

June 5, 2020

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Kevin McCarthy
House Minority Leader
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Jerrold Nadler
Chair, Judiciary Committee
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Jim Jordan
Ranking Member, Judiciary Committee
U.S. House of Representatives
Washington, D.C. 20515

Re: Due Process Protections Act

Dear Speaker Pelosi, Minority Leader McCarthy, Chairman Nadler, and Ranking Member Jordan:

The undersigned organizations urge you to support the Due Process Protections Act. This narrowly tailored bipartisan bill confirming prosecutors' obligation to disclose exculpatory evidence consistent with the Due Process Clause of the Constitution passed the Senate by unanimous consent on May 20. The bill, S. 1380, was sponsored by Senator Sullivan and Senator Durbin, and cosponsored by Senators Lee, Booker, Cornyn, Whitehouse, and Paul. Given the tremendous bipartisan support for this bill, we urge the House to consider it on suspension of the rules as soon as possible.

The Due Process Clause of the Constitution requires that prosecutors disclose to the accused all exculpatory evidence that is material. The Supreme Court has said that a "prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. . . . [and] does not comport with standards of justice."¹ However, current procedural safeguards to ensure due process is protected are inadequate. The Due Process Protections Act

¹ *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963); *see also id.* at 87 ("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.").

simply requires federal judges to issue an order in each case that confirms prosecutors' constitutional obligation to disclose exculpatory evidence. Studies have identified the nondisclosure of exculpatory evidence as a factor in many documented wrongful convictions later overturned by post-conviction DNA testing. Because appellate and post-conviction remedies are so limited, it is essential to prevent violations before they occur.

One prominent example of the failure to disclose exculpatory evidence is the case of then-Senator Ted Stevens. Six months after Senator Stevens was convicted at trial for false statements in 2008, it was revealed that the prosecutors had committed egregious due process violations by failing to disclose exculpatory evidence to the defense. The trial judge appointed a special prosecutor to investigate the misconduct. The special prosecutor issued a report that was highly critical of the prosecutors' misconduct. However, the report also found that the trial judge could not sanction the prosecutors, because he had not issued a direct, written court order requiring them to comply with their ethical and constitutional obligations to disclose exculpatory evidence.

In response to Senator Stevens's case, the United States District Court for the District of Columbia amended its local rules to require prosecutors to comply with disclosure obligations in June 2018. Many other districts have also issued specific local rules or standing orders that govern disclosure obligations. A 2011 survey by the Federal Judicial Center identified thirty-eight federal district courts² that have a local rule or standing order confirming the government's obligations to disclose exculpatory and/or impeachment evidence.

The Due Process Protections Act is a narrowly-tailored bipartisan bill that would reinforce the government's already-existing constitutional obligations by:

- Amending Rule 5 of the Federal Rules of Criminal Procedure to require that a judge issue an order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor in every criminal case.
- Requiring each judicial council in which a district court is located to issue a model order that its courts could use at their discretion.
- Leaving it to the courts in each district to tailor the parameters of their order. The bill would not impose any new requirements on prosecutors.

² There are 94 federal district courts.

We urge the House to consider and pass the bill on suspension of the rules. If you have further questions, feel free to contact Nathan Pysno at 202-465-7627 or npysno@nacdl.org.

Sincerely,

National Association of Criminal Defense Lawyers (NACDL)

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American Conservative Union

Americans for Tax Reform

Digital Liberty

Drug Policy Alliance

Federal Public and Community Defenders

FreedomWorks

Innocence Project

The Leadership Conference on Civil and Human Rights

The Sentencing Project