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The Honorable Lisa Murkowski
United States Senate
709 Hart Office Building
Washington, DC 20510

Dear Senator Murkowski:

I am writing to you on behalf of the American Bar Association, with nearly 400,000 members nationwide, to commend you for your leadership in introducing the Fairness in Disclosure of Evidence Act of 2012, a bill to require attorneys for the government to disclose favorable information to the defendant in criminal cases brought by the United States. We strongly support the proposed Act and believe its enactment will be an important step toward achieving consistency and improving fairness in the federal criminal justice system and will serve the cause of achieving justice in countless individual cases.

In our adversary system, the parties are in charge of gathering and submitting the evidence. This raises an interesting paradox. In the criminal justice system- in particular the federal criminal system, the government often has control over the ability of the defense to obtain evidence it needs to try its case. Specifically, the government is required to assess whether evidence is exculpatory and to disclose that information to the defense. This disclosure of exculpatory information by the prosecution is vital to notions of due process as guaranteed by the Fifth Amendment and effective assistance of counsel as guaranteed by the Sixth Amendment.

In 1963 the Supreme Court decision in *Brady v. Maryland* stated the constitutional basis of the duty of prosecutors to disclose evidence to the defense, holding that: "The suppression by prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." A few years later, in *Giglio v. United States*, 405 U.S. 150, 154 (1972), the Supreme Court made it clear that the prosecutor's duty to disclose is not limited to exculpatory evidence, but also covers "evidence affecting credibility," in other words, impeachment evidence. In *United States v. Agurs*, 427 U.S. 97 (1976), the Supreme Court held that the prosecution's constitutional duty to disclose is not limited to situations where the defendant made a specific request for the relevant evidence.

The ABA has been concerned since *Brady* and its progeny with articulation of a rule or standard that will guide prosecutors and in their responsibilities to disclose evidence to the defense. The ABA Standards for Criminal Justice: Prosecution Function, first introduced in 1964 and approved in a third edition in 1993, set out guidance for implementing *Brady* duties at Standard 3-3.11, Disclosure of Evidence by the Prosecutor, as does Rule 3.8(d) of the Model Rules of Professional Conduct, prepared by the ABA. The ABA House of Delegates has approved several resolutions calling for various steps to improve the discovery process in recent years, including: in February 2010 calling for courts to conduct a pre-trial conference to facilitate discovery in criminal cases; in February 2011 calling for adoption of court rules requiring use of a written checklist of disclosure obligations of the prosecution under *Brady*; and, most recently, in August 2011 supporting legislation to implement a standard for discovery obligations of prosecutors under *Brady*.

The ABA concluded last year that federal legislation is needed to implement *Brady* disclosure duties. After a decade of controversial and highly publicized cases, the response by DOJ through a succession of studies and formulation of internal guidance memoranda has not resulted in a uniform practice as to the timing or scope of *Brady* and *Giglio* disclosures by federal prosecutors. There are wildly different policies in the local United States Attorney Offices and, on occasion, amongst Assistant United States Attorneys in a particular office. For example, some United States Attorney Offices routinely provide FBI interview forms and interview memoranda of witnesses to comply with *Brady* and *Giglio*, while other United States Attorney Offices virtually never produce witness interview memoranda or agent or prosecutor notes regarding interviews. There is no reason why the DOJ should have 96 different policies rather than one uniform policy.

In the absence of a clear definition of what constitutes *Brady* material, prosecutors around the country have utilized a myriad of different policy judgments about the nature and extent of favorable information to be disclosed to defendants. The varied definitions of a prosecutor's disclosure obligations have resulted in confusing and differing disclosure practices rather than a uniform standard for the scope of disclosure. Even rare violations of *Brady* are intolerable. The stakes in a criminal case are simply too high to sanction even one isolated occurrence of *Brady* violation.

A clearly defined and codified disclosure standard would help eliminate the pitfalls of the current system where there is a multiplicity of disparate interpretations of the *Brady* obligation by both state and federal prosecutors.

For all these reasons, we commend you for your leadership in introducing the Fairness in Disclosure of Evidence Act of 2012. The ABA looks forward to working with you towards enactment by this Congress of this important legislation.

Sincerely,

Wm. T. (Bill) Robinson III