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PERSPECTIVE

Due Process Protections Act: An opportunity to fulfill *Brady*'s promise

By Alyssa Bell and Michael Schafler

For criminal defense lawyers, it's an all too familiar experience: you request that the prosecutor turn over any evidence in the government's possession that is exculpatory or material to the defense, as required by *Brady v. Maryland*, 373 U.S. 83 (1963). In response, the prosecutor states only that she's aware of, and has complied fully with, her obligations. She offers no examples, no elaboration, no explanations. Neither you nor the court will likely n ever learn what steps she took, what steps she didn't, what evidence she withheld, and why.

This paradigm may soon change, however. In October, during the homestretch of the presidential election, Congress unanimously passed the Due Process Protections Act (S. 1380) and President Donald Trump signed it into law. The act, subtitled "Reminder of Prosecutorial Obligations," affords a rare and momentous opportunity to fulfill *Brady*'s promise. It gives courts the opportunity to participate in, and supervise, the prosecutor's otherwise unilateral determination of what *Brady* requires, both in terms of investigation and disclosure. Specifically, it amends Federal Rule of Criminal Procedure 5 to require federal district judges in criminal cases to issue an order confirming the prosecution's obligation to disclose exculpatory evidence:

New York Times News Service

Sen. Dick Durbin (D-Illinois), in Washington in October. Durbin is one of the co-sponsors of the Due Process Protects Act, along with Sen. Dan Sullivan (R-Alaska).

"In all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present, the judge shall issue an oral and written order to prosecution and defense counsel 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."

The act also provides that "[e]ach judicial council in which a district court is located shall promulgate a model order ... that the court may use as it determines is appropriate." To date, no district court in California has issued such an order.

Brady is among the brightest stars in the constellation of Supreme Court decisions enshrining the rights of criminal defendants. The decision's animating principles include the highest notions of justice and fairness: "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady*, 373 U.S. at 87. Perhaps for this very reason, *Brady*'s mandate — that prosecutors turn over exculpatory evidence in their possession — is common knowledge among lawyers and nonlawyers alike.

Why then, nearly 60 years after *Brady* was decided, has Congress taken the *extraordinary* step of passing a law to "remind" federal prosecutors of constitutional obligations none could forget? If *Brady* is so fundamental to equity and justice that it is woven into the fabric of our justice system, what did Congress hope to accomplish with the passage of the Due Process Protections Act?

Too often, *Brady* has become a right without a remedy — an ephemeral guarantee honored only in the breach. As Senator Dick Durbin, one of two co-sponsors of the act, explained in a press release earlier this year, "[t]he Due Process Clause is enshrined in our Constitution as a check against government overreach, but there are inadequate safeguards in federal law to ensure that this fundamental right is protected for criminal defendants. [The act] will help protect the right of the accused to all evidence that could exonerate them without placing undue burdens on prosecutors." Senator Dan Sullivan, the second co-sponsor, noted in the press release that "[t]he trial of the late Senator Ted Stevens showed us that, while the vast majority of federal prosecutors abide by their constitutional duties and obligations, some choose to win at all costs by taking short-cuts and violating defendants' constitutional rights."

The corruption trial of Stevens is a powerful example of the limitations judges have historically faced in enforcing *Brady*'s mandate. Judge Emmet Sullivan of the District Court for the District of Columbia called the Stevens prosecution his "wake-up call," and, in response to revelations of serial *Brady* violations, appointed a

special prosecutor to investigate prosecutorial misconduct. The special prosecutor found that Stevens' trial prosecutors' *Brady* violations were deliberate and their ethical violations "systematic." Judge Sullivan, however, "was powerless to act against the wrongdoers, because [he] had not issued a direct, written court order requiring them to abide by their ethical and constitutional obligations to disclose favorable evidence." In other words, while Judge Sullivan could impose case-related sanctions, such as dismissal, he had no means to sanction individual prosecutors.

By the time that the *Brady* violations that tainted the Stevens trial were discovered, Stevens had been convicted, his reputation ruined, and his reelection to the Senate lost. Similarly severe consequences inhere for all criminal defendants, even those who are not sitting senators.

One problem is that there is no consensus as to what prosecutors must do to satisfy *Brady*'s mandate and when they must do it. Should prosecutors be required to admonish their case agents? To interview all law enforcement members of the prosecution team regarding their *Brady* compliance? Must they participate in the interviews of witnesses they will call to testify at trial? Must they vet all informants? Prosecutors across jurisdictions, and even within the same office, are likely to answer these questions differently.

By way of comparison, when a defendant pleads guilty in federal court, Federal Rule of Criminal Procedure 11 calls for the judge to engage in a detailed colloquy to ensure that defendants understand the charges, the consequences of pleading guilty, the rights they are giving up by pleading guilty, the facts supporting the guilty plea, and their satisfaction with the legal representation received. Rule 11 establishes our joint, settled understanding of what it means for a guilty plea to be knowing and voluntary. But there is no equivalent settled understanding of what prosecutors must do to fulfill their *Brady* obligations — no list of questions that must be answered — although the right to a fair trial is no less important than a knowing plea.

By requiring the entry of a *Brady* order in each criminal case, the Due Process Protection Act could provide much-needed guidance as to what measures *Brady* requires. More profound, however, is the opportunity for judges to become active participants in assuring that *Brady* affords the accused both a right *and* a remedy. Empowered by a specific mandate to regulate prosecutors' compliance, judges can inquire as to what actions the government has taken to uncover exculpatory evidence, what evidence the prosecutor has declined to produce, and what legal basis underlies those decisions. Judges, not just prosecutors, can become the arbiters of whether a piece of evidence has exculpatory value or would assist the defense. Judges will have greater discretion to impose sanctions on individual prosecutors when they fail to comply. Such sanctions are sorely, and unfortunately, needed, if nothing more than for their deterrent value. Today, personal sanctions are imposed, if ever, in only the rarest cases.

The Due Process Protection Act reminds prosecutors of their obligations, but it also invites judges and defense counsel into the conversation. In that way, this seemingly simple piece of overwhelmingly popular and uncontroversial legislation provides an opportunity to make our system fairer. It will be up to individual judges, to defense lawyers, and to the judicial councils fashioning model orders, to decide whether to answer the call. ■

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