

# New Criminal Rule 5(f) Firms Up Prosecutor Brady Obligations

By **Lily Becker and Amy Walsh** (January 27, 2021)

Lost amid a heated presidential election and the greatest public health crisis in more than a century is the news that Congress took a critical step at the end of 2020 to strengthen the rights of criminal defendants by seeking to ensure that prosecutors honor their ethical and constitutional obligations from the outset of every criminal case.

Prosecutors wield enormous power in the American criminal justice system, and with that power comes commensurate ethical and constitutional obligations. One of the most fundamental of these obligations is the government's duty to disclose to the defense all evidence favoring the accused.

While many prosecutors are mindful of and discharge this duty with care and diligence, many high-profile cases show that this obligation is often neglected, either out of carelessness or overzealousness, or both.

On Oct. 21, 2020, Congress enacted the Due Process Protections Act, or DPPA, which amends Rule 5 of the Federal Rules of Criminal Procedure by adding subsection (f).[1]

Rule 5(f) now requires all federal district court judges, during the initial appearance in every criminal case, to:

issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under Brady ... and its progeny, and the possible consequences of violating such order under applicable law.[2]

Moreover, the DPPA states that judicial councils must promulgate a model order for district courts to use at it determines is appropriate.[3] The new rule not only reinforces prosecutors' existing duty to disclose exculpatory evidence to the accused, but also gives federal judges, through the court's contempt powers, the ability to hold government attorneys accountable when they fail to comply with that duty.

For this article's co-author Lily Becker, the legislation touches a deeply personal note. The deliberate misconduct exposed in the 2008 prosecution of her father, the late Sen. Ted Stevens, R-Alaska, was one impetus for the DPPA, which was many years in the making. The legislation was introduced by Sen. Dan Sullivan, R-Alaska, a successor to Stevens, and marks an important win in the battle for a more just system of justice.

In the 1963 *Brady v. Maryland* decision, the U.S. Supreme Court established the prosecution's duty in all criminal cases to provide the defense with evidence in the government's possession that favors the accused when such evidence is material to either guilt or punishment.[4]

Since then, the court has expanded *Brady*: Materially exculpatory evidence that would bear on the outcome of the case, regardless of whether the defense specifically requests it, and information collected on the government's behalf, such as by law enforcement, must be produced.[5]



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Brady obligations begin as soon as an individual is indicted, and the duty to turn over such material is triggered as soon as the government discovers its exculpatory or impeachment value. This duty stems from the prosecutor's obligation to seek justice, not to seek a win.

However, in spite of the importance of Brady and its progeny to a fair criminal justice system, there have been many instances of failure to disclose materially favorable evidence to the defense. One of the most egregious and high-profile examples occurred during the 2008 prosecution of the late Ted Stevens, which was dismissed approximately five months after trial on the government's own motion.

In *U.S. v. Stevens*, U.S. District Judge Emmet Sullivan of the U.S. District Court for the District of Columbia found that prosecutors deliberately and systematically withheld evidence of Stevens' innocence.[6] The government indicted Stevens under Title 18 of the U.S. Code, Section 1001, approximately 100 days before the general election in which he was running, for allegedly making false statements to the government in connection with gifts he received as a U.S. senator.

Stevens' prosecution was riddled with government misconduct from the beginning, and the full nature of it came to light only after a Federal Bureau of Investigation whistleblower took the extraordinary step of submitting a complaint to the court. In the ensuing months, serious misconduct and unethical behavior on the part of the government was exposed, and Judge Sullivan granted the government's motion to dismiss its indictment against Stevens. Judge Sullivan also appointed a special prosecutor to review the government's misconduct.

Although Brady violations arose during the trial, Judge Sullivan was unable to impose contempt charges against the prosecutors because he had not previously issued a direct, written court order to the government requiring them to honor their Brady obligations.[7]

Since Stevens' trial, Judge Sullivan made it a practice to issue a detailed Brady order in every criminal case before his courtroom and began advocating for Brady reform on the federal level. But as to Stevens, the damage was already done to him, his reelection and his family.

Stevens' case involved gross misconduct and, unfortunately, was not an isolated incident. Just last year, in the high-profile case of *U.S. v. Bundy*, the U.S. Court of Appeals for the Ninth Circuit upheld U.S. District Judge Gloria Navarro of the U.S. District Court for the District of Nevada's dismissal with prejudice of indictments that charged Cliven Bundy and 17 other individuals with obstructing federal law enforcement due to the prosecutors' willful and flagrant Brady violations.

Despite having facially exculpatory evidence in its possession before trial that directly negated its theory that defendants intentionally spread false information, the government failed to turn the information over until well after the trial had commenced.[8] The prosecution also unsuccessfully attempted to absolve itself of wrongdoing by arguing that the nondisclosures were the fault of the FBI.

In September 2020, in *U.S. v. Nejad*, U.S. District Judge Alison Nathan of the U.S. District Court for the Southern District of New York concluded that the government had committed serious Brady violations.

In that case, involving an Iranian businessman accused of funneling millions of dollars to his family business in violation of U.S. sanctions law, the court found that the government

withheld Brady evidence from the defense that was highly relevant to the defendant's state of mind at the time of the alleged offenses before, during and after the trial and misled the court regarding its remedy of the issue.

The court noted that the government had spent 20 hours strategizing how best to turn it over and that "[o]ne prosecutor suggested to another that they 'bury' the evidence along with other, already disclosed documents." [9]

A key problem with addressing Brady violations has been that, just as Judge Sullivan experienced in 2008, federal judges overseeing cases have held little power to hold the government accountable and were confined to piecemeal corrective measures. [10]

For example, once the misconduct was revealed in Nejad, Judge Nathan issued directives to the U.S. Attorney's Office for the Southern District of New York based on her observations about prosecutors' supervisors. She directed the government to implement two corrective measures: (1) that the acting U.S. attorney ensure and declare that all current government prosecutors read the court's opinion; and (2) that the government conduct further fact finding to determine whether the prosecution's conduct was intentional.

Judge Nathan also articulated areas that required "systemic solutions," including insufficient training and a failure to coordinate between various the government offices involved. [11]

Rule 5(f) appropriately highlights the importance of compliance with Brady obligations at the beginning of every criminal case, rather than their implicit nature.

Moving forward, Rule 5(f) Brady orders will hopefully incentivize prosecutors to fully evaluate the government's files prior to indictment and make prompt Brady disclosures at the outset and continuing forward throughout the case as further evidence develops.

For the DPPA to truly have impact, however, district court judges must use their authority to hold prosecutors accountable, including for violating Rule 5(f) orders, when they fail to uphold their constitutional and ethical obligations.

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[1] The DPPA was a bipartisan effort spearheaded by U.S. Senators Dan Sullivan (R-AK) and Dick Durbin (D-IL). In a press release, Senator Sullivan stated he "put forward this legislation with Senator Durbin to ensure all Americans' due process rights are protected, and to hold prosecutors accountable when they violate a defendant's constitutional rights." Sen. Dan Sullivan, Sullivan-Durbin Due Process Protections Act Signed Into Law, Press Release (Oct. 22, 2020), <https://www.sullivan.senate.gov/newsroom/press-releases/sullivan-durbin-due-process-protections-act-signed-into-law>.

[2] Due Process Protections Act, Pub. L. No. 116-182, 134 Stat. 894 (2020).

[3] Id.

[4] 373 U.S. 83 (1963).

[5] See, e.g., *United States v. Giglio*, 405 U.S. 150 (1972); *United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Strickler v. Greene*, 527 U.S. 263 (1999).

[6] *United States v. Stevens*, No. CRIM. 08-231 EGS, 2008 WL 8743218, (D.D.C. Dec. 19, 2008); see also Rob Cary, *Not Guilty: The Unlawful Prosecution of U.S. Senator Ted Stevens* (2014).

[7] Emmett Sullivan, *How New York Courts Are Keeping Prosecutors in Line*, THE WALL STREET JOURNAL (Nov. 17, 2017), <https://www.wsj.com/articles/how-new-york-courts-are-keeping-prosecutors-in-line-1510953911>.

[8] 968 F.3d 1019, 1042 (9th Cir. 2020).

[9] No. 18-cr-224 (AJN), 2020 WL 5549931 (S.D.N.Y. Sept. 16, 2020).

[10] Id.; see also *U.S. v. Jain*, 19-cr-59 (PKC), 2020 WL 6047812 (S.D.N.Y. Oct. 13, 2020) (the government's reported findings will be made available on the case docket by December 18, 2020).

[11] Id. at \*6, 12-13.