

LAW OFFICES
JANIS. SCHUELKE & WECHSLER
1728 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D.C. 20036

HENRY F. SCHUELKE, III

TELEPHONE
(202) 861-0600
hfschuelke@janisschuelke.com

April 18, 2012

By email to Halley_Ross@Judiciary-dem.senate.gov

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

Re: Responses to written questions by Senators Grassley, Hatch and Lee

Dear Mr. Chairman:

In response to your letter dated April 5, 2012, enclosing written questions for the record from Senators Grassley, Hatch and Lee, provided below are the questions followed by my answers which are italicized.

Questions from Senator Charles E. Grassley and Answers

(1) Mismanagement by the Justice Department

The Stevens prosecution, as the report found, suffered from misconduct by individual attorneys. But it also suffered from mismanagement by DOJ supervisors.

For example, the report states that the deputy chief of the Public Integrity unit in Main Justice "abdicated" her responsibility to manage the prosecution team. Management failures included the fact that no one was in charge of a meaningful, organized review of material for Brady and Giglio information.

FBI agents and IRS agents, who claimed no proper training, were assigned to do the review, as were attorneys who had no familiarity with the case. There were frequent changes in the leadership of Public Integrity, including five section chiefs over the course of a few years. And decisions by the Public Integrity and Criminal Division leadership led to dissension among the line prosecutors, particularly with respect to the assignment of Brenda Morris to be the lead trial attorney.

Furthermore, the leadership had poor communication with the line attorneys in Alaska, who were left out of important discussions, including the timing of the indictment.

- A. There were frequent changes in the leadership of the Stevens prosecution team, including five section chiefs over the course of a few years. What impact did the evolving nature of the prosecution team have on the Stevens investigation?

Answer:

Our investigation detected no impact on the investigation and prosecution of Senator Stevens by changes in the leadership of the Public Integrity Section ("PIN"). William M. Welch II became Deputy Chief of PIN in August 2006 and Chief of that section in March 2007. Brenda K. Morris joined PIN in 1991; she became PIN's Deputy Chief for Litigation in 2004 and Principal Deputy Chief in 2007. Their tenure at PIN overlapped the investigation and prosecution of Senator Stevens: Bill Allen began cooperating with the Polar Pen Investigation on August 30, 2006, Senator Stevens became a target of that investigation no later than April 2007, when a 62-page memorandum recommending his indictment was written by Joseph W. Bottini, Nicholas A. Marsh, James A. Goeke and Mr. Edward P. Sullivan, and he was indicted on July 29, 2008. Since there were no changes in PIN's leadership during the relevant time period, previous changes in PIN's leadership had no impact on the investigation and prosecution of Senator Stevens.

- B. Decisions by the Public Integrity Unit and Criminal Division leadership led to dissension among the line prosecutors. What impact did this dissension have on the chain of command? What impact did it have on Ms. Morris' leadership?

Answer:

As the report chronicles at pages 44-46, the Assistant Attorney General's appointment of Ms. Morris as the lead trial prosecutor caused dissension in the trial team which led to her decision "to make herself as little as possible" (Report at 3) to avoid exacerbating that dissension. She played no significant role in determining the Brady/Giglio disclosures made to Senator Stevens's lawyers and her direct reporting relationship with the Assistant Attorney General and his Principal Deputy removed Mr. Welch, at least in part, from participation in strategic and tactical decision making.

- C. Would a better-managed and better-led prosecution team have avoided the failures in this case?

Answer:

It may have but it would also have been hobbled by the fact that no FBI 302 was written of Mr. Allen's interview on April 15, 2008, when he told Joseph W. Bottini, James A.

Goeke, Nicholas A. Marsh and Edward P. Sullivan, that he did not recall speaking to Bob Persons about Senator Stevens's written requests in October and November 2002 for bills for the work done on his home (the "Torricelli note(s)"), and by the fact that the two-sentence FBI 302 of the interview of Rocky Williams on August 22, 2008, which was dictated to FBI Agent Chad Joy by Mr. Goeke and/or Mr. Bottini, omitted Brady information provided by Mr. Williams during that interview, i.e., he understood, based on conversations with Mr. Allen and Senator Stevens, that the time spent by VECO employees on the renovation of Senator Stevens's home would be added to the Christensen Builders bills. Better managers and leaders could not ensure that Brady information, of which they were unaware, would be disclosed to the defense.

- D. Do you believe that a better-staffed prosecution team, with more personnel and resources available, could have avoided these problems?

Answer:

In light of the short time between indictment and trial, caused by the government's acquiescence to Senator Stevens's demand for a speedy trial before the November election, more personnel and resources might have prevented other failures to disclose Brady information which were discovered during the trial, e.g., Brady information provided by Mr. Allen which had been redacted from a 302 (the "Pluta 302") and the overstatement in VECO's spreadsheet, a government trial exhibit, of costs incurred during the renovation of Senator Stevens's home. But the failures to disclose Mr. Allen's April 15, 2008-statements about the Torricelli notes, his statements about the value of the improvements to Senator Stevens's home, the evidence of his subornation of perjury by Bambi Tyree, Mr. Williams's statements about adding VECO employees' time to the bills sent to Senator Stevens, and the failure to correct Mr. Allen's false testimony at trial about when he first told the prosecutors about Mr. Persons's statement that "Ted is just covering his ass", were not caused by lack of personnel or resources.

- E. Why did the Department fail to ensure that its "A-team" was on this case, the most significant public corruption case it had prosecuted in many years?

Answer:

The trial prosecutors in United States v. Theodore F. Stevens were Mr. Bottini, Ms. Morris and Mr. Marsh. Mr. Bottini and Ms. Morris were career prosecutors and veteran trial lawyers, with 23 and 22 years of experience respectively. Mr. Bottini had been part of the Polar Pen investigative team since September 2004 and conducted the trial of Victor Kohring, a Polar Pen defendant, in October 2007, assisted by Mr. E. Sullivan,

who joined Polar Pen in March 2006. Mr. Marsh was assigned to Polar Pen in April 2004, and he conducted the trial of Peter Kott, another Polar Pen defendant, in September 2007. He was assisted by Mr. Goeke, who was assigned to the Polar Pen investigation in January 2006. Mr. Kott and Mr. Kohring were both convicted at trial. The team assigned to the case was experienced and knowledgeable and therefore in the view of the Department of Justice ("DOJ") well qualified.

- F. Ultimately, the buck stops with the head of the prosecution team, here that was Ms. Morris. Shouldn't Morris have risen above petty concerns of dissension among the trial team and managed the prosecution better?

Answer:

Yes.

(2) Decision to Move Trial Date to September

One of the more curious decisions by the trial team seemed to exacerbate the problems with turning over exculpatory evidence. According to the report, the initial review for Brady and Giglio material began just shortly after the indictment was filed in July.

The Stevens defense team moved for an expedited trial, telling the judge they would like an October trial. The Justice Department stated they were fine with that, but then asked the Court for a September trial. The Judge granted this request and trial was set for September 24, with discovery to begin immediately.

Questions:

- A. Why did Ms. Morris request a September trial date, as opposed to the October date that the defense team requested?

Answer:

We have no reason to doubt Ms. Morris's statements at arraignment that she offered an early date to accommodate Senator Stevens's request for a trial before the November election. See United States v. Stevens, Transcript, July 31, 2008, at 6.

- B. Was there pressure from Main Justice to expedite the trial earlier than October? If so, from whom?

Answer:

Not to our knowledge.

- C. Was there any disagreement among the trial team about this expedited timeframe?

Answer:

Our investigation found no contemporaneous evidence of any disagreement.

- D. Were any of the trial team members concerned with the impact this expedited timeframe would have on complying with discovery obligations?

Answer:

There is no contemporaneous record or evidence of any expression of concern about their ability to meet their discovery obligations. Mr. Welch discussed this subject with Ms. Morris, Mr. Bottini, Mr. Goeke, Mr. Marsh and Mr. E. Sullivan on July 14, 2008 and he was told then, and on other occasions by Mr. Marsh, that they were ready and able to discharge their discovery obligations.

- E. Do you believe that this request for the expedited trial in advance of the date proposed by the Stevens defense team had an impact on the disclosure problems? If not, why not?

Answer:

No. First, any disclosure problems that were caused by the compressed trial schedule would likely have persisted even if the trial had been scheduled to commence two weeks later. Second, the failures to disclose the Brady information provided by Rocky Williams and the Brady/Giglio information regarding Mr. Allen's alleged subornation of perjury by Ms. Tyree were not caused by the accelerated trial schedule. Mr. Allen's alleged subornation of perjury had not been disclosed to the defense before or during the trials of Mr. Kott and Mr. Kohring which took place one year before the trial of Senator Stevens, in September 2007, and October 2007, respectively.

(3) Office of Professional Responsibility Review

Immediately following the dismissal, the Justice Department initiated an internal review via the Office of Professional Responsibility (OPR). To his credit, Judge Sullivan did not simply take the Department's word that it would hold those involved accountable and hired you to conduct an independent review.

- A. What involvement, if any, have you had with the OPR investigation?

Answer:

We and OPR shared deposition transcripts and other information throughout the course of our investigations.

- B. Do you have any reason to believe that it will uncover additional wrongdoing in addition to the misconduct your report found?

Answer:

Our charter was to investigate whether the six subject attorneys committed contempt and, if appropriate, to prosecute. OPR investigated the conduct of the prosecutors and the FBI who participated in the investigation and prosecution. Based upon our exchanges of information during the investigations, it appears that OPR focused on the same conduct which led to our conclusions.

- C. Do you feel that it should be redacted to protect the privacy of those you have already named in your report?

Answer:

I believe that question is governed by the Privacy Act.

You stated in your report that you had the complete cooperation of OPR, and that you and OPR shared information during your concurrent investigations.

- D. What is your understanding of the status of the OPR report?

Answer:

Our understanding is that the matter is under review by DOJ.

- E. Are you aware of the findings of the OPR report?

Answer:

We are aware of tentative findings contained in a revised draft OPR report which was furnished to us on July 22, 2011, pursuant to a Confidentiality Agreement, dated July 15, 2011.

F. If so, do you agree with those findings?

Answer:

We reviewed the revised draft OPR report pursuant to the Confidentiality Agreement described above and we are not at liberty to comment on OPR's findings.

In your testimony, you stated that the evident management failures by the Public Integrity Unit were not the direct subject of your report, rather, the criminal contempt charges were. According to a footnote in William Welch's response to your report, he was cleared by OPR last summer.

G. Does that mean that William Welch will suffer no repercussions for his conduct in this case?

Answer:

I do not know.

H. Do you agree with that result?

Answer:

Please see response to Question F above.

I. In your opinion should the OPR report in its entirety be released to Congress? If not, why not?

Answer:

If permitted by the Privacy Act and governing law, yes.

J. In your opinion should the OPR report in its entirety be released to the public? If not, why not? And how is this different than your report being released to the public?

Answer:

If permitted by the Privacy Act and governing law, yes.

Assuming that governing law permits release, the disclosure issue would be no different from the disclosure of our report pursuant to Judge Emmet G. Sullivan's Memorandum

Opinion, dated Feb. 8, 2012. See In re Special Proceedings, Misc. No. 09-0198 (EGS) 2012 U.S. Dist. LEXIS 15656 (D.D.C. Feb. 8, 2012).

(4) Senator Murkowski's Bill

In response to the discovery production failures outlined in this report, a bill has been filed called the "Fairness in Disclosure of Evidence Act of 2012.". While I share the concerns behind the bill, which is to ensure failures of this kind never happen again, I have some serious concerns about the bill's language, some of its consequences, and the serious impact it will have on national security.

- A. This bill creates new rules for discovery disclosures. Mr. Schuelke, would you agree that people who disregard the rules are unlikely to follow new ones?

Answer:

I agree that, while no statute or rule can guarantee compliance or conduct in conformity with the statute or rule, the existence of such a statute or rule would at least focus the attention of prosecutors and possibly serve as a deterrent.

- B. Are you familiar with the language of this proposed bill?

Answer:

Yes.

- C. In the Stevens case, if the prosecutors had tough questions about what to disclose, would they have benefitted from filing an ex parte motion, and allowing the judge to make the tough call?

Answer:

Yes, certainly.

- D. What impact on the criminal justice system would a complete overhaul of all rules, regulations, procedures, and informal guidance have on criminal cases?

Answer:

The views of the Department of Justice are contained in its "Statement for the Record", dated March 28, 2012, which was submitted to the Senate Judiciary Committee.

The provisions of the bill which mandates Brady/Giglio disclosure would not constitute "a complete overhaul of all rules, regulations, procedures, and informal guidance". Nor in our view would such a bill have a deleterious effect on the criminal justice system.

- E. Is it safe to assume that a major rewrite of criminal procedure such as this would require years of litigation to redefine certain established procedures that were amended?

Answer:

No. The decisional law of the federal courts already requires timely disclosure of outcome determinative Brady/Giglio information. Were a statute to require disclosure of any and all Brady/Giglio information, I see no reason why years of litigation would be necessary.

In your testimony, you expressed support for a change to the standard for discovery obligations, specifically with regard to "materiality." Such a change has repeatedly been rejected by the Advisory Committee on Criminal Rules. Most recently, the Rules Committee rejected changes after considering, *inter alia*, a letter from Judge Sullivan expressing support for a change based on his experience with the Stevens case.

- F. Why should the Rules Committee's determination now be overturned by Congress?

Answer:

It is our view that Judge Sullivan and other federal district judges, who have given the matter considerable thought, have the better of the argument. As I testified, the elimination of the materiality standard is in the interests of ensuring fair trials, and if the Rules Committee is not prepared to act, then the Congress should.

(5) Prosecution of Bill Allen for Child Sexual Exploitation

One of the worst stories in this case is the prosecution's star witness' involvement with a then 15-year-old prostitute. In addition to the prosecution's failure to turn over this fact to Stevens' attorneys, it now appears the Justice Department declined to prosecute Allen, despite working with local police in Alaska to investigate this charge.

Senator Murkowski asked Attorney General Holder about this case, stating that police tried to make a federal case but the Justice Department refused. Attorney General Holder denied the charge that this was in response to Allen's testimony against Stevens. However, in yet another OPR investigation, the Department is investigating the charge of quid pro quo.

Questions:

- A. During the course of your investigation, did you uncover any information that would lead you to believe that there was an agreement to pass up prosecution of Allen in exchange for his testimony?

Answer:

No.

- B. Was there any discussion among the Stevens prosecution team about prosecuting Allen? If so, what was their view on that?

Answer:

Not that I am aware of.

- C. Have you discussed this matter with OPR?

Answer:

No.

(6) Schuelke Investigation General Accountability

It is vitally important that the public and Congress understand how the prosecution of Senator Stevens went so awry. Were these prosecutors just "bad apples" or is there a more wide-spread problem?

If there is a problem, is it based on individuals' conduct or a systemic failure? What types of changes are necessary to ensure this doesn't happen again?

Only through a thorough examination of the facts of this case can we begin to answer these questions.

Your report is more than 500 pages long and all the individuals discussed were provided the opportunity to submit responses as appendices, which stretched many more pages.

Some people have criticized the report, and I'd like to hear your responses to that criticism.

- A. For example, some have criticized you for taking too aggressive a stand in the pursuit of your investigation, similar to a special prosecutor with one target in mind. These critics say, for example, that you assumed intentional misconduct rather than inadvertent mistakes and that you ignored exculpatory evidence. Thus, according to these critics, you conducted a prosecution rather than a neutral examination of the evidence. How do you respond to that?

Answer:

To my knowledge, the critics are counsel to subjects of the investigation and the criticisms were made in the course of advocacy. The charge, that my approach was with one target in mind and that I assumed intentional misconduct, is belied by the fact that I found misconduct by two of the six surviving subject attorneys and concluded that a prosecution for criminal contempt was not appropriate with respect to any subject.

I am aware of those who have criticized that decision. I assure you that I went about my assignment without fear or favor and reached conclusions that are, in my judgment, compelled by the evidence. Our report details the evidence in a fashion such that no one need rely only on my expressed conclusion.

This question is apparently prompted by Mr. Bottini's counsel's claim that we ignored exculpatory evidence, namely that Mr. Bottini recommended some disclosure concerning Mr. Allen's alleged subornation of perjury on a number of occasions.

The report describes in detail the evidence that Mr. Bottini and Mr. Goeke advocated some disclosure regarding Mr. Allen's alleged subornation of perjury by Ms. Tyree. Contrary to Mr. Bottini's counsel's view, I did not find that evidence to be exculpatory. Indeed, we believe those very disclosure suggestions demonstrated beyond a reasonable doubt a clear knowledge on Mr. Bottini's part that there was evidence to be disclosed and he did not disclose it.

The failure to disclose Brady in Stevens was but a part of a series and pattern of nondisclosures and concealment of Brady information which occurred in three prosecutions in 2007-2008. Mr. Bottini and Mr. Goeke failed to disclose the same Brady information not only to Senator Stevens in 2008, they failed to disclose it in September and October 2007 during the trials of Mr. Kott (prosecuted by Mr. Marsh and Mr. Goeke) and Mr. Kohring (prosecuted by Mr. Bottini and Mr. E. Sullivan), whose convictions were reversed by the Ninth Circuit Court of Appeals in 2011 after that information finally came to light following the trial of Senator Stevens.

Some have argued that in presenting their side of the story in response to the findings of the report, the prosecutors were disadvantaged because they did not have access to all the material you collected, such as documents and transcripts of interviews with other subjects. As a result, they say the prosecutors could not effectively rebut your findings.

B. Why did you not provide full discovery to the subjects? How do you respond to such criticisms?

The investigation subjects also claim that they were not provided the opportunity to respond to your report prior to its being filed with the court. The Government Accountability Office (GAO) and the Inspector General provides opportunities for investigation subjects to learn of the findings and respond to them prior to their reports being finalized or made public. It appears that you did not follow this standard procedure. In your investigation, you allowed the subjects to provide input prior to your final findings, but they claim their input was not reflected in the final report and its findings.

Answer:

In the criminal process, the government's disclosure obligations are triggered only upon the commencement of a prosecution; discovery is virtually never provided to the subject of an investigation during the pendency of the investigation before any charge is filed. We chose not to follow this practice but rather to permit the subjects of the investigation access to the same source of information that was available to us.

In response to the commitment by DOJ to provide full cooperation as Judge Sullivan ordered, DOJ produced to us all the information we requested, including prosecution memos, grand jury testimony, emails between and among the prosecution team, handwritten notes of the prosecutors and FBI agents, the files of DOJ's Professional Responsibility Advisory Office, and transcripts of sealed hearings during the trials of Mr. Kott and Mr. Kohring. At the start of this process, DOJ inquired of us if we had any objection to its disclosure of relevant material to the subjects and their attorneys, and we

responded that we had no objection and that DOJ was free to honor requests for information and documents by the subjects and their attorneys.

Aside from the public trial record of the trial in United v. Theodore F. Stevens and the notes provided to us by Mr. Allen's attorney that were taken during the prosecutors' and agents' interviews of Mr. Allen, the materials provided to us by DOJ constitute our entire investigative file. Since we told DOJ that we had no objection to its honoring requests for information and documents by the subjects' attorneys, they had access to the same file. In addition, our report details virtually all of that material, including the notes taken by Mr. Allen's attorney. At no time during our investigation did the attorneys for the subject attorneys request from us the production of any materials provided to us by DOJ. In fact, Mr. Bottini testified in our deposition that he and his counsel reviewed a large volume of material received from DOJ, including emails, 302s, his own handwritten notes, the handwritten notes of the other subjects and FBI agents, trial transcripts and motions. Deposition of J. Bottini, Dec. 16, 2009, at 12-16.

Copies of the deposition transcripts of the subjects' testimony were provided to the attorneys for each subject. However neither I nor any competent investigator would produce the transcript of the deposition testimony of one subject to another subject of the investigation in advance of that other subject's deposition, as the object of the investigation was a search for the truth and not to invite collaborative accounts of the matters at issue.

Mr. Bottini's lawyer has claimed that we refused to provide him with access to transcripts of depositions of witnesses. See Letter from K. Wainstein to Hon. Eric H. Holder, Jr., dated March 15, 2012, at 10. That is simply incorrect. After our depositions of the subjects and witnesses were completed, Mr. Bottini's counsel asked to review Mr. Allen's deposition transcript, and we provided it to him. Similarly, in response to his request, we read to him portions of the deposition of Mr. Allen's attorney. See Email from Sara S. Zdeb to H. Schuelke, dated Feb. 4, 2011 (5:54 p.m.) ("Ken is out of the office, and asked me to email you with a request regarding the response we're preparing to OPR's draft report on Mr. Bottini's behalf. As you may know, that report periodically relies on testimony provided by various individuals during the course of your investigation, which we understand was provided to OPR pursuant to a confidentiality agreement. OPR's draft contains a significant factual allegation based on a statement Bill Allen made during his interview with you, and we have only just focused on this specific issue now. In order for us to have a fair opportunity to respond to the allegation, it's important for us to review the specific passage of Mr. Allen's testimony on which it is based. OPR is unable to provide Mr. Allen's transcript to us, but gave us permission to request it from you. We apologize for the late notice, but would appreciate the opportunity to review his

transcript before close of business Monday, when we're due to submit our response to OPR. . . ."); email from H. Schuelke to S. Zdeb, dated Feb. 4, 2011 (5:58 p.m.)("Sara - We'll be happy to assist; please call Monday morning and we'll set a time for the afternoon.").

The voluminous nature of the report itself is the result of our inclusion of all relevant excerpts of the deposition testimony by Mr. Bottini and the other subjects. As a result, our report does present their "side of the story" in their own words.

Well before we drafted our report, we invited each of the subjects through counsel to make a submission to us setting forth their views on the issues which had been crystallized for the benefit of all during the depositions of the subjects.

We found nothing in any such submissions that caused us to alter our view of the facts, and while we considered their arguments with respect to our conclusions of intentional conduct, we did not find them to be persuasive.

*We submitted our report to the Court in camera on Nov. 14, 2011. On November 21, 2011, Judge Sullivan issued an order in which he expressed his intention to make as much of the report public as possible and invited the subjects of the report to state their position and any objections with respect to disclosure and to submit "any comments or factual information regarding the Report". Such comments and objections as were expressed did not prompt us to modify the report. In re Special Proceedings, Misc. No. 09-0198 (EGS), 2011 U.S. Dist. LEXIS 133812, *8 & *14 (D.D.C. Nov. 21, 2011).*

Had someone told us we were wrong, we would have addressed it. So for example, Mr. Allen through his counsel brought to our attention that the references in the report to his client's "subornation of perjury" and to his false testimony during his cross-examination at trial suggested that we had concluded that Mr. Allen had suborned perjury and had intentionally concealed information at trial. In fact, we reached no such conclusions; the focus of the report was on the Brady/Giglio information regarding those two matters that was never disclosed to Senator Stevens. We added two footnotes to the report to make that distinction clear. See Report, at 11 n.3 and 474 n. 65.

On Feb. 8, 2012, the Court, having considered the submissions made by the subjects, issued a Memorandum Opinion directing that the report be made public on March 15, 2012, again provided the subjects through their counsel "an opportunity to submit their comments or objections to Mr. Schuelke by no later than March 8, 2012", and ordered that "any such submissions [shall be included] as addenda to the published Report." In re Special Proceedings, Misc. No. 09-0198 (EGS), Dkt. No. 73, Memorandum Opinion, at

*1-2 (unredacted version), 2012 U.S. Dist. LEXIS 15656, *2-*3 (D.D.C. Feb. 8, 2012)(redacted version). Again, we found no basis in those submissions to alter the statement of facts, the findings or the conclusions in our report.*

- C. Please describe the extent of your consideration of any information provided by the subjects in preparing your report.

Answer:

As described above, in Spring 2010, we invited each subject's attorney to make a submission to us addressing why a contempt prosecution was not appropriate. Submissions were made by the subjects' attorneys and each was considered by us. In the main, the subjects presented legal arguments and contended that they had not willfully failed to disclose any Brady/Giglio information. Apart from denials of any intent to withhold or conceal Brady/Giglio information, none proffered any matter of fact which contradicted the recitation of facts that was ultimately reflected in our report.

- D. Having seen the subjects' responses to the filed report, have you reconsidered any of your findings? Why or why not?

Answer:

No. None of the responses has caused us to reconsider the statements of fact in the report nor our conclusions which we believe were compelled by undisputed facts.

In their responses to your report, the investigation subjects submit legal arguments. For example, an assumption by a witness is not admissible evidence; hence the prosecutors at least had a non-frivolous argument that the statements of Rocky Williams were not material.

- E. Why did you not consider legal arguments by the subjects?
F. If you considered their legal arguments and found them to be without merit, please explain why they do not have merit or value.

Answers to Questions E and F:

We did consider the arguments and found them to be unpersuasive.

In the case of the failure to disclose the Brady information provided by Rocky Williams to Mr. Goeke and Mr. Bottini on Aug. 22, 2008, a brief statement of the undisputed facts

is necessary.

The prosecutors were well and long aware that Senator Stevens's primary defense at trial would be that he and his wife, Catherine A. Stevens, understood and believed that any expenses incurred by VECO during the renovation were included in the Christensen Builders bills which they paid in full. On August 22, 2008, one month before the trial began, Mr. E. Sullivan emailed his Polar Pen colleagues, including Mr. Bottini and Mr. Goeke, and reminded them that this would be the principal defense, i.e., that Catherine A. Stevens would likely testify to that effect and that, in the event she did not testify at trial, Senator Stevens's lawyers would try to "squeeze" that information out of Mr. Williams on cross-examination. Mr. Williams, a VECO employee and the foreman of the renovation who supervised the VECO employees and Christensen Builders, was interviewed that same day by Mr. Bottini and Mr. Goeke in the presence of FBI Agent Joy. He told them as he had two days previously that, based on conversations he had with Mr. Allen and Senator Stevens in 1999, it was his understanding that Senator Stevens wanted to pay for all of the work done on the cabin, that he routinely reviewed the Christensen Builders bills for accuracy and then took them to Mr. Allen for purposes of adding to those bills his time, David Anderson's time, and the time of any other VECO employee who worked on the renovation.

Mr. Williams's understanding was not, as counsel argued, a mere assumption; it was based on conversations which he had with Mr. Allen and Senator Stevens and was relevant, admissible and important evidence. The counsel who addressed this point in response to the report ignored the underlying facts which formed the basis for Mr. Williams's understanding.

After the interview ended, Mr. Goeke and/or Mr. Bottini dictated a two-sentence 302 to Agent Joy which contained none of the Brady information that supported Senator Stevens's expected defense. Instead, Agent Joy was directed to write a 302 that contained only two other statements made by Mr. Williams during the interview: that he never told Senator Stevens or his wife that VECO expenses were included in the Christensen Builders bills and that neither Senator Stevens nor his wife ever asked him if VECO expenses were included in those bills. Mr. Goeke testified that this 302 was created for the prosecutors' use in questioning Mr. Williams if he testified at trial that, in addition to his understanding that the VECO employees' time was added to and included in the Christensen Builders bills, he told Senator Stevens and/or his wife that the VECO costs were, in fact, included in the Christensen Builders bills. Deposition of J. Goeke, Jan. 8, 2010, at 125 ("... that's the part that if we heard contrary testimony in the stand, I wanted to make sure there was some memorialization of it somewhere so that you could -- he could be impeached with his own statement."). A prosecutor would not logically

prepare to impeach his own witness unless he recognized that the testimony to be impeached, that VECO's costs were included in the contractor's bills, was favorable to the defense and harmful to the prosecution.

Counsel also failed to address the fact that Mr. Bottini's and Mr. Goeke's failure to disclose to Senator Stevens's lawyers the Brady/Giglio information about Mr. Allen's alleged subornation of perjury by Ms. Tyree was not an isolated event. It was part of a pattern of nondisclosure of the same information that began a year earlier, in September 2007, during the trial of Mr. Kott and continued through the trial of Mr. Kohring in October 2007. Mr. Goeke and Mr. Marsh were the prosecutors in Kott and Mr. Bottini was the lead prosecutor in Kohring, assisted by Mr. E. Sullivan.

Your report essentially covers three discrete allegations of prosecutorial misconduct. To cover these three allegations, your report consists of more than 500 pages of factual findings, including extensive quotations from depositions, emails, and transcripts of court hearings. Ultimately you found that the prosecutors had intentionally withheld *Brady* and *Giglio* material, but they could not be prosecuted for contempt of court because the court had not directly ordered them to produce all *Brady* and *Giglio* material. The legal analysis part of your report was quite short—less than twenty pages.

- G. Why did you write a report that went into such factual detail if it was obvious from the start that, given there was no direct order, that there was no crime?

Answer:

It was not "obvious from the start that, given there was no direct order, that there was no crime." First, Judge Sullivan issued a series of clear and unequivocal orders during the trial including orders on Oct. 2, 2008, which directed the prosecutors to produce to the defense unredacted FBI 302s, IRS Memoranda of Interviews and grand jury testimony, and investigation was necessary to determine whether those orders had been intentionally violated. Second, no responsible investigator would attempt to determine whether the elements of a criminal offense had been established by the subjects' conduct without first understanding the underlying facts.

Judge Sullivan was also entitled to know what had transpired behind the scenes during the investigation and trial which caused the government to abandon the prosecution and whether, and for what reason, any additional Brady/Giglio had been withheld or concealed from the defense.

- H. Do you think it was fair to release a report with such factual detail about misconduct but that in the end exonerates them of a crime? Is it not standard procedure for the government not to comment at all in cases in which an indictment is not brought?

Answer:

*The report was submitted in camera to Judge Sullivan and, pursuant to the Court's Order, copies were provided to DOJ, the attorneys for the subjects and the attorneys for Senator Stevens. In re Special Proceedings, Misc. No. 09-0198 (EGS), 2011 U.S. Dist. LEXIS 133812, *10-*11 (D.D.C. Nov. 21, 2011). The Court further ordered that DOJ file a motion by Jan. 6, 2012, identifying any documents, sealed pleadings or transcripts in the report that should be withheld from the public and that "any other individual seeking to withhold from the public information contained in Mr. Schuelke's Report shall file a motion under seal, and, if appropriate, any comments or factual information regarding the Report, by no later than January 6, 2012." Id. at *12-*13.*

*DOJ filed no objection, Ms. Morris requested public disclosure of the report, Mr. Welch did not object to disclosure, Mr. E. Sullivan and attorneys for Mr. Marsh (who died on Sept. 26, 2010) moved to seal the report, Mr. Bottini and Mr. Goeke opposed disclosure, and the attorneys for the deceased Senator Stevens urged its release. In re Special Proceedings, Misc. No. 09-0198 (EGS), Dkt. No. 73, Memorandum Opinion, at 6-7 & 9 (unredacted version), 2012 U.S. Dist. LEXIS 15656, *9-*11 & *13 (redacted version) (D.D.C. Feb. 8, 2012). We took no position.*

*After a thorough and well-reasoned analysis, Judge Sullivan concluded in a 55-page decision that "the public has a First Amendment right of access" to the report and ordered that the report be filed on the court's docket on March 15, 2011, along with any comments or objections by the subjects in the form of an addendum to the report. Id., Memorandum Opinion, at 53 & 55, 2012 U.S. Dist. LEXIS 15656, *70 & *72-*73. Judge Sullivan denied Mr. E. Sullivan's motion for a stay pending appeal on Feb. 27, 2012 and the Court of Appeals for the District of Columbia Circuit denied Mr. E. Sullivan's emergency motion for a stay pending appeal on March 14, 2012. Pursuant to Judge Sullivan's Order, the report and the addenda provided by the subjects were publicly filed on the court's docket on March 15, 2012.*

In your testimony, you stated that the subjects of your investigation, while not prosecutable for contempt of court, were possibly subject to prosecution for other crimes, such as obstruction of justice.

- I. Please identify any laws, regulations, or code sections under which you believe they could be criminally charged.

Answer:

As stated in the report "[w]e offer no opinion as to whether a prosecution for Obstruction of Justice under 18 U.S.C. §1503 might lie against one or more of the subject attorneys". Report, at 514, n.78.

You stated in your report that you had complete cooperation from Senator Stevens' defense attorneys, the firm of Williams & Connolly, including "information, documents, and other assistance."

- J. Please describe precisely what that cooperation consisted of.

Answer:

At our request, Williams & Connolly, the attorneys for Senator Stevens, provided us with information and documents relating to the investigation, trial and post-trial proceedings, including motions, correspondence and trial exhibits. See for example Report, at 103 ("See Letter from S. Latcovich, Williams & Connolly, dated Nov. 19, 2009, to W. Shields, Janis, Schuelke & Wechsler ('Pursuant to your request . . . enclosed please find all Bill Allen FD-302s produced by the government in [Stevens].'); Letter from S. Latcovich, dated May 9, 2009, to W. Shields, ('Pursuant to your request . . . enclosed please (sic) the redacted FD-302s and grand jury transcripts produced by the government on September 17, 2008, in response to the Court's Order of the previous day.'"))(brackets in original), and Report at 152, n.16 ("See Email from S. Latcovich, Williams & Connolly, dated March 30, 2010, to W. Shields, Janis Schuelke & Wechsler ('I can confirm that we never received a 302 for an interview of Rocky Williams that was conducted on August 22, 2008 and transcribed on August 23, 2008.'))."

- K. Senator Stevens' defense attorneys have been known to engage in accusations of prosecutorial misconduct as part of their trial strategy. How did the defense attorneys' strategy in this case affect your investigation?

Answer:

Not at all.

(7) FBI Whistleblower

It has been reported in the media that FBI Agent Chad Joy, one of the agents in the Stevens case, was the source of allegations of wrongdoing on the Stevens prosecution and acted as a whistleblower alerting Judge Sullivan of significant discovery issues in the Stevens case. It was also reported that Department of Justice Attorneys told Judge Sullivan that Agent Joy's name could be revealed because he did not qualify for FBI Whistleblower status under Department policy. Judge Sullivan wanted to know why the Department refused to grant Agent Joy whistleblower status. Ms. Morris informed the court she was unaware of the date she learned he did not have whistleblower status, but that it was being handled by the Inspector General and the Department Office of Professional Responsibility. Ultimately, Judge Sullivan asked Welch and Morris for a signed declaration from then-Attorney General Mukasey outlining the timeline for Agent Joy's whistleblower complaint.

- A. During the course of your investigations, did you discuss Agent Joy's whistleblower complaint with any of the witnesses you interviewed? If so, what did you learn?

Answer:

Agent Joy complained primarily of violations of FBI policies, rules and procedures by his colleague, FBI Agent Mary Beth Kepner, the lead case agent in the Polar Pen investigation, e.g., mishandling sources and evidence, accepting things of value from her sources and violating grand jury secrecy rules. These complaints were outside our mandate which was limited to an investigation of the conduct of the six prosecutors.

Agent Joy also alleged in his complaint that Mr. Marsh "inappropriately created scheme to relocate prosecution witness [Rocky Williams] that was also subpoenaed by defense during trial" and that he "attempted to conceal from defense counsel an FD-302 discovered that had exculpatory information during trial that had not previously been provided to the defense". Joy Complaint, ¶¶ 10 & 11.

We investigated these allegations and determined that Mr. Williams had provided significant Brady information to Mr. Bottini and Mr. Goeke during pre-trial interviews which was never disclosed to the defense, that Mr. Williams's health was poor and deteriorating while he was in Washington, D.C. for pre-trial preparation, and that on the day opening statements were delivered in the trial of Senator Stevens, the prosecutors sent him home to Alaska for medical attention without notifying the defense or the Court, though he was under subpoena by the defense at the time.

The FBI 302 identified in Agent Joy's complaint was the report of an interview of Mr. Allen by Agent Pluta and Agent Kepner on Feb. 28, 2007 (the "Pluta 302"), which had been provided to the defense, in redacted form, prior to trial, on Sept. 17, 2008, pursuant to a discovery order issued by Judge Sullivan. On Sept. 30, 2008, Mr. Bottini began his direct examination of Mr. Allen which continued through Oct. 1 when the trial recessed for the day, shortly after Mr. Allen's testimony that Bob Persons told him that "Ted is just covering his ass" by asking for bills. That evening the prosecutors discovered that exculpatory information had been redacted from the version of the Pluta 302 that had been provided to the defense. After several hours of deliberations by the six prosecutors about whether they were obliged to disclose that Brady information, Mr. Welch ordered its disclosure, and a less redacted version of that 302 containing the previously redacted Brady information was provided to Williams & Connolly shortly before midnight.

The next day, the defense filed an Emergency Motion To Dismiss Indictment Or For A Mistrial Due To Government's Continuing Brady Violations and, after lengthy argument on the motion on Oct. 2, Judge Sullivan ordered the prosecutors "forthwith" to provide the defense with unredacted copies of all FBI 302s, all IRS Memoranda of Interviews, and the grand jury testimony of all of the government's witnesses. Judge Sullivan recessed the trial until those documents were disclosed to the defense and Mr. Allen did not return to the stand until Oct. 6 when his direct examination concluded and his cross examination began.

- B. Are you aware of the reasons the Department denied Agent Joy's whistleblower complaint? If so, please describe what you learned.

Answer:

I am not aware of the reasons.

- C. Do you believe that Agent Joy's disclosures to the court were beneficial to uncovering the truth about the Stevens prosecution?

Answer:

Yes, Agent's Joy's disclosures were critically important and instrumental. The disclosure of Agent Joy's complaint to the Court and to Williams & Connolly precipitated a series of post-trial discovery motions and hearings which led ultimately to the appointment in February 2009 of a new team of prosecutors. The new prosecutors, Paul M. O'Brien (Chief, Narcotic and Dangerous Drug Section), David L. Jaffe (Deputy Chief, Domestic Security Section) and William J. Stuckwisch (Senior Trial Attorney, Fraud Section) quickly discovered some of the Brady/Giglio information which had been withheld from the defense. They discovered emails exchanged among Mr. Bottini, Mr. Goeke, Mr. Marsh and Mr. E. Sullivan during their April 15, 2008-interview of Mr. Allen about the Torricelli notes which had been provided to them by Williams & Connolly on April 8, 2008. That discovery in turn led them to Mr. E. Sullivan's and Mr. Goeke's handwritten notes of that interview which reflected that Mr. Allen told the prosecutors on that occasion that he did not recall speaking to Mr. Persons about the Torricelli notes. Their notes, and the later discovered notes of Mr. Bottini, constituted significant Brady/Giglio information which directly contradicted Mr. Allen's dramatic trial testimony that Mr. Persons told him that "Ted is just covering his ass" by asking for bills and which should have been disclosed to Williams & Connolly before the trial. The prosecutors' failure to disclose this information led directly to DOJ's motion to dismiss the indictment with prejudice, which Judge Sullivan promptly granted.

- D. If agents are prohibited from obtaining whistleblower status for reporting significant investigative and prosecutorial misconduct to federal judges, doesn't that create a disincentive for agents to come forward and provide information to federal judges that may be embarrassing to supervisors or attorneys conducting criminal prosecutions?

Answer:

My understanding is that FBI agents are entitled to whistleblower protection. See Code of Federal Regulations, Title 28, Chapter 1 (Department of Justice), Part 27, Whistleblower Protection for Federal Bureau of Investigation Employees (28 C.F.R. § 27.1, et seq.).

Chairman Patrick J. Leahy

April 18, 2012

page 23

- E. Do you believe FBI agents who come forward and report wrongdoing to federal judges should be afforded whistleblower protections? If not, why not?

Answer:

Yes.

Questions from Senator Orrin G. Hatch and Answers

1. On 3/15/12, Senator Murkowski introduced the Fairness in Disclosure of Evidence Act of 2012 (S. 2197). In your opinion, if enacted as written, would this bill have prevented the misconduct of the prosecutors in this case? If not, why not?

Answer:

A federal statute mandating disclosure of information favorable to the defense by a certain deadline after indictment might have caused the prosecutors to give more attention than was given to their Brady/Giglio obligations in Stevens and/or might have caused them or their supervisors to delay filing the indictment until they were sure that all required disclosures could be made by the deadline.

A specific statutory obligation might have deterred the intentional non-disclosures which we found to have occurred.

2. Despite significant evidence that the prosecution's star witness, Bill Allen, engaged in a sexual relationship with a minor, the Department of Justice has refused to prosecute him. Do you have any insight as to why the prosecution wasn't pursued?

Answer:

I have no insight regarding the reason or reasons for DOJ's declination.

3. The FBI Agents in this case prepared 55 FBI 302s of the government's interviews of Bill Allen from August 30, 2006 to September 9, 2008. However, there were interviews of Bill Allen which produced significant exculpatory information that were not memorialized in an FBI 302. In addition, there were several interviews of Rocky Williams which produced significant exculpatory evidence that were not memorialized in an FBI 302. Much of the focus has been on the subsequent discipline and investigation of the prosecuting attorneys in this case. To your knowledge has the FBI case agent been disciplined for her actions in this case?

Answer:

Not to my knowledge. As I stated in response to a question by Senator Grassley, we understand that the matter remains under review by the Department of Justice.

Questions from Senator Michael S. Lee and Answers

1. In your report you state that *Brady* information passed through the hands of many people in the office while prosecutors decided what information should be disclosed. During the hearing, you reiterated that Joseph W. Bottini and James A. Goeke proposed disclosing some of the *Brady* information to the defense, but in the end, none of it was disclosed. Which member of the prosecution made the final decision on what should and should not be disclosed on the final drafts of the two *Brady* letters submitted?

Answer:

Mr. Welch made the final decision during a meeting on Sept. 8, 2008 with Ms. Morris, Mr. Marsh and Mr. E. Sullivan. Based on information previously provided to him by Mr. Marsh, Mr. Bottini and Mr. Goeke, Mr. Welch believed at that time that there was no evidence supporting the allegation that Mr. Allen suborned perjury by Ms. Tyree. During that meeting, he instructed Mr. Marsh to disclose all information in the government's possession on the issue. He believed that the next to last paragraph in the summary Brady letter sent to Williams & Connolly on Sept. 9, 2008 did that until on or about Oct. 15, 2008, when he first read Agent Eckstein's 302 of his and AUSA Russo's interview of Ms. Tyree on July 22, 2004, which reported that:

TYREE had sex with BILL ALLEN when she was 15 years old. TYREE previously signed a sworn affidavit claiming she did not have sex with ALLEN. TYREE was given the affidavit by ALLEN's attorney, and she signed it at ALLEN's request. TYREE provided false information on the affidavit because she cared for ALLEN and did not want him to get into trouble with the law.

FBI SA John Eckstein's 302 of Interview of B. Tyree, dated Oct. 28, 2004, at 1.

Mr. Welch sent a copy of the Anchorage Police Department's file on Mr. Allen, which included a copy of Agent Eckstein's 302, to Williams & Connolly the same day.

2. You concluded that significant Brady/Giglio information was intentionally withheld from Senator Stevens' attorneys. You stated that Joseph W. Bottini and James A. Goeke withheld and concealed significant exculpatory information obtained from Robert Williams and impeachment information regarding Bill Allen, and that James A. Bottini failed to correct materially false testimony given by Bill Allen.
 - a. Why were these two gentlemen the only ones found to be at fault for the *Brady* violations when others were aware of the information?

Answer:

Our investigation revealed that neither Ms. Morris nor Mr. Welch was aware of the Brady/Giglio information contained in Agent Eckstein's 302 or provided by Rocky Williams during his pre-trial interviews with Mr. Bottini and Mr. Goeke in August and September 2008, that Mr. E. Sullivan, given his junior status, made no decisions on Brady/Giglio disclosures and deferred to his much more experienced colleagues and supervisors. Mr. Marsh died on September 26, 2010 and our report contains no conclusions regarding his conduct and intent.

Mr. Bottini and Mr. Goeke were aware of the Brady/Giglio impeachment information about Mr. Allen that was contained in Agent Eckstein's 302 and other Department of Justice documents since 2007 when Mr. Bottini tried the case against Mr. Kohring and when Mr. Goeke tried Mr. Kott. In each case, they withheld and concealed that information from the defense attorneys and from the Court during sealed hearings that were held in each case.

Mr. Goeke and Mr. Bottini also interviewed Rocky Williams in August and September 2008 and he repeatedly told them that he understood and believed, based on conversations that he had had with Mr. Allen and Senator Stevens, that the costs of VECO's work on Senator Stevens's home were included in the bills of Christensen Builders which were sent to, and paid in full by, the senator and his wife. And they were also aware since 2007, and specifically reminded on August 22, 2008 in an email sent to them by Mr. E. Sullivan, that Senator Stevens's principal defense at trial would be that he and his wife understood and believed that the VECO expenses were included in the Christensen Builders bills for the renovation and that his defense attorneys would "try to squeeze this point out of Rocky on cross". After they interviewed Mr. Williams on Aug. 22, 2008, Mr. Goeke and/or Mr. Bottini dictated a two-sentence 302 to Agent Joy which omitted the Brady information and contained only statements by Mr. Williams that would be useful to them in impeaching Mr. Williams at trial in the event the Brady information came out during cross-examination.

3. When asked what can be done to prevent such mismanagement from happening again, you suggest Congress should work to eliminate the materiality requirement in the pretrial setting and require the prosecution to disclose any and all information that would be considered favorable.
- a. Do you believe the bill proposed by Senator Murkowski adequately enforces this solution?

Answer:

Yes, by its elimination of the materiality standard.

- b. What else can Congress do?

Answer:

Require prosecutors to disclose to a defendant before trial all statements made by witnesses during interviews which are contained in FBI 302s (or their equivalent) and in investigators' handwritten notes by amending the Jencks Act (18 U.S.C. § 3500).

In my view, in the interest of a fair trial, it is simply unacceptable that a cooperating, key witness like Bill Allen could be interviewed by agents and prosecutors 55 times over two years, and 55 memoranda (FBI 302s) of those interviews created, but because he never testified in a grand jury, no prior statement of Mr. Allen was required by the Jencks Act to be disclosed to the attorneys for Senator Stevens.

To correct this very significant defect, Congress needs to amend the definition of "statement" contained in 18 U.S.C. § 3500(e)(1&2) by eliminating the requirements that the witness's statement must be "signed or otherwise adopted or approved by him" or "a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously", and/or by specifically including agents notes and memoranda of statements made by a witness within the definition of "statement".

4. In the hearing, you stated that the prosecutorial misconduct examined in the Stevens case is not "representative of what happens in cases brought by the thousands across this country by the Department of Justice." What evidence leads you to this conclusion?

Answer:

My opinion, based on my many years of experience as a prosecutor and defense lawyer, is that most prosecutors disclose Brady/Giglio information as required. Though the Department of Justice has brought much needed attention to this subject through improved Brady/Giglio disclosure policies and training requirements, there is room for material improvement.

Respectfully submitted,

Yours truly,



Henry F. Schuelke III