June 5, 2012

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
United States Senate
Washington, DC 20510

The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
224 Dirksen Senate Office Building
United States Senate
Washington, DC 20510

Re: “Ensuring that Federal Prosecutors Meet Discovery Obligations”

Dear Chairman Leahy and Ranking Member Grassley:

I write to you on behalf of the American Bar Association, with nearly 400,000 members nationwide, to commend you for scheduling a hearing on the disturbing issue of federal prosecutors’ failure to meet their constitutional obligations to provide accused persons and entities with important information critical to their ability to defend themselves.

In 1963 the Supreme Court decision in *Brady v. Maryland* stated the constitutional basis of the duty of prosecutors to disclose evidence to the defense, holding that: "The suppression by prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." A few years later, in *Giglio v. United States*, 405 U.S. 150, 154 (1972), the Supreme Court made it clear that the prosecutor's duty to disclose is not limited to exculpatory evidence, but also covers "evidence affecting credibility," in other words, impeachment evidence. In *United States v. Agurs*, 427 U.S. 97 (1976), the Supreme Court held that the prosecution's constitutional duty to disclose is not limited to situations where the defendant made a specific request for the relevant evidence.

The ABA has been concerned since *Brady* and its progeny with articulation of a rule or standard that will guide prosecutors and in their responsibilities to disclose evidence to the defense. The ABA House of Delegates has approved several resolutions calling for various steps to improve the discovery process in recent years, including: in February 2010 calling for courts to conduct a pre-trial conference to facilitate discovery in criminal cases; in February 2011 calling for adoption of court rules requiring use of a written checklist of disclosure obligations of the prosecution under *Brady*; and, most recently, in August 2011 supporting legislation to implement a standard for discovery obligations of prosecutors under *Brady*.

The ABA concluded last year that federal legislation is needed to implement *Brady* disclosure duties. After a decade of controversial and highly publicized cases, the
response by DOJ through a succession of studies and formulation of internal guidance memoranda has not resulted in a uniform practice as to the timing or scope of *Brady* and *Giglio* disclosures by federal prosecutors. There are wildly different policies in the local United States Attorney Offices and, on occasion, amongst Assistant United States Attorneys in a particular office. For example, some United States Attorney Offices routinely provide FBI interview forms and interview memoranda of witnesses to comply with *Brady* and *Giglio*, while other United States Attorney Offices virtually never produce witness interview memoranda or agent or prosecutor notes regarding interviews. There is no reason why the DOJ should have 97 different policies rather than one uniform policy.

Unfortunately, the type of conduct at issue in the highly publicized criminal case against former Senator Stevens is not a rare occurrence, nor did the Department of Justice effectively address the serious flaws within its own organization after the problems with the Stevens prosecution came to light.

The disturbingly high number of reported instances of similar prosecutions, as well as the countless stories left undiscovered and untold, provide clear evidence that federal prosecutors are failing to discharge their constitutional obligation under *Brady*, whether as a result of intentional tactical decisions, negligence, or a misunderstanding of their obligations. To address this problem, Senator Murkowski’s recently proposed discovery reform legislation creates clear and meaningful standards governing the prosecutor’s duty to disclose any and all evidence favorable to individual and corporate defendants.

The “Fairness in Disclosure of Evidence Act of 2012” (S. 2197) provides that in a federal criminal prosecution, the prosecutor must provide to the accused any “favorable” information that is either in the possession of the prosecution team or would become known to the prosecutor through the exercise of due diligence, without delay after arraignment. It provides a fair mechanism by which prosecutors can seek a protective order in the rare case in which there is a reasonable basis to believe that disclosure would endanger a witness. The bill also completely exempts any classified information from its purview and instead makes clear that such information will continue to be handled, as it is now, under the provisions of the Classified Information Procedures Act (CIPA), 18 U.S.C. App. §§ 1-16. Lastly, the bill provides the court with wide discretion to provide an appropriate remedy for noncompliance.

The time for a clear and uniform standard for disclosure of favorable evidence by the prosecution in federal criminal cases has come, and therefore we encourage you to consider the merits of current reform proposals. Thank you for your consideration, and please do not hesitate to contact us if you have any questions or want additional information.

Sincerely,

Thomas M. Susman