Responses to Questions for the Record

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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.

<u>Questions on Materiality and "Reasonably Appear"</u>

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.

<u>Questions on Plea Bargains</u>

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.

<u>Questions on National Security</u>

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 sentence 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.