

THE CONSTITUTION PROJECT



Safeguarding Liberty, Justice & the Rule of Law

FOR IMMEDIATE RELEASE - March 28, 2012

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Congress Must Act to Reform Criminal Discovery *Constitution Project Statement From Over 100 Criminal Justice Experts Demands Action*

WASHINGTON, D.C. -- More than 100 criminal justice system experts are calling on Congress to pass legislation requiring federal prosecutors to disclose favorable information to defendants and to provide appropriate penalties when they do not. Nearly 80 former federal prosecutors are among those joining the call, including former Acting U.S. Attorney General Stuart Gerson, former Deputy Attorney General Larry Thompson, former FBI Director William S. Sessions and noted author Scott Turow.

In a statement sent to the Senate Judiciary Committee yesterday, the bipartisan group of current and former judges, prosecutors, law enforcement officers, defense lawyers, opinion leaders and others say that a new law is needed to clarify federal prosecutors' disclosure obligations and address the problems that arise when prosecutors fail in their constitutional duty to hand over evidence that might help lawyers for an accused person mount an effective defense.

The statement was organized by The Constitution Project (TCP), a bipartisan watchdog group, whose president, Virginia E. Sloan, stated, "When so many leading members of the prosecution community demand legislation to cure a serious problem, Congress should take notice and act without delay."

The statement references "a string of recent cases...in which the defense eventually discovered undisclosed evidence that was constitutionally required to have been disclosed." The statement also cites a 2010 *USA Today* investigation that documented 86 cases since 1997 in which judges found that federal prosecutors had failed to turn over evidence required to be disclosed.

The statement also notes the high-profile corruption case the federal government brought against former U.S. Senator Ted Stevens (R-AK). The U.S. Department of Justice moved in April 2009 to set aside the jury verdict in Senator Stevens' case and dismiss the indictment after discovering that federal prosecutors in the case had withheld evidence that would have impeached the trial testimony of a key government witness and bolstered Stevens' defense. Stevens has since died in a plane crash.

The Senate Judiciary Committee heard testimony today from Henry Schuelke, III, the independent investigator appointed by the trial court judge, Emmet Sullivan, to examine the extent of the

prosecutorial misconduct in the Stevens' case. Schuelke found that the Stevens' prosecution had, in fact, been "permeated by the systematic concealment of significant exculpatory evidence."

"Our experience leads us to believe that the vast majority of prosecutors act in good faith to fulfill their constitutional and legal obligations," the signers of the TCP statement said. But they also noted that "inconsistent, shifting, and sometimes contradictory standards for criminal discovery" make it difficult for even well-meaning prosecutors to fulfill their obligations.

Self-regulation of the problem by the Department of Justice has been tried and failed, the statement says. Attempts to amend the Federal Rules of Criminal Procedure have similarly yielded no results. Consequently, the signers of the statement say that "only federal legislation can adequately address these continued violations by federal prosecutors." Senator Lisa Murkowski (R-AK) has introduced the Fairness in Disclosure of Evidence Act (S. 2197), legislation that would address many of the concerns raised in the statement. TCP supports the bill.

The constitutional obligation to disclose evidence arises from the U.S. Supreme Court decision in *Brady v. Maryland*, a 1963 decision holding 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." The failure by a prosecutor to disclose appropriate information is often referred to as a "*Brady* violation."

TCP's "Call for Congress to Reform Federal Criminal Discovery" with a full list of 112 signatories is available online at <http://constitutionproject.org/pdf/callforcriminaldiscoveryreform.pdf>.

[About The Constitution Project](#)

Created out of the belief that we must cast aside the labels that divide us in order to keep our democracy strong, The Constitution Project (TCP) brings together policy experts and legal practitioners from across the political spectrum to foster consensus-based solutions to the most difficult constitutional challenges of our time. TCP seeks to reform the nation's broken criminal justice system and to strengthen the rule of law through scholarship, advocacy, policy reform and public education initiatives. Established in 1997, TCP is based in Washington, D.C.



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