

**Statement for the Record of
Alan I. Baron
Before The
Subcommittee on Crime, Terrorism and Homeland Security
Committee on the Judiciary
United States House of Representatives**

**Regarding
Oversight Hearing on the Prosecution of Former Senator
Ted Stevens**

April 19, 2012

STATEMENT OF ALAN I. BARON

My name is Alan Baron and I am Senior Counsel to the law firm of Seyfarth Shaw LLP based in Washington, DC. In the course of my career, I have served as an Assistant United States Attorney for Maryland, during which time I headed the investigation which led to the indictment of former Senator Daniel Brewster for bribery while in office.¹ I am aware of the pressures on prosecutors when involved in a case of such magnitude and importance.

A substantial portion of my career in private practice over the years has involved acting as defense counsel in white collar criminal cases. I am familiar with the requirements of *Brady v. Maryland*,² *Giglio v. United States*³ and related cases.

I have also served, from time-to-time, as special counsel in the public sector. I have been retained as special impeachment counsel by the House of Representatives to pursue the impeachment, trial and removal of four federal judges, including former Judge G. Thomas Porteous.

I am appearing before the Subcommittee to testify concerning the report filed by Mr. Henry Schuelke setting forth the results of his investigation into possible criminal contempt proceedings against the prosecutors who conducted the investigation and prosecution of Senator Ted Stevens of Alaska (hereafter “the Report”). I should note that I have no connection

¹ Senator Brewster ultimately entered a plea of *nolo contendere* after the Supreme Court rejected his claim of immunity under the Speech or Debate clause of the Constitution. *See United States v. Brewster*, 408 U.S. 501 (1972).

² 373 U.S. 83 (1963)

³ 405 U.S. 150 (1972)

whatsoever to the Stevens case and have no relationship with any of the individuals involved in that matter other than minimal contact with Mr. Welch, relative to the Porteous impeachment.

Mr. Schuelke is to be commended for this comprehensive report. It clearly is the product of an enormous amount of effort conducted in a highly professional manner. For purposes of my testimony, I accept the accuracy of his findings of fact, specifically that “By any standard, the information provided to the prosecutors by Rocky Williams and Bambi Tyree was *Brady* material” (the Report at 500).⁴ The Report concluded that Mr. Bottini and Mr. Goeke consciously withheld and concealed this critical information from the defense. Indeed, the Report states that there were affirmative misrepresentations regarding the Tyree information to the effect that such materials did not exist (the Report at 503).

Finally, Mr. Schuelke found that Mr. Bottini failed to take steps to correct testimony by Mr. Allen on the witness stand which Mr. Bottini knew to be false in violation of *Napue v. Illinois*⁵ (the Report at 503).

⁴ Rocky Williams was foreman for the renovations on the Stevens’ house. He told prosecutors, based on statements made by Bill Allen, his boss, and by Senator Stevens, he understood that all charges would be added to the bill submitted to Senator Stevens by the subcontractor. This corroborated the heart of the defense case. Senator Stevens maintained that when he paid the bills submitted to him, he understood he was paying for everything he owed.

Bambi Tyree was an underage prostitute with whom Mr. Allen had a relationship. Allen was a major prosecution witness against Senator Stevens. In an unrelated case, Tyree was interviewed by the FBI. The FBI memorandum of that interview states that Tyree submitted a false affidavit at Allen’s request denying her sexual relationship with Allen. The Government in that case filed a memorandum under seal which stated Allen had procured the false affidavit.

⁵ 360 U.S. 264 (1959). When Allen was interviewed by prosecutors shortly before trial, he changed his version of the facts on a critical issue for the defense. For the first time, Allen characterized memoranda Senator Stevens had sent to him in 2002 asking Allen to be sure and send Senator Stevens a bill for the work, as “cover your ass” memos. When asked on cross-examination at trial whether his characterization of the documents as “cover your ass” memos

Mr. Schuelke was appointed “to investigate and prosecute criminal contempt proceedings as may be appropriate against the prosecutors in this case” (the Report at 1). Despite having found that Mr. Bottini and Mr. Goeke intentionally withheld and concealed material exculpatory information which was required to be disclosed to Senator Stevens and Williams & Connolly by *Brady* and *Giglio* (the Report at 36), Mr. Schuelke ultimately concluded that no prosecution for criminal contempt would lie. According to Mr. Schuelke, at a hearing on September 10, 2008, the judge in the Stevens case failed to issue “a clear, specific and unequivocal order such that it would support a finding by a District Court beyond a reasonable doubt that 18 U.S.C. § 401 (3) had been violated” (the Report at 513).

In my view, Mr. Schuelke’s report is entitled to deference where it purports to find facts and reach conclusions based on the enormous investigative effort which underlies it. However, the entire transcript of the September 10, 2008 hearing is available for review so that one can reach one’s own conclusion as to what transpired at that critical event. Here, I must respectfully disagree with Mr. Schuelke’s characterization of what occurred. On September 10, 2008, the court issued a clear, unequivocal order to the government to produce material pursuant to *Brady* and its progeny. Everyone agreed that they understood their obligation. None of the prosecutors asked for clarification of what was being ordered. We must recall Mr. Schuelke’s earlier conclusion that “By any standard . . .” the Williams and Tyree materials were *Brady*. Accordingly, failure to disclose what were clear *Brady* materials, was in direct violation of the court’s order.

was something he had just recently told prosecutors, Allen said “no.” That answer was false, but no effort was made to correct the testimony.

The fact that no written order was entered on September 10 is irrelevant because it is well established that a written order is not required. *See In re Hipp, Inc.*, 5 F.3d 109, 112 n.4 (5th Cir. 1993). It is noteworthy that Mr. Wainstein, counsel for Mr. Bottini, in a letter to Attorney General Holder dated March 15, 2012, acknowledges that no written order is required for a contempt proceeding and that the judge's verbal order at the September 10, 2008 hearing was clear and unequivocal.

Based on the foregoing, I believe that Mr. Schuelke's rationale for not proceeding is unpersuasive. There may be many reasons for a prosecutor to exercise discretion and decide not to prosecute a case, but the reason stated here is not convincing. The judge's order was clear as was its violation.

It is fair to ask "how did this happen?" The obvious answer is that over-zealous prosecutors got caught up in a win at all costs mentality and ignored their obligation to prosecute fairly and within the limits imposed by the Constitution. The question remains, however, where was the supervision which would have operated as a reality check to rein in prosecutors who, according to the Report, engaged in "systematic concealment of significant exculpatory evidence which would have independently corroborated Senator Stevens' defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness.?"

It is clear from the Report that there was a breakdown in responsibility and accountability in how the case was being handled. Brenda Morris, Principal Deputy Chief of the Public Integrity Section, was thrust into the role of lead prosecutor just a few days before the indictment was filed in a case which had been investigated for two years. According to Ms. Morris, she had resisted being put in the position of lead counsel several times. (See Exhibit 4 in the Addendum to the Report.) Once in the position, she was well behind the curve in mastering the facts and

was faced with resentment by the prosecutors who had been on the case. Her solution, in her own words was, “to make herself as little as possible” (the Report at 3). In essence, she accepted the position of lead counsel without accepting and exercising the responsibilities inherent in the role. This was at least part of the reason the case imploded. No one was supervising the prosecutors in a meaningful way. This does not in any way excuse the misconduct, but it is part of the explanation for how matters got to the sorry state set out in the Report.⁶

The vast majority of federal prosecutors perform their roles with integrity and in conformity with their sworn obligation to uphold the law. Matters went terribly awry in this case, and it is to Attorney General Holder’s credit that he decided to dismiss the Stevens case with prejudice, in effect, expunging the verdict.

⁶ The Report exonerates Ms. Morris of knowingly and willfully withholding *Brady* and *Giglio* information from the defense (the Report at 506).