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Senator Patrick J. Leahy
Chairman, Senate Judiciary Committee
United States Senate
Washington, DC 20510-6275

Re: Testimony for Hearing on "Ensuring that Federal Prosecutors Meet Discovery Obligations," June 6, 2012

Dear Senator Leahy:

Thank you for inviting me to testify before the Senate Judiciary Committee in connection with your consideration of S. 2197, which would reform federal prosecutors' discovery obligations and procedures. By way of background, I am a professor of law and criminology at the University of Pennsylvania Law School and director of its Supreme Court Clinic. I have also served as a law clerk to the Honorable Anthony M. Kennedy on the Supreme Court of the United States and as an Assistant U.S. Attorney for the Southern District of New York, in which capacity I prosecuted a wide range of criminal cases and became intimately familiar with prosecutors' discovery obligations. My scholarship focuses on criminal procedure, particularly as it relates to prosecutors, and several of my articles address *Brady* obligations and the structure and functioning of prosecutors' offices, including "Brady v. Maryland: *From Adversarial Gamesmanship Toward the Search for Innocence?*," *in* CRIMINAL PROCEDURE STORIES 129 (Carol S. Steiker ed. 2006); *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009); and *New Perspectives on* Brady *and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961 (2010) (coauthored with five other authors; I had primary responsibility for the training and supervision section).

The impulse behind the bill is a noble one. Constitutional due process rightly requires that prosecutors turn over to defendants significant evidence that could tend to prove the defendant innocent or reduce the penalty (which is called *Brady* material, after *Brady v. Maryland*, 373 U.S. 83 (1963)) or could tend to impeach the credibility of the prosecution's witnesses (which is called *Giglio* material, after *Giglio v. United States*, 405 U.S. 150 (1972)). It appears that prosecutors violate that obligation with some frequency, and those violations can lead to convictions of innocent defendants, but violations may well come to light much later or not at all. In the wake of the failure of Senator Stevens' prosecutors to turn over multiple items of *Brady* and *Giglio* material, it makes sense that this Committee is scrutinizing the discovery problem closely.

I think it important, however, to step back from the Stevens prosecution to look at the problem more generally. That was an unusually high-profile case, involving prosecutors both from Main Justice in Washington and the U.S. Attorney's Office in Alaska and a great deal of documentary evidence, on a very compressed timetable. It was a public-corruption prosecution, not one involving violence, drugs, or property crime, which are far more typical federal prosecutions. Most importantly, the Senator Stevens case went to trial, but the vast majority of defendants plead guilty much earlier. What happened there should not be allowed to recur, but it is far from the typical scenario. S. 2197 would apply to all such cases. Thus, it is important to focus on the sources of the broader problem and the possible effects of the bill's solutions.

The bill would change the substantive standard of material, favorable evidence; accelerate the timing of its disclosure; limit protective orders and waivers of the right to disclosure; and allow defendants who suffer such violations to recover their costs, as well as authorizing a range of other remedies.

I fear that the thrust of the bill is beside the point. The root problem is not one of standards but enforcement. The prosecutors in Senator Stevens' case, as in so many cases, violated pre-existing law, and nothing in this bill would have prevented those violations. I also think it important to focus not on the handful of jury trials but on plea bargaining, which resolves roughly 95% of adjudicated criminal cases. In that vein, I have concerns about the bill's waiver provisions, which would likely change nothing but might wind up doing some harm. And while I favor automatic disclosure of *Brady* material during plea bargaining, which is already the norm for federal prosecutors, I worry that routine disclosure of *Giglio* material would carry real costs for victims and witnesses, impeding prosecution of child, sex, and violent crimes in particular.

I. The Root Problem Is Not the Standards but Enforcement

The *Brady* and *Giglio* decisions have been on the books now for decades, yet they are not infrequently violated. Studies have found hundreds of violations by state and local prosecutors. *See, e.g.*, Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHICAGO TRIBUNE, Jan. 10, 1999, at 1; Bill Moushey, *Hiding the Facts: Discovery Violations Have Made Evidence-Gathering a Shell Game*, PITTSBURGH POST-GAZETTE, Nov. 24, 1998, at A1. No particular mental state is required to prove a discovery violation, so many of these violations were inadvertent or negligent, though on occasion they are reckless or intentional.

All of these failures to disclose, including those in the Stevens case, happened in violation of well-settled law. This bill would not have prevented any of those violations.

The much bigger problem is not the substantive standards but the structures and procedures used to comply with or enforce them. Those include prosecutorial hiring, incentives, training, oversight, discipline, firing, and office culture. Some of that can come externally, from congressional oversight hearings, bar disciplinary authorities that currently do little, and sometimes judicial review of evidence *in camera*. But experience has proven these approaches to be at best secondary. After-the-fact policing by such outsiders may weed out a few egregious

cases or bad apples but not attack the systemic failings that led to the Senator Stevens debacle. Outsiders lack the information, the sustained oversight, and the policy expertise to craft and police prosecutorial guidelines, and their scrutiny is sporadic. Legislatures, judges, and bar authorities may all play constructive roles, but mainly as backstops, prodding prosecutors' offices and other law-enforcement agencies to regulate and supervise themselves.

In practice, there are two basic prosecutorial-discovery issues, both of which are about not the substantive standards but about compliance. First, prosecutors, police, and other agents must gather all the evidence from across far-flung agencies, case files, computers, lawyers, and teams. In the Senator Stevens case, much of the problem came from a failure to memorialize witness-interview evidence into formal FBI 302 reports in the first place. Second, prosecutors must learn to see and track what evidence in fact meets the standard of being favorable or helpful to the defense and how a creative defense lawyer might use it. Prosecutors gearing up for trial can easily develop tunnel vision and be blind to how evidence could in fact help the defense or discount its significance, particularly if the prosecutors themselves have no or limited experience as defense lawyers.

As far as I can tell, this bill would do nothing to attack those core problems.

II. The Core Issue Is Not a Handful of Trials, but Plea Bargaining

As originally conceived, *Brady*, *Giglio*, and related cases interpreted a criminal defendant's right under the Due Process Clauses of the U.S. Constitution to a fair trial. They guarantee disclosure of material, favorable evidence in time for its effective use at trial. Thus, these guarantees already applied with full force to the Senator Stevens prosecution.

But the Stevens case is quite atypical. Roughly 95% of criminal cases never reach trial, but result in guilty pleas, usually as a result of plea bargaining. Thus, the U.S. Supreme Court held that defendants have no constitutional right to *Giglio* impeachment material or evidence of affirmative defenses ahead of trial, in time for plea bargaining. *United States v. Ruiz*, 536 U.S. 622 (2002). The Court has never explicitly addressed whether the same is true of classic *Brady* exculpatory material.

Of course, for federal prosecutions, Congress may broaden discovery rights beyond the constitutional minimum. Thus, in order to address plea bargaining, the bill moves the timing of disclosure very early in the case, to arraignment, before entry of a guilty plea.

For classic *Brady* material, which tends to undercut a defendant's guilt or sentence, earlier disclosure is probably a good idea (except perhaps for affirmative defenses such as entrapment, or possibly duress or insanity, that excuse wrongful conduct rather than justifying it). Plea bargaining too often happens in the dark, and withholding *Brady* material may let prosecutors bluff factually and morally innocent defendants into pleading guilty. But, when I was a federal prosecutor more than a decade ago, it was already standard practice to turn over such classic *Brady* material quite early, well in advance of trial, so I doubt the bill would change

much in practice. It is noteworthy that even the fast-track plea agreement in *Ruiz* represented that the prosecution had disclosed and would continue to disclose such evidence.

But for *Giglio* impeachment material, mandating very early disclosure could prove costly, as I discuss below. Such discovery obligations are routinely waived in plea agreements, as they were in the *Ruiz* case, so the import of the bill depends on how courts construe its procedure requiring knowing, voluntary waivers in open court subject to judicial discretion.

I strongly suspect that prosecutors will routinely ask for such waivers, defendants will routinely acceded to them, and courts will routinely rubber-stamp them, just as they do for the myriad other rights that defendants waive every day in pleading guilty. Every day, the plea-bargaining assembly line pressures defendants to waive such fundamental constitutional rights as the Sixth Amendment right to a jury trial and the due process right to proof beyond a reasonable doubt, and most of the time defendants and judges go along. Judges have little incentive to buck such waivers, for otherwise they would clog their own courts instead of clearing their dockets. And defendants prefer to take advantageous plea bargains quickly; at most, they will use this new right as a bargaining chip to extract lower sentences in return.

If, however, the waiver rules have any teeth, they will prevent or impede guilty pleas, particularly the fast-track pleas used to deal with the flood of immigration cases along the southwestern border. That rule would reduce the value to prosecutors of guilty pleas, particularly if courts take seriously the requirement of disclosure right after arraignment, before prosecutors have had much time to gather evidence or bargain. Because pleas would not save them as much work, they would be correspondingly less willing to offer the concessions needed to plead cases out.

Moreover, I do not see disclosure of *Giglio* material during plea bargaining as crucial to justice in the way that *Brady* disclosure is. *Brady* goes to whether a defendant actually did the crime and deserves the punishment. *Giglio*'s right to impeachment material makes sense at trial, in the context of all the incriminating evidence, as it undercuts the key witnesses on which the jury might over-rely. The incriminating evidence provides the prosecution's version of events, while the impeachment material tempers it, limiting its affirmative significance. But during plea bargaining, defendants have no right to the incriminating evidence beyond the narrow confines of Federal Rule of Criminal Procedure 16. As the Supreme Court recognized in *Ruiz*, it is artificial to disclose impeachment material early, divorcing it from the incriminating evidence whose importance it undercuts. After all, if one witness has bad eyesight, that may be utterly irrelevant if there are five other witnesses with perfect eyesight who also reported the exact same event. Thus, in *Ruiz*, the Supreme Court unanimously declined to find that the Constitution requires disclosure of impeachment evidence during plea bargaining.

If early *Giglio* disclosures had little cost, I might still support them as helping to reduce bluffing and trial by surprise. That might make sense in the context of other reforms to broaden discovery of incriminating evidence, which would put that evidence in context. But as I will discuss, I fear that routine *Giglio* disclosures would carry serious costs to victims and witnesses.

III. Costs of Discovery to Witnesses and Victims

Giglio material will often provide reveal or provide clues as to the identities of various victims or witnesses. It may unavoidably refer to a particular witness's romantic jealousies, professional rivalries, criminal record, or role in a conspiracy, all of which may allow the defense to figure out the witness's identity. At trial, that is not a problem: the witness is about to testify in person, in open court, so the defense will learn his identity regardless. But accelerating that discovery, so that it applies not only to the 5% of trials but also to the 95% of plea bargains, carries heavy costs.

The most obvious costs are those to victims. Rape victims, molested children, and victims of other forms of violence are understandably traumatized and fearful. They may be easy prey to intimidation or other forms of tampering. Those risks are probably greatest in cases with child victims, organized crimes, violent gangs, and sex or other violent crimes. The risks are likely lower in white-collar crime cases, such as the Senator Stevens prosecution, and property-crime prosecutions.

Criminal cases also involve many hidden witnesses. These include undercover agents, cooperating witnesses, and confidential informants. These witnesses legitimately fear for their safety. As the widespread "Stop Snitching" campaign demonstrates, many communities are hostile to witnesses who dare to cooperate with the government. Yet in jurisdictions that disclose prosecution witnesses' names, addresses, and statements to the defense, witness threats and tampering have become serious problems. *See, e.g.*, David Kocieniewski, *Scared Silent: In Witness Killing, Prosecutors Point to a Lawyer*, N.Y. TIMES, Dec. 21, 2007.

Now, the bill does allow a safety valve, authorizing prosecutors to move for protective orders. But it requires prosecutors to affirmatively prove that the witness's safety is threatened, and the procedure might prove too cumbersome and difficult, deterring prosecutors from using it.

More importantly, the bill limits protective orders to those needed to protect witness's safety. It makes no provision for preventing witness tampering or bribery. And it makes no provision for keeping undercover agents' and confidential informants' identities secret so that they may continue to work undercover and provide information to prove future cases. A major reason that prosecutors agree to plea bargains in many cases is so that they can preserve that confidentiality. That is an important quid pro quo for plea-bargaining concessions, and if prosecutors cannot withhold those identities they will be much less willing to offer defendants plea concessions and will be able to prosecute many fewer gang, conspiracy, and organized-crime cases.

In short, I applaud the Committee's work and focus on this important problem, but I fear that this bill distracts attention from the root problem and, unless amended, would cause unintended harms.

Sincerely,

Stephanos Bibas

Enclosure:

My curriculum vitae