

THE CONSTITUTION PROJECT



Safeguarding Liberty, Justice & the Rule of Law

FOR IMMEDIATE RELEASE - April 24, 2012

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

The Constitution Project's Board of Directors Appalled at Department of Justice Discovery Obligation Breaches

As members of the Board of Directors of The Constitution Project, we are responding to recent reports in the media and elsewhere that the Department of Justice too often fails to disclose favorable evidence to defendants when it is constitutionally, legally, and ethically required to do so. We are appalled that, as a result, an untold number of people unjustly face criminal prosecution, languish in prison, live under the cloud of a criminal conviction, and in some cases, perhaps are even put to death. Our board comprises an ideologically, politically and professionally diverse group of people who have served in Congress, in the Department of Justice, in the White House under various presidents, in the federal judiciary, and in academia. Although we approach this issue from a variety of perspectives, we unanimously agree that legislative guidance is necessary to prevent future violations.

Prosecutors' duty to disclose favorable information to the defense arises from the Due Process Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution, as the U.S. Supreme Court explained in the seminal 1963 case of *Brady v. Maryland*. We know that the vast majority of prosecutors on the federal, state, and local levels perform their difficult duties in good faith and with every intention of adhering to the Constitution, and legal and ethical dictates. However, at the Department of Justice and at state and local prosecution offices, there appears to be, on the part of some, a continuing pattern of failure to comply with *Brady's* mandatory disclosure requirements.

For instance, two recent *Washington Post* articles describe an internal Justice Department investigation into flawed forensic evidence and problematic testimony by FBI analysts. However, according to the articles, the results of this internal investigation were not disclosed to many of those whose convictions were affected by the results, or to their lawyers. This follows on the heels of a judicially-ordered report in the high-profile prosecution of the late Senator Ted Stevens, which found that the prosecution had been "permeated by the 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."

Numerous examples in lower profile cases abound, such as a federal prosecutor's failure to produce prior inconsistent statements of a police officer witness in the prosecution of Darwin Jones, in which the court reprimanded the prosecution in 2009 for its "dismal history of intentional and inadvertent violations of the government's duties to disclose in cases assigned to this court." More

recently, in January 2012, federal prosecutors moved to dismiss charges against defendant Andrew Berke, following a statement from the trial judge that he was going to have to dismiss the charges himself based on a law enforcement officer's destruction of "apparently exculpatory" evidence in the case; prosecutors failed to notify the defense of the destruction. And the conviction of Lindsey Manufacturing Corporation and two of its executives under the Foreign Corrupt Practices Act was vacated in December 2011, partly because the judge found that the government had "recklessly failed to comply with its discovery obligations."

Unfortunately, most prosecutorial nondisclosures by their very nature go undiscovered by the defense, which generally has no way to uncover what prosecutors have chosen to keep hidden.

The Department of Justice has repeatedly assured Congress and the public that it can, and has, put its house in order. However, the evidence belies this claim. Let us be clear, these are not all cases of prosecutors acting in bad faith to hide evidence they know must be disclosed to defendants. Many times these violations result from prosecutors erroneously concluding, in good faith, that evidence is not subject to disclosure obligations, because, for example, it does not comply with the obligations the *Brady* case imposes on them. But these good faith errors only strengthen the argument that the Department must support congressional efforts to create clear, uniform, statutory guidelines for the disclosure of favorable evidence.

In addition, if the Department becomes aware of problems with the analysis, evaluation or handling of evidence in the future, the Department must not "go it alone" in attempting to rectify such problems. The Department must work with independent experts, the defense bar, the American Bar Association, ethics authorities, and others with relevant experience, to conduct a comprehensive examination of affected cases. Working with these independent experts, the Department must also develop rigorous procedures for the immediate reporting of potentially exculpatory evidence to not only the prosecutors, but also to the defendants and their counsel, in all affected cases.

The Board of The Constitution Project believes that an unprecedented opportunity is at hand for the Department of Justice to show a commitment to the Constitution and to fairness and accuracy in our criminal justice system. It must assure the American public that it is putting into practice the principle that a prosecutor's first duty is not to ensure and protect convictions at all costs, but to ensure justice and to adhere to the Constitution.

Members of The Constitution Project's Board of Directors

Stephen F. Hanlon - Chair
Holland & Knight LLP

Mariano-Florentino Cuéllar
Stanford Law School

Mickey Edwards
Aspen Institute and Princeton University

Armando Gomez
Skadden Arps

Phoebe A. Haddon
Francis King Carey School of Law
The University of Maryland

Morton H. Halperin
Open Society Foundations

Kristine Huskey
Physicians for Human Rights

Asa Hutchinson
Asa Hutchinson Law Group PLC

David A. Keene
The American Conservative Union

Timothy K. Lewis
Schnader Harrison Segal & Lewis LLP

William S. Sessions
Holland & Knight LLP

Virginia Sloan
The Constitution Project

Note: Affiliations listed for identification purposes only.

[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.



Try it FREE today.