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**The Due Process Protections Act:  
Is the Juice Worth the Squeeze?**

**Allyson D. Benko\***

On Wednesday, October 21, 2020, the President signed the Due Process Protections Act into law, amending Federal Rule of Criminal Procedure 5. Specifically, the Act requires all federal judges in criminal proceedings to issue an order that confirms the prosecutorial obligation to disclose exculpatory evidence under *Brady v. Maryland*, the landmark case in which the Supreme Court of the United States held that prosecutorial suppression of material evidence favorable to the accused violated due process. The Act also requires federal judges to state on the record the potential consequences for attorneys violating such an order. Finally, the Act requires each judicial council in which a district court is located to promulgate a model order for its courts to use.<sup>1</sup> According to its sponsors, the Act and the resulting “*Brady orders*” are intended to “protect the right of the accused to all evidence that could exonerate them and hold accountable prosecutors who fail to comply.”<sup>2</sup> However, the Act does not change prosecutors already existing legal and ethical obligations for making *Brady* disclosures to defense counsel.<sup>3</sup> Rather, it now burdens federal courts to inform prosecutors of those obligations in every case, along with the consequences

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<sup>1</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963); 166 CONG. REC. H4582-83 (daily ed. Sep. 21, 2020) (statement of Rep. Lee); *Bill Announcement*, THE WHITE HOUSE (Oct. 21, 2020), <https://www.whitehouse.gov/briefings-statements/bill-announcement-102120/>.

<sup>2</sup> *Durbin-Sullivan Due Process Protections Act Signed Into Law*, RIVERBENDER.COM (Oct. 23, 2020), <https://www.riverbender.com/articles/details/durbinsullivan-due-process-protections-act-signed-into-law-45336.cfm>.

<sup>3</sup> *Brady*, 373 U.S. at 87 (ruling (1) the suppression of evidence favorable to an accused, called exculpatory evidence, violates due process by creating an unfair trial for the accused where the evidence is material to guilt or punishment; (2) the prosecutor has a duty to anticipate what defenses might be presented in a case, and, regardless of whether the defense requests discovery, the prosecutor has a constitutional duty to provide any exculpatory evidence to the defense, and (3) providing exculpatory evidence to the defense upholds the standards of justice and gives the public confidence in the fairness of the criminal justice system).

of not meeting them,<sup>4</sup> and further reduces the rulemaking powers granted to the judiciary by the Rules Enabling Act of 1934.<sup>5</sup>

The Due Process Protections Act (S. 1380) was introduced by Senators Dick Durbin (D-IL) and Dan Sullivan (R-AK) on May 8, 2019,<sup>6</sup> but this was not the first time Congress considered legislation on *Brady* violations. In 2012, Congress considered similar legislation when Senator Lisa Murkowski (R-AK) introduced the Fairness in Disclosure Act (S. 2197), which would have amended Title 18 of the U.S. Code to include the prosecutor's disclosure obligations, as well as the timing of such disclosures.<sup>7</sup> That legislation followed the exoneration of Senator Ted Stevens (R-AK) in 2009,<sup>8</sup> but it never moved out of the Senate Judiciary Committee because the Advisory Committee for the Federal Rules of Criminal Procedure informed the Judiciary Committee that it was already considering rules amendments addressing prosecutorial disclosure obligations.<sup>9</sup>

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<sup>4</sup> Due Process Protections Act, Pub. L. No. 116–182, 134 Stat. 894 (2020).

<sup>5</sup> *How the Rulemaking Process Works*, UNITED STATES COURTS, <https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works> (last visited Oct. 28, 2020).

<sup>6</sup> Due Process Protections Act, S. 1380, 116th Cong. (2020) (as enacted, Oct. 21, 2020).

<sup>7</sup> Fairness in Disclosure Act, S. 2197, 112th Cong. (2012) (as introduced in Senate, Mar. 15, 2012).

<sup>8</sup> Editorial, *Justice After Senator Stevens*, N.Y. TIMES, Mar. 18, 2012, at A20; *See generally* In re Special Proceedings, 842 F. Supp. 2d 232, 235 (D.D.C. 2012), *stay pending appeal denied*, 840 F. Supp. 2d 370, 371 (D.D.C. 2012) (U.S. Senator Ted Stevens was found guilty on seven counts of making false statements, but the verdict was set aside because the prosecution did not turn over *Brady* evidence during the trial. Senator Stevens was prosecuted for lying about gifts received as a Senator in the preceding year. After the jury returned a guilty verdict, his lawyer moved for a mistrial due to allegations of prosecutorial misconduct, but the motion was denied. Despite the denial, before sentencing, the DOJ conducted an investigation into all the discovery it had given to the defendant during the case and decided that it had committed sufficient error in failing to disclose exculpatory evidence to warrant moving to set aside the verdict and to dismiss the indictment. The court granted the motion, and the prosecution of Senator Stevens ended.)

<sup>9</sup> Letter from David G. Campbell (Ari.), Chairman of the Committee on Rules of Practice and Procedure, & Raymond M. Kethledge (6th Cir.), Chairman of the Advisory Committee on Criminal Rules to Chairman, to Jerrold Nadler, Chairman of the Committee on the Judiciary for the United States House of Representatives (May 28, 2020) (on file with the Dep't of Justice).

Since then, the Advisory Committee has taken several steps to increase the effectiveness of federal judges in overseeing the government's *Brady* obligations. First, the Advisory Committee recommended that the Federal Judicial Center (FJC) update its *Benchbook for U.S. District Court Judges* – which is issued to every federal trial judge in the United States – to include “best practices” for dealing with *Brady* disclosure issues. The Chair of the Advisory Committee worked with the FJC to develop comprehensive updates to the *Benchbook*.<sup>10</sup> As described in the 2013 edition:

[T]he Benchbook Committee developed a primer on *Brady* that addresses such issues as the basic duty to disclose exculpatory information, the elements of a *Brady* violation, and the timing of disclosures. New section 5.06 includes an extensive discussion of later Supreme Court and appellate case law interpreting and applying *Brady*; links to the Department of Justice's disclosure policies and the [Federal Judicial] Center's report to the Advisory Committee in 2011 on *Brady* and Federal Rule of Criminal Procedure 16; and a list of sample cases in which disclosure of *Brady* material was required.<sup>11</sup>

The Advisory Committee has also acted to improve the timing and content of pretrial disclosures. For example, new Criminal Rule 16.1 went into effect on December 1, 2019. It requires that, no later than fourteen days after arraignment, the attorneys for the government and defense must confer and try to agree on the timing and procedures for all pretrial disclosures. It further provides that the parties may “ask the court to determine or modify the time, place, manner, or other aspects of disclosure to facilitate preparation for trial.” This rule alone will ensure that *Brady* disclosure obligations are discussed early in every case.<sup>12</sup>

In the last few months, the Advisory Committee approved for publication a proposed amendment to Rule 16 that increases the pretrial disclosure requirements for expert witnesses. The public comment period will last six

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<sup>10</sup> *Id.*

<sup>11</sup> Fogel, Jeremy D., *Preface to FEDERAL JUDICIAL CENTER'S BENCHBOOK FOR U.S. DISTRICT COURT JUDGES*, at iii (6th ed. 2013); *see also* FEDERAL JUDICIAL CENTER, *BENCHBOOK FOR U.S. DISTRICT COURT JUDGES* § 5.06, at 173-82 (6th ed. 2013).

<sup>12</sup> Campbell & Kethledge, *supra* note 9.

months, and the Advisory Committee will consider all comments and testimony when finalizing a rule amendment.<sup>13</sup>

Despite the many steps taken in the interests of justice, Senators Durbin and Sullivan still introduced the Bill, and it was referred to the Senate Judiciary Committee for action.<sup>14</sup> Just over a year later, during the global pandemic and a time of rampant public protest about unfairness in the criminal justice system, the Judiciary Committee discharged the Bill unanimously on May 20, 2020.<sup>15</sup> That same day, it also passed unanimously in the Senate and was sent to the House, where it passed on September 21, 2020, before being presented to the President for signature or veto.<sup>16</sup>

The Act has passed, now what?

First, there is nothing new as far as legal and ethical obligations under *Brady*; those are still the same. However, the “order” may make disclosure requirements a priority for prosecutors to avoid any negative consequences of concealment.<sup>17</sup> Prosecutors are already keenly aware of their discovery obligations, and adequate sanctions already exist if prosecutors do not meet their obligations under *Brady*.<sup>18</sup> Sanctions include investigations by the Office of Professional Responsibility, referral to state bar disciplinary authorities, and unfavorable employment actions.<sup>19</sup> In some situations prior to the Due Process Protections Act being signed into law, courts have even used civil contempt as a means to enforce compliance with discovery orders.<sup>20</sup> In that regard, the kind of notice required in the Due Process Protections Act could provide courts with the opportunity to further hold prosecutors in *criminal* contempt. Civil contempt “is ordinarily used to compel compliance with a court order . . . . By contrast, criminal contempt

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<sup>13</sup> *Id.*

<sup>14</sup> S. 1380, *supra* note 6.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Durbin-Sullivan Due Process Protections Act Signed Into Law*, *supra* note 2.

<sup>18</sup> Letter from Stephen Boyd, Assistant Attorney General of the Office of Legislative Affairs for the U.S. Department of Justice, to Russell Vought, Director of the Office of Management and Budget (Sep. 28, 2020).

<sup>19</sup> *Id.*

<sup>20</sup> *See, e.g., In re Contempt Finding in United States v. Stevens*, 663 F.3d 1270, 1272-75 (D.C. Cir. 2011).

is used to punish; that is, to vindicate the authority of the court following a transgression rather than to compel future compliance or to aid the complainant."<sup>21</sup> Does Congress intend to *punish* prosecutors for *Brady* violations? If it does, what are the unintended second and third order effects of doing so? Regardless of these effects, supporters of the Act would argue it puts more "teeth" into the *Brady* obligations—an order on the record will give federal judges the authority to hold prosecutors accountable even if a case is dismissed as a mistrial or for any other reason.

Second, while not adding any new obligations to prosecutors, the legislation does unnecessarily impose the burden of a new procedure on district courts,<sup>22</sup> which should have full authority to run the discovery process in their courtrooms. Many district courts already issue their own pre-trial criminal discovery orders detailing prosecutors' obligations under Rule 16 and *Brady*.<sup>23</sup> If a district court is concerned that a prosecutor appearing in the courtroom may not understand his or her obligations, the court has adequate existing tools to address the issue.<sup>24</sup> That said, requiring an order in all district courts in every criminal case seeks to ensure every criminal defendant has a fair trial, even those defendants in districts that did not issue pre-trial discovery orders prior to enactment of the Due Process Protections Act.<sup>25</sup>

Third, Congress's direct amendment of the Federal Rules acts to reduce the judiciary's rulemaking authority pursuant to the Rules Enabling Act, which empowers the Supreme Court to prescribe "general rules of practice and procedure."<sup>26</sup> The only caveat is that "[s]uch rules shall not abridge, enlarge or modify any substantive right."<sup>27</sup> The Supreme Court, through the Judicial Conference of the United States, exercises its delegated policymaking powers by engaging in a deliberative and transparent process involving all criminal justice stakeholders.<sup>28</sup> The Rules Enabling Act

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<sup>21</sup> *Id.* at 1274.

<sup>22</sup> Due Process Protections Act, Pub. L. No. 116–182, 134 Stat. 894 (2020).

<sup>23</sup> Boyd, *supra* note 18.

<sup>24</sup> *Id.*

<sup>25</sup> Press Release, Chairman Nadler Applauds House Passage of 10 Judiciary Bills (Sept. 22, 2020) (on file with U.S. Rep. Jerry Nadler).

<sup>26</sup> Rules Enabling Act, 28 U.S.C. § 2072 (2018) (effective as amended Dec. 1, 1990).

<sup>27</sup> *Id.*

<sup>28</sup> *How the Rulemaking Process Works*, *supra* note 5.

authorizes amendments to the Federal Rules of Criminal Procedure only after broad public participation and review by the bench, bar, academia, and Congress. It has worked well for more than eighty years, ensuring a thorough and inclusive process for evaluating important changes to criminal procedure.<sup>29</sup> However, every time Congress directly amends the Federal Rules, the judiciary is deprived of its “opportunity to receive testimony and written submissions” on the proposed change and citizens of the United States are deprived of their opportunity to provide comments on the rulemaking before it goes into effect.<sup>30</sup>

In conclusion, the Due Process Protections Act was a long time coming after the exoneration of Senator Ted Stevens from Alaska. Now, only time will tell if it really has an effect on the fairness or unfairness of criminal prosecutions. While it does not change any ethical or legal obligations, it may increase the priority with which prosecutors turn over *Brady* evidence. While it imposes an added burden on federal judges and district courts, if the equality of justice improves, the juice may be worth the squeeze. As for Congress taking back or reducing delegated authority, it is well within the limits of the United States Constitution to do so.

Edited by Ben Davisson

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<sup>29</sup> Campbell & Kethledge, *supra* note 9.

<sup>30</sup> *Id.*