Department of Justice

STATEMENT OF

JAMES M. COLE
DEPUTY ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ENTITLED

"ENSURING THAT FEDERAL PROSECUTORS MEET DISCOVERY OBLIGATIONS"

PRESENTED

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1. Introduction

Chairman Leahy, Ranking Member Grassley, and distinguished Members of the Committee, I appreciate the opportunity to appear before you to discuss the Department's commitment to criminal discovery efforts that will result in fair trials, the serious public safety risks that would result from proposed legislation in this area, and the process by which the Department recently imposed discipline on two prosecutors responsible for discovery failures in the prosecution of former Senator Ted Stevens. As someone who spent over a dozen years as a prosecutor and then nearly twenty more as a defense attorney, I know firsthand the importance that discovery plays in ensuring criminal defendants fair trials. But, at the same time, I am acutely aware of the other critical interests – such as the safety and privacy of witnesses and victims – that our criminal justice system properly takes into account.

What occurred in the *Stevens* case is unacceptable. But it is not representative of the work of the Department of Justice. And it does not suggest a systemic problem warranting a significant departure from longstanding criminal justice practices that have contributed to record reductions in the rates of crime in this country while at the same time providing defendants with a fair and just process. The *Stevens* case is one in which the well-established rules governing discovery were violated, not one in which the rules themselves were found insufficient to ensure a fair trial. The lesson from *Stevens* was not that the scope of existing discovery obligations needed to change, but rather that the Department needed to focus intently on making sure that its prosecutors understand and comply with their existing obligations. Since *Stevens*, the Department has done just that, by enhancing the supervision, guidance, and training that it provides its prosecutors and by institutionalizing these reforms so that they will be a permanent part of the Department's practice and culture.

Accordingly, the Department does not believe that legislation is needed to alter the way discovery is provided in federal criminal cases. While we fully share Senator Murkowski's goal of ensuring that what occurred in the *Stevens* case is never repeated, we have very serious concerns with her draft legislation. We understand Senator Murkowski's strong views; but in reacting to the *Stevens* case, we must not let ourselves forget the very real dangers to safety and privacy that victims and witnesses often face in the criminal justice system; the national security interests implicated by discovery rules; and the strong public interest in ensuring not only that defendants receive a fair trial but also that the guilty be held accountable for their crimes. As

was recently recognized by the Advisory Committee on Criminal Rules of the Judicial Conference of the United States ("Criminal Rules Committee"), which in 2010-11 considered and rejected changes to Rule 16 not dissimilar to Senator Murkowski's proposals, true improvements to discovery practices will come from prosecutors and agents having a full appreciation of their responsibilities under their existing obligations and the tools and oversight to fulfill those obligations, rather than by expanding those obligations. In other words, new rules are unnecessary. What is necessary, and what the Department has been vigorously engaged in providing since the *Stevens* dismissal is enhanced guidance, training, and supervision to ensure that the existing rules and policies are followed.

2. The Department's enhanced discovery efforts

The Department's own policies require federal prosecutors to go beyond what is required to be disclosed under the Constitution, statutes, and rules. The United States Attorneys' Manual (USAM) was amended in 2006 – several years before the *Stevens* case – to mandate broader disclosure of exculpatory and impeachment evidence than the Constitution requires. The USAM requires prosecutors to disclose information beyond that which is "material" to guilt as articulated by the U.S. Supreme Court, and prosecutors must disclose exculpatory or impeachment information "regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime." USAM § 9-5.001. While the Department has had this policy in place since 2006, it was as a result of the *Stevens* case that we have significantly increased our focus on providing prosecutors and agents with the improved guidance, training, and resources necessary to comply with this policy and meet their discovery obligations. After the Attorney General sought the dismissal of the conviction of Senator Stevens, he ordered a comprehensive review of all discovery practices and related procedures to reduce the likelihood of future discovery failures. That review identified areas where the Department could improve, and we have undertaken a series of reforms.

In January 2010, the Office of the Deputy Attorney General issued three memoranda to all criminal prosecutors: "Issuance of Guidance and Summary of Actions Taken in Response to the June 2009 Report of the DOJ Criminal Discovery and Case Management Working Group," "Requirement for Office Discovery Policies in Criminal Matters," and "Guidance for Prosecutors Regarding Criminal Discovery." Through these memoranda, prosecutors have been instructed to provide broader and more comprehensive discovery than before, to provide more than the law requires, and to be inclusive when identifying the members of the prosecution team for discovery purposes. (The Department's policies do recognize that the requirement that prosecutors disclose more than the law requires may not be feasible or advisable in some national security cases where special complexities arise.) These memoranda also provide overarching guidance on gathering and reviewing potentially discoverable information and making timely disclosure to defendants; they also direct each U.S. Attorney's Office and Department litigating component to develop additional, district- and component-specific discovery policies that account for controlling precedent, existing local practices, and judicial expectations. Subsequently, the Office of the Deputy Attorney General has issued separate guidance relating to discovery in national security cases and discovery of electronic communications.

Later in January 2010, the Deputy Attorney General appointed a long-serving career prosecutor as the Department's first full-time National Criminal Discovery Coordinator to lead and oversee all Department efforts to improve disclosure policies and practices. Since January 2010, the Department has undertaken rigorous enhanced training efforts, provided prosecutors with key discovery tools such as online manuals and checklists, and continues to explore ways to address the evolving nature of e-discovery. These steps have included:

- All federal prosecutors are now required to undertake annual update/refresher discovery training. Roughly 6,000 federal prosecutors across the country – regardless of experience level – receive the required training annually on a wide variety of criminal discovery-related topics.

- Starting in 2010, each United States Attorney's Office and Main Justice litigating component has appointed one or more criminal discovery coordinators, who are responsible for working with the National Criminal Discovery Coordinator to provide the necessary training and resources to line prosecutors to help them fulfill their disclosure obligations on a daily basis.

- The Department has held several "New Prosecutor Boot Camp" courses, designed for newly hired federal prosecutors, which include training on *Brady*, *Giglio*, and electronically stored information (ESI), among other topics.

- These training requirements were institutionalized through their codification in the USAM. Specifically, USAM § 9-5.001 was amended in June 2010 to make training mandatory for all prosecutors within 12 months after hiring, and requiring two hours of update/refresher training on an annual basis for all other prosecutors.

- In 2011, the Department provided four hours of training to more than 26,000 federal law enforcement agents and other officials – primarily from the FBI, DEA, and ATF – on criminal discovery policies and practices. The Department is currently developing annual update/refresher training for these agents.

- In late February 2012, the Department held "train-the-trainer" programs in Washington, D.C., to begin training the next round of federal law enforcement agencies, including Department of Homeland Security agencies such as ICE, various OIGs, and other federal agencies.

- The Department has held several Support Staff Criminal Discovery Training Programs, including one session this past March. In addition, the Department has produced criminal discovery training materials for victim/witness coordinators.

- A Federal Criminal Discovery Blue Book – which comprehensively covers the law, policy, and practice of prosecutors' disclosure obligations – was created and distributed to prosecutors nationwide in 2011. It is now electronically available on the desktop of every federal prosecutor and paralegal.

- The Department developed – in collaboration with representatives from the Federal Public Defenders and counsel appointed under the Criminal Justice Act – a ground-breaking protocol issued in February 2012 concerning discovery of ESI. The principal purpose of the protocol, which has already received praise from both the judiciary and the defense bar, is to ensure that prosecutors are complying with their disclosure obligations in the digital era by providing the defense with ESI in a usable format in a timely fashion.

- In order to ensure consistent long-term oversight of the Department's discovery practices, the Department moved the National Criminal Discovery Coordinator position into the Office of the Deputy Attorney General and made it a permanent executive-level position.

3. Legislative reform is unnecessary and will create substantial problems

Since the public release in mid-March 2012 of the *Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated April 7, 2009* ("Schuelke Report"), some have argued that legislation is necessary to alter federal criminal discovery practice. The Department does not share that view.

Legislation along the lines being proposed by Senator Murkowski in S.2197 would upset our system of justice by failing to recognize the need to protect not only the interests of the defendant but those of victims, witnesses, national security and public safety. It would radically alter the carefully constructed balance that the Supreme Court and lower courts, the Criminal Rules Committee, and Congress have painstakingly created over decades – a balance between ensuring the protection of a defendant's constitutional rights and, at the same time, safeguarding the equally important public interest in a criminal trial process that reaches timely and just results, safeguards victims and witnesses from retaliation or intimidation, does not unnecessarily intrude on victims' and witnesses' personal privacy, protects ongoing criminal investigations from undue interference, and recognizes critical national security interests.

Unfortunately, witness safety concerns are more than merely theoretical. Even under the current system's careful balance between a defendant's right to a fair trial and witnesses' privacy and safety interests, we have had witnesses intimidated, assaulted, and even killed after their names were disclosed in pretrial discovery. Law enforcement officials throughout the nation repeatedly confront chilling situations where witnesses are murdered to prevent them from testifying – or in retaliation for providing testimony. Just a few of the many examples include the following:

- In the District of Maryland, prosecutors provided broad discovery, including a 10-page interview report for a potential witness, to the defense attorneys for two defendants in a narcotics case. The defendants pled guilty, so the witness was never called to testify. Nevertheless, in violation of the discovery agreement, one of the defense attorneys turned over a copy of the interview report to the mother of his client. Copies of the interview report were later found in a number of state and federal prison cells. After the interview report was produced, a drug dealer named in the report shot the witness in front of a half-dozen people. The shooter was convicted; his case is presently on appeal.

- In federal court in the District of Columbia, a defendant was recently convicted of heading a violent drug organization. At trial, the government proved that the homicide of a witness – who was killed by a co-defendant before the start of a Superior Court narcotics and firearms trial at which the witness was scheduled to testify – was committed in furtherance of the drug organization's illicit activities. Prosecutors had disclosed the witness's identity in a court filing two weeks before trial. The witness was shot to death as she walked out of a halfway house at 8:30 a.m., next to a busy street during rush hour. Her murderer did not speak to her before shooting her, and nothing was taken from her. Because of her death, the Superior Court case was dismissed.

- In the Eastern District of Pennsylvania, a defendant has been charged with ordering the murders of four children and two women from his federal jail cell. The six murder victims, who were killed in the firebombing of a North Philadelphia row house, included the mother and infant son of a cooperating witness. The defendant is also charged with plotting to kill family members of other witnesses and with maintaining a list of their names and addresses.

- In the Central District of California, witness statements were ordered produced in a gang prosecution shortly after indictment. After the materials were produced, a cooperator was beaten by several gang members at the local detention center, a female cooperator was assaulted by the girlfriend of a gang member, a car was fire-bombed, and the sole eyewitness to a murder was approached at the day care center she uses for child care and asked whether she thought the government could keep her family safe.

Legislation requiring earlier and broader disclosures would likely lead to an increase in such tragedies. It would also create a perverse incentive for defendants to wait to plead guilty until close to trial in order to see whether they can successfully remove identified witnesses from testifying against them.

The proposed legislation would also negatively impact our must vulnerable crime victims. In cases involving criminal charges against a defendant for child exploitation, impeachment information on the child-victim would need to be disclosed without regard to either admissibility or the substantial policy interests in keeping this information private, even if the evidence against the defendant included his own confession and videotapes of the defendant committing the abuse. In rape cases, information about a sex-crime victim's sexual history, partners, and sexual predisposition would need to be disclosed to the defense – again, regardless of admissibility. The disclosures required by the current legislative proposal cut against the important policy aims of child protection and rape shield laws.

The Department is also concerned that Senator Murkowski's legislative proposal would result in the unnecessary and harmful disclosure of national security-related information and would compromise intelligence and law enforcement sources and methods. Although the bill prescribes that classified information be treated in accordance with the Classified Information Procedures Act (CIPA), it nonetheless creates a substantial risk that classified information will be unnecessarily disclosed and that our country's most sensitive investigative sources and methods will be compromised during the prosecution of criminal national security cases. In

cases involving guilty pleas – where a defendant is necessarily prepared to admit facts in open court that establish he or she committed the charged offense(s) – such legislation would require the unnecessary disclosure of the identity of undercover employees or confidential human sources, scarce investigative assets who, once revealed, may no longer be used to covertly detect and disrupt national security threats. Currently, in the national security context, we tell other countries that we will keep the information they share with us confidential unless we absolutely need to disclose it because of its exculpatory nature. Under such a bill, we would have to disclose an increased volume of information and disclose it more frequently, thus discouraging cooperation from our foreign partners.

Such legislation would also invite time-consuming and costly litigation over discovery issues not substantially related to a defendant's guilt, resulting in delayed justice for victims and the public and greater uncertainty regarding the finality of criminal verdicts. Inclusion of a provision for awarding attorney's fees would provide a significant incentive to engage in such collateral litigation. These concerns, among others, recently led the Criminal Rules Committee – a body populated by federal judges who are intimately familiar with these discovery issues – to reject a proposed amendment to Rule 16 to expand prosecutors' discovery obligations.

The primary objective of the criminal justice system is to ensure fair trials and produce just results. Fair trials and just results ensure that the innocent are not wrongly convicted, and that the guilty do not go free. A fair and just criminal justice system should also ensure that other participants in the process – *i.e.*, victims, law enforcement officers, and other witnesses – are not unnecessarily subjected to physical harm, harassment, public embarrassment or other prejudice, or the fear that they might be subjected to such consequences. The bill ignores the very substantial costs the legislation's additional disclosure requirements would impose – costs to the reputational and privacy interests of witnesses, and, if witnesses become less willing to step forward, costs to society from the loss of the just conviction of the guilty. In national security cases, such results could have devastating consequences with respect to the government's ability to protect the American people, an ability that depends upon obtaining the cooperation of confidential human sources. These are real costs and ones that both the Supreme Court and Congress have taken great pains to avoid incurring. Unfortunately, they are costs that the bill fails to recognize.

4. The *Stevens* case

The misconduct that occurred during the *Stevens* prosecution has now been well documented, both in the report of the Special Counsel to District Court Judge Emmet Sullivan and in the report of the Office of Professional Responsibility. The Department's failures in that case were serious and the Attorney General's decision to dismiss the case reflected that seriousness. Nonetheless, it is important to recognize that the misconduct involved in the Stevens case was an aberration. The men and women who make up the prosecutor corps at the Department of Justice are among the best lawyers in the country. They work hard every day to keep Americans safe, to hold criminals accountable for their actions, to ensure that victims and witnesses are treated with the respect and care they deserve, and to do justice for all in every case.

Nevertheless, prosecutors – like other professionals – will never be immune to mistakes. As a matter of policy, we strive to be perfect, even though we know perfection is impossible. We require our prosecutors to strictly obey the law in both letter and spirit, and we work to ensure that isolated mistakes are detected early, corrected, and do not prevent justice from being done. Over the past 10 years, the Department has filed over 800,000 cases involving more than one million defendants. In the same time period, only one-third of one percent (.33 percent) of these cases warranted inquiries and investigations of professional misconduct by the Department's Office of Professional Responsibility ("OPR"). Less than three-hundredths of one percent (.03 percent) related to alleged discovery violations, and just a fraction of these resulted in actual findings of misconduct. Department regulations require DOJ attorneys to report any judicial finding of misconduct to OPR, and OPR conducts computer searches to identify court opinions that reach such findings in order to confirm that it examines any judicial findings of misconduct, reported or not. In addition, defense attorneys are not reticent to raise allegations of discovery failures when they do occur.

On those rare occasions when discovery failures do occur, the Department takes steps to hold individual prosecutors accountable. Late last month, the Department provided to the Senate and House Judiciary Committees a copy of OPR's investigative report and documents relating to the Department's disciplinary process in connection with the federal prosecution of Senator Stevens. OPR issued its 672-page final report on August 15, 2011. That report reflects that OPR thoroughly examined multiple allegations of misconduct that arose during the course of the proceedings in the *Stevens* case. OPR concluded that the government violated its obligations under constitutional *Brady* and *Giglio* principles and Department of Justice policy (USAM § 9-5.001) by failing to disclose exculpatory statements by prosecution witnesses during trial preparation sessions and law enforcement interviews and by failing to disclose a witness's alleged involvement in securing a false sworn statement. OPR found that the government violated D.C. Rule of Professional Conduct 4.1(a) by misrepresenting to the defense certain facts in a September 2008 disclosure letter. In other words, OPR found that the government violated rules that were already in place, thus depriving Senator Stevens of a fair trial.

With respect to the individual prosecutors, OPR concluded that two prosecutors committed professional misconduct by acting in reckless disregard of their disclosure obligations and forwarded the report to the Professional Misconduct Review Unit (PMRU) for consideration of disciplinary action. After evaluating the prosecutors' conduct and the factors mandated by *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), the Chief of PMRU proposed that one prosecutor be suspended without pay for 45 days and that the other be suspended without pay for 15 days, noting that OPR had found that neither prosecutor had acted intentionally. On May 23, 2012, the deciding official in the Office of the Deputy Attorney General – a long-term career employee – determined that the first prosecutor should be suspended for 40 days without pay and that the second prosecutor should be suspended for 15 days without pay. In doing so, the deciding official sustained the OPR findings of misconduct against both prosecutors but rejected an additional OPR finding that the first prosecutor exercised poor judgment by failing to inform his supervisors that the representations in a *Brady* letter were inaccurate and misleading. Both the PMRU Chief and the deciding official agreed that OPR's findings of reckless professional misconduct were supported by the law and the facts and were serious. Although the decisions of the deciding official represent the Department's final actions in this matter, the

prosecutors are entitled by law and regulation to appeal his decisions to the Merit Systems Protection Board.

The proposal for discipline and the disciplinary decision set forth those factors that the disciplinary officials considered in assessing the appropriate punishment. In short, OPR determined that the prosecutors acted recklessly rather than intentionally, and the disciplinary officials also considered that both AUSAs had previously unblemished records with the Department. Additionally, the disciplinary officials were required to consider the consistency of the penalty with those imposed on other employees for the same or similar offenses, and while the discipline did not result in dismissal, we are not aware of any case within the Department where an employee with a record similar to the subject AUSAs was terminated after OPR found that the employee engaged in something less than intentional misconduct

5. Conclusion

The objective of the criminal justice system is to produce just results. This includes ensuring that the processes we use do not result in the conviction of the innocent, and likewise ensuring that the guilty do not unjustifiably go free. It also includes an interest in ensuring that other participants in the process – *i.e.*, victims, law enforcement officers, and other witnesses – are not unnecessarily subjected to physical harm, harassment, public embarrassment, or other prejudice.

For nearly fifty years, a careful reconciliation of these interests has been achieved through the interweaving of constitutional doctrine (*i.e.*, *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S. 419, 439 (1995)), statutory directives (*i.e.*, the Jencks Act and the Crime Victims' Rights Act), and Federal Rules (*i.e.*, Rule 16; Rule 26.2). The legislation proposed by Senator Murkowski would disturb this careful balance without a demonstrable improvement in either the fairness or reliability of criminal judgments and in the absence of a widespread problem. The rules of discovery do not need to be changed – and the *Stevens* case does not prove otherwise. Rather, it demonstrates that prosecutors and other law enforcement officials need to recognize fully their obligations under these rules, must apply them fairly and uniformly, and must be given guidance, tools, and training to meet their discovery obligations rigorously. This is what the Department has done since the Attorney General directed the dismissal of the conviction in *Stevens*. And it is what the Department will continue to do in the future, under the policies and procedures that have been implemented and institutionalized during the past three years.