



April 18, 2012

The Honorable F. James Sensenbrenner, Jr.  
Chairman  
Committee on the Judiciary  
Subcommittee on Crime, Terrorism  
and Homeland Security  
Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Robert C. Scott  
Ranking Member  
Committee on the Judiciary  
Subcommittee on Crime, Terrorism  
and Homeland Security  
Rayburn House Office Building  
Washington, D.C. 20515

**RE: House Judiciary Committee's Hearing on "The Prosecution of Former Senator Ted Stevens"**

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Dear Chairman Sensenbrenner and Ranking Member Scott:

On behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to the principles of individual liberty and justice embodied in the U.S. Constitution, we offer this statement on the subject of the April 19th hearing on "the Prosecution of Former Senator Ted Stevens." This hearing is an important first step in addressing the problem brought to the public's attention in the Ted Stevens' case: the failure of prosecutors to disclose exculpatory evidence to criminal defendants.

There could not be a more opportune time for this hearing in light of this week's Washington Post series of articles on the Department of Justice's review of flawed forensic evidence entitled "*Convicted defendants left uninformed of forensic flaws found by Justice Dept.*" and "*DOJ review of flawed FBI forensics processes lacked transparency.*"<sup>1</sup> These articles underscore the fact that potentially exculpatory evidence – discovered both before and after criminal convictions – is not being disclosed to defendants and their lawyers. Such was the case in Senator Ted Stevens' prosecution.

The constitutional obligation of prosecutors to turn over exculpatory material was established in the 1963 case of *Brady v. Maryland* where the U.S. Supreme Court recognized a defendant's fundamental right to any and all favorable information that might prove he or she is innocent of a crime. The Supreme Court has applied this standard retrospectively – to cases in which the trial has already occurred and a judicial record has been developed, thereby allowing for a determination of whether the suppressed evidence was "material." However, before a trial has occurred, the application of this standard has been inconsistent. That inconsistency has created confusion for prosecutors (and judges) about the scope of evidence they must reveal, when to do so, and what remedies to provide defendants who do not receive exculpatory evidence.

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<sup>1</sup> Spencer Hu, "*Convicted defendants left uninformed of forensic flaws found by Justice Dept.*" Wash. Post, April 16, 2012, [http://www.washingtonpost.com/local/crime/convicted-defendants-left-uninformed-of-forensic-flaws-found-by-justice-dept/2012/04/16/gIQAWTcgMT\\_story.html?tid=pm\\_local\\_pop](http://www.washingtonpost.com/local/crime/convicted-defendants-left-uninformed-of-forensic-flaws-found-by-justice-dept/2012/04/16/gIQAWTcgMT_story.html?tid=pm_local_pop); and "*DOJ review of flawed FBI forensics processes lacked transparency*" April 17, 2012, [http://www.washingtonpost.com/local/crime/doj-review-of-flawed-fbi-forensics-processes-lacked-transparency/2012/04/17/gIQAFegIPT\\_story.html](http://www.washingtonpost.com/local/crime/doj-review-of-flawed-fbi-forensics-processes-lacked-transparency/2012/04/17/gIQAFegIPT_story.html)

Almost 50 years after the first enunciation of the “Brady Rule,” violations persist as prosecutors continue to violate their obligation to turn over evidence in their efforts to “win” cases. Such Brady violations have had devastating consequences for those accused of crimes. Only a fraction of such cases have been discovered. Senator Ted Stevens' 2009 case is one recent highly publicized example of a prosecution team ignoring its Brady obligation to a defendant. Senator Stevens was prosecuted and convicted for criminal ethics violations, but later exonerated after it was uncovered that prosecutors withheld important evidence of the Senator’s innocence in violation of his constitutional rights. Nevertheless, the damage to Senator Stevens’ reputation resulting from the conviction was irreversible. After serving in the U. S. Senate longer than any other Republican in history, he lost his re-election campaign in 2008 in the immediate aftermath of the trial and before the court dismissed the case against him after learning of the prosecutorial abuse.

If this could happen to an influential person like Ted Stevens, imagine how it affects the average person accused of a crime. In 2003, Edgar Rivas was sentenced to serve more than 10 years in federal prison after being convicted of conspiracy and possession of cocaine aboard a foreign freighter arriving in the U.S. During the trial, the prosecution failed to inform the defense that on the day the trial began, the government’s main witness against Mr. Rivas admitted to bringing the drugs aboard the ship. This fact only came to light after the trial ended, when the government translator revealed this critical piece of information to the defense counsel. Even after the defense learned of the conversation, the prosecution maintained that it was not required to disclose the information because it did not prove Mr. Rivas’ innocence. Fortunately, on appeal, the 2nd U.S. Circuit Court of Appeals disagreed and called “the Government’s ‘tactical reason’ for the nondisclosure ... totally unacceptable.” The appellate court said that Rivas “should have had the opportunity to bolster the defense theory” of the other party’s guilt. The Second Circuit proceeded to find that the prosecution’s non-disclosure violated the Brady Rule, vacated the judgment, and ordered a new trial. If not for the actions of a government translator, Mr. Rivas might still be in prison today.

After the committee reviews the Special Counsel’s report in the Ted Stevens’ case, we encourage it to consider reforms to the current process that will ensure prosecutors turn over Brady evidence in every criminal case. Failure to disclose exculpatory evidence cannot be tolerated in a system predicated on justice. When the government does not meet its obligation to reveal this information, it must be held accountable. If you have any additional questions about this issue, please feel free to contact Jesselyn McCurdy, Senior Legislative Counsel, at [jmccurdy@dcaclu.org](mailto:jmccurdy@dcaclu.org) or (202) 675-2307.

Sincerely,



Laura W. Murphy  
Director  
Washington Legislative Office



Jesselyn McCurdy  
Senior Legislative Counsel

cc: House Committee on the Judiciary, Subcommittee on Crime, Terrorism and Homeland Security