LICENSED TO LIE

Exposing Corruption in the Department of Justice

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Foreword

We Americans are extremely proud of our criminal justice system. We believe it to be the best and fairest in the world. And in many ways it is. We guarantee every criminal defendant an impartial judge, a fair jury and a defense lawyer—at public expense for the many who can't afford one. The prosecution must prove guilt beyond a reasonable doubt, and must do so in a speedy, public trial. And we have a variety of rules governing the collection and presentation of evidence, all designed to ensure that justice is done in every case. But the system only works if the participants follow the rules.

Prosecutors have a particularly strong duty to act fairly because, as the Supreme Court has explained, they are the representatives "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." In the words of fabled defense lawyer Brendan Sullivan, "[i]f the government is not honest, it can trump even the best efforts of those of us who work in the system."

Sullivan uttered those words in the case against former Senator Ted Stevens, who was convicted after federal prosecutors concealed

evidence favorable to the defense and lied about it in court. The conviction was vacated once the government's deception was revealed, but this occurred long after Stevens had lost an election—ending a 40-year Senate career and changing the balance of power in the Senate—as a direct result of the wrongful conviction.

The Stevens case is just one of several high-profile criminal prosecutions engineered by a small cadre of high-ranking United States Department of Justice lawyers. Most of the convictions obtained by the government have been set aside, but not before wasting countless millions of taxpayer dollars and wreaking havoc on the lives and businesses of those charged with federal crimes. The venerable accounting firm of Arthur Andersen was destroyed by a prosecutorial decision to charge the firm, not merely individual partners, with criminal conduct. While the Supreme Court eventually held that the "crime" of which Andersen was convicted was no crime at all—in other words, that Andersen had acted lawfully—the exoneration came too late to save the business or the 85,000 jobs it provided in its various offices world-wide. Other defendants were exonerated after spending time behind bars for conduct that turned out to be entirely lawful.

The Center for Prosecutor Integrity lists the following as some of the most serious types of prosecutorial misconduct:

- Charging a suspect with more offenses than is warranted
- Withholding or delaying the release of exculpatory evidence
- Deliberately mishandling, mistreating, or destroying evidence
- Allowing witnesses they know or should know are not truthful to testify
- Pressuring defense witnesses not to testify
- Relying on fraudulent forensic experts
- During plea negotiations, overstating the strength of the evidence

- Making statements to the media that are designed to arouse public indignation
- Making improper or misleading statements to the jury
- Failing to report prosecutor misconduct when it is discovered.

And why do prosecutors engage in misconduct? The Center provides an answer:

> Prosecutors are subjected to a variety of powerful incentives that serve to reward zealous advocacy: the gratitude of victims, favorable media coverage, career promotions, appointment to judgeships, and the allure of high political office.

Much of this behavior is illustrated in the pages of this book, and requires no elaboration. However, two items on the Center for Prosecutor Integrity's list merit a few additional words, as their significance may not be immediately apparent to readers unfamiliar with the criminal justice process.

The first is the growing practice of over-charging, particularly with crimes of dubious validity. One of the bedrock principles of our criminal law is that citizens are entitled to fair notice of what is criminal and what is legal. People can then avoid prosecution by engaging in lawful activities. The right to do what the law does not prohibit, without fear of harassment or punishment, is one of the hallmarks of a free society. One of the fundamental responsibilities of a prosecutor is to charge defendants only with conduct that is clearly criminal. And yet, time and again in these high-profile prosecutions, the United States Department of Justice charged multiple defendants with crimes that simply weren't crimes. In addition to the so-called crime that destroyed Arthur Andersen, the Supreme Court held in rapid succession that

the government had obtained convictions in three other cases where the charged conduct wasn't criminal. Nevertheless, the government insisted—and the judges supinely agreed—that the defendants must start serving their time behind bars even as their challenges to their convictions upon these alleged violations were being considered on appeal.

Another important responsibility of prosecutors is to disclose to the defense any exculpatory information of which the government is aware. The Supreme Court announced this as a constitutional requirement in the 1963 case of *Brady v. Maryland*, and it has confirmed its underlying principles many times since. It may not be obvious to the lay reader why the government must provide the defendant with evidence that may undermine the prosecution, so it's worth a brief explanation. Most fundamental is the fact that the government is not an ordinary litigant whose interest lies in winning at all costs. Rather, the government's legitimate interest lies in convicting only those defendants who are proven guilty beyond a reasonable doubt. If the government has evidence that casts doubt on the defendant's guilt, it has every interest in producing that evidence for the jury to consider in reaching its decision. As the Supreme Court noted in *Brady*, "[a]n inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.'"

Beyond this theoretical justification are important practical reasons for the *Brady* rule: Government agents usually have unimpeded and exclusive access to the crime scene, so they can easily remove and conceal evidence that might contradict the prosecution's case. Police also generally talk to witnesses first and can pressure them to change their story to conform to the prosecution's theory of the case. Prosecutors can, and often do, threaten to charge witnesses as accomplices or co-conspirators

if they testify favorably to the defense. As a result, potential exculpatory witnesses invoke the Fifth Amendment to avoid getting themselves into trouble. The government has virtually unhampered control over forensic evidence, as well as its analysis and presentation by experts. Too often these experts turn out to be sloppy or dishonest; many defendants have spent long years behind bars because of incompetent or corrupt forensic scientists employed by law enforcement. Many of those convictions could have been avoided if the jury had been shown the evidence casting doubt on the validity of the expert reports.

While no one openly disputes the validity of the *Brady* rule, many prosecutors see it as a thorn in their sides—an obstacle to overcome rather than a welcome responsibility to be scrupulously observed. Prosecutors want to win, for all the reasons mentioned by the Center for Prosecutor Integrity Report above, and they see *Brady* as an impediment to obtaining a conviction. While there are certainly many honest and fair-minded prosecutors, a disturbing number fail to disclose exculpatory evidence to the defense. Some prosecutors affirmatively and knowingly conceal it.

There was such knowing concealment of exculpatory evidence in the case against Senator Stevens, and his conviction was vacated and the charges against him dismissed. But Senator Stevens was doubly lucky: First, an honest FBI agent broke ranks with his colleagues and the prosecutors in the Department of Justice, and disclosed the government's willful *Brady* violations and lies to the district court. And, second, Emmet Sullivan, the district judge presiding over the case, took the matter seriously and ordered an investigation of the lawyers who had conducted the prosecution. Deeply troubled that "[a]gain and again . . . the Government was caught making false representations"—a polite term for telling bald-faced lies—Judge Sullivan bristled: "The United States Government has an obligation to pursue convictions fairly and

in accordance with the Constitution, and when the Government does not meet its obligations to turn over evidence, the system falters."

But what happened in Stevens's case is vanishingly rare. *Brady* violations are extremely difficult to discover because the prosecution has complete control over the evidence gathered by its investigators. Prosecutors know that if they fail to produce exculpatory evidence, no one is likely to find out. Even when the evidence is fortuitously disclosed after the defendant is convicted, judges are very reluctant to order a new trial, so they sweep the evidence under the rug as "immaterial" or "cumulative." Sanctions against prosecutors who violate *Brady* are practically unheard-of and professional discipline is non-existent. As a consequence, there is, as I've said elsewhere, "an epidemic of *Brady* violations abroad in the land."

The author of this book is a former prosecutor turned private practitioner who represented a defendant in one of the high-profile cases discussed in the pages that follow. She was called in by the defense team after the client had been convicted. As she describes her first meeting with the client and his lawyers, they were "[t]raumatized, exhausted, wrung out, meek, and broken" as a result of what had been a brutal trial. "I seemed to have more testosterone than all of them put together," she quips. In truth, Sidney Powell has more testosterone than pretty much any roomful of lawyers, be they men or women. Writing a book like this more than proves it. Not only does she take on, by name, prosecutors and former prosecutors who continue to serve in powerful and responsible positions, she is also relentless in criticizing judges before whom she has practiced for years. Few lawyers have the stones to do this.

Some of what Powell recounts—such as the concealment of evidence and lies told to the court in the Stevens case—is in the public record and not subject to reasonable dispute. As to other matters, she

draws on her own experience, the trial record and evidence later uncovered to level serious accusations of malfeasance against the lawyers and judges involved in the high-profile criminal cases she discusses. Readers can make up their own minds as to whether those accusations are supported. It is hoped that those at whom she points the finger will answer the charges. One way or another, however, this book should serve as the beginning of a serious conversation about whether our criminal justice system continues to live up to its vaunted reputation. As citizens of a free society, we all have an important stake in making sure that it does.

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Judge Kozinski's Foreword is written in his personal capacity and does not represent the views of the Court.