



U.S. Department of Justice

Washington, D.C. 20530

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Re: *The Annual Review of Criminal Procedure*

Dear Editors:

Earlier this year, Judge Alex Kozinski penned a provocative preface to the *Annual Review of Criminal Procedure*, calling into question whether our criminal justice system is “fundamentally just.” Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. xiii (2015). He took aim at the types of evidence used to secure convictions and the people who collect, present, and analyze this evidence on its way from the crime scene to the jury room. In doing so, he sought to deflate the supposed infallibility of various aspects of our criminal justice system: not just eyewitness testimony, forensic evidence, and confessions, but also the work of law enforcement officers, prosecutors, and jurors.

Our criminal justice system isn’t perfect. No human institution is. We must be candid about our shortcomings and firm in our commitment to remedying them. As long-time prosecutors with broad responsibilities in the U.S. Department of Justice, we care deeply about making sure that the system is just, and we recognize the importance of holding everyone who is a part of that system accountable for the work that they do and the way they do it.

While the preface raises several points that merit discussion, such as the reliability of certain forms of evidence, Judge Kozinski goes too far in casting aspersions on the men and women responsible for the administration of justice in this country. His preface seemed to question not only the integrity of our agents and prosecutors, but also the government’s capacity to self-correct in the (very small) minority of cases when someone falls short.

Consider the Judge’s discussion of the government’s obligations to disclose exculpatory evidence. He asked whether prosecutors “play fair,” *id.* at viii, suggesting they are motivated by an “attitude of God-like omniscience” and a desire for career advancement that can crowd out adherence to their professional and ethical duties. On one hand, he recognized that, with few exceptions, federal prosecutors are “fair-minded, forthright, and highly conscientious,” *id.* at xxii; yet on the other, he questioned whether prosecutors could be trusted to turn over material favorable to the defense and repeated his assertion that there is an “epidemic of *Brady* violations abroad in the land,” *id.* at viii (quoting *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting from denial of rehearing en banc)).

We have both worked with many prosecutors during our combined thirty-three years at the Justice Department. We have served as line prosecutors and supervisors, and now hold positions with national responsibility. Throughout our careers, what has always struck us is the professionalism, integrity, and decency of our colleagues. They care deeply about the work that they do, not because they are trying to rack up convictions or long sentences, but because they seek to ensure that justice is done in each and every case they handle. This extends to the seriousness with which they take their discovery obligations. Our prosecutors comply with these obligations—because they are required to do so and because it is the right thing to do. It is a principle embedded not only in the Department’s internal rules, but in the Department’s culture.

Judge Kozinski suggested that DOJ attorneys interpret these discovery obligations narrowly. He claimed, for example, that the Department takes the position that exculpatory evidence must be produced to defense counsel “only if it is material”—suggesting that we do the constitutionally bare minimum and nothing more. *Id.* at viii. To support this assertion, he cited to the U.S. Attorneys’ Manual (USAM), which governs the conduct of DOJ attorneys. But, strangely, he ignored the entire USAM section that describes the obligation to disclose exculpatory information “beyond that which is constitutionally and legally required.” USAM, Chapter 9-5.001, POLICY REGARDING DISCLOSURE OF EXCULPATORY AND IMPEACHMENT INFORMATION, <http://www.justice.gov/usam/usam-9-5000-issues-related-trials-and-other-court-proceedings>. Under these procedures, our prosecutors are required to turn over anything that might “cast substantial doubt upon the accuracy of any evidence” or “might have a significant bearing on the admissibility of prosecution evidence.” *Id.* This is not a policy of gamesmanship; it is one that encourages transparency and fairness.

And Judge Kozinski proffered little support for the purported epidemic of *Brady* violations. In making this claim, the Judge cited to his own dissent in *United States v. Olsen*, which identified an “epidemic” based on twenty-nine cases over a fifteen-year period. 737 F.3d at 626. However, he failed to note that only eight of the cases cited were federal prosecutions (the rest involved state prosecutions), and only two of them actually contained findings of deliberate misconduct. Two cases over fifteen years—compared to the roughly 80,000 cases that DOJ prosecutes each year, and the over one million cases prosecuted during that fifteen-year span—is still two cases too many. But it is not evidence of systematic problems in the way our attorneys disclose evidence, and is not a basis on which to question the integrity of thousands of hardworking and committed professionals who have sworn to uphold the law.

On several occasions, Judge Kozinski referenced the prosecution of former senator Ted Stevens. The *Stevens* case, as others have noted, involved significant discovery failures and deserves to be held up as an object lesson to prosecutors. But the Department’s efforts in the aftermath of that case also deserve discussion. One of Eric Holder’s first acts after his swearing in as Attorney General was to seek dismissal of the conviction. In the months that followed, the Department undertook a sweeping review of its discovery-related procedures and instituted a string of new policies. All federal prosecutors, regardless of experience level, are now required to attend annual discovery trainings, while new prosecutors must attend rigorous, multi-day “discovery boot camps.” The Department developed a series of new policies governing the collection and disclosure of electronically stored information. And the Department established an extensive infrastructure of experienced prosecutors to focus on discovery issues, including a full-time national criminal discovery coordinator (who reports directly to the Deputy

Attorney General, second only to the Attorney General herself at the Department of Justice) and discovery coordinators at each of the 93 U.S. Attorney's Offices across the country.

None of this guarantees that every prosecutor will act appropriately in every circumstance. To the contrary, these efforts reflect the Department's understanding that upholding the law requires constant training and constant vigilance. And these efforts reflect, more fundamentally, the Department's abiding commitment to justice, to the rule of law, and to maintaining the public's confidence in the institutions we represent. As former Attorney General Holder said in a July 2009 speech, "When we are wrong we will admit our errors. When we see an affront to justice, we will rectify the problem." Eric Holder, Address to the National Black Prosecutors Association's Profile in Courage Luncheon, July 22, 2009, <http://www.justice.gov/opa/speech/attorney-general-eric-holder-national-black-prosecutors-association-s-profiles-courage>.

This has been our guiding principle. At the Department of Justice, we recognize our responsibility to work tirelessly to improve the work that we do, and to enhance the fair administration of justice. For that reason, the Department has moved aggressively on several fronts—whether on a new policy that requires our agents to record custodial interrogations, or our decision to create a national commission to enhance forensic science, or our efforts to limit the application of harsh mandatory minimum sentences to non-violent drug offenders. We cannot promise that every member of the public will agree with our approach, and we cannot promise that the future will be free of errors. But as stewards of the public's trust, we are committed to fair play and honest dealings in every matter we handle, in the pursuit of equal justice under law. Judge Kozinski's preface failed to take this fully into account. And so, as he might say, we respectfully dissent.

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