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PROSECUTION OF FORMER SENATOR TED STEVENS

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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CONTENTS

APRIL 19, 2012

Page

OPENING STATEMENTS

The Honorable F. James Sensenbrenner, Jr., a Representative in Congress from the State of Wisconsin, and Chairman, Subcommittee on Crime, Terrorism, and Homeland Security 1
The Honorable Robert C. "Bobby" Scott, a Representative in Congress from the State of Virginia, and Ranking Member, Subcommittee on Crime, Terrorism, and Homeland Security 3

WITNESSES

Henry F. Schuelke, III, Partner, Janis, Schuelke, and Wechsler
Oral Testimony 36
Kenneth L. Wainstein, Partner, Cadwalader, Wickersham and Taft LLP
Oral Testimony 48
Prepared Statement 51
Alan I. Baron, Senior Counsel, Seyfarth Shaw LLP
Oral Testimony 57
Prepared Statement 58

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary 5
Material submitted by the Honorable Robert C. "Bobby" Scott, a Representative in Congress from the State of Virginia, and Ranking Member, Subcommittee on Crime, Terrorism, and Homeland Security 7

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Addendum to the Prepared Statement of Kenneth L. Wainstein, Partner, Cadwalader, Wickersham and Taft LLP 74
Letter from Virginia E. Sloan, The Constitution Project, to the Honorable F. James Sensenbrenner, Jr. 183
Letter from Virginia E. Sloan and Stephen F. Hanlon, The Constitution Project, to the Honorable Eric H. Holder, Jr. 185
Letter from Robert Gay Guthrie, President, the National Association of Assistant United States Attorneys 188
Prepared Statement of Sean Bennett, Kalamazoo, Michigan 191

OFFICIAL HEARING RECORD

MATERIAL SUBMITTED FOR THE HEARING RECORD BUT NOT REPRINTED

Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated April 7, 2009, Henry F. Schuelke III, Special Counsel, D.C. Bar no. 91579; and William Shields, D.C. Bar no. 451036, Janis Schuelke & Wechsler This report is available at the Subcommittee and can also be accessed at:

http://www.dcd.uscourts.gov/dcd/sites/www.dcd.uscourts.gov.dcd/files/Misc09-198.pdf

PROSECUTION OF FORMER SENATOR TED STEVENS

THURSDAY, APRIL 19, 2012

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 9:34 a.m., in room 2141, Rayburn House Office Building, the Honorable F. James Sensenbrenner, Jr. (Chairman of the Subcommittee) presiding.

Present: Representatives Sensenbrenner, Gohmert, Goodlatte, Poe, Gowdy, Adams, Scott, Conyers, Johnson, Pierluisi, and Jackson Lee.

Staff Present: (Majority) Caroline Lynch, Subcommittee Chief Counsel; Harold Damlin, Counsel; Sheila Shreiber, Counsel; Samuel Ramer, Counsel, Lindsay Hamilton, Clerk; (Majority) Bobby Vassar, Subcommittee Chief Counsel; Aaron Hiller, Counsel; and Veronica Eligan, Professional Staff Member.

Mr. SENSENBRENNER. The Subcommittee will come to order.

Today's hearing examines the troubled prosecution of former United States Senator Ted Stevens of Alaska, which resulted in the Department of Justice requesting the judge to overturn the jury's guilty verdict and dismiss the charges against him. The Justice Department's Public Integrity Section, with the assistance of two assistant U.S. attorneys from Alaska, prosecuted Senator Stevens. The Public Integrity Section is supposed to be the Department's elite unit for handling political corruption cases. In light of what the prosecutors did in this case, I have to question the section's competency and ethics.

In July 2008, a few months before he was to run for reelection, Senator Stevens was indicted for making false statements on his annual Senate disclosure form. The indictment charged that he had not paid for certain renovations made to a home he owned in Alaska and failed to disclose the value of the renovations as gifts. The renovations were made by VECO Corporation, an Alaska company owned by the Senator's longtime friend, Bill Allen.

In order to allow Senator Stevens the chance to clear his name before the upcoming November election, his attorney requested an October trial date. The government not only agreed to a speedy trial, but suggested an even earlier date of September. The result was that there would be only 55 days between indictment and the start of the trial.

Since this was a criminal prosecution, the government was required to produce all exculpatory and impeachment-type evidence known as the Brady and Giglio material. Pretrial, the government summarized what it represented to be all of the Brady and Giglio material in its possession in two letters sent to counsel for Senator Stevens. As would be discovered later, the prosecutors had made misstatements and omitted significant evidence in each letter.

This trial started in late September 2008. Senator Stevens' counsel repeatedly asked the judge to dismiss the case because the prosecutors had failed to produce the evidence in violation of their Brady and Giglio obligations. Numerous times the judge found that the prosecutors had violated their discovery obligations. While the judge declined to dismiss the case, he repeatedly ordered the prosecutors to produce the various documents required by Brady and Giglio. He sanctioned the government by excluding certain evidence.

In late October, the jury found Senator Stevens guilty on all seven counts of the indictment. As subsequent events would reveal, the jury reached its verdict based upon a distorted version of the facts. Soon after the trial ended, an FBI agent involved in the case took the unusual step of filing a whistleblower complaint with DOJ and the judge, alleging in specific detail that his co-FBI agent and at least one of the prosecutors engaged in serious misconduct and unethical behavior in the prosecution of Senator Stevens.

Given these serious allegations, the judge ordered the government to produce materials relating to the agent's complaint. Consistent with its behavior during the trial, the government did not comply with the judge's order. The judge had finally had enough of the government's noncompliance, and held two of the Public Integrity Section's prosecutors in civil contempt.

At this point, the DOJ assigned a new team of attorneys from outside the Public Integrity Section to handle the remainder of the Stevens post-trial litigation. They soon discovered that the prosecutors had failed to produce to Senator Stevens' counsel significant exculpatory and impeachment information in the form of interview notes relating to the key prosecution trial witness, Bill Allen.

After producing the interview notes to the judge and to Senator Stevens' counsel, DOJ took the drastic step of asking the judge to set aside the guilty verdict and to dismiss the indictment of Senator Stevens based upon the prosecutor's prior failure to produce the interview notes. While the case was tossed out, it was too little, too late. Senator Stevens had lost his bid for reelection and the damage done by the prosecutors was irrevocable.

The judge was so concerned about the government's admitted Brady violations, combined with what he described as "prosecutorial misconduct to a degree and extent that this court has not seen in 25 years on the bench," that he took the extraordinary step of appointing a special counsel, Henry Schuelke, to investigate and, if appropriate, prosecute criminal contempt proceedings against the Stevens prosecutors.

In November of last year, Mr. Schuelke completed his investigation and submitted to the judge a 500-page report.* The judge re-

*See http://www.dcd.uscourts.gov/dcd/sites/www.dcd.uscourts.gov.dcd/files/Misc09-198.pdf.

leased the report to the public on March 15, 2012, and the facts detailed in that report have generated today's hearing.

Mr. Schuelke did not recommend bringing criminal contempt charges against any of the prosecutors due to what he concluded was a deficiency in the judge's orders. One might say that the prosecutors got lucky. Significantly, Mr. Schuelke found that the investigation and prosecution of U.S. Senator Ted Stevens were permeated by the systematic concealment of exculpatory evidence which would have independently corroborated Senator Stevens' defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness.

Mr. Schuelke's report describes a series of improper actions taken by the prosecutors and the FBI agent that are sobering. His report takes us inside a major criminal prosecution where he found that the prosecutors won their case through willfully failing to disclose exculpatory and impeachment evidence, intentionally failing to correct false testimony, making misrepresentations to the judge, to defense counsel, and even to people within DOJ, shirking supervisory responsibility, grossly mismanaging the trial team, and acting on questionable ethical decisions.

Further discrediting the prosecutors, he also found that they had a collective memory failure relating to certain key events. As would be expected regarding any report like this one, people have criticized Mr. Schuelke's conclusions, tactics and tones, but there can be no dispute about the hard facts which lead to only one conclusion: that Senator Stevens was denied a fair trial due to the collective misconduct of the prosecutors. If they had complied with their ethical and legal obligations, the jury might not have convicted Senator Stevens.

I think it is important that we try to understand how and why the government botched this prosecution before considering whether we need legislative changes. I am also interested to know that what, if anything, DOJ has done in response to the problems that have been uncovered in the Stevens prosecution. DOJ undertook an internal review of the Stevens' prosecutors, the results of which were leaked to the press over a year ago.

Despite the Attorney General's public pronouncements to Congress that he plans on sharing the DOJ report, he has not done so. We invited DOJ to send a representative to testify at this hearing, but the Department declined the invitation.

I look forward to discussing this very troubling matter today with Mr. Schuelke and the other panel of witnesses which we have scheduled to testify.

And I now yield to the gentleman from Virginia, Mr. Scott, for his opening statement.

Mr. SCOTT. Thank you, Mr. Chairman. I am pleased to join you for this hearing regarding the prosecutorial misconduct in the case involving former Senator Ted Stevens of Alaska.

I commend the Attorney General for taking decisive action after the findings that you have outlined, dismissing the prosecution of Senator Stevens with prejudice upon learning of the misconduct. I understand that his Department's decision not to comment on the matter during the Office of Professional Responsibility review, but it is clear from other cases that the problem is greater than just

the Stevens case. And I am concerned about whether or not there are sufficient safeguards in place to prevent such disturbing cases from occurring in the future.

The government is given enormous powers over individuals in the criminal justice system, including the power to jeopardize and take away their freedom, even their lives in some cases. In exercising such enormous power over individuals, it is incumbent upon the criminal justice system to ensure basic fairness to them. And when the government conceals information in a prosecution that could undermine its case against a defendant, such concealment is fundamentally and constitutionally unfair as well as unethical, and it is actually illegal under *Brady v. Maryland* and other cases.

Generally a defendant will have no way to know of or learn of exculpatory evidence known to the government unless the government discloses it. Given the adversarial relationship between the government and the defendant in criminal cases and the natural desire of human beings, including prosecutors, to win a case, there are strong temptations not to reveal case weaknesses. Therefore, there must be strong disincentives, as well as obligations, for the government to overcome such temptations. I believe that the Attorney General and his staff have demonstrated and continue to demonstrate commendable responsibility in revealing the failures of the Department to meet its obligations in the Stevens case. However, I am not convinced that the dependence on after-the-fact actions by an individual Attorney General and disciplinary proceedings against individual attorneys for their failures to reveal exculpatory evidence, if discovered, is a strong enough standard to prevent such problems from occurring in the future.

In other recent cases, including potential cases among those reported in recent newspaper articles, regarding unrevealed discredited scientific evidence relied upon for convictions of hundreds of defendants caused me to believe that stronger requirements than those currently in place need to be considered.

Also, we have several letters that I will offer for the record, signed by dozens of criminal justice professionals and observers, including many former prosecutors calling for stronger measures as safeguards against concealment of exculpatory information by prosecutors.

I look forward to any light the testimony of our witnesses may shed on these issues. I also look forward to working with you, Mr. Chairman, and the Department of Justice, to ensure that effective measures are in place to prevent such cases as Senator Stevens' case from occurring in the future. Thank you and I yield back.

Mr. SENSENBRENNER. Thank you.

And without objection, the letters referred to by the gentleman from Virginia will be put into the record.

The Ranking Member of the full Committee, the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Sensenbrenner. I commend you and Ranking Member Scott for your statements, which I concur with, and will merely submit my opening for the record and observe that the Brady rule is being violated in other respects as well. In other words, there are people that don't have the rank of United States Senator who are no doubt being affected by viola-

tions of the Brady rule. So it is in that spirit that I commend both the Chairman and the Ranking Member for the work that they have done in this regard. And I will yield back the balance of the time, and I will yield briefly to Bobby Scott.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

In the landmark case *Brady v. Maryland,* the Supreme Court writes: "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." Looking to the constitutional guarantees of due process and effective assistance of counsel in the Fifth and Sixth Amendments, the Court stated that prosecutors have a duty to disclose evidence that is favorable to the defense. This rule, when honored, helps to ensure fair process in criminal trials.

Over time, the *Brady* rule has become an integral part of our federal criminal system. As a direct consequence of *Brady* and its line, Rule 16 of the Federal Rules of Criminal Procedure requires prosecutors to disclose a wide array of evidence at the request of a defendant. The Jencks Act, 18 U.S.C. § 3500, requires prosecutors to disclose certain information about government witnesses.

And, of course, all prosecutors are governed by professional rules of ethics that require us to share information in our possession that may be favorable to the defense. Because the government controls so much of the information pertinent to a criminal trial, we require federal prosecutors to make favorable evidence readily available to the other side.

Notably, however, Congress has never codified the *Brady* rule itself. No statute compels the disclosure of all exculpatory evidence. Instead, we have relied on Department of Justice policy, rules of procedure, and a sense of trust in our federal prosecutors to ensure that *Brady* is enforced.

Today, we will address whether that trust has been misplaced. Specifically, we focus on the trial of the late Senator Ted Stevens, whose prosecution was as flawed as they come. At no point in Senator Stevens' trial did prosecutors conduct a full or effective review for *Brady* information. They knowingly withheld impeachment evidence, and knowingly failed to correct perjured testimony.

We have come to these conclusions after a 2-year investigation by independent counsel Henry F. Schuelke. His analysis demontrates, beyond a reasonable doubt, that federal prosecutors intentionally withheld *Brady* information from Senator Stevens—and, in some instances, never bothered to learn the extent of the exculpatory evidence in their possession.

It has become common to say that, if these offenses could happen to Senator Stevens, they could happen to anyone. Often overlooked is the fact that prosecutorial misconduct of this nature happens with alarming frequency, to the obvious harm of countless defendants—many of them far less prominent than a U.S. Senator.

For example, the Lindsay Manufacturing Company was the first corporation to be convicted of charges under the Foreign Corrupt Practices Act. The conviction was reversed after the court found that prosecutors had inserted falsehoods in requests for search warrants, allowed an FBI agent to testify untruthfully before a grand jury, improperly reviewed *Brady* material, and withheld key *Brady* evidence from the defense.

Consider the case of Edgar Rivas, a sailor on a Venezuelan freighter bound for New York who was charged with possession of more than five kilograms of cocaine. He was sentenced to ten years in prison. On appeal, the Second Circuit learned that prosecutors had obtained a confession from their main witness, Rivas's shipmate, and never disclosed that statement to the defense.

Or consider the case of Anthony Washington, a drug dealer with multiple felony convictions. Washington might have been in prison for unlawful possession of a firearm had federal prosecutors not withheld the fact that their main witness had been previously convicted for making a false report.

These cases, and others like them, are inexcusable. Still, the Department of Justice has been given time to bring its attorneys into line with *Brady.* In 2006, the Department revised the United States Attorney Manual to explicitly require *Brady* disclosure. In 2010, following the embarrassing reversal of Senator Stevens' conviction, Deputy Attorney General David Ogden issued a series of memoranda to provide further guidance for prosecutors.

But neither of these policies are judicially enforceable. And given the continued run of *Brady* violations, it may be time for Congress to consider other options.

During the trial of Senator Stevens, in deliberations about whether a court order would be necessary to compel the government to produce *Brady* material, Judge Emmet G. Sullivan stated: "I'm not going to write an order that says 'follow the law.' We all know what the law is. . . . I'm convinced that the government and its team of prosecutors . . . in good faith, know that they have an obligation on an ongoing basis to provide the relevant, appropriate information to defense counsel." Because the court accepted the prosecutors' repeated assertions that they were complying with *Brady,* it did not issue an order directing the attorneys to follow the law.

But if federal prosecutors must be ordered to obey *Brady,* because it is too vague a rule or too difficult to follow, then it may fall to Congress to draw a brighter line. This is the conclusion drawn in this letter, "A Call for Congress to Reform Federal Criminal Discovery," signed by 141 judges, prosecutors, law enforcement officers, defense lawyers, conservative leaders, and others. Few issues draw so much agreement from such a diverse and experienced group.

I look forward to the testimony of the witnesses their insights into how we can prevent prosecutorial misconduct, restore a measure of faith in our federal criminal process, and protect the constitutional rights of all Americans.

Mr. SCOTT. Thank you. Mr. Chairman, I just want to mention for the record the statement from the Department of Justice, a letter from the National Association of Criminal Defense Lawyers, ACLU, and a letter from the Constitutional Project that has almost 150 signatories.

Mr. SENSENBRENNER. Without objection, the material will be included.

[The information referred to follows:]

Department of Justice

STATEMENT FOR THE RECORD

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

HEARING ON THE PROSECUTION OF FORMER SENATOR TED STEVENS

APRIL 19, 2012

Statement for the Record from the Department of Justice

Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
U.S. House of Representatives

Hearing on the Prosecution of Former Senator Ted Stevens
April 19, 2012

1. Introduction

The Department of Justice respectfully submits this statement for the record for today's hearing before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, on the prosecution of former Senator Ted Stevens.

When concerns were first raised about the handling of the prosecution of Senator Stevens, the Department immediately conducted an internal review. The Attorney General recognized the importance of ensuring trust and confidence in the work of Department prosecutors and took the extraordinary step of moving to dismiss the case when errors were discovered. Moreover, to ensure that the mistakes in the *Stevens* case would not be repeated, the Attorney General convened a working group to review discovery practices and charged the group with developing recommendations for improving such practices so that errors are minimized. As a result of the working group's efforts, the Department has taken unprecedented steps, described more fully below, to ensure that prosecutors, agents, and paralegals have the necessary training and resources to fulfill their legal and ethical obligations with respect to discovery in criminal cases. These reforms include a sweeping training curriculum for all federal prosecutors and the requirement – for the first time in the history of the Department of Justice – that every federal prosecutor receive refresher discovery training each year.

In light of these internal reforms, the Department does not believe that legislation is needed to address the problems that came to light in the *Stevens* prosecution. Such a legislative proposal would upset the careful balance of interests at stake in criminal cases, cause significant harm to victims, witnesses, and law enforcement efforts, and generate substantial and unnecessary litigation that would divert scarce judicial and prosecutorial resources. As was recently recognized by the Advisory Committee on Criminal Rules of the Judicial Conference of the United States ("Criminal Rules Committee"), which in 2010-11 considered and rejected changes to Rule 16, true improvements to discovery practices will come from prosecutors and agents having a full appreciation of their responsibilities under their existing obligations, rather than by expanding those obligations.

2. The Schuelke Report on the prosecution of Senator Stevens and the OPR investigation

As Mr. Schuelke acknowledged in his report, the Department cooperated fully with Mr. Schuelke's inquiry into the prosecution of former Senator Ted Stevens. The Department's Office of Professional Responsibility ("OPR") separately investigated allegations of professional

misconduct by prosecutors in the *Stevens* case. Although OPR and Mr. Schuelke worked together and shared information throughout the investigative process, OPR is required to make an independent assessment of the allegations of misconduct. The entire Department misconduct review involves various steps, and the process is not finished until all the necessary steps have been completed. No formal action is taken against a Department employee until the disciplinary process is final.

The Department seeks to be as transparent as possible with respect to decisions involving our attorneys. Nonetheless, the Department must also comply with the provisions of the Privacy Act, and disclosures of information from OPR and Office of Inspector General investigations that examine the conduct of individual Department employees have significant Privacy Act implications. The Department's misconduct review process is in its last stages. To the extent it is appropriate and permissible under the law, we will endeavor to make the OPR findings public when that review is final.

The Department acknowledges the wide variety of discovery failures that occurred in the *Stevens* case. These failures are core topics of the Department's training regimen. The discovery training and resources that have been put in place over the past three years are designed, in part, to minimize the likelihood that the types of failures that occurred in *Stevens* will happen again.

3. The Department's response to the discovery failures that occurred in *Stevens*

Attorney General Holder, who had taken office shortly after the *Stevens* trial, acted swiftly and decisively after learning of the discovery failures that occurred in that case. A new team of seasoned prosecutors was assigned to review the matter, and they determined that Senator Stevens and his attorneys had not been provided access to information they were entitled to receive. Because the undisclosed information could have affected the outcome of the case, the Attorney General took the extraordinary and appropriate step of dismissing the prosecution of Senator Stevens. He also ordered a comprehensive review of all discovery practices and related procedures across the country to reduce the likelihood of future discovery failures. Over the past three years, as summarized in the Attorney General's memorandum to all federal prosecutors, dated March 27, 2012, the Department has taken extraordinary steps to provide prosecutors and agents with the training and resources necessary to meet their discovery obligations. Those steps are described in bullet points below.

The discovery failures in the *Stevens* case were not typical and must be considered in their proper context. Over the past 10 years, the Department has filed over 800,000 cases involving more than one million defendants. In the same time period, only one-third of one percent (.33 percent) of these cases warranted inquiries and investigations of professional misconduct by the Department's Office of Professional Responsibility. Less than three-hundredths of one percent (.03 percent) related to alleged discovery violations, and just a fraction of these resulted in actual findings of misconduct. Department regulations require DOJ attorneys to report any judicial finding of misconduct to OPR, and OPR conducts computer searches to identify court opinions that reach such findings in order to confirm that it examines any judicial findings of misconduct, reported or not. In addition, defense attorneys are not reticent to raise allegations of discovery failures when they do occur.

Our prosecutors and agents work hard to keep our country and communities safe and to ensure that criminals are brought to justice honorably and ethically. Nonetheless, when there is even a single lapse, we must, and we do, take it seriously, because it could call the integrity of our criminal justice system into question and could have devastating consequences. In April 2009, within days after the *Stevens* case was dismissed, the Criminal Discovery and Case Management Working Group was created to review the Department's policies, practices, and training concerning criminal case management and discovery, and to evaluate ways to improve them. Our comprehensive review of discovery practices identified some areas where the Department could improve, and we have undertaken a series of reforms which have since been institutionalized.

In January 2010, the Office of the Deputy Attorney General issued three memoranda to all criminal prosecutors: "Issuance of Guidance and Summary of Actions Taken in Response to the June 2009 Report of the DOJ Criminal Discovery and Case Management Working Group," "Requirement for Office Discovery Policies in Criminal Matters," and "Guidance for Prosecutors Regarding Criminal Discovery." These memoranda provide overarching guidance on gathering and reviewing potentially discoverable information and making timely disclosure to defendants; they also direct each U.S. Attorney's Office and Department litigating component to develop additional, district- and component-specific discovery policies that account for controlling precedent, existing local practices, and judicial expectations. Subsequently, the Office of the Deputy Attorney General has issued separate guidance relating to discovery in national security cases and discovery of electronic communications.

Later in January 2010, the Deputy Attorney General appointed a long-serving career prosecutor as the Department's first full-time National Criminal Discovery Coordinator to lead and oversee all Department efforts to improve disclosure policies and practices. Since January 2010, the Department has undertaken rigorous enhanced training efforts, provided prosecutors with key discovery tools such as online manuals and checklists, and continues to explore ways to address the evolving nature of e-discovery. These steps have included:

- All federal prosecutors are now required to undertake annual update/refresher discovery training. Roughly 6,000 federal prosecutors across the country – regardless of experience level – receive the required training annually on a wide variety of criminal discovery-related topics.

- During 2010-11, the Department's National Criminal Discovery Coordinator traveled to approximately 40 U.S. Attorney's Offices throughout the country to present four-hour blocks of training on prosecutors' disclosure obligations under *Brady*, *Giglio*, the Jencks Act, Rule 16, and the U.S. Attorneys' Manual ("USAM"), as well as on the discovery implications of electronically stored information ("ESI"). He also conducted numerous training sessions for prosecutors and other law enforcement officials at Main Justice in Washington, D.C. – including a series of training sessions for attorneys at OPR and the Department's Professional Responsibility Advisory Office – and at the National Advocacy Center in Columbia, South Carolina.

- Since 2010, the Department has held several "New Prosecutor Boot Camp" courses, desig for newly hired federal prosecutors, which include training on *Brady*, *Giglio*, and ESI, amc other topics.

- These training requirements were institutionalized through their codification in the USAM Specifically, USAM § 9-5.001 was amended in June 2010 to make training mandatory for prosecutors within 12 months after hiring, and requiring two hours of update/refresher trai on an annual basis for all other prosecutors.

- In 2011, the Department provided four hours of training to more than 26,000 federal law enforcement agents and other officials – primarily from the FBI, DEA, and ATF – on criminal discovery policies and practices. The Department is currently developing annual update/refresher training for these agents.

- In late February 2012, the Department held "train-the-trainer" programs in Washington, D.C., to begin training the next round of federal law enforcement agencies, including Department of Homeland Security agencies such as ICE, various OIGs, and other federal agencies.

- The Department has held several Support Staff Criminal Discovery Training Programs, including one session last month. In addition, the Department has produced criminal discovery training materials for victim/witness coordinators.

- A Federal Criminal Discovery Blue Book – which comprehensively covers the law, policy, and practice of prosecutors' disclosure obligations – was created and distributed to prosecutors nationwide in 2011. It is now electronically available on the desktop of every federal prosecutor and paralegal.

- One of the most challenging issues for prosecutors in meeting their discovery obligations in the digital age is the explosion of ESI. The Department developed – in collaboration with representatives from the Federal Public Defenders and counsel appointed under the Criminal Justice Act – a ground-breaking criminal ESI protocol. The protocol was distributed to prosecutors, defense attorneys, and members of the federal judiciary in February 2012. It is designed to:

    - promote the efficient and cost-effective production of ESI discovery in federal criminal cases;
    - reduce unnecessary conflict and litigation over ESI discovery by encouraging the parties to communicate about ESI discovery issues;
    - create a predictable framework for ESI discovery; and
    - establish methods for resolving ESI discovery disputes without the need for court intervention.

  The protocol has already received praise from the judiciary and defense bar. The Department is in the process of developing training on the protocol for prosecutors, defense attorneys, and the judiciary.

- In order to ensure consistent long-term oversight of the Department's discovery practices, the Department moved the National Criminal Discovery Coordinator position into the Office of the Deputy Attorney General and made it a permanent executive-level position.

The Department's own policies require federal prosecutors to go beyond what is required to be disclosed under the Constitution, statutes, and rules. For example, under the USAM, prosecutors are directed to take a broad view of their obligations and resolve close calls in favor of disclosing exculpatory and impeaching evidence. The USAM requires prosecutors to disclose information beyond that which is "material" to guilt as articulated by the U.S. Supreme Court, and prosecutors must disclose exculpatory or impeachment information "regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime." USAM § 9-5.001. In addition, pursuant to the January 2010 memoranda issued by then-Deputy Attorney General David Ogden, prosecutors have been instructed to provide broader and more comprehensive discovery than the law requires, and to be inclusive when identifying the members of the prosecution team for discovery purposes. (The Department's policies do recognize that the requirement that prosecutors disclose more than the law requires may not be feasible or advisable in some national security cases where special complexities arise.)

Despite these and other robust efforts, prosecutors – like other professionals – will never be immune to mistakes. As a matter of policy, we strive to be perfect, even though we know perfection is impossible. We require our prosecutors to strictly obey the law in both letter and spirit, and we work to ensure that isolated mistakes are detected early, corrected, and do not prevent justice from being done.

4. Legislation in this area is unnecessary

With the release of the Schuelke Report, some have argued that legislation is necessary to alter federal criminal discovery practice. The Department does not share that view. As detailed above, since *Stevens*, the Department has addressed vulnerabilities in the Department's discovery practices. In light of these efforts, and the high profile nature of the discovery failures in *Stevens*, Department prosecutors are more aware of their discovery obligations than perhaps ever before. Now, of all times, a legislative change is unnecessary.

Moreover, legislation along the lines that some have suggested, would upset our system of justice by failing to recognize the need to protect interests beyond those of the defendant. It would radically alter the carefully constructed balance that the Supreme Court and lower courts, the Criminal Rules Committee, and Congress have painstakingly created over decades – a 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 on-going criminal investigations from undue interference, and recognizes critical national security interests.

Unfortunately, witness safety concerns are more than merely theoretical. Even under the current system's careful balance between a defendant's right to a fair trial and witnesses' privacy and

safety interests, we have had witnesses intimidated, assaulted, and even murdered after their names were disclosed in pretrial discovery. Legislation requiring earlier and broader disclosures would likely lead to an increase in such tragedies. It would also create a perverse incentive for defendants to wait to plead guilty until close to trial in order to ensure that they learn the identities of all the people who would have testified against them.

The Department is also concerned that one such legislative proposal would require disclosure of information that is not substantially related to the defendant's guilt, even in cases where the defendant is pleading guilty. This requirement would result in the unnecessary and harmful disclosure of national security-related information and would compromise intelligence and law enforcement sources and methods. For example, despite the existence of the Classified Information Procedures Act, a new discovery standard could result in the disclosure of investigative steps taken, investigative techniques or trade craft used, and the identities of witnesses interviewed during counterterrorism and counterespionage investigations. Moreover, in cases involving guilty pleas – where a defendant is necessarily prepared to admit facts in open court that establish he or she committed the charged offense(s) – such legislation would require the unnecessary disclosure of the identity of undercover employees or confidential human sources, scarce investigative assets who, once revealed, may no longer be used to covertly detect and disrupt national security threats. Currently, in the national security context, we tell other countries that we will keep the information they share with us confidential unless we absolutely need to disclose it because of its exculpatory nature. Under such a bill, we would have to disclose an increased volume of information and disclose it more frequently, thus discouraging cooperation from our foreign partners.

In cases involving criminal charges against a defendant for child exploitation, impeachment information on the child-victim would need to be disclosed without regard to either admissibility or the substantial policy interests in keeping this information private, even if the evidence against the defendant included his own confession and videotapes of the defendant committing the abuse. In rape cases, information about a sex-crime victim's sexual history, partners, and sexual predisposition would need to be disclosed to the defense – again, regardless of admissibility. The disclosures required by the current legislative proposal cut against the important policy aims of child protection and rape shield laws.

Such legislation would also invite time-consuming and costly litigation over discovery issues not substantially related to a defendant's guilt, resulting in delayed justice for victims and the public and greater uncertainty regarding the finality of criminal verdicts. Inclusion of a provision for awarding attorney's fees would provide a significant incentive to engage in such collateral litigation. These concerns, among others, recently led the Criminal Rules Committee – a body populated by federal judges who are intimately familiar with these discovery issues – to reject a proposed amendment to Rule 16 to expand prosecutors' discovery obligations.

5. Conclusion

The *Stevens* case was deeply flawed. But it does not represent the work of federal prosecutors around the country who work for justice every day. And it does not suggest a systemic problem warranting a significant departure from well-established criminal justice practices that have

contributed to record reductions in the rates of crime in this country while at the same time providing defendants with due process. The *Stevens* case is one in which the current rules governing discovery were violated, not one in which the rules were complied with but shown to be inadequate.

The objective of the criminal justice system is to produce just results. This includes ensuring that the processes we use do not result in the conviction of the innocent, and likewise ensuring that the guilty do not unjustifiably go free. It also includes an interest in ensuring that other participants in the process – *i.e.*, victims, law enforcement officers, and other witnesses – are not unnecessarily subjected to physical harm, harassment, public embarrassment, or other prejudice.

For nearly fifty years, a careful reconciliation of these interests has been achieved through the interweaving of constitutional doctrine (*i.e.*, *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S. 419, 439 (1995)), statutory directives (*i.e.*, the Jencks Act and the Crime Victims' Rights Act), and Federal Rules (*i.e.*, Rule 16; Rule 26.2). Legislation in this area would disturb this careful balance without a demonstrable improvement in either the fairness or reliability of criminal judgments and in the absence of a widespread problem. The rules of discovery do not need to be changed. Rather, prosecutors and other law enforcement officials need to recognize fully their obligations under these rules, must apply them fairly and uniformly, and must be given tools to meet their discovery obligations rigorously. This is what the Department has done since the Attorney General directed the dismissal of the conviction in *Stevens*. And it is what the Department will continue to do in the future, under the policies and procedures that have been implemented and institutionalized during the past three years.

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April 18, 2012

The Honorable Jim Sensenbrenner
Chairman
Subcommittee on Crime, Terrorism
and Homeland Security
2138 Rayburn House Office Building
U.S. House of Representatives
Washington, DC 20515

The Honorable Bobby Scott
Ranking Member
Subcommittee on Crime, Terrorism
and Homeland Security
2138 Rayburn House Office Building
U.S. House of Representatives
Washington, DC 20515

Re: "Hearing on The Prosecution of Former Senator Ted Stevens"

Dear Chairman Sensenbrenner and Ranking Member Scott:

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I write to thank you for scheduling a hearing on the prosecution of former Senator Ted Stevens.

Former U.S. Senator Theodore "Ted" Stevens was prosecuted and convicted for criminal ethics violations, subsequently lost his re-election campaign, and, only shortly before his tragic passing, was exonerated after a whistleblower revealed that prosecutors withheld critical evidence of Senator Steven's innocence in violation of his constitutional rights. From the start, his prosecution was permeated with government misconduct, making it impossible for the Senator to get a fair trial. As a result of numerous egregious violations committed by the experienced prosecutors in this case, the Senator's conviction was eventually dismissed. The investigation into the misconduct ordered by U.S. District Court Judge Emmet G. Sullivan that has now been concluded by Special Counsel Henry F. Schuelke, III will shed light on some of the types of discovery lapses that occur in criminal cases, whether due to misunderstanding, mistake, negligence, or even purposeful misconduct.

Nearly fifty years ago, in *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court recognized the constitutional importance of disclosing evidence that is favorable to a person accused of a crime. This decision established certain constitutional obligations for prosecutors during the pre-trial information

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sharing process known as "discovery." Unlike discovery in civil cases, where money as opposed to a person's freedom is at stake, criminal discovery is guided by prosecutors' exceedingly narrow reading of the requirement established in *Brady*. The failure to satisfy *Brady* obligations presents a compromised criminal justice system with an obvious risk of conviction of the innocent. In addition, it puts a significant financial burden on the accused. Yet, such failures occur all too often.

Unfortunately, the type of conduct at issue in the criminal case against Senator Stevens is not a rare occurrence. By this letter, our association wishes to bring your attention to just a few stories of *other* people whose lives have been dramatically harmed by the government's failure to comply with the constitutional demands of *Brady*.

1. Companies facing criminal charges rarely go to trial, but Lindsey Manufacturing President and CEO Keith Lindsey and Vice-President and CFO Steve K. Lee took the risk and mounted an aggressive defense, on behalf of themselves and their company, that lifted the veil on numerous serious violations of their constitutional rights—all of which occurred *after* the prosecution of Stevens and *after* the Department of Justice issued new guidance to its prosecutors regarding their discovery obligations.[1] The Lindsey defendants were charged and ultimately convicted of multiple violations of the foreign bribery statute (FCPA). In a lengthy post-trial order, however, U.S. District Court Judge Howard Matz described this case as an "unusual and extreme picture of a prosecution gone awry," threw out all the convictions, and banned the government from retrying the case. Occurring over a three-year period, the misconduct included, among other things, the intentional withholding of several grand jury transcripts evidencing the serious flaws in the investigation and substantially undercutting the government's case. Judge Matz characterized these transcripts as the "most complete and compelling evidence that the Government investigation had been tainted" and explained that without the transcripts, the defense was severely hamstringed. Despite all this, the Lindsey defendants were able to fight for their innocence and protect their rights. But the successful defense of these individuals and their company came at great cost.

2. Originally sentenced in 2003 to over ten years in prison, Edgar Rivas only regained his freedom after the Second Circuit Court of Appeals ruled that prosecutors violated his constitutional rights when they intentionally withheld a statement made by their main witness that actually supported Rivas' version of events.[2] A sailor on a foreign freighter, Rivas was charged and ultimately convicted of smuggling cocaine from Venezuela to New York despite his assertion that the drugs belonged to his shipmate. Prior to trial, the government's main witness, a fellow shipmate, admitted that he was the one who brought the drugs onto the ship, but the government hid that admission and it only came to light

[1] *U.S. v. Aguilar, et al.*, Case No. CR-10-1031(A)-AHM (C.D.Cal. 2011).
[2] *United States v. Rivas*, 377 F.3d 195 (2nd Cir. 2004).

after the jury found Rivas guilty. The Second Circuit threw out Rivas' conviction, stating that the government's behavior was "totally unacceptable." Ultimately, the prosecutors declined to retry Rivas. But if the shipmate's admission had remained undisclosed, he would have spent over ten years in prison.

3. For the last four years, Dr. Ali Shaygan has been fighting to restore his professional reputation and to receive compensation for the damage the government inflicted upon him through a series of constitutional violations in their unsuccessful attempt to prosecute him for unlawfully dispensing prescriptions.[3] Dr. Shaygan came under investigation in 2007, was indicted on 141 counts in 2008, and his entire defense team was inappropriately investigated prior to trial. The jury ultimately acquitted the doctor on all counts, but not before, at the government's request, two informants secretly recorded conversations with the defense team and shared the recordings with the government. Although these two informants later testified against Dr. Shaygan, the prosecutors withheld all information, notes, and an informant agreement related to these recordings. The recordings only came to light because one informant accidentally mentioned it while testifying. U.S. District Judge Alan S. Gold described the events surrounding Dr. Shaygan's prosecution as "profoundly disturbing" and, in a sharply worded order imposing sanctions on the government, chastised the prosecutors for "knowingly and willfully disobeying" court orders, failing to comply with their discovery obligations, and engaging in "unethical behavior not befitting the role of a prosecutor." The government has since appealed that order and, despite proving his innocence at trial, Dr. Shaygan is still fighting to be made whole by our justice system.

4. Charged and convicted of unlawful possession of a gun, it took Anthony Washington nearly two years to clear his name after the government failed to disclose that the 911 caller, upon whom the government based its entire case, had been previously convicted of making a false report.[4] In this case, the only question for the jury was whether Washington possessed a gun. It was not until the first day of trial, however, that prosecutors revealed that the now-deceased 911 caller—who provided the only real evidence in this case—had been criminally convicted for lying. As U.S. District Court Judge Janet Bond Arterton explained, this "impeachment evidence was critical in this context" because the defense could have fully explored the caller's character and discredited the 911 tape had this information been disclosed as required. After nearly two years of waiting, Washington finally got the closure he deserved when Judge Arterton threw out his unconstitutionally-obtained conviction.

These stories, as well as the countless stories left undiscovered and untold, provide clear evidence that federal prosecutors have failed to discharge their constitutional obligation under *Brady*, whether as a

[3] *See United States v. Shaygan*, 652 F.3d 1297 (11th Cir. 2011).
[4] *United States v. Washington,* 263 F.Supp.2d 413 (D.Conn. 2003).

result of intentional tactical decisions, negligence, or a misunderstanding of the obligation in other cases as well.

Once you have heard about the serious failures in the prosecution of Senator Stevens, I am confident that you will determine it necessary to hold additional hearings to further explore the need for discovery reform and the merits of current reform proposals. The time for a more transparent and level playing field in the criminal justice system is now.

Thank you for your consideration, and please do not hesitate to contact me if you have any questions or want additional information.

Sincerely,

Lisa Monet Wayne
President

cc: Hon. Adams, Hon. Amodei, Hon. Chaffetz, Hon. Chu, Hon. Cohen, Hon. Deutch, Hon. Forbes, Hon. Gohmert, Hon. Goodlatte, Hon. Gowdy, Hon. Griffin, Hon. Jackson Lee, Hon. Johnson, Hon. Lungren, Hon. Marino, Hon. Pierluisi, Hon. Poe, Hon. Polis, Hon. Quigley

April 18, 2012

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
Subcommittee on Crime, Terrorism
and Homeland Security
Rayburn House Office Building
Washington, D.C. 20515

The Honorable Robert C. Scott
Ranking Member
Committee on the Judiciary
Subcommittee on Crime, Terrorism
and Homeland Security
Rayburn House Office Building
Washington, D.C. 20515

RE: House Judiciary Committee's Hearing on "The Prosecution of Former Senator Ted Stevens"

AMERICAN CIVIL LIBERTIES UNION

OFFICERS AND DIRECTORS

Dear Chairman Sensenbrenner and Ranking Member Scott:

On behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to the principles of individual liberty and justice embodied in the U.S. Constitution, we offer this statement on the subject of the April 19th hearing on "the Prosecution of Former Senator Ted Stevens." This hearing is an important first step in addressing the problem brought to the public's attention in the Ted Stevens' case: the failure of prosecutors to disclose exculpatory evidence to criminal defendants.

There could not be a more opportune time for this hearing in light of this week's Washington Post series of articles on the Department of Justice's review of flawed forensic evidence entitled "*Convicted defendants left uninformed of forensic flaws found by Justice Dept.*" and "*DOJ review of flawed FBI forensics processes lacked transparency*."[1] These articles underscore the fact that potentially exculpatory evidence –discovered both before and after criminal convictions – is not being disclosed to defendants and their lawyers. Such was the case in Senator Ted Stevens' prosecution.

The constitutional obligation of prosecutors to turn over exculpatory material was established in the 1963 case of *Brady v. Maryland* where the U.S. Supreme Court recognized a defendant's fundamental right to any and all favorable information that might prove he or she is innocent of a crime. The Supreme Court has applied this standard retrospectively – to cases in which the trial has already occurred and a judicial record has been developed, thereby allowing for a determination of whether the suppressed evidence was "material." However, before a trial has occurred, the application of this standard has been inconsistent. That inconsistency has created confusion for prosecutors (and judges) about the scope of evidence they must reveal, when to do so, and what remedies to provide defendants who do not receive exculpatory evidence.

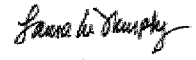
[1] Spencer Hu, "*Convicted defendants left uninformed of forensic flaws found by Justice Dept.*" Wash Post, April 16, 2012, http://www.washingtonpost.com/local/crime/convicted-defendants-left-uninformed-of-forensic-flaws-found-by-justice-dept/2012/04/16/gIQAWTegMT_story.html?tid=pm_local_pop; and "*DOJ review of flawed FBI forensics processes lacked transparency*" April 17, 2012, http://www.washingtonpost.com/local/crime/doj-review-of-flawed-fbi-forensics-processes-lacked-transparency/2012/04/17/gIQAFegIPT_story.html

Almost 50 years after the first enunciation of the "Brady Rule," violations persist as prosecutors continue to violate their obligation to turn over evidence in their efforts to "win" cases. Such Brady violations have had devastating consequences for those accused of crimes. Only a fraction of such cases have been discovered. Senator Ted Stevens' 2009 case is one recent highly publicized example of a prosecution team ignoring its Brady obligation to a defendant. Senator Stevens was prosecuted and convicted for criminal ethics violations, but later exonerated after it was uncovered that prosecutors withheld important evidence of the Senator's innocence in violation of his constitutional rights. Nevertheless, the damage to Senator Stevens' reputation resulting from the conviction was irreversible. After serving in the U. S. Senate longer than any other Republican in history, he lost his re-election campaign in 2008 in the immediate aftermath of the trial and before the court dismissed the case against him after learning of the prosecutorial abuse.

If this could happen to an influential person like Ted Stevens, image how it affects the average person accused of a crime. In 2003, Edgar Rivas was sentenced to serve more than 10 years in federal prison after being convicted of conspiracy and possession of cocaine aboard a foreign freighter arriving in the U.S. During the trial, the prosecution failed to inform the defense that on the day the trial began, the government's main witness against Mr. Rivas admitted to bringing the drugs aboard the ship. This fact only came to light after the trial ended, when the government translator revealed this critical piece of information to the defense counsel. Even after the defense learned of the conversation, the prosecution maintained that it was not required to disclose the information because it did not prove Mr. Rivas' innocence. Fortunately, on appeal, the 2nd U.S. Circuit Court of Appeals disagreed and called "the Government's 'tactical reason' for the nondisclosure ... totally unacceptable." The appellate court said that Rivas "should have had the opportunity to bolster the defense theory" of the other party's guilt. The Second Circuit proceeded to find that the prosecution's non-disclosure violated the Brady Rule, vacated the judgment, and ordered a new trial. If not for the actions of a government translator, Mr. Rivas might still be in prison today.

After the committee reviews the Special Counsel's report in the Ted Stevens' case, we encourage it to consider reforms to the current process that will ensure prosecutors turn over Brady evidence in every criminal case. Failure to disclose exculpatory evidence cannot be tolerated in a system predicated on justice. When the government does not meet its obligation to reveal this information, it must be held accountable. If you have any additional questions about this issue, please feel free to contact Jesselyn McCurdy, Senior Legislative Counsel, at jmccurdy@dcaclu.org or (202) 675-2307.

Sincerely,



Laura W. Murphy
Director
Washington Legislative Office

Jesselyn McCurdy
Senior Legislative Counsel

cc: House Commirtee on the Judiciary, Subcommittee on Crime, Terrorism and Homeland Security

A Call for Congress to Reform Federal Criminal Discovery
March 15, 2012

We, the undersigned, are current and former judges, prosecutors, law enforcement officers, defense lawyers, conservative leaders and others, all with substantial professional experience within or personal dedication to the efficient operation of the criminal justice system. We call upon Congress to address the persistent problems with discovery in the federal criminal justice system by immediately enacting legislation that clarifies federal prosecutors' obligations to disclose information to the defense and that provides appropriate remedies when prosecutors fail to do so.

Over the past few years, we have seen a troubling number of cases involving failures to disclose evidence to the defense pursuant to *Brady v. Maryland* and its progeny. Most notable was the prosecution of the late Senator Ted Stevens. The U.S. Department of Justice (DOJ) moved in April 2009 to set aside the jury verdict in Senator Stevens's case and dismiss the indictment after discovering that prosecutors had withheld evidence they were required to disclose—evidence that would have impeached the trial testimony of a key government witness and bolstered the Senator's defense. A subsequent, court-ordered investigation concluded that the prosecution had been "permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated Senator Stevens's defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness."[1]

In addition to the Stevens case, a string of recent cases has emerged in which the defense eventually discovered undisclosed evidence that was constitutionally required to have been disclosed. For example, in December 2011, a judge in the Central District of California vacated the government's conviction of the Lindsey Manufacturing Company and two of its executives for violations of the Foreign Corrupt Practices Act. The judge found that the government had "recklessly failed to comply with its discovery obligations" pursuant to *Brady*, among other forms of misconduct throughout the prosecution.[2] A month later, federal prosecutors in Massachusetts moved to dismiss charges against defendant Andrew Berke related to an illegal Internet pharmacy. The prosecutors' dismissal immediately followed a statement from the trial judge that he was going to have to dismiss the charges himself based on the fact that a law enforcement officer had destroyed "apparently exculpatory" evidence in the case and prosecutors had not notified the defense when they learned of this fact.[3] In 2009, federal prosecutors in the District of Montana failed to disclose compelling information impeaching a key witness's credibility in the criminal case against W.R. Grace Corporation and three of its former executives.[4] All defendants in the case were ultimately found not guilty. Around the same time, in the District of Massachusetts, a federal prosecutor failed to produce prior inconsistent statements of a police officer witness in the prosecution of Darwin Jones, charged with possessing a

[1] Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order dated April 7, 2009, at 1, *In re Special Proceedings*, Misc. No. 09-0198 (D.D.C. Mar. 15, 2012).
[2] *United States v. Aguilar*, 2011 U.S. Dist. LEXIS 138439 at *3 (C.D. Cal. Dec. 1, 2011).
[3] Milton J. Valencia, *U.S. Drops Charges in Internet Drug Case*, Boston Globe, Jan. 18, 2012.
[4] Order, *United States v. W.R. Grace et al.*, No. CR-05-07-M (D. Mont. Apr. 28, 2009).

firearm as a felon. When the violation was discovered, the court reprimanded the prosecution for its "dismal history of intentional and inadvertent violations of the government's duties to disclose in cases assigned to this court,"[5] though ultimately decided sanctions were not warranted in this particular case as the violation had been "unintentional rather than deliberate."[6]

Failure to disclose *Brady* evidence is a constitutional violation that by its very nature often goes undiscovered—anything that the government chooses not to disclose to the defense generally remains unknown. So, it is impossible to know how often these violations occur. Still, a 2010 USA Today investigation documented 86 cases since 1997 in which judges found that federal prosecutors had failed to turn over evidence that they were legally required to disclose.[7] Reports by a host of organizations have reached similar conclusions about the frequency of these violations. Suffice it to say that *Brady* violations—which include both intentional misconduct and inadvertent errors—occur with sufficient frequency that Congress must act.

Our experience leads us to believe that the vast majority of prosecutors act in good faith to fulfill their constitutional and legal obligations. However, federal courts, the DOJ and other entities have for years articulated inconsistent, shifting, and sometimes contradictory standards for criminal discovery, leaving it up to individual prosecutors to navigate this legal maze and determine the scope of their obligations to disclose information.

The constitutional obligation to disclose such evidence arises from the 1963 U.S. Supreme Court decision in *Brady*, which held that prosecutors have a constitutional obligation to provide the defense with "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment."[8] That obligation alone can cause confusion. As a group of former DOJ officials wrote in an *amicus* brief filed in *Connick v. Thompson* in 2010, "complying with *Brady* and its progeny is not always simple or self-evident."[9] The difficulty primarily arises because prosecutors must make a judgment call about whether evidence is sufficiently "material" that *Brady* and subsequent cases would require disclosure of the evidence to the defense. The Supreme Court has held that evidence is material "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."[10] Materiality does not require a showing that the defendant "would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial."[11] When a prosecutor tries to determine whether particular evidence meets this test for

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[5] *United States v. Jones*, 686 F. Supp. 2d 147, 148 (D. Mass. 2010) (citing *United States v. Jones*, 620 F. Supp. 2d 163, 165 (D. Mass. 2009)).
[6] *Id.* at 149.
[7] Brad Heath and Kevin McCoy, *Prosecutors' Conduct Can Tip Justice Scales*, USA Today, Sep. 23, 2010.
[8] 373 U.S. 83, 87 (1963).
[9] Brief for *Amici Curiae* Former Federal Civil Rights Officials and Prosecutors Wan J. Kim *et al.* in Support of Respondent at 2, *Connick v. Thompson*, 131 S.Ct. 1350 (2011) (No. 09-571).
[10] *Smith v. Cain*, No. 10-8145, slip op. at 2-3, 132 S. Ct. 627 (Jan. 10, 2012) (citing *Cone v. Bell*, 556 U.S. 449, 469-70 (2009).
[11] *Id.* at 3 (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)) (internal quotation marks omitted).

materiality before trial begins, the prosecutor necessarily engages in speculation and even guesswork about the hypothetical impact that the evidence will have in the future trial. Oftentimes, the prosecutor simply cannot know for certain what the impact of the evidence will be.

Compounding the confusion surrounding *Brady* obligations are the separate, competing obligations established by local court rules, state ethics rules and other sources. For example, 49 states have adopted some version of Model Rule of Professional Conduct (MRPC) 3.8(d), which requires a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense[.]"[12] MRPC 3.8(d) is not limited to information that would be deemed "material" pursuant to *Brady* but is meant to demand more extensive disclosure than the constitutional baseline of *Brady*.[13]

Further confusion exists beyond the scope of what must be disclosed to related matters, such as the timing of disclosures and prosecutors' obligations to seek out exculpatory evidence unknown to them. For example, the Jencks Act provides that federal prosecutors do not have to turn over prior witness statements to the defense until after the witness has testified.[14] Thus, prosecutors oftentimes withhold such statements—which are otherwise subject to *Brady* disclosure—until after the witness has testified, leaving the defense very limited time to understand and make use of the information during the trial.

In addition, the rare actions of some federal prosecutors who knowingly and intentionally violate their obligations are cause for even more concern. Currently, such misconduct often goes unpunished, as federal prosecutors are immune from civil liability, and criminal liability is extraordinarily rare. Further, state bar associations do not robustly enforce the rules against prosecutors who intentionally do not disclose information to the defense.[15]

Amid previous calls for reform, the DOJ has claimed that it could handle the problem of nondisclosure internally and added language to the U.S. Attorneys Manual instructing federal prosecutors to comply with constitutional requirements to disclose material evidence pursuant to *Brady*. Violations continued to occur despite this new guidance. Later, in the wake of the Stevens case, the U.S. Attorney General spoke out publicly and created a working group that reviewed discovery practices. The DOJ then issued additional guidelines and required additional training for line prosecutors as to their constitutional obligations. However, while commendable, these actions have not solved the problem, and violations have continued to occur.

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[12] *See* David Keenan *et al.*, *The Myth of Prosecutorial Accountability After* Connick v. Thompson, 121 Yale L.J. Online 203, 221-33 (2011) (describing the versions of MRPC 3.8 adopted in the states). The McDade Amendment made state ethics rules applicable to federal prosecutors practicing in a state. 28 U.S.C. § 530B.

[13] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009).

[14] 18 U.S.C. § 3500.

[15] *See* Keenan *et al.*, *supra* note 12, at 213-220 (discussing prosecutorial immunity from liability and several studies documenting the infrequency of state bar disciplinary actions).

We have concluded that *Brady* violations, whether intentional or inadvertent, have occurred for too long and with sufficient frequency that Congress must act. Self-regulation by the DOJ has been tried and has failed. It is ultimately not a solution to the injustices that continue to occur. Nor is an amendment to the Federal Rules of Criminal Procedure a solution. Such a proposal has been considered at least twice by the Advisory Committee on the Rules of Criminal Procedure, only to be rejected by either the Advisory Committee or the full Standing Committee on Rules of Practice and Procedure, at least partly in deference to the DOJ's attempts to address the issue internally. But, again, DOJ's own internal efforts have not remedied the problem.

Only federal legislation can adequately address these continued violations by federal prosecutors, creating a uniform standard for what must be disclosed and what remedies will exist for non-disclosure, and sending a strong message to the DOJ that there will be consequences when federal prosecutors violate their discovery obligations.

The legislation that we envision would do the following:

1. Provide that the scope of the prosecution's discovery obligation extends to all information—regardless of admissibility at trial—that could reasonably be considered favorable to the defendant, with respect to pretrial motions, guilt, impeachment of witnesses, or sentencing. Requiring disclosure of all "favorable" information requires less room for interpretation on the part of the prosecutors than a materiality standard.
2. Clarify that prosecutors have an obligation to exercise due diligence in obtaining any favorable evidence, beyond what is in their possession, from other parties involved in the investigation and/or prosecution, including federal, state and local law enforcement or other agencies.
3. Require that prosecutors disclose favorable information without delay, as soon as they become aware of it, thus clarifying that the Jencks Act does not trump this disclosure requirement. If the government has legitimate objections to disclosure due to concerns about a witness' safety, a desire to protect classified information, or other reasons, prosecutors may raise those concerns with the court, which can issue a protective order if appropriate.
4. Impose an appropriate remedy in the case of non-compliance, including exclusion of evidence or witness testimony, a new trial, dismissal of the charges, or other remedies to be determined by the court. Courts generally have the power to fashion appropriate remedies under their general supervisory powers, but this law would clarify that the court shall use that power to fashion an appropriate remedy each time a violation of the disclosure requirement has occurred.

The time has come for Congress to act. Clarifying *Brady* obligations will ultimately strengthen effective law enforcement. All previous attempts to cure this problem—a problem that goes to the heart of the fairness and accuracy of the criminal justice system—have failed. Nothing short of the legislation described above is adequate, and we urge Congress to take immediate action to enact it.

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Mr. SENSENBRENNER. Without objection, all Members' opening statements will be included at this time.

I would now like to introduce today's witness on the first panel. Henry F. Schuelke, III, is a partner in the law firm Janis, Schuelke, and Wechsler. Mr. Schuelke was named by Judge Emmet Sullivan to serve as Special Counsel to investigate the prosecution of Senator Ted Stevens. Mr. Schuelke previously served twice as Special Counsel to the U.S. Senate. He served as an assistant United States attorney for the District of Columbia. And following his graduation from law school, he served for 4 years in the Judge Advocate General's Corps. He received his undergraduate degree from St. Peters college and his law degree from Villanova University.

The Chair is going to swear witnesses at this hearing, so Mr. Schuelke would you please stand and raise your right hand.

[Witness sworn.]

Mr. SENSENBRENNER. Thank you. I ask that you summarize your testimony in 5 minutes or less. We have the red, yellow, and green lights before you. And when the light turns red, it indicates that the 5 minutes have expired. Mr. Schuelke.

TESTIMONY OF HENRY F. SCHUELKE, III, PARTNER, JANIS, SCHUELKE, AND WECHSLER

Mr. SCHUELKE. Thank you. Mr. Chairman, Mr. Scott, Mr. Conyers, good morning. I appear this morning at the Committee's invitation to answer such questions as the Committee might have concerning the investigation that my colleague William B. Shields and I have performed, having been ordered to do so by the Honorable Emmet G. Sullivan of the United States District Court for the District of Columbia. I understand that the Committee has our report, and I am prepared to respond to the Committee's questions.

I should like to observe that we had the complete cooperation of the Department of Justice as we undertook this investigation, as well as that of its Office of Professional Responsibility. And with that, Mr. Chairman, I am prepared to answer your questions.

Mr. SENSENBRENNER. Thank you very much, Mr. Schuelke.

Mr. SCHUELKE. Mr. Chairman, I am not sure—is this microphone working?

Mr. SENSENBRENNER. It is working fine.

First of all, can you describe the willful nondisclosures of Brady and Giglio material that you found during the course of your investigation?

Mr. SCHUELKE. I can. I found that the prosecutors, Messrs. Bottini and Goeke in particular, failed to disclose exculpatory information provided to them by the then-anticipated government witness, Mr. Rocky Williams, concerning his understanding based on a conversation that he had with Senator Stevens and Bill Allen before the renovation project ever began, that whatever time and material that Allen's company, VECO, was to provide on the renovation would be included in the bills submitted to Senator and Mrs. Stevens by the general contractor who they had engaged, Christensen Builders, and consistent with that understanding, it was his practice on a monthly basis to retrieve the Christensen Builders invoices, check them for accuracy, take them to Allen's of-

fice, so that his time and other VECO employees' time could be added to the bills before they were sent to Senator and Mrs. Stevens.

Mr. SENSENBRENNER. Do you think that the failure to disclose this exculpatory information would have had an impact on the outcome of the trial?

Mr. SCHUELKE. I do. It was altogether consistent with Senator Stevens' defense, which the government well anticipated and forecast. When Senator Stevens and Mrs. Stevens testified during the course of the trial that they understood and believed that they had paid all the bills—because they did, indeed, pay all the Christensen Builders bills to the tune of $160,000—that testimony was not only challenged in cross-examination and in closing arguments by the government, it was ridiculed. Had the government's own witness, who was the foreman on the job, testified to the understanding which I just described, I believe it would have had a significant impact on the outcome.

Secondly, the government, since 2004—that is 4 years before the Stevens trial commenced—was in possession of evidence that its principal witness, Mr. Allen, had suborned a false statement from a young teenage prostitute with whom it was alleged that he had had a sexual relationship. That information, which clearly would have been admissible to impeach Mr. Allen's credibility—namely, that he had suborned a false statement—was not disclosed to the defense. It was not disclosed to the Stevens defense in 2008, nor was it disclosed in the course of two trials conducted in the District of Alaska 1 year before the Stevens trial.

Peter Kott and Victor Kohring were two Alaska State legislators who were indicted, tried, and convicted for bribery offenses. The principal government witness in both of those cases was Mr. Allen who had, according to the government—and ultimately according to Mr. Allen's guilty plea—paid the bribes to those two State legislators. The evidence of Mr. Allen's subornation of a false statement was not provided to either of them either. This was a pattern that prevailed over the space of three trials conducted over 1 year.

Mr. SENSENBRENNER. What do you think motivated the prosecutors to do this?

Mr. SCHUELKE. As I testified when I was asked that question by the Senate Judiciary Committee a couple of weeks ago, I said that I believed that it was the adversary's desire to win, and not to disclose to the defense information which would have hurt the government's case. That is my view today.

Mr. SENSENBRENNER. So it was win at all costs and not to have justice served?

Mr. SCHUELKE. I think that is a fair characterization, yes.

Mr. SENSENBRENNER. Okay. Thank you. My time has expired. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you. Mr. Schuelke, when Attorney General Holder came in, what was the status of the Stevens case? I understand that he had been found guilty by the jury, but the judge had not entered the guilty verdict; is that where we were?

Mr. SCHUELKE. When Attorney General Holder took office, the trial had been concluded, you are correct, and the jury had re-

turned a guilty verdict. And post-trial proceedings were underway; that is, motions for a new trial.

Mr. SCOTT. Had the judge entered the guilty verdict?

Mr. SCHUELKE. Well, if you mean, Mr. Scott, was there a conviction entered, the answer is no because a conviction occurs as a matter of law only when the sentence is imposed, and of course the case never got to that point.

Mr. SCOTT. You hadn't gotten to the sentencing phase? What did the Attorney General find out that provoked his investigation? The defense counsel got some tips as to what might have happened?

Mr. SCHUELKE. A couple of things, Mr. Scott. As Chairman Sensenbrenner observed, there was an FBI agent whose name was Chad Joy, who filed essentially a whistleblower complaint, making a number of allegations about the conduct of the lead FBI agent on the case, as well as the prosecutors, that prompted ost-trial motions brought by Senator Stevens' counsel.

In the process of responding to those motions, as Chairman Sensenbrenner also observed, Judge Sullivan found two of the government prosecutors to have been in civil contempt for failure to have produced certain records which he had ordered in connection with those proceedings. At that point, the Department of Justice appointed a new team of prosecutors to represent the United States in the course of these post-trial proceedings.

Those three prosecutors commenced an investigation. And they focused initially on the most dramatic testimony delivered by Mr. Allen in the trial; namely, that a letter that he had received from Senator Stevens, asking him to make sure and send him the bill was just Senator Stevens covering his ass, based upon a conversation Mr. Allen claimed to recall with a mutual friend of his and Senator Stevens in Alaska. That testimony was, as one might imagine, dramatic and damning to Senator Stevens' defense that he acted at all times with pure intent.

As these new prosecutors focused on this, they began to review some internal emails by, between, and among the prosecution team and found a series of emails that were obviously contemporaneous to an interview of Mr. Allen 5 months before the trial. I say contemporaneous, meaning it was obvious that they were emailing back and forth while the interview was in progress. They were curious about this exchange and, in short, ultimately found the handwritten notes of that interview, which had been recorded by two of the prosecutors. Ultimately, the handwritten notes of two more prosecutors and the lead FBI agent were also discovered. All of those notes reflected that Mr. Allen was asked during that interview whether he remembered the note he got from Ted Stevens and whether he remembered speaking to Mr. Persons, the one to whom he at trial attributed the cover-your-ass comment. And all of those notes reflected that he either said no, he did not speak to Persons, or he did not recall speaking to Persons.

Mr. SCOTT. And my time is almost up. But as a result of those findings, the new team of lawyers made a motion to dismiss the case with prejudice?

Mr. SCHUELKE. That is correct. The new team of lawyers, as I understand it, recommended that that be the course taken by the

Department. And the Attorney General authorized the motion to dismiss with prejudice, which of course Judge Sullivan granted.

Mr. SENSENBRENNER. Thank you. The gentleman from South Carolina, Mr. Gowdy.

Mr. GOWDY. Thank you, Mr. Chairman. Mr. Schuelke, if I heard you correctly, Senator Stevens paid $160,000 for the improvements made, the addition? Did I hear you correctly?

Mr. SCHUELKE. Yes, sir, you did.

Mr. GOWDY. What was the fair market value of the additions or changes made to the lodge?

Mr. SCHUELKE. The fair market value of the house after the renovations was $152,000.

Mr. GOWDY. Were the bills paid contemporaneous with their being submitted? In other words, was he paying the bills in a timely fashion? Or was it a circumstance where he got a lot of bills toward the end?

Mr. SCHUELKE. No. The Christensen Builders bills were paid in the regular course by Mrs. Catherine Stevens upon receipt. The Stevenses, in order to finance this project, had taken a second mortgage, liquidating $100,000 in cash for the project, had liquidated a $10,000 trust and spent from their savings as well. And that is how they timely paid the $160,000 worth of Christensen invoices.

Mr. GOWDY. Well, here is what I am struggling with: I actually like prosecutors. I actually like Federal prosecutors.

Mr. SCHUELKE. I do, too. I used to be one.

Mr. GOWDY. So when I say what I am getting ready to say it is not by virtue of a criticism toward them. But they are not known for taking really close cases that could go either way, unless they have to, particularly against a high-profile defendant. State prosecutors have to roll the dice more than Federal prosecutors do. So if you have a high-profile defendant with a really good defense team and your allegation is that he unjustly enriched himself via gifts, and the evidence is he actually paid more than the value of the home, what am I missing? Why was the case ever brought in the first place? It doesn't seem to be a very good case from a factual standpoint.

Mr. SCHUELKE. Well, the government had evidence that Bill Allen's company, VECO, had provided labor and materials for the project, and it was the government's theory of the case that Senator Stevens well knew that that had occurred, acknowledged, at least late in the process, that he knew that, which is why he sent the note to Mr. Allen asking him, please send me a bill for whatever work you did. And the government contended that VECO's contribution to this project, as was alleged in the indictment, was $250,000.

Now, at trial, when the government introduced the records of the VECO Corporation which purported to establish this $250,000 figure, it was demonstrated that the records were simply inaccurate. They, for example, logged 8 hours a day, 5 or 6 days a week, for Rocky Williams. He didn't work 8 hours a day, 5 or 6 days a week on the project. They logged 8 hours a day, 5 days a week, for another VECO employee, Dave Anderson, who wasn't even in Alaska for several months during that period of time. And Judge Sullivan,

upon the motion of Senator Stevens' defense counsel, concluded that those records were false and excluded the majority of those records.

Mr. GOWDY. All right, my light is on. So let me ask you this, which is kind of related, I guess somewhat. Before I ask you that, the Federal prosecutors weren't interviewing these witnesses without the Bureau being present, were they? I mean they are not crazy enough to do witness prep without a law enforcement agent present, were they?

Mr. SCHUELKE. As a general practice, they did have FBI agents, and, on occasion, agents of the Internal Revenue Service, accompany them for purposes of interviews.

Mr. GOWDY. This may or may not be true because it has been reported, which carries no presumption of credibility, that there is this movement to change Brady/Giglio, the discovery rules, because of this case. There is a Senator from Alaska that has introduced legislation. It strikes me that if the rules as they existed had been followed, you and I wouldn't be having this conversation.

Mr. SCHUELKE. Well, I think that is quite right, Mr. Gowdy. It has been the law, since the Supreme Court decided the Brady case and the Giglio case, that the government is obligated to disclose material exculpatory information. I don't believe that this materiality issue, which I personally think is a problem that needs to be addressed, was a determining factor in the problems that occurred in the Stevens case. But I do think it is a problem that needs to be addressed.

I have seen Senator Murkowski's proposed bill. I don't know that I am in a position to subscribe to it in its entirety. But to the extent that it would eliminate the materiality requirement with respect to the disclosure of exculpatory material, I think it is welcome and necessary.

Mr. SENSENBRENNER. The gentleman's time has expired. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. I first want to thank you for coming before us today. And I just want to take a moment to look at the larger question of Brady rule violations and how we ought to look at them. I understand the Subcommittee may be considering looking at other kinds of cases like this, and it might add some dimension to the problem. So I would just like you to tell us about your impressions of whether the Brady rule needs strengthening or whether we need to get a way for the prosecutors to actually look at it more and use it more appropriately.

Mr. SCHUELKE. Yes, sir. I shall try, Mr. Conyers.

First of all, we should all understand that the Supreme Court has for years announced the rule that in order for a conviction to be reversed for the government's failure to provide exculpatory information, that failure must have had an outcome determinative effect. That is to say, are we left with a situation where we can have no confidence in the verdict because of the failure to disclose Brady information? That is the materiality concept which, in my judgment, is perfectly sensible and appropriate from that post hoc appellate perspective.

Now we are in the pretrial situation. The prosecutor has an obligation to disclose Brady material. The prosecutor says—and they

have argued in court repeatedly, they did in the Stevens case—well, we were only obligated to disclose material exculpatory information. Now mind you, the prosecutor is one of the adversaries in this process. In my judgment, it is not appropriate for one of the adversaries to be the self-appointed gatekeeper for what may be exculpatory information that the defense, consistent with its strategy, may be in a position to pursue and to use in the course of the trial.

And this adversarial process, which is a general proposition I applaud, leaves one in a situation where there is a considerable risk for mischief. If I am the prosecutor and I say, here is this little tidbit which is in my files which reflects adversely on the credibility of my star witness, it is really not material. I don't think I have to turn that over. Human nature is such that good people motivated by this adversarial desire to prevail make those kinds of judgments. They should not. And it is for that reason that I believe, as I have testified, that the materiality requirement with respect to pretrial disclosure of the Brady material should be eliminated.

Mr. CONYERS. Is it fair, in closing, to ask you whether this kind of problem occurs perhaps more than we on the Judiciary Committee could be aware of?

Mr. SCHUELKE. Well, that is a very good question, Mr. Conyers. One never knows what one doesn't know.

Based on my experience both as a prosecutor and a defense attorney for now over 40 years, I do not personally believe that there is a pervasive nondisclosure problem in the thousands and thousands of cases that are brought by the Department of Justice. There have been a number of celebrated ones. There have been a half a dozen or so that have attracted considerable attention in the last 2 years. So it happens. And of course, one never knows if the case goes to trial and there had been no disclosure of Brady material, and the defendant, for whatever reason, was not equipped to ferret it out, if there was not a Judge Sullivan presiding over the matter, one never knows. But it is my personal view, based on my experience, that it is not a widespread pervasive problem in the Department of Justice. And I know that the Department, since the Stevens case, has taken significant steps both in terms of policy, proscription and training to address this problem.

Mr. CONYERS. Thank you for your views.

Mr. SENSENBRENNER. The gentleman's time has expired. We are expecting about 25 minutes of votes pretty soon, and then there will be a second series of votes later on. I would kind of like to do, to speed this hearing up and not to impose undue time delays upon our witnesses, to do what we can in shuttling us in and out. So the Chair recognizes the gentleman from Texas, Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman. We know that we had an FBI Agent Joy that filed a whistleblower complaint against the DOJ. As of November 2008, how long had FBI Agent Joy been working for the FBI?

Mr. SCHUELKE. Mr. Gohmert, I don't remember precisely how long. He was quite young and inexperienced.

Mr. GOHMERT. And still had the courage to come forward with the information. That is very impressive.

One of my concerns over the FBI 5-year "up or out" policy that this Director implemented, it drove thousands of years of FBI experience out of the FBI and left people with much less experience in charge. And my experience, from having been a prosecutor in my early days out of law school was, you know, you are hard-charging and you need somebody, maybe not as smart as you, but somebody with experience to say, "This is not a good idea. You should not put a case in jeopardy. We are about justice, and that means your title forces you to disclose Brady material, whether there is a Brady case or not. You are about justice. You are not about winning at all cost." And some people have a hard time understanding that and understanding their role.

I have got to tell you, just my perceptions. I was not a big fan of Ted Stevens. When I heard and saw and read the information coming from the Justice Department, it sounded like, gee, this guy really had, you know, over $100,000, $200,000 of benefits come his way, and that really is abusive. This is a bad situation. And then when you find out the real facts, he paid more than the value of the structure. And then you find out that, gee, they knew—not only his theory, they had his notes where he was saying, "Give me the bill. Let me pay the bill." And as you said, his wife was paying them as they came in and they end up paying more than the value of the structure itself.

It is just hard to imagine prosecutors, Justice officials, FBI officials—I have got a lot of friends in the FBI, a lot of people I have so much respect for. And I do disagree with you that an adversary should not be a gatekeeper. If they understand their goal, their end is justice, not to win at all costs. As you have said, I don't think this is a widespread problem. But I am wondering—and having been a judge and a chief justice, I have sat on disbarment cases back in Texas in State court. I don't know why anybody that literally took the life that Ted Stevens built and destroyed it, took his life, why they should ever be allowed to practice law again if they do not understand the trust and betrayed it as they did here.

And I understand your recommendations with regard to contempt of court. You looked at the burden of proof. Had there been any actions taken to pull the ticket to disbar these people that would ruin a man's life, at the end of his life, in such a way by withholding evidence, it sure seems it would have made a heck of a difference.

If I am a judge hearing a case without a jury, and I find out the structure is worth less than he paid, that he has notes out there that he gave timely manner and said, Give me the bills, and the evidence was his wife paid the bills as they came in, and then it turns out there is evidence of the key witness involved with a prostitute—can we say "prostitute," involved with a prostitute—I cannot imagine why they should not be allowed to practice law again after ruining this man's life. Have you looked at possible disbarment?

Mr. SENSENBRENNER. If the gentleman will yield, you can use that word because The Washington Post has used it quite a bit in the last week.

Mr. GOHMERT. Okay. Well, have you looked at disbarment recommendations?

Mr. SCHUELKE. I have not, Mr. Gohmert. It is beyond my charter, and I don't have a view on that subject.

Mr. GOHMERT. You don't have a view at all? Not even personally?

Mr. SCHUELKE. I don't care to take a view on it.

Mr. GOHMERT. Okay. You could have one but you don't care to take a view.

Mr. SENSENBRENNER. The gentleman's time has expired. I am going to recess the Committee. And I will admonish both Mr. Johnson and Mr. Pierluisi to be back after the last vote of this series. Otherwise, we will move on.

Without objection, the Committee is recessed until after the last vote of the series.

[Recess.]

Mr. SENSENBRENNER. The Subcommittee will be in order. The Chair recognizes the gentleman from Georgia, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman, for holding this very important Committee meeting on this issue.

Ted Stevens was a gentleman who I met for the first time Christmas of 2007, and we were both standing in line together at the White House Christmas celebration, waiting to shake hands with the President. And while he was there, I think it was his wife and a couple of his daughters were with him, and they were very jovial and, you know, just regular, normal people. I know they have hearts and feelings and that kind of thing, and they were happy.

Senator Stevens was spry, kind of cantankerous, and he was irascible, but I liked him. He seemed to be a good proud man, used to being in authority and in control. I can only imagine how he must have felt when the jury announced the verdict of guilty in this case. And in this case, it was in 2004 that the government knew that the principal witness, Bill Allen, had suborn perjury by getting a prostitute to testify or make a false statement under oath; is that correct, Mr. Schuelke?

Mr. SCHUELKE. Yes, sir, that is correct.

Mr. JOHNSON. And was Mr. Allen prosecuted for that?

Mr. SCHUELKE. He was not.

Mr. JOHNSON. But that was a note that was in—that was evidence that was in the file of the prosecution in the Stevens case?

Mr. SCHUELKE. Yes. The young woman had been interviewed by an FBI agent and——

Mr. JOHNSON. Okay. I will stop you there. I just wanted to clear up the facts. And that same information was available in a Federal prosecution of the two cases prior to Senator Stevens' trial. And those two cases involving State legislators were Federal trials as well; is that correct?

Mr. SCHUELKE. That is correct.

Mr. JOHNSON. So we have three instances of failure to disclose subornation of perjury. That would have been material information, would it not?

Mr. SCHUELKE. Yes, sir.

Mr. JOHNSON. And pursuant to Giglio, that information should have been disclosed as well as Brady.

Mr. SCHUELKE. It was Giglio material, I would say.

Mr. JOHNSON. Yeah. And then during the trial in 2008, the prosecution failed to disclose—or during the Ted Stevens case, the pros-

ecution failed to disclose written information in the files, in the way of case notes that the prosecutors had written down what a witness was telling them, that witness being Bill—or, excuse me, Rocky Williams. And then also, that information would have been material also, in your opinion; is that correct?

Mr. SCHUELKE. I believe that was material Brady information, yes, sir.

Mr. JOHNSON. And then you have already testified about the fact that the prosecutors derided Senator Stevens' principal defense which was that, I have this note here and it shows that I requested so-and-so to send me a bill. And prosecutors allowed the witness, Bill Allen, to testify falsely that he was just trying to cover up his ass.

Mr. SCHUELKE. Well, the note from Senator Stevens in 2002 to Mr. Allen said, Bill, when I think of all the ways you help me, I lose count, but you have to send me a bill. And I am going to have Bob Persons talk to you. So don't get PO'd at him.

Mr. JOHNSON. Okay.

Mr. SCHUELKE. Six years later Allen testified at the trial——

Mr. JOHNSON. Okay. We are getting into the weeds now. I just wanted that particular statement. My time is getting ready to run out, and I hate to interrupt you. But why was there no prosecution recommendation to charge any of the prosecutors with the same charge that probably should have been leveled against Bill Allen back in 2004; it is 18 USC 1622, subornation perjury. And has there been a recommendation to the State bar of the State where these gentlemen, the prosecutors practiced?

Mr. SCHUELKE. Not that I am aware of.

Mr. JOHNSON. And they have not been prosecuted; no recommendation; no sanction has been applied to them?

Mr. SCHUELKE. To the Stevens prosecutors?

Mr. JOHNSON. Yes.

Mr. SCHUELKE. Not that I am aware of.

Mr. JOHNSON. And you do say, though, that Senator Murkowski's legislation should go a little bit further and make sure that the gatekeeper is not the sole keeper of that file insofar as Brady and Giglio materials are concerned.

Do you think that it would be a good idea for the judge to have to look at that case, look at the case file, make a determination independently that there is no—or all information that should have been disclosed has been disclosed, and then seal that, file a copy of that file, what he has reviewed in the clerk's office for purposes of later appeals? Do you think that is a reasonable way of going about getting this responsibility out of——

Mr. SCHUELKE. It is a reasonable way of going about it, assuming that the prosecutor first says, I am in doubt about whether I should disclose this. I will submit it to the judge in camera and let the judge decide. But the prosecutor first has to get to that point in his own analysis.

Mr. SENSENBRENNER. The gentleman's time has expired. The gentleman from Puerto Rico, Mr. Pierluisi.

Mr. PIERLUISI. Good morning, Mr. Schuelke.

Mr. SCHUELKE. Good morning, sir.

Mr. PIERLUISI. As I understand the Supreme Court case law, the Supreme Court has set a constitutional minimum in this area. So States, and I would assume also this Congress, Congress can set a higher standard and change the rule so that it is more favorable to the defense and to the process as a whole.

You mentioned before that in your view, the materiality requirement shouldn't be there. I heard that. Apart from that, do you have any other suggestions to us in terms of how to go about changing the rule? Are we talking about amending rule 16? And if so, in what fashion would you recommend that we would do so?

Mr. SCHUELKE. Well, as you may know, sir, the Rules Committee of the Federal Judiciary has been contemplating such a change since 2006, I believe, and has rejected suggestions that rule 16 be amended to accomplish this purpose. As I recall, when most recently the Rules Committee took it up, they had available to them a poll that was taken of sitting Federal judges across the country, and slightly in excess of 50 percent of the Federal judges recommended an amendment to the rule. The Justice Department opposed such an amendment, and the views of the Justice Department, as I understand it, carried the day.

So I persist in the view that such a change is necessary. And while it could be accomplished by an amendment to rule 16, that has not occurred, and I think if the Rules Committee is not going to do it, the Congress should.

Mr. PIERLUISI. And in your view, is the prosecutor's intent to use or not to use the evidence a relevant factor here, or not?

Mr. SCHUELKE. I am not sure I understand the question. The prosecutor's intention to——

Mr. PIERLUISI. Yeah. Because some of the case law seems to suggest and rules also that one of the relevant factors in determining whether you turn over this type of evidence to the defense is whether the prosecutor intends to use it at trial. And in my view, that shouldn't be a factor. And I want to hear from you about it.

Mr. SCHUELKE. I quite agree. That should not be, and I don't know that it typically is a factor.

Mr. PIERLUISI. Okay. And we have been talking about Congress. Now would you turn your attention to DOJ? The U.S. attorney manual, as you know, is binding on the prosecutors and internally can be used for disciplinary purposes but it has no bearing—it has no remedy for the defense. So that is a flaw. I have seen that they have made some revisions to it. I have seen that training has been enhanced in this area. Is there anything else that the Department of Justice should be doing so that this type of conduct doesn't happen again?

Mr. SCHUELKE. Well, as you have pointed out, the Department, through its U.S. attorney's manual, has a provision, which has recently been revised, together with guidance from the then-deputy Attorney General Ogden, right after the Stevens trial, which as a matter of policy tells the Federal prosecutors that they are to disclose Brady and Giglio material. They are to take a liberal view of it, and in most cases, they are not to impose this materiality standard.

As you have also observed, the U.S. attorney's manual has an explicit disclaimer that these policy pronouncements do not have the

force of law, and they vest in no one any rights. I believe if the Justice Department, as expressed in the U.S. attorney's manual, is of the view that the materiality requirement ought to be eliminated, then I see no principled reason why they would oppose legislation which does, of course, have the force of law to accomplish the same thing.

Mr. PIERLUISI. Thank you.

Mr. SENSENBRENNER. The gentleman's time has expired. The gentlewoman from Florida, Ms. Adams.

Mrs. ADAMS. Thank you, Mr. Chairman. Knowing that, how was the Stevens trial team structured?

Mr. SCHUELKE. How was it structured?

Mrs. ADAMS. Uh-huh.

Mr. SCHUELKE. Very shortly before the indictment was returned in July of 2008, Brenda Morris, who was a deputy chief of the Public Integrity Section, who up until that point had very limited involvement in the Stevens investigation, was tapped by the Office of the Assistant Attorney General for the criminal division to be the lead trial prosecutor.

The team in the courtroom, in addition to Ms. Morris, was Mr. Nicholas Marsh and Mr. Joseph Bottini. Mr. Marsh was a public integrity lawyer. Mr. Bottini was an assistant U.S. attorney in the district of Alaska. They had significant experience in this public corruption investigation in Alaska because Mr. Goeke, the other Alaska assistant U.S. attorney, and Mr. Marsh tried the first of the two State legislators, whose cases I have described, and Mr. Bottini and a young Public Integrity lawyer named Edward Sullivan tried the other one. So that was the composition of the trial team.

Mrs. ADAMS. Do you believe that the six prosecutors who were the subject of your inquiry were candid, forthright, truthful with you during the course of your investigation?

Mr. SCHUELKE. I believe that they were.

Mrs. ADAMS. Can you explain your references in the report to the simultaneous and collective memory failure, I guess it is of Messrs. Bottini, Marsh, Goeke and Sullivan, to recall the details of their interview with Bill Allen on April 15, 2008?

Mr. SCHUELKE. Can I explain the memory failure?

Mrs. ADAMS. Your references to that. Because you just said they were being forthright.

Mr. SCHUELKE. All of them participated in the interview of Mr. Allen on April 15, 2008. All of them took notes, in which they recorded what he said. Five months later, Mr. Allen has a dramatically different—indeed, a polar opposite—account from the one he gave them in April. And all of them, to a person, maintained that they had no memory of him having said what he said on April 15.

As I say in the report, I was unable to determine by compelling evidence that any one of them, in fact, remembered what had transpired in that April interview and falsely represented that they had not.

Mrs. ADAMS. At this time I yield to Mr. Gowdy.

Mr. GOWDY. Was this what we sometimes refer to as an open-file case? Or did they try to follow the statute?

Mr. SCHUELKE. In the Stevens case?

Mr. GOWDY. Right.

Mr. SCHUELKE. It was not a so-called open-file discovery practice.

Mr. GOWDY. If DOJ adopted an open-file status for all of its cases, how many of the concerns raised by our colleagues on the other side would go away?

Mr. SCHUELKE. Some, but not all.

Mr. GOWDY. Can you give me an example of something that is potentially impeachment material but not material; doesn't meet the materiality element but is potentially impeachment, Giglio material.

Mr. SCHUELKE. I suppose a witness could testify at a trial that the crime he or she observed occurred on a Tuesday, and that witness could have testified—or in the course of an interview earlier, stated that it occurred on a Thursday. The accounts of the events themselves might in both the interview and the trial testimony have been otherwise altogether consistent. And one can make an argument that the witness' memory at one point, months ago, that it was a Tuesday versus memory that it was a Thursday at the trial was not material.

Mr. GOWDY. Well, my time is out. But I appreciate your testimony. And I would hope you would come back at some point. You are a former prosecutor. There are other former prosecutors up here. Reciprocal discovery is something I would like to get your perspective on as well, because I can't recall the name of any criminal defense attorneys—at least in my experience—that have been disciplined in any way for not meeting the reciprocal discovery requirements. And that may be a source of frustration for prosecutors.

Mr. SENSENBRENNER. The gentleman's time has expired. Mr. Schuelke thank you very much not only for coming today and answering the questions that we all have relative to this prosecution and your report, but also the extensive time you spent putting together an extremely thorough report on a very messy and sad experience in the history of the Justice Department. So I think the entire country should thank you for your efforts on that. And hopefully your report and what has transpired in the Stevens case will prevent this from happening again. So thank you.

Mr. SCHUELKE. Thank you, Mr. Chairman. I appreciate your hospitality.

Mr. SENSENBRENNER. Yes. Thank you.

Okay. We will now go to the second panel of witnesses. Kenneth Wainstein is a partner in the law firm of Cadwalader, Wickersham & Taft where his practice focuses on corporate internal investigations. He is also an adjunct professor at Georgetown law school. Mr. Wainstein served as an assistant U.S. attorney both in the Southern District of New York and the District of Columbia. Later he served as the U.S. Attorney in the District of Columbia, and then was the first assistant attorney general for national security. He has served as FBI Director Robert Mueller's chief of staff and then as President Bush's homeland security adviser. He received his undergraduate degree from the University of Virginia and his law degree from the University of California at Berkeley.

Alan Baron is the senior counsel at the law firm of Seyfarth Shaw where his practice focuses on white-collar criminal defense. He has served as special impeachment counsel to the U.S. House

of Representatives three times, and most recently he was Special Counsel in the impeachment of Judges Samuel Kent and G. Thomas Porteous. He also is minority chief counsel to the Senate Governmental Affairs Committee and served as an assistant U.S. attorney in Maryland. He received his undergraduate degree from Princeton and his law degree from Harvard.

As I said earlier, I will swear the witnesses in. Could the two witnesses please stand, raise your right hand.

[Witnesses sworn.]

Mr. SENSENBRENNER. Let the record show that both witnesses answered in the affirmative. Their written statements will be entered in the record in their entirety. And you all have been up here before, so you know about green lights, yellow lights, and red lights.

Mr. Wainstein.

TESTIMONY OF KENNETH L. WAINSTEIN, PARTNER, CADWALADER, WICKERSHAM AND TAFT LLP

Mr. WAINSTEIN. Thank you, Chairman Sensenbrenner, Ranking Member Scott, Members of the Subcommittee. I am here with two of my colleagues, Jeffrey Nestler and Sara Zdeb. And together, we are proud to represent assistant United States attorney Joe Bottini in this matter. We are here today for one reason: to demonstrate that the Special Prosecutor got it simply wrong when he found that Joe intentionally violated the rules in the Stevens case.

First let me take a minute on who Joe is. Joe is a 27-year veteran of the Alaska U.S. attorney's office. He is universally respected by the Alaska bench and bar, has never had a single allegation of misconduct against him. He has tried and prosecuted hundreds of cases. And the only recognition he wants in life is to be counted among those prosecutors who go to work each day seeking to do justice for the American people. In short, and in my eyes, Joe is a model public servant.

Joe is also something else. He is human. He makes mistakes. He acknowledges he made mistakes, serious mistakes in the Senator Stevens case. And he acknowledges and he greatly regrets the impact those mistakes had on the integrity of that trial and on the public's perception of the Justice Department. But Joe does not acknowledge, I do not acknowledge and, most importantly, the facts do not acknowledge that Joe committed those errors purposely or with any bad faith.

The Special Prosecutor's report, as you know, concluded definitively that he did. While the report goes on for some 500-odd pages, it really distills down to just two findings about Joe: one, a finding that Joe committed errors; and two, a finding that those errors were intentional. What is completely missing, however, is any connective tissue between those two findings, any actual support for the conclusion that Joe's errors were intentional as opposed to inadvertent.

In fact, there is really no analysis of Joe's intent at all. We have carefully gone through the 514 pages and have found a grand total of one paragraph that reports to analyze the intent behind Joe's conduct, one single paragraph for the most critical question in the whole investigation.

Professional prosecutors understand that every error is not a crime, and that they have a duty to carefully distinguish between mistake and misconduct before concluding that somebody is guilty of an intentional crime.

The Special Prosecutor's report failed to uphold that duty in just about every respect. First, the report fails to take into account the conditions under which the prosecutors were working before and during trial. And the Chairman mentioned these earlier today. Circumstances that made it likely that balls would be dropped and made it therefore more likely that mistake rather than misconduct was behind any errors; circumstances such as the complete failure by the Public Integrity Section management to do its job; the severely shortened time period for trial preparation; and the combative defense tactics that kept the prosecutors off balance during trial, all highly relevant circumstances and none given any real consideration by the report.

Second failing: The report fails to consider critically important mitigating circumstances, such as the fact that Joe is universally admired by his defense counsel adversaries as, quote, a man of high moral character and as, quote, the kind of person for whom the expression "straight arrow" was invented. And also, the fact that on seven different occasions, Joe actually pushed his Public Integrity Section supervisors to disclose the very information the Special Prosecutor's report accuses him of trying to suppress, requests that were firmly denied each time.

Third failing. The report mischaracterizes important facts in a way that puts a nefarious slant on Joe's conduct by saying, for example, that Joe made a prejudicial argument in his closing jury address, an argument that is not found in the jury trial transcript.

The report altogether ignores other facts, facts that cut against its findings. For instance, the report finds Joe guilty of suppressing Rocky Williams' assumption about the Senator paying for the work on his house, but never addresses the fact that Joe's outline for his direct examination of Rocky Williams had an entry showing that Joe intended to elicit that very assumption on the record in open court, a circumstance that completely undermines a finding of intentional misconduct and a circumstance that should have been front and center in any credible consideration of that issue.

As a final failing, the report reflects a process that showed very little regard for fairness, and, most troublingly, in the way the investigation concluded with no criminal charges, but with a public branding of our client as a proven criminal.

Under our system, professional prosecutors have one way and only one way to accuse a person of a crime, and that is with the filing of formal charges that the person can then contest in open court to defend his liberty and his reputation. That rule was not followed in this case. The Special Prosecutor decided not to file charges against Joe but then turned around and publicly declared to the world that Joe was guilty of the worst thing one can say about a Federal prosecutor, that he is dishonest and a cheat. This left Joe with the shame of a criminal accusation but without any opportunity to show the American people that that accusation was wrong.

Today, thanks to this hearing, we finally have that opportunity and we are very grateful to the Committee for giving it to us. I look forward to this hearing and I look forward to answering any questions you may have for me.

Mr. SENSENBRENNER. Thank you very much.

[The prepared statement of Mr. Wainstein follows:]*

*See Appendix for the Addendum submitted with this statement.

STATEMENT OF

KENNETH L. WAINSTEIN
PARTNER, CADWALADER, WICKERSHAM & TAFT LLP

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

CONCERNING

THE PROSECUTION OF
FORMER SENATOR TED STEVENS

PRESENTED ON

APRIL 19, 2012

Chairman Sensenbrenner, Ranking Member Scott and Members of the Subcommittee, thank you for the invitation to appear before you today. My name is Ken Wainstein. I'm a partner at the law firm of Cadwalader, Wickersham & Taft LLP, and I'm proud to represent Assistant United States Attorney Joe Bottini in this matter. I'm here with two of my colleagues, Jeffrey Nestler and Sara Zdeb, who have worked closely with Joe and me on this case.

I. Introduction

We are here today for one reason — to demonstrate to you and the American people that the Special Prosecutor's conclusion that Joe Bottini intentionally violated the law is simply wrong.

Before starting into the facts, it's important that you understand who Joe Bottini is. Joe is a 27-year veteran of the Alaska U.S. Attorney's Office; he has tried over 50 cases and prosecuted hundreds of crimes ranging from bombings to complex white-collar schemes without so much as an allegation of misconduct; and he is widely respected by the Alaska bench and bar, and particularly by the criminal defense bar. Joe has spent his entire career doing the hard work of criminal prosecution, and does so without fanfare or glory. He is the ultimate team player, always the first to volunteer for the tough job and the last to ask for credit.

Throughout his career, Joe has shunned the spotlight and declined numerous offers to assume more glamorous leadership positions. He wants nothing more than to serve as a line federal prosecutor, and the only recognition he seeks is to be counted among those who proudly go to work each day seeking justice on behalf of the people of the United States. As one Alaska defense attorney explained, Joe is "a modest man, without ego, and incapable of saying or doing something that is self-aggrandizing." In short, Joe is a model public servant.

Joe is also something else: he is human. He makes mistakes. Like every prosecutor — myself included — he has made his share of mistakes, especially in the hectic and unpredictable environment of criminal trials. He acknowledges that he made mistakes — serious mistakes — in the Senator Stevens case, and he will always regret the effect they had on the integrity of that prosecution and on the public perception of the Justice Department.

But Joe will never acknowledge, I will not acknowledge, and — most importantly — the facts do not acknowledge that he purposely committed those errors with the intention of violating Senator Stevens' rights.

The Special Prosecutor's report nonetheless concluded that he did — that Joe intentionally suppressed exculpatory information that he knew he was obligated to disclose to defense counsel.

II. General Concerns about the Special Prosecutor's Report

Considering the length of the report — all 500-plus pages of it — one would assume that that conclusion must be well-founded. That assumption would be wrong. This is a case that proves up the old adage that quantity does not lead to quality. If you actually read all those pages, you find that they distill down to two findings about Joe: (1) a finding that he committed the errors that he acknowledges; and (2) a finding that those errors were intentional. Completely missing, however, is any connective tissue between those two findings; any support for the inference that

Joe's errors were intentional and not inadvertent; or any genuine effort at all to apply and satisfy the specific intent elements of the crime of contempt.

In fact, there is really no analysis of Joe's intent in this report at all. We have carefully gone through it page-by-page, and among its 514 pages we have found a grand total of one paragraph (page 505, paragraph 3) that purports to actually analyze the intent behind Joe's conduct — one single paragraph for the most critical question in the whole investigation.

Reading this report is actually a little disconcerting. It's like reading a novel that goes straight from the introduction to the happy ending or a judicial opinion that states the issue and the court's ruling but omits the analysis that leads to the ruling. It's as though someone forgot to include the most important part of the report.

Professional prosecutors understand that it is their job to analyze intent when deciding how and whether to assign blame. They recognize that every error is not a punishable crime, and that it is the prosecutor's duty to examine all the relevant circumstances and carefully distinguish between mistake and misconduct before concluding that someone is guilty of a crime. The Special Prosecutor's report failed to uphold that duty. It branded AUSA Bottini a criminal and found his errors intentional without so much as considering the circumstances that demonstrated their inadvertence.

We have the greatest respect for the attorneys who generated the Special Prosecutor's report and for their diligence in pursuing and bringing to conclusion what was a tremendously complicated investigation. It is clear, however, that their investigation fell victim to the loss of perspective and target-fixation that can affect high-profile prosecutions.

Prosecutors have to constantly guard against the human temptation to see the target of an investigation as their quarry and to conduct the investigation as an effort to "build a case" against that target rather than as an effort to reveal the facts, no matter whether those facts incriminate or exculpate the target. That temptation is a constant struggle for professional prosecutors, and many features of federal prosecution practice — including charging guidelines and supervisory review of proposed indictments — are in place largely to protect the criminal process from its effects. Special prosecutions can be even more vulnerable to this temptation, given that they are solely focused on one case and are not governed and checked by the regularized procedures of a prosecutor's office. The telltale symptoms of that target-fixation are a result-oriented approach to the investigation, a conclusory assessment of the target's motive and intent, and ultimately a flawed determination of criminality. Each of those symptoms is present here.

III. Specific Failings of the Special Prosecutor's Report

Let's now look at the specific failings in the report — the particular reasons why its conclusions are unreliable and wrong. These failings are fully addressed in my March 15, 2012 letter to the Attorney General — which is attached to my testimony — and I will only summarize them here today.

Failure to consider explanatory circumstances: First, the report fails to take into account the chaotic conditions under which the prosecutors were working — conditions that made it likely that balls would be dropped and that the prosecutors would make mistakes. These include:

- The failure of the Public Integrity Section management to do its job of supporting the line prosecutors and ensuring coordination across the trial team;

- The extraordinarily compressed time period between indictment and trial for preparing the case; and

- The combative defense tactics that kept the prosecutors off-balance once they got into trial.

All of these circumstances created the situation where mistakes were likely — if not inevitable — yet the Special Prosecutor's report failed to consider them in determining that Joe's errors were intentional.

Failure to consider mitigating circumstances: Second, the report fails to consider critically important mitigating circumstances, including:

- The abundant evidence of Joe's exemplary character and record of absolute integrity, including letters from defense counsel in Alaska who praise him as "a man of high moral character," as "the kind of person for whom the expression "straight arrow" was invented," and as someone who "plays by the rules, . . . does not cut corners [and] is as thoughtful, professional, and fair-minded as any prosecutor I have encountered."

- The fact that Joe had no motive to deny Senator Stevens a fair trial. Interestingly, when pressed by Members of the Senate Judiciary Committee, the Special Prosecutor speculated that Joe was motivated by ambition — by a win-at-all-costs gladiator mentality that he called "contest living." While it might apply to some lawyers, that pseudo-diagnosis is completely at odds with the qualities of modesty, fairness, and gentlemanliness that Joe's colleagues and adversaries universally attribute to him or to the selflessness that has been the hallmark of his career. It should also be noted that this "contest living" theory — and for that matter, any discussion of motive at all — was absent from the report.

- And importantly, the fact that Joe took numerous good-faith efforts to comply with all discovery requirements, including pushing his Public Integrity supervisors **on seven separate occasions** to permit him to disclose the very information that the Special Prosecutor accuses him of unlawfully suppressing — requests that were met by denials from the management of the Public Integrity Section (known as "PIN") each time, including one in an email from PIN Chief Bill Welch instructing Joe to stand down and sharply reminding him that "you work for PIN, and so these are your marching orders."

Failure to accurately characterize salient facts:

The report fails to accurately recite certain facts, and even mischaracterizes several uncontroverted facts in a way that puts a nefarious slant on Joe's conduct that is completely unsupported by the established record. For instance, the report accuses Joe of making a prejudicial argument in his closing jury address — an argument that the transcript shows he never made. It also asserts that Joe had a hand in drafting the critical passage in a defective discovery letter — a passage that was completely composed by *other* members of the prosecution team. In both cases the assertion was cited as a basis for the report's findings, and in both cases the assertion simply had no basis in fact.

Failure to cite facts that directly exculpate Joe of the Special Prosecutor's accusations:

Besides mischaracterizing certain facts, the report altogether ignores other facts that clearly show that Joe did not intentionally violate his discovery obligations — ironically, the exact sort of exculpatory evidence that professional prosecutors are obligated to disclose and that Joe is accused of suppressing in the Stevens trial. For instance, the report finds Joe guilty of suppressing construction worker Rocky Williams' assumption that Senator Stevens was paying for the construction work on his house. Yet, the report never addresses the fact that Joe's outline for his direct examination of Mr. Williams had an entry showing that Joe intended to elicit **that very fact** on the record in open court — a circumstance that completely undermines a finding that Joe intended to suppress that information and a circumstance which certainly should have been front and center in any credible consideration of that issue.

Failure to cite legal authority adverse to the Special Prosecutor's positions:

Not only does the report fail to advise the Court of facts that are adverse to its position, it also ignores case law that is adverse to its position — case law that a lawyer is ethically obligated to disclose to a judge, especially in an ex parte situation like this where the Court did not have the benefit of hearing opposing views from the subjects' attorneys before it adopted and announced the Special Prosecutor's findings. In April 2010, we provided the Special Prosecutor with a memo detailing significant case law that undercut any finding of intentional misconduct against our client. The Special Prosecutor's report never addresses these cases.

Failure to conduct a fair process:

It is particularly ironic that the Special Prosecutor tasked with investigating whether federal attorneys subjected Senator Stevens to an unfair process has done exactly that with the subjects of this investigation. From limiting our access to critical information (i.e., discovery) to denying us the opportunity to review and provide input about the report's findings before they were finalized and publicly announced, this investigation has been conducted with little regard for fairness and due process.

IV. Conclusion

Most troubling has been the manner in which this investigation concluded — with no criminal charge or prosecution but with a public branding of our client as a proven criminal. It is a rule in our criminal justice system that professional prosecutors are allowed to accuse a person of

criminal conduct in one way and one way only — and that's with the filing of formal charges that the person can then contest in open court to defend his liberty and his reputation. That rule is based on the rationale that a prosecutor should level accusations against a citizen only if and when he has the evidence and the confidence to back them up in a public court of law.

That rule was not followed in this case. The Special Prosecutor decided not to file charges against Joe, but then turned around and publicly declared to the world that he was guilty of the worst thing one can say about a federal prosecutor — that he is dishonest and a cheater. This has left Joe with the shame of a criminal accusation, but without the opportunity to show the American people that that accusation is wrong.

Today we finally have that opportunity, and we are very grateful to the Committee for giving it to us. I look forward to this hearing and to answering your questions.

Mr. SENSENBRENNER. Mr. Baron.

TESTIMONY OF ALAN I. BARON, SENIOR COUNSEL, SEYFARTH SHAW LLP

Mr. BARON. Thank you very much, Mr. Chairman. As you noted in introducing me, you mentioned that I had been an assistant United States attorney for Maryland. I think I would only add to that that during that time, I headed the investigation which led to the indictment of a former United States Senator, Daniel Brewster of Maryland. And I am aware therefore—although that was a long time ago—of the pressure that is put on a prosecutor when he is involved in a case of such magnitude and importance. I would note that I have no connection whatever to the Stevens case, I have no relationship with any of the individuals involved in that matter, other than having had minimal contact with Mr. Welch relative to the Porteous impeachment.

I join with the Chairman in commending Mr. Schuelke for his comprehensive report. In my view it is clearly the product of an enormous amount of effort conducted in a highly professional manner.

So for purposes of my testimony, I accept the accuracy of his findings of fact; specifically, that by any standard—and I think I want to keep those words in mind—"By any standard, the information provided to the prosecutors by Rocky Williams and Bambi Tyree was Brady material." And Mr. Schuelke concluded that both Mr. Bottini and Mr. Goeke consciously withheld and concealed this critical information from the defense, and indeed that there were affirmative misrepresentations regarding the Tyree information to the effect that such material did not even exist.

And then Mr. Schuelke also found that Mr. Bottini failed to take steps to correct false testimony by Mr. Allen on the witness stand, which testimony Mr. Bottini knew to be false, in violation of the Supreme Court case *Napue v. Illinois.*

Mr. Schuelke was appointed to investigate and prosecute criminal contempt proceedings as may be appropriate against the prosecutors in this case. Despite having the findings that we have all referred to this morning, Mr. Schuelke ultimately concluded that no prosecution for criminal contempt would lie. According to Mr. Schuelke at a hearing on September 10, 2008, the judge in the Stevens case failed to issue—I am quoting now from the report—"a clear, specific, and unequivocal order such that it would support a finding by a district court beyond a reasonable doubt that 18 USC section 4013—that is the criminal contempt statute—had been violated."

In my view—and I certainly defer to Mr. Schuelke's report, wherever it purports to find facts and reach conclusions based on the enormous investigative effort which clearly underlies it—but the entire transcript of the proceedings on September 10, 2008, is available for review. Anyone here can read—that is the entire universe contained in that transcript. And one can therefore reach one's own conclusion as to what transpired at that critical event. And here, I must regrettably and respectfully disagree with Mr. Schuelke's characterization of what occurred.

On September 10, 2008, the court issued a clear, unequivocal order to the government to produce material pursuant to Brady and its progeny. Everyone agreed that they understood their obligation. None of the prosecutors asked for clarification of what was being ordered. And we must recall Mr. Schuelke's earlier conclusion that by any standard, even the narrowest view of what Brady requires, the Williams and Tyree materials had to be disclosed as Brady material.

In my view, if you accept Mr. Schuelke's factual premise, the failure to disclose what were clear Brady materials was in direct violation of the court's order. Now, the fact that there was no written order entered on September 10 is irrelevant. It is well established that no written order is required. And it is noteworthy that Mr. Wainstein, who represents Mr. Bottini, in a letter to the Attorney General, dated March 15, 2012, acknowledges A, that no written order is required for contempt proceeding and that the judge's verbal order at the September 10, 2008 hearing was clear and unequivocal. To me, the judge's order was clear, as was its violation.

The question is how did this happen? In a sense, it is a bigger issue. The obvious answer is that overzealous prosecutors got caught up in a win-at-all cost mentality and ignored their obligation to prosecute fairly within the limits imposed by the Constitution.

But I think there is a deeper question here. There seems to have been a total breakdown of supervision. Who was in charge? Who would accept responsibility to rein in prosecutors when they began to violate their constitutional obligations?

What I find—and we can talk about this perhaps in response to questions, because I see my time is elapsing—what I see here is a total breakdown in supervision. You might ask, Why do experienced prosecutors need supervision? Because it puts someone in a position where they must account for what happens. And when you don't have that structure, you get the problem of people going off and essentially doing their own thing, very much to the detriment of the administration of justice. Thank you.

Mr. SENSENBRENNER. Thank you Mr. Baron.

[The prepared statement of Mr. Baron follows:]

Prepared Statement of Alan I. Baron, Senior Counsel, Seyfarth Shaw LLP

My name is Alan Baron and I am Senior Counsel to the law firm of Seyfarth Shaw LLP based in Washington, DC. In the course of my career, I have served as an Assistant United States Attorney for Maryland, during which time I headed the investigation which led to the indictment of former Senator Daniel Brewster for bribery while in office.[1] I am aware of the pressures on prosecutors when involved in a case of such magnitude and importance.

A substantial portion of my career in private practice over the years has involved acting as defense counsel in white collar criminal cases. I am familiar with the requirements of *Brady v. Maryland,*[2] *Giglio v. United States*[3] and related cases.

[1] Senator Brewster ultimately entered a plea of *nolo contendre* after the Supreme Court rejected his claim of immunity under the Speech or Debate clause of the Constitution. *See United States v. Brewster,* 408 U.S. 501 (1972).

[2] 373 U.S. 83 (1963)

[3] 405 U.S. 150 (1972)

I have also served, from time-to-time, as special counsel in the public sector. I have been retained as special impeachment counsel by the House of Representatives to pursue the impeachment, trial and removal of four federal judges, including former Judge G. Thomas Porteous.

I am appearing before the Subcommittee to testify concerning the report filed by Mr. Henry Schuelke setting forth the results of his investigation into possible criminal contempt proceedings against the prosecutors who conducted the investigation and prosecution of Senator Ted Stevens of Alaska (hereafter "the Report"). I should note that I have no connection whatsoever to the Stevens case and have no relationship with any of the individuals involved in that matter other than minimal contact with Mr. Welch, relative to the Porteous impeachment.

Mr. Schuelke is to be commended for this comprehensive report. It clearly is the product of an enormous amount of effort conducted in a highly professional manner. For purposes of my testimony, I accept the accuracy of his findings of fact, specifically that "By any standard, the information provided to the prosecutors by Rocky Williams and Bambi Tyree was *Brady* material" (the Report at 500).[4] The Report concluded that Mr. Bottini and Mr. Goeke consciously withheld and concealed this critical information from the defense. Indeed, the Report states that there were affirmative misrepresentations regarding the Tyree information to the effect that such materials did not exist (the Report at 503).

Finally, Mr. Schuelke found that Mr. Bottini failed to take steps to correct testimony by Mr. Allen on the witness stand which Mr. Bottini knew to be false in violation of *Napue v. Illinois*[5] (the Report at 503).

Mr. Schuelke was appointed "to investigate and prosecute criminal contempt proceedings as may be appropriate against the prosecutors in this case" (the Report at 1). Despite having found that Mr. Bottini and Mr. Goeke intentionally withheld and concealed material exculpatory information which was required to be disclosed to Senator Stevens and Williams & Connolly by *Brady* and *Giglio* (the Report at 36), Mr. Schuelke ultimately concluded that no prosecution for criminal contempt would lie. According to Mr. Schuelke, at a hearing on September 10, 2008, the judge in the Stevens case failed to issue "a clear, specific and unequivocal order such that it would support a finding by a District Court beyond a reasonable doubt that 18 U.S.C. § 401 (3) had been violated" (the Report at 513).

In my view, Mr. Schuelke's report is entitled to deference where it purports to find facts and reach conclusions based on the enormous investigative effort which underlies it. However, the entire transcript of the September 10, 2008 hearing is available for review so that one can reach one's own conclusion as to what transpired at that critical event. Here, I must respectfully disagree with Mr. Schuelke's characterization of what occurred. On September 10, 2008, the court issued a clear, unequivocal order to the government to produce material pursuant to *Brady* and its progeny. Everyone agreed that they understood their obligation. None of the prosecutors asked for clarification of what was being ordered. We must recall Mr. Schuelke's earlier conclusion that "By any standard . . ." the Williams and Tyree

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[4] Rocky Williams was foreman for the renovations on the Stevens' house. He told prosecutors, based on statements made by Bill Allen, his boss, and by Senator Stevens, he understood that all charges would be added to the bill submitted to Senator Stevens by the subcontractor. This corroborated the heart of the defense case. Senator Stevens maintained that when he paid the bills submitted to him, he understood he was paying for everything he owed.

Bambi Tyree was an underage prostitute with whom Mr. Allen had a relationship. Allen was a major prosecution witness against Senator Stevens. In an unrelated case, Tyree was interviewed by the FBI. The FBI memorandum of that interview states that Tyree submitted a false affidavit at Allen's request denying her sexual relationship with Allen. The Government in that case filed a memorandum under seal which stated Allen had procured the false affidavit.

[5] 360 U.S. 264 (1959). When Allen was interviewed by prosecutors shortly before trial, he changed his version of the facts on a critical issue for the defense. For the first time, Allen characterized memoranda Senator Stevens had sent to him in 2002 asking Allen to be sure and send Senator Stevens a bill for the work, as "cover your ass" memos. When asked on cross-examination at trial whether his characterization of the documents as "cover your ass" memos was something he had just recently told prosecutors, Allen said "no." That answer was false, but no effort was made to correct the testimony.

materials were *Brady*. Accordingly, failure to disclose what were clear *Brady* materials, was in direct violation of the court's order.

The fact that no written order was entered on September 10 is irrelevant because it is well established that a written order is not required. *See In re Hipp, Inc.,* 5 F.3d 109, 112 n.4 (5th Cir. 1993). It is noteworthy that Mr. Wainstein, counsel for Mr. Bottini, in a letter to Attorney General Holder dated March 15, 2012, acknowledges that no written order is required for a contempt proceeding and that the judge's verbal order at the September 10, 2008 hearing was clear and unequivocal.

Based on the foregoing, I believe that Mr. Schuelke's rationale for not proceeding is unpersuasive. There may be many reasons for a prosecutor to exercise discretion and decide not to prosecute a case, but the reason stated here in not convincing. The judge's order was clear as was its violation.

It is fair to ask "how did this happen?" The obvious answer is that over-zealous prosecutors got caught up in a win at all costs mentality and ignored their obligation to prosecute fairly and within the limits imposed by the Constitution. The question remains, however, where was the supervision which would have operated as a reality check to rein in prosecutors who, according to the Report, engaged in "systematic concealment of significant exculpatory evidence which would have independently corroborated Senator Stevens' defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness."?

It is clear from the Report that there was a breakdown in responsibility and accountability in how the case was being handled. Brenda Morris, Principal Deputy Chief of the Public Integrity Section, was thrust into the role of lead prosecutor just a few days before the indictment was filed in a case which had been investigated for two years. According to Ms. Morris, she had resisted being put in the position of lead counsel several times. (See Exhibit 4 in the Addendum to the Report.) Once in the position, she was well behind the curve in mastering the facts and was faced with resentment by the prosecutors who had been on the case. Her solution, in her own words was, "to make herself as little as possible" (the Report at 3). In essence, she accepted the position of lead counsel without accepting and exercising the responsibilities inherent in the role. This was at least part of the reason the case imploded. No one was supervising the prosecutors in a meaningful way. This does not in any way excuse the misconduct, but it is part of the explanation for how matters got to the sorry state set out in the Report.[6]

The vast majority of federal prosecutors perform their roles with integrity and in conformity with their sworn obligation to uphold the law. Matters went terribly awry in this case, and it is to Attorney General Holder's credit that he decided to dismiss the Stevens case with prejudice, in effect, expunging the verdict.

Mr. SENSENBRENNER. Mr. Wainstein, I think that Mr. Bottini was very clearly the most experienced of the prosecutors that were prosecuting Senator Stevens. And I just look at the long litany of errors that occurred, and ignoring the judge's admonition. You know, for example, during one hearing, the judge admonished the prosecutors that the government has an obligation to turn over the Brady and Giglio information, and if they don't want to do that, they ought to resign.

And then there were some letters that Mr. Bottini authored relative to the Brady and Giglio issues that were sent to counsel for Senator Stevens. In one of those letters Mr. Bottini failed to include significant Brady information provided to him by Rocky Williams, which a few days earlier corroborated Senator Stevens' primary defense. In your written testimony, you said, Mr. Bottini only skimmed the second of the two Brady letters, which also, according to Mr. Schuelke, contain significant misstatements and conceal the

[6] The Report exonerates Ms. Morris of knowingly and willfully withholding *Brady* and *Giglio* information from the defense (the Report at 506).

importance of important Brady and Giglio information. At trial, Mr. Bottini did not correct Bill Allen's false testimony on cross-examination. On September 10, the judge issued a clear order to the prosecutors to comply with Brady and Giglio or it would support a criminal contempt prosecution.

Mr. Williams was sent to Alaska, and Mr. Bottini apparently had some role in making that decision. Mr. Allen suborned perjury. That information was not disclosed. And Mr. Bottini did not produce counsel for Senator Stevens' April 15, 2008 interview notes of Bill Allen pursuant to Brady or Giglio.

Now it is going on again and again. And we know of at least two admonitions from the bench to either produce the information, resign, or face criminal prosecution. Mr. Allen's false testimony was not corrected on cross-examination.

Now, this is an experienced prosecutor. And it was up to the Department of Justice to determine when to file the indictment. Senator Stevens was up for reelection 4 months after the indictment was filed. And as one who has run for office numerous times, it is pretty hard to get reelected when you are indicted, you don't have an opportunity to have a jury decide your guilt or innocence. And that is, the timing that the Justice Department undertook in determining when to file the indictment I think practically guaranteed that Senator Stevens' attorneys would have asked for a very speedy trial.

And finally, there was the complaint that the defense counsel was very aggressive in the presentation of their case. Now, it has been a long time since I have tried cases in court. And I always thought that the counsel, pursuant to rules, was on an ethical obligation to present a vigorous case for their trial. You know, you say that Mr. Bottini was caught up in the milieu of the trial and the lack of supervision from on high. But he was so experienced, couldn't he overcome that? Or couldn't he throw the red flag down on the field and tell his superiors in the Justice Department that they ought to have a hand on the tiller?

Basically what I hear from you, Mr. Wainstein, is that well, he did the best he could under the circumstances, and it was the folks up above him that kind of dropped the ball. And I will give you a chance to answer my 4½ minutes of a litany of things that are in the report. And forget about the red light, because I am not going to ask a follow-up question.

Mr. WAINSTEIN. Thank you, Mr. Chairman. You gave me a lot to chew on here. Let me start off. First, Joe is not saying—not pointing fingers at the people above him. He is not saying that he didn't do anything wrong. He will say he wishes he did throw a flag. He just bore down and worked on his little area and didn't say, you know what, we really need to do this, we need to stop the presses here, go back to the beginning and try to fix this. And he wishes he did. So he is not saying that this is all somebody else's fault. He is accepting responsibility for the mistakes and the miscalculations he made.

Another thing I would like to mention is, you know, you mentioned zealous advocacy by defense counsel. I am not complaining about their work. They are very a successful defense counsel and they do a great job for their clients. My only point is, that is a cir-

cumstance that kept the prosecutors on their heels, confused, running here and there, and they never really got their sea legs at trial. And that is one of the reasons why mistakes were more likely, because the critical thing that we have focused on is, is there intentional conduct here or is it mistaken conduct?

And the circumstances that we have laid out here, we have laid out with the intention of showing you that this really was a series of mistakes. Now, you have laid out a number of the things that the report indicates that my client is guilty of. Now of course, you are characterizing the facts as characterized in the report. You are accepting the conclusions that these things were done intentionally. And I understand that, because your basis of knowledge is the report.

What I am doing is—on behalf of Joe, and frankly on behalf of the other subjects—pushing back on those assertions by the Special Prosecutor, because I think the Special Prosecutor, like you, did a tremendous service to the country here and it was a tremendous challenge what he had to deal with. But I believe that he got some of the facts wrong and he got the inferences wrong.

So if you look at a few of the things raised, it is not so clear-cut. For instance, the question about whether Bill Allen provided perjured testimony or wrong testimony that Joe should have corrected. If you actually go back and look at the record, you will see why Joe realized he was totally confused, and the jury who had already—Joe had already advised the jury that Mr. Allen had some cognitive impairments, that he had some serious problems, and those problems actually played out while he was on the stand. The jury understood that he would get confused and he got confused.

I think his final question was, hell I don't know what day it was that I talked about this. Joe's recognition—he explained this to Mr. Schuelke—was I realized he was confused. If I tried to clean it up, it would get worse. And the critical thing is that Joe did not use that information, did not try to take advantage of it in his closing argument by suggesting that Allen had not just recently told him this information. He didn't exploit it at all, even though defense counsel raised that issue. My point is, he had a reason for what he did which was not nefarious, was in fact understandable.

Rocky Williams, the only other example I would like to cite. He talked about how he learned that Rocky Williams had this assumption that Senator Stevens was going to pay for that work. He did. Rocky Williams told Joe this, and Joe thought about it. He has explained this to Mr. Schuelke. He thought about, boy, this is an assumption by a person who is working on a work site that the guy who owns that work site, the house there, is going to pay for that work. Is that something that we need to turn over to defense?

He asked a critical question: Did you Mr. Williams, Rocky Williams, tell the Senator or the Senator's wife that the charges for the work were all going to be put in the Christensen Builders bills that you are paying? "No, I didn't but I assumed that."

Well, frankly, Joe's thinking was, everybody on that work site assumes that the owner of the house is paying for the construction on that house. I think we would all assume that. That is not something that can be elicited on the stand. That is just speculation, and is not something that is disclosable.

Now, you can take issue with that decision. My point is, he had a reasonable basis for the decision he made that is far from criminal intent to hide facts that should have gotten to the defense, even though one can question whether, you know, in retrospect he should have made the other decision.

Mr. SENSENBRENNER. Thank you. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you. Thank you, Mr. Chairman. Mr. Chairman, I am not as concerned about the individual prosecutors involved. Their fate will be determined in another forum. But it does show, I think it is clear particularly from what we have heard from the Chairman and from the gentleman from South Carolina, that things didn't go right in this trial. It should have been treated differently.

And if this kind of stuff happens in a high-profile case like this, you can only imagine what happens in the run-of-the-mill cases. In most cases, this kind of information would never come to light.

So we have a question of whether or not we need to change our procedures, particularly in light of the laboratory scandal that has just come to light. So in terms of what the standard ought to be going forward, does anybody think admissibility ought to be part of the standard if it is evidence that Brady information has to be admissible? I know in civil standards, if it would lead to admissible evidence it would help impeach witnesses, it would help the investigation, even if it is hearsay, or if it helps settlement you can get discovery in civil cases, and it has nothing to do with admissibility. Should admissibility be part of the standard going forward?

Mr. BARON. Let me respond. Usually when you are talking about Brady material, it is material that the prosecution does not want admitted, I mean, because it is going to tend to be exculpatory. It may be material that the defense wants to admit. And certainly if it is relevant and material, it certainly should be admitted, if that is your question.

Mr. SCOTT. Well, should that be part of the standard? It wouldn't have to be admissible evidence. It could be hearsay and other things that are clearly inadmissible that would be helpful to the prosecution. So admissibility is not going to be part of——

Mr. BARON. Admissibility of the evidence in and of itself should not be the standard. It is whether it might lead to evidence that could be used in that way.

Mr. SCOTT. Okay. So we are back to material. Is there any suggestion that the standard on review, on appellate review ought to be different? The standard on appellate review suggests that the availability of the Brady material could have changed the result. Could have—not necessarily—but could have. Is there any suggestion that that standard on appellate review be changed?

Mr. WAINSTEIN. I think there is talk about that. I don't know that—I see problems with that. If you were to change the—or to take materiality out of the appellate standard, then every little deviation—let's say to talk about it in a Giglio context, impeachment, to use the example that Mr. Schuelke cited before, about a Tuesday versus a Thursday. You would be litigating every little discrepancy. So there would be no finality to cases, and you would end up with cases being reversed for what really is not outcome determinative.

Mr. SCOTT. So if all of these proposals will not change the standard on appellate review, are we just talking about good practice and not really changing the law?

Mr. BARON. I think that the materiality standard—and I think Mr. Schuelke made the point earlier; it is very difficult for someone who is a prosecutor to put himself in the shoes of defense counsel in a hotly contested case and figure out what is material, what is not material, what is relevant, what is not relevant. Indeed, the prosecutor may not really know just what his defense strategy is going to be. How can he make the judgment in a vacuum?

So I think that to the extent that one continues to impose a materiality standard, it makes it harder and harder for the prosecutor to make a judgment that is sound. And so therefore I think that is the push of removing that standard because it is unrealistic to expect the prosecutor to make that judgment and indeed very difficult for an appellate court to make that judgment.

Mr. SCOTT. Well particularly because neither may know what the defense knew, and this could be the key little connection that could help them make their case and be material to the defense, but the prosecution had no way of knowing that it was that important information.

Mr. BARON. Exactly.

Mr. SCOTT. Now on appellate review, if it turns out that way, and you hadn't released it, you would have a Brady problem.

Mr. BARON. Yes.

Mr. SCOTT. So we are talking about good practice; don't get into Brady problems that you can avoid. Just release it all. But you are not talking about changing the standard on review. If it in fact was not material, then there should be—are you suggesting that there is no sanction?

Mr. BARON. I think that—to the extent that on appellate review, the court—it is going to be a pretty extreme case that where an appellate court will feel it is in a position to, let's say, reverse a conviction for failure to disclose I think will be material evidence.

I agree with Mr. Wainstein that to the extent—you don't want the appellate courts getting bogged down in every relatively minor instance that something was not turned over. If it would not have had some material effect, it seems to me that that is asking too much. I think you bog down, you clog the system with a lot of cases on appeal where it shouldn't be happening.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. GOWDY. [presiding.] I thank the gentleman from Virginia. Mr. Wainstein, I don't really care about how zealous or not zealous the defense counsel was. I would rather have good facts than good lawyers. And it just strikes me that the facts weren't good, which means maybe I am missing something.

If you paid $170,000 for something whose fair market value is $160,000, even Mr. Scott can't win that case if he is a prosecutor—I don't think. Am I missing facts? Look, I want to be sympathetic to prosecutors. I was one for a long time. But what am I missing?

Mr. WAINSTEIN. Good question, sir. Just keeping in mind, I represent Joe Bottini. And I will say that Joe was not involved in the decision to charge the case. When the decision was made to charge

the case, he was actually surprised that an indictment was actually filed.

Mr. GOWDY. It is not tough to get an indictment.

Mr. WAINSTEIN. No, no, no. I am not making the point that that passed the threshold. I am saying the fact that it was actually issued caught him by surprise. He was off working on a capital case up in Alaska when it was issued. But you know, having been in main Justice for quite some time, I have often seen where you have a case that looks a certain way at the indictment stage and then especially with good defense counsel—and we had good defense counsel here—get involved, it starts to morph and it starts to look different. And I am only speculating because I wasn't inside this process. But sometimes that happens, where the facts just get worse. I think everybody would question, you know, why the case was charged. You have got to remember, it is tough. If you have what looks like a makable case against a sitting United States Senator, charging has its consequences. But not charging also has its consequences. So it is a tough—I just think the people in that position were in a tough position.

Mr. GOWDY. You were at DOJ for a time period. This practice of interviewing witnesses without the case agent present, which at best may potentially make you a witness, at worst leads to what we are talking about here, wouldn't that have corrected it if you had had a Bureau agent or an IRS agent or the case agent present for the interview?

Mr. WAINSTEIN. Yes. I mean in most cases they did as far as I know, and I think Mr. Schuelke is sort of the expert on the facts. He indicated that he thought that there was an agent there, either FBI or IRS agent. Not always the case agent.

One of the problems was—in a couple of the critical interviews, a 302, an FBI report, was not generated. And especially in the interview of Bill Allen, on April 15, 2008, where he made the critical comment—statement which was then—which he then changed as it got closer to trial, there was no 302 written of that.

And that is one of the problems in the case because prosecutors didn't have a written record, which they could have looked at to say, oh, wait a minute; what Bill Allen is saying now in September is different from what he said in April. So that was really the main problem. And I don't believe there were instances where they went forward without agents. They were smart. They get it. Yeah, if you go in there without an agent, you are going to make yourself a witness in case something arises at trial that hearkens back to that interview.

Mr. GOWDY. Well, as you probably noticed, Congress is much better at doing autopsies than it is at doing well-checkups. We like to wait until something horrible happens and then we rush in with a long list of cures, most of which are cures for symptoms that don't exist. But it does sully the name of 99 percent of the prosecutors who actually do value the administration of justice more than they do results. And you don't ever make the news when you don't drop the baby. It is only when you do that you have your counsel at a House Judiciary Committee hearing.

So do the rules need to change? Does the law need to change? Or is this just a case where the rules are sufficient, they just weren't followed?

Mr. WAINSTEIN. I am not going to pretend to be the world's expert on this issue, because my focus in this has been different. It has been Joe. But I think, as someone has said earlier, the rules here were sufficient. And I think especially in the aftermath of this, I give a lot of credit to the Department for what they did, where they have tightened up training, expanded training and that their whole focus is, okay, we are going to give guidance to the prosecutors that they turn over all exculpatory, all favorable information to the defense without regard to the materiality requirement. But we want the law to be a materiality requirement.

So that if we don't turn over the Tuesday versus Thursday thing, because we just overlooked it, that we are not going to then put a conviction in jeopardy or really undermine the process of——

Mr. GOWDY. So an open-file policy by not an open-file law?

Mr. WAINSTEIN. Well, I don't know if I would say open file. The prosecutor's job is to turn it over whether it is through open file or just telling them, providing the relevant documents to the defense, if they find something favorable, and don't just hold onto it because it is not favorable information that is material.

And I think having that as the policy guidance and the law being, okay, but we only actually take action against the prosecutors and against their case if it was material information that wasn't turned over. I think that is a good approach if well trained and well carried out and well supervised. And 99.99 percent of the criminal trials should go smoothly.

Mr. GOWDY. My time is up. And I think the Chairman is back.

Mr. SENSENBRENNER. [Presiding.] The gentleman from Georgia, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

There are two issues that I am concerned with. One is the prosecution being the gatekeeper or the keeper of the file and having the unbridled discretion with which to decide whether or not to disclose information that might be exculpatory to guilt or of impeachment value to the defense. So with that unbridled discretion, it means that most failures to disclose evidence will never be decided—or would never be discovered because at no point during the initial prosecution, the trial, the appeal, at no point does the defense have the right to peruse the entire prosecution file.

And I can tell you that this is not the first time this has happened. It happens many times. It even happened in a death penalty case that I handled out of Georgia, that we got the case reversed because the prosecutor used perjured testimony, knowingly, knowingly used perjured testimony. This is in a death penalty case. So this desire to win at all cost, I am afraid is a little more prevalent than we may admit.

And then my second problem is that whenever it is discovered, then nothing happens to the prosecutor. People think that lawyers are—you know, make up kind of a good-old-boy club-type situation, and they are supposed to discipline themselves. They don't want another outside force outside of the bar to discipline lawyers. And that is why under most State bar rules, lawyers have an obligation

to—when a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer is in question, then they have an obligation by their State bar association to disclose that information.

We have a reluctance to disclose misconduct. It is like tattling on our club member. And that, if it continues, will result in a public demand that the power to discipline lawyer misconduct be put in the hands of nonlawyers, and I don't think we want that. So we need to be cognizant of our obligation to disclose any case where there may be a question about whether or not something was untruthful or not.

Now, as far as a remedy for this situation, upon motion of a defense counsel or the State for an in-camera review of the entire State's file and a continuing obligation thereafter to disclose, all the way through appeal, such information, to require that by statute, to require that the court do that by statute, is that a workable solution to this first problem that I cited about the prosecutor being the unbridled gatekeeper? Mr. Baron.

Mr. BARON. I think it is a nice idea. But I think from a practical matter there would be something of an uproar by the judges that they don't have the time to be burdened with that. And also, they know about a case. They may have had a couple of hearings in it, but they don't know the case in depth. So to put that burden on them and expect them to be the gatekeeper, even though we like the fact that they are neutral, rather than a prosecutor who is in an adversarial process, it is a huge burden to impose on the courts.

And I think implicit in your question is, How do we legislate integrity? And can we? Because ultimately what we see from what Mr. Schuelke found in his report, even if you had had open-file discovery, complete access, things never got into the file that should have been there. Or 302s, the FBI interview form, were edited in such fashion that the exculpatory information was left out and the inculpatory stuff was left in.

So ultimately, even the most prophylactic approach is going to turn on the integrity of the people who are serving as prosecutors. I think some of these steps might be a step in the right direction, but we shouldn't kid ourselves. If what happened here—if Mr. Schuelke is right about what happened here, this was really pretty terrible. I don't want to put too fine a point on this. It is pretty terrible. And prosecutors engaged in that kind of conduct, no amount of reviewing the file is going to really reveal that, because they were hiding things, according to Mr. Schuelke. And that is pretty awful.

Mr. SENSENBRENNER. The gentleman's time has expired. The gentlewoman from Florida, Ms. Adams.

Mrs. ADAMS. Thank you, Mr. Chairman. That kind of is very bothersome to me as a law enforcement officer.

You mentioned in your opening statement the breakdown in supervision. Would you like to elaborate on that? Would you care to elaborate on that a little bit further? I think from what you are saying here, there was a definite breakdown.

Mr. BARON. Yes, of course. I have over the course of my career run a number of investigations, some very big ones where I had a dozen lawyers and a dozen forensic auditors conducting an inves-

tigation, and much smaller ones where there were three or four of us.

What seems to have happened here—it was very interesting. When Mr. Schuelke was asked to describe what was the administrative structure, he started with the trial itself. But who was running the show for the 2 years that the investigation was going on? When I read the report, I couldn't figure out who was in charge, which is kind of shocking and I think can lead to all kinds of problems.

The thing is that even when Brenda Morris was appointed, apparently she was appointed the lead prosecutor a few days before the indictment came down. Apparently, prior to that, according to her submission she made, had basically declined several times taking the role of lead prosecutor. I don't know why she ultimately accepted, whether she was pressured into it, or decided it was a good idea. But in any event, to push somebody into that spot was not a good decision.

But then it gets worse. According to her own testimony, she decided that she would, quote, make herself small in her role as now the lead prosecutor. That could only make a bad situation worse. It is basically saying, even though I am accepting the role of lead prosecutor and all the responsibility that comes with that, I am not going to exercise it. I am not going to do that.

In the absence of that, all kinds of very bad things happen. There has to be a hierarchy when you are running an investigation or when you are running a case, because with hierarchy comes structure, and with structure comes accountability. You can't have people milling around on their own making these decisions. You need somebody who steps up and says, I am going to lead this, and if things go bad, I am going to be responsible for it, and I am going to give everybody direction. That didn't happen here. It doesn't excuse the misconduct but it helps explain it.

Mrs. ADAMS. Thank you. Mr. Wainstein, your specific criticism about Mr. Schuelke and the way he conducted his investigation, what are they? And his conclusions? What are they? What are your specific criticisms about the way it was handled?

Mr. WAINSTEIN. Well, I guess the general criticism is that he looked at what were clearly mistakes, very serious mistakes made on behalf of the whole trial team. And my client participated in those mistakes as well, and was responsible for some. He looked at those mistakes. He gauged them as being very serious and having a serious impact on the integrity of the trial. And I don't take any issue with any of that. But then he concluded that they were intentional. And that is the very critical thing that I am focusing on here, because in my book, if you are—and I think former prosecutors here would all agree—if you find a prosecutor who intentionally broke the rules, punish him to the hilt. That is it. Throw the book at him. Because one bad apple is going to have serious implications not only for that person and that person's trial, but for the whole Justice Department.

But that is very different, though, from making mistakes. And that is why I wanted to focus—and I think he didn't focus sufficiently—on the circumstances that were very difficult for these prosecutors that caused them to make the mistakes they shouldn't

have made, but nonetheless they were inadvertent as opposed to intentional.

Mrs. ADAMS. Didn't the court give you an opportunity to comment on Mr. Schuelke's report and have those appended to the report?

Mr. WAINSTEIN. The report was——

Mrs. ADAMS. Did they give you the opportunity, the court?

Mr. WAINSTEIN. The court gave us the opportunity, after announcing the conclusions, to provide a criticism that could be appended to the report, but not to provide any input that might have any impact on the outcome of the report.

Mrs. ADAMS. Did you choose to do so?

Mr. WAINSTEIN. I submitted a 50-or-so-page memo that we had provided before that wasn't even mentioned in the report, with a cover memo. And then Joe said his main concern was talking to his colleagues and the Attorney General in the Justice Department.

Mrs. ADAMS. So you submitted that to the courts to have it appended?

Mr. WAINSTEIN. Yes. And that was appended. Yes, ma'am. And then we also provided a letter to the Attorney General.

Mrs. ADAMS. Okay. Which, if any, of the Brady and Giglio violations described in Mr. Schuelke's report do you take issue with?

Mr. WAINSTEIN. Well, I don't take issue with—well, there are a couple where he determines it is a Brady violation. And I think there is an argument that it is not a Brady violation. My criticism is not so much that these were not violations. So if you look at it from the perspective of Senator Stevens, he was denied a fair process. No question about it.

My criticism, as I explained earlier, is Mr. Schuelke's determination that those violations on the part of Joe were intentional. And my point is, no, they were not intentional. They were mistakes.

Mr. SENSENBRENNER. The gentlewoman's time has expired. The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. I thank the Chairman and Ranking Member for this hearing and thank the witnesses for their presence and express my deep concern over this question. And I really refer to the numbers of individuals who have been released under the new premise of DNA evidence, as led by the Innocence Project. And the reason why I mention that is because a lot of that has occurred in the State of Texas.

I know that we are looking at a number of different issues. But I think the underlying premise, what I want to speak to, is when people are convicted wrongly and they are incarcerated inappropriately, because of either a lack of expanded evidence, an unwillingness to investigate evidence and then, of course, not presenting evidence or not sharing evidence.

So Mr. Wainstein, within the limits of what you can say, what is the status of your case, of your client? Where is it? Is the case completed? Or are you still in the process of defense of this individual?

Mr. WAINSTEIN. I am actually—I am representing him for purposes of the investigation that was conducted by Mr. Schuelke. I also happen to be representing him in regard to the internal dis-

ciplinary process at the Justice Department, and that is not completed.

Ms. JACKSON LEE. And is he, or she, presently still a functioning prosecutor?

Mr. WAINSTEIN. Yes. Mr. Bottini, a 27-year AUSA, assistant U.S. Attorney, and is in court, going in and out of court every day, doing everything from meth cases to—he is doing a case involving a militia, members of a militia who threatened to kill a Federal judge. So he is still going in there and doing——

Ms. JACKSON LEE. So is it in the public domain as to the reason—is it in the public domain based upon Mr. Schuelke's report why he did not present that evidence? Is that in the public domain?

Mr. WAINSTEIN. Yes. Our submissions to Mr. Schuelke in which I explained the reasons why these discovery violations happened on the part of Joe, and explained how they were mistakes, that is in the public domain. That was released with the Schuelke report. So yes, people see that. And hopefully people are hearing today that there is another side to the story, not just a finding of intentional misconduct.

Ms. JACKSON LEE. And I don't want to litigate your case, but I guess since it is in the public domain—Mr. Schuelke's report—is the explanation that the paperwork was voluminous, that it didn't come to his attention, what is the parameters of the explanation of the mistake?

Mr. WAINSTEIN. Well, there are several different things that Mr. Schuelke has accused him of doing wrong. And he did make mistakes. He didn't turn over several things that should have been disclosed.

Ms. JACKSON LEE. That he was aware of?

Mr. WAINSTEIN. He was aware of. But one thing he forgot. Another thing he made an assessment that it was something that didn't need to be turned over. Another thing, he tried to get it disclosed but his supervisors wouldn't let him. Seven times he said to his supervisors in the Public Integrity Section, you have got to get this out. We have got to disclose it. And they shut him down. In fact, the section chief supervisor sent him an email saying, You work for Public Integrity. These are your marching orders. Stand down." That is why that information didn't get out.

Ms. JACKSON LEE. Without litigating his case here, if I just take the parameters or the framework that you have just given, I would assume, then, that we look at this question of either prosecutorial abuse or misconduct, we need to look up the chain and try to understand what supervisors are told and what they are not.

Let me quickly ask: This proposed legislation that has been suggested that might clarify Brady material, would that be helpful in knowing and having more detailed procedures for presenting or finding evidence? Both of you, any of you.

Mr. BARON. I would say that eliminating the materiality requirement for a prosecutor to take into consideration in making a Brady or Giglio judgment, I think that is a step in the right direction.

Ms. JACKSON LEE. So that means that they would just present what they had and you don't have the discretion to say, "No, this is not really relevant. I will keep this." Is that what you are saying?

Mr. BARON. Well, as I understand the legislation, the prosecutor is not to say, gee, this might help them but I don't think it is really material.

Ms. JACKSON LEE. That discretion is taken away. It is supposed to be turned over, even though the issue of materiality, that is not going to be addressed. You have to turn it over if it might be helpful to the other side.

Ms. JACKSON LEE. I think this is crucial in terms of what happened to Senator Stevens. And in his death, I apologize for what happened. And I hope we can correct this situation. Thank you. I yield back.

Mr. SENSENBRENNER. The gentlewoman's time has expired. I would like to thank all of our witnesses for their testimony today.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses which we will forward and ask them to respond as promptly as they can so their answers may be part of the record. Without objection, all Members will have 5 legislative days to submit additional materials for inclusion in the record.

Now in closing, let me say that this is probably one of the blackest incidents in the history of the Justice Department, because by their misconduct they have ruined the reputation of a senior United States Senator and probably caused his defeat in the election, both by their timing of the indictment, how the trial was conducted, the lack of supervision by the Justice Department and the like.

I think culpability here goes beyond the trial team that actually prosecuted Senator Stevens. There is plenty of evidence that there was a lack of supervision, that the Public Integrity Section wanted to get Senator Stevens one way or the other.

And even though some members of the Public Integrity Section have been exonerated in the internal review of the Justice Department, there has to be a review beyond the Justice Department into exactly what happened.

All of us in law school are reminded that in addition to being advocates for our clients, we are also officers of the court. And as officers of the court, we have taken an oath to attempt to have justice administered fairly and impartially, which means that it is based upon all of the evidence and the applicable law.

As one of my colleagues on the panel has indicated earlier, I think that this terrible miscarriage of justice warrants the investigation of the D.C. bar into whether any of those who were involved in this should be disciplined, with penalties up to disbarment.

I don't trust the Justice Department to conduct an impartial investigation. We have heard time and time again that the marching orders were to win at all cost, and to forget about the administration of justice. That is something that is profoundly troubling to me and I think to anybody who looks at this objectively. I am not saying that any one person should possibly be disbarred, but I am saying that the D.C. bar ought to look at this away from the old boys' and girls' network in the Justice Department, and impose what discipline that is warranted on whomever was responsible for what happened in this trial.

This is not the first time the Public Integrity Section has gone overboard. We had the case a couple of decades ago of former Congressman Joe McDade of Pennsylvania who basically spent his life savings and then some to get an acquittal verdict from a jury for essentially doing casework for constituents.

So I think that what has to happen here is the message has to get out that any prosecutor who does something like this, their career and their bar license may be on the line for doing something that is outrageous and egregious. I am not a bar commissioner. I think that they ought to look at the evidence on this. But they ought to look at it.

So with that, without objection, the Subcommittee is adjourned.

[Whereupon, at 12:12 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Addendum to the Prepared Statement of Kenneth L. Wainstein, Partner, Cadwalader, Wickersham & Taft LLP

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March 15, 2012

BY HAND DELIVERY

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Re: ***Comments on the Special Prosecutor's Report on the Investigation of the Prosecution of Senator Ted Stevens***

Dear Mr. Attorney General:

We represent Assistant United States Attorney (AUSA) Joseph W. Bottini in connection with Special Prosecutor Henry Schuelke's investigation into potential criminal contempt stemming from the government's prosecution of Senator Ted Stevens. We write because today the District Court publicly released the Special Prosecutor's Report.

As you know, since April 2009 the Special Prosecutor has been investigating allegations of prosecutorial misconduct by AUSA Bottini and five other prosecutors. On November 21, 2011, Judge Emmet G. Sullivan issued an order announcing that the Special Prosecutor[1] had submitted to the Court a report of his investigation concluding that the government's prosecution of Senator Stevens was "permeated by the systematic concealment of significant exculpatory evidence." Nov. 21, 2011 Order[2] at 3 (quoting Report at 1). The subjects of the investigation were given no notice of the Report's findings and no opportunity to review or comment on its findings before the Court's announcement. In a subsequent order issued two months later, Judge

[1] Mr. Schuelke conducted his investigation with the assistance of his colleague William Shields, and this letter addresses the work of both attorneys. Unless otherwise noted, we will refer to them jointly throughout this letter as the "Special Prosecutor" for ease of understanding.

[2] The Clerk for the U.S. District Court for the District of Columbia assigned separate case numbers for the government's prosecution (*United States v. Stevens*, 08-cr-231-EGS) and for the Special Prosecutor's investigation (*In re Special Proceedings*, 09-mc-198-EGS). Aside from the Court's Orders of November 21, 2011 and February 8, 2012, which were entered on the miscellaneous docket, the remainder of the court documents cited herein were entered on the *Stevens* docket.

Sullivan permitted the subjects of this investigation to submit written comments or objections to be filed as attachments to the Report when it is made publicly available. Feb. 8, 2012 Order at 1.

We considered submitting complete written comments and objections to be attached to the Special Prosecutor's Report. Given the Court's November 21, 2011, announcement, however, it was apparent that any input by AUSA Bottini would have absolutely no impact on the content or fairness of the completed Report. As such, we saw no value in submitting comments or objections that would not be considered by the Special Prosecutor or the Court.

We do, however, see great value in explaining AUSA Bottini's view of the Special Prosecutor's findings to you, the leader of the Department that has been his professional home for 27 years. AUSA Bottini truly loves the Justice Department, and has devoted his career to serving the Department and its mission. He is very concerned that you and his Department colleagues might accept the Special Prosecutor's findings and believe that he intentionally subverted justice in the *Stevens* case. We send you this letter to explain why those findings are wrong and why AUSA Bottini would never consider committing the crimes alleged in the Special Prosecutor's Report.

Our objection to the Special Prosecutor's findings is very simple. We take no issue with the finding that the investigation and prosecution of Senator Stevens were marked by mistakes, miscalculations, and oversights that led to a series of discovery violations. AUSA Bottini acknowledges that he played a role in those violations, and he will always live with a profound sense of personal and professional regret for the effect they had on the *Stevens* trial and on the reputation of the Justice Department. However, we do take issue—very strong issue—with the finding that these missteps were intentional and were something more than simple human errors on the part of an AUSA who was working under extremely difficult circumstances. That finding of intentional misconduct is completely unsupported by the evidence, and is the product of an investigative process that was marked by selective fact-finding and faulty legal analysis.

We have the utmost respect for the Special Prosecutor's efforts and intentions in this case. He faced the enormous challenge of examining the subjects' conduct over literally thousands of hours of investigative and prosecutorial activity and drawing conclusions about their actions and intent based on a complicated and diffused factual record. This was a monumental task, and he deserves our gratitude for accepting the task and working so diligently to complete it.

While the Special Prosecutor's diligence has been impressive, it is clear that his investigation fell prey to the narrowing of perspective and target-fixation that can affect prosecutorial analysis and judgment in a high-profile case.[3] As a result, the investigation

[3] Every prosecutor—and especially one investigating a high-profile matter—must resist the temptation to conduct his or her investigation as an effort to "build a case" against the subject rather than as an effort to find the truth, no matter whether that truth is incriminating or exculpatory. Resisting that

footnote continued on next page

produced a flawed and unsupported set of findings that unfairly accused a very honorable man of intentionally trying to subvert justice.

The balance of this letter shows why and how the Report's allegation of intentional misconduct against AUSA Bottini is dead wrong. It does not attempt to entirely restate the factual and legal arguments contained in our April 2010 submission to the Special Prosecutor, which is appended to this letter. This letter focuses instead on isolating, identifying, and explaining the significance of each of the critical flaws in the Special Prosecutor's investigation and Report. Those flaws include, for example, the following:

- **The Report does not meaningfully consider the conditions and circumstances of the *Stevens* prosecution.** The Report ignores the circumstances—such as the extremely compressed pretrial schedule and the dysfunctional management of the prosecution team —that help to explain how any missteps were more likely the product of mistake than calculation. *Cf. Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.").

- **The Report ignores mitigating evidence, including evidence of AUSA Bottini's indisputably good character.** We provided the Special Prosecutor with multiple letters of reference, which praise AUSA Bottini as "ethical," "honest," "honorable," and "a man of high moral character," and "one of the very best human beings I have ever had the

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temptation is a constant struggle among the ranks of professional prosecutors, and, indeed, many features of a federal prosecutor's office—such as supervisory scrutiny of charging decisions, indictment review sessions, and Department of Justice guidelines stating that a prosecution should only be initiated if the government believes the subject "will probably will be found guilty by an unbiased trier of fact," *see* United States Attorney's Manual § 9-27.220 (Grounds for Commencing or Declining Prosecution)—are in place specifically to protect the criminal process from the effects of target-fixation. In fact, the lack of such protections is one of the primary critiques against the use of special prosecutors in the first place. *See* Joseph S. Hall et al., *Independent Counsel Investigations*, 36 Am. Crim. L. Rev. 809, 827 (1999) (noting that many investigations led by special prosecutors "have been criticized for . . . the zeal with which independent counsels pursued their target"); Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 Am. Crim. L. Rev. 463, 489 (1996) (criticizing special prosecutors' tendency to "'selectively' target a person, set out to see if he or she ever did anything criminal in relation to a vaguely worded mandate, and then publish any results of this inquiry"); Gerald Lynch & Philip Howard, *Special Prosecutors: What's the Point?*, Wash. Post, May 28, 1995 ("The special prosecutor has . . . only one investigation to pursue, and the unnatural intensity skews the decision [of whether to prosecute]. The smallest infraction can take on a life of its own."); Amici Curiae Brief of Edward H. Levi, Griffin B. Bell, & William French Smith at 11, *Morrison v. Olson*, 487 U.S. 654 (1988), No. 87-1279, 1988 WL 1031601 (explaining that a special prosecutor's unique position "heighten[s] . . . all of the occupational hazards of the dedicated prosecutor[:] the danger of too narrow a focus, of the loss of perspective, of preoccupation with the pursuit of one alleged suspect to the exclusion of other interests").

pleasure of knowing." Much of the praise comes from members of Alaska's defense bar, whose clients AUSA Bottini prosecuted and who insist that "I know I can trust him absolutely." These character references bear heavily on an assessment of AUSA Bottini's credibility and intent, yet the Report does not consider them.

- **The Report omits exculpatory and mitigating evidence.** The Report omits mention of many relevant facts and circumstances that undercut the Report's findings.

- **The Report omits adverse legal authority.** Even though we provided the Special Prosecutor with citations to caselaw favorable to AUSA Bottini's positions on numerous issues, the Report makes no mention of legal authority that cuts against its findings.

- **The Special Prosecutor does not and cannot prove the central element of criminal contempt.** Criminal contempt requires proof than an attorney *intentionally* violated a court order; were it otherwise, negligence and even routine mistakes would be transformed into criminal conduct. Yet the Report, after spending some 500 pages recounting the facts of the investigation, devotes fewer than 6 pages to applying the law of contempt to those facts and offers virtually *no legal analysis* to support its contention that AUSA Bottini's conduct was intentional.

SUMMARY OF POINTS

This letter makes the following points:

I. BACKGROUND 5
II. THE SPECIAL PROSECUTOR'S INVESTIGATION 8
III. THE SPECIAL PROSECUTOR'S REPORT 10
A. The Failure to Consider Explanatory Circumstances 10
1. The Dysfunctional Management of the Prosecution 11
2. Uncoordinated Division of Responsibilities 12
3. The Dramatically Compressed Preparation Time 14
4. The Confrontational Defense Strategy 15
B. The Failure to Consider Mitigating Circumstances 16
1. Evidence of AUSA Bottini's Exemplary Character 16
2. Evidence of AUSA Bottini's Motive 17
3. AUSA Bottini's Good-Faith Actions During the *Stevens* Prosecution 19
C. The Failure to Consider AUSA Bottini's 48-Page Submission 22
D. The Failure to Accurately Recite Certain Critical Facts 22
1. The Report's assertion that Williams' time was "supposed" to be added to the bills .. 23
2. The Report's assertion that AUSA Bottini used false testimony from Bill Allen during his closing argument 24
3. The Report's assertion that AUSA Bottini "assisted" in drafting the inaccurate paragraph in the September 9 *Brady* letter. 25
E. The Failure to Cite Exculpatory Facts 26

F. The Failure to Cite Legal Authority Adverse to the Special Prosecutor's Positions 28
1. Legal authority indicating that *Brady* did not require the disclosure of Williams' assumptions 28
2. Legal authority directing that claims under *Napue v. Illinois* must be considered in context 30
G. The Failure to Cite the Applicable Legal Standard 31
H. The Failure to Follow the Applicable Legal Standard in the Analysis of AUSA Bottini's Culpability 32
1. The Rocky Williams Statements 32
2. The Bambi Tyree Information 34
3. Bill Allen's Testimony 35
I. The Failure to Afford the Subjects the Opportunity to Review and Comment on the Report Before Finalizing and Submitting It to the Court 36
IV. THE SPECIAL PROSECUTOR'S RECOMMENDATION TO THE COURT 37
V. THE COURT'S ANNOUNCEMENT OF INTENTIONAL MISCONDUCT FINDINGS 38
VI. CONCLUSION 40

I. BACKGROUND

The government indicted Senator Stevens on July 29, 2008. Two days later, the parties and the Court agreed to start trial less than two months later, on September 22—a dramatically truncated pretrial period for a complicated white-collar case. AUSA Bottini and his colleagues spent each of the next 53 days (including weekends) preparing for the trial.

Once trial began, the government committed a series of discovery errors, beginning with their mistaken use of a data-summary exhibit whose underlying figures were directly contradicted by information from two government witnesses and continuing with their belated disclosure of an exculpatory report of an interview with government witness Bill Allen. The prosecution team acknowledged the mistakes, represented to the Court that they were unintentional, and disclosed the mistakenly withheld evidence each and every time they learned of it.

The defense team complained early and often that the discovery errors were intentional. *See, e.g.*, Mot. to Dismiss the Indictment Due to the Government's Intentional and Repeated Misconduct (Doc. No. 130) at 1 (Oct. 5, 2008) ("Until today, defense counsel have refrained from alleging intentional misconduct by the government. We can no longer do so in good conscience. . . . The evidence is compelling that the government's misconduct was intentional."). The senator's attorneys would eventually send multiple letters to the Attorney General, arguing that the prosecutors lied, maliciously elicited bombshell testimony known to be false, fabricated Allen's testimony, suborned perjury, procured false testimony, sent a witness back to Alaska to prevent the defense from uncovering evidence, and obstructed the defense's access to another witness. *See generally* Letter from Brendan Sullivan, Williams & Connolly, to Attorney General Michael Mukasey (Oct. 28, 2008); Letter from Brendan Sullivan, Williams & Connolly, to Attorney General Eric Holder (Apr. 28, 2009). The senator's attorneys continued their drumbeat

of criticism in the press long after the trial concluded, characterizing the prosecution team as "hell-bent on ignoring the Constitution and willing to present false evidence" and alleging that the prosecutors "intentionally hid . . . and created false evidence." Press Release, Brendan V. Sullivan & Robert M. Cary (Apr. 1, 2009) at 1-2.[4]

Judge Sullivan initially rejected the defense team's allegations of misconduct, but eventually began voicing the opinion that the prosecutors had engaged in intentional misconduct. *See, e.g.*, Trial Tr. (Oct. 2, 2008 pm) at 10 ("It strikes me that [the belated disclosure of a Bill Allen 302] was probably intentional. I know I'm getting out there on a limb by saying that. I find it unbelievable that this was just an error."); *id.* at 28 (Judge Sullivan complains about redacted 302s produced by the government, insisting that "someone made a conscious effort to shade that information and keep defense counsel from learning of it"); *id.* at 29 ("How does the Court have any confidence that the Public Integrity Section has integrity?"). Following the lead of the Court and defense counsel, the press drew many of the same conclusions. *See, e.g.*, Mike Scarcella, *Williams & Connolly Wants to Put Lawyer on Witness Stand*, Blog of Legal Times, Oct. 9, 2008 ("Judge Sullivan admonished Public Integrity Lawyers yesterday and last week for, among other things, intentionally presenting false evidence and withholding discovery materials.").

After securing a conviction at trial, the government moved to dismiss the indictment against Senator Stevens with prejudice on April 1, 2009. Judge Sullivan convened a hearing and announced his appointment of the Special Prosecutor, a well-respected criminal defense attorney. Judge Sullivan made clear that his decision to appoint the Special Prosecutor was motivated by his unwillingness to rely on the Justice Department's Office of Professional Responsibility (OPR), whose own investigation was proceeding too slowly.[5] *See* Trial Tr. (Apr. 7, 2009) at 45 (Judge Sullivan stated that, since OPR's investigation began six months earlier, "the silence has been deafening"). While Judge Sullivan took pains to state for the record that he "ha[d] not, by any means, prejudged these attorneys or their culpability," he stated that their conduct had been "shocking and disturbing," faulted them for "making false representations," and announced that, "[i]n nearly 25 years on the bench, I've never seen anything approaching the mishandling and misconduct that I've seen in this case." *Id.* at 3-5, 47.

Notwithstanding AUSA Bottini's understandable concern that his culpability had been prejudged, he immediately had me contact the Special Prosecutor to emphasize his willingness to cooperate fully in every aspect of this investigation. He has completely cooperated with the investigation from its inception, authorizing me to conduct two lengthy attorney proffers with the Special Prosecutor; sitting through eighteen hours of deposition; abiding by the confidentiality

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[4] *Available at* http://media.npr.org/documents/2009/apr/stevens_attorneys.pdf.

[5] Ironically, OPR completed its investigation before the Special Prosecutor did—even though OPR, unlike the Special Prosecutor, devoted additional time for the subjects to comment on its draft report and to revise its report in light of those comments.

agreements demanded by the Department, the Special Prosecutor, and the Court; and continuing to serve the ends of justice as a federal prosecutor without making a single public statement to defend his reputation (despite constant public maligning).

The Special Prosecutor's investigation into AUSA Bottini's conduct focused on three alleged instances of misconduct. To provide context for the following discussion, we will summarize each allegation at this point:

1. The government's failure to disclose allegations that government witness Bill Allen may have suborned perjury related to his sexual misconduct.

Bill Allen, the owner of VECO Corporation, arranged for his company to provide free construction services to Senator Stevens and served as the government's chief witness at trial. Every member of the prosecution team knew of allegations that Allen had asked a woman named Bambi Tyree to sign an affidavit falsely exonerating him of sexual misconduct with her while she was a minor. Because the allegations cast doubt on Allen's credibility, AUSA Bottini repeatedly pressed Public Integrity Section (PIN) management to disclose them to the defense, taking the issue to his superiors at PIN and within the United States Attorney's Office and urging disclosure even after his ultimate supervisor on the investigation, PIN Chief Welch, admonished him to cease and desist. The government ultimately disclosed the substance of the allegations in its *Brady* letter to the defense, but the letter, which was drafted by PIN attorneys under PIN supervision, contained a substantial inaccuracy: it stated that "no evidence" existed to support the allegation, even though three pieces of evidence did exist. PIN attorney Nick Marsh drafted this language in the letter, following a meeting on the topic with Mr. Sullivan, Ms. Morris, and Mr. Welch. AUSA Bottini was not involved in drafting the letter. While he acknowledges, and the record fully supports, that he "skimmed" the letter after Mr. Marsh completed it, he did not do so for purposes of approving or agreeing with the substance, and in the course of his cursory review he did not notice the "no evidence" reference.

The Report nonetheless concludes that AUSA Bottini—but not Mr. Sullivan, Ms. Morris, or Mr. Welch—intentionally withheld this allegation about Allen's attempted subornation of perjury.

2. AUSA Bottini's failure to disclose the assumption by Rocky Williams, a government witness who worked on the renovation of Senator Stevens' home, that the senator would be billed for his work on the house.

Rocky Williams, a VECO foreman who oversaw the company's renovations of Senator Stevens' residence, told prosecutors he assumed that VECO's expenses were added to the invoices submitted by Christensen Builders—a VECO subcontractor whose bills Senator Stevens paid—and that the combined bills were forwarded to Senator Stevens for payment. Williams made this assumption because Senator Stevens had previously told him that he (the senator) wanted to "pay for everything" and because Williams did not think that Allen, his employer and the senator's friend, would be so "stupid" as to not charge the senator when there was public

scrutiny on the project. Williams' erroneous assumption echoed an anticipated defense theory: that Senator Stevens and his wife believed they had paid any outstanding VECO liabilities when they paid the Christensen Builders bills. The Special Prosecutor's Report concluded that AUSA Bottini's decision not to disclose Williams' assumption to the defense was intentional criminal conduct.

3. AUSA Bottini's failure to clarify Bill Allen's trial testimony.

In 2002, Senator Stevens sent a handwritten note to Allen, cautioning him to "remember Torricelli" (a New Jersey senator then embroiled in ethics charges) and reminding him to send the senator a bill. The defense pointed to the "Torricelli Note" as evidence that Senator Stevens wanted to pay for the renovations VECO performed on his home. Allen undercut that defense argument when he testified at trial that the senator's close friend and sometimes business partner Bob Persons told Allen that the senator was just "covering his ass" when he wrote the note. Convinced that Allen must have fabricated the incriminating statement, defense counsel attempted during cross-examination to elicit that Allen had only "just recently" told prosecutors about the "covering his ass" statement for the first time (which was, in fact, the case) so as to establish that Allen had fabricated the statement, six years after the fact. Allen, who suffers from cognitive difficulties, initially misunderstood the question as a suggestion that he had "just recently" discussed the Torricelli Note with Persons. Allen ultimately gave a series of disjointed and internally inconsistent answers, which the Special Prosecutor interprets as a false denial that he had in fact "recently" told the prosecutors about the "covering his ass" statement for the first time.

Concluding that it was clear to all in the courtroom that Bill Allen was simply confused, AUSA Bottini opted not to try to clarify that point in his re-direct examination. The Special Prosecutor's Report concludes that that decision was an effort to seed the record with false testimony and was therefore the basis for a criminal contempt charge.

* * *

For the next two years, the Special Prosecutor undertook a process of investigation and analysis that produced his finding that AUSA Bottini "intentionally withheld and concealed significant exculpatory [and impeachment] information." Report at 28. It is evident that the process suffered from the outset from a number of specific flaws that significantly undermined its fairness and credibility. It is critical that you, AUSA Bottini's colleagues at the Justice Department, and the American public understand each of these flaws when you assess the legitimacy of this process and the validity of the Report's findings against AUSA Bottini. The balance of this letter will discuss each of those flaws and explain their impact on the fairness of the Special Prosecutor's judgment against AUSA Bottini.

II. THE SPECIAL PROSECUTOR'S INVESTIGATION

The Court directed the Special Prosecutor to conduct a probing investigation into whether

crimes had been committed by the prosecution team. Like any criminal investigation, this was a serious undertaking that required a searching look at the facts and the individuals involved. By their nature, criminal investigations often require energetic probing and strong measures to reveal the truth. Even by criminal investigation standards, however, this was a particularly aggressive and accusatory process.

That aggressiveness was noticeably apparent in the Special Prosecutor's two-day, eighteen-hour interview of AUSA Bottini.[6] Although he volunteered to be interviewed, the Special Prosecutor did not conduct the deposition like an interview, but rather like the cross-examination of an opposing party. During the course of the deposition, Mr. Schuelke and Mr. Shields asked over 170 leading questions that posited their version of the facts and concluded with "correct?" or "right?"—the quintessential cross-examiners' line. They lobbed compound questions;[7] cut AUSA Bottini off mid-answer;[8] and asked "gotcha" questions.[9] They also presented AUSA Bottini with unfamiliar documents and demanded immediate answers about

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[6] AUSA Bottini voluntarily agreed to be interviewed or deposed by both the Special Prosecutor and OPR, who then shared materials with one another. We cite the respective transcripts as "S.P. Tr." and "OPR Tr." The transcripts from the *Stevens* trial and related hearings are cited as "Trial Tr.," with a reference to the date and whether it was an "am" or "pm" session.

[7] *See, e.g.*, S.P. Tr. at 512 ("**Q**: When you say 'forever,' meaning meeting after meeting after meeting? How |many| meetings about would you say it took? Were all of them until September 14th?").

[8] *See, e.g.*, S.P. Tr. at 629 ("**Q**: . . . Now [Allen] didn't mean when he heard that testimony, it had just been three weeks earlier? **A**: But he also says -- **Q**: Or does that -- can you answer my question? **MR. WAINSTEIN**: Let Joe [Bottini] answer your first question. Let him answer your question. He was going to the answer."). According to the notations in the transcript ("--"), more than 200 times the Special Prosecutor did not let AUSA Bottini completely finish his thought.

[9] For example, AUSA Bottini testified at the deposition that he was not aware of any sense of alarm or urgency after defense counsel provided in discovery a hand-written note (the "Torricelli Note") in which Senator Stevens professes a desire to pay for the improvements to his house. The Special Prosecutor possessed an email that AUSA Bottini had never seen, in which Agent Kepner appeared to express urgency to the PIN attorneys about contacting Bill Allen on April 8, 2008, immediately after Williams & Connolly produced the Torricelli Note to the government. Without mentioning the email, the Special Prosecutor asked AUSA Bottini, "So you don't remember any sense of urgency on April 8th, when these two new notes came in documenting that [Senator Stevens] had asked Allen for bills?" When AUSA Bottini answered in the negative, the Special Prosecutor introduced Agent Kepner's email and aggressively challenged his credibility: "So when you said a moment ago you don't remember a reaction like, '[O]h my God, we've got to get Bill up here,['] that's exactly what happened." S.P. Tr. at 393-95. AUSA Bottini stuck to his testimony that, from his vantage point, the Torricelli Note did not cause him to have a sense of alarm or urgency about the investigation (which makes sense, given that such a note is actually incriminating—and not exculpatory—in a case charging the senator with intentionally omitting financial liabilities on a financial disclosure form, as it shows that the senator knew he owed the contractors the payment that he never made).

them.[10]

In addition, although the Special Prosecutor declared that he practiced "'open file' discovery" during his investigation, *see* Declaration of Henry F. Schuelke, III (Feb. 8, 2012) ¶ 2 [Doc. No. 74] ("During the course of the investigation and with my consent, the six subject attorneys were provided by the Department of Justice with copies of and/or access to the same information that I received from the Department of Justice for use in conducting the investigation. I decided, as a matter of policy, that 'open file' discovery was appropriate."), the only documents we received from the Special Prosecutor or the Justice Department were AUSA Bottini's own documents, files, and emails.[11] Aside from the small number of documents he was shown during his deposition, we never received the other subjects' materials, nor were we provided access to the transcripts of the interviews the Special Prosecutor conducted with the other subjects and witnesses.[12]

While we recognize that it was certainly within the Special Prosecutor's prerogative to use these tactics—they are not uncommon in criminal investigations—they evinced an aggressive and adversarial attitude that sheds light on the thinking that went into the drafting of the Report that was issued today.

III. THE SPECIAL PROSECUTOR'S REPORT

After conducting an aggressive investigative process, the Special Prosecutor produced an investigative Report that contains a number of significant flaws and oversights in factual and legal analysis. We will identify these flaws and explain how each one affects the validity of the Report's findings against AUSA Bottini.

A. The Failure to Consider Explanatory Circumstances

Professional prosecutors understand that every misstep is not an intentional offense, and that in many cases the prosecutor's most critical job is distinguishing between mistake and misconduct. They recognize that before finding someone guilty of wrongdoing, they must look at all circumstances that shed light on whether that person's missteps were intentional or

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[10] They did this with an email from Agent Kepner to her supervisor at the FBI, and with Mr. Goeke's handwritten notes of two August 2008 witness prep sessions with Rocky Williams. *See* Report at 117, 145. We objected during the deposition to the Special Prosecutor's approach of showing AUSA Bottini two or three year-old documents he had neither drafted nor seen and then demanding immediate answers about them. *See* S.P. Tr. at 167, 221.

[11] The one exception are the handwritten notes from the April 15 and 18, 2008, meetings with Bill Allen, for which we were provided all copies, not just AUSA Bottini's.

[12] To the extent we quote from other transcripts in this submission, we are simply repeating those excerpts that were included in the Special Prosecutor's Report or in OPR's draft report.

inadvertent —the same circumstances that we all use every day in assessing the motives and blameworthiness of people with whom we interact. Strangely, the Special Prosecutor's Report in this case chose to find that AUSA Bottini committed intentional violations of the law—and rejected the possibility that they were honest mistakes—without considering the context that helps to explain his missteps.

The *Stevens* prosecution was beset by a series of management failures and other challenges that would have made mistakes by line prosecutors like AUSA Bottini likely under even the best of circumstances. Those circumstances created a prosecution that was struggling from its inception and ill-equipped to handle the rapid discovery process required by the senator's speedy trial request. The prosecution was set against the backdrop of a demanding judge and a scorched-earth strategy by defense counsel who allege prosecutorial misconduct as a routine defense tactic. Any one of those factors made mistakes likely; all of these factors together virtually guaranteed them.

1. The Dysfunctional Management of the Prosecution

The management problems afflicting the prosecution were legion.

The recusal of the Alaska U.S. Attorney's Office: The government's management difficulties had their genesis in late 2005. At the first hint that Senator Stevens was linked to Operation Polar Pen, the Department of Justice recused the entire Alaska U.S. Attorney's Office from cases arising from that investigation. OPR Tr. at 46-47. Because of PIN's lack of resources and Alaska's remoteness from Washington, D.C., the Department instructed two Alaska line AUSAs, Mr. Bottini and Jim Goeke, that they would continue working on Polar Pen cases, but would report directly to PIN.[13] S.P. Tr. at 315; Email from EOUSA to the Office of the Deputy Attorney General, Nov. 3, 2005. This arrangement left the Alaska AUSAs disconnected from the prosecution's management and unable to successfully push back against decisions with which they disagreed. *See* OPR Tr. at 56-58, 176-78.

AUSA Bottini's lack of interaction with PIN management: AUSA Bottini had little interaction with PIN's leadership once the Criminal Division assumed control from the U.S. Attorney's Office. PIN itself was in disarray; it had five different Section Chiefs (including in acting capacities) over the course of the Polar Pen investigation. When Mr. Welch became Section Chief, neither he nor Ms. Morris (his principal deputy) actively communicated with the Alaska attorneys; on one of the few occasions Mr. Welch did, it was to brush back the Alaska attorneys—who had been unsuccessfully pressing PIN to disclose information to the court and defense counsel about Allen and Tyree—by chiding them that they "work[ed] for PIN." Email from Welch to Bottini et al. (Dec. 20, 2007 5:18 pm). Apart from that direct admonishment, Ms.

[13] Unlike some of the other prosecutors, who sought out opportunities to work on this potentially high-profile investigation, AUSA Bottini did not want, and did not request, this assignment. *See infra* at III.B.2 (explaining the lack of evidence as to AUSA Bottini's motive).

Morris and Mr. Welch typically communicated only with PIN attorneys Marsh and Sullivan, who would in turn communicate with Mr. Bottini and Mr. Goeke—and vice versa. *See* S.P. Tr. at 314.[14] As such, they operated effectively as subordinates, receiving instructions from and effectively reporting to Mr. Marsh and Mr. Sullivan.[15] *See* Jeffrey Toobin, *Casualties of Justice*, The New Yorker, Jan. 3, 2011, at 40 (Alaska defense attorney notes that "[t]he lawyers in the U.S. Attorney's office were a couple of decades older than Nick [Marsh], but there was no doubt that he was the top dog. . . . He was making the decisions"); *see also* S.P. Tr. at 314 (AUSA Bottini explains that "I didn't pick up the phone and call Bill Welch. It didn't work that way."). In addition, the Alaska prosecutors were excluded from meetings and discussions among PIN management, Mr. Marsh, and Mr. Sullivan—including those about decisions as fundamental as the timing and content of a potential indictment.[16]

2. Uncoordinated Division of Responsibilities

Once the Criminal Division decided to indict Senator Stevens, it chose Ms. Morris to lead

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[14] For instance, the Alaska attorneys pressed Mr. Sullivan to disclose the Tyree allegations in the affidavit supporting the government's March 2007 search warrant for Senator Stevens' Girdwood residence; Mr. Sullivan then communicated with Mr. Welch, who decided not to make that disclosure. Email from Goeke to Sullivan (Mar. 5, 2007 3:34 pm); Email from Sullivan to Welch (Mar. 5, 2007 5:00 pm).

[15] The subordinate status of AUSAs Bottini and Goeke is apparent from a review of the emails among the prosecutors: there are numerous critically important email discussions from which they are excluded. On April 15, 2008, for instance, the four PIN attorneys, including PIN Chief Welch, exchanged multiple emails regarding the status of the prosecution's review of reciprocal discovery and the timing of a potential indictment. They did not copy Mr. Bottini or Mr. Goeke. Email from Marsh to Morris, Sullivan & Welch (Apr. 15, 2008 9:48 am). A month later, the four PIN attorneys exchanged another set of emails—again excluding Mr. Bottini and Mr. Goeke—discussing the Front Office's anticipated reaction to a revised indictment that Mr. Marsh and Mr. Sullivan drafted following a meeting with Mr. Welch and Ms. Morris. Email from Welch to Marsh & Morris (June 16, 2008 9:41 am).

[16] One symptom of this was that AUSA Bottini was not even aware that an indictment would be issued until he was on a college tour with his son around July 23—only days in advance of the indictment. By the time Assistant Attorney General Matthew Friedrich summoned prosecutors to a July 14, 2008, meeting, Mr. Bottini was deeply skeptical that the Department would indict Senator Stevens. PIN told the Alaska attorneys on numerous occasions, dating back to April 2007, to "get ready" and "be prepared" for an indictment because the statute of limitations was about to expire; a tolling agreement was reached each time, and no indictment ever resulted. S.P. Tr. at 312-13. Despite repeatedly asking Mr. Marsh and Mr. Sullivan whether the case was moving forward, AUSA Bottini had little indication—by the spring of 2008—whether an indictment would even issue. *Id.* at 312-14.

Believing the case would not move forward, AUSA Bottini eventually agreed to take on a high-profile capital murder prosecution in Alaska. *Id.* at 316. He spent most of July 2008 preparing for that case, working on it even after the mid-July meeting with Mr. Friedrich, and was "absolutely convinced," as late as the third week of July, that the *Stevens* case would not be indicted. *Id.* at 317-19.

the trial team. Report at 44. The job of lead trial counsel on a Department of Justice trial team is not only to direct and allocate responsibility among other team members, but also to ensure that all of the government's trial and pre-trial responsibilities are being met. Yet Ms. Morris exerted little leadership over the trial team, despite being selected expressly for that purpose. *See, e.g.*, Report at 74-76 (Ms. Morris acknowledges that she tried to make herself "as little as possible," refraining from "really [taking] a supervisory role"). The same was true for Mr. Welch, who apparently deferred to Ms. Morris because of the direct reporting relationship she enjoyed with the Criminal Division Front Office. Report at 4. In her defense, Ms. Morris was inserted as lead counsel less than two months before trial began, and it is understandable that she had difficulty attaining the level of familiarity with the case necessary to completely assert control over its conduct. But the practical effect of the resulting vacuum of leadership was that trial preparation became disjointed and compartmentalized precisely when the need for coordination was greatest.[17]

This disorganization had noticeable adverse effects on the government's discovery efforts and particularly on the process of reviewing the government's evidence for *Brady* material and deciding what needed to be disclosed to the defense. Although AUSA Bottini and the District of Alaska had a standard practice of requiring defense attorneys to sign discovery receipts and keeping duplicate copies of all discovery productions, PIN apparently did not follow these procedures in this case even though PIN assured AUSA Bottini it was managing and tracking discovery. OPR Tr. at 114-15; *see also* Bottini Notes (Aug. 22, 2008) (during call with Mr. Sullivan and other prosecution team members, AUSA Bottini writes that "PIN is keeping score of what is turned over").) PIN also organized the *Brady* review, opting to delegate document review responsibilities to agents and to bifurcate the functions of preparing a witness for trial and reviewing that witness' statements for *Brady* information—measures that PIN evidently believed necessary given the compressed pretrial preparation period. Report at 87-97. In AUSA Bottini's experience, the prosecutor who presents a witness at trial is almost always the prosecutor who conducts the *Brady* review for that witness, OPR Tr. at 128, and AUSA Bottini never employed FBI or IRS agents to assist (let alone conduct) a *Brady* review. S.P. Tr. at 789; OPR Tr. at 111.

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[17] As it became clear that PIN was failing to provide sufficient supervision, the Criminal Division Front Office understandably stepped up its hands-on supervision in an apparent attempt to fill the prosecution's leadership void. Among other things, the Front Office exerted control over the substance of the prosecution's trial preparation, the content of their pretrial motions, the assignment of witnesses to trial team members, and even the questions prosecutors were to ask certain witnesses. *E.g.*, S.P. Tr. at 808-10. Those eleventh-hour directives would have burdened a prosecution team even under normal circumstances, and they were doubly burdensome here given the accelerated trial preparation schedule. For example, three days after he arrived in Washington, AUSA Bottini was told that he would deliver the government's summation and was directed to submit a comprehensive draft by the following week—even though trial had not begun and AUSA Bottini already had extremely limited time to prepare and argue a number of critical pre-trial motions and to meet with and prepare his approximately ten trial witnesses (including Rocky Williams, whom PIN Chief Welch had just assigned to him because Mr. Marsh did not have enough time). S.P. Tr. at 808-09.

But this case was not run by AUSA Bottini according to the District of Alaska's procedures; it was run by PIN according to PIN's procedures. *See* Report at 321 (quoting Ms. Morris: "I was relying on Bill Welch to take the lead on really focusing on the *Brady* issues." (alterations omitted)).

3. The Dramatically Compressed Preparation Time

This prosecution cannot be evaluated without acknowledging the impact that the compressed pretrial period had on the prosecutors. In the typical white-collar case—and especially in one involving a high-profile defendant—the prosecution has a fairly well-developed case by the time of indictment and then has many months and often over a year to prepare and refine it before trial starts. That was not the case in the Ted Stevens prosecution.

The *Stevens* prosecutors had only 55 days, including weekends, from the date of the indictment to the start of the trial. This compressed schedule was a function of the Criminal Division's decision to indict Senator Stevens only four months before the November election and also Ms. Morris' agreement, in open court, to a trial date even sooner than the defense requested or was entitled to.[18] And, as noted above, AUSA Bottini could not have begun his preparations much before the indictment, because he had no idea the indictment was forthcoming. During this frenzied time in August and early September, the prosecutors had to do literally everything to prepare for the trial, from meeting with witnesses to creating examination outlines to drafting opening and closing statements to drafting and arguing pretrial motions and responses to compiling and organizing the over 1000 trial exhibits. They also, of course, had to compile and produce the voluminous discovery (comprising some 750 gigabytes of data, *see* Report at 104) and conduct the extensive *Brady* and *Giglio* review that resulted in the government's August 25 and September 9 disclosure letters.[19]

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[18] The Report contends that "[t]he prosecutors had anticipated the possibility of a speedy trial request . . . and decided in advance to consent if one was made." Report at 2. While Criminal Division management apparently made this decision, it was never communicated to AUSA Bottini, who continued to assume that the trial would not take place until after the election in November.

[19] The breakneck pretrial and trial pace, and sheer volume of material involved, compounded the likelihood that mistakes would happen. In fact, Williams & Connolly itself committed three significant mistakes during that same compressed time period. First, in early October 2008, it violated grand jury secrecy and the Court's confidentiality order when it disclosed grand jury transcripts to counsel for potential defense witnesses; this mistake drew the Court's ire. *See* Trial Tr. (Mar. 10, 2009) at 15 ("The Court had admonished the defendant not to disseminate grand jury transcripts that it received pursuant to this Court's order . . . ."). Then, on two separate occasions, Williams & Connolly publicly disclosed confidential information about prospective government witnesses. On August 25, 2008, it disclosed the Anchorage Police Department's investigation into Bill Allen for statutory rape, even though the government had provided that information in confidence. *See* Mem. in Opp'n to Mot. *in Limine* to Exclude Prior Criminal Convictions of Prospective Gov't Witnesses, Ex. 1 [Doc. No. 36-2]. And on October 2, 2008, when Williams & Connolly attached the highly confidential August 25 *Giglio* letter as an exhibit to a motion, it neglected to redact a footnote on page 6 about criminal conduct of potential

footnote continued on next page

4. The Confrontational Defense Strategy

When the prosecutors started trial, they then confronted another challenge—a calculated effort by defense counsel to keep them off balance with regular attacks on the prosecutors and their motives.[20] On a daily basis, the defense made motions that alleged gross misconduct and caused the prosecutors to scramble and respond to the attacks. To the extent that the prosecutors started the trial in a state of confusion, these attacks compounded the problem and made it impossible for the prosecutors to get their footing and settle into a normal mode of functioning. Instead, they were forced to act like a garrison under siege, constantly throwing themselves against the most recent frontal assault. They were playing defense from the start, and the operational and management defects inherent in the patch-work trial team only worsened as the trial progressed.

* * *

Each of these circumstances—dysfunctional management, uncoordinated division of responsibilities, a compressed time frame and combative defense tactics—created the conditions where mistakes were likely. While they are not excuses for the errors that took place, they are critical aspects of the story that must be considered when assessing whether those errors were the product of mistake or intentional misconduct. Yet, the Special Prosecutor's Report completely failed to take these factors into account before concluding that the prosecutors were guilty of intentional misconduct.

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government witness Justin Steifel. *See* Emerg. Mot. to Dismiss Indictment or for Mistrial, Ex. C [Doc. No. 126-4]. Before the public damage could be undone, the press picked up the story. *See* Lisa Demer & Richard Mauer, *New Name in federal corruption case; Justin Steifel: Agent interviewed him involving VECO payment scheme*, Anchorage Daily News (Oct. 3, 2008).

[20] Senator Stevens' counsel typically pursue a strategy that follows the common sports mantra: the best defense is a good offense. They routinely turn the tables on the government in criminal cases by accusing the prosecution of withholding evidence and generally violating their clients' rights. *See* Kim Eisler, *Better Get Brendan*, Washingtonian (June 2010), at 35 (the subtitle says it all: "When Brendan Sullivan is on your side, the prosecutor will probably go to jail before you do."); Andrew Longstreth, *Jersey Boys: A Pair of Young Prosecutors Finally Beat Brendan Sullivan in the Third Trial of Former Cendant Chairman Walter Forbes*, American Lawyer (Mar. 2007) (for Brendan Sullivan, "Every battle is nuclear warfare. Everything is prosecutorial misconduct.") *United States v. Forbes*, No. 3:02-cr-264, 2006 WL 680562, at *1-2 (D. Conn. Mar. 16, 2006) (explaining that these defense counsel "had engaged in a pattern in this case of arguing, premised on speculation, that opposing counsel had engaged in improper conduct"). Ironically, before the *Stevens* trial even began, a former Connecticut federal prosecutor who had litigated against Brendan Sullivan warned AUSA Bottini in a phone call that Brendan Sullivan would likely accuse the prosecutors of misconduct.

B. The Failure to Consider Mitigating Circumstances

It is also incumbent on a prosecutor examining the intentionality of a subject's errors to consider that person's record for good or bad character as well as any evidence that sheds light on his disposition or motive at the time of the questioned conduct. There was abundant evidence in each of these categories, but the Report does not give that evidence any weight.

1. Evidence of AUSA Bottini's Exemplary Character

In our federal judicial system, a defendant is explicitly permitted to introduce evidence of his favorable character, *see* Fed. R. Evid. 404(a)(2)(A),[21] so that a "jury may infer that he would not be likely to commit the offense charged." *Michelson v. United States*, 335 U.S. 469, 476 (1948). Despite this long-standing rule, the Report does not consider any evidence of AUSA Bottini's character.

We provided the Special Prosecutor with abundant character evidence demonstrating that AUSA Bottini is an exceptionally unlikely candidate to intentionally violate a defendant's rights. Six defense attorneys wrote letters to the Special Prosecutor attesting to AUSA Bottini's high moral character.[22] These defense attorneys maintain that "I know I can trust him absolutely"; that "I would go to the bank on Mr. Bottini's word. There isn't another prosecutor in that office about whom I would make that statement"; that "I would trust a client's, or my future on [his] word and integrity"; and that "I would accept Joe's word and his hand shake on any matter knowing that it is more reliable than any document that could be drafted."

Similarly, his past and present colleagues describe him as "ethical," "honest," "honorable," and "one of the very best human beings I have ever had the pleasure of knowing," and they routinely praise his "integrity" and "unwillingness to seek personal status or attention." Leaders of the Alaskan defense bar—whose clients AUSA Bottini prosecuted—extol him as "a man of high moral character," "a modest man, without ego," "a fine public servant and a good man," and "a genuinely good and decent person, highly respected by his colleagues, his adversaries, and the judges before whom he appears."

One defense attorney told the Special Prosecutor that "the manner in which Mr. Bottini has lived his life and practiced law over the past 25 years should militate in favor of giving him the benefit of every doubt." Yet the Report does precisely the opposite.

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[21] Prior to a renumbering of Rule 404's internal paragraphs four months ago, this particular provision was at paragraph (a)(1).

[22] The character references were included in our April 9, 2010 submission to the Special Prosecutor, and are also attached to this letter.

2. Evidence of AUSA Bottini's Motive

Federal law is clear that evidence of motive is a relevant consideration in a criminal case. Fed. R. Evid. 404(b); *see United States v. Hill*, 643 F.3d 807, 843 (11th Cir. 2011) ("Motive is always relevant in a criminal case, even if it is not an element of the crime.") (internal citation and alteration omitted). The law is also clear that just as the *existence* of a motive on a defendant's part can be incriminating, the *absence* of a motive can be exculpatory. *See Martin v. United States*, 606 A.2d 120, 128 (D.C. 1991) ("Evidence of a lack of motive is quintessentially exculpatory."). In this case, there was abundant evidence that AUSA Bottini had absolutely no motive to violate the rules to convict Senator Stevens. The Report completely ignored that evidence.

While one can posit a variety of different potential motives, there are two primary motives that would most likely explain why a prosecutor would go to the extent of violating the law to convict a defendant at trial. One of those motives is rooted in personal ambition that might tempt a prosecutor to bend the rules for the glory of getting a conviction. While I concede that one can certainly find the occasional prosecutor with an ego, AUSA Bottini is decidedly not one of them. As the above-mentioned reference letters explain, AUSA Bottini has consistently shunned the spotlight throughout his career and has rejected numerous entreaties from supervisors in the U.S. Attorney's Office to take on higher-profile roles, preferring instead to do the work of a line prosecutor. United States Attorneys he has worked for attest that AUSA Bottini is the first to volunteer to take on the tough but righteous prosecution, and the last to demand that he receive the glory case or the credit for his office's work—the hallmarks of a team player and true professional.[23]

That selfless approach was clearly evident in the way AUSA Bottini conducted himself as a member of the *Stevens* trial team. Other prosecutors on the team often demonstrated concern about their own status and opportunities in the trial, at times sending emails expressing their desires—or demands—that they be assigned more prominent roles in the trial. For example, some were upset when management installed Ms. Morris as lead counsel, complaining that it meant a diminished trial role for them.[24] AUSA Bottini, by contrast, never pushed for a

[23] Two former U.S. Attorneys wrote character letters to the Special Prosecutor on AUSA Bottini's behalf; they are attached. His current U.S. Attorney has attested to his exemplary character in communications to Department management.

[24] *See, e.g.*, Ed Sullivan OPR Tr. at 176-77 (he testified that he felt "anger and frustration" about the Criminal Division's staffing decisions); Email from Marsh to Morris (July 28, 2008 12:36 pm) ("I'm not taking it very well. The section will lose people over this."); Email from Marsh to Sullivan (Aug. 6, 2008 7:37 pm) ("If all of this is true, it means that the front office isn't just trying to put together a trial team, they're actively trying to marginalize people for no justifiable reason whatsoever. It is unbelievably wrong."); Email from Marsh to Morris (Aug. 6, 2008 12:19 pm) ("I cannot overstate how much of a negative impact these front office decisions are having on the rest of the trial team."); Email from Marsh

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higher-profile role and actively encouraged his supervisors to give his colleagues more in-court opportunities.[25] He also welcomed Ms. Morris' appointment as lead counsel and went out of his way to ease her transition onto the team. *See* Email from Bottini to Morris (Aug. 7, 2008 8:39 pm) ("I want you to know that I am glad that you are part of the team and that I really look forward to working with you."); *see also* OPR Tr. at 182 ("[I]n my view, the decision to make, to bring Brenda on the team and make her the lead attorney, I thought was brilliant, quite frankly. I was happy with that personally.").

A review of the emails also demonstrates that there were personal tensions among other prosecutors and agents on the trial team.[26] AUSA Bottini stayed above those frays and never expressed a caustic or petty thought to anyone on the team.[27] Instead, he treated his colleagues with complete dignity and always put the prosecution team's interests before his own—not the character traits that one typically finds in a person who would be tempted to violate the law to enhance his personal glory.

The second possible motive that could possibly have impelled AUSA Bottini to cheat would be that he harbored a particular animus against Senator Stevens himself. Again, the record demonstrates just the opposite. AUSA Bottini made it clear that he was quite ambivalent about going forward with the prosecution against his senator.

AUSA Bottini specifically told the Special Prosecutor, "quite frankly, as odd as this may sound, Ted Stevens is still a man that I have a fair measure of respect for. Aside from what happened in this case, to me, you can't set aside what he did for 40 years for the state of Alaska . . . . It's a much better place to live because of this guy." S.P. Tr. at 408. The case therefore gave

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to Matthew Stennes (July 29, 2008) ("Ed and I were displaced yesterday by new lead trial counsel Brenda Morris. There is no joy in Mudville right now with Team Polar Pen.").

[25] *See, e.g.*, Email from Morris to Welch (Sept. 27, 2008) (stating that AUSA Bottini, among others, "ask[ed] if Jim and Ed could do the worker bees [the VECO construction workers] on Monday."); Email from Bottini to Morris (Aug. 7, 2008) ("None of us like to see Jim and Ed on the sidelines, but we are over it and are fully focused to win this thing—as a team.").

[26] *See, e.g.*, Bottini Decl. (Feb. 20, 2009) ¶ 42 ("[A]gent Joy did not like taking direction from Marsh or certain other attorneys with the Public Integrity Section."); Morris Decl. (Feb. 21, 2009) ¶ 11 ("Joy was not pleased that Kepner would be allowed to sit at the table and not him."); Welch 302 (Feb. 26, 2009) at 8 (Welch recounts that IRS agents were "not happy with Marsh's personality, especially how he dealt with them."); Email from Morris to Welch (Oct. 21, 2008) ("Nick had a temper tantrum in front of the defense yesterday."); Email from Morris to Welch (July 29, 2008 10:37 am) ("GET OVER HERE! Nick is tanking!"); Email from Morris to Welch (July 28, 2009) (forwarding an email from Marsh's colleague—"I love Nicky, but he will need you if this goes to trial"—and sarcastically commenting, "[t]his is coming from his 'friend'").

[27] We have reviewed every relevant email from AUSA Bottini through the whole investigation and prosecution, and he **never** said anything to his colleagues that was not supportive and team-focused.

AUSA Bottini pause, even though he believed that the evidence merited prosecution. S.P. Tr. at 410; OPR Tr. at 5-18. He would be prosecuting a man he respected and who many Alaskans, himself included, considered a hero. *See* S.P. Tr. at 408-09 ("It's never lost on me when I fly out of Anchorage, his name's on the airport, Ted Stevens International Airport...."). Thus, unlike other members of the prosecution who were eager to play lead roles on the government's trial team, AUSA Bottini "desperately was hoping that either this thing was going to settle out, or they'd find someone else to do it." *Id.* at 410.

3. AUSA Bottini's Good-Faith Actions During the *Stevens* Prosecution

The standard for criminal contempt requires an examination of the alleged contemnor's good-faith actions that are inconsistent with contemptuous behavior. *See In re Brown*, 454 F.2d 999, 1007 (D.C. Cir. 1971) (good faith "is antithetical to contumacious intent"); *see also United States v. Crowe*, No. 94-5690, 1996 U.S. App. LEXIS 2439, at *4 (4th Cir. Feb. 16, 1995) (non-precedential) ("If the defendant makes a good faith effort to comply with a court order, he may not be convicted of criminal contempt."). Yet the Report does not even mention this standard or include a section on good-faith efforts.

AUSA Bottini's actions in prosecuting Senator Stevens demonstrate his good faith. Take three examples:

First, AUSA Bottini was the only prosecutor we know of in this investigation who reviewed his handwritten notes for *Brady* material. *See* S.P. Tr. at 567; *see also* Report at 440. None of the other prosecutors reviewed their attorney notes. *See* Report at 445 (Ed Sullivan admits to not reviewing attorney notes); *id.* at 460 (Brenda Morris says that "reviewing prosecutors' notes for *Brady* material 'would never even cross my mind'"); *id.* at 448 (Jim Goeke admits to not reviewing attorney notes); *id.* at 449 (Nick Marsh "didn't specifically remember" if he reviewed his notes for *Brady*).

Second, AUSA Bottini did, in fact, conduct a *Brady/Giglio* review of the materials in his possession relating to each of his witnesses. OPR Tr. at 162. He even developed a *Giglio* checklist, by which he ensured that he had checked for all relevant types of *Giglio* material. *See* OPR Tr. at 167-68.[28]

Third, regarding the Special Prosecutor's accusation that he suppressed the evidence that Bill Allen had induced Bambi Tyree to sign a false affidavit, the reality is that AUSA Bottini[29]

[28] He titled the list "Witness Impeachment Issues," listed eight non-exclusive categories (sexual misconduct, alcohol use, criminal history, bias, prior inconsistent statements, false statements to government, reputation/opinion, and prior convictions), and included with it 30 hand-annotated pages of a handbook on *Brady* and *Giglio* issues, focusing on D.C. Circuit law (with which he was unfamiliar). CRM BOTTINI 061218-47.

[29] Mr. Goeke was also involved in several of these attempts to convince PIN to allow disclosure.

on seven separate occasions pressed his superiors at the Public Integrity Section to do the exact opposite—to voluntarily make a disclosure of that information to the defense, to the court, to higher-level management, and/or to the Department's Professional Responsibility Advisory Office (PRAO). AUSA Bottini was rebuffed by the PIN supervisors at each turn. Specifically:

- In March 2007, he sought to disclose the information to the judge in relation to the government's search warrant application for Senator Stevens' house. The affidavit was based in part on information from Bill Allen, and AUSA Bottini believed the judge considering whether to authorize the search warrant should know about the suborning-perjury allegation and consider it when assessing the credibility of Allen's information and the strength of the evidentiary showing in the affidavit. Email from Goeke to Sullivan (Mar. 5, 2007 3:34 pm). PIN Chief Welch decided against disclosure. Email from Sullivan to Welch (Mar. 5, 2007 5:00 pm); *see* Welch OPR Tr. at 232 ("I didn't think we had to get into every *Giglio* issue for a particular witness we were relying upon.").

- In October 2007, AUSA Bottini pushed PIN to seek PRAO's guidance "as soon as possible" on whether a post-trial disclosure in *Kott* or a pretrial disclosure in *Kohring*, or perhaps an ex parte disclosure to Judge Sedwick, was required. Email from Bottini to Marsh (Oct. 8, 2007 4:12 pm). At the same time, he raised the disclosure issue with his superiors at the Alaska U.S. Attorney's Office, including the U.S. Attorney and the Criminal Division Chief, who supported his disclosure efforts. OPR Tr. at 610, 647. Mr. Marsh reported back that PRAO said no disclosure was required.

- In December 2007, he again pushed PIN to seek PRAO's guidance, after he saw a newspaper article that he thought might change PRAO's original calculus. S.P. Tr. at 697-98. Again, Mr. Marsh reported back that PRAO said no disclosure was required. *Id.* at 700. When AUSAs Bottini and Goeke continued to push PIN to disclose the information to Judge Sedwick, PIN Chief Welch admonished them to stop: "We've done all that we are going to do on the matter. . . . Joe and Jim, per the recusal notice, **you work for PIN, and so these are your marching orders** until I talk to Nelson [Cohen, the interim United States Attorney]." Email from Welch to Bottini et al. (Dec. 20, 2007 5:18 pm).[30]

- In April 2008, he pushed PIN to alert Criminal Division management to the issue, because he questioned the sufficiency of a document Mr. Marsh was drafting on

[30] This "stand down" email from PIN Chief Welch is inconsistent with Mr. Welch's memory at his deposition that "none of them were pushing for disclosure" around this time. Report at 255. That's precisely why Mr. Welch sent the email—because AUSA Bottini (and Mr. Goeke) continued to press for disclosure, including with their own U.S. Attorney, after hearing about PRAO's advice.

the case's weaknesses that listed only Allen's "shady personal background" without elaborating on Bambi Tyree and the subornation of perjury issue. Email from Bottini to Marsh et al. (Apr. 7, 2008 6:47 pm). PIN declined.

- At a July 14, 2008 meeting, he personally informed Criminal Division management, including the Assistant Attorney General and Principal Deputy Assistant Attorney, about the Bambi Tyree situation after his PIN colleagues neglected to do so. S.P. Tr. at 707-09; *see also* Email from Bottini to Goeke (July 15, 2008 5:50 pm) ("Group updated about our meeting with Matt and Rita. I pointed out the issue about [B]ambi [Tyree] coming up and how they were interested in that . . . .") (ellipsis in original).

- On August 14, 2008, when he was drafting the government's motion in limine to exclude inflammatory cross-examination, AUSA Bottini told his PIN superiors that although PRAO had concluded there was no disclosure obligation, he believed the motion should nevertheless explain the false subornation of perjury issue.[31] Email from Bottini to Sullivan et al. (Aug. 14, 2008 2:32 am) ("The big question: This [draft] obviously does not front out the rumored procurement of the false statement from Bambi by Bill. . . . I worry that if we don't make some mention of it—passing mention of it as a rumor which we investigated and disproved—they may respond to the [motion in limine] and raise it—thus possibly making it look like we potentially tried to hide something. Completely aware of what PRAO says, but do we run that risk?"). PIN declined.

- When he was drafting the August 25, 2008, *Giglio* letter, he again sought permission from PIN to make the defense aware of the issue. Email from Bottini to Morris et al. (Aug. 21, 2008 10:44 pm). Not only did PIN decline, but Ms. Morris, Mr. Marsh, and Mr. Sullivan discussed and rejected AUSA Bottini's suggestion in a series of emails from which he was excluded. *See* Emails among Marsh, Morris, and Sullivan (Aug. 22, 2008 1:40 pm and 1:41 pm).

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Each one of these mitigating circumstances sheds important light on the central question that the Special Prosecutor was supposed to investigate: did AUSA Bottini *intentionally* try to subvert the law? Did a veteran prosecutor with a quarter-century of experience and no desire for

[31] As a last-ditch effort to convince PIN to make some type of disclosure, AUSA Bottini resorted to making strategic "sales pitches" that were designed to appeal to his PIN colleagues—like arguing that they should give notice of the Bambi Tyree subornation of perjury issue so they could "smoke out" what the defense might already know. AUSA Bottini fully explained this strategy in his deposition. OPR Tr. at 662-64.

the spotlight risk his career by intentionally withholding evidence? Did a man who is universally praised as having the utmost integrity intentionally conceal exculpatory information from Court and counsel? Did a lifelong Alaskan who had great respect for Senator Stevens and mixed feelings about prosecuting him undertake to violate the law in some sort of vendetta against the senator? Did a prosecutor who repeatedly pushed and cajoled his colleagues and superiors to provide disclosure on an issue suddenly turn around and decide to intentionally conceal that issue from the defense?

None of these questions was addressed in the Special Prosecutor's Report.

C. The Failure to Consider AUSA Bottini's 48-Page Submission

In April 2010, we provided the Special Prosecutor with a 48-page submission explaining why, on both the facts and the law, AUSA Bottini did not commit intentional misconduct.[32] For each of the three eventual "counts" the Special Prosecutor leveled against AUSA Bottini, we methodically explained how they were not legally or factually supported. The Report does not even mention the fact of our submission, let alone reference our ample caselaw regarding the question of whether AUSA Bottini's conduct amounted to a violation in the first place. It is as though we never submitted anything at all.

D. The Failure to Accurately Recite Certain Critical Facts

Three of the material "facts" asserted in the Report are wrong and are misconstrued in a way that provides unwarranted support for the Report's conclusion that AUSA Bottini acted maliciously and intentionally.[33]

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[32] A copy of this document is appended to this letter.

[33] In addition to these misstatements of material facts, the Report also uses loaded language. In one example, the Report finds it "difficult to believe" that at the time of trial the prosecutors did not recall having shown the Torricelli Note to Bill Allen five months earlier, and asserts that this "collective memory failure strains credulity," Report at 22, 512; *see also* Report at 505 ("suspicious pattern of forgetfulness"). The clear import of these passages is to suggest that AUSA Bottini and the others lied about failing to recall the April meeting.

There are two reasons why it is clear that this suggestion is wrong and grossly unfair. First, if AUSA Bottini really is lying about this point, then that means there is quite a large conspiracy among four federal prosecutors, an FBI agent, a federal witness, and a former United States Attorney who represented Bill Allen at that interview and similarly forgot that this client had been shown the Torricelli Note. This is an astonishing accusation to level, given that there literally is no evidence—other than the Special Prosecutor's unfounded suspicion—that all seven of these individuals lied to him when they testified that they could not recall the Torricelli Note being shown during the April 15, 2008, meeting.

Second, AUSA Bottini's notes from a pretrial preparation session with Bill Allen on September 14—five months later—demonstrate that, when he showed Allen the Torricelli Note that day, he believed it was the first time he had done so; he wrote "BA SEEN THIS!!" with two exclamation points, to

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1. The Report's assertion that Williams' time was "supposed" to be added to the bills

The Report accuses AUSA Bottini of illegally suppressing witness Rocky Williams' statement that the charges for his work and that of the other VECO employees on the job were "supposed" to be combined with the invoices from subcontractor Christensen Builders and then transmitted by VECO owner Bill Allen to Senator and Mrs. Stevens:

> In August 2008, as Mr. Bottini drafted the first *Brady* disclosure letter to Williams & Connolly, Mr. Williams told him several times that VECO employees' time ***was supposed to*** be added by Mr. Allen to the Christensen Builders' bills to Senator Stevens. Mr. Bottini made notes of those statements, which supported Senator Stevens's defense, but that *Brady* information was never disclosed to Williams & Connolly.

Report at 71 (emphasis added). The Report then uses the word "*supposed*" (or the synonymous phrase "*were to be*") 20 times in describing what Williams allegedly told AUSA Bottini about the combining of the VECO and Christensen Builders invoices. The record is clear, however, that Williams **never** made that statement to AUSA Bottini (or, apparently, to anyone else on the prosecution team).

Although the Special Prosecutor spent over 100 transcript pages pushing this interpretation, AUSA Bottini was absolutely clear and emphatic in his deposition that Williams *never* said that the invoices were "supposed" to be combined, *see* S.P. Tr. at 136-37 ("**Q**: … Did you ever hear him say anything like that [that his time was supposed to be added to the Christensen bills]? **A**: I did not. **Q**: Ever? **A**: Ever. **Q**: Not just at this meeting[?] **A**: Ever, yes."), and the term "supposed" is nowhere to be found in AUSA Bottini's notes of his meetings with Rocky Williams. Nor apparently did Mr. Goeke and Agent Joy—the only other two participants in the meetings with Rocky Williams—indicate that there was an agreement whereby Allen was "supposed to" add Williams' time to the Christensen Builders bills.[34]

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underscore a fact that was obviously new to him. *See* Report at 437 (reprinting the note). He would not have written that note on September 14 if he actually recalled that Bill Allen had told him the same thing in April. The Report's loaded language about this incident was misplaced, and should have no place in a Court-sanctioned official report, especially one that will be publicly released and have an impact on personal reputations.

[34] The Report cites no deposition from those two men to support its interpretation. Not having received the Special Prosecutor or OPR deposition transcripts of any other witness or subject, we do not know the full extent of Agent Joy's or Mr. Goeke's questioning on this topic.

What Williams *did* tell AUSA Bottini was that he "*assumed*" that the VECO expenses would be added to the subcontractor's bills and submitted to Senator Stevens for payment. AUSA Bottini told the Special Prosecutor that Williams said the same thing in three different interview sessions, and his notes from all three of those meetings confirm that Williams used the term "*assume*."

This is more than just semantics; *assuming* that something will occur is quite different from saying something was *supposed* to occur. The latter requires a factual basis, while the former does not. Surprisingly, the Special Prosecutor's Report simply substitutes "supposed" for "assumed" in its discussion of this issue and then uses the stronger term as the factual predicate for its finding that AUSA Bottini violated *Brady* by failing to disclose Williams' statement to the defense. As explained below, *see* Section III.H.1, that finding is as flawed as the Report's creative terminology on this point.

2. The Report's assertion that AUSA Bottini used false testimony from Bill Allen during his closing argument.

The Report states that AUSA Bottini "endorsed and capitalized on Mr. Allen's false denial during his summation," Report at 20, presumably in furtherance of its suggestion that AUSA Bottini was unfairly exploiting defense counsel's inability to pin Bill Allen down as to when Allen first told the prosecutors about the statement by Bob Persons that "Ted is just covering his ass." The record is clear that AUSA Bottini did no such thing.

AUSA Bottini argued in his summation, in relevant part: "Now the defendant says, well, Allen just made that up, that's a lie, that never happened. Again, you saw and you heard from Bill Allen and you saw and you heard from Bob Persons. You can judge yourself the credibility of those two individuals. Again, if that were so, if Allen just made that up, wouldn't the story be better about that?" Trial Tr. (Oct. 21, 2008 am) at 54.[35] AUSA Bottini's argument is solely directed against defense counsel's contention that Bill Allen "made up" the story about Persons telling him the senator was "covering his ass"; that argument says and implies nothing about *when* Allen first allegedly made that story up. By injecting a temporal element into AUSA Bottini's argument, the Report is then able to draw a sinister interpretation of his argument—i.e., that AUSA Bottini was suggesting that Allen had not just recently told the government about the "covering his ass" statement, when he knew that that was the case. It is plainly evident from the trial transcript that AUSA Bottini was saying nothing about when Allen first mentioned the "covering his ass" statement. The point he is addressing is the defense contention that this was a fabrication (regardless of *when* it was allegedly fabricated), and that is apparent from his

[35] It is worth noting that the Special Prosecutor deposed Allen about his "covering his ass" testimony, and Allen was emphatic that he was telling the truth about his conversation with Persons in 2002. *See* Allen S.P. Tr. at 21-25, 45-46. Allen's testimony to the Special Prosecutor on this point is not mentioned in the Special Prosecutor's Report, but we know about it because it was in the OPR draft report.

response to the contention—"[I]f that were so, if Allen just made that up, wouldn't the story be better about that?"—which counters the defense's fabrication theory[36] without any reference to the timing of the alleged fabrication.[37]

3. The Report's assertion that AUSA Bottini "assisted" in drafting the inaccurate paragraph in the September 9 *Brady* letter.

The Report accuses two prosecutors—AUSA Bottini and AUSA Goeke—of falsely informing the defense in the September 9, 2008 *Brady* letter that "no evidence" existed to support the suggestion that Allen asked Tyree to sign a false affidavit, when, in fact, three pieces of such evidence did exist. Report at 28. To support this accusation, the Report repeatedly states or suggests that AUSA Bottini wrote or somehow had a hand in the creation or ratification of this language in the *Brady* letter. For example:

- "Mr. Marsh, *assisted by Mr. Bottini*, Mr. Goeke and Mr. E. Sullivan, wrote [the *Brady* letter's] penultimate paragraph which falsely stated that 'the government is aware of no evidence to support any suggestion that Allen asked [Ms. Tyree] to make a false statement.'" Report at 15 (second alteration in original) (emphasis added).

- "Instead of disclosing information that was on its face, and in fact, *Giglio* material, *Mr. Bottini*, Mr. Goeke and Mr. Marsh told Williams & Connolly that no such evidence existed." Report at 502 (emphasis added).

- "*Mr. Bottini*, Mr. Goeke and Mr. Marsh falsely represented

[36] This is a common prosecution argument to the jury. When the defense asserts that a government witness has embellished his testimony with a particular fabricated fact that is helpful to the government, the prosecutor will often cite other facts in that witness' testimony that are not helpful to the government. The prosecutor then asks the jury to assess the defense contention by asking themselves the following questions: "If that witness is willing to lie about that one point to make it more helpful to the government, why didn't he or she just lie about the other points and make them all helpful to the government? If the witness really was lying to you, why didn't he make the whole story a lot better for the government?" That is the argument AUSA Bottini is making in this passage, and it is an argument that goes solely to the defense counsel's suggestion of fabrication and not to the timing of the alleged fabrication.

[37] There is a suggestion in the Report that AUSA Bottini's use of the word "just" in his closing argument was intended to convey that Allen had not *recently* told the government about the "covering his ass" statement. *See* Report at 476. Read in context, it is obvious that AUSA Bottini is using the word "just" to mean *simply*, not *recently*. He says, in essence, that Allen did not fabricate that statement; not that he did not fabricate it recently.

> that there was 'no evidence' that Mr. Allen asked Ms. Tyree to lie." Report at 503 (emphasis added).

It is inaccurate for the Report to claim that AUSA Bottini in any way "assisted" Mr. Marsh in drafting the letter. The record is clear that AUSA Bottini simply saw a copy of the completed letter on the evening it was sent. As AUSA Bottini testified, he just "skimmed it"; he "didn't read it in any detail for accuracy" and "do[es]n't recall reading that section about this issue [subornation of perjury], and looking at it and going this isn't right." S.P. Tr. at 774. It is therefore inaccurate for the Report to assert that AUSA Bottini "told" or "represented" anything to Williams & Connolly about this issue.

E. The Failure to Cite Exculpatory Facts

The Model Rules of Professional Conduct require an attorney, in an ex parte proceeding,[38] to disclose to a tribunal adverse facts that are known to the attorney. Mod. R. Prof'l Cond. 3.3(e). This maxim is so important in ex parte proceedings because the tribunal (here, Judge Sullivan) does not have the benefit of an adverse attorney to point out those facts that contradict or rebut the positions put forward by the unopposed attorney. *See id.* cmt. 14 ("The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.").

Based in part on this maxim that the decision-maker should be aware of the absent party's "good facts," the Department of Justice requires its prosecutors to present substantial exculpatory information to grand juries. United States Attorneys' Manual § 9-11.233 (Presentation of Exculpatory Evidence). Here, Judge Sullivan is functioning like a grand jury, absorbing all of the information provided to him by the Special Prosecutor and then deciding, pursuant to Rule 42, whether sufficient evidence exists to institute contempt proceedings.

The Special Prosecutor omitted several critical adverse facts:

First, the Report faults AUSA Bottini for the inaccurate language in the September 9 *Brady* letter that there was "no evidence" to support the allegation that Allen asked Tyree to sign a false affidavit. The offending language was drafted by Mr. Marsh on September 8, immediately following a meeting among the PIN attorneys (and not AUSA Bottini). *See* Report at 324, 330. The Report never mentions that, on the day that language was drafted, AUSA

[38] "A judicial proceeding, order, injunction, etc., is said to be ex parte when it is taken or granted at the instance of and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested." Black's Law Dictionary 661-62 (6th ed. 1968). This Report was "ex parte" because it was provided to the Court without providing AUSA Bottini (the party adversely interested) with notice or the opportunity for contestation.

Bottini spent that entire day travelling from Alaska to Washington, and that when he arrived PIN assigned him to argue two motions on September 10 that he had neither drafted nor researched. S.P. Tr. at 117-18, 241. There is no mention of how AUSA Bottini was otherwise fully occupied while others were composing the disclosure language for which the Report holds AUSA Bottini responsible.[39]

Second, as explained above, the Report faults AUSA Bottini for failing to correct Allen's testimony suggesting he had not "just recently" told the government about Persons' "covering his ass" statement for the first time. In his deposition, AUSA Bottini explained at length to the Special Prosecutor that Allen had some serious impairments, was easily confused and had a hard time hearing—facts that directly support AUSA Bottini's understanding that everyone in the courtroom (including the jury and defense counsel) would recognize that Allen was simply confused by the cross-examination. *See* OPR Tr. at 341. During his depositions, AUSA Bottini discussed Allen's serious cognitive, speech, and auditory difficulties—the effects of a head injury following a motorcycle accident and a degenerative cognitive disease. S.P. Tr. at 500, 558; OPR Tr. at 283, 345. In addition, Allen's hearing was so poor he had to wear headphones during the trial,[40] and the transcript of his trial testimony reflects countless verbal stumbles and a repeated disconnect between Allen's testimony and the questions put to him. These facts have a direct bearing on the reasonableness of AUSA Bottini's assessment that Allen's testimony about the "covering his ass" statement was simply confused,[41] that that confusion was apparent to the jurors who were already aware of Allen's deficiencies,[42] and that because of these deficiencies it would likely have been fruitless to try to clarify Allen's confusion on re-direct examination. Despite their direct relevance, the Report does not reference Allen's cognitive difficulties when discussing Allen's cross-examination testimony.

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[39] Even more jarring is the fact that the Report gives Ed Sullivan a free pass for the inaccurate language in the September 9 *Brady* letter, because he was preparing to argue a case before the D.C. Circuit on September 12, see Report at 342 ("Around the time the *Brady* letter was drafted, Mr. E. Sullivan was preparing for oral arguments that week in *Stevens* and in the D.C. Circuit Court of Appeals in *United States v. Turner*."), even though Mr. Sullivan—unlike AUSA Bottini—was directly involved in drafting the letter. It is difficult to see why the same reasoning did not apply to AUSA Bottini.

[40] To add to Allen's confusion, the transcript reflects that his headphone technology failed repeatedly, including on two occasions during the afternoon of his cross-examination when defense counsel focused on his account of the "covering his ass" statement. Trial Tr. (Oct. 6, 2008 pm) at 28, 78.

[41] Indeed, Allen testified to the Special Prosecutor that he merely "misunderstood the question"; he did not "intentionally lie." Report at 492 (quoting Allen deposition testimony).

[42] AUSA Bottini had elicited from Bill Allen on direct examination that he had these impairments. *See* Trial Tr. (Sept. 30, 2008 pm) at 53-54 (**Q**: Now as a result of the accident, did you sustain a brain injury? **A**: Yes. . . . **Q**: And you said that it is in an area of your brain that affects your speech; is that correct? **A**: Yes. **Q**: How does that brain injury actually affect your ability to speak? **A**: It does. It was pretty bad there for three to four months, and then as you go along, I guess your brain rewires itself. **Q**: Okay. Do you still have trouble expressing yourself sometimes? **A**: Sometimes, I can see the word or the picture and sometimes it won't go through my lips.").

Third, the Report accuses AUSA Bottini of subverting justice by intentionally suppressing Williams' statement that he assumed Allen was adding his time to the Christensen Builders' bills. However, the Report omits a directly inconsistent and exculpatory fact—that AUSA Bottini was planning to elicit that very statement during William's direct examination at trial (that testimony never happened, as Williams fell ill right before trial and returned to Alaska for treatment, where he died shortly thereafter). *See* S.P. Tr. at 299. In fact, AUSA Bottini's written outline for Williams' testimony—which the Special Prosecutor has in his possession and used to question AUSA Bottini during the deposition—includes two questions to Williams about that assumption:

> [Q] What [did you] do after you reviewed [Christensen Builders' bills]?
> [A] Went to VECO, assumed that my time and Dave's time added on
> [Q] Nobody tell you that?
> [A] I assumed.

Id. (AUSA Bottini reading from his outline (deposition exhibit 21, page 139)). If AUSA Bottini intended to violate the law by withholding the fact of this assumption from the defense, it is hard to explain why he was planning to elicit it during his direct examination of Williams. The Report makes no mention of this very salient fact.

F. <u>The Failure to Cite Legal Authority Adverse to the Special Prosecutor's Positions</u>

The Model Rules of Professional Conduct also prohibit a lawyer from knowingly failing to disclose "legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client." Rule 3.3(a)(2). This requirement applies in proceedings where the lawyer is facing an adversary arguing the contrary position, and its application is even *more important* in an ex parte proceeding like the Special Prosecutor's Report to the Court where there is no other party to point out the adverse authority. In our submission to the Special Prosecutor on April 9, 2010, we provided legal authority that clearly militated against a finding that AUSA Bottini committed a *Brady* or *Napue* violation, but none of that caselaw made it into the Report.

1. Legal authority indicating that *Brady* did not require the disclosure of Williams' assumptions

Williams told the government that he assumed that Allen would add the time spent by Williams and another VECO employee to Christensen Builders' bills before sending the bills to Senator Stevens for payment. Williams based this assumption on the fact that Senator Stevens had told him and Allen in 1999, before Christensen was hired or any plans were drawn up, that

he wanted to pay for everything.[43] S.P. Tr. at 172.

The Report repeatedly asserts that Williams' assumption (which it inaccurately characterizes, *see supra* Section III.D.1) was *Brady* material because it would have "supported" and "corroborated" the defense theory that Senator and Mrs. Stevens thought that they were also paying VECO when they paid the Christensen Builders invoices. *See* Report at 1, 5, 6, 8, 38, 107, 175, 192-93, 500. While that may, in fact be true, the law—which the Report ignores on this issue—clearly shows that more than an assumption is required to establish a *Brady* violation.

For information to be "*Brady*," it must either (1) be admissible or (2) directly lead to admissible evidence. *United States v. Johnson*, 592 F.3d 164, 171 (D.C. Cir. 2010). The Williams assumption fails both prongs of that test. First, it is black-letter law that an assumption is not admissible evidence because an assumption, by definition, is based on something short of first-hand knowledge—which is the strike zone of witness testimony at trial. *See United States v. Burnett*, 890 F.2d 1233, 1240 (D.C. Cir. 1989) ("[T]he admissibility of a witness' testimony depends on proof of the witness' firsthand knowledge of the events he will describe.") (citing Fed. R. Evid. 602).[44] Second, the Report fails to explain what "admissible evidence" would have been uncovered had the defense been made aware of Williams' assumption. In fact, it is impossible to come up with any such evidence, in large part due to the following line of legal authority that the Report also completely overlooks.

The source of Williams' assumption was the 1999 conversation in which Senator Stevens told Allen and Williams that he wanted to pay for everything (which led Williams to assume—incorrectly, it turned out—that his and all of VECO's time was added to the bills submitted to and paid by Senator Stevens and his wife). The law is clear that Williams' description of that conversation would not be *Brady* material, because the defendant himself was a participant in the conversation. It is black-letter law that information is not *Brady* material if the defense is aware of the information. *See United States v. Derr*, 990 F.2d 1330, 1335 (D.C. Cir. 1993) ("*Brady* only requires disclosure of information unknown to the defendant ...."); *United States v. O'Hara*, 301 F.3d 563, 569 (7th Cir. 2002). And a statement made by the defendant himself is quintessentially information that the defendant knows. *See United States v. Mahalick*, 498 F.3d 475, 478-79 (7th Cir. 2007) (explaining that, by definition, the government cannot "suppress[]" a defendant's statements in violation of *Brady* because that information is known to the defendant, and even if the defendant forgot what he said, "it [i]s not the government's job to remind him"); *United States v. Phillips*, 596 F.3d 414, 419 (7th Cir. 2010) ("[T]here was no *Brady* violation

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[43] Williams also explained that he made that assumption because he did not think that Allen would "do something as stupid" as not to charge Senator Stevens for VECO's work. S.P. Tr. at 172.

[44] Indeed, in *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995) (per curiam), when a defendant challenged the prosecution's suppression of a prosecution witness's failed polygraph test, the Supreme Court held that such information is not even "evidence" for the purpose of *Brady* because it is inadmissible.

because [the defendant] was a party to the [suppressed] recorded conversation and would have been aware of any exculpatory statements made."); *United States v. Paris*, 388 F.3d 452, 461-62 (4th Cir. 2004) ("The FBI 302 was nothing more than a summary of [the defendant's] own statements. . . . Because the contents of the FBI 302 were already known to [the defendant], the failure to disclose this report did not violate *Brady*."), *vacated on other grounds*, 544 U.S. 916 (2005).

2. Legal authority directing that claims under *Napue v. Illinois* must be considered in context

The Report also fails to cite the caselaw advising courts how to analyze allegations that a prosecutor violated the rule laid out in *Napue v. Illinois*, 360 U.S. 264 (1959), by eliciting or failing to correct false testimony. It overlooks the controlling caselaw instructing that witness statements on the stand should not be viewed in isolation, but must be analyzed "in context." *United States v. Mejia*, 597 F.3d 1329, 1339 (D.C. Cir. 2010).[45] Nor does the Report reference the law holding that confused testimony[46] does not impose a *Napue* duty for the prosecutor to correct it. *United States v. Crockett*, 435 F.3d 1305, 1317 (10th Cir. 2006).[47] Finally, the Report makes no mention of the many opinions holding that a *Napue* claim will lie only if the uncorrected witness testimony can be shown to be intentionally perjurious, as opposed to simply mistaken or confused.[48]

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[45] The Report does cite *Mejia*, *see* Report at 470, but not for this proposition.

[46] Bill Allen told the Special Prosecutor that, just as AUSA Bottini believed, he was simply confused by the cross-examination when he answered "No." to the question "When did you first tell the government that Persons told you Ted was covering his ass and these notes were meaningless? It was just recently, wasn't it?" *See* Report at 491-92.

[47] In *Crockett*, the prosecution witness falsely but mistakenly answered "no" to defense counsel's question about whether she would receive a benefit in exchange for her testimony. *Id.* After viewing that response in the context of her entire direct and cross-examinations, the court found that the witness was "confused about her obligation to testify against [the] Defendant," and therefore found no *Napue* violation because "[t]here has been no showing of deliberate false testimony." *Id.*

[48] Many courts require *perjured* testimony—as opposed to simply false testimony—to make out a claim for *Napue*. *See United States v. Agurs*, 427 U.S. 97, 103 (1976) (explaining that the government violates *Brady* if "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury"); *United States v. Clarke*, 767 F. Supp. 2d 12, 66-67 (D.D.C. 2011) (explaining that, to make out a *Napue* violation, the defendant "must first establish that the testimony at issue was, in fact, perjured"); *see also United States v. Are*, 590 F.3d 499, 509 (7th Cir. 2009); *Crockett*, 435 F.3d at 1317. In fact, the Special Prosecutor appeared to accept this proposition in his questioning of AUSA Bottini in December 2009 when the Special Prosecutor specifically equated a *Napue* violation with perjurious testimony. *See* S.P. Tr. at 653:1-4 ("Q: You were aware of your obligations under [*Napue*] *v. Illinois*? Are you familiar with that case, that the government's not allowed the use perjury as testimony in its case?"). The Report should have at least mentioned that many courts—and the Special Prosecutor himself—require a showing of intentional

footnote continued on next page

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The Report's failure to include all of this case law was a serious oversight. It denied the Court—and now the public—the knowledge that the law provided two strong refutations of the Report's conclusions: (1) that the Report's finding that Williams' statements would have "corroborated the defense theory" is not enough to establish an actionable violation of the *Brady* disclosure rules and (2) that Allen's discrete cross-examination testimony did not rise to the level of a *Napue* false-testimony violation. Without any discussion of the relevant legal authority, these two glaring weaknesses in the Report's findings remained hidden.

G. The Failure to Cite the Applicable Legal Standard

Judge Sullivan appointed Mr. Schuelke to investigate the prosecutors for committing criminal contempt. Trial Tr. (Apr. 7, 2009) at 46. Yet while the Report lists three elements required to prove criminal contempt, *see* Report at 507-09, it never even recites the applicable mens rea standard.

Criminal contempt is a specific intent crime. *See United States v. Cutler*, 58 F.3d 825, 837 (2d Cir. 1995) ("Criminal contempt generally requires a specific intent to consciously disregard an order of the court." (internal citation omitted)); *Waste Conversion, Inc. v. Rollins Envtl. Servs. (NJ), Inc.*, 893 F.2d 605, 610 (3d Cir. 1990) (en banc) (similar). Acting with "specific intent" requires that the individual have a wrongful "purpose," rather than simply "knowledge" (which is the general intent standard). *United States v. Bailey*, 444 U.S. 394, 405 (1980). The pattern jury instruction provides:

> In order to be guilty of criminal contempt, therefore, it is essential that the defendant acted knowingly and with the specific intent to disobey or disregard the order of the court. A person acts knowingly if he acts intentionally and voluntarily and not because of ignorance, mistake, accident, or carelessness. I instruct you that if you find beyond a reasonable doubt that the defendant understood [the Court's] order and consciously refused to obey that order, the defendant's conduct would then be knowing and willful, and this element of the offense would be satisfied.

1-20 Modern Federal Jury Instructions: Criminal ¶ 20.02, Instruction No. 20-15.

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perjury to make out a *Napue* violation. This is especially true here, where Allen told the Special Prosecutor, under oath, that his cross-examination testimony was innocently mistaken rather than intentionally false. Report at 491-92.

When he deposed AUSA Bottini, the Special Prosecutor indicated he was aware of the specific intent standard. In reference to the *Stevens* prosecution, he specifically reminded AUSA Bottini that "the defendant's state of mind ... is what the [*Stevens*] case was all about—this was a specific intent crime alleged." S.P. Tr. at 139. Yet, the Report never mentions that specific intent is equally required for a contempt case like this one, and should therefore have been established before the Special Prosecutor concluded that "the evidence . . . compels the conclusion, and would prove beyond a reasonable doubt, that . . . *Brady* information was intentionally withheld from the attorneys for Senator Stevens." Report at 28.

H. The Failure to Follow the Applicable Legal Standard in the Analysis of AUSA Bottini's Culpability

Predictably enough, the failures cited above—and particularly the failure to recognize the relevant legal standard for criminal contempt (specific intent)—result in a legal analysis of AUSA Bottini's culpability that falls far short of the rigorous balancing of law and facts that should underlie any determination of guilt or innocence. In fact, it is fair to say there is almost no legal analysis at all in this Report.

When we submitted our 48-page argument to the Special Prosecutor in early 2010, we devoted approximately 15 pages of that document to legal analysis—i.e., to applying the facts of this case to the rules and caselaw that define the boundaries between culpability and non-culpability for each allegation against AUSA Bottini. In the Special Prosecutor's 514-page Report, there are about eight pages of general description of *Brady* material and the prosecutor's *Brady* obligations. Then as to each allegation, the Report devotes barely a paragraph to a discussion of the relevant rules before finding AUSA Bottini in violation of those rules.

The paucity of legal discussion is but a symptom of the fundamental problem in the Special Prosecutor's Report—the absence of fair legal reasoning behind its findings against AUSA Bottini. A cursory examination of each of the Report's findings demonstrates the shallowness of its legal reasoning.

1. The Rocky Williams Statements

The following paragraph is the sum total of the Report's analysis of the *Brady* allegations relating to Rocky Williams' statements:

> By any [articulation of the *Brady*] standard, the information provided to the prosecutors by Rocky Williams and Bambi Tyree was *Brady* material. Mr. Williams's statements to Mr. Bottini, Mr. Goeke and Agent Joy during trial preparation interviews in August and September 2008, days before the trial began, that he understood, based on conversations with Mr. Allen and Senator Stevens, that VECO expenses were to be included in the Christensen Builders' bills, directly supported and corroborated

> Senator Steven's [*sic*] principal defense and his and Catherine Stevens's testimony at trial. Mr. Williams's statements constituted quintessential *Brady* information which Mr. Bottini and Mr. Goeke withheld and concealed from Senator Stevens and Williams & Connolly.

Report at 500.

In that one paragraph, the Report purports to demonstrate that the Special Prosecutor has a prosecutable case regarding AUSA Bottini's failure to disclose Williams' statements—i.e. that he has proof beyond reasonable doubt that: (1) AUSA Bottini violated a court order;[49] (2) that he did so knowingly, and (3) that he did so intentionally. A less superficial discussion of those elements as to each allegation shows that the Report utterly failed to satisfy them.

Violation: AUSA Bottini's uncontradicted deposition testimony was that Williams said that he (Williams) "assumed" that the VECO bills were being combined with the Christensen Builders bills. As explained above, assumptions are typically not considered relevant and admissible at trial. The fact that a contractor assumed that a United States Senator would pay for the work the contractor was doing on the senator's house is probative of nothing. Most contractors working on a job would assume that the homeowner would be billed and pay for their work. If that were considered relevant and admissible, then every worker who appeared on that job site could be called to testify about their assumption. Given that reasoning, it is hard to see how AUSA Bottini's failure to disclose the fact of Williams' assumption to the defense constitutes a *Brady* violation in the first place.

Knowledge: As AUSA Bottini explained at his deposition, he considered whether this assumption was exculpatory *Brady* information. He went through the analysis summarized above and concluded that it was not *Brady* material. Given his reasonable determination that it ***was not*** *Brady* information, it is difficult to see how the Special Prosecutor concluded that AUSA Bottini knew that it ***was*** and thereby knowingly violated the *Brady* requirement to disclose it to the defense.

Intent: Even if AUSA Bottini were wrong with his analysis—and Williams' statement was, in fact, disclosable *Brady* information—his resulting decision not to disclose it could not be deemed an *intentional* suppression of exculpatory material.[50] At worst, that would have been a mistake—and not intentional misconduct. Lest there was any question on this point, the uncontroverted fact that AUSA Bottini planned to elicit this assumption during Williams' direct

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[49] For purposes of this discussion, we will assume that there was an order requiring the government to comply with it *Brady* obligations.

[50] And, having worked alongside Mr. Goeke for several years, AUSA Bottini believes it is inconceivable that Mr. Goeke would have intentionally committed misconduct on this issue or any other issue in this or any other case.

examination, *see supra* Section III.E (explaining this exculpatory fact), definitively demonstrates that he did not *intend* to withhold the information from the defense.

2. The Bambi Tyree Information

The government has an obligation under *Brady* and *Giglio* to give the defense information that undercuts the credibility of its witnesses. The prosecution team clearly violated that obligation when it sent a letter saying that "the government is aware of no evidence to support any suggestion that Allen asked [Tyree] to make a false statement." Letter from Morris to Williams & Connolly (Sept. 9, 2008). The question for the Special Prosecutor, however, was whether AUSA Bottini—as opposed to others on the prosecution team—was personally responsible for that statement. The following is the Report's legal analysis relating to AUSA Bottini's liability on that point:

> Instead of disclosing information that was on its face, and in fact, *Giglio* material, Mr. Bottini, Mr. Goeke and Mr. Marsh told Williams & Connolly that no such evidence existed.
>
> * * *
>
> The *Brady* disclosure in *Stevens* was not just incomplete. Mr. Bottini, Mr. Goeke and Mr. Marsh falsely represented that there was "no evidence" that Mr. Allen asked Ms. Tyree to lie.

Report at 501-02.

The analysis—if one can call it that—simply groups AUSA Bottini together with Mr. Goeke and Mr. Marsh in assigning guilt for the *Giglio* violation. In doing that, the Report completely overlooks a highly-relevant and uncontroverted fact—that AUSA Bottini simply did not know or see that the "no evidence" reference was in the letter. *See* S.P. Tr. at 774 ("I don't recall reading that section [in the *Brady* letter] about this issue [of 'no evidence'], and looking at it and going[,] this isn't right…."); *see also id.* at 740 ("**Q**: So it may well be today, the first time that you have realized the shortcomings of this paragraph [of the *Brady* letter about 'no evidence']? **A**: Yeah.").

The following is the analysis of the elements that was absent from the Report:

Violation: A violation of *Brady* occurred when the government sent its September 9, 2008, letter saying that there was "no evidence" that Bill Allen asked Bambi Tyree to sign a perjurious affidavit. The question, however, is whether AUSA Bottini committed that violation. The record is clear that he did not: he had no role in drafting that part of the letter; he was on travel as it was being finalized; he simply skimmed it after it was completed; and he did not see that the letter was inaccurate.

Knowledge: Given the evidence that AUSA Bottini simply did not see the "no evidence" reference when he skimmed the letter, it is impossible to understand how he could be held responsible for *knowingly* committing a *Brady* violation.

Intent: Without knowledge that the letter was inaccurate, he logically cannot be held responsible for *intentionally* misleading the defense.

3. Bill Allen's Testimony

Again, the Report provides no more than a single paragraph of analysis before accusing AUSA Bottini of violating *Napue*:

> Mr. Bottini had not forgotten during Mr. Allen's cross-examination on Oct. 6, 2008, when Mr. Sullivan attempted to demonstrate that his CYA testimony [Allen's testimony that Bob Persons had told him Senator Stevens was just "covering his ass" with the Torricelli Note] was a recent fabrication, that Mr. Allen told him about that CYA conversation for the first time on Sept. 14, 2008. He failed to correct Mr. Allen's false testimony that he had not told the prosecutors "just recently" about his CYA conversation with Mr. Persons. Mr. Bottini knew that he was obliged by *Brady*, *Giglio* and *Napue* to correct that false testimony and/or disclose the truth to Williams & Connolly and the Court, and he chose not to. Mr. Bottini's explanation, that he knew from his experience with Mr. Allen that he was confused and misunderstood Mr. Sullivan's question, does not excuse his failure to correct testimony which he knew was false.

Report at 505 (internal citations and parentheticals omitted).

Here, the Report at least attempts a cursory analysis under the elements of criminal contempt, but its recitation of the facts is flat wrong.

Violation: The government violates *Napue* when a witness's false testimony goes uncorrected and the government does not notify defense counsel or the court. *United States v. Crockett*, 435 F.3d 1305, 1317 (10th Cir. 2006); *see also* Report at 505. Here, there was no violation, because after finally grasping that defense counsel was asking when Allen told the government about the CYA comment (rather than when Persons told Allen about it), Allen testified truthfully to the best of his ability: "Hell, I don't know[.] I don't know what day it was." Trial Tr. (Oct. 6, 2008 pm) at 81; *see also United States v. Mejia*, 597 F.3d 1329, 1339 (D.C. Cir. 2010) (in *Napue*

analysis, testimony must be evaluated "in context").[51]

Knowledge: The Report claims that "Mr. Bottini knew that he was obliged by *Brady*, *Giglio* and *Napue* to correct ***that*** false testimony." Report at 505 (emphasis added). Wrong. He did not know (and did not believe) that *Napue* or any other doctrine obliged him to correct what he perceived to be Allen's innocently confused testimony that Allen then sufficiently cleared up on his own. *See also Hess v. Trombley*, No. 2:06-cv-14379, 2009 WL 1269631, at *6 (E.D. Mich. May 1, 2009) ("While a prosecutor may not knowingly use perjured testimony, a prosecutor is not required to ensure that prosecution witnesses' testimony be free from all confusion, inconsistency, and uncertainty.").

Intent: Because he did not think he had a duty to correct Allen's testimony, AUSA Bottini could not have intentionally decided to violate *Napue* by remaining silent.

I. The Failure to Afford the Subjects the Opportunity to Review and Comment on the Report Before Finalizing and Submitting It to the Court

The Special Prosecutor spent almost two years drafting a 500-page, fact-intensive report. As we explain here, he got critical facts wrong, and came to a number of incorrect conclusions. If he had given us an opportunity to comment on a draft of the report and then fairly considered those comments before finalizing it, the Report could have been much more analytically sound and factually accurate.

Indeed, the federal offices that conduct similar such investigations routinely afford subjects the opportunity to review and comment on a draft report. The Department's Office of Professional Responsibility, for example, afforded us that opportunity with its own report on the *Stevens* case. The Department's Inspector General also frequently takes this approach. There is good reason for such a practice, as it strengthens the integrity of the final report and serves as an important measure of fairness for the subjects. Here, the Special Prosecutor disregarded this common and critical practice. We did not learn about his findings and conclusions until after he issued his Report to the Court and the Court made its announcement on November 21, 2011.

It is true that on February 8, 2012, three months after the Report was finalized, Judge Sullivan permitted subjects the opportunity to draft written comments that would be appended to the public version of the Report. While this may have afforded a good opportunity to vent, it did nothing to address the substance of the Report. Unlike the processes described above, where subjects submit comments on a *draft* report with the hope and intention of shaping the final report, here there has been no such possibility: the Report has been finalized, and nothing in our appended comments will alter its analysis or conclusions.

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[51] Many courts require testimony to be intentionally false (rather than simply confused) before finding a *Napue* violation, *see supra* note 48, but one does not even need to reach that legal argument here to see that there was no *Napue* violation.

IV. THE SPECIAL PROSECUTOR'S RECOMMENDATION TO THE COURT

Internal Department of Justice guidance permits a federal prosecutor to institute criminal charges against the subject of an investigation only if he "believes that the person's conduct constitutes a Federal Offense and that the admissible evidence probably will be sufficient to obtain and sustain a conviction." United States Attorneys' Manual § 9-27.220 (Grounds for Commencing or Declining Prosecution). "Moreover, both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact." *Id.* The Special Prosecutor's Report, for all of the reasons discussed above, falls dramatically short of meeting that standard—particularly when it comes to proving that AUSA Bottini acted with the intent necessary to sustain a prosecution for criminal contempt.

Rather than concede the lack of evidence to prove an intentional violation beyond a reasonable doubt, however, the Report relies on a technicality to justify its decision not to recommend criminal charges: that a contempt prosecution for *Brady* violations cannot be established because the Court failed to "issue a clear, specific and unequivocal order" directing the prosecution team to comply with *Brady*. Report at 513. In the absence of such an order, the Report concluded, it could not recommend that a prosecution be undertaken. After stating its recommendation against prosecution, the Report then pointedly explains that "[w]ere there a clear, specific and unequivocal order of the Court which commanded the disclosure of [the alleged *Brady* information], we are satisfied that a criminal contempt prosecution would lie." Report at 513.

This tactic may have seemed an elegant solution to the Special Prosecutor. But, it did not seem so elegant to AUSA Bottini. While he was gratified that he would not face criminal prosecution, he was horrified to see that the declination of prosecution was accompanied by a full-throated accusation that he had intentionally subverted justice in the pursuit of his duties for the Justice Department.

This device for declining the case without addressing the prosecutability of the alleged misconduct raises a couple of interesting questions. First, a cursory reading of the trial transcript shows that the Court *did*, in fact, issue a clear and unequivocal order to the government to produce *Brady* material, despite the Report's assertion otherwise.[52] On September 10, 2008, when the defense was complaining about the government's *Brady* practices, the Court said:

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[52] While there is indeed no *written* order, it is well established that a written order is not required for a contempt proceeding; an oral order will suffice. *See United States v. Turner*, 812 F.2d 1552, 1564 (11th Cir. 1987) (assuming that oral orders could give rise to contempt); *In re Hipp, Inc.*, 5 F.3d 109, 112 n.4 (5th Cir. 1993) ("[An] order entered in open court in presence of [the] defendant may be enforced by criminal contempt.").

> So the government says[,] ["]we're aware of our *Brady* obligations,["] and I say[,] ["]fine, then comply with your *Brady* obligations,["] and why should I do more than that?

Trial Tr. (Sept. 10, 2008 am) at 60. The defense responded by exhorting the Court to issue the sort of comply-with-*Brady* order it had just described. *Id.* The Court agreed, telling all attorneys present that "I just did it. I just did it." *Id.* Later during the same hearing, the Court re-iterated its order that the government must comply with *Brady*: "I'll just issue an order as a general reminder to the government to remind it of its daily ongoing obligation to produce that material [*Brady* material]." *Id.* at 74. The Court's oral ruling was plain and unequivocal: the government was ordered to "comply with [its] *Brady* obligations."[53]

The second peculiar aspect of this declination rationale lies in the fact that the "absence of a clear order" should have been apparent from the very inception of this investigation. The Special Prosecutor understood from the date of his appointment that his mandate was to investigate contempt charges specifically, and within a short time he had the trial transcripts and knew that no "clear order" existed. If the absence of such an order were truly the impediment to a contempt prosecution, it is difficult to understand why the Special Prosecutor spent an additional two and-a-half years (and cost the government unknown thousands of dollars) to conduct an investigation into conduct he knew could never be prosecuted.

We do not raise those questions to quibble with the Report's legal conclusion that a "clear, specific and unequivocal order" is necessary for contempt. Rather, we do so because the Report leveled the unsupported accusation that AUSA Bottini committed federal crimes and then used that legal conclusion in a way that avoided any responsibility for backing up that accusation with actual proof.

V. THE COURT'S ANNOUNCEMENT OF INTENTIONAL MISCONDUCT FINDINGS

On November 21, 2011, the Court entered a public order stating that the Special Prosecutor "concluded that the investigation and prosecution of Senator Stevens were 'permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated his defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness.'" Nov. 21, 2011 Order at 3 (quoting Report at 1). In the same order, the Court indicated its desire to publicly release the Report. *See id.* at 11 ("[T]he Court has already expressed its intent to make the results of Mr. Schuelke's Report public to the greatest extent possible.").

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[53] If the *Brady* violations are as clear-cut as the Report suggests, then it is impossible to see how an order to "comply with your *Brady* obligations" can be deemed insufficiently "clear, specific and unequivocal" to cover those violations.

This process has led inevitably to the public concluding that our client is guilty of gross intentional misconduct. *See* Editorial, *Release the Stevens Report*, N.Y. Times (Feb. 7, 2012) (quoting from Judge Sullivan's November 21 order and contending that prosecutors engaged in "illegal concealment"). This has led, in turn, to calls for retribution and punitive action against AUSA Bottini that would mean the ruin of his career. *See Oversight of the U.S. Dep't of Justice: Hearing Before the Senate Judiciary Comm.*, Webcast at 64:20-65:15 (Nov. 8, 2011) (Senator Hatch is "bother[ed]" by "really offensive approaches" of *Stevens* prosecutors; "I don't see anything being done about it."); Jordy Yager, *Senators to Justice Department: Sack Prosecutors, Apologize to Stevens Family*, The Hill (Dec. 14, 2011) ("A bipartisan group of senators is calling on the Justice Department to . . . fire the attorneys accused of the withholding of evidence that contributed to [Senator Stevens'] criminal conviction."); Mike Scarcella, *AG Holder: Ted Stevens Report Has "Disturbing" Findings*, Blog of Legal Times (Mar. 8, 2012) (quoting Senator Feinstein: "I think that actions have to be taken [against the *Stevens* prosecutors]."); Statement of Senator Hutchinson on Prosecutorial Misconduct in the Investigation of Senator Ted Stevens (Mar. 12, 2012)[54] ("I have further asked the Attorney General what action he will take to remove the prosecutors from the Justice Department."); Editorial, *Case Closed? Not Yet*, Wash. Post (Nov. 29, 2011) ("Mr. Holder should ask for an independent assessment of whether the culpable attorneys should be prosecuted for obstruction of justice.... The Justice Department should refer the report to the state bar associations that licensed these lawyers, so that they may consider disbarment or other punishments.").

This process is an object lesson in the dangers that arise when there is a deviation from the standard rules of criminal prosecution. It demonstrates with absolute clarity why our federal prosecutors are prohibited from publicly issuing accusations against subjects they choose not to prosecute. *See* United States Attorneys' Manual § 9-27.760 (Limitation on Identifying Uncharged Third-Parties Publicly). In our criminal justice system, the government has only one means of leveling an accusation against an individual—through the official filing of criminal charges. At the end of an investigation, the prosecutor either seeks charges against a subject or he does not. There is no middle ground. He cannot decline to bring criminal charges but then turn around and level public accusations against the subject—accusations that the subject cannot rebut through the truth-finding process of litigation.

That is exactly what happened here. And the result is that AUSA Bottini is now the subject of criminal accusations—accusations issued with the imprimatur of a federal court—that he will never have the opportunity to confront and rebut in court. This letter is AUSA Bottini's rebuttal—the rebuttal he was denied by this flawed process.

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[54] *Available at* http://hutchison.senate.gov/?p=press_release&id=1015.

VI. CONCLUSION

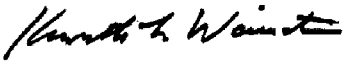
As you can see, AUSA Bottini feels very strongly about the conclusions in the Special Prosecutor's Report. He believes that federal prosecutors must be above reproach in every aspect of their work, and he has held himself to that high standard throughout his long career of service to the United States. While he readily admits that he made mistakes during the *Stevens* prosecution, he cannot accept the Report's finding that he intentionally violated the rules—a finding that runs completely counter to the principles of honor and public trust that he holds dear as a federal prosecutor.

I also reject those findings, and I do so in large part because I have come to know Joe Bottini as a very good and honest man who would never do the things charged in the Report. For those who do not know Joe—like you and most of your colleagues at the Department—it will take more than that to see through the Report's findings. It will require doing what we did in this letter—going behind the conclusory statements and scrutinizing the evidence and analysis underlying those findings. If you do that, I am absolutely confident you will see that the Special Prosecutor's charges are completely unsupported by hard facts or sound legal analysis, and that Joe acted in good faith in the *Stevens* trial and never intentionally violated the rules and principles to which he has devoted his entire career as a federal prosecutor.

Once you and your colleagues come to that realization, Joe will once again be seen within the Department as the honest and upright public servant that he is. That will mean more to Joe than you can possibly imagine.

On Joe's behalf, I want to thank you for reading this letter and considering his views about the Special Prosecutor's Report.

Sincerely,



Kenneth L. Wainstein

Enclosure

ENCLOSURE:

AUSA Bottini's Submission to the Special Prosecutor

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Re: ***Comments to Special Prosecutor Report***

Dear Mr. Schuelke:

We have reviewed your November 14, 2011 Report on your investigation, as Special Prosecutor, of possible criminal contempt arising from the prosecution of Senator Ted Stevens. We write because, by his February 8, 2012 Order, Judge Sullivan provided us permission to submit comments to your Report.

We appreciate and agree with your conclusion that District of Alaska Assistant United States Attorney Joseph W. Bottini should not be prosecuted for criminal contempt and Judge Sullivan's decision to "accept [your] . . . conclusion[]" and not institute contempt proceedings. (Feb. 8, 2012 Opinion at 23-24.)

On April 9, 2010, we provided you with a 48-page submission, explaining why AUSA Bottini did not intentionally commit any misconduct in the course of prosecuting Senator Stevens. At a general level, it acknowledged that AUSA Bottini made mistakes that he very much regrets during the *Stevens* prosecution, but demonstrates that he never intentionally did anything to subvert justice or violate the rules. Specifically, it addressed each of the allegations and explained the following:

- That AUSA Bottini acted responsibly — and certainly not criminally — in assessing and determining that Rocky Williams' statements that he "*assumed*" Bill Allen would invoice Senator Stevens for Williams' work was not *Brady* information that needed to be disclosed;

- That AUSA Bottini was not responsible for the misstatement in the September 9, 2008 *Brady* letter — that there was "no evidence" that Bill Allen asked Bambi Tyree to sign a false affidavit — given that he did not draft the letter, only

glanced over it once it was completed, and did not notice the inaccuracy in that passage; and

- That AUSA Bottini was completely justified in not attempting to clarify the confused testimony elicited by defense counsel's cross-examination of Bill Allen.

In the course of those arguments, we highlighted a number of critical facts and considerations — such as AUSA Bottini's extensive, and ultimately unsuccessful, efforts to persuade his Public Integrity Section superiors to disclose to the court and defense that information about Bill Allen's alleged subornation of perjury that your Report accuses him of intentionally trying to suppress. We also provided with you citations to extensive caselaw that undercuts your legal analysis and findings, including court opinions that that demonstrate why Williams' statement was not *Brady* and why Allen's testimony did not violate *Napue*. In addition to those arguments and points, we included with that submission eight character reference letters — including several from defense lawyers whose clients AUSA Bottini prosecuted — that depict AUSA Bottini as an upstanding and ethical prosecutor who would never even consider intentionally violating a defendant's constitutional rights.

We were saddened that your Report did not acknowledge any of this information, especially because the Report appears to go out of its way to accuse AUSA Bottini of engaging in intentional misconduct. We are therefore attaching our April 2010 submission, with the hope that you, Judge Sullivan, and the public will read it and better understand how AUSA Bottini's conduct throughout the *Stevens* prosecution was ethical, proper, and in keeping with his reputation for unimpeachable integrity and fairness.

Sincerely,

s/ Kenneth L. Wainstein

Kenneth L. Wainstein

Attachment

United States District Court for the District of Columbia
***In Re: Special Proceedings*, No. 09-MC-0198 (EGS)**

Submission of Joseph W. Bottini
to the Special Prosecutor

CONFIDENTIAL – UNDER SEAL

Dated: April 9, 2010

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TABLE OF CONTENTS

Page(s)

INTRODUCTION 1

I. BACKGROUND 4

A. Mr. Bottini's Background 4

B. The *Stevens* Prosecution 7

II. MR. BOTTINI DID NOT COMMIT WILLFUL MISCONDUCT 10

A. Mr. Bottini's Repeated Insistence On Disclosing The Bambi Tyree Allegations Is Fundamentally Inconsistent With Willful Misconduct. 12

B. Mr. Bottini Did Not Commit Any Misconduct In Connection With The Rocky Williams Interviews. 24

C. The Failure To Disclose Bill Allen's Statement Regarding The Torricelli Note Was Inadvertent, Not Intentional. 32

D. Mr. Bottini Was Not Obligated To Clarify Bill Allen's Torricelli Note Testimony Because It Was Confused, Not Knowingly False. 39

III. CONCLUSION 46

EXHIBITS 49

INTRODUCTION

Assistant United States Attorney Joseph W. Bottini makes this submission to show why punishing his conduct during the prosecution of former Senator Ted Stevens as criminal contempt would be unjustified, virtually unprecedented, and profoundly harmful to the responsible prosecution of crime. Mistakes were undoubtedly made during the *Stevens* trial, including by Mr. Bottini. But the crime of contempt requires more than mistakes: because it "is a dark stain on an attorney's record," prosecution for criminal contempt requires proof of willful misconduct. *United States v. Mottweiler*, 82 F.3d 769, 770 (7th Cir. 1996).

This submission details Mr. Bottini's conduct in four areas and shows how it does not come close to meeting that standard:

1. ***Allegations Regarding Bambi Tyree***. From the outset, Mr. Bottini pressed the trial team and its leadership at the Department of Justice's Public Integrity Section ("PIN") to disclose allegations that Bill Allen—the government's principal witness—had engaged in sexual misconduct with minors and had asked Bambi Tyree to make a false statement clearing him of that misconduct. Mr. Bottini pressed that point repeatedly and for more than a year prior to the *Stevens* trial, urging *ex parte* disclosures to the district judge who presided over earlier cases in which Allen testified and pressing for more complete disclosures in the government's *Brady* letters and pretrial filings in the *Stevens* case—despite being rebuffed on multiple occasions by PIN. The government ultimately disclosed the substance of the allegations against Allen in its *Brady* letter, and subsequently provided the Anchorage Police Department's entire investigative file to the defense with enough time for Allen's cross-examination to be reopened.

2. ***Pretrial Statements of Robert "Rocky" Williams***. During pretrial interviews in August 2008, Rocky Williams told prosecutors that he "assumed" Bill Allen added his time and

Dave Anderson's time to bills prepared by Christensen Builders, the subcontractor hired by VECO Corporation to perform carpentry work on Senator Stevens' home. Williams based that assumption on his belief that Allen, who "was under a microscope," would not do anything to draw further scrutiny to himself or Stevens; Williams conceded that he never saw the actual bills that Allen forwarded to the senator, does not know whether Allen actually added his time and Anderson's to those bills (he did not), and did not have a single conversation with Stevens or his wife about whether the bills Allen sent Stevens reflected VECO's time.

3. ***Disclosure of Bill Allen's April 15 Statement***. At a September 14, 2008 witness preparation session, Mr. Bottini and other prosecutors showed Bill Allen a handwritten note from Senator Stevens, asking Allen for an invoice for VECO's work, cautioning him to "remember Torricelli," and telling him that he had asked Bob Persons to discuss a bill with Allen. Allen responded that he believed "Ted is covering his ass here," and that he thought Persons likewise told him that Allen was "just covering his ass." That response, which he repeated in his testimony at trial, contradicted Allen's statement on April 15—months before the case was indicted and long before Allen became Mr. Bottini's witness—that he did not recall talking to Persons about the Torricelli note. Allen's April 15 statement should have been disclosed to the defense; it was not. But Mr. Bottini's sworn testimony, his recollection of the purpose of the April 15 meeting, his notes from the September 14 meeting, and his failure to recall that Allen was shown the Torricelli note on April 15 even after that interview became a point of contention point to a single conclusion: Mr. Bottini's failure to locate his handwritten notes from the April 15 meeting, and the government's failure to disclose their substance, was an inadvertent mistake—not a willful violation of his obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).

4. ***Bill Allen's Testimony During Cross-Examination.*** During cross-examination, the defense asked Allen when he first told the government that he had discussed the Torricelli note with Persons, in essence accusing him of "just recently" concocting that testimony. The responses Allen gave, however, make clear that he misunderstood the question—and believed that defense counsel was asking when he first discussed the Torricelli note with ***Persons***, not when he first discussed it with the government. And when responding to the question he believed defense counsel was asking, Allen provided a truthful answer, testifying that it was not "just recently" that he discussed the Torricelli note with Persons. That Allen would become flummoxed is unsurprising and in keeping with his typical speaking style and thought process and, indeed, is consistent with one of the principal goals of cross-examination: to confuse the witness. Mr. Bottini was not obligated, under *Napue v. Illinois*, 360 U.S. 264 (1959), to aid the defense in elucidating that confusion.

* * *

Even if this conduct ran afoul of the government's obligations under *Brady*, *Giglio*, *Napue*, and the Court's discovery orders, Mr. Bottini would have needed to violate those obligations willfully in order for his conduct to be punishable as criminal contempt. He did not remotely do so. It is clear that Mr. Bottini's mistakes were made in the context of a complex case, made more difficult by an extraordinary time crunch that resulted from the mishandled management of the prosecution and Senator Stevens' decision to invoke his right to a speedy trial. Those mistakes were amplified and, in many cases, distorted by attorneys whose zeal to secure acquittals has led them to use the allegation of prosecutorial misconduct as a regular defense tactic.

But if the criticism leveled at the government as a result of the *Stevens* prosecution has created misconceptions, the reality is this: Mr. Bottini is a dedicated, career prosecutor without a single disciplinary complaint in 25 years of practice and after more than 50 jury trials. He is universally admired by the judges, defense attorneys, and prosecutors with whom he has worked most closely, and who consider him "a man of conscience and honor who has devoted his life as a federal prosecutor to doing the right thing" and someone who "does not grasp for the spotlight or for self-promotion." (*See* Letters from Nelson Cohen (Ex. D), Mark Bonner (Ex. B).) He went above and beyond his *Brady* obligations on multiple occasions during the *Stevens* prosecution itself, pressing the trial team—sometimes repeatedly—to disclose additional information bearing on the credibility of the government's principal witness. He has acknowledged his mistakes, has cooperated with this investigation readily and voluntarily, and has already been punished enough. Criminal sanctions would be entirely unwarranted.

I. BACKGROUND

A. Mr. Bottini's Backgrouud

Joe Bottini has practiced law for 25 years, and for almost that entire period he has served as an Assistant United States Attorney in the District of Alaska. (Deposition of Joseph Bottini 7:12-17, Dec. 16-17, 2009 ("Dep.").) Colleagues with whom he has worked during this time describe him as "ethical" and "honest" and routinely praise his "integrity" and "unwillingness to seek personal status or attention"; defense attorneys who litigate against him have said that "I would trust a client's, or my future on [his] word and integrity" and "I would accept Joe's word and his hand shake on any matter knowing that it was more reliable than any document that could be drafted." (*See* Letters from Nelson Cohen (Ex. D), Robert Bundy (Ex. B), Michael White (Ex. H), Robert Chadwell (Ex. C).) Throughout more than 24 years in the United States Attorney's Office and in excess of 50 jury trials (Dep. 7:18-21), Mr. Bottini has not been the

subject of a single disciplinary action by a bar, has not been held in contempt by a single court, and has never been the subject of any court-imposed sanction (*id.* 6:19-7:8). And, save for the *Stevens* case, he has never been involved in a proceeding where a court found that the government committed a *Brady* violation—let alone reversed a verdict on that basis. (*Id.* 12:7-13.)

In short, Mr. Bottini understands the constitutional requirements that *Brady* imposes on prosecutors, and he takes those obligations seriously. He served for 13 years, for instance, as his district's *Henthorn* coordinator, advising attorneys about their duty under *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991), to review the personnel files of agents for impeachment evidence (Dep. 19:21-20:8); he also served as the district's professional responsibility officer, coordinating with the Justice Department's Professional Responsibility Advisory Office ("PRAO") to provide guidance to other attorneys on a range of ethics topics—including *Brady* and *Giglio* (*id.* 10:7-11:14).

When it comes to carrying out the government's *Brady* and *Giglio* obligations in his own right, Mr. Bottini follows a standard practice: he reads through handwritten notes, Memoranda of Interviews, and FBI 302s; examines pertinent grand jury transcripts; and reviews not just his own notes, but those prepared by agents. (*Id.* 63:11-64:11; 74:14-75:1.) In fact, the only case with which Mr. Bottini has been involved that did ***not*** follow this practice was the one whose *Brady* review he was not charged with administering: the *Stevens* prosecution. (*See id.* 74:14-75:1 (*Stevens* is "the only case I have ever worked on where the attorneys weren't doing the entirety of the *Brady* review"), 789:15-20 ("Q: Is that the way grand jury transcripts are reviewed in Alaska for purposes of *Brady*, having the agent do the review? A: That's the first time I ever

heard of it. Q: Who usually does it in the [District of] Alaska? A: The attorneys do it. I do it if it's my case.").)

Throughout the *Stevens* trial and the months that followed, the defense depicted the government's trial team, including Mr. Bottini, as overly eager prosecutors whose "zeal to convict this 84-year old-man who has served his country in the Senate for 40 years" led them to deliberately cast their *Brady* obligations aside. *See* Letter from Brendan Sullivan, Williams & Connolly, to Attorney General Michael Mukasey (Oct. 28, 2008) (CRM BOTTINI 051465). That caricature could not be farther from the truth. To the contrary, Mr. Bottini—an Alaska native since age 13—harbored substantial misgivings about the prospect of indicting and, ultimately, trying Senator Stevens. His reluctance stemmed in large part from the esteem that, to this day, Mr. Bottini has for the former senator: "[Q]uite frankly, as odd as this may sound, Ted Stevens is still a man that I still have a fair measure of respect for. Aside from what happened in this case, to me . . . you can't set aside what he did for 40 years for the state of Alaska . . . . It's a much better place to live because of this guy." (Dep. 408:12-20.)

Political realities also gave Mr. Bottini pause. He was well aware that, because of Senator Stevens' popularity in Alaska, his job and his reputation stood to suffer if prosecutors indicted and tried the senator—even if they had made no errors at all. (*Id.* 408:21-409:9 ("Part of it was, I don't know who the U.S. Attorney is going to be four years from now. It's never lost on me when I fly out of Anchorage, his name's on the airport, Ted Stevens International Airport. . . . I mean, we could have come out of this trial crystal clean, no errors. You know, I still ran the risk.").) Thus, unlike other members of the prosecution who were eager to play lead roles on the trial team and disappointed when they did not (*see* Interview of Joseph Bottini 181:20-184:21, Mar. 10-11, 2010 ("OPR Interview")), Mr. Bottini "desperately was hoping that either this thing

was going to settle out, or they'd find somebody else to do it" (Dep. 410:9-16). Nevertheless, he believed "[t]he facts were there . . . . [t]o merit going forward" (*id.*), and did not object when he was told that the Criminal Division had decided that he would be part of the trial team (*see id.* ("At the end of the day, I didn't see how I could just punch out of this thing, without it looking like an act of cowardice."); *see also* OPR Interview 5-18).

B. The *Stevens* Prosecution

To understand how the prosecution came to make errors during the *Stevens* case requires an appreciation of how the case was managed—and how that often dysfunctional management made it almost inevitable that the trial team ***would*** make mistakes. The Criminal Division's belated decision to indict Senator Stevens, combined with its subsequent micromanagement of the case, led to a prosecution that was behind from its inception and poorly equipped to handle a rigorous discovery process.

The genesis of the prosecution's anomalous management came in late 2005, when, at the first hint that Senator Stevens was linked to the larger "Polar Pen" corruption investigation, the acting United States Attorney for the District of Alaska recused the entire office from cases arising from that operation. (*See* OPR Interview 46:5-47:1.) Mr. Bottini and Jim Goeke alone were permitted to continue working on Polar Pen cases, but they reported directly to PIN (Dep. 315:10-15)—an arrangement that left them disconnected from the operation's management, unable to successfully push back against decisions with which they disagreed, and in the dark about whether the Criminal Division would approve indicting the *Stevens* case at all. (*See* OPR Interview 56:19-58:21, 176:9-178:5 (describing tension between PIN and the District of Alaska).)

Over time, Mr. Bottini became skeptical that Senator Stevens would be indicted. Despite repeatedly asking PIN attorneys Ed Sullivan and Nick Marsh whether the case was moving

forward, Mr. Bottini still had no indication, by late spring 2008, whether the Criminal Division would decide to indict Senator Stevens or not. (Dep. 314:6-8, 312:6-313:4.) If anything, he took PIN's June 2008 directive to indict state senator John Cowdery, a different Polar Pen target, as an indication that the *Stevens* case would ***not*** be indicted. (*Id.* 314:15-19 ("I mean, they wouldn't tell us to go indict Senator [Cowdery] if they think we're . . . dropping the hammer on the Ted Stevens indictment.").) Believing that the *Stevens* case would not move forward, Mr. Bottini agreed to take on a high-profile, capital murder case in Alaska (*id.* 316:7-22)—and was "absolutely convinced . . . going into the third week of July, that [a Stevens indictment] is not going to happen" (*id.* 318:22-319:2).

Once the Criminal Division decided to indict Senator Stevens, control over the prosecution's decision-making became increasingly centralized. That process began with the makeup of the government's trial team, which the Criminal Division determined would be led by Brenda Morris—despite her lack of involvement in the Stevens investigation or the previous cases arising out of the government's Polar Pen operation (OPR Interview 93:5-18)—and would exclude Ed Sullivan and Jim Goeke from counsel table altogether (*see* Dep. 78:20-29:2). That control extended to the substance of the prosecution's trial preparation (for example, the Criminal Division ordered the trial team to focus its initial preparation of Allen on evidence supporting a theory of official acts (OPR Interview 329:3-331:15 ("we wasted hours on [official acts] during the trial prep sessions with Bill Allen"))) and the minutest detail of the government's case, including where in the courtroom members of the prosecution could sit and what member of the trial team would be responsible for particular witnesses. (*E.g.*, Dep. 809:12-20.) The Criminal Division ordered, for instance, that Ms. Morris could ask three specific questions—and

only those questions—of General (Ret.) Colin Powell, whom Senator Stevens had called as a character witness.

This micromanagement had a palpable effect on Mr. Bottini. At a meeting shortly after Mr. Bottini arrived in Washington, for example, the Criminal Division informed him that he would be delivering the government's closing argument; they also directed him to submit a draft by the following week, even though the government's summation was several weeks away and Mr. Bottini was focused on preparing witnesses, including Bill Allen. (Dep. 808:15-809:11 ("That just increased the burden on me that much more, particularly since I had to produce a draft."); OPR Interview 98:12-99:11 (directive to prepare draft summation "was time . . . that was taken away from me, that I couldn't afford to lose, in my view").) And just days before jury selection began, Bill Welch then asked Mr. Bottini, who was already charged with presenting Bill Allen and Dave Anderson, to take on the additional responsibility of preparing and presenting Rocky Williams—who had previously been assigned to Mr. Marsh. (*See* Dep. 153:3-154:7.)

Despite the intensive oversight of these issues, there was little attention paid to the *Brady* review in this case. (*See* OPR Interview 100:2-8.) While that process fell to PIN (Dep. 786:3-7), nobody in the Criminal Division assigned anyone to serve as an "intermeshing gear" linking the many attorneys and agents who were involved in the case (*id.* 810:13-15). "What we needed," Mr. Bottini explained, "was someone cut loose specifically to deal with a project manager type role for this thing, and we didn't have that." (*Id.* 812:16-18.) Without a single person charged with overseeing the *Brady* review, the *ad hoc* process that PIN put in place was, by its very nature, doomed to result in mistakes—no matter how diligently Mr. Bottini and the rest of the trial team worked to fulfill their disclosure obligations.

II. MR. BOTTINI DID NOT COMMIT WILLFUL MISCONDUCT.

The mission of this proceeding is a limited one: to investigate whether the actions of the *Stevens* trial team rose to the level of criminal contempt, and to file an order to show cause only "if appropriate." (Mot. Hr'g Tr. 46:12-15, Apr. 7, 2009 (CRM BOTTINI 013319); *see also id.* 47:16-17 (Judge Sullivan emphasizes, "[I]et me stress that I have not, by any means, prejudged these attorneys or their culpability.").) That decision must be guided by the likelihood that the prosecutors would be found guilty of contempt beyond a reasonable doubt, because "as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact." United States Attorneys' Manual § 9-27.220(B). This case does not come close to meeting that standard because, despite his mistakes, there is not a shred of proof that Mr. Bottini willfully violated *Brady*, *Giglio*, or the court's orders implementing those obligations. Instead, all evidence points to the contrary conclusion: any errors by Mr. Bottini were honest mistakes.

An attorney may only be punished for contempt under 18 U.S.C. § 401(3) if he willfully violated a clear and reasonably specific court order. *United States v. NYNEX Corp.*, 8 F.3d 52, 54 (D.C. Cir. 1993). Thus, while a prosecutor may run afoul of *Brady* if he acted inadvertently or even with good faith, *United States v. Agurs*, 427 U.S. 97, 110 (1976), he cannot be convicted of criminal contempt without proof that his misconduct was willful. *In re Holloway*, 995 F.2d 1080, 1082 (D.C. Cir. 1993); *Mottweiler*, 82 F.3d at 770 ("Criminal contempt of court is a dark stain on an attorney's record, even when it does not lead to imprisonment or a substantial fine. That is among the reasons why a conviction under 18 U.S.C. § 401 depends on proof of willful misconduct."). And although the willfulness element of criminal contempt may be satisfied by a showing that an attorney acted recklessly, *Holloway*, 955 F.2d at 1082, criminal recklessness

imposes an exacting standard in its own right: an attorney does not act recklessly unless he knows of a substantial risk of harm and disregards it anyway. *See Farmer v. Brennan*, 511 U.S. 825, 836-37 (1994) ("The civil law generally calls a person reckless who acts . . . in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known. The criminal law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware.") (citations and quotation marks omitted); *Mottweiler*, 82 F.3d at 771 ("[C]riminal recklessness is present only if the actor is conscious of a substantial risk that the prohibited events will come to pass."); Model Penal Code § 2.02(2)(c) (1962) ("A person acts recklessly . . . when he consciously disregards a substantial and unjustifiable risk that a material element exists or will result from his conduct.").

It comes as little surprise, given the high burden of showing that an attorney committed willful misconduct, that the use of criminal contempt to punish *Brady* violations and other alleged prosecutorial misconduct is virtually unprecedented. *See* Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 Tex. L. Rev. 629, 674 (1972); Maurice Possley & Ken Armstrong, *Prosecution on Trial in Du Page*, Chi. Trib., Jan 12, 1999, at 1; Richard Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 703 n.56 (1987) (finding "[n]o cases . . . in which a prosecutor was found in contempt for *Brady*-type misconduct").[1] That punitive sanction should not be imposed here.

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[1] A state court in North Carolina did convict former Durham District Attorney Mike Nifong of criminal contempt after finding that he deliberately suppressed DNA evidence that not only exonerated the defendants of rape but showed the presence of someone ***else's*** DNA on the alleged rape victim. *See* Anne Blythe, *Nifong Gets 24 Hours in Jail for Contempt*, News & Observer (Raleigh), Sept. 1, 2007, at A1. But that high-profile example is the exception. Courts routinely refuse to refer prosecutors for investigation for criminal contempt, let alone impose criminal sanctions, even in the face of significant and repeated *Brady* violations. *See, e.g.*, *United States v. Jones*, 620 F. Supp. 2d 163, 181-83 (D. Mass. 2009) (declining to impose criminal contempt sanctions on Assistant United States Attorney despite "serious and repeated" *Brady* violations); *United States v. Shaygan*, 661 F. Supp. 2d 1289, 1324 (D. Mass. 2009) (using public reprimand, not criminal contempt charges, to punish prosecutor who committed

A. Mr. Bottini's Repeated Insistence On Disclosing The Bambi Tyree Allegations Is Fundamentally Inconsistent With Willful Misconduct.

If there is anything that shows how at odds Mr. Bottini's conduct was with willful misconduct, it is his repeated insistence that the government disclose allegations casting doubt on the credibility of Bill Allen. Allen had been under investigation by the Anchorage Police Department ("APD") for sexual misconduct with minors, one of whom—Bambi Tyree—was at one point believed to have created a false affidavit, at Allen's request, stating that she never had sexual relations with him while underage. Mr. Bottini pressed PIN to disclose those allegations at every turn, arguing, for example, that the government should make post-trial disclosures to the judge who presided over the *Kott* and *Kohring* cases, disclose the allegations to the *Stevens* court and the defense in a motion *in limine*, and provide more details about Allen's alleged misconduct in the government's *Giglio* and *Brady* letters. The prosecution disclosed the allegations before trial, and ultimately turned over the entire APD investigative file to the defense with time enough to reopen Allen's cross-examination. One district judge has already concluded that the failure to disclose those items until well ***after*** the *Kott* trial did not violate *Brady* in that case, *United States v. Kott*, No. 3:07-CR-056 JWS, 2010 WL 148447, at *9 (D. Alaska Jan. 13, 2010), and the government's belated disclosure did not violate *Brady* here. But even it if did, Mr. Bottini's insistence on disclosure is fundamentally inconsistent with the willful misconduct required to prosecute him for criminal contempt.

1. Factual Background

The Bambi Tyree allegations arose in 2004 and their connection to the Polar Pen operation spanned over several years. Any fair understanding of Mr. Bottini's actions in the

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multiple *Brady* violations); *United States v. Lyons*, 352 F. Supp. 2d 1231, 1251 (M.D. Fla. 2004) (remedying prosecution's failure to disclose "a raft of evidence material to an adequate defense" by dismissing the government's case, not imposing criminal contempt sanctions).

Stevens case, and how they are antithetical to willful misconduct, requires consideration of the Tyree allegations' protracted history.

The Tyree issue had its origin in a case that was entirely unrelated to the Polar Pen investigation: the drug trafficking and sexual misconduct prosecution of Josef Boehm. (Dep. 671:10-672:10.) During the investigation of that case, Tyree participated in a 2004 interview with Assistant United States Attorney Frank Russo and FBI Special Agent John Eckstein, and the Form 302 memorializing her interview stated that Tyree signed an affidavit, at Allen's request, falsely asserting that she did not have sexual relations with him while she was a juvenile. (*Id.* 672:5-673:12, 674:14-675:10.) Russo later moved, in a sealed filing, to preclude the *Boehm* defense from cross-examining Tyree about who directed her to make the false statement. (*Id.* 674:5-13.)[2]

The allegations resurfaced in early 2007, when the government began developing a search warrant affidavit for Senator Stevens' residence—and from that point forward, Mr. Bottini repeatedly urged their disclosure. Because the search warrant affidavit relied heavily on information from Allen (*id.* 675:19-676:2), Mr. Goeke—who was particularly concerned about the government's disclosure obligations because he served as co-counsel in the *Boehm* case (OPR Interview 550:20-551:9)—notified PIN about the false affidavit allegations (Dep. 676:15-21). Mr. Goeke also conveyed that, contrary to Russo's *Boehm* filings, Tyree herself told prosecutors during preparation for a sentencing hearing in the *Boehm* case that she provided the false affidavit of her own volition—not at Allen's request. (*Id.* 679:13-18.) While he and Mr.

[2] It is Mr. Bottini's understanding that Russo filed this motion, pursuant to Federal Rule of Evidence 403, to prevent the sideshow that would likely have occurred had Allen—a prominent figure in Anchorage—been linked to the *Boehm* trial's salacious details. (*See* Dep. Ex. 66 (CRM088473-74) (excerpt from *Boehm* brief forwarded by Mr. Goeke notes that Allen is "president of VECO and publisher of the 'Voice of the Times' section in the Anchorage Daily News").) As far as Mr. Bottini is aware, Allen was not involved in any federal investigations in the summer of 2004, the time that briefing was filed.

Bottini were told that Bill Welch was "thinking about the Bambi issue," the final search warrant affidavit omitted the allegations. (*See id.* 675:16-679:12.) In fact, it was the insistence of Mr. Bottini and Mr. Goeke that caused Mr. Sullivan to ask Mr. Welch whether the government should make such a disclosure. (*See* Email from E. Sullivan to Welch (Mar. 5, 2007) (CRM BOTTINI 030459 ("The only issue for us to decide is whether we should include something in the affidavit that flags the potential credibility of Allen as an informant. . . . Joe/Jim wanted me to flag it . . . .").)

In October 2007, Mr. Bottini raised the Tyree allegations himself when he and Mr. Goeke learned from Eckstein that, in addition to the Russo *Boehm* filing, a 302 stating that Allen had asked Tyree to sign a false affidavit also existed. Because the *Kott* trial had by then concluded, Mr. Bottini became concerned that the prosecution might have "an obligation at this point to make a post-trial disclosure in *Kott* and a pre-trial disclosure in *Kohring*." (Dep. 686:8-10.) He faxed the Eckstein 302 and the pertinent sections of the *Boehm* briefing to PIN (*id.* 683:7-17; 684:6-11) and scheduled an interview with Tyree. Tyree told prosecutors that she did not sign the false affidavit at Allen's request, and both Tyree and her attorney emphasized that she never told Eckstein she did. (*Id.* 692:17-22; 694:11-18 (when shown the Eckstein 302, Tyree "immediately disavows the part about Bill Allen asking me to do this. She said that's not what I said.").) Russo's handwritten notes of the July 2004 interview were located and they likewise contradicted the 302, appearing to reflect that Tyree said the affidavit was her idea—not Allen's. (*Id.* 693:5-12; *see also* CRM080943 (Russo initially wrote "at the request of," crossed out the next word, and then wrote "Bambi's idea.").) Mr. Marsh communicated with PRAO and informed Mr. Bottini that PRAO concluded that the prosecution had no disclosure obligation. (Dep. 695:18-697:2.) Mr. Bottini did not know precisely what Mr. Marsh told PRAO—though

he assumed whatever Mr. Marsh told PRAO was full and accurate—and Mr. Bottini was never provided a written rendition of PRAO's advice or the facts upon which that advice was predicated.

Before long, Mr. Bottini pressed PIN about the government's disclosure obligations again. He worried that the implication of a December 2007 article recounting Allen's gifts to the Tyree family was that Allen was "greasing the family to keep quiet about his relationship with Bambi"—and that PRAO, which reviewed the Tyree allegations before the press report was published, had not considered the issue. (*Id.* 697:1-698:19.) PIN agreed to approach PRAO a second time, and for the second time Mr. Marsh reported that PRAO concluded the prosecution had no obligation to disclose the Tyree allegations. (*Id.* 700:14-22; *see also* Dep. Ex. 69 (Email from PRAO to N. Marsh and E. Sullivan).) Mr. Bottini did not receive a written copy of PRAO's actual report until January 2008, a few weeks after he had been scolded by Mr. Welch for continuing to press PIN to make a disclosure.[3] (*See* Email from Welch to Bottini and Goeke (Dec. 20, 2007) (CRM BOTTINI 081094) ("We've done all that we are going to do on the matter . . . Joe and Jim, per the recusal notice, you work for PIN, and so these are your marching orders until I talk to Nelson [Cohen, the interim United States Attorney].").) When he did finally receive the written PRAO report, he filed it away—rather than reviewing it with a "fine-toothed comb" (Dep. 708:10-14)—because he had been specifically told to not pursue the issue any further. As a result, he did not immediately realize that the report omitted any mention of the Eckstein 302 and was based on the inaccurate predicate that the agent's notes "reflect that at the

[3] Indeed, Mr. Bottini continued pressing the issue with PIN even though PRAO had by then issued two opinions. In particular, he asked whether the government should make an *ex parte* disclosure to Judge John Sedwick, who had presided over both the *Kott* and *Kohring* trials, regardless of PRAO's advice—and he noted that colleagues in the Alaska United States Attorney's Office strongly supported that course of action. (Dep. 701:3-14; *see also* OPR Interview 645:8-646:7 (Mr. Bottini explains that "I would have [gone] to the Court *ex parte* . . . I would have filed something with Judge Sewick [*sic*] under seal and would have said 'here's what we know.'").)

time of the interview [Tyree] was adamant that the lie was her own idea." (*See* Dep. 703:13-705:7; 708:12-14; Dep. Ex. 69.)[4]

By the time the Criminal Division began weighing whether to indict Senator Stevens, Mr. Bottini's insistence on disclosing the Tyree allegations—and PIN's rejoinder—had become a persistent refrain. He questioned whether a document summarizing the prosecution's strengths and weaknesses, prepared by Mr. Marsh at the Criminal Division's request, contained enough detail about Allen's background—or whether, instead of referring only to Allen's "shady personal background," the document should squarely address the Tyree allegations. PIN declined to follow his suggestion. (Dep. Ex. 30 (CRM016149) (Mr. Marsh responds that Mr. Welch would probably want to limit any mention of Tyree to the "shady personal background" reference.).) It was because of PIN's resistance that Mr. Bottini determined that, along with Mr. Goeke, he would raise the Tyree allegations directly with the Criminal Division leadership in a July 2008 meeting without consulting PIN first. He explained:

> In fact, the morning before we had that meeting, Goeke and I went and had breakfast, and I told him, you know, if they, they, the Public Integrity folks, don't raise this issue about Bill Allen being under investigation for sexual misconduct, including these allegations that he may have procured a false statement from somebody, we have to. Because ironically, I told him, I don't want to be sitting here down the road a year from now, having somebody ask me how come we didn't know that?

(Dep. 381:14-382:2.) In the end, PIN did fail to mention the Tyree allegations during the meeting, so Mr. Bottini raised them himself, telling Matt Friedrich and Rita Glavin that "you need to know about this issue with Bill Allen and the sexual misconduct allegations" and describing the false affidavit, the Eckstein 302, and the Russo notes. (*Id.* 707:17-709:12; *see*

[4] In reality, the handwritten notes Eckstein took were consistent with the 302 that was based on the notes. (*See* Dep. Ex. 86 (CRM081267).) On the other hand, Eckstein himself later told Mr. Goeke that "he could have gotten it wrong," and that both the 302 and his underlying notes could have been incorrect. (Dep. 731:20-732:11.)

also Dep. Ex. 73 (CRM071953 (Mr. Bottini remarks in an email that Friedrich and Glavin were "interested" when "Bambi [came] up" during the July 2008 meeting).)

As the *Stevens* trial drew closer, Mr. Bottini persisted in urging the government to disclose the Tyree false affidavit allegations to the defense and the court. In particular:

- He noted with concern that the government's draft motion *in limine* to exclude inflammatory cross-examination did "not front out the rumored procurement of the false statement from Bambi by Bill." (Dep. Ex. 74 (CRM075442).) Mr. Bottini believed that the government should disclose the false affidavit allegations to the court even though PRAO had concluded that no disclosure obligation existed, because Judge Sullivan "may view it differently . . . we don't know how the judge is ultimately going to rule on this." (OPR Interview 565:3-566:22.) Thus, he emphasized to PIN that while he was "[c]ompletely aware of what PRAO says," he did not "want to run afoul of Emmet G. [Sullivan] over this." (Dep. Ex. 74 (CRM075442).)

- He pressed the trial team to address the allegations of Tyree's false affidavit in the government's August 25, 2008 *Giglio* letter. (*See id.*; *see also* Dep. Ex. 79 (CRM035906, CRM036032-33).)

- He urged the government to include a more robust description of the false affidavit allegations in the September 9, 2008 *Brady* letter, particularly because Allen's involvement with other juveniles beyond Tyree had by then come to light. (Dep. 715:6-717:10; *see also* Dep. Ex. 81 (CRM022047).)

By this point, Mr. Bottini and Mr. Goeke had received so much push-back from PIN about disclosing the allegations at all that their goal became simply to ensure that the defense was, in some fashion, put on notice about them. (*See* Dep. Ex. 81 (Email from Goeke to Team (Sept. 8, 2008) (CRM022049-50).) Mr. Bottini believed that PIN would not bless full disclosure, so he strategically pushed for sufficient disclosure to allow the court to make further inquiries or the defense to conduct its own investigation. Thus, the language Mr. Bottini suggested was in some cases modest and did not fully detail the allegations or the evidence supporting them. (*See, e.g.*, Dep. Ex. 74 (CRM075442) (urging trial team to address allegations in August 25 *Giglio* letter and stating that "I worry that if we don't make some mention of it—passing mention of it as a rumor which we investigated and disproved—they may respond to the MIL and raise it").) Mr.

Bottini's efforts nevertheless met resistance from PIN at every turn. (*See, e.g.*, Dep. Ex. 80 (CRM036166) (Mr. Marsh states that "[w]e should not revisit the Bambi non-subornation of perjury stuff [in the government's *Giglio* letter]. We have nothing to turn over . . . We have twice investigated this until the end of time and have been blessed by PRAO twice"); Ex. 82 (CRM022050-52) (Mr. Marsh's revised *Brady* letter excerpt omits false affidavit allegations altogether).)

After repeated prodding by Mr. Bottini and Mr. Goeke, PIN ultimately included a paragraph in the government's *Brady* letter disclosing the Tyree false affidavit allegations. (Dep. Ex. 2 at 5).) Mr. Bottini did not draft the actual language. (OPR Interview 530:6-531:6.) Instead, the letter was finalized over a two-day period during which he was traveling to Washington (Dep. 45:9-20) and preparing to argue two pre-trial motions at a September 10 hearing (*id.* 117:17-118:2 ("my focus on September 9th was getting ready for those oral arguments . . . that's what I spent the bulk of the day doing").) In response to an early draft of the letter that omitted any mention of the false affidavit allegations (*see* CRM BOTTINI 030185-90), Mr. Goeke emailed the trial team, on his and Mr. Bottini's behalf, urging them to in some form address the false affidavit allegations and to "put W&C on effective notice that both Allen and Bambi deny that Allen asked Bambi to make a false statement" (Dep. Ex. 81 (CRM022049-50)). Mr. Bottini echoed that sentiment, emphasizing that the trial team "ha[s] to approach this assuming they have access to everything from *Boehm*, including the under seal filings." (*Id.* (CRM022047).) Mr. Marsh then circulated a new draft of the letter, which mentioned the false affidavit allegations but stated that there was "no evidence" to support them. (CRM BOTTINI 030563.) This "no evidence" language was thus first generated and circulated fewer than 24 hours before the government finalized the *Brady* letter and sent it to the defense (September 8 at

8:52 pm to September 9 at 8:36 pm (*see* CRM BOTTINI 030723))—and while Mr. Bottini was still en route to Washington. Therefore, while Mr. Bottini "skimmed" the final version of the *Brady* letter, he "didn't read it in any detail for accuracy" (Dep. 774:10-17), especially because he trusted that his fellow prosecutors had accurately portrayed the evidence. For these reasons, he did not realize at the time that the letter omitted any mention of the Eckstein 302 or the Russo *Boehm* filing or that it asserted that there was "no evidence" to support the false affidavit allegations.

Once trial was underway, Mr. Bottini learned that "[s]omebody at Main Justice" decided to disclose the APD's entire investigative file on Allen to the defense and to Judge Sullivan (Dep. 718:13-719:1); the file was produced on October 16, 2008 and it contained the Eckstein 302.[5] Anticipating that the defense would reopen its cross-examination of Allen, Mr. Bottini and the trial team summoned Allen and Tyree to Washington (*id.* 720:1-14). The defense never moved to reopen Allen's cross-examination. (*Id.* 720:14-17.)[6]

2. **Mr. Bottini Did Not Commit Willful Misconduct.**

With little conception of what Mr. Bottini actually did to urge the disclosure of the Tyree allegations, the defense assumed that he must have committed misconduct, accusing him and the trial team, for instance, of creating "fabrication[s]," "manufactur[ing] and conceal[ing]

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[5] Because Mr. Bottini never saw the contents of the APD file (*see* OPR Interview 653:6-10), he does not know whether that file also contained the sealed *Boehm* filing or the handwritten notes upon which Special Agent Eckstein based his 302. But because those two documents merely reflected the same statement that the Eckstein 302 contained, they would have been cumulative—and any failure to disclose them along with the 302 would not violate *Brady*. *See United States v. Pollack*, 534 F.2d 964, 975 (D.C. Cir. 1976) (no *Brady* violation where "newly discovered evidence was at best cumulative").

[6] The defense has subsequently asserted that, because it did not receive the entire APD investigative file—including the Eckstein 302—until after Allen's testimony concluded, "[w]e were never able to use this information during trial." Letter from Brendan Sullivan, Williams & Connolly, to Attorney General Eric Holder, at 15 (Apr. 28, 2009) (CRM BOTTINI 051449). Not so. The defense could have moved to reopen Allen's cross-examination for the purpose of asking him about information contained in the APD file; it simply chose not to. *See United States v. O'Hara*, 301 F.3d 563, 569 (7th Cir. 2002) ("The evidence at issue here was not suppressed at all. Though discovered during trial, [the defendant] had sufficient time to make use of the material disclosed. Delayed disclosure of evidence does not in and of itself constitute a *Brady* violation.").

evidence," and "paper[ing] the trail and conceal[ing] information." *See* Letter from Brendan Sullivan, Williams & Connolly, to Attorney General Eric Holder (Apr. 28, 2009) (CRM BOTTINI 051444-49). That invective bears little resemblance to reality. To the complete contrary, a closer look at the government's disclosures and Mr. Bottini's actions shows that he did not commit willful or criminally reckless misconduct—and indeed, that a *Brady* violation did not occur at all.

First, even if the government did violate *Brady*, *Giglio*, or the court's orders, Mr. Bottini did not remotely violate those obligations willfully. As described in detail above, *see supra* pages 12-19, Mr. Bottini pressed PIN and the trial team, at every turn, to consider the government's *Brady* and *Giglio* obligations and to err on the side of disclosing the false affidavit allegations, even though the Department of Justice's own ethics advisory office twice concluded that their disclosure was unwarranted. He ensured that the Criminal Division leadership was aware of the allegations; urged the prosecution to address them in a motion *in limine*, which would have disclosed them not just to the defense, but to the court; and pressed the trial team to include a more robust discussion of the allegations in its *Brady* and *Giglio* letters. With certainty, those are not the actions of an attorney who willfully or with criminal recklessness violates his disclosure obligations—in fact, they are exactly the opposite.

If Mr. Bottini can be faulted for anything, it is his failure to closely review the final September 9, 2008 letter, which did not mention the Eckstein 302 or *Boehm* filings and asserted that "no evidence" existed to support the false affidavit allegations. But his passing attention to the final draft of that letter—which was drafted by PIN, not Mr. Bottini (OPR Interview 530:6-531:6)—was hardly a willful or criminally reckless violation of his disclosure obligations. Instead, it was the natural consequence of the facts that the *Brady* disclosures were being handled

by another prosecutor, that Mr. Bottini was traveling from Alaska the day Mr. Marsh first proposed the "no evidence" language, and that, once in Washington, Mr. Bottini "spent the bulk of the day" on September 9, 2008—the day Mr. Marsh's draft was finalized and sent to the defense—preparing to argue multiple pre-trial motions. *See supra* page 18; (Dep. 117:18-19). In any event, Mr. Bottini's unrelenting efforts to disclose the Tyree false affidavit allegations demonstrate his good faith, which negates any finding that his failure to closely review the *Brady* letter was somehow willful or criminally reckless. *See United States v. Crowe*, No. 94-5690, 1996 U.S. App. LEXIS 2439 (4th Cir. Feb. 16, 1995) (non-precedential) ("To support a conviction for criminal contempt, the government must establish beyond a reasonable doubt that the defendant willfully, contumaciously, intentionally, with a wrongful state of mind, violated a decree . . . If the defendant makes a good faith effort to comply with a court order, he may not be convicted of criminal contempt.") (citation and quotation marks omitted).[7]

Second, not only did Mr. Bottini not commit willful misconduct, but any argument that the prosecution violated *Brady* or *Giglio* in the first place founders because there is no indication that it withheld documents that were "material" in the constitutional sense—*i.e.*, whose suppression would undermine confidence in the unanimous guilty verdict against Senator Stevens. To begin, it bears emphasizing that the government ultimately ***did*** disclose, on a timely basis, the substance of all allegations that were relevant to Allen's character for truthfulness and motive to testify for the government. It disclosed the substance of Allen's sexual misconduct

[7] *See also United States v. Ray*, 683 F.2d 1116, 1126 (7th Cir. 1982) ("A good faith effort to comply with a court order tends to negate willfulness, an element of criminal contempt which must be proven beyond a reasonable doubt."); *Richmond Black Police Officers Ass'n v. City of Richmond*, 548 F.2d 123, 129 (4th Cir. 1977) ("While the appellants might well have misinterpreted and, thus, violated the requirements of the consent decree under the facts with which they were faced, such conduct does not amount to criminal contempt . . . appellants' conduct indicates a good faith effort toward compliance, and, even though the alternative conduct adopted was mistaken, this alone does not constitute criminal contempt."); *In re Brown*, 454 F.2d 999, 1007 (D.C. Cir. 1971) ("Knowledge that one's act is wrongful and a purpose to nevertheless do the act are prerequisites to criminal contempt, as to most other crimes. Good faith pursuit of a plausible though mistaken alternative is antithetical to contumacious intent.").

allegations multiple times beginning with the August 14, 2008 motion *in limine* to exclude inflammatory cross-examination (Government's Motion *in Limine* to Exclude Inflammatory, Impermissible Cross-Examination 2-3 (Aug. 14, 2008) (CRM BOTTINI 104994-95)); it reiterated those allegations in the August 25, 2008 *Giglio* letter and September 9, 2008 *Brady* letter (Dep. Exs. 1, 2). The government likewise disclosed, in the motion *in limine* and *Giglio* letter, allegations that the Alaska United States Attorney's Office played a role in ending the APD investigation into Allen's misconduct. (CRM BOTTINI 104995; Dep. Ex. 1.) Finally, in the September 9 *Brady* letter, the government disclosed the existence of allegations that Allen had asked both Tyree and another minor to sign false affidavits stating they never had sex with him. (Dep. Ex. 2.)

It is true that the prosecution belatedly disclosed the Eckstein 302 and that the prosecution omitted any mention of that document from the September 9, 2008 *Brady* letter, writing instead that "the government is aware of no evidence to support any suggestion that Allen asked" Tyree to make a false statement. (*See* Dep. Ex. 2, at 5.) To the extent the Eckstein 302 was tantamount to evidence, that statement—that there was "no evidence" to support the false affidavit allegations—was inaccurate, and the prosecution erred by including it. But the prosecution's failure to ***affirmatively*** mention the Eckstein 302 (and its belated disclosure of the document itself) was not improper at all, because the mere fact that evidence is exculpatory or would help defense counsel impeach a witness does not make it *Brady* or *Giglio* material. Indeed, it is well-settled that "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Agurs*, 427 U.S. at 109-10 (citation omitted). Instead, information is material, and the failure to disclose it violates *Brady* or *Giglio*, "only if the

evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *United States v. Bagley*, 473 U.S. 667, 678 (1985).

The Eckstein 302 does not satisfy that requirement. Indeed, Judge Sedwick recently denied the *Kott* defendant's motion for a new trial for precisely that reason, emphasizing that—while the Eckstein 302 cast doubt on Allen's character for truthfulness—it was inadmissible under Federal Rule of Evidence 608(b) and, as a result, would not have aided the defendant. He explained:

> Kott also cites to an FBI 302 dated October 28, 2004, indicating that Allen's lawyer provided "CHILD VICTIM 1" an affidavit containing false statements indicating that she had not had sex with Allen and that she had signed the affidavit at Allen's request . . . These materials clearly suggest that Allen's character for truthfulness was doubtful. However, under Rule 608 Kott would have been prohibited from attempting to prove this by extrinsic evidence. He would have been left to inquire about the matter (assuming the court would permit the inquiry—as it would have) in cross-examination of Allen himself. It is known that Allen had previously denied the conduct, so he surely would have repeated the denial. The result is that this line of inquiry would not be of significant assistance to Kott. In the view of this court, ***the evidence regarding the alleged subornation of perjury is not material in the context of all the evidence, and the failure to disclose it did not prejudice Kott***.

United States v. Kott, No. 3:07-CR-056 JWS, 2010 WL 148447, at *9 (D. Alaska Jan. 13, 2010) (emphasis added). That same reasoning applies with equal force to the *Stevens* case. Under Rule 608(b), the defense was free to impeach Allen with the substance of the Tyree false affidavit allegations—which the government disclosed in the September 9, 2008 letter—but would not have been permitted to prove those allegations with extrinsic evidence. And because the defense could not have actually used the Eckstein 302 at trial, the belated disclosure of that document

does not undermine confidence in the outcome of the trial—and did not violate *Brady* or *Giglio* as a result.[8]

* * *

The government disclosed the substance of the Tyree false affidavit allegations—along with other allegations surrounding Tyree's relationship with Bill Allen—to the defense well before the beginning of trial. Against that backdrop, the prosecution's belated disclosure of the Eckstein 302 did not violate *Brady* or *Giglio* because that document was not material. But even if the prosecution did somehow violate *Brady*, *Giglio*, or the court's orders, Mr. Bottini's persistent and good faith efforts to disclose the Tyree allegations preclude any finding that he acted willfully or with criminal recklessness.

B. Mr. Bottini Did Not Commit Any Misconduct In Connection With The Rocky Williams Interviews.

The trial team began scheduling interviews with witnesses once the *Stevens* case was indicted and, in August 2008, they met on multiple occasions with Rocky Williams, one of two VECO foremen who oversaw the renovation of Senator Stevens' house. During those meetings, Williams explained that he took bills prepared by subcontractor Augie Paone and Christensen

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[8] Nor did the prosecution's belated production of the Eckstein 302 violate Judge Sullivan's order that the government comply with *Brady* and its progeny. While Judge Sullivan favorably mentioned *United States v. Safavian*, 233 F.R.D. 12 (D.D.C. 2005)—which rejects *Brady*'s "materiality" standard in favor of broader pretrial disclosure requirements—he did so in passing and did not order the government to follow that standard. (*See* Trial Tr. 60:1-16, Sept. 10, 2008 (CRM BOTTINI 007375) (mentioning *Safavian* along with "other district court opinions" and "opinions from this Circuit" and *Brady* itself); *id.* 74:14-16 (CRM BOTTINI 007389) (court will "just issue an order as a general reminder to the government to remind it of its daily ongoing obligation to produce that [*Brady*] material").) And in any event, the approach endorsed by *Safavian* conflicts with governing Supreme Court and D.C. Circuit precedent, which makes clear that a prosecutor's *Brady* obligation is measured by a materiality standard, not the "favorable evidence" standard that *Safavian* endorses. *Kyles v. Whitley*, 514 U.S. 419, 437-78 (1995); *United States v. Oruche*, 484 F.3d 590, 596 (D.C. Cir. 2007); Christopher Deal, Note, Brady *Materiality Before Trial: The Scope of the Duty to Disclose and the Right to a Trial by Jury*, 82 N.Y.U. L. Rev. 1780, 1807-08 (2007) (*Safavian* approach directly contradicts *Kyles*, *Agurs*, and other Supreme Court precedent).

The prosecution's belated production of the Eckstein 302 also did not violate Judge Sullivan's October 2, 2008 order, which directed the government to produce unredacted 302s for "every witness in this case." (Trial Tr. 29:17-19, Oct. 2, 2008 (CRM BOTTINI 009686).) Because Tyree was not a "witness in this case," the government's belated production of her 2004 Form 302 did not violate Judge Sullivan's order.

Builders to Allen, assuming—because Allen was by then "under the microscope"—that Allen would add Williams' time and Dave Anderson's time to those bills in order to avoid drawing further scrutiny to VECO. Williams never saw the bills that Allen sent to Senator Stevens, did not convey his assumption to Senator Stevens or his wife, and had no idea whether his time actually was reflected in the bills or not. His subjective belief, while consistent with a theory the government anticipated that the defense would advance, had no basis in reality and was not *Brady* material at all. Yet even if *Brady* did require the disclosure of Williams' assumption, Mr. Bottini did not violate that obligation willfully or with criminal recklessness.

1. **Factual Background**

Like most witnesses the prosecution would ultimately call, Williams had had almost no contact with the trial team between his 2006 grand jury testimony and the July 2008 *Stevens* indictment. (Dep. 46:14-21.) In an effort to re-engage Williams and "begin the formulation of some . . . semblance of trial preparation" (*see id.* 79:18-22), the trial team scheduled multiple witness preparation sessions in August 2008. Responsibility for Williams, who would subsequently become Mr. Bottini's witness, was at this point still assigned to Mr. Marsh. (*See* Dep. Ex. 12 (Email from Bottini to Team (Aug. 22, 2008) (CRM036168).)

At an August 20, 2008 interview, Williams described how he first became involved in the remodel of Senator Stevens' home in 1999, when he, Stevens, and Allen discussed the possible project around the time of the Kenai River Classic event. (Dep. 84:1-5; *see also* Dep. Ex. 8 (CRM057292).) At that event, Williams told prosecutors, Stevens indicated that he wanted to "brighten up" his Girdwood home, potentially by lifting the house up to create a "daylight basement" (*see* Dep. Ex. 8 (CRM057290-93))—a relatively modest project compared to the renovations that the senator ultimately decided he wanted, nearly a year after the 1999 conversation. According to Williams, Senator Stevens also stated he wanted to pay for the

renovations himself. (*See id.* (CRM057293-94).) The discussion was a preliminary one, however; beyond Stevens' indication that he wanted to pay for the cost himself, the three men did not "hammer[] out any kind of an understanding as to . . . what VECO was going to do, and how it was going to be paid for." (Dep. 160:16-19.)

In addition to telling prosecutors what Stevens had said in 1999, Williams also described what he himself thought at the time; specifically, that because Allen was "under a microscope," Williams wanted to involve outside contractors such as Augie Paone and Christensen Builders in the project, in order to avoid drawing further attention to Allen and VECO. (Dep. 89:3-9; 91:4-11.) According to notes taken by Mr. Bottini, Mr. Goeke, and Special Agent Chad Joy, Williams also told prosecutors that he "normally got the bill from Augie," "would review Augie's bills," and would "take them to the main [VECO] office to review" before giving them to Allen's secretary. (*See, e.g.*, Dep. Ex. 8 (CRM057297).)[9]

Williams provided more details about his role in delivering the Christensen Builders bills in subsequent interviews. On August 22, 2008, for example, Williams stated that he took Paone's bills to the VECO front office and that he "assumed" that his time and Dave Anderson's would be added to those bills. According to Mr. Bottini's notes, Williams "assumed this based on what TS had said in 1999" (Dep. Ex. 13 (CRM057316))—presumably, that he wanted to pay for the entire cost of the renovation—and because Williams could not believe Allen would "do

[9] Williams' statement that he reviewed the Christensen Builders bills before delivering them to the VECO front office was consistent with what he told grand jurors on November 6, 2006. (Grand Jury Testimony of Robert B. Williams 45:25-46:4, Nov. 6, 2006 (CRM BOTTINI 007055-76).) But both his grand jury testimony and August 20, 2008 statement contradicted a statement he made to IRS agents on September 1, 2006 and which is memorialized in a Memorandum of Interview, that "Williams did not see or review the [billing] statements" prepared by Paone before they went to Stevens. (CRM BOTTINI 002193.) Because that prior inconsistent statement could be used to impeach Williams if he testified, the government disclosed it in its September 9, 2008 *Brady* letter. (Dep. Ex. 2, at 3.) While that letter did not specify that it was Williams' grand jury testimony that his earlier statement contradicted, the defense would have received his grand jury transcript 24 hours prior to his testimony under an agreement that the prosecution made for early disclosure of *Jencks* material. (*See* Email from Robert Cary to Brenda Morris (Aug. 12, 2008) (CRM BOTTINI 021795).) There was nothing unusual about this disclosure; indeed, the entire point of the *Brady* letter was to alert the defense to prior inconsistent statements.

something as stupid" as have VECO pay for the renovations (Dep. 172:1-3). While Williams "assumed" that Allen added his time to the Christensen Builders bills, he "never saw" the bills that Allen actually sent to Stevens, did not know whether Allen actually added his time to those bills, and never conveyed his assumption to Senator Stevens or his wife Catherine or talked to them about what their bills included. (*See* Dep. Ex. 13 (CRM057315-17).) Williams emphasized his lack of knowledge about the contents of the actual bills, yet again, on August 30, 2008, telling prosecutors that while he "assumed that my time [and] Dave's time [was] added to" the Christensen Builders bills, he "didn't know whether that happened or not" because he "never saw them after [he] turned them in." (Dep. Ex. 17 (CRM057327).)

Special Agent Joy memorialized the August 22, 2008 interview in a terse 302, writing only that "Williams advised he never had any conversations with Ted Stevens or Catherine Stevens in which Williams made any representations that VECO expenses were placed on Christianson [*sic*] Builders invoices," and that "Williams further stated that neither Ted Stevens nor Catherine Stevens ever asked Williams whether any of the VECO expenses, labor or materials, were included in the Christianson [*sic*] bills." (Dep. Ex. 15 (CRM036413).) While accurate, Joy's 302 omitted other statements that Williams had made during the course of his interview, including his assumption that Allen added his time and Dave Anderson's into the Christensen Builders bills and his statements that he never saw the final bills and did not know whether Allen actually incorporated his time or not. Mr. Bottini does not know why Joy prepared such a short 302, and he played no role in dictating the form's contents. (*See*, *e.g.*, Dep. 209:15-16; 212:22-213:1; 213:13-15; 235:2-9 ("My personal practice has always been I've never told an agent, you know, 'Write something up,' or 'Don't write something up,' or 'Write only that up.' I don't do that. Either they do it because that's what they've been instructed to do by

their agency or not.").) And, while acknowledging that he received a copy of the 302 a day after the interview, Mr. Bottini does not recall reviewing the 302 or asking Joy why it omitted other statements that Williams—who was not yet Mr. Bottini's witness—made during the course of the August 22 session. (*Id.* 214:11-17.)

By the time Williams arrived in Washington in mid-September, his physical condition—which had already "changed dramatically" between his 2006 grand jury testimony and August, 2008 interviews (*id.* 46:11-47:2)—had deteriorated even further (*see id.* 331:20-21). His "obvious physical discomfort" impaired his ability to focus on questions and provide coherent answers during mock direct and cross examinations (*see* Declaration of Joseph W. Bottini ¶¶ 28, 29 ("Bottini Decl.") (Dep. Ex. 64) (CRM000046)), and Mr. Bottini worried that by the time Williams took the stand several days later, "I may have said, 'Mr. Williams . . . what are you presently doing for a job,' and he could have said, 'I will have fries with that.'" (Dep. 331:10-13.) The prosecution agreed to allow Williams to return to Alaska to see his own physician and to move him down in their lineup of witnesses. (*Id.* 80:5-14; 114:18-115:1.) Mr. Bottini emphasized to Williams that he was still under subpoena by both the government and the defense, and instructed him to call Williams & Connolly to inform them he had returned to Anchorage to receive medical treatment. (Bottini Decl. ¶¶ 32, 33 (Dep. Ex. 64) (CRM000047-48).) The declaration Mr. Bottini subsequently filed with the court made clear that "[t]he primary concern was Williams' physical condition at the time and how that appeared to be affecting his ability to concentrate and answer questions." (*Id.* ¶ 28, 29.)

2. **Mr. Bottini Did Not Commit Any Misconduct.**

To be sure, Williams' assumption that Allen added his time to Augie Paone's bills was consistent with a defense the trial team anticipated Senator Stevens would advance: that he and his wife assumed that VECO's time was reflected in the Christensen Builders invoices they paid.

(*See* Dep. Ex. 11 (Email from E. Sullivan to Team (Aug. 22, 2008) (CRM036198).) But Mr. Bottini did not suppress that assumption willfully or with criminal recklessness and indeed, for multiple reasons, Williams' assumption was not *Brady* material at all.

First, to the extent *Brady* required the prosecution to disclose Williams' assumption, Mr. Bottini did not violate that obligation willfully. He did not conclude that Williams' assumption was favorable, material evidence but make a deliberate decision to suppress it anyway. *See United States v. Roach*, 108 F.3d 1477, 1481 (D.C. Cir. 1997) (defendant who "act[s] with ***deliberate . . . disregard*** of the obligations created by the court order" acts willfully) (emphasis added), *vacated in part on other grounds by* 136 F.3d 794 (D.C. Cir. 1998). Nor did Mr. Bottini know that there was a "substantial risk" a *Brady* violation would occur if the prosecution did not disclose that assumption and, in so doing, act with criminal recklessness. *See Mottweiler*, 82 F.3d at 771. Instead, Mr. Bottini gave at most passing consideration to Williams' assumption, and did not, at any point, believe it was *Brady* material at all. (*See* Dep. 198:1-3 ("At the time I just didn't think of this, given that it's Williams assuming it, not knowing it . . . ."); 193:14-16 ("I don't remember sitting there and dwelling on it and thinking about it.").) And because he did not act willfully or with criminal recklessness, Mr. Bottini cannot be punished for criminal contempt.

Second, any argument that Williams' assumption was *Brady* material in the first instance rests on the fundamentally mistaken premise that *Brady* requires the production of all evidence that is consistent with a possible defense. It does not. "[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense," and the Supreme Court has "never held that the Constitution demands an open file policy." *Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995). Thus, evidence bolstering the defense's

argument—that Senator Stevens and his wife believed the Christensen Builders bills reflected VECO's time—would be *Brady* material only if the suppression of that evidence "undermine[d] confidence in the outcome of the trial." *Bagley*, 473 U.S. at 678. Williams' assumption, which as unfounded speculation would have been inadmissible, *see* Fed. R. Evid. 602, does not meet this standard. Because the prosecution anticipated that Catherine Stevens would "likely testify that ***Rocky told her*** the VECO costs were rolled into the large Christensen bills" (Dep. Ex. 11 (CRM036198) (emphasis added)), evidence that those bills ***actually*** included VECO's costs would likely meet the *Brady* standard. So would evidence that Williams ***told*** Senator or Catherine Stevens that he believed his time was reflected in the invoices they paid. But the mere fact he ***assumed*** that the Christensen Builders invoices included his time, while consistent with the anticipated defense, would not so corroborate that defense that its suppression would undermine confidence in the guilty verdict—particularly because Williams never saw the actual bills and never discussed them with Stevens.

Williams' assumption is not *Brady* material for another reason, too: the defense could have obtained that statement from Williams himself simply by asking him. It is well-settled that, "where the exculpatory information . . . lies in a source where a reasonable defendant would have looked," no *Brady* violation occurs. *See United States v. Bates*, No. 05-81027, 2007 WL 2156278, at *4 (E.D. Mich. July 26, 2007).[10] In *Bates*, for example, the defendant moved for a

[10] Courts in numerous other jurisdictions are in accord, holding that no *Brady* violation occurs when the government fails to disclose exculpatory evidence that the defendant could, through an exercise of reasonable diligence, obtain on his own. *See, e.g.*, *United States v. O'Hara*, 301 F.3d 563, 569 (7th Cir. 2002) (*Brady* violation occurs only where "the evidence was not otherwise available to the defendant through the exercise of reasonable diligence"); *Fullwood v. Lee*, 290 F.3d 663, 686 (4th Cir. 2000) ("The *Brady* rule does not compel the disclosure of evidence available to the defendant from other sources, including diligent investigation by the defense."); *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990) ("[W]here the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine."); *United States v. Wilson*, 787 F.2d 375, 389 (8th Cir. 1986) (government had no obligation to disclose statement where defense was able to examine witnesses about their supposedly exculpatory statements); *United States v. McKenzie*, 768 F.2d 602, 608 (5th Cir. 1985) ("*Brady* does not oblige the government

new trial, arguing that because the government omitted an exculpatory statement from a witness's 302, "he elected not to interview [her] as a potential witness because he presumed . . . that she would not offer exculpatory evidence." *Id.* at *5. The court rejected that argument, emphasizing that the defendant was aware of "essential facts" that put him on notice that the witness might provide helpful testimony. Because the witness "was a source a reasonable defendant would have explored for exculpatory evidence," the government's failure to produce her exculpatory statement did not violate *Brady*. *Id.* Similarly, in *United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990), the court held that the government did not violate *Brady* by failing to disclose a witness's exculpatory statement, because the defendant "was free to question [the witness] in preparation for trial" and because, given the facts of the anticipated defense, "it would have been natural for [the defendant] to have interviewed [the witness] in preparation for trial to determine" if he could provide exculpatory evidence.

The same is true here. If the defense planned to argue that Catherine Stevens believed, based on her interactions with Williams, that Christensen Builders' invoices included VECO workers' time, "it would have been natural" for them to interview Williams himself to determine his understanding of the invoices. There is no suggestion that the defense attempted to do so but encountered difficulties locating or speaking with Williams. To the contrary, he arrived in Washington before the *Stevens* trial under a defense subpoena, and, after he returned to Alaska for medical treatment, was contacted in person by someone from Fairbanks who was affiliated with the defense. (*See* Affidavit of Robert Williams ¶¶ 2, 7 (Dec. 24, 2008) (CRM BOTTINI 000098-100.) Nor is there any indication that Williams would not have disclosed his assumption

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to provide the defendants with evidence that they could obtain from other sources by exercising reasonable diligence."); *United States v. Griggs*, 713 F.2d 672, 673-74 (11th Cir. 1983) (per curiam) (government did not violate *Brady* by failing to disclose exculpatory statements that defense counsel later elicited from government's witnesses at trial, because the defense had the government's witness list before trial).

to the defense if they asked; indeed, he spoke willingly to the defense, both before and after his return to Alaska. (*See id.* ¶¶ 3, 7.) Because the defense could have obtained his statement through an exercise of reasonable diligence, the government's failure to disclose it did not violate *Brady*.

C. **The Failure To Disclose Bill Allen's Statement Regarding The Torricelli Note Was Inadvertent, Not Intentional.**

Nowhere is the gulf between Mr. Bottini's actual conduct and the allegations of his misconduct wider than it is with the Torricelli note. In that handwritten note, Senator Stevens asked Allen for an invoice for VECO's work, urged him to "remember Torricelli," and told him that he had asked Bob Persons to discuss a bill with Allen. Allen explained—at a September 14, 2008 trial preparation session and again at trial—that Persons told him Stevens was "just covering his ass" and did not actually want a bill at all. That statement contradicted one that Allen made in an interview several months before Senator Stevens was even indicted, evidence of which was mistakenly not provided to the defense. As a result of that mistake, Mr. Bottini and the trial team have been accused of lying, maliciously eliciting "bombshell testimony that [they] must have known to be false," fabricating Allen's testimony, and suborning perjury. *See generally* Letter from Brendan Sullivan to Attorney General Michael Mukasey (Oct. 28, 2008); Letter from Brendan Sullivan to Attorney General Eric Holder (Apr. 28, 2009).

Allen's prior inconsistent statement was undoubtedly *Giglio* material, and the government should have produced it. But any fair assessment of Mr. Bottini's actions shows that, contrary to the misperceptions that shroud the government's conduct, he simply made a mistake—and did not act with the willful or criminally reckless intent needed to prosecute him for contempt.

1. **Factual Background**

From the outset, the government anticipated that Stevens' counsel would argue that the senator did not knowingly file false statements because he asked Allen, on multiple occasions, to send him invoices for VECO's work. The government also knew that this defense would cut both ways. On one hand, evidence that Stevens asked for invoices would permit the defense to argue that he wanted to pay VECO, and that the only reason he failed to do so was because Allen never sent him a bill. (*See* Dep. Ex. 29 (CRM016134) ("strengths and weaknesses" memo explains that Stevens would argue he "did not pay because he never received a bill").) On the other hand, it would require Stevens to acknowledge that he knew he had received benefits from VECO and still owed the company money. (*See id.* ("strengths and weaknesses" memo explains that if the defense points to requests for invoices it "will require TS to admit that he knew VECO did the work and that he knew he never paid for the work done . . . Also inconsistent with TS' continued use of VECO's services in 2002 and beyond—*i.e.*, if TS really wanted an invoice and couldn't get one, why continue to ask the same individuals to do more work?").) Far from being exculpatory, that acknowledgement directly supported the government's theory that Stevens knowingly failed to report a liability. (*See* Dep. 601:22-602:3.)

It was against that backdrop that the prosecution first obtained the Torricelli note, which the defense produced—along with a significant number of other documents—on April 8, 2008. Seven days later, the prosecution held a meeting with Allen that was intended, among other things, to review pertinent items from the April 8 production—with a focus on asking Allen about a potential theory of official acts, which the Criminal Division leadership was pressing the trial team to pursue. (*See* Dep. 398:19-399:6.)

The April 15 meeting took place in Anchorage, months before the case was ultimately indicted and long before Allen became Mr. Bottini's witness. (*See id.* at 805:11-806:9.) It was

attended in person by Mr. Bottini, Mr. Goeke, and Special Agent Mary Beth Kepner; Mr. Sullivan and Mr. Marsh, who led the meeting and asked Allen questions as Ms. Kepner showed him documents, participated by phone. (*Id.* 484:6-17.) Mr. Bottini was not a critical participant in the meeting and spent the majority of it taking notes. (*See id.* 483:12-484:19.)

Consistent with Mr. Bottini's understanding of the purpose of the April 15, 2008 meeting, the trial team spent the majority of time asking Allen about recently produced documents that could support a potential theory of official acts. (*See generally* Dep. Ex. 43 (CRM013688-710) (Mr. Bottini's handwritten notes reflect substantial discussion about official acts-related documents).) What Mr. Bottini did not recall until several months after the *Stevens* trial concluded was that the trial team also asked Allen about the Torricelli note at that meeting. That note was the 13th of 17 documents that the trial team showed Allen, and, in response to the first question Mr. Marsh asked—"do you recall talking to Bob Persons about this?"—Allen replied no. (*See id.* (CRM013705).) Immediately afterwards, and in response to Mr. Marsh asking whether Allen sent Senator Stevens a bill, Allen began complaining about how Williams and Dave Anderson were incompetent and drunk and "screwed up" the renovation, a topic that in turn caused Allen—who hated Dave Anderson—to go "into the stratosphere." (Dep. 487:22-488:9; 489:13-22.) Mr. Bottini explained: "It was getting progressively heated, to the point where he had raised his voice . . . he's about three turns into the overhead." (*Id.* 490:11-491:7.) Allen eventually became so angry that he "wasn't making much sense," and Mr. Bottini recalled that he "continue[d] to escalate on Dave and Rocky to the point where at some point I stopped writing. Put my pen down, and jumped in, and tried to help defuse him." (OPR Interview 279:3-15.) Allen returned from a break "sullen" and "engaged in . . . the adult version of pouting" (Dep. 493:2-5), and was unresponsive to Mr. Marsh's further questioning. While it was obvious

to Mr. Bottini that Allen no longer wanted to be at the meeting, Mr. Marsh—who could tell something was wrong based on Allen's verbal responses but could not see his body language in person—sent an email to the group asking, "am I pushing too hard?" (*Id.* 495:1-21.) Shortly afterwards, the prosecution concluded the meeting.

The prosecution met with Persons himself on May 8, 2008. Because the purpose of the May 8 meeting was to confront Persons with inconsistencies between his grand jury testimony and correspondence between Persons and Stevens that the defense had recently produced, Mr. Bottini gave no thought to showing Persons additional materials, such as the Torricelli note (which was correspondence between Stevens and Allen, not Stevens and Persons). (*Id.* 436:8-12; 437:8-438:4.) And he did not consider showing Persons the note after that meeting, during which Persons was "totally insincere . . . [and] full of crap," because it was clear to Mr. Bottini that "going back and talking to this guy about anything is not going to bear much fruit." (*Id.* 439:20-440:9.)

It was not until five months later that they asked Allen about the Torricelli note again. Mr. Bottini's notes of that September 14, 2008 trial preparation session show that Allen first told prosecutors that he recalled having seen the Torricelli note; Mr. Bottini memorialized that statement with emphasis, writing "BA SEEN THIS!!" above his description of the note. (Dep. Ex. 45 (CRM089242).) Allen then stated, as a matter of his own opinion, that "Ted is covering his ass here." (*Id.* 526:8-22; *see also* Dep. Ex. 45 (CRM089242).) When Allen was asked whether he spoke to Bob Persons about the note, Allen replied that "Bob never did push me on this" and that Persons didn't want Senator Stevens to have to put more money into the project. (*See id.*) Continuing to think about the note, Allen continued, "I think Persons said he was just covering his ass by sending this note." (Dep. 526:8-22.) Mr. Bottini understood that Persons'

"cover your ass" comment was significant, because, among other reasons, it helped explain why Allen never sent Senator Stevens a bill. (*Id.* 538:2-6.) It was also "very significant as to Bob Persons and his MO," which Mr. Bottini believed was to allow Allen to pay for things for Senator Stevens while "doing whatever he could" to prevent the senator from paying Allen back. (*Id.* 538:7-10.)

In hindsight, it was not unusual that Allen would have first made that statement on September 14, 2008 even though he previously discussed the Torricelli note with prosecutors. In fact, Allen's delayed ability to recall his conversation with Persons was entirely consistent with his behavior on previous occasions. Mr. Bottini explained that, based on his experience working with Allen during the *Kohring* case, he knew Allen would often look at a document for a prolonged period of time and only later remember details about that document that he had not initially recalled. (*Id.* 527:15-528:1.) Early in that investigation, for instance, Allen recalled making certain payments to Vic Kohring; later on, when the trial team was preparing the Pros Memo and indictment, Allen was asked about the payments he previously recalled—and, after further contemplation, provided details about an additional meeting. Allen explained that he gave Kohring a payment outside a Juneau McDonald's and that the two of them then ate hamburgers in a hotel suite that investigators had wiretapped. Prosecutors reviewed intercepts from that time period and confirmed that Allen was being truthful. (*Id.* 528:2-530:17.)

2. **Mr. Bottini Cannot Be Prosecuted For His Inadvertent Failure To Recall Or Locate His April 15 Notes.**

Allen's April 15, 2008 statement contradicted his September 14, 2008 statement and trial testimony, and it was *Giglio* material that the prosecution should have, but did not, disclose. But the crime of contempt demands more than a showing that *Brady* or *Giglio* was violated; indeed, accidental and even negligent *Brady* and *Giglio* violations do not support imposition of that

punitive sanction. *Mottweiler*, 82 F.3d at 772 ("negligence does not support a criminal conviction under § 401"). Taken together, Mr. Bottini's sworn testimony, actions, and handwritten notes point to only one possible conclusion: Mr. Bottini simply did not recall discussing the Torricelli note with Allen on April 15, 2008, and the subsequent failure to produce his notes was an inadvertent mistake that does not justify prosecuting him for contempt.

To begin, Mr. Bottini's description of the purpose and substance of the April 15, 2008 meeting—which was led by Mr. Marsh and occurred well before Allen became Mr. Bottini's witness—helps explain why he did not recall the Torricelli note discussion. He has consistently recalled two overriding features of that meeting: its intended focus on an official acts theory and Allen's paroxysm of anger. Mr. Bottini's notes themselves reflect the fact that, for a significant part of the April 15 interview, prosecutors questioned Allen about documents related to official acts—not the Torricelli note. (*See generally* Dep. Ex. 43 (CRM013688-710).) That questioning was intended to help the Criminal Division's process of vetting the case and, indeed, it took place well before the case was indicted. And when it came to the discussion initiated by the Torricelli note, Mr. Bottini's dominant recollection was Allen's diatribe about Williams and Dave Anderson "screwing it all up"—not the fact that prosecutors had shown the Torricelli note to Allen before that angry outburst. (OPR Interview 320:9-14 ("I didn't remember that this note was the catalyst for [Allen getting upset]. I remembered the meeting in April and that he had gone off on Dave and Rocky. But I didn't remember that the Torricelli note had been the spark that set that off.").)

The organization and placement of Mr. Bottini's notes likewise helps explain why he neither recalled discussing the Torricelli note on April 15 nor located his notes memorializing that discussion. He customarily creates a trial folder for each witness that will ultimately contain

handwritten notes, 302s, grand jury transcripts, and other materials related to that witness; as trial approaches, he reviews the contents of a witness's file both for the purpose of creating a trial outline and for the purpose of reviewing it for *Brady* material. (*See* Dep. 10-22.) Because Allen was such a significant witness, Mr. Bottini ultimately created multiple folders and organized them by topic, making sure to add handwritten notes from his interviews to those folders. (*Id.* 573:6-9.) But because the April 15, 2008 meeting occurred so long before the *Stevens* case was indicted—and indeed, at a time when Mr. Bottini was unsure if it would be indicted at all, or, even if it was indicted, whether he would be on the trial team—he had not yet created trial folders to prepare Allen's testimony. Mr. Bottini instead placed his notes from the April 15 meeting in the same file folder that contained the documents that the prosecution team had just shown to Allen during the meeting—labeled, appropriately enough, "Documents to Show BA on April 15." (*Id.* 571:10-22; *see also* Dep. Ex. 46 (CRM013686).) Had that folder been labeled "notes from BA interview on April 15," Mr. Bottini would in all likelihood have reviewed its contents once the case was indicted and trial preparation began. But because it was not, he did not recall that he had notes from April 15, did not review them before trial, and could not initially locate them even when asked by Paul O'Brien. (*See* Dep. 576:15-587:5.) The fact that the FBI did not prepare a 302 memorializing the April 15 meeting compounded the problem[11]; had a 302 been prepared, it would likely have prompted Mr. Bottini's recollection that the meeting occurred. (OPR Interview 228:12-229:16.)

[11] As a matter of practice, Mr. Bottini does not have any interactions with agents about the preparation of a 302; he does not tell agents when to draft a 302 or what to include in a 302, and he does not regularly review those documents for content or accuracy. *See supra* page 27. In fact, the *Stevens* prosecutors did not even receive 302s as a matter of course following witness interviews; the trial team would instead need to periodically ask the FBI and IRS for copies if they wished to review them. (Dep. 23:1-16; OPR Interview 141:4-143:1.) It is therefore unsurprising that Mr. Bottini was unaware that Special Agent Kepner did not create a 302 to memorialize the April 15 meeting—and, in fact, Mr. Bottini believes that, at the time, he assumed that one would have been created. (OPR Interview 228:12-18.)

Finally, Mr. Bottini's notes from the September 14, 2008 trial preparation session further underscore that, by the time prosecutors met with Allen prior to trial, Mr. Bottini had forgotten about the April 15, 2008 Torricelli note conversation entirely. Those notes contain short descriptions of documents that prosecutors planned to show Allen. Above the description of the Torricelli note, Mr. Bottini wrote "BA SEEN THIS!!" (Dep. Ex. 45 (CRM089242))—memorializing a statement that was significant because it meant Allen, who recalled seeing the note, could authenticate it at trial. The fact that Mr. Bottini attached such significance to Allen's statement on September 14 was a clear indication that he "did not recall [Allen] having seen this thing back in April" (Dep. 805:1-10; OPR Interview 335:21-336:20).

Together, Mr. Bottini's recollection of the April 15 meeting, the way he labeled his notes from that meeting, and his handwritten September 14 notes show how his failure to recall showing the Torricelli note to Allen in April—and the prosecution's failure to produce Allen's statement about not recalling speaking to Persons upon receiving the note—was an inadvertent mistake.

D. Mr. Bottini Was Not Obligated To Clarify Bill Allen's Torricelli Note Testimony Because It Was Confused, Not Knowingly False.

While cross-examining Allen, the defense—which had been surprised by Allen's statement that Persons told him, after Allen received the Torricelli note, that the note was just Ted "covering his ass"—suggested that he had just recently fabricated that statement. Allen first misinterpreted the line of questioning but eventually responded, "hell, I don't know. I don't know what day it was." (Trial Tr. 81:10, Oct. 6, 2008 (Dep. Ex. 61)). To suggest that Mr. Bottini should have stood up and informed the court that Allen first recounted this recollection to the government on September 14, 2008 is to advance an interpretation of *Napue* that is fundamentally incorrect. While that case compels a prosecutor to correct knowingly false

testimony, it does ***not*** require the prosecutor to clarify a witness's confusion or assist the defense by responding to a question whose answer the witness himself does not remember. For that reason, Mr. Bottini's conduct was not a *Napue* violation at all—let alone a willful or criminally reckless one.

1. **Factual Background**

Attempting to show that Allen had fabricated the Bob Persons "cover your ass" comment, the defense asked Allen when he first told the government that he had spoken to Persons about the Torricelli note and that Persons had told him that Stevens was simply "covering his ass." In particular, the defense attempted to elicit testimony that Allen first told the government about the "cover your ass" remark sometime after September 9, the date when the defense received the government's *Brady* letter. The responses Allen gave, however, make clear that he misunderstood the question—and believed that defense counsel was asking when he first discussed the Torricelli note with ***Persons***, not when he first discussed it with the government:

> Q [B. Sullivan]: Well, you came in here the other day on your direct examination, and you said, well, despite the fact that I saw this letter, I heard from Mr. Persons I shouldn't send a bill because this was just Ted covering his ass; do you remember that testimony?
>
> A [Allen]: That's exactly right.
>
> Q: When did you first tell that story? When did you first say those words? Was it in the last—since September 9th? Was it since September 9th?
>
> A: It's been so long that I can't tell you how many days before I talked to him, but I did, and I asked him, hey, I got to get something done. I've got to get some invoices. And he said, hell, don't worry about the invoices. Ted is just covering, his ass. That's exactly what he said.
>
> Q: My question to you, sir, is when did you first tell the government that because on September 9th, 2008, you were giving them three other reasons why you didn't send the bill.
>
> A: I don't know.

Q: When did it come to you, sir?

A: What?

Q: When did you first tell the government that Persons told you Ted was covering his ass and these notes were meaningless? It was just recently, wasn't it?

A: No. No.

Q: On September 9th, you didn't tell them that, did you?

A: Hell, I don't know whatever—

Q: You gave them reasons why you didn't send a bill. You answered you simply wanted to do the work was one of them, and another was part of the reason. Was that the costs were higher than they needed to be. You didn't tell them then about Persons' conversation with you, did you?

A: You know what, I don't know when I talked to them, but I did talk to him, and it's been quite aback, quite a while back. Whether you like it or you don't.

Q: When did you first come up with this, sir?

A: When did I come up with it?

Q: When did you first tell somebody?

A: Huh?

Q: When did you first tell a government agent?

A: Hell, I don't know. I don't know what day it was.

(Trial Tr. 79:21-81:10, Oct. 6, 2008 (Dep. Ex. 61).) Immediately after that exchange, Brendan Sullivan asked to break for the evening (*id.* 81:11-12); when he resumed cross-examining Allen the following morning, Sullivan asked him about an unrelated expense report—not the "cover your ass" statement (*see* Trial Tr. 23:25-27:18, Oct. 7, 2008 (CRM BOTTINI 010053-57)).

It was apparent to Mr. Bottini that Allen, who had previously suffered a serious head injury and was often prone to confusion and difficulty communicating (Dep. 500:4-8), misunderstood what he was being asked with respect to the Torricelli note and was answering an entirely different question as a result (*id.* 635:1-4). He explained: "Allen's getting his back up,

which is always an interesting thing to see, because you never know where that's going. He's to me, I mean the way he's answering these questions, he's running together when he first talked about Persons about this, in response to [Brendan] Sullivan asking him when did you first tell these people about that. That's what I thought was going on here." (*Id.* 633:1-9; *see also* OPR Interview 341:3-18 ("I think that was clear . . . to anybody listening to that who had sat through this trial knew that he was talking about Bob Persons at that point").)

Allen's confused responses were "very characteristic of Allen" and the way Mr. Bottini knew that he processed questions—particularly "very aggressive," "compound" ones such as defense counsel's. (Dep. 632:11-17.) Those questions may have been particularly confusing because of defense counsel's repeated references to a conversation on September 9; because Allen spoke with the government several times a week in August and September, he would have had no reason to ascribe particular significance to the date of September 9. And because it was customary for Allen, once confused, to become even ***more*** flummoxed in response to additional questions, Mr. Bottini believed that any attempt to clarify his testimony would only lead to more confusion. (*Id.* 636:12-637:1 ("[M]y experience with Mr. Allen is when he gets confused about things, unless you have had some opportunity to sit down with him, which you never do before redirect, to explain to him what it is you're going to ask him, you're just begging for more confusion. I thought that he had adequately explained himself, albeit I wasn't quite sure whether he fully understood what Mr. Sullivan was asking, particularly since he kept jumping back and forth between referring to when he talked to Bob Persons.").)

2. **Mr. Bottini Had No Obligation To Correct Allen's Confusion.**

Any suggestion that Mr. Bottini was required to correct Allen's testimony depends on a tortured reading of that testimony and reflects a fundamental misunderstanding of *Napue*, which prohibits the knowing use of false testimony but imposes no obligation to correct mistaken

inaccuracies, clarify confusion, or provide an answer that the witness himself cannot remember—particularly when that confusion is created by the inartful questioning of defense counsel.

It is true that, midway through Allen's cross-examination, defense counsel asked him "[w]hen did you first tell the government that Persons told you Ted was covering his ass . . . it was just recently, wasn't it?"—and that Allen responded by insisting, "No. No." (Trial Tr. 80:16-19, Oct. 6, 2008 (Dep. Ex. 61).) But that single question and answer cannot be read in isolation. Instead, they must be viewed in the context of Allen's entire exchange with defense counsel, which shows unmistakably that he was describing when he first discussed the Torricelli note with *Persons*—not when he first discussed that conversation with the prosecution. Immediately prior to that single question and answer, for example, Allen was asked when he first "told that story" about Persons to the government; he responded, referring to Persons and not the government, that "[i]t's been so long that I can't tell you how many days ***before I talked to him***, but I did, and I asked him, hey, I got to get something done. I've got to get some invoices. And he said, hell, don't worry about the invoices. Ted is just covering his ass. That's exactly what he said." (*Id.* 80:5-9 (emphasis added).) And immediately after the "No. No." response, Allen—in response to the question, "[y]ou didn't tell them then about Persons' conversation with you, did you?"—replied, "[y]ou know what, I don't know when I talked to ***them***, but I did talk to ***him***, and it's been quite aback, quite awhile back. Whether you like it or you don't." (*Id.* 81:2-4 (emphasis added).) Thus, Allen's "No. No." statement, while not an accurate response to the question he was actually being asked, was the product of confusion—not a deliberately false statement.[12]

[12] While technically Brendan Sullivan asked Allen whether he recently ***told*** the government about the "cover your ass" statement, from the context, it was evident that he was accusing Allen of recently ***fabricating*** that

Any argument that Mr. Bottini was obligated to correct Allen's testimony rests on the mistaken assumption that *Napue* requires a prosecutor to clarify confused testimony, no matter what its cause. It does not. Instead, it is almost universally understood that "a prosecutor is not required to ensure that prosecution witnesses' testimony be free from all confusion, inconsistency, and uncertainty." *Hess v. Trombley*, No. 2:06-CV-14379, 2009 WL 1269631, at *6 (E.D. Mich. May 1, 2009). For that reason, courts considering a prosecutor's failure to correct inaccurate testimony resulting from confusion or the witness's faulty memory—rather than a deliberate intent to provide false testimony—routinely hold that no *Napue* violation occurred. *Id.*; *see also United States v. Crockett*, 435 F.3d 1305, 1317 (10th Cir. 2006).[13]

In *Crockett*, for example, the defendant argued that the prosecutor knowingly permitted a cooperating witness to falsely testify that she received no benefit in exchange for her plea agreement, which required her to testify against the defendant. *Id.* Among other things, the witness had mistakenly answered "no" when, during cross-examination, defense counsel asked her whether she agreed to testify against the defendant as part of her plea agreement. *Id.* After viewing that response in the context of her entire direct and cross-examinations, the court found that it was clear that the witness—who eventually acknowledged that she had agreed to testify against the defendant—was "confused about her obligation to testify against [the] Defendant," and "may have understood the inquiry to relate to benefits other than those she had already

statement. (*See* Trial Tr. 80:2, Oct. 6, 2008 (Dep. Ex. 61) ("When did you first tell that story?"); *id.* 81:5 ("When did you first come up with this, sir?").) Read in that proper context, Allen's denial was not inaccurate at all.

[13] *See also United States v. Are*, 590 F.3d 499, 509 (7th Cir. 2009) ("*Napue* does not require the government to recall [a witness] in its rebuttal case to clear up any possible confusion when the witness's testimony was not perjurious."); *Overdear v. United States*, 212 Fed. App'x 930, 931 (11th Cir. 2006) (*Napue* prohibits only "willfully made" false testimony, not false testimony that results from confusion, mistake, or faulty memory); *United States v. Monteleone*, 257 F.3d 210, 219 (2d Cir. 2001) (*Napue* is not violated where the "incorrect testimony result[s] from confusion, mistake, or faulty memory"); *United States v. Manzano-Excelente*, Nos. 95-1459, 95-1626, 1996 WL 414465, at *2 (2d Cir. July 25, 1996) (*Napue* violation did not occur because the defendant did not "establish the threshold element of his claim: that [the witness] committed perjury . . . confusion and inability to remember do not constitute perjury."); *United States v. Russell*, 532 F.2d 1063, 1067 (6th Cir. 1976) (*Napue* does not require prosecution to recall witness during rebuttal to clarify confusion).

received." *See id.* Against that backdrop, the court reasoned that "[t]here has been no showing of deliberately false testimony." *Id.*

That reasoning applies with equal force here. As set forth above, Allen's "No. No." response, when viewed in its proper context, reflected his confusion about what question defense counsel was asking him and whether that inquiry related to Allen's conversations with Persons or with the government. Mr. Bottini was accordingly under no obligation to clarify Allen's response, or to otherwise provide a clearer answer to the defense's question when Allen, due to confusion and faulty memory, could not provide one himself.

Nor did Mr. Bottini's failure to clarify Allen's response prevent the defense from advancing an argument they otherwise would have. To the contrary, defense counsel could have continued pressing Allen about when he first told the government about the "cover your ass" statement; they simply chose not to. Instead, the defense abruptly ended that line of questioning when it suggested that the court break for the evening, and elected not to revisit it when cross-examination resumed the following morning. *See supra* page 41. Moreover, it is evident from their closing argument—which took Allen to task extensively for supposedly fabricating the "cover your ass" statement (*see* Trial Tr. 8:5-15:9, Oct. 21, 2008 (CRM BOTTINI 012738-45))—that the defense was satisfied with the responses they elicited during his cross-examination and was able to effectively make use of them.

Even if *Napue* and its progeny were read to obligate Mr. Bottini to correct Allen's testimony, his failure to do so was plainly not a willful effort to mislead the jury or defy the court's orders. He was motivated, instead, by his conclusion that Allen "had adequately explained himself, albeit I wasn't quite sure whether he fully understood what [the defense] was asking," and his belief, based on his familiarity with Allen, that attempting to clarify the

testimony would only sow more confusion. (Dep. 636:12-637:1.) That good-faith belief is fundamentally at odds with a willful or criminally reckless intent, *see In re Brown*, 454 F. 2d 999, 1007 (D.C. Cir. 1971) (good faith "is antithetical to contumacious intent"), and, as a result, it forecloses any conclusion that he committed criminal contempt.

III. CONCLUSION

Mr. Bottini and the *Stevens* prosecution undoubtedly made mistakes. Most relevant here, Mr. Bottini concededly erred when he failed to recall that Allen had been asked about the Torricelli note on April 15—and when he failed to locate and review the notes from that meeting. Throughout the course of the trial and the months that followed, however, those mistakes became shrouded in misperceptions and distortions and, in many cases, the prosecutors have been assailed for conduct that did not amount to *Brady* violations at all. But the question now is not whether Mr. Bottini made mistakes or even whether he violated *Brady*, *Giglio*, or *Napue*. Instead, the question is whether he willfully or with criminal recklessness violated the obligations imposed by those cases and the court's orders. The answer, with certainty, is no.

At most, Mr. Bottini made errors during the course of a difficult case, made more challenging by the prosecution's anomalous organization and the intrusive, sometimes counterproductive micromanagement of the Justice Department's Criminal Division. But the extent of those mistakes was amplified and in many cases distorted by defense attorneys who allege prosecutorial misconduct as a defense tactic. *See United States v. Forbes*, No. 3:02CR00264, 2006 WL 680562, at *1-2 (D. Conn. Mar. 16, 2006) (criticizing Brendan Sullivan and Robert Cary for a "pattern of unseemly tactics employed by counsel for defendant" and observing that "counsel for defendant Forbes had engaged in a pattern in this case of arguing, premised on speculation, that opposing counsel had engaged in improper conduct"). As a result, the prosecution was condemned each and every time it failed to disclose evidence that was

conceivably consistent with a possible defense, even though, in many cases, *Brady* did not require them to. And to the extent Mr. Bottini did make mistakes—for example, by failing to recall and disclose the fact that prosecutors discussed the Torricelli note with Allen on April 15, 2008—those mistakes were inadvertent, not the product of willful or criminally reckless conduct.

Mr. Bottini has cooperated with this investigation since its inception and through a two-day deposition with the Special Prosecutor and a one-and-a-half-day interview with the Justice Department's Office of Professional Responsibility. He is a dedicated public servant who is universally admired by the attorneys with whom he works most closely, has a reputation of "provid[ing] quiet leadership without any trace of self promotion or self interest" (Letter from Robert Bundy (Ex. C)), and has not been the subject of a single disciplinary complaint in his 25 years of practice, *see supra* pages 4-5. Against that backdrop, prosecuting Mr. Bottini for criminal contempt would be both legally insupportable and profoundly unfair. *See United States v. Jones*, 620 F. Supp. 2d 163, 181-83 (D. Mass. 2009) (declining to impose contempt sanctions despite "serious and repeated misconduct" because, among other things, attorney's affidavits and testimony "indicate that she is an earnest public servant . . . who does not have a 'win at any cost' or 'ends justify the means' mentality" and because "[s]he has never been subject to disciplinary action or, apparently, sanction").

Nor would prosecuting Mr. Bottini serve the foremost objective of criminal contempt: deterring future misconduct. *See United States v. Barnett*, 376 U.S. 681 (1964) (Goldberg, J., dissenting) ("The sanction imposed for criminal contempt has always been 'regarded as punishment' designed to deter future defiances of the court's authority and to vindicate its dignity.") (citing 4 Blackstone, Commentaries, 283-285). That goal has already been achieved. The *Stevens* prosecution and its aftermath have already led the Justice Department to formalize

and strengthen discovery guidelines for all federal prosecutors, *see* Memorandum from David W. Ogden to Department Prosecutors, Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010), *available at* http://www.justice.gov/dag/discovery-guidance.html, and the notoriety surrounding the case has without a doubt caused prosecutors to carefully consider their disclosure obligations. If anything, an unjustified prosecution of Mr. Bottini could result in *over*-deterrence, causing prosecutors to disclose evidence indiscriminately, including evidence about cooperating witnesses whose disclosure could put those witnesses in danger; it could also cause attorneys to think twice before becoming prosecutors at all. Those outcomes would be deeply damaging to the responsible prosecution of crime.

In sum, Mr. Bottini and the rest of the *Stevens* prosecution have, in many instances, come under attack for conduct that did not violate *Brady* at all. But even in those circumstances when Mr. Bottini concededly erred, his conduct was not remotely willful or criminally reckless. Under any fair analysis, he cannot be prosecuted for contempt.

INDEX OF REFERENCE LETTERS

Mark H. Bonner ..... Ex. A
Robert C. Bundy ..... Ex. B
Robert G. Chadwell ..... Ex. C
Nelson P. Cohen ..... Ex. D
Allen N. Dayan ..... Ex. E
Jeffrey M. Feldman ..... Ex. F
James E. Torgerson ..... Ex. G
Michael N. White ..... Ex. H

EXHIBIT A

AVE MARIA
SCHOOL OF LAW

March 24, 2010

Henry F. Schuelke, III, Esq.
Janis, Schuelke & Wechsler
1728 Massachusetts Avenue, N.W.
Washington, DC 20036-1903

Re: Joseph W. Bottini

Dear Mr. Schuelke:

Firstly, let me say that I know Joe Bottini, and I know others who know him: his character and reputation for truth and veracity, for honesty and fair dealing, and for adhering to the highest standards of legal ethics are of the highest order. I would trust him to act lawfully and ethically in the most important case and even under the most extreme pressure. I would be happy to repeat this under oath. Both from what I know of him as colleague and as a human being, it is inconceivable to me that he would knowingly violate a known legal duty (including discovery and *Brady* duties). He is careful, honest, assiduous, possessed of sound judgment, learned in the law, and well-respected. He is also kind, generous, fair, and has an easy sense of humor. He is capable and accomplished, and notwithstanding that, he is self-effacing and modest. He's a credit to DOJ, the USAO, and to the Bar.

I have known Joe and his family continuously since 1991. I first met him professionally in September 1991, approximately one week after a mail bomb killed David Kerr and catastrophically injured his wife, Michelle near Anchorage. I was working as a trial attorney in the Terrorism & Violent Crime Section of the Criminal Division of DOJ at the time, and had been assigned from Washington, DC to handle the case. I worked daily with AUSA Bottini, whom I chose as my partner. We worked principally in Alaska, and then in Tacoma and Los Angeles where the trials ultimately were held, through 1996. We also worked on two interlocutory appeals together, on the appeal from the convictions, and on subsequent habeas petitions. I have seen him, his family, and colleagues on largely an annual basis since then during my visits to Anchorage to go fishing with him, federal agents, and other AUSAs, where I am usually the houseguest of the US Attorney. I speak with him regularly on the telephone. I also have seen Joe during some of his visits to Washington; most recently I saw him and spent some time with him during the Stevens trial. When he's available, I would like him and Cindy to visit me and my wife in Naples, where I would like him to address one of my classes.

Joe does not grasp for the spotlight or for self-promotion. An insight into Joe's character came to me when he was appointed US Attorney for the District of Alaska. This occurred in the middle of our working together on the mail bomb case. Prior to his appointment, we had listed my name first on the multitude of motions, briefs, and replies that we were producing, due to my seniority and assignment, followed by his name. In other words, he was billed as second chair in what was then the most notorious and publicized case in Alaska history. When Joe was appointed US Attorney during the case, it seemed right to me that his name should now be listed first on our documents. There's a difference between being an Assistant and in being the actual chief law enforcement officer in the District. I told Joe that we were going to do it this way and actually had to insist, despite his saying no. This had to come from me, and had to be implemented over Joe's objection.

Joe is sincere and polite. In cross-examining the co-defendant supplier of the explosives in the mail bomb case, Joe's demeanor and language toward the defendant gave me a further insight into his character. Joe was measured, professional, and addressed the defendant respectfully. One thing I noticed was that if Joe erred during his examination it was in being too polite to the defendant!

Joe doesn't cut corners or sail close to the wind in the discharge of his office. In years of close-quarters working together on what was then the State's most notorious case, I never perceived even a hint of even a consideration of not playing it straight from Joe. In dealing with the numerous defense counsel in the case, Joe was invariably on very good terms with them. And when we went into court before judicial officers in Alaska, Joe was regularly received there with the tokens of welcome and respect that litigators value from the bench. The Federal Public Defender, Richard Curtner, represented the principal defendant (Raymond D. Cheely, Jr.). In testimony to how he is regarded by his opponents, to Joe's credit the FPD was and remains a supporter of Joe. The same can be said concerning sitting U.S. District Judge Timothy Burgess (D. AK) who was previously Joe's colleague in the USAO for many years.

Joe treats victims with compassion and understanding. The surviving victim of the mail bombing (Michelle Kerr) is one of Joe's biggest fans; he treated her with concern, respect, and a gentleness that might be somewhat unexpected from Joe's physical size. She still sends him Christmas cards every year. Joe's marriage to a Japanese-American from California, and their healthy family life with their three children is an example of his being in a way like St. Nathaniel: a man in whom there is no guile.

I would be happy to provide this information and to speak with anyone concerned, either on the telephone or in person.

Sincerely,

Mark Healy Bonner (DC Bar #202036)
Associate Professor of Law
1025 Commons Circle
Naples, FL 34119

EXHIBIT B

DORSEY

ROBERT C. BUNDY
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March 23, 2010

Mr. Henry F. Schuelke, III
Janis, Schuelke & Wechsler
1728 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Re: Joseph Bottini

Dear Mr. Schuelke:

I have been requested by Joseph Bottini's attorneys to provide you with my impressions of his reputation for honesty and integrity in the Alaska legal community, as well as my experiences working with him during my tenure as United States Attorney for the District of Alaska.

I understand that you are in the process of considering Mr. Bottini's actions or omissions in the case of *United States v. Stevens*. You took my deposition in the course of your inquiry and I have nothing further to add to the information I provided you there about the activities of the Stevens prosecution team.

I have been acquainted with Mr. Bottini since the mid-1980s, but did not work with him until I became United States Attorney in 1994. At the time I took office, Mr. Bottini had served as the interim U.S. Attorney for nearly one year. It was clear from the beginning that Mr. Bottini had the unconditional respect and support of all in the United States Attorney's Office, and in the Federal law enforcement community. He provided quiet leadership without any trace of self promotion or self interest. As an Assistant U.S. Attorney, Mr. Bottini performed his duties professionally and without complaint. He worked long hours on his own cases yet always seemed to be available to assist other lawyers in the office when asked. In many ways he was the "go to" person for difficult cases, be they long complex prosecutions, such as a multiple defendant mail bomb case, or simply sensitive cases, such as a misdemeanor prosecution of a locally well-known person. I never received a complaint about Mr. Bottini's performance as a Assistant United States Attorney, ethical or otherwise, from any judge, attorney, law enforcement agent or member of the public.

What I believe to be most remarkable about Mr. Bottini's tenure as an Assistant United States Attorney, is his unwillingness to seek personal status or attention. I asked Mr. Bottini to serve as criminal chief, and I understand that several of my successors in the office have asked him to assume supervisory positions as well. Except to take on supervisory duties on an interim basis, Mr. Bottini declined the opportunity to advance in the hierarchy. During my tenure, Mr. Bottini served as an informal leader of the office, while maintaining a full caseload, but showed no interest in the personal status and power that goes with a supervisory position.

DORSEY

Mr. Henry F. Schuelke III
March 23, 2010
Page 2

Mr. Bottini is well known among lawyers practicing criminal law in the United States District Court in Alaska and is, to my knowledge, uniformly liked and respected. He is not seen as vindictive, overzealous, or uncompassionate. He is respected as a good trial lawyer, well versed in criminal law.

I hope my perspective is of some assistance to you in your difficult and important inquiry.

Very truly yours,

DORSEY & WHITNEY LLP

Robert C. Bundy
Of Counsel

cc: Paul Knight
Kenneth Wainstein

EXHIBIT C

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March 25, 2010

Mr. Henry F. Schuelke
Janis, Schuelke & Wechsler
1728 Massachusetts Ave. NW
Washington, DC 20036

Re: AUSA Joe Bottini

Dear Mr. Schuelke,

The purpose of my letter is to give you both my personal perspective and a broader view of the character of Joe Bottini. Since we have never met, let me share some of my background as a means of giving you a basis for evaluating my comments. I have been a member of a small firm for the past 15 years. The senior members of the firm, including myself, have all served in the Department of Justice. We have two former presidentially appointed U.S. Atttorneys, a former interim U.S. Attorney and U.S. Magistrate Judge, and I served as Criminal Chief in the U.S. Attorney's Office for the Western District of Washington. The bulk of my personal practice has been complex fraud and white collar criminal defense.

I first met Joe in approximately 1990, when I was assigned to serve as a Special AUSA in the U.S. Attorney's Office in Anchorage on an investigation which the Alaska office could not handle because of a conflict issue. Shortly thereafter, Joe and I worked together investigating and successfully prosecuting members of a Taiwanese based fishing operations who were illegally harvesting immature salmon on the high seas. In the course of this case, Joe and I became friends and our families are friends. We have remained in contact since then. We went on to work together on a number of other cases until I left the U. S. Attorney's Office in Seattle to start my present firm.

Because of the size of the defense bar in Alaska, attorneys from Seattle are often involved in representing clients in matters being investigated and prosecuted in Alaska. I have had occasion to work with Joe in cases in which we were in adversarial roles. And, we've also worked in cases in which we had shared interests. Regardless of our relative positions, I have always found Joe to be a true professional. He is hard working and thoughtful.

Joe has always shunned the spotlight. He is satisfied to know within himself that he has done a good job. He served as Criminal Chief and interim U.S. Attorney in the past but never sought those positions. Although he has been touted as a presidentially appointed candidate for U.S. Attorney in the past, he has studiously avoided nomination. He is happiest serving as a line

Assistant and aspires to no greater position within the Department of Justice. In that capacity, the people of Alaska and the United States have been well served by Joe.

In his duties as an AUSA, there is no doubt that he is the advocate for the United States. Personal relationships are put aside. However, he does not see the defendant or defendants as the enemy. I've watched him both in private sessions and in Court and he treats all parties with respect. He does not take a personal stake, beyond doing his best job, in a case.

An attorney with Joe's skills and experience could command a prestigious income and an equally impressive position in private practice. However, Joe continues to live modestly and faces the same financial struggles of any middle class family with three children approaching college age. Simply, he is happy where he is doing the work he does. He is devoid of the ambitions for personal advancement within the Department, financial gain, or public fame that have led others to place themselves above their ethical obligation.

I am a member of a number of defense organizations and know most of the attorneys in Anchorage and Seattle that have come in professional contact with Joe, many of whom represented individuals involved in the investigation and prosecution of Senator Stevens. Of course the Senator's trial and the developments following the trial were a frequent topic of our conversations. The opinions voiced in those conversations were unanimously favorable to Joe. As each recounted a story of their individual encounter with him in a particular case, they concluded by saying, in their own fashion, that Joe was a fair man and a man of his word. We all agreed that he would not intentionally conceal or knowingly participate in concealing relevant evidence, especially exculpatory evidence. This came from a group of attorneys that are universally frustrated by the state of the law on criminal discovery in the federal system.

To sum up, Joe Bottini is and has been for well over twenty years a hard working public servant serving the interests of justice. His reputation for fairness, honestly and hard work is well deserved. His history of treating defendants with respect and doing his job without personal agenda is well known. On a personal note, I would accept Joe's word and his hand shake on any matter knowing that it was more reliable than any document that could be drafted.

While I know I am biased, I also have had the opportunity to see Joe from many perspectives. I trust my letter is helpful to you in carrying out your responsibilities. Thank you for taking on the task.

Very truly yours,

McKAY CHADWELL, PLLC

Robert G. Chadwell

EXHIBIT D

March 29, 2010

Henry F. Schuelke, III, Esquire
c/o Jeffrey S. Nestler
O'Melveny & Myers LLP
1625 Eye Street N.W.
Washington DC 20006

RE: Assistant U.S. Attorney Joe Bottini

Dear Mr. Schuelke:

I am writing to provide you with information that may be of assistance to you in your analysis of a matter regarding Assistant U.S. Attorney Joe Bottini.

Please permit me to share with you my background. Twenty-six of my 35 years practicing law have been devoted to public service through the Department of Justice including several years as the Chief of the White Collar Crime Section in the U.S. Attorney's Office in the Western District of Pennsylvania, and 30 months as the United States Attorney for the District of Alaska.

One of my first undertakings after I was sworn in as U.S. Attorney in August 2006 was to meet individually with each member of the staff. That is when I met Mr. Bottini. For the following 30 months I had periodic but not daily contact with him. It was, however, through my conversations with others that I learned the most about Mr. Bottini. He is uniformly respected and considered one of the most ethical, professional, honest, knowledgeable, reliable and even tempered prosecutors in the office. It is not an exaggeration to refer to Joe as the backbone of the Criminal Division and the glue that held it together. In addition to his well deserved stature in the office, Mr. Bottini is known to all as a man of honesty. He is highly regarded for his integrity and sound judgement by the courts and the defense bar.

Joe Bottini's actions are not controlled by ego or the desire of media attention. Indeed, Mr. Bottini is unlikely to assert himself with his colleagues if he feels doing so would create hard feelings. For example, in the setting of a trial team deciding on a lead attorney for an upcoming trial (and this is not a reference to the Stevens case), if Mr. Bottini were the best choice for lead counsel by reason of ability and experience, but another team member less able made it known that he or she wanted to be lead, Mr. Bottini would most likely acquiesce. Similarly, he is reticent to supervise others preferring to interact as a peer rather than as a manager.

From what I saw and heard during all of my interactions with Joe Bottini, and what I know of him through others, I hold a doubt-free belief that Joe Bottini values doing what is right over doing whatever it takes to win. No matter how harmful information may be to his case, he is not the type of prosecutor to bury it. He is a man of conscience and honor who has devoted his life as a federal prosecutor to doing the right thing. As U.S. Attorney I was proud to call Joe Bottini my colleague and fortunate that he was on my staff.

By the end of your investigation I hope you will agree with me that Joe Bottini is a highly ethical, hard working, honest attorney who is a tremendous asset and exemplary employee of the Department of Justice.

Thank you for your consideration of my views.

Very truly yours,

NELSON P. COHEN

NPC/dls

EXHIBIT E

Law Office of
ALLEN DAYAN & ASSOCIATES, INC.

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March 18, 2010

Henry F. Schuelke, III, Esq.
Janis, Schuelke & Wechsler
1728 Massachusetts Avenue, N.W.
Washington, D.C. 20036-1903

Dear Mr. Schuelke:

I have been a practicing criminal defense lawyer for 29 years. I have been practicing in Alaska's U.S. District Courts since 1988. Criminal law is 95% of my firm's practice. As a result, I have known Joe Bottini professionally for at least 16 or 17 years and I have litigated several criminal cases against him. We do not socialize outside of work. Mr. Bottini's practice has always been to let opposing counsel know of all evidence against the defendant that is required. On many occasions, Mr. Bottini informed me of very persuasive evidence that was not required to be disclosed short of trial. This has allowed my clients to make intelligent and informed decisions in a timely fashion regarding their cases. This approach has better served the government, the defendant and the court system. I have never known him to withhold evidence. He has always been candid, truthful and forthcoming. I certainly cannot say that about all prosecutors.

The Alaska federal criminal bar is relatively small. I certainly would have heard if Mr. Bottini was in the habit of withholding evidence. Joe Bottini's reputation for integrity in the Anchorage criminal law community is excellent. I have never heard any complaints from fellow defense lawyers regarding his conduct in cases, or otherwise. In my opinion, he is a fine public servant and a good man.

If it is shown that Mr. Bottini did commit any ethical breach, then I am sure it was a one-time aberration in an otherwise long and unblemished career of public service.

Sincerely,

Allen Dayan

EXHIBIT F

FELDMAN ORLANSKY & SANDERS
COUNSELORS AT LAW
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JEFFREY M. FELDMAN
Direct Tel: 907.677.8303
feldman@frozenlaw.com

March 17, 2010

Henry Schuelke
JANIS, SCHUELKE & WECHSLER
1728 Massachusetts Avenue, NW
Washington, DC 20036

Re: Assistant U.S. Attorney Joseph W. Bottini

Dear Mr. Schuelke:

I am writing on behalf of Assistant U.S. Attorney Joseph Bottini. I have known Mr. Bottini for approximately twenty-five years, both as a respected colleague and as a skilled and able adversary. I understand that Mr. Bottini's actions in connection with the criminal prosecution of former U.S. Senator Ted Stevens are under review by the Department of Justice. This letter offers my assessment of Mr. Bottini's character and my observations of his approach toward his work as a prosecutor, with the hope that the information provided will be of assistance to you in reviewing this matter.

By way of background, I have practiced law for thirty-five years. I started my legal career as a law clerk for the Alaska Supreme Court and, since that time, have maintained an active trial and appellate practice in Alaska, consisting of both civil and criminal matters. Over the course of my career, I have devoted a significant amount of time to matters involving issues of professional ethics. I served two terms on the Board of Governors of the Alaska Bar Association, including one term as president of the Association. In Alaska, the Bar Association is responsible for enforcement of the Rules of Professional Conduct and the imposition of lawyer discipline. I also served as a member and chair of the Alaska Commission on Judicial Conduct for 13 years. The Commission is responsible for enforcement of the Code of Judicial Conduct and the imposition of judicial discipline in Alaska. As a result of twenty years of experience applying professional standards to Alaska lawyers and judges, I believe that I have a strong and respectful appreciation for the standards to which all lawyers properly are held.

I first met Mr. Bottini after he completed law school and returned to Alaska to serve as a law clerk to Superior Court Judge Seaborn J. Buckalew. From the outset, Mr. Bottini struck me as a bright and conscientious young lawyer, impressively committed to his professional responsibilities. As a law clerk, he was courteous and respectful of litigants and counsel, meticulous in his legal work, and devoted to serving Judge Buckalew, who was a much admired and beloved jurist in our state. Judge Buckalew had served as a respected state prosecutor before his appointment to the bench, and my impression is that he imprinted Mr. Bottini early on with his own high ethical standards and his commitment to public service. As a result, it was not surprising that, after he completed his clerkship, Mr. Bottini embarked on a career as a prosecutor, first for the State of Alaska and, thereafter, for the United States Attorney for the District of Alaska. A significant portion of my caseload over the years has consisted of the defense of criminal cases, so I encountered Mr. Bottini as an adversary with some regularity.

I can state, without any reservation, that Mr. Bottini is a lawyer of exceptional skill and commitment, keen intelligence, and a man of high moral character. He is the kind of person for whom the expression "straight arrow" was invented. He takes public service seriously. It not only defines his career, it defines his life. It defines him, as a person.

As a prosecutor, Mr. Bottini plays by the rules. He does not cut corners. He is careful and disciplined. His word is his bond and he is completely trustworthy. More than once, I have made significant decisions in cases I have handled based solely on my confidence and trust in representations he made to me. I would do so again in a heartbeat, as he never gave me any reason to doubt his candor or trustworthiness. Mr. Bottini exemplifies all of the qualities, characteristics, and abilities that we want all individuals who do the important work of enforcing the law to display. He is as thoughtful, professional, and fair-minded as any prosecutor I have encountered.

Mr. Bottini couples these professional characteristics with equally impressive personal qualities. He is mature. He is unfailingly courteous. He exercises sound judgment and is able to display a deft sense of humor that oftentimes can defuse what otherwise would be a difficult moment. He is kind and thoughtful; there have been times, long after a case was concluded, when he took the time to ask me how someone that I represented (and that he prosecuted) was doing. He is a modest man, without ego, and incapable of saying or doing something that is self-aggrandizing. In sum, Mr. Bottini always has struck me as an exceptionally skilled prosecutor and a genuinely good and decent person, highly respected by his colleagues, his adversaries, and the judges before whom he appears.

Like many Alaskans, I read reports of the Stevens trial and the issues that arose. As a defense lawyer who regularly faces federal prosecutors, I take allegations of

prosecutorial misconduct seriously and I understand the damage that can result when rules are bent or violated. It is difficult to speak to the issues raised by the Stevens prosecution as they pertain to Mr. Bottini, since the underlying allegations and questions are so totally at odds with the person I have known for quite a long time. It is inconceivable to me that Mr. Bottini would knowingly fail to meet his obligations as a prosecutor or knowingly fail to comply with a court's rules or orders. I have encountered prosecutors who gave me pause to consider whether the discovery I was provided was complete, or reason to question whether statements they made were accurate. Suffice it to say that, based on a quarter century of experience, I firmly believe that Mr. Bottini is not such an individual. He has a steady and true moral compass, and he takes his obligations as a prosecutor seriously.

I do not know the details of the issues that are under review by the Department of Justice. What I do know is that Mr. Bottini is an exceptional person. If there is to be a post-mortem assessment of decisions and actions that were made during the course of the Stevens prosecution, the manner in which Mr. Bottini has lived his life and practiced law over the past 25 years should militate in favor of giving him the benefit of every doubt. I do not offer these assessments lightly or casually. I know the matter under review is important, both to the Department of Justice and to the individuals involved. I have given this letter serious consideration, and I share these comments with the importance of the task at hand very much in mind.

Please let me know if I can provide any additional information that would be of assistance to you.

Very truly yours,

FELDMAN ORLANSKY & SANDERS

Jeffrey M. Feldman

JMF:jaf

EXHIBIT G

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JAMES E. TORGERSON
Direct (907) 263-8404

March 31, 2010

Henry F. Schuelke, III, Esq.
Janis, Schuelke & Wechskler
1728 Massachussetts Avenue, N.W.
Washington, DC 20036-1903

Re: Joe Bottini

Dear Mr. Schuelke:

I have practiced law in Alaska for 25 years. I have a litigation practice that includes federal white collar criminal defense. For the last couple of years, I have been the managing partner of Stoel Rives LLP's Anchorage office. Before that, I was the managing partner of Heller Ehrman's Anchorage office for 10 years. I worked in the Alaska United States Attorney's office for almost 8 years before I went into private practice, first as a line assistant, then as Chief of the Criminal Section and finally as Chief of the Civil Section.

I began working with Joe Bottini in 1991 when I joined the United States Attorneys' Office. I was his peer, when we were both Assistant United States Attorneys. I have been his supervisor, when I was Chief of the Criminal Section and he was a line assistant, and his subordinate, when he was the Acting U.S. Attorney for the District of Alaska for almost a year in 1993-1994. More recently, I have dealt with him as an "adversary," in the course of my white collar criminal defense work.

I have long thought that Joe possessed all of the best qualities of a federal prosecutor. He is a very able lawyer: talented, self- disciplined and hard working. In addition, Joe has always demonstrated another quality that I think equally important. His advocacy is ever moderated by an innate sense of fairness, courtesy and justice.

My opinion of Joe has not changed now that I am a member of the defense bar. In my dealings with Joe, he always has been candid and forthright. If he makes a representation regarding the United State's interest in my client I know I can trust him absolutely. I also know that my perception of Joe, and experience of him, is neither unique nor a result of our long acquaintance. I have talked with other defense attorneys over the years who have the same experience of Joe, including out-of-town counsel who have no history of a relationship with him. I have heard

more criminal defense lawyers say positive things about Joe, including before the events of the last couple of years, then I have heard them say about any other prosecutor.

In conclusion, while I do not know the specific circumstances of the concerns involving Joe arising from the *Stevens* case, I do have the privilege of knowing Joe. I have deep confidence that he would not knowingly fail to disclose exculpatory material to the defense or participate in misleading the court in any way.

Very truly yours,

James E. Torgerson

EXHIBIT H

LAW OFFICE OF MICHAEL WHITE

Michael N. White, Admitted in Washington and Alaska

March 17, 2010

Henry F. Schuelke, III, Esq.
Janis, Schuelke & Wechsler
1728 Massachusetts Avenue, N.W.
Washington, D.C. 20036-1903

Dear Mr. Schulke:

I have represented many defendants charged by the United States with criminal offenses in Alaska. I write to provide you with my perspectives as to Joe Bottini. Before doing so, I will provide you with some information about myself.

Upon graduation from law school in 1979 I went to Alaska and became an assistant District Attorney in Anchorage, then District Attorney in two judicial districts in Alaska. In 1984 I was appointed to the state court bench. I left the judiciary and went into the private practice of law in 1987 and have been in practice since then. In my practice I have handled numerous state and federal serious commercial fishery offenses, and have had AUSA Bottini as the prosecutor in numerous cases. My best guess is that I have had between 5-10 cases against Mr. Bottini.

I can unequivocally state that AUSA Bottini is a breath of fresh air in the Alaska United States Attorney's office. I would go to the bank on Mr. Bottini's word. There isn't another prosecutor in that office about whom I would make that statement. In all of my cases with Mr. Bottini, I have never sensed a discovery violation, nor have I seen Mr. Bottini take any action that wasn't honorable and in accord with the highest standards of the Department of Justice.

I can give a recent example of Mr. Bottini taking the extra step to make sure that results obtained by the DOJ are fair. I represented a defendant twelve years ago that Mr. Bottini prosecuted. Although I forget many of the details, the case started as a criminal prosecution of a Canadian married couple for some type of commercial fishing violations. Ultimately the case resolved as a civil fine against the husband only. Years later the husband reported to me that every time that his wife enters the United States there is a problem with immigration, apparently related to the earlier criminal charges

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mike@michaelwhitelaw.com

that were dismissed. On two separate occasions, based on complaints from me, Mr. Bottini took steps to make sure that it is clear in United State's computer systems that the criminal case was resolved with no adverse consequences for this woman.

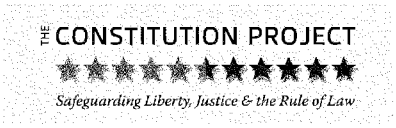
When I heard that there would be an investigation based on misconduct by the DOJ, I wasn't completely surprised. I was shocked, however, that Joe Bottini's was part of the investigation. I can't think of another AUSA for whom I would write this letter. I would trust a client's, or my future on AUSA's Bottini's word and integrity. Mr. Bottini exemplifies the very best that we all hope for in the Department of Justice.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Michael N. White

Offices in Puget Sound and Alaska
999 3rd Ave. No. 2600, Seattle, WA 98104
(206) 829-7572
mikc@michaelwhitelaw.com



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The Constitution Project

Affiliations listed for identification purposes only

April 18, 2012

VIA ELECTRONIC MAIL

The Honorable F. James Sensenbrenner, Jr.
Chairman
U.S. House Subcommittee on Crime, Terrorism, and Homeland Security
Rayburn House Office Building
Room B-370
Washington, DC 20515

The Honorable Robert C. "Bobby" Scott
Ranking Member
U.S. House Subcommittee on Crime, Terrorism, and Homeland Security
Rayburn House Office Building
Room B-336
Washington, DC 20515

Dear Chairman Sensenbrenner and Representative Scott:

As president of The Constitution Project (TCP), I write to commend your leadership in holding tomorrow's hearing on the Prosecution of Former Senator Ted Stevens, featuring testimony from, among others, Henry F. Schuelke III, the special counsel who presiding judge Emmet G. Sullivan appointed to investigate the federal prosecutors' conduct in that case.

Mr. Schuelke's report reveals a disturbing level of misconduct that pervaded Senator Stevens' prosecution. TCP is gratified that you and your colleagues on the House Subcommittee on Crime, Terrorism, and Homeland Security are closely examining Mr. Schuelke's findings and hopes that you will carefully consider what lessons we can take from this distressing episode.

I am also providing a letter signed by more than 140 criminal justice experts. The letter's signatories, including more than 100 former federal prosecutors whose years of service span from 1962 through 2011, have all concluded that congressional action is needed to address the problems with criminal discovery in federal prosecutions. Senator Stevens' prosecution undermined confidence in our justice system, but as the letter notes, it is just one example of a larger, persistent problem. To address this problem Congress should create a clear, uniform statutory obligation for federal prosecutors.

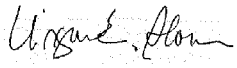
Finally, I am including a letter sent to U.S. Attorney General Eric Holder today expressing my deep concern with the Department's handling of

1200 18th Street NW, Suite 1000, Washington, DC 20036 • tel 202-580-6920 • fax 202-580-6929 • www.constitutionproject.org

potentially exculpatory evidence uncovered during a task force's investigation into the FBI's use of flawed forensic evidence in possibly thousands of cases. As a pair of news reports in the Washington Post reveals, federal prosecutors in at least 24 cases failed to disclose the findings of the task force to defendants whom they had prosecuted, many perhaps in violation of the constitutional, legal and ethical obligations to turn over exculpatory evidence. The articles imply that many other cases may have suffered from the same flaws and violations of the prosecution's obligations.

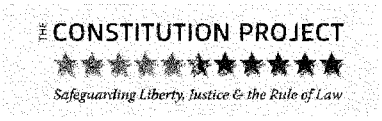
We look forward to working with you and your staffs on this critical issue. In the meantime, if TCP can provide any assistance, please feel free to contact me at (202) 580-6923 or Christopher Durocher, TCP's Government Affairs Counsel, at (202) 580-6939 or cdurocher@constitutionproject.org.

Best regards,



Virginia E. Sloan

cc: Representative Lamar S. Smith, Chairman of the House Committee on the Judiciary
Representative John Conyers, Jr., Ranking Member of the House Committee on the Judiciary
Members of the House Committee on Crime, Terrorism, and Homeland Security



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Holland & Knight LLP

Virginia E. Sloan
The Constitution Project

Affiliations listed for identification purposes only

April 18, 2012

The Honorable Eric H. Holder, Jr.
United States Attorney General
United States Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Dear General Holder:

As the president and chair of the board of directors of The Constitution Project, an organization dedicated to upholding constitutional safeguards in our criminal justice system, we were shocked to read the stories from today and yesterday in the Washington Post concerning the Department of Justice's investigation into the flawed forensic reports and testimony of the Federal Bureau of Investigation that have led to the wrongful conviction of innocent individuals, and even the apparent wrongful execution of one individual. While the DOJ admirably undertook this investigation upon learning of potential flaws in the work of 13 FBI analysts, it is unconscionable that in "fewer than half of the 250-plus questioned cases" in which a scientific review of the evidence was completed, did the defendants or their defense counsel received notification of the potential flaws.

The Post's investigation reveals further examples in what appears to be a culture of nondisclosure as evidenced by a continuing pattern of federal prosecutors' failing to disclose favorable evidence to the defense in direct violation of constitutional, legal and ethical requirements. These examples are added to a litany of unconstitutional nondisclosures by federal prosecutors, from the prosecutions of the late Senator Ted Stevens to W.R. Grace Corporation and its executives, and very recently, Lindsey Manufacturing Corporation and its executives. These are a few of the numerous examples, and we know that they are just the tip of the iceberg—most nondisclosures go undiscovered by the defense, who generally have no access to information that the prosecution has not provided.

DOJ has repeatedly claimed over the past decade that it can fix this problem internally, and it repeatedly claims that it has done so—until the next problem is revealed. While we admire the steps you have taken as Attorney General, it is readily apparent that this problem cannot be remedied through changes to DOJ's internal policies. Too many prosecutors are not getting the message that these disclosures are not optional. Moreover, even the overwhelming majority of prosecutors who operate in good faith may have difficulty determining what information must be disclosed in the face of inconsistent and opaque standards for criminal discovery.

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Legislation is urgently needed to clarify the obligations of federal prosecutors to disclose favorable evidence. The Constitution Project has assembled more than 140 criminal justice experts—more than 100 of whom have served as federal prosecutors during the course of their careers—who agree that, "*Brady* violations, whether intentional or inadvertent, have occurred for too long and with sufficient frequency that Congress must act. Self-regulation by the DOJ has been tried and has failed. It is ultimately not a solution to the injustices that continue to occur." We attach their letter calling for legislative reform in the face of this problem.

We are further concerned that in response to the Washington Post investigation, the DOJ claims that the notifications that have occurred up to this point "met legal requirements." The duty to disclose favorable evidence to the defense is ongoing and extends past a conviction to subsequent stages of the judicial process; a prosecutor's failure to disclose potentially exculpatory evidence amounts to a violation of *Brady v. Maryland*. The Washington Post was able to locate defendant names and other significant details in 137 of the 250 cases for which a scientific review of the potentially flawed evidence was undertaken. Of these 137 cases, there are 24 federal prosecutions in which no documentation of disclosure to the defendants of the potentially exculpatory evidence exists. In only two federal cases of the 137 did federal prosecutors document that they had disclosed the results of the investigation to the defendants. Particularly troubling among these 24 cases is the case of Donald Gates, who spent 12 additional years in prison for a crime he did not commit due to prosecutors' failure to notify him of the results of the DOJ task force's investigation.

Further, as the former inspector general who helped to lead the investigation of the FBI lab stated, the DOJ task force that undertook the investigation had an independent obligation to ensure that the defendants were notified. Appallingly, the DOJ chose to keep the findings of the investigation secret and to disclose the results of the investigation only to the prosecutors in the affected cases, leaving it up to the individual prosecutors whether to disclose the information to affected defendants. According to the Post, the DOJ set "strict rules" about what would be disclosed in an effort to protect convictions, and also abandoned initial plans to ensure that state and local prosecutors had provided the results to defendants in appropriate state cases. While the DOJ claims that they met their legal and constitutional obligations by notifying only the prosecutors, certainly the DOJ cannot claim that their hiding these results from the public, and in particular from the defendants, served the interests of justice.

Finally, we know now that there are problematic cases beyond the scope of the task force's investigation that must be reviewed. While the DOJ's investigation focused on one particular FBI scientist, there were clear indications that the problems are much more widespread. The cases of Santae Tribble and Kirk Odom in the District of Columbia—both discussed in the Post's report—involve flawed hair comparison techniques, but were not part of the task force's review because the evidence had been analyzed by experts who were not the subject of its investigation. Thus, Mr. Tribble and Mr. Odom spent needless years apparently wrongfully incarcerated.

We encourage the DOJ to undertake an investigation into those additional cases involving potentially faulty evidence or flawed testimony that were not part of the task force's review. This investigation cannot be done by DOJ alone. Independent experts, along with the defense bar, the ABA, ethics authorities, and others, must work side by side with DOJ as it conducts this work. Further, we call on the DOJ to take the necessary steps to ensure that each and every defendant whose case has been implicated by the previous investigation or any future investigation, along with his or her defense counsel, receives immediate notice that evidence in the defendant's case has been or is being reviewed, for what reasons, and where known, with what results.

Moreover, we call on the DOJ to work with Congress on legislative efforts to reform the broader systemic problem of *Brady* violations. We hope the DOJ will build upon its internal efforts by recognizing the need for a new law that would clarify the obligations of all federal prosecutors to disclose favorable evidence. The bipartisan legislation introduced by Senator Lisa Murkwoski (R-AK) is deserving of the DOJ's support. DOJ has an unprecedented opportunity to show its commitment to fairness and accuracy in our criminal justice system by endorsing criminal discovery reform. The articles in the Washington Post bring shame to our criminal justice system and to the Department supposedly devoted to justice—not just to convictions.

Sincerely,

Virginia E. Sloan

Stephen F. Hanlon

National Association of Assistant United States Attorneys
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April 19, 2012

The Honorable James Sensenbrenner
Chairman
Subcommittee on Crime, Terrorism
and Homeland Security
Committee on Judiciary
House of Representatives
Washington, DC 20515

The Honorable Bobby Scott
Ranking Minority Member
Subcommittee on Crime, Terrorism
and Homeland Security
Committee on Judiciary
House of Representatives
Washington, DC 20515

Re: Hearing on the Special Counsel's Report on the Prosecution of Senator Ted Stevens

Dear Chairman Sensenbrenner and Ranking Member Scott:

On behalf of the approximately 5,700 Assistant United States Attorneys who serve this nation as the federal government's prosecutors and civil litigators, we respectfully submit these comments for inclusion in the record of today's hearing on the Special Counsel's report on the prosecution of Senator Ted Stevens. The Special Counsel's report alleges certain failures on the part of the prosecutors in carrying out their duty to disclose exculpatory and impeachment information, often referred to as *Brady* material. It also identifies incidents of poor judgment and mismanagement by certain Department of Justice officials in the conduct of the prosecution.

While the Special Counsel's report is troubling at several levels, we intend to withhold final judgment on the legality and correctness of the subject prosecutors' conduct until the Office of Professional Responsibility, the official Department of Justice investigative authority in this matter, has completed its investigation and rendered its report. At the same time, on behalf of all Assistant United States Attorneys who closely work with federal law enforcement partners in protecting the innocent and prosecuting the guilty, we want to make it clear that, day in and day out, Assistant United States Attorneys are vigilant in properly carrying out their statutory and professional duties and responsibilities, and in some instances at deadly risk to themselves and their families.

If it the Department of Justice ultimately finds that prosecutorial errors were committed, we are confident that the Department will address such shortcomings. One wrongly prosecuted case, however, does not demand a revamping of the entire federal discovery process or a body of law that has developed over the course of many years in the federal courts. Any error in the Stevens prosecution was not in the law, but in the execution of the law. To avoid the possibility of repetition of further errors, the

Department of Justice to its credit has taken unprecedented steps in establishing a rigorous regimen of training and education for its prosecutors and law enforcement investigators.

We strongly challenge the notion that a nationwide systemic problem of discovery abuse by Assistant United States Attorneys exists and that such non-compliance requires a legislative fix. The careful balance of interests that at stake in criminal cases would be upset by legislation that could cause significant harm to victims, witnesses and law enforcement efforts, and generate substantial and unnecessary litigation that diverts scarce judicial and prosecutorial resources.

Over the past 10 years, the Department of Justice, mostly through the actions of its Assistant United States Attorneys, has filed over 800,000 cases involving more than one million defendants. In the same time period, only one-third of one percent (.33 percent) of these cases warranted inquiries and investigations of professional misconduct by the Department's Office of Professional Responsibility. Less than three-hundredths of one percent (.03 percent) of those inquiries related to alleged discovery violations, and just a fraction of these resulted in actual findings of misconduct. Moreover, Department of Justice statistics show that in 2010, 68,591 cases were prosecuted. In all those cases, only 26 allegations of *Brady* violations were reported. Even as to that small number of allegations, it is unknown how many allegations were dismissed as unfounded, how many alleged *Brady* violations were simply the result of a lone mistake or bad judgment, or how many were instances constituted actual prosecutorial misconduct.

What these facts prove is that American citizens can be assured that Assistant United States Attorneys conscientiously and diligently fulfill their *Brady* obligations on a routine basis. We are not unmindful that special interest groups are urging the passage of retaliatory legislation against government prosecutors, both state and federal, in the hopes of advancing their narrow self interest. This, though purporting to serve justice, merely serves to chip away at it.

We regard legislative proposals that would dramatically revise the criminal discovery process, such as the Fairness in the Disclosure of Evidence Act of 2012 (S. 2197) as unnecessary and inappropriate. An Assistant United States Attorney's duty to disclose exculpatory or impeaching information springs from his special role in our system of justice under the Constitution as the legal representative of the United States of America. In the context of a criminal prosecution Assistant United States Attorneys well understand that their ultimate responsibility in this role is the pursuit of justice. Furthermore, over decades the duty to protect the innocent and prosecute the guilty has been defined and interpreted by the Supreme Court and other appellate courts of the United States. Those courts have prodigiously studied and analyzed the Constitutional and legal rights to be afforded a criminal defendant. The Federal Judiciary is in the best position to determine the parameters of the discovery obligations of Assistant United States Attorneys. The Advisory Committee on Criminal Rules of the Judicial Conference of the United States recently reaffirmed that responsibility through its determination to preserve the current language of Rule 16 of the Federal Rules of Criminal Procedure.

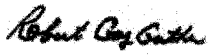
Thus, no further legislation is required. The proposed legislation will only confuse and complicate an already fair, well-known, and well understood discovery process.

Moreover, the proposed legislation will lead to a variety of unintended harms involving witness privacy and safety, as well as the potential and dangerous disclosure of national security-related information, including intelligence and law enforcement sources and methods. The legislation also will invite time-consuming and costly litigation over discovery issues not substantially related to a defendant's guilt, resulting in delayed justice for victims and the public and greater uncertainty regarding the finality of criminal verdicts. Inclusion of a provision for awarding attorney's fees would only provide significant incentive to engage in such collateral litigation.

In conclusion, while the Stevens case was deeply flawed, it does not represent the daily work of federal prosecutors throughout the country. Neither does it suggest a systemic problem warranting a significant departure from well-established criminal justice practices that have contributed to record reductions in the rates of crime in this country, while providing defendants with the basic rights of due process under the law.

Thank you for your consideration of these comments and for your whole-hearted and continued support for the necessary work that Assistant United States Attorneys perform for our nation.

Sincerely,



Robert Gay Guthrie
President

Prepared Statement of Sean Bennett, Kalamazoo, Michigan

FROM : FAX NO. : Nov. 29 2010 11:17AM P2

To Chair Sensenbrenner: Please include in Hearing Record

Sean Bennett
1011 Crown St.
Kal. Mich. 49006
734-239-3541

Statement To U.S. House Judiciary Subcommittee on Crime, 4-19-12 Hearing On The Prosecution of Senator Stevens

TO REMEDY AND DETER PROSECUTOR MISCONDUCT AND TO ASSURE THE CIVIL RIGHTS OF ALL AMERICANS CONGRESS SHOULD MODIFY THE SUPREME COURT'S LAW OF ABSOLUTE IMMUNITY FROM CIVIL LIABILITY FOR PROSECUTURS AND WITNESSES UNDER CIVIL RIGHTS LAW (2 pages)

The Supreme Court's recent decisions in Rehberg v Paulk, and VandeKamp v Goldstein, which have expanded absolute immunities previously proclaimed in Briscoe v LaHue, and Imbler v Pachtman, are wrong, and are contrary to justice, contrary to the public interest, contrary to the US Constitution, and contrary to 42 USC 1983,1985. When Congress passed a civil remedy to enforce the 14th Amendment of the Constitution in 1871, Congress was absolutely clear that they were not permitting any absolute immunities for any government officials or witnesses in judicial proceedings. The language of the Act as passed in 1871 stated that "any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any state, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States shall, *any such law, statute, ordinance, regulation, custom, or usage of the state to the contrary notwithstanding*, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress." The 2nd section of the Act stated that if two or more persons conspire together for the purpose of *in any manner obstructing the due course of justice* in any state, with the intent to deny any citizen the due and equal protection of the laws, the person injured or deprived of rights may maintain an action for damages against one or more of the persons engaged in the conspiracy.

The legislative history of the civil rights Act shows that it was the intent of Congress to make perjury an offense covered by the Act, and there is no of evidence that Congress only intended to make perjury which wrongly acquits liable and not perjury which wrongly convicts, Briscoe Majority wrong. Moreover, the common law differed from state to state on judicial and witness immunity. In many states witnesses who engaged in malicious prosecution did not receive absolute immunity, and indeed the only Supreme Court case on the issue in 1871 rejected absolute witness immunity, Briscoe Dissent correct. In a number of states even judges did not receive absolute immunity in 1871. Many Congressman spoke on the matter of judicial liability, and none understood the Civil Rights Act to be granting judges absolute immunity. An examination of the history surrounding the Act reveals that it would have been absurd for Congress to be granting absolute immunity to malicious prosecutors and malicious witnesses when the abuse of state judicial processes/malicious prosecutions by southerners to attack innocent citizens, including northerners, was a massive problem during this period. In the year following passage of the 1st Civil Rights Act in 1866 there were at least 100,000 complaints concerning abusive state court proceedings. Thus, the Supreme Court currently has usurped legislative powers to obstruct justice en mass so that victims of egregious Constitutional violations are alone as the only citizens who cannot sue, and the Court has done so by subordinating Federal law, the U.S. Constitution, and the most fundamental America values, to an erroneous interpretation of a varied state common law, and done so under the false pretense of claiming the public is clearly and substantially better off unable to sue. It is the duty of the judicial branch to hear and decide cases, not to refuse cases based on their views of public policy. It is for the duly elected legislative and executive branches to concern themselves with recruiting persons for office, or whether prosecutors should be indemnified, or how to respond to meritless civil rights claims.

Is there any American who would say that it is better for the American people to protect a guilty government official, who has violated the Constitution, betrayed a public office, abused government powers, and has injured or deprived a citizen of liberty, from legal accountability, than it is to allow an opportunity for compensatory justice for the citizen who has suffered injury from the intentional misconduct of a government official? Is there any American who would say that witnesses, including expert witnesses, will be more loyal to telling the truth, more accurate, and more likely to avoid lying where they cannot be sued for anything they say in court, no matter how false, malicious, or injurious? In a country who's citizens attach the greatest value to freedom, justice, human dignity, and the rule of law, and in a country who's foundational principle is that government's greatest duty is to secure our civil rights, it would be unthinkable for most Americans to say that they care more about protecting the guilty who have attacked the life or liberty of a citizen by maliciously abusing government powers, than they do about assuring that the unfortunate victim is at least allowed to attempt to pursue justice to be compensated for his/her losses.

Sincerely, Sean Bennett

Statement For The Record To U.S. House Judiciary Subcommittee on Crime 4-19-12 Hearing
RECOMMENDING CONGRESS MODIFY THE JUDICIALLY CREATED ABSOLUTE IMMUNITY FOR FEDERAL, STATE, AND LOCAL PROSECUTORS

Congress should amend S. Bill 2197 to permit a civil damages remedy for the Unconstitutional suppression or failure to disclose exculpatory evidence.

Congress should also enact a civil remedy for Constitutional claims against Federal government officials/employees, replacing what are now known as "Bivens" lawsuits.

We should expect the unconstitutional and harmful misconduct of Public Prosecutors against innocent citizens to be rare, but should it occur, the obvious solution is Insurance or governmental liability, not forcing the unfortunate violated citizen to be denied any opportunity for recovery.

The U.S. Supreme Court would have us believe that it is more important for prosecutors to seek a conviction, even where reasonable persons could not disagree the prosecution was improper, than it is for prosecutors to avoid an erroneous conviction. That the integrity of a Prosecutor's office and the Judicial process is served, not disserved, by allowing the corrupt, plainly incompetent, biased, or malicious prosecutor to ignore civil liability. That criminal and Bar sanctions against prosecutors are sufficient to deter misconduct, when these sanctions are virtually never enforced against prosecutors , no matter how egregious the misconduct. That an overzealous civil rights bar is going to deter honest, ethical prosecutors from doing their jobs right, by pursuing meritless civil rights lawsuits by disgruntled criminals. That the federal judicial process, along with a qualified immunity, along with all the resources of a public prosecutor's office, cannot be trusted to shield competent prosecutors from meritless lawsuits. That the public is better served when prosecutors do not fear for violating their Constitutional rights. That Executive branch administrative efficiency takes priority over justice, truth, and human rights in the U.S. , and that it is the Court's duty to say so.

The Supreme Court has a legitimate power to void legislation which seriously conflicts with the Constitutional rights of citizens. The Court has no legitimate power to void the Constitutional rights of citizens in the name of exercising legislative and executive branch powers. I urge Congress to intervene on these matters.

Thank you. Sincerely,

Please include in Hearing Record

To Chair Sensenbrenner:

Sean Bennett (Page 2)

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