

ANONYMOUS DOJ STATEMENT: “TRUST US”

The Senate Judiciary Committee is holding a hearing today to review the results of the Schuelke report on the prosecutorial misconduct in the Ted Stevens case and to entertain the Lisa Murkowski bill requiring disclosure. In response, DOJ submitted a statement for the record, opposing any legislation enforcing its discovery obligations.

When concerns were first raised about the handling of the prosecution of Senator Stevens, the Department immediately conducted an internal review. The Attorney General recognized the importance of ensuring trust and confidence in the work of Department prosecutors and took the extraordinary step of moving to dismiss the case when errors were discovered. Moreover, to ensure that the mistakes in the Stevens case would not be repeated, the Attorney General convened a working group to review discovery practices and charged the group with developing recommendations for improving such practices so that errors are minimized. As a result of the working group's efforts, the Department has taken unprecedented steps, described more fully below, to ensure that prosecutors, agents, and paralegals have the necessary training and resources to fulfill their legal and ethical obligations with respect to discovery in criminal cases. These reforms include a sweeping training curriculum for all federal prosecutors and the requirement—for the first time in the history of the Department of Justice—that every federal prosecutor

receive refresher discovery training each year.

In light of these internal reforms, the Department does not believe that legislation is needed to address the problems that came to light in the Stevens prosecution. Such a legislative proposal would upset the careful balance of interests at stake in criminal cases, cause significant harm to victims, witnesses, and law enforcement efforts, and generate substantial and unnecessary litigation that would divert scarce judicial and prosecutorial resources.

In short, DOJ is saying, “trust us. We don’t need a law requiring us to do what case law says we need to.”

Right off the bat, I can think of 5 major problem with this statement:

No one has been held accountable

We are three years past the time when Stevens’ case was thrown out. Yet none of the prosecutors involved have been disciplined in any meaningful way.

No doubt DOJ would say that it will hold prosecutors responsible if and when the Office of Professional Responsibility finds they committed misconduct. But in the interim three years, DOJ as a whole has sent clear messages that it prefers protecting its case to doing anything about misconduct. And—as Chuck Grassley rightly pointed out at the hearing—thus far no one has been held responsible.

This statement may claim DOJ is serious about prosecutorial misconduct. But its actions (and inaction) says the opposite.

Even after this training, discovery problems remain

As the DOJ statement lays out, in response to the Stevens debacle, DOJ rolled out annual

training programs for prosecutors to remind them of their discovery obligations.

And yet, last year, Leonie Brinkema found that prosecutors in the Jeff Sterling case had failed to turn over critical evidence about prosecution witnesses—one of the problems with the Stevens prosecution. The prosecutor involved? William Welch, whom Schuelke accused of abdicating his leadership role in the Stevens case (note, DOJ says the CIA is at fault for the late discovery; but Welch is, after all, the prosecutor who bears responsibility for it).

If William Welch can't even get discovery right after his involvement in this case and, presumably, undergoing the training DOJ promises will fix the problem, then training is not enough to fix the problem.

Eric Holder won't run DOJ forever

The statement focuses on Holder's quick decision to dismiss the case against Stevens, as if that, by itself, guards against any similar problems in the future. But before Holder was AG, Michael Mukasey was—and Judge Emmet Sullivan grew so exasperated with Mukasey's stonewalling on this case, he ordered him to personally respond to questions about the case.

In short, while Holder may require prosecutors to meet their discovery obligations (I'm much, much less sanguine that Criminal Division head Lanny Breuer will), that's no guarantee the next Attorney General won't just blow off a judge's concerns about it.

DOJ released this statement on the same day as reports that FBI agents told they can "suspend the law"

One of the problems with the Stevens case Schuelke referenced today arose when FBI Agents without a great understanding of Brady and Giglio requirements conducted the document review to fulfill discovery. Given lapses in prosecutorial management, that resulted in failures to comply with discovery.

Now, last year, DOJ conducted a 4-hour training session for FBI agents to review these issues. But look at what else DOJ has trained its FBI agents, as revealed by Spencer Ackerman today:

One FBI PowerPoint – disclosed in a letter Durbin sent to FBI Director Robert Mueller on Tuesday and shared with Danger Room – stated: “Under certain circumstances, the FBI has the ability to bend or suspend the law to impinge on the freedom of others.”

Now, if DOJ went back and made sure all the agents who had received the training telling agents they could break the law, this might not be such a problem. But how seriously can you take DOJ’s current training efforts given what they have reinforced in the past?

Trust us. Love, anonymous

Ultimately, this statement amounts to DOJ—and the Executive Branch more generally—again imploring Congress to just trust the Executive Branch. Trust us, allow us flexibility, we won’t screw up again.

But as noted, this is an unsigned statement.

That is, DOJ is asking Congress to just trust that it—“we”—will fix the problem. But no one is signing that promise.

Who is the “us” we’re supposed to trust?

This is what the Executive Branch has increasingly become, a bureaucracy resisting any controls on its power—all in the name of flexibility—all while shielding the decisions made under the veil of anonymity from any accountability.

“Trust us. But you’ll just have to take it on faith that we’re worthy of your trust.”