



March 27, 2012

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
Dirksen Senate Office Building
Washington, D.C. 20510

RE: The Senate Judiciary Committee's Hearing on "The Special Counsel's Report on the Prosecution of Senator Ted Stevens" and S. 2197, the Fairness in Disclosure of Evidence Act of 2012

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Dear Chairman Leahy and Ranking Member Grassley:

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 are writing to applaud the committee on scheduling the March 28 hearing regarding "The Special Counsel's Report on the Prosecution of Senator Ted Stevens." This hearing is just the 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.

The next step must be the passage of S. 2197, the Fairness in Disclosure of Evidence Act of 2012, recently introduced by Senator Lisa Murkowski (R-AK). This bill would clarify the evidence prosecutors must disclose to those accused of crimes. Also, the bill would specify when such information must be disclosed as well as remedies available to impacted defendants when prosecutors violate the provisions of the bill.

In the 1963 case of *Brady v. Maryland*, 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 "[Brady Rule](#)" derives from this case and created a constitutional obligation for the prosecution to disclose any material evidence favorable to the accused. 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. S. 2197 clarifies the law in all three respects.

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 urge consideration of S. 2197, the Fairness in Disclosure of Evidence Act. Such legislation is long overdue. Failure to disclose exculpatory evidence cannot be tolerated in a system predicated on justice. This bill will help ensure that the principle of the Brady Rule is upheld and that all those accused of crimes receive the benefit of their constitutionally guaranteed rights. If you have any additional questions about this issue, please feel free to contact Jesselyn McCurdy, Senior Legislative Counsel at jmccurdy@dcaclu.org or (202) 675-2307.

Sincerely,



Laura W. Murphy,
Director
Washington Legislative Office



Jesselyn McCurdy
Senior Legislative Counsel