

# THE CONSTITUTION PROJECT



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June 5, 2012

VIA ELECTRONIC MAIL

The Honorable Patrick Leahy  
Chairman  
U.S. Senate Committee on the Judiciary  
Dirksen Senate Office Building  
Room 224  
United States Senate  
Washington, DC 20510

The Honorable Chuck Grassley  
Ranking Member  
U.S. Senate Committee on the Judiciary  
Dirksen Senate Office Building  
Room 152  
Washington, DC 20510

Dear Chairman Leahy and Senator Grassley:

As president of The Constitution Project (TCP), I write to commend you for holding tomorrow's hearing, "Ensuring that Federal Prosecutors Meet Discovery Obligations," and encourage you to carefully consider the need for legislation to clarify federal prosecutors' discovery obligations in the face of mounting evidence that the Department of Justice's efforts to address the problem internally have proven insufficient.

In a statement submitted to the record for the March 28, 2012 hearing regarding the misconduct in the late Senator Ted Stevens' prosecution, the DOJ reassured the Senate Judiciary Committee that, "Department prosecutors are more aware of their discovery obligations than perhaps ever before. Now, of all times, a legislative change is unnecessary." Yet, since providing those assurances to the Committee, the extent of the Department's systemic failure to adequately disclose evidence has only become clearer.

As evidence of the longstanding nature of the problem, a pair of recent news reports in the Washington Post reveals that over a period of years, federal prosecutors in at least 24 cases failed to disclose to defendants the findings of a task force investigating possibly flawed forensic evidences.<sup>1</sup>

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<sup>1</sup> Spencer S. Hsu, *Convicted defendants left uninformed of forensic flaws found by Justice Dept.*, Washington Post (Apr. 16, 2012), available at [http://www.washingtonpost.com/local/crime/convicted-defendants-left-uninformed-of-forensic-flaws-found-by-justice-dept/2012/04/16/gIQAWTcgMT\\_story.html](http://www.washingtonpost.com/local/crime/convicted-defendants-left-uninformed-of-forensic-flaws-found-by-justice-dept/2012/04/16/gIQAWTcgMT_story.html); Spencer S. Hsu et al., *DOJ review of flawed FBI forensics processes lacked transparency*, Washington Post (Apr. 17, 2012), available at

The articles suggest that many additional cases may have suffered from the same flaws in forensic evidence and yet defendants were never notified of the possible flaws.

Additionally, not a month after the Judiciary Committee held its hearing, Judge Gladys Kessler of the Federal District Court for the District of Columbia stated in a pretrial hearing that “there [was] not the slightest doubt” that federal prosecutors had violated their constitutional obligations to turn over exculpatory information in a conspiracy case against attorney Charles Daum, Daaiyah Pasha, and Iman Pasha.<sup>2</sup> Moreover, Judge Kessler expressed astonishment that such violations continue to occur despite publicity surrounding Senator Stevens’ prosecution and the recent Washington Post series about flawed forensic evidence. These are but a few of the mounting examples of the Department’s inability to effectively address systemic failures of nondisclosure.

Despite the Justice Department’s assertions, internal policies like the U.S. Attorneys’ Manual (USAM), no matter how well tailored to address the issue, are an ineffective means to ensure compliance. The primary reason is that the USAM “is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.” USAM § 1-1.000. While we by no means believe that this problem extends to all prosecutors, it seems clear that in an adversarial system, prosecutors cannot be expected to consistently adhere to policies when the consequences for violating those policies are minimal or nonexistent. Internal Department policies, by design, cannot be relied upon by courts or defendants, and are, therefore, inadequate to ensure fairness in criminal proceedings.

I am providing the most recent version of TCP’s letter calling for congressional action, signed by more than 140 criminal justice experts, for inclusion in the record for this hearing. The letter’s signatories include more than 100 former federal prosecutors whose years of service span from 1962 through 2011. This letter recommends a series of reforms, many of which are contained in Senator Lisa Murkowski’s bill, “The Fairness in Disclosure Act” (S. 2197). We hope that the Committee will seriously consider these recommendations and pursue reforms that clarify prosecutors’ disclosure obligations and hold prosecutors accountable to courts when they fail to meet those obligations.

We look forward to working with you and your staffs on this critical issue. In the meantime, if TCP can provide any assistance, please feel free to contact me at (202) 580-6923 or Christopher Durocher, TCP’s Government Affairs Counsel, at (202) 580-6939 or [cdurocher@constitutionproject.org](mailto:cdurocher@constitutionproject.org).

Best regards,



Virginia E. Sloan

cc: Senator Lisa Murkowski  
Members of the Senate Committee on the Judiciary

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[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).

<sup>2</sup> Mike Scarcella, *In conspiracy case, judge chides DOJ over exculpatory evidence*, Legal Times (April 27, 2012), available at <http://legaltimes.typepad.com/blt/2012/04/in-conspiracy-case-judge-chides-doj-over-exculpatory-evidence.html>.