ARGUMENT NOT YET SCHEDULED

No. 15-5051

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,

Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS; AND UNITED STATES DEPARTMENT OF JUSTICE,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (NO. 14-269 (CKK))

BRIEF OF SIXTY-THREE LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF THE APPELLANT AND REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Counsel for *amici curiae* adopts the Appellant's statement of parties, but adds to it the sixty-three *amici curiae* identified in Appendix A to this brief.

2. Counsel for *amici curiae* adopts the Appellant's statement of ruling under review.

3. Counsel for *amici curiae* adopts the Appellant's statement of related cases.

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GLOSSARY

FOIA Freedom of Information Act

STATUTES AND REGULATIONS

The statute in question, 5 U.S.C. § 552, is reproduced in an addendum to the Appellant's opening brief.

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY

Amici curiae are sixty-three law professors who teach and write about criminal law and/or legal ethics. Some *amici* also represent criminal defendants, either in their private practice or through clinical programs at their respective law schools. A complete list of *amici* who join in this brief is attached as Appendix A.

Amici curiae believe the public has an interest in, and a right to see, the Department of Justice's Blue Book. *Amici* agree with the Appellant that the district court erred in holding the Blue Book is privileged attorney-work product, such that the Department may withhold the Blue Book from the public. *Amici* are familiar with the Appellant's brief and do not seek to restate the same arguments here. *Amici* write separately to emphasize instead the important public interests at stake in this case.

The Appellant consents to the filing of this brief; the Appellees, as of filing, had not responded to a request for consent. Pursuant Rule 29(c)(5), counsel for *amici curiae* represents that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no other person contributed money that was intended to fund the preparation or submission of this brief.

ARGUMENT

I. The public has a clear right to know "what its government is up to."

Justice Louis Brandeis famously wrote that "sunlight is the most powerful of all disinfectants." Louis D. Brandeis, *Other People's Money and How the Banker's Use It* 92 (Melvin I. Urofsky 1914). The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, embodies this sentiment. When Congress enacted FOIA in 1966, it intended to usher a new era of transparency in government. Under earlier law, "government agencies considered themselves free to withhold information from the public under whatever subjective standard could be articulated for the occasion." *Senate Committee on the Judiciary, Freedom of Information Act Source Book: Legislative Materials, Cases, Articles*, S. Doc. No. 82, 93d Cong., 2d Sess., at 1 (1974) ("FOIA Sourcebook"). Congress was concerned in particular with what had come to be known as secret law, the undisclosed policies of federal agencies. *See, e.g.*, Charles H. Koch Jr., *The Freedom of Information Act: Suggestions for Making Information Available to the Public*, 32 Md. L. Rev. 189, 198 (1972), *reprinted in* FOIA Sourcebook at 374. Congress intended FOIA to "pierce the veil of administrative secrecy" and expose government undertakings "to the light of public scrutiny." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation and internal quotation marks omitted).

See also United States Dep't of Justice v. Reporters Comm., 489 U.S. 749, 774 (1989) (FOIA's "central purpose" is to ensure that government's business is "opened to the sharp eye of public scrutiny."); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (Congress enacted FOIA to "ensure an informed citizenry" and to "check against corruption and hold the governors accountable to the governed.") (citations omitted).

Through FOIA, Congress gave the public the clear right, enforceable through the federal courts, to obtain information from federal government agencies. The right has been simply described as the public's right to be informed about "what their government is up to." *See, e.g., Reporters Comm.*, 489 U.S. at 773 (FOIA "focuses on the citizens' right to be informed about 'what their government is up to.'" (quoting *Envtl. Prot. Agency v. Mink*, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting) ("The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to.") (citation and internal quotation marks omitted))).

The public's right to be informed about "what their government is up to" is no less compelling when the government agency in question is one, such as the Department of Justice, charged with the sensitive task of prosecuting crime.

Arguably, the public's right to be informed is *most* compelling where prosecution is concerned. Prosecutors wield immense power. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) ("Only someone who has worked in the field of law enforcement can fully appreciate the vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation."). They alone decide whether to bring criminal charges, what those criminal charges should be, and whether to offer a defendant a plea bargain in exchange for a guilty plea.

As for any power, inherent in the power of prosecution is a risk of abuse. Justice Robert Jackson, then Attorney General, once warned federal prosecutors that even within the simple act of picking a case, there lies "the greatest danger of abuse":

> If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. … It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

Morrison, 487 U.S. at 727 (Scalia, J., dissenting) (quoting Robert H. Jackson, Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940)).

Prosecutorial abuse is not hypothetical. In recent years, there have been several highly-publicized failures of prosecutors to disclose exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963). More than one judge has decried the regularity of such abuses; Judge Kozinski of the Ninth Circuit recently called *Brady* violations an "epidemic." *United States v. Olsen*, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, C.J., dissenting from the denial of a petition for rehearing en banc) ("*Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend.") (citing cases). *See also United States v. Tavera*, 719 F.3d 705, 708 (6th Cir. 2013) ("[N]ondisclosure of *Brady* material is still a perennial problem, as multiple scholarly accounts attest."). High profile cases involving former United States Senator Ted Stevens, *see United States v. Stevens*, 744 F. Supp. 2d 253 (D.D.C. 2010), *aff'd*, 663 F.3d 1270 (D.C. Cir. 2011), and former New Orleans District Attorney Harry Connick, *see Connick v. Thompson*, 563 U.S. ___, 131 S.Ct. 1350 (2011), are but the tip of an iceberg whose size the public may never truly appreciate. "Due to the nature of a *Brady* violation, it's highly unlikely wrongdoing will ever come to light in the first place." *Olsen*, 737 F.3d at 631.

"This creates a serious moral hazard for those prosecutors who are more interested in winning a conviction than serving justice." *Id.*

The public's interest in transparency in such matters is self-evident. Prosecutors are public servants; unlike most lawyers, their duty is to the public. Moreover, prosecutors' obligations in criminal prosecutions, including their obligation to disclose exculpatory evidence under *Brady*, are constitutional in proportion. Like the police, prosecutors must "obey the law while enforcing the law." *Spano v. New York*, 360 U.S. 315, 320 (1959) ("the police must obey the law while enforcing the law"). When they do not, the consequences are grave. Their omissions can result in the wrongful conviction of an innocent man, *e.g.*, *Connick*, 131 S. Ct. 1350, or even, at the opposite end of the spectrum, the vacating of a known mobster's guilty plea, *e.g.*, *Ferrara v. United States*, 384 F. Supp. 2d 384, 430 (D. Mass. 2005), *aff'd*, 456 F.3d 278 (1st Cir. 2006).

Instances of prosecutorial abuses erode the public's trust in the criminal justice system. This mistrust is made worse by the unknowable nature of certain kinds of abuses. Moreover, a lack of transparency not only breeds mistrust. By concealing abuses, it facilitates them, and thereby stands in the way of future deterrence. The public has an interest in, and a right to know, what its federal prosecutors are up to. FOIA was designed to vindicate this very interest.

It is against this backdrop that the Department of Justice's Blue Book must be evaluated. The Department created the Blue Book in 2011, in the wake of Congressional investigations into widespread *Brady* violations by federal prosecutors. In 2009, a court-appointed investigator concluded that the prosecution of United States Senator Ted Stevens had been "permeated by the systemic concealment of significant exculpatory evidence." Report to the Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated Apr. 7, 2009 at 1, *In re Special Proceedings*, No. 09-0198 (D.D.C. Mar. 15, 2012). The conclusions, and the negative attention they drew, compelled Congress in 2012 to propose legislation that would have established national standards for the disclosure of exculpatory evidence in federal criminal prosecutions. The Department opposed the legislation. It assured Congress and the public that it was already self-policing through internal reforms. Statement of James M. Cole, Deputy Attorney General: Hearing on S. 2197 Ensuring that Federal Prosecutors Meet Discovery Obligations Before the S. Comm. on the Judiciary, 112th Cong., at 1 (June 6, 2012). It pointed specifically to the Blue Book, which the Department said "comprehensively covers the law, policy, and practice of prosecutors' disclosure obligations." *Id.* at 3.

The Blue Book is a statement of agency policy that sheds light on the Department of Justice's performance of its constitutional obligation of disclosure

in criminal prosecutions. FOIA expressly provides that, among other things, statements of agency policy shall be made available to the public. 5 U.S.C. § 552(a)(2) (each federal government agency "shall make available for public inspection and copying ... those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register"); *Tax Analysts v. I.R.S.*, No. 94-CV-923, 1996 WL 134587, at *2 (D.D.C. Mar. 15, 1996), *aff'd*, 117 F.3d 607 (D.C. Cir. 1997) (statements of policy can be "adopted by the agency" even if they are non-binding on agency personnel) (citations omitted). "Official information that sheds light on an agency's performance of its statutory duties falls squarely within [FOIA's] statutory purpose." *United States Dep't of Justice v. Reporters Comm.*, 489 U.S. 749, 773 (1989). FOIA gives the public the right to inspect the Blue Book.

The Department of Justice does not dispute that the Blue Book constitutes agency policy, or that it sheds light on the Department's performance of its constitutional duties. It nevertheless resists disclosure on the premise that the Blue Book is privileged attorney-work product and thereby exempt from disclosure under FOIA § 552(b)(5). The district court agreed with the Department, concluding that although the Blue Book includes statements of agency policy, "it contains sufficient advice and litigation strategy for use in actual litigation to qualify as attorney work-product." *Nat'l Ass'n for Criminal Defense Att'ys v.*

Exec. Office of U.S. Att'ys, No. 14-CV-269, 2014 WL 7205392, at *6 (D.D.C. Dec. 18, 2014) ("Opinion").

II. The Blue Book is not privileged attorney-work product.

The Department of Justice's position, and the district court's holding, is wrong for at least two reasons. As an initial matter, the Blue Book is not privileged attorney-work product under this Court's precedent. Although, generally speaking, the Department created the Blue Book in anticipation of future litigation, it did not create the Blue Book in contemplation of a specific claim. In FOIA cases, for purposes of applying the work product privilege, this Court's precedent distinguishes between situations in which government lawyers act *offensively* as prosecutors and situations in which government lawyers instead act *defensively* as legal advisors who wish to avoid litigation against their agency clients. Where, as here, government lawyers act *offensively* as prosecutors, they must prove they created the document in question in contemplation of a specific claim. The district court improperly excused the Department of this burden, concluding it is enough that the Department created the Blue Book in anticipation of foreseeable litigation. The district court's holding reads the work product privilege so broadly, no Department memoranda could ever be exposed to the light of public scrutiny.

As an additional matter, allowing the Department of Justice to withhold the Blue Book does not serve the interests underlying the work product privilege. The work product privilege is intended to ensure effective representation within the framework of the adversarial system by creating a zone of privacy around attorney-work product. The constitutional obligation to disclose exculpatory evidence under *Brady*, however, is an acknowledged *departure* from the adversarial system. The interests the adversarial system intends to protect—truth and justice—are benefited when prosecutors faithfully discharge their *Brady* obligation. There should be no zone of privacy around prosecutors' understanding of that obligation.

A. The Blue Book is not privileged attorney-work product under this Court's precedent.

The work product privilege "does not extend to every written document generated by an attorney; it does not shield from disclosure everything a lawyer does." *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 775 (D.C. Cir. 1978) (en banc), *overruled in part on other grounds*, *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc). "Its purpose is more narrow, its reach more modest." *Id.*, 591 F.2d at 775. When the Supreme Court established the work product privilege in *Hickman v. Taylor*, 329 U.S. 495 (1947), it acknowledged a lawyer's need for a zone of privacy "in the giving of legal advice and in the preparation of cases for trial":

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman, 329 U.S. at 510–11. Thus this Court has counseled that because "the purpose of the privilege is to encourage effective legal representation within the framework of the adversary system," in the privilege's application the focus should be "on the integrity of the adversary trial process itself." *Jordan*, 591 F.2d at 775. *See also In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998) ("the privilege protects the adversary process"). The privilege only applies to materials "prepared in anticipation of litigation or for trial." *Jordan*, 591 F.2d at 775.

The fact that materials may one day be used in agency litigation does not make them privileged. If a government agency were allowed "to withhold any document prepared by any person in the Government with a law degree simply because litigation might someday occur, the policies of the FOIA would be largely defeated." *Senate of the Com. of Puerto Rico on Behalf of Judiciary Comm. v. U.S. Dep't of Justice*, 823 F.2d 574, 586–87 (D.C. Cir. 1987 (quoting *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980)). This is especially true when the government agency in question is the Department of Justice. *See, e.g., Senate of Puerto Rico*, 823 F.2d at 586; *SafeCard Servs., Inc. v.*

S.E.C., 926 F.2d 1197, 1203 (D.C. Cir. 1991) ("We are mindful of the fact that 'the prospect of future litigation touches virtually any object of' a prosecutor's attention, and that the work product exemption, read over-broadly, could preclude almost all disclosure from an agency with substantial responsibilities for law enforcement.") (quotation marks and citation omitted).

FOIA cases in this Circuit have distinguished between government lawyers who act *offensively* as prosecutors or investigators of a suspected wrongdoer and government lawyers who act *defensively* as legal advisors defending, or attempting to avoid, litigation against their agency clients. When government lawyers "act as prosecutors or investigators of suspected wrongdoers," to invoke the work product privilege they must prove the material in question was prepared with a "specific claim"—*i.e.*, one supported by concrete facts, *see Coastal States*, 617. F.2d at 865—in mind. When instead government lawyers act as legal advisors to their agency clients—"advis[ing] the agency of the types of legal challenges likely to be mounted *against* a proposed program, potential defenses available to the agency, and the likely outcome," *see Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124 (D.C. Cir. 1987) (emphasis added)—no specific claim is required. It is enough in such cases that the material in question was prepared "in anticipation of foreseeable litigation against the agency." *See In re Sealed Case*, 146 F.3d at 884–85 (reconciling *Coastal States*, 617. F.2d 854 (specific claim required where

government lawyers act as prosecutors); *SafeCard*, 926 F.2d 1197 (same), with *Schiller v. NLRB*, 964 F.2d 1205 (D.C. Cir. 1992) (specific claim not required where government lawyers act as legal advisors either defending, or attempting to avoid, litigation against their agency clients), and *Delaney*, 826 F.2d 124 (same)). *See also Shapiro v. U.S. Dep't of Justice*, 969 F. Supp. 2d 18, 30 (D.D.C. 2013) *appeal dismissed*, No. 13-5345, 2014 WL 1378748 (D.C. Cir. Feb. 26, 2014) (observing that the Court in *In Re Sealed Case* "reconciled" two "apparently divergent lines" of cases); *United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121, 135–36 (D.D.C. 2012) (same).

The district court's opinion largely ignores this critical distinction between *offensive* prosecutors and *defensive* legal advisors. The district court assumed, without inquiry, that when the Department of Justice's lawyers drafted the Blue Book, they acted as legal advisors to the Department, and therefore not as prosecutors of suspected wrongdoers. The district court thus excused the Department of the burden of proving the Blue Book was created with a specific claim in mind. The district court correctly observed that "[i]n the context of a government agency, a document will be protected if its authors acted as 'legal advisors protecting their agency clients from the possibility of future litigation." Opinion at 3 (quoting *In re Sealed Case*, 146 F.3d at 885; *Delaney*, 826 F.2d at 127). But without asking whether, instead of *defensive* legal advisors, the

Department's lawyers acted as *offensive* prosecutors, the district court concluded simply the Blue Book falls within the work product privilege because it was "prepared in anticipation of foreseeable litigation against the agency." Opinion at 4. The district court's conclusion ignores that the "foreseeable litigation" contemplated by the Blue Book is not litigation in which the Department is a defendant, but instead litigation in which the Department is a prosecutor.

That the Blue Book is concerned with prosecutions, and not with the defense of the Department itself, is made clear by the way the Department and the district court described the Blue Book's contents:

> This book was created exclusively for federal prosecutors to provide them advice and guidance regarding discovery-related issues that arise *in criminal investigation and prosecutions*.

Opinion at 2 (quoting the Department's motion for summary judgment) (emphasis added).

> The Blue Book is a "litigation manual" available only to DOJ personnel that "advise[s] federal prosecutors on the legal sources of their discovery obligations as well as the types of discovery related claims and issues that they would confront *in criminal investigations and prosecutions*."

Opinion at 4 (quoting the Department's Vaughn Index) (emphasis added).

Because the Blue Book is concerned with prosecutions, and not with the defense of the Department itself, this case is distinguishable from the cases on which the district court relied. *See Schiller*, 964 F.2d at 1209 (memoranda

addressing ways to *defend* the National Labor Relations Board *against* claims for attorneys' fees and costs under Equal Access to Justice Act were privileged); *Soghoian v. U.S. Dep't of Justice*, 885 F. Supp. 2d 62, 72 (D.D.C. 2012) (memoranda addressing ways to implement electronic surveillance program that *avoids* litigation *against* the Department of Justice were privileged) (quoting *Delaney*, 826 F.2d at 127 (memoranda "advis[ing] the agency of the types of legal challenges likely to be mounted *against a proposed program*, potential defenses available to the agency, and the likely outcome" are privileged) (emphasis added)); *Am. Civil Liberties Union Found. v. U.S. Dep't of Justice,* No. 12-CV-7412, 2014 WL 956303, at *6 (S.D.N.Y. Mar. 11, 2014) (memoranda addressing "not how prosecutors should interpret and apply the laws they are charged with enforcing—the criminal code—but how to *defend* the Government *against* accusations of unlawful searches or seizures" were privileged).

This case instead falls within the category of cases involving materials prepared by government lawyers tasked with the prosecution or investigation of suspected wrongdoers, for which proof that the material was created with a specific claim in mind is required. *E.g., SafeCard*, 926 F.2d at 1202 (documents prepared by the Securities and Exchange Commission "in the course of active investigations into potentially unlawful stock trades by specific individuals" were privileged); *Coastal States*, 617 F.2d at 866 (memoranda to Department of Energy field

auditors, for which no specific claim was shown, were not privileged); *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec*., 926 F. Supp. 2d 121, 143 (D.D.C. 2013) (memorandum advising ICE attorneys on how to exercise prosecutorial discretion was not privileged; "While the memorandum may be, in a literal sense, 'in anticipation of litigation'—it simply does not anticipate litigation in the way the work-product doctrine demands, as there is no indication that the document includes the mental impressions, conclusions, opinions, or legal theories of Goldman, or any other agency attorney, relevant to any specific, ongoing or prospective case or cases."); *Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, 905 F. Supp. 2d 206, 222 (D.D.C. 2012) (PowerPoint slides prepared "by USCIS's Office of the Chief Counsel to teach USCIS employees how to interact with private attorneys during USCIS proceedings before adjudicators" were not privileged; "While those slides are literally 'in anticipation of litigation'—the agency proceedings before adjudicators—they do not anticipate litigation in the manner that the privilege requires.").

Because the Blue Book was created in anticipation of future prosecutions, to invoke the work product privilege, the Department of Justice had the burden of proving it created the Blue Book with a specific claim, supported by concrete facts, in mind. It cannot and did not even attempt to do so. Under this Court's precedent, then, the work product privilege does not apply.

The district court's holding to the contrary ignores this Court's admonishment not to read the work product privilege over-broadly in FOIA cases. *See SafeCard*, 926 F.2d at 1203. By excusing the Department of its burden to prove the Blue Book was prepared with a specific claim in mind, the district court's holding effectively insulates the Department from FOIA. Because "'the prospect of future litigation touches virtually any object of' a prosecutor's attention," *see id.* (quoting *Senate of Puerto Rico*, 823 F.2d at 586), under the district court's holding, no Department memoranda could ever be exposed to the light of public scrutiny. The result is especially troubling here, given that the Blue Book was intended to address widespread *Brady* violations by federal prosecutors, an "epidemic," *see Olsen*, 737 F.3d at 631, that unquestionably warrants public scrutiny. The public has an interest in, and a right to know, what its federal prosecutors are up to. This Court should reverse the district court, hold the Blue Book is not privileged attorney-work product, and restore to the public the right that FOIA granted it.

B. Withholding the Blue Book does not serve the interests underlying the work product privilege.

Not only is the Blue Book not privileged attorney-work product under this Court's precedent, allowing the Department of Justice to withhold the Blue Book stymies the interests underlying the work product privilege.

The work product privilege must be understood in light of its goals. The privilege is intended to ensure effective representation within the framework of the adversarial system by creating a zone of privacy around attorney-work product. *See, e.g.*, *Jordan*, 591 F.2d at 775 (citing *Hickman*, 329 U.S. at 510–11). One authority explains that this zone of privacy furthers the adversarial system's interests in truth and justice by fostering a "competitive relationship" between two adversaries:

> The central justification for the work product doctrine is that it preserves the privacy of preparation that is essential to the attorney's adversary role. . . .
>
> The adversary system operates on the assumption that "[n]o single advocate [or investigator] can perform equally well for several rivals." Each party, therefore, has responsibility for presenting its own arguments. By placing the burden of representation on the parties themselves, the adversary system fosters a competitive relationship that motivates each party to marshal all the law and facts beneficial to its case.

Jeff A. Anderson et al., *The Work Product Doctrine*, 68 Cornell L. Rev. 760, 784–85 (1983) (citations omitted). The idea is that "two investigations of the facts will produce a more complete picture of the truth." *Id.* at 800. *See also United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1300 (D.C. Cir. 1980) ("The work product privilege rests on the belief that such promotion of adversary preparation ultimately furthers the truth-finding process.").

The constitutional obligation to disclose exculpatory evidence under *Brady*, however, is an acknowledged departure from the adversarial system. *Brady* requires a prosecutor to disclose material evidence "favorable to an accused," broadly defined to include exculpatory evidence and impeachment evidence, *see Strickler v. Greene*, 527 U.S. 263, 280–82 (1999), including "any understanding or agreement" between the prosecutor and a testifying witness regarding that witness's future prosecution, *see Giglio v. United States*, 405 U.S. 150, 154–55 (1972). The prosecutor's obligation under *Brady* arises regardless of the defendant's (or his attorney's) request for favorable evidence, *see Strickler*, 527 U.S. at 280 ("[T]he duty to disclose such evidence is applicable even though there has been no request by the accused...") (citations omitted), and extends to evidence within the prosecutor's immediate possession, as well as evidence held by investigating agencies, *see Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (holding prosecutors have a duty to "learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"). Moreover, the prosecutor's mental state is irrelevant: An unintentional failure to disclose materially exculpatory evidence is as much a violation as a purposeful one. *Brady*, 373 U.S. at 87 (finding failure to hand over material exculpatory evidence "violates due process ... irrespective of the good faith or bad faith of the prosecution"); *see also Giglio*, 405 U.S. at 154 (observing "whether the

nondisclosure was a result of negligence or design, it is the responsibility of the prosecution").

Because *Brady* requires the prosecutor to act affirmatively to disclose information that may not otherwise be available to his adversary, it represents a "limited departure" from the "adversary model." *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985) ("By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model."). Such departure is justified in part by the fundamental difference between a criminal case—where the defendant's life or liberty is on the line—and the ordinary civil dispute—where only pecuniary interests are at stake. *See Bagley*, 473 U.S. at 675 ("The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur."). *See also Reynolds v. City of Little Rock*, 893 F.2d 1004, 1009 (8th Cir. 1990) ("The most obvious difference between a prosecutor and a city lawyer in a § 1983 action is that a state prosecutor threatens a private defendant with loss of life or liberty, while the government lawyer in a civil suit seeks only to deny the private adversary a judgment."). It finds further support in the "special role played by the American prosecutor in the search for truth in criminal trials." *Strickler*, 527 U.S. at 280–82 (stating that the prosecutor's "special status explains ... the basis for

the prosecution's broad duty of disclosure"). As the representative of "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all," the prosecutor's goal in a prosecution is "justice" above "win[ning]." *Berger v. United States*, 295 U.S. 78, 87–89 (1935). When the prosecutor fulfills his or her *Brady* obligation, he or she acts as an executor of the law, not as an adversarial litigant.

Because a prosecutor's *Brady* obligation exists *outside* the framework of the adversarial system, allowing the Department of Justice to withhold the Blue Book does not further the interests underlying the work product privilege, which, to repeat, is expressly designed to foster "adversary preparation." *See Am. Tel. & Tel. Co.*, 642 F.2d at 1300. Stated differently, prosecutors and defense attorneys do not compete for *Brady* material: a prosecutor's decision to withhold *Brady* material is not a legitimate litigation tactic.

Although the *Brady* obligation exists outside the framework of the adversarial system, its ultimate goals are consistent with those of the adversarial system: truth and justice. These goals are served when prosecutors faithfully discharge their *Brady* obligation to disclose exculpatory evidence. There should be no secrecy surrounding prosecutors' understanding of that obligation. Understood in this light, there is no justification for establishing a zone of privacy around the Department of Justice's Blue Book.

In this case, FOIA, the work product privilege, and *Brady* all intersect, but they need not collide. The Department of Justice's obligations under these differing sources of law can be reconciled—and the interest in truth that these laws share is promoted—by the Blue Book's public disclosure.

July 22, 2015

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with Rule 29(d) because it is 5,032 words, which is no more than one-half the maximum length (14,000 words) authorized by Rule 32(a)(7)(B)(i) for a party's principal brief.

July 22, 2015 *<u>/s/ Alysson L. Mills</u>*

Alysson L. Mills

CERTIFICATE OF SERVICE

I certify that I electronically filed the original of the foregoing brief with the clerk of this Court by using the CM/ECF system. I certify that the participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. Pursuant to this Court's rules, I have caused eight copies of the foregoing brief to be filed, by hand delivery, with the clerk of the Court.

July 22, 2015

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APPENDIX A

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