Keller/Anderle LLP
BUSINESS TRIAL LAWYERS

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Statement of Reuben Camper Cahn

A corporation fighting for money has far more rights to information than an accused citizen fighting for his life.

Consider this thought experiment. Your campaign manager has violated campaign-finance laws, but prosecutors suspect you're involved. A grand jury subpoenas documents and witnesses. Your campaign manager is threatened with charges but offered a sweetheart deal if she testifies against you. The government indicts you and offers probation if you plead guilty but threatens 5 years imprisonment if you go to trial.

You're innocent. What can you do to take apart the case against you. You cannot depose your accuser, or anyone else for that matter. You cannot subpoena third-parties for emails or documents that might lead to evidence that proves you innocent. You cannot demand that prosecutors turn over all evidence they have. And in many courts, even when prosecutors possess evidence of your actual innocence, they can withhold it—unless and until you go to trial.

We're told that a trial is a search for truth. If we want that to be true, we have to fix this.

First, we must recognize that Brady has failed. In Brady, the Supreme Court recognized that no criminal trial or sentencing can be fair if a defendant doesn't get information that could help the defense at trial or sentencing. But the Court left it to prosecutors to turn over this evidence. The results are predictable. Recent examples: In New York, Judge Alison Nathan was forced to sanction prosecutors for "burying" exculpatory evidence.[1] The Ninth Circuit upheld dismissal of the Cliven-Bundy case, calling the prosecutors' repeated failures to disclose exculpatory evidence "egregious."[2] These are two examples; there are others.[3]

Last fall, prompted by the disastrous Ted-Stevens prosecution, Congress passed the bipartisan Due Process Protection Act to promote prosecutorial accountability.[4] But the Department of Justice has resisted Congress' clear intent. It insists that a prosecutor, alone, should be able to decide what information gets turned over because its prosecutors are trained on what to disclose, to err on the side of disclosure, and to pursue justice, not conviction.

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[1] *U.S. v. Nejad*, __ F. Supp.3d __, 2020 WL 5549931 (S.D.N.Y. Sep. 16, 2020).

[2] *U.S. v. Bundy*, 968 F.3d 1019 (9th Cir. 2020).

[3] *See, e.g., U.S. v. Obagi*, 965 F.3d 993 (9th Cir. 2020) (finding a *Brady* violation where prosecutors in the Central District of California failed to disclose an immunity agreement with a witness while telling the jury in closing the witness "had no agreement" and should therefore be believed).

[4] *See* Pub. Law 116-182 (October 21, 2020).

This is true, and it doesn't matter. That's why we still see cases like Ted Stevens and Cliven Bundy. Prosecutors are not the right people to decide what evidence the defense sees. If the trial is really going to be a search for the truth and not a sporting contest, both sides must have equal access to evidence. That means Criminal Rule 16 should allow discovery of any information likely to lead to admissible evidence. Criminal defendants must have the same rights as civil defendants.

Second, let defendants investigate their cases. When Congress passed the subpoena rule, Rule 17, it said the rule is "substantially the same" as its civil counterpart, which allows parties to seek documents leading to admissible evidence.[5] But judge-made limitations have rendered the rule almost meaningless. Again, the revision needed is simple: criminal Rule 17 should be amended so it mirrors civil Rule 45[6]—as Congress intended.

Third, stop trial by surprise. The Jencks Act allows prosecutors to withhold witness statements until after the witness testifies at trial.[7] Statements should be provided well before trial.

Fourth, allow defendants to depose witnesses. Multiple states have done it for decades without problem.[8] Compelling pretrial testimony is a basic power enjoyed by every civil litigant and by prosecutors. It is wrong that accused citizens cannot.

These changes will help ensure equal justice under law.

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[5] *See* Fed. R. Crim. P. 17, 1944 Adv. Comm. Notes ("This rule is substantially the same as rule 45(a) of the Federal Rules of Civil Procedure.").

[6] Fed. R. Civ. P. 45 is generally considered a pretrial discovery tool for use with non-parties. *Roberts v. Cty. of Riverside*, 2020 WL 5913852, at *2 (C.D. Cal. July 14, 2020) ("[Rule 45] provides the exclusive method of discovery on non-parties" and noting that the "general scope of discovery for parties and non-parties is the same"). Civil Rule 45 is widely understood to allow broader discovery than Criminal Rule 17, which is strictly limited.

[7] *See* 18 U.S.C. §3500(a) (2021).

[8] *See*, *e.g.*, Iowa R. Crim. P. 2.13 (allowing a defendant in a criminal case to depose all witnesses listed by the state); Florida R. Crim. P. 3.220 (same).