Questions for the Record
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Committee on the Judiciary
United States Senate

"Ensuring That Federal Prosecutors Meet Discovery Obligations"
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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.

<u>FBI Agent Involvement</u>

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.

<u>**Addressing disciplinary concerns within the Federal Bureau of Investigations**</u>

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.

<u>**Training versus discipline**</u>

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.