

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 hamstrung. 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