



November 2, 2024

I write as the elected President of the National Association of Criminal Defense Lawyers for 2023 - 2024, an organization consisting of 10,000 men and women who proudly defend the liberty of individual citizens in our nation's courts every day. I also write as a lawyer who proudly represented my state of Texas as a prosecutor and the United States of America as a federal prosecutor. And, for this letter, I write as someone deeply concerned about a critical issue: our nation's failure to hold prosecutors accountable when they break rules designed to ensure all Americans are treated fairly and equitably by our justice system.

Fifteen years ago, a jury found U.S. Senator Ted Stevens guilty of not reporting gifts on his Senate gift disclosure form. After the trial, an FBI whistleblower came forward to report prosecutorial misconduct in the case. The presiding judge, Emmet G. Sullivan, appointed respected lawyers to conduct an independent investigation. That investigation revealed that federal prosecutors had not only concealed evidence that would have led to the Senator's exoneration but had participated in the creation of false evidence to take its place. Were the prosecutors held to account? No. Sadly, their lack of accountability surprised no one in the legal community.

In 2020, after Curtis Flowers spent 23 years on Mississippi's death row for a murder he did not commit, the Supreme Court of the United States reversed his conviction. The Court found that throughout *six* retrials, the prosecutor engaged in a "relentless effort" to eliminate Black citizens from the jury in order to get Mr. Flowers tried and convicted before an all-white jury. The prosecutor engaged in other disgraceful and unlawful tactics as well, including concealing evidence of Mr. Flowers' innocence and securing the release of a jailhouse informant as a reward for falsely claiming that Mr. Flowers had confessed to the murder. The prosecutor who engaged in blatant racial discrimination and other misdeeds has never fully been held to account. Once again, to no one's surprise.

These cases are not as exceptional as some would like to believe. According to the National Registry of Exonerations (NRE), prosecutorial misconduct was a contributing factor in thirty-two percent of the over 3,500 innocent men and women now proven to have been wrongfully convicted. In some cases, prosecutors made negligent mistakes. In the other cases, prosecutors engaged in intentional wrongdoing. Prosecutors committed misconduct most frequently in the

most serious cases with the most severe punishments: they did it in forty- eight percent of cases of defendants who were exonerated from murder convictions, and sixty-three percent of cases of exonerated defendants who were sentenced to death. In nearly all of these cases, prosecutors were not held accountable for the grievous harm they caused. They were not prosecuted criminally; they received no professional discipline from state bars or from within their own offices; and they were shielded from civil liability by immunity. A well researched study by the NRE revealed that “Prosecutors who committed misconduct in criminal cases that led to exoneration were rarely disciplined; it happened only 4% of the time.” See, “Government Misconduct and Convicting the Innocent,” Gross, Possley, Roll and Stephens, p.120 (Sept. 01, 2020).

This is unacceptable. A system in which prosecutors operate above the law and with impunity cannot be considered just. A just society fundamentally requires that all accused, regardless of their station in life, deserve a fair trial – a trial in which the accused and the prosecutor know that if the prosecutor cheats, they will be held accountable. It is time to implement actionable deterrents to prevent prosecutors from intentionally mishandling cases. Only then might we have confidence that our system of justice is fair. Only then will these injustices stop.

To address our nation’s failure to hold prosecutors who break the rules accountable, I convened a task force of experts to make recommendations on how to address this important problem. As my term as President of the National Association of Criminal Defense Lawyers draws to a close, I wanted to share with the public eleven recommendations from that task force.

Improve the Bar Disciplinary Processes. Not only defense lawyers, but judges must refer prosecutors to bar disciplinary panels when they have found a prosecutor violated court orders, discovery rules, or engaged in other misconduct. Once prosecutors have been referred to bar disciplinary panels, those panels must then do their jobs. Too often we give a pass to our fellow lawyers even when they are deserving of discipline. That must end. Those who violate the rules must be held accountable so those who follow the rules receive the respect they deserve.

State bars should also adopt the full text of the American Bar Association Model Rules of Professional Responsibility Rule 3.8, which recognizes the Special Responsibilities of a Prosecutor that comes with the authority and power of that position.

Use Contempt Power. If there had been a clear, unequivocal order at the outset of the Stevens case, Judge Sullivan could have held the prosecutors accountable by holding them in direct contempt of court orders. Every trial judge across the country should make clear what she or he expects of prosecutors. This means that judges should clearly order prosecutors at the outset of cases:

- to disclose all relevant information and materials to the defense. To avoid misunderstandings, each judge should provide a checklist, consistent with constitutional law and that state's discovery and bar rules, of potentially relevant information and materials they expect the prosecutor to produce.
- not to make arguments unsupported by evidence and not to make arguments that appeal to bias and prejudice. Again, the judge should provide a checklist of the sorts of arguments that are inappropriate so there are no misunderstandings.
- not to discriminate based on race, gender, sexual orientation, or religious or political beliefs during jury selection.

And if prosecutors violate a clear, unequivocal order, the judge needs to hold them in contempt of court and, when appropriate, dismiss the criminal charges with prejudice.

Create Criminal Liability for Willful or Knowing Cheating. When prosecutors, whose fundamental duty is to pursue justice and who have taken an oath to uphold the law, break their vow and cheat on purpose, they should be prosecuted and punished. I take no joy in saying that. But the only way to deter prosecutors from cheating is to punish them severely when they get caught.

Mandate Effective Training. Require that every federal and state prosecution office train all its prosecutors using a mandatory curriculum that includes training on the disclosure of information to the defense, the appropriate treatment of witnesses, the appropriate selection of jurors, appropriate arguments, and the absolute necessity for candor with the court and truth in justice.

Provide Defense Lawyers with the Tools They Need. Wrongdoing by prosecutors by its very nature can be hidden and will often go undetected if defense lawyers do not have the resources to battle for their clients, which they often do not. We need to make sure that public defense is adequately funded. And we need to make sure that defense lawyers understand how to combat prosecutorial misconduct effectively. Towards that end, the National Association of Criminal Defense Lawyers will soon be making a tool kit available to defense lawyers with model letters,

motions, and briefs designed to prevent, discover, and correct prosecutorial misconduct. And the National Association of Criminal Defense Lawyers will continue to encourage the defense bar not to pull its punches. When there are credible, good-faith cases of prosecutorial misconduct, we owe it to our clients to vigorously litigate them. And when the case is over, we owe it to the Bar and to society to report misconduct. My home State of Texas, as well as many others, have Rule 8.3 of the Model Rules of Professional Conduct that requires a lawyer to report a lawyer who has breached the rules in such a way that it “raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.” At a minimum, defense lawyers must live up to that rule.

Eliminate Absolute Immunity from Civil Lawsuits. Fifty years ago, before the advent of DNA exonerations, the Supreme Court of the United States held that prosecutors cannot be sued by defendants in civil court, even if the defendant was wrongly convicted as a result of the prosecutors' intentional misconduct, period. This ruling is not supported by the text of the Constitution or by any federal law. The Supreme Court should reconsider this position. Congress should also pass legislation making clear that prosecutors can be sued in federal court. And state legislators should pass legislation making clear that state prosecutors can be sued in state court.

Establish More Conviction Integrity Units. In the past five years, Prosecution Conviction Integrity Units (CIU’s) and Conviction Review Units (CRU’s) have been partly responsible for over forty percent of the exonerations across the country. Prosecutors in those offices have embraced the fact that they are the “ministers of justice” and if there has been injustice, they have recognized their ethical duty to do all they can do to correct it. In some cases, they have even identified misconduct perpetrated by actors within their own office. Actions by those offices increase confidence in our justice system by the public and justice system stakeholders. More prosecution offices should have a unit designed to review cases in which there is a good faith question of, at a minimum, actual innocence, or prosecutorial misconduct. Office leadership should support these units with adequate funding, staffing, and the ability to operate independently. Guidance on these matters is available from successful units such as the Conviction Integrity Unit of Dallas County in my home state and the Quattrone Center of the Fair Administration of Justice.

Enact the Inspector General Access Act. All federal employees are subject to investigation by the Inspector General of the U.S. Department of Justice except for Department of Justice lawyers. The Department of Justice's *Office of Professional Responsibility*, created in 1975 after the Watergate scandal revealed professional misconduct among its prosecutors, has woefully failed in its mission and cannot be counted on to adequately train and police its attorneys to uphold professional standards of conduct. Federal law prevents the DOJ Inspector General from investigating federal prosecutors, but there is no reason for them to hold such special privilege or to be treated differently than every other federal employee. A bipartisan group of Senators has proposed legislation, the Inspector General Access Act, which would ensure that the Inspector General can also investigate prosecutors, which would be a step in the right direction towards holding them accountable when they break the rules. Congress should pass and the President should sign the Inspector General Access Act.

Make Post-Conviction Records Available to Journalists. The prosecutorial misconduct in the Flowers case would never have been discovered if not for hardworking journalists with sufficient resources and courage to uncover the truth. Investigative journalists will continue to play a key role in holding prosecutors accountable – or at least bringing their failings to light. Journalists should have access to post-conviction records so that journalists may do their jobs.

Establish a Database Tracking Misconduct. We all want to believe that most prosecutors are honest and follow the rules and that only a small percentage of misguided or misbehaving prosecutors are damaging our criminal justice system. That may be true, but we do not know how far-reaching misconduct is in cases where there are no exonerations or in cases that are dismissed where prosecutorial misconduct occurred. There is room for a non-governmental organization to maintain a database of prosecutors associated with wrongful convictions and wrongful conduct. Only with data can we determine the root causes, and their magnitude, whether it is a small percentage of prosecutors who are doing most of the damage, and in what jurisdictions most of the damage is occurring. This data will put the bench, the bar, and the public on proper notice.

Eliminate Procedural Barriers Preventing Exonerations in Cases of Prosecutorial Misconduct. The deck is overwhelmingly stacked against a citizen who wishes to challenge his or her criminal conviction. The laws governing such challenges are designed to favor efficiency and finality over justice, and technical barriers to reaching the merits of such challenges abound. This is especially offensive when prosecutors have cheated to obtain a conviction. Such

behavior, by its very nature, is often buried and difficult if not impossible to uncover. Congress and state legislatures should pass legislation assuring that challenges to convictions caused by prosecutorial misconduct are heard on the merits and not swept under the rug on procedural technicalities, as they often are.

We will never live up to the promise of our criminal justice system unless we hold everyone accountable when they break the rules, particularly those who have the authority and power to impact lives the way prosecutors can. I hope you will join me in this effort by supporting my recommendations.

It has been a great honor to lead the National Association of Criminal Defense Lawyers over the past year. It was also my great honor to serve as a state and federal prosecutor. I will continue to commit myself to the improvement of our justice system. To make it more just. To make it fair. To make it a system in which we can all have confidence.

Finally, I want to thank NACDL's Task Force of Prosecutorial Accountability for its outstanding work this past year as it grappled with and helped in addressing the many tentacles that spring from this multifaceted issue. The co-chairs of this task force in particular worked tireless hours in sifting through the many periodicals, law review articles, and other comprehensive treatises on this topic at both the state and federal levels to formulate the recommendations contained herein. I salute the task force for a job well done.

Sincerely,



Michael P. Heiskell
President, 2023-2024
National Association of Criminal Defense Lawyers