victims, or major drug cases which hinge on the testimony of unsavory lower-level drug distributors.
- Because of unique considerations related to criminal investigations, charging procedures and trials, applying the standard of "substantial justification" to criminal cases would be fraught with difficulty. This standard cannot be translated properly from the civil to criminal context.
- Whether or not the determination of "substantial justification" under the Hyde amendment would be based solely on the trial record, this amendment presents serious problems in the context of criminal cases in which not all reasons for pursuing federal criminal charges are evident on the record.
  - If the court does not allow any evidence outside the record, the government will not be able to offer a complete defense against the claim. For instance, a key witness may have disappeared, died or refused to testify at trial. Information from a confidential informant that led to an indictment may not be able to be used at trial. Certain evidence developed and relied upon in good faith by the government may have been suppressed at trial under the exclusionary rule.
  - Even if the court does allow evidence outside the trial record, prosecutors will not be in a position to present all relevant information. Under Rule 6(e), the government would not be able to reveal grand jury information. Presenting a complete defense may require disclosure and compromise of confidential sources and

law enforcement techniques, particularly in organized crime or conspiracy cases. Or it might require compelling testimony from a child victim who refused to testify at a child abuse or child pornography trial, but on whose testimony the prosecutor and grand jury relied in bringing an indictment. In espionage and national security cases, a litigant may pursue a claim against the government believing the government would be unwilling to make the disclosure of classified information necessary to defend against the claim.

- An unacceptable consequence of the Hyde amendment is that the time prosecutors spend defending against monetary claims of criminals is time not spent prosecuting drug dealers, gang members and child sex molesters. The amendment would strain prosecutorial resources by providing a financial incentive for criminal defense attorneys to generate additional litigation in cases in which prosecutors in good faith have brought sound charges.
- The amendment would also create chaos with budgeting the need for future resources. There is no way to know the financial impact of this amendment, and it would create uncertainty in the budgeting process for federal prosecutors. This is particularly problematic because it would be impossible to anticipate the need for funds relating to claims by defendants whose convictions are reversed on appeal years after trial.

#### Existing Safeguards and Remedies

- There are already plenty of safeguards against unjustified prosecutions and remedies for those who are subjected to such prosecution:
  - The Fifth Amendment requires that every felony case prosecuted federally must proceed by indictment, which means that a group of citizens must have examined the government's evidence and determined that charges should be brought.
  - The courts may dismiss a case for either lack of evidence or various forms of prosecutorial misconduct, including selective or vindictive prosecution. Moreover, the court may hold a prosecutor who has engaged in misconduct in contempt and impose sanctions. Sanctions can include fines, suspension of the prosecutor from practicing before the court, and reprimand of the prosecutor in a published opinion.
  - A prosecutor can be held criminally liable for intentional abuse of prosecutorial authority.

- The Department's Office of Professional Responsibility (OPR), which investigates allegations of misconduct by federal prosecutors, provides a significant deterrence to potentially overzealous prosecutors. To strengthen the Department's internal disciplinary mechanism, the number of attorneys in OPR has increased significantly during this Administration.
- Prosecutorial misconduct complaints are received from a variety of sources, including judges, defense counsel, and subjects of criminal prosecutions. When a federal judge makes a finding of misconduct by a government attorney, OPR conducts an expedited inquiry.
- Prosecutors found to have engaged in misconduct may be disciplined, including reprimand, suspension or dismissal.
- OPR also refers instances of serious misconduct to the Bar where the prosecutor is licensed to practice.



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 16, 1997

The Honorable Henry J. Hyde  
Chairman, Committee on the Judiciary  
U.S. House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

This letter conveys the position of the Department of Justice on an amendment you have proposed to include in H.R. 2267, the Commerce, Justice, State and the Judiciary Appropriations bill for Fiscal Year 1998. The amendment would require the United States, in a criminal case, to pay "to a prevailing party . . . 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." The Justice Department strongly opposes this amendment and, if it is included in H.R. 2267 when it is sent to the President, the Attorney General would recommend that the President veto the bill.

The proposal would have a profound and harmful impact on the federal criminal justice system. The amendment, which provides for reimbursement to come out of the budget of federal prosecutors, would have a serious and unwarranted chilling effect on the Department's exercise of its prosecutorial function. It would unwisely inject financial and budgetary considerations and projections into prosecutive decisions that should be based on the facts and the law. Such considerations could discourage prosecutors from bringing tough but necessary cases that rely on the testimony of witnesses whose credibility would be subject to particularly vigorous attack, such as rape cases that rely on the testimony of children or mentally retarded victims, or drug distribution cases that rely on the testimony of low-level drug operatives. The amendment also would create a monetary incentive for criminal defense attorneys to generate additional litigation in cases in which prosecutors in good faith have brought sound charges, tying up the scarce time and resources that are vital to bringing criminals to justice.

The standard in the amendment appears to be taken verbatim from 28 U.S.C. 2412, which applies in civil cases brought by the United States. It would be unsound and inappropriate, however, to import into the federal criminal arena the concepts and

standards designed by Congress for application in civil litigation. Many of the terms used in this statute applying to civil cases make little sense and have profound implications when applied to criminal cases.

First, it is entirely unclear what "prevailing party" would ultimately be held to mean in a criminal context, and years of litigation over the meaning of this term, potentially with unintended results, would ensue. If a defendant charged with multiple counts of drug distribution or mail fraud, for example, is convicted on some counts and acquitted on others, is he a "prevailing party" on the latter, entitled to have a percentage of his legal expenses recompensed? What if certain counts are dismissed or result in conviction of lesser included offenses? Is a defendant in a case with a hung jury a "prevailing party," entitled to litigate over attorney's fees prior to retrial? What if there is no retrial?

Second, and even more problematic, is determining what is meant by "substantially justified" in the context of a criminal case. This determination is particularly likely to require burdensome and unnecessary litigation. The prospect of monetary gain will create a powerful incentive for any "prevailing party" and his defense counsel to claim that the federal criminal case against him was not "substantially justified" for any number of reasons. This would lead to spurious and baseless claims, many of which may not be based upon the evidentiary record.

In a criminal case, the standard of proof for a conviction is that the defendant be found guilty "beyond a reasonable doubt." A determination by a jury that this high standard of proof has not been met, and thus an acquittal is appropriate, does not lead to the conclusion that a prosecution was improperly brought. In the majority of cases, the evidence on the record would justify the charges being brought. Indeed, a grand jury has so found in every felony case.

However, not all reasons for pursuing federal criminal charges would be evident on the trial record. For instance, certain evidence developed and relied upon in good faith by the government may ultimately be suppressed at trial under the exclusionary rule. In other cases, the government may need to reveal information not in the record in order to offer a complete defense against the claim. The litigation required to prove that a prosecution was "substantially justified" may require disclosure and compromise of confidential sources and law enforcement techniques, particularly in organized crime or conspiracy cases. Or it might require compelling testimony from a child victim who refused to testify at a child abuse or child pornography trial, but on whose testimony the prosecutor and grand jury relied in bringing an indictment. In espionage and national security cases, a litigant may pursue a claim against

the government believing the government would be unwilling to make the disclosure of classified information necessary to defend against the claim. The potential for this kind of damaging proceeding for attorneys' fees would undoubtedly have a chilling effect on legitimate prosecutions.

Similar to the problems with determining the meaning of "prevailing party" and "substantially justified," litigation would ensue concerning the exception for "special circumstances mak[ing] an award unjust." The result would be more unnecessary litigation. In addition, there is, of course, the question of the extent of potential financial liability and its impact on agency budgets. This is an amount that cannot be quantified without knowing in more detail how the courts would interpret the scope of the amendment, but even if the amendment were narrowly interpreted the financial impact of the amendment could be significant.

Finally, the amendment is not necessary as a means to ensure that federal prosecutions are appropriate under the facts and the law. As you know, the Fifth Amendment already requires that, in every federal felony case, a grand jury of citizens find probable cause to bring charges against a defendant, thereby protecting against unjustified prosecutions. In addition, the Department of Justice and the courts have safeguards to protect against any such prosecutions.

In sum, the amendment would pose a substantial obstacle to the accomplishment of the essential mission of the Department of Justice.

Sincerely,



Andrew Fois  
Assistant Attorney General

cc: The Honorable John Conyers, Jr.  
Ranking Minority Member  
Committee on the Judiciary

The Honorable Harold Rogers  
Chairman, Subcommittee on Commerce, Justice,  
State and the Judiciary  
Committee on Appropriations

The Honorable Alan B. Mollohan  
Ranking Minority Member, Subcommittee on Commerce, Justice,  
State and the Judiciary  
Committee on Appropriations

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Copy to Joe -

Joe - could you pick out the best couple of examples and talk to Rahim about how best to do something with them?

Eric

**Amendment to H.R. 2267, As Reported  
Offered by Mr. Hyde of Illinois**

Page 116, strike line 16 and all that follows through line 2 on page 117 and insert the following:

**SEC. 616. ATTORNEYS FEES AND OTHER COSTS IN CERTAIN  
CRIMINAL CASES.**

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 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 ~~(or otherwise)~~. No new appropriations shall be made as a result of this provision.



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- 3 -

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- Under the Hyde amendment, criminals who have been convicted of some charges in a case would be allowed to pursue fees and costs for other charges in which the government did not "prevail." What does this really mean? It means that, if the Hyde amendment had been in effect:
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- Furthermore, for a variety of reasons, some cases which are appropriately brought by prosecutors may not result in convictions on any charge. Some examples for why this sometimes occurs:
  - In a criminal case, the standard of proof for a conviction is that the defendant be found guilty "beyond a reasonable doubt." A determination by a jury that this high standard of proof has not been met, and thus an acquittal is appropriate, does not lead to the conclusion that a prosecution was improperly brought.
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acquittal on all counts in the first trial in which the government charged him with racketeering and murder. In a subsequent trial on similar charges, he was found guilty and is now serving life without possibility of parole. If in a ten-month trial with three attorneys each working only 40 hours per week, someone in a position such as Gotti could have collected over \$600,000. Should a criminal such as Gotti be given the opportunity to be paid huge sums by the taxpayers?

- In another example, would we have wanted John Hinckley, who was found not guilty by reason of insanity, to have had the opportunity to pursue a claim for taxpayers to pay for defending his attempt to assassinate President Reagan?
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  - If the court does not allow any evidence outside the record, the government will not be able to offer a complete defense against the claim. For instance, a key witness may have disappeared, died or refused to testify at trial. Information from a confidential informant that led to an indictment may not be able to be used at trial. Certain evidence developed and relied upon in good faith by the government may have been suppressed at trial under the exclusionary rule.
  - Even if the court does allow evidence outside the trial record, prosecutors will not be in a position to present all relevant information. Under Rule 6(e), the government would not be able to reveal grand jury information. Presenting a complete defense may require disclosure and compromise of confidential sources and

law enforcement techniques, particularly in organized crime or conspiracy cases. Or it might require compelling testimony from a child victim who refused to testify at a child abuse or child pornography trial, but on whose testimony the prosecutor and grand jury relied in bringing an indictment. In espionage and national security cases, a litigant may pursue a claim against the government believing the government would be unwilling to make the disclosure of classified information necessary to defend against the claim.

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#### Existing Safeguards and Remedies

- There are already plenty of safeguards against unjustified prosecutions and remedies for those who are subjected to such prosecution:
  - The Fifth Amendment requires that every felony case prosecuted federally must proceed by indictment, which means that a group of citizens must have examined the government's evidence and determined that charges should be brought.
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- Prosecutorial misconduct complaints are received from a variety of sources, including judges, defense counsel, and subjects of criminal prosecutions. When a federal judge makes a finding of misconduct by a government attorney, OPR conducts an expedited inquiry.
- Prosecutors found to have engaged in misconduct may be disciplined, including reprimand, suspension or dismissal.
- OPR also refers instances of serious misconduct to the Bar where the prosecutor is licensed to practice.

# DRAFT

As former United States Attorneys General, we urge you to reject a legislative proposal currently before the conferees that poses a serious threat to federal law enforcement.

H.R. 2267, the House version of the Commerce, Justice, State and the Judiciary Appropriations bill, includes an amendment that would require the United States, in a criminal case, to pay:

to a prevailing party . . . 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.

This amendment would have a chilling effect on the exercise of prosecutorial discretion by injecting financial considerations into the exercise of a prosecutor's decisions to charge certain crimes. Prosecutions involving espionage, terrorism, organized crime, drug trafficking, and sexual abuse -- to give but a few examples -- are tough to win, since they often hinge on the testimony of a limited number of witnesses. These cases are, of course, critically important in protecting society from crime, and justice demands that prosecutors pursue these cases vigorously, even if no conviction is ultimately obtained. Prosecutors should not be deterred from bringing such cases out of fear that an unsuccessful effort will lead to a sharp reduction in their available resources to institute these and other cases.

It is worth noting in this regard that the amendment directs that funds reimbursed to a defendant be paid by the agency over which the party prevails, but without any new appropriations. This prospect will create chaos in budgeting for future resources by federal law enforcement agencies and federal prosecutors. It will be virtually impossible to anticipate the need for funds relating to claims by defendants whose convictions could be reversed on appeal years after trial.

We know from experience that there always have been, and always will be, cases that do not result in conviction, even though it was perfectly appropriate for the prosecutor to bring the case in the first place. In a criminal case, the standard of proof for conviction is "beyond a reasonable doubt." A determination by a jury that this high standard of proof has not been met, resulting in an acquittal, does not necessarily signify that a prosecution was improperly brought. Furthermore, the government may have appropriately presented to the grand jury that indicted the case important evidence which the trial judge subsequently suppressed at trial, resulting in the defendant's acquittal. In addition, a trial may end with some or all charges being dismissed because of a hung jury. In many of these circumstances, the prosecution may have been entirely proper, but the amendment will nonetheless obligate the government to shoulder a non-indigent defendant's entire legal bill.

# DRAFT

The application of this provision may not be limited to situations in which defendants are acquitted on all charge. Under the amendment, criminals who have been convicted of some charges in a case may be allowed to pursue fees and costs for other charges in which the government did not "prevail." Thus, the amendment leads to the disturbing prospect of courts awarding taxpayers' funds to convicted criminals.

Regardless of whether a defendant was acquitted on one or more charges, had a hung jury, or was convicted on all counts, the amendment will create the opportunity for defendants to tie up law enforcement and judicial resources in extensive post-trial litigation regarding the meaning of the phrase "substantially justified." Such post-trial litigation will be particularly problematic for the government if the court does not allow the government to present evidence outside of the trial record. For instance, a key witness may have disappeared, died, or refused to testify at trial. Certain evidence that was relied upon in good faith by the government prior to trial may have been suppressed at trial under the exclusionary rule. If the government cannot use this evidence during post-trial fees litigation, it will be deprived of the opportunity to raise a complete defense against the fees claim.

Even if a court does allow evidence outside the trial record, prosecutors will not always be in a position to present all relevant information. Presenting a complete defense may require the disclosure and compromise of confidential sources and law enforcement techniques, particularly in terrorism, organized crime, and conspiracy cases. In a child abuse or child pornography case, it might require compelling the testimony of a child victim who refused to testify at trial, but on whose testimony the prosecutor relied in seeking a grand jury indictment. In espionage and national security cases, a litigant may pursue a fees claim against the government because he or she may believe -- correctly, in some instances -- that the government would be unwilling to make the disclosure of classified information necessary to defend against the claim.

It must not be forgotten that the Fifth Amendment requires that all federal defendants be indicted by a grand jury, which must find that a prosecutor has presented sufficient evidence demonstrating that there is probable cause to believe that the defendant committed the crime in question. This constitutional requirement has served for over 200 years as check on unfettered prosecutorial discretion. Congress need not graft additional, untested, requirements -- which undoubtedly will spawn unnecessary litigation -- to ensure that there is a substantial basis for federal prosecutions. The Fifth Amendment already serves that salutary purpose.

For the foregoing reasons, we urge you to not include this amendment in the conference version of the Commerce, Justice, State and the Judiciary Appropriations bill.