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ENSURING THAT FEDERAL PROSECUTORS MEET DISCOVERY OBLIGATIONS

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WEDNESDAY, JUNE 6, 2012

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:09 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Whitehouse, Klobuchar, Franken, Coons, Grassley, Sessions, Hatch, Cornyn, and Lee.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. The Committee will come to order, and I thank the Members for being here.

Today, as we promised, we are continuing our inquiry into ensuring that federal prosecutors meet their obligations, and these are obligations, as I look at this, whether the defendant is a prominent official or an indigent defendant. Either way, prosecutors have certain obligations that should always be followed.

Now, we have seen the results of two separate investigations and two reports into what went wrong during the Ted Stevens trial. And I thank Attorney General Holder for making the report of the Department of Justice's internal Office of Professional Responsibility available to us, something that normally is not, and we have now made it available to the public.

The investigation by the Justice Department found that several career prosecutors acted with reckless disregard of their discovery obligations and that the Deputy Chief of the Public Integrity Section exercised poor judgment in failing to supervise discovery. While the Department's OPR investigation did not find intentional misconduct, its findings are serious, and they are significant. They resulted in suspensions of two of the prosecutors.

Everybody knows that Ted Stevens was a friend of mine, but even if Ted Stevens was somebody I never knew, I would be bringing this hearing because I believe that prosecutors bear unique responsibilities in maintaining the integrity of our criminal justice system. I am looking at the Senators who are here now. Senator Klobuchar and Senator Cornyn have both been prosecutors.

We all know that our constitutional framework provides that all individuals are guaranteed the right to fair treatment and a fair trial. And without ensuring adherence to the rule of law and vigorous and competent counsel for defendants, we cannot live up to

these guarantees. But we also have to remember that prosecutors have a unique position in our whole system, a unique thing. They wield so much power when it comes to charging decisions, plea bargaining, and gathering of evidence. Simply the power to bring or to withhold prosecution is probably the most significant power in the whole criminal justice system. So we count on them to uphold the law, adhere to the highest ethical standards, and seek justice. That is, justice for everybody involved. Their standards are different than that of defense attorneys.

What happened in the Stevens case undermines this system and cannot be tolerated. Two separate investigations have now found that significant evidence was not disclosed to the defense, and critical mistakes were made throughout the course of the trial that denied Senator Stevens a fair opportunity to defend himself. The mistakes and poor decisions in connection with the Stevens case disturbed the judge hearing the case, and they disturb the Chairman of the Senate Judiciary Committee.

But I also know they disturb the Department of Justice. Attorney General Holder did the right thing when he came into office and, based upon his review of the matter, decided to dismiss the indictment that had been brought against Senator Stevens, and he withdrew the case even after a jury's guilty verdict. Today we will hear from Deputy Attorney General Jim Cole, the number two official at the Department of Justice, about the steps the Department has taken and plans to take to ensure that federal prosecutors meet their discovery obligations so that the situation in the Stevens prosecution is never repeated—never repeated whether it is a Ted Smith or a Ted Stevens, whether it is somebody we have never heard of before or somebody we have. The standard should be the same.

We want to ensure that prosecution supervisors are diligent as well. The recent mistrial declared in the prosecution of John Edwards raises concerns about the exercise of prosecutorial judgment in that case. Now, I worry that when this happens, you can also end up with sometimes unfair, partisan criticism directed at the Justice Department, and that may make them reluctant to exercise restraint.

Let us get things back on the balance where they are supposed to be. Prosecutors make tough judgment calls all the time. By and large, they make the right ones, and they use their discretion in the interests of justice. Remember, that is the discretion both to bring prosecution or to withhold it. More than 70 years ago, while he was serving as Attorney General of the United States, Robert Jackson spoke about federal prosecutors, saying: "The prosecutor has more control over life, liberty, and reputation than any other person in America." As he spoke about the exercise of prosecutorial discretion, he wisely observed that federal prosecutors need to be "diligent, strict, and vigorous in law enforcement" but also "just."

As a young prosecutor, I remember reading those words. I also made sure that every prosecutor in my office subsequently read those words.

Now, I know how strongly Attorney General Holder and Deputy Attorney General Cole feel about these issues. I know they are committed to justice and to ensuring that our federal prosecutors

follow Attorney General Jackson's timeless advice that "the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility."

When I talk about my time as a prosecutor in Vermont, it is because I am proud of the dedicated public servants—the prosecutors and the law enforcement officers—with whom I had the privilege to serve. Our criminal justice system is the envy of the world in large measure because good prosecutors adhere to the directive to seek justice for all parties, the government and the defendants, not just convictions. So we have to ensure that all federal prosecutors continue these high standards.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Senator Grassley, did you want to say something before we go to our first witness?

STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Yes, please. Thank you. This is a very important hearing to make sure that people get justice. Since our last hearing, the Office of Professional Responsibility has released its report. You talked about that, so I am going to skip that part of my remarks.

You talked about the second review, and I am going to skip that part. I am just going going to say that finally we have the review of the OPR's findings by Terrence Berg, a career prosecutor assigned to the Professional Misconduct Review Unit. Berg was assigned the case by the head of the review unit, and he rejected much of OPR's findings with regard to individual prosecutors. Instead, Berg's review determined that the problems in the Stevens case were part of the mismanagement and poor organization of the case by the Public Integrity Section. While Berg's findings were ultimately overturned by the head of the review unit who sided with OPR, his findings raise interesting questions about the failed mismanagement of the case.

Berg's findings deserve particular attention for two reasons: First, he has been nominated by the President for a position as a federal district judge of the Eastern District of Michigan; and, second, he led the U.S. Attorney's Office in the Eastern District after a scandal similar to the Stevens case when a major post-9/11 terrorism prosecution was dismissed because of discovery issues. So his judgment on this should not have been lightly overturned.

All three reviews reached different conclusions but point to the same problem: a fundamental failure of justice attorneys to follow the rules required by the Department, courts, and the Constitution. So where we go from here is the focus of today's hearing.

Senator Murkowski has introduced this *Fairness in Disclosure of Evidence Act*, a bill designed to reform the discovery and disclosure process in criminal cases. We will also hear about her proposal from representatives of the legal community that have offered different views. I thank Senator Murkowski for putting forth a pro-

posal and am looking forward to hearing from her and discussing it with our third panel of experts.

Justice's conduct in the Stevens case definitely warrants Congress's attention. However, I am not sure at this point that legislation to completely overhaul the criminal justice system is necessary. I do have letters here from the National Association of Assistant U.S. Attorneys and one from Deputy Attorney General George Terwilliger expressing concern, and I ask that those be put in the record.

Chairman LEAHY. Without objection.

[The letters appear as a submission for the record.]

Senator GRASSLEY. I have concerns that changes to ex parte orders could have a dangerous impact by discouraging their use as a means to balance between defendants' rights and the protection of sensitive information. There could be unwarranted disclosure of classified information in national security cases such as terrorism and espionage prosecutions. Further, these changes could impact witness safety as they could require Justice attorneys to provide evidence that could be used to harm or intimidate witnesses, a sad but true reality of high-profile criminal prosecutions. Where I think we can all agree is that reforms are needed at the Justice Department, and I support Senator Murkowski's efforts to achieve reform in the Department. I believe the failures in the Stevens case were not simply just a couple of line attorneys making bad decisions, so that brings me to something I have been crusading for a long time.

I have been concerned about the double standard of discipline at the Justice Department and FBI. As recently as May 2009, the DOJ Inspector General found that "a perception of a double standard of discipline between higher-ranking and lower-ranking employees continues." This perception was backed by the Inspector General's findings that senior executives at the FBI had OPR findings reversed 83 percent of the time compared with lower-level career employees who had their findings overturned 18 percent of the time. While no similar review of Justice Department OPR findings was conducted, it is easy to see with the OPR report in the Stevens case how this perception continues.

Another area of concern for me with Justice is the growing list of high-profile failures in the Public Integrity Section. Just last week, a jury found former Senator John Edwards not guilty on one count and a mistrial was declared on five others.

Then there was the prosecution of State legislators in Alabama that ended in two acquittals, a hung jury, and allegations from the judge that the Government's witnesses were racist. Add to this list the Stevens prosecution, the failure of the prosecution of Governor Blagojevich, and a pattern appears. However, this pattern is not a recent trend and dates back to the 1990s. At that time, the Public Integrity Section was unwilling to prosecute cases. When the FBI presented evidence of campaign finance violations in the Clinton administration, it looked the other way. When the FBI Director concluded that the law required the appointment of an independent counsel, the Justice Department disagreed based on frivolous legal analysis, keeping the cases within DOJ but then refusing to prosecute. Hearings were held in the Senate, and the poor management of the Public Integrity Section was documented 15 years ago.

Clearly, something must be done at the Department to address the failures of the Public Integrity Section, the double standard of discipline, and the discovery failures. Department Attorney General Cole is here today on our second panel to talk about a remedial effort taken following the Stevens case and ongoing efforts to correct the problems. I am not sure that these efforts will be enough, and we may need to act in Congress. That is why today's hearing is so important.

Thank you very much.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Chairman LEAHY. Thank you.

We will begin with Senator Murkowski, Alaska's senior Senator. She and I have talked about this case on a number of occasions. We also worked together to pass a strong bipartisan reauthorization of the *Violence Against Women Act* in the Senate, and I appreciate that. I am hoping it is going to be enacted into law soon. In March, she introduced the *Fairness in Disclosure of Evidence Act of 2012*, on which she is going to testify today, and I told her at the time we would have a hearing.

Senator Murkowski, thank you for taking the time to be here.

STATEMENT OF THE HONORABLE LISA MURKOWSKI, A UNITED STATES SENATOR FROM THE STATE OF ALASKA

Senator MURKOWSKI. Thank you, Mr. Chairman, and to the Ranking Member, I so appreciate the fact that you have convened this hearing today to take up what I believe we all agree is an important issue, and that is, as we explore whether our federal prosecutors are meeting their discovery obligations. It is an important issue for this Committee to pursue as it goes directly and intimately to the question of whether federal criminal defendants are being treated lawfully and consistently by application of divergent *Brady* practices across the various judicial districts here in the United States.

I am hopeful that this oversight hearing will be followed in the near future by a legislative hearing on the bill which you have addressed, which is S. 2197. It would establish uniformity in compliance with the *Brady* obligations. It would establish uniformity basically in three different ways: the what, the when, and the how if *Brady* is not complied with.

So with respect to the what, S. 2197 would eliminate the materiality requirement as a matter of statutory law and end the practice through which prosecutors rationalize their way out of disclosing material evidence by claiming that it is not material.

With respect to the when, the legislation would direct that prosecutors disclose *Brady* and *Giglio* material as early in the process as is feasible, and this would enable both sides then to evaluate the merits of the cases and promote appropriate and efficient dispositions.

And then, finally, S. 2197 provides trial judges with a broad range of remedies that can be employed if *Brady* obligations are not obeyed and the confidence then to use them.

To appellate courts, what it does is send a strong message that the *Brady* obligation is mandatory, it is not optional, and that the

harmless error rule should be used sparingly when evaluating breaches of a *Brady* obligation. I believe that the legislation strikes an appropriate balance between competing interests in particular with respect to the issue of witness intimidation and protection of classified information, which Senator Grassley has raised.

The bill has been endorsed by pretty broad and wide-ranging groups, well-respected groups. We have got the American Bar Association that has supported it, the American Civil Liberties Union, the U.S. Chamber of Commerce, so clearly coming from divergent perspectives but all in support of this legislation.

Of course, the bill does have its detractors, most notably the U.S. Department of Justice, and I would like to take a moment to address my concerns with their approach taken to the legislation.

It has been widely reported in the legal press that the Justice Department has historically opposed efforts to establish a uniform *Brady* process. I have consistently said that Congress is perhaps not the most desirable of places to deliberate on *Brady* reform. Ideally, these issues would be sorted out by the Advisory Council on the Federal Rules of Evidence. The Justice Department would have us believe that the Advisory Council has considered *Brady* reform on its merits and then rejected it. But the legal press indicates that the Advisory Council's reform efforts have been abandoned as a direct result of the Justice Department opposition.

I would also like to comment on the superficial approach that the Justice Department has taken to its evaluation of the legislation. The Department first criticized the bill in the press after it was introduced and subsequently in hearings before the House Judiciary Committee. The Justice Department would have us believe that this legislation somehow is going to open the jailhouse doors, let the criminals and let the terrorists all run free—precisely the same sort of superficial arguments that are used so frequently to argue that searches conducted and evidence seized in violation of the Fourth Amendment should be excluded, precisely the sort of argument used to argue that the Miranda rule should be eliminated.

Now, under our system of justice, the victim has rights, the government has rights, and the defendant has rights. And one of the defendant's rights is the disclosure of exculpatory evidence in the hands of the government. Another of the defendant's rights is access to information suggesting that a government witness might not be forthright and truthful. The government's interest in prosecution is balanced then against the defendant's interests in a fair trial. In this instance, the government would have us ignore that the defendant has rights which need to be uniformly administered, and that is how the government got into the *Brady* mess that it presently finds itself in.

As this Committee hear from Mr. Schuelke, prosecutors from time to time exhibit a contest mentality which gets in the way of their judgment with respect to the rights of the defense, and that is why I think it is important for Congress to speak to the obligations with a single and enduring voice. A criminal defendant's rights should not depend on whether or not Mr. Holder or someone else is the Attorney General or whether the Attorney General comes from one party or another. The obligations and the rights should be uniform, they should be predictable, and they should be

consistent. And as you have noted, Mr. Chairman, it should not make any difference who that defendant is.

Now, I would also acknowledge that some would argue that S. 2197 is not sufficiently protective of the interests of defendants. These experts would have us go to an open-file system of discovery. I do think that there are merits to this approach provided that the exceptions do not swallow up the rule and discovery is provided sufficiently early in the process to then be meaningful.

My suggestion to the Justice Department is that they express a willingness to work with me and the Committee on a set of unified *Brady* practices that can be legislated. If the Justice Department thinks that S. 2197 is not sufficiently balanced or protective of some interest or another, perhaps they could propose a concept that would make it more balanced. But I am sad to say that since my legislation was introduced in March, I have had no direct contact from the Justice Department until yesterday when Mr. Cole did call me to discuss this hearing. But I think that that suggests that the Justice Department does not take this effort seriously, and if that is the case, it suggests that this is somewhat of an arrogant or a dismissive approach. And I think that is unfortunate.

I would respectfully submit that the Justice Department is in no position to be arrogant. The latest chapter in the Ted Stevens prosecution demonstrates that beyond a reasonable doubt. Every time I read a postmortem on the Stevens prosecution, I am left more and more convinced that it was fatally mismanaged from the get-go, and the Justice Department's unwillingness to stop it from going to the jury despite the many red flags that justice had not been done I think is unconscionable.

The Office of Professional Responsibility report released in late May reveals that there was considerable doubt as to whether the Justice Department would go forward with the indictment. Once it did go forward, it is evident that the case was mismanaged from the very top to the very bottom. Senior Public Integrity Section managers were more interested in the egos of staff attorneys passed over for first-chair responsibilities than seeing that *Brady* was carried out. *Brady* obligations were delegated to law enforcement officials who were neither properly trained nor supervised to carry out their responsibilities.

There was poor communication between Washington and the Alaska attorneys that were working the *Brady* issue, and in spite of all of these deficiencies, the Office of Professional Responsibility offers only a slap on the hand to one senior official in Main Justice—that would be Ms. Morris—who was responsible for supervising the case, not anything directed toward her boss.

I would also note that while Mr. Schuelke found that the *Brady* violations committed by two members of the Alaska U.S. Attorney's Office were intentional, the Office of Professional Responsibility simply discards this finding, and the reason, I think, is obvious. The Office of Professional Responsibility never once considered Mr. Schuelke's findings. Its report was issued August 15, 2011, about 90 days before Schuelke's report was completed. I cannot understand why the Office of Professional Responsibility did not go back and reconsider its report in light of Schuelke's conclusions.

The public deserves to know whether the Office of Professional Responsibility concurs with each of Schuelke's conclusions, or does not, and why. The Department's plans to expeditiously close the books on this unfortunate episode will prevent the people of Alaska from ever reaching closure on this issue.

The Ted Stevens prosecution was one of the most sensitive and probably one of the most delicate, one of the most important prosecutions that the Justice Department has ever undertaken, and I say this because few prosecutions cut as close to the relationship of the American people to the government as this one did.

If the Justice Department is going to allow a case involving a sitting Senator seeking reelection to go to a jury weeks before that Senator's general election, it must be absolutely certain that the defendant's rights were meticulously observed. In other words, if the Justice Department had the slightest doubt that it conducted its trial in the fairest fashion, it should have asked for—it actually should have demanded a mistrial.

With 20/20 hindsight, there is no question that this case should never have gone to the jury, and with 20/20 hindsight, it is now evident that the right of the people of Alaska to select a Senator of their choosing was interfered with by the Justice Department's malfeasance that permeated every aspect of this prosecution. This is truly one of the darkest moments in the Justice Department's history. I have said that before. We are no longer able to do justice to Senator Stevens as he was defeated and then died less than two years later. But we can, through legislation, through reforms, make a start in ensuring that the same fate does not befall other defendants.

Mr. Chairman, I thank you for your attention to this issue and look forward to working with you and Members of the Committee.

[The prepared statement of Senator Murkowski appears as a submission for the record.]

Chairman LEAHY. Well, thank you.

The providing of exculpatory evidence to a defendant should be the sine qua non of any prosecution, whether it is a State prosecution, a federal prosecution, or any prosecution. If we are going to have a justice system, justice, the true meaning of the word "justice," I do not care whether it is a State court, a federal court, if the prosecution has exculpatory evidence available only to them, they have a duty to give it to the defense. They might not like the idea, but that duty, unless it is enshrined in the minds of everybody, our justice system is damaged. I felt this as a prosecutor. I feel this as a Senator. I feel it especially as an American.

I know, Senator Murkowski, that you have other places you are supposed to be, and Senator Grassley and I have already discussed this. We will not have questions at this time for you, but I thank you for being here.

Senator MURKOWSKI. I thank you. And, again, I look forward to working with the Committee and the Department as we resolve these issues. Thank you.

Chairman LEAHY. Senator Murkowski mentioned James Cole and the conversation they had. Mr. Cole was confirmed by the Senate to be the Deputy Attorney General at the Department of Jus-

tice. It is the number two leadership position at the Department. He was confirmed June 20, 2011.

Mr. Cole first joined the Department in 1979 as part of the Attorney General's Honors Program, served for 13 years, first as a trial attorney in the Criminal Division, later as the Deputy Chief of the Division's Public Integrity Section, the section that handles investigation and prosecution of corruption cases against officials and employees at all levels of government. He entered private practice in 1992 and was a partner at Bryan Cave from 1995 to 2010 specializing in white-collar defense.

I have known Mr. Cole for years, and I am delighted to have you here. Please go ahead, and then we will open it up to questions in the usual order, going back and forth between both sides.

STATEMENT OF THE HONORABLE JAMES COLE, DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. COLE. Thank you, Mr. Chairman. Chairman Leahy, Ranking Member Grassley, and distinguished Members of the Committee, I appreciate the opportunity to appear before you to discuss the Department's commitment to criminal discovery procedures that will result in fair trials, the serious public safety risks that would result if pending discovery legislation were enacted, and also to talk about the recently imposed discipline on two prosecutors responsible for the discovery failures in the prosecution of former Senator Ted Stevens. Having been both a prosecutor and for nearly 20 years a criminal defense attorney, I understand the critical importance of all of these issues.

What occurred in the Stevens case was unacceptable, but it is not representative of the work of the prosecutors in the Department of Justice, and it does not suggest a systemic problem warranting a departure from longstanding criminal justice practices that have contributed to a record reduction in the rates of crime in this country and that have provided defendants with a fair and a just process. The Stevens case was one in which the well-established rules governing discovery were violated. It is not one in which the rules themselves were found to be insufficient to ensure a fair trial.

The lesson from Stevens was not that the scope of existing discovery obligations needed to change but, rather, that the Department needed to focus intently on making sure that its prosecutors understand and comply with their existing obligations. And we have done just that.

Under Attorney General Holder's leadership, the Department has taken unprecedented steps to ensure that federal prosecutors meet their discovery obligations. In January 2010, my predecessor issued a memorandum instructing prosecutors to provide broader and more comprehensive discovery than before, to provide more than the law requires, and to be inclusive when identifying the members of the prosecution team for discovery purposes.

Since then, the Department has instituted mandatory rigorous training for all federal prosecutors, appointed a national criminal discovery coordinator who reports directly to me, appointed local discovery coordinators in each U.S. Attorney's Office, and provided

prosecutors with key discovery tools such as online manuals and checklists.

The specific steps we have taken, which are detailed in my written testimony, have already had a demonstrable effect of improving criminal discovery practices nationwide. And what is more, we have institutionalized these reforms so that they will be a permanent part of the Department's practice and culture.

Despite these actions, some have argued that legislation is necessary to alter federal criminal discovery practice. The Department does not share that view. Legislation along the lines being proposed by Senator Murkowski would alter the balance between ensuring protection of a defendant's constitutional rights and safeguarding the equally important public interest in a criminal trial process that reaches timely and just results, safeguarding victims and witnesses from retaliation and intimidation, protecting ongoing criminal investigations from undue interference, and recognizing critical national security interests.

Unfortunately, our concerns are more than merely theoretical, and in my written testimony, we set forth examples of witnesses being intimidated, assaulted, and even killed after their names were disclosed in pretrial discovery. Law enforcement officials throughout the Nation repeatedly confront chilling situations where witnesses are murdered to prevent them from testifying.

The bill ignores the very substantial costs the legislation's additional disclosure requirements would impose—costs to the reputational and privacy interests of witnesses, and, if witnesses become less willing to step forward, costs to society from the loss of the just conviction of the guilty. In national security cases, such results could have devastating consequences with respect to the government's ability to protect the American people, an ability that depends upon obtaining the cooperation of confidential human sources.

The bill would also give the defendants the perverse incentive to wait to plead guilty until close to trial in order to see whether they can successfully remove identified witnesses from testifying against them. These are real costs and ones that both the Supreme Court and the Congress have taken great pains to avoid incurring. Unfortunately, they are costs that the bill does not account for.

But it must be noted that when the Department discovers that the applicable rules that exist have been violated, it takes disciplinary action. Late last month, the Department provided this Committee the OPR investigative report in connection with the federal prosecution of Senator Stevens. That report reflects OPR's thorough examination of the allegations of misconduct in the case. OPR concluded that the government violated its obligations under the constitutional *Brady* and *Giglio* principles and under the Department of Justice policy by failing to disclose exculpatory statements by the prosecution and by prosecution witnesses during trial preparation sessions and law enforcement interviews and by failing to disclose a witness' alleged involvement in securing a false sworn statement.

OPR found that two prosecutors violated existing rules, thus depriving Senator Stevens of a fair trial. With respect to those two prosecutors, the Department found each should be suspended with-

out pay, one for 40 days, the other for 15. The prosecutors violated existing rules and are being held to account for that violation.

The objective of the criminal justice system is to produce just results. This includes ensuring that the processes we use do not result in the conviction of the innocent, and likewise ensuring that the guilty do not go free. It also includes an interest in ensuring that other participants in the process—victims, witnesses, and law enforcement officers—are not unnecessarily subjected to physical harm, harassment, public embarrassment, or other prejudice.

For nearly 50 years, a careful reconciling of these interests has been achieved. The legislation proposed by Senator Murkowski would disturb this careful balance without a demonstrable improvement in either the fairness or the reliability of criminal judgments and in the absence of a widespread problem.

As the Judicial Council's Rules Committee recently agreed, the rules of discovery do not need to be changed—and the Stevens case did not prove otherwise. Rather, it demonstrates that prosecutors, their supervisors, and other law enforcement officials need to recognize fully their obligations under these rules that do exist. They must see to it that they are applied fairly and uniformly and must be given tools to meet their discovery obligations rigorously. This is what the Department has done since the Attorney General directed the dismissal in the Stevens case. And it is what the Department will continue to do in the future under the policies and procedures that have been implemented and institutionalized during the past three years.

Thank you, Mr. Chairman. I am prepared to answer any questions.

[The prepared statement of Mr. Cole appears as a submission for the record.]

Chairman LEAHY. Well, thank you. The Attorney General did the right thing in directing, even after the guilty verdict, the dismissal of the Stevens case because of all the misconduct there. What I worry about—and I must admit I come at this with the mind-set I had as a prosecutor, and I know some of the superb prosecutors we have, not only our State prosecutors but in our federal system. But I also know that with some you get this idea of an environment where securing a conviction is the most important measure of a prosecutor's success. And if you are in the Justice Department, you have huge resources behind you. Millions of dollars were spent on this fiasco, and in the Edwards case to get a hung jury and a not guilty verdict. Whether you believe one way or the other about Mr. Edwards' conduct, but many people from the right to the left have asked what was the crime involved, not behavior anybody would approve of, but what was the crime. But millions of tax dollars were spent on that. In the Stevens case, it seemed to be driven by let us get a conviction at all costs, and somehow justice, the question of justice, gets lost.

Now, some have criticized the OPR report for focusing more on the conduct of line attorneys than on the role of supervisory failures in the Stevens prosecution. The OPR report concluded that two Alaska-based line prosecutors committed reckless professional misconduct and recommended suspension but did not make a professional misconduct finding against any of the other prosecutors.

And one of the supervisors of the Stevens prosecution was found by OPR to have exercised poor judgment and failed to supervise discovery but was not disciplined.

What responsibility does supervision and the leadership of the Public Integrity Section and the Criminal Division bear for what happened in the Stevens case? It is easy to talk about the line attorneys, but at the higher level, the supervisor, what kind of responsibility did they have? They are certainly well aware of this case going on.

Mr. COLE. Well, Mr. Chairman, I think there are two separate issues here. One is the question of misconduct from the OPR findings, and the other is a question of good management. As you have pointed out in talking about Attorney General Jackson and as Justice Jackson noted in his opinions, the role of the prosecutor is to make sure that justice is done at all costs. It is not just to win; it is to make sure justice is done.

In regard to the two line attorneys, they were found to have actually committed professional misconduct by OPR, but the OPR report, as did the Schuelke report, goes into the management failures and the supervisory failures of some of the people who were in the supervisory line in that matter. They did not find that they had engaged in professional misconduct, but they found that they had not performed as they should have as managers. That is different. It is not something to be sanctioned in that way. But I will note that as soon as the review that was done that Attorney General Holder had ordered after the allegations in the Stevens case came to light, the two supervisors that were in the Public Integrity Section were assigned to non-supervisory positions. And so from the management role standpoint, that was being dealt with.

Chairman LEAHY. Well, we have what Terrence Berg said, who was a long-time career prosecutor initially charged with assessing discipline in the matter. He said, "Conduct by the supervisors was of equal or comparatively greater consequence in causing the disclosure violations, created a unique and extremely difficult set of circumstances under which line attorneys were required to function."

Without going into a debate of whether he is right or wrong in that, do you believe the changes that you have instituted in the Department of Justice addressed this problem?

Mr. COLE. Yes, Mr. Chairman, I do think the changes we have made address this problem. We have taken great pains to try and elevate the issues of proper discovery and following the rules of discovery to a point where everybody, every supervisor, every trial attorney, is required every year to take the training. As the Deputy Attorney General, I am required to take this training every year. It is the constant topic not only of training, but of supervisory control over every case. It is one of the things we always ask about and always make sure is being done, that the rules that we have, which are robust, for discovery are being complied with.

Chairman LEAHY. But those are your rules, and I commend the rules. I have commended both you and Attorney General Holder on that. But if the Department determines you have to have these kind of rules and broader disclosure of exculpatory and impeachment evidence, even more than the Constitution requires to make

sure everything is fair, the Congress looks at it. Attorneys General come and go. Why should Congress not consider codifying these policies in order to allow for consistent enforcement by independent judges? Which sort of goes to the question that Senator Murkowski raises. That will be my last question.

Mr. COLE. I think you raise a good question, Mr. Chairman, and it is one we have thought about a great deal. As we went and developed the standards that we use for discovery disclosures, particularly for *Brady* and *Giglio* material that are in the *U.S. Attorneys' Manual*—and those have been in there since 2006—they go beyond, as you noted, the constitutional minimums, and that is something that we want to encourage in the Department of Justice, that the constitutional minimums are just that. They are the minimums that the law requires. But we want our prosecutors to go beyond them, and we want them to use their discretion and their abilities in these cases to make sure that fairness is being done.

So anytime that the Department should voluntarily decide that it will go beyond what the law requires and give defendants in criminal cases more than the law demands that they be given, if you then take that as the benchmark and say, okay, we are now going to codify that, I am concerned that it would be a disincentive for the Department to ever go beyond what the law requires if it starts to then become the new floor. And the Department will say, well, we do not want to keep moving that floor; we want to make sure that we have the ability—because some of these issues, what is favorable to the defendant, what is significant to the defendant's case, are sometimes judgment calls, and we want to encourage our prosecutors, with a little bit of a buffer, to make those judgment calls generously. But if you start putting them into the new floor, if you will, by codifying them, you start making prosecutors just hew to the minimums, and I would rather that they not hew to the minimums. I would rather that they go beyond them.

Chairman LEAHY. We will have more discussion of that, but I want to yield to Senator Grassley, who is the Ranking Member and famously known as the grandfather of Pat Grassley, who won his primary last night.

[Laughter.]

Chairman LEAHY. Congratulate your grandson for me.

Senator GRASSLEY. I will, and I am sure the whole country knows it now.

First of all, Senator Hatch was here for just a short period of time. He had to go to the floor, and he wanted me to express that he had great interest in this issue. He wants to see that the crimes against Senator Stevens, et cetera, do not happen again, and he may be able to come back, but just in case he does not.

Also, I had questions along the lines of your questioning, so I am not going to go over that ground again.

Mr. Cole, obviously, you know, we are upset about the misconduct of the prosecutors in the Stevens case. We do not want future instances of people having their constitutional rights denied.

If S. 2197 had been in effect during the Stevens case, would the results have been any different? And could you explain why they would be different?

Mr. COLE. Senator Grassley, I do not think the results would have been different because the problem was not what the rules were that were in place. The problem was that the prosecutors in the case did not follow the rules, and that was the real damage and harm in the Stevens case. So we believe and we are confident that the rules, had they been followed, would have produced all of the information that should have been produced in the Stevens case and it would have been a fair and a just trial.

Senator GRASSLEY. You heard what I said in my opening remarks about the Inspector General of the Department reviewing disciplinary procedures at the FBI. In 2009, the Inspector General found that a perception of a double standard continues to plague the FBI; however, the report also found that 83 percent of the SES employees had negative disciplinary proceedings overturned compared to only 18 percent of career employees. The OPR report continues to support the theory of a double standard by holding line attorneys accountable but not their managers, despite both the Schuelke and Berg reports finding the mismanagement of DOJ superiors was a significant factor.

How should we view the OPR report as anything but evidence of a double standard of discipline for managers and line employees?

Mr. COLE. I do not think the OPR report does show a double standard, Senator. I think what we have here is two different sets of conduct. We had misconduct by the line prosecutors by not fulfilling their discovery obligations. And I think we had poor supervision and mismanagement by the supervisors in not making sure that the trial attorneys were, in fact, paying attention to those rules, as was gone through in great detail in both reports, by micromanaging the trial teams as opposed to letting them do their jobs.

Those are the kinds of things, while we do not think they are proper and we do not think it is the way our managers should perform, they do not rise to the level of misconduct. So we deal with them as a management issue as opposed to a misconduct issue because they do not violate rules, but they do not produce the kinds of results we want to have produced in the Department of Justice. So we dealt with that as a management issue.

Senator GRASSLEY. Well, then let me follow up on whether or not you believe Morris and Welch had a duty as attorneys in charge to oversee the production of *Brady* material. And why were they not held accountable by OPR for the failures in the Stevens case even though the Schuelke and Berg reviews thought they should be?

Mr. COLE. Well, first of all, OPR did find that there was poor judgment on the part of Ms. Morris, who was the chief trial attorney on the trial team and had delegated the review of the *Brady* material to an FBI agent, which is unusual, and had not ensured that all the trial attorneys had gone back and reviewed what redactions were being made and made sure that what was being produced was all that should be produced.

It was not as though she was personally aware of things that were not being produced, and that was her poor judgment failure, that she was not aware and she was not supervising it properly. But that is different than misconduct.

The concern that I think we find with Mr. Berg's view is that he was not suggesting that the supervisors be elevated to the level of misconduct. He instead was suggesting that the trial attorneys, their misconduct would be discounted because of poor supervision. And I think that both OPR disagreed with that, the head of the Professional Misconduct Review Unit disagreed with that, and that is why there were changes made in that regard.

Senator GRASSLEY. In our investigation of Fast and Furious, a supervisor in the U.S. Attorney's Office in Arizona named Patrick Cunningham refused to testify before the House Oversight Committee on grounds that he might incriminate himself. He then resigned a few days later. This raises questions about how the Department manages situations where the prosecutor may have engaged in criminal misconduct. I understand that Mr. Cunningham has a constitutional right of the Fifth Amendment, but does he have the right to continue supervising federal prosecutors after having pled the Fifth? And, hypothetically, if he had not resigned, would you have allowed him to continue supervising prosecutors while invoking his Fifth Amendment rights?

Mr. COLE. Senator, in that matter, obviously Mr. Cunningham had his own counsel. His counsel gave him advice on whether or not he should assert his Fifth Amendment right, and he proceeded in that regard. He left fairly shortly after that, and we were not in a position of having to evaluate that.

What we would normally do in those situations is try and find out what the facts are behind the matter and make our judgment based on those facts.

Senator GRASSLEY. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much.

Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. Thank you, Mr. Cole.

As Senator Leahy mentioned, many of us up here are former prosecutors, and I always viewed that job as—we would always call it a "minister of justice," that our job went beyond prosecuting the guilty. It was also protecting the innocent, and I think a larger duty to uphold the system of justice and uphold the system of law, and that is what is so troubling about what happened here.

I was listening to your answer to Senator Leahy's last question about why not codify the rules that we have in place, and I think your answer would be—and you can change it if you like, but that we are doing better—you know, we have started this education effort with all the prosecutors and done something. When Attorney General Holder came in, he started a new program here. But is there any way to track whether this has worked as opposed to codifying these rules in terms of disciplinary actions, in terms of appeals, in terms of reversals before this education on discovery was put in place?

Mr. COLE. Well, one of the things, I think, that needs to be pointed out is that the instances where there have been findings of misconduct for violating the discovery rules is infinitesimally small. We have looked at it over, I think——

Senator KLOBUCHAR. And you are talking about it under Attorney General Holder or former——

Mr. COLE. Even, frankly, before that. We have looked at it over the past 10 years, and the percentage of cases where there have been discovery violations, where there was misconduct involved, is something like three-hundredths of one percent of all the cases that have been brought. And I think it is worth pointing out there is no shortage of defense attorneys, having once been one, who will make any argument that there is a discovery violation at any moment in any case and push that very, very hard. Also, anytime that a judge who is in charge of the case sees any discovery violation, the judge, if he puts it into an opinion, our Office of Professional Responsibility picks that up. They look at all legal opinions to find any indication of that. And under our own rules, if a judge makes that kind of finding, even if the prosecutor disagrees with it, the prosecutor is required to inform OPR that, in fact, the judge has found that there was a discovery violation. So we have a lot of sources to put allegations of discovery violations into the system.

I think part of what we look at in terms of any additional legislation to codify what is being done is that you are legislating judgment, and I think that is a difficult thing to do. The rules are good rules. They provide beyond the constitutional minimums. They provide what should be done on an everyday basis to make sure that nobody, whether they are rich or poor or famous or not famous, gets a fair trial. What is really the heart of what happened in the Stevens case was bad judgment, not paying attention, and poor supervision.

Senator KLOBUCHAR. And you must understand where Senator Murkowski is coming from, hearing her passion for this, that she is really standing in Senator Stevens' shoes. He sadly, tragically, cannot be here today. How do you respond to some of the things that she said about the timing of this and what happened in terms of the Justice Department's decision to move forward?

Mr. COLE. Well, obviously, the decision to move forward with the case was made long before I was in the Justice Department, long before Attorney General Holder was in the Justice Department. So I cannot really speak to what those decisions—how those decisions were made.

I can understand Senator Murkowski's concerns. We find what happened in the Senator Stevens case wholly unacceptable. And I am hard-pressed to find another instance where the Attorney General would come in, look at a case, see a discovery violation, and instead of just saying let the court work it out, walk in and take the initiative of actually dismissing that case on our own initiative. That is very unprecedented.

Senator KLOBUCHAR. The last question. My ears perked up when I heard you talk about the potential danger of disclosing names. We had several cases when I was a prosecutor where jurors were actually threatened because their names were out there or people had identified them. Could you just walk through your concerns about that issue?

Mr. COLE. We have had a number of instances where, while people are awaiting trial, they may find out the name of one of the witnesses or two of the witnesses or several of the witnesses against them. We have had instances—and it is detailed in my written testimony—where the family of a witness, their house was

firebombed in the middle of the night, and several children and some adults, relatives of this witness, were in the house and were killed. We have had a witness who walked out of a halfway house after having been identified who was killed to prevent her from testifying at trial. We have had instances where the defense attorney received the name and the statements of witnesses in the course of discovery, gave them to a relative of the defendant, and the witness was then killed.

So these, sadly, happen more than we would like to see them happen and create a great concern on our part that this be carefully controlled. You still have to have discovery. You still have to make sure that the trial is conducted fairly. But these are countervailing concerns that are very important that need to be protected and taken care of.

Senator KLOBUCHAR. Thank you very much for your testimony.

Mr. COLE. Thank you, Senator.

Chairman LEAHY. Thank you very much, Senator Klobuchar.

I am going to yield to Senator Cornyn but first ask consent that a letter from the Chair of the Judicial Conference Committee on Rules of Criminal Procedure sent to Senator Grassley and myself be included in the record.

[The letter as a submission for the record.]

Chairman LEAHY. Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman, for holding this hearing. Good morning, Mr. Cole.

Mr. COLE. Good morning, Senator.

Senator CORNYN. I join Senator Grassley in expressing deep concern about what appears to be a troubling lack of accountability at the Department of Justice, and it is not just limited to this one instance where there is a suspension of these lawyers for 15 and 40 days. Under the circumstances of this case, it hardly seems adequate to dismiss the case once what happened here occurred, and then to have suspensions for that short period of time hardly seems like a just outcome.

But I also would join Senator Grassley in expressing concern that as part of the investigation into the botched gunrunning operation known as Fast and Furious that the Department has unfortunately misled Congress. Mr. Breuer came back nine months after the fact and said, "Sorry about that," but, again, very little accountability there.

But what I want to focus my attention on and ask your opinion about are two sensitive national security leaks, specifically on our intelligence efforts on Iran's pursuit of nuclear weapons, and the war against al Qaeda and the use of drone strikes, two highly sensitive and highly classified programs.

First of all, just to lay the groundwork, is it a crime to leak classified information on the part of a government employee?

Mr. COLE. Without going into all the details, generally, yes, it is, Senator.

Senator CORNYN. Just looking at the article in the *New York Times* on the so-called Kill List and the President's personal participation in that process and the process by which 100 national security personnel are patched in by videoconference to go through this list and then make recommendations to the President, it says

in this article that, "David Axelrod, the President's closest political adviser, began showing up at the 'Terror Tuesday' meetings, his unspeaking presence a visible reminder of what everyone understood: a successful attack would overwhelm the President's other aspirations and achievements."

Are you aware or can you confirm that Mr. Axelrod participated in that? And wouldn't that concern you?

Mr. COLE. Well, two things, Senator. Number one, Mr. Axelrod was no longer with the White House by the time I started serving as Deputy Attorney General; and, number two, those meetings are classified, so I would not be at liberty to talk about what occurred inside at those meetings.

Senator CORNYN. In the article on the Kill List, which is intriguing and troubling in a number of different respects that I do not have the time to go into here, the reporters Joe Becker and Scott Shane said, "In interviews with the *New York Times*, three dozen of his current"—meaning the President—"and former advisers describe Mr. Obama's evolution since taking on the role, without precedent in Presidential history, of personally overseeing the shadow war with al Qaeda."

As a prosecutor and Deputy Attorney General of the United States, does it trouble you that current and former advisers of the President would talk to reporters and disclose classified information about this highly sensitive program?

Mr. COLE. It troubles me that anybody who has classified information and lawfully has it would then disclose it in violation of their duties to keep that classified information secret.

Senator CORNYN. Are you aware that any of this had been declassified?

Mr. COLE. I am not aware of any of that.

Senator CORNYN. And, also, the whole issue of the use of cyber attacks to try to disrupt Iran's pursuit of nuclear weapons, a highly sensitive and classified program, and I must say even in classified settings it is difficult for Members of Congress to get information on some of these issues. Now we read about it, of course, on June 1 in the *New York Times* once again.

It seems to be that there is some sort of coordinated effort to leak classified information, which, of course, jeopardizes the sources of that information, because if the sources realize that they are going to be exposed to being identified in public, then they are not likely to cooperate. Likewise, our allies whom we are working with would be unlikely to share information. And, indeed, disclosure of classified information like this makes the world a more dangerous place for the people of the United States.

So I would just like to ask you, is it the intention of the Department of Justice to pursue an investigation? It seems to me that if you can—these interviews took place by talking to three dozen current and former advisers. Another article, the one on the cyber attacks, talks about quotations from President Obama, according to members of the President's national security team who were in the room, I mean, that is a rather small and defined number of people who would be the potential source of those leaks.

Is it your intention and the Department of Justice's intention to conduct an investigation of this to see if prosecution is warranted?

Mr. COLE. I do not mean to dodge the question, Senator, but obviously we are talking about material that, if it exists, would be very classified, and the existence of it itself obviously would be classified. So it is a difficult topic to talk about without treading into the area of either confirming or denying that such information exists, which I think is also in the realm of how sensitive and classified anything like that might be, were it to exist.

Senator CORNYN. So this information is so classified you cannot even confirm it——

Mr. COLE. Well, there is a lot of information that is classified at a very high level, and obviously, as you described it—I take you at your word that information of that nature would be very, very sensitive and agree that information of that nature, should it exist, would be very, very sensitive.

Senator CORNYN. If confirmed, do you believe that a special prosecutor or special counsel would be warranted?

Mr. COLE. I do not believe that it would be necessary in this case, no.

Senator CORNYN. If I may ask, Mr. Chairman, just one follow-up question. Thank you for your usual courtesy.

The problem of accountability that Senator Grassley addressed earlier and that I touched on, too, ranging across so many different topics to me raises the concern that I think the Justice Department is perhaps the hardest job that you and Attorneys General generally have, and that is to maintain a separation between the political operations of an administration and your separate professional responsibility as a lawyer and as the chief administrator of justice. Can you understand why people would be worried, if these types of stories were confirmed, that there has been not only cooperation but collaboration and a lack of accountability when it comes to maintaining those separate and distinct roles, pursuing justice and winning the next election?

Mr. COLE. We are always cognizant of the fact that the role of the Justice Department is a very sensitive role and has to be separated from not only the actual influence of politics but the appearance of any influence of politics, and we take great pains to both separate what the Justice Department does from any actual or apparent influence by the White House and, with all due respect, trying to separate what the Justice Department does from any actual or apparent influence from the Congress, because we just do not want politics in it at all.

Chairman LEAHY. The questions asked by the Senator from Texas are legitimate questions, and I worry that we see this so often. I do recall a time when then Director of the CIA, Mr. Casey, was required to report certain things to the so-called Gang of Eight, and over a period of several weeks he came up to the Hill three times to report something that had not been reported to Congress, even though required by law to be reported to Congress, but had been on the front page of the *New York Times*. On the third time that he came up, he was asked in the hearing, "You want to report these things to us, but you never do. Wouldn't it be easier just to send us each a copy of the *New York Times* marked 'Top Secret'?" Because three things would happen: one, we would get the information in a more timely fashion than we ever got it, from

Mr. Casey; second, we would get greater detail; and, third, of course, you would have that wonderful crossword puzzle.

[Laughter.]

Chairman LEAHY. I appreciate the chuckles insofar as I was the one that said that to him, but I appreciate the chuckles around the room. I should note for the record that Mr. Casey was not amused.

Senator CORNYN. Mr. Chairman, if I may——

Chairman LEAHY. And I do not suggest by saying that that this is something amusing because, as I read these articles in the *New York Times*, like the Senator from Texas and we all have, you can get these briefings when you want. I remember sitting there just fuming as I read the details of what was—and I have not had a briefing yet to determine whether what was in there was accurate or not, so I am not saying whether it was—but if it was, it should not be in a newspaper.

Senator CORNYN. Mr. Chairman, thank you for your comments and your leadership on these issues, but I would just—my concern really comes from our independent constitutional responsibility to provide oversight of the Federal Government, including the Department of Justice. And that implies, indeed requires, a certain accountability and transparency, and we need to get information to be able to do our jobs, or else we are failing to do our jobs in holding the Department of Justice or any federal agency accountable.

Senator WHITEHOUSE. Mr. Chairman.

Chairman LEAHY. We are in agreement on that. What I am going to do—Senator Whitehouse?

Senator WHITEHOUSE. May I add one point while we are having this moment of discussion? That is, the executive branch has an enormous advantage in these discussions versus the legislative branch, which is that the executive branch has a great number of officials who are, by virtue of their official responsibilities, declassifiers. And as they utter classified information, it becomes declassified because they have uttered it. There are no declassifiers in the legislative branch of government. We have to go through exhaustive procedures. And so I just wanted to add that point to this discussion. I thank the Chairman for his courtesy.

Chairman LEAHY. What I am going to do, I am going to yield to Senator Franken, and I am going to ask Senator Coons to take the gavel, and he has agreed to do that, as I go to another hearing. But thank you. And, Senator Franken, thank you. You have been here diligently through all of this. Please go ahead, sir.

Senator FRANKEN. Thank you, Mr. Chairman.

Deputy Attorney General Cole, when the court-appointed special counsel appeared before the Committee in March, basically on this subject, I asked him whether in close cases could prosecutors present evidence to judges in camera and seek ex parte advisory opinions about their *Brady* obligations. He said that that was an option. Do your prosecutors ever take that approach? And, more generally, what instructions do you give your prosecutors when they are unsure whether to produce evidence?

Mr. COLE. First of all, sure, prosecutors do take that approach. When I was a prosecutor, I would at times take that approach. But what we instruct our prosecutors to do—and it is in the *U.S. Attor-*

neys' Manual—is if it is a close call, turn it over. And that is the general rule that we want them to follow.

Senator FRANKEN. Well, what if it is a close call as to whether it is a close call?

Mr. COLE. If it is a close call that it is a close call, they should first seek some input from their supervisors, and there is a discovery coordinator who is even more advanced, has gone through more advanced training in each district to advise on discovery issues on the close calls. And if that does not answer the question and it really becomes one of those, there is an incredible reason why I cannot turn it over but I am not sure, it might be *Brady*, then we ask them to go to the court.

Senator FRANKEN. That to me seems possibly one way to address the objections that the DOJ may have to Senator Murkowski's bill, which is maybe that could be a procedure build in that you go to the judge, and that way there is some third party who is not doing the prosecuting deciding whether this information should be—whether it is safe to pass on in terms of all those witnesses you talked about who are getting blown up. Is that idea out of bounds for you or what?

Mr. COLE. It already exists. It is already there. I do not think we need to legislate for it because the judges are available in those situations to make those rulings. Judges make discovery rulings all the time on any number of different things, and when you get into very close calls on *Brady* issues, the judges are available to look through those as well.

Senator FRANKEN. But that is up to the discretion of the prosecutor.

Mr. COLE. To initiate it, that is right.

Senator FRANKEN. Yes, that is what I am saying.

Mr. COLE. But, again, I think that anytime you would initiate it, it is one of those where you are going to be making the judgment call up front that it is a close, close call. Under our rules, we are telling you if it is a regular close call, turn it over.

Senator FRANKEN. Okay. Well, just a suggestion.

Mr. COLE. Thank you.

Senator FRANKEN. You are welcome.

Mr. Cole, in your written testimony, you say that "true improvements to discovery practices will come from prosecutors and agents having a full appreciation of their responsibilities . . ." Don't you think that defense lawyers have a role to play here, too? And if so, what do you think that role should be?

Mr. COLE. Well, they do have a role to play, just like the role they play in any trial. It is an adversarial proceeding, and defense attorneys are there to make sure that their client's rights, including the discovery rights, are honored. And even when a prosecutor who may have his or her own view of what should or should not be turned over, the defense attorneys are there to try and challenge that and to push it and to make sure that anything that comes out is everything that should come out.

I think it should be noted again that the failures in this receive a lot of attention, but they are actually very rare. But when they happen—and if it happens once, it is unacceptable from our point

of view. But when it happens, they do get a lot of play, and, frankly, they should get a lot of play because it is unacceptable.

Senator FRANKEN. Most cases result in plea bargains. What are the Justice Department's policies with respect to the disclosure of exculpatory evidence during plea negotiations?

Mr. COLE. Well, I think that every prosecutor, if they are aware of information that indicates that the defendant who is planning on pleading guilty did not commit the crime, they should not be taking that plea because they have a duty as an officer of the court to make sure that whatever is being done is, in fact, just and is based on the facts and the law.

As far as something like *Giglio* material, whether there is an inconsistent statement from a witness or there is something in the witness' background that may make them somewhat unsavory, that is not necessarily required to be turned over before a plea because really what you are focusing on there is how the trial might progress and how the proof might progress. But in a situation with a plea, the defendant, with the advice of counsel, has gone through their own view of whether or not it is appropriate for them to plead guilty, and they have made that decision knowing what it is they have done and knowing what it is they are willing to swear to under oath in court.

Senator FRANKEN. Thank you. My time is up.

Thank you, Mr. Chairman.

Senator COONS [presiding]. Senator Lee.

Senator LEE. Thank you, Mr. Chairman, and thank you, Mr. Cole, for joining us today. It is an honor to have someone with your distinguished background join us and help us with this.

Like many of my colleagues, I am very concerned with any practice that could result in innocent people going to prison, especially considering the fact that our Nation has the highest incarceration rate in the world. It is my understanding that we have got about five percent of the world's population, and yet we have about 25 percent of the world's incarcerated population. And we need to look at that, and we need to look at the fact that, notwithstanding these facts, we continue to expand the federal criminal code, we continue to expand the number of federal inmates we have, which right now I think is at about 200,000. We have got to watch out for this.

As a former Assistant U.S. Attorney, I am committed to enforcing our laws. I want to be certain that victims and witnesses are properly protected and that prosecutors are able to pursue their cases zealously where crimes have been committed, and that opportunities for guilty parties to get off on a mere technicality are avoided.

I am, at times, though, inclined to wonder whether the somewhat vague and inconsistent standard that currently constitutes the *Brady* rule and the *Giglio* rule might allow prosecutors to withhold important information from the defense without a real threat of penalty. And so I would like to ask you, Mr. Cole, you mentioned the fact that the *U.S. Attorneys' Manual* standards are actually higher than what *Brady* itself requires. What might happen to a prosecutor who violates that rule even where there is not a *Brady* violation recognized by the court? What might be the consequences for a prosecutor who does that?

Mr. COLE. Well, certainly there would be supervisory admonishment. There would be counseling at a minimum if that came to our attention. It would probably be referred to OPR for them to look at whether or not it amounts to misconduct or poor judgment or something that was negligent or any of the various options that might be available. It would be part of how that prosecutor gets evaluated. If it is misconduct, they will be sanctioned. If it is not, they will be admonished, and they will be counseled, and they will be looked at a lot more closely and supervised a lot more closely to make sure that they comport and comply with Department policy. We do not put them in the *U.S. Attorneys' Manual* just to make it thick. We put them in there to be followed.

Senator LEE. Right. I appreciate that.

You referred in your opening statement to the fact that the incidents of violation of the *Brady* rule and of the accompanying *U.S. Attorneys' Manual* standards are, I think as you put it, infinitesimally small. Doesn't the very nature of the *Brady* rule and the violation of the *Brady* rule make it somewhat difficult to detect? So the incidents that you referred to I think were those that were actually discovered, but isn't it somewhat difficult to detect by its very nature?

Mr. COLE. Well, it can be, but I think one of the interesting aspects of the cases we have looked at is that most of—maybe not most, but a number of the instances where we have discovered violations of *Brady* have been because some other motion was raised in the case which caused either a supervisor or somebody else to start looking through the file, discovered the material that they believed should have been turned over, and we voluntarily let people know that this matter, this piece of evidence had not been turned over. So a number of these are generated by the Department voluntarily, giving over after the fact what turned out to be *Brady* material.

Senator LEE. Okay. That is helpful.

I think one of the arguments that could be made in support of this legislation is the fact that the *Brady* rule itself has some vagueness built into it, it has some subjectivity built into it—vagueness and subjectivity that I think, arguably, are reduced under the standard proposed by this legislation. So there is a judgment call that has to be made in the case of *Brady* as to whether or not there is a reasonable probability that the conviction or sentence might have been different had the materials been disclosed; whereas, there is less subjectivity, less vagueness built into the other rule. Is that a strength? Is that a benefit to this statute? Or is there something that I am not taking into account there?

Mr. COLE. I think, frankly, that the other rule of "favorable to the defendant" is a less-defined standard. The *Brady* standard, I think, is a little tighter, and it is a little more easy to define, but it is not the standard we use going into a trial. It is the standard that the appellate courts use when they are reviewing a trial after the fact in order to make sure that we have finality and that if a case is going to be overturned, it is going to be overturned for a good reason. But going into trial, looking at it prospectively, that is not the standard we use in the Justice Department.

Senator LEE. That is part of why you have the *U.S. Attorneys' Manual* standard to help flesh that out in advance of trial.

Mr. COLE. Exactly. And our standard is any evidence that is inconsistent with any element of any crime that is charged against the defendant, turn it over; any information that casts doubt upon the accuracy of any evidence, including but not limited to witnesses' testimony, turn it over; and that we tell people err on the side of disclosure. And those are mantras that we repeat over and over and over again, particularly since what happened with Senator Stevens' case, and we realize that there was a need in the Department for greater sensitivity for this, greater supervision, and greater training.

Senator LEE. Thank you very much.

Mr. Chairman, my time has expired.

Senator COONS. Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman. Welcome, Mr. Cole.

Mr. COLE. Thank you, Senator.

Senator WHITEHOUSE. I was here for your exchange with Senator Franken, and it sounded for a moment as if you were saying that the only reason that any defendant pleads guilty is because they are guilty. You did not mean to make that point, did you?

Mr. COLE. Well, I think there have been instances found where defendants who are not guilty have pled guilty, and——

Senator WHITEHOUSE. Correct. So having an open file prior to a plea negotiation and having, from the defendant's point of view, some view of how likely or effective the prosecution's case is against them could actually have a meaningful effect on a defense counsel's recommendation to his or her client, correct?

Mr. COLE. Yes.

Senator WHITEHOUSE. Okay. Let me ask unanimous consent to put into the record of this hearing a letter of May 30, 2012, that Senator Cornyn and I wrote to the Attorney General. I do not expect you to be familiar with this letter, Mr. Cole——

Mr. COLE. I have read it, Senator.

Senator WHITEHOUSE. Oh, good. Well, it concludes, "We recommend that the Department of Justice give serious consideration to a departmentwide default open file policy. We invite your thoughts on this proposal, whether it is sound and why, and what exceptions ought to apply. We understand that there are exceptions, particularly in the witness safety and witness privacy context, and what their scope should be. We look forward to your response."

Do you have any idea when we might get a response to that letter or where it is in the process?

Mr. COLE. I do not know exactly where it is in the process, but it is something we will certainly respond to.

Senator WHITEHOUSE. I appreciate it.

Senator COONS. Without objection, it will be made part of the record.

Senator WHITEHOUSE. Thank you.

[The letter appears as a submission for the record.]

Senator WHITEHOUSE. As Attorney General of Rhode Island, I operated under rules that were so liberal that I think they could fairly be described a de facto open file policy, and I thought we did

fine. I tried to run as wide open a U.S. Attorney's Office as I could when I was U.S. Attorney in terms of discovery. So I think it is a worthy discussion to have, that the traps and the damage to the Department's reputation, setting aside the damage to the defendant themselves, is worth—is a heavy weight in the balance.

I also would like to react briefly to your suggestion that the *U.S. Attorneys' Manual* applies a higher standard to Assistant United States Attorneys than the *Brady* rule or the *Giglio* rule per se. There is one piece—and I think we have had this discussion before—that remains a real thorn in my side in which that is not true, and that is the so-called Margolis memo that closed out the investigation into the Office of Legal Counsel and that declined to apply to opinions of the Office of Legal Counsel the same standard and duty of care with respect to candor toward a tribunal that a regular lawyer has. And it strikes me that this is a mistake, and I once again urge the Department to correct it.

In Rhode Island, you see workaday lawyers heading into the Garrahy Judicial Complex with multiple files under their arms to get through the work of the day. They are going before a judge who has the chance to do independent research and correct any failure of candor to the tribunal. They are facing an opposing attorney who has every incentive to catch them out in any failure of candor to the tribunal. And even in that environment, they nevertheless bear a duty of candor to the tribunal.

Cut to OLC. You have perhaps the smartest lawyers in the country. You have lawyers who go on to become Supreme Court Justices. You have lawyers who come off Supreme Court clerkships. You do not have any safeguard on them. There is no judge who will be reviewing that opinion, and there is no opposing counsel who will see it.

So it would seem to me that structurally it is even more important that an OLC opinion meet the basic standard of duty of candor to a tribunal that a regular workaday lawyer has to meet slugging into the courthouse every day. And I urge you to reconsider that. I think it is the last bad legacy of that bad event that we no longer hold OLC—or since then we do not hold OLC to the minimal standards that a regular workaday lawyer is held to in a context in which I think it is more important that they be held to a high standard because so many of the checks and balances do not apply.

So I think it is important that the Department set high standards. I am delighted that the U.S. Attorneys' Manual sets a higher standard with respect to *Brady* and *Giglio*. In this area, you are on the wrong side. You are setting a lower standard, and I urge you to correct it.

The last thing I want to raise with you in my last second is Director Mueller of the FBI said that a substantial reorientation of the Bureau was necessary to face the modern age of cyber crime, and I hope that the Department will be similarly flexible and thoughtful about how we should reorient the resources and perhaps even the structure of the Department to meet a threat that now the head of the cyber command says is the cause of the greatest transfer of wealth in the history of humankind and of which we are on the losing end. It is a very important issue, and I think the De-

partment needs to be flexible in rethinking what its role is, even if it means clashing with OMB about asking for more resources.

Mr. COLE. All I can say is, as you know, Senator, you and I have had many discussions on the cyber issue. It is one of the greatest dangers facing our country today, and it is something that we need to look at very carefully, both in terms of what legislation we have, what organizational structures we have, what resources we have to fight it.

Senator WHITEHOUSE. I appreciate that.

Thank you, Chairman.

Senator COONS. Thank you, Senator Whitehouse.

Before we proceed to Senator Sessions, Senator Grassley has asked for an opportunity to speak briefly.

Senator GRASSLEY. I have to apologize to Professor Bibas because he came at our request to be here, but I have an 11:45 meeting I have got to go to, and I just wanted to apologize, and I will submit questions for answer in writing.

Senator COONS. Thank you, Senator Grassley.

Senator Sessions.

Senator SESSIONS. Mr. Cole, thank you for coming. It strikes me, looking at your bio, that you are well prepared to deal with this question, having spent 13 years as a trial attorney in the Criminal Division, later as Deputy Chief of the Public Integrity Section, having prosecuted notable cases, including a federal judge, a Member of Congress, and a federal prosecutor.

You know one thing, and that is, when you send an attorney into a courtroom to try a big case, this is not a little bitty matter. It is a very, very intense environment. When you have a person who is the Chairman of the Appropriations Committee, a governor, a Congressman, or a federal judge, and they are looking at maybe the rest of their life in jail, it ceases to be an academic matter. Wouldn't you agree? It becomes a very intense environment.

Mr. COLE. I would agree wholeheartedly, Senator. It is a very important matter.

Senator SESSIONS. And the defense attorneys are highly skilled at identifying the slightest *Brady* violation, and they make charges in the press of prosecutorial misconduct and denial, and it may be an innocent, insignificant event, an error perhaps by the prosecutor, but insignificant nevertheless. Is that true?

Mr. COLE. That does happen.

Senator SESSIONS. And it is just part of the technique to put the prosecutor on the defensive from the get-go.

Mr. COLE. It is one of the standard avenues of attack that prosecutors use.

Senator SESSIONS. So prosecutors——

Mr. COLE. That defense attorneys use.

Senator SESSIONS. Excuse me. Defense attorneys. Let me tell you what I am worried about. I am worried that we have these big cases—we have had them in my State. We have had them in Alaska. We have had them with a former Presidential candidate here. These are tough things, and my sense is from my observation of it that too often we are sending prosecutors in from Washington who do not have the depth of experience—they may be top of their class academically. They may be men and women of integrity. But

they just do not know what they are in for, the kind of challenges they are going to be facing, and there is no substitute for real experience, having been through these kinds of cases.

Do you sense and don't you think the Department of Justice as part of your review needs to give serious thought to the question I just raised?

Mr. COLE. I think you raise a very important and a very interesting point, Senator. In looking at the statistics over the years, the number of trials that are taking place in federal court, criminal trials, has gone down.

Senator SESSIONS. Gone dramatically.

Mr. COLE. Dramatically.

Senator SESSIONS. So there is a lot less experience out there by the FBI and by the prosecutors.

Mr. COLE. And having been one of those Washington lawyers who went out and tried cases in different parts of the country, I know how important it was when I did that to make sure that I understood what the local rules were, that I understood what the makeups of the juries were, that I understood what the preferences of the judges were. I would try——

Senator SESSIONS. Did you listen to experienced local prosecutors who have been in the courtroom?

Mr. COLE. To the point where I would annoy them. I would try and get as much information as I could.

Senator SESSIONS. I understand that often prosecutors—and it is always I have been told that, but even in recent years—ignore or reject the opinion of the experienced attorneys oftentimes. Do you think that would be a dangerous thing for a prosecutor to do?

Mr. COLE. Well, I think it would. I am hopeful that those are the exceptions to the rule because I do know that many of our prosecutors go out and in most cases work with the local United States Attorney's Offices on these cases. The times where they are not working together are pretty rare, and in my view, and certainly the tradition has been, even in those cases, except where there are recusals and there have to be walls, you should be checking with the local prosecutors to make sure you understand what is going on in that district.

Senator SESSIONS. I do not think that always happens.

Let me mention something to you. Isn't it true that there is a real danger in putting prosecutors in big cases that require a lot of discovery, a lot of records and documents, heading out to a big trial, facing some of the best defense lawyers in the country, isn't there a real danger that cases can be rushed, prosecutors can be put in a position where they are physically unable to master all the evidence and can get in trouble for that reason?

Mr. COLE. Yes, I think those are certainly big concerns that any manager and any supervisor should have, that they want not only the most capable team trying the case but the most experienced and familiar team trying the case, so that the lawyers who really handled the case should be the ones trying it. It does not mean you cannot add talent to a team, but you have to take care that they are up to speed.

Senator SESSIONS. Right. Well, I would just say, this case in Alaska had two local Assistant United States Attorneys. Public In-

tegrity Section attorneys Edward Sullivan and Nick Marsh were assigned to the trial team. However, this arrangement was abruptly altered by the Chief of Public Integrity Bill Welch's decision to bring in Brenda Morris, his Principal Deputy, as a lead prosecutor just before the indictment was issued. That was before you were Deputy Attorney General. But wouldn't you say that is a highly risky thing just from the basic facts I have given you?

Mr. COLE. You know, you have to learn what all the facts are surrounding it. Certainly when I was the Deputy Chief of Public Integrity, every now and then I would get called in at the last minute to help with trying a case just to add in a level of trial experience, a level of seasoning that may have been viewed as needed in the team. So you have to try and look at what all the reasons may have been for having done that.

Senator SESSIONS. Well, I understand that the new dynamic created by the Morris addition led to discord among the litigation team and a lack of communication. I think that factually has been ascertained.

Mr. COLE. Right, and that is not good.

Senator SESSIONS. That is not good. Are you confident that the Chief of Public Integrity, who served under your direction, is sufficiently aware of the dangers and difficulties of trying these kinds of cases and is sufficiently committed to having the kind of experienced prosecutors necessary to handle a case of this magnitude facing perhaps some of the best defense lawyers in America? And do you think that is something you will be looking at in your supervisory role?

Mr. COLE. Absolutely, we look at it in our supervisory role, and absolutely, I feel that this is something that has been reiterated time and time again, something that we focus on, and something that the Chief of the Public Integrity Section understands.

Senator SESSIONS. Well, Mr. Chairman, thank you for letting me go over a minute. I really love the Department of Justice. I spent 14 years in it. I personally tried some very big public corruption cases for weeks at a time. And I am telling you, anybody that thinks that is a picnic does not know what it is about. And I lived with those cases, and the idea on the eve of trial of another lawyer being assigned to a case of the kind that Alaska was and the cases I dealt with is unthinkable to me. It is just very dangerous. And I would think you do not have in the Department of Justice, Mr. Chairman, you just almost cannot have in the Department of Justice the kind of experience you need. And perhaps these big cases, you need to look around to the offices around the country where they have got skilled Assistant United States Attorneys who have tried cases, who know what it is like to be called on to move to another district if need be to lead or assist in these prosecutors, something like that. But you cannot have, in my opinion, a big, complex case being tried by an inexperienced attorney. It is a disaster waiting to happen.

Mr. COLE. Well, Senator, obviously, that cannot be disputed. There are, however, very experienced attorneys both in U.S. Attorney's Office and in Main Justice, and in some of the sections in Main Just, there is a real repository of expertise in some of these kinds of cases which is very helpful. But I agree with you. People

who are not experienced with a case should not be thrown on it at the last minute.

Senator SESSIONS. My time is up. Thank you, Mr. Chairman. And I do hope that you will give that attention. And I am inclined to believe, as you have said, that it is not a question of legislation, rules. The rules are in my view clear. You have to disclose exculpatory evidence. The question is: When you do a massive case, do the lawyers have the time or the ability or the knowledge to ascertain what is discoverable, what needs to be produced within the time frame set for the trial? And if you rush it too fast, you can make mistakes. And Alaska went awfully fast, it seems to me.

Mr. COLE. Yes, it did. And they need to make that time to make sure that those things are being followed and those rules are being honored.

Senator SESSIONS. So when you announced—I hate to keep—but so when this trial was moved up, first at the request of the defendants, which is a clever gambit sometimes when they know the prosecution really is not prepared, so they demand the speediest of trials, and you—do you think in retrospect sufficient resources were poured into that case to make sure every document was scanned and evaluated and promptly gotten to the defendant as required?

Mr. COLE. Based on the record that has been developed rather exhaustively, obviously not.

Senator SESSIONS. I think not, too. It is just dangerous to have a big case like that go that fast and have lawyers being changed in the process. It is a disaster waiting to happen.

Thank you.

Senator COONS. Thank you, Senator Sessions. I think your personal experience and your passion for this is obvious and contributes significantly to this discourage today.

I believe I am the last questioner for this panel. Mr. Cole, thank you for your testimony in front of us today. As Senator Sessions has so roughly summarized it, we are weighing a piece of legislation that is intended through statute to enforce certain commitments, requirements, and obligations of prosecutors, and you have suggested in your testimony that the Department already sort of goes above and beyond the *Brady* obligations and is already engaged in the sorts of actions to enforce appropriate disclosure and compliance. So if I could, I just wanted to go over a few things with you before we conclude.

Mr. COLE. Certainly.

Senator COONS. First, there was an exchange with Senator Whitehouse before you testified that each U.S. Attorney's Office has a designated discovery attorney, and I would just be interested in hearing what regulations exist governing the qualifications and experience of that attorney, and then what percentage of their time they are available to answer disclosure questions—in other words, the sort of first level questions—so in these instances when you have got fast-moving trials, perhaps relative inexperience, high stakes, and you have got a tough judgment call to make prospectively, how accessible, how reliable, how engaged are the discovery attorneys that are available to those practitioners who have got a tough judgment call?

Mr. COLE. Generally, they are experienced attorneys who have had a number of trials, who have been through those wars that Senator Sessions has described. They have the scars to show for it. They are part of the office. They are there to answer those questions. They will have their own cases, too, but they are generally going to be available to answer those tough discovery questions, and they are going through their own training to make sure that they are really up on all of the Department policies and procedures that need to be followed in order to make sure we have a fair trial.

Senator COONS. And what sort of policies are in place in the DOJ to audit line prosecutors for their *Brady* compliance, to ensure and to record their *Brady* compliance?

Mr. COLE. Well, first of all, we have the standards that are put not only in the *United States Attorneys' Manual*, but there are memos that have been issued by the Deputy Attorney General's office, by my predecessor, that give further instruction not only on what the standards are but how to implement them. And then we have the Office of Professional Responsibility's procedures where any allegation of a violation of discovery rules is going to come to their attention. If a judge questions whether discovery was done properly in a case and makes any finding, that automatically goes to OPR. If the attorneys have been found by a judge to have violated discovery, the attorneys themselves are supposed to report it to OPR.

As was pointed out, I believe, by Senator Sessions, defense attorneys are always giving us letters and calls and making allegations that discovery has not been given as it should have been. And while those happen frequently, we do not just throw them out. We look at them and we take them seriously, and we make sure that there was no problem.

So there is an enormous number of sources that come in that allow us to have visibility into whether or not the individual line attorneys are fulfilling their obligations.

Senator COONS. So if I could summarize, there is no uniform, routine audit process, but there are so many different ways in which challenges are presented, whether judicial, opposing counsel, postconviction if that is the outcome, that you are confident that the audit process is sufficiently robust and broad?

Mr. COLE. Yes, I think that a kind of regularized routine audit process would require you to go through virtually every piece of information or evidence in a case file, and I do not think that would be practical.

Senator COONS. Would you comment on whether the duty imposed in this proposed disclosure fairness bill to use due diligence to discover exculpatory evidence that was reasonably available to the prosecutor, would that, in fact, expand the duty of the prosecutor beyond current Department regulations?

Mr. COLE. I am not sure that in and of itself would expand it. Obviously, that is not a hard-and-fast standard. There is a lot of room and judgment that is contained in that standard. The memos that have been put out by the Department really expand who is part of the prosecution team, and I think that is really the key to that part of it, to define whose material should be looked at. And this is something the Department has taken great pains to make

sure is taken into account, who is part of the Department team, the prosecution team, making sure that their files are reviewed to determine whether there is any *Brady* or *Giglio* information in them, and that is certainly one of the most important parts of complying with these rules, is starting out by defining where you are going to get the information.

Senator COONS. Then my last question, as has been referenced before, the vast majority of cases are actually resolved through plea bargains rather than taken to trial?

Mr. COLE. Correct.

Senator COONS. And, if anything, that percentage has increased. You are familiar, I presume, perhaps, with the Ashcroft memorandum regarding plea deals which restricted prosecutors post indictment to accepting pleas for anything less than the top count, and my understanding is that that standard has been changed somewhat in the current administration. I am concerned with the potential *Brady* implications. A deal may be impossible if a prosecutor discovers and discloses *Brady* material that negates the top count if there is still a position that you cannot accept a plea for less than the top count.

What is the current status of this policy memo? My impression was it had receded to individual U.S. Attorney's Offices to make their decisions. And what would you think of the DOJ adopting a uniform policy that permitted prosecutors to resolve cases with plea bargains that did not require the top count? And what is the impact both for *Brady* and, to the extent relevant, for *Giglio* material?

Mr. COLE. Well, the Attorney General issued a memorandum that I think expanded on the Ashcroft memorandum and allowed for—while there is the general policy still in effect, but it allows for individual considerations in each case—not every case is the same—and allows there to be consideration of any number of factors that may not have been anticipated in a case so that you can deal with them in the most effective way possible. And so I think there is room within that standard to take into account the situation that you propose where you may not be able to prove the top count in a charge and you should not be taking a plea for something you cannot prove, but there are other charges that are available that will end up producing justice for the matter, and that is really where we want to be.

Senator COONS. Thank you. Thank you very much, Mr. Cole, for your testimony here before us today.

Senator SESSIONS. Could I say one more thing to Mr. Cole?

Senator COONS. Senator Sessions.

Senator SESSIONS. Mr. Cole, you may be uniquely qualified to deal with this problem. You have got the experience and the knowledge. You have seen the Department of Justice Public Integrity Section. I do not think it is performing well in terms of getting your best people in the courtroom trying some of the most important cases. I think the Department has been embarrassed by the results of a lot of big cases. And I think you should look at it really hard. You should review from top to bottom the staff you have got there, see if you can find ways to make sure that the best attorneys are available, whether they are in Washington or in U.S. Attorney's

Offices around the country or in the courtroom handling these cases, because I do think the Department is challenged right now and needs to demonstrate that it is operating at the highest degree of professionalism.

Mr. COLE. Senator, I appreciate those comments. The only comment I would like to make in return is that I think you end up emphasizing—the press ends up emphasizing—our losses much more than our victories. There are a huge number of very successful cases that prosecutors throughout the country and throughout the Public Integrity Section win on a regular basis.

We, of course, do not like to lose cases because obviously we make a lot of decisions on the way toward a case being tried. And as you point out, these are tough cases. Some of them are very tough cases. And the ability to find that right balance and to exercise your discretion under tough sets of facts, under issues that cry out, on the one hand, to be dealt with and, on the other hand, may have questions about how far are you going and where are you going as far as the interpretation of the law. These are very tough cases to deal with day in and day out, but I think our prosecutors do a very good job of it, but we are constantly looking as managers to make sure that all of our attorneys are trained as well as they can be, are as experienced as they can be, are supervised as well as they can be, and are performing at the peak of their abilities. By and large, they are, but there is always room for improvement.

Senator COONS. Thank you very much, Mr. Cole, for your service, for your leadership, and for your testimony before us today, and I would like to specifically thank the men and women of the Department of Justice for their very hard work to ensure that witnesses are protected, that cases are brought forward, and that justice is served. So thank you for appearing before this Committee here today.

Mr. COLE. Thank you, Senator.

Senator COONS. I would like to invite the second panel, Executive Director Carol Brook of the Federal Defender Program and Professor Stephanos Bibas, professor of law at the University of Pennsylvania Law School. As this next panel is coming forward, I would like to state that, without objection, we will enter into the record a number of letters that Senator Murkowski had asked be put into the record. These are letters from the American Bar Association, the ACLU, the U.S. Chamber of Commerce, the Constitution Project, and the NACDL broadly in support of Senator Murkowski's legislation. That matter of housekeeping simply needed to be done before we introduce our second panel.

[The letters appears as a submission for the record.]

Senator COONS. First we welcome Carol Brook, who is executive director of the Federal Defender Program for the Northern District of Illinois. Director Brook has been an attorney with the Federal Defender Program for over 25 years. She previously served as staff attorney, chief appellate attorney, and deputy director. Her duties include representation of clients through trial and all appeals and the training of staff attorneys and 170 private attorneys under the Criminal Justice Act panel. Ms. Brook received her law degree from the University of Illinois College of Law and undergraduate degree from the University of Michigan, and we are grateful for

your willingness to join with us here today. Before I then introduce Professor Bibas, if you would like to make your opening statement.

STATEMENT OF CAROL BROOK, EXECUTIVE DIRECTOR, FEDERAL DEFENDER PROGRAM FOR THE NORTHERN DISTRICT OF ILLINOIS, CHICAGO, ILLINOIS

Ms. BROOK. Thank you, Chairman Coons, Senator Sessions. I guess I want to start by thanking you, Senator Coons, for saying it was 25 years rather than 36 years. I appreciate that.

Senator COONS. I appreciate the length and seasoning that your service has brought.

Ms. BROOK. I am honored to be here not just because you want to hear my testimony, but because the issue of discovery in federal cases has been near and dear to my heart since I began practicing law. I am here as a member of the criminal defense bar on behalf of the hundreds, probably thousands of federal defender colleagues. And I need to say I am not here representing the Federal Criminal Rules Committee, and if you ask me any questions about it, you will get me in trouble.

When I began practicing law——

Senator COONS. Disclosure up front is always very practical.

Ms. BROOK. I promised I would.

When I began practicing law, I first learned about the kind of training that Deputy Attorney General Cole talked about from a story that then U.S. Attorney and later Chief Judge of the Second Circuit Jon Newman told. At that time the training consisted of going before very large groups of prosecutors and giving a hypothetical. The hypothetical was, "You have indicted a bank robber, and several bank tellers and customers have identified that person as the robber in a line-up. Later, a witness comes in and says, 'No, that was not the man.'"

Judge Newman asked the prosecutors at the time, How many of you would turn over the name of the witness who said that was not the man? It turned out only two would.

That vignette, if you will, is important, I think, because although we have heard from Deputy Attorney General Cole that everything is much better now, that the Stevens case was an aberration, that is not my experience, nor is it the experience of my colleagues. Our experience is that it is a rare case where some piece of discovery is not turned over at midnight the night before the trial or during the trial or after the trial. And, of course, we do not know how many cases there are when the evidence is not turned over at all. We do know that there are a significant number of cases where our research determines, our investigation determines, that there was *Brady* evidence that we did not get.

What that tells me is that the internal training, commendable as it is, which has gone on now for 50 years since the decision in *Brady*, is not making enough of a difference; that the rules governing criminal discovery, although helpful, are not making enough of a difference; and that what we need at this point is legislation, the imprimatur of Congress to say we believe in the rule of *Brady*, which is not about guilt or innocence but about fairness. The bedrock principle of *Brady* is fairness.

It seems to me that when we talk about internal training, I can hear the difference between what the prosecution believes and what we see. They say the *U.S. Attorneys' Manual* is far broader than the law. I see their interpretation of the law as far narrower than what I believe the law to be. So we start out, I think, in different places, and we continue to go out from those places instead of coming back together.

It is my belief that the clear legislation that Senator Murkowski has proposed would bring us together because it would set a level of clarity that we simply do not have at this time, and I urge this Committee and the full Congress to take up that legislation.

Thank you.

[The prepared statement of Ms. Brook appears as a submission for the record.]

Senator COONS. Thank you, Ms. Brook.

Next I am going to welcome and introduce Professor Stephanos Bibas, who is a professor of law and criminology and director of the Supreme Court Clinic at the University of Pennsylvania Law School. Professor Bibas is a former Assistant U.S. Attorney for the Southern District of New York, a national leader in the field of criminal law who has published important articles regarding the role of plea bargaining and the effects of scarce resources in the criminal justice system. He clerked for Judge Patrick Higginbotham in the Fifth Circuit and for Justice Anthony Kennedy of the U.S. Supreme Court. Professor Bibas is a graduate of Columbia University, Oxford University, and I have the passing impression that I remember him from our time at Yale Law School together.

So I welcome you, Professor Bibas. Thank you so much. And, again, Senator Grassley was grateful for your willingness to join us and testify here today.

STATEMENT OF STEPHANOS BIBAS, PROFESSOR, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, PHILADELPHIA, PENNSYLVANIA

Mr. BIBAS. Mr. Chairman, Members, thank you for having me back, and good to see you again.

I am delighted the Committee is looking at this problem. The impulse is important. The problem is a real one. I fear that the thrust of the bill is beside the point, and I think it important to look beyond the Stevens case to the impact of the bill, which would be far broader.

I want to make three points today. The first is the root problem here is not one of standards but enforcement. Second, the core issue here is not the very small minority of cases that go to trial but plea bargaining. And, third, that particularly disclosure of *Giglio* material during plea bargaining poses grave risks to victims, to witnesses, to undercover agents, and confidential informants in particular.

So the first point I want to make is the *Brady* and *Giglio* decisions have been on the books for decades, and yet we have seen multiple studies that show hundreds of violations. Now, most of these focus on State and local prosecutors, but I would not be surprised if there are a good number in the federal system as well.

I agree that there is a problem here, but all of these are already unlawful under existing constitutional law, and nothing in the bill would appear to solve that. The much bigger problem—and I have written about this repeatedly—is not the substantive standard. It is the structures and procedures used to comply with them.

We have heard reference to—and I would agree—the mentality of winning a conviction at all costs as opposed to seeing justice done. And that is bound up with a series of structural issues: prosecutorial hiring, incentives such as pay and promotion, training, oversight, discipline, firing, office culture. Some of that can be spurred externally. I do believe there may be a role for congressional oversight hearings, for bar disciplinary authorities which currently do almost nothing in practice, and sometimes judicial review of evidence in camera, as I think Senator Franken referred to. But experience has shown that at best they are going to have a secondary role. You can weed out a few bad apples, but there are systemic failings here that led to the Senator Stevens debacle. What you really need is to have the outsiders be backstopped to prod DOJ and prosecutors' offices themselves to self-regulate and supervise themselves.

As I view it, from what I have seen empirically, there are two basic clusters of discovery issues that come up, and both of them are not about the substantive standards. They are about compliance. The first one is that prosecutors, police, and other agents have to gather all the evidence from across far-flung agencies, case files, computer systems, lawyers, and teams, and here we have the problem that in the Stevens case you had Main Justice, you have Alaska, you have different people coming on and off the team. That is a logistical problem, and especially in the Stevens case, there is a problem that some of the evidence that came up in interviews was not even recorded down into FBI 302 witness reports. That is a procedural problem. Once it is not in the report, whatever substantive standard you put on the paper is not going to affect that problem.

The second problem is that prosecutors have to learn to see and track what evidence, in fact, meets the standard of being favorable or helpful. I have been a prosecutor, and I know that there is a mentality that comes with being on one side of the aisle that means you do not always see the evidence the way the other side is going to see it. It is a valuable thing to have some prosecutors who can see things through a defense lawyer's eyes, but that is an issue of perspective, of vision.

You can tweak the materiality standard or not, but if you do not understand the defense's theory of the case and the way they are going to use a piece of evidence, any formula of words on paper is not going to deal with that problem. And so that, again, is a cultural issue that DOJ needs to work on within. As far as I can tell, the bill would do nothing to attack these core problems.

The second issue I want to point out, which is something that the Chairman has referred to, is that the Stevens case is atypical, because roughly 95 percent of criminal cases never reach trial. They result in guilty pleas. One of the big things the bill would do is accelerate the timing of all of this disclosure to say it has to be right after arraignment, as soon as is feasible.

For classic *Brady* material, that is, stuff that shows you are innocent of the crime or deserve a lower penalty, I probably would support that. It's probably not a bad thing if it shows the person is innocent. We could set aside some possible defenses like entrapment, but core evidence as to whether you did it and whether you deserve the punishment, that is fine—except that is already standard Department of Justice policy. That is what I was taught. That is what everyone understood in the system.

I think the crux of the dispute here is going to be about *Giglio*, impeachment material. The problem with that is that often signals who the defense witness is. If you are signaling there is a romantic jealousy or someone who is a co-conspirator, the defense lawyer is going to be able to tell the identity of this witness in a lot of cases. And I do not think it is as crucial to justice in the way classic *Brady* disclosure is. It makes sense at trial in the context of undercutting the incriminating evidence, but without the picture of what the incriminating evidence is, you do not really know whether this witness's compromised eyesight matters or not if there are five other witnesses who had perfect eyesight.

So it is part of the whole picture at trial. It does not matter as much during plea bargaining. I am strongly inclined to believe that the waiver provisions in this bill would wind up meaning that this right would be waived the same way that the rights to a jury trial and proof beyond a reasonable doubt are waived all the time.

If I am wrong about that, I think this would be a serious impediment to plea bargaining, to disposing of the flood especially of immigration cases along the southwestern border. And I think correspondingly defendants would be less likely to receive concessions because they would not be able to trade that off.

If I thought that these disclosures had little cost, I might still support them. Even if they do not do much good, they would help to reduce some bluffing, some trial by surprise. But, as I am going to discuss, my fear is that *Giglio* disclosures at an early stage come with a very high cost.

So my final point is that there are substantial costs to giving this discovery of witness and victim information. The most obvious cost is to victims—rape victims, molested children, victims of other forms of violence. They are traumatized, they are fearful, they can easily be intimidated or tampered with, and there is some evidence I mention in my written testimony that this happens routinely in jurisdictions such as New Jersey where this kind of disclosure is commonplace. So in the Stevens case, that may not be a fear. That is a public corruption or white-collar case. But the majority of federal cases involve violence, gangs, drugs, other situations where this is pretty common.

Criminal cases also involve a lot of hidden witnesses—undercover agents, cooperating witnesses, confidential informants—and they legitimately fear for their safety. There is the big "Stop Snitching" campaign out there to show community hostility to working with the government, and in New Jersey and other jurisdictions with broad discovery, witness threats have become serious problems, witness tampering.

The bill does allow a safety valve. It would require prosecutors to jump through hoops, so I am not sure that would take care of

it. But even the safety valve is only limited to threats to witness safety. It makes no provision for witness influence to shade their testimony, to bribery of witnesses, no provision for keeping undercover agents' and confidential informants' identities secret so they can continue to work undercover and provide information for future cases.

One of the major reasons why prosecutors plea bargain is so that they can preserve the confidentiality of an informant who will continue to penetrate organized crime or some other big organization. That is an important quid pro quo for plea bargaining concessions. It takes a lot of time, a lot of money, and a lot of risk to infiltrate these organizations. And the prosecution should not have to burn the informant the first time it makes a case or bring the entire organization down at once. If they had to do that, they would be much less willing to offer concessions, and they would be much less able to prosecute many gang conspiracy and organized crime cases.

So, in short, I applaud the Committee's work. I think it is focusing on an important problem. But I fear that the bill distracts attention from the root problem, and if it is not amended to take care of these victim and witness concerns, it would cause some serious harm.

[The prepared statement of Mr. Bibas appears as a submission for the record.]

Senator COONS. Thank you, Professor Bibas. Thank you, Ms. Brook. We will begin five-minute rounds of questions.

Ms. Brook, if I might, first, thank you for your many years of service in the Federal Defender Program. Could you describe from your experience as the chief appellate attorney of the Federal Defender Program in the Northern District your experience of the difficulty seeking meaningful recourse on appeal following a prosecutor's failure to disclose exculpatory evidence?

Ms. BROOK. Well, you really cannot raise that on appeal because you do not have the evidence. You have to go all the way through the appellate process and then come back down and file a habeas corpus petition and then do the investigation to present the evidence into the record. So we are talking about, first of all, some length of years and, second of all, an entirely new investigative process, which is not only time-consuming but costly. And then the standards are, of course, much more difficult to meet on an appeal from a habeas corpus petition than a direct appeal.

Senator COONS. Mr. Cole testified that *Brady* should not be augmented by statute and pointed to the very extensive training the Department of Justice has put in place and the higher standard they meet than the *Brady* obligations and argued repeatedly that the disclosure standard that the Department currently complies with goes beyond *Brady* obligations. In your statement to us, you suggested you have a different view. How do you see this?

Ms. BROOK. Well, I see it in two ways. One, we see cases all the time where we are not receiving whatever *Brady* material is out there in those cases that we know about it. Now, Senator Sessions, I would just say in response to your earlier comment, some of those may not seem like significant pieces, but in the context of the hundreds and hundreds of cases that we see that are not the Ted Stevens case or a mob case but a much smaller immigration case or

a drug case, that can make the difference. It can be a witness who could not see as well or who was not wearing their glasses that does make the difference truly in a case where there are only two witnesses and my client talking about some relatively small drug deal, which make up the majority of cases that we see in federal defender offices and the majority of cases that are prosecuted are represented by federal defenders. I think the number is 85 percent across the country.

The *U.S. Attorneys' Manual*, as I read it, in answer to the second part of your question, starts out as a narrower reading of *Brady*. It talks actually, as Professor Bibas talks, about this idea of classic *Brady* and impeachment material under *Giglio*. That is not something that I think the law supports. I think the law is *Brady*, is *Brady* and *Giglio* impeachment material, is a part of *Brady*. It could be that the impeachment of a witness is the key. Indeed, in the capital cases that the Supreme Court hears on discovery, such as *Kyles* v. *Whitley*, that is what they find, that it was the impeachment material that was withheld that made the difference between whether that defendant was sentenced to death or not.

Senator COONS. Would you, Ms. Brook, support a duty for prosecutors to certify to the court what they have done in order to identify *Brady* material?

Ms. BROOK. To certify to the court.

Senator COONS. And would that be sufficient to make some real progress on this compliance issue?

Ms. BROOK. If I had a preference, I would prefer to see the statute that would put the onus on them rather than to have them bring a certification to the court. I think that might cause some, I guess I would say, bad feelings between the prosecutors and the court, which I would not like to see. My preference would be for this body to create legislation that would apply to everybody and send a signal to everybody. I mean, Congress knows better than anybody the importance of passing a law, not to catch the law breakers but to prevent the law breakers, and that is what I think would make a difference here.

Senator COONS. Thank you, Ms. Brook.

I will yield to Senator Sessions.

Senator SESSIONS. Thank you. You know, you told the story of Judge Newman. Maybe the prosecutors were sleeping when he asked them to raise their hand. Maybe they did not bother to raise their hand. But that is obvious——

Ms. BROOK. That is what he said.

Senator SESSIONS. There is no question about it—well, I am just saying I do not think the story is that valuable. It was 1968, also, so I do not want to—I am just saying today I do not think any prosecutor faced with that choice would withhold evidence that he had an eyewitness that said this was not the guy. Do you disagree with that?

Ms. BROOK. I do disagree with that.

Senator SESSIONS. Well, I think the prosecutor should be fired on the spot.

Ms. BROOK. Well, I would agree with that. But I do not think that is what happens, and I think it is the materiality that makes that so difficult because——

Senator SESSIONS. Well, it could be. They talk about the——

Ms. BROOK [continuing]. It gives them a whole different——

Senator SESSIONS [continuing]. Glasses. You know, if you know that there is a key eyewitness and you know they do not have good eyesight and you know they did not have their glasses on, that has to be disclosed. Wouldn't you agree, Mr. Bibas? It is not a question. It should not take 30 seconds to give that any thought.

Mr. BIBAS. Absolutely.

Ms. BROOK. And I wish the government prosecutor was like you——

Senator SESSIONS. I do not think—I think you are exaggerating the willingness of prosecutors not to disclose. I am just telling you. You and I can disagree, and I respect your opinion, but I do not agree on that.

Now, what about, Mr. Bibas, in the Murkowski legislation—we had a defense lawyer write the Committee, a defense lawyer, saying that eliminating the materiality requirement, which I think the Murkowski bill tends to do, "could lead to new trials and reversals in cases even where error results in no prejudice to a defendant and would have no impact on the case." Do you agree that that problem with the Murkowski bill?

Mr. BIBAS. It is hard to know whether the materiality change would make a difference or not when it interacts with the harmless error standard that the bill preserves. I actually tend to think that, you know, it looks like a change in the form of words. It probably would not matter that much. It could wind up——

Senator SESSIONS. Because it preserves the harmless error.

Mr. BIBAS. It preserves the harmless error rule. The place where it would matter is in those cases in which a defense lawyer had the evidence and did not make a timely objection. In that situation, it is possible to read the harmless error rule in here as undercutting the requirement that a defense lawyer make a timely objection or else suffer a more demanding plain error standard. So it could get in the way of resolving the issue early on, but it is really hard to tell how it is going to interact with the harmless error rule.

Senator SESSIONS. Well, I know judges and courts analyze it on the basis of, you know, is it material, is it a matter not relevant to the guilt or innocence of the defendant. And I think you do have differences of opinion about where to draw that line. At some point a judge gets to call the question. But I do not think that is the final thing.

I am just aware of some big cases that go to trial rapidly. Sometimes you have computer access documentation of massive amounts, and so I worry about charges of prosecutorial misconduct when it is simply that may be a young prosecutor doing the best they can do, just did not fulfill the responsibility either from lack of time, lack of insight to realize this could be a problem, that this might be something a defense lawyer would come up with as part of the defense.

So I guess there is some problem or dangers there, but I believe that there are more—that prosecutors are hammered constantly over this question. Almost every case that you have large complaints about, you know, anything that is close to a *Brady* violation is raised. So most prosecutors that have much experience are pret-

ty well informed about what they should produce and what they should not.

Ms. Brook, would you—I will give the two of you a right to comment on that.

Ms. BROOK. Well, in cases that I have laid out in the written testimony, there are a number of cases—small cases, not these big cases—where prosecutors have not turned over evidence that seems to me—fingerprint evidence, for example—to be clearly exculpatory, as you say, and yet it was not turned over.

Senator SESSIONS. Is that like there was no fingerprint on the counter where a robbery occurred?

Ms. BROOK. It was the fingerprint of the investigating agent in a case where the defense was, "I, the defendant, did not touch it. Somebody else must have put the drugs there." And it turned out that actually somebody else did have access to the piece, but he did not know it.

I am not saying, Senator, that all these prosecutors are deliberately sneaking around withholding evidence. I do not believe that. But I believe the standards are so muddled and the internal kind of non-disclosure culture that has developed would change if there was a higher ruling that said this is what the United States declares.

Senator SESSIONS. Professor Bibas.

Mr. BIBAS. Yes, Senator Sessions, I think you are right. There are young prosecutors, and they do not always know how to look at things, but I think it is dangerous to view this as a matter of a few bad apples. I also think there are false charges that get thrown around. And fundamentally, I think it is an issue of culture and systems, and I just do not see what changing the standard of materiality is going to do to that. Fundamentally, when I was a young prosecutor and I look back and I say, gee, I should have turned that over under *Brady*, it was because I—and I can think of a specific case. I just did not see this the way that the lawyer on the other side saw his defense. And I think one thing that is very atypical about Stevens is there is an internal memo in Stevens where the prosecutors knew exactly what the Stevens defense was going to be, and it was very clear how this plugged into that. But you cannot write a bill based on the Stevens case that is going to apply to a whole bunch of cases where the real problem is the young prosecutors who have not dealt with a lot of defense lawyers or do not see things that way do not see the evidence that way. I mean, partner them up with senior prosecutors, maybe some of them who have served some time on the defense side. Maybe there is a way to get the defense to voluntarily provide some of its theory of the defense so that in time the prosecution can see, oh, this relates to the idea that the contractor had folded this into his bills. But it is much more complicated than just putting a set of words on paper and saying getting rid of the materiality requirement is going to change what is a failure to see things in the first place.

Senator SESSIONS. Thank you.

Senator COONS. Thank you, Senator Sessions.

If I might just follow up on that specific line of questioning, if I remember correctly, in the Schuelke report, there is a reference to a Stevens prosecutor defending his non-disclosure of a statement

that would corroborate the Stevens defense by stating that it never crossed his mind that *Brady* required disclosure, and I think that reflects what you are suggesting about just the difference in mindset and how prosecutors and defense attorneys look at evidence. And should this cause us to doubt whether *Brady* is sufficiently clear in what it demands of prosecutors? In short, is the core issue here a lack of clarity in how to interpret what constitutes *Brady* material or a failure to adhere to *Brady* standards? Both of you, if you would, please.

Mr. BIBAS. I think it is more foundational than that. If it were unclear, people would be running around, wondering, asking questions. I just do not—the "never crossed his mind" I think is about just the tunnel vision. There is a psychological tunnel vision that when you are too invested in a particular theory and you are rushing to trial and this case is under very tight time pressure, you know, you do not step back. And I think a second opinion is what doctors do for that, right? But there is not a mechanism for a second opinion for someone else more seasoned to step in and say, well, here are the strengths and weaknesses. Maybe you need a pause or a little more time in the cases that are going to trial to really look at it the way that they will. But I do not think that that has to do with the wording of the standards. You know, training and culture and those other things could help with that, but it is a more complex problem than I think the bill grapples with.

Senator COONS. So, in an article that you published, I think, in *Northwestern Law Review*, you suggest the problem is skewed priorities and metrics of success rather than underfunding or other proposed factors. Are you implying prosecutors are fully capable of complying with *Brady* but do not do so just because in their career paths and in their operating environment they just do not place enough emphasis on it?

Mr. BIBAS. I think some of that is conscious and a lot of it is unconscious. I think a lot of it is just the way their worldview has been shaped. In England, generally people do not specialize in being prosecutors or defense lawyers. Barristers do some prosecution, some defense. We are not going to require all prosecutors here to have defense experience, but having a fraction who do or having a supervisor who does or having to justify something—it is like a moot court where you get the hostile questions, and you really test whether your theory works or holds up under the best cross-examination.

There are other ways to do that, but I do think that you are right—and in a way I fear that if we stigmatize losses too much or there are always the occasions for stigmatizing the prosecutor, you discourage prosecutors from saying, okay, I dismiss the case. Maybe we want to celebrate the prosecutor who dismisses the case, loses the case, because he turned over the evidence. And if every acquittal is an occasion for saying, oh, this prosecution should never have been brought, the risk is that there will be more pressure to win or to be so risk averse that everything winds up in generous plea bargaining, because there are a lot of moving parts here. So I am reluctant to say—I am reluctant to put my finger on one thing as the easy solution, but you are right, the metrics, the incentives, the worldview are connected here, and DOJ has to make a

point of rewarding and praising the people who maybe do not do everything that they can do to win a case.

Senator COONS. So if the main thing that Mr. Cole points to is policies, training, compliance, access to more seasoned attorneys in close calls, would you suggest, Professor, not the adoption of this new statute and the imposition of new statutory standards but instead some voluntary action by the Department of Justice to change or strengthen their recognition and training procedures so that those who fully comply yet lose the important case as a result, those who are less willing to focus on the win-loss record and more willing to invest time in mentoring more junior attorneys ought to be celebrated and that would be the better path forward?

Mr. BIBAS. Yes, I think——

Senator COONS. Is that what I hear you suggesting?

Mr. BIBAS. I think that—and I think this Committee could play a role in oversight and just communicating that, you know, if the Department wants to prove that it is capable of self-regulation, the Committee is going to want to see progress on those fronts. And I think they are better at self-regulating than maybe just a piece of legislation in the first instance, assuming the Department is making good-faith efforts. And when you look at states like Florida and New Jersey, actually, prosecutors in those states have adopted self-regulation to head off legislative reforms and have been able to come up with more careful, more subtle metrics than maybe just writing a piece of legislation in the first instance could do.

Senator COONS. Let me in closing on my part—has Senator Sessions left? Okay. If I might just as a last question, both of you highlighted the importance of the predominance of federal cases being resolved through plea bargains. Your closing comments, if you would, on the impact of insufficient disclosure of potentially exculpatory evidence on the plea bargain process and the question I had for Mr. Cole about the Ashcroft memo and whether or not the approach of the Department ought to be, as it is now, to allow some consideration of individual case factors in order to avoid being overly rigid in terms of plea bargaining and its interaction with *Brady* disclosure, some comments on how do we ensure plea bargaining is being done fully appropriately.

Ms. BROOK. Well, as I said in my written testimony, I think especially in light of the most recent Supreme Court decisions, the idea that we will receive adequate discovery, including *Brady* discovery, prior to a plea is going to be mandatory. We are going to be required as defense lawyers, as all good defense lawyers have always tried to do in the past, to understand as much about the case and as much about the prosecution's evidence as we can to knowingly advise our clients whether or not it makes sense to plead, not just because either you did it or you did not, but because of a whole host of factors, including what the risks are, which we generally do not know now, although in my view we should know now, and certainly under the law that the Supreme Court has put down, we must know now.

So I think this idea that we will have to have more discovery prior to plea is already going to be mandated by the Supreme Court and, as you point out, is required for us to actually make any

kind of reasonable assessment of what to tell our clients and whether they should plead.

I agree with you on your second point as well that—and they have backed away from the Ashcroft memo. They do more individual decision making now on what is a reason to plead. So we are not always told you must plead to only the highest possible statute that we can prove. But there would be some room—like under the Sentencing Guidelines, there would be some room for some more breadth of consideration.

Senator COONS. Thank you, Ms. Brook.

Professor Bibas, I thought you raised in your testimony some particularly interesting points about the potential threats or risks of compromising confidential informants, potentially risking witness intimidation or inappropriate persuasion. Your comments—and this will be the last—on how to ensure that plea bargaining is being done appropriately and that there is accelerated disclosure that is relevant.

Mr. BIBAS. I think it is a very important point, and I am glad that the Committee focuses on it. I will talk generally about the plea bargaining issue and then specifically about the Ashcroft and Holder memos.

The general point is I think I have a different emphasis from Ms. Brook, in part, because the Supreme Court itself unanimously in the *Ruiz* case said, you know, when it comes to impeachment evidence, when it comes even to affirmative defense evidence, they said this is—it is not the central factor for a defense in weighing the evidence. I think defendants would like to have a picture of the prosecution's case, but they do not get the incriminating evidence, which is what they would really need to weigh it. And in the ordinary case, that probably does not matter too much because in the ordinary case the defendant knows whether he did it or not and has a general idea as to what the likely evidence is going to be against him, especially assuming that he did do it. There are some special cases, but they are not going to be a huge fraction.

I agree that the classic *Brady* exculpatory material is important to keep innocent people from being bluffed into pleading guilty. But as I said, the Department of Justice policy and what I taught and what I observed consistently as a prosecutor was the classic exculpatory material gets turned over as soon as you get it, and it is about whether you should be able to bargain over a concession in exchange for keeping your witnesses confidential, and that strikes me as a legitimate tradeoff as long as we do not have any of that red-flag classic *Brady* material. And I do think the Court in *Ruiz* treated that differently from *Giglio* material.

Now, on to your specific point about the change from the Ashcroft to the Holder memos, I think it is a good one. My understanding of the way that the Ashcroft memo was interpreted in practice is that you could always drop the top charge if there were genuine doubts about the likelihood that it would result in a sustainable conviction. So if you had a good-faith *Brady* argument, that itself you could use as your rationale for dropping the top charge and pleading it down from, you know, a high-level conspiracy to a low-level conspiracy or something like that.

So I think in practice that was never barred, and what the Holder memo does only serves to underscore that prosecutors have some flexibility that way. And there are costs and benefits, and that is beyond the scope of this particular panel. But I do think it important that in plea bargaining it be clear to prosecutors that when there is a good-faith doubt about *Brady* material, et cetera, that that should not be viewed as something they have to push ahead. I tend to think that is already covered by the Holder memo, certainly, and even by the Ashcroft memo, but that is something DOJ could underscore internally as well.

Senator COONS. Thank you. Thank you, Professor Bibas. Thank you, Ms. Brook. Thank you for your service. Thank you for your contribution to this hearing today.

We will keep in the Committee the record open for a week for those Members who had other hearings and were not able to attend or have questions they would like to submit to any of today's witnesses for the record. But other than that, this hearing is hereby adjourned.

[Whereupon, at 12:35 p.m., the Committee was adjourned.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Witness List

Hearing before the
Senate Committee on the Judiciary

On

"Ensuring that Federal Prosecutors Meet Discovery Obligations"

Wednesday, June 6, 2012
Dirksen Senate Office Building, Room 226
10:00 a.m.

Panel I

The Honorable Lisa Murkowski
United States Senator
State of Alaska

Panel II

The Honorable James Cole
Deputy Attorney General
U.S. Department of Justice
Washington, DC

Panel III

Carol Brook
Executive Director
Federal Defender Program for the Northern District of Illinois
Chicago, IL

Stephanos Bibas
Professor
University of Pennsylvania Law School
Philadelphia, PA

PREPARED STATEMENT OF COMMITTEE CHAIRMAN PATRICK LEAHY

Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
"Hearing on Ensuring that Federal Prosecutors Meet Discovery Obligations"
June 6, 2012

Today, as promised, we continue our inquiry into ensuring that Federal prosecutors meet their obligations, whether the defendant is a prominent official or an indigent defendant.
We have now seen the results of two separate investigations and two reports into what went wrong during the Stevens trial. I thank Attorney General Holder for making the report of the Department of Justice's internal Office of Professional Responsibility (OPR) available to us. We have now made it available to the public.

The investigation by the Justice Department found that several career prosecutors acted with reckless disregard of their discovery obligations and that the Deputy Chief of the Public Integrity Section exercised poor judgment in failing to supervise discovery. While the Department's OPR investigation did not find intentional misconduct, its findings are serious, and they are significant. They resulted in suspensions of two of the prosecutors.

Prosecutors bear unique responsibilities in maintaining the integrity of our criminal justice system. Our constitutional framework provides that all individuals are guaranteed the right to fair treatment and a fair trial. Without ensuring adherence to the rule of law and vigorous and competent counsel for defendants, we cannot live up to these guarantees. Because prosecutors wield so much power when it comes to charging decisions, plea bargaining, and gathering of evidence, we count on them to uphold the law, adhere to the highest ethical standards, and seek justice.

What happened in the Stevens case undermines this system and cannot be tolerated. Two separate investigations have now found that significant evidence was not disclosed to the defense, and critical mistakes were made throughout the course of the trial that denied Senator Stevens a fair opportunity to defend himself. The mistakes and poor decisions in connection with the Stevens case disturbed the Judge hearing the case and disturb me.

I know they also disturb the Department of Justice. Attorney General Holder did the right thing when he came into office and, based upon his review of the matter, decided to seek to dismiss the indictment against Senator Stevens and withdraw the case even after a jury's guilty verdict. Today we will hear from Deputy Attorney General Jim Cole, the number two official at the Department of Justice, about the steps the Department has taken and plans to take to ensure that Federal prosecutors meet their discovery obligations so that the situation in the Stevens prosecution is never repeated.

We all want to ensure that prosecution supervisors are diligent, as well. The recent mistrial declared in the prosecution of John Edwards raises concerns about the exercise of prosecutorial judgment in that case, which was also begun under the prior administration. I worry that unfair, partisan criticism directed at the Justice Department has resulted in some being reluctant to exercise restraint.

Prosecutors make tough judgment calls all the time, and by and large they make the right ones, using their discretion in the interests of justice. More than 70 years ago while he was serving as Attorney General of the United States, Robert Jackson spoke about Federal prosecutors, saying: "The prosecutor has more control over life, liberty, and reputation than any other person in America." As he spoke about the exercise of prosecutorial discretion, he wisely observed that Federal prosecutors need to be "diligent, strict, and vigorous in law enforcement" but also "just".

I know how strongly our Attorney General and Deputy Attorney General feel about these issues and know that they are committed to justice and to ensuring that our Federal prosecutors follow Attorney General Jackson's timeless advice that "the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility."

I talk about my time as a prosecutor in Vermont because I am proud of the dedicated public servants – the prosecutors and law enforcement officers – with whom I had the privilege to serve. Our criminal justice system is the envy of the world in large measure because good prosecutors adhere to the directive to seek justice for all parties, the Government and the defendants, not just convictions. We must ensure that all Federal prosecutors continue to meet these high standards.

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PREPARED STATEMENT OF RANKING MEMBER CHUCK GRASSLEY

U.S. Senator Chuck Grassley • Iowa
Ranking Member • Senate Judiciary Committee
http://grassley.senate.gov

Prepared Statement of Ranking Member Grassley of Iowa
U.S. Senate Committee on the Judiciary
"Hearing on Ensuring Federal Prosecutors Meet Discovery Obligations"
Wednesday, June 5, 2012

Mr. Chairman, thank you for holding today's hearing on discovery obligations for federal prosecutors. This is an important topic and is the follow-up to our March hearing on the Special Counsel's report on the prosecution of Senator Stevens.

Since our last hearing, the Department of Justice's Office of Professional Responsibility has released its final report on the conduct of attorneys handling the Stevens prosecution. Unfortunately, this document, in my view, has not put this matter to rest. In fact, it raises new questions about the longstanding problem of a double standard between discipline applied to line agents and attorneys compared to managers and supervisors at the Department.

We now have three different sets of findings regarding the Department's failures in the Stevens case. First, we have the report of a third party defense attorney appointed by Judge Sullivan who asked for an independent review. That review found that the Department's attorneys "intentionally withheld" information from Stevens' defense team, but that there was not enough evidence to establish that the attorneys violated the criminal contempt statute.

The second review, conducted by OPR found that the attorneys failed to make disclosures as required by Brady and Giglio and DOJ policy expressed in the U.S. Attorney's Manual. OPR found that two of the attorneys engaged in professional misconduct because their actions, "established a reckless disregard" toward those disclosure requirements. But, OPR found that the misconduct was not intentional. Accordingly, OPR recommended suspensions without pay for two line attorneys, while exonerating the management team, finding that only one of the managers exercised poor judgment.

Finally, we have the review of the OPR's findings by Terrence Berg, a career prosecutor assigned to the Professional Misconduct Review Unit. Berg was assigned the case by the head of the review unit and he rejected much of OPR's findings with regard to the individual prosecutors. Instead, Berg's review determined that the problems in the Stevens case were part of the mismanagement and poor organization of the case by the Public Integrity Section. While Berg's findings were ultimately overturned by the head of the review unit who sided with OPR, his findings raise interesting questions about the failed management of the case.

Berg's findings deserve particular attention for two reasons: first, he has been nominated by the President for a position as a federal district court judge in the Eastern District of Michigan; and, second, he led the U.S. Attorney's Office in the Eastern District after a scandal similar to the

Stevens case, when major post-9/11 terrorism prosecution was dismissed because of discovery issues. So, his judgment on this shouldn't have been lightly overturned.

All three reviews reach different conclusions but point to the same problem—a fundamental failure of Department of Justice attorneys to follow the rules required by Department, Courts, and the Constitution. So, where we go from here is the focus of today's hearing.

Senator Murkowski has introduced the Fairness in Disclosure of Evidence Act, a bill designed to reform the discovery and disclosure process in criminal cases. We will also hear about her proposal from representatives of the legal community that have different views on the bill. I thank Senator Murkowski for putting forth a proposal and look forward to hearing from her and discussing it with our third panel of experts today.

The Department of Justice's conduct in the Steven's case definitely warrants attention from Congress. However, I'm not certain at this point legislation to completely overhaul the criminal justice system is necessary. In fact, I have letters here from the National Association of Assistant U.S. Attorney's and one from former Deputy Attorney General George Terwilliger expressing concerns with the bill. I ask consent that they be made part of the record.

I have concerns that changes to ex parte orders could have a dangerous impact by discouraging their use as a means to balance between defendants' rights and protection of sensitive information. There could be unwarranted disclosures of classified information in national security cases, such as terrorism and espionage prosecutions. Further, these changes could impact witness safety as it could require Justice Department attorneys to provide evidence that could be used to harm or intimidate witnesses—a sad but true reality of high profile criminal prosecutions.

Where I think we all can agree is that reforms are needed at the Justice Department and I support Senator Murkowski's effort to achieve reform at the Department. I believe the failures in the Stevens case were not simply just a couple of line attorneys making bad decisions.

For many years, I have been concerned about the double standard of discipline at the Justice Department and Federal Bureau of Investigation (FBI). As recently as May 2009, the Inspector General at the Justice Department found that "a perception of a double standard of discipline between higher-ranking and lower-ranking employees, continues." This perception was backed by the Inspector General's findings that senior executives at the FBI had OPR findings reversed 83% of the time compared with lower level career employees who only had their findings overturned 18% of the time. While no similar review of Justice Department OPR findings was conducted, it is easy to see with the OPR report in the Stevens case how this perception continues.

Another area of concern for me with the Justice Department is the growing list of high profile failures of the Public Integrity Section. Just last week a jury found former Senator John Edwards not guilty on one count and a mistrial declared on five other counts. Then there was the prosecution of state legislators in Alabama that ended in two acquittals, a hung jury, and allegations from the judge the government witnesses were racist. Add to this list the Stevens prosecution, the first failed prosecution of Rod and a pattern appears. However this pattern is not a recent trend and dates back to the 1990's.

At that time, the Public Integrity Section was unwilling to prosecute cases. When the FBI presented evidence of campaign finance violations in the Clinton Administration, it looked the other way. When the FBI Director concluded that the law required the appointment of an independent counsel, the Justice Department disagreed based on a frivolous legal analysis, keeping the cases within DOJ, but then refusing to prosecute. Hearings were held in the Senate, and poor management of the Public Integrity Section was documented fifteen years ago.

Clearly, something must be done at the Department to address the failures of the Public Integrity Section, the double standard of discipline, and the discovery failures. Deputy Attorney General Cole is here today on our second panel to talk about the remedial efforts taken following the Stevens case and ongoing efforts to correct problems at the Department.

I'm not sure that these efforts will be enough and we may need to act in Congress. That is why today's hearing is important and I look forward to hearing all points of view from all the witnesses. I will also pledge to work with the Chairman, Senator Murkowski, the Justice Department, and interested parties to see what reforms are needed and how to go about enacting those reforms. Thank you.

PREPARED STATEMENT OF HON. JAMES M. COLE

Department of Justice

STATEMENT OF

JAMES M. COLE
DEPUTY ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ENTITLED

"ENSURING THAT FEDERAL PROSECUTORS
MEET DISCOVERY OBLIGATIONS"

PRESENTED

JUNE 6, 2012

Statement of James M. Cole
Deputy Attorney General
U.S. Department of Justice

Before the
Committee on the Judiciary
United States Senate

"Ensuring That Federal Prosecutors Meet Discovery Obligations"
June 6, 2012

1. Introduction

Chairman Leahy, Ranking Member Grassley, and distinguished Members of the Committee, I appreciate the opportunity to appear before you to discuss the Department's commitment to criminal discovery efforts that will result in fair trials, the serious public safety risks that would result from proposed legislation in this area, and the process by which the Department recently imposed discipline on two prosecutors responsible for discovery failures in the prosecution of former Senator Ted Stevens. As someone who spent over a dozen years as a prosecutor and then nearly twenty more as a defense attorney, I know firsthand the importance that discovery plays in ensuring criminal defendants fair trials. But, at the same time, I am acutely aware of the other critical interests – such as the safety and privacy of witnesses and victims – that our criminal justice system properly takes into account.

What occurred in the *Stevens* case is unacceptable. But it is not representative of the work of the Department of Justice. And it does not suggest a systemic problem warranting a significant departure from longstanding criminal justice practices that have contributed to record reductions in the rates of crime in this country while at the same time providing defendants with a fair and just process. The *Stevens* case is one in which the well-established rules governing discovery were violated, not one in which the rules themselves were found insufficient to ensure a fair trial. The lesson from *Stevens* was not that the scope of existing discovery obligations needed to change, but rather that the Department needed to focus intently on making sure that its prosecutors understand and comply with their existing obligations. Since *Stevens*, the Department has done just that, by enhancing the supervision, guidance, and training that it provides its prosecutors and by institutionalizing these reforms so that they will be a permanent part of the Department's practice and culture.

Accordingly, the Department does not believe that legislation is needed to alter the way discovery is provided in federal criminal cases. While we fully share Senator Murkowski's goal of ensuring that what occurred in the *Stevens* case is never repeated, we have very serious concerns with her draft legislation. We understand Senator Murkowski's strong views; but in reacting to the *Stevens* case, we must not let ourselves forget the very real dangers to safety and privacy that victims and witnesses often face in the criminal justice system; the national security interests implicated by discovery rules; and the strong public interest in ensuring not only that defendants receive a fair trial but also that the guilty be held accountable for their crimes. As

was recently recognized by the Advisory Committee on Criminal Rules of the Judicial Conference of the United States ("Criminal Rules Committee"), which in 2010-11 considered and rejected changes to Rule 16 not dissimilar to Senator Murkowski's proposals, true improvements to discovery practices will come from prosecutors and agents having a full appreciation of their responsibilities under their existing obligations and the tools and oversight to fulfill those obligations, rather than by expanding those obligations. In other words, new rules are unnecessary. What is necessary, and what the Department has been vigorously engaged in providing since the *Stevens* dismissal is enhanced guidance, training, and supervision to ensure that the existing rules and policies are followed.

2. The Department's enhanced discovery efforts

The Department's own policies require federal prosecutors to go beyond what is required to be disclosed under the Constitution, statutes, and rules. The United States Attorneys' Manual (USAM) was amended in 2006 – several years before the *Stevens* case – to mandate broader disclosure of exculpatory and impeachment evidence than the Constitution requires. The USAM requires prosecutors to disclose information beyond that which is "material" to guilt as articulated by the U.S. Supreme Court, and prosecutors must disclose exculpatory or impeachment information "regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime." USAM § 9-5.001. While the Department has had this policy in place since 2006, it was as a result of the *Stevens* case that we have significantly increased our focus on providing prosecutors and agents with the improved guidance, training, and resources necessary to comply with this policy and meet their discovery obligations. After the Attorney General sought the dismissal of the conviction of Senator Stevens, he ordered a comprehensive review of all discovery practices and related procedures to reduce the likelihood of future discovery failures. That review identified areas where the Department could improve, and we have undertaken a series of reforms.

In January 2010, the Office of the Deputy Attorney General issued three memoranda to all criminal prosecutors: "Issuance of Guidance and Summary of Actions Taken in Response to the June 2009 Report of the DOJ Criminal Discovery and Case Management Working Group," "Requirement for Office Discovery Policies in Criminal Matters," and "Guidance for Prosecutors Regarding Criminal Discovery." Through these memoranda, prosecutors have been instructed to provide broader and more comprehensive discovery than before, to provide more than the law requires, and to be inclusive when identifying the members of the prosecution team for discovery purposes. (The Department's policies do recognize that the requirement that prosecutors disclose more than the law requires may not be feasible or advisable in some national security cases where special complexities arise.) These memoranda also provide overarching guidance on gathering and reviewing potentially discoverable information and making timely disclosure to defendants; they also direct each U.S. Attorney's Office and Department litigating component to develop additional, district- and component-specific discovery policies that account for controlling precedent, existing local practices, and judicial expectations. Subsequently, the Office of the Deputy Attorney General has issued separate guidance relating to discovery in national security cases and discovery of electronic communications.

Later in January 2010, the Deputy Attorney General appointed a long-serving career prosecutor as the Department's first full-time National Criminal Discovery Coordinator to lead and oversee all Department efforts to improve disclosure policies and practices. Since January 2010, the Department has undertaken rigorous enhanced training efforts, provided prosecutors with key discovery tools such as online manuals and checklists, and continues to explore ways to address the evolving nature of e-discovery. These steps have included:

- All federal prosecutors are now required to undertake annual update/refresher discovery training. Roughly 6,000 federal prosecutors across the country – regardless of experience level – receive the required training annually on a wide variety of criminal discovery-related topics.

- Starting in 2010, each United States Attorney's Office and Main Justice litigating component has appointed one or more criminal discovery coordinators, who are responsible for working with the National Criminal Discovery Coordinator to provide the necessary training and resources to line prosecutors to help them fulfill their disclosure obligations on a daily basis.

- The Department has held several "New Prosecutor Boot Camp" courses, designed for newly hired federal prosecutors, which include training on *Brady*, *Giglio*, and electronically stored information (ESI), among other topics.

- These training requirements were institutionalized through their codification in the USAM. Specifically, USAM § 9-5.001 was amended in June 2010 to make training mandatory for all prosecutors within 12 months after hiring, and requiring two hours of update/refresher training on an annual basis for all other prosecutors.

- In 2011, the Department provided four hours of training to more than 26,000 federal law enforcement agents and other officials – primarily from the FBI, DEA, and ATF – on criminal discovery policies and practices. The Department is currently developing annual update/refresher training for these agents.

- In late February 2012, the Department held "train-the-trainer" programs in Washington, D.C., to begin training the next round of federal law enforcement agencies, including Department of Homeland Security agencies such as ICE, various OIGs, and other federal agencies.

- The Department has held several Support Staff Criminal Discovery Training Programs, including one session this past March. In addition, the Department has produced criminal discovery training materials for victim/witness coordinators.

- A Federal Criminal Discovery Blue Book – which comprehensively covers the law, policy, and practice of prosecutors' disclosure obligations – was created and distributed to prosecutors nationwide in 2011. It is now electronically available on the desktop of every federal prosecutor and paralegal.

- The Department developed – in collaboration with representatives from the Federal Public Defenders and counsel appointed under the Criminal Justice Act – a ground-breaking protocol issued in February 2012 concerning discovery of ESI. The principal purpose of the protocol, which has already received praise from both the judiciary and the defense bar, is to ensure that prosecutors are complying with their disclosure obligations in the digital era by providing the defense with ESI in a usable format in a timely fashion.

- In order to ensure consistent long-term oversight of the Department's discovery practices, the Department moved the National Criminal Discovery Coordinator position into the Office of the Deputy Attorney General and made it a permanent executive-level position.

3. Legislative reform is unnecessary and will create substantial problems

Since the public release in mid-March 2012 of the *Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated April 7, 2009* ("Schuelke Report"), some have argued that legislation is necessary to alter federal criminal discovery practice. The Department does not share that view.

Legislation along the lines being proposed by Senator Murkowski in S.2197 would upset our system of justice by failing to recognize the need to protect not only the interests of the defendant but those of victims, witnesses, national security and public safety. It would radically alter the carefully constructed balance that the Supreme Court and lower courts, the Criminal Rules Committee, and Congress have painstakingly created over decades – a balance between ensuring the protection of a defendant's constitutional rights and, at the same time, safeguarding the equally important public interest in a criminal trial process that reaches timely and just results, safeguards victims and witnesses from retaliation or intimidation, does not unnecessarily intrude on victims' and witnesses' personal privacy, protects ongoing criminal investigations from undue interference, and recognizes critical national security interests.

Unfortunately, witness safety concerns are more than merely theoretical. Even under the current system's careful balance between a defendant's right to a fair trial and witnesses' privacy and safety interests, we have had witnesses intimidated, assaulted, and even killed after their names were disclosed in pretrial discovery. Law enforcement officials throughout the nation repeatedly confront chilling situations where witnesses are murdered to prevent them from testifying – or in retaliation for providing testimony. Just a few of the many examples include the following:

- In the District of Maryland, prosecutors provided broad discovery, including a 10-page interview report for a potential witness, to the defense attorneys for two defendants in a narcotics case. The defendants pled guilty, so the witness was never called to testify. Nevertheless, in violation of the discovery agreement, one of the defense attorneys turned over a copy of the interview report to the mother of his client. Copies of the interview report were later found in a number of state and federal prison cells. After the interview report was produced, a drug dealer named in the report shot the witness in front of a half-dozen people. The shooter was convicted; his case is presently on appeal.

- In federal court in the District of Columbia, a defendant was recently convicted of heading a violent drug organization. At trial, the government proved that the homicide of a witness – who was killed by a co-defendant before the start of a Superior Court narcotics and firearms trial at which the witness was scheduled to testify – was committed in furtherance of the drug organization's illicit activities. Prosecutors had disclosed the witness's identity in a court filing two weeks before trial. The witness was shot to death as she walked out of a halfway house at 8:30 a.m., next to a busy street during rush hour. Her murderer did not speak to her before shooting her, and nothing was taken from her. Because of her death, the Superior Court case was dismissed.

- In the Eastern District of Pennsylvania, a defendant has been charged with ordering the murders of four children and two women from his federal jail cell. The six murder victims, who were killed in the firebombing of a North Philadelphia row house, included the mother and infant son of a cooperating witness. The defendant is also charged with plotting to kill family members of other witnesses and with maintaining a list of their names and addresses.

- In the Central District of California, witness statements were ordered produced in a gang prosecution shortly after indictment. After the materials were produced, a cooperator was beaten by several gang members at the local detention center, a female cooperator was assaulted by the girlfriend of a gang member, a car was fire-bombed, and the sole eyewitness to a murder was approached at the day care center she uses for child care and asked whether she thought the government could keep her family safe.

Legislation requiring earlier and broader disclosures would likely lead to an increase in such tragedies. It would also create a perverse incentive for defendants to wait to plead guilty until close to trial in order to see whether they can successfully remove identified witnesses from testifying against them.

The proposed legislation would also negatively impact our most vulnerable crime victims. In cases involving criminal charges against a defendant for child exploitation, impeachment information on the child-victim would need to be disclosed without regard to either admissibility or the substantial policy interests in keeping this information private, even if the evidence against the defendant included his own confession and videotapes of the defendant committing the abuse. In rape cases, information about a sex-crime victim's sexual history, partners, and sexual predisposition would need to be disclosed to the defense – again, regardless of admissibility. The disclosures required by the current legislative proposal cut against the important policy aims of child protection and rape shield laws.

The Department is also concerned that Senator Murkowski's legislative proposal would result in the unnecessary and harmful disclosure of national security-related information and would compromise intelligence and law enforcement sources and methods. Although the bill prescribes that classified information be treated in accordance with the Classified Information Procedures Act (CIPA), it nonetheless creates a substantial risk that classified information will be unnecessarily disclosed and that our country's most sensitive investigative sources and methods will be compromised during the prosecution of criminal national security cases. In

cases involving guilty pleas – where a defendant is necessarily prepared to admit facts in open court that establish he or she committed the charged offense(s) – such legislation would require the unnecessary disclosure of the identity of undercover employees or confidential human sources, scarce investigative assets who, once revealed, may no longer be used to covertly detect and disrupt national security threats. Currently, in the national security context, we tell other countries that we will keep the information they share with us confidential unless we absolutely need to disclose it because of its exculpatory nature. Under such a bill, we would have to disclose an increased volume of information and disclose it more frequently, thus discouraging cooperation from our foreign partners.

Such legislation would also invite time-consuming and costly litigation over discovery issues not substantially related to a defendant's guilt, resulting in delayed justice for victims and the public and greater uncertainty regarding the finality of criminal verdicts. Inclusion of a provision for awarding attorney's fees would provide a significant incentive to engage in such collateral litigation. These concerns, among others, recently led the Criminal Rules Committee – a body populated by federal judges who are intimately familiar with these discovery issues – to reject a proposed amendment to Rule 16 to expand prosecutors' discovery obligations.

The primary objective of the criminal justice system is to ensure fair trials and produce just results. Fair trials and just results ensure that the innocent are not wrongly convicted, and that the guilty do not go free. A fair and just criminal justice system should also ensure that other participants in the process – *i.e.,* victims, law enforcement officers, and other witnesses – are not unnecessarily subjected to physical harm, harassment, public embarrassment or other prejudice, or the fear that they might be subjected to such consequences. The bill ignores the very substantial costs the legislation's additional disclosure requirements would impose – costs to the reputational and privacy interests of witnesses, and, if witnesses become less willing to step forward, costs to society from the loss of the just conviction of the guilty. In national security cases, such results could have devastating consequences with respect to the government's ability to protect the American people, an ability that depends upon obtaining the cooperation of confidential human sources. These are real costs and ones that both the Supreme Court and Congress have taken great pains to avoid incurring. Unfortunately, they are costs that the bill fails to recognize.

4. The *Stevens* case

The misconduct that occurred during the *Stevens* prosecution has now been well documented, both in the report of the Special Counsel to District Court Judge Emmet Sullivan and in the report of the Office of Professional Responsibility. The Department's failures in that case were serious and the Attorney General's decision to dismiss the case reflected that seriousness. Nonetheless, it is important to recognize that the misconduct involved in the Stevens case was an aberration. The men and women who make up the prosecutor corps at the Department of Justice are among the best lawyers in the country. They work hard every day to keep Americans safe, to hold criminals accountable for their actions, to ensure that victims and witnesses are treated with the respect and care they deserve, and to do justice for all in every case.

Nevertheless, prosecutors – like other professionals – will never be immune to mistakes. As a matter of policy, we strive to be perfect, even though we know perfection is impossible. We require our prosecutors to strictly obey the law in both letter and spirit, and we work to ensure that isolated mistakes are detected early, corrected, and do not prevent justice from being done. Over the past 10 years, the Department has filed over 800,000 cases involving more than one million defendants. In the same time period, only one-third of one percent (.33 percent) of these cases warranted inquiries and investigations of professional misconduct by the Department's Office of Professional Responsibility ("OPR"). Less than three-hundredths of one percent (.03 percent) related to alleged discovery violations, and just a fraction of these resulted in actual findings of misconduct. Department regulations require DOJ attorneys to report any judicial finding of misconduct to OPR, and OPR conducts computer searches to identify court opinions that reach such findings in order to confirm that it examines any judicial findings of misconduct, reported or not. In addition, defense attorneys are not reticent to raise allegations of discovery failures when they do occur.

On those rare occasions when discovery failures do occur, the Department takes steps to hold individual prosecutors accountable. Late last month, the Department provided to the Senate and House Judiciary Committees a copy of OPR's investigative report and documents relating to the Department's disciplinary process in connection with the federal prosecution of Senator Stevens. OPR issued its 672-page final report on August 15, 2011. That report reflects that OPR thoroughly examined multiple allegations of misconduct that arose during the course of the proceedings in the *Stevens* case. OPR concluded that the government violated its obligations under constitutional *Brady* and *Giglio* principles and Department of Justice policy (USAM § 9-5.001) by failing to disclose exculpatory statements by prosecution witnesses during trial preparation sessions and law enforcement interviews and by failing to disclose a witness's alleged involvement in securing a false sworn statement. OPR found that the government violated D.C. Rule of Professional Conduct 4.1(a) by misrepresenting to the defense certain facts in a September 2008 disclosure letter. In other words, OPR found that the government violated rules that were already in place, thus depriving Senator Stevens of a fair trial.

With respect to the individual prosecutors, OPR concluded that two prosecutors committed professional misconduct by acting in reckless disregard of their disclosure obligations and forwarded the report to the Professional Misconduct Review Unit (PMRU) for consideration of disciplinary action. After evaluating the prosecutors' conduct and the factors mandated by *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), the Chief of PMRU proposed that one prosecutor be suspended without pay for 45 days and that the other be suspended without pay for 15 days, noting that OPR had found that neither prosecutor had acted intentionally. On May 23, 2012, the deciding official in the Office of the Deputy Attorney General – a long-term career employee – determined that the first prosecutor should be suspended for 40 days without pay and that the second prosecutor should be suspended for 15 days without pay. In doing so, the deciding official sustained the OPR findings of misconduct against both prosecutors but rejected an additional OPR finding that the first prosecutor exercised poor judgment by failing to inform his supervisors that the representations in a *Brady* letter were inaccurate and misleading. Both the PMRU Chief and the deciding official agreed that OPR's findings of reckless professional misconduct were supported by the law and the facts and were serious. Although the decisions of the deciding official represent the Department's final actions in this matter, the

prosecutors are entitled by law and regulation to appeal his decisions to the Merit Systems Protection Board.

The proposal for discipline and the disciplinary decision set forth those factors that the disciplinary officials considered in assessing the appropriate punishment. In short, OPR determined that the prosecutors acted recklessly rather than intentionally, and the disciplinary officials also considered that both AUSAs had previously unblemished records with the Department. Additionally, the disciplinary officials were required to consider the consistency of the penalty with those imposed on other employees for the same or similar offenses, and while the discipline did not result in dismissal, we are not aware of any case within the Department where an employee with a record similar to the subject AUSAs was terminated after OPR found that the employee engaged in something less than intentional misconduct

5. Conclusion

The objective of the criminal justice system is to produce just results. This includes ensuring that the processes we use do not result in the conviction of the innocent, and likewise ensuring that the guilty do not unjustifiably go free. It also includes an interest in ensuring that other participants in the process – *i.e.*, victims, law enforcement officers, and other witnesses – are not unnecessarily subjected to physical harm, harassment, public embarrassment, or other prejudice.

For nearly fifty years, a careful reconciliation of these interests has been achieved through the interweaving of constitutional doctrine (*i.e.*, *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S. 419, 439 (1995)), statutory directives (*i.e.*, the Jencks Act and the Crime Victims' Rights Act), and Federal Rules (*i.e.*, Rule 16; Rule 26.2). The legislation proposed by Senator Murkowski would disturb this careful balance without a demonstrable improvement in either the fairness or reliability of criminal judgments and in the absence of a widespread problem. The rules of discovery do not need to be changed – and the *Stevens* case does not prove otherwise. Rather, it demonstrates that prosecutors and other law enforcement officials need to recognize fully their obligations under these rules, must apply them fairly and uniformly, and must be given guidance, tools, and training to meet their discovery obligations rigorously. This is what the Department has done since the Attorney General directed the dismissal of the conviction in *Stevens*. And it is what the Department will continue to do in the future, under the policies and procedures that have been implemented and institutionalized during the past three years.

PREPARED STATEMENT OF CAROL A. BROOK

Statement of Carol A. Brook

Executive Director, Federal Defender Program for the Northern District of Illinois

Hearing on "Ensuring that Federal Prosecutors Meet Discovery Obligations"

Before the
United States Senate
Committee on the Judiciary

June 6, 2012
Washington, D.C.

Chairman Leahy, Ranking Member Grassley, and Distinguished Members of the Committee: I want to thank you for allowing me to testify today on the critical issue of how we can better ensure that federal criminal discovery complies with due process. I am privileged to be able to speak not only as a member of the criminal defense bar but also for the hundreds of lawyers in the federal defender system nationwide. I do not speak today, however, as a member of the Judicial Conference Advisory Committee on Federal Criminal Rules.

When I first began practicing law, the Supreme Court's decision in *Brady v. Maryland*[1] was only slightly more than a decade old, but there were already problems with its implementation. A famous story illustrating one of these problems, perhaps the main problem, was told by Jon Newman, then U.S. Attorney and later Chief Judge of the Second Circuit. At the 1968 Second Circuit Judicial Conference, Judge Newman recounted that he had recently given a large group of prosecutors a hypothetical bank robbery case where several tellers and one or two bank customers viewed a line up and all identified the defendant as the robber. Another eye witness was later found who said that the defendant was *not* the robber. Judge Newman asked the group of prosecutors how many believed they should disclose the name of the witness who said that the defendant was not the robber. Only two prosecutors raised their hands. Commenting that he thought he had described the clearest case for disclosure, Judge Newman wryly noted: "I dare say . . . that the obligation to disclose favorable evidence is not one fully appreciated by all prosecutors."[2]

It is important to recall that the reason the Court imposed that obligation on the prosecution was to make sure trials are fair. *Brady* was not about guilt or innocence, nor was it about prosecutorial misconduct; it was about fairness, a bedrock principle of our criminal justice system. Nowhere did the Court make that point more clearly than when it said: "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[3]

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[1] 373 U.S. 83 (1963).

[2] *Discovery in Criminal Cases*, 44 F.R.D. 481, 500-01 (1968). *See also* the 1995 study conducted by the John Jay Legal Clinic at Pace Law School which came to a similar conclusion. In that study, the clinic sent out questionnaires to 62 New York prosecutors' offices, giving each office the same hypothetical and the same series of witness statements. It then asked each office which, if any, of the hypothetical witness statements it would turn over as *Brady* material. Thirty offices responded. Yet, even for those statements that seemed to be most clearly favorable to the defendant on the issue of guilt or sentencing, there was ***no*** unanimity on whether to disclose a single statement. The hypothetical involved a domestic violence prosecution in which the defendant had been charged with assault, aggravated harassment and menacing. The statements were: "It was all my fault;" "I instigated the whole encounter;" "I made him hit me;" "He didn't hurt me;" "I hit him too;" "I exaggerated what happened;" and "What's in the police report isn't true."

[3] 373 U.S. at 87.

And yet, based on case law, newspaper reports, and first-hand experience, it seems we have made little progress in the almost fifty years since *Brady* was decided.

Although *Brady* violations, by their very nature, are difficult to discover and many are undoubtedly never discovered, the federal reporters contain numerous cases where prosecutors failed to turn over favorable evidence. Sometimes the courts reverse, but more often they use hindsight to find that the evidence was not material in light of the evidence supporting the defendant's conviction.

From the newspapers and blogs we learn about headline-grabbing cases like the one that brought us here, or:

- *United States v. Berke*, out of the District of Massachusetts, where federal prosecutors moved to dismiss charges against the defendant immediately following a statement from Judge Richard G. Stearns that he was going to have to dismiss the charges himself because a law enforcement officer had destroyed "apparently exculpatory" and irreplaceable evidence in the case and prosecutors had not notified the defense when they learned that fact;[4] and

- *United States v. Sterling*, out of the Eastern District of Virginia, where, in a case against former CIA agent Jeffrey Sterling, who is accused of leaking information about the CIA's effort to provide flawed nuclear designs to Iran, Judge Leonie Brinkema struck two witnesses from the prosecution's witness list for failure to timely disclose impeachment information.[5]

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[4] Milton J. Valencia, *U.S. drops charges in Internet drug case*, Boston Globe (Jan. 18, 2012), *available at* http://articles.boston.com/2012-01-18/metro/30635935 1 prescription-drugs-defense-lawyers-phony-prescriptions.

[5] The government appealed Brinkema's decision to the Fourth Circuit; oral arguments were held on May 18, 2012. Carrie Johnson, *Documents reveal more potential evidence-sharing failures by Justice Dept.*, NPR (Nov. 10, 2011), *available at* http://www.npr.org/blogs/thetwo-way/2011/11/10/142206489/documents-reveal-more-potential-evidence-sharing-failures-by-justice-dept; Charlie Savage, *Appeals panel weighs question on press rights*, New York Times (May 18, 2012), *available at* http://www.nytimes.com/2012/05/19/us/politics/appeals-panel-weighs-press-rights-in-case-involving-reporter-james-risen.html.

Those cases are far from the only recent cases where courts have found *Brady* violations. Other examples include ***United States v. Noriega et al.*** (Lindsey Manufacturing), 2011 U.S. Dist. LEXIS 138439 (C.D. Cal. Dec. 1, 2011) (Judge Howard Matz vacated the convictions under the Foreign Corrupt Practices Act of Lindsey Manufacturing Company and two of its executives after finding that federal prosecutors had committed numerous, repeated errors in their handling of the case between 2008 and 2011, including "recklessly fail[ing] to comply with [their] discovery obligations" under *Brady* although the government assured the Court that it had turned over all relevant material before trial began.

Finally, consider the experiences of lawyers like my federal defender colleagues who are in the trenches daily. Although the cases we see rarely make headlines, they all too often involve fights over what is, was, or should be turned over under *Brady*.

As this Committee clearly recognizes by the fact of its holding this hearing, every one of those cases - big and small - means that a human being was treated unfairly and our justice system did not work as it should. Confidence in our justice system is critical to its continued viability. As is pride. When I meet with lawyers and judges from other countries they always express admiration and sometimes even disbelief at how hard we work to be fair. And of course, all of this litigation costs us time and money, and prevents us from focusing on other cases.

So, the questions become, what is the problem and how best to fix it?

What is the Problem?

Numerous commentators have grappled with this question. They have pointed to factors as diverse as the difficulty of placing prosecutors in conflicting roles as architects of the government's case and the defense case; a "win at all cost" mentality; vague and sometimes conflicting sets of rules; cognitive bias; tunnel vision; overwork; lack of supervision; and an overall culture of nondisclosure. [6]

Nonetheless, transcripts of grand jury testimony of an FBI agent containing exculpatory information, as well as two relevant witness interview memoranda, were not delivered to the defense until well into the trial); ***United States v. Daum et al.*** (District of Columbia) (Judge Kessler stated that "there [was] not the slightest doubt" that federal prosecutors had violated their constitutional obligations to turn over exculpatory information in a conspiracy case against attorneys charged with using staged photos in a federal drug case to dupe jurors. Prosecutors failed for two years to disclose information provided by a previously undisclosed witness until three weeks before trial. Judge Kessler stated: "In this day and age with all the publicity going on about Brady issues, not just the (Ted) Stevens trial, the series that is running these days in the Washington Post, so many other cases that are being dug up, it is hard to fathom why the government would not be super, super attentive to the issue of what is and what isn't Brady." Mike Scarcella, *In conspiracy case, judge chides DOJ over exculpatory evidence*, Legal Times (April 27, 2012), *available at* http://legaltimes.typepad.com/blt/2012/04/in-conspiracy-case-judge-chides-doj-over-exculpatory-evidence.html); *United States v. Gupta*, 11 CR 907 (JR)(S.D.N.Y. Mar. 27, 2012) (Judge Rakoff rejected DOJ prosecutor's argument that it had no obligation to review SEC interview memos of 44 potential witnesses for potentially exculpatory material because investigations were not joint and ordered disclosure of all *Brady* material), *available at* http://lawprofessors.typepad.com/files/gupta-brady-ruling.pdf.

[6] See, e.g., Rachel Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 Cardozo L. Rev. 2089, 2091-98 (2010) (pressure to win and general list of reasons); Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 Ohio St. J. Crim. L. 467, 488 (2009) (tunnel vision); Paul C. Giannelli, *Prosecutorial Ethics and the Right to a Fair Trial: The Role of the Brady Rule in the modern Criminal Justice System*, 57 Case W. Res. L. Rev. 593, 601 (2007) (belief that defendant is guilty); Alafair S. Burke, *Improving prosecutorial Decision Making:*

In the end, however, it is the lack of clarity - the vague and inconsistent standards - that everyone seems to agree is the biggest obstacle to a consistent practice of disclosing *Brady* material.[7] As The Constitution Project noted in its March 27, 2012 letter to Chairman Leahy and this Committee commending its decision to hold a hearing to review the findings of the Special Prosecutor's Report on the Ted Stevens Case: "[F]ederal courts, the DOJ and other entities have for years articulated inconsistent, shifting, and sometimes contradictory standards for criminal discovery, leaving it up to individual prosecutors to navigate this legal maze and determine the scope of their obligations to disclose information."

Currently, every prosecutor in every U.S. Attorney's office is left with the task of predicting which pieces of evidence will be "material" to the defense. But the definition of "material" varies from court to court and rule to rule. Compare, for example, the court's statement in *United States v. Naegele*, 468 F. Supp. 2d 150, 153 (D.D.C. 2007), that: "The government is obligated to disclose all evidence relating to guilt or punishment which might be reasonably considered favorable to the defendant's case, that is, all favorable evidence that is itself admissible or that is likely to lead to favorable evidence that would be admissible, or that could be used to impeach a prosecution witness," with this statement from the U.S. Attorney's Manual: "While ordinarily, evidence that would not be admissible at trial need not be disclosed, this policy encourages prosecutors to err on the side of disclosure if admissibility is a close question."[8] Such predictions before trial even begins require powers beyond the capability of mere mortals.

And then there are the ethical rules, recognized by virtually every bar association and the Supreme Court, which are broader than the language of *Brady* itself.[9] ABA Model Rule of Professional Conduct 3.8(d)(2008), provides:

> The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Some Lessons of Cognitive Science , 47 Wm. & Mary L. Rev. 1587, 1611 (2006) (cognitive bias).

[7] *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 Cardozo L. Rev. 1961, 2016 (2010).

[8] U.S. Attorneys' Manual, sec. 9-5.001(B)(1)(2010).

[9] *See* Model Rules of Professional Conduct, R. 3.8(d) (2008); Model Code of Professional Responsibility, DR. 7-103(B) (2004); ABA Standing Comm. On Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009).

Commenting on this provision in *Cone v. Bell*, 129 S. Ct 1769, 1783 n.15 (2009), the Supreme Court said: "Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations."

How to Fix the Problem?

Although we commend the Department of Justice for its continuing efforts to change what we see as a culture of nondisclosure, events make clear that its efforts alone are not enough. Neither the 2006 changes to the *Brady* section of the U.S. Attorney's Manual[10] or the positive changes outlined in the memoranda from Deputy Attorney General David Ogden to all U.S. Attorney's offices in January 2010 can fix (or have fixed) the overarching problem.[11]

To make that happen, we need Congress' help. We need this body to put the force of law behind the idea that due process requires the disclosure of all favorable evidence. Congress understands the importance of laws. After all, it is Congress is entrusted to pass our nation's laws. We believe that passage of the "Fairness in Disclosure of Evidence Act of 2012" would go far to make the promise of *Brady* a reality. By passing *this* law, you would be sending a powerful message, not only to prosecutors, but to the entire country – a message that we believe in the importance of fairness in even the most difficult of situations and we are willing to put the imprimatur of our Legislative Branch behind it.

What does the bill do? First, it eliminates the term "materiality." That alone removes what most see as the biggest obstacle to achieving fairness in discovery. Instead of analyzing

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[10] In 2009, after a lengthy trial earlier that year where the jury convicted the Commissioner of the Department of Streets and Sanitation and a co-defendant in Chicago of four counts of fraud, the district court judge was forced to throw out the verdict and order a new trial after learning that the prosecutors had failed to turn over exculpatory evidence, stating that he had "lost confidence in the integrity of the verdict." *United States v. Alfred Sanchez & Aaron DelValle*, 2009 U.S. Dist. LEXIS 119398 (N.D. Ill. Dec. 22, 2009). *See also United States v. McDuffie*, 2009 U.S. Dist. LEXIS 75737 (E.D. Wash. Aug. 13, 2009) (Where federal prosecutors failed to disclose key fingerprint evidence until after direct examination of its expert during trial, judge vacated verdict and ordered new trial). In addition, in 2010, USA Today ran its own investigation of federal prosecutors, documenting 86 cases since 1997 where judges found that federal prosecutors had failed to disclose favorable evidence. Brad Heath and Kevin McCoy, *Prosecutors' Conduct Can Tip Justice Scales*, USA Today Sept. 23, 2010.

[11] *See* cases cited in footnote 5 as examples of the continuing problem. *See also* what is called the "Africa Sting" Foreign Corrupt Practices Act case tried in December of 2011, where the court struck part of a prosecution witness' testimony after discovering that the prosecution had withheld notes referencing exculpatory post-arrest statements made by a defendant. Mike Scarcella, *Judge chides prosecutors in FCPA case over secret notes*, Legal Times (Dec. 15, 2011), *available at* http://legaltimes.typepad.com/blt/2011/12/judge-chides-prosecutors-in-fcpa-case-over-secret-notes.html.

each piece of evidence to determine whether it fits into a hypothetical defense theory of the case, the prosecutor can simply decide whether the evidence "reasonably appears to be favorable." That is a much easier, and far less subjective, standard to apply. The standard also eliminates the problem of predicting whether evidence will be admissible, when the fact of admissibility should not be the touchstone of the rule, even if admissibility could actually be predicted pretrial.

The bill also makes clear that evidence favorable to sentencing must be disclosed. It is ironic indeed that even though *Brady* was a sentencing case, few prosecutors believe they are obligated to disclose *Brady* evidence for sentencing purposes. And yet we know that all but 3% of federal cases result in pleas and sentences. Thus, enactment of this provision of law would impact virtually every person standing before a sentencing judge in the future.

By requiring *Brady* disclosure "without delay after arraignment and before entry of any guilty plea," the Fairness in Disclosure bill was prescient. Precisely one week after the bill was introduced, the Supreme Court decided two major criminal justice cases, *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) and *Missouri v. Frye*, 132 S. Ct. 1399 (2012). Both cases state what every good criminal defense lawyer already knew – that representation of a client during plea negotiations is a critical stage of the proceedings and requires effective representation by counsel. What seems new after these decisions is the idea that we now must receive discovery, including (and perhaps especially) *Brady* material prior to advising our clients on whether to accept a plea offer. The Fairness in Disclosure bill would eliminate any confusion on this point.

Finally, the bill would create much needed uniformity among and within U.S. Attorney's offices. What must be disclosed and when would be much clearer, not only to the prosecutors, but importantly, to defense counsel as well.

The significance of the *Brady* decision cannot be overstated. This Committee obviously recognizes that. What the Committee may not know is how the *Brady* decision affects our clients and their families, and so I will close with this story: After John Leo Brady, the defendant in the *Brady* case, was finally released from prison, he moved to Florida and became a truck driver. He started a family and was never in trouble again. When his son was old enough to understand, he explained to him what he had done and what happened in his case. Shortly after that, his son sought out the telephone number of his father's lawyer, Clinton Bamberger, and called him. What he said to Mr. Bamberger was, thank you for saving my father's life.

Again, I would like to express my deep thanks to this Committee for inviting me to testify before you today.

PREPARED STATEMENT OF STEPHANOS BIBAS

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5 June 2012

Senator Patrick J. Leahy
Chairman, Senate Judiciary Committee
United States Senate
Washington, DC 20510-6275

Re: Testimony for Hearing on "Ensuring that Federal Prosecutors Meet Discovery Obligations," June 6, 2012

Dear Senator Leahy:

Thank you for inviting me to testify before the Senate Judiciary Committee in connection with your consideration of S. 2197, which would reform federal prosecutors' discovery obligations and procedures. By way of background, I am a professor of law and criminology at the University of Pennsylvania Law School and director of its Supreme Court Clinic. I have also served as a law clerk to the Honorable Anthony M. Kennedy on the Supreme Court of the United States and as an Assistant U.S. Attorney for the Southern District of New York, in which capacity I prosecuted a wide range of criminal cases and became intimately familiar with prosecutors' discovery obligations. My scholarship focuses on criminal procedure, particularly as it relates to prosecutors, and several of my articles address *Brady* obligations and the structure and functioning of prosecutors' offices, including "Brady v. Maryland: *From Adversarial Gamesmanship Toward the Search for Innocence?*," *in* CRIMINAL PROCEDURE STORIES 129 (Carol S. Steiker ed. 2006); *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009); and *New Perspectives on* Brady *and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961 (2010) (coauthored with five other authors; I had primary responsibility for the training and supervision section).

The impulse behind the bill is a noble one. Constitutional due process rightly requires that prosecutors turn over to defendants significant evidence that could tend to prove the defendant innocent or reduce the penalty (which is called *Brady* material, after *Brady v. Maryland*, 373 U.S. 83 (1963)) or could tend to impeach the credibility of the prosecution's witnesses (which is called *Giglio* material, after *Giglio v. United States*, 405 U.S. 150 (1972)). It appears that prosecutors violate that obligation with some frequency, and those violations can lead to convictions of innocent defendants, but violations may well come to light much later or not at all. In the wake of the failure of Senator Stevens' prosecutors to turn over multiple items of *Brady* and *Giglio* material, it makes sense that this Committee is scrutinizing the discovery problem closely.

I think it important, however, to step back from the Stevens prosecution to look at the problem more generally. That was an unusually high-profile case, involving prosecutors both from Main Justice in Washington and the U.S. Attorney's Office in Alaska and a great deal of documentary evidence, on a very compressed timetable. It was a public-corruption prosecution, not one involving violence, drugs, or property crime, which are far more typical federal prosecutions. Most importantly, the Senator Stevens case went to trial, but the vast majority of defendants plead guilty much earlier. What happened there should not be allowed to recur, but it is far from the typical scenario. S. 2197 would apply to all such cases. Thus, it is important to focus on the sources of the broader problem and the possible effects of the bill's solutions.

The bill would change the substantive standard of material, favorable evidence; accelerate the timing of its disclosure; limit protective orders and waivers of the right to disclosure; and allow defendants who suffer such violations to recover their costs, as well as authorizing a range of other remedies.

I fear that the thrust of the bill is beside the point. The root problem is not one of standards but enforcement. The prosecutors in Senator Stevens' case, as in so many cases, violated pre-existing law, and nothing in this bill would have prevented those violations. I also think it important to focus not on the handful of jury trials but on plea bargaining, which resolves roughly 95% of adjudicated criminal cases. In that vein, I have concerns about the bill's waiver provisions, which would likely change nothing but might wind up doing some harm. And while I favor automatic disclosure of *Brady* material during plea bargaining, which is already the norm for federal prosecutors, I worry that routine disclosure of *Giglio* material would carry real costs for victims and witnesses, impeding prosecution of child, sex, and violent crimes in particular.

I. The Root Problem Is Not the Standards but Enforcement

The *Brady* and *Giglio* decisions have been on the books now for decades, yet they are not infrequently violated. Studies have found hundreds of violations by state and local prosecutors. *See, e.g.*, Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHICAGO TRIBUNE, Jan. 10, 1999, at 1; Bill Moushey, *Hiding the Facts: Discovery Violations Have Made Evidence-Gathering a Shell Game*, PITTSBURGH POST-GAZETTE, Nov. 24, 1998, at A1. No particular mental state is required to prove a discovery violation, so many of these violations were inadvertent or negligent, though on occasion they are reckless or intentional.

All of these failures to disclose, including those in the Stevens case, happened in violation of well-settled law. This bill would not have prevented any of those violations.

The much bigger problem is not the substantive standards but the structures and procedures used to comply with or enforce them. Those include prosecutorial hiring, incentives, training, oversight, discipline, firing, and office culture. Some of that can come externally, from congressional oversight hearings, bar disciplinary authorities that currently do little, and sometimes judicial review of evidence *in camera*. But experience has proven these approaches to be at best secondary. After-the-fact policing by such outsiders may weed out a few egregious

cases or bad apples but not attack the systemic failings that led to the Senator Stevens debacle. Outsiders lack the information, the sustained oversight, and the policy expertise to craft and police prosecutorial guidelines, and their scrutiny is sporadic. Legislatures, judges, and bar authorities may all play constructive roles, but mainly as backstops, prodding prosecutors' offices and other law-enforcement agencies to regulate and supervise themselves.

In practice, there are two basic prosecutorial-discovery issues, both of which are about not the substantive standards but about compliance. First, prosecutors, police, and other agents must gather all the evidence from across far-flung agencies, case files, computers, lawyers, and teams. In the Senator Stevens case, much of the problem came from a failure to memorialize witness-interview evidence into formal FBI 302 reports in the first place. Second, prosecutors must learn to see and track what evidence in fact meets the standard of being favorable or helpful to the defense and how a creative defense lawyer might use it. Prosecutors gearing up for trial can easily develop tunnel vision and be blind to how evidence could in fact help the defense or discount its significance, particularly if the prosecutors themselves have no or limited experience as defense lawyers.

As far as I can tell, this bill would do nothing to attack those core problems.

II. The Core Issue Is Not a Handful of Trials, but Plea Bargaining

As originally conceived, *Brady*, *Giglio*, and related cases interpreted a criminal defendant's right under the Due Process Clauses of the U.S. Constitution to a fair trial. They guarantee disclosure of material, favorable evidence in time for its effective use at trial. Thus, these guarantees already applied with full force to the Senator Stevens prosecution.

But the Stevens case is quite atypical. Roughly 95% of criminal cases never reach trial, but result in guilty pleas, usually as a result of plea bargaining. Thus, the U.S. Supreme Court held that defendants have no constitutional right to *Giglio* impeachment material or evidence of affirmative defenses ahead of trial, in time for plea bargaining. *United States v. Ruiz*, 536 U.S. 622 (2002). The Court has never explicitly addressed whether the same is true of classic *Brady* exculpatory material.

Of course, for federal prosecutions, Congress may broaden discovery rights beyond the constitutional minimum. Thus, in order to address plea bargaining, the bill moves the timing of disclosure very early in the case, to arraignment, before entry of a guilty plea.

For classic *Brady* material, which tends to undercut a defendant's guilt or sentence, earlier disclosure is probably a good idea (except perhaps for affirmative defenses such as entrapment, or possibly duress or insanity, that excuse wrongful conduct rather than justifying it). Plea bargaining too often happens in the dark, and withholding *Brady* material may let prosecutors bluff factually and morally innocent defendants into pleading guilty. But, when I was a federal prosecutor more than a decade ago, it was already standard practice to turn over such classic *Brady* material quite early, well in advance of trial, so I doubt the bill would change

much in practice. It is noteworthy that even the fast-track plea agreement in *Ruiz* represented that the prosecution had disclosed and would continue to disclose such evidence.

But for *Giglio* impeachment material, mandating very early disclosure could prove costly, as I discuss below. Such discovery obligations are routinely waived in plea agreements, as they were in the *Ruiz* case, so the import of the bill depends on how courts construe its procedure requiring knowing, voluntary waivers in open court subject to judicial discretion.

I strongly suspect that prosecutors will routinely ask for such waivers, defendants will routinely acceded to them, and courts will routinely rubber-stamp them, just as they do for the myriad other rights that defendants waive every day in pleading guilty. Every day, the plea-bargaining assembly line pressures defendants to waive such fundamental constitutional rights as the Sixth Amendment right to a jury trial and the due process right to proof beyond a reasonable doubt, and most of the time defendants and judges go along. Judges have little incentive to buck such waivers, for otherwise they would clog their own courts instead of clearing their dockets. And defendants prefer to take advantageous plea bargains quickly; at most, they will use this new right as a bargaining chip to extract lower sentences in return.

If, however, the waiver rules have any teeth, they will prevent or impede guilty pleas, particularly the fast-track pleas used to deal with the flood of immigration cases along the southwestern border. That rule would reduce the value to prosecutors of guilty pleas, particularly if courts take seriously the requirement of disclosure right after arraignment, before prosecutors have had much time to gather evidence or bargain. Because pleas would not save them as much work, they would be correspondingly less willing to offer the concessions needed to plead cases out.

Moreover, I do not see disclosure of *Giglio* material during plea bargaining as crucial to justice in the way that *Brady* disclosure is. *Brady* goes to whether a defendant actually did the crime and deserves the punishment. *Giglio*'s right to impeachment material makes sense at trial, in the context of all the incriminating evidence, as it undercuts the key witnesses on which the jury might over-rely. The incriminating evidence provides the prosecution's version of events, while the impeachment material tempers it, limiting its affirmative significance. But during plea bargaining, defendants have no right to the incriminating evidence beyond the narrow confines of Federal Rule of Criminal Procedure 16. As the Supreme Court recognized in *Ruiz*, it is artificial to disclose impeachment material early, divorcing it from the incriminating evidence whose importance it undercuts. After all, if one witness has bad eyesight, that may be utterly irrelevant if there are five other witnesses with perfect eyesight who also reported the exact same event. Thus, in *Ruiz*, the Supreme Court unanimously declined to find that the Constitution requires disclosure of impeachment evidence during plea bargaining.

If early *Giglio* disclosures had little cost, I might still support them as helping to reduce bluffing and trial by surprise. That might make sense in the context of other reforms to broaden discovery of incriminating evidence, which would put that evidence in context. But as I will discuss, I fear that routine *Giglio* disclosures would carry serious costs to victims and witnesses.

III. Costs of Discovery to Witnesses and Victims

Giglio material will often provide reveal or provide clues as to the identities of various victims or witnesses. It may unavoidably refer to a particular witness's romantic jealousies, professional rivalries, criminal record, or role in a conspiracy, all of which may allow the defense to figure out the witness's identity. At trial, that is not a problem: the witness is about to testify in person, in open court, so the defense will learn his identity regardless. But accelerating that discovery, so that it applies not only to the 5% of trials but also to the 95% of plea bargains, carries heavy costs.

The most obvious costs are those to victims. Rape victims, molested children, and victims of other forms of violence are understandably traumatized and fearful. They may be easy prey to intimidation or other forms of tampering. Those risks are probably greatest in cases with child victims, organized crimes, violent gangs, and sex or other violent crimes. The risks are likely lower in white-collar crime cases, such as the Senator Stevens prosecution, and property-crime prosecutions.

Criminal cases also involve many hidden witnesses. These include undercover agents, cooperating witnesses, and confidential informants. These witnesses legitimately fear for their safety. As the widespread "Stop Snitching" campaign demonstrates, many communities are hostile to witnesses who dare to cooperate with the government. Yet in jurisdictions that disclose prosecution witnesses' names, addresses, and statements to the defense, witness threats and tampering have become serious problems. *See, e.g.*, David Kocieniewski, *Scared Silent: In Witness Killing, Prosecutors Point to a Lawyer*, N.Y. TIMES, Dec. 21, 2007.

Now, the bill does allow a safety valve, authorizing prosecutors to move for protective orders. But it requires prosecutors to affirmatively prove that the witness's safety is threatened, and the procedure might prove too cumbersome and difficult, deterring prosecutors from using it.

More importantly, the bill limits protective orders to those needed to protect witness's safety. It makes no provision for preventing witness tampering or bribery. And it makes no provision for keeping undercover agents' and confidential informants' identities secret so that they may continue to work undercover and provide information to prove future cases. A major reason that prosecutors agree to plea bargains in many cases is so that they can preserve that confidentiality. That is an important quid pro quo for plea-bargaining concessions, and if prosecutors cannot withhold those identities they will be much less willing to offer defendants plea concessions and will be able to prosecute many fewer gang, conspiracy, and organized-crime cases.

In short, I applaud the Committee's work and focus on this important problem, but I fear that this bill distracts attention from the root problem and, unless amended, would cause unintended harms.

Sincerely,

Stephanos Bibas

Enclosure:

My curriculum vitae

QUESTIONS SUBMITTED BY SENATOR GRASSLEY FOR HON. JAMES COLE

Questions for the Record
Deputy Attorney General James Cole
Committee on the Judiciary
United States Senate

QUESTIONS POSED BY RANKING MEMBER SENATOR GRASSLEY

Problems with the Public Integrity Section

1. The Schuelke report commissioned by Judge Sullivan found that the DOJ attorneys "intentionally withheld" Brady material from Stevens' attorneys. More specifically, the investigation found that "Mr. Bottini and Mr. Goeke intentionally withheld and concealed significant exculpatory information from the defense. The Department of Justice's OPR found that the misconduct was unintentional, but that the attorneys acted with "reckless disregard" toward their disclosure requirements.

   A. Why did DOJ's internal watchdog (OPR) determine less culpability than an independent outside reviewer?

   B. Explain how two independent investigations, with access to the same information, could arrive at such different opinions?

   C. Was this a case of OPR covering up a mess on behalf of its own?

2. The Department's failures in the Stevens case are a serious black-eye for the Public Integrity Section. However, there have been a number of recent high profile cases involving the Public Integrity Section, raising questions as to whether there is a leadership problem in determining what cases are brought.

   A. Given the high profile nature of cases brought by the Public Integrity Section, wouldn't you agree that these cases should be an example of the best the Department has to offer?

   B. There have been a number of high profile incidents with cases brought by the Public Integrity Section, including the recent prosecution of John Edwards, the Alabama bingo case against state legislators, and the Stevens case. Why is the Public Integrity Section continually losing high profile cases?

Differences between OPR and Berg Reports

3. DOJ's Office of Professional Responsibility did not hold supervisors at the Public Integrity Section or in the front office of the Criminal Division responsible for the poor management of the lawyers and the case against Senator Stevens. Terrence Berg, the independent reviewer at DOJ tasked by the Professional Misconduct Review Unit to

review the allegations, questioned the OPR findings and ultimately placed a great deal of the responsibility for the misconduct in the case on the lack of leadership and supervision by senior attorneys in the Department.

A. At the hearing, you stated that the problem with Berg's analysis was his finding that the trial attorneys' misconduct should be discounted because of the supervisors' poor judgment. At what point should leadership be held accountable? What is the point of having supervisory attorneys if they are in no way responsible for the work of the attorneys working underneath them?

B. Model Rule 5.1 of the Model Rules of Professional Responsibility, comment 2 provides, "Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised." Given the failures of the Stevens' investigation, what *specific* "policies and procedures," excluding those already discussed in your testimony, have been instituted with respect to ensuring that supervising attorneys are helping their subordinate attorneys meet discovery obligations?

C. The President nominated Terrence Berg for appointment to the District Court for the Eastern District of Michigan. If the President endorses his judgment to serve on the bench, shouldn't the Justice Department value his judgment with regard to the OPR investigation?

D. As I mentioned in my statement, Terrence Berg led the U.S. Attorney's Office in the Eastern District of Michigan after a scandal similar to the Stevens case, when a major post-9/11 terrorism prosecution was dismissed because a prosecutor was found to have suppressed exculpatory evidence. Shouldn't Berg's past experience dealing with a similar scandal give his findings more value when determining if the line prosecutors engaged in professional misconduct?

FBI Agent Involvement

4. The report from the Office of Professional Responsibility failed to disclose findings on an FBI Special Agent since the process concerning her conduct is not yet complete. This resulted in 66 pages being redacted from the report.

   A. Why wasn't this process completed before releasing the report?

   B. Who is reviewing the FBI agent's conduct?

   C. What stage is the process at?

D. When will it be complete?

E. FBI Agent Chad Joy's disclosures to Judge Sullivan led to the review of the case and uncovered the discovery violations. However, the Justice Department denied him whistleblower status for making disclosures to a federal judge. This is likely because the Justice Department requires strict adherence to certain guidelines for FBI agents to qualify for whistleblower status. This creates a disincentive for agents to report wrongdoing outside of the FBI. Why was Agent Joy denied whistleblower status by the Justice Department?

F. Doesn't this create a situation where agents could be punished for providing candid information to federal judges?

G. Is legislation required to fix this so agents can make disclosures to federal judges and still qualify as a whistleblower?

Administrative Concerns

5. According to the report, the lack of a clear leader on the team of Public Integrity Section attorneys hindered the team's work, as there was no one to assign tasks to the various attorneys and ensure they were completed.

   A. Is there a formal procedure within the Department that provides prosecutors with an opportunity to raise administrative concerns, such as lack of effective trial team leadership? If an attorney raises such a concern, what mechanisms are in place to protect that attorney?

S. 2197: Obligations for the Prosecution Team

6. S.2197 broadens the definition of "prosecution team" to include executive agencies working on the case, further expanding discovery obligations to turn over evidence that is favorable to the defendant.
   A. Is it reasonable to hold the prosecutor responsible if a particular piece of evidence in the possession of an agent is not turned over to the defense, as S. 2197 would do? What would be the effect on prosecutions if this provision of S. 2197 became law?

Addressing the administrative concerns of trial preparation within the Department of Justice

7. The Office of Professional Responsibility's (OPR's) report regarding the prosecutorial misconduct in *United States v. Theodore F. Stevens* indicates that Public Integrity Section (PIN) Principal Deputy Chief Morris was a late addition to the *Stevens* trial team whose poor leadership drew criticism from other team members. Morris claimed that the government's disclosure mistakes were a result of the "accelerated pace of the trial"; however, Morris herself suggested the trial date of September 22, 2008 instead of accepting Judge Sullivan's October 9, 2008 recommendation. According to the report,

the lack of adequate team leadership hindered the PIN attorneys' work. No one assigned tasks to the various attorneys. No one ensured the successful completion of critical tasks. The OPR investigation ultimately found that Morris exercised poor judgment in supervising the *Brady* review and various other actions, including the redactions performed by Special Agent Kepner.

A. Please describe any formal procedures within the Department that provide prosecutors with an opportunity to raise administrative concerns, such as lack of effective trial team leadership.
B. If an attorney does raise such a concern, what mechanisms are in place to protect that attorney from professional retaliation?
C. In response to my question about there being a double standard for managers and line employees, you said that errors by supervisors were simply mismanagement, and not misconduct. What kind of disciplinary actions may be taken under current policy against supervisors who commit management errors, when those errors compound or fail to prevent disclosure violations like the ones that occurred in Senator Stevens' case?

Addressing disciplinary concerns within the Federal Bureau of Investigations

8. FBI Special Agent Kepner was accused of committing several acts of misconduct, including the mishandling of evidence and FBI sources. These failures contributed to the ultimate dismissal of the *Stevens* case. It is my understanding that an FBI ethics review is underway and Special Agent Kepner is still entrusted to conduct criminal investigations on behalf of the FBI.

A. Should an FBI Special Agent whose actions were severe enough to warrant both an FBI ethics investigation and DOJ litigation dismissal should be allowed to conduct criminal investigations pending the final results of an ethics investigation, which could take years?
B. What action is the Department prepared to take or currently taking to ensure that all of Special Agent Kepner's past, present, and future investigations do not also compel dismissals?
C. If the FBI does not conduct an in-depth review of Special Agent Kepner's past investigations, would you disagree with the FBI's course of action? Why? Moreover, if the Department disagrees with the scope of investigation, is the Department prepared to take corrective action?

Training versus discipline

9. During your hearing, you testified that you did not believe having more strict rules would not have led to a different result in the Stevens case, because the problem was not the rule, but the fact that the rules were not followed. You discussed in both your written and oral testimony efforts to better train prosecuting attorneys about their discovery obligations.

   A. Do you believe that the threat of disciplinary action deters misconduct? If not, why not? If so, then don't the relatively light disciplinary actions against the individuals in this case undermine the increased training?

Discovery issues

10. In response to Senator Franken's question, you testified that if it is unclear whether a prosecutor should turn over evidence, they should speak with their supervisor. You also testified that each district had a discovery coordinator who receives special training regarding discovery issues.

    A. Do any procedures exist to facilitate the review the decisions of the supervisors and discovery coordinators, particularly when they advise against turning over evidence to the defense?
    B. You further testified that judges are available to give *ex parte* rulings on discovery issues. Are there any situations where it is mandatory for a prosecutor to seek an *ex parte* ruling?

QUESTIONS SUBMITTED BY SENATOR HATCH FOR HON. JAMES COLE

QUESTIONS FOR DEPUTY ATTORNEY GENERAL JAMES COLE FROM SENATOR HATCH

1. The Office of Professional Responsibility Report indicates that the lead FBI investigating agent in the Stevens' case violated FBI policies. Specifically, the report indicates the FBI agent failed to comply with the policy requirement for a written memorandum of interview, known as a FBI 302, for some of the interviews conducted by the prosecution. Furthermore, it was also indicated that several FBI 302s were back dated by the agent, also in violation of FBI policy. If the investigating agents aren't in compliance, the prosecution cannot meet its obligation of full and fair disclosure to the defense. What safeguards does the Department of Justice have in place to ensure the investigating law enforcement agents are complying with their respective agency policies during the preparation of cases for trial?

2. The Office of Professional Responsibility Report indicates FBI Agents and IRS Agents were responsible for reviewing discovery materials for *Brady* and *Giglio* information and making evidentiary determinations. Given the critical importance of *Brady* and *Giglio* information to defense counsel in determining defense strategy, making recommendations to their client and defining appellate issues, shouldn't the prosecuting attorneys, who are officers of the court, be responsible for reviewing discovery and making those determinations?

3. As a result of the prosecutorial missteps in the Stevens' case, the Department of Justice has undertaken a number of steps to improve disclosure policies and practices. One of those steps is to provide 4 hours of training to Department of Justice law enforcement agents – primarily from the FBI, DEA and ATF on criminal discovery policies and practices. Given the critical importance of evidentiary issues at trial, do you feel 4 hours of training every 12 months is adequate?

4. In the Stevens' case, there were investigating agents from the IRS who were responsible for reviewing discovery materials and making evidentiary determinations. The IRS falls under the Department of Treasury, not the Department of Justice. What policies does DOJ have in place for the situation where the investigating agent has not received the requisite training on the disclosure of *Brady* and *Giglio* material?

5. In your written testimony, you indicated that the Department of Justice has appointed a National Criminal Discovery Coordinator to lead and oversee all Department efforts to improve disclosure policies and practices. The Coordinator has been working since January, 2010 to improve training and provide prosecutors with key discovery tools. In that testimony, you highlight 10 steps the Department of Justice has taken to improve disclosure policies and practices. In reviewing those 10 steps, 6 of those steps focus on improvements specifically for the prosecuting attorneys, 2 of those steps focus on the investigating agents, 1 of those steps focuses on the DOJ support staff and the last step focuses on the transfer of the National Criminal Discovery Coordinator position into the Office of the Deputy Attorney General. Does it make sense to focus so much time and energy on training the prosecuting attorneys to identify *Brady* and *Giglio* material if the review is going to actually be done, in some cases, by law enforcement agents who may only have a total of 4 hours of training?

6. Would you agree that the prosecution of any defendant requires the utmost due diligence of the prosecution team in all aspects of the case, especially the disclosure of *Brady* and *Giglio* material to defense counsel? In hindsight, would you agree that the review of the *Brady* and *Giglio* material in this case should have been done by the prosecutors themselves?

QUESTIONS SUBMITTED BY SENATOR GRASSLEY FOR CAROL A. BROOK

Questions for the Record
Carol Brooks
Committee on the Judiciary
United States Senate

QUESTIONS POSED BY RANKING MEMBER SENATOR GRASSLEY

Question on Materiality and "Reasonably Appear"

1. A criminal defense lawyer has written to the Committee, stating that by eliminating the materiality requirement, the bill before us "could lead to new trials and reversals in cases even where the error results in no prejudice to the defendant." He also says that the bill's evidence disclosure requirements "may reasonably appear to be favorable to the defendant [and]…may well compel open-file discovery."

   A. How do you respond to this analysis from your fellow defense counsel?

   B. What impact would open-file discovery have on the length of cases and on the courts?

QUESTIONS SUBMITTED BY SENATOR GRASSLEY FOR STEPHANOS BIBAS

Questions for the Record
Professor Bibas
Committee on the Judiciary
United States Senate

QUESTIONS POSED BY RANKING MEMBER SENATOR GRASSLEY

Impact on Victims

1. Professor Bibas, in your prepared remarks you mentioned a number of ways in which different kinds of victims and witnesses could be harmed if S.2197 were to become law in its current form.

   A. Can you elaborate on the potential harms to victims and witnesses that may be caused by the bill?

   B. Are there any protections in this bill as currently drafted?

Questions on Materiality and "Reasonably Appear"

2. A criminal defense lawyer has written to the Committee stating that by eliminating the materiality requirement, the bill before us "could lead to new trials and reversals in cases even where the error results in no prejudice to the defendant." He also says that the bill's evidence disclosure requirements "may reasonably appear to be favorable to the defendant [and]…may well compel open-file discovery."

   A. Professor Bibas, aside from the dangers to witnesses and victims, what other problems could arise as a result of open-file discovery?

   B. Professor Bibas, what impact would open-file discovery have on the Justice Department and information other federal agencies share with the Justice Department? Could this lead to stove piping where agencies keep information from the Justice Department to avoid disclosure to defense counsel?

   C. What impact would open-file discovery have on the length of cases and on the courts?

Questions on Plea Bargains

3. Prof. Bibas, your prepared remarks discussed important differences between trials and plea bargains when considering the rules that should govern discovery of evidence of innocence or impeachment evidence.

   A. Can you elaborate on those distinctions and whether S.2197 would create any unintended consequences that might reduce the likelihood that plea agreements could be reached in cases where they are warranted?

Questions on National Security

4. You cite the possibility of danger to victims and witnesses in ordinary criminal cases, such as undercover officers and confidential informants. It seems that similar problems would arise in national security cases, where early and extensive disclosure could compromise intelligence sources and methods. I am concerned that the Classified Information Procedures Act is inadequate to the task of protecting such information, as witnesses told this to the Committee last summer at another hearing.

   A. Do you agree that disclosure obligations in the bill would pose risks in terrorism and espionage prosecutions?

   B. What would be the impact of the bill's disclosure provisions and limits on ex parte motions in such cases?

Additional Questions:

A. Professor Bibas, you stress that, "head and supervisory prosecutors play important roles in shaping and communicating office culture and socializing line prosecutors into that culture," and "rhetoric from the top matters." Given this perspective that supervisory prosecutors are instrumental in setting the standards of office culture, which shapes the conduct of prosecutors, what is your opinion of the OPR report's finding that *none* of the supervisory prosecutors were at all responsible for the line prosecutors' misconduct?

B. You state that "recruiting, hiring, training, retaining, and promoting the right people matter greatly," and "replacing old managers with new ones from the healthiest, most successful units assists in changing cultures." Considering the fact that OPR did not recommend *any* form of discipline for the supervising attorneys of the Public Integrity section in the *Stevens* case, what kind of message does that send to line prosecutors? What is the effect on institutional values when OPR refuses to hold leadership accountable?

C. Mr. Bibas, in your article entitled, "Prosecutorial Regulation Versus Prosecutorial Accountability, you argue that "institutional design is more promising than rigid legal regulation," and state that, "simply commanding ethical, consistent behavior is far less effective than creating an environment that hires for, inculcates, expects, and rewards ethics and consistency." Can you please explain, in light of this viewpoint, why S. 2197 would likely *not* have its intended effect, which is to decrease instances of discovery violations, among prosecutors?

D. In this same article, you identified "opacity" and "insularity" as two primary obstacles to prosecutors serving the public faithfully. Can you please express your opinion of DOJ's recent training initiatives for prosecutors, and whether you think they effectively combat

the problems of "opacity" and "insularity" that can contribute to prosecutorial misconduct as seen in the *Stevens* case?

E. Professor Bibas, you also argue that, "as a mechanism, oversight hearings are finer regulatory tools than legislation, and their ongoing or periodic nature is better designed to ensure compliance." You characterize oversight hearings as preferable to legislation and a "piece of the solution." To what extent would oversight hearings be an effective legislative tool in ensuring prosecutorial compliance with existing discovery obligations?

F. When evaluating effective tools to monitor prosecutorial discretion, you state, "damage suits [against prosecutors] are not tailored to address systemic shortcomings." In your opinion, does the provision in S. 2197 that allows for the opposing party to receive expenses incurred in the course of litigation (including attorney's fees) if there is a discovery violation, mimic the same ineffective outcome that damage suits against prosecutors can have?

G. In your article, you recommend disseminating reputational surveys and feedback to criminal defendants and their defense attorneys, can you please explain how this would be an effective tool to monitor and improve prosecutorial conduct?

H. You posit that "centralized leadership, hierarchy, and monitoring aid consistency in all but the smallest prosecutors' offices." Given your emphasis on such a hierarchical structure, what is your opinion of the Department of Justice's model? Is their leadership centralized enough? If you had the opportunity to advise them on this issue, is there anything you would change on a macro level?

I. In your article, you cite works that argue that "prosecutorial self-regulation can and does work well." Please explain this argument, and perhaps elaborate on what this would entail for DOJ? Would their existing self-regulation policies and procedures need to change? If so, how so?

J. You seem to place a lot of emphasis on writing things down and recordkeeping. Do you think that existing requirements (such as declination letters) for federal prosecutors to justify their decisions in writing could be strengthened to improve internal self-regulation? If the Department of Justice were to require prosecutors to provide some form of written justification for their decisions, should Congress be able to view these documents as part of their oversight responsibilities? Do you think that requiring prosecutors to justify their decisions in writing could pose a risk that criminals might obtain valuable information, such as why prosecutors decline to prosecute or the nature and extent of the government's evidence against them?

RESPONSES OF HON. JAMES COLE TO QUESTIONS SUBMITTED BY SENATORS GRASSLEY AND HATCH

Questions for the Record
James Cole
Deputy Attorney General
U.S. Department of Justice

Committee on the Judiciary
United States Senate

"Ensuring That Federal Prosecutors Meet Discovery Obligations"
June 6, 2012

QUESTIONS POSED BY SENATOR GRASSLEY

Problems with the Public Integrity Section

1. The Schuelke report commissioned by Judge Sullivan found that the DOJ attorneys "intentionally withheld" Brady material from Stevens' attorneys. More specifically, the investigation found that "Mr. Bottini and Mr. Goeke intentionally withheld and concealed significant exculpatory information from the defense. The Department of Justice's OPR found that the misconduct was unintentional, but that the attorneys acted with "reckless disregard" toward their disclosure requirements.

A. Why did DOJ's internal watchdog (OPR) determine less culpability than an independent outside reviewer?

The Schuelke and OPR reports both determined that government prosecutors violated their *Brady* and *Giglio* obligations by failing to disclose materially exculpatory information to the defense. Both reports made findings of professional misconduct against the same two prosecutors. The main difference between the two reports was the determination of whether that misconduct was intentional or reckless. Mr. Schuelke concluded, without applying any one particular framework, that the government's disclosure violations were the result of intentional misconduct on the part of certain prosecutors. In contrast, OPR measured the culpability of each subject attorney against standards of conduct imposed by bar rule, federal law, and Department policy and then followed its longstanding analytical framework in determining that two prosecutors acted in reckless disregard of their obligation to comply with applicable obligations and standards, while certain other prosecutors did not engage in any misconduct. A career Department official, who was designated the discipline deciding official, agreed with OPR's determination that the evidence did not support an intentional misconduct finding.

Among other things, OPR noted that AUSAs Bottini and Goeke argued for the disclosure of certain exculpatory information. In addition, OPR found an absence of documents or e-mails to support the notion that the withholding of exculpatory material was intentional. In short, OPR determined that the evidence did not support the claim that the withholding of exculpatory information was the product of a conscious, purposeful decision.

B. Explain how two independent investigations, with access to the same information, could arrive at such different opinions?

Please see the response to question 1(A), above.

C. Was this a case of OPR covering up a mess on behalf of its own?

Since its inception in 1975, OPR's mandate has been to conduct unbiased investigations of misconduct allegations against Department attorneys and to make findings based on the applicable standards of conduct, including those imposed by law. OPR followed that mandate in resolving the *Stevens* investigation, pursuant to its standard methodology: ascertaining the facts and applying standards without showing any favoritism to the subjects under investigation. OPR conducted a thorough investigation that is well documented in its 672-page report. The conclusion of that report is that certain Department employees engaged in misconduct, for which they now are subject to discipline. Other than its conclusion as to level of intent, OPR's findings are almost identical to those of the special counsel appointed by the court.

2. The Department's failures in the Stevens case are a serious black-eye for the Public Integrity Section. However, there have been a number of recent high profile cases involving the Public Integrity Section, raising questions as to whether there is a leadership problem in determining what cases are brought.

A. Given the high profile nature of cases brought by the Public Integrity Section, wouldn't you agree that these cases should be an example of the best the Department has to offer?

What occurred in the *Stevens* case was unacceptable and is not representative of the Department's work, or the work of the Public Integrity Section. The men and women who make up the prosecutor corps at the Department of Justice work hard every day to keep Americans safe, to hold criminals accountable for their actions, to ensure that victims and witnesses are treated with the respect and care they deserve, and to do justice for all in every case, regardless of the amount of public attention a case may receive.

Public corruption cases can be difficult, and, at times, unpopular. But it is the duty of the Public Integrity Section – and has been since 1976 – to conduct thorough investigations, bring cases when the facts and the law support criminal charges, and let juries decide whether the government has proved the charges beyond a reasonable doubt. That is what the Public Integrity Section has been doing since its inception and continues to do today. During the past three years, the Public Integrity Section has successfully prosecuted dozens of individuals throughout the country in domestic public corruption cases involving federal, state and local officials. From the beginning of 2009 through May 31, 2012, the Public Integrity Section successfully tried 25 defendants and another 144 pleaded guilty. Among these prosecutions were cases involving corruption by federal and state judges, elected state representatives, and local council members and commissioners; their corrupt conduct stretched from Arizona to Indiana, from New York to Texas, and from the District of Columbia to Puerto Rico. The fact that, in limited instances, a jury decided that the government did not prove the charges beyond a reasonable doubt should not be misinterpreted as a sign of diminished competence or effectiveness, particularly given all the

Section has accomplished. Public Integrity's mandate is to aggressively pursue corruption, and both the Department and the public benefit when the Section does not shy away from difficult cases.

B. There have been a number of high profile incidents with cases brought by the Public Integrity Section, including the recent prosecution of John Edwards, the Alabama bingo case against state legislators, and the Stevens case. Why is the Public Integrity Section continually losing high profile cases?

Please see the response to question 2(A), above.

Differences between OPR and Berg Reports

3. DOJ's Office of Professional Responsibility did not hold supervisors at the Public Integrity Section or in the front office of the Criminal Division responsible for the poor management of the lawyers and the case against Senator Stevens. Terrence Berg, the independent reviewer at DOJ tasked by the Professional Misconduct Review Unit to review the allegations, questioned the OPR findings and ultimately placed a great deal of the responsibility for the misconduct in the case on the lack of leadership and supervision by senior attorneys in the Department.

A. At the hearing, you stated that the problem with Berg's analysis was his finding that the trial attorneys' misconduct should be discounted because of the supervisors' poor judgment. At what point should leadership be held accountable? What is the point of having supervisory attorneys if they are in no way responsible for the work of the attorneys working underneath them?

Supervisors are held accountable for their work, but it is critical to distinguish performance problems from professional misconduct. The issues on which OPR found professional misconduct related to the conduct of the prosecutors, not the supervisors. No one in management either directed or suggested that the trial team withhold any of the information. The conduct that resulted in these findings consisted of the acts and omissions of the individual prosecutors on whom the disclosure duty fell.

In any event, the Department has not been uncritical of the performance of the supervisors in the *Stevens* case. OPR found that although the DOJ management demands were within the legitimate prerogatives of management, the demands contributed to a leadership void which resulted in team members' lacking clear assignments for certain tasks or accountability for the proper completion of such tasks. Of the four senior managers referenced in the Schuelke and OPR reports, all were no longer in management positions shortly after the indictment in *Stevens* was dismissed, and three are no longer with the Department. As to one, OPR made a finding that she exhibited poor judgment based on a failure to properly supervise the review of *Brady* material.

In appropriate cases, OPR has found that DOJ attorneys committed professional misconduct by failing to supervise employees. These findings resulted from facts indicating that the misconduct

was the direct result of a supervisory decision or direction, or from the supervisor's failure to take action when there was a clear and unambiguous obligation to do so.

B. Model Rule 5.1 of the Model Rules of Professional Responsibility, comment 2 provides, "Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised." Given the failures of the Stevens' investigation, what *specific* "policies and procedures," excluding those already discussed in your testimony, have been instituted with respect to ensuring that supervising attorneys are helping their subordinate attorneys meet discovery obligations?

The Department provides its prosecutors with an array of resources to assist them in meeting their discovery obligations. In addition to a prosecutor's supervisory attorneys, these resources include: discovery coordinators and professional responsibility officers in each office; the Professional Responsibility Advisory Office; online resources; a full-time National Criminal Discovery Coordinator; and experienced attorneys throughout the Department.

In January 2010, the Deputy Attorney General instructed prosecutors to consult with the designated criminal discovery coordinator in their office when they have questions about the scope of their discovery obligations, and to contact the Professional Responsibility Advisory Office when they have questions about their ethical obligations regarding discovery. At that time, the Deputy Attorney General also directed that each U.S. Attorney's Office and Department component that prosecutes criminal cases develop a discovery policy that establishes discovery practice within that component or district. Those policies address the role of supervisory attorneys in the discovery process. For example, one policy states, among other things, that prosecutors "are responsible for keeping their supervisors informed of any discovery conflicts or issues that arise[,]" and that they "should consult [their] supervisor[s] any time the [prosecutor] has a question or doubt about discovery practice or guidelines." Another policy instructs that, if a prosecutor "has any doubt whether a piece of evidence is exculpatory, the evidence should be disclosed. Your immediate supervisor, the Chief of the Criminal Division, or the Discovery Coordinator should be consulted as issues arise." And, consistent with the U.S. Attorneys' Manual, the policies address the critical role supervisors play in situations where prosecutors believe there are case-related reasons justifying an exception to their office's discovery policy. *See, e.g.*, U.S. Attorney's Manual 9-5001(D)(4) ("A prosecutor must obtain supervisory approval not to disclose impeachment information before trial or not to disclose exculpatory information reasonably promptly because of its classified nature.").

On March 27, 2012, the Attorney General issued a memorandum entitled "Criminal Discovery Resources and Training," which in addition to listing the Department's most significant criminal discovery efforts over the past three years, advised prosecutors:

> Though you are ultimately responsible for the decisions you make, no prosecutor should

have to make discovery determinations on his or her own. When necessary, I encourage you to consult with supervisors and criminal discovery experts in your offices on discovery-related questions that arise in your cases. If, after discussing any discovery-related matter within your office, you collectively decide that it would be helpful to receive additional input, please feel free to contact the National Criminal Discovery Coordinator . . . .

C. The President nominated Terrence Berg for appointment to the District Court for the Eastern District of Michigan. If the President endorses his judgment to serve on the bench, shouldn't the Justice Department value his judgment with regard to the OPR investigation?

The Department agrees that Terrence Berg is well qualified to be a judge on the District Court for the Eastern District of Michigan. The Chief of the Professional Misconduct Review Unit (PMRU) valued Mr. Berg's views in the *Stevens* matter. The PMRU Chief had extensive conversations with Mr. Berg and closely analyzed Mr. Berg's draft memorandum.

D. As I mentioned in my statement, Terrence Berg led the U.S. Attorney's Office in the Eastern District of Michigan after a scandal similar to the Stevens case, when a major post-9/11 terrorism prosecution was dismissed because a prosecutor was found to have suppressed exculpatory evidence. Shouldn't Berg's past experience dealing with a similar scandal give his findings more value when determining if the line prosecutors engaged in professional misconduct?

The *Koubriti* case to which you refer was dismissed for discovery violations in 2004. Terrence Berg did not lead the U.S. Attorney's Office in the Eastern District of Michigan at that time and Mr. Berg has advised the Department that he was not involved in handling the *Koubriti* case review, its dismissal, or the subsequent prosecution of AUSA Convertino.

FBI Agent Involvement

4. The report from the Office of Professional Responsibility failed to disclose findings on an FBI Special Agent since the process concerning her conduct is not yet complete. This resulted in 66 pages being redacted from the report.

A. Why wasn't this process completed before releasing the report?

The Department of Justice (DOJ) Office of Professional Responsibility (OPR) referred its investigation of an FBI Special Agent to the FBI's OPR in late September 2011. The FBI reviewed the extensive investigative file, which included more than 10 boxes of materials, and issued a proposed penalty on December 8, 2011. In accordance with FBI policy, the Agent and the Agent's counsel were provided the opportunity to review the investigative file, submit a written response, and make an oral presentation to the Assistant Director of the FBI's OPR. The Agent made an oral presentation on May 31, 2012, and on June 4, 2012, the FBI's OPR issued its determination.

B. Who is reviewing the FBI agent's conduct?

As noted above, the FBI's OPR has adjudicated the allegations against the Agent.

C. What stage is the process at?

The adjudication process was completed on June 4, 2012.

D. When will it be complete?

Please see response to question 4(C), above.

E. FBI Agent Chad Joy's disclosures to Judge Sullivan led to the review of the case and uncovered the discovery violations. However, the Justice Department denied him whistleblower status for making disclosures to a federal judge. This is likely because the Justice Department requires strict adherence to certain guidelines for FBI agents to qualify for whistleblower status. This creates a disincentive for agents to report wrongdoing outside of the FBI. Why was Agent Joy denied whistleblower status by the Justice Department?

SA Joy was not denied whistleblower status by the Justice Department. In late November 2008, SA Joy faxed an undated letter to the FBI Inspection Division, alleging misconduct by SA Kepner and *Stevens* prosecutors. The FBI Inspection Division referred Joy's allegations to the DOJ Office of the Inspector General (OIG), which in turn referred the matter to OPR. OIG and OPR thereafter provided Joy's letter to the DOJ Criminal Division, which shared a redacted copy of the letter with the court and the defense in the *Stevens* case. On December 4, 2008, OPR notified SA Joy that it planned to investigate his complaints and that OPR had jurisdiction to investigate any allegations of reprisal, should SA Joy make such claims. Joy did not raise allegations of reprisal with OPR.

During a January 14, 2009 hearing before Judge Sullivan, former Public Integrity Section (PIN) Chief William Welch stated that SA Joy "does not qualify for whistleblower status." Welch's statement meant to convey that SA Joy had not alleged reprisal or retaliation, not that Joy failed to qualify for whistleblower protection against future reprisals or retaliation. The government clarified Welch's January 2009 statement in its February 5, 2009 submission to the court.

F. Doesn't this create a situation where agents could be punished for providing candid information to federal judges?

As a general matter, when an agent discloses information that the government would otherwise have a duty to make known to the court, adverse personnel action or other retaliation for the disclosure would be improper. For example, the FBI Code of Conduct requires employees to "[r]efrain from retaliating against employees who, reasonably believing them to be true, report the violation of laws and regulations." This provision places FBI employees on notice that they may be subject to disciplinary action for retaliation against employees for reporting allegations

of wrongdoing, including reports made to individuals or offices not addressed by the FBI whistleblower regulations.

G. Is legislation required to fix this so agents can make disclosures to federal judges and still qualify as a whistleblower?

No. Recognizing the sensitivity of information to which FBI employees have access, Congress established separate, internal Departmental procedures for FBI whistleblower cases, which designate a limited number of offices and individuals as recipients of protected disclosures. *See* 5 U.S.C. § 2303; 28 C.F.R part 27. These separate procedures are justified in light of the information at issue, including both national security information and sensitive law enforcement information, such as investigative techniques, the identities of confidential informants, and information in open investigations. To include federal judges in the general list of designated recipients to whom a protected disclosure may be made could potentially cause confusion, increase the risk of public disclosure of national security or sensitive law enforcement information, and delay the transmittal of the information to an individual or office in a position to address the alleged wrongdoing.

Administrative Concerns

5. According to the report, the lack of a clear leader on the team of Public Integrity Section attorneys hindered the team's work, as there was no one to assign tasks to the various attorneys and ensure they were completed.

Is there a formal procedure within the Department that provides prosecutors with an opportunity to raise administrative concerns, such as lack of effective trial team leadership? If an attorney raises such a concern, what mechanisms are in place to protect that attorney?

There are a variety of procedures within the Department, both formal and informal, by which prosecutors may raise administrative concerns. The Department encourages all of its prosecutors to raise such concerns with their component's leadership. Additionally, the Attorney General has an online "Suggestion Box" in which Department employees may raise comments, suggestions and concerns, anonymously if they wish.

Under 5 U.S.C. § 2302(b)(8)(A), prosecutors may not be retaliated against for making "any disclosure of information" that the prosecutor "reasonably believes evidences—(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs[.]"

S. 2197: Obligations for the Prosecution Team

6. **S. 2197 broadens the definition of "prosecution team" to include executive agencies working on the case, further expanding discovery obligations to turn over evidence that is favorable to the defendant.**

   Is it reasonable to hold the prosecutor responsible if a particular piece of evidence in the possession of an agent is not turned over to the defense, as S. 2197 would do? What would be the effect on prosecutions if this provision of S. 2197 became law?

S. 2197 would significantly alter the careful balance of constitutional doctrine, statutory directives, and federal rules that has been achieved over the last 50 years. Among other things, by eliminating the long-standing "materiality" requirement as the legal benchmark, the bill would create significant problems. As the Supreme Court explained in *United States v. Bagley*, 473 U.S. 667, 675 n.7 (1985), "a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments." These problems are compounded by the bill's expansion of the definition of "prosecution team" and its requirement that prosecutors provide information "the existence of which . . . by the exercise of due diligence would become known[] to the attorney for the Government." The bill would disrupt the balance between ensuring the protection of a defendant's constitutional rights and, at the same time, safeguarding the equally important public interest in a criminal trial process that reaches timely and just results, safeguards victims and witnesses from retaliation or intimidation, does not unnecessarily intrude on victims' and witnesses' personal privacy, protects ongoing criminal investigations from undue interference, and recognizes critical national security interests.

Addressing the administrative concerns of trial preparation within the Department of Justice

7. **The Office of Professional Responsibility's (OPR's) report regarding the prosecutorial misconduct in *United States v. Theodore F. Stevens* indicates that Public Integrity Section (PIN) Principal Deputy Chief Morris was a late addition to the *Stevens* trial team whose poor leadership drew criticism from other team members. Morris claimed that the government's disclosure mistakes were a result of the "accelerated pace of the trial"; however, Morris herself suggested the trial date of September 22, 2008 instead of accepting Judge Sullivan's October 9, 2008 recommendation. According to the report, the lack of adequate team leadership hindered the PIN attorneys' work. No one assigned tasks to the various attorneys. No one ensured the successful completion of critical tasks. The OPR investigation ultimately found that Morris exercised poor judgment in supervising the *Brady* review and various other actions, including the redactions performed by Special Agent Kepner.**

A. Please describe any formal procedures within the Department that provide prosecutors with an opportunity to raise administrative concerns, such as lack of effective trial team leadership.

Please see the response to question 5, above.

B. If an attorney does raise such a concern, what mechanisms are in place to protect that attorney from professional retaliation?

Please see the response to question 5, above.

C. In response to my question about there being a double standard for managers and line employees, you said that errors by supervisors were simply mismanagement, and not misconduct. What kind of disciplinary actions may be taken under current policy against supervisors who commit management errors, when those errors compound or fail to prevent disclosure violations like the ones that occurred in Senator Stevens' case?

The Department has a wide variety of disciplinary actions at its disposal including written reprimands, reassignments, demotions, suspensions, and removals. *See generally* 5 U.S.C. Chapter 75; 5 C.F.R. Part 752. What disciplinary action should be taken, if any, in response to any particular case depends on the particular facts and circumstances of that case.

Addressing disciplinary concerns within the Federal Bureau of Investigations

8. FBI Special Agent Kepner was accused of committing several acts of misconduct, including the mishandling of evidence and FBI sources. These failures contributed to the ultimate dismissal of the *Stevens* case. It is my understanding that an FBI ethics review is underway and Special Agent Kepner is still entrusted to conduct criminal investigations on behalf of the FBI.

A. Should an FBI Special Agent whose actions were severe enough to warrant both an FBI ethics investigation and DOJ litigation dismissal should be allowed to conduct criminal investigations pending the final results of an ethics investigation, which could take years?

Internal investigations of FBI employees are conducted in accordance with the FBI's administrative process and DOJ policy and can result in a variety of consequences ranging from the employee's dismissal or suspension to a finding that the allegations are unsubstantiated. Depending on the circumstances, an FBI employee may be placed on administrative leave

pending the outcome of an internal investigation. In some cases, an employee may remain in his or her position while an internal investigation is pending and/or may be assigned different duties, if appropriate. In cases where the employee remains in his or her position, the FBI follows DOJ policy and applicable legal standards to disclose potentially exculpatory and impeachment information. If any such information is identified, whether in a pending or adjudicated internal investigation, it is provided to the prosecuting attorney who in turn will evaluate the information to determine whether it must be disclosed to the court or to the defense.

B. What action is the Department prepared to take or currently taking to ensure that all of Special Agent Kepner's past, present, and future investigations do not also compel dismissals?

During DOJ's investigation of the *Stevens* matter, DOJ reviewed each allegation of misconduct against Special Agent Kepner, all but one of which related to her work on Operation Polar Pen – an investigation into political corruption by various Alaskan public officials. During that review, a number of witnesses – including FBI supervisors, agents, and employees – were interviewed. None of the interviewees raised allegations of misconduct by Special Agent Kepner in other cases beyond Operation Polar Pen, and the review did not reveal any such additional misconduct. At the time of the investigation, Special Agent Kepner's cases and confidential human sources were reassigned. In addition, the FBI provided Special Agent Kepner with additional training and closer supervision with increased management oversight.

Special Agent Kepner is also subject to the Department's mandatory discovery training for all FBI personnel involved in investigative matters, which was designed to help ensure the integrity of investigations by training all personnel about the importance of the Government's discovery obligations and how to meet those obligations. Any cases in which Special Agent Kepner is involved as a potential witness are also subject to DOJ policy and applicable legal standards requiring disclosure of exculpatory and impeachment information.

C. If the FBI does not conduct an in-depth review of Special Agent Kepner's past investigations, would you disagree with the FBI's course of action? Why? Moreover, if the Department disagrees with the scope of investigation, is the Department prepared to take corrective action?

Please see the response to question 8(B), above.

Training versus discipline

9. **During your hearing, you testified that you did not believe having more strict rules would not have led to a different result in the Stevens case, because the problem was not the rule, but the fact that the rules were not followed. You discussed in both your written and oral testimony efforts to better train prosecuting attorneys about their discovery obligations.**

Do you believe that the threat of disciplinary action deters misconduct? If not, why not? If so, then don't the relatively light disciplinary actions against the individuals in this case undermine the increased training?

The Department agrees that the threat of disciplinary action can deter misconduct, but we also believe that enhanced training of federal prosecutors will have a more immediate and lasting impact on prosecutors' adherence to their professional obligations. We do not view this as an "either or" proposition – training and disciplinary action go hand in hand. Better training minimizes the instances of misconduct, and disciplinary action is necessary for those who, despite their training, deviate from the principles that prosecutors are sworn to uphold. The overwhelming majority of federal prosecutors strive to abide by their professional duties, as defined by statute, court rule, and Department of Justice policy. Based on our experience, the lapses are rare, but when they do occur, more often than not, they occur because the prosecutor failed to understand and appreciate the applicable rule. Training will help prosecutors avoid the lapses, while the threat of disciplinary action reminds prosecutors that the lapses have consequences – both for the Department and the prosecutor personally.

For a federal prosecutor, the imposition of discipline for professional misconduct is an extremely serious matter. A federal prosecutor's reputation is his or her most important asset. The disciplinary action that follows a misconduct finding has serious ramifications for a federal prosecutor beyond the terms of whatever penalty is imposed by the Department. The Department does not agree that the discipline imposed in this case was relatively light. Two prosecutors in the *Stevens* case were found to have committed misconduct in reckless disregard of their obligations, and they received a punishment that was fair in light of the factors the Department is required by law to consider when imposing discipline. We are unaware of any instance within the Department where an employee with a record similar to those of the two prosecutors was terminated after OPR found that the employee engaged in something less than intentional misconduct.

<u>Discovery issues</u>

10. In response to Senator Franken's question, you testified that if it is unclear whether a prosecutor should turn over evidence, they should speak with their supervisor. You also testified that each district had a discovery coordinator who receives special training regarding discovery issues.

A. Do any procedures exist to facilitate the review the decisions of the supervisors and discovery coordinators, particularly when they advise against turning over evidence to the defense?

Please see the response to question 3(B). The discovery-related decisions of supervisors and criminal discovery coordinators are an important component of their day-to-day responsibilities and annual performance review process. If a supervisor or criminal discovery coordinator fails to adhere to or implement Department discovery policies, such a failure would negatively impact his or her annual performance review.

Moreover, managers with supervisory responsibility for criminal cases, in addition to receiving annual training required of every federal prosecutor, receive specialized training from the National Criminal Discovery Coordinator at the National Advocacy Center (NAC). For example, the National Criminal Discovery Coordinator provided instruction at the NAC in late May 2012 to the Criminal Chiefs from every U.S. Attorney's Office. In addition, a multi-day training session was held in October 2012 for all the Criminal Discovery Coordinators from U.S. Attorney's Office and Main Justice litigating components. During this course, the Criminal Discovery Coordinators will receive training to assist them in carrying out their responsibilities to ensure that prosecutors in their respective offices meet – and in many circumstances exceed – their disclosure obligations.

B. You further testified that judges are available to give *ex parte* rulings on discovery issues. Are there any situations where it is mandatory for a prosecutor to seek an *ex parte* ruling?

Section 9-5.001(F) of the United States Attorneys' Manual (USAM) indicates that "[w]here it is unclear whether evidence or information should be disclosed, prosecutors are encouraged to reveal such information to defendants or to the court for inspection *in camera* and, where applicable, seek a protective order from the Court." Accordingly, in practice, where case-related reasons ("such as witness security and national security," *see* USAM § 9-5.001(D)(2)) suggest that early disclosure may not be appropriate, prosecutors must obtain supervisory approval and, in certain circumstances, should disclose such information to the court on an *ex parte* basis for an *in camera* review. Prosecutors are trained on this precise situation, and are instructed on the importance of seeking protective orders from judges on an *ex parte* basis when warranted.

Similarly, then-Deputy Attorney General David W. Odgen instructed prosecutors in his January 4, 2010 memorandum entitled "Guidance for Prosecutors Regarding Criminal Discovery" that "[w]hen the disclosure obligations are not clear or when . . . countervailing considerations in the particular case . . . conflict with the discovery obligations, prosecutors may seek a protective order from the court addressing the scope, timing, and form of disclosure."

QUESTIONS POSED BY SENATOR HATCH

11. The Office of Professional Responsibility Report indicates that the lead FBI investigating agent in the Stevens' case violated FBI policies. Specifically, the report indicates the FBI agent failed to comply with the policy requirement for a written memorandum of interview, known as a FBI 302, for some of the interviews conducted by the prosecution. Furthermore, it was also indicated that several FBI 302s were back dated by the agent, also in violation of FBI policy. If the investigating agents aren't in compliance, the prosecution cannot meet its obligation of full and fair disclosure to the defense. What safeguards does the Department of Justice have in place to ensure the investigating law enforcement agents are complying with their respective agency policies during the preparation of cases for trial?

In 2011, in order to uphold the highest standards for conducting investigations and to emphasize the importance of fully meeting the Government's discovery obligations, DOJ instituted mandatory training for employees of law enforcement agencies who are involved in investigative matters. Working closely with DOJ, the FBI, DEA, and ATF developed a refresher course that their agents were required to take during the fourth quarter of 2012 to build upon the initial training sessions. In addition, all new Federal law enforcement agents receive training concerning criminal discovery as part of their new agent training. For example, during the FBI's new agent training in Quantico, Virginia, students are required to complete 8 hours of instruction regarding the Federal judicial system, including instruction regarding *Brady*, *Giglio*, and Jencks, the government's discovery obligations, and DOJ's discovery policy. In addition, when agents fail to comply with agency policies that affect disclosure obligations, they are subject to their agency's disciplinary process.

12. The Office of Professional Responsibility Report indicates FBI Agents and IRS Agents were responsible for reviewing discovery materials for *Brady* and *Giglio* information and making evidentiary determinations. Given the critical importance of *Brady* and *Giglio* information to defense counsel in determining defense strategy, making recommendations to their client and defining appellate issues, shouldn't the prosecuting attorneys, who are officers of the court, be responsible for reviewing discovery and making those determinations?

Yes. As Deputy Attorney General David W. Odgen explained in his January 4, 2010 memorandum entitled "Guidance for Prosecutors Regarding Criminal Discovery":

> It would be preferable if prosecutors could review the [potentially discoverable] information themselves in every case, but such review is not always feasible or necessary. The prosecutor is ultimately responsible for compliance with discovery obligations. Accordingly, the prosecutor should develop a process for review of pertinent information to ensure that discoverable information is identified. Because the responsibility for compliance with discovery obligations rests with the prosecutor, the prosecutor's decision about how to conduct this review is controlling. This process may involve agents, paralegals, agency counsel, and computerized searches. Although

prosecutors may delegate the process and set forth criteria for identifying potentially discoverable information, prosecutors should not delegate the disclosure determination itself.

13. As a result of the prosecutorial missteps in the Stevens' case, the Department of Justice has undertaken a number of steps to improve disclosure policies and practices. One of those steps is to provide 4 hours of training to Department of Justice law enforcement agents – primarily from the FBI, DEA and ATF on criminal discovery policies and practices. Given the critical importance of evidentiary issues at trial, do you feel 4 hours of training every 12 months is adequate?

The Department believes it has implemented an appropriate and effective training regimen designed to ensure that our law enforcement agents, at both the line and supervisory levels, understand and abide by their discovery obligations. All Department of Justice law enforcement agents, including supervisory agents, were required during 2011 to attend a four hour block of criminal discovery training. In addition, all agents and other law enforcement personnel, including supervisors, from the FBI, DEA, and ATF will receive mandatory annual refresher/update training in 2012 (and beyond) that is designed to build on the live training provided in 2011 through the use of interactive computer-assisted training modules. Moreover, all new federal law enforcement agents receive training concerning criminal discovery as part of their new agent training in Quantico, Virginia (the FBI and DEA) or the Federal Law Enforcement Training Center (FLETC) in Brunswick, Georgia (all other agencies). For example, for the FBI's new agents, the discovery training is conducted at Quantico as part of an overall eight hour block on the federal judicial system, of which between one-third to one-half of the time is devoted to *Brady, Giglio*, Jencks and discovery; for DEA, the Basic Agent Trainee curriculum at Quantico provides twelve hours on federal court procedures including two hours instruction on *Brady/Giglio* and two hours on federal discovery (including electronic discovery); and new ATF agents attend the basic Criminal Investigator Training Program at FLETC, where they receive a six hour class entitled Federal Court Procedures, which includes discussions on *Brady, Giglio*, Jencks and Fed. R. Crim. P. 16 and 26.

14. In the Stevens' case, there were investigating agents from the IRS who were responsible for reviewing discovery materials and making evidentiary determinations. The IRS falls under the Department of Treasury, not the Department of Justice. What policies does DOJ have in place for the situation where the investigating agent has not received the requisite training on the disclosure of *Brady* and *Giglio* material?

As indicated in the response to question 12, the prosecutor is ultimately responsible for compliance with discovery obligations, regardless of the level of training received by an investigating agent. That said, the Department is hard at work to ensure that investigating agents have received appropriate training. In late February 2012, the Department held "train-the-trainer" programs in Washington, D.C., in order to train federal law enforcement agencies outside the Department, including Department of Homeland Security agencies, various OIGs, and other federal agencies.

Furthermore, training and testing on *Brady* and *Giglio*, the Jencks Act, and Fed. R. Crim. P. 16 and 26 is already in place in the basic programs at FLETC for its 91 Federal Partner Organizations, including criminal agents from the IRS/Department of the Treasury. In addition to new agent training, FLETC regularly provides refresher/update training all over the country for agents and officers already in the field.

Also, in early August 2012, the National Criminal Discovery Coordinator traveled to FLETC to conduct a "train-the-trainers" session for FLETC training managers concerning criminal e-discovery. This topic will become part of mandatory training for new and experienced agents from Department of Homeland Security agencies, such as Immigration and Customs Enforcement, Customs and Border Protection, and the U.S. Secret Service, as well as other federal law enforcement agencies.

In addition, in mid-June 2012, the National Criminal Discovery Coordinator provided training on *Brady, Giglio*, and e-discovery at IRS' Criminal Investigative Division's Office in Washington, D.C., for a wide variety of supervisors from the IRS, ICE, U.S. Secret Service, Department of State, and other federal agencies in the greater Washington, D.C., metropolitan area.

15. **In your written testimony, you indicated that the Department of Justice has appointed a National Criminal Discovery Coordinator to lead and oversee all Department efforts to improve disclosure policies and practices. The Coordinator has been working since January, 2010 to improve training and provide prosecutors with key discovery tools. In that testimony, you highlight 10 steps the Department of Justice has taken to improve disclosure policies and practices. In reviewing those 10 steps, 6 of those steps focus on improvements specifically for the prosecuting attorneys, 2 of those steps focus on the investigating agents, 1 of those steps focuses on the DOJ support staff and the last step focuses on the transfer of the National Criminal Discovery Coordinator position into the Office of the Deputy Attorney General. Does it make sense to focus so much time and energy on training the prosecuting attorneys to identify *Brady* and *Giglio* material if the review is going to actually be done, in some cases, by law enforcement agents who may only have a total of 4 hours of training?**

Please see the response to question 12, above.

16. **Would you agree that the prosecution of any defendant requires the utmost due diligence of the prosecution team in all aspects of the case, especially the disclosure of *Brady* and *Giglio* material to defense counsel? In hindsight, would you agree that the review of the *Brady* and *Giglio* material in this case should have been done by the prosecutors themselves?**

Please see the response to question 12, above.

RESPONSES OF CAROL A. BROOK TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

FEDERAL DEFENDER PROGRAM
United States District Court
Northern District of Illinois
55 E. Monroe Street, Suite 2800
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CAROL A. BROOK
Executive Director

July 5, 2012

Senator Patrick J. Leahy
Chairman
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6275

Senator Charles E. Grassley
Ranking Member
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6275

Dear Chairman Leahy, Ranking Member Grassley and Members of the Committee:

Thank you for soliciting my views on the potential ramifications of Senate Bill 2197, the "Fairness in Disclosure of Evidence Act of 2012."

You first ask for my response to a fellow criminal defense lawyer's concern that the bill could result in new trials or reversals absent any prejudice to a defendant. Under the bill's specific language and carefully calibrated remedial provisions, I do not believe the bill would support this result in the district court or on appeal.

In the District Court

As you know, the bill requires attorneys for the government to provide to the defendant all evidence that "may reasonably appear to be favorable to the defendant," subject to various exceptions, including invocation of the Classified Information Procedures Act, requests for delays in disclosure and requests for protective orders.

If, despite these protections, a district court finds the government has not complied with the bill's provisions, it "shall order an appropriate remedy." None of the remedies listed in the bill are mandatory, nor is the list exclusive. What is mandatory, is that the district court consider the "totality of the circumstances" in fashioning a remedy and that in doing so, it consider:

(1) "the seriousness of the violation,"

(2) "the impact on the proceeding,"

(3) "whether the violation resulted from innocent error, negligence, recklessness, or knowing conduct," and

(4) "the effectiveness of alternative remedies to protect the interest of the defendant and the public in assuring fair prosecutions and proceedings."

Of these four considerations, the importance of the non-disclosed evidence is central to three of them. Only the question of whether the non-disclosure resulted from innocent error, negligence, recklessness or knowing conduct can be divorced from the importance of the evidence to the defendant's case, and even there, it is likely that the most egregious conduct will correlate to the significance of the evidence in question.

Therefore, because the "totality of the circumstances" test controls, and the remedy must be appropriate to the importance of the violation, a new trial would not be the appropriate remedy if the violation was minor, had little or no impact on the proceeding, and the resulting trial was fair, even if the court made a finding of knowing conduct. Other remedies might could be imposed, but not a new trial. Recognizing this, the bill lists a variety of possible remedies, leaving it to the district court to determine the appropriate remedy in the particular circumstances of the case within the parameters of the Act.

In the Court of Appeals

Nor will the bill result in reversals on appeal absent prejudice to the defendant. The bill requires that the standard of review conform to the standard used for reviewing the claimed denial of other fundamental constitutional rights. That standard originated in *Chapman v. California*, 386 U.S. 18, 24 (1967), which held: "[T]he beneficiary of a constitutional error . . . [must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." This is the standard used to review all constitutional errors other than structural errors like the complete denial of the right to counsel.

Currently, the appellate courts use a "materiality" standard to review alleged *Brady* violations, which has resulted in a tangled mess. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 247 U.S. 97 (1976). Changing this standard to the standard used to review all other claimed non-structural constitutional violations will bring more clarity to the law. It will also allow the government to show, both in the district court and on appeal, that the claimed error did not affect the verdict. Only structural constitutional errors require reversal regardless of prejudice and the bill does not turn disclosure violations into structural errors.

The Bill Would Not Compel Open File Discovery

It is important to note that the phrase "open-file" has no standardized meaning. In some districts, like the Eastern District of Wisconsin, there is a clear definition of what "open file" means written into the rules. In others, it is up to the individual prosecutor to decide whether

to turn over more than is required and even whether to say that in a particular case there will be an open-file policy. Sometimes this means that the defense is entitled to everything it would otherwise be entitled to under the discovery rules without having to make a request. To other prosecutors, it means opening up to the defense all of the files in their possession. And to still others, it means that they will reach out beyond their agents' offices to provide the defense with relevant documents.

Regardless of how it is defined, however, it does not appear to my fellow defenders or to me that the proposed legislation would compel an open-file policy. What the legislation would do is require prosecutors to disclose favorable evidence earlier without having to determine whether each piece of evidence is "materially" favorable. This would save time and would result in the disclosure of more favorable evidence than is currently disclosed. Indeed, it seems likely that the biggest impact of the legislation would be to ensure that most of the evidence the prosecution previously should have but often was not turning over under *Brady* will now be disclosed. It is of course possible that there would be cases where the entirety of the case files would need to be disclosed, but those cases would be in the minority.

It is for these reasons that many commentators, organizations and practitioners recommend the elimination of the materiality requirement. They believe it is not a workable standard prior to trial and that it is virtually impossible for prosecutors to make such fine distinctions in our adversary system. In fact, Professor Bibas noted in his article, *The Story of Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Innocence?* (available in *Criminal Procedure Stories* (Carol Steiker ed. 2006)):

> [P]olice and prosecutors who become too convinced early on of a suspect's guilt may simply fail to appreciate or investigate contrary leads. Even if they come across exculpatory evidence, they may minimize or not see its significance. **(In other words, even if they see that the evidence is exculpatory, they may not see how it is material.)** They may thus conclude that because a piece of evidence does not change their own minds about guilt, it would not change jurors' minds either and so is not *Brady* material. This over-stringent perspective could lead prosecutors to decide that nothing is *Brady* material unless it persuades them to dismiss a case . . . . [Emphasis added, footnote omitted.]

Professor Alafair S. Burke of Hofstra University School of Law writes: "The definition of 'material' exculpatory evidence is so restrictive that it is probably best articulated not as a duty of the prosecutor to disclose, but as a narrow exception to a prosecutor's general right to withhold evidence from the defense." *Revisiting Prosecutorial Disclosure*, 84 Ind. L.J. 481, 483 (2009).

Professor Daniel S. Medwed at University of Utah S.J. Quinney College of Law, analyzes the problem as one of cognitive bias. He says: "The tension between the prosecutor's dual role of zealous advocate and minister of justice peaks in the context of *Brady* decisions, leaving the

prosecutor acutely vulnerable to cognitive bias." Medwed, *Brady's Bunch of Flaws*, 67 Wash. & Lee L. Rev. 1533, 1542 (2010). Moreover, he suggests that "[c]ognitive biases can prompt a prosecutor who has already charged the defendant with a crime and is now conducting a pretrial materiality assessment to 'engage in biased recall, retrieving from memory only those facts that tend to confirm the hypothesis of guilt.'" Medwed at 1542, *quoting* Alafair Burke, *Improving Prosecutorial Decision-Making: Some Lessons of Cognitive Science*, 47 Wm. & Mary L. Rev. 1587, 1593-1601 (2006).

Professor Susan Bandes makes a similar point in her article, *Loyalty to One's Convictions, the Prosecutor and Tunnel Vision*, 49 How. L.J. 475, 493-94 (2006). She points out what we all already know – "loyalties, cognitive biases and emotional commitments" are an inherent part of the human condition. Moreover, "[l]oyalty to a particular version of events may develop at a very early stage, and may prove mightily resistant to reconsideration." Therefore, Professor Bandes suggests that reforms regarding prosecutorial disclosure of evidence will be most effective "when they take into account the actual dynamics at work," including human cognitive limitations.

Removing the requirements that prosecutors determine the meaning of the term "material" and determine which pieces of evidence are material, comports with Professor Bandes' suggestion that we take into account all aspects of the problem. A determination that evidence is favorable is easier to make than a determination that the evidence is both favorable and material, and, importantly, leaves far less room for the entry of unconscious cognitive bias.

Ethical rules already require prosecutors to provide this kind of broad discovery. American Bar Association Model Rule of Professional Conduct 3.8(d) requires prosecutors to timely disclose "all evidence or information known to [them] that tends to negate guilt . . . or mitigates the offense." Interpreting this provision in Formal Opinion 09-454, issued July 8, 2009, the ABA makes clear that a prosecutor's ethical obligations are broader than its legal obligations.

The increasingly restrictive interpretation given to the materiality requirement was of such great concern to the American Bar Association that at its August 8-9, 2011 annual meeting it adopted a Resolution urging elimination of the requirement. The Resolution urges all government prosecutors to disclose information that tends to negate guilt or mitigate the offense charged or the possible sentence without a showing of materiality. *See* ABA Res. 105D, American Bar Association House of Delegates (August 8-9, 2011), *available at* http://www.abanow.org/2011/07/2011am105d/.

Eight years earlier, the highly-respected American College of Trial Lawyers submitted a *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16* (Approved by the Board of Regents March 2003), which also proposed eliminating the materiality requirement at the trial court level and recommended that Rule 16 of the Federal Rules of Criminal Procedure be amended to provide that all exculpatory information

in any form be disclosed promptly and in advance of trial. 41 Am. Crim. L. Rev. 93, 102-03 (Winter 2003).[1]

The courts too have urged elimination of the requirement. *See, e.g., United States v. Safavian*, 233 F.R.D. 12, 15 (D.D.C. 2005), where the court reasoned that because the materiality standard is a post-conviction standard, "it is not the appropriate one for prosecutors to apply during the pretrial discovery phase." Instead, the court ruled that: "The government is obligated to disclose all evidence relating to guilt or punishment which might be reasonably considered favorable to the defendant's case. . . . " *Safavian* at 17.

All of this is to say that elimination of the materiality requirement is not a new idea, and that its ramifications have been pondered and considered from a variety of viewpoints over the course of many years. Whether its elimination would in fact compel open-file discovery in some form or another is not at all clear.

The Impact of Open-File Discovery on Length of Cases and on the Court

You ask what impact open-file discovery would have on the length of cases and on the court. My answer is based on two assumptions. The first is that the requirements of Rule 16 of the Federal Rules of Criminal Procedure would continue to govern discovery procedures. The second is that the innovative procedures currently being developed by the Department of Justice and Administrative Office of the U.S. Courts Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG) for the production of electronically stored information will be mandatory and will allow defense lawyers to easily open, read and organize the electronically stored discovery they receive. With these rules in place, the prosecution would not be permitted to simply flood the defense with documents, creating one more mountain for the defense to climb. Under those circumstances, open-file discovery could shorten the length of cases, result in fewer continuances, produce more guilty pleas earlier in the process, remove the courts from some pretrial discovery litigation and result in less posttrial litigation, fewer appeals, and fewer retrials. It should also result in fairer proceedings in both perception and fact.

As discussed above, a determination that evidence is favorable is easier and less subjective than a determination that the evidence is "material." In that way alone, the elimination of the materiality requirement makes the prosecution's job easier and shortens the case. It stands

[1] After the American Trial Lawyers' call for reform and a number of highly publicized cases involving *Brady* violations, the Department of Justice in 2006 added stronger language to the section of the U.S. Attorney's Manual on *Brady*. However, violations continued and, on January 4, 2010, following the decision in the Stevens case, the Department of Justice issued what are known as the "Ogden Memos" creating a working group that later recommended more institutionalized training and oversight on *Brady*. These actions, while commendable, have also proved insufficient, as violations continue to occur. (See for example the cases cited in my written testimony to the Committee.)

to reason that the fewer decisions the prosecutor must make about what evidence to disclose, the earlier the prosecutor will be able to disclose the evidence.

Early disclosure would have a number of positive consequences, some obvious and some more subtle. Delays in disclosure, of course, result in delays in filing pretrial motions and in delays in recommending to clients whether they should go to trial or plead guilty. The obvious consequence of these delays is that the case takes longer. The less obvious consequence is that clients who must wait long periods of time tend to lose faith in their lawyers, in the prosecutor and in the criminal justice system. When I must repeatedly tell my client that I have no new information and that I cannot file any motions until I receive the discovery, my client becomes disheartened, perhaps thinking I am not fighting hard enough. At that point, my client might file a motion requesting a new lawyer. This uses up more of everyone's time and leaves us with one more person, and perhaps one more family, disillusioned with the criminal justice system. On the other hand, if I do file motions asking the court to rule on my discovery requests, which also happens, then I am using up more of everyone's time in a different way.

If the unhappy client's request for a new lawyer is not granted, that person becomes more resistant to accepting his or her lawyer's advice. When that occurs, cases that might otherwise end up in guilty pleas may end up in trial. Or, if that person loses faith in the prosecutor, he or she may find it impossible to believe that any plea offer is being made in good faith and refuse to accept all offers even when it may be in the person's best interest.

With the early, complete discovery that should come with open-file, the converse will more often be true. Knowing that all evidence has been disclosed, fewer pretrial motions will be filed since many pretrial motions seek, in one way or another, more information. Early and complete discovery also gives the defense time to adequately prepare well ahead of trial instead of being given information on the eve of trial, requiring requests for continuances and more litigation. Early discovery also makes it possible for defense counsel to knowledgeably advise their clients about the wisdom and consequences of pleading guilty and, somewhat counter-intuitively, makes it more likely that defendants will decide to plead guilty once they see not only all of the evidence but that their lawyer has had time to properly investigate the case based on that evidence. *See* Don DeGabrielle & Mitch Neurock, *Federal Criminal Prosecutions: A View From the Inside of the U.S. Attorney's Office*, 43 Hous. Law. 32, 34 (2005).

Early and more complete discovery also reduces posttrial litigation, both in the district court and on appeal. In addition, it clearly goes a long way toward preventing wrongful convictions. *See generally* The Pew Charitable Trusts, The Justice Project, *Expanded Discovery in Criminal Cases: A Policy Review* (2007), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Death_penalty_reform/Expanded%20discovery%20policy%20brief.pdf.

According to a study conducted by the Federal Judicial Center in 2007, numerous federal districts require early disclosure of *Brady* evidence, including names of potential witnesses and impeaching material. There is no indication that, having made the change, any of those jurisdictions reverted back to restricted discovery. Laurel Hooper & Sheilia Thorpe, Federal Judicial Center, *Brady v. Maryland Material in the United States District Courts: Rules, Orders, and Policies, Report to the Advisory Committee on Criminal Rules of the Judicial Conference of the United States* (May 31, 2007), *available at* www.fjc.gov/public/pdf.nsf/lookup/bradyma2.pdf/.../bradyma2.pdf.

The federal study shows that the following 22 federal districts require by local rule that *Brady* material be disclosed early in the process:

At arraignment or other date set by court:
Middle District of Alabama, Southern District of Alabama,

Five days after arraignment:
Northern District of Florida, Southern District of Georgia, Western District of Pennsylvania

Seven days after arraignment:
District of Hawaii, District of Idaho, Western District of Michigan, Northern District of West Virginia

Ten days after arraignment:
District of Connecticut, Eastern District of Michigan, Western District of Missouri, District of Nebraska

Fourteen days after arraignment:
Northern District of New York, Southern District of Florida, Middle District of Tennessee, Western District of Texas, District of Vermont

Ten days after not guilty plea:
Western District of Oklahoma

Ten-twenty days after not guilty plea:
Northern District of California

Ten days after defendant's request:
Southern District of West Virginia

Open-File:
Eastern District of Wisconsin

A number of states also have created what amounts to open-file discovery, requiring early discovery of all favorable evidence without regard to materiality, including the names and addresses of all persons known to the prosecution who may have relevant information as well as impeaching information on potential witnesses. See for example: Arizona (Ariz. R. Crim. P. 15)); Colorado (Colo. R. Crim. P. 16); Illinois (Ill. S. Ct. R. 412(d)); Massachusetts (Mass. Crim. P. 14(a)(1)(A)); North Carolina (N.C. Gen. Stat. Sec. 15A-903); Ohio (Ohio R. Crim. P. 16). Because of their success, the discovery rules followed in these states are often cited. *See generally* The Pew Charitable Trusts, The Justice Project, *Expanded Discovery in Criminal Cases: A Policy Review* (2007); John Schoeffel, *Criminal Discovery Reform in New York: A Proposal to Repeal C.P.L. Article 240 and to Enact a New C.P.L. Article 245*, The Legal Aid Society (April 1, 2009), *available at* www.legal-aid.org; Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 Hastings L.J. 1321 (2011).

The state experience mirrors the federal experience. No state has gone back to its prior discovery rules or has found that the broader discovery rules put more witnesses at risk. As pointed out by the Director of the D.C. Public Defender Service, Maryland Attorney General Douglas Gansler, a former Assistant United States Attorney, implemented open-file discovery when he became Attorney General, recognizing that it is a better way to conduct prosecutions. Avis Buchanan, *Fairer Trials and Better Justice in D.C.*, Wash. Post, Oct. 28, 211, *available at* http://www.washingtonpost.com/opinions/fairer-trials-and-better-justice-in-dc/2011/10/25/gIQATkFMQM_story.html.

In short, I do not believe the proposed legislation would allow new trials or reversals where there was no prejudice to the defendant. The bill is carefully written to provide different remedies for different types of violations just for that reason. It is my view that the proposed legislation would instead create clearer and simpler responsibilities for the prosecution while concomitantly creating a fairer, faster and more transparent system of justice, that also saves money.

Sincerely,

Carol A. Brook

RESPONSES OF STEPHANOS BIBAS TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

QUESTIONS AND ANSWERS

Responses to Questions for the Record

Professor Stephanos Bibas, University of Pennsylvania Law School

Committee on the Judiciary

United States Senate

RESPONSES TO QUESTIONS POSED BY RANKING MEMBER SENATOR GRASSLEY

Impact on Victims

1. Professor Bibas, in your prepared remarks you mentioned a number of ways in which different kinds of victims and witnesses could be harmed if S.2197 were to become law in its current form.

   A. Can you elaborate on the potential harms to victims and witnesses that may be caused by the bill?

Section 2 of the bill requires disclosure of all *Brady* and *Giglio* information promptly after arraignment and before entry of any guilty plea. *Giglio* information, which impeaches a potential witness, will often refer to the witness's romantic or financial relationships, role in a crime, criminal record, or the like, all of which unavoidably provide clues to the witness's identity. Disclosing that information well before trial, before any plea, carries multiple costs.

The most obvious harm is that victims and witnesses face grave risks to their safety, particularly in violent or sex-crime cases, from those who would eliminate witnesses or scare them into silence. Even where no assaults or threats ultimately occur, victims and witnesses understandably fear for their safety, and thus will be less willing to come forward and provide incriminating evidence if they cannot be assured that their identities will remain confidential at least until trial. Witness tampering can also involve bribery or persuasion to buy a witness's silence or change of story.

Even apart from violence, threats, and corrupt persuasion, early disclosure unmasks undercover agents, cooperating witnesses, and confidential informants, whose existence and identity could otherwise be kept secret, allowing them to make many more cases. At least if there is any *Giglio* material, which there will be in almost all cases involving confidential informants and cooperating witnesses, they will be of use only once, instead of being able to provide ongoing information and make ongoing cases. It will thus become far harder to break criminal organizations, fracturing them from the inside all the way up to the top. As a result, agents and prosecutors will be less willing to enlist such witnesses in the first place.

One might have thought that the solution would be to disclose the discovery to defense lawyers but not defendants themselves. But while many defense lawyers are honorable, defense lawyers do sometimes leak discovery to their clients, resulting in witness intimidation or tampering.

B. Are there any protections in this bill as currently drafted?

The bill does authorize prosecutors in individual cases to seek protective orders to delay disclosure of *Giglio* impeachment material until 30 days before trial. But the government would have to move for and justify that delay in each individual case. Moreover, the government would have to prove a threat to a person's safety, instead of being able to presume it in cases involving organized crime, violent gangs, drug rings, human traffickers, kidnappers, terrorism, national security, and the like. (Indeed, there is a good argument for presuming such threats and thus non-disclosure in all cases involving violent or sex crimes or child victims or witnesses, if not drug and weapons crimes as well.) And, absent "compelling circumstances," the government would still have to disclose the information at least 30 days before trial.

Even though prosecutors may file such motions for protective orders under seal, they may not file them ex parte. That itself may endanger some witnesses. In some criminal-organization cases, even the filing of such a motion under seal may tip off ringleaders to an informant in their midst, leading them to hunt down and exterminate the suspected informant.

Questions on Materiality and "Reasonably Appear"

2. A criminal defense lawyer has written to the Committee stating that by eliminating the materiality requirement, the bill before us "could lead to new trials and reversals in cases even where the error results in no prejudice to the defendant." He also says that the bill's evidence disclosure requirements "may reasonably appear to be favorable to the defendant [and]...may well compel open-file discovery."

   A. Professor Bibas, aside from the dangers to witnesses and victims, what other problems could arise as a result of open-file discovery?

Open-file discovery reveals not just exculpatory or impeachment information but also the prosecution's entire incriminating case to the defense. That makes it possible for defendants and their counsel to tailor their defenses, and even sculpt their own testimony and suborn perjury, to conform to the known evidence. It is extremely difficult to detect and punish such misconduct after the fact in individual cases, so there is little deterrent to lying. In addition, the concept of the "file" is not obvious. Evidence is spread across agencies, and there would still be litigation over whether agents memorialized all evidence, placed it in the agency's file, and shared that agency's file with the prosecution team. Open-file discovery does not obviate such concerns.

   B. Professor Bibas, what impact would open-file discovery have on the Justice Department and information other federal agencies share with the Justice

Department? Could this lead to stove piping where agencies keep information from the Justice Department to avoid disclosure to defense counsel?

It is possible that agencies, seeking to avert discovery, might avoid writing down information in the first place or might not share written or oral information with the prosecution team. Legally, all such information is supposed to be pooled. But as a practical matter, it is quite possible that agencies would stove-pipe information if they feared that the prosecution would have to disclose too much. I know of no way to verify, refute, or quantify that danger. Prosecutors might then have to monitor law enforcement more closely, which could improve discovery at the cost of generating friction with law-enforcement agencies. To reduce such friction, it would be important to insulate prosecutors (in civil or ethics proceedings) from liability unless they themselves intentionally or negligently failed to disclose information.

C. What impact would open-file discovery have on the length of cases and on the courts?

It is hard to predict how open-file discovery across the board would affect cases and courts in practice. On the one hand, knowledge of the prosecution's case can induce many defendants to plead guilty. But, knowing that, many prosecutors already conduct so-called reverse-proffer sessions, so no law is needed to accrue that benefit. On the other hand, as I suggested above, open-file discovery is no panacea. There would likely be litigation over whether agents had written down information and shared their files with prosecutors. Thus, there is a real danger that a binding open-file policy could lead to more litigation, not less, unless defendants routinely had to waive their right to open-file discovery, which would make the policy worthless or just a new plea-bargaining chip for defendants to trade for lower sentences. Some defendants might drag cases out, in the hopes that they could bribe or intimidate the witnesses against them or that the witnesses would die, be deported, or fail to keep coming to repeated court dates.

Questions on Plea Bargains

3. Prof. Bibas, your prepared remarks discussed important differences between trials and plea bargains when considering the rules that should govern discovery of evidence of innocence or impeachment evidence.

   A. Can you elaborate on those distinctions and whether S.2197 would create any unintended consequences that might reduce the likelihood that plea agreements could be reached in cases where they are warranted?

Classic *Brady* material, which tends to exculpate a defendant or reduce the penalty, goes to whether a defendant is factually and morally innocent and thus whether a plea agreement is warranted in the first place. I favor disclosure of such evidence in time for plea bargaining (possibly excluding evidence relating to certain

excuses such as entrapment, or maybe duress or insanity), but disclosing such information early is already Department of Justice policy.

The real change in plea bargaining would come from requiring early disclosure of *Giglio* impeachment material after arraignment and before pleas. Given the costs to victims and witnesses (including undercover witnesses) detailed above, pre-plea disclosure would greatly reduce the benefits to prosecutors of plea agreements in many cases. They would thus be much less willing to offer substantial concessions to induce pleas, leading to fewer pleas, unless defendants routinely waived these rights.

I strongly suspect that, in response to the bill, prosecutors would routinely seek such waivers of pre-plea discovery, defendants would accede to them, and judges would rubber-stamp them. Thus, the bill would change little, apart from perhaps giving defendants another bargaining chip to exchange for a sentence reduction. If, however, I am mistaken and courts put teeth into the waiver rules, the bill could well impede or delay plea agreements, clogging courts.

Questions on National Security

4. You cite the possibility of danger to victims and witnesses in ordinary criminal cases, such as undercover officers and confidential informants. It seems that similar problems would arise in national security cases, where early and extensive disclosure could compromise intelligence sources and methods. I am concerned that the Classified Information Procedures Act is inadequate to the task of protecting such information, as witnesses told this to the Committee last summer at another hearing.

   A. Do you agree that disclosure obligations in the bill would pose risks in terrorism and espionage prosecutions?

   Yes. Unless prosecutors could defeat the bill by routinely seeking and obtaining protective orders, their victims and witnesses would be in grave danger. Even if they did, witnesses and victims would be revealed 30 days before trial, jeopardizing their safety and testimony. Moreover, prosecutors could not use plea bargains to keep intelligence sources and methods confidential, as they do now.

   B. What would be the impact of the bill's disclosure provisions and limits on ex parte motions in such cases?

   Prosecutors would likely bring fewer such cases in the first place, for fear of compromising intelligence sources and leads. That would make it harder for them

to flip the small fry in an organization to work up the chain to the middlemen and eventually to the big fish or kingpins at the top. The ban on ex parte motions could perhaps tip off spymasters and terrorist ringleaders, making it easier for them to catch wind of investigations and abscond before prosecutors could build cases and secure arrest warrants for them. That is speculative, of course, but it is a dangerous chance to take.

Additional Questions:

A. Professor Bibas, you stress that, "head and supervisory prosecutors play important roles in shaping and communicating office culture and socializing line prosecutors into that culture," and "rhetoric from the top matters." Given this perspective that supervisory prosecutors are instrumental in setting the standards of office culture, which shapes the conduct of prosecutors, what is your opinion of the OPR report's finding that *none* of the supervisory prosecutors were at all responsible for the line prosecutors' misconduct?

The report, at page 670, does censure Public Integrity Principal Deputy Chief Brenda K. Morris for "exercis[ing] poor judgment by failing to supervise the *Brady* review, delegating the redaction of interview reports to SA Kepner, and failing to ensure that the team attorneys reviewed Kepner's redactions." It also laments, at page 23, "the fractured leadership" and "void in leadership" that allowed many matters to fall through the cracks.

It is fair to say, however, that supervisors cannot simply plead ignorance or inaction or deflect blame onto their subordinates. Supervisory prosecutors have affirmative obligations to shape and communicate office culture and to implement it through review structures and hands-on oversight. In particular, they should be expected to give cases a second and third look, spot-checking especially important decisions and remaining abreast of key decisions and tactical judgments that their subordinates make in the name of the entire Department of Justice. It does not appear that the supervisors in this case did so, nor that the Department has fully owned up to the importance of improving its discovery culture. It is not enough simply to say "mistakes were made" when a defendant's life, liberty, or good name is on the line.

B. You state that "recruiting, hiring, training, retaining, and promoting the right people matter greatly," and "replacing old managers with new ones from the healthiest, most successful units assists in changing cultures." Considering the fact that OPR did not recommend *any* form of discipline for the supervising attorneys of the Public Integrity section in the *Stevens* case, what kind of message does that send to line prosecutors?

What is the effect on institutional values when OPR refuses to hold leadership accountable?

Even good prosecutors make terrible mistakes. When prosecutors, however good or honorable, make a grievous mistake, the right thing to do is to admit the error, apologize, make amends, discipline any intentional or reckless misconduct, and fix the problems that contributed to the error. I deliberately phrase "prosecutors" in the plural, because very often the problem is not a bad apple but a team or system that failed. Line prosecutors must perceive that the buck stops with head prosecutors and that head prosecutors are expected to be actively involved and to bear responsibility. If line prosecutors construe the OPR report as, in your words, "refus[ing] to hold leadership accountable," then they will draw the wrong conclusion about who is responsible. As I am not privy to all the details, I do not offer an opinion as to how DOJ prosecutors will in fact read this report.

C. Mr. Bibas, in your article entitled, "Prosecutorial Regulation Versus Prosecutorial Accountability, you argue that "institutional design is more promising than rigid legal regulation," and state that, "simply commanding ethical, consistent behavior is far less effective than creating an environment that hires for, inculcates, expects, and rewards ethics and consistency." Can you please explain, in light of this viewpoint, why S. 2197 would likely *not* have its intended effect, which is to decrease instances of discovery violations, among prosecutors?

S. 2197 focuses on changing the substantive standard for discoverable material. But, in very many cases, that is not the root problem. If a prosecutor has developed tunnel vision, he may often be blind to how defense counsel will find a piece of evidence helpful. In an empirical study I conducted, few *Brady* or *Giglio* violations involved smoking-gun evidence such as DNA; most were far less clear. I fear that S. 2197 distracts attention from the root problem, which is office culture and procedures. Various members of the law-enforcement team must work together to record all the evidence, collect the disparate records across many agencies into a single prosecutorial file, and then assess how any fact might conceivably help the defense. Rather than focusing on substantive legal standards and punishing a few bad apples, it makes more sense to learn from the ways in which hospitals reverse-engineer medical errors or air traffic controllers analyze near misses. Blame can even make the parties defensive and tight-lipped. That fear of blame for good-faith errors can get in the way of gathering the complete story, analyzing everything that happened, and fixing procedures and systems to keep those errors from happening again.

The urge to blame and punish prosecutors for miscarriages of justice is entirely understandable, and blame and punishment make sense when a prosecutor has misbehaved intentionally or recklessly. Many more errors, however, appear to

stem from tunnel vision and systemic failings, and the bill is not the right way to address those failings.

D. In this same article, you identified "opacity" and "insularity" as two primary obstacles to prosecutors serving the public faithfully. Can you please express your opinion of DOJ's recent training initiatives for prosecutors, and whether you think they effectively combat the problems of "opacity" and "insularity" that can contribute to prosecutorial misconduct as seen in the *Stevens* case?

Training is good and useful. But training needs to involve more than formal book learning of legal rules. Prosecutors need hypotheticals and real-world examples. They also need to work in teams, subject to close supervision, to catch instances of tunnel vision. I doubt that training programs alone can change the culture and structures of supervision. Different levels of supervisors need to be more directly involved in cases to provide second and third opinions and to debias prosecutors who have grown too enamored of their own theories. Often, the best way to help prosecutors see the other side and how evidence might tend to support a possible line of defense is to have a different prosecutor with a fresh perspective offer a devil's-advocate presentation of likely defenses. This is a useful way to combat opacity and insularity. Training alone cannot do that.

Perhaps Congress could order DOJ to promulgate rules to establish routines for regular involvement and review by those outside the immediate litigation team.

E. Professor Bibas, you also argue that, "as a mechanism, oversight hearings are finer regulatory tools than legislation, and their ongoing or periodic nature is better designed to ensure compliance." You characterize oversight hearings as preferable to legislation and a "piece of the solution." To what extent would oversight hearings be an effective legislative tool in ensuring prosecutorial compliance with existing discovery obligations?

Congress cannot monitor ongoing prosecutions in real time, both because of legitimate secrecy concerns and because of the enormous workload involved. But data collection, periodic audits, and hearings can help to keep pressure on prosecutors to reform themselves and document their improvements. They can also counteract the sometimes implicit message that prosecutors' sole goal is to maximize convictions. In the past, oversight has not by itself fixed matters. The danger is that Congress's attention can wane or fade; data collection and audits need to happen regularly, even when there is no impending hearing to spur action. But hearings can be at least a piece of a solution.

F. When evaluating effective tools to monitor prosecutorial discretion, you state, "damage suits [against prosecutors] are not tailored to address systemic shortcomings." In your opinion, does the provision in S. 2197 that allows for the opposing party to receive expenses incurred in the course of litigation (including attorney's fees) if there is a discovery violation, mimic the same ineffective outcome that damage suits against prosecutors can have?

Apart from compensating aggrieved parties, attorney's-fee awards or damage suits likely will do little. Any damage awards come out of a general judgments fund and probably have no effect on individual prosecutors' pay, promotion, or performance evaluations. This section of the bill will probably have little effect. Perhaps Congress could encourage DOJ to publish rules that require performance evaluations to account for alleged and proven discovery violations by the prosecutor under review.

G. In your article, you recommend disseminating reputational surveys and feedback to criminal defendants and their defense attorneys, can you please explain how this would be an effective tool to monitor and improve prosecutorial conduct?

Most businesses solicit feedback from customers, suppliers, supervisors, coworkers, subordinates, and others. Feedback can flag problems and areas for improvement. Obviously, one would not want to give defendants and defense lawyers the power to retaliate against a prosecutor who was simply being tough but fair, but anecdotal evidence suggests defendants expect that of prosecutors and do not hold it against them, and prosecutorial supervisors could discount such self-serving grousing. If, however, a supervisor spotted a pattern of alleged *Brady* violations, that would be a yellow or red flag that would call for further inquiry, supervision, and possibly even firing of the problem prosecutor if the allegations proved to be true.

H. You posit that "centralized leadership, hierarchy, and monitoring aid consistency in all but the smallest prosecutors' offices." Given your emphasis on such a hierarchical structure, what is your opinion of the Department of Justice's model? Is their leadership centralized enough? If you had the opportunity to advise them on this issue, is there anything you would change on a macro level?

It is surprising that, given DOJ's many levels of supervision, there could still be vacuums and voids in which no one is sure who is responsible, according to the OPR report. Clear, simple lines of authority and hands-on involvement in line prosecutors' cases are important. Supervisors need to be accountable for the good and bad that their line prosecutors do. In addition, supervisors need enough time so that a rush to trial (as in the Senator Stevens case) does not preclude a second look and reflection. That may sometimes require opposing motions for speedy trials in cases involving large quantities of documents or evidence. I do not know the specifics of Main Justice's supervision system well enough to know whether the failings in the Senator Stevens case were isolated ones or symptomatic of a more widespread chaos.

More generally, I would suggest that each Section within Main Justice, and each unit of a U.S. Attorney's Office, designate one supervisor as the monitor for discovery compliance for all attorneys and cases within that unit. That supervisor,

as well as higher-up officials within Main Justice, would share responsibility for communicating discovery requirements, ensuring training of subordinates, and spot-checking discovery compliance in both ongoing and completed cases.

I. In your article, you cite works that argue that "prosecutorial self-regulation can and does work well." Please explain this argument, and perhaps elaborate on what this would entail for DOJ? Would their existing self-regulation policies and procedures need to change? If so, how so?

In that and other works, I argued that the key to regulating prosecutors is two-fold. First, outside actors need to put pressure on head prosecutors to regulate themselves to ensure greater equality, fairness, and the like. In the federal system, voters and victims have little leverage on the Attorney General, but Congress and the media have substantial leverage to expose prosecutorial shortcomings and maintain pressure to improve. For example, *Brady* violations or wrongful convictions occasionally come to light, as in the Senator Stevens case. These are opportunities to prod prosecutors to demonstrate constructive reforms. Periodic follow-up and scrutiny of those reforms can encourage continued improvements.

The second step is that head prosecutors need to structure their offices and procedures in ways that supervise and guide line prosecutors effectively. Prosecutors have more detailed knowledge about the tradeoffs they must make than Congress does, so they can write rules that are more flexible and informed by expertise than any congressional bill. They can change office culture from the top; they can tweak the kinds of people they hire, fire, promote, and reward; and they can use training and supervision to spur reforms.

The DOJ training materials and policies that you have shared with me are certainly efforts in this direction, but it is unclear whether they will prove sufficient in practice. For instance, the materials make clear that agents should memorialize all witness statements (including material variances) and that a wide range of files must be gathered, but it is unclear how these rules will be implemented in practice. Also, discovery training needs to happen not only initially upon a new prosecutor's hiring but also periodically; it is unclear whether or how often that is happening in practice. Congress could consider mandating that DOJ publicly disclose its training materials and publicly confirm when individual prosecutors last received discovery training, which would encourage DOJ to retrain its prosecutors regularly.

DOJ might also need to experiment with further reforms, such as second opinions or greater supervisory involvement before trial. Those could be required for all cases, or at least for those in units that have demonstrated discovery problems. If the written requirement that agents memorialize witness interviews proves inadequate, it might be beneficial to experiment with audio or video recording of such interviews. Internal discovery audits might also help. In many cases, discovery failures may come from failing to see the defense's theory of the case. Soliciting voluntary disclosure of theories from the defense, or having another

prosecutor play devil's advocate, can ensure disclosures of favorable information while at the same time making the prosecution's offensive case more forceful.

DOJ could learn from the ways in which hospital and air-traffic controllers learn from medical errors or near misses. Particularly when errors come to light, supervisors need to audit what went wrong this time and how to prevent it again next time. Sometimes that may requiring firing or suspending bad apples; more often, it should require adjusting internal procedures and supervision. If DOJ knows that these errors will regularly be reported to and scrutinized by this Committee, it may be more proactive in rectifying these problems itself.

Even before errors crop up, routine audits and spot checks could identify and nip problems in the bud. DOJ should routinely report to Congress or otherwise disclose aggregate information about its training and auditing efforts and what those audits have uncovered.

More generally, knowledge that this Committee expects DOJ to do more and will periodically revisit discovery issues should prove an important spur to continual internal assessment and improvement, even if only as a way to head off legislative reforms. In Florida, state legislative committees commissioned a study that found racial and other disparities in the use of a habitual-offender statute, which prompted prosecutors to self-regulate to obviate proposed legislation. Similar studies, commissioned by this Committee, could monitor DOJ's improvements and need for further reforms.

J. You seem to place a lot of emphasis on writing things down and recordkeeping. Do you think that existing requirements (such as declination letters) for federal prosecutors to justify their decisions in writing could be strengthened to improve internal self-regulation? If the Department of Justice were to require prosecutors to provide some form of written justification for their decisions, should Congress be able to view these documents as part of their oversight responsibilities? Do you think that requiring prosecutors to justify their decisions in writing could pose a risk that criminals might obtain valuable information, such as why prosecutors decline to prosecute or the nature and extent of the government's evidence against them?

Requiring prosecutors to explain, even briefly, decisions such as declinations, plea bargains, cooperation agreements, and sentencing recommendations would certainly assist oversight by prosecutorial supervisors. It might also be possible to use such documents in oversight hearings, though there are legitimate privacy concerns about possible leaks of case-specific information. I think it would be important to make clear that any internal documents are subject to the work-product protections, create no substantive entitlements, and are inadmissible in the criminal case at issue. I would be more comfortable with allowing congressional access to aggregated statistics or memoranda redacted of case-specific identifying information. I think that most experienced defense lawyers already have a reasonably good sense of the factors that lead the government not to prosecute, and so I am less concerned about the leaking of why prosecutors decline to prosecute.

SUBMISSIONS FOR THE RECORD

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June 5, 2012

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
United States Senate
Washington, DC 20510

The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
224 Dirksen Senate Office Building
United States Senate
Washington, DC 20510

Re: **"Ensuring that Federal Prosecutors Meet Discovery Obligations"**

Dear Chairman Leahy and Ranking Member Grassley:

I write to you on behalf of the American Bar Association, with nearly 400,000 members nationwide, to commend you for scheduling a hearing on the disturbing issue of federal prosecutors' failure to meet their constitutional obligations to provide accused persons and entities with important information critical to their ability to defend themselves.

In 1963 the Supreme Court decision in *Brady v. Maryland* stated the constitutional basis of the duty of prosecutors to disclose evidence to the defense, holding that: "The suppression by prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." A few years later, in *Giglio v. United States,* 405 U.S. 150, 154 (1972), the Supreme Court made it clear that the prosecutor's duty to disclose is not limited to exculpatory evidence, but also covers "evidence affecting credibility," in other words, impeachment evidence. In *United States v. Agurs,* 427 U.S. 97 (1976), the Supreme Court held that the prosecution's constitutional duty to disclose is not limited to situations where the defendant made a specific request for the relevant evidence.

The ABA has been concerned since *Brady* and its progeny with articulation of a rule or standard that will guide prosecutors and in their responsibilities to disclose evidence to the defense. The ABA House of Delegates has approved several resolutions calling for various steps to improve the discovery process in recent years, including: in February 2010 calling for courts to conduct a pre-trial conference to facilitate discovery in criminal cases; in February 2011 calling for adoption of court rules requiring use of a written checklist of disclosure obligations of the prosecution under *Brady;* and, most recently, in August 2011 supporting legislation to implement a standard for discovery obligations of prosecutors under *Brady.*

The ABA concluded last year that federal legislation is needed to implement *Brady* disclosure duties. After a decade of controversial and highly publicized cases, the

response by DOJ through a succession of studies and formulation of internal guidance memoranda has not resulted in a uniform practice as to the timing or scope of *Brady* and *Giglio* disclosures by federal prosecutors. There are wildly different policies in the local United States Attorney Offices and, on occasion, amongst Assistant United States Attorneys in a particular office. For example, some United States Attorney Offices routinely provide FBI interview forms and interview memoranda of witnesses to comply with *Brady* and *Giglio*, while other United States Attorney Offices virtually never produce witness interview memoranda or agent or prosecutor notes regarding interviews. There is no reason why the DOJ should have 97 different policies rather than one uniform policy.

Unfortunately, the type of conduct at issue in the highly publicized criminal case against former Senator Stevens is not a rare occurrence, nor did the Department of Justice effectively address the serious flaws within its own organization after the problems with the Stevens prosecution came to light.

The disturbingly high number of reported instances of similar prosecutions, as well as the countless stories left undiscovered and untold, provide clear evidence that federal prosecutors are failing to discharge their constitutional obligation under *Brady*, whether as a result of intentional tactical decisions, negligence, or a misunderstanding of their obligations. To address this problem, Senator Murkowski's recently proposed discovery reform legislation creates clear and meaningful standards governing the prosecutor's duty to disclose any and all evidence favorable to individual and corporate defendants.

The "Fairness in Disclosure of Evidence Act of 2012" (S. 2197) provides that in a federal criminal prosecution, the prosecutor must provide to the accused any "favorable" information that is either in the possession of the prosecution team or would become known to the prosecutor through the exercise of due diligence, without delay after arraignment. It provides a fair mechanism by which prosecutors can seek a protective order in the rare case in which there is a reasonable basis to believe that disclosure would endanger a witness. The bill also completely exempts any classified information from its purview and instead makes clear that such information will continue to be handled, as it is now, under the provisions of the Classified Information Procedures Act (CIPA), 18 U.S.C. App. §§ 1-16. Lastly, the bill provides the court with wide discretion to provide an appropriate remedy for noncompliance.

The time for a clear and uniform standard for disclosure of favorable evidence by the prosecution in federal criminal cases has come, and therefore we encourage you to consider the merits of current reform proposals. Thank you for your consideration, and please do not hesitate to contact us if you have any questions or want additional information.

Sincerely,

Thomas M. Susman

A Call for Congress to Reform Federal Criminal Discovery

March 15, 2012

We, the undersigned, are current and former judges, prosecutors, law enforcement officers, defense lawyers, conservative leaders and others, all with substantial professional experience within or personal dedication to the efficient operation of the criminal justice system. We call upon Congress to address the persistent problems with discovery in the federal criminal justice system by immediately enacting legislation that clarifies federal prosecutors' obligations to disclose information to the defense and that provides appropriate remedies when prosecutors fail to do so.

Over the past few years, we have seen a troubling number of cases involving failures to disclose evidence to the defense pursuant to *Brady v. Maryland* and its progeny. Most notable was the prosecution of the late Senator Ted Stevens. The U.S. Department of Justice (DOJ) moved in April 2009 to set aside the jury verdict in Senator Stevens's case and dismiss the indictment after discovering that prosecutors had withheld evidence they were required to disclose—evidence that would have impeached the trial testimony of a key government witness and bolstered the Senator's defense. A subsequent, court-ordered investigation concluded that the prosecution had been "permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated Senator Stevens's defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness."[1]

In addition to the Stevens case, a string of recent cases has emerged in which the defense eventually discovered undisclosed evidence that was constitutionally required to have been disclosed. For example, in December 2011, a judge in the Central District of California vacated the government's conviction of the Lindsey Manufacturing Company and two of its executives for violations of the Foreign Corrupt Practices Act. The judge found that the government had "recklessly failed to comply with its discovery obligations" pursuant to *Brady*, among other forms of misconduct throughout the prosecution.[2] A month later, federal prosecutors in Massachusetts moved to dismiss charges against defendant Andrew Berke related to an illegal Internet pharmacy. The prosecutors' dismissal immediately followed a statement from the trial judge that he was going to have to dismiss the charges himself based on the fact that a law enforcement officer had destroyed "apparently exculpatory" evidence in the case and prosecutors had not notified the defense when they learned of this fact.[3] In 2009, federal prosecutors in the District of Montana failed to disclose compelling information impeaching a key witness's credibility in the criminal case against W.R. Grace Corporation and three of its former executives.[4] All defendants in the case were ultimately found not guilty. Around the same time, in the District of Massachusetts, a federal prosecutor failed to produce prior inconsistent statements of a police officer witness in the prosecution of Darwin Jones, charged with possessing a

[1] Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order dated April 7, 2009, at 1, *In re Special Proceedings*, Misc. No. 09-0198 (D.D.C. Mar. 15, 2012).
[2] *United States v. Aguilar*, 2011 U.S. Dist. LEXIS 138439 at *3 (C.D. Cal. Dec. 1, 2011).
[3] Milton J. Valencia, *U.S. Drops Charges in Internet Drug Case*, Boston Globe, Jan. 18, 2012.
[4] Order, *United States v. W.R. Grace et al.*, No. CR-05-07-M (D. Mont. Apr. 28, 2009).

firearm as a felon. When the violation was discovered, the court reprimanded the prosecution for its "dismal history of intentional and inadvertent violations of the government's duties to disclose in cases assigned to this court,"[5] though ultimately decided sanctions were not warranted in this particular case as the violation had been "unintentional rather than deliberate."[6]

Failure to disclose *Brady* evidence is a constitutional violation that by its very nature often goes undiscovered—anything that the government chooses not to disclose to the defense generally remains unknown. So, it is impossible to know how often these violations occur. Still, a 2010 USA Today investigation documented 86 cases since 1997 in which judges found that federal prosecutors had failed to turn over evidence that they were legally required to disclose.[7] Reports by a host of organizations have reached similar conclusions about the frequency of these violations. Suffice it to say that *Brady* violations—which include both intentional misconduct and inadvertent errors—occur with sufficient frequency that Congress must act.

Our experience leads us to believe that the vast majority of prosecutors act in good faith to fulfill their constitutional and legal obligations. However, federal courts, the DOJ and other entities have for years articulated inconsistent, shifting, and sometimes contradictory standards for criminal discovery, leaving it up to individual prosecutors to navigate this legal maze and determine the scope of their obligations to disclose information.

The constitutional obligation to disclose such evidence arises from the 1963 U.S. Supreme Court decision in *Brady*, which held that prosecutors have a constitutional obligation to provide the defense with "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment."[8] That obligation alone can cause confusion. As a group of former DOJ officials wrote in an *amicus* brief filed in *Connick v. Thompson* in 2010, "complying with *Brady* and its progeny is not always simple or self-evident."[9] The difficulty primarily arises because prosecutors must make a judgment call about whether evidence is sufficiently "material" that *Brady* and subsequent cases would require disclosure of the evidence to the defense. The Supreme Court has held that evidence is material "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."[10] Materiality does not require a showing that the defendant "would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial."[11] When a prosecutor tries to determine whether particular evidence meets this test for

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[5] *United States v. Jones*, 686 F. Supp. 2d 147, 148 (D. Mass. 2010) (citing *United States v. Jones*, 620 F. Supp. 2d 163, 165 (D. Mass. 2009)).
[6] *Id.* at 149.
[7] Brad Heath and Kevin McCoy, *Prosecutors' Conduct Can Tip Justice Scales*, USA Today, Sep. 23, 2010.
[8] 373 U.S. 83, 87 (1963).
[9] Brief for *Amici Curiae* Former Federal Civil Rights Officials and Prosecutors Wan J. Kim *et al.* in Support of Respondent at 2, *Connick v. Thompson*, 131 S.Ct. 1350 (2011) (No. 09-571).
[10] *Smith v. Cain*, No. 10-8145, slip op. at 2-3, 132 S. Ct. 627 (Jan. 10, 2012) (citing *Cone v. Bell*, 556 U.S. 449, 469-70 (2009).
[11] *Id.* at 3 (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)) (internal quotation marks omitted).

materiality before trial begins, the prosecutor necessarily engages in speculation and even guesswork about the hypothetical impact that the evidence will have in the future trial. Oftentimes, the prosecutor simply cannot know for certain what the impact of the evidence will be.

Compounding the confusion surrounding *Brady* obligations are the separate, competing obligations established by local court rules, state ethics rules and other sources. For example, 49 states have adopted some version of Model Rule of Professional Conduct (MRPC) 3.8(d), which requires a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense[.]"[12] MRPC 3.8(d) is not limited to information that would be deemed "material" pursuant to *Brady* but is meant to demand more extensive disclosure than the constitutional baseline of *Brady*.[13]

Further confusion exists beyond the scope of what must be disclosed to related matters, such as the timing of disclosures and prosecutors' obligations to seek out exculpatory evidence unknown to them. For example, the Jencks Act provides that federal prosecutors do not have to turn over prior witness statements to the defense until after the witness has testified.[14] Thus, prosecutors oftentimes withhold such statements—which are otherwise subject to *Brady* disclosure—until after the witness has testified, leaving the defense very limited time to understand and make use of the information during the trial.

In addition, the rare actions of some federal prosecutors who knowingly and intentionally violate their obligations are cause for even more concern. Currently, such misconduct often goes unpunished, as federal prosecutors are immune from civil liability, and criminal liability is extraordinarily rare. Further, state bar associations do not robustly enforce the rules against prosecutors who intentionally do not disclose information to the defense.[15]

Amid previous calls for reform, the DOJ has claimed that it could handle the problem of nondisclosure internally and added language to the U.S. Attorneys Manual instructing federal prosecutors to comply with constitutional requirements to disclose material evidence pursuant to *Brady*. Violations continued to occur despite this new guidance. Later, in the wake of the Stevens case, the U.S. Attorney General spoke out publicly and created a working group that reviewed discovery practices. The DOJ then issued additional guidelines and required additional training for line prosecutors as to their constitutional obligations. However, while commendable, these actions have not solved the problem, and violations have continued to occur.

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[12] *See* David Keenan *et al.*, *The Myth of Prosecutorial Accountability After* Connick v. Thompson, 121 Yale L.J. Online 203, 221-33 (2011) (describing the versions of MRPC 3.8 adopted in the states). The McDade Amendment made state ethics rules applicable to federal prosecutors practicing in a state. 28 U.S.C. § 530B.

[13] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009).

[14] 18 U.S.C. § 3500.

[15] *See* Keenan *et al.*, *supra* note 12, at 213-220 (discussing prosecutorial immunity from liability and several studies documenting the infrequency of state bar disciplinary actions).

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THE CONSTITUTION PROJECT

Safeguarding Liberty, Justice & the Rule of Law

June 5, 2012

VIA ELECTRONIC MAIL

The Honorable Patrick Leahy
Chairman
U.S. Senate Committee on the Judiciary
Dirksen Senate Office Building
Room 224
United States Senate
Washington, DC 20510

The Honorable Chuck Grassley
Ranking Member
U.S. Senate Committee on the Judiciary
Dirksen Senate Office Building
Room 152
Washington, DC 20510

Dear Chairman Leahy and Senator Grassley:

As president of The Constitution Project (TCP), I write to commend you for holding tomorrow's hearing, "Ensuring that Federal Prosecutors Meet Discovery Obligations," and encourage you to carefully consider the need for legislation to clarify federal prosecutors' discovery obligations in the face of mounting evidence that the Department of Justice's efforts to address the problem internally have proven insufficient.

In a statement submitted to the record for the March 28, 2012 hearing regarding the misconduct in the late Senator Ted Stevens' prosecution, the DOJ reassured the Senate Judiciary Committee that, "Department prosecutors are more aware of their discovery obligations than perhaps ever before. Now, of all times, a legislative change is unnecessary." Yet, since providing those assurances to the Committee, the extent of the Department's systemic failure to adequately disclose evidence has only become clearer.

As evidence of the longstanding nature of the problem, a pair of recent news reports in the Washington Post reveals that over a period of years, federal prosecutors in at least 24 cases failed to disclose to defendants the findings of a task force investigating possibly flawed forensic evidences.[1]

[1] Spencer S. Hsu, *Convicted defendants left uninformed of forensic flaws found by Justice Dept.*, Washington Post (Apr. 16, 2012), *available at* http://www.washingtonpost.com/local/crime/convicted-defendants-left-uninformed-of-forensic-flaws-found-by-justice-dept/2012/04/16/gIQAWTcgMT_story.html; Spencer S. Hsu et al., *DOJ review of flawed FBI forensics processes lacked transparency*, Washington Post (Apr. 17, 2012), *available at*

The articles suggest that many additional cases may have suffered from the same flaws in forensic evidence and yet defendants were never notified of the possible flaws.

Additionally, not a month after the Judiciary Committee held its hearing, Judge Gladys Kessler of the Federal District Court for the District of Columbia stated in a pretrial hearing that "there [was] not the slightest doubt" that federal prosecutors had violated their constitutional obligations to turn over exculpatory information in a conspiracy case against attorney Charles Daum, Daaiyah Pasha, and Iman Pasha.[2] Moreover, Judge Kessler expressed astonishment that such violations continue to occur despite publicity surrounding Senator Stevens' prosecution and the recent Washington Post series about flawed forensic evidence. These are but a few of the mounting examples of the Department's inability to effectively address systemic failures of nondisclosure.

Despite the Justice Department's assertions, internal policies like the U.S. Attorneys' Manual (USAM), no matter how well tailored to address the issue, are an ineffective means to ensure compliance. The primary reason is that the USAM "is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." USAM § 1-1.000. While we by no means believe that this problem extends to all prosecutors, it seems clear that in an adversarial system, prosecutors cannot be expected to consistently adhere to policies when the consequences for violating those policies are minimal or nonexistent. Internal Department policies, by design, cannot be relied upon by courts or defendants, and are, therefore, inadequate to ensure fairness in criminal proceedings.

I am providing the most recent version of TCP's letter calling for congressional action, signed by more than 140 criminal justice experts, for inclusion in the record for this hearing. The letter's signatories include more than 100 former federal prosecutors whose years of service span from 1962 through 2011. This letter recommends a series of reforms, many of which are contained in Senator Lisa Murkowski's bill, "The Fairness in Disclosure Act" (S. 2197). We hope that the Committee will seriously consider these recommendations and pursue reforms that clarify prosecutors' disclosure obligations and hold prosecutors accountable to courts when they fail to meet those obligations.

We look forward to working with you and your staffs on this critical issue. In the meantime, if TCP can provide any assistance, please feel free to contact me at (202) 580-6923 or Christopher Durocher, TCP's Government Affairs Counsel, at (202) 580-6939 or cdurocher@constitutionproject.org.

Best regards,

Virginia E. Sloan

cc: Senator Lisa Murkowski
Members of the Senate Committee on the Judiciary

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http://www.washingtonpost.com/local/crime/doj-review-of-flawed-fbi-forensics-processes-lacked-transparency/2012/04/17/gIQAEegIPT_story.html.

[2] Mike Scarcella, *In conspiracy case, judge chides DOJ over exculpatory evidence*, Legal Times (April 27, 2012), *available at* http://legaltimes.typepad.com/blt/2012/04/in-conspiracy-case-judge-chides-doj-over-exculpatory-evidence.html.

June 5, 2012

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
United States Senate
Washington, DC 20510

The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
224 Dirksen Senate Office Building
United States Senate
Washington, DC 20510

Re: **Hearing on "Ensuring that Federal Prosecutors Meet Discovery Obligations"**

Dear Chairman Leahy and Ranking Member Grassley:

We write to thank you for scheduling a hearing on the troubling issue of federal prosecutors' failure to meet their constitutional obligations to provide accused persons and entities with important information critical to their ability to defend themselves.

Nearly fifty years ago, in *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court recognized the constitutional importance of disclosing evidence that is favorable to a person or entity accused of a crime. This decision established certain constitutional obligations for prosecutors during the pre-trial information sharing process known as "discovery." Failure to satisfy *Brady* obligations compromises the criminal justice system, greatly increases the risk that an innocent person will be convicted, puts a significant financial burden on the accused, and undermines the fairness and integrity of the process.

We know the Committee Members share our concerns about the tragic misconduct that occurred in the highly-publicized criminal case against former Senator Stevens. While such misconduct may not be rampant, incidents of misconduct occur with unacceptable frequency. The Department of Justice has failed to effectively address the flaws within its own organization, even after the problems with the Stevens prosecution came to light. For example, the recent case of Lindsey Manufacturing makes that abundantly clear.

Although companies facing criminal charges rarely go to trial, Lindsey Manufacturing President and CEO Keith Lindsey and Vice-President and CFO Steve K. Lee mounted an aggressive defense, on behalf of themselves and their company, of alleged violations of the Foreign Corrupt Practices Act (FCPA). Their fight for justice lifted the veil on numerous serious violations of their constitutional rights—all of which occurred *after* the prosecution of Stevens and *after* the Department of Justice issued new guidance to its prosecutors regarding their discovery obligations.[1] The Lindsey defendants were ultimately convicted of multiple FCPA violations. In a lengthy post-trial order, however, U.S. District Court Judge Howard Matz described this case as an "unusual and extreme picture of a prosecution gone awry," threw out all the convictions, and banned the government from retrying the case. Occurring over a three-year period, the misconduct included, among other things, the intentional withholding of several grand jury transcripts evidencing the serious flaws in the investigation and substantially undercutting the government's case. Judge Matz characterized these transcripts as the "most complete and compelling evidence that the Government investigation had been tainted" and explained that without the

[1] *U.S. v. Aguilar, et al.*, Case No. CR-10-1031(A)-AHM (C.D.Cal. 2011).

transcripts, the defense was severely hamstringed. The Lindsey defendants were ultimately able to fight for their innocence and protect their rights, but the successful defense of these individuals and their company came at great cost.

The number of reported instances of similar prosecutions suggests that federal prosecutors are failing to discharge their constitutional obligation under *Brady* with unacceptable frequency, whether as a result of intentional tactical decisions, negligence, or a misunderstanding of their obligations. Reforms like those found in Senator Murkowski's recently proposed discovery reform legislation would address this problem by creating clear and meaningful standards governing prosecutors' duty to disclose any and all evidence favorable to individual and corporate defendants.

Specifically, the "Fairness in Disclosure of Evidence Act of 2012" (S. 2197) provides that in a federal criminal prosecution, the prosecutor must provide to the accused any "favorable" information that is either in the possession of the prosecution team or would become known to the prosecutor through the exercise of due diligence, without delay after arraignment. It provides a fair mechanism by which prosecutors can seek a protective order in the rare case in which there is a reasonable basis to believe that disclosure would endanger a witness. The bill protects national security concerns by completely exempting any classified information from its purview and instead makes clear that such information will continue to be handled, as it is now, under the provisions of the Classified Information Procedures Act (CIPA), 18 U.S.C. App. §§ 1-16. Finally, the bill provides the court with wide discretion to provide an appropriate remedy for noncompliance.

The time for a more transparent and level playing field in the criminal justice system has come, and we therefore encourage you to consider the merits of current reform proposals.

Sincerely,

American Civil Liberties Union
National Association of Criminal Defense Lawyers
The Constitution Project
U.S. Chamber of Commerce
U.S. Chamber Institute for Legal Reform

cc: Members of the U.S. Senate Committee on the Judiciary

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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SIDNEY A. FITZWATER
EVIDENCE RULES

June 5, 2012

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The Judicial Conference has received the Senate Committee on the Judiciary's request for written testimony on the subject of its June 6 hearing "Ensuring that Federal Prosecutors Meet Discovery Obligations." You asked the Conference to discuss its work on this subject, the challenges it may have encountered, and any suggestions for discovery reform going forward. The Judicial Conference has taken no official position on this subject and, thus, cannot offer the requested testimony on behalf of the Judicial Branch. Indeed, any federal judge could offer only individual views.

Nevertheless, because the Conference wishes to be as helpful as possible to the Committee, Judge Thomas F. Hogan, Secretary of the Judicial Conference, and Judge Mark R. Kravitz, Chair of the Standing Committee on Rules of Practice and Procedure, have asked me, as the recently appointed Chair of the Advisory Committee on the Rules of Criminal Procedure ("Advisory Committee"), to provide the Judiciary Committee with information relating to the Advisory Committee's past work in this area. Toward that end, I hereby transmit the enclosed materials, which reflect the consideration given over much of the last decade to the general question of prosecutors' discovery obligations.

As you know, a prosecutor's discovery obligations derive primarily from three sources: (1) the Constitution, particularly the Due Process Clause as construed by the Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and their

progeny ("*Brady/Giglio*"); (2) the federal code, notably 18 U.S.C. § 3500 (the "Jencks Act"); and (3) the Federal Rules of Criminal Procedure, specifically Rule 16 (itself amended by Congress in 1975). From time to time, the Advisory Committee has been urged to consider amending the Federal Rules of Criminal Procedure, both to provide a comprehensive definition of "evidence favorable to an accused," *Brady*, 373 U.S. at 87, and to set time limits (prior to either trial or guilty plea) within which prosecutors must produce such information to the defense. As the enclosed materials demonstrate, these matters, as well as the general subject of prosecutors' disclosure obligations, have received considerable attention from the Advisory Committee (as well as the Standing Committee on Rules of Practice and Procedure) through two rounds of review, each spanning several years.

In undertaking these reviews, the Advisory Committee confronted a number of challenges, not the least of which was the feasibility of "codifying" in a rule of procedure a constitutional requirement that has been subject to frequent refinement over more than fifty years as courts have confronted the myriad of circumstances in which *Brady/Giglio* obligations can arise. Questions arose as to whether it would be possible to craft a single rule that could comprehensively—and specifically—capture all *Brady/Giglio* and Jencks Act disclosure obligations arising across the entire spectrum of federal criminal jurisdiction. If that could not be done, further concerns were expressed as to what benefit would be gained by adopting a rule of procedure simply reiterating general disclosure obligations already mandated by the Constitution and federal law.

To the extent the Advisory Committee considered the possibility of a procedural rule going beyond the obligations of *Brady/Giglio* and the Jencks Act, similar concerns arose as to whether a rule could be drafted with sufficient specificity to provide concrete and precise guidance for courts and litigants in identifying required disclosure. Significant skepticism was expressed concerning the utility of adding an additional hortatory disclosure obligation whose specific requirements could only be developed by further litigation.

Insofar as the call for a rule amendment to codify disclosure obligations derived from well-publicized reports of cases in which prosecutors failed to comply with their constitutional or statutory obligations, the Advisory Committee considered the results of a judicial survey conducted by the Federal Judicial Center. This survey indicated that while judges in general favored a rule providing more guidance on prosecutors' disclosure obligations, they themselves encountered such disclosure problems only infrequently. Further, during the course of these deliberations, the Department of Justice reported to the Advisory Committee on internal departmental reforms initiated to minimize such problems. These materials are among those being transmitted with this letter.

As the materials indicate, the Advisory Committee ultimately decided not to pursue an amendment to the Criminal Rules pertaining to disclosure. It did, however, recommend to the Federal Judicial Center that its Committee on the *Benchbook for U.S. District Court Judges* consider developing a "best practices" guide in this area, a current endeavor in which that Committee has graciously allowed me to participate.

I hope the enclosed materials will prove helpful to the Judiciary Committee. While every effort has been made over the last week to ensure that the materials are comprehensive, if any further pertinent documents come to light, they will be promptly transmitted. Please feel free to contact me with any questions prompted by the enclosed materials.

Respectfully submitted,

Reena Raggi
United States Circuit Court Judge
Court of Appeals for the Second Circuit
Chair, Advisory Committee on the Rules of
Criminal Procedure

Enclosure

Identical letter sent to: Honorable Charles E. Grassley

National Association of Assistant United States Attorneys
12427 Hedges Run Dr. • Ste 104 • Lake Ridge, VA 22192-1715
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June 4, 2012

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Charles Grassley
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: June 6 Hearing -- "Ensuring that Federal Prosecutors Meet Discovery Obligations"

Dear Chairman Leahy and Senator Grassley:

On behalf of the approximately 5,600 Assistant United States Attorneys ("AUSAs") who serve this nation as the federal government's prosecutors and civil litigators, we respectfully submit these comments in advance of the June 6 hearing, "Ensuring that Federal Prosecutors Meet Discovery Obligations," and request that these comments be included in the hearing record. NAAUSA represents the AUSAs who, day in and day out, fight for truth and justice to protect the innocent and bring the guilty to the bar of justice.

The 2008 prosecution of former U.S. Senator Ted Stevens has generated considerable controversy regarding the failure of the government to disclose material that would have been helpful to the defense. That prosecution began in Alaska by AUSAs in the Office of the United States Attorney for Alaska, but was ultimately taken over, managed and supervised by attorneys in the Department's Public Integrity Section ("PIN") and their superiors. The two AUSAs remained as members of the prosecution team.

As a result of serious discovery breaches by the prosecution team, the trial court dismissed the jury's conviction of Senator Stevens and appointed a special counsel to investigate the matter. However, the special counsel's investigation was critically incomplete because of limitations in the authority granted to the special counsel by the judge who presided over the Stevens trial. As a result, the special counsel never fully investigated the actions of trial team members in the Public Integrity Section at Justice headquarters or their superiors who had ultimate authority and managed the Stevens case. That limitation resulted in placing blame on the two AUSAs from Alaska for discovery errors that were clearly the result of prosecution team mistakes and failures by those at the Department who supervised the team.

While the special prosecutor was conducting his investigation, simultaneously, the Department of Justice Office of Professional Responsibility ("OPR") was also investigating the Stevens team prosecution and did include a consideration of the actions of PIN attorneys and, to a lesser

degree, their supervisors. After OPR completed its investigation and issued its report, a thorough review of the entire record was completed by an attorney for the Department's Professional Misconduct Review Unit ("PMRU"), an entity created by the Attorney General to serve as an adjudicatory unit to resolve disciplinary matters such as the ones presented in the Stevens case.

Despite the clear finding that, whatever errors occurred, they were made by team members as a whole, that conclusion was reversed by the head of PMRU, who directed the suspension without pay of only the two AUSAs from Alaska, because of mistakes made in the non-disclosure of material evidence to Senator Stevens' defense team. Mistakes undoubtedly occurred, but we believe that these mistakes were inadvertent and not willfully made by the two AUSAs. Moreover, we believe the entire team was culpable, not merely the two AUSAs.

Selective and Unfair Punishment Occurred

Mistakes of poor judgment and mismanagement were clearly made by certain Department of Justice officials who supervised the prosecution. We believe that the actions of these supervisory officials resulted in a series of management decisions in the prosecution of the case that contributed to the ultimate disclosure violations. Indeed, this conclusion is borne out by the initial review conducted by the Department's PMRU, which concluded "...that the failures that led to the collapse of the Stevens prosecution were caused by team lapses rather than individual misdeeds, with their origins in inept organizational and management decisions that led to a hyper pressurized environment in which poor judgments, mistakes and errors compounded one another and made it almost inevitable that disclosure violations would occur." Surprisingly, these mistakes by officials in the Public Integrity Section did not trigger the slightest punishment.

While even a single instance of a prosecutor's failure to meet the discovery obligations imposed by the law is one too many, claims of widespread discovery abuse are simply not supported by the record. Furthermore, we must point out that the standard of proof employed by OPR in its investigations is contrary to the "clear and convincing" standard of proof endorsed by the American Bar Association, which is employed by the vast majority of state bar disciplinary entities. That standard is the standard that the Department of Justice should be held to before making any adverse finding that can destroy the good name, reputation and career of an Assistant United States Attorney. That said, the OPR and PMRU process did result in a thorough analysis of the facts in the Stevens matter. Clearly, no member of the Stevens' prosecution team intentionally committed discovery violations. In the end, only the two AUSAs, who were members of the team, were punished. Other members of the team, who were in superior positions, and their supervisors, escaped similar treatment. We believe that disparity is wrong and unjust.

Attorney Misconduct in Criminal Prosecutions Is Infrequent

While we acknowledge that serious discovery mistakes were made by the Stevens' prosecution team, we suggest that they were aberrations, and not the normal course of conduct by the approximately 5,600 AUSAs across the country. In fact, the historical record speaks strongly to the contrary. AUSAs consistently abide by their discovery obligations to provide exculpatory evidence to criminal defendants. Over the past 10 years, Justice Department prosecutors, the majority of which are AUSAs, have pursued justice in over 800,000 cases involving more than

one million defendants, according to the Department records. Of those cases, only a tiny portion (0.0033) spurred allegations of misconduct by the defendant, triggering an OPR investigation. Only a small portion of those OPR investigations (.0003) involved inquiry into alleged discovery violations. Moreover, just a fraction of those cases actually resulted in findings of discovery-related prosecutorial misconduct. For example, in 2010, only 26 cases among 68,591criminal prosecutions involved discovery-related allegations of misconduct. Even as to that small number of allegations, it is unknown how many were dismissed as unfounded, or were simply the result of a lone mistake or bad judgment by a prosecutor, especially during a hard-fought trial often without time for reflection.

Legislative Alteration of Federal Discovery Obligations is Unwarranted and Risky

As a result of the Stevens case, a legislative proposal has been introduced in the Senate that would substantially alter the course of federal criminal discovery. Similar proposals in the past have originated and been supported by the criminal defense bar, criminal defense professors and so-called "innocence projects," hardly an unbiased group. Over the past decades, the Supreme Court, appellate courts and district courts have finely honed and defined a federal prosecutor's duties and responsibilities regarding discovery. AUSAs have assiduously, as the statistics point out, complied with their discovery obligations. Any attempt to legislatively change those time-honored judicial discovery obligations is clearly unnecessary and simply an overreaction to the isolated discovery errors made in the Stevens case.

We oppose the Fairness in the Disclosure of Evidence Act of 2012, S. 2197, because it is unwarranted and risky. An AUSA's duty to disclose exculpatory or impeaching information springs from his special role in our system of justice under the Constitution as the legal representative of the United States of America. In the context of a criminal prosecution, AUSAs well understand that their ultimate responsibility in this role is the pursuit of justice. Furthermore, over decades, the duty to protect the innocent and prosecute the guilty has been defined and interpreted by the Supreme Court and other appellate courts of the United States. Those courts have prodigiously studied and analyzed the Constitutional and legal rights to be afforded a criminal defendant. The Federal Judiciary is in the best position to determine the parameters of the discovery obligations of AUSAs. The Advisory Committee on Criminal Rules of the Judicial Conference of the United States recently reaffirmed that responsibility through its decision to preserve the current language of Rule 16 of the Federal Rules of Criminal Procedure. Thus, no further legislation is required. The proposed legislation will only confuse and complicate an already fair, well-known, and well understood discovery process.

Moreover, the proposed legislation will lead to a variety of unintended harms involving witness privacy and safety, as well as the potential and dangerous disclosure of national security-related information, including intelligence and law enforcement sources and methods. The legislation also will invite time-consuming and costly litigation over discovery issues not substantially related to a defendant's guilt, resulting in delayed justice for victims and the public and greater uncertainty regarding the finality of criminal verdicts. Inclusion of a provision for awarding attorney's fees would only provide significant incentive to engage in such collateral litigation.

While the Stevens case was deeply flawed, it does not represent the daily work of federal prosecutors throughout the country. Neither does it suggest a systemic problem warranting a

significant departure from well-established criminal justice practices that have contributed to record reductions in the rates of crime in this country, while providing defendants with the basic rights of due process under the law.

In conclusion, there is nothing wrong with the current state of the law regarding discovery. Those laws must simply be followed. As a result of the Stevens' prosecutorial teams errors, the Department of Justice has taken extraordinary measures to assure that such errors will not occur again. All new AUSAs go to "Discovery Boot Camp," all AUSAs participate in various mandatory yearly discovery training programs, and each United States Attorney's Office is obligated to produce a Department-approved, "Discovery Manual." The Stevens case has caused the Department to redouble its efforts and ensure that such errors will not occur in the future. We firmly believe no additional legislation is warranted or required.

Thank you for your consideration of these comments and for your whole-hearted and continued support for the necessary work that Assistant United States Attorneys perform for our nation.

Sincerely,

Robert Gay Guthrie
President

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June 5, 2012

The Honorable Charles E. Grassley
Ranking Member
United States Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Re: S. 2197, The Fairness in Disclosure of Evidence Act of 2012

Dear Sen. Grassley:

Thank you for the opportunity to submit my views on S. 2197, the Fairness in Disclosure of Evidence Act of 2012, currently being considered by the Senate Judiciary Committee. As a result of my service as a line and supervisory federal prosecutor, as well as United States Attorney in two administrations and Deputy Attorney General, I have a strong appreciation of the importance consideration of this legislation has to the work of the Department of Justice ("DOJ" or "Justice Department"). As a current practicing lawyer, and counsel to the government's principal witness in the *Stevens*[1] prosecution, I also fully appreciate from a defense perspective the importance of those same considerations to achieving justice and fairness in the adjudication of criminal cases. It is, I believe, important to note at the outset, that in thirty four years of law practice in both the public and private sectors, I have found the vast majority of federal prosecutors to be professionals committed evenly to both the cause of justice and to prosecuting those who are a threat to public safety and integrity in our society.

The perspective I endeavor to bring to consideration of this legislation is neither pro-government nor pro-defense, but rather tries to look to what is in the best interests of justice in the criminal justice system. The views expressed in this letter are wholly my own, and I do not speak on behalf of White & Case LLP, where I currently serve as the head of the Firm's Global White Collar Practice, or for any individuals or entities whom I represent.

My overall view is that although the proposed legislation has the obvious good intent of promoting fairness in the criminal justice process, its broad reach is unnecessary and could do more harm than good. In sum, the legislation would substitute a new statutory standard for a

[1] *United States v. Stevens*, Criminal No. 1:08-cr-231-EGS (D.D.C. July 29, 2008).

well understood existing standard that has been well-defined by years of jurisprudence. The disclosure issues in the *Stevens* case were not a product of misunderstood obligations; they arose because well-established existing requirements for disclosure were not met. A new standard of disclosure is likely to engender expanded litigation of collateral matters in criminal cases, and thereby unnecessarily consume judicial, public and private resources better used for other purposes. The new standard, by requiring disclosure without regard to the materiality of information to guilt or punishment, also would likely change the basis for appellate review of *Brady/Giglio*[2] issues, and could permit reversal of criminal convictions even where no harm resulted from a disclosure error in the trial proceedings. As a result, the legislation, in my judgment, works to fix a legal standard that is neither broken nor inadequate. In addition, it is important to recognize that a one-size-fits-all standard may present new challenges to the fair adjudication of criminal cases where, for example, in a gang or other violent crime case, the disclosure of the names of witnesses or others interviewed during an investigation may result in less cooperation from such persons, or even put them in jeopardy. In contrast, greater disclosure about witnesses and interviewees in a fraud or other white collar case typically carries little or no such risk.[3]

If consideration of reform is indicated by the events in the *Stevens* prosecution, it should, in my judgment, be focused on oversight concerning whether the Justice Department is providing the resources and supervision necessary to insure it meets its *Brady* obligations in all cases and on consideration of possibly affording defendants more access to the aid of the trial court in holding the government to those obligations. It seems far preferable that effort be directed to insuring that defendants get a fair trial in the first place, rather than on remedies and cost shifting where it is later determined that one has not.

The Brady Standard

The obligations governing the government's disclosure of *Brady/Giglio* material is well-developed and is clearly understood by the DOJ as a result of nearly fifty years of experience with the rule.[4] *Brady* itself held "that the suppression by the prosecution of evidence favorable

[2] *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1974).

[3] The pending legislation applies "notwithstanding" 18 U.S.C. § 3500(a), which protects statements of government witnesses from disclosure until they have had an opportunity to testify on direct examination. Under the proposed Bill, the government may move for an order protecting against immediate disclosure of information only if the information is impeachment evidence against a potential witness and the government establishes a "reasonable basis" to believe the witness is not already known to the defendant and disclosure of the information would present a threat to the potential witness' safety. This provision would necessitate re-establishing under the new provisions jurisprudence for different types of cases, such as national security cases or child exploitation cases, where certain information may be subject to disclosure despite being inadmissible. In addition, because disclosure would be subject to after-the-fact court decisions, the protective order safeguard does little to eliminate the potential for negative impact on witnesses and witness cooperation.

[4] *See* United States Attorneys' Manual § 9-5.001(B). Internal DOJ policy goes beyond the constitutional minimum and requires disclosure of any favorable information to the defense---regardless of whether it is admissible evidence or would make a difference between conviction and acquittal. However, the policy does not require disclosure of information which is "irrelevant or not significantly probative of issues before the court." *Id.* at § 9-5.001(C).

to an accused upon request violates due process where the evidence is *material* either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."[5] The Supreme Court has maintained that due process does not require the disclosure of all favorable information known to the government, only that information the omission of which "is of sufficient significance to result in the denial of the defendant's right to a fair trial."[6] Thus, "there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."[7]

The pending legislation, on the other hand, would seemingly compel disclosure of favorable information without regard to relevance or materiality. By passing legislation which does not conform to the current law governing *Brady/Giglio* material, Congress would introduce new rules for the courts, prosecutors, and defense counsel to learn, understand, and litigate, undermining the value of the 50 years of case law developed since the rule was first announced in 1963 in two principal ways. By doing away with the "materiality" requirement of *Brady*, the proposed legislation fundamentally alters the harmless error analysis that has governed appellate review of criminal discovery challenges.[8] This could lead to new trials and reversals in cases even where the error results in no prejudice to the defendant. Likewise, under the proposed legislation's lowered standard, non-prejudicial failures to disclose any covered information could result in lengthy delays and increased judicial costs at the trial court level, as defendants may increasingly allege noncompliance by prosecutors, requiring courts to conduct mini-trials on whether the government met its obligations.

Second, by requiring the government to disclose any "information, data, documents, evidence, or objects that may reasonably appear to be favorable to the defendant," the proposed legislation may well compel open-file discovery. That procedure, as a practical matter, may lead witnesses to be less cooperative in investigations and investigators to record less rather than more information, which may in turn reduce the overall effectiveness of the criminal justice process.

Consideration for Reform

The important question in any effort to reform the government's disclosure obligations is not whether sufficient standards exist (they do) or whether they are well known by federal prosecutors (they are), but rather whether deviations by prosecutors from those standards can be dealt with appropriately at the trial court level so a defendant receives a fair trial. Instead of

[5] *Brady*, 373 U.S. at 87 (emphasis added).

[6] *United States v. Agurs*, 427 U.S. 97, 108 (1976).

[7] *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (discussing the materiality requirement). At least one court has held, however, that the materiality requirement is critical to a post hoc vindication of a defendant's constitutional rights, but that prosecutors are still obligated to disclose any evidence favorable to a defendant "without regard to how the withholding of such evidence might be viewed—with the benefit of hindsight—as affecting the outcome of the trial." *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005).

[8] *See, e.g.*, *Rosencrantz v. Lafler*, 568 F.3d 577, 584 n.1 (6th Cir. 2009) ("[t]he materiality standard in traditional *Brady* claims supplants harmless-error review because practically speaking, the two analyses are the same").

relying on new legislation to implement new standards, which would not serve to prevent prosecutorial misconduct from occurring, the DOJ should devote more effort to ensure adequate training and supervision of line personnel—an effort the Justice Department has begun, to its credit—and to hold supervisory personnel more responsible for line level decisions.

The *Stevens* case is illustrative; the information subject to disclosure was discoverable in the government files. Both the DOJ's Office of Professional Responsibility ("OPR"), and Special Counsel Henry F. Schuelke, III (appointed by Judge Sullivan to determine if criminal contempt charges should be brought against the *Stevens* prosecution team) concluded that prosecutors violated their disclosure obligations by withholding, among other things, information of which they were aware and which could have undermined the prosecution's attempt to discredit a vital piece of evidence critical to Senator Stevens' defense. The OPR and Schuelke reports reveal that those omissions occurred in an environment where fundamental disclosure obligations got less than the full attention and commitment of the trial team and supervisors that they merit. Additionally, FBI and IRS agents, perhaps not adequately familiar with the *Brady/Giglio* requirements, were to some extent relied upon by DOJ to review government evidence for required disclosures. Other information that may have been exculpatory also was not adequately or fully documented by investigators, which may have masked such information during disclosure review. These are not shortcomings that a new legal standard for disclosure would correct. Rather, they are performance issues that supervision and oversight can rectify.

The issues to be addressed also do not represent a widespread problem. The vast majority of line prosecutors and investigative agents are dedicated professionals devoted to the highest standards of justice and the rule of law. In highly visible detail we know the shortcomings that occurred in the *Stevens* case. What we do not know and cannot see are the hundreds of good judgments and decisions on similar issues that are made daily by the many dedicated professionals in the United States Attorneys' Offices and other Justice Department components. Before embarking on wholesale change due to the potential arising from a relatively few poor or misguided judgments, we should carefully consider the impact of those changes on a wider array of concerns.

Potential to Enhance the Trial Court's Role

While the *Stevens* case is an outlier situation, and does not, in my judgment, call for the wholesale overhaul this legislation represents, consideration could be given to procedural changes that would provide defendants a better opportunity to request that trial courts perform *in camera* reviews for information that may be subject to disclosure. This could occur, for example, where, upon a low threshold showing, a defendant can demonstrate a basis for the probable existence of exculpatory information in government files. Following review, the court could compel disclosure or not—a decision that could be reviewed on appeal under existing standards. Where such a procedure is available, one can presume the government would both review its files with more keen attention to its disclosure obligations and err on the side of disclosure in marginal circumstances.

Additionally, DOJ could consider establishing by policy directive a *Brady* review process independent of the trial prosecutors in cases going to trial. That could provide the prosecutors with the benefit of peer review of their disclosure decisions. Finally, investigative agencies could be tasked with greater responsibility and training to identify and bring to the attention of prosecutors information that may be subject to disclosure.

Conclusion

I am sure that I join many in appreciation of the Committee's consideration of this important aspect of criminal litigation, and thank you for the opportunity to share my views regarding procedures governing the government's disclosure obligations.

Best regards,

George J. Terwilliger, III

United States Senate
WASHINGTON, DC 20510

May 30, 2012

The Honorable Eric Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Attorney General Holder:

On March 28, 2012, the Senate Committee on the Judiciary held a hearing at which Henry F. Schuelke testified about the results of his investigation into the conduct of Department of Justice prosecutors in *United States v. Stevens*. Like our fellow Committee members, we were dismayed by Mr. Schuelke's description of egregious misconduct by prosecutors in the *Stevens* case, in particular the alleged willful failure to comply with constitutional discovery obligations detailed in *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). We also are reviewing the report issued last week by the Office of Professional Responsibility, and hope to be able to discuss its findings with a representative of the Department at the hearing on June 6th.

As former prosecutors, we understand the heavy responsibility that all prosecutors bear in pursuing justice. Prosecutors must not forget that part of that responsibility is the protection of defendants' constitutional rights. The dismissal of the case against Senator Ted Stevens underscored that his prosecutors had breached that duty. The Department must do all it can to prevent that from occurring again.

In our view, a department-wide default "open file" policy, in which defendants generally have access to the same evidence as prosecutors, would help prevent similar failures. Not only would such a policy protect defendants' constitutional rights, it would save prosecutors the effort of deciding what evidence should be produced. We recognize that an open file may be inadvisable in certain cases and that any rule should have reasonable exceptions: the identification of witnesses in particular must provide both for witness safety and for the timely disclosure of *Giglio*-type material bearing on credibility. Setting open file as the default will reduce gamesmanship and better align prosecutors' incentives with their constitutional obligations. We note that many federal and state prosecutors already adhere to a default open file policy in their jurisdictions. These prosecutors remain able to enforce the law and pursue justice.

We recommend that the Department of Justice give serious consideration to a department-wide default open file policy, and we invite your thoughts on this proposal: whether it is sound, and why; and what exceptions ought to apply, and what their scope should be. We look forward to your response.

Sincerely,

JOHN CORNYN
United States Senator

SHELDON WHITEHOUSE
United States Senator