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The Proposed Fairness in Disclosure of Evidence Act of 2012: More Cons than Pros with Proposed Disclosure Requirements in Federal Criminal Cases

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Comment

The Proposed Fairness in Disclosure of Evidence Act of 2012: More Cons than Pros with Proposed Disclosure Requirements in Federal Criminal Cases*

I. INTRODUCTION: BRADY, THE ACT, AND MODEL RULE 3.8

The proposed Fairness in Disclosure of Evidence Act of 2012 (the Act) is a proposal of uniform standards for disclosing evidence in federal criminal cases that was introduced on March 15, 2012 by Senator Lisa Murkowski of Alaska.[1] The Act's stated purpose is: "To require the attorney for the Government to disclose favorable information to the defendant in criminal prosecutions brought by the United States, and for

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* The Author would like to thank Professor James P. Fleissner for his guidance in each stage of developing this Comment.

1. Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. (2d Sess. 2012), *available at* http://www.govtrack.us/congress/bills/112/s2197 (last visited Jan. 26, 2013). The bill also has five co-sponsors: Daniel Akaka (Democrat) of Hawaii, Mark Begisch (Democrat) of Alaska, Kay Hutchinson (Republican) of Texas, Daniel Inouye (Democrat) of Hawaii, and Michael Enzi (Republican) of Wyoming.

other purposes."[2] Particularly, the Act would amend Chapter 201 of title 18 of the United States Code by adding the text that is discussed below.[3]

On June 5, 2012, Thomas M. Susman, ABA Director of the Government Affairs Office, wrote a letter to the Honorable Patrick Leahy, Chairman of the Congressional Committee on the Judiciary, as well as the Honorable Charles Grassley, a ranking member in the Committee on the Judiciary, commending the scheduling of a hearing regarding the topics that the proposed legislation addresses.[4] Susman described the problem that the Act addresses as, "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."[5] Susman then directly addressed how *Brady v. Maryland*[6] has shaped federal criminal law since 1963.[7]

Brady stated the constitutional reasoning for the duty of prosecutors to disclose evidence to opposing counsel, finding "the suppression by the 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."[8] Then in *Giglio v. United States*[9] in 1972, the Court clarified that the duty to disclose is not limited only to exculpatory evidence, but also covers evidence "affecting credibility."[10] Following that decision, in *United States v. Agurs,*[11] the Court held this duty is not only in place when a defendant requests the pertinent evidence, but all the time.[12]

The Comment below addresses the shortcomings of this Act by analyzing both the arguments for and against it. A bill to prevent prosecutorial misconduct is one that is easy to support and difficult to oppose, for obvious reasons. As explained below, those who reject supporting the Act do not do so because they encourage or endorse

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2. S. 2197, 112th Cong. (2d Sess. 2012).
3. *Id.* § 2.
4. Letter from Thomas M. Susman, ABA Director of the Government Affairs Office, to the Honorable Patrick Leahy, Chairman of the congressional Committee on the Judiciary, as well as the Honorable Charles Grassley, member in the Committee on the Judiciary (June 5, 2012), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/ GAO/2012jun5_discoveryobligations_l.authcheckdam.pdf.
5. *Id.*
6. 373 U.S. 83 (1963).
7. Susman, *supra* note 4.
8. 373 U.S. at 87.
9. 405 U.S. 150 (1972).
10. *Id.* at 154.
11. 427 U.S. 97 (1976).
12. *Id.* at 107.

wrongful convictions. Instead, the rejection of the proposal comes from its rushed and reactionary requirements that undermine firmly-established precedent regarding discovery obligations.

The proposal not only dramatically changes the materiality standard for exculpatory evidence, it also imputes knowledge to prosecutors that creates an investigative duty for offices that will be impossible to comply with. Further, it requires that prosecutors prove beyond a reasonable doubt—a reverse-standard of proof to that of the conviction burden they already carry—that they have produced such exculpatory evidence.

Under Model Rule of Professional Conduct 3.8 (Rule 3.8),[13] prosecutors have to turn over all exculpatory evidence.[14] The rule provides in comment 1, "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."[15] The comment continues, "[t]his responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons."[16]

However, what Rule 3.8 does not include is an imputation of knowledge on the prosecutor. This is a standard that will be further discussed below, but one that the Author believes to be unworkable. Further, under the proposal, there is a broad duty to turn over any exculpatory information, and if prosecutors fail to do so, they must show that their failure was, beyond a reasonable doubt, harmless to the defendant.[17] This implicit "criminalizing" of prosecutors' misconduct is one that the Author considers to be a far overshoot of what is necessary to prevent prosecutorial misconduct. Further, it is unnecessary considering the materiality standard already in place which institutes a standard that has proved to be both workable by prosecutors and which sets a reasonable burden for showing the information not turned over would not have harmed the defendant. This standard will be further discussed below.

There are other problems with the Act that step outside of the reasonable bounds that Rule 3.8 delineates for prosecutors. The Act creates a duty to investigate—if one reads the Act literally it says that prosecutors have a duty to turn over *everything* exculpatory that is in possession of, or could, in due diligence, be found for the defendant.[18]

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13. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2012).
14. *Id.*
15. *Id.* at cmt. 1.
16. *Id.*
17. S. 2197 § 2.
18. *Id.*

This language creates an investigative function for the prosecutor that would traditionally be defense counsel's job.

Not only is the prosecutor, under the proposal, required to look for evidence that the defendant committed the crime, but also any evidence that could be exculpatory that he did not commit the crime—not just evidence that is material, but *any* evidence.[19] This shift creates an unworkable standard because now, defense counsel, if they are acting with due diligence, will be required to check up and make sure the prosecutor (and prosecutorial team) is investigating exculpatory information as well—and turning over that information immediately.

II. History of Prosecutorial Discovery Compliance

All prosecutors have the heavy burden of ensuring justice in their pursuit of convictions of those guilty of a crime. While preparing and presenting a case, a prosecutor could easily become aware of information that could help the defendant.[20] That information can oftentimes be in the prosecutor's files before either the defendant or defense counsel even knows that it exists.[21] The government often has both more and better-quality resources, as well as law-enforcement, and through the nature of its policies and procedures, the government also has very early access to "critical evidence."[22] Some examples are:

> a prosecutor might discover a police report of an interview with an eyewitness who stated that the defendant was not the perpetrator of the robbery; the police might tell the prosecutor that one of his key witnesses recently failed a lie detector test and then partially recanted his story; a prosecutor might learn that a laboratory test failed to link the defendant to the murder weapon and items of clothing worn by the killer; or a prosecutor at trial might hear his main witness embellish his testimony to such an extent that he is committing perjury.[23]

Further, the assumption is that in these examples, the prosecutor believes wholeheartedly in the accused's guilt, and has significant evidence to support that belief.[24] The prosecutor has an interest and a duty in protecting the community by securing a conviction.[25] The duty to disclose any evidence to a defendant that is favorable to his case

19. *Id.*
20. Bennett L. Gershman, Prosecutorial Misconduct § 5:1 (2d ed. 2012).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*

"raises difficult legal and ethical questions."[26] Obviously, a prosecutor does not have to share his whole file with a defendant, nor his strategies for prosecuting.[27]

Still, a prosecutor is more than just a zealous advocate for his "client"—he represents a government that is committed to "ensur[ing] that justice is done under fair and civilized rules."[28] Also, failure to disclose favorable evidence is a serious violation of ethical rules that can lead to a horrible miscarriage of justice, especially in convicting the innocent or forcing guilty pleas that may not have occurred but for the withholding of evidence.[29]

The Supreme Court has outlined rules governing this duty. The rules are often grouped as "Brady" rules, after the landmark case, *Brady v. Maryland*.[30] *Brady* rules apply when "a prosecutor has failed to disclose to a defendant convicted of a crime favorable evidence, has solicited false testimony, or allowed false testimony to go uncorrected."[31] This Comment discusses how recent proposed legislation aims to regulate a prosecutor's duty to assist a defendant in obtaining exculpatory evidence, including both the benefits and the shortcomings of that regulation.

Kyles v. Whitley[32] explains how prosecutors are responsible for finding the material exculpatory information in the hands of the police.[33] The Court explained that, "[w]hile the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden."[34] This burden is one that prosecutors' policies and procedures have been developed around.[35] *Kyles* continues,

> On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to

26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*; Brady v. Maryland, 373 U.S. 83 (1963).
31. GERSHMAN, *supra*, note 20, § 5.1.
32. 514 U.S. 419 (1995).
33. *Id.* at 421.
34. *Id.* at 437.
35. *Id.* at 437-38.

> gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached.[36]

Under this system, the traditional balance between the prosecutor and defense counsel is preserved. Justice Souter continues,

> [t]his in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see *Brady*, 373 U.S., at 87, 83 S.Ct., at 1196–1197), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.[37]

The opinion here elucidates the burden of prosecutors' responsibility. The Act creates an impossible burden with the extension of the scope of the agencies the prosecutor is required to investigate. The "prosecutorial team" extends to agencies that the prosecutors work with, creating a literally impossible burden to meet when the imputation of knowledge is combined with the scope of the team.[38]

This Comment, above all, aims to generate discussion from a neutral vantage point. Below are arguments both in favor of and in opposition to the Act. Both sides emphasize their vantage point largely due to the associations they represent. That said, it is important that this analysis start from an empirical analysis of the problem of prosecutorial misconduct. Several intrinsic empirical obstacles prevent an accurate assessment of how widespread prosecutorial misconduct in the United States is.[39] Obviously, anyone who willfully breaks the rules does not want to be found out and thus would likely take steps to "conceal their misdeeds."[40] Further, "[e]ven a scrupulous prosecutor who witnesses a colleague engage in misconduct may [not] report it for fear of professional repercussions."[41]

Another important consideration is the autonomy of prosecutors' offices in creating their own policies, and even though "judicial oversight should theoretically check this autonomy, courts are generally loath to

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36. *Id.* at 438.
37. *Id.* at 437-38.
38. S. 2197 § 2.
39. David Keenan, Deborah Jane Cooper, David Lebowitz, Tamar Lerer, *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 209-13 (2011), http://yalelawjournal.org/2011/10/25Keenan.html.
40. *Id.* at 209.
41. *Id.* at 209-10.

interfere with the inner workings of a coordinate branch of government[,]" and rightly so based on the role of the judiciary.[42] Individual prosecutors also have very broad discretion when deciding who will be prosecuted and with what charges.[43] One article notes, "[p]retrial hearings ostensibly exist to cabin these powers but in practice rarely operate as an effective safeguard."[44] Because of this seemingly "insulated" set-up, misconduct can slip by undeterred.

So how much misconduct is out there? One article points out that "the vast majority of known instances of prosecutorial misconduct come to light only during the course of a drawn-out trial or appellate proceeding."[45] Further, since most criminal cases "plea out," there is little investigation into the processes followed by prosecutors, and thus little exposure of misconduct. One of the most problematic reasons that could explain prosecutorial misconduct is that "those in the best position to report misconduct—namely judges, other prosecutors, and defense attorneys and their clients—are often disincentivized from doing so for both strategic and political reasons."[46] The only one who would have an interest in doing so has very little incentive in creating an even greater adversary as one judge explains: "[It is unreasonable] to expect a defendant to risk a prosecutor's actual or imagined displeasure by instituting proceedings that cannot directly benefit him. The defendant may not unreasonably believe such action will adversely affect his case in subsequent proceedings . . . or his later chances for parole."[47]

The evidence we do have shows that prosecutorial misconduct is a grave problem.[48] One study found, for instance, over two thousand appellate cases in the last four decades where prosecutorial misconduct made for dismissals, sentence reductions, or reversals.[49] Another study of capital convictions in America from 1973 to 1995 found evidence of either the defendant's innocence or favorable evidence to negate the death penalty was withheld in one in six cases where the conviction was reversed.[50]

Some argue that these statistics "significantly underreport" the width and depth of prosecutorial misconduct, not only because of empirical obstacles, but also of the "harmless error" standard courts utilize upon

42. *Id.* at 210.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 211.
48. *Id.* at 211-12.
49. *Id.* at 211.
50. *Id.* at 211-12.

review of criminal convictions.[51] For a reversal, a defendant "must not only prove misconduct, but must also show that the misconduct substantially prejudiced the outcome of his or her trial."[52] So, with this standard, courts can hedge the difficult finding by simply deeming the error harmless, even if it is proven.[53] One article notes: "[k]nowing that 'minor' misconduct is unlikely to jeopardize a conviction on appeal, prosecutors may be more likely to bend the rules in the pursuit of victory."[54]

This Comment will address the obstacles that the proposed Fairness in Disclosure of Evidence Act meets and, debatably, fails to overcome. It will detail the benefits and arguably overwhelming burdens that the Act creates through its over-creation of duties for individual prosecutors. It will explain how the Act fails to take into account the benefits of locally-operated prosecutors' offices that can manage prosecutors on a more familiar level, while placing burdens on prosecutors that are difficult to shoulder. Though clearly there needs to be some reform of policies, especially since the *Stevens* case has been consuming headlines, this reactionary suggestion will create more problems than solutions for prosecutors and the communities they protect.

III. THE PROPOSED FAIRNESS IN EVIDENCE DISCLOSURE ACT

A. *The Text*

The "Official Summary" on GovTrack, an online source for tracking the progress of bills, summarizes the text of the Act as such:

> Fairness in Disclosure of Evidence Act of 2012 - Amends the federal criminal code to require the attorney for the government, in a criminal prosecution, to provide to the defendant any information or evidence that may reasonably appear to be favorable to the defendant regarding the determination of guilt, any preliminary matter before the cour[t], or the sentence to be imposed (covered information):
> (1) that is within the possession, custody, or control of the prosecution team; or
> (2) the existence of which is known, or through due diligence would become known, to that attorney.
> Directs the government attorney to provide to the defendant any covered information:

51. *Id.* at 212.
52. *Id.*
53. *Id.*
54. *Id.*

> (1) without delay after arraignment and before the entry of any guilty plea; and
> (2) as soon as is reasonably practicable upon its becoming known, without regard to whether the defendant has entered or agreed to enter a guilty plea.
> Authorizes the court, upon motion of the United States which the court may permit to be filed under seal to protect a witness's identity, to issue an order to protect against immediate disclosure if:
> (1) the covered information is favorable to the defendant solely because it would provide a basis to impeach the credibility of a potential witness, and
> (2) the United States establishes a reasonable basis to believe that the identity of the potential witness is not already known to any defendant and disclosure would present a threat to anyone's safety.
> Permits the court, under specified circumstances, to accept a waiver of this Act by a defendant.
> Prohibits a defendant from waiving a provision of this Act except in open court.
> Requires the court to order an appropriate remedy upon determining that the United States has violated the requirement to disclose or to disclose in a timely manner and provides for payment of the defendant's costs.[55]

In order to fully examine the Act, an analysis of the proposed Act's relevant sections are included below. Section 2, "Duty to Disclose Favorable Information" adds to Chapter 201 of title 18 of the United States Code several definitions. These include the term "covered information," which is defined as:

> information, data, documents, evidence, or objects that may reasonably appear to be favorable to the defendant in a criminal prosecution brought by the United States with respect to (A) the determination of guilt; (B) any preliminary matter before the court before which the criminal prosecution is pending; or (C) the sentence to be imposed.[56]

This section also includes who is under this duty by defining the "prosecution team" as:

> (A) the Executive agency . . . that brings the criminal prosecution on behalf of the United States; and (B) any entity or individual, including

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55. LIBRARY OF CONGRESS SUMMARY, S. 2197 (112th): Fairness in Disclosure of Evidence Act of 2012 (2012), *available at* www.govtrack.us/congress/bills/112/s2197#summary/libraryofcongress. The summary was written by the Congressional Research Service, a nonpartisan arm of the Library of Congress; GovTrack did not write the summary.

56. Fairness in Disclosure of Evidence Act of 2012, S. 2197 § 2, 112th Cong. (2d Sess. 2012).

> a law enforcement agency or official, that—(i) acts on behalf of the United States with respect to the criminal prosecution; (ii) acts under the control of the United States with respect to the criminal prosecution; or (iii) participates, jointly with the Executive agency described in subparagraph (A), in any investigation with respect to the criminal prosecution.[57]

The definitions define the duty itself, clearly one of the most important terms, as follows:

> In a criminal prosecution brought by the United States, the attorney for the Government shall provide to the defendant any covered information—(1) that is within the possession, custody, or control of the prosecution team; or (2) the existence of which is known, or by the exercise of due diligence would become known, to the attorney for the Government.[58]

One of the most crucial determinations is when this information would have to be turned over, which can be found in the definition of timing, which must be:

> (1) without delay after arraignment and before the entry of any guilty plea; and (2) if the existence of the covered information is not known on the date of the initial disclosure under this subsection, as soon as is reasonably practicable upon the existence of the covered information becoming known, without regard to whether the defendant has entered or agreed to enter a guilty plea.[59]

B. The ABA and Other Supporters of the Act

The variety of policies was the greatest reason for formulating the Act as written. As Susman discussed in the ABA letter to the Congressional Judicial Committee:

> [F]ederal 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.[60]

Susman explains that the "wildly different policies" are the problem and that there is "no reason why the DOJ should have 97 different policies

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57. *Id.* § 2.
58. *Id.* § 2 (emphasis added).
59. *Id.* § 2.
60. Susman, *supra* note 4.

rather than one uniform policy."[61] One example is that some United States Attorney Offices provide FBI interview forms and interview memoranda of witnesses routinely to comply with disclosure duties while other United States Attorney Offices regularly do not. Susman makes this argument, but does not explain why the variations are necessarily harmful. In fact, localized attention to when disclosure is necessary on a case-by-case basis may be an important efficiency and thoroughness strategy for USAO offices.

One article, "Justice After Senator Stevens," explains the problems that have spurred the Act by explaining the highly-publicized prosecutorial misconduct in Senator Steven's trial.[62] It alleges that "[t]he Department of Justice has acknowledged pervasive prosecutorial misconduct in the corruption trial of the late Senator Ted Stevens. It needs to take an even closer look at the powers and responsibilities of its prosecutors, after a scathing new report on the case by a court-appointed investigator."[63] At Senator Stevens's trial in 2008, evidence was concealed that had the potential to damage the testimony and credibility of the federal prosecutors' most important witness.[64] Henry Scheulke, special counsel, conducted an investigation that took over two years and summarized his findings in March of 2012.[65] Stevens was found guilty of lying to hide gifts relating to home-renovation and lost a re-election bid narrowly only a few days later.[66] Though the verdict was set aside before Stevens died in a plane crash in 2010, the prosecutorial misconduct in that case raised several red flags that have spurred on the attempted reform behind this Act.[67]

Among the misconduct described in the report is that "the prosecuting team went unsupervised, withheld documents and never conducted a review for exculpatory evidence. Their 'complete, simultaneous and long-term memory failure' concerning a crucial witness with information backing the senator's claim of innocence was 'astonishing,'" according to Schuelke.[68] But Schuelke concluded that "contempt charges against

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61. *Id.*

62. *Justice After Senator Stevens*, N.Y. TIMES, Mar. 18, 2012, http://www.nytimes.com/2-012/03/19/opinion/justice-after-senator-stevens.html?_r=0.

63. *Id.*

64. *Id.*

65. Report to Hon. Emmett G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated Apr. 7, 2012, In re Special Proceedings, No. 1:09-mc-00198-EGS (D.D.C. Mar. 15, 2012), *available at* http://legaltimes.typepad.com/files/Stevens_report.pdf [hereinafter Schuelke Report].

66. *Justice After Senator Stevens*, *supra* note 62.

67. *Id.*

68. *Id.*

team members—not all were found at fault—were not feasible because they did not receive an explicit reminder from a judge of their obligation to disclose evidence helpful to the defense."[69] Since this investigation, the Justice Department has increased training prosecutors on policy regarding exculpatory evidence. That said, they still have the discretion to decide what is "material."[70]

An ABA letter commending Senator Lisa Murkowski for her efforts is a good example of the arguments in favor of the Act.[71] The President of the ABA wrote, "We strongly support the proposed Act and believe its enactment will be an important step toward achieving consistency and improving fairness in the federal criminal justice system and will serve the cause of achieving justice in countless individual cases."[72] The reasoning, though, assumes that prosecutors are not able to be impartial in their evaluation of the materiality of evidence: "[in] the federal criminal system, the government often has control over the ability of the defense to obtain evidence it needs to try its case. Specifically, the government is required to assess whether evidence is exculpatory and to disclose that information to the defense."[73] Once information is deemed "exculpatory," its disclosure is crucial to protecting the defendant's Fifth and Sixth Amendment rights.[74] The ABA has several standards attempting to regulate conduct in criminal trials; The Standards for Criminal Justice: Prosecution Function "set out guidance for implementing *Brady* duties at Standard 3-3.11, Disclosure of Evidence by the Prosecutor, as does Rule 3.8(d) of the Model Rules of Professional Conduct, prepared by the ABA."[75]

Without a clear definition of what *Brady* material is, prosecutors inevitably use many varying decision-making practices about what materials are favorable to defendants, and thus what should be disclosed.[76] The ABA describes this practice as "confusing," stating that "[e]ven rare violations of *Brady* are intolerable," because criminal convictions are too weighty for the occasional mistake.[77]

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69. *Id.*

70. *Id.*

71. Letter from Wm. T. (Bill) Robinson III to the Honorable Lisa Murkowski, United States Senator (Mar. 15, 2012), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2012March15_EvidenceDisclosure_l.authcheckdam.pdf. (last visited Jan. 26, 2013).

72. Robinson, *supra* note 71.

73. *Id.*

74. *See* Brady v. Maryland, 373 U.S. 83, 87-88 (1963).

75. Robinson, *supra* note 71.

76. *Id.*

77. *Id.*

There are several other arguments in support of the proposal. The Act clarifies the timing of *Brady* disclosures, for example.[78] One author explains,

> Whereas the law currently allows the government to provide *Brady* disclosures essentially any time it wants before trial (with the . . . limitation that it must be provided within a reasonable time for the defense to use it at trial), the Act requires the disclosure of such information "without delay after arraignment."[79]

The proposal would also require the information be handed over before any guilty pleas are entered.[80] This would make it more likely that more parts of the case are known before a defendant decides to plead guilty.[81] Further, the current Jencks Act[82] allows prosecutors to hold information that is contained in witness statements until after a witness testifies—this Act requires that this same information (if it is favorable to the defense) be produced.[83]

One of the greatest strengths of the Act is the definition of what it means for evidence to be in the "possession" of the government as far as its discoverability.[84] Federal criminal cases often raise this contention regarding the denial of the government based on denying possession, "while the defense seeks to impute to the prosecution possession of an item by any part of the government."[85] The Act includes government agencies that participate in *any* investigation as within the definition of the prosecution.[86] The Act also includes disclosing items prosecutors either know about or should know about; which effectively means that prosecutors should not be able to avoid disclosure by avoiding knowledge of certain parts of the investigation.[87]

Specifically, the Act attempts to solve the "materiality" issue, which has divided so many courts asking the question about the importance of certain evidence before trial. Courts are currently applying a post-trial evaluation method by asking "would the information at issue have made

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78. Matthew Umhofer, *Fairness in Disclosure of Evidence Act: The good and the bad*, (Apr. 23, 2012), http://newsandinsight.thomsonreuters.com/Legal/Insight/2012/04_April/Fairness_in_Disclosure_of_Evidence_Act_The_good_and_the_bad/.

79. *Id.*

80. S. 2197 § (2).

81. Umhofer, *supra* note 78.

82. 18 U.S.C. § 3500 (2012).

83. Umhofer, *supra* note 78.

84. S. 2197 § 2.

85. Umhofer, *supra* note 78.

86. *Id.*

87. *Id.*

a difference in the trial *result*?"[88] Matthew Umhofer argues that under this standard, prosecutors are able to withhold more because they can make a good-faith argument that they did not think that a particular piece of evidence would influence the jury.[89] Though this is much cleaner, the argument for simply necessitating a better rule of law often fails depending upon the situation being evaluated.[90] Instead, a bright-line rule is instituted, requiring prosecutors to turn over any favorable information related to guilt or sentencing.

Some argue that the Act also deals with admissibility well.[91] Currently, inadmissible evidence has not been covered under the *Brady* standard, according to the Supreme Court.[92] This means inadmissible but favorable evidence could be withheld because prosecutors did not think the evidence would be able to be presented at trial. The Act does not include these limits, taking the discretion of its admissibility out of the prosecutor's hands. Further, the Act includes remedies for failures to disclose favorable evidence which include: (1) a new trial being ordered; (2) dismissal without prejudice; and, (3) enabling a defendant to recover costs when discovery violations are successfully exposed through litigation.[93] There is also a prohibition at the appellate level of a court finding a disclosure error "harmless" unless the "United States demonstrates beyond a reasonable doubt that the error did not contribute to the verdict obtained."[94]

One blog from the Southern District of Florida calls the proposed legislation "entirely non-controversial . . . [with] support of both Democrats and Republicans."[95] It goes on to say, "[o]ne problem—[the Department of Justice] will oppose the bill. And for no good reason except that it doesn't want to have to turn over favorable information if [it's] not material."[96] David Oscar Markus, the writer for the blog, denotes Senator Murkowski's explanation of why the Act is needed:

> It is the solemn responsibility of federal prosecutors to secure justice—not simply convictions. It is the responsibility of the government to prove an individual's guilt beyond a reasonable doubt, and if the

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88. *Id.* (emphasis added).
89. *Id.*
90. *See infra* Subsection C.
91. Umhofer, *supra* note 78.
92. *See Brady*, 373 U.S. at 87.
93. Umhofer, *supra* note 78.
94. S. 2197 § 2.
95. David Oscar Markus, *The Fairness in Disclosure of Evidence Act*, SOUTHERN DISTRICT OF FLORIDA BLOG (Mar. 15, 2012), http://sdfla.blogspot.com/2012/03/fairness-in-disclosure-of-evidence-act.html.
96. *Id.*

> government cannot, it is expected to voluntarily abandon the case. To keep Americans' faith in the system we must raise the standards for government prosecutors and cut the chances that we will see the same "hide the ball" tactics Sen. Stevens faced.[97]

Senator Murkowski goes on,

> Enough is enough. When his conviction was overturned, Sen. Stevens said, "What some members of the prosecution team did nearly destroyed my faith." Ted Stevens was a life-long public servant. He and all Americans deserve to have full faith in the judicial system in this country. We cannot allow the government to have a finger on the scales of justice. My bill will ensure that another legacy of the Alaskan of the 20th Century is fairness and justice for the centuries ahead.[98]

Kirsten Schimpff argues that the Act substantially changes the Jencks Act by requiring initial disclosure of all "favorable information, 'notwithstanding the Jencks Act.'"[99] Schimpff notes how similar the Act is to the text of Formal Opinion 09-454, but the Act *directly* addresses the Jencks Act.[100] The Act actually says that favorable information should be disclosed "as soon as is reasonably practicable upon the existence of the . . . information becoming known . . . [,] notwithstanding [the Jencks Act] or any other provision of law," while Formal Opinion 09-454 interprets Model Rule 3.8(d) as requiring such disclosure "as soon as reasonably practical . . . once known to the prosecutor."[101]

Further, the release of the over-500 page Schuelke Report motivates many to support the Act. Before it was released, one judge wrote, "the public cannot monitor the misconduct in the *Stevens* case without access to the results of Mr. Schuelke's investigation, which are detailed in his five-hundred-page Report."[102] That Report, which was released on March 15, 2009, details "pervasive" *Brady* violations.[103] The duty that, as a result, was proposed by Senator Murkowski, will be "a continuing

97. *Id.*

98. *Id.*

99. Kirsten M. Schimpff, *Rule 3.8, the Jencks Act, and How the ABA Created a Conflict Between Ethics and the Law on Prosecutorial Disclosure,* 61 AM. U. L. REV. 1729, 1779-80 n. 277 (2012); *see also* S. 2197 § 2.

100. Schimpff, *supra* note 99, at 1779 n.277.

101. *Id.*; *see also* S. 2197 § 2.

102. Schuelke Report, *supra* note 65, at 54.

103. *Id.* at 4.

duty, subject to reasonable and limited exceptions for classified information and fully litigable applications for protective orders."[104]

There is also an argument for the Act because it will allow for discretion among the courts to develop remedies for violations of the duty, including the "harmless error" rejection unless proved beyond a reasonable doubt, as previously discussed.[105] The appellate burden-shifting makes prosecutors less likely to risk that an appellate court will find beyond a reasonable doubt that their decision to withhold was harmless.[106] There is also a hypothesis that the Act "may provide strong impetus to a national discovery reform effort on the state level," encouraging prosecutors at the state level to conform to the same disclosure duties, and state legislators to work on a similar bill.[107]

Supporters of the Act argue that "[n]o one should have any illusion as to the difficulty of securing eventual passage. [The Department of Justice] will likely resist with all its might. But in this case, might does not necessarily make right."[108] For supporters of the Act, the more they can emphasize (and in some opinions, inflate) *Brady* violations, the greater support there should be of the Act. Norman Reimer writes, "[t]he many examples of abuse should overcome government resistance. [The National Association of Criminal Defense Lawyers] will [help] to secure this important reform, and the Association will need the help of every member and every person throughout the profession who cares about justice in the nation's criminal courts."[109]

What does the National Association of Criminal Defense Lawyers (NACDL) have to say about the Act other than encouraging its passage? A press release from March 15, 2012 on their website explains the Act as "nonpartisan" and "empowering" of prosecutors.[110] The NACDL is obviously an organization dedicated to criminal defense work and thus has one of the most biased opinions in support of the Act.[111] The

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104. Lindsay Erickson, *The Failed Prosecution of Former United States Senator from Alaska, Ten Stevens*, PUBLIC LEGAL DECISIONS, Spring 2012, at 9.

105. *Id.*; *see also* S. 2197 § 2.

106. Norman L. Reimer, *Discovery Reform: The Time for Action is at Hand*, CHAMPION, Mar. 2005.

107. *Id.*

108. *Id.* The Author does not describe how this "might" will affect the passage of the Act.

109. *Id.*

110. Press Release, NACDL Applauds Sensible, Bipartisan Discover Reform Legislation Introduced Today in the United States Senate (Mar. 15, 2012), *available at* http://www.nacdl.org/NewsReleases.aspx?id=23792.

111. *See* the NACDL's mission statement, listed on the bottom of their website:

legislation is described as "bipartisan legislation" which intends to "bring about sensible discovery reform in criminal prosecutions."[112] The NACDL's president, Lisa Monet Wayne, details the rights secured in *Brady* as "often [] misunderstood or ignored."[113] She continues, "Even well-intentioned prosecutors lack the clear statutory guidance necessary to ensure the full and prompt disclosure to the defense of favorable evidence."[114] She goes on to explain that disclosure problems create unjust results in prosecutions and presumably wrongful convictions, and that this legislation will "fix[] that problem."[115] She describes that if passed, the Act would be "a giant step" in improving how fair and accurate federal criminal prosecutions are.[116] She goes on to explain that the Act "will *empower* prosecutors across the country."[117]

The press release references a Capitol Hill news conference that, as President Wayne argues, "reflect[ed] the broad-based support for the legislation."[118] Proposing Senator Murkowski and Senator Kay Bailey Hutchison of Texas detailed the *Stevens* case in order to explain the "need for reform and uniform standard."[119] One telling quote regarding the case was from Rob Cary, a member of NACDL's White Collar Crime Committee, as well as counsel to the late Senator Stevens: "No amount of reform can guarantee that prosecutors will not lie and cheat as they did in his case, but this legislation today would go a long way towards making it much less likely . . . in the future."[120] The power that the government has in prosecuting criminals should not be considered "a game[;] [i]t is not hunt. It is not sport. It's about justice

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The National Association of Criminal Defense Lawyers is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

Id.

112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* (emphasis added).
118. *Id.*
119. *Id.*
120. *Id.*

and fairness[,]" according to NACDL Executive Director Norman L. Reimer.[121]

The ACLU is an additional supporter of the Act. Michael Macleod-Ball, Chief of Staff of the ACLU's Washington Legislative Office, explained their position as, "[thinking that this] bill supports the principle that justice demands and depends on fairness," and adding that the Act "is intended to help ensure that our criminal courts mete out justice and not merely convictions."[122] The NACDL press release goes on to detail that the Act is also supported by the Constitution Project and the Institute for Legal Reform at the U.S. Chamber of Commerce, among other support.[123]

C. *The Act's Downfalls*

Commentators have discussed several notable problems with the Act as it is proposed.[124] As Matthew Umhofer for Thomson Reuters News & Insight notes, "First, the Act fails to include sanctions against an offending prosecutor as an express remedy."[125] That said, the Act does allow courts to administer other remedies it determines to be appropriate.[126] One of the most crucial questions that the Act brings forth is whether prosecutors deserve sanctions when "anything goes wrong with their cases," whether those things are within or outside of the prosecutors' control.[127] However, it is quite clear that when a prosecutor acts against a defendant's constitutional rights recklessly or intentionally the prosecutor should certainly be sanctioned.[128] The Act does not make the differences in this kind of conduct clear and instead holds prosecutors, in a blanketed fashion, responsible for the acts of governmental organizations that they have limited control over. It is certainly true that "[p]ersonal prosecutorial accountability is wholly consistent with, and indeed will likely enhance, our system of justice."[129] Furthermore, the Act contains a list of several factors that should be considered, but crucially leaves out two very important factors: (1) instances of past misconduct and (2) deterrence.[130] One author notes that the Act "problematically narrows the scope of the remedy to a particular case,

121. *Id.*
122. *Id.*
123. *Id.*
124. *See, e.g.*, Umhofer, *supra* note 78.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*

when repeated misconduct in other cases may point to a larger problem and may warrant consideration in developing a [more] meaningful remedy."[131] This is especially relevant because repeated instances of prosecutorial misconduct are often the most egregious.

For example, in 2009 one judge from the District Court of Massachusetts pointed to the "persistent recurrence of inadvertent violations of defendants' constitutional right to discovery in the District of Massachusetts," concluding that he could not trust Justice Department training because it was failing to ensure the protection of defendants' discovery rights.[132] That judge started his own training program on criminal discovery processes.[133] Matthew Umhofer argues that the Department of Justice regularly requests courts to consider deterrence as a factor when sentences for criminal conduct are made, so the courts should thus consider deterrence of prosecutorial misconduct in the same way. [134]

Also, the Act hones in on evidence that the prosecution considers "favorable" to the defendant, but not evidence that is "material to guilt or punishment."[135] Thus, the Act, as written, allows prosecutors to delay producing items that it decides are "relevant" but not favorable.[136] One of the fundamental issues in deeming evidence "favorable" or just "relevant" is that only the defense would truly know what evidence would be favorable to it; "the prosecution is just guessing."[137] Federal courts' recognition of Federal Rule of Criminal Procedure 16 emphasizes that having information can lead either party to other information because the rule requires disclosure of information that "will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal."[138] This limitation in the Act could prevent the defendant from immediate access to evidence that the prosecutor may not deem favorable, but only relevant.[139]

The Department of Justice's position on the Fairness in Disclosure of Evidence Act of 2012 is that Congress should not pass this Act as it is currently drafted. The Deputy Attorney General has several arguments in support of rejecting the Act, one of which is that it could endanger

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131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*; *see also* FED. R. CRIM. P. 16.
139. Umhofer, *supra* note 78.

Government witnesses' lives.[140] Because of this fear, the witness's information section of the Act was removed, the Conference Report explaining,

> [A] majority of the Conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contact directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy.[141]

Other facets of the Department of Justice have thoroughly explained their perspective on the harms of the Act and how the Act itself is motivated by fear, not facts (the same argument expressed above about why the Act's witness protection is flawed).[142] The National Association of Assistant United States Attorneys (NAAUSA) articulated this view in a letter to the Honorable Patrick Leahy, Chairman of the Congressional Committee on the Judiciary, and the Honorable Charles Grassley, Ranking Minority Member of the same, dated June 4, 2012.[143] In the letter, Robert Gay Guthrie begins by expressing that the letter represents the opinion of 5600 Assistant United States Attorneys (AUSAs) and requesting that his comments be included in the June 6, 2012 hearing on disclosure requirements of federal prosecutors.[144] He explains that the NAAUSA represents the attorneys who, "day in and day out, fight for truth and justice to protect the innocent and bring the guilty to the bar of justice."[145]

Guthrie then explained the problems with the 2008 prosecution of Senator Stevens, which have spurred the Act and many other reactions

140. Carl Lietz, *Government Recycles Risk of Danger Argument To Convince Congress To Reject Enactment of Fairness in Disclosure of Evidence Act; Congress Should not be Misled (Again)!*, FEDERAL CRIMINAL LAWYER BLOG (June 28, 2012), http://www.georgiafederalcriminallawyerblog.com/2012/06/government_recycles_risk_of_da_1.html. One author rejects this contention as relying on fear, not fact. *See* Jon May, *Government's Response to Brady Reform Relies on Fear Not Fact*, WHITE COLLAR CRIME PROF BLOG (Jan. 25, 2012) http://lawprofessors.typepad.com/whitecollarcrime_blog/2012/06/governments-response-to-brady-reform-relies-on-fear-not-fact.html.

141. Lietz, *supra* note 140.

142. *See* May, *supra* note 140.

143. Letter from Robert Gay Guthrie to The Honorable Patrick Leahy, Chairman, as well as The Honorable Charles Grassley, Ranking Minority Member (June 4, 2012), *available at* http://www.judiciary.senate.gov/resources/transcripts/upload/060612RecordSubmission-Grassley.pdf (last visited Jan. 26, 2013).

144. *Id.* at 1.

145. *Id.*

as well.[146] Not only does he acknowledge that the case generated "considerable controversy" in regards the government's actions in that case, it has also called into question the government's actions in all federal, and even non-federal, criminal cases.[147] He explains that the prosecution of the late Senator Stevens was flawed in many ways, and the blame does not trace back just to the Alaska AUSAs.[148] The investigation was ultimately "taken over, managed and supervised by attorneys in the Department's Public Integrity Section . . . and their supervisors," with the same initial AUSAs remaining as part of the prosecution team.[149] Obviously, there were serious breaches in discovery in that case, resulting in the ultimate dismissal of the conviction.[150]

Guthrie explained that the special counsel that was appointed to investigate turned over results that were "critically incomplete because of limitations in the authority granted to the special counsel" by the presiding judge.[151] In short, the entire prosecution team was not fully investigated, and blame was placed on the two initial AUSAs when those problems, in reality, are also attributable to their supervisors.[152] The Department of Justice's Office of Professional Responsibility was investigating at the same time, and the Department's Professional Misconduct Review Unit[153] clearly found that "whatever errors occurred, they were made by team members as a whole."[154] Guthrie pointed out that though mistakes did clearly occur, they were not intentional and were not willfully made by the two AUSAs who were punished, but instead the entire team was culpable.[155]

The problem with conduct, Guthrie explains, was not with "individual misdeeds" but instead with "team lapses."[156] He wrote, "[w]e believe that the actions of these supervisory officials resulted in a series of management decisions in the prosecution of the case that contributed to

146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. This is an entity created by the Attorney General to serve "as an adjudicatory unit to resolve disciplinary matters such as the ones presented in the Stevens case." Guthrie, *supra* note 143, at 2.
154. Guthrie, *supra* note 143, at 2.
155. *Id.*
156. *Id.*

the ultimate disclosure violations."[157] The environment that the AUSAs were working in was described in the letter as "hyper pressurized," and one in which "poor judgments, mistakes, and errors compounded one another and made it almost inevitable that disclosure violations would occur."[158] Guthrie then gets to the heart of his argument: "While even a single instance of a prosecutor's failure to meet the discovery obligations imposed by the law is one too many, claims of widespread discovery abuse are simply not supported by the record."[159]

He goes on to detail the infrequency of misconduct: "[the *Stevens* mistakes are not] the normal course of conduct by approximately 5,600 AUSAs across the country. In fact, the historical record speaks strongly to the contrary. AUSAs consistently abide by their discovery obligations to provide exculpatory evidence to criminal defendants."[160] The statistics provided in the letter are even more telling: 800,000 cases involving over one million defendants, but an "error" rate in a very small portion, (0.0003) of cases.[161] In 2010, for example, only 26 of 68,591 criminal prosecutions involved discovery-related misconduct allegations, an unknown number of which were dismissed or simply unfounded.[162]

One reason the Department of Justice does not support the Act is because it would alter the course of federal criminal discovery in an unwarranted way. The letter argues, "[s]imilar proposals in the past have originated and supported by the criminal defense bar," and other largely-biased groups.[163] Yet simultaneously, courts from the highest in the land down have been "finely hon[ing]" duties and responsibilities of federal prosecutors in the discovery process.[164] As the statistics referenced above show, prosecutors have overwhelmingly complied, and those isolated incidents where they have erred do not merit this "overreaction" in the form of legislation.[165]

The NAAUSA opposes the Act because it is "unwarranted and risky."[166] The duty of an AUSA does not come from forced legislation but "springs from his special role in our system of justice under the

157. *Id.*

158. *Id.* Guthrie makes sure to note that the supervisors, as part of the prosecutorial team, were not punished for creating these conditions for the AUSAs. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 2-3.

162. *Id.* at 3.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

Constitution as the legal representative of the United States of America."[167] They understand that the duty to protect innocent people and secure convictions for guilty people is at the heart of this ultimate responsibility. Courts, not Congress, Guthrie argues, are the proper place to determine the discovery responsibilities and obligations of each party.[168] Recently the Advisory Committee of the Judicial Conference of the United States "reaffirmed that responsibility through its decision to preserve the current language of Rule 16 of the Federal Rules of Criminal Procedure."[169] This additional legislation is not only unnecessary, it is cumbersome and confusing in a process that is well-known and understood.[170]

The Act also will create harms that are not intended: endangering witness privacy and safety; releasing potentially dangerous national security-related information; increasing litigation over discovery issues not substantially influencing a defendant's guilt; delayed justice; and public uncertainty with criminal verdicts.[171] Guthrie argues that the *Stevens* case does not represent a systematic problem that needs remedying, and certainly does not merit a "significant departure from well-established criminal justice practices that have contributed to record reductions in the rates of crime in this country, while providing defendants with the basic rights of due process under the law."[172]

The letter concludes by arguing that the current state of criminal discovery law is not flawed, but the laws in place must simply be followed.[173] Since that case, the Department of Justice has certainly taken several steps to prevent errors like that again: "All new AUSAs go to 'Discovery Boot Camp', all AUSAs participate in various mandatory yearly discovery training programs, and each United States Attorney's Office is obligated to produce a Department-approved [] 'Discovery Manual.'"[174] Because of the *Stevens* case, prosecutors are more-closely watched and the Department is "redoubl[ing]" efforts to prevent future violations.[175] The case itself and the media attention do not merit, according to the NAAUSA, sweeping restructuring of the prosecutorial discovery process and requirements.[176]

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167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 3-4.
173. *Id.* at 4.
174. *Id.*
175. *Id.*
176. *Id.*

Another source from the Department of Justice further explains the problems with the Act.[177] This source is a letter to a ranking member of the United States Committee on the Judiciary, the Honorable Charles E. Grassley, from George J. Terwilliger III, a former U.S. Deputy Attorney General.[178] Terwilliger served as counsel for one of the chief witnesses for the government in the *Stevens* case, as well as a U.S. Attorney General during two administrations.[179] He explains that "the vast majority of federal prosecutors [are] professionals committed evenly to both the cause of justice and to prosecuting those who are a threat to public safety and integrity in our society."[180] He articulates his overall view of the Act as such: "although the proposed legislation has the obvious good intent of promoting fairness[,] in . . . its broad reach is unnecessary and could do more harm than good. In sum, the legislation would substitute a new statutory standard for a well understood existing standard that has been well-defined by years of jurisprudence."[181]

He goes on to detail the specifics of the *Stevens* case and explains that there was no problem with a misunderstanding of obligations there—the problems occurred because the already well-established requirements for disclosing exculpatory information were not met.[182] Thus, using the *Stevens* case as a reason for a new standard does not make sense. This is because the new standard, "by requiring disclosure without regard to the materiality of information to guilt or punishment, . . . could permit reversal of criminal convictions even where no harm resulted from a disclosure error in trial proceedings."[183] Therefore, the new standard would change the basis for appellate review of disclosure issues and thus would "fix a legal standard that is neither broken nor inadequate."[184]

He then explains that a bright line rule like the one-size-fits-all system the legislation creates results in problems unrecognized by the proposal.[185] For example, disclosing the names of witnesses in cases

177. Letter from George J. Terwilliger, III to the Honorable Charles E. Grassley, Ranking member, United States Senate (June 5, 2012), *available at* http://www.judiciary.senate.gov/resources/transcripts/upload/060612Recordsubmission-Grassley.pdf.

178. Mr. Terwilliger is a partner in the Washington D.C. office of White & Case LLP and is a former United States Deputy Attorney General and acting United States Attorney General. *See* Mr. Terwilliger's biography, *available at* http://www.morganlewis.com/bios/gterwilliger.

179. Terwilliger, *supra* note 177, at 1.

180. *Id.*

181. *Id.* at 1-2.

182. *Id.* at 2.

183. *Id.*

184. *Id.*

185. *Id.*

involving gangs or violent crimes could lead to less effective investigation of crimes because such persons would be less likely to participate and put their lives in jeopardy.[186] Footnote three in the letter explains that the pending legislation "applies 'notwithstanding' 18 U.S.C. § 3500 (a),"[187] a code section which protects the statements of witnesses for the government from being disclosed until the witnesses have an opportunity to testify on direct.[188] Because with this proposed legislation the government can move for an order preventing disclosure of information "only if the infromation is impeachment evidence against a potential witness and the government establishes a 'reasonable basis'" for believing that there would be a threat to the witness's safety, with the legislation would come a "re-establish[ment] under the new provisions jurisprudence for different types of cases, such as national security cases and child exploitation cases."[189] Further, the letter notes that because the disclosure is considered by "after-the-fact" decisionmaking by courts, the protective order, which attempts to be a safeguard, does "little to eliminate the potential for negative impact on witnesses and witness cooperation."[190]

One of the major problems with the legislation is that it creates a gray area where a clear rule currently stands under *Brady*. Terwilliger explains that *Brady* and *Giglio* obligations are "well developed and [] clearly understood by the DOJ as a result of nearly fifty years of experience with the rule."[191] The United States Attorneys' Manual goes farther than the constitutional minimum requirements and requires disclosure of "any favorable information to the defense—regardless of whether it is admissible evidence or would make a difference between conviction and acquittal."[192] The manual, under section § 9-5.001(C), however, does not require the disclosure of information that is "irrelevant or not significantly probative of issues before the court," which does surpass constitutional requirements, but seems to stay within the bounds of practicality.[193] This is also consistent with the holding in *Brady* and cases post-*Brady*.[194] Since then, the Supreme Court has explained that the Constitution's Due Process Clause does not require

186. *Id.*
187. Jencks Act, 18 U.S.C. § 3500 (2012).
188. Terwilliger, *supra* note 177, at 2 n.3.
189. *Id.*
190. *Id.*
191. *Id.* at 2.
192. *Id.* at 2 n.4; *see also* United States Attorneys' Manual § 9-5.001(B).
193. Terwilliger, *supra* note 177, at p.2 n.4; *see also* United States Attorneys' Manual § 9-5.001(C).
194. Brady v. Maryland, 373 U.S. 83, 87 (1963).

all favorable evidence known to the government be disclosed, but instead only the evidence, which, if omitted, "is of sufficient significance to result in the denial of the defendant's right to a fair trial."[195] Because of this, it is required that the evidence had a reasonable probability of producing a different verdict in order for there to be a *Brady* violation.

This is the most significant problem with the Act: the change in the materiality and, therefore, the harmless error standard. As Terwilliger explains, the proposed Act apparently requires disclosure of favorable information regardless of the relevance or materiality of the information.[196] This Act is effectively requiring Congress to introduce new rules for everyone involved in the federal criminal process: the courts, prosecutors, and defense attorneys.[197] With the new rules, the fifty years of developing precedent is undermined, as Terwilliger explains: because the materiality standard of *Brady* is altered, the harmless error standard for appeal of criminal discovery matters is also altered.[198] A new standard like this could easily lead to reversals in cases where there was no prejudice to the defendant even with the error—thus creating greater judicial costs and delays at the trial court and "mini-trials" regarding the government's discovery obligations.[199]

IV. BAD FACTS MAKE BAD LAW: A MORE RATIONAL SOLUTION

The solution to prosecutorial misconduct is not a broad, vague, overreaching, reactionary change in laws. Legislation based on a media-inflated problem—making the *Stevens* case seem like the norm—is not a prudent solution. As Terwilliger explains, "[t]he important question in any effort to reform the government's disclosure obligations is not whether sufficient standards exist (they do) or whether they are well known by federal prosecutors (they are)," but whether the errors made by prosecutors under those standards are able to be dealt with appropriately at trial by the court so that defendants can receive a fair trial.[200]

The Court should not rely on new legislation to implement new standards because doing so would not actually prevent misconduct from occurring by prosecutors. Instead of more laws to prevent misconduct, enforcement of currently sufficient standards is necessary. The

195. United States v. Agurs, 427 U.S. 97, 108 (1976).

196. Terwilliger, *supra* note 177, at 3.

197. *Id.*

198. *Id. See, e.g.*, Rosencrantz v. Lafler, 568 F.3d 577, 584 n.1 (6th Cir. 2009) ("[t]he materiality standard in traditional *Brady* claims supplants harmless-error review because practically speaking, the two analyses are the same").

199. Terwilliger, *supra* note 177, at 3.

200. *Id.*

Department of Justice has indeed begun to do so by holding supervisors more responsible for all decision-making.[201] The case relied on for the reactionary Act is actually an illustration of why proper training is a better solution than new legislation. In the *Stevens* case, the Department of Justice's Office of Professional Responsibility and Special Counsel Henry J. Schuelke, III, in the investigative report previously mentioned, concluded that the prosecutors withheld information that was very important to Senator Stevens's defense.[202] The investigative report explained that the omissions by prosecutors happened in an "environment where fundamental disclosure obligations got less than the full attention and commitment of the trial team and supervisors that they merit."[203] In that case, non-lawyer (and thus not as familiar with *Brady* and *Giglio* precedent) investigators—FBI and IRS agents—were at times relied upon to review government evidence by the Department of Justice.[204] The problems there were with performance issues that new legislation will not correct—performance issues that can be corrected by greater training and supervision.

There are many options, other than training, to remedy this problem that are not a comprehensive overhaul of current practice. One way is allowing defendants a greater opportunity for *in camera* review by the courts. If defendants were only required to meet a low-threshold standard if they expected that the prosecution was withholding exculpatory information, that would keep the government aware that the court could call forth that information. This would encourage more thorough record-keeping without an unnecessary overhaul of current precedent. This would keep the materiality standard and also the harmless error standard intact. Generally speaking, prosecutors would be even more likely to "err on the side of disclosure in marginal circumstances."[205]

There could also be a more intensive peer-review system set up within the Department of Justice or individual United States Attorney Offices. If the process were independent of prosecutors actually going to trial, it would encourage a similar transparency in record-keeping while providing a check for the effectiveness of training and supervisory roles within each individual office. Investigative agencies could also be further trained to identify information that is automatically flagged as likely to be required for disclosure. All of these possible schemes present

201. *Id.* at 4.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*

alternative solutions to the proposed Act that have much less unnecessary change of past precedent involved.

The other possible solution is to consider the version of the proposal that the Judicial conference was considering within Rule 16. Under the Murkowski bill, the prosecutor has to have a protective order to not disclose a piece of evidence. Though the Judicial Center's Rule 16 version of the proposal was stalled, prosecutors could decide if they were not going to turn over the evidence. The decision did, however, have to be certified.

V. CONCLUSION: EVALUATING BURDENS

This Comment aimed to discuss both supporters of the proposal and those who think that the Act is not tailored to its conceived purpose. To present these views, several groups with obvious interests were presented, as well as those who are neutral on their faces. If one is honest with his or her view of the Act itself—and gets into the language that is presented—the Author thinks it is inevitable to view the Act as an overshoot.

That said, there are many reasons a proposal could certainly intend to overshoot its eventual purpose. Here, the language could be broad and sweeping because the proposers expect the Act to go through several line-by-line revisions that scrape and modify the Act into a piece of legislation that becomes workable. The Act may also be presented as an extreme that will encourage a more moderate proposal including more tailored versions of the more burdensome obligations the Act included.

The Senate Judiciary Committee held a hearing on the Act on June 6, 2012, but it remains to be seen whether any further action will be taken.[206] There are many reasons to reject the Act; namely, it was written as a reactionary measure in a case where greater training and supervision would have solved the problem without the new overreaching standards the Act requires.

The proposal focuses too little on witness protection and is unnecessarily broad. Evidence unrelated to the outcome is required to be turned over by the prosecutorial team, though unrelated evidence obviously could not make a difference in the outcome for the defendant. A materiality standard that is engrained in prosecutor and defense attorney offices, and, of course, courts throughout the country, is abandoned. The harmless error standard that appellate courts firmly

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206. *See* Ensuring that Federal Prosecution Meet Discovery Obligations: Hearing Before the S. Comm. on the Judiciary, 112th Cong. (2012), *available at* www.judiciary.senate.gov/hearings/hearing.cfm?renderforprint=1&id=45b1dd574a1177ba092e43f19974eb99.

rely on for discovery conduct questions is uprooted. The problem of prosecutorial misconduct being inflated by the media is the impetus for this proposal.

Instead, United States Attorney Offices should—and have—continue to implement standards that encourage compliance with discovery requirements. Prosecutors should be thoroughly trained and refreshed on those standards. Strict supervision from inside—and possibly outside, in the form of investigative bodies or neutral peer review—could be implemented in its place. When manuals are developed by the offices themselves, the day-to-day actions of prosecutors can be incorporated more effectively. The harsh standards proposed by the Murkowsi bill (like the beyond-a-reasonable-doubt standard[207] on appeal) are an overreaction that looks to punish prosecutors and will create a system of uneasiness and inefficiency. It will be very difficult for prosecutors to prove their non-knowledge (or imputed knowledge, as the bill necessitates) regarding exculpatory information.

The scope of the imputation of knowledge to a prosecutor is also far too broad to be acceptable or practical under our system. It is impossible for every member of every prosecutorial team—a difficult entity to define, as well—to be instantly responsible for the knowledge of investigatory bodies that work with them. It is part of the nature of criminal investigation that non-lawyers are often responsible for the tools that prosecutors rely on, and often the tools that they are charged with providing the defense.

To put the whole burden of disclosure on the prosecutor instantly by creating a legal fiction that the prosecutor knows what every investigator knows in a case is to create an impossible compliance standard. Instead, the individual government bodies, as well as courts, can create better enforcement mechanisms when standards that are already in place fail like they did in the *Stevens* case. When evidence is not directly linked to the guilt of the accused, or evidence is immaterial to a conviction is required to be turned over, prosecutors' offices are turned into investigatory bodies that do not actually promote the adversarial nature of our justice system.

Though it is certainly and unquestionably true that prosecutors should turn over exculpatory evidence that will prevent a wrongful conviction, this logical requirement is pushed to an illogical end when all information is required to be disclosed. Defense attorneys' roles would become,

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207. This is a standard that really does not make sense considering the foundations of our criminal justice system. This standard requires *prosecutors* to prove beyond a reasonable doubt that they are compliant with discovery requirements—that they are innocent, in a way, of unethical conduct.

instead of finding the best information to defend their client through their own tools, an investigation of the actions of the prosecutor. In fact, as the Act is currently written, defense attorneys might not be zealously defending their client if they do not question whether all information—material or not, as required by the proposal—is given to them.

In conclusion, it is unlikely for this Act to make its way into federal law. But the compelling reasons against and effective solutions that could, and are, replacing it provide ample reason to prevent shaking the foundation of our federal criminal justice system's discovery rules, which have been carefully laid by courts for the last five decades. The rules have been carefully delineated by the judiciary to create enough breathing room to ensure rightful and effective law enforcement at the federal level, and though the belt certainly should be tightened in situations like the *Stevens* case, a comprehensive and choking overhaul is certainly not the answer. This Act is certainly a good lesson for the old adage "bad facts can create bad law."

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