



**U.S. Department of Justice**

Office of Legislative Affairs

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Office of the Assistant Attorney General

Washington, D.C. 20530

September 24, 2020

The Honorable Russell Vought  
Director  
Office of Management and Budget  
Washington, DC 20503

Dear Mr. Director:

This letter responds to your request for the views and recommendations of the Department of Justice (the Department) on enrolled bill S. 1380, the “Due Process Protections Act.” The Department strongly recommends that the President does not sign the bill.

The Department has identified several concerns with this proposal. The bill would require the district court in each criminal proceeding to enter an order that “confirms the disclosure obligation of the prosecutor under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law.”

As a threshold matter, we respectfully do not believe that the order required in the proposed legislation is necessary. The Department currently requires Federal prosecutors to receive training on their obligations under *Brady*, *Giglio*, and their progeny every year. New prosecutors also are required to take designated training on their *Brady/Giglio* obligations. Simply stated, prosecutors are keenly aware of their discovery obligations.

Adequate sanctions currently exist for prosecutors who fail to meet those obligations. Those sanctions may include investigations by Office of Professional Responsibility, referral to state bar disciplinary authorities, and employment actions. In some situations, courts have also used *civil* contempt as a means to enforce compliance with discovery orders. *See, e.g., In re Contempt Finding in U.S. v. Stevens*, 663 F.3d 1270 (D.C. Cir. 2011).

The kind of notice required in this legislation could provide courts with the opportunity to further hold prosecutors in *criminal* contempt. Civil contempt “is ordinarily used to compel compliance with a court order . . . . By contrast, criminal contempt is used to punish, that is, to vindicate the authority of the court following a transgression rather than to compel future compliance or to aid the complainant.” *In re Contempt Finding*, 663 F.3d at 1274 (D.C. Cir. 2011).

To be susceptible to criminal contempt under 18 U.S.C. § 401, “a party must willfully violate a specific, clear, and unequivocal court order.” *Downey v. Clauder*, 30 F.3d 681, 686 (6th Cir. 1994) (collecting cases). In considering whether to initiate criminal contempt proceedings, courts have looked to whether a prosecutor specifically intended to violate a discovery order or “intentionally misrepresented that she had done so.” *United States v. Jones*, 620 F. Supp. 2d 163, 166 (D. Mass. 2009).

The legislation also unnecessarily imposes a new procedure on district courts, which should have full authority to run the discovery process in their courtrooms. Many district courts already issue their own pre-trial criminal discovery orders detailing prosecutors’ obligations under Rule 16 and *Brady*. If a district court is concerned that a prosecutor appearing in the courtroom may not understand his or her obligations, the court has adequate existing tools to address the issue.

The bill is also one-sided, aiming to reinforce the disclosure obligation of prosecutors, while remaining silent on the disclosure obligations of defense lawyers. The defense in criminal cases is subject to discovery and disclosure obligations whose violation may disrupt proceedings and risk miscarriages of justice. *See* FED. R. CRIM. P. 12(b)(3), 12.1, 12.2, 12.3, 16(b)-(c). Any admonition to the parties regarding disclosure obligations would be incomplete if it failed to include defense counsel’s need to comply with defense’s discovery and disclosure obligations.

In addition, the bill, which would directly amend Rule 5 of the *Federal Rules of Criminal Procedure*, would circumvent the usual process for amending the rules relating to the judicial branch. This is not the preferred method for amending the rules, and we believe it should be avoided.

Congress delegated authority to develop and amend federal court rules to the Supreme Court in the Rules Enabling Act, 28 U.S.C. § 2071, *et seq.* In implementing the Act, the Court looks to the Judicial Conference to examine proposed changes to court rules, including to the *Federal Rules of Criminal Procedure* and to engage in a deliberative and transparent process involving all criminal justice stakeholders. The Judicial Conference and its Advisory Committee on the Criminal Rules has been examining discovery rules for several years in a considered and deliberative manner, and the proposed changes in the bill should be referred to the Conference.

Even in an emergency, such as the COVID-19 global health pandemic, Congress has been reluctant to directly amend the federal rules. In the CARES Act, for example, rather than directly amend the rules to expand the use of video-teleconferencing in federal criminal proceedings, Congress provided temporary emergency authorities to courts to address the emergency and then directed the Judicial Conference to create a permanent rule for inclusion in the rules:

NATIONAL EMERGENCIES GENERALLY.—The Judicial Conference of the United States and the Supreme Court of the United States shall consider rule amendments under chapter 131 of title 28, United States Code (commonly known as the “Rules Enabling Act”), that address emergency measures that may be taken by the Federal courts when

the President declares a national emergency under the National Emergencies Act (50 U.S.C. 1601 *et seq.*).

Pub. L. No. 116-136 § 1502(b)(6)

If Congress believes an amendment to Rule 5 is required along the lines delineated in the bill, it should similarly direct the Judicial Conference to consider such an amendment but instead rely on the expertise and deliberative process of the Judicial Conference, which will engage all stakeholders and transparently examine all of the issues and related procedures.

Thank you for the opportunity to present our views. Please do not hesitate to contact this office if we may be of additional assistance to you.

Sincerely,

A handwritten signature in black ink, appearing to read "S. E. Boyd" followed by the word "for". The signature is written in a cursive, slightly slanted style.

Stephen E. Boyd  
Assistant Attorney General