



Recently Introduced Legislation Would Substantially Expand the Rights of Federal Criminal Defendants Concerning Exculpatory Evidence

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On the heels of last month's release of a report concerning alleged prosecutorial misconduct in the prosecution of former U.S. Senator Ted Stevens, federal lawmakers are considering legislation that would establish nationwide rules concerning the nature of exculpatory evidence that federal prosecutors must disclose to criminal defendants and the timing of that disclosure. The bill has received bipartisan support from several members of Congress as well as the American Bar Association, the National Association of Criminal Defense Lawyers, and the American Civil Liberties Union. If enacted, the legislation would substantially expand the scope of exculpatory evidence that must be disclosed under the Supreme Court's longstanding *Brady v. Maryland* decision.

THE STEVENS CASE

In October 2008, Stevens was convicted of failing to report over \$250,000 in improper gifts and home renovations. But in early 2009, allegations of prosecutorial misconduct began surfacing with an FBI agent's complaint that another agent and federal prosecutors had concealed potentially exculpatory evidence from Stevens's defense team. Ultimately, the presiding judge held three prosecutors in contempt for failing to turn over certain material that he had ordered them to disclose and, on the government's motion, set aside the guilty verdict and dismissed the charges.

The judge then ordered an independent review of the government's conduct in the Stevens case. The independent report concluded that the investigation was "permeated by the systematic concealment of significant exculpatory evidence" and "seriously damaged the testimony and credibility of the government's key witness." Among other things, the report concluded that "prosecutors never conducted or supervised a comprehensive and effective review for exculpatory information" and that the *Brady* review "was conducted by FBI and IRS agents, some of whom were unfamiliar with the facts" or with *Brady's* requirements. The Justice Department responded that it has "instituted a sweeping training curriculum for all federal prosecutors, and made annual discovery training mandatory."

THE PROPOSED LEGISLATION

The Fairness in Disclosure of Evidence Act of 2012 would require federal prosecutors to disclose any information or evidence that "may reasonably appear to be favorable to the defendant" with respect to "the determination of guilt; any preliminary matter before the court before which the criminal prosecution is pending; or the sentence to be imposed." This material would need to be provided "without delay after arraignment and before the entry of any guilty plea."

With certain exceptions, including for classified information and some material covered by protective orders, the legislation would require prosecutors to turn over this material promptly – without a court order requiring disclosure.

Perhaps most significantly, the legislation would eliminate the materiality requirement that has long existed under *Brady v. Maryland* for the disclosure of exculpatory evidence. Instead, prosecutors would be required to disclose any information that “may reasonably appear favorable” to a defendant “with respect to” guilt or punishment, as opposed to evidence that is “material” to guilt or punishment.

Violations would result in “an appropriate remedy,” including “postponement or adjournment of the proceedings; exclusion or limitation of testimony or evidence; ordering a new trial; dismissal with or without prejudice; or any other remedy determined appropriate by the court.” If a court were to determine that a prosecutor’s violation was the result of negligence, recklessness, or knowing conduct, the judge could require that the relevant agency pay costs and reasonable defense attorneys’ fees. In addition, the legislation would prohibit appellate courts from determining that an error arising from noncompliance was harmless “unless the United States demonstrates beyond a reasonable doubt that the error did not contribute to the verdict obtained.”

LOOKING AHEAD

In light of the publicity surrounding the Stevens prosecution and the independent report concerning the alleged prosecutorial misconduct in that case, it is not surprising that the Fairness in Disclosure of Evidence Act of 2012 has received support from various interest groups. On the other hand, the Justice Department has noted “significant concerns” about the impact of the proposed legislation. At a Congressional hearing last month, the Justice Department said the Stevens case was “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 Justice Department also stated the legislation “would upset the careful balance of interests at stake in criminal cases,” could put victims and witnesses at risk if their names are disclosed in pretrial discovery, and would require the disclosure of favorable evidence without regard to admissibility. Whatever the merits of the legislation, the Fairness in Disclosure of Evidence Act certainly would provide increased clarity and predictability in a critical area of criminal law while substantially expanding the scope of exculpatory information that prosecutors must disclose to criminal defendants.

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