A PRIMER ON WHY SCHUELKE REPORT OF DOJ MISCONDUCT IS IMPORTANT

Yesterday morning, the District of Columbia Court of Appeals entered its *per curiam* order denying a DOJ prosecutor's motion for stay of the release of the Schuelke Report on prosecutorial misconduct in the Ted Stevens criminal case. As a result, barring unforeseen Supreme Court intervention, later this morning the full 500 page plus Schuelke Report will be released by Judge Emmet Sullivan of the DC District Court. What follows is a recap of the events leading up to this momentous occasion, as well as an explanation of why it is so important.

The existence of rampant prosecutorial misconduct in the Department of Justice case against Alaska Senator Ted Stevens was crystal clear before the jury convicted him in late October 2008 on seven counts of false statements in relation to an ethics investigation of gifts he received while in office. The trial judge, Emmet Sullivan of the District of Columbia District Court, could well have dismissed the case before it ever went to the jury for verdict but, as federal courts of all varieties are wont to do, he gave the DOJ the benefit of the doubt. It, as is all too often the case these days, proved to be a bridge too far for the ethically challenged DOJ.

Within a week of the ill be gotten verdict obtained by the DOJ in the criminal case, Ted Stevens had lost his reelection bid, after

serving in the Senate for 40 years (the longest term in history). Before Stevens was sentenced, an FBI agent by the name of Chad Joy filed a whistleblower affidavit alleging even deeper and additional prosecutorial misconduct, and, based on the totality of the misconduct, Judge Emmet Sullivan, on April 7, 2009, upon request by newly sworn in Attorney General Eric Holder, dismissed with prejudice all charges and convictions against Ted Stevens.

But Emmet Sullivan did not stop with mere dismissal, he set out to leave a mark for the outrageous unethical conduct that had stained his courtroom and the prosecution of a sitting United States Senator:

> Judge Emmet G. Sullivan, speaking in a slow and deliberate manner that failed to conceal his anger, said that in 25 years on the bench, he had “never seen mishandling and misconduct like what I have seen” by the Justice Department prosecutors who tried the Stevens case.
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> Judge Sullivan’s lacerating 14-minute speech, focusing on disclosures that prosecutors had improperly withheld evidence in the case, virtually guaranteed reverberations beyond the morning’s dismissal of the verdict that helped end Mr. Stevens’s Senate career.
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> The judge, who was named to the Federal District Court here by President Bill Clinton, delivered a broad warning about what he said was a “troubling tendency” he had observed among prosecutors to stretch the boundaries of ethics restrictions and conceal evidence to win cases. He named Henry F. Schuelke 3rd, a prominent Washington lawyer, to investigate six career Justice Department prosecutors, including the chief and deputy chief of the Public Integrity Section, an elite unit charged with dealing with official corruption, to see if they should face criminal

> charges.

On August 9, 2010, Ted Stevens died in a small plane crash in Alaska, never having seen the results of Henry Schuelke's special prosecutor investigation into the misconduct during the Stevens criminal case. And lo, all these years later, we finally sit on the cusp of seeing the full Schuelke report in all its gory glory.

On November 21, 2011, Judge Sullivan issued a scathing order in relation to his receipt of Henry Schuelke's full report, and how it would be reviewed and scheduled for release to the public. Actually, scathing is a bit of an understatement. The order makes clear not only is Schuelke's report far beyond damning, but Judge Sullivan's level of anger at the misconduct of the DOJ has only grown over time and with continued DOJ obstinate duplicity. The November 21, 2011 order is only 12 pages, and is a must read.

As Marcy summarized in her post on the order, not only did Schuelke find systematic intentional prosecutorial misconduct permeating the entire case, Judge Sullivan hinted criminal obstruction of justice would have been in play had such a charge been within Schuelke's special prosecutor jurisdiction and scope (see footnote 2 of the 11/21/2011 order).

The Schuelke report is a watershed document of public importance for several reasons. First, obviously, is it details **evidentiary abuses, ethical violations and obstruction of justice by the Department of Justice**, the very agency charged with protecting justice for all Americans. And not just in any old run of the mill case, but against a sitting United States Senator. If the DOJ feels immune and impugn to commit this misconduct against Ted Stevens, they certainly have no compunction against the normal disadvantaged defendant.

And the DOJ does indeed feel immune and impugn because, as will be discussed below, and as any

lawyer who actively practices criminal defense will confirm, this is a problem that has been growing worse at an ever increasing rate over the last 10-15 years, and especially since 9/11, which seems to have been a power up threshold for all law enforcement conduct.

The Stevens criminal case, and the Schuelke Report of misconduct therein, is of seminal importance not because there is anything novel that occurred in it in the way of DOJ misconduct, but because the powerful light a defendant like Senator Ted Stevens can shine upon the all too common cancer on the rule of law imposed by the DOJ, which should be protecting the public, and the legal system, from the same.

A regular run of the mill criminal defendant could not bring a US Senator like Lisa Murkowski to say:

> In the 14 minutes of remarks delivered when he vacated the conviction against Stevens, Judge Sullivan said he had "never seen mishandling and misconduct like what I have seen." Worse still, Sullivan added that he had seen a "troubling tendency" over the years of prosecutors bending, twisting and breaking the rules to help their cases.
> …..
> While the 500-page report will undoubtedly shed sunlight on the effort by some government attorneys to deny Senator Stevens a fair trial – an effort which Judge Sullivan's independent investigating counsel has already described as "willful and intentional," it will not fix the serious underlying problem with the Stevens trial: the failure to disclose evidence indicating Stevens' innocence.
> ….
> It is the solemn responsibility of federal prosecutors to secure justice – not simply convictions. Under our

> judicial system, it is the responsibility of the government to prove an individual's guilt beyond a reasonable doubt, and if the government cannot do that it is expected to voluntarily abandon the case. It is critical to Americans' faith in the system that we raise the standards for government prosecutors and cut down on the chances that we will see the same "hide the ball" tactics Senator Stevens faced.
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> The Stevens case was not unique, though we wish it were. As Sullivan pointed out, federal prosecutors' "troubling tendency" touches lives and businesses across our country.

Strong, but far more than appropriate words. Even Attorney General Eric Holder stated, one week ago today, the findings of direct DOJ prosecutorial misconduct evidenced in the Schuelke Report were "disturbing".

So, we know the Schuelke Report will skewer DOJ prosecutors working on the Stevens criminal case. That is a given. The question left is *which prosecutors*, and *how hard*. And therein lies one of the rubs, because there is fair reason to believe the Schuelke Report will lay the primary blame on Assistant US Attorneys (AUSAs) from the Alaska US Attorney's Office (Alaska USAO), and shift culpability from their supervisors from DOJ Main, leaders of the DOJ Public Integrity Section (PIN), William Welch and Brenda Morris.

DOJ, even in the District Court trial level, did not oppose release of the Schuelke Report, and neither DOJ, nor Welch nor Morris, joined in the appeal to the DC Circuit and attempted stay of the release of the Schuelke Report. The only credible takeaway from those facts is that somehow the DOJ, Welch and Morris managed to snooker Schuelke into buying they had no culpability, and that the gross misconduct was

all perpetrated by the Alaska AUSA servants, and not the masters, Welch and Morris, from DOJ Main and PIN. Pretty neat trick, in spite of the fact it would belie all credulity to excuse the hands on trial court supervisors for continuing fraud upon the defendant and court that occurred over an extended period of time and was repeatedly questioned all the way through by Stevens and his attorneys from Williams & Connolly (led by Brendan Sullivan and Simon Latcovich).

To be frank and succinct, there is not a chance in hell Welch and Morris bear no sanctionable responsibility for the heinous misconduct in the Stevens prosecution. No. Chance. Whatsoever.

I am far from the only one thinking there is absurdity afoot. Here is noted law professor and legal commentator Jonathan Turley:

> The report will be made public after the Justice Department reviews it. However, the premise of the report is an outrage and should shock the conscience of every lawyer. It would suggest that Justice Department lawyers can act in flagrant violation of ethical and legal rules absent an order directed at them by the court and that courts must now issue such orders to every attorney if they want to enforce basic rules of practice and ethics.
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> So, these lawyers will not be held in contempt despite the finding (as detailed in the order below) that the investigation showed a case “permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated his defense and his testimony, and seriously damaged the testimony and credibility of the government’s key witness.”

Jon is right. But the absurdity is even worse than that. In one of the most bizarre and brazen

arguments I have seen in 25 years of practice in criminal law, Welch and Morris at one point literally argued they could not possibly be held in civil contempt because they were guilty of criminal contempt. No, I am not kidding. Here is how Josh Gerstein at Politico incredulously described it at the time:

> Rarely do lawyers ask an appeals court to treat their attorney clients as convicted criminals, but that's precisely what happened in the D.C. Circuit this afternoon.
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> Lawyers for two Justice Department prosecutors told the court that U.S. District Court Judge Emmet Sullivan's order holding prosecutors Brenda Morris and William Welch in contempt for their involvement in the prosecution of the late Sen. Ted Stevens (R-Alaska) was so harsh and uncoupled from any effort to gain compliance with the court's instructions that it amounted to finding them guilty of a crime rather than civil contempt, which is viewed as milder.
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> If the argument sounds bizarre, it also struck the three-judge [appellate] panel that way.

Well, yes, that is pretty far on the wrong side of extremely bizarre. When it narcissistically served their desperate attempt to save their rear ends from the ethical grinder, Senior PIN Officials William Welch and Brenda Morris, who led the Stevens prosecution through the entire trial process, were willing to admit they were legitimately found in *criminal contempt*. To try to escape *civil contempt*. Now they stand to walk away cravenly and falsely acting like they did nothing wrong. And, to do so, it looks as if Welch, Morris, and DOJ Main will egregiously and unconscionably try to paint the whole misconduct picture on the hapless Alaska AUSAs, including Nicholas Marsh, who is now conveniently dead.

Yes, it appears the DOJ, and the amazingly *still* senior PIN officials Welch and Morris, are low enough to attempt to pin the mess occurring on their watch upon the state level plebes and the dead guy. Is there any wonder the accountability side of the DOJ has long been called, by no less than the ABA Journal, "The Roach Motel"?

In the ABA Journal Roach Motel article, Judge Emmet Sullivan, describing the instant Ted Stevens case, painted this picture:

> The judge said he had been lodging OPR complaints for varying violations since autumn, but had heard nothing of them. "The silence has been deafening," he said. And the latest round of ethical accusations was "too serious and too numerous," Sullivan said, to entrust the investigation to an office controlled by the attorney general with "no outside accountability."
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> Defense attorney Sullivan told the court he'd complained three times to [then Attorney General] Mukasey about the conduct and never received so much as an acknowledgment. "Shocking, but not surprising," Judge Sullivan responded.

No, it is not surprising in the least. In fact, it is standard operating procedure for the Department of Justice these days, and distressingly ever more so under the Administration of Barack Obama, and stewardship of Eric Holder. It was clearly not just the progressive left stalking horses Alberto Gonzales, Michael Mukasey and David Margolis, for the new Obama heroes mostly play the same old Bush/Cheney tune.

Which makes the words of another longtime sitting US Senator, Kay Bailey Hutchinson, all the more sobering:

> I commend Attorney General Holder for taking the initiative to dismiss the case against the late Senator Stevens.

> The prosecutors clearly concealed evidence that would have helped him prove his innocence. Public integrity prosecutors should be held to the highest of standards and **I am appalled that taxpayer funds have not only been used to defend them, but according to the Attorney General's testimony, they are still employed at the Department of Justice**. I have requested that Attorney General Holder release the Office of Professional Responsibility report and make public this document along with the names of these prosecutors who blatantly hid evidence. **I have further asked the Attorney General what action he will take to remove the prosecutors from the Justice Department**. The investigation shows that these prosecutors knowingly withheld information that would have shown Senator Stevens' innocence. (emphasis added)

Senator Hutchinson is quite correct. The prosecutors should be removed from the nation's Justice Department, there is no place for this brand of craven misconduct. And not just the line level worker AUSAs, but the supervisors, William Welch and Brenda Morris, who shepherded and condoned such glaring ethical misconduct. It simply is not plausible they did not know, because Ted Stevens' defense attorneys, Brendan Sullivan and Simon Latcovich, were screaming about it from the get go. The captains go with their ship, and the vessel of Welch and Morris is so ethically corrupted as to be sunk.

Were the Stevens mess an isolated incident, perhaps a breath could be sucked in and a measure of restraint applied. But such is so far from the case in the Roach Motel of Justice as to be laughable. The same issues were, and are, present on the other side of the nation, in the Ninth Circuit. Here is what the Ninth Circuit stated as recently as a month ago in the case of *US v. Aurora Lopez-Avila*:

> The mistake in judgment does not lie with AUSA Albert alone. We are also troubled by the government's continuing failure to acknowledge and take responsibility for Albert's error.
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> The Department of Justice has an obligation to its lawyers and to the public to prevent prosecutorial misconduct. Prose- cutors, as servants of the law, are subject to constraints and responsibilities that do not apply to other lawyers; they must serve truth and justice first. United States v. Kojayan, 8 F.3d 1315, 1323 (9th Cir. 1993). Their job is not just to win, but to win fairly, staying within the rules. Berger, 295 U.S. at 88. That did not happen here, and the district court swiftly and correctly declared a mistrial when Albert's misquotation was revealed.
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> When a prosecutor steps over the boundaries of proper con- duct and into unethical territory, the government has a duty to own up to it and to give assurances that it will not happen again. Yet, we cannot find a single hint of appreciation of the seriousness of the misconduct within the pages of the govern- ment's brief on appeal. Instead, the government attempts to shift blame…

That was in the Ninth Circuit on the west coast. The bankrupt ethics of the DOJ in this regard is a sea to shining sea matter, however. Here is what the Eleventh Circuit said in analyzing DOJ efforts to seal similar disingenuous trial conduct in *US v. Ignasiak*:

> Perhaps ironically, by arguing that there was no Brady violation in this case because the AUSA prosecuting Ignasiak was unaware of Dr. Jordan's history, it is actually the government that most persuasively highlights the

> value in unsealing the Notice. Indeed, should the Notice remain sealed, the significant likelihood is that in the next CSA prosecution in which Dr. Jordan testifies as an expert, both the prosecuting AUSA and the defense counsel will again be unaware of the highly relevant impeachment evidence contained in the Notice. And in that case, as in this one, should the truth ever come to light, the government could again point to its own ignorance and claim immunity from Brady error. Stated this way, we would have expected the government to condemn, rather than condone, such a problematic outcome.

As posted by Ignasiak's attorney, fellow NACDL friend Roy Black, move over Ted Stevens, there is company in the form of defendants all over the country harmed by duplicitous DOJ misconduct.

That is why the Schuelke Report is so important. It will lay out the systematic misconduct that is so pervasive in the criminal justice system today. Senator Ted Stevens left his mark in a number of ways over his career of public service; let his final mark be initiation of accountability and cleanup up of the Department of Justice. And not just for the scrubs, but the key PIN supervisors, William Welch and Brenda Morris, who were involved every step of the way.

When the Schuelke Report is released later this morning, it will be posted in a separate article.