



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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