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Safeguarding Liberty, Justice & the Rule of Law

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Contact: Larry Akey, Director of Communications, (202)580-6922 [o] or (202)580-9313 [c], lakey@constitutionproject.org

Watchdog Group Calls on AG to Back Discovery Reform *TCP: 'Culture of Nondisclosure' at Justice Dept Requires Congressional Action*

WASHINGTON, D.C. -- Reports of the failure of the Justice Department to inform defendants of favorable evidence, and to ensure that state and local prosecutors do the same, should compel the agency to support legislation clarifying and simplifying the disclosure requirements, a constitutional watchdog group said in a [letter to Attorney General Eric Holder](#).

Saying they were "shocked" by the apparent "culture of nondisclosure" at the Department of Justice (DOJ), Stephen F. Hanlon and Virginia Sloan, chair and president respectively of The Constitution Project (TCP), a bipartisan legal think tank, called on Holder to back a new law that would "clarify the obligations of all federal prosecutors to disclose favorable evidence."

At issue is the constitutional duty of prosecutors to hand over evidence that might help lawyers for an accused person mount an effective defense, or for a convicted person to receive a fair sentence.

"The U.S. Supreme Court and other courts have repeatedly condemned the failure of prosecutors, whether intentional or inadvertent, to share with defendants evidence that is constitutionally, legally, and ethically required to be disclosed," Sloan said. "Yet all too often defendants are not given this information, and defendants are convicted and sentenced without any knowledge of what is in the government's possession and should be in theirs as well," she said.

Sloan and Hanlon were responding to several cases of nondisclosure, including recent reports by *The Washington Post* concerning the DOJ's investigation into the [flawed forensic reports and testimony](#) by the FBI that resulted in the wrongful conviction of innocent individuals, and even the apparent wrongful execution of one individual, and the department's subsequent efforts to [tightly control the disclosure](#) of the results.

According to the *Post* report, the DOJ investigation began in 1996 in response to criticism of the FBI about its handling of forensic evidence in several high-profile cases. DOJ investigators took nine years to complete their work, and the department never publicly released its findings. Instead, 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 to decide whether to disclose the information to affected defendants, many of whom apparently did not do so.

Although it applauded DOJ for undertaking the investigation, TCP called it "unconscionable" that defendants were notified of the potential flaws in the forensic evidence used against them in "fewer than half of the 250-plus questioned cases."

"While the DOJ claims that they met their legal 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," Hanlon and Sloan wrote.

Sloan and Hanlon noted a "continuing pattern of federal prosecutors' failing to disclose favorable evidence to the defense in direct violation of constitutional, legal and ethical requirements." They pointed not only to the prosecutions of the late Senator Ted Stevens, but also of W.R. Grace Corporation and its executives and, most recently, of Lindsey Manufacturing Corporation and its executives.

DOJ brought a high-profile corruption case against former U.S. Senator Ted Stevens (R-AK) in 2008, but subsequently asked the court to set aside the jury's guilty verdict 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 the Senator's defense. A [court-ordered investigation](#), conducted by Henry Schuelke III and finally released to the public earlier this year, found that the prosecution had been "permeated by the systematic concealment of significant exculpatory evidence." Stevens has since died in a plane crash.

Hanlon and Sloan said that the department has repeatedly claimed over the past decade that it can fix the problem of nondisclosure 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," they wrote.

"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," they added.

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."

In 1963, the U.S. Supreme Court ruled in *Brady v. Maryland* 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."

[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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